

2008

# Jodi Howick v. Salt Lake City Employee Appeals Board, Salt Lake City Corporation : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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JODI HOWICK,

Petitioner/Appellant,

vs.

SALT LAKE CITY EMPLOYEE  
APPEALS BOARD and SALT LAKE CITY  
CORPORATION,

Respondents/Appellees.

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**BRIEF OF APPELLEES**

Case No. 20080608

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**APPEAL FROM THE FINAL ACTION OR ORDER OF THE  
SALT LAKE CITY EMPLOYEE APPEALS BOARD**

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**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over Petitioner's appeal from a final action or order of the Salt Lake City Employee Appeals Board ("the Board") pursuant to Utah Code Ann. § 10-3-1106(6) (2007).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

In responding to the brief of the Appellant, Appellee Salt Lake City ("the City") presents the following issues for review by this Court:

I. Whether Ms. Howick has the right to appeal her termination to the Board, including whether she is estopped from denying the validity of the contract she entered into with the City wherein she agreed to become an at-will employee in exchange for a substantial increase in pay, and the related issue of whether she waived her right to challenge her allegedly illegal at-will employment status because she accepted the benefits of the contract for nine years. The standard of appellate review of this issue is abuse of discretion. Allen v. Dept. of Workforce Services, 2005 UT App 186, ¶6, 112 P.3d 1238, 1241; Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 588 (Utah 1991).

The issues of Ms. Howick's right to appeal, estoppel, and waiver were preserved below. Ms. Howick's right to appeal her termination to the Board was examined throughout the proceedings below, and the Board determined that Ms. Howick did not have the right to appeal her termination because she was an at-will employee. R. 73. Additionally, the City's waiver and estoppel arguments should be considered by this Court because, "[a]s the rule states, an appellate court may affirm the judgment appealed

from ‘if it is sustainable on any legal ground or theory apparent on the record.’” Bailey v. Bayles, 2002 UT 58, ¶13, 52 P.3d 1158 (quoting Dipoma v. McPhie, 2001 UT 61, ¶18, 29 P.3d 1225).

II. Whether Ms. Howick’s agreement with the City, even assuming it is void, may be enforced because a balance of the equities favors enforcing the contract. The standard of appellate review of this issue is abuse of discretion. Allen, 2005 UT App 186 at ¶6; Morton, 814 P.2d at 588. The issue of the validity of Ms. Howick’s agreement with the City was preserved because it was raised by Ms. Howick in proceedings below. R. 109.

III. Whether this Court has jurisdiction to consider the constitutional due process arguments raised by Ms. Howick, whether Ms. Howick had a “property interest” in her employment with the City, and whether Ms. Howick received due process in the Board’s proceedings related to her appeal. The standard of appellate review of this issue is abuse of discretion. Allen, 2005 UT App 186 at ¶6; Morton, 814 P.2d at 588.

IV. Whether Ms. Howick is entitled to the attorney fees and costs for bringing this appeal where the rule is that, absent exceptional circumstances, fees and costs are only awarded if they are authorized pursuant to statute or contract. The standard of review of this issue is de novo. Culbertson v. Bd. of County Commissioners of Salt Lake County, 2008 UT App 22, ¶7, 177 P.3d 621. This issue was not raised below.

### **LAWS TO BE INTERPRETED**

The following are constitutional provisions, statutes, ordinances, rules and regulations whose interpretation is determinative of the appeal or of central importance to

the appeal. The full text of the following citations is set forth in Appendix 1 of Appellee's Brief.

Utah Code Ann. § 10-3-1105 (2007).

Utah Code Ann. § 10-3-1106 (2007).

Utah Constitution Article I, § 7.

### **STATEMENT OF THE CASE**

This case is an appeal from a final agency action of the Salt Lake City Employee Appeals Board, wherein the Board determined that Ms. Howick was an at-will employee and did not have the right to an appeal.

Ms. Howick was hired as a city attorney in 1992, and in 1998 she agreed to become an at-will employee in exchange for a substantial increase in salary and benefits. Ms. Howick's employment was terminated in 2007. The month after she was discharged, Ms. Howick submitted a Notice of Appeal to the Board. The City's Labor Relations Officer determined that the Board could not hear Ms. Howick's appeal because she was an at-will employee, and sent Ms. Howick's counsel a letter explaining this position. Ms. Howick appealed to this Court, and this Court dismissed the appeal on the ground it lacked jurisdiction because there had been no final action of the Board. The Court, however, suggested that the City's Labor Relations Officer could not issue final decisions of the Board.

The City then forwarded Ms. Howick's appeal to the Board. The Board determined that there was a question about whether Ms. Howick could make an appeal to the Board given that she was an at-will employee. After receiving briefing on the issue

from both sides, the Board decided to request a legal opinion on whether Ms. Howick's at-will status was legal. The legal opinion was initially sought from the City Attorney, but the City Attorney determined that he had a conflict of interest because he was the person who had terminated Ms. Howick. The City Attorney referred the Board's question to independent outside counsel to provide an opinion on the validity of Ms. Howick's at-will status. Independent counsel concluded that Ms. Howick had lawfully waived her statutory rights and became an at-will employee in 1998. The Board voted unanimously that it could not consider Ms. Howick's appeal because she was an at-will employee. The Board's decision constituted a final action, which Ms. Howick then appealed to this Court.

#### **STATEMENT OF FACTS**

1. In 1992, the City hired Ms. Howick as an attorney. R. 83.
2. On July 22, 1998, Ms. Howick voluntarily agreed to become an at-will employee in exchange for a substantial increase in her compensation and benefits. R. 27, 83-85. Ms. Howick signed an "At-Will Employment Disclaimer," attached hereto as App'x 3, that states:

I understand that, if I am appointed by the Salt Lake City Attorney to the "Appointed Senior City Attorney" position, my employment will be at-will and will be for no fixed length of time.

I understand that no oral or written statements (in personnel manuals, policies, procedures, or elsewhere) or any conduct of the Mayor, City Attorney, or other City official at any time, other than in a written contract of employment signed by the Mayor or City Attorney, can create an express or implied contract to the contrary.

R. 63; App'x 3. Ms. Howick's decision was voluntary, and not all city attorneys who had the option of becoming at-will in exchange for increased salary chose to do so. R. 48.

3. Ms. Howick remained an at-will employee for more than nine years. She was discharged on August 31, 2007.<sup>1</sup> R. 83.

4. On September 10, 2007, Ms. Howick submitted a Notice of Appeal to the Employees Appeals Board (the "Board"). R. 108. While acknowledging that she was an at-will employee, Ms. Howick argued that her at-will status was unlawful. R. 109.

5. On September 21, 2007, the City's Labor Relations Officer wrote to Ms. Howick's counsel, explaining that because Ms. Howick was an at-will employee, she did not have the right to appeal her termination. R. 35.

6. The Employee Appeals and Grievance Policy and the Board Procedures both state that at-will employees are not entitled to an appeal to the Board. R. 37, 40.

7. On October 22, 2007 Ms. Howick filed a Notice of Appeal with this Court under Utah Code Ann. § 10-3-1106(6) (2007), which provides for an appeal from a final action or order of an appeal board.

8. This Court dismissed Ms. Howick's appeal because there had been no final action or order of the Board. Howick v. Salt Lake City Corp., 2008 UT App 216, 2008 UT App. LEXIS 212 at \*2. This Court also suggested that the City's Labor Relations

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<sup>1</sup> Ms. Howick claims that she was discharged without notice or explanation. Br. of Appellant at 5-6. Ms. Howick's assertion is incorrect because the City Attorney met twice with her regarding her conduct and the reasons for her discharge. Additionally, Ms. Howick's assertions about the circumstances of her discharge are not based on facts in the administrative record and are irrelevant to her appeal.

Officer could not issue final decisions regarding the Board's jurisdiction. See id. 2008 UT App. LEXIS at \*3 n.1. The City then determined that Ms. Howick could submit an appeal to the Board, and the Board would determine whether Ms. Howick's appeal was proper.

9. On June 20, 2008 the Board received Ms. Howick's appeal. The Board recognized that there was a question as to whether Ms. Howick had the right to appeal her discharge given her at-will status, and the Board invited Ms. Howick and the City to submit their respective positions on the issue in writing. R. 104. Both Ms. Howick and the City did so, and Ms. Howick fully briefed the issues in an extensive memorandum. R. 27-46, 47-68.

10. The Board met on June 26, 2008 to consider Ms. Howick's appeal. R. 8. The members of the Board noted that Ms. Howick had agreed in writing to be at-will and had remained an at-will employee for nine years. R. 18, 22. After considering Ms. Howick's argument that her at-will employment was not lawful, the Board decided to request a legal opinion from the City Attorney on whether Ms. Howick's at-will status was legally proper. R. 15-17, 19-20, 23-24. The Board's request for a legal opinion from the City Attorney is required when the Board has "a question whether a City employee is within the class of persons who may appeal a discharge . . . ." Employee Appeals Board Procedures ("Procedures") § III.G, attached hereto as App'x 2.

11. On July 1, 2008 the Board requested a legal opinion from the City Attorney on the lawfulness of Ms. Howick's becoming an at-will employee in 1998. R. 96.

12. The City Attorney wrote back to the Board, explaining that he had a conflict of interest because he had made the decision to terminate Ms. Howick's employment. R. 94. The City Attorney further explained that, pursuant to Salt Lake City Code Section 2.08.040A(3), he was referring the Board's question to independent outside legal counsel, who would be "in no way subject to the control or direction of the city attorney." Id.

13. The City Attorney wrote to attorney Stanley Preston at Snow Christensen & Martineau, requesting that he serve as "independent special counsel" for the purpose of responding to the question raised by the Board. Letter at R. 131-32 and attached hereto as App'x 4. The City Attorney emphasized to Mr. Preston that he would "not be subject to the control or direction of the city attorney." Id. The City Attorney explained to Mr. Preston the Board's question as well as the parties' respective positions on the issue. He also provided to Mr. Preston copies of the memoranda that had been submitted to the Board by the parties' counsel. Id.

14. On July 2, 2008, Mr. Preston accepted the assignment to serve as independent special counsel to the Board. R. 90.

15. On July 10, 2008, Mr. Preston provided his legal opinion to the Board. R. 81-87. Mr. Preston concluded that Ms. Howick had waived her statutory rights and voluntarily become an at-will employee in July 1998. Preston Opinion at R. 85-87 and attached hereto as App'x 5.

16. Mr. Preston limited his opinion "solely to Ms. Howick's situation," and did not address the legality of any City policy or procedure. R. 87. He noted that Ms.

Howick's argument against her at-will status focused "only on the state statute" and "ignore[d] that she voluntarily signed the Disclaimer." R. 85. Because the statutes in question (§ 10-3-1105; § 10-3-1106) do not expressly prohibit an employee from waiving his/her statutory rights, unlike other Utah statutes dealing with workers' rights, and because Ms. Howick voluntarily agreed to become an at-will employee "in exchange for an increase in pay, which she subsequently received," Mr. Preston concluded that Ms. Howick had lawfully waived her statutory rights and properly became an at-will employee in 1998. R. 85-86 and App'x 5.

17. Mr. Preston summarized his opinion as follows:

[W]e conclude that the "conversion" of Ms. Howick's position to an at-will position in July 1998 was effected in accordance with the lawful prerogatives of the parties. Ms. Howick, a lawyer, voluntarily signed the Disclaimer wherein she agreed to be an at-will Senior Staff Attorney in exchange for an increase in pay. She remained in that position for ten years until her termination in 2007. There is nothing in Utah Code Ann. § 10-3-1105, § 10-3-1106, or in any other law, which prohibits a municipality's requesting an individual's waiving statutory due process rights by voluntarily agreeing to become an at-will employee pursuant to an agreement supported by consideration.

R. 87 and App'x 5.

18. On July 15, 2008 the Board met and considered the legal opinion it had received from Mr. Preston.<sup>2</sup> Decision of Board at R. 73 and attached hereto as App'x 6.

The Board "voted unanimously that it did not have the authority to review the appeal of

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<sup>2</sup> The Board met in a closed session (R. 73) as required by its Procedures, § VII.G, attached hereto as App'x 2 ("[T]he Board shall meet in a . . . closed meeting to deliberate and reach a decision.").

Ms. Howick.” Id. It based its decision on three factors: (1) Ms. Howick was an at-will employee at the time of her termination, (2) she had properly become an at-will employee in 1998, and (3) under the City’s policies and procedures, the appeal process to the Board did not apply to at-will employees. Id.

19. The Board informed Ms. Howick of its decision on the same day. R. 73.

20. On July 18, 2008 Ms. Howick filed a Notice of Appeal/Petition for Review with this Court pursuant to Utah Code Ann. § 10-3-1106.

21. Utah Code Ann. § 10-3-1106(6) provides in relevant part:

- (1) “A final action or order of the appeal board may be appealed to the Court of Appeals . . .”;
- (2) “The Court of Appeals’ review shall be on the record of the appeal board . . .”; and
- (3) “The Court of Appeals’ review shall be . . . for the purpose of determining if the appeal board abused its discretion or exceeded its authority.”

Utah Code Ann. § 10-3-1106(6)(a), (c).

22. Utah Code Ann. § 10-3-1106 does not provide a standard (or a set of permitted grounds) for a proper discharge of a covered employee, but only an appeal process to be followed in the case of a discharge of a covered employee. Compare Utah Code Ann. § 10-3-1106(1) through (6) with Utah Code Ann. § 10-3-1012(1), which applies to a different category of public employees.<sup>3</sup>

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<sup>3</sup> See infra fn 12.

23. Sections 10-3-1105(3) and 10-3-1106(7) provide that the reasons for discharging employees and “the procedure for conducting an appeal and the standard of review” to be used by an appeal board are left to the municipality.<sup>4</sup>

24. In 2004 the Utah legislature amended Utah Code Ann. § 10-3-1105 and § 10-3-1106. Among the changes, the 2004 amendments specified the procedures for appealing a board’s decision to the Utah Court of Appeals and the abuse of discretion standard of review to be applied by the Court of Appeals. The 2004 amendments also declared that they may not be “construed to limit” a city’s ability to determine reasons for discharging an employee, and delegated to municipalities the authority to decide “the procedure for conducting an appeal and the standard of review to be used by administrative appeal boards.” Utah Code Ann. § 10-3-1105(3); § 10-3-1106(7)(a); First Substitute S.B. 23, available at <http://www.le.state.ut.us/~2004/bills/sbillint/sb0023s01.pdf>; Joint Conf. Committee Report, 2/16/04, available at <http://www.le.state.ut.us/%7E2004/comreport/SB023C10.pdf>.

25. Representative David Ure, the sponsor of the bill (“First Substitute Senate Bill 23”) that became the 2004 amendments to § 10-3-1105 and § 10-3-1106, explained

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<sup>4</sup> The Board applies a deferential, abuse of discretion standard of review when considering an appeal from the discipline or discharge of a covered employee. If the department head’s decision regarding an employee is supported by “plausible” reasons, “the decision should be upheld, even though the Board may have weighed the evidence differently had it been in the department head’s position.” “Unless the Board finds the [action] to constitute an abuse, rather than an exercise of the department head’s discretion, the decision of the department head should be upheld.” Procedures § VII.G.1 and 2, attached hereto as App’x 2.

the purpose of the bill on the floor of the House of Representatives on February 11, 2004 as follows:

[The bill will] help provide stronger ability of a city to release or discipline some of their employees . . . . We are giving city councils and administrations the ability to fire employees . . . .

House floor debate, 2/11/04, Rep. Ure speaking, available at <http://www.le.state.ut.us/asp/audio/index.asp?Sess=2004GS&Day=O&Bill=SB0023SO1&House=H>.

### **SUMMARY OF ARGUMENTS**

The City's arguments in this appeal rest on a fundamental principle: It is unfair and inequitable to allow an employee to repudiate the obligations of an agreement she voluntarily entered into and under which she has received substantial benefits for nine years. Ms. Howick argues that this Court must examine the contract Ms. Howick made with the City and determine that it is void and unenforceable. To the contrary, it is unnecessary for this Court to determine whether the Contract at issue in this case is enforceable. Ms. Howick, a lawyer, is estopped from attacking the validity of the contract because she accepted the benefits of the agreement, including a substantial increase in pay and benefits, for nine years. Similarly, Ms. Howick waived her right to attack the validity of the contract because she as a lawyer knowingly and voluntarily waived her statutory and constitutional right to an appeal. It is well established that an individual may waive a statutory right as long as the rights of others are not affected. In this case, Ms. Howick's agreement governed her situation only, and no public policy is implicated in her individual decision to become at-will.

Ms. Howick argues that her position is just one of many that the City illegally designated as at-will in its employment and compensation plans, and she asserts that her action is intended to force the City to discontinue at-will classifications. Br. of Appellant at 38. Ms. Howick's argument is not well taken because her at-will status and the Board's decision were based on her individual agreement to become at-will in 1998, not on any compensation plan or other policy. Ms. Howick also ignores that, by statute, this Court's review is limited to whether the Board abused its discretion in making its decision regarding Ms. Howick, based on the administrative record. Even if this Court concludes the agreement between Ms. Howick and the City was illegal, it may still enforce the contract because the facts of this case demonstrate that justice will be served by enforcement of the contract.

Ms. Howick further asserts that the City violated her constitutional right to receive due process. However, Ms. Howick has not demonstrated that this Court has jurisdiction to hear her constitutional claim, nor has she shown that she had a sufficient property interest in her employment with the City; therefore, her constitutional claim is without merit. Additionally, even if it were assumed that Ms. Howick was entitled to due process, she received it; she presented her arguments to the Board in an extensive brief which the Board considered. The Board complied with its mandated procedures throughout the process, and properly determined that Ms. Howick did not have a right to appeal her discharge to the Board.

Ms. Howick is not entitled to attorney fees (even if she were to prevail) because no statute or contract authorizes an award of attorney fees. None of the equitable grounds on which she seeks to recover her fees has any merit.

Finally, Ms. Howick is not entitled to the remedy of reinstatement that she seeks. It is the Board that has authority to address reinstatement. This Court only has authority to affirm or reverse the decision of the Board. Thus, even if Ms. Howick were to prevail, the most she would be entitled to is a hearing before the Board.

## **ARGUMENT**

### **I. THE DECISION OF THE BOARD SHOULD BE REVIEWED FOR ABUSE OF DISCRETION OR REASONABLENESS.**

The governing statute provides that this Court shall review the Board's decisions under the abuse of discretion standard: "The Court of Appeals' review shall be . . . for the purpose of determining if the appeal board abused its discretion or exceeded its authority."<sup>5</sup> Utah Code Ann. § 10-3-1106(6)(c). Ms. Howick argues that the "correction of error" standard of review should be applied. Br. of Appellant at 10. Ms. Howick's argument is incorrect.

Where the decision of an administrative body applies the law to the facts (a mixed question of law and fact), the standard of review is the deferential standard of "reasonableness."

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<sup>5</sup> This Court's review of Ms. Howick's appeal must be "on the record of the appeal board." Utah Code Ann. § 10-3-1106(6)(c). However, Ms. Howick has cited in her brief to many materials that are extraneous to the record. See Br. of Appellant at 5 n.2, 37-38 nn.16 & 17, and Appellant's App'x 3 (2008 city compensation plan and staff report); id. at 13 n.6 (citing to a Salt Lake Tribune article). These documents are outside the administrative record and should be disregarded, as should any argument based on them.

Agency decisions that apply the law to facts are entitled to discretion and are only subject to judicial review to assure that they fall within the limits of reasonableness and rationality.

Allen v. Dept. of Workforce Services, 2005 UT App 186, ¶6, 112 P.3d 1238, 1241 (citation omitted); see also Savage Indus. v. Utah State Tax Comm’n, 811 P.2d 664, 667 (Utah 1991) (“[A]gency decisions involving mixed questions of law and fact ... given deference by the courts and . . . upheld as long as . . . within the bounds of reasonableness and rationality.”); Tolman v. Salt Lake County Attorney, 818 P.2d 23, 27 n.4 (Utah Ct. App. 1991) (“[M]ixed questions of law and fact [are] matters reserved for the discretion of the administrative body. . . . [T]he standard of review for such questions is one of reasonableness . . .”).

In the instant case, the Board’s decision was its determination that Ms. Howick was not entitled to an appeal to the Board. Statement of Facts (“Facts”) ¶18. In making its decision, the Board applied the provisions of its Policies and Procedures regarding who was entitled to an appeal, and relied on the independent legal opinion of attorney Stanley Preston. Id. Mr. Preston applied the legal doctrine of “waiver” to the fact of Ms. Howick’s voluntarily signing of an agreement in 1998 to become an at-will employee in exchange for consideration which she received. Facts ¶¶ 16-17. On this basis, Mr. Preston concluded that Ms. Howick had knowingly and voluntarily waived her statutory rights and lawfully became an at-will employee in 1998. Id. The Board adopted Mr. Preston’s analysis and concluded that Ms. Howick was not entitled to an appeal. Facts ¶18.

In short, the Board's decision applied the law to the facts and hence was a "mixed question of law and fact." As such, the Board's decision should be reviewed under the deferential standard of "reasonableness" or "abuse of discretion."<sup>6</sup>

Ms. Howick ignores the fact that the Board was making a mixed decision of law and fact, and treats the decision as if it were a matter of pure legal interpretation. Br. of Appellant at 10. While Ms. Howick's characterization of the Board's decision is incorrect, the same deferential standard of review would apply even if her characterization were accepted. This is so because where, as here, the governing statute grants discretion to the administrative body, that body's legal interpretations are entitled to review under the deferential standard of "reasonableness." "[A]bsent a grant of discretion," an agency's interpretation of law is reviewed under the "correction-of-error" standard. However, where there is an "explicit or implicit grant of discretion contained in the governing statute," "it is appropriate to grant the agency deference." Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 588 (Utah 1991); Savage, 811 P.2d at 668 (deference to agency's decisions of law where legislature granted agency discretion).<sup>7</sup>

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<sup>6</sup> In arguing that the Board's decision should be reviewed under the correction-of-error standard, Ms. Howick quotes Tolman, addressing the standard of review that would be applicable where no discretion is granted to the agency or where the agency "has stepped out of the arena of [its] discretion" and "crossed the law" in making a purely legal determination. 818 P.2d at 27-28. In the instant case, the governing statutes grant discretion to the City and the Board, the Board did not exceed the boundaries of its discretion and made a mixed decision of law and fact, not a pure determination of law. Hence, the standard of "reasonableness" or "abuse of discretion" should be applied.

<sup>7</sup> Deference to an administrative body's decisions is not limited to where the agency has

That the governing statutes grant discretion to the Board is clear from the language of the statutes themselves. First, Section 10-3-1105(3) expressly leaves to municipalities the unlimited authority to decide on appropriate reasons for an employee's discharge. Second, Section 10-3-1106(6) expressly states that this Court is to review the Board's decision to determine if it "abused its discretion." Third, Section 10-3-1106 does not provide a standard for determining the propriety of an employee's discharge, but leaves that up to the municipality.<sup>8</sup> Fourth, the statute delegates to the municipality the authority to determine both "the procedure for conducting an appeal" and the "standard of review" to be applied. Utah Code Ann. § 10-3-1106(7)(a). Fifth, under the Board's Procedures, it is the Board that has the authority to determine "whether a City employee is within the class of persons who may appeal [his/her] discharge," and the Board may request a legal opinion on that issue in making its determination. Procedures § III.G, attached hereto as App'x 2. Finally, the legislative history of the statute, in its current form, shows that the statute was intended to strengthen the power of cities to discharge employees: "We are giving city councils and administrations the ability to fire employees." Facts ¶25.

In sum, the governing statute provides "an explicit or implicit grant of discretion" to the Board to determine "whether a City employee is within the class of persons who

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special expertise or experience, although that is one basis for deferring to agency action. Morton, 814 P.2d at 588; Savage, 811 P.2d at 668. The Utah Supreme Court, in Morton, noted that under the Utah Administrative Procedures Act, deference to an agency's decision does not require and is not predicated on agency expertise or experience. 814 P.2d at 588.

<sup>8</sup> Compare Section 10-3-1106, which contains no standard, with Section 10-3-1012(1) (which does not apply to Ms. Howick) which specifies limited permitted grounds for an employee's discharge.

may appeal” his/her discharge and to rely on a properly obtained legal opinion in making its decision. Morton, 814 P.2d at 588; Procedures § III.G, attached hereto as App’x 2. Accordingly, the Board’s decision, even if it were construed as a pure legal interpretation, is entitled to “deference” and review only for “reasonableness.” Morton, 814 P.2d at 588; Tolman, 818 P.2d at 27 n.4.

It is clear from the record that the Board acted reasonably and did not abuse its discretion. It followed the required procedures each step of the way, from when it first received Ms. Howick’s appeal to when it made its final decision. At its first meeting the Board recognized that the first issue confronting it was whether it had the authority to accept Ms. Howick’s appeal. Facts ¶9. The Board invited Ms. Howick and the City to present their positions on the issue. Ms. Howick did so by submitting an extensive brief. Id. Faced with conflicting arguments from the parties, the Board requested a legal opinion as it was permitted to do by its governing procedures. The City Attorney acted properly in recusing himself from providing a legal opinion because of his conflict of interest. Pursuant to the City’s Code, the City Attorney requested that an independent outside legal counsel provide the legal opinion. Id. ¶13. The independent outside counsel did so, and concluded that Ms. Howick was an at-will employee because she had waived her statutory rights when she voluntarily agreed to become an at-will employee in exchange for consideration. Id. ¶¶16-17. The Board relied on the legal opinion in determining that, under the governing policies and procedures, Ms. Howick’s appeal to the Board was not proper. Id. ¶18. In making its decision, the Board did not exceed its

authority, but acted reasonably in exercising the decision-making authority granted to it.

Accordingly, Ms. Howick's appeal to this Court should be dismissed.<sup>9</sup>

**II. MS. HOWICK IS ESTOPPED FROM ASSERTING THAT THE CONTRACT IS INVALID BECAUSE SHE ACCEPTED THE BENEFITS OF THE CONTRACT FOR NINE YEARS, TO THE DETRIMENT OF THE CITY.**

Ms. Howick contends that the at-will Disclaimer she executed with the City, wherein she elected to become an at-will employee, is void and unenforceable because it was formed in contravention of state statute. Br. of Appellant at 22. However, it is unnecessary for this Court to determine whether the contract at issue in this case is enforceable. Ms. Howick is estopped from attacking the validity of the contract because she accepted the benefits (a substantial increase in pay and benefits) of the agreement. As the members of the Board noted, Ms. Howick had agreed in writing to be at-will and had remained an at-will employee for nine years. Facts ¶10.

Equitable estoppel requires

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3)

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<sup>9</sup> The Board's decision may be upheld on the alternative ground that the Board did not have the authority to determine that Ms. Howick was other than at-will. It is undisputed that Ms. Howick was classified as an at-will employee at the time of her termination. Ms. Howick acknowledged that fact, but argued to the Board that under state law her at-will status was unlawful. R. 33, 50-60 ("[W]hether the City could legally classify Ms. Howick's position as at-will . . . is a question of law . . ."). However, under its governing Procedures, "the Board ha[d] no authority to determine the City's legal liability under . . . state law." Procedures § I.C at R.40 and App'x 2. Accordingly, as the City explained to the Board, the Board could not "look behind" Ms. Howick's admitted at-will status to see if it was lawful under state law. R. 29-30. For this additional reason, the Board's decision that Ms. Howick was at-will and not entitled to an appeal was correct.

injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act.

Whitaker v. Utah State Retirement Bd., 2008 UT App 282, ¶22, 191 P.3d 814; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶34, 989 P.2d 1077. Equitable estoppel prevents a party from “denying the validity of [a] contract when one party has relied on another party’s conduct.” Glew v. Ohio Sav. Bank, 2007 UT 56, 181 P.3d 791, 798. Furthermore, “one of the most familiar applications of the rule relating to acceptance of benefits arises in case of contracts. It has been repeatedly held that a person by acceptance of benefits *may be estopped from questioning the existence, validity and effect of a contract.*” Tanner v. Provo Reservoir Co., 289 P. 151, 154 (Utah 1930) (emphasis added). “Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other’s prejudice.” Id.; cf. Pelton’s Spudnuts v. Doane, 234 P.2d 852, 855 (Utah 1951) (“If a party continues to exercise the privileges of a franchise . . . he is not in any position to deny the obligations which attach to such use.”).

This doctrine has been applied in many cases like the instant case, where a party contracted with a governmental entity, received the benefits of the contract, and later sought to have the contract declared void. For example, in Kiewit W. Co. v. City and County of Denver, 902 P.2d 421 (Colo. Ct. App. 1994), a general contractor who agreed to construct several runways at the Denver Airport and had received payment under the

contract was estopped from later asserting that the contract was contrary to the Colorado Constitution and the Denver City Charter. Id. at 423. The appellate court determined that it did not have to consider the validity of the contract, and instead held that “having received and retained the benefits under the contract,” the contractor was “estopped to assert that the . . . contract was *ultra vires* or unconstitutional.” Id. (citing City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467 (1964)). The same result was reached in Lone Pine Corp. v. City of Ft. Lupton, 653 P.2d 405 (Colo. App. 1982), where two land developers sought to have their contract with the municipality declared void based on it being *ultra vires* and therefore illegal. In exchange for the municipality’s zoning and platting approval, the contract required the developers to make payments to the city’s school district to offset the impact of increased school enrollment. The court held that because the district relied on the agreement and already conferred benefits on the developers, the developers were estopped from denying the obligations of the contract. Id. at 406. See also Baukol Builders, Inc. v. County of Grand Forks, 2008 ND 116, ¶¶9-12, 751 N.W.2d 191 (holding that a builder who had received the benefits of a contract could not go back and assert that the city’s bidding process had been contrary to statute); Boulder Brook Acres, Inc. v. Town & Vill. of Scarsdale, 91 N.Y.S.2d 785, 786 (N.Y. App. 1985) (“[P]laintiff is estopped from attacking the validity of the deed conveying the property. Having accepted the benefits resulting from an approval of a subdivision of its property, it cannot now seek to avoid the corresponding obligations.”); Cluggish v. Koons, 43 N.E. 158, 160 (Ind. Ct. App. 1896) (“It has been time and time again decided that a property holder who quietly permits money to be expended or labor to be done by

another, which benefits his lands, under a contract with a municipality or other constituted authorities, is estopped to deny that the municipality or authorities had the power to make the contract.”). As demonstrated below, the elements of equitable estoppel are met in this case, and it would be unfair and unjust to allow Ms. Howick to now declare her contract with the City unenforceable.

**A. Ms. Howick Voluntarily Entered Into the At-Will Contract and Thereby Agreed that She Was Waiving Her Right to an Appeal, Which is Inconsistent With Her Current Argument.**

The first requirement of equitable estoppel is that there be “a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted.” See Whitaker, 2008 UT App 282 at ¶22. Here, the “act” at issue is Ms. Howick’s agreement to become an at-will employee in exchange for a substantial increase in pay and benefits. Facts ¶2. This agreement was entirely voluntary and not coerced; in fact, a number of employees faced with the same decision as Ms. Howick chose not to become at-will. Id. As a lawyer, Ms. Howick clearly knew that becoming “at will” meant that she could be discharged for any reason and would not be entitled to appeal the decision. Id.; see also Preston Opinion, R. 85 and App’x 5 (“There is no allegation by Ms. Howick that her signing the Disclaimer was anything other than voluntary on her part and in exchange for an increase in pay, which she subsequently received.”). Her act of agreeing to become at-will in exchange for a substantial pay increase is directly inconsistent with the claim Ms. Howick now asserts—that she is entitled to a hearing before the Board.

[I]f a public employee has served in an unclassified position and has enjoyed the benefits of the unclassified status such as increased salary, then as a matter of equity and fairness, the

employee should be precluded from claiming classified status in order to receive the statutory benefits afforded classified civil servants.

Chubb v. Ohio Bureau of Worker's Compensation, 690 N.E.2d 1267, 1269 (Ohio 1998).

The first element of equitable estoppel is met.

**B. Salt Lake City Relied on Ms. Howick's Agreement To Be At-Will and Provided Her With a Substantial Increase in Pay and Benefits.**

The second requirement of equitable estoppel is that there be reasonable “action or inaction by the other party taken on the basis of the first party’s statement, admission, act, or failure to act.” Whitaker, 2008 UT App 282 at ¶22. It is beyond dispute that this requirement is satisfied here. Ms. Howick acknowledges that in exchange for her agreement to become an at-will employee, she received increased pay and benefits. Br. of Appellant at 4. This action by Salt Lake City was taken solely on the basis of Ms. Howick’s act—her agreement that she could be terminated for any reason and would not be entitled to appeal the decision. The City, therefore, “change[d] its position in justifiable reliance on the conduct” of Ms. Howick. Lone Pine Corp., 653 P.2d at 406.

**C. If Ms. Howick is Permitted to Repudiate the Contract, Salt Lake City Will Suffer Injury Because it Has Already Paid Ms. Howick a Substantial Sum of Money; Indeed, Salt Lake City Has Already Suffered Injury By Having to Expend Time and Resources to Defend This Legal Action.**

Finally, for equitable estoppel to prevent repudiation of a contract, there must be “injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act.” Whitaker, 2008 UT App 282 at ¶22.

Salt Lake City will be injured—and has already been injured—by not getting its benefit of the bargain, which is being able to terminate Ms. Howick at will and without a hearing. As already noted, Salt Lake City has already paid Ms. Howick a substantial sum in increased salary and benefits and did so to avoid having to expend time and resources handling claims of the sort asserted here by Ms. Howick. Facts ¶2.

Equitable estoppel is “imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and *who, in justifiable reliance upon the opposing party’s words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.*” Ionosphere Clubs, Inc. v. Ins. Co. of the State of Pa., 85 F.3d 992, 999 (2d Cir. 1996) (emphasis added).<sup>10</sup> This element of estoppel is met here, as Salt Lake City acted upon the assurance that Ms. Howick would not seek to appeal a termination decision, and Ms. Howick cannot now, nine years after the fact, seek to repudiate a contract from which she has benefitted for so long.

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<sup>10</sup> Ms. Howick also asserts in her brief that her at-will status is void because Salt Lake City created the at-will position through unenforceable City ordinances, policies and procedures. The basis of Ms. Howick’s at-will status was the agreement she signed in 1998, not the policies, compensation plans, etc. that she refers to. The City Counsel Staff Report and the compensation plan attached to Ms. Howick’s Brief were created in 2008 and did not exist at the time she agreed to become at-will. Moreover, the principles of equitable estoppel apply in the same manner as that already described in the circumstance of one who accepts benefits under ordinances or policies/procedures and then seeks to declare the ordinance or policy/procedures void. See Rhodus v. Geatley, 147 S.W.2d 631, 637 (Mo. 1941) (“Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested.”).

### **III. MS. HOWICK WAIVED ANY STATUTORY OR CONSTITUTIONAL RIGHT TO RECEIVE A HEARING BEFORE THE BOARD.**

Similarly, Ms. Howick is also not entitled to a hearing because she waived any statutory or constitutional entitlement she may have had to a hearing. “A waiver is the intentional relinquishment of a known right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. [The relinquishment] must be distinctly made, although it may be express or implied.” Anderson v. Thompson, 2008 UT App 3, ¶37, 176 P.3d 464 (alteration in original); see also Yates v. Am. Repubs. Corp., 163 F.2d 178, 180 (10th Cir. 1947) (stating that elements of waiver are (1) an existing right, (2) knowledge of the right, and (3) an intention to relinquish the right, and holding “one in possession of a right of that kind may effectively waive it by acts, conduct, declarations, acquiescence, or silence where duty requires that he speak”).

#### **A. Ms. Howick Has Waived Her Statutory Rights.**

It is well-established that a party may waive statutory rights through a contract. “It is everywhere recognized that the person for whose benefit a [statutory] provision is made may waive it when it does not affect the rights of others.” Palmer v. Broadbent, 260 P.2d 581, 586 (Utah 1953); see also Tustian v. Schriever, 2001 UT 84, ¶16, 34 P.3d 755 (“[A] party may waive the benefit of a statute enacted for protection of the party, providing the waiver does not infringe public policy or morals.” (citing 83 C.J.S. Stipulations § 28)).

Here, by knowingly and voluntarily signing the at-will disclaimer and thereby agreeing to become an at-will employee, Ms. Howick waived any right to the process

contained in Utah Code section 10-3-1106. Ms. Howick is an attorney who had practiced at the Salt Lake City Attorneys Office for six years at the time she voluntarily agreed to become at-will. Facts ¶¶1-2. She knew that she was giving up her right to a hearing or other process upon termination in exchange for an increase in pay and benefits. See Preston Opinion, R. 85 and App’x 5 (“There is no allegation by Ms. Howick that her signing the Disclaimer was anything other than voluntary on her part and in exchange for an increase in pay, which she subsequently received.”). Her waiver and agreement with the City were particularized to her individual circumstances and did not affect anyone else. No one else’s employment status or rights were impacted by Ms. Howick’s voluntary and knowing waiver. See Palmer, 260 P.2d at 586.

Ms. Howick is challenging only her employment status and appeal rights,<sup>11</sup> and no infringement of public policy is involved. The term “public policy” is not “subject to precise definition,” but matters of public policy in general are “of such fundamental concern to society that the right of individuals to order their affairs by contract may yield to society’s interest in preserving or advancing the matter.” Lee v. Thorpe, 2006 UT 66, ¶24, 147 P.3d 443. Although constitutions and statutes are often the source of public policy, “*this does not mean that all statements made in a statute are expressions of public policy,*” id. (quoting Peterson v. Browning, 832 P.2d 1280, 1282 (Utah 1992))

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<sup>11</sup> Ms. Howick asks this Court to invalidate the provisions of City ordinances and policies/procedures that allegedly exceed the City’s statutory authority. However, this Court only has the jurisdiction to review Ms. Howick’s individualized agreement, because that was all that was considered by the Board, and to determine if the Board’s decision should be affirmed or reversed under the abuse of discretion standard.

(emphasis added), unless the statute at issue contains a “purposeful legislative expression[] of public policy,” *id.* (citing Utah Code section 53A-12-201, which states that “[i]t is the public policy of this state that public education shall be free”). See also *Ockey v. Lehmer*, 2008 UT 37, ¶¶23-24, 189 P.3d 51 (holding, in case where plaintiff asserted that conveyance was void due to lack of authority of trustees to transfer property, that conveyance was not per se unenforceable on public policy grounds as “no statute declares ultra vires acts by trustees absolutely void as against public policy,” and contrasting plaintiff’s case with previous case arising under a different statute, Utah Code Ann. §§ 50-1-1 through -6, which declares that contracts formed to control prices are void as against public policy); *Rothstein v. Snowbird Corp.*, 2007 UT 96, ¶12, 175 P.3d 560 (construing Utah Code section 78-27-51, which states that “*as a matter of public policy*, no person engaged in that sport [of skiing] shall recover from a ski operator for injuries resulting from those inherent risks” (emphasis added))).

Here, the statutes that Ms. Howick contends Salt Lake City violated are found at Utah Code sections 10-3-1105 and -1106. Br. of Appellant at 11. Nowhere in these two statutes or in the entire statutory scheme in which these statutes are contained is there a statement of public policy declaring agreements formed in alleged violation of these statutes void and unenforceable. Nothing in Section 10-3-1105 or 10-3-1106 prohibits an employee from making an agreement to waive his/her rights under the statutes.<sup>12</sup> In

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<sup>12</sup> Actionable “‘public policy’ is far narrower than what may typically be characterized as ‘public policy.’” Where the parties are not prohibited from modifying their obligations by contract, a statute does not embody an actionable public policy. *Ryan v. Dan’s Food*

contrast, other Utah statutes dealing with employee rights, such as the Employment Security Act and the Workers Compensation Act, expressly prohibit waivers of statutory rights. See Utah Code Ann. § 34A-2-108(1) (employee may not agree to waive rights to workers compensation benefits) & Utah Code Ann. § 34A-4-103(1)(a) (“any agreement by an individual to waive, release, or commute his rights to [unemployment] benefits or any other rights under this chapter is void.”). Additionally, in amending 10-3-1105 and 10-3-1106 in 2004 to allow municipal authorities to decide grounds for terminations and the procedure and standard of review for conducting appeals, the amendment’s sponsor stated that the changes were intended to strengthen cities’ ability “to fire employees.” Facts ¶25.

Ms. Howick’s waiver of her appeal rights is not a matter of such “fundamental concern to society” that public policy is implicated. Indeed, the Utah Supreme Court has urged courts to exercise extreme caution in determining that a silent statute embodies a particular public policy:

To pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle *is to invite judicial mischief*. . . . [P]ublic policy is a protean substance that is *too often easily shaped to satisfy the preferences of a judge rather than the will of the people or the intentions of the Legislature*. We aptly noted the risks of relying on public policy rationales when we stated that “the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as a basis for judicial determinations, if at all, with only the utmost circumspection.”

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Stores, Inc., 972 P.2d 395, 405 (Utah 1998); Rackley v. Fairview Care Centers, Inc., 2001 UT 32, ¶ 17, 23 P.2d 1022, 1027 (Utah 2001).

Rothstein, 2007 UT 96, at ¶10 (quoting Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1043 (Utah 1998) (emphasis added). This Court should use caution and uphold Ms. Howick’s knowing and voluntary waiver of any presumed statutory right to appeal her termination to the Board because the statutes at issue do not embody a matter of public policy.

**B. Ms. Howick Waived Her Constitutional Rights.**

It is also beyond dispute that a party is able to waive constitutional protections, including due process rights, through an agreement. See State v. Rhinehart, 2007 UT 61, ¶¶15-18, 167 P.3d 1046 (stating guilty plea waives alleged pre-plea constitutional violations); Jenkins v. Percival, 962 P.2d 796, 800 (Utah 1998) (holding arbitration agreements can waive constitutional right of access to the courts); Legg v. Bd. of Pardons, No. 20060729-CA, 2007 WL 1576394, at \*1 n.2 (prisoner’s signing of a “Time Waiver For Parole Revocation Hearing” waived any claim that he was denied procedural due process). Ms. Howick’s act of signing the at-will disclaimer waived her constitutional right to due process.

**IV. EVEN ASSUMING MS. HOWICK’S CONTRACT WITH THE CITY WAS ILLEGAL, A BALANCE OF THE EQUITIES FAVORS ENFORCEMENT.**

Ms. Howick asserts that “Salt Lake City attempts to give itself an expanded power to designate at-will positions in violation of [s]ections 10-3-1105 and 10-3-1106 by contract. However, all of Salt Lake City’s contractual efforts to create at-will positions and deny statutory protections in violation of [s]ections 10-3-1105 and 10-3-1106 are void.” Br. of Appellant at 21. Even assuming Ms. Howick is correct in her assertion that

her contract with the City is illegal and therefore void, *the Contract may still be enforceable.*

“Despite the general rule that every contract in violation of law is void, the fact that a contract serves a prohibited purpose does not necessarily make the contract unenforceable.” Peterson v. Sunrider Corp., 2002 UT 43, ¶39, 48 P.3d 918.

Survey of the authorities reveals that when contracts involve gambling, immorality or violation of laws purposed to the protection of health, morals or welfare, the law, as a matter of policy, regards the contracts as void and refuses to take cognizance thereof or to grant any relief. However, arbitrary refusal to grant relief under contracts merely in violation of statute often brings about such incongruous results in giving advantages to wrongdoers and penalizing the relatively innocent that the courts have carved out so many exceptions to the so called “general rule” that it can hardly be properly so denominated.

McCormick v. Life Ins. Corp. of Am., 308 P.2d 949, 951 (Utah 1957). Instead of declaring illegal or void contracts per se unenforceable, courts may look at the “over-all picture of each such questioned contract” and “determine upon the facts of the individual case whether the ends of justice demand that relief be granted.” Id. at 952. The following factors are examined: “(a) the degree of criminality or evil involved; (b) the moral quality of the conduct of the parties; (c) comparison between them as to guilt or innocence; (d) the equities between them; and (e) the effect upon third parties or the public.” Id.

An examination of the factors in this case demonstrates that, on balance, the contract between Salt Lake City and Ms. Howick should be enforced. First, there is

nothing to suggest that any criminality or evil intent was involved in the formation of this contract, and neither party has conducted itself in a morally questionable manner.

Both the equities between the parties and the effect upon the public favor enforcement. As already described, Ms. Howick, after having worked as an attorney for the City for six years, voluntarily chose to accept a substantial increase in pay and benefits in exchange for becoming at-will. Facts ¶¶1, 2. Ms. Howick served in her at-will position for nine years, never once complaining about her supposed illegal status, and all the while accepting the increase in pay and benefits that came with the agreement she signed. Because she was a municipal employee, taxpayer money was used to pay Ms. Howick's increased salary and benefits. This is not the situation where if the contract is enforced, it will cost the taxpayers money—in fact, just the opposite is true: more taxpayer dollars will be expended if Ms. Howick's contract is not enforced and the City has to provide her with a hearing and continue to defend its position throughout a process to which she is not entitled. Indeed, if Ms. Howick truly believes that the contract was void from the beginning, she has been unjustly enriched at the taxpayers' expense and would be liable for the overpayment on that ground.

The City believed what it was getting from the contract was the certainty of being able to terminate Ms. Howick at-will and without undergoing the time and expense of an appeal. The efficiencies of being able to terminate unsatisfactory employees who are designated at-will are beneficial to the municipal government, the taxpayers of the municipal government, and society at large.

In light of freedom of contract, courts have “a duty to employ any reasonable construction to declare contracts lawful and not in contravention of public welfare.” Ockey, 2008 UT 37 at ¶ 24 (quotations omitted). Ms. Howick exercised her freedom of contract to be appointed to the at-will position. The contract should be enforced, and this Court should determine that Ms. Howick is not entitled to an appeal before the Board.

**V. THE BOARD HAD NO JURISDICTION TO HEAR THE CONSTITUTIONAL ARGUMENTS, NOR DOES THIS COURT NOW HAVE JURISDICTION BECAUSE IT IS ONLY EMPOWERED TO REVIEW THE DECISION OF THE BOARD.**

No jurisdiction exists for this Court to hear Ms. Howick’s constitutional arguments. “Both courts and quasi-judicial administrative agencies . . . must have subject matter jurisdiction to validly decide a controversy. Therefore, the initial inquiry of any [adjudicative body] should always be to determine whether the requested action is within its jurisdiction.” Blaine Hudson Printing v. Utah State Tax Comm’n, 870 P.2d 291, 292 (Utah Ct. App. 1994).

The Board could not have heard Ms. Howick’s constitutional due process arguments because nothing in Utah Code section 10-3-1106 permits the Board to consider such issues, and nothing in the rules governing the Board allows the consideration of constitutional issues. Indeed, the Board has no authority to determine “the City’s legal liability under federal or state law.” Procedures § I.C. (App’x 2). While an employee is allowed to appeal a decision of the Board to this Court, the statute limits what this Court may consider: “The Court of Appeals’ review *shall be on the record of*

*the appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.”* Utah Code Ann. § 10-3-1106(c) (emphasis added).

In sum, the jurisdiction of the Board is narrow—the Board does not have the statutory authority to examine or determine constitutional issues. If the Court of Appeals may only look at the record of the Board to determine if there was an abuse of discretion, it necessarily follows that the Court of Appeals must circumscribe its review to the narrow issue determined by that Board, as reflected in the record. As a result, in this case, Ms. Howick’s constitutional arguments must be disregarded as they are not in the record of the Board, were not, and could not have been, determined by the Board, and are thus beyond the Court’s subject matter jurisdiction in this case.<sup>13</sup>

## **VI. MS. HOWICK’S DUE PROCESS ARGUMENTS ARE WITHOUT MERIT.**

### **A. Ms. Howick Does Not Have a Protected Property Interest in Her Employment.**

Ms. Howick cites Lucas v. Murray City Civil Serv. Comm’n, 949 P.2d 746 (Utah Ct. App. 1997) for the principle that public employees may have a property right in employment if “contractual or statutory provisions guarantee continued employment absent ‘sufficient cause’ for discharge.” Id. at 752.

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<sup>13</sup> It should be noted that the lack of opportunity to present the due process argument before the Employee Appeals Board and this Court does not deny Ms. Howick of all opportunities to advance this claim. Ms. Howick can file for relief in the district court through, for example, an extraordinary writ. Blaine Hudson Printing, 870 P.2d at 294.

It is undeniable that Ms. Howick cannot look to any contractual provisions for a protected property interest. Indeed, it is the contract that Ms. Howick voluntarily executed with the City that eliminated the right to process upon termination.<sup>14</sup> Facts ¶2.

Ms. Howick asserts, incorrectly, that Utah Code sections 10-3-1105 and -1106 create a constitutional property right. In Board of Regents v. Roth, the United States Supreme Court stated that to have a property interest in employment, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it.” 408 U.S. 564, 577 (1972).

Furthermore, to create a property interest, the statute relied upon “must provide more than procedure, for there is neither a liberty nor a property interest in procedures themselves. . . . In order to give rise to a constitutionally protected property interest, a statute or ordinance must go beyond mere procedural guarantees to provide some substantive criteria limiting the state’s discretion—as can be found, for example, in a requirement that employees be fired only for cause.” Colburn v. Trs. of Ind. Univ., 739 F.Supp. 1268, 1289 (S.D. Ind. 1990); *see also* Kingsford v. Salt Lake City Sch. Dist., 247 F.3d 1123, 1129 (10th Cir. 2001) (“It is well established in this circuit . . . that procedural protections alone do not create a claim of entitlement to continued public employment. Rather, a legitimate claim of entitlement to continued public employment arises only

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<sup>14</sup> As discussed *supra*, Ms. Howick, by signing the “at-will disclaimer” waived her due process rights. Her constitutional argument fails for this reason as well as the others discussed in this section of Appellee’s brief.

when there are substantive restrictions on the ability of the employer to terminate the employee.”).<sup>15</sup>

In Lucas, this Court examined Utah Code section 10-3-1012, which states:

All persons in the classified civil service may be . . . removed from office or employment by the head of the department for misconduct, incompetency, failure to perform his [or her] duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission . . . which shall fully hear and determine the matter.

Utah Code Ann. § 10-3-1012 (emphasis added).<sup>16</sup> This language created a property interest because it “specifically list[ed] the reasons for which a civil service employee may be discharged” and therefore, with “unmistakable clarity,” granted employees security against discharge without cause. Id.

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<sup>15</sup> See also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (same); Bunger v. Univ. of Okla., 95 F.3d 987, 991 (10th Cir. 1996) (same); Silver, I., Public Employee Discharge & Discipline § 17.04[B], at 1134 (“The existence of certain procedural protections has been almost uniformly held insufficient to warrant constitutional due process protection.”)

<sup>16</sup> It is beyond dispute that Ms. Howick would not be covered by this statute because she is not in the classified civil service, which

consist[s] of all places of employment now existing or hereafter created in or under the police department and the fire department of each first or second class city that establishes a civil service commission and the health department in each first class city that establishes a civil service commission, except the head of the departments, deputy chiefs of the police and fire departments, and assistant chiefs of the police department in cities of the first and second class, and the members of the board of health of the departments.

Utah Code Ann. § 10-3-1002(1).

By contrast, here, the controlling statutes contain nothing even remotely resembling a for-cause standard as is found in Section 10-3-1012(1). Ms. Howick first cites Section 10-3-1105(1) as creating a “for-cause” standard, yet this section merely provides that a covered employee may be discharged “as provided in Section 10-3-1106.” Section 10-3-1106 does not contain a “for-cause” standard for discharge, nor does it list particular reasons for which a discharge may properly occur. Ms. Howick cites to Section 10-3-1106(3), as if it creates a “for-cause” standard. It does not but merely states, unremarkably: “Upon receipt of the referral from the municipal recorder, the appeal board shall forthwith commence its investigation, take and receive evidence, and fully hear and determine the matter which relates to the cause for the discharge, suspension, or transfer.” Id. § 10-3-1106(3)(b)(ii). Indeed, the Legislature expressly stated that it was not creating a for-cause standard in these sections but was leaving such matters to individual municipalities. Id. § 10-3-1105(3) (neither § 10-3-1105 nor § 10-3-1106 “may be construed to limit a municipality’s ability” to decide appropriate reasons for an employee’s termination). As pointed out above, the Board applies a very deferential abuse of discretion standard of review. See fn. 4 supra. Ms. Howick’s attempt to torture the language in these statutes into a property interest fails. At most, sections -1105 and -1106 provide required procedural steps, which, as discussed, do not create a property interest.

In sum, in Ms. Howick’s case, there is no “contractual or statutory provision guarantee[ing] continued employment absent ‘sufficient cause’ for discharge,” as required by Lucas. 949 P.2d at 752. Because Ms. Howick did not have a property

interest in her employment, her constitutional due process claim lacks an essential element and should be dismissed.

**B. Even Assuming Ms. Howick Has A Protected Property Interest, the Process Given to Ms. Howick Satisfies the Constitution.**

If this Court determines that Ms. Howick has a protected property interest, it should nonetheless determine that due process has been satisfied. The Board followed its own procedures to the letter and did not abuse its discretion.

As previously described, after Ms. Howick was discharged, she submitted a Notice of Appeal to the Board. Facts ¶4. Because Ms. Howick was at-will, the City's Labor Relations Officer sent Ms. Howick's counsel a letter explaining that no appeal was available because the Board did not have jurisdiction. *Id.* ¶5; *see* Procedures § III.A, attached hereto as App'x 2 ("Any City officer or employee *to whom these procedures apply* may appeal a discharge . . . ." (emphasis added)). Ms. Howick then appealed to this Court, and this Court dismissed the appeal on the ground it lacked jurisdiction because there had been no final action of the Board. Facts ¶8.

Nevertheless, responding to the suggestion in the Court of Appeals' Memorandum Decision that the Labor Relations Officer could not issue a final agency action, the City then forwarded Ms. Howick's appeal to the Board. Facts ¶8. The Board recognized that Ms. Howick had to be entitled to an appeal in order for it to properly consider her claim, and that its initial inquiry was whether it could accept her appeal. *Id.* ¶9. The Board invited both sides to submit their respective positions on the issue, and Ms. Howick submitted an extensive legal brief. *Id.* After receiving the briefing on the issue, the

Board determined that it would need a legal opinion on whether Ms. Howick's at-will status was proper, as it was required to do by its own Procedures. Id. ¶¶10, 11; see also Procedures § III.G, attached hereto as App'x 2 ("If there is a question whether a City employee is within the class of persons who may appeal a discharge . . . the Board shall request an opinion from the City Attorney regarding that issue.").

The legal opinion was initially sought from the City Attorney, but the City Attorney determined that he had a conflict of interest because he was the person who had terminated Ms. Howick. Facts ¶12. The City Attorney referred the matter to "independent special counsel," who would "in no way [be] subject to the control or direction of the city attorney," to render an opinion on the validity of Ms. Howick's at-will status. Id. ¶¶12, 13.

After examining the briefing by the parties and the issues presented, independent counsel concluded that Ms. Howick had lawfully waived her statutory rights in becoming an at-will employee in 1998. Based on the opinion, the Board voted unanimously that it did not have the authority to consider the appeal of Ms. Howick. Id. ¶18. The Board's determination that Ms. Howick was not entitled to an appeal and that it lacked jurisdiction over Ms. Howick's appeal constituted a final action, and Ms. Howick then appealed, again, to this Court.

This process demonstrates that the Board acted carefully and with caution in attempting to determine whether it was empowered to hear Ms. Howick's appeal. The Board precisely followed its own procedures, and there was nothing arbitrary, capricious, or abusive about the process. Therefore, even if Ms. Howick is entitled to constitutional

due process in the circumstances of this case, the above-described facts demonstrate that she received more than adequate process.

**VII. MS. HOWICK IS NOT ENTITLED TO ATTORNEY FEES UNDER ANY OF THE LEGAL DOCTRINES SHE ASSERTS.**

Utah follows the American rule that absent exceedingly unusual circumstances, attorney fees are recoverable only if provided for by statute or contract. Culbertson v. Bd. of County Commr's of Salt Lake County, 2008 UT App 22, ¶9, 177 P.3d 621. Ms. Howick has asserted several equitable grounds upon which she claims she may recover attorney fees; however, even if she were to prevail in this appeal, none of Ms. Howick's asserted grounds justify an award of attorney fees in this case.

**A. Attorney Fees Are Not Available to Ms. Howick Under the Private Attorney General Doctrine.**

Ms. Howick first asserts that she is entitled to recover her attorney fees under the private attorney general doctrine. Utah courts may only award attorney fees under this doctrine when “the vindication of a strong or societally important public policy takes place and the necessary costs in doing so transcend the individual plaintiff's pecuniary interest to an extent requiring subsidization.” Culbertson, 2008 UT App 22 at ¶9. Fees are awarded under this doctrine only in “extraordinary” cases. Id.; see also Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 784 n.9 (Utah 1994) (private attorney general doctrine applies only in an “exceptional” and “extraordinary” case).

Ms. Howick cannot demonstrate that she meets this standard. As discussed supra, Ms. Howick is not seeking through this litigation to vindicate a strong or societally important public policy; rather, she is merely seeking to vindicate her own supposed right

to a hearing and reinstatement. Ms. Howick has a large personal stake in this litigation, which undermines her claim for fees under this doctrine. Culbertson, 2008 UT App 22 at ¶13.

In Culbertson, the Utah Supreme Court allowed a landowner to recover fees under this doctrine because there was collusion between a property developer and the county, resulting in willful disregard of zoning ordinances so that both the developer and the county could obtain economic advantage. Id. at ¶14. The county and the developer determined that they would proceed with their development plans even though the landowners had put them on notice that they would be harmed and that what they were doing was illegal. Id. The court held that the litigation vindicated “an actual and concrete benefit to a large number of citizens.” Id. at ¶16; see also Stewart, 885 P.2d at 783 (stating that application of private attorney general doctrine was appropriate in case where ratepayers petitioned for judicial review of Public Service Commission’s order and therefore benefitted all ratepayers); Utahns for Better Dental Health, Inc. v. Davis County Clerk, 2007 UT 97, ¶10, 175 P.3d 1036 (awarding attorney fees under the private attorney general doctrine because “blocking from the ballot of an unconstitutional initiative petition is an actual and concrete benefit to a large number of citizens and voters, especially in light of the potential costs associated with campaigns to secure or avoid the initiative’s passage”).

In contrast to these cases, Ms. Howick’s case does not seek to confer benefits through this appeal on anyone but herself. She has not demonstrated any public benefit that would be realized if she prevails—in fact, the only remedy that she can obtain

through this appeal is a hearing before the Board on the reasons behind the termination of her employment. Not once during the nine-year period of her at-will employment, during which time she was receiving increased salary, did Ms. Howick ever raise concerns that her at-will job status was contrary to or affected the public interest. Nor has Ms. Howick demonstrated that others are unhappy with the City's employment classifications whereby they are able to voluntarily choose to become at-will employees in exchange for increased pay.

Ms. Howick also cannot demonstrate that the "costs incurred in this litigation exceeded their intended goals to such an extent that subsidization is appropriate." Culbertson, 2008 UT 22 at ¶17. Ms. Howick has a strong pecuniary interest in this case—she is seeking reinstatement to a high-paying position and is also seeking back pay that she asserts she is owed as a result of her alleged wrongful discharge. Ms. Howick asserts that she has incurred legal fees in vindicating her legal rights. However, these fees do not transcend Ms. Howick's pecuniary interest because the position to which she seeks reinstatement is a high-paying attorney position. Subsidization is not required or appropriate in this case.

Ms. Howick describes in general terms the challenges that discharged employees face in bringing an action against their former employers at a time when they are without employment and without any income. Ms. Howick also asserts that "[r]aising a challenge creates severe stress and difficulty for the employee and places at risk the employee's ability to return to the workplace or find other employment." Br. of Appellant at 37. Ms. Howick, however, does not describe any challenges of this sort that she, personally, has

faced. Indeed, what Ms. Howick particularly fails to mention is that she is currently employed at a large private law firm in Salt Lake City, and therefore these purported concerns are not relevant to her situation.

She further states that “employees seeking to vindicate these important rights face strong financial and personal disincentives and the City’s classifications, ordinances, policies, procedures, and contracts have previously gone without challenge. This action will make it less likely that municipal employees, including others at the City, will be subjected to illegal classifications by their employers or be subjected to deliberately protracted and improper processes if they seek to vindicate their rights.” Br. of Appellant at 38. However, Ms. Howick has not cited any evidence that any other municipal employees are dissatisfied with their voluntary at-will status or believe that they were subjected to an illegal classification. In sum, Ms. Howick seeks subsidization of the legal fees she has expended to vindicate her personal pecuniary interests, but these legal fees do not exceed her interests. This consideration does not support an award of attorney fees under the private attorney general doctrine.

Finally, this case is not extraordinary. In Stewart, the court noted the exceptional nature of the case because plaintiffs “successfully vindicated an important public policy benefitting all of the ratepayers in the state. Plaintiffs, a handful of ratepayers acting entirely on their own, took on [U.S. West Communications], the Public Service Commission, and the Division of Public Utilities and have succeeded in having the Commission’s rate of return set aside as unlawful, a [state statute] held unconstitutional, and the Commission’s incentive plan held invalid. . . . The results achieved by the

ratepayers will necessarily benefit all . . . ratepayers in the state of Utah especially as to future rates . . . .” 885 P.2d at 783. Then court then noted that any award of attorney fees under the private attorney general doctrine would take an “*equally extraordinary case.*” Id. at 784 n.19 (emphasis added). This case is not the “equally extraordinary case” referred to in Stewart. Ms. Howick has done nothing in this case to vindicate anyone’s rights but her own, and she has therefore not conferred a benefit on the public generally through this action. More likely, this action is harmful to the general public because it is requiring Salt Lake City to expend taxpayer dollars to continue to defend against Ms. Howick’s claims.

Ms. Howick contends that this case is extraordinary because the City deliberately chose to engage in protracted litigation by not allowing her an immediate hearing before the Board. As explained in detail supra, the Board had no jurisdiction to hear her case and has no jurisdiction to decide legal questions, and the City has only followed its proper policies and procedures in this case. Ms. Howick could have filed her action in a district court immediately after she was terminated instead of continuing to seek an appeal before a body that she was repeatedly informed had no jurisdiction. See footnote 10, supra. If anyone is to blame for the protraction of these proceedings, it is Ms. Howick. An award of attorney fees under the private attorney general doctrine is absolutely unwarranted in this case.

**B. The City Did Not Act in Bad Faith, Vexatiously, Wantonly, or for Oppressive Reasons.**

Ms. Howick next contends that she is entitled to attorney fees because the City acted with bad faith, willfully and dishonestly, with some motive of self interest, and with a desire to take unconscionable advantage. Ms. Howick's contentions in this regard strain credulity, and although she hurls a plethora of accusations at the City, she cites no facts to back them up. See Still Standing Stable, LLC v. Allen, 2005 UT 46, ¶13, 122 P.3d 556 (holding that a finding of bad faith must be supported by "sufficient evidence in the record"). To the contrary, the record demonstrates that the City properly followed its processes and procedures in processing Ms. Howick's claims and by so doing provided her with sufficient due process.

"Bad faith" involves dishonesty and requires willful misconduct. Research-Planning, Inc. v. Bank of Utah, 690 P.2d 1130 (Utah 1984). Ms. Howick cannot demonstrate that there was any dishonesty or willfulness involved in the City's handling of her request for an appeal. As recited supra in detail in the City's arguments that there was no abuse of discretion and that Ms. Howick received sufficient due process, the Board acted properly, prudently, and in accordance with its own procedures in determining whether it was allowed to hear Ms. Howick's appeal. This argument should be disregarded.

**C. Attorney Fees Are Not Available to Ms. Howick Under the Due Process Provisions of the Utah Constitution.**

Ms. Howick's final argument is that attorney fees are available under the due process provisions of the Utah Constitution. In support, she cites Spackman v. Board of

Education, which holds that article I, section 7 of the Utah Constitution is self-executing, and “self-executing constitutional provisions allow for awards of money damages” if three elements are met. 2000 UT 87, ¶¶10, 19, 16 P.3d 533, 536-39. First, a plaintiff seeking damages must demonstrate a “flagrant” violation of her constitutional rights. Second, a plaintiff must establish that existing remedies do not redress her injuries. And finally, a plaintiff must establish that equitable relief was or is wholly inadequate to protect her rights or redress her injuries. Id. ¶¶23-25.

Ms. Howick’s argument that Spackman is applicable here fails for a number of reasons. First, Spackman applies only to money damages. The case does not make any mention of attorney fees. Ms. Howick therefore appears to assume that attorney fees may always be an element of money damages. This assumption is incorrect because, again, the American rule is that an award of attorney fees—unlike money damages—is appropriate only if provided for by statute or contract. See S. Sanpitch Co. v. Pack, 765 P.2d 1279, 1282 (Utah Ct. App. 1988) (setting forth American rule and few limited exceptions where attorney fees may be recovered as damages).

Furthermore, even if attorney fees could be considered as damages, Ms. Howick cannot meet the three elements required under Spackman. As analyzed supra, Ms. Howick cannot demonstrate that she had a property interest in her employment that would provide her with any due process right, and even if such a right were found to exist, Salt Lake City provided Ms. Howick with sufficient due process. No “flagrant” violation of Ms. Howick’s constitutional rights occurred in this case. Also, Ms. Howick cannot demonstrate that her existing remedy—a hearing before the Board—would not

redress her alleged injury, which is that her at-will contract was void and illegally denied her of process upon termination. An award of attorney fees to Ms. Howick in this case is wholly inappropriate.

#### **VIII. THE REMEDY THAT MS. HOWICK SEEKS IN HER “STATEMENT OF RELIEF SOUGHT” IS UNSUPPORTABLE.**

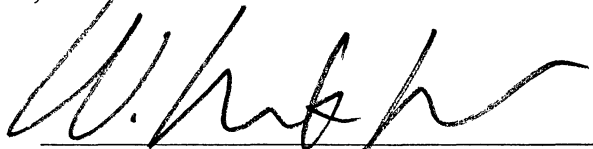
Ms. Howick also asks this Court to “[r]everse the decision of the Salt Lake City Employee Appeals Board and reinstate her to her position in the Salt Lake City Attorney’s Office because she was a City employee entitled to the protections of Utah Code Ann. §§ 10-3-1105 and 1106, and because her due process rights have been violated by the City and the Board.” Br. of Appellant 46. At present, no tribunal has had the authority to examine Ms. Howick’s claims on the merits, i.e., to determine whether Ms. Howick’s department head acted within his discretion in terminating her. Moreover, no evidence from the City is in the record on this issue. Despite these obvious issues, Ms. Howick would have this Court bypass the important step of a lower tribunal determination on the merits and simply reinstate her to her previous position. This argument overlooks the fact that this Court only has jurisdiction to examine the record of the Board and determine whether there was an abuse of discretion in the Board’s determination that Ms. Howick was not entitled to an appeal. Indeed, nothing in section - 1105 and -1106 permits automatic reinstatement. Those statutes provide procedures for administrative review only. Even if Ms. Howick were entitled to an appeal, reinstatement would only be available to her if the Board were to find in her favor. *See* Procedures § V.B, attached hereto as App’x 2; Utah Code Ann. § 10-3-1106(5)(b).

In sum, this Court, after reviewing the administrative record, may do one of two things: (1) either uphold the Board's decision and deny Ms. Howick an appeal, or (2) reverse the Board's decision and order the Board to provide Ms. Howick with an appeal. See Kelly v. Salt Lake Civil Serv. Comm'n, 2000 UT App 235, ¶23, 8 P.3d 1048. Reinstatement is not a proper remedy in this appeal.

### CONCLUSION

For the foregoing reasons, Respondent/Appellee Salt Lake City respectfully requests that this Court affirm the decision of the Employee Appeals Board and determine that Ms. Howick is not entitled to an appeal before the Board.

DATED this 24th day of November, 2008.

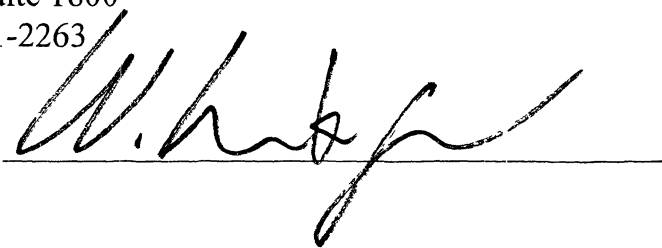
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W. MARK GAVRE  
NICOLE G. FARRELL  
PARSONS BEHLE & LATIMER  
Attorneys for Respondents/Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of November, 2008, I caused to be hand delivered two true and correct copies of the foregoing **BRIEF OF APPELLEES**, to:

Elizabeth T. Dunning  
Holme Roberts & Owens  
299 South Main Street, Suite 1800  
Salt Lake City, UT 84111-2263

A handwritten signature in black ink, appearing to read "E. T. Dunning", is written over a horizontal line.

# APPENDIX 1

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 56 Am. Jur. 2d Municipal Corporations, Etc. § 230.

**C.J.S.** — 63 C.J.S. Municipal Corporations § 649 et seq.

### **10-3-1104. Library personnel — Monthly wage deductions and matching sums — Time of inclusion.**

(1) The librarians, assistants and employees of any public library may, at the discretion of the board of directors of the library, be included within and participate in the pension, retirement, sickness, disability and death benefit system established under Section 10-3-1103. In the event the librarian, assistants and employees of the municipality are included within and participate in the system, there shall be deducted from the monthly wage or salary of the librarian, assistants and employees and paid into the system, a percentage of their wage or salary equal to the percentage of the monthly wage or salary of other employees of the municipality which is paid into the system. Also there shall be paid monthly into the system from the funds of the library a further sum equal to the total amount deducted monthly from the wage or salary of the librarian, assistants and employees and paid into the retirement system.

(2) Where the election by the board of directors of any library for inclusion of its librarian, assistants and employees within the system of any municipality is subsequent to the establishment of the system, the inclusion may begin as of the date of the establishment of the system or as of the date of the election as shall be determined by the board of directors. If inclusion is as of the date of the establishment of the system, there shall be paid into the system in addition to the subsequent monthly wage deductions and matching sums, a sum equal to the aggregate of monthly payroll deductions and matching sums that would have accrued during the period beginning with the establishment of the system and ending with the election had the librarian, assistants and employees been included within the system from its establishment.

**History:** C. 1953, 10-3-1104, enacted by L. 1977, ch. 48, § 3.

## NOTES TO DECISIONS

**Prerequisites.**

Before library employees were eligible to participate in city plan under prior law, the library board had to take proper action consisting of at least two separate and distinct acts: (1) Pass

necessary resolutions permitting employees to participate; and (2) provide funds necessary for cost of participation. *Taft v. Glade*, 114 Utah 435, 201 P.2d 285 (1948).

### **10-3-1105. Municipal employees — Duration and termination of employment — Exceptions.**

(1) Except as provided in Subsection (2), each employee of a municipality shall hold employment without limitation of time, being subject to discharge, suspension of over two days without pay, or involuntary transfer to a position with less remuneration only as provided in Section 10-3-1106.

(2) Subsection (1) does not apply to:

- (a) an officer appointed by the mayor or other person or body exercising executive power in the municipality;
- (b) a member of the municipality's police department or fire department who is a member of the classified civil service in a first or second class city;
- (c) a police chief of the municipality;
- (d) a deputy police chief of the municipality;
- (e) a fire chief of the municipality;
- (f) a deputy or assistant fire chief of the municipality;
- (g) a head of a municipal department;
- (h) a deputy of a head of a municipal department;
- (i) a superintendent;
- (j) a probationary employee of the municipality;
- (k) a part-time employee of the municipality; or
- (l) a seasonal employee of the municipality.

(3) Nothing in this section or Section 10-3-1106 may be construed to limit a municipality's ability to define cause for an employee termination or reduction in force.

**History:** C. 1953, 10-3-1105, enacted by L. 1977, ch. 48, § 3; 2004, ch. 260, § 1.

**Amendment Notes.** — The 2004 amendment, effective May 3, 2004, rewrote the section, which had read "All appointive officers and employees of municipalities, other than

members of the police departments, fire departments, heads of departments, and superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided."

## NOTES TO DECISIONS

### ANALYSIS

Construction.  
De facto officer.  
Duration of term.  
Removal.  
— Council to concur.  
— Right to appeal.  
— Who holds power.  
— Without cause.

#### Construction.

The language "as hereinafter provided" in this section specifically refers to the sections that follow. Therefore, "any officer" in § 10-3-1106 must mean any officer not excluded in this section. *Ward v. Richfield City*, 776 P.2d 93 (Utah Ct. App. 1989), *aff'd*, 798 P.2d 757 (Utah 1990).

#### De facto officer.

Where the person in possession of a city office is at most only a de facto officer, he is subject to removal at any time and is not in a position to complain of the city council's action abolishing office. *McAllister v. Swan*, 16 Utah 1, 50 P. 812 (1897).

#### Duration of term.

City marshal's term will not in any event last beyond the next municipal election even though no successor be appointed. *Taylor v. Gunderson*,

107 Utah 437, 154 P.2d 653 (1944).

#### Removal.

##### — Council to concur.

The consent of a majority of the council is necessary for removal of officer. *State ex rel. Breeden v. Sheets*, 26 Utah 105, 72 P. 334 (1903).

Assuming that the city marshal was rightfully holding office, the attempt by the mayor to remove him without the concurrence of the council was wholly ineffectual. *Henriod v. Church*, 52 Utah 134, 172 P. 701 (1918).

##### — Right to appeal.

The legislature intended specifically to exclude a chief of police, and hence "head" of a police "department," from the appeal provisions of § 10-3-1106. *Ward v. Richfield City*, 798 P.2d 757 (Utah 1990).

##### — Who holds power.

When this section is read in connection with former § 10-6-30 (see present § 10-3-916), it will be seen that the same authorities who have the power of appointment, the mayor and city council, have the power of removal. *Taylor v. Gunderson*, 107 Utah 437, 154 P.2d 653 (1944).

##### — Without cause.

It is the legislative intent that a city marshal in cities of the third class may be removed

without cause. *Taylor v. Gunderson*, 107 Utah 437, 154 P.2d 653 (1944).

## COLLATERAL REFERENCES

C.J.S. — 63 C.J.S. Municipal Corporations  
§ 618 et seq.

**10-3-1106. Discharge, suspension without pay, or involuntary transfer — Appeals — Board — Procedure.**

(1) An employee to which Section 10-3-1105 applies may not be discharged, suspended without pay, or involuntarily transferred to a position with less remuneration:

- (a) because of the employee's politics or religious belief; or
- (b) incident to, or through changes, either in the elective officers, governing body, or heads of departments.

(2) (a) If an employee is discharged, suspended for more than two days without pay, or involuntarily transferred from one position to another with less remuneration for any reason, the employee may, subject to Subsection (2)(b), appeal the discharge, suspension without pay, or involuntary transfer to a board to be known as the appeal board, established under Subsection (7).

(b) If the municipality provides an internal grievance procedure, the employee shall exhaust the employee's rights under that grievance procedure before appealing to the board.

(3) (a) Each appeal under Subsection (2) shall be taken by filing written notice of the appeal with the municipal recorder within ten days after:

- (i) if the municipality provides an internal grievance procedure, the employee receives notice of the final disposition of the municipality's internal grievance procedure; or
- (ii) if the municipality does not provide an internal grievance procedure, the discharge, suspension, or involuntary transfer.

(b) (i) Upon the filing of an appeal under Subsection (3)(a), the municipal recorder shall forthwith refer a copy of the appeal to the appeal board.

(ii) Upon receipt of the referral from the municipal recorder, the appeal board shall forthwith commence its investigation, take and receive evidence, and fully hear and determine the matter which relates to the cause for the discharge, suspension, or transfer.

(4) An employee who is the subject of the discharge, suspension, or transfer may:

- (a) appear in person and be represented by counsel;
- (b) have a public hearing;
- (c) confront the witness whose testimony is to be considered; and
- (d) examine the evidence to be considered by the appeal board.

(5) (a) (i) Each decision of the appeal board shall be by secret ballot, and shall be certified to the recorder within 15 days from the date the matter is referred to it, except as provided in Subsection (5)(a)(ii).

(ii) For good cause, the board may extend the 15-day period under Subsection (5)(a)(i) to a maximum of 60 days, if the employee and municipality both consent.

## 10-3-1012.5. Appeal to district court — Scope of review.

### NOTES TO DECISIONS

#### ANALYSIS

Commission's discretion.  
Cited

#### **Commission's discretion.**

City civil service commission did not abuse its discretion in upholding a police officer's termination for conduct including an angry interchange with a supervisor, an angry verbal

exchange with another officer, and threatening conduct toward a suspect's son because the officer could not show that the facts did not support the charges against him or that the charges did not warrant termination. (Unpublished decision.) Greer v. Salt Lake City Civ. Serv. Comm'n, 2007 UT App 293.

**Cited** in Harmon v. Ogden City Civ. Serv. Comm'n, 2007 UT App 336, 171 P.3d 474.

## PART 11

### PERSONNEL RULES AND BENEFITS

## 10-3-1106. Discharge, suspension without pay, or involuntary transfer — Appeals — Board — Procedure.

(1) An employee to which Section 10-3-1105 applies may not be discharged, suspended without pay, or involuntarily transferred to a position with less remuneration:

(a) because of the employee's politics or religious belief; or

(b) incident to, or through changes, either in the elective officers, governing body, or heads of departments.

(2) (a) If an employee is discharged, suspended for more than two days without pay, or involuntarily transferred from one position to another with less remuneration for any reason, the employee may, subject to Subsection (2)(b), appeal the discharge, suspension without pay, or involuntary transfer to a board to be known as the appeal board, established under Subsection (7).

(b) If the municipality provides an internal grievance procedure, the employee shall exhaust the employee's rights under that grievance procedure before appealing to the board.

(3) (a) Each appeal under Subsection (2) shall be taken by filing written notice of the appeal with the municipal recorder within ten days after:

(i) if the municipality provides an internal grievance procedure, the employee receives notice of the final disposition of the municipality's internal grievance procedure; or

(ii) if the municipality does not provide an internal grievance procedure, the discharge, suspension, or involuntary transfer.

(b) (i) Upon the filing of an appeal under Subsection (3)(a), the municipal recorder shall forthwith refer a copy of the appeal to the appeal board.

(ii) Upon receipt of the referral from the municipal recorder, the appeal board shall forthwith commence its investigation, take and receive evidence, and fully hear and determine the matter which relates to the cause for the discharge, suspension, or transfer.

(4) An employee who is the subject of the discharge, suspension, or transfer may:

(a) appear in person and be represented by counsel;

(b) have a public hearing;

- (c) confront the witness whose testimony is to be considered; and
- (d) examine the evidence to be considered by the appeal board.
- (5) (a) (i) Each decision of the appeal board shall be by secret ballot, and shall be certified to the recorder within 15 days from the date the matter is referred to it, except as provided in Subsection (5)(a)(ii).
- (ii) For good cause, the board may extend the 15-day period under Subsection (5)(a)(i) to a maximum of 60 days, if the employee and municipality both consent.
- (b) If it finds in favor of the employee, the board shall provide that the employee shall receive:
  - (i) the employee's salary for the period of time during which the employee is discharged or suspended without pay; or
  - (ii) any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.
- (6) (a) A final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review.
- (b) Each petition under Subsection (6)(a) shall be filed within 30 days after the issuance of the final action or order of the appeal board.
- (c) The Court of Appeals' review shall be on the record of the appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.
- (7) (a) The method and manner of choosing the members of the appeal board, the number of members, the designation of their terms of office, and the procedure for conducting an appeal and the standard of review shall be prescribed by the governing body of each municipality by ordinance.
- (b) For a municipality operating under a form of government other than a council-mayor form under Chapter 3b, Part 2, Council-Mayor Form of Municipal Government, an ordinance adopted under Subsection (7)(a) may provide that the governing body of the municipality shall serve as the appeal board.

**History:** C. 1953, 10-3-1106, enacted by L. 1977, ch. 48, § 3; 2004, ch. 260, § 2; 2008, ch. 19, § 11; 2008, ch. 115, § 1.

**Amendment Notes.** — The 2008 amendment by ch. 19, effective May 5, 2008, substituted "Chapter 3b, Part 2, Council-Mayor Form of Municipal Government" for "Part 12, Optional Forms of Municipal Government Act" in (7)(b).

The 2008 amendment by ch. 115, effective May 5, 2008, in (6)(a), substituted "reviewed by" for "appealed to" and substituted "petition for review" for "notice of appeal" and in (6)(b), substituted "petition" for "notice of appeal."

This section has been reconciled by the Office of Legislative Research and General Counsel.

### **10-3-1110. Exemption from state licensure by Division of Real Estate.**

In accordance with Section 61-2-3, an employee of a municipality is exempt from licensure under Title 61, Chapter 2, Division of Real Estate:

- (1) when engaging in an act on behalf of the municipality in accordance with:
  - (a) this title; or
  - (b) Title 11, Cities, Counties, and Local Taxing Units; and
- (2) if the act described in Subsection (1) is related to one or more of the following:
  - (a) acquiring real property, including by eminent domain;
  - (b) disposing of real property;

COLLATERAL REFERENCES

**Utah Law Review.** — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

**Am. Jur. 2d.** — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

**C.J.S.** — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

**A.L.R.** — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

**Key Numbers.** — Constitutional Law ⇌ 83(1), 121 to 123.

**Sec. 6. [Right to bear arms.]**

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

**History:** Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

**Compiler's Notes.** — Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.

Regulation of right to bear arms.

**Prospective application.**

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

**Regulation of right to bear arms.**

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

**Utah Law Review.** — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

**Am. Jur. 2d.** — 79 Am. Jur. 2d Weapons and Firearms § 4.

**C.J.S.** — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

**A.L.R.** — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

**Key Numbers.** — Constitutional Law ⇌ 82; Weapons ⇌ 1, 3, 6 et seq.

**Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

**History:** Const. 1896.

**Cross-References.** — Eminent domain generally, § 78-34-1 et seq.

## APPENDIX 2

## I. Purpose & Background

A. These procedures establish the rules for:

1. the composition, nomination and election of the Employee Appeals Board;
2. the filing of appeals to the Employee Appeals Board;
  3. the exercise of the Employee Appeals Board's authority, including conduct of hearings;
  4. the standard of review applicable to matters heard by the Employee Appeals Board.

B. The Employee Appeals Board is created and functions under Utah Code Annotated § 10-3-1105 & 1106 of the Utah Code, as such statutes may be amended from time to time. The Board has authority to investigate, take and receive evidence, and fully hear and determine the matter that relates to the cause for an employee discharge, suspension without pay for more than two days (2 shifts for employees who work shifts longer than 8 hours) or involuntary transfer from one position to another with less remuneration.

C. The Board has no jurisdiction to review or decide any other personnel matters. The Board has no authority to award attorney's fees or costs to either party. Additionally, the Board has no authority to determine the City's legal liability under federal or state law.

D. Any City officer or employee to which these procedures apply may appeal a discharge, suspension without pay for more than two days (2 shifts for employees who work shifts longer than 8 hours) or involuntary transfer from one position to another with less remuneration, to the Employee Appeals Board.

E. These procedures shall apply to each employee of the City, except the following employees:

1. an officer appointed by the Mayor or the Mayor's designee;
2. a member of the police department or fire department who is a member of the classified civil service;
3. a police chief;
4. a deputy police chief;
5. a fire chief;
6. a deputy or assistant fire chief;
7. a head of a City department;
8. a deputy of a head of a City department;
9. a superintendent;
10. a probationary employee;
11. an hourly part-time employee;
12. seasonal employee; or
13. any other at-will employee

F. The City labor relations officer in the Management Services Department is responsible for coordinating with the applicable departments that will conduct nominations and elections for elected Board members, coordinating with the Mayor regarding appointments to the pool of appointed Board members, impaneling an Employee Appeals Board from the pool of appointed and elected Board members to hear each appeal and providing staff support to the Employee Appeals Board. The City Attorney shall train and advise the City labor relations officer in all matters relating to the Board's authority and due process.

G. As required by Utah Code, the Employee Appeals Board must certify its decision to the City Recorder within fifteen (15) business days after the Board receives an **appeal**, unless for good cause the Board extends the fifteen (15) day period up to a maximum of 60 calendar days, with the consent of the employee and the City. The following procedures are necessary to assure the Board can effectively render its decision within the statutorily required time.

## **II. Board Members Selection Procedures**

A. The City shall establish a pool of Board members, which shall include fourteen (14) persons: 4 appointed members and 10 elected members (elected members shall consist of five 100/200 series employees and five 300/600 series employees).

1. Appointed Board Members. The Mayor shall appoint four (4) persons to serve on the Board. The next appointment process shall begin in sufficient time for new Board members to be in place by October 1, 2005. The terms of appointed persons serving on the Employee Appeals Board shall be three years and shall begin upon the date of the person's appointment. In the event of a vacancy created by the resignation of an appointed person or by termination for cause, the Mayor may appoint a new person to fill the remaining term of the person who resigned or was otherwise removed from the Board.

2. Elected Board Members. The pool of elected Board members shall consist of one (1) 100/200 series employee and one (1) 300/600 series employee from each of the following departments: (1) Department of Airports, (2) Public Services, (3) Public Utilities, (4) Community Development, and (5) Management Services and other areas or divisions not included in the other four departments listed.

a. Every three years the (1) Department of Airports, (2) Public Services, (3) Public Utilities (4) Community Development and (5) Management Services (including all other areas and divisions not enumerated above except Police and Fire) shall solicit nominations of employees within the respective department or area and conduct elections for the pool of elected Employee Appeals Board members. Nominations must be open for a minimum of ten (10) days. Nominees must be full-time City employees.

b. At least one and no more than five (5) 100/200 series employees and at least one and no more than five (5) 300/600 series employees from each of the respective departments set forth above shall be included on the list of nominees on the election ballot

c. In the event more than 5 nominations are received in any department listed above for each of the two employee groups (100/200 and 300/600), the department may conduct a preliminary election within such department to limit the number of nominees as set forth in paragraph 2.b, above.

d. After nominees are identified, the respective departments shall conduct elections. The election shall be by secret ballot. Each City employee or officer in each of the departments shall be entitled to cast two votes for nominees in their own department: one vote for a 100/200 series nominee and another vote for a 300/600 series nominee. City employees and officers who are not in the Department of Airports, Public Services, Community Development, Public Utilities, Police Department or Fire Department shall be entitled to vote on nominees in Management Services. One 100/200 series nominee and one 300/600 series nominee with the most votes from each department shall comprise the pool of elected persons for the Employee Appeals Board. In case of a tie in any department, the Mayor shall cast the deciding vote.

e. Elected Board members shall serve for three year terms, except for any person who fills the remaining term of a person who has resigned or otherwise been removed from the Board. The next nomination period shall begin in sufficient time for new Board members to be in place by October 1, 2005. Every three years thereafter, the respective

departments shall conduct elections in sufficient time for .the terms of elected Board members to begin on October 1 of the year in which they are elected.

f. If a an elected Board member resigns or is otherwise removed from the Board, the remaining elected Board members shall promptly meet and elect, by majority vote, another person from the same department and employee classification series (100/200 or 300/600) as the departing Board member to fill the remaining term of the person who resigns or is otherwise removed from the Board. The City labor relations officer shall assist the Board members to develop a list of nominees.

B. The Mayor or the Mayor's designee may remove any Board member for cause.

### **III. Appeal Filing Process**

A. Any City officer or employee to whom these procedures apply may **appeal** a discharge, suspension without pay for more than two (2) days (2 shifts for employees who work shifts longer than 8 hours) or an involuntary transfer from one position to another with less remuneration to the Employee Appeals Board. All requests for **appeals** must be in writing, addressed to the City Recorder and filed with the City Recorder within the time limitations contained in these procedures.

B. The notice of **appeal** shall be in writing and filed before the close of the tenth business day following the employee's receipt of a written decision by the employee's department head effecting or upholding the disciplinary action at issue. The notice of **appeal** must be signed by the appellant employee, or by his or her attorney or representative.

C. The Notice of **Appeal** shall be in the form or contain the information as set forth in Appendix "A." The form is available at the City Attorney's Office, the City Human Resources office or online at the City's website. The Notice of **Appeal** must (a) set forth with specificity any issue the employee raised in the **appeal** before the department head and which the employee intends to raise on **appeal** to the Board (the employee may not raise any issues before the Board that were not raised in the **appeal** before the department head) ; (b) include copies of any documents the employee intends to introduce at the hearing.

D. To be considered by the Employee Appeals Board, the Notice of **Appeal** must be filed in the Office of the City Recorder within the time limit specified. The Board has no authority or jurisdiction to hear an **appeal** that is filed beyond the time limits specified in this procedure or filed anywhere other than with the Office of the City Recorder.

E. The Office of the City Recorder is located in Room 415, City & County Building, 451 South State Street, Salt Lake City, Utah 84111.

F. Upon receipt of a written **appeal**, the City Recorder shall immediately provide a copy of the **appeal** to the City labor relations officer and to the City Attorney.

G. If there is a question whether a City employee is within the class of persons who may **appeal** a discharge, suspension or transfer, the Board shall request an opinion from the City Attorney regarding that issue. The City Attorney shall render an opinion no later than the next business day after a request is received.

H. Any person who voluntarily terminates his or her employment with the City may not **appeal** his or her release from employment to the Employee Appeals Board.

#### **IV. Impaneling a Board for each Appeal**

A. When an employee files an appeal, the City labor relations officer shall impanel a Board to hear such appeal from the pool of Employee Appeals Board members. Each such Board shall consist of five (5) members.

B. The City labor relations officer shall impanel members for each appeal who are least likely to have personal knowledge of the cause for the appellant's discharge, suspension or transfer. The City labor relations officer shall designate one of the Board members as the Chairperson for the subject appeal and notify that member of his or her designation. At the same time the Board members and the Chairperson receive their notification, the City labor relations officer shall notify the department head of each impaneled Board member. The notification to the respective department heads shall state that the duties of the Board member take precedence over all other duties.

C. As soon as reasonably possible after the labor relations officer receives the appeal, the labor relations officer shall notify the appellant, the affected City department, the Board members, and the City Attorney of the date, time, and location the Board will hear the appeal. While the labor relations officer may consider requests from either party for a particular hearing date, the availability of the Board members and other requirements imposed by law will constrain the ability of the Board to accommodate the parties.

D. Board members shall receive no additional compensation or benefits beyond their City salary or wages for their service as Board members. However, Board members who are Fair Labor Standards Act non-exempt employees shall be paid their regular rate of pay for time worked for their duties and such time worked shall be considered in determining the City's overtime liability during the work weeks in which the employee serves as a Board member.

## **V. Appellant's Rights on Appeal**

- A. An appellant may be represented by any person of his or her choice to act as an advocate at any level of the appeal procedure.
- B. An appellant may request City employees and other persons to appear as witnesses during the appeal proceedings and may present any relevant information in mitigation. Such witnesses and information must relate directly to (1) the cause for the action taken, as set forth in the disciplinary decision letter, and (2) any issues raised by either party at the proceeding before the department head.
- C. An appellant may cross-examine any witnesses called by the City department during the appeal proceedings. An appellant may inspect documents offered by the City department and may offer evidence in explanation and rebuttal.
- D. No City employee may take any reprisals against anyone who participates in an appeal proceeding under this procedure.
- E. If the Employee Appeals Board finds in favor of the employee, the next business day after the Board's decision is certified to the City Recorder an employee who has been discharged or involuntarily transferred to a position of less remuneration shall be restored to his or her former position. The employee shall receive the employee's salary for the period of time during which the employee is discharged, or suspended without pay, or any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

## **VI. Pre-hearing Procedures**

A. The appellant employee or City department may file with the Board prior to the hearing any relevant documents or written arguments that directly relate to (1) the cause for the discharge or transfer as set forth in the disciplinary decision letter, and (2) any issues raised at the appeal to the department head.. In case of such a filing, the appellant or City department shall make six copies of such documents or written arguments for the Board and one copy for the other party to the proceeding. The six copies of relevant documents or written arguments for the Board shall be filed with the City labor relations officer. The party filing such documents or written arguments shall provide a copy of such documents or written arguments to the other party to the proceeding the same day as any filing with the Board.

B. In each case of the filing of relevant documents or written arguments, the City labor relations officer shall immediately distribute one copy of such materials to each impaneled Board member. The City labor relations officer shall request that each member take any necessary work time to read and review any materials. The City labor relations officer shall request that the department head of each Board member authorize work time for Board members to review materials received.

C. At any time prior to the hearing, the Board Chair may meet with the parties in a pre-hearing conference. The pre-hearing conference is intended as a mechanism to expedite the proceeding and will not be used to stall or unnecessarily delay the hearing process. At the discretion of the Board Chair, the pre-hearing conference may be conducted telephonically. At the conference, the Board Chair may require the parties to submit a list of witnesses, exhibits, and documents that each party intends to offer in evidence; submit a joint statement detailing stipulated facts not in dispute; submit a joint statement narrowing the matters for consideration by the Board; and make other orders to facilitate an efficient and effective hearing. The pre-hearing conference is informal and not open to the public. Submissions of required information from the pre-hearing conference shall be to the City labor relations officer.

D. The Board has no legal authority to issue subpoenas. If a party to the proceeding requests that certain information or persons be subpoenaed, the Board shall request the Office of the City Attorney to issue the subject subpoena. The Board has the authority to quash any subpoena issued by the City Attorney or issued by any other office or authority regarding matters that are pending before the Board.

E. The Board has the authority to direct the participation or attendance of any City employee in the Board's proceedings. Any employee who fails to comply with a Board directive to participate or attend a Board proceeding shall be subject to discipline as determined by the employee's department head.

## **VII. Hearing Procedures**

- A. The City labor relations officer shall employ a court reporter to record the hearing and prepare an official transcript of the hearing. The official transcript of the hearing and all exhibits, written arguments, and other evidence received by the Board shall be the official record of the Employee Appeals Board proceeding.
- B. Board hearings are considered open meetings under Utah law. The Board may close a hearing by complying with the procedures and requirements of Utah Code Annotated Title 52, Chapter 4, Open and Public Meetings.
- C. Board hearings are not judicial or quasi-judicial process. They shall, however, be conducted with appropriate formality and decorum so that the due process rights of all parties are protected and the Board may perform its function. Utah Rules of Evidence and Utah Rules of Civil Procedure are used as guidelines in the conduct of Board hearings, but are not strictly followed or applied. The Board shall not strictly apply rules of evidence regarding authentication, foundation, or hearsay.
- D. Upon motion of either party, the Board may invoke the exclusionary rule for witnesses. However, one department representative of the City's choice will be allowed to remain present at all times.
- E. The City labor relations officer will serve as procedural advisor to the Board and will assist the Board in maintaining order in the proceedings.
- F. Unless the Board Chair rules otherwise for good cause, the hearing should proceed as follows:
1. The Board Chair opens the hearing and asks if the parties are ready. The Board Chair may ask that a summary of any pre-hearing proceedings or activity be placed in the record.
  2. Each party makes an opening statement. The City department makes its opening statement first.
  3. The City department presents evidence. The representative of the City department asks the witnesses questions. After the City representative has questioned each witness, the employee or the representative for the employee is entitled to cross-examine the witness. After cross-examination, the City may ask questions relating to the subject of the cross-examination.
  4. After the City department has presented its evidence, the employee or employee's representative calls witnesses and presents evidence. After the employee or the employee's representative has questioned each witness, the representative of the City department is entitled to cross-examine the witness. After cross-examination, the employee or representative for the employee may ask questions relating to the subject of the cross-examination.
  5. After all witnesses and evidence have been presented, each party makes a closing statement. Ordinarily, the City department makes its closing statement first. The employee or employee representative makes his/her statement next. The City is then entitled to make a final statement to discuss any issues raised in the closing statement of the employee or employee's representative.

6. After the closing statements, the Board Chair thanks everyone and closes the hearing so the Board may consider the matter.

G. Following the hearing, the Board shall meet in a duly noticed, closed meeting to deliberate and reach a decision. The ruling of the Board shall be based on a majority vote of the members. The Board may only uphold or overturn the decision of the Department. The Board may not modify the decision of the Department. The Board shall vote by secret ballot using the following standard of review:

1. Do the facts support the need for discipline or, in the case of a non-disciplinary discharge, the need for remedial action to be taken by the department head? In other words, was action warranted? If the City's account of the evidence is plausible in light of the record viewed in its entirety, the decision should be upheld, even though the Board may have weighed the evidence differently had it been in the department head's position. In order to overturn a disciplinary action, the Board must have a definite and firm conviction that the department head's decision was clearly erroneous.

In an appeal where an employee was discharged, not for disciplinary reasons but because the employee was no longer able or qualified to do the job, the Board's analysis shall end with the analysis set forth in subsection 1, above. However, in an appeal of a disciplinary action the Board shall proceed to step 2 of the analysis, as set forth below.

2. In a disciplinary action, if the facts support the need for discipline, is the action taken proportionate to the discipline imposed? Discipline imposed for employee misconduct is within the discretion of the department head. Unless the Board finds the discipline imposed is so harsh as to constitute an abuse, rather than an exercise of the department head's discretion, the decision of the department head should be upheld.

### VIII. Board Decision

After fully hearing the matter on appeal, the Board shall certify its decision with the City Recorder within fifteen (15) business days after receipt of the appeal. For good cause, the Board may extend the 15-day period to a maximum of sixty (60) days, with the consent of the employee and the City. The Board shall set forth findings of fact and conclusions based on such findings regarding the issues to be decided by the Board, as set forth above in paragraph VII. G. 1 and 2. The Board Chair may sign the decision on behalf of the Board. The decision shall be addressed to the appellant, with copies to the head of the City department that took the action that was appealed. The City labor relations officer will assure that copies of the certified decision are served on the appellant and on the affected department head.

Revised October 17, 2005 (Major revision to comply with Utah Code Annotated § 10-3-1105 & 1106, and to revise board composition and processes )

References: Utah Code Annotated § 10-3-1105 & 1106  
Salt Lake City Code 2.52.130, 2.24.010  
Memoranda of Understanding with Employee Organizations  
Grievance Procedure for 300, 600 and 700 Series Employees  
Policy 3.02.04 Employee Appeals and Grievances  
Notice of Appeal Before Salt Lake City Employee Appeals Board

#### APPENDIX A

#### NOTICE OF APPEAL BEFORE SALT LAKE CITY EMPLOYEE APPEALS BOARD

NAME OF APPLICANT: \_\_\_\_\_

ADDRESS OF APPLICANT: \_\_\_\_\_  
\_\_\_\_\_

TELEPHONE: WORK \_\_\_\_\_ HOME \_\_\_\_\_

DEPARTMENT: \_\_\_\_\_

**ACTION BEING APPEALED:**

Brief description of action (discharge, suspension, demotion): \_\_\_\_\_

Date of action being appealed: \_\_\_\_\_

Person who took action: \_\_\_\_\_

APPELLANT WILL BE REPRESENTED BY: \_\_\_\_\_

SPECIFIC STATEMENT OF ISSUES TO BE RAISED ON APPEAL (attach additional pages if necessary):

**WITNESSES YOU MAY HAVE TESTIFY APPEAL (attach additional pages if necessary)::**

**Name:**  
**Address:**  
**Telephone:**

**Name:**  
**Address:**  
**Telephone:**

**Name:**  
**Address:**  
**Telephone:**

**Page 1 of 2**  
**DOCUMENTS YOU INTEND TO INTRODUCE AT THE HEARING :**

**WHAT ACTION DO YOU WANT THE EMPLOYEE APPEALS BOARD TO TAKE:**

**I hereby request a hearing before the Employee Appeals Board**

\_\_\_\_\_  
**Signature of Appellant**

\_\_\_\_\_  
**Date**

## APPENDIX 3

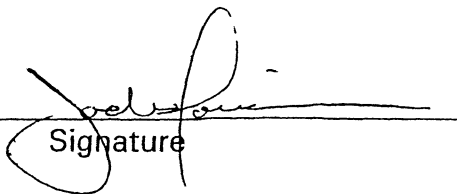
Jodi Howick

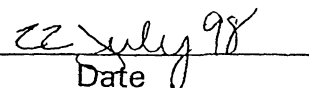
**SALT LAKE CITY CORPORATION  
AT-WILL EMPLOYMENT DISCLAIMER**

23  
14:52 JUL 29 PM '98

I understand that, if I am appointed by the Salt Lake City Attorney to the "Appointed Senior City Attorney" position, my employment will be at-will and will be for no fixed length of time.

I understand that no oral or written statements (in personnel manuals, policies, procedures, or elsewhere) or any conduct of the Mayor, City Attorney, or other City official at any time, other than in a written contract of employment signed by the Mayor or City Attorney, can create an express or implied contract to the contrary.

  
Signature

  
Date

## APPENDIX 4

# SALT LAKE CITY CORPORATION

EDWIN P. RUTAN, II  
CITY ATTORNEY

LAW DEPARTMENT

RALPH BECKER  
MAYOR

July 1, 2008

Via Hand Delivery

Stan Preston, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place  
Salt Lake City, UT 84111

Dear Mr. Preston:

I am writing to request that you serve as independent special counsel for the Salt Lake City Employee Appeals Board (the "Board") in an appeal in which I have a conflict of interest. I was the immediate supervisor and made the decision to terminate the employment of Jodi Howick, the employee filing the appeal.

Please note, that if you accept this assignment, pursuant to Salt Lake City Code Section 2.08 040A(3), you "shall not be subject to the control or direction of the city attorney in such matter."

Paragraph III(G) of the Employee Appeals Board Procedures (the "Procedures") (copy attached) provides that "If there is a question whether a City employee is within the class of persons who may appeal a discharge, suspension, or transfer, the Board shall request an opinion from the City Attorney regarding the issue."

By letter of July 1, 2008 (copy attached), the Chairman of the Board requested an opinion from me "about whether the conversion of Ms. Howick's position to an 'at-will' position was done appropriately. The conversion of her position took place in July, 1998."

I am advising the Board today that I have a conflict of interest because I was Ms. Howick's immediate supervisor and made the decision to terminate her employment and that I am referring their request for an opinion to you.

As background, Ms. Howick was an "at-will" employee at the time her employment was terminated. Paragraph I(E)(13) of the Procedures provides that the Procedures do not apply to "at-will" employees.

Ms. Howick contends that the City did not have the legal authority under state law to classify her as "at-will." The City contends that it did and that in any event, the Board (as opposed to the courts) does not have jurisdiction to consider such issues of state law under Paragraph I(C) of the Procedures.

Copies of the memoranda submitted to the Board by counsel for the parties (W. Mark Gavre, Esq. for the City and Elizabeth T. Dunning, Esq. for Ms. Howick) are attached.

Paragraph III(G) of the Procedures provides that when an opinion is requested by the Board "The City Attorney shall render an opinion no later than the next business day after a request is received." The Procedures do not address the situation when the City Attorney has a conflict of interest.

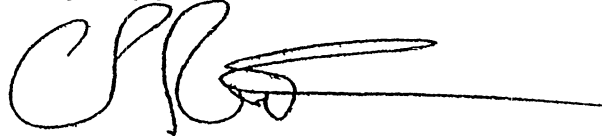
In addition, Paragraph I(G) of the Procedures provides that the Board must certify its decision to the City Recorder within fifteen (15) business days after the Board receives an appeal, unless for good cause shown the board extends the fifteen (15) day period up to a maximum of 60 calendar days, with the consent of the employee and the City.

The Board members received a copy of the notice of appeal on June 23, 2008, which means that the fifteen business day period runs on July 15, 2008. (Ms. Dunning, if you disagree with that calculation, please advise Mr. Porter and me.)

Because you are not familiar with the Procedures insofar as I am aware, the City will not object to your taking a reasonable period of time to render your opinion to the Board as long as you keep in mind the provisions of Paragraph I(G) of the Procedures.

Please let me know as quickly as possible if you accept this assignment. Compensation would be on the same terms as your legal work for the Civil Service Commission.

Very truly yours,

A handwritten signature in black ink, appearing to be "W. Mark Gavre", with a long horizontal line extending to the right.

cc: Randy Buckley  
Debra Alexander  
Mark Gavre, Esq.  
Elizabeth Dunning, Esq.

## APPENDIX 5

## SNOW, CHRISTENSEN & MARTINEAU

Reed L. Martineau  
A. Dennis Norton  
Allan L. Larson  
John E. Gates  
Kim R. Wilson  
Michael R. Carlston  
David G. Williams  
Max D. Wheeler  
David W. Slaughter  
Stanley J. Preston  
Shawn E. Draney  
John R. Lund  
Rodney R. Parker  
Richard A. Van Wagoner  
Andrew M. Morse  
Camille N. Johnson  
Elizabeth L. Willey  
E. Scott Awerkamp  
Dennis V. Dahle  
Korey D. Rasmussen  
Terence L. Rooney  
Jill L. Dunyon  
David L. Pinkston  
Julianne Blanch  
Stephen H. Urquhart  
Brian P. Miller

Judith D. Wolferts  
Keith A. Call  
Kara L. Pettit  
Heather S. White  
Robert R. Harrison  
Robert W. Thompson  
Scott H. Martin  
Joseph P. Barrett  
Trystan B. Smith  
Maralyn M. Reger  
Kenneth L. Reich  
Bradley R. Blackham  
D. Jason Hawkins  
Richard A. Vazquez  
Sam Harkness  
David F. Mull  
Bryan M. Scott  
P. Matthew Cox  
Derek J. Williams  
Leilani Marshall  
R. Scott Young  
Jordan G. Garn  
Levi J. Clegg  
Murry Warhank  
John S. Treu

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmLaw.com

July 10, 2008

Thurman & Sutherland 1886  
Thurman, Sutherland & King 1888  
Thurman, Wedgwood & Irvine 1906  
Irvine, Skeen & Thurman 1923  
Skeen, Thurman, Worsley & Snow 1952  
Worsley, Snow & Christensen 1967

John H. Snow 1917-1980

*Of Counsel*  
Harold G. Christensen  
Joseph Novak

*St. George Office*  
555 South Bluff Street, Suite 301  
St. George, Utah 84770  
Telephone (435) 673-8288  
Facsimile (435) 673-1444

To Contact Writer

### *Via Hand-Delivery and First-Class Mail*

Randy Buckley  
Chairman, Employee Appeals Board  
Salt Lake City Corporation  
451 South State Street, Rm. 115  
P.O. Box 145464  
Salt Lake City, Utah 84114-5464

Re: *Salt Lake City Employee Appeals Board's Request for Legal  
Opinion in Jodi Howick Appeal*

Dear Mr. Buckley:

Due to a conflict of interest by the Salt Lake City Attorney's Office ("City Attorney's Office"), we have been asked by City Attorney Edwin P. Rutan, II, to act as independent special counsel for the Salt Lake City Employee Appeals Board (the "EAB") with regard to the appeal of Jodi Howick, as well as with regard to a July 1, 2008 "Request for Legal Opinion" by the EAB concerning Ms. Howick's appeal. By letter to Mr. Rutan dated July 2, 2008, we agreed to accept the offered assignment.

### REQUEST FOR LEGAL OPINION

Ms. Howick, a lawyer, was employed in the City Attorney's Office until she was terminated<sup>1</sup> on August 31, 2007. The EAB has requested a legal opinion in connection with an appeal by Ms. Howick, addressing the following issue:

Whether the conversion of Ms. Howick's position to an "at-will" position was done appropriately. The conversion of her position took place in July 1998.

#### RELEVANT FACTS

Ms. Howick's employment with Salt Lake City Corporation (the "City") began in 1992 when she assumed a position as staff attorney in the City Attorney's Office. In 1998, in exchange for an increase in pay, Ms. Howick signed a document titled "Salt Lake City Corporation At-Will Employment Disclaimer" (the "Disclaimer"). The Disclaimer states as follows:

I understand that, if I am appointed by the Salt Lake City Attorney to the "Appointed Senior City Attorney" position, my employment will be at-will and will be for no fixed length of time.

I understand that no oral or written statements (in personnel manuals, policies, procedures, or elsewhere) or any conduct of the Mayor, City Attorney, or other City official at any time, other than in a written contract of employment signed by the Mayor or City Attorney, can create an express or implied contract to the contrary.

The Disclaimer is signed by Ms. Howick, and is dated July 22, 1998.

Ms. Howick thereafter worked for the City Attorney's Office as an Appointed Senior City Attorney until August 31, 2007, when she was terminated. Subsequently, when Ms. Howick filed an appeal of her termination with the EAB, she was informed by Jamey Knighton, of the City's Labor Relations Office, that she was not entitled to an appeal of her termination because she was an at-will employee.

Ms. Howick then filed an appeal to the Utah Court of Appeals. *See* Appeal No. 20070863-CA. On its own *sua sponte* Motion for Summary Disposition based on lack of subject matter jurisdiction due to the absence of a final, appealable order, the Court of Appeals dismissed Ms. Howick's appeal. In a footnote to its opinion, the Court of Appeals noted that the EBA procedures allow it to "request an opinion from the City Attorney regarding questions of whether an employee is within the class of persons who may appeal." Ms. Howick's appeal to the EAB then proceeded.

### DISCUSSION

For purposes of responding to the EAB's Request for Legal Opinion, we accept its statement that Ms. Howick's employment position was "converted" in July 1998 to an at-will position. This assumes that prior to July 1998,<sup>1</sup> Ms. Howick's employment position was not at-will, and that some event resulted in this "conversion" to at-will employment. If Ms. Howick's municipal employment was *not* at-will prior to her signing the Disclaimer, she would have had a property interest in employment such that she could not be terminated except for cause, and she would have had a right to the due process procedures set forth in Utah Code Ann. §10-3-1106. This would include notice of the "cause" for discipline prior to termination, and a hearing before the EAB after termination.

Based on the undisputed facts contained in the briefing submitted by Ms. Howick and the City, the "conversion" event was the signing by Ms. Howick of the Disclaimer, the language of which is quoted above. As Ms. Howick states in her brief to the EAB:

In July, 1998, the [City] Attorney's Office claimed to create a new "at-will" position outside of the merit employment system. Staff attorneys were asked to agree to move to the newly-created position in exchange for a raise in pay. Ms. Howick moved to this position and signed a document titled "Disclaimer" in connection with this move.

---

<sup>1</sup>The version of Utah Code Ann. §10-3-1105 in effect in 1998 stated as follows:

**Appointive officers and employees—Duration and termination of term of office.**

All appointive officers and employees of municipalities, other than members of the police departments, fire departments, heads of departments, and superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided.

The language of §10-3-1105 was changed in 2004, and the 2004 version remains in effect today.

See Howick's Mem. Supp. Juris. & Rt. to Appeal, p. 1 (copy of Disclaimer attached as Ex. A to Brf.). There is no allegation by Ms. Howick that her signing the Disclaimer was anything other than voluntary on her part and in exchange for an increase in pay, which she subsequently received.

Based on the foregoing, the fundamental issue involved in the EAB's question is whether Ms. Howick, who once had a property interest in employment under Utah Code Ann. §10-3-1105 with attendant rights to due process under Utah Code Ann. §10-3-1106, could agree to waive those statutory rights and become an "at-will" employee. The question also involves whether the City could ask Ms. Howick to agree to waive those statutory rights. For the reasons set forth below, we conclude that Ms. Howick could waive the referenced statutory rights under §§10-3-1105 and 1106, that the City was not prohibited from making that request, and that the "conversion" of Ms. Howick's employment to at-will status in 1998 was, therefore, a binding agreement within the legal prerogatives of the parties.

Ms. Howick contends that under Utah law, specifically Utah Code Ann. §10-3-1105, the Legislature has designated which employment positions are at will, that "Ms. Howick's position is not on that list," and that the City therefore violated its legal authority as well as state law when it "classified" and "treated her" as an at-will employee. She contends this makes any action by the City "void and without effect" from the beginning. However, Ms. Howick's argument focuses only on the state statute itself and ignores that she voluntarily signed the Disclaimer.

Case law recognizes that statutory rights are not necessarily fixed. Even a government employee who did not have a statutory property interest might be found to have a property interest (with due process rights) through other means, such as an independent agreement with the municipality. For example, in *Palmer v. City of Monticello*, 731 F. Supp. 1503 (D. Utah 1990), the court found that even though police officers were excluded from the purview of §10-3-1105, nothing in §10-3-1105 would "prevent police officers from negotiating separate employment contracts, or cities from giving police officers further rights in their employment" which *would* give them due process rights. See *id.* at 1507. Courts also recognize that additional rights can be created by implied contract. The Utah Supreme Court acknowledged in *Buckner v. Kennard*, 2004 UT 78, 99 P.3d 842, that although the terms of employment for public employees are generally set by statute and not by contract, "there may be circumstances in which the government voluntarily undertakes an additional duty that it would otherwise have no obligation to perform, in which case an implied contract arises imposing that duty" as long as the duty is not inconsistent with the underlying statute. See *id.* ¶32.

If an implied or express contract can expand due process rights for a municipal employee who does not have a statutory property interest and attendant due process rights, it would then follow that Ms. Howick may voluntarily agree to waive any statutory property interest and due process rights to which she might otherwise be entitled.

In fact, government employees with rights under §10-3-1105 and §10-3-1106 routinely enter into settlement agreements with municipalities in which the employee agrees to waive statutory due process and other statutory rights in exchange for monies or other consideration. These agreements, generally initiated by the municipality, are not improper or illegal even though their effect sometimes is to “convert” an employee to an at-will status.

Numerous cases also recognize that constitutional due process rights can be waived by agreement or by failure to assert them. For example, in *Legg v. Board of Pardons*, 2007 UT App. 190, 2007 WL 1576394, the court held that by signing a “Time Waiver for Parole Revocation Hearing,” a prisoner “waived any claim that he was denied procedural due process when the Board failed to hold parole and revocation proceedings immediately after his return to custody.” 2007 WL 1576394 at \*1. Likewise, in *Kirkland v. St. Vrain Valley School District No. RE-IJ*, 464 F.3d 1182 (10th Cir. 2006), the court recognized that a government employee with due process rights can waive those by failing to pursue them. *Id.* at 1195; *accord*, *Tenorio v. Sandoval County Bd. of Commissioners*, 77 F.3d 493, 1996 WL 77039, \*2 (10th Cir.).

It is also significant that nothing in Part 11 of the Utah Municipal Code (which deals with Personnel Rules and Benefits) prohibits the kind of agreement entered into here between Ms. Howick and the City. By contrast, the Employment Security Act and the Workers Compensation Act, both of which deal with workers’ rights, expressly prohibit an agreement by an employee to waive rights or compensation obtainable under those Acts. Utah Code Ann. §34A-2-108(1) (employee may not agree to waive rights to workers compensation); *id.* §34A-4-103(1)(a) (“any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter [unemployment] is void”). If the legislature had intended that a municipal employee could not waive his or her statutory rights under §10-3-1105 and §10-3-1106, the legislature could have so specified, and it did not.

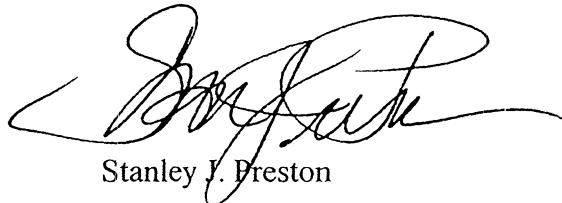
### CONCLUSION

This legal opinion is restricted solely to Ms. Howick's situation. No opinion is expressed as to the legality or appropriateness of any City policy or procedure since it is not necessary to address them in arriving at the conclusion reached herein.

Based on the foregoing, we conclude that the "conversion" of Ms. Howick's position to an at-will position in July 1998 was effected in accordance with the lawful prerogatives of the parties. Ms. Howick, a lawyer, voluntarily signed the Disclaimer wherein she agreed to be an at-will Senior Staff Attorney in exchange for an increase in pay. She remained in that position for ten years until her termination in 2007. There is nothing in Utah Code Ann. §10-3-1105, §10-3-1106, or in any other law, which prohibits a municipality's requesting, and an individual's waiving, statutory due process rights by voluntarily agreeing to become an at-will employee pursuant to an agreement supported by consideration.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Stanley J. Preston

SJP:kd  
cc: Judith D. Wolferts, Esq.

# APPENDIX 6

July 15, 2008

Elizabeth Dunning  
Holme Roberts & Owen, L.L.P.  
299 South Main Street  
Salt Lake City, Utah 84111

RECORDED

JUL 15 2008

CITY RECORDER

Re: Decision – Jodi Howick Appeal

Dear Ms. Dunning,

As outlined in Salt Lake City Corporation Policy and Procedure, the Employee Appeals Board (EAB) met on July 15, 2008. At the meeting, the EAB considered the question of its authority to review the appeal of Jodi Howick.

The EAB reviewed documentation submitted on behalf of Ms. Howick and for Salt Lake City Corporation. The EAB also reviewed documentation submitted by Stan Preston, who had been asked to provide an independent legal opinion regarding the conversion of Ms. Howick's position to an "at-will" position.

Having reviewed the documentation, and having deliberated in closed session, the EAB voted unanimously that it did not have the authority to review the appeal of Ms. Howick. The EAB considered the following facts in making their decision:

1. Ms. Howick was an "at-will" employee at the time of her termination.
2. The conversion of Ms. Howick's position to an "at-will" position was done appropriately.
3. Salt Lake City Policy and Procedure – 3.02.04 specifies that the appeal process does not apply to "at-will" employees.

In accordance with policy, the Board's decision will be certified with City Recorder's Office.

Sincerely,



Randy Buckley  
Chairman, Employee Appeals Board

Cc: Mark Gavre, Esq.