

2008

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

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

W. Mark Gavre; Parson Behle & Latimer; attorney for appellees.

Elizabeth T. Dunning; Holme Roberts & Owens; attorney for appellant.

---

## Recommended Citation

Reply Brief, *Jodi Howick v. Salt Lake City Employee Appeals Board, Salt Lake City Corporation*, No. 20080608 (Utah Court of Appeals, 2008).

[https://digitalcommons.law.byu.edu/byu\\_ca3/1042](https://digitalcommons.law.byu.edu/byu_ca3/1042)

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

IN THE UTAH STATE COURT OF APPEALS

JODI HOWICK,

Petitioner/Appellants,

vs.

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

Respondents/Appellees.

REPLY BRIEF OF APPELLANT

Case No. 20080608

W. Mark Gavre, #4577  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
(801) 532-1234

Counsel for Respondents/Appellees

Elizabeth T. Dunning, #3896  
HOLME ROBERTS & OWENS  
299 South Main Street, Suite 1800  
Salt Lake City, UT 84111-2263  
(801) 521-5800

Counsel for Petitioner/Appellant

FILED  
UTAH STATE COURTS  
DEC 24 2008

IN THE UTAH STATE COURT OF APPEALS

JODI HOWICK,

Petitioner/Appellants,

vs.

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

Respondents/Appellees.

REPLY BRIEF OF APPELLANT

Case No. 20080608

W. Mark Gavre, #4577  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
(801) 532-1234

Counsel for Respondents/Appellees

Elizabeth T. Dunning, #3896  
HOLME ROBERTS & OWENS  
299 South Main Street, Suite 1800  
Salt Lake City, UT 84111-2263  
(801) 521-5800

Counsel for Petitioner/Appellant

## TABLE OF CONTENTS

I.	THE CITY HAS CONCEDED THAT IT VIOLATED THE LAW WHEN IT CREATED AN AT-WILL STAFF ATTORNEY POSITION.....	1
II.	THE COURT DETERMINES THIS MATTER UNDER THE CORRECTION OF ERROR STANDARD.....	2
III.	HOWICK IS NOT ESTOPPED FROM CHALLENGING THE CITY’S ILLEGAL ACTIONS. ....	4
IV.	HOWICK HAS NOT WAIVED HER RIGHT TO CHALLENGE THE CITY’S ILLEGAL ACTIONS. ....	8
V.	THE EQUITIES DO NOT FAVOR ENFORCING THE CITY’S ACTIONS. ....	13
VI.	THIS COURT HAS JURISDICTION TO HEAR CONSTITUTIONAL ARGUMENTS.....	14
VII.	THE CITY VIOLATED HOWICK’S CONSTITUTIONAL RIGHT TO DUE PROCESS. ....	14
VIII.	HOWICK IS ENTITLED TO ATTORNEY FEES.....	16
IX.	HOWICK IS ENTITLED TO REINSTATEMENT.....	20
	A. SECTION 10-3-1106 REQUIRES THAT HOWICK BE REINSTATED.	20
	B. EQUITY REQUIRES THAT HOWICK BE REINSTATED.....	23
	C. THE CITY’S DUTY UNDER CITY ORDINANCES REQUIRES REINSTATEMENT. ....	24
	CONCLUSION .....	24

## TABLE OF AUTHORITIES

### Cases

<u>Anderson v. Thompson</u> , 2008 UT App 3, 176 P.3d 464 .....	10
<u>Baukol Builders, Inc. v. County of Grand Forks</u> , 2008 ND 116, 751 N.W.2d 191.....	7
<u>Bd. of Equalization of Summit County v. State Tax Comm’n.</u> , 2004 UT App 283, 98 P.3d 782 .....	14
<u>Berube v. Fashion Center, Ltd.</u> , 771 P.2d 1033 (Utah 1989) .....	11
<u>Boulder Brook Acres, Inc. v. Town and Village of Scarsdale</u> , 491 N.Y.S.2d 785.....	7
<u>Chubb v. Ohio Bureau of Workers’ Compensation</u> , 690 N.E. 2d 1267 (Ohio 1998).....	7
<u>City of Colorado Springs v. Kitty Hawk Dev. Co.</u> , 392 P.2d 467 (Colo. 1964) .....	7
<u>Cluggish v. Koons</u> , 43 N.E. 158 (Ind. Ct. App. 1896).....	6
<u>Code v. Utah Dep’t of Health</u> , 2007 UT App. 390, 174 P.2d 113 .....	6
<u>Culbertson v. Bd. of County Comm’rs of Salt Lake County</u> , 2008 UT App. 22, 177 P.3d 621 .....	9, 16
<u>Druffner v. Mrs. Fields, Inc.</u> , 828 P.2d 1075 (Utah App. 1992).....	13
<u>Eastern Air Lines, Inc. v. Ins. Co. (In re Ionosphere Clubs, Inc.)</u> , 85 F.3d 992 (2 <sup>nd</sup> Cir. 1996) .....	6
<u>Glew v. Ohio Sav. Bank</u> , 2007 UT 56, 181 P.3d 791 .....	6
<u>Green River Canal Co. v. Thayn</u> , 2003 UT 50, 84 P.3d 1134 .....	17
<u>Harmon v. Ogden City Civil Service Comm’n.</u> , 917 P.2d 1082 (Utah 1996).....	4
<u>Heslop v. Bank of Utah</u> , 839 P.2d 828 (Utah 1991) .....	19
<u>Howick v. Salt Lake City Corp.</u> , 2008 UT App. 216.....	19, 21
<u>Jenkins v. Percival</u> , 962 P.2d 796 (Utah 1998).....	10
<u>Johannessen v. Canyon Rd. Towers Owners Ass’n</u> , 2002 UT App 332, 57 P.3d 1119 .....	5
<u>Kelly v. Salt Lake City Civil Service Comm’n</u> , 2000 UT App. 235, 8 P.3d 1048 .....	23

<u>Kiewit W. Co. v. City and County of Denver</u> , 902 P.2d 421 (Colo. App. 1994) .....	7
<u>Lee v. Thorpe</u> , 2006 UT 66, 147 P.3d 443.....	11
<u>Legg v. Bd. of Pardons</u> , 2007 UT App 190 .....	10
<u>Lone Pine Corp. v. Ft. Lupton</u> , 653 P.2d 405 (Colo. Ct. App 1982).....	7
<u>Lucas v. Murray City Civ. Serv. Comm’n.</u> , 949 P.2d 746 (Ut. App. 1997) .....	14, 23
<u>McCormick v. Life Insurance Corp. of Am.</u> , 308 P.2d 949 (Utah 1957).....	5, 9
<u>McDonnell Douglas Corp. v. NASA</u> , 895 F. Supp. 316 (D. D.C. 1995).....	22
<u>Millard County Sch. Dist. v. State Bank of Millard County</u> , 14 P.2d 967 (Utah 1932) .....	8
<u>Mills v. Brody</u> , 929 P.2d 360 (Utah App. 1996).....	4
<u>Morton Int’l, Inc. v. Auditing Div. of the Utah State Tax Comm’n.</u> , 814 P.2d 581 (Utah 1991) .....	3
<u>Nunley v. Westates Casing Servs., Inc.</u> , 1999 UT 100, 989 P.2d 1077 .....	7
<u>Ockey v. Lehmer</u> , 2008 UT 37, 189 P.3d 51 .....	8, 11
<u>Palmer v. Broadbent</u> , 260 P.2d 581 (Utah 1953).....	10
<u>Parker v. Ind. School Dist. No. I-003</u> , 82 F.3d 952 (10 <sup>th</sup> Cir. 1996) .....	9, 10, 11
<u>Pelton’s Spudnuts, Inc. v. Doane</u> , 234 P.2d 852 (Utah 1951) .....	6
<u>Peterson v. Browning</u> , 832 P.2d 1280 (Utah 1992) .....	11
<u>Peterson v. Sunrider Corp.</u> , 2002 UT 43, 48 P.3d 918 .....	5, 11
<u>Rackley v. Fairview Care Ctrs, Inc.</u> , 2001 UT 32, 23 P.3d 1022 .....	11
<u>Rhodus v. M.P. Geatley</u> , 147 S.W. 2d 631 (Mo. 1941).....	6
<u>Rothstein v. Snowbird Corp.</u> , 2007 UT 96, 175 P.3d 560 .....	11, 12
<u>Ryan v. Dan’s Food Stores, Inc.</u> , 972 P.2d 395 (Utah 1988).....	11
<u>Salt Lake City Corporation v. Salt Lake City Civil Service Comm’n</u> , 908 P.2d 871 (Utah App. 1995) .....	23

<u>Salt Lake County Comm'n v. Short</u> , 1999 UT 73, 985 P.2d 899 .....	18
<u>Savage Industries, Inc. v. Utah State Tax Comm'n.</u> , 811 P.2d 664 (Utah 1991) .....	4
<u>Spackman v. Bd. of Educ. of Box Elder County Sch. Dist.</u> , 2000 UT 87, 16 P.3d 533 ...	19
<u>Tanner v. Provo Reservoir Co.</u> , 289 P. 151 (Utah 1930) .....	6, 7
<u>Thurston v. Box Elder County</u> , 835 P.2d 165 (Utah 1992) .....	5, 8
<u>Thurston v. Box Elder County</u> , 892 P.2d 1034 (Utah 1995) .....	24
<u>Tolman v. Salt Lake County Attorney</u> , 818 P.2d 23 (Utah App. 1991) .....	3, 4, 14
<u>Tustian v. Schriever</u> , 2001 UT 84, 34 P.2d 755 .....	10
<u>Whitaker v. The Utah State Retir. Bd.</u> , 2008 UT App 282, 191 P.3d 814 .....	7
<u>Yates v. American Republics Corp.</u> , 163 F.2d 178 (10 <sup>th</sup> Cir. 1947) .....	10

## **Statutes**

Utah Code Ann. § 10-3-1105 .....	passim
Utah Code Ann. § 10-3-1106 .....	passim
Utah Code Ann. § 10-3b-202 .....	17
Utah Code Ann. § 67-16-4 .....	17

## **Other Authorities**

Salt Lake City, Utah, Policy 3.01.01 (7.1) .....	15
Salt Lake City, Utah, Policy 3.01.02 (1.3) .....	17
Salt Lake City, Utah, Policy 3.02.01 .....	15
Salt Lake City, Utah, Policy 3.02.02 (2.3) .....	15
Salt Lake City, Utah, Code § 2.24.060 .....	3, 15
Salt Lake City, Utah, Code § 2.24.070 .....	21
Salt Lake City, Utah, Code § 2.44.030 .....	17
Salt Lake City, Utah, Code § 2.44.040 .....	17

## **Rules**

Utah Rules of Professional Conduct 1.13 .....	18
Utah Rule of Appellate Procedures 33.....	16, 19, 20

## **Appendices**

- Appendix A - Salt Lake City Code §§ 2.24.060; 2.24.070; 2.44.030; 2.44.040
- Appendix B - Conference Committee Report, 2004 General Session, SB0023S01,  
February 16, 2004
- Appendix C - City Policy 3.01.01 (7.1); 3.01.02 (1.3); 3.02.01; 3.02.02 (2.3)

Appellees Salt Lake City Employee Appeals Board (the “Board”) and Salt Lake City (collectively the “City”) fail to contest and therefore concede the central issue in this appeal: that Salt Lake City acted in violation of the Utah Municipal Code and outside of its statutory authority when it created an at-will senior city attorney position.

Furthermore, Salt Lake City admits that it has created numerous other “at-will” positions in violation of the Code and outside of its statutory authority. It asks the Court to ignore this pattern of violation and to bar Jodi Howick's appeal based on estoppel and waiver.

However, Utah law clearly holds that neither estoppel nor waiver prevent Howick's challenge to the City's actions.

**I. THE CITY HAS CONCEDED THAT IT VIOLATED THE LAW WHEN IT CREATED AN AT-WILL STAFF ATTORNEY POSITION.**

The City concedes that there is no basis under Utah Code Annotated §10-3-1105 to classify the Senior City Attorney position in the Salt Lake City Attorney’s Office as an at-will position. It makes no argument in its Brief that there is any interpretation of Section 10-3-1105 that permits this position to be classified as at-will, and it has never, in the 16-month history of this dispute, offered a legal justification for its effort to strip these attorneys of their protection under Section 10-3-1106. The Brief of Appellees is therefore simply another effort to avoid review of the important legal question presented by Howick’s appeal: Can Salt Lake City create at-will positions in addition to those specifically identified in Section 10-3-1105 and act on that basis? The Brief of Appellant Howick ("Opening Brief") demonstrates that Utah law does not allow the City to do so,

whether by ordinance, policy, procedure or contract. Likewise, the City cannot achieve that result through equitable estoppel, waiver or de facto through delay and obstruction.

## **II. THE COURT DETERMINES THIS MATTER UNDER THE CORRECTION OF ERROR STANDARD.**

The City contends that this Court should review the action of the Board under a “reasonableness” standard because it claims this case involves a question of mixed fact and law. It argues that the Board made its decision based on City rules and Preston’s legal opinion, but that Preston, in his opinion, “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 she received.” Brief of Appellees at 14.

The City’s argument is constructed on several errors. First, the argument falsely assumes that the Board relied on something other than an opinion of the law. The Board clearly asked for a legal opinion,<sup>1</sup> and Preston clearly provided one.<sup>2</sup> The Board then adopted Preston’s legal opinion<sup>3</sup> regarding Howick’s alleged at-will status.<sup>4</sup>

Second, the argument erroneously assumes that Preston’s Opinion involved an application of law to facts. The matter Preston considered could not involve such an exercise because whether a party can enter into a contract with a government entity, the

---

<sup>1</sup> Letter of Randy Buckley, R. 96 (“the Board is requesting a legal opinion”).

<sup>2</sup> Preston Opinion, R. 87 (“This legal opinion is restricted solely to Ms. Howick’s situation”).

<sup>3</sup> Transcript of Final Board Meeting, R. Ex. A at 3 (“given the information we received from Snow, Christensen & Martineau, this matter should not be heard by the EAB”).

<sup>4</sup> Salt Lake City’s position before this Court is contrary to its position before the Board. There it described Howick’s appeal to the Board as presenting only a “legal issue of state law,” R. 28, which the Board had no authority to consider and which was “for a court to decide.” R. 30.

subject matter of which exceeds statutory authority and violates the law, is purely a question of law and involves no factual analysis. See Section IV below. Howick clearly raised this question. R. 56. Preston simply chose to ignore it entirely. R. 82-87.

Furthermore, the cases cited by the City do not support its position. These cases make clear that a deferential mixed fact and law standard applies only in specialized circumstances that are not present in this case.<sup>5</sup> Sections 10-3-1105 and 1106 clearly grant the Board no discretion to determine to whom the protections of Sections 10-3-1105 and 1106 extend. As the City has acknowledged that is plainly a legal issue for which the Board may seek a legal opinion if it has a question. Brief of Appellees at 6. To the extent the Board has been granted any discretion, that grant is limited to determining "was action warranted. . . . [and if so] is the action taken proportionate to the charges?" Salt Lake City Code § 2.24.060, Appendix A. Contrary to the City's assertions, it does not have unlimited discretion regarding its reasons for termination, standard of review or procedures. See below at Section VII.

This Court reviews to determine if the Board "abused its discretion or exceeded its authority." Section 1106(6)(c). However, this statement of the Court's authority to review the Board's decision grants no "discretion" to the Board. As the Court said in Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26-27 (Utah App. 1991), abuse of

---

<sup>5</sup> These cases point out that a deferential standard applies when the law in a specialized area is ambiguous or technical, and an agency has specialized expertise and knowledge that place it in a better position than the courts to interpret those provisions consistent with regulatory objectives because it understands the industry. See Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n., 814 P.2d 581, 586 (Utah 1991) (analyzing UAPA revisions not applicable to this case). This was not the case for Preston or the Board.

discretion is not a standard of review. The term indicates that a board has the ability to choose among permissible courses of action within the bounds of the law; “[i]t is a legal term [used] to indicate that the appellate court is of the opinion that there was commission of error of law in the circumstances.”

The Utah Supreme Court has held that “[a]n agency’s determination of its subject matter jurisdiction is a question of law, which we review for correctness.” Harmon v. Ogden City Civil Service Comm’n., 917 P.2d 1082, 1084 (Utah 1996). “For most questions of basic statutory interpretation or construction of the law, the court is as suited to decide the issues involved as is the agency and therefore will review the agency decision for correctness.” Savage Industries, Inc. v. Utah State Tax Comm’n., 811 P.2d 664, 13 (Utah 1991). As this Court found in Tolman, 818 P.2d at 27 (Utah App. 1991), when a tribunal “crosses the law” this Court applies a correction-of-error standard, which constitutes a finding of an abuse of discretion.

### **III. HOWICK IS NOT ESTOPPED FROM CHALLENGING THE CITY’S ILLEGAL ACTIONS.**

The City argues that this Court need not determine whether the creation of an at-will “appointed senior attorney” position violates the Utah Municipal Code because under Howick’s specific circumstances, she is estopped from challenging the validity of the Disclaimer she signed. Initially, the Court should not consider this argument, because Salt Lake City failed to preserve it for consideration on appeal. It cites to no instance on the record where it preserved this issue, and in fact, this argument is not discussed in the record. See Mills v. Brody, 929 P.2d 360, 364 (Utah App. 1996) (plaintiff mentioned

estoppel below and made some references to it, but did not sufficiently raise the issue to a “level of consciousness” before the trial court and did not provide the trial court with any legal authority; this was insufficient to preserve the issue and it could not be considered on appeal).

Furthermore, the City's argument reverses the inquiry under Utah law, which requires that the courts first determine whether the object that the contract proposes to achieve is prohibited by statute. If it is, the law clearly states estoppel cannot be used to enforce it. The Utah Supreme Court has found that “[i]f the law were such that the parties could make a contract . . . oblivious to or ignoring the statute . . . [and a party could] invoke estoppel to preclude [assertion of the statutory limitations] . . . the statute would be thus nullified by the simple device of ignoring it. This would . . . have the harmful effect of depriving the public and third parties of the protection it was designed to give.” McCormick v. Life Insurance Corp. of Am., 308 P.2d 949, 952 (Utah 1957). See also, Peterson v. Sunrider Corp., 2002 UT 43, ¶ 40, 48 P.3d 918 “if the court finds that the contract falls within [the prohibitions of] the statute, it need not consider the purpose and reach of the statute”); Johannessen v. Canyon Rd. Towers Owners Ass’n, 2002 UT App 332, ¶ 25 n.3, 57 P.3d 1119.

The law of estoppel is consistent with the law governing public employment. When examining public employment rights, courts “must first determine whether the [government's action] . . . complies with the requirements of [the statute]” before considering contractual rights. Thurston v. Box Elder County, 835 P.2d 165, 168 (Utah 1992) (noting that the parties inaccurately formulated the issues as a contract action when

the County's contract had violated a statute and could not be upheld). See also Code v. Utah Dep't of Health, 2007 UT App. 390, ¶ 6, 174 P.2d 113 (ancillary public employment contract rights “must be consistent with the underlying statutes . . . [contract rights] [can] not alter *or contradict* an employee's statutory rights.”).

No case cited by the City supports its argument that a public entity can systematically enter into a series of contracts,<sup>6</sup> knowing they are in violation of statute as the City has conceded, and then argue that each of the other parties to the contracts is equitably estopped from challenging the contracts. Many of the cases cited by the City do not involve public entities at all and do not involve any illegality in the private contract. The private parties were simply estopped or not estopped based on whether they had clean hands or had acted wrongfully in connection with a lawful contract or ordinance.<sup>7</sup> In some, the courts found no contract had ever been formed by the parties

---

<sup>6</sup> The City acknowledges that its practice is widespread. See Brief of Appellees at 41 (“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.”); Id. at 40 (“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”) (emphases added).

<sup>7</sup> See Glew v. Ohio Sav. Bank, 2007 UT 56, 181 P.3d 791 (lender estopped from enforcing legal loan agreement because its actions lead to loss); Eastern Air Lines, Inc. v. Ins. Co. (In re Ionosphere Clubs, Inc.), 85 F.3d 992 (2<sup>nd</sup> Cir. 1996) (airline estopped from repudiating legal insurance agreement negotiated during bankruptcy with court approval); Pelton’s Spudnuts, Inc. v. Doane, 234 P.2d 852 (Utah 1951) (franchise agreement enforceable); Tanner v. Provo Reservoir Co., 289 P. 151 (Utah 1930) (employee who helped create legal water contract estopped from later challenging it); Cluggish v. Koons, 43 N.E. 158 (Ind. Ct. App. 1896) (property owner benefiting from contractor’s work under lawful ordinance estopped from refusing payment based on second ordinance impliedly repealing first ordinance 20 years later), Rhodus v. M.P. Geatley, 147 S.W. 2d 631, 638 (Mo. 1941) (remaindermen not estopped from challenging partition sale;

and benefits could not be obtained by applying the doctrine of estoppel.<sup>8</sup> In others, the courts found that estoppel was permissible if a contract did not violate state law, or if a state law itself was not unconstitutional and did not prohibit city actions. In these cases the City relies primarily on early Colorado exaction cases, which reflect that the constitutional parameters of exaction requirements have developed over time.<sup>9</sup> One case states that where technical violations in procurement processes do not cause harm, they will not deprive the public of its interest in public procurement.<sup>10</sup>

Estoppel is a “just and equitable principle that a person is said to be estopped to take advantage of his own fraud or wrong.” Tanner, 289 P. at 154. The City concedes

---

estoppel “must be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience”). See also Kiewit W. Co. v. City and County of Denver, 902 P.2d 421 (Colo. App. 1994) (contractor estopped to avoid contractual dispute resolution clauses that were lawful under statute and constitution).

<sup>8</sup> See Nunley v. Westates Casing Servs., Inc., 1999 UT 100, 989 P.2d 1077 (private parties’ actions in connection with stock option did not create an enforceable agreement, nor did promissory estoppel); Whitaker v. The Utah State Retir. Bd., 2008 UT App 282, 191 P.3d 814 (board interpreted statute correctly and plaintiff could not obtain unauthorized benefits by estoppel).

<sup>9</sup> See Chubb v. Ohio Bureau of Workers’ Compensation, 690 N.E. 2d 1267, 1269 (Ohio 1998) (public employer entitled to plead estoppel in action by employee in lawfully created unclassified position; unlike situation where employees were alleged to be unclassified due to employer's neglect of statutory duty); City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467 (Colo. 1964) (early exaction case where the court treated city’s contract as validly executed under law since there were no prohibitions against it); Lone Pine Corp. v. Ft. Lupton, 653 P.2d 405 (Colo. Ct. App 1982) (early exaction case where court treated contract as validly executed based on Kitty Hawk); Boulder Brook Acres, Inc. v. Town and Village of Scarsdale, 491 N.Y.S.2d 785 (N.Y. App. Div. 1985) (exaction case treating deed as validly executed in four sentence opinion).

<sup>10</sup> See Baukol Builders, Inc. v. County of Grand Forks, 2008 ND 116, 751 N.W.2d 191 (second lowest bidder estopped to challenge award where project not advertised for required 21 days, but bidder not harmed; bidding procedures are for the benefit of the public by preventing favoritism and corruption, and securing best work at low price).

that it violated the requirements of Sections 10-3-1105 and 1106 and that it had no legal authority to make a senior city attorney position at-will. Equity cannot support these acts. The City may not invoke the equitable defense of estoppel to shield, and thereby enforce, its unlawful conduct.

#### **IV. HOWICK HAS NOT WAIVED HER RIGHT TO CHALLENGE THE CITY'S ILLEGAL ACTIONS.**

The City further argues that Howick cannot challenge the City's unlawful acts because she has waived all statutory and constitutional rights by signing a disclaimer. This argument again reverses Utah law, which requires that the courts first determine whether a contract with an unlawful subject matter is enforceable as a waiver. Once again, the City may not use an illegal and void contract to shield, and thereby enforce, its unlawful conduct.

The City has conceded that public employment rights are statutory, and ancillary contracts “[can] not alter *or contradict* an employee’s statutory rights.” Code 2007 Ut App., 390 at ¶ 6 (original insertion and emphasis). Thus, courts “must first determine whether the [government’s action] . . . complies with the requirements of [the statute]” before considering contractual rights. Thurston, 835 P.2d at 168. The City may not use a disclaimer to violate a statute any more than it may use any other contract to do so.

Here, the City’s disclaimers are malum in se and malum prohibitum and therefore illegal and void. Ockey v. Lehmer, 2008 UT 37, ¶ 22, 189 P.3d 51 (“contracts . . . which are malum in se or malum prohibitum, which contravene some rule of public policy, or violate some public duty . . . are illegal and void.”), citing Millard County Sch. Dist. v.

State Bank of Millard County, 14 P.2d 967, 971-72 (Utah 1932)(noting that a distinction between “void” and “merely ultra vires” contracts is generally not observed with “public corporations as distinguished from private or business corporations”).

To the extent a “public policy” analysis is applied to such contracts, the overarching policy in question is a policy against violating the law. See Culbertson v. Bd. of County Comm'rs of Salt Lake County, 2008 UT App. 22, ¶ 12, 177 P.3d 621 (there is an “important public policy of ensuring that . . . [government] is governed by the rule of law, not of man.”). Courts have recognized that when the object achieved by a contract is prohibited by law, the contract is simply not enforceable. See McCormick 308 P.2d at 952 (“the statute would be thus nullified by the simple device of ignoring it.”). In other words, such a contract violates both the law and public policy, and courts have so determined when faced with the same arguments that the City is making in Howick’s case.

In Parker v. Ind. School Dist. No. I-003, 82 F.3d 952 (10<sup>th</sup> Cir. 1996), a school district asked a teacher to sign a contract allowing it to terminate her employment in violation of state law. The teacher signed the agreement for several years, then was terminated. The Tenth Circuit reversed a trial court decision against the teacher, finding it to be well established law that contract provisions cannot override statutorily created public employment rights. The court expressly rejected the argument that these statutory rights could be waived because other types of rights could be waived. It also found that the cases that the school district relied on “involved contract terms that *did not violate statutory provisions*”) (original emphasis). Id. at 954. It also found that the public

employment statute served a public function in that it promoted the good order and welfare of the state and the school system by preventing the removal of capable and experienced teachers for reasons arising from political or personal whim. The court also rejected as “patently erroneous” the school district’s argument that because the statute contained some exceptions to its protection, the school district should be able to create other ad hoc exceptions not specified in the statute. Id. at 956.

Like the school district in Parker, the City attempts to argue a variety of cases discussing waiver that are not on point because they do not involve contract terms that violate statutory provisions. Some of these cases discuss ordinary waiver principles where the waiver violates no law.<sup>11</sup> Some of these cases point out that a lack of compliance with mere formalities or technicalities will not render a contract unenforceable or prevent compliance with a substantive law when policy considerations favor that outcome.<sup>12</sup> Many of the cases, on a case-by-case basis, analyze whether to enforce an otherwise lawful agreement when actions taken pursuant to that agreement

---

<sup>11</sup> See Yates v. American Republics Corp., 163 F.2d 178 (10<sup>th</sup> Cir. 1947) (conduct not intended to waive reassignment provision in oil and gas lease); Legg v. Bd. of Pardons, 2007 UT App 190 (parolee waived immediate parole revocation hearing upon return to custody); Anderson v. Thompson, 2008 UT App 3, 176 P.3d 464 (question regarding whether wife’s conduct waived rights under divorce decree not preserved on appeal); Tustian v. Schriever, 2001 UT 84, 34 P.2d 755 (private lien holder waived an available statutory argument where it elected to rely on a different statutory protection).

<sup>12</sup> See Jenkins v. Percival, 962 P.2d 796 (Utah 1998) (oral agreement to arbitrate may be enforced in equity where agreement party performed and based on public policy favoring extra judicial resolution of disputes); Palmer v. Broadbent, 260 P.2d 581 (Utah 1953) (statutory procedures for initiating a ballot referendum would not invalidate submission where noncompliance involved “mere formalities” and “directory” not mandatory procedures meant to assist those initiating referenda).

may contradict a public policy.<sup>13</sup> Among them, the City relies on cases addressing the public policy exception to the private employment at-will presumption under which a statutory policy may render a private at-will contract unenforceable.<sup>14</sup> These cases are unlike Howick’s case, where the City seeks to use its at-will contracts and other acts to violate a statute, and they provide no support for the City’s position.

The City also seeks to bolster its argument by inferring that Howick acted voluntarily when signing the Disclaimer. As Parker notes, whether or not a disclaimer is voluntary, the courts cannot enforce a violation of statutory employment requirements through the doctrine of waiver. In Parker, the district court found for the school district based on the teacher’s voluntary assent, but the Tenth Circuit reversed “without deciding whether the purported waiver was voluntary” because the contract terms purporting to waive the statutory provisions were invalid. Parker 82 F.3d at 954.<sup>15</sup>

---

<sup>13</sup> Ockey, 2008 UT 37 at ¶ 21 n.12 (trustee lacked authority to convey property based on a legal private agreement, but under public policy and trust principles, these private actions could be ratified; contracts can be binding “barring such things as illegality of subject matter or legal incapacity”); Rothstein v. Snowbird Corp., 2007 UT 96, 175 P.3d 560 (pre-injury release on ski pass was wholly incompatible with public policy served by statute and unenforceable); Peterson, 2002 UT 43 (trial court required to hold a contract unenforceable if determined to be within prohibitions of penal statute; if statute not directly implicated, court had to determine whether nonenforcement would benefit or harm parties statute designed to protect); Lee v. Thorpe, 2006 UT 66, 147 P.3d 443 (otherwise legal contract not rendered unenforceable due to lack of compliance with related statutory provisions where contract did not offend public policy articulated by statute).

<sup>14</sup> Rackley v. Fairview Care Ctrs, Inc., 2001 UT 32, 23 P.3d 1022; Berube v. Fashion Center, Ltd., 771 P.2d 1033 (Utah 1989); Ryan v. Dan’s Food Stores, Inc., 972 P.2d 395 (Utah 1988) and Peterson v. Browning, 832 P.2d 1280 (Utah 1992), are all such cases.

<sup>15</sup> See Appointed Senior City Attorney job description, R. 65-66, and Senior City Attorney job description, R. 67-68. The Appointed Senior City Attorney position was

Finally, the City contends that waiver must be enforceable because the Utah Municipal Code does not expressly state that its provisions cannot be waived. This argument again ignores the law. The Utah Municipal Code contains statutory powers and prohibitions that create the City's power to act, and the City has no other power. The Utah Supreme Court has found that "the absence of express legislative disapproval" does not prove that a release is valid. Rothstein, 2007 UT 96, at ¶ 19 (finding that an act's expression of public policy may not lend itself to the need for an additional statement regarding releases).<sup>16</sup> Further, the legislative history of Sections 10-3-1105 and 1106 does not alter this result. The City's characterization of that history as allowing the City an "unlimited authority" to "fire employees" is not accurately stated and is not supported by the plain text or the history itself. The legislative history makes clear that the Legislature did not establish at-will employment, nor endorse illegal action by cities.<sup>17</sup>

The City's argument regarding waiver is pernicious because while conceding that its acts were illegal, the City attempts to retain the ability to continue those acts by eliminating any challenge. Under this argument, the City is free to act illegally without the burden of judicial review, whether in employment matters or otherwise. The City

---

available only to more experienced attorneys as an advance in their careers if they would "accept" an at-will status.

<sup>16</sup> For example, the Utah Antidiscrimination Act contains no provision prohibiting the waiver of its protections, but surely a waiver of its protections by an employee in exchange for a promotion or raise would be unenforceable.

<sup>17</sup> The City cites partial testimony of Rep. David Ure on February 11, 2004. Further, after Rep. Ure made his comments, a conference committee modified the bill on February 16, 2004 to insert a requirement that the governing body of each municipality prescribe by ordinance "the standard of review" for the board to use when it hears and determines the matter which relates to the *cause* for the discharge. See Appendix B, Conference Committee Report, 2004 General Session, SB0023S01, February 16, 2004.

does not have absolute power. It cannot enforce an illegal act under the guise of a void and unenforceable waiver.

**V. THE EQUITIES DO NOT FAVOR ENFORCING THE CITY'S ACTIONS.**

The City contends that illegal contracts can still be enforced, although both of the cases it cites expressly state that a contract cannot be enforced if the object it proposes to achieve is prohibited by statute. Brief of Appellees at 28-29. The City argues the importance of “freedom of contract” and the “efficiencies” for an employer of at-will terminations over merit system protection. Brief of Appellees at 25, 30. However, that balance has been struck by the Legislature for the benefit of the public, as was noted in Parker.<sup>18</sup> As other Utah public employers have recognized, if they wish to remove positions from statutory protection, they must convince the Legislature to restrike the balance for those specific positions. See Opening Brief at 13-14, n. 6.

Here, the equities clearly favor Howick. From the outset, the City refused to provide to Howick the 15-day review required by the Legislature to resolve this matter, and at every turn it has argued a lack of jurisdiction and sought delay. Howick has waited 16 months to see the City’s legal basis for its conduct only to find that the City concedes its illegality and never had a basis in the law for its actions.

---

<sup>18</sup>The City also argues that this result is required because “taxpayer dollars” are involved. However, the Brief of Appellees demonstrates the important public issue of waste that is raised when public officials willfully choose to violate the law and then engage in a prolonged court battle without any legal support for their actions instead of correcting the violations. See Druffner v. Mrs. Fields, Inc., 828 P.2d 1075, 1080 (Utah App. 1992) at 1080 (employer’s knowledge that he cannot escape liability tends to ensure compliance in the first place).

## **VI. THIS COURT HAS JURISDICTION TO HEAR CONSTITUTIONAL ARGUMENTS.**

The City argues that this Court has no jurisdiction to hear Howick's constitutional due process arguments because the matter is not in the record, the Board had no jurisdiction to hear it, and this Court is limited to the narrow issue before the Board. The record of this case is a record of numerous violations of due process as Howick was terminated at will and was given no meaningful review to protect her property interest. This Court has recognized that due process arguments may be heard in connection with an appeal pursuant to statutory processes that protect public employment property rights. See Lucas v. Murray City Civ. Serv. Comm'n., 949 P.2d 746 (Ut. App. 1997); Tolman, 818 P.2d 23. Further, "this court may decide a case based on any valid ground found within the record." Bd. of Equalization of Summit County v. State Tax Comm'n., 2004 UT App 283, ¶ 6, 98 P.3d 782.

## **VII. THE CITY VIOLATED HOWICK'S CONSTITUTIONAL RIGHT TO DUE PROCESS.**

The City argues that Sections 10-3-1105 and 1106 do not create a property interest. This argument is at odds with the Preston Opinion, which acknowledges that these sections create a property interest prohibiting a termination except for cause, R. 84, and it is simply incorrect. Those sections clearly establish an entitlement to ongoing public employment without sufficient basis for termination and limit a supervisor's discretion to act.

Section 10-3-1105(1) establishes that municipal employees hold employment "without limitation of time" and are subject to discharge "only as provided in Section 10-

3-1106.” Section 10-3-1106(1) prohibits action because of an employee’s politics or religious belief, or incident to, or through changes, either in the elective officers, governing body, or heads of departments. Further, the Board must determine “the matter which relates to the cause for discharge.” Section 10-3-1106(3)(b)(ii) (emphasis added). Section 10-3-1106(7)(a) mandates that the governing body of each municipality prescribe by ordinance the standard of review that the Board must apply to that cause, and the City has done so under Salt Lake City Code § 2.24.060 (the Board must review a City action by determining “was action warranted. . . .[and if so,] is the action taken proportionate to the charges?”). This Court then reviews the determination under Section 10-3-1106(6)(c) to decide if the board abused its discretion or exceeded its authority when applying the statutory limitations to a given situation.

State law allows cities to “define cause,” not act without it, pursuant to Section 10-3-1105(3). The City has done so under City Policy 3.01.01 (7.1), Appendix C, which states “[e]mployees may be terminated for the following reasons: A. Cause: employees may be terminated for cause in accordance with the City’s Standards of Conduct and Disciplinary Guidelines policies. . . B. Failure to pass a probationary period . . . C. Resignation or retirement . . . D. At-will positions . . . E. [job abandonment].” The referenced City policies place additional limitations on supervisory actions. For example, “[d]isciplinary rules must be reasonable and related to City business.” City Policy 3.02.02 (2.3) (Disciplinary Guidelines), Appendix C. See also City Policy 3.02.01 (Standards of Conduct), Appendix C. As the City concedes, Section 10-3-1105 lists the only positions that are not subject to these rights.

The City argues that Howick cannot “look to any contractual provisions for a protected property interest,” Brief of Appellees at 33, but that is irrelevant. Howick’s property interest is created by state law, and the statutory directive is further implemented as required through City ordinances and policies. These provisions clearly demonstrate that Howick has not just a right to procedural protections, but a claim of entitlement to continued public employment.

The City further argues that even if Howick has a property interest, she has been given due process. The record demonstrates that this is not the case despite the City’s purported checklist of actions. As detailed in her opening Brief, the City denied Howick any pretermination process, initially denied access to post-termination process, and denied any meaningful process once it gave her Notice of Appeal to the Board by, among other things, never addressing her legal arguments. See Opening Brief at 28-33. The City concedes that Howick’s position is entitled to the protections of Sections 10-3-1105 and 1106; it just refuses to provide those protections to Howick.

#### **VIII. HOWICK IS ENTITLED TO ATTORNEY FEES.**

The City wrongly claims that Howick is not entitled to attorney fees on the bases she asserts. In fact, all of those bases are appropriate, and the City has now clearly demonstrated that Howick is entitled to attorney fees and double costs by operation of Utah Rule of Appellate Procedures 33 as well.

Contrary to the City's assertions, under the private attorney general doctrine Howick’s case follows the same pattern as other cases where fees and costs have been awarded. The first element of Culbertson v. Board of County Comm’rs, 2008 UT App.

22, 177 P.2d 621, is met not only by the matters stated in the opening Brief at 34-39, but by the City's current assertions. The City's positions on estoppel and waiver seek to give the City the ability to enforce illegal acts despite their conceded illegality and to eliminate any right to challenge the City.<sup>19</sup> If the City has these "rights," it can apply them to enforce illegal acts in the pursuit of any activity, whether in employment, zoning, licensing, etc. The City's arguments seek to immunize its violation of statutory obligations from any meaningful review, and this action will preclude that.

Further, the City's ignoring Sections 10-3-1105 and 1106 subverts the public's interest in good government, which the Legislature has determined is better served by prohibiting the termination of public employees in connection with politics or changes in elected officials and heads of departments, or without cause as defined by each municipality. The alternative is generally considered to be cronyism, and both state and City law amply demonstrate the intent to prohibit cronyism in government.<sup>20</sup> Further,

---

<sup>19</sup> The City argues that this Court may not consider that there are many other City employees in Howick's position. Brief of Appellees at 13 n.5. However, the City has acknowledged this fact (see footnote 7 above), and the Court may take notice of public records such as the Unclassified Pay Plan and the current Executive Compensation Plan. Green River Canal Co. v. Thayn, 2003 UT 50, 930 n.8, 84 P.3d 1134.

<sup>20</sup> For example, for those few municipal positions that are at-will, state and City law impose requirements on the qualifications of persons hired. See Utah Code Ann. § 10-3b-202(3) (chief administrative officer must be appointed on basis of ability and prior experience in field of public administration, and other qualifications prescribed by ordinance); Utah Code Ann. § 10-3b-202(1)(c) (mayor shall appoint qualified persons as officers with council's advice and consent); City Policy 3.01.02 (1.3) (City regular full-time employees (regularly requiring 40 hours of work per week) must be selected through an open competitive process). Cronyism also violates public ethics requirements. See Utah Code Ann. § 67-16-4(1)(b) (prohibition on securing special privileges for self or others); Salt Lake City Code §§ 2.44.030 and 040, Appendix A, (similar provisions).

cronyism is particularly corrosive to the role of public attorneys, since they have responsibilities that differ from other attorneys. They may have a duty to question conduct or pursue investigations,<sup>21</sup> and the public client generally does not have the ability to seek other counsel. See Salt Lake County Comm'n v. Short, 1999 UT 73, ¶ 34, 985 P.2d 899. These responsibilities may make a public attorney's role unpopular at times, leaving attorneys particularly subject to the whims and animosities of staff that may be badly or personally motivated, or simply uneducated in public requirements.

Culbertson's second element is also met, since Howick has the same financial interest in this action that other appellants under this doctrine have had in theirs – the recovery of her own property, which was illegally taken from her. No case has withheld fees under this doctrine on the basis that appellant seeks the return of her property.

Finally, Culbertson's third element is met by the extraordinary nature of this case. The City has spent the past 16 months declaring that no forum had jurisdiction and refusing to provide the legal basis for its actions. Now that it finally has been forced to disclose its legal argument, the City concedes the determinative issues in this case and demonstrates that it never had a legal basis for its actions. Rather than performing its statutory duty to resolve this matter in 15 days, the City knowingly sought to achieve de facto what it could not achieve legally for its own benefit. The City's complete disregard

---

<sup>21</sup> Comments under Rule 1.13(h) of the Utah Rules of Professional Conduct note that government lawyers "may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution." In contrast to other attorney-client relationships, they may have obligations to respond to illegal or improper conduct to ensure wrongful acts are prevented or rectified where public business is involved. "The obligation of the government lawyer may require representation of the public interest as that duty is specified by law." *Id.*

for its statutory duties, its insistence on trying to evade the law through legal process, its reckless use of public funds when doing so, and the extensive burdens that it placed on Howick in an effort to prevent a vindication of her rights are extraordinary.

These same factors demonstrate that the City has consistently acted in bad faith, vexatiously, wantonly or for oppressive reasons during this process. The City knew that it never had a legal basis for its actions, yet despite its knowledge of illegality, it forced Howick through 16 months (to date) of lengthy and expensive legal process. The City knowingly ignored its statutory duty and chose instead to delay and obstruct this matter.<sup>22</sup>

The City also asserts that attorney fees are not available to Howick for the City's violation of her state constitutional due process rights by claiming that attorney fees cannot be considered as damages. The Utah Supreme Court has recognized that in fact, attorney fees are a well known aspect of the harm caused by improper employment terminations.<sup>23</sup> Howick's case meets the elements stated in Spackman v. Bd. of Educ. of Box Elder County Sch. Dist., 2000 UT 87, 16 P.3d 533, and a remedy is appropriate. See also opening Brief at 43.

Finally, this Court should award attorney fees and double costs to Howick pursuant to the operation of Rule 33, Utah Rules of Appellate Procedure. Howick asserted in her opening Brief that the City pursued this matter for delay and other frivolous reasons. However, Howick never had the opportunity to review the City's legal

---

<sup>22</sup> See Howick v. Salt Lake City Corp., 2008 UT App. 216, n.1

<sup>23</sup> See Heslop v. Bank of Utah, 839 P.2d 828, 840-41 (Utah 1991) ("Employers can reasonably foresee that wrongfully terminated employees will be forced to file suit . . . and will foreseeably incur attorney fees).

arguments prior to submitting her opening Brief. The City did not present its legal arguments to the Board, it only attempted to persuade the Board that it was a “fact” that Howick was an at-will employee, that she was “highly paid,” and that this Court should consider the matter and not the Board. R. 27-30. The City cited no case law and made no legal arguments. The Brief of Appellees for the first time made clear that the City never had a claim of right for its actions. Rule 33 permits an award of attorney fees and double costs on this basis. Howick thus should be awarded fees and double costs pursuant to Rule 33. Alternatively, this Court may award attorney fees and double costs as damages upon its own motion pursuant to Rule 33 (c)(1).

## **IX. HOWICK IS ENTITLED TO REINSTATEMENT.**

### **A. SECTION 10-3-1106 REQUIRES THAT HOWICK BE REINSTATED.**

The City now seeks to avoid the consequences of its at-will termination of Howick’s employment by arguing that, at most, Howick is entitled to have her case remanded to the Board for a hearing “on the merits.” Brief of Appellees at 45. The City mistakes the matter. The merits of Howick’s appeal were whether she could be terminated at-will, the only basis the City has ever offered for her termination. Those merits were considered by the Board when it adopted Preston’s incorrect legal opinion, and when this Court reverses the Board’s decision, the effect will be to require Howick’s reinstatement.

The City’s only position for the last 16 months has been that Howick was an at-will employee whose employment could be terminated without cause or process. It first

made that assertion 16 months ago by verbally informing Howick that it was terminating her employment without prior notice as a “business decision.” R. 108. It again made that assertion in support of its refusal to submit Howick’s appeal to the Board. R. 35. It reiterated that assertion in Howick’s earlier appeal. Respondent’s Memorandum in Support of Summary Disposition for Lack of Jurisdiction, Case No. 20070863, at 1-2. This Court recognized the City’s position in its Memorandum Decision. See Howick, 2008 UT App. 216. The City again reiterates that assertion throughout its Brief.

Further, the record demonstrates that the City acted at will and determined “cause” to be inapplicable. To act “for cause,” the City must employ a disciplinary process that culminates with a written letter of discipline. Employees submit the “written letter of discipline” when filing an appeal to the Board. Procedures III(B), at Appendix 2 to opening Brief. The Board can only consider evidence and address issues raised below “as set forth in the disciplinary letter.” Procedures III (C) and V(B). Id. The parties can present preliminary information relating to the cause for discharge “as set forth in the disciplinary letter.” Procedures VI(A). Id. The employee then presents evidence at a hearing before the Board regarding the cause for the action taken “as set forth in the disciplinary letter.” City Code 2.24.070, Appendix A. Based on evidence regarding the cause for the action as set forth in the disciplinary letter, the Board then determines whether the evidence supports a need for that disciplinary action, and whether that action was proportionate. Procedures VII (G), at Appendix 2 to opening Brief; City Code 2.24.060, Appendix A. The City makes no claim that it engaged in the pretermination process required under City ordinances and the Board’s procedures culminating in the

mandatory “disciplinary letter,” and no such letter exists. Thus, no proceeding could legally be conducted under City ordinances and procedures, and there is no other basis for termination.

Similarly, the City submitted Howick’s complete Notice of Appeal to the Board, in which she appealed not jurisdiction, but the at-will termination of her employment. The Board then informed the City that “[e]ither party may submit written documentation pertaining to the appeal” for its consideration. R. 104. Howick did so, and the City submitted neither facts nor a legal argument to the Board. Howick alleged in her appeal that she was terminated without notice and without cause. R. 108. The City did not contest this assertion before the Board and it could not have, since it chose not to follow pretermination procedures required for a cause termination. The City did not contest Howick’s asserted facts or even attempt to preserve some argument in the alternative, and thus there is nothing that the Board could consider on remand.<sup>24</sup>

Furthermore, case law makes clear that this matter cannot be remanded to the Board as the city suggests. The Board is only empowered to act pursuant to its standard of review, and when doing so, “[t]he Board may only uphold or overturn the decision of the Department. The Board may not modify the decision of the Department.”

---

<sup>24</sup> McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 319 (D. D.C. 1995) (declining to remand to agency to correct inadequacies in the record and procedural deficiencies: an agency “is not entitled to a second bite of the apple just because it made a poor decision -- if that were the case, administrative law would be a never ending loop from which aggrieved parties would never receive justice.”). Howick denies the City’s assertions at footnote 1 of Brief of Appellees, and unlike Howick’s statements concerning the circumstances of her termination, the City’s assertions are nowhere in the record. The City is asking not just for a second bite at the apple, but for a second apple.

Procedures VII(G). Under substantially identical language, this Court has held that a board "cannot modify the department head's decision or remand the matter to the department head for further consideration." Salt Lake City Corporation v. Salt Lake City Civil Service Comm'n, 908 P.2d 871, 877 (Utah App. 1995) (emphasis added). See also, Kelly v. Salt Lake City Civil Service Comm'n, 2000 UT App. 235, ¶ 23 n. 5, 8 P.3d 1048 (this language "does not authorize the commission to modify suspension or termination decisions or to remand such decisions for further proceedings"). Thus, this Court has determined that where the reviewing body may only affirm or reverse once a termination decision is reversed, the department may take no further action. See also Lucas, 949 P.2d at 763.

**B. EQUITY REQUIRES THAT HOWICK BE REINSTATED.**

The City seeks to obstruct and delay Howick's remedy by any means possible, but an endless and expensive process would not do equity or be in the public interest. Throughout this process, the City repeatedly claimed that Howick's appeal could not be heard, refused to explain its legal basis, has now conceded that it never had a legal basis, has asked this Court to enforce its illegal acts anyway through equitable and legal defenses, and now asks this Court for an opportunity to start over in violation of its own requirements. Howick has already waited 16 months. There is no basis to postpone her remedy any longer.

Further, if this Court permits the City to attempt a new cause termination process 16 months after terminating Howick's employment at-will, the City will have no incentive to cease its unlawful conduct. The City loses nothing by creating unlawful at-

will provisions and terminating employees under them if it can cost the employee a year or two of delay and tens of thousands of dollars in attorneys fees, and after all of that, it can start over with new “cause” allegations.

**C. THE CITY’S DUTY UNDER CITY ORDINANCES REQUIRES REINSTATEMENT.**

Howick established in her opening Brief that City ordinances place an affirmative duty on the City to remedy its violations of state employment laws. When the City violates state employment laws, these ordinances mandate that the City *shall* take corrective or curative action and ensure that violations will not recur. Further, the employee *shall* be provided relief, including the cancellation of an unwarranted action, and restoring the employee to the position the employee would have occupied absent the violation. See Howick’s Brief at 25-26. The City’s Procedures further require reinstatement with back salary. Procedures V(E). The City has now conceded that it had no ability to exceed its authority or violate state law, and that Howick’s position was entitled to the protections of Sections 10-3-1105 and 1106. Thus, consistent with its duty under Thurston, the City has an affirmative duty by ordinance to reinstate Howick to the position she would have occupied absent the violation with full back salary and benefits. See Thurston v. Box Elder County, 892 P.2d 1034, 1038 (Utah 1995).

**CONCLUSION**

The City wrongfully attempted to convert Howick's employment position to an at-will position, and it concedes that it acted without any claim of right. Neither waiver nor estoppel bar Howick's challenge to the termination of her employment. The Board

decision should be reversed, and Howick should be reinstated with full back pay and benefits, plus interest at the statutory rate. Howick is also entitled to attorneys fees and double costs for challenging the City's systematic violation of law.

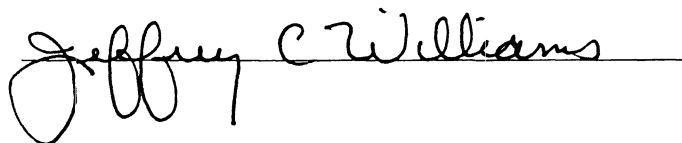
Dated this 24<sup>th</sup> day of December, 2008.

Elizabeth Dunning /EBH  
Elizabeth T. Dunning  
Attorney for Petitioner Jodi Howick

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 24<sup>th</sup> day of December, 2008, a true and correct copy of the foregoing Petitioners Reply Brief was mailed via the U.S. Mail, postage prepaid to:

W. Mark Gavre  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Attorneys for Salt Lake City Corporation

A handwritten signature in black ink, reading "Jeffrey C. Williams", is written over a horizontal line.

## **Appendices**

Appendix A - Salt Lake City Code §§ 2.24.060; 2.24.070; 2.44.030; 2.44.040

Appendix B - Conference Committee Report, 2004 General Session, SB0023S01,  
February 16, 2004

Appendix C - City Policy 3.01.01 (7.1); 3.01.02 (1.3); 3.02.01; 3.02.02 (2.3)

Tab A

The employee appeals board shall review a decision by the department head using the following standard of review:

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 step 1 of the analysis, as set forth above. However, in an appeal of a disciplinary action the board shall proceed to step 2 of the analysis, as set forth below.

**Step 2: In a disciplinary action, if the facts support the need for action to be taken, is the action taken proportionate to the charges? Discipline imposed for employee misconduct is within the discretion of the department head. Unless the board finds the penalty 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. (Ord. 62-05 § 1, 2005)**

**2.24.070 Rights Of Appellant:**

An appellant may present relevant information in mitigation, including the presentation of witnesses and other evidence. Such evidence must relate to: a) the cause for the action taken as set forth in the disciplinary decision letter, and b) any issues raised at the proceeding before the department head. (Ord. 62-05 § 1, 2005)

**2.44.030 Disclosure And Disqualification:**

Whenever the performance of a public servant's or volunteer public servant's official duty shall require any governmental action on any matter involving the public servant's or volunteer public servant's financial, professional, or personal interests and it is reasonably foreseeable that the decision will have an individualized material effect on such interest, distinguishable from its effect on the public generally, the public servant or volunteer public servant shall disclose such matter to the city council, in the case of the mayor, and in all other cases to the mayor and to the members of the body, if any, of which the public servant or volunteer public servant is a member. The disclosure shall be made in the manner prescribed in section 2.44.050 of this chapter and shall identify the nature and extent of such interests. The public servant or volunteer public servant shall disqualify himself or herself from participating in any deliberation as well as from voting on such matter. (Ord. 4-07 □ 2, 2007: Ord. 88-98 □ 2, 1998)

**2.44.040 Prohibited Acts Designated:****A. A public servant or volunteer public servant may not:**

1. Unless otherwise allowed by law, disclose confidential information acquired by reason of the public servant's or volunteer public servant's official position or in the course of official duties or use such information in order to: a) substantially further the public servant's or volunteer public servant's personal, financial, or professional interest or the personal, financial, or professional interest of others; or b) secure special privileges or exemptions for the public servant or volunteer public servant or others.

2. Corruptly use or attempt to use the public servant's or volunteer public servant's official position to: a) further the public servant's or volunteer public servant's personal, financial, or professional interest or the personal, financial, or professional interest of others; or b) secure special privileges, treatment, or exemptions for the public servant or volunteer public servant or others.

**B. A public servant may not have a financial interest in an entity that is doing business with the city department in which the public servant is employed. A volunteer public servant may not have a financial interest in an entity that is doing business with the city department or division to whom the city committee, commission, authority, agency, or board of which the volunteer public servant is a member primarily provides direct assistance or direction. For purposes of this subsection, the city department of a member of the city council shall be deemed to be the city council office, and the city department of the mayor shall be deemed to be all city departments.**

**C. No elected officer, spouse or child of an elected officer, or business entity in which an elected officer has a substantial interest, may apply for or receive a loan or grant of money from the city. (Ord. 4-07 □ 3, 2007; Ord. 88-98 □ 2, 1998)**

Tab B



# Utah State Legislature

**Senate** • 319 State Capitol • Salt Lake City, Utah 84114  
(801) 538-1035 • Fax: (801) 538-1414

**House of Representatives** • 318 State Capitol • Salt Lake City, Utah 84114  
(801) 538-1029 • Fax: (801) 538-1908

## CONFERENCE COMMITTEE REPORT

February 16, 2004

Mr. President and Mr. Speaker:

The Joint Conference Committee comprised of Sens. Thomas Hatch, Beverly Evans, and Gene Davis, and Reps. Michael E. Noel, David Ure, and James R. Gowans, recommends **1st Sub. S.B. 23**, AMENDMENTS TO MUNICIPAL GOVERNMENT, by Senator T. Hatch, with the following amendments:

1. Page 5, Line 125: After "an appeal" insert "and the standard of review"

Respectfully,

Sen. Thomas Hatch  
Senate Chair, Conference Committee

Rep. Michael E. Noel  
House Chair, Conference Committee

Voting: 6-0-0

17 SB0023 CC1 WPD 2/16/04 5 02 pm rrees/ RHR/JTW

Bill Number



SB0023S01

Action Class



C

**AMENDMENTS TO MUNICIPAL GOVERNMENT**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: Thomas V. Hatch**

---

---

**LONG TITLE**

**General Description:**

This bill modifies provisions of the Utah Municipal Code relating to municipal officers and employees.

**Highlighted Provisions:**

This bill:

- ▶ modifies the officers and employees of a municipality to whom certain provisions relating to the duration of employment and appeals from employment decisions apply;
- ▶ modifies the composition of an appeal board for employment decisions;
- ▶ modifies the process for appealing an action or decision of the appeal board;
- ▶ expands circumstances covered by provisions relating to limitations on taking negative employment action;
- ▶ requires rather than permits the appeal board to provide that an employee receive back salary if the board finds in favor of the employee; and
- ▶ makes technical changes.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**10-3-1105**, as enacted by Chapter 48, Laws of Utah 1977

**10-3-1106**, as enacted by Chapter 48, Laws of Utah 1977

---

*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **10-3-1105** is amended to read:

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

~~[All appointive officers and employees of municipalities, other than members of the police departments, fire departments, heads of departments, and superintendents,]~~

(1) Except as provided in Subsection (2), each employee of a municipality shall hold [their] employment without limitation of time, being subject to discharge [or dismissal only as hereinafter provided:], 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.

Section 2. Section 10-3-1106 is amended to read:

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

(1) ~~[No officer or]~~ An employee ~~[covered by]~~ to which Section 10-3-1105 ~~[shall]~~ applies may not be discharged, suspended without pay, or involuntarily transferred to a position with less remuneration:

(a) because of ~~[his]~~ 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. ~~[In all cases where any officer or]~~

(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, [he shall have the right to] 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 [which shall consist of five members, three of whom shall be chosen by and from the appointive officers and employees, and two of whom shall be members of the governing body], 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.

~~[(2) The]~~ (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 ~~[the]~~ an appeal under Subsection (3)(a), the ~~[city]~~ municipal recorder shall forthwith refer a copy of the ~~[same]~~ 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.

~~[(3) The]~~ (4) An employee [shall be entitled to] who is the subject of the discharge, suspension, or transfer may:

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

~~[(4) In the event the appeal board upholds the discharge or transfer, the officer or employee may have 14 days thereafter to appeal to the governing body whose decision shall be final. In the event the appeal board does not uphold the discharge or transfer the case shall be closed and no further proceedings shall be had.]~~

(5) ~~[The]~~ (a) (i) Each decision of the appeal board shall be by secret ballot, and shall be certified to the recorder ~~[with]~~ within 15 days from the date the matter is referred to it~~[-. The board may, in its decision,], 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 [an] the employee shall receive [his]:

(i) the employee's salary for the period of time during which [he] the employee is discharged[-] or suspended without pay; or

(ii) any deficiency in salary for the period [he] during which the employee was transferred to a position of less remuneration [but not to exceed a 15 day period. In no case shall the appointive officer or employee be discharged or transferred, where an appeal is taken, except upon a concurrence of at least a majority of the membership of the governing body of the municipality].

~~[(6) In the event that the appeal board does not uphold the discharge, or transfer, the recorder shall certify the decision to the employee affected, and also to the head of the department from whose order the appeal was taken. The employee shall be paid his salary, commencing with~~

~~the next working day following the certification by the recorder of the appeal board's decision, provided that the employee, or officer, concerned reports for his assigned duties during that next working day.]~~

(6) (a) A final action or order of the appeal board may be appealed to the Court of Appeals by filing with that court a notice of appeal.

(b) Each notice of appeal 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, [and] 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~~[, but the provisions for choosing the three members from the appointed officers and employees shall in no way restrict a free selection of members by the appointive officers and employees of the municipality].~~

(b) For a municipality operating under a form of government other than a council-mayor form under Part 12, Optional Forms of Municipal Government Act, an ordinance adopted under Subsection (7)(a) may provide that the governing body of the municipality shall serve as the appeal board.

Tab C

## 3.01.01 Employment, Hiring, and Termination

RESPONSIBLE CITY AGENCY: Division of Human Resource Management

**KEYWORDS:** Employment, employee, employer, hiring, hire, full-time, part-time, season, seasonal, civil service, career service, intern, internship, exempt, non-exempt, Fair Labor Standards Act, FLSA, appointed, appoint, at-will, affirmative action, discrimination, equal opportunity, benefit, benefits, modified duty, injury, injured, termination, terminate, fire, resign, resignation, cause, reason, orientation, probation, merit, qualifications, relocation, tuberculosis, TB, testing, test.

## 7. Termination

**7.1 City employees may be terminated for the following reasons:**

- A. Cause: employees may be terminated for cause in accordance with the City's Standards of Conduct and Disciplinary Guidelines policies;
- B. Failure to pass a probationary period: at the supervisor's discretion, employees may be terminated during their probationary period, as defined in union agreements, compensation plans, job descriptions, written agreements, or Civil Service Rules and Regulations;
- C. Resignation or retirement: termination occurs when an employee chooses to leave his/her position;
- D. At-will positions: at-will employees may be terminated at the discretion of the appointing official.
- E. If the City has no contact with an employee for three (3) working days, the City will consider the employee to have abandoned his or her job and resigned, in the absence of extenuating circumstances.

**CURRENT REFERENCES:**

## Worker's Compensation policy

### Standards of Conduct policy

Disciplinary Guidelines policy

*U.C.A. 67-19-15*

*SLCC 2.52.*

## Fair Labor Standards Act

## Human Resource Management procedures

## Employee compensation plans

## Bargaining Unit Memoranda of Understanding

## Human Resources benefits documents

CFR 29 1910.134

Center for Disease Control Strategic Plan on TB

### *Alcohol and Drugs policy*

## Relocation Procedure

### PRE-1995 REFERENCES:

City policy 4.01.102

4.01.200

4.01.202

4.01.203

4.01.204

4.01.308

4.01.400

4.01.502

4.02.203

4.03.100

4.05.100

4.06.100

EFFECTIVE DATE: October 1, 1995

DATE APPROVED BY CABINET: September 6, 1995

Revised: March 13, 1996

April, 2002: bargaining Unit Memorandum of Understanding

July 9 2004: inclusion of Executive Order on Non-Discrimination

Effective Date of Current Revision (Date Signed by Mayor): July 18, 2007

( 7.1 E changed to three working days from five)

## 3.01.01 Employment, Hiring, and Termination

RESPONSIBLE CITY AGENCY: Division of Human Resource Management

KEYWORDS: Employment, employee, employer, hiring, hire, full-time, part-time, season, seasonal, civil service, career service, intern, internship, exempt, non-exempt, Fair Labor Standards Act, FLSA, appointed, appoint, at-will, affirmative action, discrimination, equal opportunity, benefit, benefits, modified duty, injury, injured, termination, terminate, fire, resign, resignation, cause, reason, orientation, probation, merit, qualifications, relocation, tuberculosis, TB, testing, test.

## **1. General**

1.1 Salt Lake City administers a merit employment system that encourages the attraction, hiring, retention, and promotion of employees based on their qualifications within the personnel systems established by state law: Career Service and Civil Service.

1.2 Certain employees are “at will” and serve at the pleasure of the Mayor (see definition in Employment Status policy).

1.3 The City will assure equal employment opportunity to all employees and applicants for employment and/or promotion. The City will also prohibit any employment practice which discriminates against any employee or applicant for employment with respect to compensation, terms, conditions, or privileges of employment based on protections granted by Title VII , or executive order on non-discrimination, unless based on job-related or bona fide occupational qualifications.

1.4 The City will adhere to the spirit and practice of established affirmative action guidelines.

1.5 The City provides upward mobility for employees through recruitment and career ladder movement of qualified candidates among existing City employees to fill available positions.

1.6 The Division of Human Resource Management guides the employment process.

1.7 Definitions:

A. Civil Service: All places of employment in the Police and Fire Departments except the heads of these departments and their deputy chiefs.

B. Career Service: All places of employment within Salt Lake City, not including Civil Service positions, and those elected, appointed, and statutory officers designated by the Mayor.

C. Pre-bid rights: The process which allows qualified 100 and 200 Series employees to receive prioritized consideration for other 100 and 200 Series positions.

## 3.01.02 Employment Status

RESPONSIBLE CITY AGENCY: Division of Human Resources

KEYWORDS: Employment, type, status, at will, appointed, part time, full time, seasonal, intern, exempt, non-exempt, telecommuting.

## 1. General

1.1 Regular full-time employees are eligible for the City's benefits package, subject to the terms, conditions, and limitations of each benefit program and to each employee's election to participate in specific benefit programs.

1.2 Regular part-time employees are eligible for some benefits sponsored by Salt Lake City, subject to the terms, conditions, and limitations of each benefit program and to each employee's election to participate in specific benefit programs.

1.3 Regular full-time and regular part-time employees are selected through an open competitive process.

1.4 Part-time and seasonal employees and interns are only entitled to benefits required by federal, state, or municipal law.

1.5 Regular full-time and regular part-time employees are subject to a probationary period to determine if further employment with the City is appropriate. The duration of the probationary period is designated when vacancies are filled.

1.6 At their discretion, supervisors may extend probationary periods due to job cycle requirements or performance problems or goals. Such extensions shall not exceed 60 days, and must be made in writing not later than 30 days prior to the conclusion of the original probationary period. This provision does not apply to Civil Service employees.

1.7 Regular full-time and regular part-time employees are entitled to bidding rights as specified in applicable memoranda of understanding or Division of Human Resources procedures approved by the Attorney's Office.

1.8 At will positions are:

- A. Executive employees who report directly to the Mayor or a Department Director;
- B. Unclassified Employees;
- C. Part-time and seasonal employees; and,
- D. Regular employees who have not yet completed their probationary period.

### 1.9 Definitions:

- A. Regular full-time: Employees whose positions regularly require 40 hours per week on a full-time schedule.
- B. Regular part-time: Employees whose positions regularly require 20 hours or more but less than 40 hours per week.

C. Part-time or hourly: Employees whose positions require less than 20 hours per week.

D. Seasonal: Employees who work during a specific season, as defined by the department, equal to or less than eleven months in duration.

E. Intern: Students working for the City through a recognized university or college for a specified period of time, as defined by the department.

F. Exempt/Non-exempt: Employees "exempt" or "non-exempt" from the payment of overtime in accordance with the Fair Labor Standards Act.

G. Probationary period: The period of time that an employee serves as part of the hiring process before career service or civil service status is granted to the employee. For career service employees this period is 180 days. For civil service employees, the length of probationary periods is determined by the Civil Service Commission.

H. Telecommuting: A work arrangement in which the workplace is located, at least part of the time, at an alternative location such as an employee's residence.

RESPONSIBLE CITY AGENCY: Division of Human Resources

**KEYWORDS:** Conduct, behavior, ethics, discipline, elections, conflict of interest, weapons, guns, firearms.

## **1. General**

1.1 City employees will dedicate themselves to the highest ideals of professionalism, honor, and integrity in order to merit the trust, respect, and confidence of the public they serve.

1.2 It is the policy of Salt Lake City Corporation to provide employees with due process and equal protection. Review of potential violations must be coordinated through the Division of Human Resources.

1.3 During work hours, City employees will devote their whole time, attention, and efforts to City business.

1.4 Employees will maintain safe and orderly equipment, including City vehicles.

1.5 Employees are to meet performance standards and goals in order to effectively serve the public, and meet the City's standards for efficient, safe, effective, and courteous operations.

1.6 De minimus personal use of City equipment and information technology by employees, with prior departmental approval, is permissible if fully reimbursed. City employees may not use City equipment or information technology for personal gain or inappropriately.

1.7 Employees shall abide by the provisions of all official City policies and procedures.

1.8 The following types of behavior are considered inappropriate and will subject the employee to non-disciplinary or disciplinary action.

a. Falsifying or altering documents, or otherwise providing false or intentionally misleading information.

b. Insubordination.

c. Possession of firearms or other weapons on City property or while on City business, except as permitted by Utah law.

d. Use of City property for personal use unless authorized, except as expressly authorized by City ordinance or policy

e. Committing any action that may constitute a crime, either on-duty or off-duty, where such action adversely reflects on the employee's ability to perform assigned duties.

f. Disregarding safety regulations or guidelines.

g. Disrespectful behavior towards any supervisor in the employee's chain of command.

h. Disrespectful behavior towards another City employee or towards a citizen.

i. Stealing, destroying, damaging, defacing or threatening to damage or destroy City property, work-related documents, work areas, or personal property of others while at work or in connection with work.

- j. Failure to comply with uniform, dress, or grooming requirements in the workplace.
- k. Failure to comply with federal, state or local law, where such action adversely reflects on the employee's ability to perform assigned duties or is inimical to the public service.
- l. Malfeasance, nonfeasance, or acts inimical to the public service.
- m. Refusal to respond to an official request for factual information or willfully impeding a formal investigation after notification that such response is required in the investigation.
- n. Refusal to appear for a directed fitness for duty evaluation or follow through with a directed testing or evaluation process.
- o. Filing a malicious, fraudulent, or frivolous complaint with the intent to cause harm, disrupt City services, or with reckless disregard or intent to harass.

## **2. Conflicts of Interest**

2.1 Salt Lake City employees will strictly avoid conflicts of interest (see U.C.A. 10-3-1301, et. seq., and 67-16-1, et. seq.; S.L.C.C. 2.44. and 2.52.170, et.seq.).

2.2 City employees will not have any investment, directly or indirectly, in any transaction which creates a conflict with their official duties.

2.3 City employees will not endorse commercial products or services by the use of their pictures, endorsements, or quotations in paid advertisements, while on City time or with the use of City equipment or property. During off duty time, approval by a department head is required.

### **3. Vehicles**

3.1 City employees shall maintain City vehicles appropriately and use them safely and courteously.

3.2 City employees shall report any vehicle accidents or damages to their supervisor immediately and cooperate fully with any investigations.

*RESPONSIBLE CITY AGENCY: Division of Human Resources*

*KEYWORDS: Conduct, behavior, ethics, discipline, elections, conflict of interest, weapons, guns, firearms.*

*CURRENT REFERENCES: U.C.A. 10-3-1301 -- 10-3-1312*

*U.C.A. 67-16-1 et. seq.*

*S.L.C.C. 2.44.*

*S.L.C.C. 2.52.170 et. seq.*

*Alcohol and Drugs policy*

*PRE-1995 REFERENCES: City policy 4.02.100*

*4.02.101*

*5.03.100*

*5.03.300*

*5.06.100*

*EFFECTIVE DATE: October 1, 1995*

*DATE APPROVED BY CABINET: September 6, 1995*

*REVISED: May 6, 1996*

*June 7, 1996*

*Effective date of current revision (Date signed by Mayor): March 8, 2007  
(Policy clarifications)*

## 3.02.02 Disciplinary Guidelines

RESPONSIBLE CITY AGENCY: Division of Human Resources

KEYWORDS: Discipline, disciplinary, conduct, behavior.

## **1. General**

1.1 In an effort to modify unacceptable behavior or performance, Salt Lake City may discipline employees whose conduct jeopardizes the City's mission or detracts from the City's effective operation.

1.2 The City has an interest in ensuring that employees maintain necessary job qualifications and avoid behavior, job performance, or lack of action which disrupts the workplace, undermines the authority of management, impairs close working relationships, or otherwise impedes a safe, efficient, and effective workplace environment.

1.3 The City may discipline employees for any substantive violation of any City policies or procedures, or for malfeasance, nonfeasance, neglect of duty, insubordination, misconduct, inefficiency or inability to satisfactorily perform assigned duties, unprofessional conduct at the workplace or at anytime while performing job duties or acts inimical to the public service.

1.4 Discipline may include suspension from scheduled work without pay, reduction in pay, withholding of merit, demotion, forfeiture of all rights of seniority (for violations of City Code 2.52.170), or termination.

1.5 Managers and supervisors may also attempt to modify unacceptable behavior or performance through non-disciplinary intervention.

1.6 Non-disciplinary intervention may include re-training, coaching and counseling, verbal warnings/reprimands, or written warnings/reprimands.

1.7 Prior to receiving discipline or a written warning/reprimand, the manager or supervisor shall provide the employee notice and an opportunity to respond to the violation of policy/procedure or other workplace failure.

## **2. Supervisors' disciplinary guidelines**

2.1 Supervisors are responsible for upholding the City's mission, and should take non-disciplinary or disciplinary action when necessary to maintain an effective and efficient workplace.

2.2 Within reason, employees should have prior notice of prohibited conduct.

2.3 Disciplinary rules must be reasonable and related to City business. Penalties must not be substantially disproportionate to the misconduct and may be affected by the employee's past work history and disciplinary record.

2.4 Discipline must be based on sufficient evidence of misconduct, substandard performance, or another basis for action.

*CURRENT REFERENCES:   Employment, Hiring, and Termination policy  
                                 Standards of Conduct policy  
                                 Municipal Employees Ethics Act (10-3-1301 et. seq.)  
                                 Employee Compensation Plans  
                                 Bargaining Unit Memoranda of Understanding  
                                 Information Technology Policy*

*PRE-1995 REFERENCES:   City policy   82-3*

*EFFECTIVE DATE:        October 1, 1995*

*DATE APPROVED BY CABINET:       September 6, 1995*

*Effective Date of Current Revision (Date signed by Mayor): March 8, 2007  
(Clarification of guidelines)*