

1997

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](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 Appellee, *Cassidy v. The Salt Lake County Fire Civil Service Council*, No. 970525 (Utah Court of Appeals, 1997).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/1050](https://digitalcommons.law.byu.edu/byu_ca2/1050)

This Brief of Appellee 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.

COURT OF APPEALS

---

JAMES CASSIDY,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 970323-CA
	:	
	:	
-vs-	:	
	:	Priority 15
SALT LAKE COUNTY FIRE	:	
CIVIL SERVICE COUNCIL,	:	
	:	
Defendant-Appellee.	:	

---

BRIEF OF APPELLEE  
SALT LAKE COUNTY FIRE CIVIL SERVICE COUNCIL

---

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY

HONORABLE HOMER F. WILKINSON                      T JUDGE

---

DOUGLAS R. SHORT (5344)  
Salt Lake County Attorney  
Jerry G. Campbell (0555)  
Deputy County Attorney  
2001 South State Street, S3600  
Salt Lake City, Utah 84190-1200  
Telephone: (801) 468-2653  
Attorneys for Appellee

MARY J. WOODHEAD (558)  
261 East 300 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-6367  
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

---

JAMES CASSIDY,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 970525-CA
	:	
-vs-	:	
	:	Priority No. 15
SALT LAKE COUNTY FIRE	:	
CIVIL SERVICE COUNCIL,	:	
	:	
Defendant-Appellee.	:	

---

BRIEF OF APPELLEE  
SALT LAKE COUNTY FIRE CIVIL SERVICE COUNCIL

---

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

---

DOUGLAS R. SHORT (5344)  
Salt Lake County Attorney  
Jerry G. Campbell (0555)  
Deputy County Attorney  
2001 South State Street, S3600  
Salt Lake City, Utah 84190-1200  
Telephone: (801) 468-2653  
Attorneys for Appellee

MARY J. WOODHEAD(5581)  
261 East 300 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-6367  
Attorney for Appellant

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES. . . . .	i
JURISDICTION OF THE COURT . . . . .	1
ISSUES PRESENTED FOR REVIEW . . . . .	1
STATEMENT OF DETERMINATIVE STATUTES . . . . .	2
STATEMENT OF THE CASE . . . . .	4
STATEMENT OF FACTS. . . . .	5
SUMMARY OF ARGUMENT . . . . .	8
ARGUMENT. . . . .	9
I.    THE SALT LAKE COUNTY FIRE CHIEF IS A NECESSARY AND INDISPENSABLE PARTY TO THIS ACTION. . . . .	9
II.   THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE LOWER COURT'S RULING UPHOLDING THE DECISION OF THE FIRE CIVIL SERVICE COUNCIL. . . . .	12
III.  THE APPELLANT HAS NOT SUFFERED AN ADVERSE EMPLOYMENT ACTION AND THEREFORE HIS FIRST AMENDMENT CLAIM IS WITHOUT MERIT . . . . .	15
IV.   APPELLANT'S SPEECH WAS NOT OF A PUBLIC CONCERN . . . . .	17
V.    APPELLANT'S SPEECH DOES NOT OUTWEIGH THE FIRE DEPARTMENT'S RESPONSIBILITY FOR PROMOTING EFFICIENCY OF PUBLIC SERVICE. . . . .	19
VI.   THE APPELLANT WOULD HAVE BEEN DENIED A PROMOTION TO CAPTAIN EVEN IF HIS SPEECH WAS PROTECTED . . . . .	23
VII.  THE RECORD DOES NOT SUPPORT APPELLANT'S WHISTLEBLOWER CLAIM. . . . .	25

CONCLUSION. . . . .	26
---------------------	----

ADDENDUM. . . . .	29
-------------------	----

A. Rule 19, Utah R. of Civ. P. . . . .	2, 3
--	------

B. Utah Code Annotated 17-28-6 (1992), 17-28-8 (1992), 17-28-9 (1992) . . . . .	3, 10, 11
--	-----------

C. Salt Lake County Code of Ordinances 2.80.110 . . . .	25, 26
---	--------

D. Findings and Conclusions of Judge Homer F. Wilkinson, Appellant's Addendum #2. . . . .	5
--	---

# TABLE OF AUTHORITIES

## CASES

Alta Indus. Ltd. v. Hurst, 846 P.2d 1282 (Utah 1993) . . . . .	15
Bickel v. Burkhardt, 632 F.2d 1251 (5th Cir. 1990) . . . . .	22, 23, 24
Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987). . . . .	19
Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972). . . . .	22
Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708 (1983) . . . . .	15, 18, 20, 22
Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132 (7th Cir. 1993). . . . .	16
Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994) . . . . .	16, 17
DeGuisseppie v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995) . . . . .	16
Drake v. Indus. Comm'n of Utah, 939 P.2d 177 (Utah 1997). . . . .	2
Grace Drilling Co. v. Bd. of Review, 776 P.2d 63 (Utah App. 1989). . . . .	13
H. J. Shewmake v. Bd. Of Fire and Police Comm'rs of the Village of East Alton, 390 N.E.2d 536 (Ill. Ct. App. 5th Dist. 1979) . . . . .	22
Hiltsey v. Ryder, 738 P.2d 1024, (Utah 1987). . . . .	12
In Re J.D.M., 810 P.2d 494 (Utah App. 1991). . . . .	1
Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2nd Cir. 1979) . . . . .	24
Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984). . . . .	19

Klein v. Civil Serv. Comm'n of Cedar Rapids, 152 N.W.2d 195 (Iowa 1967) . . . . .	22
Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988) . . . . .	18
Koulis v. Standard Oil, 746 P.2d 1182 (Utah Ct. App. 1987) . . . . .	26
Lamb v. B & B Amusements Corp., 869 P.2d 926 (Utah 1993) . . . . .	25
Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990) . . . . .	9
Langeland v. Monarch Motors, Inc., 307 Utah Adv. Rep. 3 (Utah 1996) . . . . .	2
Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471 (1977) . . . . .	18, 23, 24
Pickering v. Bd. Of Education, 391 U.S. 563, 20 L.Ed.2d 811 (1969) . . . . .	15, 20, 24
R.M.S. Corp. v. Baldwin, 576 P.2d 881 (Utah 1978) . . . . .	12
Rutan v. Republican Party of Illinois, 497 U.S. 62, 111 L.Ed.2d. 52 (1990) . . . . .	15
Seftel v. Capital City Bank, 767 P.2d 941 (Utah App. 1989) . . . . .	9, 12
Smith v. Fruin, 28 F.3d 646 (7th Cir. 1994) . . . . .	17
State v. Brown, 856 P.2d 358 (Utah App. 1993) . . . . .	25
State v. Pugmire, 898 P.2d 271 (Utah App. 1995) . . . . .	25
Stewart v. Bd. of Review, 831 P.2d 134 (Utah App. 1992) . . . . .	1
Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142 (Utah 1978) . . . . .	26

Werner-Jacobsen v. Benarik, 327 Utah Adv. Rep. 45 (Utah 1997).	12
Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986).	18



## **JURISDICTION OF THE COURT**

This is a response to an appeal by the appellant, James Cassidy, from a judgment of the Third District Court of Salt Lake County, dismissing his complaint seeking a review of a decision of the Salt Lake County Fire Civil Service Council, hereinafter referred to as "F.C.S.C." The Utah Court of Appeals has jurisdiction over such appeals pursuant to Utah Code Annotated Section 78-2a-3(b) (i) (1996).

## **ISSUES PRESENTED FOR REVIEW**

1. Whether the Salt Lake County Fire Chief is a necessary and indispensable party to the claim that James Cassidy suffered a nonpromotion as a result of his right of free speech.

Issues involving questions of law are reviewed under a correction of error standard. An appellate court reviews for correctness. In Re J.D.M., 810 P.2d 494 (Utah App. 1991).

2. Whether the failure to marshal the evidence in support of the lower court's decision requires this Court to assume the record supports the findings.

An appellate court reviews under the substantial evidence standard viewed in light of the whole record before the Court. Stewart v. Bd. of Review, 831 P.2d 134 (Utah App. 1992).

3. Whether the appellant suffered an adverse employment action resulting from his right of free speech.

This issue contains mixed law and facts which requires a deferential clear error standard, with the "legal effect . . . in

the province of the appellate courts," . . . However, policy considerations and other factors may . . . grant some operational discretion to the trial courts . . . ." Drake v. Indus. Comm'n. of Utah, 939 P.2d 177 (Utah 1997); Langeland v. Monarch Motors, Inc., 307 Utah Adv. Rep. 3 (Utah 1996).

4. Whether the appellant's speech was constitutionally protected and was he denied a promotion even in the absence of protected conduct.

Issues of mixed law and facts which require a deferential clear error standard, with the "legal effect . . . in the province of the appellate courts, . . . Nevertheless, . . . policy considerations and other factors may lend this court to define a legal standard so that it actually . . . grant[s] some operational discretion to the trial courts applying it." Drake at 181.

#### **STATEMENT OF DETERMINATIVE STATUTES**

1. Rules 19(a) and 19(b) of the Utah R. of Civ. P.

Rule 19. Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the

action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Utah Code Ann. Section 17-28-8:

The fire chief of each fire department of counties subject to the provisions of this chapter shall, subject to the rules of the County Fire Civil Service Council, appoint from the certified county fire civil service register, all persons necessary to fill all firefighters civil service positions in county fire department.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This case arises out of the decision of the Salt Lake County Fire Chief not to promote the appellant to the position of station captain.

### **B. COURSE OF THE PROCEEDINGS**

On November 22, 1992, the appellant, James Cassidy (hereinafter "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 to captain was in violation of his statutory and constitutional rights. On April 23, 1993, the Council ruled it lacked the authority to hear Cassidy's grievance. On October 31, 1994, Judge Timothy R. Hanson ordered the F.C.S.C. to reconsider its ruling and render a decision. Pursuant to the order of Judge Hanson, the F.C.S.C. entered its findings and decision against Mr. Cassidy on April 11, 1995.

Mr. Cassidy filed this action in the Third District Court on May 11, 1995, alleging his right of free speech was violated by the fire department for its failure to promote him to captain. The District Court granted the F.C.S.C.'s motion to limit the court's review to the record before the Fire Civil Service Council, determine questions of both law and fact, and affirm, set aside or modify the decision of the Fire Civil Service

Council. On July 31, 1997, following briefing and arguments by the parties, the District Court granted judgment for the F.C.S.C.<sup>1</sup>

#### STATEMENT OF FACTS

1. On August 1, 1982, Mr. Cassidy was hired as a Salt Lake County Firefighter. R. 37, ¶1.

2. In October of 1990, he filed a grievance challenging the change of procedure in dealing with minor violations of the Uniform Fire Code. R. 180. Mr. Cassidy's first free speech claim.

3. His grievance was denied by his captain, Scott Collins; the Fire Chief, Larry Hinman; and the F.C.S.C. R. 181, 183, 192-194.

4. In the fall of 1991, Mr. Cassidy met with Deputy Fire Chief Don Berry and Fire Chief Larry Hinman and was told that he would not be passed over for promotions if he met certain conditions. Transcript of hearing before the Salt Lake County Fire Civil Service Council (hereinafter "Transcript")<sup>2</sup> at page 201 (hereafter "p" for page and "l" for lines).

5. In February of 1992, a promotional register was created for the position of captain. Candidates one, two, three, and six

---

<sup>1</sup>See the attached findings and decision of the lower court.

<sup>2</sup>References 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.

were selected for promotion to captain. Transcript, p. 160, l. 19-23.

6. In the spring of 1992, the fire department announced the formation of the wildland fire crew. Transcript, p. 160. The wildland fire crew would allow the fire department to hire and train part-time firefighters to fight brush fires, and allow the full-time firefighters of the department to concentrate on structural fires or fires where lives and property are threatened. Transcript, p. 190, l. 1-10.

7. Mr. Cassidy complained to his captain and other crew members that the wildland fire crew was illegal. Transcript, p. 238, l. 1-15.

8. In the spring of 1992, he met with Deputy Chief Don Berry and told him that if the department went ahead with the wildland fire crew, he was going to take action to see that the department didn't hire those people. Transcript 197, l. 4-8. Mr. Cassidy's second claim of free speech.

9. In October of 1992, Mr. Cassidy was notified by the department that he had not been selected for the captain position. R. 277, ¶3. He was told that the fire department had mistakenly failed to schedule his and Jeff Miles' interview. R. 277, ¶3; Transcript, p. 101, l. 9-22.<sup>3</sup> Both were informed that

---

<sup>3</sup>Salt Lake County Firefighter Policy 2150.3.2.2 provides that if a firefighter has not been interviewed for the position within the last 90 days, he/she must be re-interviewed.

the prior promotion was canceled and the department would correct its error and schedule interviews. Transcript, p. 102, l. 11-24. Mr. Cassidy was also informed that Mr. Cooper would not be removed from his appointment to captain. R. 277, ¶5. At the time of the promotion of Mr. Cooper, Mr. Cassidy had the highest ranking. R. 74.

10. In October of 1992, Cassidy was promoted to position of Hazardous Material Firefighter with an increase in pay. R. 37, ¶1; Transcript, p. 175, l. 9-16, 24-25.

11. Pursuant to the department's error in not interviewing Cassidy for captain, an interview was scheduled during November of 1992. Shortly after the interview had commenced, it was discovered that Cassidy had secreted a tape recorder on himself. R. 263, ¶6.

12. After the interview in November, Mr. Cassidy filed a grievance with the F.C.S.C. alleging a tainted interview process. Transcript, p. 115, l. 20-25; p. 289, l. 7-20.

13. During December of 1992, a second interview board was created as a result of another captain's vacancy. The fire chief removed himself from the second board because of the allegations by appellant. Mr. Cassidy was interviewed, along with George Painter, Mont Cooper and Jeff Miles. R. 263, ¶6.

14. The interview board recommended retaining Mont Cooper as a captain and promoting George Painter. R. 263, ¶8.

15. The Fire Chief, Larry Hinman, followed the board's recommendation. The fire chief was concerned with Mr. Cassidy's ability to follow fire department policy, his ability to fill the position of captain, and passed him over for promotion. The fire department believed Mont Cooper and George Painter were more qualified than the appellant. R. 263, ¶9; Transcript, p. 216; p. 96, l. 14-24.

16. Pursuant to Mr. Cassidy's grievance, the F.C.S.C. ruled on April 23, 1993, that it lacked jurisdiction or authority over the fire department's hiring and promotion grievances. R. 264, ¶10.

17. Mr. Cassidy appealed the decision of the F.C.S.C. to the Third District Court. On October 31, 1994, Judge Timothy Hanson ruled that the F.C.S.C. did have jurisdiction and remanded the matter to the F.C.S.C. to render an appropriate decision. R. 264, ¶12.

18. On April 11, 1995, the F.C.S.C. ruled that the fire department did not violate Cassidy's statutory or constitutional rights by failing to promote him. R. 264, ¶13.

#### **SUMMARY OF ARGUMENT**

The failure of Mr. Cassidy to name as an indispensable party, the fire chief of Salt Lake County, prevents the Court from granting the relief requested. Substantial evidence exists in the record that supports the F.C.S.C. and the lower court's



decision, which Cassidy has failed to marshal. No adverse employment action has been suffered by Cassidy. His rights of free speech did not rise to the level of public concern and assuming his criticism was of a public concern, there were sufficient reasons for his nonpromotion. Additionally, Cassidy's claim of retaliation for violating the Salt Lake County whistleblower ordinance is not supported by the record.

## **ARGUMENT**

### **POINT I**

#### **THE SALT LAKE COUNTY FIRE CHIEF IS A NECESSARY AND INDISPENSABLE PARTY TO THIS ACTION.**

Under Utah law a party must first be determined to be a necessary party under Rule 19(a) of the Utah R. Civ. P. before the issue of indispensability is reached under Rule 19(b). Seftel v. Capital City Bank, 767 P. 2d 941 (Utah App. 1989), aff'd sub nom. Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990). Rule 19(a) requires that a person be joined as a party if:

. . . (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (i) as a practical matter impair or impede his ability to protect that interest . . .

Chapter 28 of Title 17 of the Utah Code (the "Statute") and the Fire Civil Service Policies promulgated thereunder regulate

the Fireman's Civil Service System. The Statute was amended in 1992, to provide for the establishment of the Council, the adoption of fire rules and policies, the appointment of an Executive Director ("Executive Director"), the certification of eligible appointees from promotional registers, the procedure in disciplinary matters and their appeals to the District Court. The Fire Civil Service is required by Section 17-28-2.6 to be administered in a manner consistent with merit principles. Pursuant to Section 17-28-6, Utah Code Ann. (1992), the Executive Director, who is appointed by the legislative body, has the exclusive authority to:

- (a) exercise, on behalf of the county, executive or administrative duties regarding the management and administration of the County Fire Civil Service System, . . . including . . . administration of examinations, classification of duties, preparation of hiring registers, . . .
- (b) classify persons successfully passing examinations in the order of their ascertained merit and prepare a list of them; . . .

Additionally, the Executive Director certifies persons as eligible for appointment as firefighters pursuant to Section 17-28-7 and 17-28-10. The process for certification of eligible appointees is set forth in §§17-28-9 and 17-28-8, which provide:

- (1) The fire chief of each county fire department shall notify the . . . executive director of all positions to be filled . . . [executive director] shall . . . certify from . . . register to the head of the fire

department the appropriate number of persons,  
. . . . Utah Code Annotated §17-28-9(1).

After the Executive Director certifies the appropriate number, eligible candidates are then appointed pursuant to Section 17-28-8 as follows:

The fire chief of each fire department of counties subject to the provisions of this chapter shall, subject to the rules of the County Fire Civil Service Council, appoint from the certified . . . register, all persons necessary to fill all firefighter civil service positions in the county fire department.

The involvement of the F.C.S.C. in this promotional process is very limited and is specifically set forth in §§17-28-8 and 17-28-9. Section 17-28-9 provides that appointees shall be placed on probation as prescribed by Council rules. Section 17-28-8 provides that the appointment from the register prepared and certified by the Executive Director may be subject to the rules of the Council. However, any rules adopted by the Council may not be contrary to or supersede the specific powers and duties of the Executive Director. With the exception of the limited powers and duties noted above, the F.C.S.C. is not otherwise empowered to act in connection with hiring or promotional matters, which is reserved to the Executive Director and the Fire Chief.

Mr. Cassidy, in his prayer for relief, asks the lower court and now this Court to promote him to captain with back pay from February of 1992.

Courts generally can make a legally binding adjudication only between the parties actually joined in the action. Hiltsey v. Ryder, 738 P.2d 1024, 1025 n.2 (Utah 1987) [holding that under Rule 19(b), "no judgment could have been so entered for the reason that the corporation was not before the court." (quoting R.M.S. Corp. v. Baldwin, 576 P.2d 881, 893 (Utah 1978))]. Werner-Jacobsen v. Bednarik, 327 Utah Adv. Rep. 45 (Utah App. 1997). In this case, the fire chief was not a party before the lower court and no attempt was made by Mr. Cassidy to join him. To award any relief to Mr. Cassidy, the fire chief must be a party to the action because complete relief cannot be accorded without him. Only the fire chief can promote Mr. Cassidy. The fire chief is the real party in interest and any judgment would be prejudicial without his presence as a party. The F.C.S.C. raised this issue in its answer and before the lower court. Additionally, any party may raise the issue of the failure to join an indispensable party at any time in the proceedings, including the first time on appeal. Seftel, 765 P.2d at 945. Therefore, this appeal should be dismissed.

## POINT II

**THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE LOWER COURT'S RULING UPHOLDING THE DECISION OF THE FIRE CIVIL SERVICE COUNCIL.**

The Salt Lake County F.C.S.C. findings of fact must be upheld if they are supported by "substantial evidence when viewed

in light of the whole record before the court.” Grace Drilling Co. v. Bd. of Review, 776 P.2d 63, 68 (Utah App. 1989).

Before the findings of the F.C.S.C. are subjected to the substantial evidence test, the party challenging the findings “must marshal all of the evidence supporting the findings and show that despite the supporting facts, the . . . findings are not supported by substantial evidence.” Id. at 68.

Mr. Cassidy has failed to marshal the facts that show the lower court’s findings were supported by substantial evidence. He asserts that the facts do not support the findings that he carried his concerns far beyond his right to address a public concern [Finding No. 23, R. 281]; that his comments affected the efficiency of the department [Finding No. 23. R. 282]; and that there was no showing that Mr. Cassidy was denied a promotion to captain based upon his criticism of the wildland fire crew. [Finding No. 29, R. 282.]

Mr. Cassidy failed to marshal the following facts. At the same time he complained of an adverse action, he was promoted by the fire chief to a hazardous materials technician. R. 37, ¶1. Mr. Cassidy was advised by his attorney, Dave Thomas, that the upcoming interview was a sham with people involved who could not be trusted. He advised Mr. Cassidy to wear a concealed tape recorder in order to provide an accurate record. R. 282, ¶26; Transcript at p. 183, l. 7-20. After the tape recording started making noises, the chief told Cassidy he was disloyal to the

administration. Transcript at p. 180, l. 5-25. Cassidy was also told that he was neither supportive of administration nor the mission of the fire department. Transcript at p. 146, l. 1-5; p. 216, l. 23-25. Cassidy had made derogatory comments that the chief could not be trusted. Transcript at p. 108, l. 171-19. Cassidy deliberately went against directives from his supervisor. R. 282, ¶27; Transcript at p. 235, l. 14-25; p. 236, l. 1-16; p. 238, l. 11-15.

The fire chief had conversations with each candidate's captain to see how they viewed the performance of firefighters on promotional registers. Transcript at p. 210, l. 15-19. The chief viewed Cassidy's performance as substandard. Transcript at p. 210, l. 10-14. Captain Collins, Cassidy's supervisor, felt Cassidy continually undermined his authority. Transcript at p. 238, l. 11-12; his orders were countermanded; for example, "Cassidy refused to wear his combat boots at all times except for physical activity." Transcript at p. 235, l. 14-25; p. 236, l. 1-16. If any controversial issue in the fire department arose, Cassidy would jump in. Transcript at p. 238, l. 1-6; Cassidy failed to follow orders at drill tower evaluation. Transcript at p. 238, l. 16-25; p. 239 l. 1-16. Cassidy was considered a marginal firefighter by his captain. His captain was critical of his action at the fire scene; he was the first to take off his air pack and first to leave. Transcript at p. 249, l. 13-21.

Because Cassidy failed to marshal the evidence, this Court should assume the record supports the findings and proceed to review the accuracy of the lower court's conclusions of law. Alta Indus. Ltd. v. Hurst, 846 P.2d 1282 (Utah 1993). The F.C.S.C. found ample evidence to support the fire department's position that no adverse action was taken against Mr. Cassidy, nor was his right of free speech violated.

### POINT III

#### APPELLANT HAS NOT SUFFERED AN ADVERSE EMPLOYMENT ACTION AND THEREFORE HIS FIRST AMENDMENT CLAIM IS WITHOUT MERIT.

In order for Cassidy to prevail on his First Amendment claim, he must demonstrate that he has suffered an adverse retaliatory employment action motivated by the exercise of his right to free speech. Pickering v. Bd of Education, 391 U.S. 563, 20 L.Ed.2d 811 (1969). Numerous cases have limited this broad dictate. The speech must be on a matter of public concern. Connick v. Myers, 461 U.S. 138, 147, 75 L.Ed. 2d 708 (1983). The employee's interest in the speech must outweigh governmental concerns of running an efficient and productive office. Pickering, 391 U.S. at 568. And the complained-of action must be sufficiently adverse to present a potential or actual danger that the speech of employees will be chilled. Rutan v. Republican Party of Illinois, 497 U.S. 62, 73-74, 111 L.Ed.2d 52 (1990). A retaliatory employment action can take the form of a demotion,

diminished responsibility, termination or false accusations. Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994). See also, DeGuisseppie v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995). The adverse retaliatory action must be material or, in other words, the changes in employee employment conditions must be more disruptive than a mere inconvenience or alteration of job responsibility. Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). The change must be sufficiently adverse that the employee is made worse off by it. DeGuisseppie, 68 F.3d at 192. In this case, no retaliatory action was taken by the department. Cassidy was not given a written warning, transferred, demoted, or fired. In fact, he was promoted by the fire chief at that same time he was asserting the fire department failed to give him a hearing in October of 1992.<sup>4</sup>

The facts showed that he filed his grievance in 1990, concerning the proper procedure for dealing with minor violations of the Fire Code. R. 114. Mr. Cassidy exercised his rights to contest the change before the F.C.S.C. without any adverse actions by his employer. R. 281, ¶22. Over two years expired from the time he filed his complaint over the change of procedure in enforcing the Fire Code and this cause of action. Clearly, the lapse of time weakens the argument that a retaliatory action was taken by the department. Cassidy's next complaint came after

---

<sup>4</sup>See R. 277, ¶1.



the announcement of captain promotions in February of 1992, when he was not selected. In the spring of 1992, he alleged the wildland fire crew was illegal. This speech occurred more than six months prior to the present action being filed. Again, no adverse action was taken by the fire department. Contrary to the assertion of retaliation, Cassidy was promoted in October of 1992. In addition, no formal charge was ever made by Mr. Cassidy; only the threat of some type of legal action to be taken. Transcript, p. 197, l. 11-12.

The Court in Dahm, 60 F.3d at 257, citing Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994), stated: "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." None of the above can be shown to have been directed to Cassidy.

Mr. Cassidy has forgotten that his actions of secreting a tape recorder during his interview, coupled with his expressed distrust of the fire chief and his marginal performance, played an important role in the chief's belief that he was not as qualified as those promoted. R. 282, ¶26. Therefore, since Mr. Cassidy did not suffer a material adverse action, he cannot demonstrate a First Amendment violation.

#### POINT IV

##### APPELLANT'S SPEECH WAS NOT OF A PUBLIC CONCERN.

Assuming arguendo, that Mr. Cassidy has suffered from an adverse retaliatory action, this Court then determines if his speech is a matter of public concern. Connick v. Meyers, 461 U.S. 138, 147; 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In order to make the determination of public concern, the court considers the content, form and context of the speech. "In order for a public employee's speech to be of 'public concern,' . . . it is not always enough that 'the subject matter could in [certain] circumstances [be] the topic of a communication to the public that might be of a general interest.' What is actually said on that topic must itself be of public concern." Wren v. Spurlock, 798 F.2d 1313, 1317 n.1 (10th Cir. 1986). See also, Koch v. City of Hutchinson, 847 F.2d 1436, 1445 (10th Cir. 1988). Mr. Cassidy has not sought to inform the public that the fire department was not discharging its governmental responsibilities in the suppression of fires. Nor has he sought to bring to light actual or alleged wrongdoing or breach of public trust on the part of the fire chief or the department. He has merely challenged an ordinary change in procedure and criticized the formation of the wildland fire crew within the department. What is actually said on the topic is the

crux of the public concern, not the topic itself.<sup>5</sup> For instance, in Jurgensen v. Fairfax County, 745 F.2d 868, 888 (4th Cir. 1984), the court held that the release of internal police audit reports to the press, which detailed working conditions grievances but did not expose any illegality, abuse of authority, corruption or waste, was not on matter of public concern.

The fire department's responsibility for fire prevention and suppression is of public concern; however, Cassidy's grievance and subsequent criticism did not attempt to inform the public of an issue of public concern. His speech was motivated by his personal interest and not a desire to inform the public of wrongdoing or inefficiency on the part of the fire department. In sum, considering the content, form and context of appellant's speech, it did not rise to the level of public concern, and therefore is not protected.

#### POINT V

#### APPELLANT'S SPEECH DOES NOT OUTWEIGH THE FIRE DEPARTMENT'S RESPONSIBILITY FOR PROMOTING EFFICIENCY OF PUBLIC SERVICE.

The protections of the Free Speech Clause of the First Amendment extend to all citizens. U.S. Const. amend. I. Though a public employee does not lose his right to free speech by becoming a public employee, not all restraint is unreasonable.

---

<sup>5</sup>The Connick test requires the court to look at the point of the speech. What was the employee's motive? Was the point to further a purely private interest? Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987).

Pickering v. Bd. of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In applying the balancing test of Pickering, "The state has interests as an employer in regulating the speech of its employees . . . a balance between the interest of the [a public employee], as a citizen . . . [when] commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services." Id. at 568 (insert added).

The first prong of the Pickering balancing test is whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." Connick, 461 U.S. at 146 (Appellee's Point IV). The second prong of the Pickering/Connick test focuses on the governmental interest in the effective and efficient fulfillment of its responsibilities to the public through its employees, "because the employer should not be forced to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Connick, 461 U.S. at 150. Like the determination of whether Cassidy's speech was of a public concern, the court looks at the time, place, and the manner of the communication to determine whether appellant's right of free speech outweighs the interests of the fire department.

Applying the time, place and manner test to Cassidy's two instances of speech demonstrates that he enjoyed challenging the

directives of his superiors and he believed that administration was "stupid." Transcript, p. 239, l 21-24; p. 240, l. 1-3.

Cassidy's initial concern was a minor change in how fire code violations would be handled by the fire department. He exercised his right to present a grievance through the chain of command to the F.C.S.C. It was not the fact that he complained through the merit system, but the **manner** in which he complained. Cassidy went to the fire chief's superior, outside of the grievance procedure, in an attempt to have the fire chief's decision influenced. Transcript, p. 216, l. 10-18. In Cassidy's second claim of free speech, he threatened some action against the fire department for creating the wildland crew. Transcript, p. 197, l. 4-8. The place of his speech was the deputy chief's office and his fire station, which resulted in contentious relations with his co-workers. Again, it was the manner and the place of his complaint that does not outweigh the fire department's interest in providing effective fire protection to the public. Also, it should be noted that in regards to the "time" of his complaint, his first complaint occurred more than two years before this action, and his second complaint, more than six months.

The fire department must maintain a work environment conducive to its mission. Those interests are: "(1) the need to maintain discipline or harmony among co-workers; (2) the need for

confidentiality; (3) the need to curtail conduct which impedes the [employees] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." Clark v. Holmes 474 F.2d 928, 931 (7th Cir. 1972).

The government has a great interest in effective and efficient fulfillment of its responsibilities to the public. As a matter of good judgment, the First Amendment does not require a municipality to be run as a round table for employee complaints over internal office affairs. Connick, 461 U.S. at 149. This is particularly true in the case of the fire department. The operation of police and fire departments differs greatly from other public employment groups. H.J. Shewmake v. Bd. Of Fire and Police Comm'rs of the Village of East Alton, 390 N.E.2d 536, 539 (Ill. Ct. App. 5th District, 1979). Some dissension in a fire department is certain to arise. Discipline may be imposed as necessary to avoid adverse effects to the public interests. Klein v. Civil Serv. Comm'n of Cedar Rapids, 152 N.W.2d 195, 200 (Iowa 1967).

Because of the nature of firefighting, and its high stakes, operational efficiency and harmony among co-workers are critical. Where a fireman, motivated by resentment, bitterness, and self-aggrandizement, engages in disruptive conduct intending to undermine the authority of department officers, the speech accompanying such conduct is not constitutionally protected. Bickel v.

Burkhart, 632 F.2d 1251, 1257 (5th Cir. 1990).

Where appellant challenged his captain's directives to such extent that his fellow co-workers take action [Transcript, p. 236]; that they do not want to work with him [Transcript, p. 241, l. 1-3], affects the efficiency of the fire department. The fire chief lacked confidence in the appellant to follow office policy and recognized that Cassidy's behavior had created a problem with his supervisor and co-workers. The decision to promote other candidates was based on the belief they were better candidates. Thus, Mr. Cassidy's right to express himself does not outweigh the fire department's responsibility to perform efficiently for the public.

#### POINT VI

#### APPELLANT WOULD HAVE BEEN DENIED A PROMOTION TO CAPTAIN EVEN IF HIS SPEECH WAS PROTECTED.

Under the last prong of Mt. Healthy, 429 U.S. 274, Mr. Cassidy cannot recover if it can be established by a preponderance of the evidence that he would have been denied promotion even in the absence of the protected conduct. The facts, as determined by the F.C.S.C. and the lower court, amply demonstrate that Cassidy's promotion would have been denied even absent any protected conduct. More specifically, his actions and disruptive nature within the fire station, coupled with his

attempt to set up the fire department with his concealed tape recorder, reflected a disloyal attitude.

Under the analysis of the Supreme Court in Mt. Healthy, and applied by the Fifth Circuit Court of Appeals in Bickel v. Burkhardt, 632 F.2d 1251 (5th Cir. 1980), Mr. Cassidy cannot prevail on his free speech claims. The Bickel court held that the plaintiff fireman's right to recover for an adverse action of nonpromotion was conditioned upon (1) showing that he was not promoted because of the remarks he made to his superiors and (2) that his remarks were constitutionally protected. In addition, (3) if the defendant established by a preponderance of the evidence, that plaintiff would have been denied a promotion even in the absence of the protected conduct, the plaintiff could not recover. Bickel, 632 F.2d at 1255.<sup>6</sup> In this circumstance, the fire department is a paramilitary organization which requires esprit de corps not only between its rank and file but between firefighters and their supervisors. When lives may be at stake in a fire, an esprit de corps is essential to the success of the joint endeavor. "Carping, criticism and abrasive conduct has no place in an organization that depends upon common loyalty, and harmony among coworkers." Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17, 25 (2nd Cir. 1979), citing Pickering, 391 U.S. at 570.

---

<sup>6</sup>It should be noted that in Bickel, the fire chief was a party to the action, unlike the case at hand.



Appellant's criticism of the administration of the fire department, his attempts to undermine his captain, and his attempt to set up the department with a secreted tape recorder clearly demonstrate that Mr. Cassidy was disruptive to the fire department and not qualified for the position of captain.

#### POINT VII

##### THE RECORD DOES NOT SUPPORT APPELLANT'S WHISTLEBLOWER CLAIM.

Mr. Cassidy cites for the first time on appeal that his conduct was protected under Salt Lake County's whistleblower ordinance, Section 2.80.110.A., and cites a portion thereof.

Generally, an issue must be expressly preserved [in the proceedings] below to warrant appellate consideration. State v. Pugmire, 898 P.2d 271, 273 n.4 (Utah App. 1995), [citing State v. Brown, 856 P.2d 358, 360 (Utah App. 1993)].

Failure to preserve the issue in the agency proceedings bars the court's consideration of the issue on appeal. See, Lamb v. B & B Amusements Corp., 869 P.2d 926, 931 (Utah 1993). See also, Rule 24 of the Utah Rules of Appellate Procedure which requires Cassidy's brief to contain a citation to the record showing the issue was preserved in the agency proceedings. Mr. Cassidy first raised the protection of the whistleblower ordinance in his Reply Memorandum of January 8, 1997 (R. 233) as an additional argument that his First Amendment rights were violated.

Subparagraph B. of Salt Lake County Code of Ordinances 2.80.110 does not extend the protection of the ordinance to employees for proper and justified personnel actions that were not taken for retaliatory purposes.

Nowhere in Mr. Cassidy's grievance before the F.C.S.C. or his Complaint in the lower court does he allege a violation of Salt Lake County ordinance 2.80.110.A. Mr. Cassidy's counsel contended then, as now, that the actions by the fire chief violated his First Amendment rights and Utah Code Ann. 17-28-2.6. The Court should not consider facts which are not supported by and cited to the record. See Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 144 (Utah 1978). Failure to cite pages in the record should result in a finding upholding the decision below. Koulis v. Standard Oil Co., 746 P.2d 1182 (Utah App. 1987). In conclusion, Mr. Cassidy's assertion of a violation of the whistleblower ordinance was not raised below and not supported by the facts.

#### CONCLUSION

Based upon the foregoing, appellee, Salt Lake County Fire Civil Service Commission, respectfully requests that the Court affirm the decision of the lower court.

Respectfully submitted this 28<sup>th</sup> day of May,  
1998.

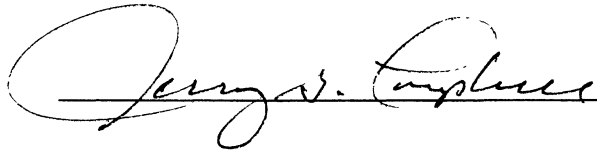
DOUGLAS R. SHORT  
Salt Lake County Attorney

By Jerry S. Campbell  
JERRY S. CAMPBELL  
Deputy County Attorney  
Attorneys for Appellee

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellee Salt Lake County Fire Civil Service Council, postage prepaid, this 28<sup>th</sup> day of May, 1998, to the following:

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



---

rt wp61.wpfiles.casbnf.wpd

|||||||

**Rule 19. Joinder of persons needed for just adjudication.**

(a) **Persons to be joined if feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) **Determination by court whenever joinder not feasible.** If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided;

third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined

(d) **Exception of class actions.** This rule is subject to the provisions of Rule 23.

(Amended effective Jan. 1, 1987.)

benefits as a full-time employee and who is hired to suppress wildland fires in areas outside of inhabited, urban areas. 1997

**17-28-6. County Fire Civil Service executive director — Powers and duties.**

(1) (a) Within each county subject to this chapter, there is created the office of executive director of County Fire Civil Service, who shall be appointed by the county legislative body.

(b) The executive director shall be a person with proven experience in personnel management and shall be accountable to the county legislative body for his performance in office.

(c) The position of executive director shall be a merit position under Title 17, Chapter 33, County Personnel Management Act, and shall be recruited and selected in the same manner as the holders of other career service merit positions, with the concurrence of the County Fire Civil Service Council.

(2) The County Fire Civil Service executive director shall:

(a) exercise, on behalf of the county, executive or administrative duties regarding the management and administration of the County Fire Civil Service System, including the management and administration of examinations, classification of duties, preparation of hiring registers, recommendations regarding civil service regulations and policies, and other duties provided in this chapter;

(b) classify persons successfully passing examinations in the order of their ascertained merit and prepare a list of them;

(c) make certification of classifications when required;

(d) make, publish, and distribute necessary rules relative to examinations, classifications, and certifications as may be proper and desirable in the administration of this chapter;

(e) establish and maintain records of employees in the County Fire Civil Service System setting forth as to each employee class, title, pay, status, and other relevant data;

(f) make necessary and proper reports to the County Fire Civil Service Council, the fire chief, or the county legislative body;

(g) apply and carry out the provisions of this chapter and the policies and rules adopted under it; and

(h) perform other lawful acts that may be necessary or desirable to carry out the purposes of this chapter.

(3) The executive director shall appoint the members of and act as chair to a County Fire Civil Service Advisory Committee which shall assist the executive director in making recommendations to the county legislative body regarding County Fire Civil Service System rules and policies. 1992

**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. 1992

**17-28-8. Eligible appointees to fire department.**

The fire chief of each fire department of counties subject to the provisions of this chapter shall, subject to the rules of the County Fire Civil Service Council, appoint from the certified

county fire civil service register, all persons necessary to fill all firefighter civil service positions in the county fire department. 1992

**17-28-9. Certification of eligible appointees — Probationary period.**

(1) The fire chief of each county fire department shall notify the County Fire Civil Service executive director of all positions to be filled in his department when the need arises. The County Fire Civil Service executive director shall then, as soon as possible, certify from the certified county fire civil service register to the head of the fire department the appropriate number of persons, consistent with adopted rules.

(2) Appointments from the certified register shall be placed on probation under conditions and for a period as prescribed by County Fire Civil Service Council rules. 1997

**17-28-10. Vacancies in civil service positions.**

Any vacancy occurring in any county fire civil service position in any county fire department subject to this chapter shall be filled by an employee of the department having a lesser, equal, or superior position than that in which the vacancy occurs if that employee submits himself to examination for the position, is found qualified, and is certified by the County Fire Civil Service executive director as provided in this chapter. 1997

**17-28-11. Temporary work — Term or period.**

The head of any county fire department coming within the provisions of this act may with the advice and consent of the county legislative body, appoint to any position or place of employment in his fire department, any person for temporary work without making such appointment from the certified civil service list, provided, however, such appointment shall not be longer than one month in the aggregate in the same calendar year. 1993

**17-28-12. Removal from office and disciplinary action — Appeals — Hearing and determination Findings.**

(1) Any person holding a position under this chapter may be removed from office or employment, reduced in rank or grade, or otherwise disciplined by the fire chief for misconduct, incompetency, failure to perform the duties of his employment or to properly observe the rules of the office or department in which he is employed, or for other cause, as set out in County Fire Civil Service Council rules.

(2) Any such disciplinary action is subject to appeal in all cases by the aggrieved party to the County Fire Civil Service Council in the manner established by rule. After an appeal is filed the council shall, as soon as practicable, hear and determine the matter.

(3) If it determines that it is in the best interest of the county, the county legislative body may appoint an administrative law judge, trained and experienced in personnel matters, to initially hear the matter. Upon hearing, the administrative law judge shall make findings of fact and a recommendation to the council. The council may adopt or reject the recommendation of the administrative law judge or request that the judge hold further factual hearings prior to the council's decision.

(4) The council may then affirm, modify, vacate, or set aside the order for disciplinary action.

(5) The aggrieved party shall, upon demand, be granted a public hearing, at which he may appear in person or by counsel or both.

(6) After the hearing, the findings and determination of the County Fire Civil Service Council shall be certified to the head of the county fire department from whose order the appeal is taken. Notice in writing of the determination shall be served upon the person affected.

**2.80.110 Report of wrongdoing—  
Protection from retaliation.**

A. 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 county 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.

B. Any employee who refuses to obey an illegal instruction or who discloses information concerning county 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 with a reasonable, good-faith belief that such refusal is justified or that such disclosures are true and accurate shall be protected from any retaliatory or coercive personnel action. This provision does not extend to any protection for employees from otherwise proper and justified personnel actions taken for disciplinary or budgetary reasons and not for retaliatory purposes. A "personnel action" means any administrative act or omission which adversely affects an employee's grade, personnel evaluation, salary or working conditions, or changes the employee's duties or responsibilities inconsistent with the employee's grade and salary.

C. Employees are encouraged and directed to report to appropriate agencies or officials instances of possible county government mismanagement, corruption, misuse or waste of funds, abuse of authority, substantial and specific danger to public health or safety, or other wrongdoings in violation of the law. If such a report is filed with a county department, official or agency, the identity of the employee filing the report shall be kept confidential unless this right is waived in writing by the employee.

D. Any person may file a complaint charging a violation of this section. The board of county commissioners shall also have authority, with or without a complaint, to initiate an inquiry of any county official or employee suspected of taking retaliatory or coercive personnel action against an employee as prohibited by this section.

E. Any person violating subsections A and B of this section shall be guilty of a Class B misdemeanor and upon conviction shall be punished as set forth in Chapter 1.12 of this code. In addition, the board of county commissioners, in accordance with policies and procedures and under the provisions of Title 17, Chapter 33, Utah Code Annotated (1953) may:

1. Revoke or modify any personnel action found to be taken in violation of this section;

2. Direct the appointing authority to reduce in grade, suspend or remove any county merit system employee found in violation of this section;

3. Recommend to the appointing authority appropriate sanctions concerning any appointed county official or employee who is not a merit system employee and who is found in violation of this section;

4. Report, in the case of an elected official, its findings to the appropriate state or local agency having jurisdiction over the conduct involved;

5. Release the report to the public; or

6. Temporarily suspend any personnel action pending a full inquiry by the board into charges of violation of this section. (1986 Recodification; Ord. 848 § 1, 1983: prior code § 1-5-11)