

1997

James Cassidy v. The Salt Lake County Fire Civil Service Council : Brief of Appellant

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Mary J. Woodhead; Attorney of Appellant.

Douglas R. Short; Jerry G. Campbell; Attorney for Appellee.

Recommended Citation

Brief of Appellant, *Cassidy v. The Salt Lake County Fire Civil Service Council*, No. 970525 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/1048

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

IN THE UTAH COURT OF APPEALS

JAMES CASSIDY,

Plaintiff and Appellant,

-vs.-

THE SALT LAKE COUNTY
FIRE CIVIL SERVICE
COUNCIL,

Defendant and Appellee.

Case No. 970525-CA

PRIORITY NO. 15

BRIEF OF APPELLANT JAMES CASSIDY

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
HONORABLE HOMER F. WILKINSON DISTRICT JUDGE

COUNSEL:

MARY J. WOODHEAD (5581)
261 EAST 300 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
TELEPHONE:(801) 532-6367

ATTORNEY FOR APPELLANT

DOUGLAS R. SHORT (5344)
JERRY G. CAMPBELL(0555)
SALT LAKE COUNTY ATTORNEY'S
OFFICE
2001 SOUTH STATE, #S-3500
SALT LAKE CITY, UTAH 84190

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT

K F U

56

A10

DOCKET NO. -

970525-CA

FILED

Utah Court of Appeals

APR 03 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JAMES CASSIDY,

Plaintiff and Appellant,

-vs.-

THE SALT LAKE COUNTY
FIRE CIVIL SERVICE
COUNCIL,

Defendant and Appellee.

Case No. 970525-CA

PRIORITY NO. 15

BRIEF OF APPELLANT JAMES CASSIDY

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
HONORABLE HOMER F. WILKINSON DISTRICT JUDGE

COUNSEL:

MARY J. WOODHEAD (5581)
261 EAST 300 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
TELEPHONE:(801) 532-6367

ATTORNEY FOR APPELLANT

DOUGLAS R. SHORT (5344)
JERRY G. CAMPBELL(0555)
SALT LAKE COUNTY ATTORNEY'S
OFFICE
2001 SOUTH STATE, #S-3500
SALT LAKE CITY, UTAH 84190

TABLE OF CONTENTS

JURISDICTION OF THE COURT	1
STATEMENT AND PRESERVATION OF THE ISSUES	1
DETERMINATIVE RULES	3
STATEMENT OF THE CASE	4
A. NATURE OF THE CASE	4
B. COURSE OF THE PROCEEDINGS	4
C. DISPOSITION BELOW	5
D. STATEMENT OF FACTS	5
MARSHALING THE EVIDENCE	11
SUMMARY OF ARGUMENTS	17
ARGUMENT	18
I. THE TRIAL COURT ERRED IN FINDING THAT CASSIDY’S COMPLAINTS WERE NOT PROTECTED SPEECH.	18
II. THE EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT CASSIDY’S SPEECH DISRUPTED THE CONDUCT OF THE FIRE DEPARTMENT ...	20
III. THE TRIAL COURT ERRED IN FINDING NO CAUSAL CONNECTION BETWEEN CASSIDY’S COMPLAINTS AND HIS FAILURE TO BE PROMOTED.	23
IV. THE TRIAL COURT ERRED IN FINDING THAT CASSIDY WAS NOT SUBJECT TO ADVERSE ACTION.	25
V. THE TRIAL COURT ERRED IN NOT SWITCHING THE BURDEN FROM CASSIDY TO THE FIRE DEPARTMENT	26
CONCLUSION	27
ADDENDUM	30

TABLE OF AUTHORITIES

CASES

Board of County Commissioners v. Umbehr, U.S. , 116 S.CT. 2342 (1996)	18
Connick v. Myers, 461 U.S. 138 (1983)	20
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)	26
Pickering v. Bd of Education, 391 U.S. 563 (1967)	19
Rankin v. McPherson, 483 U.S. 377 (1986)	18, 19
Anderson v. McCotter, 100 F.3d 723 (10 th Cir. 1996)	20
Gipson v. KAS Snacktime Co., 83 F.3d 225 (8th Cir. 1996)	25
Larou v. Ridlon, 98 F.3d 659, 662 (1st Cir. 1996)	25
Drake v. Industrial Comm'n of Utah, 317 Utah Adv. Rep. 3 (Utah 1997)	1,2,3
State v. Vincent, 883 P.2d 278, 281 (Utah 1994).	1,2,3

STATUTES

Utah Code Ann. 17-28-13.	4
Utah Code Ann. 17-28-2.4.	3
Utah Code Ann. 17-28-2.6.	3,5,20
Utah Code Ann. 17-28-7.	4
Utah Code Ann. §17-28-13(B)	5
Utah Code Ann. §78- 2a-3(b)(i) (1996)	1

ORDINANCES

Salt Lake County Ordinance 2.80.110(A)	23, 25
--	--------

JURISDICTION OF THE COURT

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. §78- 2a-3(b)(i) (1996). The District Court entered an order granting Summary Judgment¹ to appellee The Salt Lake Fire Civil Service Council on July 31, 1997. The appeal was timely filed pursuant to Utah R. App. Pro. 3 and 4 on August 29, 1997.

STATEMENT AND PRESERVATION OF THE ISSUES

A. Did the trial court err in finding that Jim Cassidy's ("Cassidy") complaints were not protected speech? Issues involving mixed questions of "whether a given set of facts comes within the reach of a given rule of law" require that the underlying empirical facts be reviewed under a deferential clear error standard but the legal effect of those facts "is the province of the appellate courts, and no deference need be given a trial court's resolution of such questions of law." Drake v. Industrial Comm'n of Utah, 317 Utah Adv. Rep. 3 (Utah 1997), State v. Vincent, 883 P.2d 278, 281 (Utah 1994). This issue was preserved at R. 156-210.

B. Did the trial Court err in finding no causal connection between Cassidy's complaints and his failure to be promoted? Issues involving mixed questions of "whether a given set of facts comes within the reach of a given rule of law" require that the underlying empirical facts be reviewed under a deferential clear error standard but the legal effect of those facts "is the province of the appellate courts, and no deference need be given a trial court's resolution of such questions of

¹Although the District Court designated its decision as one for Summary Judgment, it was in fact a Judgment on the Record. On May 16, 1996, the District Court ruled that its review would be limited to the record of the proceeding before the Salt Lake County Fire Civil Service Council and that it would not grant Cassidy a trial de novo. R. 104-105. Following that ruling, the parties made cross-motions for judgment based on the agreed upon record.

law." Drake v. Industrial Comm'n of Utah, 317 Utah Adv. Rep. 3 (Utah 1997), State v. Vincent, 883 P.2d 278, 281 (Utah 1994). This issue was preserved at R. 164-167.

C. Did the District Court err in finding that Cassidy was not subject to adverse action? Issues involving mixed questions of "whether a given set of facts comes within the reach of a given rule of law" require that the underlying empirical facts be reviewed under a deferential clear error standard but the legal effect of those facts "is the province of the appellate courts, and no deference need be given a trial court's resolution of such questions of law." Drake v. Industrial Comm'n of Utah, 317 Utah Adv. Rep. 3 (Utah 1997), State v. Vincent, 883 P.2d 278, 281 (Utah 1994). This issue was preserved at R. 236.

D. Did the District Court err by refusing to place the burden of persuasion on the Fire Department that it would not have hired Cassidy anyway after Cassidy presented direct evidence that the Fire Chief retaliated against him for speaking out on matters of public concern? Issues involving mixed questions of "whether a given set of facts comes within the reach of a given rule of law" require that the underlying empirical facts be reviewed under a deferential clear error standard but the legal effect of those facts "is the province of the appellate courts, and no deference need be given a trial court's resolution of such questions of law." Drake v. Industrial Comm'n of Utah, 317 Utah Adv. Rep. 3 (Utah 1997), State v. Vincent, 883 P.2d 278, 281 (Utah 1994). This issue was preserved at R. 232.

E. Did the District Court err in finding that Cassidy's First Amendment Rights were not violated? Issues involving mixed questions of "whether a given set of facts comes within the reach of a given rule of law" require that the underlying empirical facts be reviewed under a deferential clear error standard but the legal effect of those facts "is the province of the appellate

courts, and no deference need be given a trial court's resolution of such questions of law." Drake v. Industrial Comm'n of Utah, 317 Utah Adv. Rep. 3 (Utah 1997), State v. Vincent, 883 P.2d 278, 281 (Utah 1994). This issue was preserved at R. 156-210.

DETERMINATIVE RULES

Utah Code Ann. 17-28-2.4. County Fire Civil Service System rules and policies.

- (1) The executive director shall recommend rules and policies for the County Fire Civil Service System, which shall be subject to approval by the county legislative body.
- (2) The County Fire Civil Service System rules shall provide for recruiting activities, including the recruiting of minorities and women, job-related minimum requirements, selection procedures, certification procedures, appointments, probationary periods, promotion, position classification, record keeping, reductions in force, grievances and complaints, disciplinary action, work hours, holidays, and other necessary and proper requirements not inconsistent with this chapter.
- (3) The executive director shall publish or cause to be published these rules and policies in a manual form, to be updated regularly and made available to fire department employees.

Utah Code Ann. 17-28-2.6. Merit principles.

The County Fire Civil Service System shall be established and administered in a manner that will provide for the effective implementation of the following merit principles:

- (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;
- (2) provision of equitable and adequate job classification and compensation systems, including pay and benefits programs;
- (3) training of employees as needed to assure high-quality performance;
- (4) retention of employees on the basis of the adequacy of their performance and separation of employees whose inadequate performance cannot be corrected;
- (5) fair treatment of applicants and employees in all aspects of personal administration without regard to race, color, religion, sex, national origin, political affiliation, age, or handicap, and with proper regard for their privacy and constitutional rights as citizens;
- (6) provision of information to employees regarding their political rights and prohibited practices under the Hatch Act; and
- (7) provision of a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

Utah Code Ann. 17-28-7. Examinations.

- (1) A person may not be appointed to any civil service position as a firefighter in any fire department subject to the provisions of this chapter until he has successfully passed an examination and been certified as eligible for consideration by the County Fire Civil Service executive director, except that any honorably discharged veteran of the United States military service shall receive preferential employment consideration for entry into the County Fire Civil Service System.
- (2) All examinations shall be public, competitive, and free and fairly test the ability of persons to discharge the duties of the position.

Utah Code Ann. 17-28-13. Appeal to district court.

- (1) Any person aggrieved by a determination of the County Fire Civil Service Council may, within 30 days after notice of the council's ruling, institute an action in the District Court of the county or in the county of the aggrieved person's residence, against the County Fire Civil Service Council in its official capacity, setting out his grievance and his right to complain. In its answer, the council may set out any matter in justification.
- (2) The court shall determine the issues of both questions of law and fact and may affirm, set aside, or modify the council ruling.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out of the Salt Lake County Fire Department's failure to promote Cassidy to the position of Station Captain despite his position high on the register.

B. COURSE OF THE PROCEEDINGS

On November 22, 1992, Cassidy filed a grievance with the Salt Lake County Fire Civil Service Council alleging that Salt Lake County Fire Chief Larry Hinman's failure to promote him was in violation of his statutory and constitutional rights. On April 23, 1993, the Council ruled that it did not have jurisdiction to hear grievances involving promotions. Cassidy appealed that ruling to the Third District Court. On October 31, 1994, the District Court ruled that the Council does have jurisdiction to hear promotional grievances and remanded the matter to the

Council for a decision on the merits. On April 11, 1995, the Council ruled that the Fire Department did not violate Cassidy's statutory or constitutional rights by failing to promote him.

This matter was filed in the Third District Court on May 11, 1995 alleging that the Salt Lake County Fire Department violated Cassidy's rights to free speech guaranteed by the United States and Utah Constitutions, and that the County Fire Department violated §17-28-2.6 which requires that advancement within the Fire Department be on the basis of "relative ability, knowledge and skills." Cassidy alleged that his failure to be promoted is causally related to his exercise of his right to engage in protected speech. Following briefing by the parties, the District Court granted defendant's Motion to limit the Court's review to the record of the proceeding before the Fire Civil Service Council. The Court determined that it had the authority to determine questions of both law and fact and that it could affirm, set aside or modify the ruling below. On July 31, 1997, following briefing and argument by the parties, the District Court granted judgment for defendants on all claims.

C. DISPOSITION BELOW

This is an appeal of a Decision by the Third District Court of Salt Lake County on July 31, 1997, granting Defendants' Motion for Summary Judgment on the Record and denying Plaintiff's Motion for Judgment on the Record. The Third District Court was reviewing a decision of the Firefighters Civil Service Council pursuant to Utah Code Ann. §17-28-13(B).

D. STATEMENT OF FACTS

1. On August 1, 1982, James Cassidy ("Cassidy") was hired by the Salt Lake County Fire Department as a firefighter. On October 1, 1992, Cassidy was promoted to Hazardous

Materials Technician, Grade 22 from his prior position of Emergency Medical Technician, Grade 21. R. 37 ¶ 1.

2. On September 28, 1990, Captain and Fire Marshall Max Berry issued a new protocol concerning the proper procedure for dealing with minor violations of the Fire Code when conducting Fire Inspections. Memorandum to All Personnel, dated September 28, 1990 from Captain Max Berry. R. 112.

3. The new protocol required:

Where minor violations, that are not life threatening are found, such as the use of extension cords, outlet covers missing, or fire extinguishers not tagged, please note the violation on an FP 132, obtain a signature from the business owner or manager, and schedule one follow-up inspection.

If the violations are not corrected at that time, make a note on the FP 132 that the owner or manager is aware of the violation, and it must be corrected. Then obtain a signature again from the owner/manager and state that if the correction is not made by your next annual inspection, a citation will be issued. This procedure will alleviate the amount of FP 132s coming into Fire Prevention for follow-up on minor violations.

Id.

4. Shortly thereafter, on October 26, 1990, Cassidy filed a grievance with Captain Scott Collins arguing that the new fire inspection protocol was illegal, contrary to the mission statement of the fire department, bad management and a financial risk. Cassidy suggested that the new protocol increased the risk of fatalities "traced to an ignition source that was found by one of our inspectors but not eliminated by proper code enforcement." Memorandum from James P. Cassidy to Captain Scott Collins, dated October 26, 1990. R. 114.

5. On that same day, Captain Scott Collins responded to Cassidy's grievance stating "there is nothing I can do to answer your grievance." Collins concluded that the new policy was legally defensible. Memorandum from Captain Scott Collins to Jim Cassidy dated October 26, 1990, R. 113.
6. On October 31, 1990, Cassidy wrote to Chief Larry Hinman requesting a second formal level of review for his grievance. Letter from James P. Cassidy to Chief Larry Hinman dated October 31, 1996, R. 115.
7. On November 2, 1990, Hinman responded to Cassidy's grievance. Hinman's written response indicated that Cassidy's concerns did not have standing under the grievance procedure. However, after acknowledging the importance of the issues raised by Cassidy, Hinman went on to refute his concerns on the merits. Hinman concluded the letter by suggesting that if Cassidy believed his concerns to be of a giveable nature, he could proceed to the next step in the grievance process. Letter from Fire Chief Larry Hinman to James P. Cassidy, dated November 2, 1990, R. 116-118.
8. On November 14, 1990, Cassidy appealed Chief Hinman's decision to Terry Holzworth, Director of Public Works. Letter from James Cassidy to Terry Holzworth, dated November 14, 1990, R. 122.
9. On November 19, 1990, Holzworth rejected Cassidy's grievance as being outside the grievance process. Letter from R.T. Holzworth to James P. Cassidy Jr. dated November 1990, R. 126.

10. On November, 30, 1990, Cassidy appealed Holzworth's decision to the Salt Lake Fire Civil Service Review Commission. Handwritten note from James P. Cassidy to the Salt Lake Fire Civil Service Commission, dated November 30, 1990, R. 127.
11. On December 21, 1990, the Salt Lake Fire Civil Service Commission rejected Cassidy's grievance as outside its jurisdiction. Decision dated December 21, 1996, R. 128.
12. In the spring of 1992, the Fire Department announced the creation of the Wild Land Fire Crew, a separate staff of firefighters, not included in the merit system, to fight Salt Lake County fires in unpopulated areas. Transcript of Hearing before the Salt Lake Fire Civil Service Council at 162-163 (hereinafter "Transcript").²
13. Cassidy expressed to his Station Captain, Scott Collins, and Assistant Chief Berry, his belief that the creation of the Wild Land Fire Crew was illegal because it did not comply with the statutory merit system for firefighters. Id.
14. Cassidy never filed a grievance or took any formal action regarding the Wild Lands Fire Crew. Id.
15. In 1991, Cassidy first took the examination for promotion to Captain with the Salt Lake Fire Civil Service and was placed fourth on the register. Transcript at 158-159.
16. During February 1992, four vacancies for Captain opened up. Transcript at 160.
17. Cassidy was interviewed in February, 1992, for the vacancies and not promoted. Id.
18. In October of 1992, another vacancy opened up for Captain for which Cassidy was eligible. R. 37, ¶ 2.

²References herein to "Transcript" refer to the transcript of the hearing before the Fire Civil Service Council which is included in the record in a separate volume.

19. As of October 1992, Cassidy was first on the register. Id. at ¶ 3.
20. Jeff Miles was ranked number 2 on the list and Mont Cooper was ranked number 3. Id.
21. During October 1992, Mont Cooper was promoted to Station Captain. Id. at ¶ 4.
22. Cassidy was not interviewed for the Station Captain opening. Id. at ¶ 5.
23. Salt Lake County Fire Chief Hinman did not want to promote Cassidy because he believed that Cassidy's complaints and grievance regarding the fire code and his complaints regarding the Wild Lands Fire Crew demonstrated a lack of support for the department and its policies. Transcript at 196-98.
24. After learning of Cooper's promotion, Cassidy complained to the Fire Department alleging violations of the County Fire Civil Service Policy including the failure to conduct an interview. R. 37 at ¶ 6.
25. In October, 1992, Cassidy received a letter from the department informing him that although Cooper would ultimately retain his position as a Station Captain, the department would cancel and nullify the promotion process. The department then conducted interviews to correct the failure of not interviewing Cassidy as required by Fire Civil Service Policy 2150.3.2.2. Id. at ¶ 7.
26. In late October or early November of 1992, Cassidy was given an oral interview by Fire Chief Larry Hinman, Assistant Chief John Corak, and Deputy Chief Don Berry for the Captain position which had already been given to Cooper. Id. at ¶ 8. Cassidy was told at the time of the interview that he was not actually being considered for the opening and that the Cooper hire would be ratified. Transcript at 213.
27. An additional Station Captain position opened in December, 1992. R. 38 at ¶ 10.

28. At that time, the Fire Department reinitiated the interview process to fill the new opening and the opening intended for Mont Cooper. Id.
29. Because Cassidy had filed a grievance alleging that the previous interview process was tainted, Chief Hinman chose not to participate in the interviews which were conducted by Berry, Corak and Battalion Chief David Lindberg. Id. at ¶ 12.
30. Cassidy's grievance, filed before the Salt Lake County Fire Civil Service Council, alleged that the promotional process was tainted by fraud, in violation of 17 Utah Code Ann. §28 (19) and in violation of Cassidy's right to an unbiased promotion process. Id. at ¶ 13.
31. Cassidy, George Painter, Mont Cooper and Jeff Miles were interviewed for the two open Station Captain positions. Id. at ¶ 13.
32. Following the interviews, the interviewers unanimously recommended to Hinman that Painter and Cooper be promoted. Id. at ¶ 14.
33. Painter and Cooper were promoted. Id. at ¶ 15.
34. Berry had numerous conversations with Hinman and was aware that Hinman did not want Cassidy promoted. Berry was also opposed to Cassidy's promotion because of Cassidy's expressed objections to the changes to the Fire Code and the Wild Lands Fire Crew. Transcript at 217-219.
35. Cassidy petitioned the Fire Civil Service Council for a temporary injunction to stop the promotional process. Cassidy's petition was granted. R. 39 at ¶ 16.

36. The Fire Department determined that the Council did not have the authority to issue the injunction and, based upon that conclusion, ignored the council's order and promoted Painter and Cooper Station Captain on January 1, 1993. Id. at ¶ 17.
37. On January 23, 1993, the Salt Lake County Fire Civil Service Council heard plaintiff's grievance and ruled that it had no jurisdiction to hear grievances regarding promotion. Id. at ¶ 18.
38. Cassidy appealed that decision to Third District Court where Honorable Judge Timothy R. Hansen determined that the Council did have the authority to hear grievances regarding promotions and ordered the Council to decide Cassidy's grievance on its merits. Id. at ¶ 19.
39. On April 11, 1995, the Council determined that Chief Hinman did not violate Cassidy's rights by refusing to promote him. Findings of Fact and Decision dated April 11, 1995, R. 62-71.

MARSHALING THE EVIDENCE

Cassidy alleges that several findings of fact made by the District Court are not supported by the evidence before the court. As required by Utah law, Cassidy will address the evidence in support of each of these findings in turn.

A. Cassidy asserts that the record does not support the District Court's finding that Cassidy "carried his concerns far beyond his right to address a public concern and his grievance became a vendetta against the fire department." Finding No. 23, R. 281. Moreover, the record does not support the District Court's related finding that "plaintiff exercised his right to complain in such a manner that it affected the efficiency of the fire department." Finding No. 30, R. 282.

The only testimony in the record which supports this factual conclusion comes from the testimony of Chief Hinman, Assistant Chief Berry and Station Captain Scott Collins. Berry testified:

Q. Okay, Did Jim ever take any overt action with regard to his opposition by going to the press or going to a public figure?

A. No. What he did was he came in my office one day and basically made what I thought were threats that if we went ahead with the Wild Land Crew he was going to take action to see that we didn't hire those people.

Q. What did he specifically say that indicated to you that it was a threat?

A. He said that he was going to take some kind of action in opposition to our hiring the Wild Land Crew.

Q. Well, wouldn't it also be considered action if he had gone and filed an objection within the department to the implementation of that program? Wouldn't that also be considered an objection?

A. Yes.

Q. Is there any difficulty with having someone take action or objection to public policy?

A. The difficulty I have is when the fire fighter walks into the deputy chief's office and says that I'm opposed to your programs and I'm going to take action against it. That's the problem. I saw that as a problem.

Transcript at 197.

Hinman testified:

A. The denial of the promotion was based on what I felt was Mr. Cassidy's persistence in, since he had filed an appeal with the Civil Service Commission, it was his insistence in going above the administration to try and get remedied before the Civil Service - -

Q. Don't we have a policy where we encourage public employees to do that if they believe a public policy is not being properly administered?

A. Yes, I'm not totally familiar with the policy, but we do have a policy.

Q. And if a grievance is filed with the Civil Service Council, is it allowable for you to use that filing of a grievance as a basis to deny a person being hired or promoted to a particular position?

A. Of course not.

Q. But you had just stated that you had used the appeal to the Civil Service Council as a means in which to form your opinion that you would deny Mr. Cassidy his promotion.

A. No, that was not my answer. My answer was, aside from the appeal, Mr. Cassidy went around the appeal process to try and resolve - - After he had filed the appeal, he went around the appeal process to try and have that resolved through pressure from my immediate supervisor to me.

...

Q. So Mr. Cassidy didn't do anything which was inappropriate or wrong?

A. I don't think that long before he filed that, he had approached Mr. Holdsworth. Because I had early on communication from Mr. Holdsworth that he knew that this grievance was at my level and that he had been contacted and he wanted to try and settle it at my level.

Q. I'll move on. With regard to the Wild Lands Crew that took place and Mr. Cassidy's objection to it, he testified he was concerned about the legality of it e number of hours that these people were working.

And you said you used as one of your bases for not promoting him because he was going to take action against the department.

At any time did Mr. Cassidy express that he was going to take any kind of action that would be damaging to the order, discipline, or structure within the department in that regard? Did he specify what action meant?

A. Not to me directly.

Transcript at 218-221.

Collins also testified about Cassidy's objections to fire department policy:³

Q. Now were there other areas in which you felt that he was not up to par, if you will?

A. Yes. I think that whenever there's a controversial issue afloat in the fire department, Jim has to jump on it. I can name a few examples. Number one was the Wild Land Fire Crew. When the fire department, a year ago, came out with the Wild Land Fire Crew, I thought it was great. I thought it was a great idea.

He was telling everybody on the crew it was illegal, they can't do this, it's not right. On the other hand, I'm telling the crew that I think it's great because I'd love nothing more than to run meds or fight structure fires and watch somebody else up in the hills.

So I felt like he was countermanding me or undermining me in a way. I tried to tell him, hey Jim, I don't care whether you think it's legal or illegal. I think it's a great policy, I think it's great. I think it's something we've needed.

Transcript at 237-38.

Q. Have you ever heard fire fighter Cassidy indicate to you that he was not going to follow administrative policies or he was going to take some major, in terms of messing around with them?

A. One time in particular - - And it could have been several times, I'm not sure. But one time in particular he mentioned to me that he liked screwing around with two or three ranks above him.

And I said, well wait a minute, I'm two ranks above you. Do you like screwing around with me? And he said, no, no. I mean the white shirts and administration. He says, they're stupid and it's so fun screwing with them.

³ Although Collins testimony with regard to Cassidy's performance is in the record, it does not provide support for the Court's ultimate conclusion that Cassidy was not subject to retaliation because there is no evidence in the record that the decision makers talked to Collins or that he had verbal input in the decision not to promote Cassidy. As a result, although there is a great deal of testimony on the record indicating that Collins thought Cassidy was a bad firefighter, nothing in the record indicates that these views played a role in the decision not to promote Cassidy.

But it was time for him to turn things around. The crew is sick and tired of it. I'm sick and tired of it. I'm sick and tired of hearing this isn't right and I'm going to fight this. And I've had a lot of crew members come up to me. They don't want to work around him, especially if he's the acting officer.

Transcript at 241.

B. Cassidy asserts that the record does not support the District Court's finding that "there is no showing by the plaintiff that he was denied a promotion to captain based upon his criticism of the wildland fire crew." Finding No. 29, R. 282. There are, in fact, no facts in the record which support this conclusion. Rather, the facts in the record directly contradict this conclusion:

Q. Okay. There was another point that was asked you to testify in that phone conversation. It was expressed to Jim by the chief that he would not be promoted - - and this was the meeting that just had happened with the tape record - - due to disloyalty to the administration. And you had responded at that time, yes, that you would testify to that.

A. Again, I don't remember specifically disloyalty to the administration. What I understood the chief telling Jim was that, in the chief's opinion, he had been disloyal to the department as a whole because of his actions in previous times.

Q. Did you bring up as an example in that October 1992 meeting Jim's opposition to the Wild Land Fire Crew being implemented?

A. I believe I did.

Q. As a aspect of not conforming to the policies of the department?

A. Yes, I remember the conversation I had with Jim about the Wild Land Fire Crew.

C. No facts support the District Court's finding that "Captains Cooper and Painter, who were promoted instead of plaintiff, were more qualified based upon relative ability and skill." Finding No. 30, R. 282. Nowhere does the record include any facts whatsoever which support

this conclusion by the trial court. Rather, the record indicates that Berry and Hinman believed Cooper and Painter were more qualified. There is, however, no evidence as to their qualifications. The only references in the record to the performance of Painter and Cooper are as follows:

Q. Captain Collins, are you familiar with fire fighter George Painter?

A. Yes, I am.

Q. And did you ever have the opportunity to do a performance evaluation on him?

A. I believe I have on a couple of occasions.

Q. How did you rate him as a firefighter?

A. I can't remember the exact delineation. I'd have to see some paperwork. It's been years.

Transcript at 84.

Q. Do you believe that Cooper and Painter were better candidates?

A. Better than?

Q. Mr. Cassidy.

A. Yes, I do.

Q. And what is your opinion based on?

A. Just based on several things. Based on their responses during the interview and based on other things that have happened over the years.

Transcript at 96.

Q. Okay, what was the determination by Chief Hinman, yourself, and Corak as to the qualifications of Miles and Cassidy after those interviews, these retroactive type of interviews? Was there a determination made at that point?

A. There was a discussion and we talked about all three candidates that we had interviewed, Miles, Cooper and Cassidy, and we decided to stick with the original decision to go with Cooper.

Transcript at 104-105.

Q. Let's see. In making your determination, did you evaluate any new evidence of new information different than what you used in your first set of interviews? And I should explain the interviews I'm talking about are the ones of Miles and Cassidy. When you sat down and evaluated the candidates, did you interject anything new in that process?

A. Well I'm not sure I know what you mean by "new."

Q. New piece of evidence, a new fact, or something. An additional piece of experience that someone had, additional qualification.

A. I don't remember anything specific like that. The instructions that I gave to the board was that the previous process had been nullified, they were to treat this as an entirely new situation. Each candidate had to come in and go through the interview process.

Q. So you don't recall anything in specific that was really new?

A. All we did was evaluate their responses to the questions that we asked during that interview process.

Transcript at 106-107.

At best, the evidence on the record supports a finding that the interview panel determined that Cooper and Painter to be the best qualified candidates. Under no circumstances does the testimony support the court's finding that Painter and Cooper were the best qualified.

SUMMARY OF ARGUMENTS

The District Court erred in concluding that Cassidy's complaints about the Wildland Fire Crew and the Fire Safety Inspection policy fell outside the protection of the First Amendment to the United States Constitution and state law prohibiting retaliation for use of the grievance

process. Cassidy's speech addressed matter of public concern including a violation of Utah law and a policy change that Cassidy believed threatened the safety of the public. The decision not to promote Cassidy was not based upon evidence that his speech was disruptive or that it proposed a threat to the efficiency of the Fire Department. Rather, the evidence shows that Cassidy was not promoted because of his protected complaints about changes in Fire Department policy. This decision was an adverse action.

Because Cassidy showed that his protected conduct played a significant role in the decision not to promote him, the Court should have switched to burden of proof to the Fire Department to prove that it would not have promoted him anyway. The Court failed to comply with this mandate and thus committed reversible error. Had the Court switched burden, the evidence indisputably shows that Cassidy would have been promoted to station captain.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT CASSIDY'S COMPLAINTS WERE NOT PROTECTED SPEECH.

"[G]overnment workers are constitutionally protected from dismissal for . . . publicly or privately criticizing their employer's policies." Board of County Commissioners v. Umbehr, ___ U.S. ___, 116 S.Ct. 2342 (1996). "To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination." Id. Moreover, "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Rankin

v. McPherson, 483 U.S. 377, 386 n. 9 (1986). The Fire Department's refusal to promote Cassidy, largely on the basis of his protected speech regarding the Wild Lands Fire Crew and the Fire Inspection Program is in clear violation of Cassidy's First Amendment Rights.⁴

To show that the speech at issue is constitutionally protected, an employee must show that the speech is regarding a matter of public concern. Pickering v. Bd of Education, 391 U.S. 563, 568 (1967). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Rankin v. McPherson, 483 U.S. 377, 384-85 (1987). "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." Rankin v. McPherson, 483 U.S. 377, 387 (1987).

There can be no dispute that Cassidy's complaints regarding the fire inspection system and the Wild Lands Fire Crew implicated matters of public concern. Cassidy's various memoranda and grievances regarding the fire inspection program specifically stated that the program created a financial risk for Salt Lake County taxpayers and threatened the lives of Salt Lake County residents. R. 179-195. Similarly, Cassidy's concerns about the Wild Lands Fire

⁴Cassidy's complaint alleges that Cassidy was retaliated against for his use of the grievance process and his speech on matters of public concern. The Complaint alleges that the retaliation was in violation of the First Amendment to the U.S. Constitution, Article 1 § 15 of the Utah Constitution, Utah Code Ann. § 12-28-2.6(7) which forbids reprisal for use of the grievance process and the due process clause of the U.S. Constitution because Cassidy's promotion was denied for a reason other than his "relative knowledge, skill and ability as required by Utah Code Ann. §17-28-2.6(1). Because the causes of action arise out of the same conduct, each cause is not separately addressed in this brief. Cassidy's arguments herein are intended to address all of these causes of action to the extent they allege that he was denied promotion for prohibited reasons.

Crew related to the qualifications and training of volunteer fire fighters and the County's compliance with state laws governing merit based employment. Cassidy's statements clearly touch matters of interest to the general public and are properly considered matters of public concern. Unlike the internal employment conditions at issue in Connick v. Myers, 461 U.S. 138 (1983),⁵ Cassidy's complaints regarding fire inspections touched on subject matter of importance to every citizen of Salt Lake County⁶. As a result, Cassidy's speech meets the first requirement of the test for protected speech.

II. THE EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT CASSIDY'S SPEECH DISRUPTED THE CONDUCT OF THE FIRE DEPARTMENT

The District Court concluded that Cassidy was not promoted, in part, because his complaints were disruptive of the orderly conduct of the fire department and that as a result, his retaliation claim fails. "A government employer can deny the benefit of employment to an employee who speaks out against it on a matter of public concern only if it can show that such speech adversely affects the efficiency or effectiveness of its operations." Anderson v. McCotter, 100 F.3d 723 (10th Cir. 1996). The Fire Department cannot make this showing. To support this claim, the Court relied heavily on the testimony of Captain Scott Collins. Collins complaints about Cassidy relate directly to Cassidy's exercise of protected speech. For example, the Court cited to

⁵ In Connick, the Court found no cause of action where the plaintiff's speech was limited to complaints about working conditions.

⁶ Moreover, Cassidy used the grievance process to complain about the fire inspection system. R. 112-127. Utah law specifically prohibits retaliation against an employee for his use of the grievance process. Utah Code Ann. §17-28-2.6(7). The County Fire Civil Service System shall provide "provision of a formal grievance procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint or reprisal."

Captain Collins' testimony that Cassidy tended to jump into conversation regarding controversial issues. The example given by Captain Collins, on that same page, is Cassidy's discussion of the Wild Land Fire Crew. Transcript at 238. This discussion is the same one cited for the claim that Cassidy was countermanding Collins. Id. The actual testimony shows that Collins was a vocal supporter of the Fire Crew which Cassidy believed was a violation of Civil Service Law. Id. Collins' objection was not Cassidy's discussion of the issue, which Collins himself initiated. Id. Rather, Collins objected to Cassidy's disagreement with his own views:

When the fire department, a year ago, came out with the Wild Land Crew, I thought it was great. I thought it was a great idea.

He [Cassidy] was telling everybody on the crew it was illegal, they can't do this, it's not right. On the other hand, I'm telling the crew that I think it's great because I'd love nothing more than to run meds or fight structure fires and watch somebody else up in the hills.

So I felt like he was countermanding me or undermining me in a way. I tried to tell him, hey Jim, I don't care whether you think it's legal or illegal. I think it's a great policy, I think it's great. I think it's something we've needed.

Id. This type of viewpoint based discipline is exactly what the First Amendment forbids. Given the evidence that Collins did not object to discussion of the issue, Cassidy's viewpoint cannot be the sole basis for a finding of disruption or a threat to the efficiency of the department. Similarly, the testimony which the Court mischaracterizes as evidencing Cassidy's failure to listen to his superior officer is actually testimony wherein Collins said that if Cassidy had heeded his advice to stop discussing controversial issues, Cassidy would have been promoted. This testimony indicates that it was Cassidy's viewpoint, not his speech that was objectionable to Collins.

The Court's reliance on Collins' testimony at all is problematic. Chief Hinman indicated that he took three factors into consideration in his decision not to hire Cassidy. Hinman stated that he had conversations with Cassidy's station captain about Cassidy's performance. Transcript at

210. At the time Cassidy applied for promotion, Captain Scott Hawkinson was Cassidy's station captain, not Collins. There is no testimony as to the content of that conversation but Hawkinson's evaluation ranks Cassidy as exceeding expectations. Id. Hinman also reviewed Collins two year old "substandard" evaluation of Cassidy⁷ and chose to give it more weight than Cassidy's most recent above standard evaluation. R. 217. Hinman also stated that he did not promote Cassidy because of the grievance Cassidy had filed with regard to enforcement of the Fire Code. Because there is no evidence on the record that Collins conveyed his complaints about Cassidy to Hinman, they cannot form the basis for the decision not to promote Cassidy.

A similar conclusion is required with regard to Cassidy's decision to secret a tape recorder into his final promotion interview. Judge Wilkinson stated in his findings of fact that "[t]he Court is also concerned that the plaintiff secreted a tape recorder on himself during his promotional interview, which was discovered by the department. These actions demonstrate a disloyal attitude towards the department by the plaintiff." R.266. There are two problems with this conclusion. First, there is no testimony that the tape recorder incident was taken into consideration by anyone considering the promotion. Second, the evidence is clear that the tape recorder incident occurred after the decision was made not to hire Cassidy. Transcript at 94.

The District Court also placed great weight on the testimony that Cassidy reported his concerns regarding enforcement of the Fire Code to Public Works Director Terry Holdsworth, who was Hinman's supervisor. "The Court finds that the plaintiff attempted to have the fire chief's

⁷ That evaluation was never entered into evidence. However, in his testimony before the Fire Civil Service Council, Collins indicated that he did not put many of his complaints about Cassidy in writing, R. 248, and in fact, indicated in writing that Cassidy performed as acting station captain at an excellent level. T. 245. Moreover, Hinman testified that he would only consider disciplinary issues with regard to promotion "if they had followed up that statement with actual written discipline." Transcript at 211.

immediate supervisor intervene in the plaintiff's favor." R.266. Assuming Cassidy did bring his concerns to the attention of Holdsworth, this conduct is also protected. The Council whistleblower ordinance provides:

It is unlawful for any person to coerce any employee into undertaking an illegal, unethical or improper act, or to take any retaliatory action against any employee because of that employee's disclosure of information relating to Council government mismanagement, corruption, misuse or waste of funds, abuse of authority, substantial and specific danger to public health or safety, or other wrongdoing in violation of the law.

Salt Lake County Ordinance 2.80.110(A). Cassidy's correspondence with regard to enforcement of the Fire Code clearly states that he was concerned about issues of public safety. As a result, any report he made to Holdsworth cannot be properly be the basis of a decision not to promote Cassidy. His complaints to Assistant Chief Berry, in Berry's office, that the Wildlands Fire Crew violated the state merit statute is also protected by the whistleblower law.

The evidence on the record is that the decision makers considered Cassidy's complaints about the Wildlands Fire Crew and the Fire Safety Inspection process when making the decision not to promote him. The evidence on the record is that Cassidy's conduct in that regard was consistent with various rules for reporting grievances and concerns about public safety or violations of the law. Moreover, there is no evidence that the decision makers had any evidence before them which could support a conclusion that Cassidy's conduct was or was likely to be disruptive. As a result, the Court's conclusion that Cassidy's speech was not protected because of its potential for disruption or interference with the operation of the Fire Department cannot stand.

III. THE TRIAL COURT ERRED IN FINDING NO CAUSAL CONNECTION BETWEEN CASSIDY'S COMPLAINTS AND HIS FAILURE TO BE PROMOTED.

There is no dispute that Cassidy's public and private criticism of Fire Department Policy played a direct role in the Department's refusal to promote him to Station Captain, despite his

position high on the register. The record is undisputed that Cassidy's disloyalty was the most relevant factor to Hinman:

Q. What was the basis, as specific as you can, for your stating that he wouldn't be promoted due to lack of support for the administration?

...

A. Finally, I had reviewed Captain Collins' substandard evaluation of Mr. Cassidy and I felt that Captain Collins comments attached to that evaluation indicated to me that Mr. Cassidy really had demonstrated a lack of support for administration policies and the goals of the fire department.

The causal relationship between Cassidy's comments and the eventual decision not to promote him is apparent and undisputed.

Cassidy also testified that Deputy Chief Don Berry told him that his "opposition to the creation of the Wild Land Fire Crew," was a basis for denying him promotion. The record evidence is undisputed that Cassidy indicated to Berry that he believed the crew violated Utah law with regard to merit employment and that he intended to file a grievance to that effect. Berry later testified that this conversation led him to reject Cassidy's bid for promotion.⁸ Causation is admitted.

Toward the end of his testimony, Hinman testified that it was not Cassidy's speech but rather his decision to raise the complaint with public works director Terry Holzworth that troubled him. Assuming the Court concluded that Cassidy went to Holzworth, this speech is also protected by the County whistleblower ordinance which forbids retaliation based upon disclosures relating to "substantial and specific danger to public health and safety." Consequently, to the extent Cassidy's

⁸Berry later testified that during the last set of interviews, he determined that Cooper and Painter were better candidates than Cassidy "[b]ased on their responses during the interview and based on other things that have happened over the years." (*Emphasis added*).

report to Holdsworth was the cause of the Chief's decision not to promote him, this motive is equally improper. Salt Lake County Ordinance 2.80.110(A).

There is no way to read the record in this matter and avoid that conclusion that Cassidy's speech regarding matters of public concern played a significant role in the decision not to promote him to station captain.

IV. THE TRIAL COURT ERRED IN FINDING THAT CASSIDY WAS NOT SUBJECT TO ADVERSE ACTION.

The Court also found that Cassidy did not suffer any adverse action. This argument is not supported by the law or the facts. The evidence in the record shows that Cassidy has been denied the opportunity to be promoted to station captain based upon his exercise of his constitutional right to comment on matters of public concern. There is no question that failure to promote constitutes an adverse action. "Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote." Larou v. Ridlon, 98 F.3d 659, 662 (1st Cir. 1996). *See also*; Gipson v. KAS Snacktime Co., 83 F.3d 225, 228 (8th Cir. 1996) ("In cases construing the analogous requirements of Title VII, federal courts have concluded that a discrete adverse employment action, such as a discharge, layoff, or failure to promote, constitutes a completed act at that the time it occurred.")

Because the Fire Department excluded Cassidy from equitable consideration for promotion based upon his exercise of protected speech regarding matters of public concern, this court must find that Cassidy was subject to adverse action.

V. THE TRIAL COURT ERRED IN NOT SWITCHING THE BURDEN FROM CASSIDY TO THE FIRE DEPARTMENT

The Council argues that because numerous factors, admittedly including Cassidy's protected speech, played a role in the decision to deny his promotion, his claim must fail. This conclusion is contrary to the law. In Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), the United States Supreme Court concluded that where an employee shows that protected activity played a substantial role in the decision to subject him to adverse action, the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." Id. at 287. The council has not and cannot make that showing. A review of the Court's Findings of Fact and Conclusions of Law indicates that the District Court failed to consider the evidence in light of this rule. Had the Court required the Fire Department to meet its burden, the Court's conclusion would necessarily have been in favor of Cassidy's retaliation claim.

The record in this case shows that Cassidy's protected speech impacted every decision maker who played a substantial role in the decision to deny him promotion to Station Captain. Chief Larry Hinman testified over and over again that Cassidy's complaints about the Wild Lands Fire Crew and the Fire Inspection program played a substantial role in his decision deny Cassidy's promotion. The testimony of Assistant Chief Berry is similarly focused.

Once Cassidy's protected activity is removed from the equation, it becomes clear that the Fire Department has failed to introduce evidence to support the conclusion that Cassidy would not have been promoted even without reliance on improper factors. Of the factors considered by Chief Hinman and Assistant Chief Berry; only the qualifications of Painter and Cooper, and the comments of

Cassidy's current supervisor Scott Hawkinson fall outside of Cassidy's protected activity. As indicated above, there is no evidence in the record as to Painter and Cooper's respective qualifications. Given that the burden is on the Fire Department to prove by a preponderance of the evidence that Painter and Cooper's qualifications support the decision not to hire Cassidy, this evidence fails.

Moreover, the only record evidence with regard to Hawkinson's views of Cassidy is an employment evaluation entered into evidence before the civil service council where Hawkinson rates Cassidy above average. Given the strong testimony from various defendants of the significant role played by Cassidy's complaints in the decision not to promote him, and the dearth of evidence suggesting that there were other reasons not to promote Cassidy, this Court must rule that the Fire Department failed to meet its burden in this regard.

CONCLUSION

A review of the record below indicates that the District Court erred in ruling that Cassidy's speech was not protected and that he was not subject to adverse action as a result of his speech. The record below in this matter is undisputed that Cassidy's constitutionally protected activities played a significant role in the Fire Department's refusal to promote him. This undertaking on the part of the Fire Department violated Cassidy's rights under the State and Federal Constitutions as well as Utah state law. As a result, this Court should rule that the decision of the Third District Court is not

supported by the evidence and order Cassidy appointed to the next opening for station captain and award him back pay from the date he was denied promotion to station captain.

DATED this 3rd day of April, 1998.

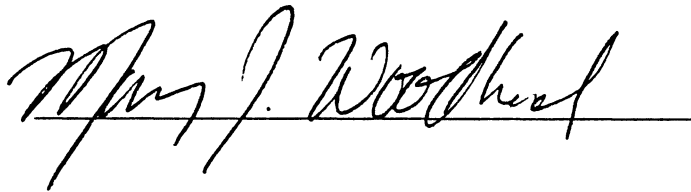


MARY J. WOODHEAD
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the attached *Appellant's brief*
~~MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE RECORD~~ upon the
following by depositing a properly addressed envelope containing the same in the United States
Mail, postage prepaid, this 3rd day of April 1998.

Douglas R. Short, Esq.
Jerry G. Campbell, Esq.
Salt Lake County Attorney's Office
2001 South State, #S-3500
Salt Lake City, Utah 84190

A handwritten signature in cursive script, reading "Mary J. Woodhead", is written over a horizontal line.

ADDENDUM

1. Findings and Conclusions of Fire Civil Service Council
2. Findings and Conclusions of Judge Homer F. Wilkinson

BEFORE THE SALT LAKE COUNTY FIRE CIVIL SERVICE COUNCIL

IN THE MATTER OF:
JAMES CASSIDY,

Petitioner,

-vs-

SALT LAKE COUNTY FIRE,
CIVIL SERVICE COUNCIL AND
SALT LAKE COUNTY FIRE
DEPARTMENT,

Respondents.

*
*
*
*
*
*
*
*
*
*
*

FINDINGS OF FACT
AND DECISION

AUTHORITY

An Administrative Hearing pursuant to Utah Code Annotated, §17-28-1 et seq., was commenced before the Salt Lake County Fire Civil Service Council on January 28, 1993 and continued on March 12, 1993 and March 24, 1993. A verbatim recording of the proceeding was made; witnesses were placed under oath; testimony and documentary evidence were received into the record. The petitioner, James Cassidy, was present and represented by counsel, David V. Thomas. The Salt Lake County Fire Chief, Larry Hinman, was present, and the Salt Lake County Fire Department was represented by Jerry G. Campbell, Deputy County Attorney. The Council comprised of Robert S. Adams, Chairman; Joe D. Campbell and Bruce T. Jones were present and now make and enter the following:

PROCEDURAL HISTORY

The petitioner is a firefighter for Salt Lake County Fire Department. On November 23, 1992, the petitioner filed his request for an appeal hearing with the Salt Lake County Fire Civil Service Council alleging that he had been unfairly treated under Utah Code Annotated §17-28-2.6(1) and (5) and §17-28-7(2) (causing him to be denied a promotion to the position of Station Captain). Additionally, the petitioner has alleged that the purpose and the authority of the Salt Lake County Fire Civil Service Council has been inappropriately usurped by Chapter 28 of Title 17 of the Utah Code, denying the petitioner an equitable right of an unbiased treatment in the promotion process.

The petition thereafter moved the Council for an order to temporarily enjoin the promotion process for Station Captain alleging the promotion process was materially flawed and violated merit principles. The motion was granted by the Council pursuant to the issuance of its order on December 17, 1992 (Temporary Injunction Order). The Council determined that there was sufficient basis for the issuance of a temporary injunction to halt the promotion process until a hearing could be held with respect the allegations that the promotional process was materially and unlawfully flawed and that irreparable harm would result if the promotion of a Station Captain was permitted prior to a hearing before the Council. Thereafter, contrary to the Temporary Injunction Order, the department determined to proceed with the promotional process and appointment of Station Captain without any hearing before the Council. Although the department had promoted

a Station Captain, the Council proceeded with an Administrative Hearing on the merits and to determine the authority of the department to proceed with the promotion process in contravention of the Council's temporary injunction order.

The petitioner also filed an action with the Third Judicial District Court, seeking declaratory judgment that the Council had authority to issue the temporary injunction order enjoining the departments hiring and promotional process.

A status conference was held before the Council and an Administrative Hearing on the merits was commenced on January 28, 1993 and thereafter continued on March 12, 1993, and March 24, 1993. The petitioner was present and represented by David V. Thomas. The department was present through its Fire Chief, Larry Hinman, and was represented by Jerry G. Campbell, Deputy County Attorney. Witnesses testifying including Jack Holmen; Paul Hare; James Collins; Don Berry; James Cassidy; Chief Hinman; Scott Collins; County Commissioner Horiuchi; Elston Snow; Jeff McKee and Arriann Woolfe. The parties were given, and exercised, the opportunity to make opening statements, closing statements and to cross-examine witnesses. In support of his grievance, the petitioner filed an initial petition, a pre-hearing brief, amendment to his pre-hearing brief, and a copy of his brief filed with the Third Judicial District Court in support of his complaint for declaratory judgment. The department filed a pre-hearing brief and a supplemental memorandum. Exhibits offered by both parties were received into evidence by stipulation and a verbatim recording was made of the proceedings.

FINDINGS

1. Petitioner was hired by the department on August 1, 1982 and at all times relevant held the position of firefighter. The petitioner was made a hazardous material firefighter, Grade 22, on October 1, 1982. Prior thereto, petitioner was an Emergency Medical Technician, Grade 21. Pursuant to the present grievance, the petitioner seeks the position of a Station Captain, Grade 26.

2. Pursuant to Chapter 28 of Title 17 of the Utah Code and County Fire Civil Service System Rules and Procedures promulgated thereunder, a register for the appointment of Station Captain, Captains in connection with the promotional process which is the subject of this grievance, was previously certified by the County Fire Civil Service System. Candidates ranked numbers 1, 2 and 3 on the register had been promoted as of October 19, 1992. As of such date, the petitioner was the highest ranking remaining candidate for Station Captain on the promotional register.

3. Notice was given by the department in October, 1992, of the promotion to Station Captain of Mont Cooper. Mr. Cooper was ranked below the petitioner on the Station Captain promotional register. Prior to the announced promotion of Mr. Cooper, the petitioner had not been given the promotional interview required under Civil Service Policy No. 2150.3.2.2 in connection with the promotional process.

4. Following notice of Mr. Cooper's promotion, the petitioner complained to the department alleging violations of the County Fire Civil Service Policies, including the failure to conduct an interview of petitioner prior to the appointment.

5. In October, 1992, petitioner received a letter from the department informing the petitioner that although Mr. Cooper would ultimately be appointed to the position of Station Captain in any event, that the prior promotion was cancelled and nullified. The department conducted interviews to correct the failure of not interviewing the petitioner as required by Civil Service Policy. Petitioner was interviewed by Chief Hinman, Assistant Chief Corak, and Deputy Chief Don Berry for the captain's position that had been nullified.

6. After the grievance had been filed by the petitioner on November 23, 1992 another captain position came open and another Board was convened to interview for the two captain positions, including previously promoted Mr. Cooper. Because of the allegations asserted by the petitioner, Chief Hinman removed himself as an interviewer and delegated the responsibility of selections to the Board, consisting of Deputy Chief Don Berry, Assistant Chief Corak and Battalion Chief Lindberg. The petitioner was interviewed in December, 1992, for the two positions of Station Captain, along with George Painter Mont Cooper and Jeff Miles.

7. The petitioner's grievance alleged that the promotional process was materially flawed, in violation of Chapter 28, of Title 17 of the Utah Code and in violation of petitioner's equitable right to an unbiased promotional process. Petitioner further alleged that as a consequence of the fire department usurp of the purpose and authority of the Council to make equitable certification decisions for promotion.

8. After the interview process was completed by the

Department, the Board unanimously agreed to recommend firefighter Cooper and Painter for the captain position. Their recommendation was sent to Chief Hinman. The Board determined that Mr. Cooper and Mr. Painter were the best candidates for the captains position based upon their responses and their history of performance. Deputy Chief Don Berry testified that he and the Board were instructed that Fire Chief Hinman would follow whatever recommendations the Board made. (Assistant Chief Don Berry's testimony, p. 110, L. 1-14). Prior to the appointment of the new Station Captains from the promotional register in December, 1992, the petitioner sought to enjoin the promotion process requesting a Temporary Restraining Order. In response to the petitioner's motion, the Council issued its Temporary Injunction Order to stop the promotional process until after hearing of the petitioner's claims.

9. Chief Hinman testified that he was concerned with the petitioner's ability to follow Fire Department policy and his ability to fill the position of captain. Additionally, he testified that in his opinion if he believed other candidates were more qualified and he would pass over the under qualified candidate (Firechief Larry Hinman testimony, transcript of hearing p.202).

10. The department proceeded with the promotional process contrary to the Council's Temporary Injunction Order of December 17, 1992 and appointed Mont Cooper and George Painter to the position of Station Captain effective January 1, 1993.

11. This Council commenced its Administrative Hearing on the merits on January 28, 1993, and thereafter entered its decision on

April 23, 1993, stating the "the Council lacks jurisdiction or authority over County Fire hiring and promotion issues, except as a Council may adopt rules consistent with a delegation of powers and duties as provided in Chapter 28 of Title 17. Therefore, any person aggrieved by a hiring or promotional matter not so delegated to the Council may not bring or appeal the grievance before this Council, but must institute an action in District Court if a satisfactory resolution in the grievance cannot be reached with the County Legislative body." This Council determined that it lacked the statutory authority to hear promotional or hiring grievances.

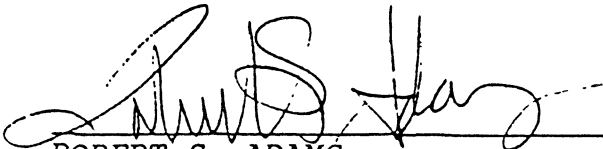
12. Petitioner then appealed this matter to Third Judicial District Court and Judge Timothy R. Hanson in a memorandum decision dated October 31, 1994, Judge Hanson granted petitioner's request for extraordinary relief in that the Court viewed the petitioner's now assisted jurisdiction of the Salt Lake County Fire Civil Service Council to hear the matters of promotion and hiring pursuant to Section 17, Utah Code Annotated. The Court ordered the Salt Lake County Fire Civil Service Council to exercise its jurisdiction and consider the petitioner's grievance and render an appropriate decision based upon the evidence that had been presented to them on this decision.

DECISION

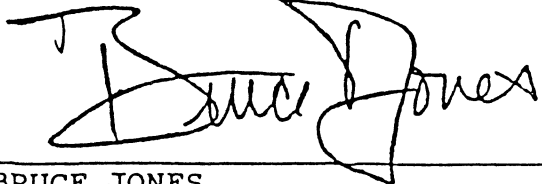
The Council, in a majority decision, upholds the promotional process in the above-entitled matter and determines that the Salt Lake County Fire Department did not violate Utah Code Annotated §17-28-2.6(1) and (5) and (5) and §17-28-7(2). In so holding, this Council upholds the "Rule of Three" whereby the Fire Chief is given

some latitude and discretion to select for promotion one of the three otherwise qualified candidates, so long as the Fire Chief does not abuse his discretion in making the selection. The discretion by the Fire Chief in the promotional process must be exercised in good faith so as not to be arbitrary, capricious, or otherwise infringe on the constitutional rights of the applicants. Within such constitutional and statutory constraints, the Fire Chief may exercise his or her discretion to select among the three candidates from a list provided by this Council after testing process consistent with merit principles. This Council finds that in the present case, the Fire Chief did not violate the First Amendment or other constitutional rights of the petitioner in exercising his discretion to select and promote Mont Cooper and George Painter instead of the petitioner. Also the Council holds that the "Rule of Three" must be maintained in order to address the well founded principles of merit and focus upon the qualified candidates. Eliminating a "Rule of Three" allows undo latitude in the hiring process.

DATED this 11th day of April, 1995.



ROBERT S. ADAMS



BRUCE JONES
(Former Member of Salt Lake County
Fire Civil Service Council)

**SALT LAKE COUNTY
FIRE CIVIL SERVICE COUNCIL**

MINORITY REPORT - APPEAL OF JAMES CASSIDY

As the dissenting vote of the Fire Civil Service Council, I wish to explain my evaluation of the hearing.

1. Mr. Cassidy was certified for the promotion according to his relative ability, knowledge and skills for the promotion.
2. Mr. Cassidy was previously passed over for promotion and told by Chief Hinman that he would not be passed over again.
3. Chief Hinman went back on his word and passed over Mr. Cassidy again. This seems to be double jeopardy.
4. Chief Hinman violated Mr. Cassidy's right to an interview within 90 days.
5. Chief Hinman ignored a temporary restraining order regarding this case.
6. Chief Hinman accused Mr. Cassidy of disloyalty in which I am not convinced was anything more than a disagreement.
7. The "Rule of Three" and the "discretionary authority" of the Chief of the Fire Department has been abused and I believe Mr. Cassidy has been deprived of the purpose and policy of career advancement as stated in Civil Service Policy and Procedure #3100.

It is my vote to promote Mr. Cassidy at once, with back pay and benefits he has been deprived of. Civil Service Policy and Procedure #1100 3.0 states that, "It is the intent that these policies and procedures be interpreted broadly on the basis of a fair and reasonable approach to specific problems and situations; they should be considered as a total set of working procedures rather than each section, sub-section, sentence or phrase being interpreted in isolation and out of context." (emphasis added)

Disloyalty cannot mean occasional disagreements, especially on issues that impact major changes in jobs. There is no cause for the Fire Administration's actions against Mr. Cassidy.

Respectfully submitted this 30th day of March, 1995.


JOSEPH D. CAMPBELL/Vice-Chair

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and exact copy of the foregoing

Findings and Decision to:

Mary Woodhead
WATKISS, DUNNING & WATKISS
111 East Broadway, Suite 800
Salt Lake City, Utah 84111-2304

Jerry G. Campbell
Deputy County Attorney
2001 South State Street
Salt Lake City, Utah 84190

Felix McGowan, Director
Salt Lake County Personnel Division
2001 South State Street #N4600
Salt Lake City, Utah 84190-3150

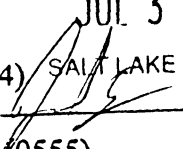
Mari Maldonado, EEO Manager
Salt Lake County Personnel Division
2001 South State Street #N4600
Salt Lake City, Utah 84190-3150

this 11th day of April, 1995.


KAY L. GATES/Coordinator

FILED DISTRICT COURT
Third Judicial District

JUL 31 1997

DOUGLAS R. SHORT (5344) SALT LAKE COUNTY
Salt Lake County Attorney By  Deputy Clerk
By: JERRY G. CAMPBELL (0555)
Deputy County Attorney
Attorneys for Defendant
2001 South State Street, S3600
Salt Lake City, Utah 84190-1200
Telephone: (801) 468-2653

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES CASSIDY,	:	
	:	
Plaintiff,	:	
	:	DECISION AND ORDER
-vs-	:	
	:	Civil No. 950903293CV
SALT LAKE COUNTY FIRE CIVIL	:	
SERVICE COUNCIL,	:	Judge Homer F. Wilkinson
	:	
Defendant.	:	

This matter came on for hearing of plaintiff's Motion for Summary Judgment on the record and the defendant's Motion for Summary Judgment on the Record. The plaintiff was present and represented by counsel, Mary J. Woodhead. The defendant, Salt Lake County Fire Civil Service Council, was present and represented by counsel, Jerry G. Campbell, Deputy Salt Lake County Attorney. Based upon a review of the extensive records and memoranda submitted, the Court finds as follows:

1. The plaintiff was hired by the Salt Lake County Fire Department on August 1, 1982 as a firefighter. He was promoted to a Hazardous Material Firefighter, grade 22, on October 1, 1992.

2. Pursuant to Chapter 28 of Title 17 of the Utah Code, and Salt Lake County Fire Civil Service policies, a register was created for appointment to Station Captain. Candidates were ranked and as of October 19, 1992, the plaintiff had the highest ranking of the remaining candidates for Station Captain on the promotional register.

3. Notice was given by the department in October of 1992, of the promotion to Station Captain of Mont Cooper. Mr. Cooper was ranked below the plaintiff on the Station Captain promotional register. Prior to the announced promotion of Mr. Cooper, the plaintiff had not been given a promotional interview as required by Salt Lake County Civil Service policy 2150.3.2.2.

4. Following the notice of Mr. Cooper's promotion, the plaintiff complained to the department alleging violations of the Salt Lake County Fire Civil Service policy including the failure to conduct an interview of the plaintiff prior to the appointment of Mont Cooper.

5. In October, 1992, the plaintiff was notified that the appointment of Mont Cooper as Station Captain was nullified; that the prior promotion was cancelled and that the department would conduct subsequent interviews to correct the failure of not interviewing the plaintiff as required by civil service policy. Plaintiff was also informed that Mr. Cooper would not be removed from his appointment of Station Captain. The plaintiff was interviewed by Fire Chief Hinman, Assistant Fire Chief Corrack and Deputy Chief Don Berry for a captain position.

6. During the course of the interview of the plaintiff, it was discovered by the fire department that the plaintiff had secreted a tape recorder on himself and was tape recording the interview. On November 23, 1992, the plaintiff filed a grievance. In December of 1992, a second captain's board was convened and interviewed the top four candidates as allowed under civil service policy and state law. Because of the allegations of the plaintiff, Fire Chief Hinman removed himself as an interviewer and delegated the responsibility of the selections to the board. The board consisted of Deputy Chief Don Berry, Assistant Chief Corrack, and Battalion Chief Limberg. The plaintiff was re-interviewed in December, 1992 for the Station Captain positions, along with George Painter, Mont Cooper and Jeff Miles.

7. Plaintiff's grievance before the Fire Civil Service Commission or defendant asserted that the promotional process was materially flawed in violation of Chapter 28 of Title 17 of the Utah Code and in violation of the plaintiff's equitable right to an unbiased promotional process.

8. After the interviews in December of 1992, the board unanimously agreed that firefighters Mont Cooper and George Painter be promoted to the captain positions. Their recommendation was sent to Chief Hinman. The board determined that Mont Cooper and George Painter were the best candidates for the captain positions based upon their responses and history of performance. The board had previously been instructed by Fire Chief Hinman that he would follow whatever recommendations the board made.

9. Fire Chief Hinman expressed concern with the plaintiff's ability to follow fire department policy and his ability to fill the position of captain, and that the fire chief believed the other candidates were more qualified than the plaintiff.

10. The defendant, Salt Lake County Fire Civil Service Council, commenced an administrative hearing on plaintiff's grievance on January 28, 1993, and thereafter entered its decision on April 23, 1993, stating that the "council lacks jurisdiction or authority over county fire hiring and promotional issues except as a council may adopt rules consistent with the delegation of powers and duties as provided in Chapter 28 of Title 17. Therefore, any person aggrieved by a hiring or promotional matter not so delegated to the council may not bring or appeal the grievance before this council, but must institute an action in district court if a satisfactory resolution in the grievance cannot be reached with the county legislative body." The Salt Lake County Fire Civil Service Council had determined that it lacked statutory authority to hear promotion or hiring grievances.

12. The plaintiff appealed the decision of April 23, 1993 to the Third Judicial District Court and Judge Timothy R. Hanson, in his Memorandum Decision dated October 31, 1994, granted plaintiff's request for extraordinary relief and ordered the Salt Lake County Fire Civil Service Council to exercise its jurisdiction and to consider plaintiff's grievance and render an appropriate decision based upon the evidence that had been presented to them on this decision.

13. In a decision dated April 11, 1995, the defendant, Salt Lake County Fire Civil Service Council, ruled that the fire chief did not violate the First Amendment or constitutional right of the plaintiff and upheld the "Rule of Three" in the selection process for promotion to the position of captain within the fire department. The Council also affirmed the decision that other candidates were more qualified and would not interfere with the discretionary decision of the fire chief.

14. Plaintiff appealed the defendant's decision to this Court on May 11, 1995 and alleged that (1) his right of freedom of speech was violated by the Salt Lake County Fire Department; (2) that the Salt Lake County Fire Department violated Section 17-28-26, where the advancement of other candidates was not based on relative ability, knowledge and skills; (3) that the plaintiff's due process rights were violated; and (4) that the fire department acted in reprisal to plaintiff's protected speech and retaliated against him for exercising his due process rights.

15. After review of the record from the Salt Lake County Fire Civil Service Council and stipulated documents dated July 8, 1996, the Court heard counsel's argument for summary judgment on February 28, 1997.

16. The Court finds that Section 17-28-2 is the controlling statute applicable to this case and that the law and facts shall be determined by the Court which in its judgment may affirm, reverse or modify the decision of the Fire Civil Service Council.

17. The Court affirms and gives deference to the Findings of Fact entered by the Fire Civil Service Council on April 11, 1995.

18. The Court is not persuaded that the expectation of a promotion is a property right or that the plaintiff had a unilateral right to a promotion. Promotions are a result of time in service and how one performs a job. The Court finds no facts to support plaintiff's claim that the constitutional right of free speech was violated by the Salt Lake County Fire Department.

19. The Court finds that one's First Amendment rights may be violated as a result of an adverse action by an employer.

20. In order for the plaintiff to prevail, he must demonstrate:

A. That he suffered an adverse employment action motivated by the exercise of his free speech;

B. That his speech was a matter of public concern;

C. That his speech outweighed the government's interest in running an efficient and productive office; and

D. That the adverse action complained of was such that it created an actual or potential danger that the speech of employees would be chilled.

21. This Court finds that a denial of a promotion based upon the plaintiff's exercise of his right of free speech can be an adverse employment action.

22. The Court finds that plaintiff's complaints in 1990 concerning the implementation of the wildland fire crew were of a public concern and that no action was taken by the fire department.

23. The Court finds that the plaintiff carried his concerns far beyond his right to address a public concern and his grievance became a vendetta against the fire department.

24. The Court also finds that plaintiff's right to address a public concern did not outweigh the fire department's interest in running an efficient and productive office.

25. The Court finds that the plaintiff was promoted to Hazardous Material Firefighter on October 1, 1992, prior to his non-selection for fire captain, also in 1992. The Court finds that the act of not promoting the plaintiff did not present an actual or potential danger that the speech of employees would be chilled.

26. The Court is not persuaded that Mr. Cassidy's First Amendment rights were violated. Specifically, the Court refers to the transcript of the proceedings, starting at

approximately at page 200, where Chief Hinman testified that the plaintiff would not comply with the rules governing the grievance process. The Court finds that the plaintiff attempted to have the fire chief's immediate supervisor intervene in the plaintiff's favor. The Court also finds that the plaintiff secreted a tape recorder on himself during his promotional interview, which was discovered by the department. These actions demonstrate a disloyal attitude towards the department by the plaintiff.

27. The Court finds that plaintiff's poor attitude was reflected in his interactions with Captain Collins where he reluctantly complied with directions or failed to perform.

28. The Court finds that the administrative hearing process conducted by the Fire Civil Service Council was fair and not unconstitutional.

29. The Court finds no violation of plaintiff's First Amendment and due process rights. The Court further finds there was no adverse action taken against plaintiff, that the Fire Civil Service Council afforded him all due process rights. Furthermore, there is no showing by the plaintiff he was denied a promotion to captain based upon his criticism of the wildland fire crew.

30. The Court finds that Captains Cooper and Painter, who were promoted instead of plaintiff, were more qualified based upon relative ability and skill. The Court further finds that there was no showing by plaintiff that he was better qualified than Painter or Cooper.

31. The Court finds that the "Rule of Three," was not abused by the fire department. The Court finds that the Rule of Three gave the fire chief the discretion to promote who he believed was the best candidate for the job.

32. The Court finds that the plaintiff exercised his right to complain in such a manner that it affected the efficiency of the fire department.

33. The Court grants the defendant's motion to amend its answer and finds sufficient justification to allow defendant's motion.

34. The Court further finds no denial of plaintiff's state rights and/or federal constitutional rights of due process, or that Section 17-28-2.6(7) (1994 Supp.) was violated.

35. The Court finds that the promotional process was not perfect, but it was constitutional and fair. The Court further finds that the plaintiff has not met his burden and no clear error was shown in the process that constituted the captain selections in 1992.

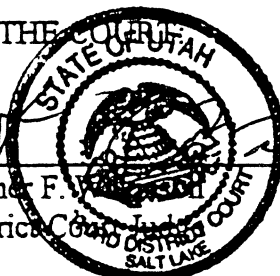
WHEREFORE, based upon the foregoing, the Court denies plaintiff's Motion for Summary Judgment, affirms the findings of fact and decision of the defendant, and enters its Order as follows:

1. The Court finds that the plaintiff's Motion for Summary Judgment on the Record is not well taken and denies the same.

2. The Court finds that the defendant's Motion for Summary Judgment is well taken and grants the same.

DATED this 31 day of July, 1997.

BY THE COURT
HOMER F. WILSON
District Court Judge
SALT LAKE COUNTY
SALT LAKE



APPROVED AS TO FORM:

Mary J. Woodhead
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing Decision and Order to be mailed, postage prepaid, this _____ day of _____, 1997, to the following:

Mary J. Woodhead
261 East 300 South, Suite 300
Salt Lake City, Utah 84111
Attorney for Plaintiff