BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0095013637:

MURAT KALINYAPRAK,	)	Case No. 1862-2010
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
CITY OF POLSON,	)	
	)	
Respondent.	)	

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I. INTRODUCTION

Murat Kalinyaprak filed a complaint with the Department of Labor and Industry on March 31, 2009. He alleged that the City of Polson discriminated against him in the provision of government services because of his national origin and retaliated against him, in violation of the Montana Governmental Code of Fair Practices, Mont. Code Ann §§49-3-205(1) and 49-3-209. On May 4, 2010, the department gave notice that Kalinyaprak's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded October 27 through 29, 2010, in Polson, Montana. Kalinyaprak attended and participated on his own behalf. Todd Crossett, City Manager, attended as the designated representative of the City, with counsel, John F. Haffey, Phillips Law Firm, P.C. A complete list of exhibits admitted during hearing is attached to the Hearing Officer's "Order re Post Hearing Filings, with Copies of Exhibit 101(a), (b), (d), (e) and (g) thru (j), and Exhibit List Enclosed," dated November 3, 2010 and issued November 4, 2010.[1] As noted in that order, a ruling on admission of Exhibit 91 was reserved, and the parties invited to address its admissibility in their post hearing filings, for a ruling in this decision. Bruce Agrella, Doug Chase, Jules Clavadetscher, Elsa Duford, Fred Funke, Margie Hendricks, Murat Kalinyaprak, Mike Lies, Lou Marchello, James Raymond and Jim Sohm testified. A copy of the hearing officer's docket accompanies this decision.

[1] The body of the order, at page 1, correctly identifies the exhibits as "copies of Exhibit 100(a), (b), (d), (e) and (g) through (j)," rather than the incorrect identification, in the caption, of the same exhibits as "copies of Exhibit 101(a), (b), (d), (e) and (g) thru (j)."

II. ISSUES

The issues in this case, pertinent to the evidence presented at hearing, are as follows. A full statement of the issues is set forth in the final prehearing order.

1. Did the City discriminate and/or retaliate against Kalinyaprak, by selectively enforcing its "3-minute rule" against him, on October 6, 2008, when he spoke in a Council meeting about his dissatisfaction with the golf course fees on the City's golf course?

2. If so, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm, and, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

On September 14, 2010, the Hearing Officer issued his "Order Granting and Denying the City's Motion to Strike and to Exclude." That order ruled, for the reasons stated therein, that Kalinyaprak could not offer proof (in support of his current claims) that the City discriminated or retaliated against him when it refused to prosecute alleged "hate crimes" involving Kalinyaprak's assertions that (1) then Council member Clavadetscher provided erroneous information to the Human Rights Bureau investigator during the 2006 investigation into Kalinyaprak's Human Rights Complaint No. 0079012479 and (2) an individual who defaced a poster for Kalinyaprak's campaign for Council member (or Commissioner), Ward 2, in 2009, committed felony malicious intimidation or harassment related to civil rights.

III. FINDINGS OF FACT[2]

1. At all times pertinent to this case, charging party Murat Kalinyaprak has been a resident of the City of Polson, Montana ("the City").

2. At all times pertinent to this case, the City has been a local government unit, functioning under the Commission-Executive form, with a commission or City Council and one elected executive or Mayor. The City owns the municipal golf course, the Polson County Club ("golf course"), and is responsible for its operation, through oversight of the Polson Golf Board, which is comprised of Polson citizens and one Council member.

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[2] All or part of findings 1-13 are from the department Hearing Officer's findings of fact in Kalinyaprak v. Polson Country Club and City of Polson (Nov. 16, 2007), "Decision," HRB Nos. 0063011928 & 0079012064, Case Nos. 695-2007 and 1369-2007. That decision is now final, having been affirmed by the Human Rights Commission and not further appealed.

3. The golf course does not have applications for membership. It sells annual passes to the public. Each year the golf course sends notices to its prior customers, as well as to anyone else who requests such a notice. The notice contains the pricing structure for the year. The pricing structure is developed by the golf board, then approved by the council.

4. Before 2006, the pricing structure allowed for various discounts, including a "couples" discount. The golf course did not define "couple." People who held themselves out as couples, although not legally married, were allowed to purchase a couple's pass. Kalinyaprak and Wilma Mixon Hall, who were not legally married, purchased a couple's pass together during the 2005 season.

5. As early as 2005, Kalinyaprak became upset with the way that the golf course was being run and the rising cost of season passes. Throughout 2005, 2006 and 2007, Kalinyaprak criticized Roger Wallace (the head professional golfer who managed the golf course), the golf board and the Council about their business management of the golf course. His ire was highlighted by his appearance before the Polson City Council at a council meeting held on February 22, 2005. At that council meeting, he presented a one hour diatribe about why he thought the golf course was being improperly run.

6. Polson City Ordinance 613 (the "3-minute rule") was duly adopted on August 15, 2005. In pertinent parts, it provides that when public comment is received by the Council on an agenda item before the Council or on an item not on the agenda, each person (proponent, opponent or commentator) can make remarks cogent to the item for a maximum of three minutes. It does not apply to City staff members discharging their duty to make presentations to the Council. The Council has the power to extend the time limit, by approving a motion that the extension is reasonable and proper, but it must then grant the same extension to all other persons making public comment on the same item.

7. For legitimate business reasons and in part because of Kalinyaprak's urging, in 2006 the golf course defined "couple" as "a solemnized married couple to include common law." This new definition was included in the 2006 notice sent out to golfers. Given this definition of "couple," Kalinyaprak was not eligible to purchase a couple's pass in 2006. Kalinyaprak was given the choice of purchasing a full single pass or a 9-hole pass.

8. On February 17, 2006, Kalinyaprak sent a letter to Wallace advising that he was still going to pay for only half of a couple's pass, even though he was purchasing an in-city single pass. Kalinyaprak included a check for $350.00, half the current price of a couple's pass. Wallace responded to Kalinyaprak in correspondence

dated February 24, 2006. Wallace returned Kalinyaprak's check and advised he must pay the full amount for an in-city single, $395.00.

9. Kalinyaprak's anger over what he perceived to be mismanagement of the golf course preceded any concern he might have had about the price or availability of a couple's pass to a male and a female golfer who were not married to each other. For example, Kalinyaprak's March 27, 2006 letter to Randy Wallace noted Kalinyaprak's complaints for the previous two years over the rising costs of playing golf. He then went on to state that he hopes "that the 'long-going' mismanagement of the public golf course and possible mishandling of public assets, by everyone involved, will be identified and rectified in an open manner allowing public input and participation."

10. Kalinyaprak had also threatened to file additional claims against the city about policies, such as the Council's 3-minute rule, as early as February 21, 2007. The express and actual purpose of the rule, which limits a person's time to speak to three minutes, (though it does not limit the number of times they can speak) was to ensure that more interested persons would be able to speak at Council meetings.

11. On March 27, 2006, Kalinyaprak filed a Human Rights complaint against the City and the Polson Country Club (the City-owned and operated golf course), alleging marital status discrimination in providing slightly discounted season pass fees for married couples.

12. On July 28, 2006, Kalinyaprak filed an additional complaint against the City and the golf course alleging retaliation. This retaliation case was consolidated with his marital discrimination case against the City and the golf course for contested case administrative proceedings before a Department of Labor and Industry Hearing Officer.

13. The Hearing Officer decided the consolidated cases in favor of the City and the golf course (see citation in footnote No. 1, above at page 2), ruling that Kalinyaprak had not been subjected to illegal retaliation or marital discrimination in any of the particulars he had asserted.

14. Kalinyaprak appealed that decision to the Montana Human Rights Commission, which affirmed the Hearing Officer's decision. Kalinyaprak v. Polson Country Club and City of Polson (May 7, 2008), "Commission Decision," HRB Nos. 0063011928 and 0079012064. Kalinyaprak did not pursue the cases further, and the Hearing Officer decision in those consolidated cases is now final. Since the Human Rights Commission's May 7, 2008, decision affirming that the golf course's discounted couples fees were not illegal and that Kalinyaprak had not been retaliated against, there has been no subsequent ruling by any administrative or

judicial tribunal that the City's lower golf course fees for couples violate state or federal anti-discrimination laws.

15. While Kalinyaprak's consolidated cases were pending, the City had stopped offering lower golf course fees for couples. After the rulings in favor of the City and the golf course in Kalinyaprak's consolidated marital discrimination and retaliation cases became final, reinstating lower couples fees at the golf course was put on the agenda for the October 6, 2008, Council meeting. The Council was not required to reinstate lower couples fees by the rulings in Kalinyaprak's consolidated cases. The Council could (and still can), at any time it might choose, consistent with the law and its standard operating procedures, offer or not offer lower golf course fees for couples, as a matter of operating policy.

16. As a resident of the City and a citizen, Kalinyaprak had the right, during public comment to the Council, within the law and its standard operating procedures, to speak to the Council members about the golf course fees and the management of the golf course. He had the right to present arguments and reasons against offering lower couples fees.

17. After the 2005 adoption of the 3-minute rule, that rule has not always been enforced during Council meetings, against Kalinyaprak or anyone else. It has sometimes been enforced, against Kalinyaprak and against others. At least some of the times when the rule was enforced against Kalinyaprak, he was speaking to the Council about couples fees or about the prior Human Rights litigation.

18. During the Council meeting on October 6, 2008, Kalinyaprak first spoke to the Commission during the public comment period on the proposed annual golf course fees. Kalinyaprak started by announcing that he was speaking in opposition to reinstatement of the lower couples season pass price. After he had spoken for slightly more than two minutes in opposition to the lower couples fees, Kalinyaprak began to talk about how Wallace (the chief golf pro and course manager at that time) had testified falsely during the May 31 through June 1, 2007, hearing held on Kalinyaprak's prior marital discrimination and retaliation complaints.

19. Mayor Lou Marchello, chairing the meeting, advised Kalinyaprak to wrap up his remarks because his three minutes were almost over. At that time Kalinyaprak had been speaking for approximately 2 minutes and 45 seconds.

20. Kalinyaprak could have returned to his opposition to the couples fees, quickly summarized his reasons, and sat down. He did not.

21. Kalinyaprak could have asked for a motion by a Council member to extend his time. He did not.

22. Instead, Kalinyaprak deliberately violated the 3-minute rule and provoked a confrontation with the Mayor. Kalinyaprak first responded to the Mayor's advice by saying, "Are we back to three minutes now?" He then asserted that he was going to continue to speak (without regard to the 3-minute rule), and resumed talking about false testimony in the contested case hearing on his prior discrimination claims. Marchello interrupted again to tell him to stop speaking because his three minutes were over. Kalinyaprak refused to sit down and continued speaking, inviting the Council members to ask him questions, so he could respond to them. Marchello continued to tell him his time was up. Kalinyaprak and the Mayor were soon both talking at the same time.

23. Commissioner Elsa Duford indicated that she was interested in hearing what Kalinyaprak had to say, since he seemed to be suggesting that there was some mistake about past impact of the lower couples golf course fees on golf course revenues. With Kalinyaprak still standing at the podium, Marchello used his gavel two or three times as he continued to direct Kalinyaprak to sit down. Kalinyaprak continued speaking, trying to get the other Council members to ask him questions. Duford asked why the 3-minute rule was so rigid and whether Kalinyaprak could be allowed to say what he wanted to say. Marchello said that it was time to move on, without explaining that an extension could be granted if a motion for it was made.

24. Kalinyaprak continued to speak. Marchello threatened to have him removed. Kalinyaprak responded, "Go ahead." The Mayor ordered Polson Chief of Police Doug Chase to remove Kalinyaprak. The Chief went and stood next to Kalinyaprak, without touching him or attempting to remove him, and in a very soft voice reminded him that the Mayor was in control of the meeting. Duford then said that since no other members of the Council wanted him to continue, he could talk to her later. Kalinyaprak gave up at that point and returned to his seat. By the time he returned to his seat, he had been at the microphone for around 6 minutes.[3]

25. There is no credible evidence of record that established or tended to establish that the Mayor, the City Council or any of its members enforced the 3-minute rule against Kalinyaprak because of his national origin.

26. The credible evidence of record likewise does not establish that, more likely than not, the Mayor, the Council or any of the Council members enforced the 3-minute rule against Kalinyaprak on October 6, 2008, because he had pursued discrimination and retaliation claims against the City.

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[3] The City argued it was over six minutes. From the recordings, the listener cannot tell precisely when someone steps to the microphone, and it is not clear when speakers leave the microphone, so approximations are often necessary.

27. There is a regulatory presumption that because the City took adverse action against Kalinyaprak within 180 days after the closure of his prior Human Rights complaints, the City took that adverse action with retaliatory intent.

28. That presumption was refuted by the City's credible evidence (a) that Marchello initially advised Kalinyaprak to wrap it up because his three minutes were almost up, which was entirely appropriate and proper; (b) that thereafter, it was Kalinyaprak's refusal to respect either the 3-minute rule or the Mayor that fueled the confrontation; and (c) that Kalinyaprak's persistent refusal to stop speaking upset the Mayor, so that his voice grew louder and more agitated while Kalinyaprak continued to speak from the podium, in a calm and level voice, in express defiance of both the 3-minute rule and the Mayor's efforts to enforce it.

29. In addition to refuting the regulatory presumption, that evidence also refuted Kalinyaprak's evidence that enforcing the 3-minute rule against him in this fashion, under these circumstances, was an adverse action. Kalinyaprak's defiance and long-term disrespect for the 3-minute rule, not his prior discrimination and retaliation cases, generated any adversity and hostility that may have surfaced on October 6, 2008.

30. Kalinyaprak did not prove that the City took any retaliatory actions against him within the 180 days preceding March 31, 2009. He did not amend his complaint, and therefore could not prove, that the City took any retaliatory actions against him after October 6, 2008.

31. Kalinyaprak's evidence, regarding continuing retaliation prior to the October 6, 2008, incident and outside of the statute of limitations for his current claims, was inconsistent, incredible and/or inadmissible. It did not buttress his assertion of adverse action by enforcement of the 3-minute rule on October 6, 2008.

IV. DISCUSSION[4]

Before commencing the analysis of this complaint and the appropriate resolution of it, there is a background issue that must be addressed. The parties appear to have started with unspoken assumptions about what kinds of restraints upon public comment in Council meetings are generally permissible. Their unspoken assumptions may well be correct, but it is useful to be clear about such matters. Montana has defined the standard for appropriate restraints upon public comment in Council meetings.

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

> . . . . Time, place, and manner restrictions that preserve a city council's legitimate interest in conducting efficient and orderly meetings are permissible, so long as the restrictions are reasonable and viewpoint neutral. See e.g. City of Madison, 429 U.S. at 175 n. 8 . . . (speech may be confined to the specified topic at hand); White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990) (same); Rowe v. City of Cocoa, 358 F.3d 800, 803 (11th Cir. 2004) (same); Wright v. Anthony, 733 F.2d 575, 577 (8th Cir. 1984) (upholding a five-minute limit on each speaker); Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 271 (9th Cir. 1995) (three-minute limit); Shero v. City of Grove, 510 F.3d 1196, 1203 (10th Cir. 2007) (three-minute limit); Jones v. Heyman, 888 F.2d 1328, 1329, 1333 (11th Cir. 1989) (holding that a truculent speaker may be restricted or even removed); Eichenlaub v. Township of Indiana, 385 F.3d 274, 281 (3d Cir. 2004) (same).

Denke v. Shoemaker, ¶50, 2008 MT 418, 347 Mont. 322, 198 P.3d 284.

Kalinyaprak, the charging party, always carried the burden of persuasion that the City illegally discriminated or retaliated against him. M.R.L. v. Byard (1993), 260 Mont. 331, 860 P.2d 121, 129; Crockett v. Billings (1988), 234 Mont. 87; 761 P.2d 813, 818; Johnson v. Bozeman School District (1987), 226 Mont. 134, 734 P.2d 209, 213.

Kalinyaprak's charge of discrimination in provision of government services alleged national origin discrimination and retaliation and identified October 6, 2008, as the date of the most recent or continuing discrimination. Kalinyaprak failed entirely to establish a prima facie case of national origin discrimination, presenting neither direct nor indirect credible and admissible evidence of discriminatory animus based upon his Turkish origin.

Within the narrow scope of what he pleaded as retaliation by the City, Kalinyaprak established a very weak prima facie case, based upon indirect evidence of possible retaliatory animus because of the proximity in time between his prior Human Rights claims against the City and the October 6, 2008, incident (a regulatory presumption), and very flimsy evidence that the City, rather than Kalinyaprak himself, behaved inappropriately, thereby taking adverse action against him in the October 6, 2008, incident.

Kalinyaprak filed his charge on March 31, 2009. Any retaliatory acts involved before the October 6, 2008, Council meeting necessarily had to occur on or after

October 2, 2008, to be within the 180 days before his retaliation complaint was filed. Mont. Code Ann.§49-2-501(4)(a). The same time limit applies under the Governmental Code of Fair Conduct. Mont. Code Ann.§94-3-315. Kalinyaprak did not present credible admissible evidence of any such acts. He never amended his charge to allege any further retaliatory acts after October 6, 2008. His retaliation case rests entirely upon whether the City retaliated against him in that Council meeting, the only timely event relevant to his charges. CEnTech Corp. v. Sprow, ¶¶24-26, 2006 MT 27, 331 Mont. 98, 128 P.3d 1036.

Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. Black's Law Dictionary, p. 413 (5th Ed. 1979); Laudert v. Richland County Sh. Dept., 2000 MT 218, 7 P.3d 386 (2000). Although Kalinyaprak argued to the contrary, the admissible credible evidence he presented did not include proof, without inference or presumption, that, more likely than not, the Mayor or the other Council members harbored retaliatory animus towards him.

In pertinent parts, Admin. R. Mont. 24.9.610(2) describes how Kalinyaprak had to prove his case by indirect evidence.

> (2) A prima facie case of discrimination or retaliation based on disparate treatment means evidence from which the trier of fact can infer that adverse action against the charging party was motivated by respondent's consideration of charging party's . . . protected activity . . . .
>
> > (a) The elements of a prima facie case will vary according to the type of charge and the alleged violation, but generally consist of proof:
> >
> > > (I) That charging party . . . engaged in protected activity;
> > >
> > > . . . .
> > >
> > > (iii) That charging party was . . . subjected to adverse action by respondent in circumstances raising a reasonable inference that charging party was treated differently . . . because of protected activity.
> >
> > (b) Examples of evidence establishing a reasonable inference that charging party was treated differently . . . because of protected activity include:

. . . .

(ii) proof that similarly situated persons [who did not engage in protected activity] . . . were treated more favorably;

(iii) proof that there was a close proximity in time between protected activity of the charging party and adverse action by the respondent;

. . . .

Kalinyaprak's credible evidence of record does not bring into play any other provisions of the regulation.

The regulation articulates three elements in Kalinyaprak's burden of proof – protected activity, adverse action, and a causal connection between them.

Kalinyaprak did prove that he filed and prosecuted the prior marital discrimination and retaliation claims, finally decided against him on May 7, 2008. Filing and prosecuting those claims was "protected activity," retaliation for which is clearly illegal. Mont. Code Ann. §§49-2-301 and 49-3-209.

Taking only the evidence most favorable to Kalinyaprak, it is also possible for a reasonable fact finder to decide that enforcing the 3-minute rule against him on October 6, 2008, was an adverse act.

The City's actions during the October 6, 2008, Council meeting were taken with knowledge of Kalinyaprak's prior claims, and within six months after the closure of those claims. Taking the most favorable view of Kalinyaprak's proof of "adverse action" that date, retaliatory animus is presumed. Admin. R. Mont. 24.9.603(3).

Admin. R. Mont. 24.9.610(3) describes the burden of proof the City must meet, to refute Kalinyaprak's prima facie case:

> Once a charging party establishes a prima facie case of unlawful discrimination or illegal retaliation based on circumstantial evidence of disparate treatment, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the challenged action.

Kalinyaprak proved that the Mayor raised his voice, shouted and banged his gavel, while Kalinyaprak remained calm as he stayed at the podium and kept speaking. However, neither man started out shouting. The Mayor calmly asked

Kalinyaprak to wrap it up. Kalinyaprak calmly refused and calmly insisted that he was going to finish what he wanted to say. Thereafter, Kalinyaprak largely ignored the Mayor and tried to keep talking to the Council.

Understandably, the Mayor, trying to keep the meeting in order, began to raise his voice. Kalinyaprak stayed at the podium and continued to speak to the Council. The Mayor was unable to regain control of the meeting by banging his gavel or talking even more loudly. Kalinyaprak only stopped speaking and left the podium after the Mayor asked for the assistance of the Chief of Police, acting as the Sergeant at Arms, and Council member Duford stopped asking whether Kalinyaprak might be given more time to speak.

Throughout the incident, the Mayor did grow increasingly upset, while Kalinyaprak never raised his voice. However, the appropriate measure of whether the Mayor's efforts to enforce the 3-minute rule constituted adverse action does not depend upon who was the most upset. The question really is whether reminding Kalinyaprak that his three minutes were almost up, and thereafter trying to enforce the 3-minute rule, constituted a "significant adverse action."

Admin. R. Mont. 24.9.603(1) states, in pertinent part, "A significant adverse act against a person because the person has engaged in protected activity . . . is illegal retaliation" [emphasis added].

The City quoted Admin. R. Mont. 24.9.603(2), which lists several examples of "significant adverse acts:"

> (a) violence or threats of violence, malicious damage to property, coercion, intimidation, harassment, the filing of a factually or legally baseless civil action or criminal complaint, or other interference with the person or property of an individual;
>
> (b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;
>
> (c) expulsion, blacklisting, denial of privileges or access, or other action adversely affecting the availability of goods, services, facilities, or advantages of a public accommodation;
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> (d) eviction, denial of services or privileges, or other action adversely affecting the availability of housing opportunities; and

(e) denial of credit, financing, insurance, educational, governmental or other services, benefits or opportunities.

None of these examples are particularly useful for ascertaining whether an allegedly selective application of a 3-minute public comment rule in a Council meeting was a significant adverse act.

Federal cases offer guidance on discrimination laws when no Montana cases address a particular point. E.g., Crockett v. City of Billings (1988), 234 Mont. 87, 761 P.2d 813. Discussing retaliation claims filed by employees who had prior discrimination claims pending against their employers, the Ninth Circuit held:

> The next question is whether Brooks alleged that she was subjected to an adverse employment action. In Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859 (9th Cir. 1996), we noted that "[n]ot every employment decision amounts to an adverse employment action." Id. at 869. On the one hand, we worry that employers will be paralyzed into inaction once an employee has lodged a complaint under Title VII, making such a complaint tantamount to a "get out of jail free" card for employees engaged in job misconduct. <u>On the other hand, we are concerned about the chilling effect on employee complaints resulting from an employer's retaliatory actions. In an effort to strike the proper balance, we have held that only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation.</u> See Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir.2000) ("[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.").

Brooks v. City of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000) [<u>emphasis added</u>].

The same reasoning applies to Kalinyaprak's current retaliation claim. The appropriate question regarding whether the Mayor's acts were retaliatory is whether those acts would have a chilling effect so that a reasonable person, having observed the incident of October 6, 2008, would be deterred from complaining about marital discrimination by the city, for fear that the next time he or she wanted to participate in public comment to the Council, the Council member running the meeting would remind him or her of the 3-minute rule, and then try to enforce it if he or she deliberately violated it. To this question, framed from the facts of this case, the

answer seems obvious. A reasonable citizen would not be "chilled" from complaining about discrimination or retaliation by the City nor from engaging in public comment during future Council meetings. A reasonable citizen would more likely than not conclude that abiding by the 3-minute rule was a good idea, no matter who that citizen was or what that citizen wanted to say to the Council. The Mayor's conduct toward Kalinyaprak on October 6, 2008, was not adverse action.

The legitimate nondiscriminatory reason for trying to apply the 3-minute rule to Kalinyaprak during the meeting was to continue the meeting and the public comment in an orderly fashion, in accord with the ordinance, to ensure that more interested persons would be able to speak at Council meetings. The Mayor's efforts to regain control of the meeting were undertaken for the very same legitimate nondiscriminatory purpose.

Even if it were possible to find adverse action by the City in the events of the October 6, 2008, Council meeting, which it is not, the admissible evidence, in its entirety, did not establish a causal link between Kalinyaprak's prior protected activity and the efforts of the Mayor to enforce the 3-minute rule against him that night. The only causal link between the events of October 6, 2008, and Kalinyaprak's prior protected activity, was the regulatory presumption.

Certainly, Kalinyaprak, who had engaged in prior protected activity, was subjected to the 3-minute rule on other occasions. On this record, no other participants in public comment to the Council had engaged in prior protected activity. But it does not follow that Kalinyaprak has proved retaliatory intent.

On this record, some public comment participants were never subjected to the 3-minute rule, but other public comment participants were, like Kalinyaprak, occasionally subjected to the 3-minute rule. The inference that he alone was subjected to the 3-minute rule because he alone engaged in prior protected activity is not supported by the evidence, since other participants in public comment who had not engaged in prior protected activity were also subjected to the 3-minute rule. The presumption is not buttressed by the evidence.

Over the years, issues and conflicts about public comment time limits arose more often when Kalinyaprak was making public comment than when any other citizen was making public comment. Stated out of its context, the frequency with which either the City reminded Kalinyaprak of time limits upon public comment or Kalinyaprak challenged the way time limits on comment were applied to him could be a concern. In its context, there are more plausible reasons than retaliatory animus on the part of the City for this situation.

Before the time limits were created, Kalinyaprak "presented a one hour diatribe about why he thought the golf course was being improperly run" at a Council meeting in February 2005.[5] The present case as well as the prior complaints decided by the November 2007 Hearing Officer Decision document Kalinyaprak 's continued defiance of the time limits once they were adopted, and his repeated challenges to them. He denounced them. He sometimes expressly noted that he was about to violate them. He called attention when others making public comment were not reminded of or held to the time limits. He deliberately talked longer than the time limits allowed and then noted, before he finally sat down, that the limits had not been applied to him. October 6, 2008, was by no means the first time that Kalinyaprak displayed his disagreement with and unwillingness to conform to the time limits upon public comment.

In light of these circumstances, Kalinyaprak's arguments that the City was retaliating against him by selectively enforcing its time limits against him personally, and by enforcing the time limits against him when he spoke against the couples pass discounts, are not credible. The facts in this record support a fact determination that the City was enforcing its time limit in a manner that was speaker and viewpoint neutral. The facts establish that, more likely than not, Kalinyaprak went out of his way to challenge the time limits, provoking confrontations about them because of his violations of them, so that his conduct as a participant in public comment to the Council led to more issues and conflicts about time limits than appear to have occurred with any other participant.

Even though he spoke calmly, what Kalinyaprak did was to criticize and deliberately violate public comment time limits for a period of years. Then, on October 6, 2008, when reminded that the time limit was about run out for this particular public comment, he announced that he would disregard and deliberately violate the time limit once again. His conduct was a legitimate non-retaliatory reason for heightened efforts to enforce the time limits, refuting and overcoming the presumption that because it had been less than 180 days since his prior discrimination and relation claims were closed, the actions taken on October 6 were retaliatory.

Because the October 6, 2008, enforcement effort was speaker and viewpoint neutral, it did not violate constitutional rights of free speech. The Hearing Officer mentions this, because had it violated constitutional rights of free speech, that violation might have provided support for the regulatory presumption of retaliatory

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[5] Finding No. 3, above, in this decision, which was taken directly from Finding No. 8 (p. 3) of the Nov. 2007 Hearing Officer Decision on the prior marital discrimination and retaliation complaints.

animus. Since there was no such constitutional violation, the regulatory presumption, standing entirely alone, was refuted by the City's evidence, and Kalinyaprak did not prove a causal connection between the effort to enforce the public comment time limit against him on October 8, 2011 and his previous protected activity.

Because the City both refuted two of three elements of Kalinyaprak's prima facie case, and presented a legitimate, nondiscriminatory reason for the Mayor's conduct, Kalinyaprak had the burden described in Admin. R. Mont. 24.9.610(4):

> If a respondent produces evidence of a legitimate, nondiscriminatory reason for a challenged action in response to a prima facie case, the charging party must demonstrate that the reason offered by the respondent is a pretext for unlawful discrimination or illegal retaliation. The charging party can prove pretext with evidence that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief.

Kalinyaprak presented and argued some other evidence, much of it regarding prior acts of alleged retaliation, presumably offered and argued in this case as evidence of continuing retaliation, supporting his assertion of the City's retaliatory animus. In some instances, the testimony and argument addressed prior incidents raised in his prior litigation, which had already been decided against him. Those incidents were barred by principles of res judicata from consideration in this case. In some instances the testimony and argument had been precluded by the Hearing Officer's prehearing rulings in this case. In some instances, the incidents were not sufficiently similar to be relevant. In some instances the testimony and argument conflicted with other testimony or evidence Kalinyaprak himself presented, and lacked credibility as a result. In other instances the testimony and argument conflicted with more credible evidence from the City. In essentially all instances, the testimony and argument involved prior incidents outside of the time frame during which Kalinyaprak's charges in this case alleged retaliation by the City.

As previously noted (at p. 8 of this "Discussion"), Kalinyaprak always carried the ultimate burden of persuading the fact-finder that he was subjected to illegal retaliation. At the end of presentation of evidence, he had failed to carry that burden. None of his evidence persuaded the Hearing Officer that the legitimate nondiscriminatory reason for the Mayor's conduct on October 6, 2008, was a pretext concocted by the City to hide its retaliatory motive.

Kalinyaprak failed to prove both his charges of national origin discrimination and retaliation for engaging in prior protected activity.

V. RULING UPON EXHIBIT 91

The DVD offered as Exhibit 91 contains electronic copies of paper files, as well as other electronic files which are audio or video recordings. Some of the electronic files upon it are already admitted into evidence, under either the exhibit numbers of the copies on Exhibit 91 or under other exhibit numbers. Other of the electronic files upon it are exhibits excluded or refused, and therefore not part of the evidentiary record, but necessary as part of the hearing files, to preserve possible appeal issues. Still other electronic files upon it were not offered into evidence, and need not even be part of the hearing files. To avoid the problem of removing some of the electronic files from Exhibit 91, the Hearings Bureau will retain it in its original condition as part of the hearing files, but only those electronic files of exhibits specifically admitted into evidence during the hearing are part of the evidentiary record. The rest of Exhibit 91 is refused.

VI. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. The City of Polson did not illegally discriminate against Murat Kalinyaprak because of his national origin nor did it illegally retaliate against Murat Kalinyaprak for engaging in protected activity, when it enforced the "3-minute" rule adopted in City Ordinance 613 against him during an October 6, 2008, Council meeting, when public comment on lower couples golf fees for the Polson Country Club was being considered by the Council. Mont. Code Ann. §§49-1-301 and 49-2-308(1) and Mont. Code Ann. §§49- 3-205(1) and 49-3-209.

3. This case must be dismissed. Mont. Code Ann. §49-2-505(3)(c).

VII. ORDER

Judgment is found in favor of the City of Polson and Kalinyaprak's case is dismissed.

Dated: March 23, 2011.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Murat Kalinyaprak, charging party, and John Haffey, Phillips Law Firm, P.C., attorney for respondent City of Polson:

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).

APPEAL OF ANY FACT FINDING IN THE HEARING OFFICER DECISION REQUIRES HUMAN RIGHTS COMMISSION REVIEW OF A TRANSCRIPT OF THE HEARING. THERE IS NO TRANSCRIPT IN THE HEARINGS BUREAU FILE. ANY PARTY APPEALING FROM THE HEARING OFFICER DECISION IS RESPONSIBLE FOR ARRANGING FOR, PAYING FOR AND FILING COPIES OF THE TRANSCRIPT WITH THE HUMAN RIGHTS COMMISSION, FOR ITS REVIEW ON APPEAL, UNLESS THE PARTIES HAVE AGREED UPON OTHER ARRANGEMENTS.

* * * * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document was, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows, as well as by email to the indicated email address(es):

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DATED this 23rd day of March, 2011.

/s/ SANDRA PAGE