BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NOS. 0049010701/0049010702

ED KINNICK,	)	Case No. 134-2005
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
PARK COUNTY, MONTANA, AND SHERIFF CLARK CARPENTER,	)	
	)	
Respondents.	)	

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I. Procedure and Preliminary Matters

Ed Kinnick filed formal complaints with the Montana Department of Labor and Industry on October 21 and 22, 2003, charging that Park County and its sheriff, Clark Carpenter, discriminated against him on the basis of political belief by subjecting him to disparate treatment beginning on or about July 2003, relieving him of his duties and responsibilities and placing him on administrative leave on or about September 15, 2003. On July 15, 2004, the Human Rights Commission sustained Kinnick's objection to dismissal and remanded the complaint to the department for a contested case hearing. On July 23, 2004, the department gave notice of hearing on Kinnick's complaints, appointing Terry Spear as the hearing examiner.

The hearing convened on October 28-29, 2004, and January 12-14, 2005, in Livingston, Park County, Montana. Kinnick attended with his attorney, Kevin Brown, Paoli & Brown. Carpenter and the county's designated representative, Undersheriff Gary Tanascu, attended with their attorney, Richard Larson, Harlen, Chronister, Parish & Larson, P.C.

Darren Raney, John Leonard, Dennis Noteboom, James Sulages, Glen Farrell, Stephen Voss, Jerry Harmon, Jeff Adams, Jerry Lord, Teresa Antoinette Adams [Erickson], Barbara Fletcher, Larkin Vonalt, Reid Scott, Eric Seaverson, Denver Cobb, Ed Kinnick, Tara DePuy, Blake Blatter, Gary Tanascu, Clark Carpenter, Pete Adams, Daniel Wertz, Tony Steffins and Doug Wonders testified.

The hearing examiner sustained failure to timely identify objections and refused the testimony of Scott Hamilton, Captain O'Neill, Sgt. LaComb and Sue Fladager. The hearing examiner sustained objections of improper rebuttal and prior excusal of the witness and refused additional testimony from Jeff Adams.

The hearing examiner admitted Exhibits 1, 3, 7-19, 26-34 and 101-128 into evidence, refusing Exhibit 129 for failure to timely disclose it. The parties filed their last post-hearing argument on April 29, 2005. The hearing examiner's file docket accompanies this decision.

II. Issues

The issue in this case is whether the respondents took adverse employment actions against Kinnick because of his political ideas and beliefs or in retaliation for his protected activity in running against Carpenter for the position of Park County Sheriff. A full statement of issues appears in the final prehearing order.

III. Findings of Fact

1. Respondent Park County is an employer of more than 15 persons, a political subdivision of the State, and a local governmental agency as those terms are defined by Montana Code Annotated, Title 49.

2. Respondent Clark Carpenter is an employer and a local governmental official as those terms are defined under Montana Code Annotated, Title 49.

3. The Park County Sheriff's Office hired Charging Party Ed Kinnick as a detention officer in 1988. In approximately 1989, Kinnick became head detention officer and reserve Sheriff's Deputy. In 1993 Kinnick applied for and was hired as a deputy sheriff. At that time, Charlie Johnson was the Park County Sheriff. In 1998, Carpenter opposed and defeated Johnson in the general election. Kinnick continued to serve as a deputy sheriff under Carpenter.

4. Kinnick was a very competent, knowledgeable, and ethical deputy. If he had spare time at work, rather than sit in the office he would serve subpoenas and other civil papers.

5. On January 31, 1991, Kinnick received a written commendation from the United States Department of Justice for "being remarkably alert and perceptive" in the detection and prevention of attempted fraud against the Untied States Government.

6. On August 2, 1994, Kinnick received a written commendation from the Livingston Fire and Ambulance Department for the assistance he rendered at an automobile accident scene.

7. On March 17, 1996, Kinnick received a commendation from then Undersheriff Henry Tashjian for demonstrating exceptional performance in the area of DUI detection and arrest.

8. In December 1999, Carpenter promoted Kinnick to Sergeant, for the standard one-year probationary period. At the end of a successful probation, Kinnick became a permanent Sergeant in December 2000. Although he received occasional counseling and reprimands, Kinnick received strong annual evaluations in 2000, 2001 and 2002.[1] He had no scores below fully satisfactory in any of those evaluations. His immediate superior, Captain Dan Wertz, prepared the evaluations.[2]

9. On March 21, 2002, Kinnick filed a "Declaration for Nomination County Nonpartisan Office" to appear on the primary ballet for Park County Sheriff. Before filing, Kinnick went to Carpenter's office to tell him, as a matter of courtesy, about his intention to run for sheriff against Carpenter. Carpenter was not present, so Kinnick told the two men who were there, Undersheriff Gary Tanascu and Wertz, that he was filing to run for sheriff. He later told Carpenter.

10. During the campaign, Kinnick complained to the state Political Practices Commissioner that two deputies publicly supporting Carpenter (Tony Steffins and Tanascu) kept campaign materials in their county-issued squad cars and that a photograph of sheriff's deputies (which Kinnick asserted was "taxpayer financed") was used in a newspaper advertisement supporting Carpenter. As the campaign continued, Kinnick made a personal decision to stop attending sheriff's office management meetings, because he felt that Carpenter and Carpenter's supporters were no longer listening to him. He also felt that he was no longer invited to join in informal lunches with Carpenter or Tanascu and other officers.

11. Kinnick and Carpenter ran against each other in the primary and the subsequent general election for sheriff in November 2002. During the campaign, Kinnick espoused several political positions at odds with Carpenter. Kinnick pledged to reinstate 24-hour service in the County, criticizing Carpenter's plan to do away with deputy patrols between the hours of 3:00 a.m. and 7:00 a.m. Kinnick promised

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[1] The "annual" evaluations were not completed at annual intervals.

[2] Wertz was a visible supporter of Carpenter during the 2002 election.

to have the Sheriff and Undersheriff patrol, asserting that Carpenter and Tanascu sat in the office instead. Kinnick criticized Carpenter regularly during the campaign.

12. On October 26, 2002, Livingston Police Department officers and Park County Sheriff's deputies cooperatively responded to a reported assault/robbery in Livingston.[3] From the victim's description, officers found the suspect, Jason Dunham, who was heavily intoxicated, in front of the Post Office. During his initial interrogation, Dunham attempted to run away. Deputy Sheriff Blake Blatter[4] tackled Dunham. City police and sheriff's officers subdued Dunham after a physical battle in which Dunham tried to punch, kick and scratch the arresting officers.

13. The law enforcement officers handcuffed Dunham, who was complaining that the officers had hurt him, and pulled him to his feet. Dunham had a bloody lip. City police officer Jerry Harmon and deputy Blatter then forcibly inserted Dunham, who was still trying to resist, in the back seat of Blatter's patrol car. At some point in the process, Dunham spit on Blatter. Harmon struggled to fasten a seat belt on Dunham, who tried to spit on him. Harmon grabbed Dunham by the chin or neck and shouted, "You do what we tell you, you hear me!"

14. Blatter observed this physical interchange, which appeared to him to involve Harmon choking a handcuffed suspect who was in custody in the back of Blatter's patrol car. Blatter took no action, because the incident was sudden and brief, ending before he could react.

15. On the drive to the jail, Dunham continued to revile the officers and complain of being injured. His barrage of wild accusations and complaints included references to being abused during the arrest and to being choked. Dunham was unclear about whom he thought had choked him and when it had happened.

16. Kinnick had just started his shift and was in the office writing reports. Dispatch called and advised him that officers were bringing in an unruly prisoner and that assistance was needed. Kinnick went to the vehicle entrance to assist in bringing the prisoner into the detention center. He was the highest-ranking member of the Sheriff's officer on duty at that time.

17. Kinnick had prior dealings with Dunham and knew that when intoxicated he sometimes fought law enforcement when they attempted to arrest him.

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[3] The two law enforcement agencies regularly cooperated both in and out of the Livingston city limits.

[4] Blatter was a visible supporter of Carpenter during the election.

Dunham recognized Kinnick. Being fearful of Blatter, Dunham asked Kinnick to remove him from the vehicle. Kinnick removed him from the vehicle and escorted him down into the detention center. Dunham complained that he had been roughed up. In response, Kinnick advised him that he could file a formal complaint. Durham never pursued the matter further. Dunham was placed in a holding cell because he was too intoxicated for formal booking.

18. After Dunham was taken to a holding cell, Kinnick and Blatter had a brief conversation directly in front of a video camera in the detention center. Blatter casually described taking Dunham down so the officers could subdue and handcuff him. He told Kinnick that Harmon "choked the shit out of him [Dunham] . . . more'n once . . . I got it all on tape." Blatter demonstrated by placing his hand on Kinnick's throat. Kinnick did not comment.

19. Blatter did not ask Kinnick to act, by notifying Harmon's captain or making a report. Blatter did not specifically say that he thought that Harmon had committed a criminal assault. Kinnick did not direct Blatter to take any action[5] and took no action himself regarding Blatter's comments.

20. On October 27, 2002, Blatter called and reported the matter to his supervising sergeant, Doug Wonders. Blatter was worried that Dunham might make a complaint of undue force during the arrest. Wonders told him to write a report. Blatter did so, devoting three sentences to the incident between Harmon and Dunham in Blatter's patrol car. In the report, Blatter stated, "It appeared he [Harmon] was choking Dunham." In the report, Blatter did not state that he had advised Kinnick, at the detention center after bringing Dunham in for booking, of the choking incident.

21. On October 28, 2002, Blatter and Wonders met. During this meeting, Blatter told Wonders that he had reported the choking incident to Kinnick. Wonders did not make a written report of this meeting. That same day, after meeting with Blatter, Wonders interviewed Dunham at the detention center. Wonders did not prepare a written report of that interview, because he was not on the scene at the time of the alleged assault.

22. On October 31, 2002, Police Chief Darren Raney heard of the allegation that Harmon had choked Dunham. Raney's policy was to do an initial internal

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[5] On duty sergeants supervised on duty deputies during each shift. Each sergeant also had responsibility for long-term supervision and evaluation of particular deputies. Kinnick was not Blatter's long-term supervisor.

investigation of complaints against his officers and then to decide between either internal handling or referral to an outside agency. He began the initial investigation.

23. Raney and Carpenter reviewed the in-dash car videotape from Blatter's patrol car and the detention center booking videotape. Raney assigned Police Captain Glenn Farrell to interview Dunham, and subsequently conducted his own recorded interview of Dunham.

24. Dunham did not allege that he was choked by Harmon during his interviews with Farrell and Raney. During the interview with Raney, Dunham did describe attempting to run, with Blatter then grabbing him by the neck and slamming him down upon the ground. Dunham declined further to pursue the matter.

25. Raney concluded that he had insufficient evidence to warrant disciplinary action against Harmon for the alleged choking incident. Raney distrusted Blatter and did not interview him. Raney suspected Blatter of possible animus toward Harmon, not Kinnick. Raney found Harmon's version of events was credible–that Dunham became violent and combative when Harmon was trying to fasten a seatbelt around him, tried to spit on Harmon, and Harmon then put his hand under Dunham's chin and face and pushed his face away.

26. On November 1, 2002, Raney issued a report concluding that there was no reliable evidence Harmon had done anything wrong in the Dunham incident and therefore would not be subject to discipline.

27. On November 1, 2002, Park County Attorney Tara DePuy found out that the city was investigating the Dunham matter. She ordered the city to cease its investigation (which was, at that point, concluded).

28. DePuy was concerned because assaulting a prisoner was a felony under Montana law, Mont. Code Ann. § 45-5-204(1)(a). She was also concerned about potential civil liability for the county, because the incident occurred in a Sheriff's Department vehicle.

29. DePuy consulted with Carpenter. They agreed that since both the Livingston Police Department and the Park County Sheriff's office had been involved in the Dunham incident, they should request investigative assistance from an independent agency, the Montana Department of Justice Division of Criminal Investigations (DCI). DCI is a branch of the Montana Attorney General's Office that provides investigative assistance to city, county, and state law enforcement agencies upon request.

30. On November 5, 2002, Carpenter sent a written request to DCI, asking for an investigation of whether Harmon assaulted Dunham.

31. DCI received Carpenter's request on November 7, 2002. Bureau Chief Arlyn Graydanis assigned agent Reed Scott to investigate the Dunham incident.

32. On November 12, 2002, Carpenter defeated Kinnick in a close race in the general election. Kinnick remained a Sheriff's deputy with a sergeant's rank.

33. After the election, Deputy Denver Cobb discussed the election results with Carpenter, mentioning how close the election was and how Kinnick might run again in four years. Carpenter said, "A lot can happen in four years. Ed might not be here in four years."

34. On November 19, 2002, Scott received the detention center booking videotape, the in-dash camera videotape and all of the investigative reports. He interviewed Livingston Police officers Farrell, Harmon and John Leonard that same day. Scott also reviewed the tapes and reports within a few days of receiving them.

35. On November 25, 2002, Scott came to Livingston and interviewed Carpenter, Tanascu, DePuy and Raney. He also did a telephone interview of Dunham, who, consistent with his prior interviews, did not claim that Harmon had choked him but did complain that Blatter had grabbed him by the neck and slammed him to the ground.

36. On January 31, 2003, Wertz drafted a field personnel evaluation of Kinnick, giving him "satisfactory" or higher scores in 37 of the 40 areas. In the remaining three areas, Wertz gave Kinnick less than satisfactory scores. These were the first unsatisfactory ratings ever assigned to Kinnick while working for the Sheriff's office. Because of the DCI investigation and the later disciplinary action (discussed ***infra***), Kinnick never actually received or reviewed this evaluation.

37. On February 4, 2003, Scott interviewed Kinnick by telephone. Having reviewed the detention center booking videotape, Scott asked Kinnick whether he recalled Blatter advising him of anything out of the ordinary that occurred during or shortly after the Dunham arrest. Kinnick replied that all he recalled was Blatter saying that Dunham had spit on him. Scott asked if Blatter mentioned Harmon choking the suspect. Kinnick said, "No, that was never brought to my attention. I heard that, as a rumor, later on." The interview continued with the following exchange:

Scott: Okay. What, what would you have done if, uh, Blatter had brought that to your attention?

Kinnick: If he brought it to my attention?

Scott: Uh huh.

Kinnick: I would probably have told him to make a report on the incident.

Scott: Okay.

Kinnick: But, um, um, I would have been the supervisor working that night and it was never brought to my attention.

38. By February 20, 2003, Scott concluded his investigation into Harmon's conduct during the Dunham arrest. He returned his case file to Carpenter and DuPuy on March 3, 2003.

39. On March 7, 2003, DePuy concluded that there was not probable cause to file criminal charges against Harmon. In her letter to DCI, which she copied to Carpenter, Raney and the Livingston City Attorney, DePuy identified five "issues that need to be addressed by the proper law enforcement agencies." Four of the issues involved the Livingston Police Department. The fifth issue was Kinnick's failure to "address the choking issue" after Blatter told him about the incident on October 26, 2002.

40. On March 7, 2003, Tanascu ordered Blatter to write a report about informing Kinnick that Harmon had choked Dunham on October 26, 2002. On March 9, 2003, Blatter wrote a brief report confirming his report to Kinnick of the choking incident.

41. On March 28, 2003, DePuy wrote to the Montana Attorney General's Prosecution Services Bureau, requesting a review of whether Kinnick should be charged with Official Misconduct (a misdemeanor). Apparently no action resulted.

42. In early May 2003, Kinnick went off active duty status ("out of service") due to a work related knee injury.

43. On May 5, 2003, the Sheriff's office wrote to DCI requesting an investigation into Kinnick's denial that he was notified of the choking incident.

44. Scott returned and again interviewed Kinnick on May 21, 2005, obtaining Kinnick's signed acknowledgment of his Miranda rights before the interview.

45. Scott showed Kinnick the transcript of the earlier interview, highlighting Kinnick's denial that Blatter had told him about Harmon's possible assault on Dunham. Kinnick said he had nothing to add to his prior statement. Scott showed Kinnick the detention center booking videotape. After watching it Kinnick reiterated that he did not recall Blatter's description or demonstration. Kinnick told Scott, "I don't pay attention to a lot of stuff."

46. On June 17, 2003, after reviewing the pertinent investigative materials, the Attorney General's Prosecution Services Bureau recommended against prosecution of Kinnick. Assistant Attorney General Mark Murphy, who wrote the recommendation, noted that although Kinnick's comment about "not paying attention to a lot of stuff" was "disturbing in a law enforcement officer," it did "not provide probable cause that a crime occurred."

47. With the conclusion of the criminal investigations, Carpenter consulted with Tanascu and DePuy about possible disciplinary action against Kinnick for failing to document Blatter's report of Harmon's conduct in either an incident report or the daily log, for failing to notify his supervisors of Blatter's report and for his denial, during the DCI investigation, of Blatter's oral report of the incident. Tanascu and DePuy favored disciplinary investigation of the matter. Carpenter authorized the commencement of disciplinary proceedings and assigned the investigation to Tanascu.

48. On July 3, 2003, Carpenter issued a written notice to Kinnick that he was being investigated for his conduct in connection with the Dunham incident and his statements to Scott. The letter notified Kinnick that he faced termination of his employment because of "willful disobedience of an order or orders given by the Sheriff" and "gross inefficiency in the performance of official duties." At that time, Kinnick was on medical leave due to a knee injury and subsequent surgery.

49. Carpenter understood, from the county's legal advisors, that he could not suspend Kinnick so long as he remained out of service due to a work related injury. In September 2003, Kinnick sought to return to light duty work while he recuperated. Carpenter understood, from the county's legal advisors, that if Kinnick returned to active duty, light or otherwise, it would then be proper to suspend him during the balance of the investigation.

50. On September 11, 2003, Carpenter sent Kinnick a letter instructing him to report to work on light duty status on September 15, 2003 at 9:00 a.m. The letter instructed Kinnick to report directly to Carpenter for further instruction.

51. On September 15, 2003, at 9:00 a.m., Kinnick came to work in uniform, reporting for light duty. He was handed a letter that notified him that he was on administrative leave with pay and ordered him to turn in his ID card, badge, keys and all department issued firearms.

52. On October 22 and 23, 2003, Kinnick filed complaints of discrimination against Carpenter and Park County, alleging political belief discrimination.

53. In October and November 2003, the Sheriff's office attempted to schedule an investigative meeting with Kinnick. Kinnick's lawyer and the union that represented Kinnick's bargaining unit disagreed about who would represent Kinnick at the meeting. As a result of this disagreement, which led to court proceedings, the investigative meeting with Kinnick did not take place until December 19, 2003 (with both Kinnick's attorney and a union representative participating).

54. On January 23, 2004, Carpenter sent Kinnick another letter, notifying him of modifications to the disciplinary charges addressed at the December 19, 2003, investigative meeting. An investigative meeting regarding the modified disciplinary charges was held with Kinnick on March 23, 2004.

55. On April 15, 2004, Carpenter demoted Kinnick to Detention Officer. Carpenter relied upon Tanascu's investigation, the materials from DCI regarding the two prior criminal investigations (of Harmon and Kinnick), the records of the Sheriff's Office (including the booking videotape) and DePuy's recommendations.[6] Carpenter took the disciplinary action against Kinnick for legitimate operational reasons consistent with the Sheriff's Office's mission and policies. Carpenter did not take the disciplinary action because Kinnick ran against him in the primary and general elections in 2002.

56. Carpenter had not previously demoted a sergeant to a detention officer, a multiple level demotion which substantially reduced Kinnick's status and rights (including income and opportunities for advancement).

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[6] Tanascu recommended discharging Kinnick.

57. Carpenter did not place Blatter on administrative leave during investigations of various allegations against him, none of which were subsequently substantiated.[7] There was no evidence, videotape or otherwise, objectively demonstrating Blatter's conduct in question.

58. Carpenter did not place Deputy Sheriff Pete Adams[8] on administrative leave during several investigations of allegations that he brought home paraphernalia and drugs from the evidence locker to his wife[9] and that he intentionally taped her phone conversations without her permission. The investigations failed to substantiate the allegations. There was no evidence, videotape or otherwise, objectively demonstrating Adams' conduct in question.[10]

59. Carpenter did not place Deputy Sheriff Tony Steffins[11] on administrative leave during investigation of his alleged assault of fellow employee Barb Fletcher. The investigation resulted in counseling, but no charges.

60. Carpenter did not place Ed Lacomb and Jay O'Neil on administrative leave during investigation of their alleged assault and injury of a female probation officer by pushing her into a new restraint chair and restraining her, as a demonstration. After investigation, Carpenter concluded the incident involved "horse play," but not criminal conduct, counseling the officers against further such conduct.

61. Carpenter did not place Detention Officer Steven Voss on administrative leave during investigation and a subsequent criminal charge of misdemeanor theft. The charge arose out of a videotape showing Voss taking a candy bar from the "honor bar" in the detention center without paying, while he was still a probationary employee. Ultimately, the charge was dismissed for lack of speedy trial. Voss admitted the act, stating that he had intended to pay later. He received verbal counseling and an extended probationary period. He was later promoted to deputy.

62. Blatter, Adams, Steffins, Lacomb, O'Neil and Voss each had an opportunity to meet with Carpenter or a member of his management team to explain their conduct prior to commencement of formal disciplinary action. In Kinnick's

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[7] DCI performed an investigation of one of the allegations against Blatter.

[8] Adams was a visible supporter of Carpenter during the election.

[9] The allegations originated with Adams' wife, during divorce and custody disputes.

[10] There was evidence (the recording device) of some taping of home telephone calls, but Adams and his then spouse disagreed about what had been recorded and for what purposes.

[11] Steffins was a visible supporter of Carpenter during the election.

case, neither the Sheriff nor any member of his administration ever met with Kinnick before giving him formal notice of disciplinary action in July 2003.

63. Other sheriff's deputies failed to make written reports when a report was proper or required. DePuy sometimes was upset with such failures when they might weaken possible or actual prosecutions. Kinnick was the only deputy placed on paid administrative leave during investigation or ultimately demoted because, at least in part, of a failure to write such a report.

64. In the incidents involving Adams, Steffins, Lacomb and O'Neil, and all but one of the incidents involving Blatter, there were no investigations by outside agencies, during which Carpenter deferred internal investigations. Neither those incidents nor the Voss and one Blatter incident (whether there were outside investigations), involved a supervisory officer being told by a subordinate (on videotape) of improper criminal conduct (assault upon a prisoner in custody) and then denying the conversation during a subsequent criminal investigation of the alleged conduct. None of the incidents with employees other than Kinnick involved a supervisory officer stating, during a criminal investigation of the alleged conduct, that if he had been told of the conduct he would have made a report of it himself, up the chain of command. None of the incidents with employees other than Kinnick involved a supervisory officer making those prior statements and then, when confronted with the videotape, stating that he did not remember the conversation and paid little attention to such things.

65. The gravity of Kinnick's failure to report the alleged assault of a prisoner in custody, his denials (first of receiving any report from Blatter and subsequently of remembering what Blatter told him) and his ultimate explanation that he did not pay much attention to such things were all potentially discoverable by defense attorneys in subsequent criminal prosecutions. DePuy considered Kinnick a potential problem if he were a key witness in such prosecutions, because of the impeachment value of his conduct regarding the alleged assault of Dunham.

66. Carpenter's legitimate reasons for disciplinary action against Kinnick were not a pretext for discriminatory treatment because of political belief.

IV. Opinion[12]

Montana law prohibits government discrimination against employees because of their political ideas or political beliefs. Mont. Code Ann. §§ 49-2-308(1)(c) and 49-3-201(1); *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862.

Taliaferro applied a three-tier evidentiary test that the Montana Supreme Court had adopted from *McDonnell Douglas Corporation v. Green* (1973), 411 U.S. 792; ***see,*** *European Health Spa v. Human Rights Comm.* (1984), 212 Mont. 319, 687 P.2d 1029, 1032, ***quoting*** *Martinez v. Yellowstone County Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242.

The *McDonnell Douglas* evidentiary analysis applies to cases when the charging party has presented indirect, rather than direct, evidence of discriminatory motive. Kinnick's anecdotal evidence of express discriminatory motives was insufficient to establish by direct evidence that the respondents took adverse action against him because of political beliefs. Carpenter's stray remark in casual conversation (that Kinnick might not "be there" in another 4 years) was insufficient to serve as direct evidence of political belief animus. ***See***, *Mysse v. Martens* (1996), 279 Mont. 253, 926 P.2d 765, 772. The three-tier indirect evidence test applies.

The first tier of *McDonnell Douglas* tests Kinnick's *prima facie* case by measuring flexible elements, which are not woodenly applied to every claim, but instead adapted to the nature of the proof proffered.[13] *Taliaferro* held that a *prima facie* case of political idea or belief discrimination required three elements: "(1) the employer received an application or equivalent from a qualified protected-class person; (2) a job vacancy or employment opportunity existed at the time of the application; and (3) the person was not selected." ***Id. at*** 863-64. This test can be readily adapted to fit the issues in this case. For Kinnick's claim of political belief discrimination in the creation of the interim chief position, he had to present evidence from which a fact finder could decide that (1) he was performing his job (was qualified) and ran against Carpenter for sheriff; (2) subsequent to the election Carpenter demoted him (3) for conduct that did not merit a demotion.

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

[13] ***Cf.***, *Martinez, supra,* 626 P.2d 242, 246, ***citing*** *Crawford v. Western Electric Company, Inc.* (5th Cir. 1980), 614 F.2d 1300 (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

For purposes of analysis, the hearing examiner will consider whether Kinnick established his *prima facie* case without regard to the evidence the respondents submitted to oppose that *prima facie* case. Kinnick did present evidence from which the hearing examiner could decide that he was performing his job and did run against Carpenter for sheriff. He also presented evidence that after the election Carpenter demoted him. Finally, he presented evidence from which the hearing examiner could decide (considering his evidence only) that Kinnick merely failed to take note of a casual comment, a "war story," which he subsequently forgot. Thus, Kinnick satisfied the first-tier test of *McDonnell Douglas*.

To respond to Kinnick's *prima facie* case, the respondents had the burden to "articulate some legitimate, nondiscriminatory reason" for the adverse action they took. *McDonnell Douglas* ***at*** 802; ***see*** *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 817. The respondents met their burden by showing, through competent evidence, that they had legitimate nondiscriminatory reasons for their conduct. *Crockett*.

Kinnick was the supervisor on duty at the time Blatter reported the choking incident. Unlike Wonders, Blatter's long-term supervisor, Kinnick did not direct Blatter to make a report of the choking incident. He did not document Blatter's report of the incident or take any action regarding it. His inconsistent explanations of this failure started with "I don't remember, but I would probably have required Blatter to write a report if he had told me, so he probably didn't" to "I see the videotape, but I still don't remember," to "I don't pay much attention to that stuff." Carpenter, the county attorney, the undersheriff, the DCI investigator and the assistant attorney general (who concluded there was insufficient evidence of criminal conduct) all found Kinnick's behavior and explanations incredible.

While it was clear that relations between Carpenter and Kinnick were strained at best during the election, Carpenter had several solid legitimate nondiscriminatory reasons for commencing a disciplinary investigation into Kinnick's conduct regarding the report of the choking incident. His undersheriff and the county attorney recommended the investigation. The initial DCI investigation documented a glaring inconsistency between Kinnick's answers to Reid's questions and the booking videotape. At a minimum, Kinnick failed to pay attention to a deputy sheriff who told him that a city policeman had assaulted a handcuffed prisoner in custody in the back of a sheriff's vehicle. At worst, Kinnick knowingly failed to perform his duties as a supervisor and tried to conceal this failure by denying Blatter's report. Either way, Kinnick exposed the county to potential civil liability, and opened the door to credibility challenges should he appear as a witness in future criminal prosecutions.

The second tier of McDonald Douglas requires defendants to "meet the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255-56. Respondents fully met these requirements.

Since the respondents rebutted Kinnick's *prima facie* case by proving legitimate reasons for their adverse action, he had to show that their reasons were nothing more than pretexts for illegal action. *McDonnell Douglas* ***at*** 802; *Taliaferro* ***at*** 863-64; *Crockett* ***at*** 817-18; *Martinez* ***at*** 246. To establish pretext:

> [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine ***at*** 256.

Throughout the *McDonnell Douglas* burden shifting, Kinnick always had the ultimate burden to persuade the fact finder that respondents illegally discriminated against him. *Taliaferro* ***at*** 864; *Crockett* ***at*** 818; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 213. Although he offered considerable evidence that other sheriff's deputies and corrections officers were treated less harshly than he was, none of that evidence involved the same kind of apparent dereliction of duty by a supervisor.[14] In short, although Kinnick was treated differently than other officers subjected to investigation and, in some instances, discipline, his conduct involved qualitatively different issues, his position as a supervising sergeant raised different concerns, and his response to the investigation and discipline was also appreciably different. Kinnick failed to meet his burden of proof and failed to persuade the hearing examiner that his demotion resulted from running against Carpenter in the election.

Because Kinnick did not prove his case, the argument that Carpenter was not a proper respondent is moot, and is not addressed in this decision.

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[14] Kinnick also presented evidence regarding "write-ups" and other instances of what he characterized as examples of being treated more harshly than officers who supported Carpenter. Those incidents occurred before disciplinary action commenced against Kinnick in July 2003, did not arise to adverse actions and were neither substantial nor credible regarding why Kinnick was demoted.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. §49-2-509(7).

2. Respondents did not discriminate against Kinnick in employment because of his political ideas or political beliefs. Mont. Code Ann. §§ 49-2-308(1)(c) and 49-3-201(1).

VI. Order

1. Judgment is entered for respondents **Park County, Montana**, and **Sheriff Clark Carpenter**, and against charging party **Ed Kinnick** on the charge that both of the respondents discriminated against the charging party on the basis of political belief by subjecting him to disparate treatment beginning on or about July 2003, relieving him of his duties and responsibilities and placing him on administrative leave on or about September 15, 2003 and ultimately demoting him effective April 15, 2004.

2. The complaint is dismissed.

Dated: July 6, 2005

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

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Certificate of Service

The undersigned hereby certifies that true and correct copies of the foregoing document were, 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:

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Certified this 6th day of July, 2005.

/s/ SANDRA K. PAGE
Legal Secretary, Hearings Bureau
Department of Labor and Industry

Kinnick FAD tsp