

1997

# Jim F. Crittenden v. Alpine School District : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT

IN THE UTAH COURT OF APPEALS

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JIM F. CRITTENDEN,

:

.A10

DOCKET NO. 970091-CA

Plaintiff/Appellee, :

Case No. 970091-CA

v.

:

ALPINE SCHOOL DISTRICT,

:

Priority No. 15

Defendant/Appellee. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM ORDER AND JUDGMENT IN THE FOURTH  
JUDICIAL DISTRICT COURT IN AND FOR UTAH  
COUNTY, STATE OF UTAH, THE HONORABLE ANTHONY  
W. SCHOFIELD, PRESIDING

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APPELLEE DOES NOT REQUEST ORAL ARGUMENT OR PUBLISHED OPINION

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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JIM F. CRITTENDEN, :  
Plaintiff/Appellee, : Case No. 970091-CA  
v. :  
ALPINE SCHOOL DISTRICT, : Priority No. 15  
Defendant/Appellee. :

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
ISSUES PRESENTED UPON APPEAL AND STANDARDS OF APPELLATE REVIEW..	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....	2
STATEMENT OF THE CASE.....	3
A.    NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.....	3
B.    STATEMENT OF RELEVANT FACTS.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I.    THE SCHOOL BOARD'S PRETERMINATION PROCEDURES GAVE PLAINTIFF ALL THE DUE PROCESS PROTECTION TO WHICH HE WAS ENTITLED.....	7
II.   PLAINTIFF IS NOT ENTITLED TO EARLY RETIREMENT BECAUSE HE DID NOT MAKE TIMELY APPLICATION FOR IT.....	13
III.  PLAINTIFF DOES NOT HAVE A VESTED RIGHT OR PROTECTIBLE PROPERTY INTEREST IN EARLY RETIREMENT BENEFITS UNDER POLICY NO. 4752.....	20
CONCLUSION.....	26
STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION.....	27

## TABLE OF AUTHORITIES

Page

### CASES

<u>Auerbach's, Inc. v. Kimball,</u> 572 P.2d 376 (Utah 1977) .....	22
<u>Brown v. Weis,</u> 871 P.2d 552 (Utah App. 1994) .....	2
<u>Cleveland Bd. of Educ. v. Loudermill,</u> 470 U.S. 532 (1985) .....	7, 9, 11-13
<u>Driggs v. Utah State Teachers Retirement Bd.,</u> 105 Utah 417, 142 P.2d 657 (1943) .....	23
<u>Ellis v. Utah State Retirement Bd.,</u> 757 P.2d 882 (Utah App. 1988), <u>aff'd</u> , 783 P.2d 540 (Utah 1989) .....	23
<u>E.M. v. Briggs,</u> 922 P.2d 754 (Utah 1996) .....	25
<u>Espinal v. Salt Lake City Bd. of Educ.,</u> 797 P.2d 412 (Utah 1990) .....	24
<u>Higgins v. Salt Lake County,</u> 855 P.2d 231 (Utah 1990) .....	2
<u>Horgan v. Indus. Design Corp.,</u> 657 P.2d 751 (Utah 1982) .....	12
<u>Hunter v. Hunter,</u> 669 P.2d 430 (Utah 1983) .....	14
<u>Kelly v. Smith,</u> 764 F.2d 1412 (11th Cir. 1985), <u>overruled on other</u> <u>grounds by McKinney v. Pate</u> , 20 F.3d 1550 (11th Cir. 1994) .....	11
<u>LeBaron &amp; Assocs. v. Rebel Enters.,</u> 823 P.2d 479 (Utah App. 1991) .....	24
<u>Plateau Mining Co. v. Div. of State Lands and Forestry,</u> 802 P.2d 720 (Utah 1990) .....	16
<u>Powell v. Mikulecky,</u> 891 F.2d 1454 (10th Cir. 1989) .....	9-10, 12-13
<u>Schofield v. Zion's Coop. Mercantile Inst.,</u> 85 Utah 281, 39 P.2d 342 (1934) .....	22-23

	Page
<u>Soter's, Inc. v. Deseret Fed. Sav. &amp; Loan Ass'n,</u> 857 P.2d 935 (Utah 1993).....	14, 16
<u>State v. Montoya,</u> 937 P.2d 145 (Utah App. 1997).....	18
<u>State v. Webb,</u> 790 P.2d 65 (Utah App. 1990).....	24
<u>White v. Deseelhorst,</u> 879 P.2d 1371 (Utah 1994).....	18

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 78-2a-3 (1996).....	1
Utah R. Civ. P. 56.....	2
Alpine Sch. Dist. Policy No. 4752.....	5, 13, 20-22, 24-26

#### OTHER AUTHORITIES CITED

Black's Law Dictionary (6th ed. 1990).....	20-21
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Defendant/Appellee. :

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BRIEF OF APPELLEE

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**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an appeal from the district court's final order granting summary judgment for defendant, denying summary judgment for plaintiff, and dismissing the case. Jurisdiction lies within this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996), as the appeal was poured over from the Supreme Court of Utah by order dated February 10, 1997.

**ISSUES PRESENTED UPON APPEAL AND STANDARDS OF APPELLATE REVIEW**

1. Did the district court correctly hold that plaintiff's due process rights were not violated by the manner of his pretermination hearing?

This issue was raised in the amended complaint's third cause of action (R. 570-69, ¶¶ 16-19).<sup>1</sup> The court granted summary

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<sup>1</sup>The district court paginated the record in this case forward from the last page of the original complaint, thereby numbering each document backward. For this reason, references to sequential pages of the record will run from higher to lower numbers.

judgment for the school district on this issue in its September 5, 1996 ruling (R. 589-85).

Standard of Review: Under Utah R. Civ. P. 56,

[s]ummary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Because entitlement to summary judgment is a question of law, no deference is due the trial court's determination of the issues presented. However, [the reviewing court] may affirm a grant of summary judgment on any ground available to the trial court, even if it is not one relied on below.

Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993)

(citations omitted). Moreover, "[t]his nondeferential standard of review also applies to the threshold issue of whether there are no material issues of fact such that summary judgment is in order." Brown v. Weis, 871 P.2d 552, 559 (Utah App. 1994).

2. Did the district court correctly conclude that plaintiff was not entitled to early retirement benefits?

This issue was raised in the amended complaint's fourth cause of action (R. 569-68, ¶¶ 20-27). The court granted summary judgment for the school district on this issue in its September 5, 1996 ruling (R. 585-82).

Standard of Review: The standard of review for this issue is the same as that cited above.

#### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.



### STATEMENT OF THE CASE

#### A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff, a former employee of defendant, Alpine School District, filed this action in January, 1993, alleging that in terminating his employment for misuse of school district resources, defendant had breached his contract of employment, terminated him in a wrongful manner, denied his right to due process of law, and wrongfully precluded him from early retirement (R. 6-1). After the school district answered the complaint (R. 13-10), plaintiff filed a motion for summary judgment (R. 119-18) supported by a memorandum (R. 129-20) and an affidavit (R. 134-30). The school district also filed a motion for summary judgment (R. 163-62) and supporting memorandum (R. 309-164).

The district court held a hearing on the motions on August 28, 1996 (R. 559, 613-676<sup>2</sup>) at which the court granted plaintiff leave to file an amended complaint (R. 671). The amended complaint was filed on August 30, 1996 (R. 572-66), as was the school district's amended answer (R. 565-61), and a second hearing was held the same day (R. 577; R. 677-704). On September 5, 1996, the district court entered a lengthy ruling granting summary judgment for the school district on all issues (R. 595-80). The court filed a separate order and judgment dismissing

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<sup>2</sup>Unlike the other documents of record, the two hearing transcripts in this case are numbered sequentially from beginning to end.

the action on October 1, 1996 (R. 600-599). This appeal followed (R. 604-03).

**B. Statement of Relevant Facts**

Plaintiff was a long-term employee of Alpine School District who was serving in the administrative capacity of Director of Transportation at the time of his termination (R. 595, ¶¶ 1-2). On June 5, 1991, he met with Assistant Superintendent Gary Keetch, who questioned him about his use of district resources for private benefit (R. 594, ¶ 3). In reply to Mr. Keetch's specific questions, plaintiff acknowledged using district resources to benefit himself and another employee (R. 594, ¶ 5). When asked whether he had used district resources to benefit his son, he replied "that this use of funds was a mistake" (*id.*). At the end of the meeting, plaintiff was directed to go home and await the district's decision on a course of action (*id.*).

Later that day, in a second meeting with Mr. Keetch, plaintiff was provided a letter which he read in Mr. Keetch's presence (R. 594, ¶¶ 6-7). The letter, signed by Susan Stone, another assistant superintendent, advised plaintiff that he was immediately suspended without pay and would be terminated effective fifteen days later (R. 594, ¶ 8; R. 275). The letter further advised plaintiff of the procedure for obtaining a hearing in review of the termination decision (R. 594, ¶ 8; R. 275). Plaintiff sought post-termination review, and a day-long hearing was held on September 23, 1991 (R. 594, ¶ 9). The termination was upheld the following month (R. 593, ¶ 10).

On June 6, 1991, the day after he received the termination letter, plaintiff notified the school district that he wanted to take early retirement under the district's policy no. 4752 (R. 585; R. 274). The request was made after the deadline imposed by the policy (R. 585-84; R. 272).

#### **SUMMARY OF ARGUMENT**

Due process requires that before a public employee is terminated for cause, he must be given oral or written notice of the basis for termination and an opportunity to respond. These measures serve only as an initial check on mistaken decisions, ensuring that there are reasonable grounds to believe the basis to be true. Although plaintiff claims that his due process rights were violated by the school district's pretermination procedures, the undisputed evidence shows otherwise: before the district reached its termination decision, plaintiff met with an assistant superintendent, was questioned about three individual acts of misconduct, admitted to two of them, and asserted an explanation for the third. In a second meeting the same day, he was given a letter which specified the reasons for the termination decision and advised him of his right to post-termination review. Pretermination due process demands no more.

Qualification for early retirement under the school district's policy no. 4752 depends on meeting several requirements. Although, as plaintiff correctly asserts, he had the requisite age and experience to qualify, he did not notify

the district of his request for early retirement until June 6, 1991, more than three months after the policy's mandatory March 1 deadline. The school district denied the request, citing two grounds: the fact that plaintiff did not retire but was, in fact, suspended and under notification of involuntary termination for cause; and plaintiff's failure to comply with the March 1 notification date. While the issue of timeliness was not addressed in the summary judgment memoranda, the court inquired about it in the August 28, 1996 hearing on the summary judgment motions, and it was the primary topic of a second hearing two days later. Therefore, any reliance on the issue by the district court was entirely appropriate. Moreover, because the record evidence supports a determination of untimeliness, this Court could affirm the lower court's decision on the basis of untimeliness even if the timeliness issue had been neither raised nor relied on below.

The district court also found that plaintiff did not establish the applicability of the school district's early retirement policy to employees in his position: under suspension and facing termination. On appeal, plaintiff attempts to escape the court's interpretation of the policy by thrusting the burden on defendants to demonstrate that the policy does not apply in such cases. However, summary judgment requires a party to establish the existence of each element essential to its claim. Plaintiff's failure to show that the policy applies to employees who do not choose to retire but are terminated for cause is, like

his failure to meet the application deadline, necessarily dispositive of his claim.

Because plaintiff has established neither a genuine issue of material fact nor legal error in the decision below, the school district is entitled to affirmance of the district court's summary judgment in its favor.

#### **ARGUMENT**

I. THE SCHOOL BOARD'S PRETERMINATION PROCEDURES GAVE PLAINTIFF ALL THE DUE PROCESS PROTECTION TO WHICH HE WAS ENTITLED.

As plaintiff correctly notes, the United States Supreme Court set out the essentials of pretermination due process in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985): "The 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." The district court concluded that the school district complied fully with these requirements. Plaintiff attacks the court's decision by claiming that genuine issues of material fact preclude summary judgment on this point. However, the undisputed facts fully support the district court's conclusion.

Plaintiff argues that "[i]n 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" (Brief of Appellant at 7). However, his attack is directed not at the

facts themselves but at the legal conclusion the court drew from them. At no point has plaintiff contested the facts relevant to the court's decision: that he was asked whether he had used district resources for his own benefit, and he replied affirmatively; that he was asked whether he had used district resources to benefit another employee, and he replied affirmatively; and that he was asked whether he had used district resources to benefit his son, and he replied "that this use of funds was a mistake" (R. 594, ¶ 5). These admissions are well documented in plaintiff's own words. In a written statement dated June 5, 1991, plaintiff explained:

I've reviewed Invoice No. 67379T--which I picked up myself and am responsible for--also no. 101396.

The material used were [sic] purchased with an Alpine School dist[.] P.O.

The material on P.O[.] No. 67379 was given to a Friend in need--Due to financial problems. He knew nothing about how I obtained it.

The material obtained in P.O. 101396 I had planned to pay for--however due to my oversight--when I had the money--I didn't take care of it. No excuse--I'm responsible.

The material in invoice 64453--was an honest mistake--I'd planned to [] Big A--when billed.

These three matters are my responsible [sic]--I'll re-imburse the dist[.] & take what ever discipline I have coming--No excuses.

R. 280-79. Further, in an affidavit, plaintiff admitted that in a June 5, 1991 meeting that lasted some 15 to 20 minutes (see R. 501, ¶ 3; R. 500, ¶ 6),

Mr. Keetch asked me if I had used a purchase order to buy parts for my personal vehicle, an old Ford Bronco, and I told him yes. He asked me if I had used a couple of purchase orders to help Dave Beal on his personal vehicle, and I told him yes.

R. 500, ¶ 4. Plaintiff's statements, by themselves, show Loudermill's requisites to have been met.

Plaintiff's attempt to distinguish Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989), a case applying the Loudermill standard, is unconvincing. Powell, a fire fighter employed by Bartlesville, Oklahoma, had met with fire chiefs from neighboring jurisdictions to request that they not respond to his own department's requests for mutual aid until after all off-duty Bartlesville firemen had been called in for overtime. When the Bartlesville fire chief was advised of Powell's action, he confronted Powell and asked if he had met with the other fire chiefs, to which Powell responded with the single word, "Yes." Asked if he had requested them to decline signing the mutual aid agreement, he answered, "'[I]n the form that we heard it would be, yes.'" Powell, 891 F.2d at 1455. The fire chief then informed Powell that he was discharged, effective immediately. After a subsequent question regarding the involvement of others, Powell refused to respond further until he consulted an attorney. The Tenth Circuit ruled that this terse exchange was sufficient to satisfy Loudermill. The court also held that Powell's admission of the allegations made disclosure of their evidentiary basis irrelevant and rendered an opportunity for further explanation by Powell meaningless, as it "would not have contributed to the prevention of an erroneous termination." Powell, 891 F.2d at 1459. The pretermination due process given

plaintiff in this case, as shown by the evidence of record, was greater than that accorded in Powell.

Plaintiff claims that Powell's refusal to respond to further inquiries distinguishes Powell from the present case, demonstrating that Powell, unlike plaintiff, was afforded an opportunity to tell his side of the story but chose to end the discussion. However, a close reading of the case does not support plaintiff's contention. After admitting to the questioned conduct, Powell was terminated effective immediately. Only after terminating Powell did the fire chief attempt to elicit additional information that bore on matters other than Powell's own culpability, resulting in Powell's refusal to continue the discussion. As in Powell, plaintiff here was asked about his questionable behavior and given an opportunity to respond. He admitted to two incidents and offered an explanation for the third. This exchange took place in the context of a fifteen-to-twenty minute meeting at the end of which, unlike Powell, plaintiff was not immediately terminated but asked to go home until the district decided on an appropriate course of action. Later that day, plaintiff, again unlike Powell, had a second meeting at which he was given a letter (R. 275) specifying the reasons for the school district's actions and placing him on suspension without pay pending termination in fifteen days. Moreover, the letter advised him of his right to a full post-termination hearing and the procedure for obtaining it. The school district's actions more than fulfilled the purpose of a



pretermination hearing as established by Loudermill: to serve as "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Loudermill, 470 U.S. at 545-46.

Plaintiff's effort to distinguish Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985), overruled on other grounds by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), is also unavailing. Rather than admitting his misconduct--failure to respond to a standby call--Kelly attempted to excuse it by claiming he was not scheduled to work standby, and further refused to work standby duty for the rest of the week despite the direction of his supervisor, whose duties included scheduling standby coverage. The supervisor warned Kelly that refusal to work the scheduled standby would result in his termination, but Kelly declined standby duty and left the worksite. He was subsequently given oral notice of his termination. The Eleventh Circuit held that Kelly's pretermination due process was not violated. Like Kelly, plaintiff in the case at bar was confronted with his misconduct and given the opportunity to deny or excuse it--the precise due process measures that Loudermill demands. That he admitted, rather than resisted, his employer's allegations has no bearing on the sufficiency of his pretermination due process.

The fact that the terminated employees in the two other cases plaintiff mentions received more lengthy pretermination hearings is without the significance plaintiff attempts to place

on it (see Brief of Appellant at 9). So long as the criteria of Loudermill are fulfilled, the length of the pretermination hearing is irrelevant. There is little point in prolonging a pretermination interview when misconduct is admitted. As the Powell court explained,

The pretermination hearing is merely the employee's chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted. The pretermination hearing is intended to supplement, not duplicate, the more elaborate post-termination hearing. Because the post-termination hearing is where the definitive fact-finding occurs, there is an obvious need for more formal due process protections at that point. To duplicate those protections at the pretermination stage would cause unnecessary delay and expense while diffusing the responsibility for the ultimate decision to terminate an employee. The idea of conducting two identical hearings runs counter to traditional principles of adjudication.

Powell, 891 F.2d at 1458.

Plaintiff's position on appeal is much like that of the plaintiff in Horgan v. Industrial Design Corp., 657 P.2d 751 (Utah 1982). Horgan signed a release waiving all claims arising from an employment relationship. He later filed suit, seeking additional termination compensation. The court stated that "[t]he movant is entitled to summary judgment only if he is 'entitled to a judgment as a matter of law' on the undisputed facts. Utah R.Civ.P. 56(c)." Horgan, 657 P.2d at 752. Observing that Horgan "attempts to create a factual dispute as to the signing of the release by alleging that he signed under duress" (id. at 753), the court noted that the facts underlying the duress claim were undisputed, leaving only a question of law

as to whether they constituted duress. In the present case, the facts underlying plaintiff's due process claim are also undisputed, leaving only the question of whether those facts constitute a denial of plaintiff's due process rights. As Loudermill and Powell show, they do not.

Plaintiff's failure to show any genuine issue of material fact or error in the district court's application of law entitles the school district to affirmance of the summary judgment in its favor on plaintiff's due process claim.

II. PLAINTIFF IS NOT ENTITLED TO EARLY RETIREMENT  
BECAUSE HE DID NOT MAKE TIMELY APPLICATION FOR IT.

Plaintiff's claim to early retirement benefits rests solely on the school district's policy no. 4752 (see R. 569-68, ¶ 20-27). Under paragraph 1.7 of the policy, "[a]dministrators wishing to retire early must make application to the superintendent of schools by March 1, of the year they elect to retire" (R. 165). Plaintiff's request for early retirement, a letter to the superintendent, was dated June 6, 1991, and stamped as received in the superintendent's office the following day (R. 274). This tardy notification does not meet the policy's mandatory deadline.

Rather than showing that he made a timely application for early retirement benefits, plaintiff attempts to avoid the policy deadline by arguing that the school district waived any argument based on timeliness by not raising it as a defense, by not arguing it in the summary judgment memorandum, and by stating "that timeliness was not the reason why Mr. Crittenden's benefits

were denied" (Brief of Appellant at 12). However, the evidence of record does not support plaintiff's waiver theory.

"Waiver requires three elements: (1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right." Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 940 (Utah 1993). Further, "the intent to relinquish a right must be distinct." Id. at 942. Although the supreme court rejected as separate and additional requirements that the party's actions or conduct "'must evince in some unequivocal manner an intent to waive, and must be inconsistent with any other intent'" (id. at 940) (quoting Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983)) (emphasis added in Soter's, Inc.), it found these phrases merely redundant elaborations of the necessary showing of intent (see 857 P.2d at 941). Because the school district's actions in the district court were, in fact, inconsistent with an intent to waive the untimeliness of plaintiff's request as a defense, plaintiff cannot show a distinct intent to relinquish it.

Plaintiff's waiver argument is largely based on the school district's response to his interrogatory no. 26 (see Brief of Appellant at 12-13).<sup>3</sup> As the school district pointed out below (see R. 682-85), it is necessary to place the response in the context of the questions being asked. Interrogatory no. 25

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<sup>3</sup>It is of note that the materials contained in Appendices A and B to plaintiff's brief are not of record in the case below. However, as both interrogatory no. 25 and interrogatory no. 26 were discussed in the August 30, 1996 hearing, the school district raises no objection to their inclusion.

requested the school district to "[s]et 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" (Brief of Appellant at App. A, 5). The school district responded,

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.

Brief of Appellant at App. B, 13. As a follow-up to this question, plaintiff asked the school district to "[s]tate whether or not the plaintiff has, in fact, filled out a form for early retirement" (Brief of Appellant at App. A, 5). In response, the school district emphasized that whether or not he had filled out the proper form was not at issue because he had foregone his early retirement opportunity by engaging in criminal conduct:

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 the defendant objects to and deplors 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.

Brief of Appellant at App. B, 13-14. The interrogatory did not ask about, and consequently the response did not address, the timeliness of plaintiff's request. However, as the supreme court has recognized, "'[m]ere silence is not a waiver unless there is some duty or obligation to speak.'" Soter's, Inc., 857 P.2d at 940 (quoting Plateau Mining Co. v. Div. of State Lands and Forestry, 802 P.2d 720, 730 (Utah 1990)) (alteration in Soter's, Inc.). The interrogatory simply did not put plaintiffs on a duty to speak on the issue of timeliness.

To the extent that plaintiff relies on the lack of reference to untimeliness in the school district's answer and motion for summary judgment, the supreme court's observation that silence does not constitute waiver is equally applicable. Plaintiff has not shown untimeliness under the policy to be an affirmative defense waived unless explicitly pleaded, nor has he shown that failure to raise it in a motion for summary judgment precludes the trial court from raising it sua sponte and the parties from

arguing it at the court's behest, as happened in this case. In the August 28, 1996 hearing on summary judgment, the court remarked, "The policy on its face says that, 'administrators wishing to retire early must make their election by March 1.' That's Section 1.7" (R. 657). The following exchange ensued:

MR. PETERSEN: Okay, let me address that issue, your Honor. We asked them specifically that in an interrogatory, and they said that it didn't apply. That is not the reason he was denied early retirement. They said in an answer to interrogatory the reason we're denying early retirement is because he was terminated for cause.

THE COURT: So you think that I should ignore Section 1.7 because you believe they are actually ignoring 1.7?

MR. PETERSEN: Correct.

R. 657-58. In the hearing, plaintiff's counsel did not specify the interrogatory to which he was referring.

Rather than responding immediately, the school district's attorney returned to his office to review the answers to plaintiff's interrogatories (R. 681). As he explained to the court in the subsequent hearing,

So what happened is yesterday afternoon or yesterday morning I started reviewing all the answers to interrogatories. I couldn't figure out which one counsel was talking about. I called counsel on the phone, and he told me he was referring to interrogatory No. 26. So you can see there, your Honor, it's tab No. 3.

I read it through, and at that point I determined that the Court was misinformed [by plaintiff's counsel]. And so that's when I got on the line with the Court, and that's why we're having this hearing.

R. 682. He then proceeded to explain the response to interrogatory no. 26 in detail (R. 682-85), and concluded,

Now I guess counsel is reasoning from that interrogatory answer that somehow we had waived the

March 1st deadline, but what we did again, is we said, "We're not getting hung up on the fact that you never filled out a form." We didn't waive the March 1st issue. We didn't say, "We're not hung up on the fact that you didn't file by March 1st,[]" and we reiterated that the reason we let you go was because you were terminated.[]

Now maybe counsel can argue that that was--that he can say, "Well, you didn't affirmatively say that you--you didn't affirmatively refer to the March 1 issue." Well, your Honor, that does not constitute a waiver, and that's what I wanted to get before the Court today.

Because the Court has focused on this issue and because of the way the discussion has developed as we have argued this motion, I think it's appropriate to look at that issue.

R. 685-86. Plaintiff's counsel was given a full opportunity to respond, but chose not to directly address the timeliness issue (R. 690-93).

As this Court has held, an appellate court "may affirm the trial court's ruling on any proper ground as long as there is evidence in the record supporting such an affirmance." State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997); accord White v. Deseelhorst, 879 P.2d 1371, 1376 (Utah 1994). In addition to the hearing transcripts cited above, other evidence of record in this case supports affirmance of the district court's decision that plaintiff's request for early retirement benefits was untimely. In support of its motion for summary judgment, the district included its response to plaintiff's request for early retirement benefits, a letter from the superintendent dated June 25, 1991. The letter stated as follows:

This letter will inform you of the Alpine School District's intention to deny your request for early retirement benefits and supplemental health insurance benefits as provided in Policies #4750 and #4752. It



is the district's position that you are ineligible for either of the benefits under the express terms of the policies. These benefits are available only to retiring employees, and you did not retire but were suspended and notified of involuntary termination for cause. In addition, you failed to comply with the District's application procedure for the granting of early retirement benefits in that you did not notify the District by March 1. Also, with respect to supplemental health insurance benefits, you have not yet attained age 65. For these reasons the District has determined to deny both of your requests.

R. 272 (emphasis supplied). Moreover, in his deposition, the superintendent was asked if he was still relying on the March 1 deadline as one of the reasons for denial of early retirement benefits and responded, "'In some measure, but I will say that it does not have the weight for me that it did at that time'"

(R. 680). Even this qualified answer demonstrates that at the time the school district made its determination, plaintiff's failure to meet the March 1 deadline was a significant reason for the denial. That it has since been overshadowed in importance by plaintiff's criminal conduct does not make it less so.

In short, it is clear from the record that the timeliness of plaintiff's request for early retirement benefits was at issue below; it is also clear that the undisputed evidence shows the request to have been untimely. Plaintiff has provided no authority for his proposition that the district court was not entitled to rely on this ground as dispositive and has failed to demonstrate that the school district had a distinct intent to waive the issue. These facts warrant affirmance of the district court's grant of summary judgment on this issue for the school district.

III. PLAINTIFF DOES NOT HAVE A VESTED RIGHT OR  
PROTECTIBLE PROPERTY INTEREST IN EARLY RETIREMENT  
BENEFITS UNDER POLICY NO. 4752.

Plaintiff advances several additional theories to justify his claimed entitlement to early retirement benefits under policy no. 4752. He argues that his right to benefits became vested by virtue of his age and years of service alone. He contends that the policy does not explicitly exclude employees terminated for criminal conduct. He alleges a lack of due process prior to the denial of benefits. Finally, he asserts that the district court's decision amounts to judicial legislation. Each of these arguments is without merit.

Although he characterizes his right to early retirement as "vested," plaintiff neither defines the term nor cites to authorities which do. Research has disclosed no Utah cases scrutinizing the word's meaning. However, according to Black's Law Dictionary, "vested" means

[f]ixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute "vested right."

Black's Law Dictionary 1563 (6th ed. 1990). A "vested pension" is one in which

an employee (or his or her estate) has rights to all the benefits purchased with the employer's contributions to the plan even if the employee is not employed by this employer at the time of retirement. One in which the right to be paid is not subject to

forfeiture if the employment relationship terminates before the employee retires.

Id. Under these definitions, plaintiff's claim must fail.

Plaintiff has pointed to no evidence of record disputing that his right to early retirement benefits is contingent or subject to defeat by a condition precedent, such as application by the mandatory deadline (see discussion in Point II, above). He has not shown that the right to early retirement benefits had become his property as a present interest prior to his suspension and termination. At most, he has shown that policy no. 4752 gave him a right to apply for early retirement benefits--an opportunity in which the school district fully cooperated, providing the appropriate forms at plaintiff's request. See Brief of Appellant at Appendix B, 13-14.

Moreover, plaintiff has not shown, nor can he show, that policy no. 4752 is a vested pension plan as defined above. There is no evidence that the employer made contributions to a plan or purchased benefits pursuant to the policy. Likewise, there is no evidence that an employee is entitled to benefits under the policy even if he no longer works for the school district at the time of retirement; in fact, the policy's language contradicts such an interpretation. Section 1.1 targets long-term administrators "who find it increasingly difficult to continue their employment with the district" (R. 165; emphasis supplied) and states, "This policy is adopted to provide these administrators an opportunity to retire early" (id.) At the time plaintiff made his request, he was under unpaid suspension

pending termination. Because his employment could not have continued under these circumstances, he "is not the type of employee for whom this policy was implemented" (R. 583), as the court correctly held. Consequently, any right to benefits under the policy was subject to forfeiture on termination, unlike a vested benefit. It is the element of vesting that differentiates early retirement under policy no. 4752 from the state retirement pension that plaintiff is currently receiving, and from the retirement benefits at issue in the three cases plaintiff cites to support his argument. Each of these cases is distinguishable from the case at bar.

In Auerbach's, Inc. v. Kimball, 572 P.2d 376 (Utah 1977), Kimball had been promised a pension of \$50.00 per month for life on fulfilling only two conditions: 20 years of employment with Auerbach's, and continued employment with the company until age 65. The court analyzed the promise as a unilateral contract fulfilled by performance of the conditions, reversed the summary judgment in favor of Auerbach's, and remanded the case for trial. In the present case, there is no promise of a fixed benefit simply on reaching a given age and length of service; instead, there is an opportunity to apply for benefits in lieu of continuing employment, based on a timely notification that plaintiff neglected to make. Plaintiff does not stand in the same position as employee Kimball.

The remaining two cases are also inapposite. Schofield v. Zion's Mercantile Institution, 85 Utah 281, 39 P.2d 342 (1934),

does not address pending benefits but the diminution of benefits already fixed by written agreement and being paid to retirees, in contrast to plaintiff's circumstances. Ellis v. Utah State Retirement Board, 757 P.2d 882 (Utah App. 1988), aff'd, 783 P.2d 540 (Utah 1989), deals with disability retirement benefits. In determining that Ellis had no vested right to benefits, the court reviewed the supreme court's analysis of vested rights in Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 142 P.2d 657 (Utah 1943). The issue in Driggs, as in Schofield, was whether an employer--this time, the state--could unilaterally reduce the amount of a pension for which Driggs had already qualified and which he was receiving on a continuing basis. The Ellis court summarized the supreme court's position in Driggs as follows:

an employee who receives a mere gratuitous allowance awarded for appreciation of past services has no vested rights in the allowance and it is terminable at will. On the other hand, when a retired employee had made the requisite contributions and had satisfied all conditions precedent to his benefits, then the employee had a "vested right" in his retirement benefits as provided by the statute at the time of his retirement and a subsequent amendment could not reduce the amount of benefits to which the employee was entitled.

Ellis, 757 P.2d at 886 (citation omitted). Plaintiff's truncated quotation of this language for the general proposition that an employee has a vested right to benefits when he has fulfilled all conditions precedent (see Brief of Appellant at 10) fails to distinguish between his circumstances and the divestiture of an ongoing benefit that Driggs addressed, as well as ignoring the necessity of a timely application as a condition precedent to

receiving the early retirement benefits to which plaintiff lays claim. Further, unlike Driggs, plaintiff made no contributions to the plan under which he maintains a right to benefits.

Plaintiff's asserted denial of due process before early retirement benefits were denied is improperly raised for the first time on appeal. No due process claim with respect to these benefits was articulated in the court below. "To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits." LeBaron & Assocs. v. Rebel Enters., 823 P.2d 479, 482-83 (Utah App. 1991) (footnote omitted); see also Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412, 413 (Utah 1990) ("With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal"); State v. Webb, 790 P.2d 65, 77 (Utah App. 1990) ("As the Utah appellate courts have reiterated many times, we generally will not consider an issue, even a constitutional one, which the appellant raises on appeal for the first time"). Moreover, as established above, plaintiff has failed to show a protectible property interest to which due process applies.

Finally, plaintiff argues that it is not the court's proper function to construe policy no. 4752 expansively to protect the school district. In doing so, he ignores clear precedent giving latitude to a school district's interpretation of its own policy.

As the supreme court stated just last year in E.M. v. Briggs, 922 P.2d 754 (Utah 1996),

On two prior occasions, we have discussed the latitude a reviewing court should give a school board's interpretation of its own policies. In *Elwell v. Board of Education*, 626 P.2d 460, 463 (Utah 1981), we stated:

It should be here noted that the management, supervision and determinations of policy are the prerogative and the responsibility of the school officials; and that the courts should be reluctant to enter therein; and indeed should not do so unless it is shown that the complainant was in some manner deprived of due process of law, or that the action of the board was so entirely without justification that it must be deemed capricious and arbitrary.

(Footnote omitted.) We reached the same result in *Espinal v. Salt Lake City Board of Education*, 797 P.2d 412, 413-14 (Utah 1990), stating, "'It is the policy of the law not to favor limitations on the powers of [boards of education], but rather to give [them] a free hand to function within the sphere of [their] responsibilities.'" *Id.* at 414 (quoting *Ricker v. Board of Educ.*, 16 Utah 2d 106, 110-11, 396 P.2d 416, 420 (1964)).

E.M., 922 P.2d at 757. The court applied this latitude to uphold the school district's reasonable interpretation of its own policy as permitting use of a disciplinary sanction that was not specified in the policy but fell within the range of severity defined by the policy's extremes.

Plaintiff has identified no language in policy no. 4752 that explicitly or implicitly permits early retirement to one whose continued employment has already been rejected for misconduct. By contrast, it is implicit in the policy that the qualifying employee could continue to work if he chose to do so: section 1.3.1 is directed to those who meet plaintiff's age and service requirements and "choose to retire early" (R. 165). One who,

like plaintiff, is under suspension and pending termination is no longer in a position to elect early retirement. For the court to construe the policy against the school district's reasonable interpretation to include employees being terminated for cause would be to engage in the very judicial legislation that plaintiff deplors.

Because plaintiff has failed to show vesting of or entitlement to early retirement benefits under policy no. 4752, the district court's summary judgment for the school district on this issue merits this Court's affirmance.

#### **CONCLUSION**

In terminating plaintiff's employment, the school district gave him oral notice of the reasons for the proposed termination and an opportunity to respond to them. Plaintiff admitted to misappropriating district funds in two instances, and offered an explanation for the third. After considering the matter further, the district provided plaintiff with a letter placing him on unpaid suspension pending termination, advising him of the reasons for its action, and informing him of the procedure for obtaining further review. Due process requires nothing more.

The school district relied on both plaintiff's criminal misconduct and the untimeliness of his notification that he desired early retirement in denying him benefits under policy no. 4752. Plaintiff has not demonstrated timely notice. Nor has he shown the district's interpretation of its policy to be arbitrary



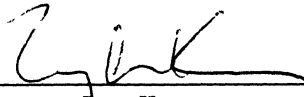
or capricious; rather, its language implicitly requires that an employee be qualified to continue employment in order to obtain early retirement benefits. Because plaintiff was incapable of continuing his employment due to his suspension and pending termination, the denial of benefits is fully warranted by policy.

For these reasons, as more fully explained above, Alpine School district respectfully requests the Court to affirm the district court's grant of summary judgment in its favor.

**STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION**

Defendant does not believe oral argument is necessary to the proper disposition of this case. However, defendant wishes to participate if oral argument is ordered by the Court. Defendant does not request a published opinion.

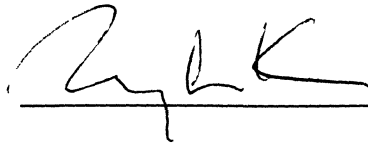
Dated this 14th day of August, 1997.

  
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Nancy L. Kemp  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I hereby certify that on this 14<sup>th</sup> day of August, 1997,  
I caused to be mailed, postage prepaid, two true and accurate  
copies of the foregoing BRIEF OF APPELLEE to the following:

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