BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0105014155 & 0105014156:

LORI REINHART,	)	Case Nos. 778-2011 & 779-2011
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
CITY OF GREAT FALLS POLICE	)	ADMINISTRATIVE DECISION
DEPARTMENT & CITY OF GREAT FALLS,	)	
	)	
Respondents.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Lori Reinhart filed a complaint with the Department of Labor and Industry on December 21, 2009, and an amended complaint on January 27, 2010. She alleged that the City of Great Falls Police Department and the City of Great Falls (collectively hereinafter "City") discriminated against her on the basis of disability in the area of government services when they failed to provide reasonable accommodations required by the Charging Party, in violation of Montana Code Annotated §§ 49-1-102, 49-2-308, and 49-3-205 (2009). On November 1, 2010, the department gave notice Lori Reinhart's complaint would proceed to a contested case hearing, and appointed Gregory L. Hanchett as hearing officer.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on August 25-26, 2011 in Great Falls, Montana. Roberta Zenker, attorney at law, represented Lori Reinhart. Kevin Meek, attorney at law, represented the City. Charging Party's Exhibits 1, 7, 8, and Respondent's Exhibits 105, 106 and 110 were admitted into evidence. Reinhart, Heather Ford, Cheri Frick, Officer Brian Smail, Great Falls Police Department Captain Dave Bowen, Cascade County Detention Officer Vicki Bachmeier (Murphy) and Cascade County Detention Sergeant Jason Cichosz all testified under oath. The parties filed post hearing briefs, the last one of which was timely received on November 17, 2011. Based on the evidence adduced at

hearing and the arguments advanced in the parties' post hearing briefs, the following hearing officer decision is issued.

II. ISSUES

1. Did the City's officers discriminate against Reinhart in effecting the arrest in this case?

2. Can the City be held liable for the actions of the detention center under the theory that the City entered into an arrangement, agreement or plan with the County which had the effect of furthering discrimination when the City was not placed on notice that the charging party sought to hold it liable under that theory because the charging party never pled that theory as a basis for liability?

3. Assuming the charging party had properly pled that the City could be held liable for the actions of the detention center under the theory that the City entered into an arrangement, agreement or plan with the County which had the effect of furthering discrimination, did the charging party prove such discrimination?

III. FINDINGS OF FACT:

A. Procedural History[1]

1. On December 21, 2009, Reinhart filed her Complaint for Discrimination ("Complaint") listing as respondents the Great Falls Police Department, City of Great Falls, Officers Khan, Kimmet, Smail, and Murphy, and Chief Cloyd "Corky" Grove. Specifically, she alleged she was discriminated against

> "on the basis of disability and that the discrimination has been in the area of government services. During an encounter between the Charging Party and the Great Falls Police Department following an incident on June 27, 2009, the Respondents discriminated against the Charging

[1] Evidence of the procedural history of this case at the Human Rights Bureau was not presented at hearing. However, the parties have in their closing briefs referenced the procedural history at the Human Rights Bureau in arguing their respective positions on the City's objection to this tribunal's ability to consider the City's liability under Mont. Code Ann. 49-3-205 (2). The parties have made representations as to the procedural history at the Human Rights Bureau and their respective representations are not divergent. Accordingly, as the parties believe the procedural history at the Human Rights Bureau to be important, the hearing officer has recounted those facts in this procedural history.

Party on the basis of disability and failed to provide reasonable accommodations required by the Charging Party, in violation of Montana Code Annotated §§ 49-1-102; 49-2-308; and 49-3-205(2009). Ms. Reinhart alleges violation of the ADA under Title II, involving public entities, 42 U.S.C. § 12132.

2. The Complaint provided factual allegations regarding her arrest and her arrival at the Cascade County Detention Center and encounter with Detention Officer Vicky Bachmeier (Murphy). It asserted Respondents did not make a sufficient effort to locate a qualified sign language interpreter, unlawfully discriminated against her, and failed to provide her with a reasonable accommodation.

3. On January 27, 2010, Reinhart filed an amended complaint of Discrimination ("Amended Complaint") listing the Great Falls Police Department, City of Great Falls, Cascade County Sheriff's Department, and the County of Cascade. As the respondent points out in its opening brief (Respondent's opening brief, page 7), the only difference between the two complaints was the additional allegation found in paragraph 3, adding the Cascade County Sheriff's Department.

4. Nowhere in either complaint is there any explicit or implicit factual assertion that the City of Great Falls was liable in its own right for the conduct of the detention center. Likewise, neither complaint contains any indication that Reinhart sought to hold the City liable under Mont. Code Ann. § 49-3-205(2).

5. On February 18, 2010, Respondents Cascade County Sheriff's Department and Cascade County filed a motion to dismiss the amended complaint requesting that the complaints against the County be dismissed for failure to timely file pursuant to Mont. Code Ann. §49-2-501. On February 22, 2010, Reinhart capitulated to a dismissal of its complaint against the Cascade County Sheriff's Department and Cascade County.

6. Following a no cause finding by the Human Rights Bureau, Reinhart appealed the no cause finding to the Human Rights Commission. On October 6, 2010, the Montana Human Rights Commission concluded dismissal was an abuse of discretion and remanded for hearing to the Hearings Bureau.

7. On December 1, 2010, Reinhart filed her Appearance and Preliminary Pre-Hearing Statement. Her preliminary prehearing statement contains virtually identical factual allegations as those contained in her complaints and amended

complaint. However, it contains no reference to the City's liability for the detention center's conduct under Mont. Code Ann. §49-3-205(2) nor does it suggest either explicitly or implicitly any factual scenario from which such liability can be discerned.

8. On June 20, 2011, the charging party filed a motion for summary judgment. The gist of the charging party's motion focuses on the officer's conduct at the scene as a basis for imposing liability. It does not suggest as a basis for summary judgment that the City had liability for the conduct of the detention center. Not surprisingly, as the motion focused on the arrest, the respondent's response focused on the arrest. Oral argument focused exclusively on Reinhart's arrest and the officers' conduct at the scene, as the charging party admits in her responsive post hearing brief.

9. Reinhart's final prehearing statement, filed on August 19, 2011, after the close of discovery, was the first clear assertion form the charging party that she sought to hold the City liable for the conduct of the detention center under the auspices of Mont. Code Ann. §49-3-205(2). Paragraph 9, Charging Party's final prehearing statement, page 4.

10. At hearing, the City objected to any efforts on Reinhart's part to introduce evidence about Reinhart's treatment at the detention center in so far as it was being introduced to prove the City's liability for conduct at the detention center in order to prove liability under Mont. Code Ann. §49-3-205(2).

B. Substantive Facts

1. Reinhart is disabled within the meaning of the Montana Human Rights Act. She is completely deaf. She is able to read "pretty well." RT page 28, lines 1 through 3.

2. Reinhart's daughter is Heather Ford. Ford has no hearing disability. Ford has no formal training in American Sign Language interpretation. However, Lori Reinhart has taught Ford how to use ASL and has also taught her how to spell out words using sign language. Ford is quite capable of accurately and effectively translating for her mother and had been doing so for some time prior to the arrest incident that precipitated the filing of the instant discrimination complaint. Heather has also served as an interpreter between Reinhart and law enforcement officials on other occasions when Reinhart had been stopped for traffic violations.

3. Reinhart was previously married to Troy Reinhart (Troy). Prior to Reinhart's arrest in this case, she had gone to the Great Falls Police Department on at least two occasions to report that Troy had assaulted her. On each occasion, she took Ford with her not only as a fact witness to the assault but also to interpret for Reinhart with the officer taking a report.

4. On June 27, 2009, Reinhart assaulted Troy by hitting him with a closed fist in the back of the head at the residence they shared in Great Falls. Great Falls Police Officers Kahn and Smail investigated the assault. Smail arrived at 1:49 p.m. RT page 157, lines 8 through 10. After Kahn spoke to Troy, Kahn determined that there was probable cause to arrest Reinhart for Partner Family Member Assault (PFMA), a violation of Mont. Code. Ann. 45-5-806(14). Reinhart does not dispute that the officers arrested her for PFMA assault and that they had probable cause to do so.

5. Ford was present at the time that Kahn interviewed Troy about the assault. Kahn also interviewed Ford about the assault. After investigating the assault, Smail and Kahn left the scene. At the time Smail left, he was aware that probable cause existed to arrest Reinhart for PFMA.

6. Per Great Falls Police Department policy and by virtue of the requirements of the PFMA statute, once probable cause to arrest an aggressor exists for a violation of that statute, the aggressor is without exception arrested and transported to jail.

7. At approximately 2:20 p.m., Smail drove back by the Reinhart residence and observed Reinhart in her car in the driveway. As he approached the driveway in his marked patrol car, Reinhart backed her car out of the driveway and drove away from the officer down 15th Street. Smail turned on the overhead lights of his fully marked patrol car in effort to stop Reinhart. Reinhart initially pulled over while she was on 15th Street, but then drove away from Smail and proceeded down an alley way and back to the residence, never yielding to Smail's car. Smail continued to pursue Reinhart with the overhead lights of his patrol car still flashing.

8. Once in the driveway of the residence, Reinhart got out of her car and began walking toward the residence. Officer Smail pulled into the driveway behind her and got out of his patrol car. He was wearing his police uniform. He started walking toward Reinhart who was continuing to walk away from Smail. Reinhart, who had just been tailed by Officer Smail in his patrol car with lights flashing for one- half block looked back at Smail and saw him get out of his patrol car. Nonetheless, Reinhart continued to walk away from Smail and head for the house. Reinhart continued to walk away from the officer even though Reinhart at that point

knew or reasonably should have known that the officer was approaching her. RT page 152, lines 14 through 20.

9. Smail approached Reinhart and placed his hand on her arm. He blurted out to Reinhart that she was under arrest, but realized that Reinhart was deaf. Reinhart continued to resist Smail. At this point in time, Ford had come outside of the house and was signing and speaking to Reinhart and telling Reinhart to calm down. RT page 149, lines 3 through 12. Despite Ford's pleas, Reinhart nonetheless continued to resist Smail and then attempted to assault Smail by turning around and trying to kick him. Smail then placed handcuffs on Reinhart cuffing her behind the back, in order to get control of the situation. He then placed Reinhart in the back of the patrol car.

10. Kahn arrived back at the scene shortly after Smail took Reinhart into custody. Both officers were aware that Reinhart was hearing impaired. Being aware that Reinhart was hearing impaired, the officers asked Ford if she could interpret for her mother. Ford responded that she could. Officer Smail told Ford to tell Reinhart to calm down and they would remove the handcuffs from Reinhart. Ford communicated this to Reinhart and Reinhart calmed down. Smail removed the cuffs from Reinhart so that she could sign with Ford.

11. Utilizing Ford's signing skills, the officers told Reinhart why she had been arrested. Ford told Reinhart that she was being arrested for assaulting Troy. The officers never told Reinhart that she was being arrested for fleeing from the police. Reinhart understood that she was being arrested for assaulting Troy. There was no confusion between Ford and Reinhart in their communications. At no time did either Ford or Reinhart request an interpreter for Reinhart.

12. Officer Smail observed that there did not appear to be any lack of understanding between Ford and Reinhart while Ford was translating the officer's comments and instructions to Reinhart. Reinhart was able to effectively communicate with the officers through Ford's interpreting.

13. Within fifteen minutes of arresting Reinhart, Officer Smail transported her to the Cascade County Detention Center for booking. The trip from the arrest scene to the detention center took about ten minutes. Reinhart was never interrogated about the incident. The entire time from Smail's arrival back at the scene at 2:20 p.m. until Reinhart arrived at the detention center was 35 minutes.

14. Great Falls has no detention facilities of its own. All persons arrested by the Great Falls police are booked into Cascade County Detention Center. There is no intergovernmental agreement between the City and Cascade County for the County to house persons arrested by City police officers. The City does not provide funds to the County for housing arrestees. The detention center is required to take all arrestees for booking under Mont. Code Ann. §§7-32-2201 and 7-32-2204. It is the County's obligation to provide detention facilities and the City has no control over the County or its methods of running the detention facility.

15. When a hearing impaired arrestee is booked into the detention center, the protocol is to locate an interpreter as soon as feasible to assist the hearing impaired person with the booking process.

16. Detention Officer Bachmeier and Correctional Sergeant Jason Cichosz were working at the time Reinhart was delivered to the detention center. Both Bachmeier and Cichosz have received training in ADA compliant procedures for booking hearing impaired persons.

17. When Reinhart arrived, staff contacted Cichosz to advise him that a hearing impaired person was being booked into the facility. The detention center maintains a list of deaf/mute interpreters who can be contacted to assist in booking in hearing impaired persons. Cichosz, pursuant to detention center protocol, began calling interpreters on the list to come in and assist with Reinhart's booking. Cichosz made 8 to 10 different phone calls in an effort to get an interpreter to the detention center to assist in booking Reinhart. RT page 238, lines 17 through 19. His calls included a call to Cherie Frick, interpreter. He left a message for Frick to return his call but he received no return phone call. Cichosz exhausted every resource that he had in an effort to find Reinhart an interpreter. RT page 240, lines 17 through 21. This included making calls to friends and to relatives of people who might have access to an interpreter.

18. Unable to find an interpreter, and in order to avoid Reinhart having a prolonged stay in the holding cell, Bachmeier was asked to assist in booking Reinhart into the facility. RT page 220, lines 19 through 25, page 221, lines 1 through 3. Bachmeier communicated with Reinhart by writing questions down and having Reinhart respond in writing. Reinhart's written responses were then entered into the computer by another detention officer who was also present.

19. In order to book a person into the detention center, the detention center must obtain certain background information from detainees, such as the detainee's

address and whether the detainee has any medical conditions. RT page 236, lines 13 through 16. For persons who are not hearing impaired, a detention officer asks the person these questions directly off the computer screen. The detainee's responses are then inputted directly into the computer. For hearing impaired persons, the County maintains a written form containing the identical questions contained on the computer screen. Bachmeier did not use that form with Reinhart. The failure to use the written form in booking Reinhart was of no consequence since Bachmeier wrote down those questions for Reinhart. RT page 222, lines 14 through 25, page 223, 1 through 2.

20. The first question Bachmeier wrote for Reinhart was whether she would like to proceed with the booking process while Cichosz continued to search for an interpreter. Reinhart responded by writing "Yes" to that question. Reinhart also wrote that she was tired and would just like to go to sleep. RT page 221, lines 4 through 10.

21. After getting Reinhart's consent to continue with the booking process, Bachmeier completed the booking process by writing down the questions she had for Reinhart and having Reinhart answer the questions in writing. Reinhart had no difficulty understanding the written communication that occurred between her and Bachmeier.

22. After the booking process was completed, Reinhart was placed in "H" Block at her request because she had previously been housed in "H" Block. RT page 227, lines 22 through 25. The door to her cell was left open so that she could come out as "she needed to" RT page 227, lines 11 through 14. In addition, Reinhart was offered the opportunity to use the detention center's TTY telephone at least two or three times. She never availed herself of this opportunity.

23. Reinhart was able to effectively communicate with Bachmeier and all other persons she came in contact with at the holding facility through the method of writing down and answering questions on paper.

24. Reinhart was provided with a pen and paper while she was in the detention center so that she could communicate with jail personnel as she needed to. At no time did she ask for an interpreter to help her complete the booking process. She never complained about having to communicate with Bachmeier in writing. In fact, the only request that she made was to ask that she be provided an interpreter for her initial appearance. Her answers to Bachmeier's questions were responsive. Bachmeier and Reinhart were able to complete the booking process efficiently with

no problems. Reinhart was able to communicate to Bachmeier that she wanted to be placed in "H" Block, further indicating that Bachmeier and Reinhart were able to effectively communicate with each other.

25. At no time during the arrest, during the transport or after arriving at the detention center was Reinhart interrogated or otherwise investigated about the assault.

26. Reinhart was booked into the detention center on a Saturday afternoon. She made her initial appearance on the following Monday morning. As Reinhart had requested, an interpreter was made available to her at the initial appearance.

IV. OPINION[2]

A. The Officers Did Not Discriminate Against Reinhart In Effecting Her Arrest.

It is an unlawful discriminatory practice for any political subdivision of the state to refuse, withhold from or deny to a person services, goods, facilities, advantages or privileges because of a physical disability. Mont. Code Ann. §49-2-308 (1)(a). An accommodation that would endanger the health or safety of any person is not required. Mont. Code Ann. §49-2-101(19)(b).

Montana's Governmental Code of Fair Practices (GCFP) requires governmental entities to provide services without discrimination based upon physical disability. Mont. Code Ann. §49-3-205(1). While governmental entities are required to provide reasonable accommodations in providing services to persons who are physically disabled, an accommodation that would endanger the health or safety of any person is not required by the GCFP. Mont. Code Ann. §49-3-101(3)(b).[3]

It is appropriate for Montana courts to look to federal case law that interprets Title II when interpreting the similarly worded provision contained in Mont. Code

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

[3] Reinhart argues that portions of the ADA are applicable to this case. Reinhart's opening brief, page 8. The hearing officer does not take this assertion to mean that Reinhart is contending that this tribunal can find liability under the ADA, since this tribunal only has jurisdiction over the MHRA and the GCFP. Instead, the hearing officer understands Reinhart to be arguing that the ADA statutes and regulations, as well as case law interpreting those statutes and regulations, provide useful comparisons in analyzing the reach of the MHRA and the GCFP.

Ann. §49-2-308 (1)(a). McDonald v. Dep't of Environmental Quality, 2009 MT 209, 351 Mont. 243, 214 P.3d 749. The purpose of the provisions of Title II of the ADA is to place those with disabilities on an equal footing with persons who are not disabled. Title II's provisions do not exist to give disabled persons an unfair advantage. Bircoll v. Miami Dade Co., 480 F. 3d 1072, 1086 (11th Cir. 2007), citing Kornblau v. Dade County, 86 F. 3d 193, 194 (11th Cir. 1996). Federal courts interpreting Title II's impact on arrests have recognized two types of claims in this area: (1) a wrongful arrest claim where police arrest a person based on her disability and (2) a claim that alleges a failure properly to accommodate a person during the investigation or arrest, causing the person to suffer greater injury or indignity than other similarly situated arrestees. See, e.g., Ryan v. Vermont State Police, 667 F. Supp. 2d 378, 387 (DC Vermont, 2009), citing Gohler v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999). Reinhart does not dispute that she was arrested for assault, not on the basis of her disability. Therefore, her argument must proceed under the second argument, that officers at the scene failed to properly accommodate her.

In order to make a prima facie case of disability discrimination under a Title II claim, Reinhart must show that (1) she is disabled; (2) that the City's conduct either excluded her participation in or denied her the benefits of a service, program or activity or that the City otherwise subjected her to discrimination on the basis of her physical disability, and (3) that the exclusion, denial of benefit or discrimination was by reason of Reinhart's disability. Bircoll, supra, 480 F. 3d at 1083, Patrice v. Murphy, 43 F. Supp. 2d 1156, 1159 (W.D. Wash., 1999), quoting Duffy v. Riveland, 98 F. 3d 447, 455 (9th Cir. 1996).

The parties do not dispute that Reinhart is disabled. The parties disagree about whether Reinhart has met the last two prongs of her prima facie case. Reinhart contends that once the scene was secure, Officer Smail discriminated against her by not obtaining a certified interpreter. The City argues both that an arrest is not the type of service to which the ADA applies and further that in any event the officers provided reasonable accommodation to Reinhart at the scene under the circumstances because they utilized the service of Ford to communicate with Reinhart and such communication was effective. While the hearing officer finds much to commend the City's argument that an arrest is not a service, program or activity to which the prohibitions of Title II and the MHRA apply, it is not necessary to answer that question here. That is because the facts of this case demonstrate that the officers reasonably accommodated Reinhart at the scene and, therefore, Reinhart has failed to prove the second and third prong of her prima facie case.

The officers properly accommodated Reinhart's disability during the arrest by utilizing Ford's interpreting skills. Ford was able to effectively facilitate communication between Reinhart and the officers. This was demonstrated many times in the record, not the least of which was when Ford relayed Smail's offer to Reinhart that if Reinhart calmed down, Smail would remove the cuffs. Reinhart complied immediately after the interpretation and Smail removed the cuffs, proving that Reinhart understood what Ford was communicating to her. Added to the long history of Ford's ability to communicate with her mother, and the fact that Reinhart used Ford during earlier occasions to communicate with police personnel, there can be no doubt that using Ford to translate provided an effective means of communication and was a reasonable accommodation under the circumstances.

Under federal case law and Department of Justice Guidelines for Police Officers, the central requirement that a public entity must satisfy to honor the rights of a hearing-impaired person under investigation is to use methods of communication with the hearing-impaired person that are effective. The thrust of the authority cited by the parties is that absent a specific legal mandate to use qualified interpreters in given circumstances, a public entity can use any effective method or combination of methods of communication with the hearing-impaired person during its investigation. Bircoll, supra; Patrice, supra; Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008)(Keith, J., dissenting); 42 U.S.C. §12102(1)(A); 28 C.F.R. §35.160; 28 C.F.R. §36.303; Appendix B to Part 36 of 28 C.F.R. Chap. 1. See also, Mueli & Montague v. Billings Police Department, HRB Case No. 0095013453 (2010), page 5.

Under the Human Rights Act, the only mandatory requirement for the use of an interpreter is found in Mont. Code Ann. §49-4-503. That statute states in pertinent part:

> A qualified interpreter must be appointed as follows: . . . . (3) (b) Upon arresting a deaf person for an alleged violation of a criminal law and prior to interrogating or taking a statement of the deaf person, the arresting law enforcement official shall make available to the person, at the earliest possible time, a qualified interpreter to assist the person throughout the interrogation or taking of a statement.

By its express and unambiguous terms, Mont. Code Ann. §49-4-503(3)(b) applies to an "arresting law enforcement official" who after "arresting a deaf person for an alleged violation of a criminal law" and before "interrogating or taking a statement of the deaf person" must "make available to the person, at the earliest possible time, a qualified interpreter to assist the person throughout the interrogation

or taking of a statement." It does not apply here where Reinhart was never interrogated about the assault nor was there any attempt to obtain a statement from her (because the officers already had probable cause to arrest her before they took her into custody). Thus, there is nothing in the Human Rights Act or the federal case law that mandated the use of a qualified interpreter during any part of their encounter with Reinhart. The officers were only required to ensure that effective communication existed between them and Reinhart. They comported with this by utilizing Ford's service as an interpreter. Therefore, the officers' interactions with Reinhart cannot form a basis for finding discrimination in this case. Ryan, supra, 667 F. Supp. 2d at 389.

Reinhart argues that the failure of the City to provide a qualified interpreter at the arrest scene amounts to discrimination because the charging party was not properly informed of the basis for her arrest, something that a person without a hearing impairment would not face. She also insists that the act of placing handcuffs on her even after she attempted to assault the police officer is discriminatory because it affected the charging party's ability to communicate with the officers. Neither argument is persuasive and they are both rejected. As a matter of fact, the officers did effectively communicate to Reinhart the basis for her arrest by utilizing Ford's interpreting skills to inform Reinhart that she was being arrested for assaulting Troy. Indeed, Reinhart admitted to the Human Rights Bureau investigator that the officers told her at the scene that she was going to jail because she hit Troy.

The charging party's argument at Page 15 of her opening brief that "handcuffing per se prevents effective communication" ignores that accommodations provided need only be reasonable, that no accommodation which endangers the health or safety of any individual is required, and that the inquiry of what is reasonable is "highly fact specific." Bircoll, supra, 480 F. 3d at 1085. The charging party has cited no case law that requires an officer to risk his or her life in order to accommodate a combative suspect who happens to be hearing impaired. Here, Officer Smail would have been foolish not to handcuff a person who had just attempted to assault him. Smail handcuffed Reinhart to ensure his safety, and only as long as necessary to accomplish that. Once Reinhart complied with his request to calm down, Smail removed the cuffs. The cuffing was undertaken only to ensure safety, not to discriminate against a hearing impaired person. Nothing about either officer's conduct either at the scene or at anytime during their contact with Reinhart shows that the officers failed reasonably to accommodate Reinhart's disability such that she suffered greater injury or indignity in that process than other arrestees.

The charging party's responsive post hearing brief also takes the position that a hearing impaired person must be accorded the choice of her auxiliary aid at the arrest scene, that in this case anything less than providing a certified interpreter was inadequate, and that the burden is on the respondent to show that it would have incurred an undue burden in supplying the requested auxiliary aid. The fundamental problem with Reinhart's argument under the facts of this case is that no request for an interpreter was ever made at the scene of the arrest (nor, indeed, at the detention center except when Reinhart asked that she be provided an interpreter for her preliminary appearance, a request which was honored). The reason Reinhart never requested anyone to interpret for her is obvious: Ford was interpreting effectively for Reinhart and there was no need for a certified interpreter. Reinhart never expressed a preference for the particular auxiliary aid of a certified interpreter nor was there any discernable indication to anyone that the means of communication which were utilized were either at odds with any request that Reinhart made or not effective. Law enforcement need not be omniscient in accommodating hearing impaired persons, only reasonable.

In Tucker, a case which is in all material respects identical to the case before this tribunal, the court rejected the same argument that Reinhart posits here. The hearing impaired arrestees in Tucker were arrested for assault and argued that the arresting officers violated the ADA by not obtaining an interpreter for them at the scene. 539 F.3d at 536. In rejecting the plaintiffs' claims, the court noted that the United States Department of Justice enabling regulations (upon which Reinhart relies to make her argument in this case) "note only that the communication must be as effective as that provided to non-disabled persons, and that the requested device should be considered. It does not require that every potential auxiliary device be on standby so that whatever request a particular individual makes can be accommodated." 539 F.3d at 538. As in Tucker, the officers at the arrest scene in this case made reasonable accommodations to ensure that Reinhart was treated like any other arrestee . That is all the law requires.

Finally, Reinhart asserts that proof that effective communication did not occur is shown in the fact that "police did not even communicate the basic and fundamental Miranda Rights." Reinhart's opening brief, page 19. The failure to communicate Miranda warnings here hardly shows a lack of effective communication. The officers did not communicate Miranda warnings because they never interrogated Reinhart about the incident. Reinhart has cited no case that stands for the proposition that law enforcement is required to provide Miranda warnings when they do not engage in custodial interrogation. In the absence of any evidence that Great Falls Police department has a policy that requires that officers under all circumstances

administer Miranda warnings, the failure to administer them to Reinhart in this case does not show discrimination. The arresting officers did not discriminate against Reinhart and her claim against the City based on the conduct of the officers fails.

B. The City Cannot be Held Liable For The Detention Center's Conduct.

1. Reinhart's Claim Against the City Is Foreclosed By Her Failure to Plead the Claim Against The City In Her Complaint.

The City contended throughout the hearing that Reinhart did not properly plead and allege the City's liability for the conduct of the detention center and that for that reason all evidence related to that issue should have been precluded from admission.

The crux of Reinhart's efforts to hold the City responsible for the conduct of the detention center emanates from her contention that the City is liable under the GCFP for the detention center's conduct. Mont. Code Ann. §49-3-205(2) prohibits a governmental entity from becoming a party to an agreement, arrangement or plan that has the effect of sanctioning discriminatory practices. Mont. Code Ann. §49-3-205(3) requires a governmental entity to analyze its operations to ascertain possible instances of noncompliance and to initiate programs to remedy defects found to exist. A review of Reinhart's complaint does not disclose that she anywhere specifically pled those subparts of the statute as a basis for finding the City liable for the detention center's conduct. She did generally aver that the respondent's officers had violated Mont. Code Ann. §49-3-205 (Paragraph 3, original complaint filed December 21, 2009 and amended complaint filed January 27, 2010) but then subsequently limited that to a violation of Mont. Code Ann. §49-3-205(1)(Paragraph 35, original complaint filed December 21, 2009 and amended complaint filed January 27, 2010). Moreover, Reinhart did not make any fact averment that would have reasonably put the City on notice that Reinhart sought to hold it liable for the conduct of the detention center. Because of this, the hearing officer agrees with the Respondent that Reinhart is precluded from arguing that the City has liability for the conduct of the detention center and, therefore, evidence of the conduct of the detention center was not admissible to prove the City liable for the conduct of the detention center.

A similar circumstance arose in the case of Centech v. Sprow, 2006 MT 27, 331 Mont. 98, 128 P.3d 1036. In that case, the charging party pled in her complaint that she had been the victim of discrimination in her part-time employment. The reasonable cause finding of the human rights bureau found that the employer had discriminated against the charging party on the basis of pay discrepancies in her full

time employment. At hearing, the hearing officer concluded that the employer had discriminated against the charging party in her full time employment even though that factual averment had not been pled. After determining that a fair reading of the complaint did not put the respondent on notice that it could be held liable for discrimination in regards to the charging party's full-time employment, the Montana Supreme Court upheld the district court's determination that the complaint could not be amended so as to hold the respondent liable for discriminating against the charging party in her full-time employment. ¶27. In reaching that conclusion, the court held:

> Any party claiming to be aggrieved by any prohibited discriminatory practice may file a written complaint with the Department 'within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. . . . Any complaint not filed within the times set forth in this section may not be considered by the commission or the department." Section 49-2-501, MCA. Although Sprow properly pled sex discrimination with regard to her part time employment, she did not plead discrimination in her full time employment within 180 days of the alleged unlawful discriminatory practice.

¶24.

Applying the rationale of Sprow to the case at bar, the hearing officer does not see how this tribunal could hold the City liable for the detention center's conduct as neither Reinhart's complaint or amended complaint put the City on notice, either by reference to applicable statute or by fact averments, that Reinhart sought to hold it liable for the detention center's conduct. The gist of the complaints was that the City's alleged violation of the GCFP was only to be found under Mont. Code Ann. § 39-3-205 (1), not under Mont. Code Ann. §39-3-205 (2). While the hearing officer understands that it is not necessary to plead specific statutory references in order to place a party on notice, there must at least be some suggestion in the statement of facts that would fairly give the respondent notice that the charging party seeks to hold it responsible for alleged conduct. Neither the complaint or amended complaint do that in this case.

The City has never implicitly or explicitly consented to an amendment that would permit this tribunal to consider the City's liability under Mont. Code Ann. §39-3-205 (2) or (3). Nothing in the charging party's motion preliminary prehearing statement or in her motion for summary judgment reasonably put the City on notice that Reinhart sought to hold it liable for the conduct of the detention center. It was

not until the final prehearing statement that Reinhart finally articulated her basis for holding the City liable for the detention center's conduct in a manner that would have put the respondent on notice. The City has properly objected throughout this proceeding to being held liable for any conduct of the detention center. Not articulating in some discernable manner a basis for liability until the filing of the final prehearing statement is not timely under the rationale of Sprow. Therefore, the hearing officer is constrained to agree with the City that evidence of the detention center's conduct was not admissible to prove the City's liability.

2. Even if Reinhart had Properly Pled her Case, the City Cannot be held Liable because the County's Conduct Was Not Discriminatory and There Is No evidence that The City Entered Into a Plan, Contract, Agreement or Arrangement With the County That Had the Effect of Sanctioning Discrimination.

Even assuming that Reinhart had properly pled her argument for the City's liability due to the conduct of the County, she still could not prevail on her claim. While Reinhart contends that the City is liable for the actions of the Detention Center under Mont. Code Ann. §49-3-205, Reinhart has never contended that the protocol of the detention center, which is to obtain an interpreter for a hearing impaired person as soon as it is reasonably possible and to offer access to TTY telephones during detention, is in itself discriminatory. Neither has Reinhart suggested that the City of Great Falls or its police officers actually knew or reasonably should have known at the time they took Reinhart to the detention center that on this one occasion the center would be unable to obtain an interpreter despite many efforts to do so. Reinhart is essentially arguing that the City must be held to account for the Detention Center's actions even though the protocol for deaf persons was non-discriminatory and even though neither the City nor its officers could have known about the unique difficulties the detention center encountered in trying to obtain an interpreter on the day that Reinhart was booked in.

The problem with this argument is that there is no authority for holding the City liable for the detention center's conduct under the circumstances of this case. In the first place, the detention center personnel reasonably accommodated Reinhart's disability. Beyond this, however, the City has no liability because the City does not control how the County runs the detention center, has no agreement or arrangement with the County, and certainly did not enter into any agreement or arrangement with the County that had the effect of sanctioning discriminatory practices.

Reinhart's claim fails first and foremost because there was no discriminatory practice perpetrated upon Reinhart during her stay in the detention center. When

Reinhart arrived at the detention center, she was placed in a holding cell and, following detention center protocol, numerous efforts were made to reach an interpreter to assist Reinhart with the booking process. She was advised that the jail was attempting to get an interpreter but could not find one and was then asked if she would like to proceed with a paper book-in, to which she responded "yes." This was not undertaken for the convenience of the detention center but was done for Reinhart in order to get her out of the holding cell and into an area where she could be more comfortable because she had told Officer Bachmeier that she wanted to get the process over so that she could just "go to sleep." In order to accommodate Reinhart's request, Bachmeier proceeded with the booking process but apparently only after satisfying herself that Reinhart could adequately communicate through pen and paper.

At no time during this process did Reinhart request the assistance of an interpreter, complain to staff about doing a paper book-in, nor did staff sense that she did not understand what was being done. Bachmeier either wrote questions or pointed to a question on the paper for Reinhart to read, to which Reinhart would respond in writing and Bachmeier would then relay the response to another officer who would input the information into the computer. Reinhart did not have trouble understanding the written communication that occurred between her and Bachmeier and Reinhart's responses were appropriate. Reinhart was informed about and given access to a TTY telephone, enabling her to communicate with individuals outside of the detention center.

Reinhart was not put in with the general population of women, but was housed in the H Block unit at her request and because there were only a few other females located in that unit. During her incarceration she was provided with paper and pens which allowed her to communicate effectively with jail personnel and the door to her cell was left open to facilitate her ability to do so. There was no interrogation or investigation of Reinhart while she was incarcerated. There is no evidence whatsoever that a non-hearing impaired person would have been released any earlier or received any benefit or service that Reinhart did not receive due to her hearing impairment. In sum, the evidence establishes that Reinhart was, as the respondent points out, "placed on equal footing as to any other hearing individual who would be booked and incarcerated at the Detention Center." On this basis alone, her claim against the City for the detention center's actions must be denied. See, e.g., Tucker, supra, 539 F.3d at 539 (holding that the judicial inquiry by which to measure whether the complained of conduct violates the ADA must focus on the effectiveness of the communication actually received to ensure that the disabled person receives equal opportunities, citing Bircoll, supra).

Tucker's facts are strikingly similar to the facts before this tribunal. In that case, the hearing impaired arrestees were transported to a jail, held overnight, and then released after seeing a magistrate late on their second day of detention. Id. at 529. When the arrestees arrived at the jail, they specifically asked to use a TTY telephone. The jail had no such telephone, but accommodated the arrestees by permitting them to call a relative who was also hearing impaired and then employing the services of a relay operator and jail personnel in order to ensure that the communication between the arrestees and their relative was effective. Id. On the day after their booking, the arrestees were scheduled to appear at their preliminary appearance in the morning. Id. The magistrate, however, recognized that the Arrestees were hearing impaired and therefore delayed their preliminary appearance until the end of his docket in the afternoon so that the magistrate could more effectively communicate with the arrestees because there was no sign language interpreter available. Id. Focusing the inquiry on the effectiveness of the communication actually received, the Tucker court concluded that no violation of the ADA had occurred. In a similar vein, because the County detention center in this case, faced with an inability to obtain an interpreter through no fault of its own, nonetheless ensured that Reinhart was able to effectively communicate with detention center personnel, the County, and therefore the City, did not fail to accommodate Reinhart during her time at the detention center.

Beyond this, however, it is difficult to imagine how the City could have been found to have liability under the GCFP in any event because there is no evidence that the City can be held accountable for any conduct of the detention center. Reinhart cannot rely on 42 USC §12132 to support the City's liability for the conduct of the detention center. As the United States Court of Appeals has recognized in interpreting Title II and specifically 42 USC §12132, :

> Title II does not contemplate . . . liability for an independent public entity that neither controls the challenged services nor discriminated against [the charging party] because of disability. . . . To the contrary, the plain text of Title II limits responsibility to public entities that discriminate against or exclude persons with disabilities from the services, programs or activities administered by the entity. Section 12132 provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity.' To hold that a city or state . . . is liable for injury caused solely by a separate and independent corporate body is a novel and unprecedented theory.

Bacon v. City of Richmond, 475 F.3d 633, 642 (4th Cir. 2007).

The City had no arrangement or agreement with the County about housing arrestees at the detention center. The City was required by statute to deliver PFMA arrestees to the detention center. The City had no control over the County's operation of the detention center. Perhaps most importantly, the City had no reason to know or believe that the detention center's protocol (call an interpreter to assist as soon as possible and provide TTY telephones) could not be followed on the day Reinhart was booked in through no fault of the detention center personnel.

Reinhart has never contended that the protocol is in itself discriminatory. Reinhart has not proven that she undertook efforts to obtain an interpreter which detention personnel thwarted. At most, she has proven that in this one instance the County was unable to obtain an interpreter through no fault of its own and, facing that problem, undertook reasonable steps to accommodate her disability by providing her at all times with a pen and paper, with which she could effectively communicate to jail personnel, and access to a TTY telephone.

The GCFP prohibits the City from entering into an agreement, arrangement or plan that has the effect of sanctioning discrimination or attempting to avoid its obligation not to discriminate against disabled persons through contractual, licensing or other arrangements. In Tucker, supra, the court recognized that the GCFP's ADA counterpart does not place unlimited obligations upon governmental entities that are required to provide services without discrimination. The requirements of Title II are "subject to the bounds of reasonableness." Tucker, 539 F.3d at 532, citing Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998).

There is nothing in the wording of the applicable GCFP that suggests that a one time glitch in the system which resulted not from any intent to discriminate or indifference to discrimination but from forces outside the control of the City is the type of conduct to which liability may be ascribed in the absence of any evidence that the City was responsible for the conduct, would have countenanced such conduct, or reasonably knew or would have suspected such conduct. A single instance of the County's inability to obtain an interpreter, not caused by jail personnel's lack of diligence, and which jail personnel combated in a reasonable manner by ensuring other means of effective communication, does not show that the City entered into an arrangement, plan or agreement that had the effect of sanctioning discrimination. Nor does it demonstrate an attempt on the part of the City to avoid its obligation not to discriminate against hearing impaired persons. Furthermore, Reinhart has provided no case law or authority to show that when an interpreter is not provided

during a single incident due to circumstances beyond anyone's control, not due to discriminatory animus, discriminatory indifference or a faulty protocol, and reasonable accommodations are made to overcome the difficulty, that the GCFP is nonetheless violated.

Reinhart relies heavily on Armstrong v. Schwarzeneggar, 622 F.3d 1058 (2010). That case is both factually and legally inapposite to the case before this tribunal. In Schwarzeneggar, the state defendants had entered into a contract with county jails to house disabled inmates. The plaintiffs sought to require the state defendants to track and accommodate the needs of disabled inmates incarcerated in county jails under that contract and to establish a grievance procedure to address any failure to accommodate in those jails, something which the state could control.

Schwarzeneggar is a far cry from this case where the City had no arrangement or agreement or other plan with the detention center but was faced with a statutory mandate not only to arrest and remove a PFMA offender from the scene but also to deposit that offender with the detention center. Moreover, unlike the state defendants in Schwarzeneggar, who had the ability to do something about the actions requested by the plaintiffs, the City could not have foreseen, did not know, and had no reason to know about the unique circumstances during this one episode of detention that resulted in the inability of jail personnel to obtain an interpreter. Nothing the City could have done under the circumstances of this case could have prevented the inability to find an interpreter. To find the City liable under the GCFP under the unique circumstances of this case would be impose liability upon wholly inculpable conduct. It would in effect make the City strictly liable for discrimination without regard to whether the City had displayed any intent to discriminate or indifference to discrimination. There is no basis either in the language of the statute, the case law or in policy to interpret the GCFP so broadly.

V. CONCLUSIONS OF LAW

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

2. The City of Great Falls did not discriminate against Reinhart on the basis of her hearing disability. The officers reasonably accommodated Reinhart both during her arrest and in transporting her to the detention center.

3. The City cannot be held liable for the conduct of the detention center's conduct because Reinhart did not put the City on notice through her complaint or

amended complaint that she sought to hod the City liable for the detention center's conduct.

4. Even if Reinhart had put the City on notice of her desire to hold the City liable for the conduct of the detention center, the detention center reasonably accommodated Reinhart's disability and the City could in no event have liability for the detention center's conduct.

5. Because Reinhart has failed to prove discrimination, her case must be dismissed.

VI. ORDER

1. Judgment is found in favor of the City and against Lori Reinhart.

2. Reinhart's case is hereby dismissed.

Dated: January 13, 2012.

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Roberta Zenker, attorney for Lori Reinhart, and Kevin Meek, attorney for City of Great Falls Police Department and City of Great Falls:

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 Marieke Beck
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. The original transcript is in the contested case file.

REINHART.HOD.GHP