

**MONTANA DEPARTMENT OF LABOR & INDUSTRY
EMPLOYMENT RELATIONS DIVISION
HUMAN RIGHTS BUREAU**

Joshua Clark, Charging Party, vs. Missoula County, et al Respondent.	Final Investigative Report HRB Case No. 0151017366-7368
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Recommendation: Based on its investigation, the Bureau finds **reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party's complaint.

I. ISSUES PRESENTED

A. Whether Missoula County discriminated against Joshua Clark in the area of employment because of his political ideas in violation of the Government Code of Fair Practices (Title 49, Chapter 3, MCA) by moving him to a senior deputy position on the night shift?

B. Whether Missoula County retaliated against Joshua Clark in the area of employment because he engaged in a protected human rights activity in violation of the Government Code of Fair Practices (Title 49, Chapter 3, MCA) by moving him to a senior deputy position on the night shift?

II. SUMMARY OF THE INVESTIGATION

This report constitutes a summary of the investigation conducted in this case. Content of this report is limited to witnesses, documents and other evidence relevant to the analysis of the issue presented. The case file may contain additional evidence not included in this report.

A. Charging Party's Position Statement:

On December 31, 2003, Joshua Clark (Clark) became a deputy with the Missoula County Sheriff's Office (sheriff's office). He had previously served as an officer with the Missoula Police Department since 1994.

In July 2011, after taking on numerous other duties within the sheriff's office, then detective Clark became the Captain of Professional Standards. Recently-elected sheriff Carl Ibsen (Ibsen) created the position and designed the new division for internal investigations of the

sheriff's office. Clark served in this role until March 2013 when he became Ibsen's undersheriff.

In June and August 2013, deputies T.J. McDermott (McDermott) and Jason Johnson (Johnson) brought complaints against Ibsen and the sheriff's office with the Montana Human Rights Bureau. Clark submitted witness statements noting problems he had with both McDermott and Johnson.

In early 2014, Clark and McDermott announced their candidacies for sheriff and ran against one another. McDermott won the primary election in June 2014 and Clark ran against him as a write-in candidate for the November 2014 general election, which McDermott also won.

On January 1, 2015, the day McDermott took office, McDermott removed Clark as undersheriff and placed him on the Sunday to Tuesday graveyard patrol shift. Though there were openings for current captain positions and new captain positions created by McDermott, he demoted Clark several ranks back to senior deputy and immediately put him on a patrol shift. (The hierarchy for rank—from highest to lowest—in the sheriff's office is sheriff; undersheriff; captain; lieutenant; sergeant; senior deputy 1; senior deputy 2; deputy; and probationary deputy.)

Clark did not have the training or equipment to feel like he was ready for patrol. Clark asserts he should have returned to his rank as a captain because of his prior tenure at that position as this was the common practice for the past three decades in the sheriff's office.

Clark became stressed because of the demotion to patrol and work became difficult for him. On January 30, 2015, after 22 years in law enforcement, Clark retired for his own personal safety. He had no intent to retire until McDermott took office.

B. Respondent's Position Statement:

The Missoula County Attorney's Office replied on behalf of the sheriff's office.

The sheriff appoints the captains and undersheriff and these positions are not covered under the collective bargaining agreement. Specific to the undersheriff, Montana statute allows a sheriff to appoint an undersheriff and must move the person who held that position to other duties in the sheriff's office. The former undersheriff must keep the tenure, seniority, and salary they had prior to becoming the undersheriff.¹

¹ **MCA 7-32-2102. Undersheriff to be appointed -- return to other duties.** (1) The sheriff, as soon as possible after taking office, shall, except in counties with a population of less than 750, appoint an undersheriff to serve at the pleasure of the sheriff. The undersheriff has the same powers and duties as a deputy sheriff.

(2) A deputy sheriff appointed undersheriff as provided in subsection (1) shall resume other duties within the sheriff's office, while maintaining tenure and seniority, if the sheriff appoints another to succeed the deputy sheriff as undersheriff. Upon the return to the position of deputy sheriff, the person must be paid the same salary the person would have received had the person not taken the undersheriff position.

McDermott ran as sheriff and told the public he intended to have Johnson as his undersheriff. The sheriff also chooses the captains and McDermott wanted to build a team he believed would best carry out what he wanted. McDermott asked Clark after the November 2014 general election what positions Clark would want in the new administration but Clark never provided any jobs he desired. Since Clark's last rank before becoming an undersheriff was as a senior deputy, McDermott placed him on the patrol team most in need of additional assistance.

Clark was not eligible for other positions because sheriff's deputies must compete for them and Clark had leapt several ranks without competing when Ibsen promoted him.

McDermott's actions were not due to Clark having run against him in the 2014 elections and he cannot bring a political ideas claim because both ran as Democrats in the primary election and Clark did not change his party affiliation during the general election. Further, Clark cannot claim retaliation because he did not participate on McDermott's behalf during the 2013 human rights complaint.

C. Witnesses:

Joshua Clark, Charging Party, started his career in law enforcement as a cadet with the sheriff's office in 1984 then was employed at the county's detention facility in 1993. He became a police officer in 1994 and McDermott worked for the city police department around the same time so Clark first met him there. Both transferred to the sheriff's office on the same day in December 2003. Clark served various jobs on patrol and as a detective.

Ibsen became sheriff in 2011 and asked Clark to become the sheriff's office first Captain of Professional Standards. Clark knew Ibsen from his previous time at the sheriff's office but did not know Ibsen was going to ask him to take this new position. He considered it an honor and accepted. Captains are perceived as doing the bidding of the sheriff or being the sheriff's most trusted deputies but it should not matter who takes the job so long as they are qualified and have done good work.

In 2013, the Captain of Detectives retired and it was a position undersheriff Mike Dominick (Dominick) wanted. Dominick took the position and Ibsen appointed Clark as the undersheriff. As undersheriff, Clark mostly took care of administrative duties like personnel and policies.

Around summer 2013, McDermott asked Clark if he was going to run for sheriff. McDermott had asked Clark the same question in late 2012 or early 2013 and told Clark he intended to run. McDermott said he believed Clark had done a good job in Professional Standards and wanted him to remain there if he became sheriff. During his time as the Captain of Professional Standards, Clark investigated some deputies who McDermott protected despite their bad actions. McDermott protected them because he did not believe deputies could do any wrong, even when presented with clear evidence they had broken the law.

Around December 2013, Ibsen announced he would not campaign again to be sheriff. In January 2014, Clark decided he would run and announced his candidacy in February 2014. Clark decided to run to keep Ibsen's integrity and vision in the sheriff's office and he did not believe McDermott represented the best of what law enforcement could offer the community.

Despite having a contentious primary, the deputies and staff within the sheriff's office continued to perform their work. Even before the primary election, Clark heard rumors from McDermott supporters in the office that Clark would not return to a position as a captain and would go back to patrol. McDermott did not confirm these rumors after he won the primary and effectively was the new sheriff because no one would run against him in the general election as a Republican candidate. He told Clark there was "no decision" about how people would be reassigned if he became sheriff.

During summer 2014, Clark decided to run against him as a write-in candidate for the general election because he became more disturbed by what could happen if McDermott became the sheriff. During the summer of 2014 it became clear from conversation among staff at the sheriff's office that McDermott and Johnson had already designed their new staff positions and chose captains who were supporting them.

In August 2014, Ibsen and Clark along with the captains went to speak with Patty Baumgart (Baumgart) from the county's human resources department. They had heard growing rumors McDermott and Johnson intended to remove all of the captains who had worked for Ibsen and wanted to know if he could do that. Baumgart said since the captains were not covered under any union agreement whoever is sheriff can move them around at will. She also said under Montana law the undersheriff could go back to being a deputy.

Around December 30, 2014, McDermott sent out an e-mail noting who would be promoted to captain when he took over and who would remain in their current job as captain. Clark was not on the list and he learned from McDermott that he would be placed on patrol. McDermott placed him on graveyard patrol, which demanded a shift in his schedule though he only had a couple days' notice. Procedure is usually to have a week or two to make adjustments to the new hours.

McDermott also transferred Dominick, a Clark supporter and Captain of Detectives, into a position where he had no staff to supervise and spent his day watching over the evidence room. McDermott placed two of his closest deputies, Anthony Rio (Rio) and Bill Burt (Burt), into positions as the Captains of Professional Standards and Patrol. The Captain of Detectives position was, and remains, filled by a lieutenant. These changes reflected the rumors among sheriff's office staff during the summer of 2014.

Clark received no training, support, or equipment after he was demoted to patrol. As undersheriff he was used to doing administrative work so he did not know what the new tactics and standards were for patrol. McDermott put Clark on the only team where he would not be a supervisor of anyone, which he had done for the past several years. He was also assigned to a patrol unit where he had previously investigated the deputy and called for his termination. McDermott, union president at the time, knew about this. Clark was worried

the deputy he investigated might not support him during any incident Clark was called to. When he arrived to his new patrol unit, the sergeant told him it was an awkward situation.

Clark decided to retire about a month later because he went on medical leave due to stress being back on patrol with little support or help and it did not seem like anything was going to get better because McDermott or the supervisors he selected would do nothing for him.

T.J. McDermott, sheriff, started his career in law enforcement with the Anaconda Police Department in 1995 then moved to the Missoula police department in 1998. He and Clark got along when they worked for the city and they discussed transferring to the sheriff's office then trained together when they started.

Ibsen and Clark had a close relationship because of connections between their families and Ibsen seemed to be grooming him for a rapid rise in the sheriff's office. In summer 2007, during the "Black Cat Fire," Ibsen attempted what McDermott termed as a "coup" against the sheriff at the time, Mike McMeekin. McDermott didn't support Ibsen's efforts to remove McMeekin and Ibsen held that against McDermott.

Ibsen won the next election and Clark backed him. Clark received the promotion to captain and it was unusual to have someone jump several ranks from senior deputy to a captain. Despite that, McDermott congratulated Clark and thought he would do a good job. However, Clark grew closer to Ibsen and used his position to protect deputies close to Ibsen while going after specific other deputies who they did not like.

McDermott spoke with Clark in previous years about his plans to run for sheriff and asked Clark if he intended to run because it seemed like Ibsen intended for Clark to replace him. Clark did not speak with him before he formally announced his run for sheriff and McDermott only found out through someone he knew. He was surprised Clark ran as a Democrat because he was known as being a conservative Republican like Ibsen.

During the primary election, Clark's campaign staff and others close to him posted on local media sites slanderous comments about McDermott having been removed from the Anaconda police department for rape and other untruths.

Following the contentious primary election, McDermott and Johnson did not have any plans for how they intended to change personnel inside the sheriff's office. McDermott knew he could not trust Clark and Dominick because of how they acted against him during the election and how they attempted to remove McMeekin in the past. When Clark announced he would run as a write-in candidate it further surprised McDermott.

Following the general election, McDermott asked Dominick and Clark what positions they would want when he became sheriff. Dominick said he wanted to remain the chief deputy coroner, which he did, and Clark did not say what he wanted despite McDermott asking him several times. Clark seemed convinced McDermott intended to move him back to patrol but McDermott said he had not made any decisions and just wanted to know what options he should consider for Clark. McDermott could not trust Clark to be a captain because of how he undermined deputies and leadership with Ibsen and other captains. He sought legal and HR advice about how to proceed with any personnel actions.

McDermott did not send Clark to patrol to punish him because patrol is honorable and meaningful work and Clark maintained his captain pay rate. Clark had enough experience and time in the sheriff's office to compete for other shifts or leadership positions if he used the union's process.

McDermott said he chose Rio and Burt to become captains because they were the most qualified and had competed for other positions in the past and received them. They were more qualified as captains than Clark was when Ibsen selected him in 2011. They did not earn the positions because of political allegiance or financial contributions to McDermott.

Brad Giffin, former Captain of Professional Standards, had served with the office since 1989 before leaving the office in late October 2014 prior to the general election. He ran for sheriff in 2006 and 2010. He now works as a policeman for the University of Montana.

He worked with Clark and McDermott when they were at the police department and he liked both of them at the time. They still got along when Clark and McDermott transferred to the sheriff's office and Giffin worked with Clark when he became a captain then undersheriff under Ibsen.

McDermott supported Giffin during his campaign against Ibsen in 2010. McDermott put more money into Giffin's campaign than Giffin had and made some contributions through a political action committee (PAC) McDermott led. Giffin did not win.

After the election, Ibsen changed the rules for promotions within the sheriff's office to count things like outside education, volunteering, or extra work duties. McDermott had put in for the lieutenant of detectives position but McDermott did not have any additional duties or volunteer work like other applicants, so he did not receive the promotion. McDermott called Giffin and said he was upset he did not get the position since he supported Giffin in the election. Giffin said that had nothing to do with the decision. McDermott later went to Giffin's house to complain about the same thing. Giffin felt like McDermott wanted political maneuvering to influence the sheriff's or undersheriff's decisions regarding personnel.

In August 2014, the captains heard sheriff's office staff talk about potential changes McDermott and Johnson wanted to make once they took over as the sheriff and undersheriff. They wanted Rio to take Giffin's position but if Giffin did not leave the Professional Standards position or retire early then they planned to take his duties and give them to the undersheriff. This would mean Giffin would not have any positions if McDermott became sheriff. Giffin wanted to meet with county HR about it to see what the captains could do ahead of time or what actions they could take when it happened.

Baumgart told them they could not do anything because they had no union or other protections as captains. She said they could be laid off if they did not have a position, which left Giffin amazed since he had served in the sheriff's office since 1989. Since McDermott and Johnson were designing schemes to remove or punish employees who had supported Clark, Giffin began looking for a new job.

By late October 2014 it was obvious Clark would not have a chance as a write-in candidate. Giffin could not stand the thought of being laid off when McDermott became sheriff so he retired before the general election.

Jason Johnson, undersheriff, started with the sheriff's office as a reserve deputy in 1997 then worked for sheriff's offices in other counties until 2005 when he returned to Missoula County. He was on patrol for about four or five years then became a detective. Ibsen selected him as the first public information officer in 2011 but does not know why. As the Captain of Professional Standards Clark was his immediate supervisor but they did not interact much.

Johnson served as the spokesman for the sheriff's office until 2013. Ibsen removed him after McDermott and Johnson announced to him their intentions to run for sheriff. Johnson had supported Giffin in his race against Ibsen in 2011 and Ibsen had not held that against him but was completely different when he told him about his intentions to run with McDermott. McDermott had earlier spoken with Johnson about running and told Johnson he should run for sheriff because Johnson had so many connections to the community.

Johnson felt like Ibsen had set Clark up to become the next sheriff by making him undersheriff about a year before the election. Johnson was not surprised Clark ran against McDermott. Clark was petty with Johnson during the election and seemed to take the election personally.

McDermott did well in the primary so Johnson was surprised Clark ran against him as a write-in because there was little chance he would succeed. After the June 2014 primary, they created organizational charts for how they wanted to redesign the sheriff's office but they did not have certain people in mind for specific positions.

Following the general election, they made more detailed plans for who would fill different positions. They had thought Giffin would stay with the sheriff's office but he left in November 2014 so they placed Rio into his position. Johnson wanted to create a new position as the support services captain, which the former Captain of Patrol, Robert Taylor, took because it allowed him to command special operations units and incidents like fires and natural disasters. Burt took the position as Captain of Patrol. The sheriff's office has not filled the position of Captain of Detectives and a lieutenant supervises the detectives.

He and McDermott asked Clark what he would want to do when McDermott took over but he never answered them. Johnson expects to return to detectives or some other position if McDermott is no longer sheriff because that is what can happen to an undersheriff. There is no protection for the undersheriff to return to a position as a captain.

Patty Baumgart, Missoula County Director of Human Resources, had dealt with Clark when he worked as the Captain of Professional Standards and with McDermott when he participated in labor negotiations.

Before the election began, Ibsen, Clark, and Dominick came into her office and called McDermott a "joke" and said he would never be sheriff. She told them not to talk about a co-worker like that.

In August 2014, Clark wanted to have a meeting with Baumgart to discuss what could happen to the captains if McDermott was sheriff. Baumgart wanted to invite McDermott and Johnson to the meeting but Clark and the other captains did not want them invited.

Baumgart told them that captains were not covered by the union's rules and the sheriff can appoint them or replace them as desired. They would be covered by the wrongful discharge laws but that was their only protection. Ibsen wanted to know what would happen with Clark and Baumgart said under Montana law he could go wherever the sheriff designated. Clark would keep his last rate of pay as a captain.

They requested a legal opinion about it but the county attorney's office does not issue legal opinions.

Baumgart was not involved in any discussions about who specifically went to any position and only learned about Clark's move to patrol in late December 2014.

D. Documents:

August 2, 1989 letter from Assistant Attorney General Dorothy McCarter to the Missoula County Attorney's Office regarding a request for an opinion on what happens to a deputy sheriff who has been appointed undersheriff and later resumes the duties of a deputy. She notes the deputy in this specific case would have been a captain and should receive the pay of a captain but does not have to fill a captain's position. She wrote this was not a formal attorney general's opinion.

Clark's September 9, 2013 human rights witness statement form noting his issues with McDermott's professionalism in the sheriff's office. Clark wrote McDermott would not be a good sheriff because he had no competence or strength of character to do the work. He wrote McDermott would "take care of his cronies."

May, June, and October 2014 C-5 campaign filings for Clark and McDermott.

August 4, 2014 e-mail from the Missoula county attorney's office regarding "County Atty Advice" on the status of captains noting a sheriff can reassign a captain's duties but not demote them in rank or pay without good cause.

December 31, 2014 organization chart for the sheriff's office showing Rio would become the Captain of Professional Standards, Burt the Captain of Patrol with seven units under his supervision, Taylor would become the captain of support services with numerous under his supervision, and Dominick would become the captain of the evidence facility with no units under his supervision. (Organization chart attached to this report.)

January 2, 2015 e-mail from McDermott to the sheriff's office noting the assignment changes for numerous deputies and what patrol teams will have regular and senior deputies as acting supervisors. He makes no mention of where Clark will go.

January 5, 2015 e-mail from Clark to McDermott noting Clark was upset with Johnson

January 5, 2015 seniority list for the sheriff's office.

E. Comparative Evidence:

In the 2014 June primary election, Burt and his wife and Rio were the highest dollar contributors to McDermott's campaign. They contributed more at that time than other sheriff's office staff during the primary or general elections. Burt and Rio went from the rank of sergeant to captain when McDermott became sheriff.

Dominick and Giffin contributed as much money as other sheriff's office staff did to Clark's primary campaign.

F. Omissions:

Clark provided a list of 10 current or former sheriff's office employees to interview but the investigator determined there was enough information from other interviews to complete the report.

A private attorney who participated in December 2014 discussions with McDermott and county staff about personnel changes—to include moving Clark to patrol—cited attorney-client privilege and would not discuss the meeting.

III. ANALYSIS

Clark alleges the sheriff's office unlawfully discriminated against him in the area of employment because of his political ideas by moving him to a position with less rank. Clark alleges the sheriff's office, McDermott, and Johnson retaliated against him for engaging in a protected human rights activity by moving him to a position with less rank. Clark establishes he filed a timely complaint. The Montana Human Rights Bureau has jurisdiction over the complaint.

Disparate Treatment Based on Political Ideas

Clark alleges the sheriff's office treated him differently due to his political ideas when it demoted him several ranks and moved him to the night patrol shift. When a person alleges he or she was treated differently, the Bureau begins by examining whether the Charging Party has certain criteria that on first look infer the adverse action happened because he or she is a member of a legally protected group. To establish these criteria, Clark must show:

- 1) he is a member of a protected class;
- 2) he was qualified for the position;
- 3) the sheriff's office subjected him to adverse acts; and
- 4) the sheriff's office replaced him with a person not in his protected class.

Here, Clark ran for sheriff in 2014 against McDermott in the primary and general election. Clark served in the sheriff's office since 2003 and held ranks of deputy, senior deputy, and captain and held the rank of captain before he became undersheriff. When McDermott took

office, he made Clark a senior deputy and moved him to a position on graveyard patrol. The sheriff's office replaced Clark as undersheriff and moved other deputies who supported McDermott into open captain's positions. By establishing the above elements, Clark successfully shows the inference the sheriff's office may have discriminated against him due to his political ideas.

Once a Charging Party establishes the appearance of unlawful discrimination, the Bureau turns to the Respondent to produce a legitimate non-discriminatory reason for the challenged action.

To begin, the county noted Clark was not protected by political ideas because he ran with the same party affiliation as McDermott. Political ideas are broader than party affiliation. Clark ran against McDermott twice and had differing political ideas about how the sheriff's office should operate. By running against Clark in the 2014 elections he is protected under the class of political ideas.

Missoula County denied Clark was moved to senior deputy position because he ran against McDermott. When McDermott took over as sheriff he selected Johnson as his undersheriff, as he announced during the campaign. This left Clark without a position and Montana law has no special protections for ranks or positions for a former undersheriff who resumes other duties in the sheriff's office. Since Clark's last rank before becoming a captain and undersheriff was senior deputy, the sheriff's office returned him to that rank on a patrol team needing the most assistance.

The county contends Clark's assertion he should have returned to a captain's position should be disregarded. McDermott did not make him a captain because of their personal animosity and he felt Clark would undermine him. McDermott said as sheriff he determines who he selects as his captains and the county's human resources officer agreed.

As for the higher-ranking positions below captain, the county contends McDermott could not put Clark into a position as lieutenant or sergeant because Clark's last rank was senior deputy. Putting him into one of those positions would violate the collective bargaining agreement. This explanation holds, though McDermott could have fought for such an assignment for Clark, but the county's reasoning on not moving Clark to a captain's position demands further discussion.

Once Respondent sets forth a legitimate non-discriminatory reason, the Bureau asks the Charging Party to demonstrate the reason offered by the Respondent masquerades as unlawful discrimination. A Charging Party can prove such pretext with direct evidence the Respondent's actions were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible or worthy of belief.

Clark indicated he should have resumed his position as a captain because that was his last rank before he assumed the position as undersheriff. This was his tenured position and placing him as a senior deputy on graveyard patrol amounted to a demotion. In addition, Clark points out he did not have the current training and equipment for the patrol position.

While captain positions are not union positions and the sheriff is able to appoint them, there is nothing that provides appointments can be done in a discriminatory manner. Clark's last

rank and position held before becoming the undersheriff was as a captain. The Government Code of Fair Practices provides “local government officials shall appoint personnel on the basis of merit and qualification” and not because of their political ideas (MCA 49-3-201).

When asked why Clark was not placed in an open captain’s position, McDermott claimed he wanted Clark and others out of his inner circle because they were detrimental to the sheriff’s office and he wanted people he could trust around him. They had a rancorous and contentious campaign against one another for most of 2014. Both McDermott and Clark provided details about investigations of other deputies and each other that led them to distrust one another. The investigator was troubled throughout this process by the petty personal attacks both parties used to color the way the Bureau would look at the people involved and left those details out of this report. It did not paint a good portrait of the people responsible for the public safety of one of Montana’s most populous counties.

McDermott presumed Clark would not be a trustworthy captain because of the contentious campaign, his inability to investigate people close to Ibsen, and Ibsen’s attempt to unseat McMeekin, the former sheriff. But what is missing is a clear explanation of how Clark lacked the merit or qualification for a captain’s position. McDermott and the county explain this by saying Clark investigated only Ibsen’s political rivals and ignored problems within their own camp. Clark felt like McDermott did the same things in his capacity as the union president. Regardless of the hostility from either side, Clark had served as the Captain of Professional Standards before he became the undersheriff and had not received any disciplinary action or other negative employment actions.

To be clear, a newly-elected sheriff is not obligated to return an outgoing undersheriff to any particular position, including captain. However, the sheriff’s decision on where to place an outgoing undersheriff must take into account that person’s merit and qualifications, not political ideas or any other protected class.

Add to this the indications of discriminatory pretext from McDermott’s appointments to other captain positions. When McDermott took over as sheriff he appointed two new captains and moved others around but has left one captain’s position remaining open. Clark had served as the Captain of Professional Standards previously but McDermott appointed Rio, a McDermott supporter, to that opening. Clark had served on patrol but McDermott moved Burt, another supporter, to the position of Captain of Patrol. Clark had served as a detective but McDermott did not consider him for the opening of Captain of Detectives, which remains unfilled.

McDermott’s response to questions about why two sergeants who provided more monetary support to his campaign received captain positions fell short. It was not enough to overcome the notion McDermott received more campaign donations from Burt and Rio as a signal of their allegiance in order to either receive the positions or he took more from them ensure he won so they could have the predetermined promotions. Giffin noted McDermott held financing during the 2010 elections as a quid pro quo for his promotion but Giffin would not play that game.

As for the county’s assertions that they reached out to Clark about his preferences and he was unresponsive, this seems unrelated. It strains credulity that McDermott did not have

anything set after the June 2014 primary, or even before then, given his animosity toward the Ibsen supporters and having planned his campaign nearly a year beforehand. This is why Clark said he did not ask for any positions because he knew what McDermott and Johnson's plan was well before January 2015. It also demonstrates why Giffin, a veteran of 25 years with the sheriff's office and who ran against two sheriffs but kept his position, left employment rather than be cast aside.

McDermott claimed patrol work is honorable and meaningful work and there is no reason Clark should complain about returning to patrol. But by placing him back into the rank of a senior deputy, the sheriff's office ignored four years of experience leading the office and relegated him to a junior position. McDermott moved Clark to a position on the graveyard shift where he had no supervisory duties but in the same stroke assigned other deputies supervisory duties. Further, he made Clark work with a deputy he had previously investigated and had recommended for termination. Clark said he was worried this deputy would not protect him if there were problems while he was responding to calls.

Clark was in a special situation since he was undersheriff and a sheriff can make the changes to the position when he or she takes office. McDermott said he was limited in where he could send Clark because of how he became a captain. Despite that, Clark was the only person to run against McDermott—on two occasions—then received a harsh rebuke for doing so. Clark's political ideas, not his merit and qualifications, have shown more influence on McDermott's decisions regarding Clark's employment.

This investigation concludes sheriff McDermott did not factor Clark's merit and qualifications into the decision to not return him to a captain's position. Clark has successfully shown, by a preponderance of the evidence, the sheriff's office reason for moving him to a senior deputy position were a pretext to discriminate against him due to his political ideas.

Retaliation

Clark alleges the sheriff's office subjected him to retaliation for participating in a 2013 human rights complaint by moving him to a position with less rank and causing him to retire. When a person alleges he or she was retaliated against, the Bureau begins by examining whether the Charging Party has certain criteria that on first look infer the adverse action happened because he or she is a member of a legally protected group. To establish these criteria, Clark must show:

- 1) he participated in a protected activity;
- 2) the sheriff's office took an adverse action against him subsequent to his participation in the protected activity; and
- 3) there is a causal connection between the protected activity and the adverse action.

Here, Clark provided a witness statement during a 2013 human rights investigation into a complaint brought by McDermott. When McDermott became sheriff he moved Clark back to the rank of senior deputy and placed him on a graveyard patrol shift. McDermott could not take action against Clark until he became sheriff, so there is a causal connection.

The Missoula County Attorney's Office argued Clark could not satisfy the first element to show retaliation because he did not provide information on McDermott's behalf during his 2013 complaint. A plain reading of the retaliation language codified in Montana law shows it was meant to protect anyone "participating in any manner in an investigation" (ARM 24.9.603). Clark made statements against McDermott inside of a human rights investigation and is protected for participating in that investigation. The appearance of adverse action against anyone participating in a human rights investigation would bring the appearance of retaliation no matter what side of the investigation a person was on.

The sheriff's office provided the same reasons cited above for moving Clark to the senior deputy position because of the way McDermott altered the sheriff's office. The sheriff's office denied this had anything to do with retaliation.

And, for much the same reasons cited above, Clark is able to also show he was retaliated against for making statements against McDermott during the 2013 investigation. McDermott claimed he had the right to place Clark wherever he wanted as undersheriff and return him to his last rank. He certainly had this right to replace him as undersheriff but where and why he placed Clark into a graveyard patrol shift is at question.


Clark provided disparaging statements contrary to McDermott's 2013 complaint. Given McDermott's political retribution against Clark, his statements against McDermott during the 2013 investigation would play a role in the decision not to allow Clark to return to a captain's position. Again, the decision of where to place Clark was not based on his merit and qualifications.

In the broader context, the movement of Clark to the night shift and severe cut in rank is enough to dissuade others to make complaints or challenge McDermott.

Clark has successfully proven the reasons offered by the sheriff's office were in retaliation for his participation in a protected human rights activity.

Conclusion

Based on its investigation, the Bureau finds **reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party's complaint.



John Manning, Investigator
Montana Human Rights Bureau

September 3, 2015
Date