

1997

Jim Crittenden v. Alpine School District : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Nancy L. Kemp; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Appellee.

Don R. Petersen; Howard, Lewis, Petersen; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Crittenden v. Alpine School District*, No. 970091 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/670

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

50
.A10
DOCKET NO. 970091-CA

JIM CRITTENDEN,	:	
Plaintiff-	:	Case No. 970091-CA
Appellant,	:	
vs.	:	Oral Argument
	:	Priority 15
ALPINE SCHOOL DISTRICT,	:	
Defendant-	:	
Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, THE HONORABLE ANTHONY W. SCHOFIELD, PRESIDING

DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84601

ATTORNEYS FOR APPELLANT

J. MARK WARD
ASSISTANT ATTORNEY GENERAL
160 East 300 South, #600
Salt Lake City, UT 84114

ATTORNEYS FOR APPELLEE

FILED
Utah Court of Appeals
JUL 25 1997

Julia D'Alesandro
Clerk of the Court

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

JIM CRITTENDEN,	:	
Plaintiff-	:	Case No. 970091-CA
Appellant,	:	
vs.	:	Oral Argument
	:	Priority 15
ALPINE SCHOOL DISTRICT,	:	
Defendant-	:	
Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, THE HONORABLE ANTHONY W. SCHOFIELD, PRESIDING

DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84601

ATTORNEYS FOR APPELLANT

J. MARK WARD
ASSISTANT ATTORNEY GENERAL
160 East 300 South, #600
Salt Lake City, UT 84114

ATTORNEYS FOR APPELLEE

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

JIM CRITTENDEN,	:	
Plaintiff-	:	Case No. 970091-CA
Appellant,	:	
vs.	:	Oral Argument
	:	Priority 15
ALPINE SCHOOL DISTRICT,	:	
Defendant-	:	
Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, THE HONORABLE ANTHONY W. SCHOFIELD, PRESIDING

DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84601

ATTORNEYS FOR APPELLANT

J. MARK WARD
ASSISTANT ATTORNEY GENERAL
160 East 300 South, #600
Salt Lake City, UT 84114

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

JURISDICTION	1
STATEMENT OF ISSUES	1
STANDARD OF REVIEW	1
PERTINENT STATUTORY AUTHORITY	2
STATEMENT OF THE CASE	2
Nature Of The Case	2
Proceedings Below	2
Facts	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
POINT I : PRE-TERMINATION HEARING.	6
POINT II: EARLY RETIREMENT BENEFITS.	10
A. <u>Vesting Of Early Retirement Benefits.</u>	10
B. <u>Timeliness.</u>	12
C. <u>"Type of Administrator" for Whom the Benefits Were Meant</u>	14
D. <u>Lack of Procedural Due Process Prior to Deprivation of Early Retirement Benefits.</u>	17
E. <u>Judicial Legislation</u>	17
CONCLUSION	19
APPENDIX	

TABLE OF AUTHORITIES

Cases Cited:

<u>American States Ins. Co. v. Utah Transit</u> , 699 P.2d 1210 (Utah 1985)	16
<u>Auerbach's, Inc. v. Kimball</u> , 572 P.2d 376, 378 (Utah 1977)	9, 10
<u>Backman v. Bateman</u> , 263 P.2d 561, (Utah 1953)	15
<u>Brasslett v. Cota</u> , 761 F.2d 827 (1st Cir. 1985)	8
<u>Brown v. Weis</u> , 871 P.2d 552, (Utah App. 1994)	14
<u>Cleveland Board of Education v. Loudermill</u> , 105 S.Ct. 1487 (1985)	6
<u>Colman v. Utah State Landlord</u> , 795 P.2d 622 (Utah 1990)	2
<u>Driggs v. Utah State Teachers Retirement Board</u> , 142 P.2d 657 (Utah 1943)	13
<u>Ellis v. Utah State Retirement Board</u> , 757 P.2d 882 (Utah App. 1988)	9
<u>Heiner v. S. J. Groves & Sons Co.</u> , 790 P.2d 107 (Utah App. 1990)	2
<u>Hoth v. White</u> , 799 P.2d 213 (Utah App. 1990)	16
<u>Kelly v. Smith</u> , 764 F.2d 1412 (11th Cir. 1985)	7, 8
<u>Olsen v. Hooley</u> , 865 P.2d 1345 (Utah 1993)	2
<u>Powell v. Mikulecky</u> , 891 F.2d 1454 (10th Cir. 1989)	7
<u>Riggins v. Board of Regents of the University of Nebraska</u> , 790 F.2d 707 (8th Cir. 1986)	8
<u>Salt Lake City Corp. v. Salt Lake City Civ. Serv.</u> , 908 P.2d 871 (Utah 1995)	7
<u>Schofield v. Zions Co-Op Mercantile Institution</u> , 85 Utah 281 (1934)	9, 10
<u>Spor v. Crested Butte Silver Mining, Inc.</u> , 740 P.2d 1304 (Utah 1987)	5
<u>Stevenson v. F. C. Life Ins. Co.</u> , 827 P.2d 973 (Utah App. 1992)	5

<u>Throckmorton v. Throckmorton</u> , 767 P.2d 121 (Utah App. 1988) .	15
<u>Transp. Auth. v. Transp. Auth. Retirement Bd.</u> , 493 N.E.2d 848 (Mass. 1986)	16
<u>W. M. Barnes Co. v. Sohio Natural Resources Co.</u> , 627 P.2d 56 (Utah 1981)	5, 15

Statutes and Rules Cited:

Alpine School District Policy No. 4752.1.3.1	9, 14
Alpine School District Policy No. 4752.1.3.3	9, 14
Utah Rule of Civil Procedure 56(c)	2

Other Authorities Cited:

Defendant's Answers to Plaintiff's First Set of Interrogatories	11
Memorandum in Support of Defendant's Motion for Summary Judgment	11
Memorandum in Support of Plaintiff's Motion for Summary Judgment	12

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

JIM CRITTENDEN,	:	
Plaintiff-	:	Case No. 970091-CA
Appellant,	:	
vs.	:	Oral Argument
	:	Priority 15
ALPINE SCHOOL DISTRICT,	:	
Defendant-	:	
Appellee.	:	

JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-3(j).

STATEMENT OF ISSUES

This case concerns two issues:

1. Whether Alpine School District denied appellant Jim Crittenden of his employment without an adequate pre-termination hearing in violation of his right to due process.
2. Whether appellant Jim Crittenden was entitled to early retirement benefits.

STANDARD OF REVIEW

When reviewing a breach of contract action, the appellate court must address questions both of fact and of law. In a summary judgment context, the facts are to be resolved in favor of the non-moving party, while the legal issues are to be reviewed for correctness. Stevenson v. F. C. Life Ins. Co., 827 P.2d 973 (Utah App. 1992).

With regard to Mr. Crittenden's early retirement benefits, the appellate court is obliged to construe plaintiff's complaint in the light most favorable to the plaintiff, and the judgment can be affirmed only if it clearly appears that there is no set of facts that can support the plaintiff's claim. Olsen v. Hooley, 865 P.2d 1345, 1346 (Utah 1993); Colman v. Utah State Landlord, 795 P.2d 622 (Utah 1990); Heiner v. S. J. Groves & Sons Co., 790 P.2d 107 (Utah App. 1990). On summary judgment, this issue is reviewed for correctness, since factual disputes are automatically resolved in the appellant's favor, and the only remaining issue is a determination of how the facts apply to the law governing early retirement. Stevenson, 827 P.2d at 973.

PERTINENT STATUTORY AUTHORITY

Utah Rule of Civil Procedure 56(c).

STATEMENT OF THE CASE

A. Nature Of The Case. This is a wrongful termination action arising from the termination of appellant by the appellee. This action also involves deprivation by the appellee of early retirement benefits to which appellant asserts a claim.

B. Proceedings Below. Mr. Crittenden filed a motion for summary judgment on May 31, 1996, to which the defendant filed a cross-motion on June 14, 1996. The Court granted the defendant's motion, ruling that, even in the amended complaint, Crittenden was challenging only the manner in which he was terminated, and that

nothing was amiss, either within district policy or within the law, with the manner of Crittenden's termination. (Ruling, at 3-11)

The Court also ruled that (a) Crittenden was not entitled to early retirement because the request was past a district-imposed deadline, (b) Crittenden was not "employed" at the time of his request, and (c) that Crittenden was not in the class of employees for which early retirement was intended. (Ruling, at 11-13)

C. Facts. In 1991, appellant, Mr. Jim Crittenden, was the director of transportation for appellee, Alpine School District, and had been an employee of the school district for 33 years. (Affidavit in Support of Plaintiff's Motion for Summary Judgment, ¶ 6; Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Statement of Material Undisputed Facts, ¶ 1)

On June 5, 1991, the assistant superintendent of the Alpine School District met with Mr. Crittenden for 15 to 20 minutes (Affidavit of Jim F. Crittenden, ¶¶ 3-6), asking Mr. Crittenden if he had used school district purchase orders to buy approximately \$650 (Affidavit of Gary V. Keetch, Exhibit A) worth of parts for vehicles belonging to Mr. Crittenden and a friend of his. Mr. Crittenden answered that he had, but was not given an opportunity to explain why or to point out that his actions were common and accepted practices in the school district. (Affidavit of Jim F. Crittenden, ¶ 6; Crittenden Depo. at 46, 51, 58, 61, 171) Mr. Crittenden did, however, mention that he would like to take early

retirement. (Affidavit of Gary V. Keetch, Exhibit A) The assistant superintendent told him to go home and wait to hear from the school district. (Affidavit of Jim F. Crittenden, ¶ 6)

Mr. Crittenden and the assistant superintendent met again later that day for five or ten minutes. (Affidavit of Jim F. Crittenden, ¶ 9) The assistant superintendent had Mr. Crittenden read a letter from the school district explaining that he was being placed on immediate suspension without pay and would be terminated in 15 days. (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Statement of Material Undisputed Facts, ¶¶ 12-13) Again, Mr. Crittenden was not given an opportunity to explain his actions, but he again requested early retirement. (Affidavit of Jim F. Crittenden, ¶ 9; Affidavit of Gary V. Keetch, Exhibits A)

The following day, Mr. Crittenden formally submitted a written request for early retirement. (Affidavit of Jim F. Crittenden, ¶ 15; Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Statement of Material Undisputed Facts, ¶ 15) The school district conducted a post-termination hearing in September, 1991, after which it informed Mr. Crittenden that his termination had been upheld. (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Statement of Material Undisputed Facts, ¶¶ 18, 20)

Mr. Crittenden filed suit in January, 1993, and alleged that the manner of his termination was improper and that he was

entitled to early retirement benefits. (Complaint and Demand for Jury Trial) He filed an amended complaint on August 30, 1996, in which he further alleged that the district breached the employment contract. (Amended Complaint and Demand for Jury Trial)

Alpine School District has stated that it "objects to and deplores any insinuation on the part of the plaintiff to suggest that defendant denied plaintiff early retirement due to a clerical oversight in the filling out of forms." (Defendant's Answers to Plaintiff's First Set of Interrogatories, #26). In fact, Alpine School District expressly stated that "[a]s communicated over and over to plaintiff and his attorney by defendant and its attorney in 1991, plaintiff failed to qualify for district early retirement because his employment was involuntarily terminated due to criminal acts." (Id.).

SUMMARY OF ARGUMENT

Summary judgment in favor of Alpine School District was improper because there are disputed issues of material fact and the District Court incorrectly applied the law to the facts.

Summary judgment regarding the adequacy of the pre-termination hearing should be reversed because it is disputed whether Mr. Crittenden had an opportunity to "tell his side of the story," and whether his further explanation would have altered the course of his termination. Also, the cases on which the District Court relied are distinguishable from this one.

Summary judgment regarding his entitlement to early retirement benefits should also be reversed because Mr. Crittenden had a vested right to the benefits and Alpine School District was contractually obligated to grant them. The District Court improperly based its decision on the timeliness of his application, an argument Alpine School District waived or otherwise failed to plead. The District Court also based its decision on terms it improperly imposed on school district policy regarding restrictions on eligibility for the early retirement benefits. Furthermore, if under the policy the early retirement benefits are limited to workers who "need to get away from the daily grind," there is a disputed issue of fact regarding whether that was part of Mr. Crittenden's motivation for applying for the benefits. Finally, he was deprived of the benefits without due process.

ARGUMENT

POINT I

PRE-TERMINATION HEARING

In considering whether there exist genuine issues of material fact, the Court does not weigh the evidence, but instead inquires whether a reasonable jury faced with the evidence presented could return a verdict for the non-moving party. W. M. Barnes Co. v. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981); Spor v. Crested Butte Silver Mining, Inc., 740 P.2d 1304 (Utah 1987). All material facts properly asserted and supported by a party shall be deemed admitted unless specifically controverted by the opposing

party. Further, the trial court must interpret the relevant facts in a light favorable to the non-moving party. Stevenson v. F. C. Life Ins. Co., 827 P.2d 973 (Utah App. 1992).

In this case, there are issues of fact regarding the adequacy of Mr. Crittenden's pre-termination hearing which were improperly resolved in favor of Alpine School District, and which should have precluded summary judgment. It is undisputed that Mr. Crittenden was an employee of the school district with a constitutionally protected property interest in his employment. As such, he was entitled to a pre-termination hearing under Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985). The United States Supreme Court in Loudermill explained that a pre-termination hearing "need not be elaborate." Nevertheless, it identified the elements essential to an adequate pre-termination hearing. The Court stated that, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 1497.

In this case there is a factual dispute as to whether Mr. Crittenden was given an opportunity to present his side of the story prior to termination. He had one meeting with the assistant superintendent prior to termination which lasted no more than 15 to 20 minutes. According to Mr. Crittenden, he did not have an opportunity to explain his actions, a fact that should be interpreted in a light favorable to Mr. Crittenden. Part of Mr.

Crittenden's explanation, had he been permitted to voice it, would have been that his actions were actually common and accepted practice in the school district, another fact that should be interpreted in a light favorable to him, and which would have been relevant to whether the termination was erroneous, and whether the penalty was proportional to the infraction. See, Salt Lake City Corp. v. Salt Lake City Civ. Serv., 908 P.2d 871 (Utah 1995), (holding that in disciplining civil servants, the penalty must be proportional to the infraction).

Furthermore, this case is distinguishable from the cases on which the District Court relied as authority for its legal determination. The District Court held that the hearing in this case was sufficiently similar to the hearings sustained as constitutionally sound in Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989), and Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985). A closer look at those cases is enlightening.

In Powell the court found that the employee had been afforded an opportunity to explain his side of the story because the employee had ended the discussion by refusing to respond to further inquiries. Powell, 891 F.2d at 1459. In this case, however, Mr. Crittenden was not able to fully explain his side of the story because he was directed to go home and wait to hear from the school district.

Like Mr. Crittenden's meeting with Alpine School District administrators, the hearing in Kelly was also very brief, but the

court in Kelly nonetheless sustained the hearing as adequate. This is because the reason the employee gave in his defense for failing to fulfill an obligation of his employment, that he was not on-call at the time, was untrue and within the personal knowledge of the supervisor terminating him. In this case, however, Alpine School District had no knowledge of Mr. Crittenden's reasons for his conduct, nor did Alpine School District ask for, nor did it desire any explanation or reason for Mr. Crittenden's actions. Mr. Crittenden, given the opportunity, could have and would have provided explanations of his conduct which were not known by the assistant superintendent and which would have been relevant to whether the termination was warranted. Similarly, the other cases cited in Powell, Riggins v. Board of Regents of the University of Nebraska, 790 F.2d 707 (8th Cir. 1986), and Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985), are also distinguishable from the instant case. Those cases involved pre-termination hearings which lasted an hour or more--substantially longer than Mr. Crittenden's pre-termination meeting with Alpine School District officials. Because the cases it cited in its decision were not on-point, the District Court's reliance upon those cases in its decision was in error.

Recognizing these disputed issues of fact, the District Court erred by making its own factual determinations. Instead of interpreting the facts in a light favorable to Mr. Crittenden, the District Court determined that 15 to 20 minutes gave the parties ample time for "some other give and take." (Ruling, at 10-11). In

other words, the District Court weighed the evidence and took from a jury a determination that properly belonged to it. Mr. Crittenden had satisfied his burden of showing a disputed issue of fact, and he should have been permitted to elaborate to a jury the reasons he was prevented him from telling his side of the story. Because of the existence of these factual disputes and erroneous legal conclusions, summary judgment in favor of Alpine School District was improper and should be reversed.

POINT II

EARLY RETIREMENT BENEFITS.

A. Vesting Of Early Retirement Benefits.

As a general rule, the adoption of a pension plan by an employer is an offer for a unilateral contract, such that the plan may be viewed as an offer to the employee. An employee accepts the offer by his or her continued employment, and continued employment constitutes the underlying consideration for the promise. A pension plan is thus "an offer which ripens into a contract upon the fulfillment of conditions by the performance of the employee." Auerbach's, Inc. v. Kimball, 572 P.2d 376, 378 (Utah 1977); Schofield v. Zions Co-Op Mercantile Institution, 85 Utah 281 (1934).

When an employee makes "the requisite contributions and [has] satisfied all conditions precedent to his benefits, then the employee [has] a 'vested right' in his retirement benefits." Ellis v. Utah State Retirement Board, 757 P.2d 882, 886 (Utah App. 1988).

The pension plan, as outlined in Alpine School District's Policy No. 4752, provides that in order for an employee to fulfill the conditions for early retirement benefits, the employee must either "have accumulated 30 years of educational service in Alpine School District and choose to retire early (prior to the 65th birthday); or . . . have attained 30 years of service in Utah and have at least 15 years of services in Alpine School District." (Alpine School District Policy No. 4752.1.3.1 and 4752.1.3.3 (1986)).

Jim Crittenden began employment with Alpine School District in 1957, and his contract with Alpine School District "ripened" in 1987, when, at age 52, he attained 30 years of service in Alpine School District and chose to seek early retirement. "The offer is [sic] such cases constitutes a promise for a completed act, and once the act is completed by the acceptor the offer cannot be modified or withdrawn. It becomes a binding contract." Auerbach's, Inc. v. Kimball, 572 P.2d 376, 378 (Utah 1977) (quoting Schofield v. Zions Co-Op Mercantile Institution, 85 Utah 281, 287 (1934)).

When Jim Crittenden reached 30 years of service for Alpine School District, the requisite act was completed and he fulfilled his part of the early retirement contract. At that same time, Alpine School District became bound to its offer of early retirement benefits to Jim Crittenden. The offer could not "be modified or withdrawn." Thus, by refusing to grant Jim Crittenden

his early retirement benefits, Alpine School District did not fulfill its part of the contract.

B. Timeliness

The District Court's primary rationale for upholding the denial of Mr. Crittenden's early retirement benefits relies upon Alpine School District's assertion that Mr. Crittenden failed to apply for the benefits before March 1, 1991. Secondly, the District Court relies upon the fact that there is no language to the effect that early retirement benefits are available to persons who are terminated for cause.

Mr. Crittenden, however, contends that Alpine School District's decision to deny Mr. Crittenden his early retirement benefits was not based upon any question of timeliness, nor was the denial based upon any policy provision. Alpine School District did not assert timeliness as a defense, it did not raise timeliness an issue in its motion for summary judgment, and it has expressly stated that timeliness was not the reason why Mr. Crittenden's benefits were denied.

1. Waiver

The district chose to deny Mr. Crittenden early retirement benefits not for any failure to meet application deadlines, but "because his employment was involuntarily terminated due to criminal acts." (Defendant's Answers to Plaintiff's First Set of Interrogatories, #26.).

In fact, while the District Court based its decision largely upon the question of timeliness, Alpine School District's motion for summary judgment did not even raise the timeliness issue. Alpine School District's Motion for Summary Judgment does not assert as a defense or as grounds for denial of the benefits that timeliness was a factor; rather, Alpine School District argues that "This court should rule as a matter of law that plaintiff did not qualify for district early retirement benefits, because he did not retire early from employment; he was terminated for cause." (Memorandum in Support of Defendant's Motion for Summary Judgment, at 25). The district makes no mention of the timeliness issue as a basis for its motion.

Mr. Crittenden pointed out to the District Court that in answers to interrogatories and in depositions, Alpine School District had denied that Mr. Crittenden's applications for early retirement benefits were rejected because they were not timely. (Memorandum in Support of Plaintiff's Motion for Summary Judgment, at 2, 5). Nonetheless, the District Court found that the timeliness defense, though not pled, was controlling. The District Court thus held that Alpine School District did not waive the timeliness issue because it was not a "distinctly made" waiver. (Ruling, at 11).

But notwithstanding Alpine School District's assertion that the timeliness issue was not determinative, and its failure to assert the defense in its pleadings, the District Court acted on

its own motion and ruled as a matter of law that Mr. Crittenden was not entitled to early retirement benefits because he did not make a timely application. Thus, the District Court's decision that the timeliness issue is controlling was in error.

C. "Type of Administrator" for Whom the Benefits Were Meant

The District Court found that, ancillary to the timeliness issue, the reason Mr. Crittenden was not entitled to early retirement benefits was that because of his termination for cause, he was not the "type" of administrator for whom the early retirement benefits were designed. Mr. Crittenden made it clear to the District Court that no language existed in the school district policy which expressly precludes him from receiving early retirement benefits otherwise available to him. The policy does not say that early retirement benefits are not available to persons who are terminated for cause. The policy simply does not address that issue.

While in some cases specified misconduct by an employee may result in forfeiture of pension or retirement benefits, especially where a contractual retirement provision states that an employee discharged for dishonesty is not entitled to receive any payment from the fund, no such contractual provisions exist either in Alpine School District policies or in the Utah Code. In the event of any ambiguity of interpretation of the contract, the language of the pension contract should be liberally construed in favor of the

pensioner. Driggs v. Utah State Teachers Retirement Board, 142 P.2d 657 (Utah 1943).

But while no part of the Alpine School District policy provides for denial of early retirement benefits to employees who are terminated for cause, Alpine School District policy provisions do provide for the distribution of early retirement benefits to administrators who have met one of the following criteria:

- 1.3.1 Have accumulated 30 years of educational service in Alpine School District and choose to retire early (prior to the sixty-fifth birthday); or
- 1.3.2 Have completed immediately prior to the request for early retirement a minimum of ten years professional experience in Alpine School District, be at least sixty years of age, and not have reached the sixty-fifth birthday; or
- 1.3.3 Have attained at least 30 years of service in Utah and have at least 15 years of service in Alpine School District.

(Alpine School District Policy No. 4752.1.3.1-3). Mr. Crittenden met all three of those criteria, and by the language of the policy, was, in fact, the type of administrator for whom the benefits were meant.

In addition, Mr. Crittenden is currently collecting State of Utah retirement benefits as a result of his 33 years of service to

Alpine School District. There is little logic to Alpine School District's denial of early retirement benefits to Mr. Crittenden, where the State of Utah currently grants Mr. Crittenden retirement benefits based upon the same criteria.

The District Court, however, ruled that Mr. Crittenden "is not the type of administrator for whom this policy was implemented." (Ruling, at 13). Again, the District Court, on Summary Judgment Motion, must construe all facts in a light most favorable to the non-moving party--in this case, Mr. Crittenden. (Brown v. Weis, 871 P.2d 552, (Utah App. 1994)).

The District Court admitted that Mr. Crittenden did not assert his motivation for seeking early retirement, and that he did not state that he sought early retirement because of health problems, the work had become more difficult, or because he wanted to get away from the daily grind. (Ruling, at 13). At the same time, the District Court did impute to Mr. Crittenden a motivation for seeking early retirement benefits out of a desire "to hang on to some benefit at a time when he was suspended and his termination was imminent." (Ruling, at 13). Such a construction of the facts was not an inquiry as to whether a reasonable jury faced with the evidence presented could return a verdict for Mr. Crittenden, but was, rather, an outright weighing of the facts by the District Court, and was therefore in error. See W.M. Barnes Co. v. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981).

D. Lack of Procedural Due Process Prior to Deprivation of Early Retirement Benefits

The District Court's imputation of motivation to Mr. Crittenden demonstrates yet another difficulty in the Court's decision to uphold denial of Mr. Crittenden's early retirement benefits. Mr. Crittenden's early retirement benefits are a protected property interest. Throckmorton v. Throckmorton, 767 P.2d 121, (Utah App. 1988); Backman v. Bateman, 263 P.2d 561, (Utah 1953)). Thus, prior to any deprivation of those benefits, Mr. Crittenden was entitled to some kind of hearing to satisfy the procedural due process requirements of both the Utah and federal constitutions. Alpine School District makes no claim that it allowed Mr. Crittenden any hearing; rather, Mr. Crittenden applied for the benefits prior to the effective date of his termination, and was summarily denied those benefits without the benefit of any hearing whatsoever.

E. Judicial Legislation

The decision to deny Mr. Crittenden his contractually vested rights to early retirement benefits was based squarely upon the whim and caprice of district administrators. No policy provisions gave the administrators guidelines to decide as they did. The District Court erred in interpreting the policy, absent language in the district policy itself, so as to deny Mr. Crittenden early retirement benefits.

Regardless of whether the District Court saw the policy as a contract or as a governing and regulating instrument, it is the

function of the District Court to construe the policy as it is written, not as it could or might have been written. (See Hoth v. White, 799 P.2d 213, 217 (Utah App. 1990) (holding that the court "will not rewrite a contract to alleviate a contracting party's mistake, but will construe it according to its terms as it is written."); American States Ins. Co. v. Utah Transit, 699 P.2d 1210, 1213-14 (Utah 1985) (Zimmerman, J. concurring) (An omission may simply reflect a legislative oversight; however, the statute as written is the statute the court must construe: "If the current law does not accurately reflect the intent of its makers, changes . . . should be addressed to the legislature."); see also Transp. Auth. v. Transp. Auth. Retirement Bd., 493 N.E.2d 848, 852 (Mass. 1986) (holding that it is the function of the court to construe the law as written, "and an event for which no provision has been made does not justify judicial legislation.")).

The fact that under Alpine School District policy employees are not subject to forfeiture of early retirement benefits in case of termination for cause, whether through oversight or inadvertence by the makers of the policy, does not justify stretching the words of the school district policy in order to accomplish a result not expressed or intended by that policy. An event or contingency for which no provision in the policy has been made, such as the event of Mr. Crittenden's termination, does not justify judicial legislation by the District Court. The District Court's decision was therefore in error.

CONCLUSION

Mr. Crittenden has been denied his early retirement which have considerable value in terms of health and accident insurance and a regular cash income, because he used a school district purchase order to purchase approximately \$650.00 worth of automotive goods, an activity which was common and acceptable among school district employees. Rather than matching the infraction with a proportional penalty, Alpine School District has disregarded constitutionally guaranteed procedural due process to which Mr. Crittenden is entitled, both in deprivation of his employment and in his early retirement benefits. The judgment of the District Court must be reversed, if not in whole, then in part.

DATED this 17th day of July, 1997.

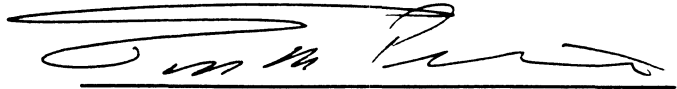


DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 17th day of July, 1997.

J. Mark Ward
Assistant Attorney General
160 East 300 South, #600
P. O. Box 140856
Salt Lake City, UT 84114

A handwritten signature in black ink, appearing to read "J. Mark Ward", is written over a horizontal line.

J:\DRP\CRITT.FIN

APPENDIX A

DON R. PETERSEN (2576), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 20,838

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

<p>JIM F. CRITTENDEN,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ALPINE SCHOOL DISTRICT,</p> <p>Defendant.</p>	<p>PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT</p> <p>Case No. 930400025 Hon. Guy R. Burningham</p>
---	--

COMES NOW the plaintiff and submits the following interrogatories to the defendant to be answered in writing, under oath, by an officer of the defendant, in accordance with Rule 33 of the Utah Rules of Civil Procedure.

1. Describe the contract referred to in the Third Defense of defendant's Answer, specifically identifying the contract; stating whether it is an oral contract or a written contract; the date that it was entered into between the parties; who executed the contract on behalf of the defendant.

22. Set forth specifically the manner in which the plaintiff did not faithfully perform all duties assigned to him as alleged in paragraph 11 of plaintiff's Complaint and denied by the defendant.

23. Set forth the manner in which the defendant allegedly followed the provisions of Utah Code Ann. § 53A-8-104, as alleged in paragraph 14 of plaintiff's Complaint.

24. Set forth the manner in which the plaintiff did not meet the requirements set forth in § 49-2-802, Utah Code Ann., as alleged in paragraph 20 of plaintiff's Complaint and denied by the defendant.

25. Set forth all facts upon which defendant relies to substantiate its denial of paragraph 21 of plaintiff's Complaint, wherein it is alleged that the defendant has failed and refused to allow the plaintiff to apply for early retirement, which allegation the defendant has denied.

26. State whether or not the plaintiff has, in fact, filled out a form for early retirement.

27. If the answer to the preceding interrogatory is in the affirmative, set forth the date upon which the application for early retirement was filled out by the plaintiff and the date that it was placed in the plaintiff's file with the district offices of defendant.

28. State whether or not the defendant has ever allowed its employees to use district resources and telephones to make long distance telephone calls for which the employees were allowed to reimburse the district for said expenses.

APPENDIX B

JAN GRAHAM - 1231
Attorney General
J. MARK WARD - 4436
Assistant Attorney General
Attorney for Alpine School District
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1650

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JIM F. CRITTENDEN,
Plaintiff,

v.

ALPINE SCHOOL DISTRICT,
Defendant.

:
:
: **ANSWERS TO PLAINTIFF'S FIRST**
: **SET OF INTERROGATORIES**
:
:
:

:
:
:
: Civil No. 930400025
:
: Judge Burningham
:
:
:

Defendant answers plaintiff's first set of
interrogatories as follows:

Interrogatory No. 1: Describe the contract referred to
in the Third Defense of defendant's Answer, specifically
identifying the contract; stating whether it is an oral contract or
a written contract; the date that it was entered into between the
parties; who executed the contract on behalf of the defendant.

Answer to Interrogatory No. 1: Written materials
evidencing the contract between the parties include the actual
written contractual documents signed and executed each year between

Answer to Interrogatory No. 25: Defendant never stopped plaintiff from applying for early retirement. Plaintiff has failed to prove otherwise. Without waiving its position as to whether plaintiff was entitled to so-called early retirement, defendant, through Assistant Superintendent Dr. Susan Stone, sent plaintiff, because he specifically requested them, the forms that constitute an employee's application for early retirement. Also, the District made it clear to plaintiff that it would cooperate in any way possible to facilitate Mr. Crittenden's drawing out his normal state retirement from the state retirement office. However, it was the position of the District that plaintiff did not qualify for the District's early retirement policy since his employment ceased as a result of a job action initiated against him by the District.

Interrogatory No. 26: State whether or not the plaintiff has, in fact, filled out a form for early retirement.

Answer to Interrogatory No. 26: As indicated in the preceding interrogatory, the appropriate forms to apply for such early retirement were requested by plaintiff; the defendant, through Assistant Superintendent Stone, mailed these forms to the plaintiff; and the forms were never sent back to Dr Stone's knowledge. However, this was not dispositive of the District's decision to deny plaintiff's request to participate in the District early retirement program. The plaintiff, by himself and through his attorney, communicated to defendant his desire to participate in the District early retirement program, and the District was well enough aware of this desire. Defendant's denial of plaintiff's

participation in this early retirement program was not due to any imagined irregularity with respect to whether the forms were properly filled out, and defendant objects to and deprecates any insinuation on the part of the plaintiff to suggest that defendant denied plaintiff early retirement due to a clerical oversight in the filling out of forms. As communicated over and over to plaintiff and his attorney by defendant and its attorney in 1991, plaintiff failed to qualify for district early retirement because his employment was involuntarily terminated due to criminal acts.

Interrogatory No. 27: If the answer to the preceding interrogatory is in the affirmative, set forth the date upon which the application for early retirement was filled out by the plaintiff and the date that it was placed in the plaintiff's file with the district offices of defendant.

Answer to Interrogatory No. 27: See the answer to the preceding interrogatory.

Interrogatory No. 28: State whether or not the defendant has ever allowed its employees to use district resources and telephones to make long distance telephone calls for which the employees were allowed to reimburse the district for said expenses.

Answer to Interrogatory No. 28: In the past the District's policy in this regard is that employees keep track of their personal long distance calls on a log and then periodically reimburse the district for the cost of such calls. In recent years, some schools in the District have gone to a policy that requires employees to use their own personal long distance credit

APPENDIX C

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JIM F. CRITTENDEN,)	CIVIL NO. 930400025
Plaintiff,)	DEPOSITION OF:
vs.)	JIM F. CRITTENDEN
ALPINE SCHOOL DISTRICT,)	Held March 25, 1996
Defendant.)	REPORTED BY:
)	RENEE L. STACY, CSR, RPR

Deposition of JIM F. CRITTENDEN, taken on behalf of the Defendant, at 100 East 300 South, Sixth Floor, Salt Lake City, Utah, commencing at 9:05 a.m. on March 25, 1996, before RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the State of Utah, pursuant to Notice.

• • • •

March 25, 1996
9:05 a.m.

PROCEEDINGS
JIM F. CRITTENDEN

called as a witness at the instance and request of the Defendant, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WARD:

Q Good morning, Mr. Crittenden. Would you state your full name for the record, please.

A My given name is Jinnie Frazier Crittenden.

Q All right. Mr. Crittenden, I had served on you through your counsel a Notice of Deposition and a request to produce documents at the taking of this deposition and I'd like to go through that, first of all, and see what you have pursuant to that request. Maybe your counsel can handle that, but -- do you have that, counsel, or --

MR. PETERSEN: Sure. Do you want to go off the record on this?

MR. WARD: Let's go off for a minute and

3

APPEARANCES

FOR THE PLAINTIFF: DON R. PETERSEN
Attorney at Law
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84606

FOR THE DEFENDANT: J. MARK WARD
Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
160 East 300 South
Sixth Floor
Salt Lake City, UT 84111

INDEX
EXAMINATION

BY MR. WARD. 3
BY MR. PETERSEN. 170

EXHIBITS

Defendant's	Marked	Discussed
1 6-5-81 handwritten letter	66	67

REQUESTS OF COUNSEL - BY MR. WARD

Page 137, line 1 Date of last paycheck

2

1 see what you've got and then we'll make a record.

2 (Discussion off the record.)

3 MR. WARD: Let's go back on the record.

4 Q Mr. Crittenden, your counsel has just
5 handed me various documents which purport to be in
6 response to defendant's request to produce documents
7 at the taking of this deposition. To your knowledge,
8 sir, are these documents which your counsel has just
9 handed me, are these all the documents that you have
10 in your possession that is responsive to these
11 requests to produce?

12 A Well, sir, without going through each one
13 specifically -- I would have to look at them
14 specifically so that I knew possibly which one you
15 referred to or whatever, you know. There's quite a
16 pile there.

17 Q Have you had an opportunity to review the
18 request to produce documents that I have referred to?

19 A Yes, sir.

20 Q Do you recall that there were
21 approximately -- well, there are exactly 32 requests
22 that were set forth in writing. Did you have a
23 chance to review those 32 written requests?

24 MR. PETERSEN: Maybe I can just clarify.
25 They're the ones that we could find at this time. We

4

1 A No, it isn't.
 2 Q Why not?
 3 A Because -- for several things. Number one,
 4 I guess what you do for one, you ought to do for all,
 5 and you can't do that. That isn't feasible. It was
 6 done for Dave Beal because he happened to be a friend
 7 of mine. I knew what I was doing at the time that
 8 took place, with the understanding it would be paid
 9 back. I didn't try to take advantage of the
 10 district. Dave Beal is as honest as the day is long.
 11 Q But as a general matter, you would agree
 12 that --
 13 A It was wrong.
 14 Q It's just not good policy?
 15 A No.
 16 Q It's not right to be -- no matter how
 17 trustworthy the individual is, it's not appropriate
 18 to be using district resources that way?
 19 A It isn't.
 20 Q Let me see if I have any more questions
 21 about this Dave Beal matter. We'll return to a
 22 question I touched on earlier. When I asked it, it
 23 kind of got us into the Dave Beal subject matter,
 24 but are you saying that the district's policy was
 25 such that you -- that people who use this kind of --

45

1 Then, with the change of administration --
 2 Q Which was when, roughly?
 3 A At the time I believe when Clark Cox came
 4 in as superintendent.
 5 Q Okay.
 6 A The district said no more purchases out of
 7 the warehouse.
 8 Q The district changed their policy?
 9 A Yes.
 10 Q Did you have a problem with that change?
 11 A No. No.
 12 Q Okay.
 13 A No, I had no problem with it.
 14 Q Okay. Go ahead.
 15 A And then, see, there was a time -- when I
 16 took this job in transportation, the mechanics could
 17 bring their vehicles into the bus garage, service
 18 them, keep track of the oil they put back in them,
 19 pay for the filter, and they're on their way. Really
 20 all they used was the hoist and the electricity if it
 21 was after hours.
 22 Then with the change of people in
 23 personnel, with Dr. Lloyd, then to Jack McKelvey,
 24 when Jack came in, it was -- you couldn't use any
 25 district resource, period.

47

1 strike that.
 2 Are you saying that people who use district
 3 property like this for their own use, are you saying
 4 that, by virtue of some policy of the district, that
 5 they have a right not to be terminated if they're
 6 caught?
 7 A I'm saying that they ought to be consistent
 8 in their policy.
 9 Q Well, let's understand, first, what their
 10 policy is. Okay. You're telling me -- I think what
 11 you're telling me is they're not being consistent in
 12 their policy. What do you understand their policy to
 13 be?
 14 A Okay. Let's take 34 years. There was a
 15 time, up until just a few years ago, when you could
 16 go to the warehouse and buy anything the warehouse
 17 stocked and it would come out of your paycheck.
 18 Q You could buy it and they would deduct it
 19 from your paycheck?
 20 A Yes. You could pick it up, order it, and
 21 it would come out of your paycheck. That went on for
 22 years. Having purchased a power saw, steel for pipe
 23 panels for a fence -- I'm just thinking of a few
 24 things that I purchased there. Fertilizer, water
 25 softener salt, a lawnmower.

46

1 Q So that's a rule that came when Jack
 2 McKelvey came in?
 3 A I believe, yes, when Jack McKelvey came in.
 4 Q When did that happen. Just roughly?
 5 A Let's see. How long has he been there? I
 6 guess he's been there since around '88 or '89,
 7 something like that.
 8 Q In any event, to your recollection, that
 9 rule came out when McKelvey came in?
 10 A Yes, uh-huh.
 11 Q Okay.
 12 A Because, see, maintenance people were
 13 rebuilding engines, doing things in their area,
 14 according to the hearsay of mechanics. I don't pay
 15 any attention to that hearsay, but it was happening
 16 in my department. I saw vehicles in there and I
 17 didn't think the guys were really taking advantage,
 18 but I understood the --
 19 Q The rule?
 20 A The rule.
 21 Q I think you just answered my question when
 22 you said I understand the rule, but I'll ask it,
 23 anyway. So did you have a problem with this rule
 24 that came out of the district when McKelvey came in?
 25 A No, sir, I didn't. I didn't have a problem.

48

1 Q And did you seek to try to clean things --
 2 well --
 3 A We did.
 4 Q Yeah. Did you try to clean things up?
 5 A Absolutely, we did.
 6 Q In other words, you tried to clear up this
 7 problem of personal vehicles inside the garage?
 8 A I did. I went and called a meeting of my
 9 mechanics and we told them what the new policy was,
 10 and as far as I know, to this day they adhere to it.
 11 Q You let them know that that was the policy?
 12 A Certainly.
 13 Q You told them you supported the policy?
 14 A You bet.
 15 Q You told them that there would be action
 16 taken against them if they violated the policy?
 17 A No, I didn't tell them that.
 18 Q Well, did you put any teeth behind your --
 19 what teeth was there behind your ultimatum? Just
 20 your authority, your statement?
 21 A I don't have to threaten people.
 22 Q Well, okay. So, what? Just the authority
 23 of -- you're the boss, you made the statement, and
 24 that's authority enough? I mean, that's fine if
 25 that's the case. I just want to know.

49

1 that he used a purchase order for his own personal
 2 item after this came down on me. Went to an
 3 assistant superintendent. He was told get it paid
 4 for, and nothing happened to him.
 5 Q What principal was that?
 6 A It was Bill Delaney. He was at Pleasant
 7 Grove High School at the time.
 8 Q When did this occur?
 9 A I can't tell you the dates on it. Bill
 10 will testify to it. I've talked to Bill about it.
 11 Q He was principal where?
 12 A At Pleasant Grove high school at the time.
 13 He's now the principal at Mountain View High School.
 14 Q This happened while you were employed?
 15 A Uh-huh. So it was probably around in 1990,
 16 possibly.
 17 Q All right.
 18 A Maybe the first part of '91.
 19 Q All right. So I see this -- I'm trying to
 20 organize all this, and the way I see it is you're
 21 saying that there are instances where people have
 22 used property, district property in one form or
 23 fashion, and whatever has happened to them, they have
 24 not been terminated?
 25 A Right.

51

1 A Certainly. I asked people to do things;
 2 they would do it. I did not have to threaten
 3 anyone.
 4 Q Okay. That was the law and you laid it
 5 down, right?
 6 A My people knew, bus drivers. You know, the
 7 safety of kids was always a concern for me.
 8 Q But as far as people having their personal
 9 vehicles in there and using things for their personal
 10 gain or their personal autos or whatever, you told
 11 them that had to stop, right?
 12 A Absolutely.
 13 Q Okay. So then was that your understanding
 14 of the policy?
 15 A Uh-huh.
 16 Q So I guess that brings me full circle then
 17 to my question -- back to my original question, which
 18 is: What would there be in the district's policy
 19 that would give you the right or anybody the right
 20 who misuses district property to not be terminated if
 21 they're caught?
 22 A Me or anyone else?
 23 Q Sure.
 24 A I would like to be treated like everyone
 25 else. I have a principal that will testify today

50

1 Q Okay. Understanding that -- and we'll go
 2 into all those instances in a minute.
 3 A Okay.
 4 Q I want to know every instance you're aware
 5 of.
 6 A Okay.
 7 Q And I'm sure some of these documents relate
 8 to it, plus you may just have your recollection,
 9 like this Delaney. You may not have any
 10 documentation, but you have just your recollection.
 11 But setting that aside for a minute, understanding
 12 your contention, which is that there are some
 13 district employees who have used district property
 14 and have not been terminated, my question, sir, is
 15 this: Are you aware of any policy, district
 16 policy -- and let's start with written policy, okay?
 17 Are you aware of any written policy which gives
 18 someone like that, someone who is caught misusing
 19 district property for their own personal gain or
 20 whatever, are you aware of any written policy which
 21 would give that person the right not to be
 22 terminated? And if you're not, fine. I just want to
 23 know.
 24 A No.
 25 Q Okay. Let's shift the question a little

52

1 bit. Are you aware of any written letters or other
2 forms of written communication from the district or
3 anybody on the district level from which you could
4 infer that persons who get caught using district
5 property for their own use have the right not to be
6 terminated? I'm asking the same question that I'd
7 ask with respect to policies, but I'm now shifting to
8 any kind of written communication, other than a
9 written policy.

10 A Not that I can recall of. I don't remember
11 anything like that where it said they'd be -- what
12 you're saying, where you're saying that they would be
13 terminated.

14 Q No. I'm saying that -- okay. You're
15 saying -- you're telling me, Mr. Crittenden, that
16 you're aware of some people who have used district
17 property for their own use, and whatever the district
18 did to them, they did not terminate them.

19 A Correct.

20 Q All right. And I asked you a minute ago,
21 just to make sure you understand the question,
22 whether you're aware of any policy that would protect
23 a person like that, any district written policy that
24 would say that if a person is caught using district
25 property for their own use, they should not be

53

1 people who get caught using district property for
2 their own use should not be terminated?

3 I'm just shifting the question a little bit
4 now to -- we already asked the question about
5 policies. Now I'm just asking a question about
6 letters or memoranda or bulletins. Are there any
7 such written communications that would give a person
8 the right not to be terminated if they were caught
9 using district property for their own use?

10 A I suppose not.

11 Q Okay. Same question but now I'm going to
12 shift it a little bit differently. Are you aware of
13 any verbal statements by district level people that
14 would give a person the right not to be terminated in
15 the event they were caught using district property
16 for their own use? Notice I'm just shifting the
17 question. I started with policies. Then I started
18 with any written communications. Now I'm talking
19 about any verbal communications.

20 A Yes, I understand. To answer your
21 question, in 34 years, Mark, I never had a problem
22 with Alpine School District, and I don't remember in
23 any of the superintendent's meetings, any of the
24 meetings I ever attended where that specifically was
25 a concern or a problem. I recall no verbalization on

55

1 terminated, that whatever happens to them, they
2 should not be terminated? Are you aware of any such
3 policy?

4 A To answer your question, Mark, it seems to
5 me that the policy ought to say if, in fact, there
6 was a problem, that you would have due process. You
7 could at least have a hearing. I know of no policy
8 like that.

9 Q Okay. But you would agree -- you haven't
10 quite answered my question. And I appreciate your
11 point, and that's something I'll take note of, but
12 let's deal with my question for a minute here. And
13 I'm sorry I can't state it more clearly or more
14 artfully, but I'm going to try it again.

15 Are you aware of any written policy by the
16 school district which says that persons who get
17 caught using district property for their own use
18 should not be terminated?

19 A I can't recall of any policy like that that
20 I'm -- I'm not aware of any.

21 Q Same question, but now I would ask it with
22 respect to any written communications, like bulletins
23 or letters. Are you aware of any bulletins or
24 letters or memoranda or any kind of written
25 communication from the district that would imply that

54

1 that.

2 Q Fair enough. I appreciate that. And
3 thanks for bearing with me on that line of
4 questions. So if I understand your contention -- and
5 that's the purpose of this deposition, for me to
6 totally understand and have it out clear as I can.
7 If I understand your contention, your contention is
8 that you should not have been terminated for using
9 district property for your own personal use because
10 others weren't? Is that your position?

11 A No.

12 Q What's your position?

13 A My position is, at this time, Mark, I
14 earned my early retirement. I gave then 34 years.
15 And I love my job. I love people in that district
16 where I live. I'm very well known in that area. My
17 position is my family and I deserve that early
18 retirement, especially the insurance that they took
19 away from me.

20 Q The medical insurance?

21 A Yes, sir. Now, whether or not the powers
22 that be can administer their policies and do it
23 equitable for the number of employees they have,
24 that's their problem. My position is that before I
25 was terminated I deserved a hearing. I received no

56

1 hearing.

2 It wasn't a secret what they, the Board of
3 Education, fired me for from the standpoint of what I
4 did. It was not a secret, the items outlined in
5 Susan Stone's letter why they let me go and what I
6 was terminated for. We have discussed one of them at
7 length, Dave Beal's situation, I believe.

8 The other, there is a statement here from
9 Al Vuksinick's business that was an error, a billing
10 error. The other one they have is my use of a
11 purchase order to Rick Warner Ford, is really the
12 reason they let me go. I had a mechanic with me. He
13 was with me when I took the purchase order back to
14 the desk, and I was terminated for that.

15 Q Well, let's go back to my question. Your
16 contention, then, goes just to early retirement?

17 A And damages now.

18 Q Well, are you saying you had a right not to
19 be terminated?

20 A I'm saying I had a right to a hearing that
21 I was denied. I was not given a hearing. I was
22 fired on the spot, after 34 years, and I'll defy you
23 to find a person down there that said I wasn't a
24 productive employee for 34 years. I don't care what
25 area you go to, from the time I coached, that I

57

1 the school district?

2 A It was known to the world.

3 Q Okay. Which would include the school
4 district?

5 A Certainly.

6 Q Okay. Well, so -- I realize, you know, you
7 don't know the -- you may not appreciate the fine
8 legal distinctions here that perhaps your counsel and
9 I would delve into, but I'm trying to understand what
10 the basis -- what the bone of your contention is, if
11 you will, and what I'm hearing is that the bone of
12 your contention is that you weren't given a hearing.

13 A I wasn't, no, sir.

14 Q Let's talk about the basic question,
15 though, of whether what you did and what you pled to,
16 which was use of district property -- well, we
17 won't -- I won't try to characterize what you pled
18 to, because you said you can't remember, but let's
19 approach it again.

20 When we talk about what you did, the use of
21 the property, would you agree that, when we talk
22 about district policy, as a matter of policy, that
23 that's an offense which is the basis for
24 termination?

25 MR. PETERSEN: I'm sorry. I didn't follow

59

1 taught, that I was a vice principal till I went to
2 the district office.

3 Q And what would you have done if you had a
4 hearing?

5 A I would liked to have explained to those
6 people why I used the purchase order, the way it came
7 about, and have a mechanic testify as to what was
8 said to him when I picked the stuff up and as I
9 returned it to the garage.

10 Q Didn't you plead guilty in the criminal
11 prosecution?

12 A On a reduced charge.

13 Q What did you plead to?

14 MR. PETERSEN: If you remember.

15 A I can't remember the -- how it was stated,
16 Mark. Maybe Don can look at it.

17 Q (BY MR. WARD) Are you aware that the fact
18 of your criminal investigation and your ultimate plea
19 were facts that were known to the school district?

20 A Huh-uh. I didn't know -- I didn't know
21 anything was even going on as far as an
22 investigation.

23 Q What I mean is the ultimate outcome of that
24 investigation, which was a plea on your part, I mean,
25 were you aware that that was a fact that was known to

58

1 that question. What was that again, now?

2 Q (BY MR. WARD) Would you agree that what
3 you did here, the use of the property that you did do
4 here, that you did carry out, that that is a basis --
5 as a matter of district policy, that is a basis for
6 the district to terminate your employment?

7 MR. PETERSEN: Now, are we talking
8 specifically about the Susan Stone letter? Which
9 instance are we talking about?

10 MR. WARD: We're talking about the totality
11 of what he did here that was -- you mentioned three
12 incidents, right?

13 MR. PETERSEN: They're the ones that are
14 mentioned in Susan Stone's letter.

15 MR. WARD: Right. Well, okay. Fair
16 enough. Let's go to Susan Stone's letter.

17 The reasons for termination, she says, are
18 specific actions which involve your misuse of
19 district resources to pay for repairs to your
20 personal vehicle, a repair on a friend's personal
21 vehicle and repairs on your son-in-law's vehicle.
22 You have admitted to the first two allegations.

23 Let's stop right there. First of all, is
24 that correct? You did admit to the first two
25 allegations?

60

1 A How do you put a dollar sign on ten,
2 fifteen years of a person's life?
3 Q Well, I'm assessing economic loss right
4 now, sir. You know, I'm just -- anyway -- okay. I
5 think I have an idea of where you're coming from.
6 A Let's talk about -- you talk about
7 economics and insurance, and my wife's colitis
8 because of nerves, and we're talking economics,
9 right?
10 Q Well, you're talking the economic value of
11 the health insurance that you lost. Does she have
12 insurance through her work?
13 A She's picked me up, but her insurance isn't
14 nearly as good as the district's.
15 Q Are you still in that gap before you can
16 get Medicare or Medicaid or whatever?
17 A Yeah.
18 Q Are you?
19 A Uh-huh.
20 Q What about -- isn't there some kind of a
21 retirement benefit that includes a health benefit as
22 part of your regular retirement or not?
23 A From where?
24 Q I'm asking.
25 A I don't think so. Not that I know of.

169

1 allowed or had a policy, whatever, that that could be
2 done?
3 A Yes.
4 Q Okay. Now, were there any other incidents
5 where you used district resources to pay repairs for
6 a personal vehicle, other than that one?
7 A No.
8 Q Okay. She says the next reason --
9 MR. WARD: Excuse me. Mean meaning your
10 own personal vehicle?
11 MR. PETERSEN: Yes.
12 Q She states the next reason, a repair of a
13 friend's personal vehicle. Now, you testified as to
14 parts that were purchased for David Beal.
15 A Yes, sir.
16 Q Were there any other friends' vehicles,
17 aside from the one of David Beal you just testified
18 to?
19 A No, sir.
20 Q Now, he was an employee of the district,
21 was he not?
22 A Yes.
23 Q And he was allowed to pay it back, was he
24 not?
25 A Yes, he was.

171

1 MR. WARD: Okay. Just one minute here.
2 (Time lapse.) Thanks for your time. I have no
3 further questions.
4 MR. PETERSEN: I just have a couple
5 follow-up questions. Can I get Susan Stone's letter
6 there?
7 MR. WARD: Oh, yeah. The June 5th letter?
8 MR. PETERSEN: Yes.
9 EXAMINATION
10 BY MR. PETERSEN:
11 Q Jin, referring to Dr. Susan Stone's letter
12 to you of June 5th, 1991, she states in the second
13 paragraph, "The reasons for termination are specific
14 actions which involve your misuse of district
15 resources to pay repairs to your personal vehicle."
16 Now, you've testified as to an incident that happened
17 when you bought some parts at Rick Warner Ford; is
18 that true?
19 A Yes, sir.
20 Q And you used those parts and the district
21 paid for them?
22 A At the time.
23 Q And you reimbursed the district?
24 A Yes, sir.
25 Q And it's your position that the district

170

1 Q And he was not terminated, was he?
2 A No. He's still working.
3 Q Then the third reason, she says, "And
4 repairs to your son-in-law's vehicle." Now, you've
5 testified as to your son-in-law?
6 A Yes, sir.
7 Q And there was an improper billing?
8 A That's correct.
9 Q Okay. Were there any other incidents,
10 other than this one that you testified to, involving
11 a son-in-law?
12 A None.
13 Q That son-in-law or another son-in-law?
14 A No, sir.
15 Q So they're the three incidents; is that
16 correct?
17 A Yes.
18 Q Are you aware of anything else that she
19 refers to?
20 A No, sir.
21 MR. PETERSEN: Okay. That's all.
22 MR. WARD: Thanks.
23 (Whereupon the taking of the deposition
24 was concluded at 1:18 p.m.)
25

172