

1996

Lucas v. Murray City Civil Service Commision and Murray City Corporation : Reply Brief

Utah Court of Appeals

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DOCKET NO. 960803-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

EDWARD J. LUCAS,

Petitioner,

vs.

MURRAY CITY CIVIL SERVICE
COMMISSION and MURRAY CITY
CORPORATION,

Respondents.

Appeal No. 960803-CA

Priority No. 14

REPLY BRIEF OF PETITIONER

AN APPEAL FROM A DECISION ISSUED BY THE MURRAY CITY CIVIL SERVICE
COMMISSION ON NOVEMBER 27, 1996.

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ARGUMENT

I.

OFFICER LUCAS HAS PRESENTED THE APPROPRIATE STANDARDS OF REVIEW

Murray City claims that regardless of the nature of the error, the Murray City Civil Service Commission's actions should be reviewed by this Court under an abuse of discretion standard. Such a broad claim is not supported by law. When an administrative agency is applying legal principles, its decisions are reviewed for correctness. See King v. Industrial Comm'n, 850 P.2d 1281, 1285 (Utah Ct. App. 1993). "We review agency interpretation of general law 'under correction of error standard, giving no deference to the agency's decision.'" Id. (citation omitted).

Officer Lucas concedes that most administrative proceedings do not strictly apply legal principles. However, the Murray City Civil Service Commission (the "Commission") through its own rules adopted the Utah Rules of Evidence. See Murray Civil Service Commission Rule 13-10. (Opening brief, exhibit 4). Therefore, the Commission's rulings on evidence and legal theories should be reviewed under a correctness standard.¹

¹ Even if this Court applies an abuse of discretion standard to all of the issues raised, it must still reverse the Commission's decisions. "The fact that administrative agencies may not be bound by formal rules of evidence and procedure does not mean that they are above the law." "An agency must at some point address the legal issues raised by a party appearing before it." Tolman v. Salt Lake County Attorney, 818 P.2d 23, 31 (Utah Ct. App. 1991) (discussing abuse of discretion standard in administrative proceedings).

II.

THE CITY'S ARGUMENTS REGARDING THE ROLE OF THE COMMISSION ARE INAPPOSITE

In its responsive memorandum, Murray City repeats time and again that the Commission had only two roles at the hearing: (1) To determine whether sufficient facts existed to support Chief Killian's decision that Officer Lucas should be disciplined for untruthfulness; and (2) To determine whether the discipline given was warranted under the circumstances. Murray City claims that because the Commission was limited to these two determinations, all of Officer Lucas' arguments regarding evidence, retaliatory motives, and procedural error are irrelevant.

Officer Lucas does not dispute the Commission's role. However, this does not invalidate Officer Lucas' argument. The first role of the Commission, as articulated by Murray City, requires the Commission to weigh all facts available to determine whether there was sufficient evidence to support Chief Killian's decision. Because the Commission suppressed critical facts, it was not able to assess whether Chief Killian's decision was justified under the circumstances. For example, the Commission suppressed the playing of an audiotape which contained a retraction by Martin Spegar, Officer Lucas' accuser. (R. at 575). It excluded evidence that Chief Killian and Lt. Fondaco were biased against Officer Lucas because he reported their alleged misconduct to the Utah Attorney General's office. (R. at 142-48; 162-3). The Commission ignored evidence that Murray City had not followed its own procedures in conducting the investigation of Officer Lucas. (R. at 707-17). These issues are directly

relevant to the Commissions' determination of whether the facts available supported Chief Killian's decision to fire Officer Lucas.

In short, the role of the Commission required it to consider evidence demonstrating that Officer Lucas was not being dishonest, that his accuser had recanted his story, that Murray City did not follow proper procedures in carrying out the internal affairs investigation, and that Officer Lucas was actually dismissed in retaliation for reporting his superior's alleged misconduct.

III.

EVIDENCE THAT OFFICER LUCAS WAS DISCHARGED AS AN ACT OF RETALIATION WAS IMPROPERLY EXCLUDED

Murray City argues that the Commission's decision to exclude evidence that Officer Lucas was terminated in retaliation for participation in an Attorney General's investigation was appropriate because (1) the Commission is not bound by the Utah Rules of Evidence; (2) the evidence was irrelevant; and (3) even if it was an error, the error was harmless. These arguments are without merit.²

A. THE COMMISSION IS BOUND TO FOLLOW THE RULES OF EVIDENCE WHEN PRACTICAL

Utah Rules of Evidence are not strictly applied at an administrative hearing unless the agency adopts the rules. See Pilcher v. Dept. of Social Services, 663 P.2d 450, 453 (Utah 1983).³ Prior to the hearing, the Commission provided Officer Lucas

² Because the City argues that each of the Commission's errors was harmless, Officer Lucas will discuss the harm to his case cumulatively in Section VII, infra.

³ Murray City attempts to distinguish Pilcher on the grounds that it applies to the Utah Rules of Civil Procedure, not the Utah Rules of Evidence. This, however, is not a material
(footnote continued...)

with a copy of its Rules and Regulations which state that “At all hearings, the Commission will determine the admissibility of evidence and shall use as near as it deems practicable the Rules of Evidence followed by courts of this State.” (Id. § 13-10) (emphasis added).

1. The Commission Erred If the Utah Rules of Evidence Applied

Murray City argues that even if the Utah Rules of Evidence applied, evidence of retaliation was still properly excluded as irrelevant pursuant to Rule 402. However, the City does not justify this position in light of the rules that specifically allow introduction of evidence of “bias, prejudice or any motive to misrepresent. . . .” Utah R. Evid. 608(c). See also Utah Code Ann. § 78-24-1 (same). In fact, it is well established under Utah law that testimony reflecting bias of a witness is relevant and admissible. Ong Int’l, Inc. v. Eleventh Ave. Corp., 850 P.2d 447, 459 (Utah 1993); see also State v. Hackford, 737 P.2d 200, 202 (Utah, 1987) (bias evidence is always relevant). Therefore, evidence that the internal affairs investigator and Chief Killian were biased against Officer Lucas, and wanted to fire him as an act of revenge, should have been admitted. Such evidence reflects directly on their credibility and the grounds for their decision to terminate Officer Lucas’ employment.

distinction. The clear import of Pilcher is that administrative agencies are not required to follow formal legal rules unless the agency has adopted those rules. Id. “Thus, administrative proceedings are not subject to the [Rules] unless the governing statute or regulations so provide.” Id. (Emphasis added).

B. EVEN IF THE UTAH RULES OF EVIDENCE DID NOT APPLY, THE COMMISSION ERRED.

Even if this Court determines that the Utah Rules of Evidence did not apply at the hearing, the Commission's decision must be reversed. "Despite the flexibility of administrative hearings [with respect to] evidence, due process requires minimum safeguards, . . . all parties must be . . . given opportunity to cross-examine witnesses, to request documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." Tolman, 819 P.2d at 29 (citation omitted) (emphasis added). "The fact that administrative agencies may not be bound by formal rules of evidence . . . does not mean that they are above the law." Id. at 31. The Commission's decision to prevent Officer Lucas from proving he was fired in retaliation for reporting internal corruption prevented him from "making his defense" and is reversible under Tolman. Id. at 29.

IV.

**THE COMMISSION WRONGFULLY EXCLUDED
A TAPE RECORDED RETRACTION BY
OFFICER LUCAS' ACCUSER**

It is undisputed that Martin Spegar, the person who accused Officer Lucas of pointing a gun at his head, later retracted portions of his testimony in a taped interview with a polygrapher. The interview followed Mr. Spegar's polygraph exam in which he scored an overall -3 (indicating dishonesty) (R. 323-6). The Commission prevented Officer Lucas from playing the taped retraction as impeachment of Mr. Spegar's testimony before the Commission. Murray City's only arguments as to why the taped retraction by Officer Lucas' accuser was properly excluded are (1) Officer Lucas never

objected to the decision excluding the evidence and (2) the error was harmless. Both arguments are baseless.

A. OFFICER LUCAS PROPERLY OBJECTED TO THE COMMISSION'S RULING

Officer Lucas's counsel expressly objected to the Commission's ruling that the audiotape could not be played. (R. at 575). Utah law regarding sufficiency of objections clarifies that counsel's role in objecting is to allow the tribunal a chance to correct its mistake at the time of occurrence. See Anderson v. Sharp, 899 P.2d 1245, 1248 (Utah Ct. App. 1995). That clearly occurred. Furthermore, the rule requiring a clear objection specifies that it applies when the Court is admitting objectionable evidence. Utah R. Evid. 103(a)(1) (clear objection must be made if ruling is to allow inadmissible evidence). Thus, the burden was on the City to object to the admission of the tape, which the City did not do in a timely manner. (R. 574). Lastly, because of the confusion created by a sua sponte ruling by the Commission's legal adviser, any decision by this Court about the sufficiency of counsel's objection should err toward finding an objection to have been made.⁴

Murray City also contends that the Commission would have allowed the evidence to be authenticated by Lt. Vern Petersen, the polygrapher who taped the interview. This

⁴ Counsel was at a disadvantage as to how and when to object since Mr. Ferguson (the "legal advisor") made the decision to exclude the tape prior to any objection from Murray City and without question by any Commissioner about the recording's admissibility. Therefore, it is unclear when the "ruling" was made. (See R. at 575). Nevertheless, it is clear that Officer Lucas' counsel attempted to play the tape and have Mr. Spegar lay the proper foundation even after Mr. Ferguson indicated he did not want the tape played. Thus, the Commission had the chance to correct its ruling.

argument contradicts the rule of evidence stating that the party whose voice is recorded is the property party to authenticate a recording. Utah R. Evid. 1007. Moreover, the City omits the fact that as soon as the Commission made the ruling in question, Murray City's counsel informed Lt. Petersen (who was under a subpoena) that he was free to leave, irrespective of his subpoena. Murray City did not inform the Commission or Officer Lucas' counsel of its actions. Thus, when Officer Lucas attempted to call Lt. Peterson to authenticate the tape, Lt. Petersen was unavailable. In an effort to comply with the Commission's instructions to complete the hearing that day, Officer Lucas proceeded forward by introducing the transcript of the audiotape of Mr. Spegar's polygraph interview. (Transcript at p. 211). However, there was no witness to lay the foundation for this testimony, and Lt. Fondaco and Chief Killian denied reviewing the transcript or the audiotape prior to their decision to fire Officer Lucas. Thus, the effect of the recantation by Mr. Spegar and the chance to discredit Mr. Spegar were lost.⁵

V.

THE COMMISSION WRONGFULLY IGNORED MURRAY CITY'S PROCEDURAL ERRORS

Officer Lucas contends that the Commission erred when it failed to analyze or even mention his argument that Murray City purposefully disobeyed its own procedures in order to terminate his employment. See Tolman, 818 P.2d at 31-2 ("at a minimum, the [Commission] should have addressed [his] legal contentions in its findings and

⁵ Officer Lucas notes that this confusion and prejudice to his case presentation were some of the harms caused by the Commission's decision to allow Mr. Ferguson to participate as he did.

conclusions”). Murray City’s responses to this point were (1) Officer Lucas never identified any procedural deficiencies; and (2) Officer Lucas was not terminated as a result of procedural errors, but because of dishonesty.

Officer Lucas introduced evidence before the Commission that Murray City had failed to follow its own procedures. He urged the Commission to set aside the discipline based upon these procedural deficiencies. This evidence included the following errors:

- (1) The internal affairs investigation of Officer Lucas lasted more than 30 days whereas Murray City Policy and Procedure requires such investigations to be completed within 30 days (R. 707-9);
- (2) Officer Lucas was never informed at any time that the internal affairs investigation against him had been changed from one of excessive force to one of dishonesty, whereas City policy requires investigations to inform an Officer of the scope of their investigation (R. 710);
- (3) Officer Lucas had not been provided with a written statement of the charges against him before he was interrogated by Lt. Fondaco in contravention of City policy and procedure (R. 709-10);
- (4) The failure to notify Officer Lucas of the original charge against him (excessive force) and that the investigation had changed to one of dishonesty were both violations of City policy (R. 710-13); and
- (5) Lt. Fondaco never contacted the Utah Attorney General’s Office or any other investigative authority regarding the internal affairs investigation of excessive force as indicated by City policy (R. 716-17).

The fact that the Commission failed to address this issue in its decision does not mean that Officer Lucas did not raise it. To the contrary, it demonstrates that the Commission erred in evaluating this defense.

It is also noteworthy that Murray City failed to distinguish, or even contest the cases cited by Officer Lucas which hold that public employers must follow established

procedure before disciplinary actions can be sustained. Officers have a property interest in continued employment as well as the procedures which protect their employment rights. See e.g., Worrall v. Ogden City Fire Dept., 616 P.2d 598, 601-2 (Utah 1980); Anderson v. City of Lawton, 748 P.2d 53, 55 (Ok. App. 1987) (officer discharged outside of established policy must be reinstated).

VI.

THE COMMISSION IMPROPERLY ALLOWED ITS LEGAL ADVISOR TO PARTICIPATE AS A COMMISSIONER

In response to Officer Lucas' argument that the Commission inappropriately allowed its legal advisor to conduct interrogation of fact witnesses, to comment on evidence on the record, and to make sua sponte rulings, Murray City contends that the Commission was justified in so acting because it was called upon to make numerous complex legal rulings, and therefore, participation by a legal advisor was mandated.

Officer Lucas first calls attention to the inherent contradiction in Murray City's arguments. In dealing with the Commission's evidentiary errors, Murray City argues that the Utah Rules of Evidence do not apply and the Commission's only role was to make factual findings. Conversely, in explaining Mr. Ferguson's role, Murray City argues that the Commission had so many complicated legal decisions to make that it had to retain a legal advisor. Officer Lucas agrees that the Commission had legal decisions to make, and Murray City's concession on this point demonstrate that its arguments to the contrary are disingenuous.

However, even this concession does not justify the Commission's actions. As Murray City also concedes, this Court should reverse the Commission if it finds the Commission acted outside its scope of authority. Salt Lake City v. Salt Lake City Civil Service Comm'n, 908 P.2d 871, 876 (Utah Ct. App. 1995). It is outside of the Commission's authority to allow a non-commissioner to interrogate fact witnesses, comment and give his opinion on witness' statements, and make sua sponte rulings without request by any commissioner. Mr. Ferguson acted not only as a fourth commissioner, he participated more than all commissioners combined. Such conduct is clearly beyond the scope of the Utah Code which narrowly defines the number, qualification, and role of civil service commissioners. See Utah Code Ann. §§ 10-3-1001 to -06; see also, Williams v. PSC, 754 P.2d 41, 50 (Utah 1988) ("any reasonable doubt of the existence of any [administrative] power must be resolved against the existence thereof"). Accordingly, the decision of the Commission cannot stand.

VII.

THE COMMISSION'S ERRORS **HARMED OFFICER LUCAS**

In numerous sections, Murray City argues that even if the Commission did err, its errors were harmless. Interestingly, Murray City has not attempted to demonstrate that the harms Officer Lucas has already listed in his opening brief (e.g. opening brief at p. 31) were not sufficiently harmful. Instead, the City makes the bald assertion that all of the Commission's errors were harmless, without addressing Officer Lucas' claims.

Officer Lucas concedes that the Commission's decisions will not be reversed if its errors are found "sufficiently inconsequential that [this Court] concludes there is no

reasonable likelihood that the error affected the outcome of the proceedings.” State v. Jacques, 924 P.2d 898, 902 (Utah Ct. App. 1996).

In Jacques, the Court outlined the factors relevant to the determination of whether an error was harmful.

In determining whether reversal is required, several factors are considered including “the importance of the witnesses’ testimony to the . . . case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise furnished, and, of course, the overall strength of the . . . case.”

Id. at 903 (citation omitted). Based on this standard, the Commission’s errors were harmful to Officer Lucas’ case.

A. REGARDING EVIDENCE OF RETALIATION

Retaliation was key to Officer Lucas’ defense because it explained why the City wanted to terminate his employment and why the City was willing to violate its own policies to do so. Moreover, it was not cumulative of other defenses presented by Officer Lucas. The Commission did not simply exclude one witness on this point, but all evidence demonstrating retaliation. Thus, there was no likelihood that the Commission understood the facts through testimony that was admitted. Finally, Officer Lucas proffered numerous corroborating witnesses to support the defense, but the Commission still refused to allow any evidence of retaliation.

Exclusion of this evidence must be presumed to have prejudiced Officer Lucas’ case. “[E]vidence of bias or motive is always relevant as discrediting the witness and affecting the weight of his testimony.” State v. Hackford, 737 P.2d 200, 202 (Utah

1987). “Therefore, if a prior instance of conduct is relevant to a witness’ bias or motive to testify differently than would otherwise be the case, evidence pertaining to that conduct is not subject to exclusion under Rule 608(b).” Id. Cases which have found exclusion of such testimony harmless error have almost uniformly done so on the ground that the fact finder “had sufficient information to fully appraise [the witness’] biases and motivations” without the evidence. E.g., Hackford, 737 P.2d at 205. The Commission had no other evidence before it regarding bias.

B. REGARDING THE TAPED RETRACTION BY OFFICER LUCAS’ ACCUSER

A tape recorded retraction by Officer Lucas’ accuser was perhaps the most damaging evidence against the City’s case. As pointed out numerous times by the City, Officer Lucas was fired for the alleged dishonesty of denying that he pointed his gun at Mr. Spegar, not for excessive force. Hence, if Officer Lucas could prove that Mr. Spegar lied when he accused Officer Lucas, that would also prove Officer Lucas was being truthful when he denied the conduct. Again, Officer Lucas was not simply prevented from cross-examining Mr. Spegar about the tape, but from even playing the tape to the Commission. As highlighted by Jacques, the error was made per se harmful because of the importance of the witness involved, his accuser. Officer Lucas was prevented from effectively cross-examining Mr. Spegar regarding his accusation and allowing the Commission to assess Mr. Spegar’s credibility.

C. REGARDING THE COMMISSION’S FAILURE TO ANALYZE THE CITY’S PROCEDURAL ERRORS

In order to have a fair hearing it is critical that the Commission listen to and analyze a grievant’s arguments. Tolman, 818 P.2d at 31. Officer Lucas argued that

Murray City intentionally ignored procedures in order to fire him. During the hearing, the City's internal affairs investigator admitted to violating several procedures designed to protect an officer's employment rights. (R. 707-17). The Commission did not even address Officer Lucas' arguments regarding procedural errors in any of its findings or conclusions. Officer Lucas was harmed by this error because without explanation from a tribunal of why it rejects or does not reach an argument, a hearing serves no purpose. Id. This Court has previously held that when an agency neglects to address an issue "the party wishing to defend an agency decision has the burden of showing that the undisclosed finding was actually made." Adams v. Industrial Comm'n, 821 P.2d 1, 5 (Utah Ct. App. 1991). Thus, Officer Lucas is presumed to be harmed unless Murray City proves otherwise. See id. Murray City has not even attempted this showing.

VIII.

THE SANCTION OF EMPLOYMENT TERMINATION WAS EXCESSIVE

In the end, this entire case came down to a question of whether Officer Lucas, during a hostile search, had his gun out of his holster and pointed in a low-ready position or merely in its holster with his hand on the grip. Even if the Commission and the Court assume for argument that Officer Lucas knew his gun was pointed at the ground and yet said it was in its holster, that conduct does not warrant termination.

Chief Killian and Lt. Fondaco admitted that during the entire investigation period, Officer Lucas was able to effectively perform his duties as an officer. He was never placed on leave. Thus, it was clear, even from the City's witnesses, that Officer Lucas could have continued his job. Because the City admitted to adopting a policy of

progressive discipline, the sanction of employment termination under such circumstances was unjustified. Moreover, other officers who had been accused of more egregious dishonesty, and who later admitted that they had lied, were not fired by the City. Therefore, the decision to fire Officer Lucas was arbitrary.

An officer with over 10 years of service, an unblemished record, and a recipient of numerous awards should not be fired because his Chief believes his weapon was drawn in a low ready position rather than in its holster. Such discipline is disproportionate, and abusive.

IX.

INSUFFICIENT EVIDENCE EXISTED TO SUPPORT THE COMMISSION'S DECISION

The parties agree that this Court's review of the Commission's factual determinations must be whether "substantial evidence" which would "convince a reasonable mind" exists to support the Commission's decision. E.g., Harken v. Board of Oil, Gas and Minerals, 920 P.2d 1176, 1180 (Utah 1996). In his opening brief, Officer Lucas devoted six pages (pp. 14-19) to marshalling the evidence in order to demonstrate that no evidence of an intent to deceive was introduced.

Murray City's only response is that Officer Lucas' initial statement (that he did not draw his weapon) compared to his later statement (that he does not remember drawing his weapon, but concedes he may have done so if another officer saw his weapon out) is inconsistent. Thus, Murray City claims Officer Lucas was reasonably believed to be lying.

Officer Lucas introduced expert testimony through Dr. Kenneth Rodgers indicating that such an inability to recall whether a weapon was in a holster or in a low ready position is normal under the circumstances. Dr. Rodgers' testimony was not rebutted. Murray City put on no witness who claimed Officer Lucas intended to deceive Lt. Fondaco or Chief Killian. Officer Lucas quite candidly told his superiors that he did not remember drawing his weapon, but would not contradict an officer who says he saw Officer Lucas do so; Officer Lucas simply could not recall.

Not only did Murray City fail to put on "substantial evidence" that Officer Lucas was being deceitful when he made this statement; no evidence was put on that Officer Lucas intended to deceive his superiors or tried to prevent others from disclosing the truth to his supervisors. To the contrary, when Officer Snow indicated to Officer Lucas that he had seen Officer Lucas' weapon out of its holster, Officer Lucas encouraged Officer Snow to give that information to Lt. Fondaco and Chief Killian. (R. 618).

Murray City has not and cannot provide substantial evidence to demonstrate that Officer Lucas wanted to deceive his superiors in this situation. Thus, the Commission's decision to uphold Chief Killian's decision must be reversed.

CONCLUSION

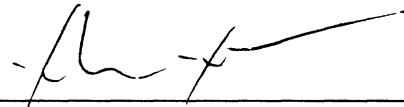
Following his termination for alleged dishonesty, Officer Lucas attempted to prove that his accuser retracted his statements; that he was fired in retaliation for a prior report to the Attorney General rather than the alleged dishonesty; and, that Murray City purposefully ignored its own policies and procedures in order to fire him. The Commission prevented Officer Lucas from having a fair opportunity to do any of these

things. He was prevented from playing a taped retraction of his accuser's statements; prevented from showing that Lt. Fondaco and Chief Killian were biased against him and had a motive to retaliate against him for reporting their alleged misconduct to the Attorney General's office; and, finally in its rush to uphold Chief Killian's decision, the Commission failed to even acknowledge his arguments about the City's procedural violations. Each of these items deprived Officer Lucas of a fair hearing; cumulatively they ensured that Officer Lucas had no chance to "make his defense" as he was entitled.

Lastly, no evidence was presented to indicate Officer Lucas intended to deceive anyone. A complete lack of evidence is not "substantial evidence." For all of these reasons, Officer Lucas respectfully submits that the Commission's decision to uphold Chief Killian's decision should be vacated and Officer Lucas reinstated with full back pay.

DATED this 4 day of June, 1997

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing Reply Brief of Petitioner to be hand-delivered, this 7 day of June, 1997, to the following:

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