

2008

Jack Guenon v. Midvale City : Brief of Respondent

Utah Court of Appeals

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H. Craig Hall; Jennifer A. Brown; Chapman & Cutler; Attorney for Respondent.

Ryan B. Hancey; Kesler & Rust; Attorneys for Petitioner.

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IN THE UTAH COURT OF APPEALS

JACK GUENON, an individual,

Petitioner,

vs.

MIDVALE CITY, a Utah municipal
corporation; and MIDVALE CITY
EMPLOYEE APPEALS BOARD;

Respondents.

BRIEF OF RESPONDENT

Appeal No. 20081043

APPEAL FROM THE MIDVALE CITY APPEALS BOARD DECISION,
DATED DECEMBER 10, 2008

Ryan B. Hancey
Kesler & Rust
68 S. Main Street, 2nd Floor
Salt Lake City, UT 84101
Attorneys for Petitioner

H. Craig Hall (#1307)
Jennifer A. Brown (#9514)
Chapman and Cutler LLP
One Utah Center
201 South Main Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 533-0066
Facsimile: (801) 533-9595
Attorneys for Respondent

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Ryan B. Hancey
Kesler & Rust
68 S. Main Street, 2nd Floor
Salt Lake City, UT 84101
Attorneys for Petitioner

H. Craig Hall (#1307)
Jennifer A. Brown (#9514)
Chapman and Cutler LLP
One Utah Center
201 South Main Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 533-0066
Facsimile: (801) 533-9595
Attorneys for Respondent

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STATEMENT OF JURISDICTION

Respondent disputes Petitioner's statement that this Court has jurisdiction pursuant to U.C.A. § 78A-4-103(2)(a) because Petitioner is not seeking review of a final order resulting from formal adjudicative proceeding of a state agency. However, Respondent acknowledges that U.C.A. § 10-3-1106(6)(a) appears to confer jurisdiction upon this Court.

ISSUES PRESENTED FOR REVIEW

Respondent does not take issue with Petitioner's framing of his **First, Third, or Sixth** Issue on appeal and, therefore, those issues are not restated herein. However, with regard to the **Second, Fourth, and Fifth** Issues included in the Brief of Petitioner ("Petitioner's Brief"), Respondent respectfully submits that those issues misrepresent the findings of the Midvale Appeals Board.¹ Accordingly, pursuant to Rule 24(b)(1) of the

¹ Petitioner's Second Issue gives the impression that the Appeals Board found that Petitioner was guilty of theft. However, the Appeals Board indicated that taking, copying and distributing the photos in question to other "may" be an act of theft and misappropriation of property of another. Finding of Fact #10. However, the Appeals Board then clarified that, whether or not such action rose to the level of theft, "an employee does not have the right to copy files from the city's computer and possess them." Finding of Fact #11.

As framed by Petitioner, the Fourth and Fifth Issue each indicate that the reports to the Utah Attorney General's Office and the Bureau of Alcohol Tobacco and Firearms were included as an element of Mr. Guenon's termination when, in fact, the Appeals Board specifically found that they were not: "Appellant was not disciplined because he reported suspected crimes to the Utah Attorney General or suspected violations to the ATF but was disciplined for his failure to report these suspected violations of rules and law to his supervisors and through the appropriate chain of command." Finding of Fact #26.

Utah Rules of Appellate Procedure, Respondent sets forth alternate issues that it believes more accurately reflects the decision from which Petitioner appeals:

Second Issue: Did substantial evidence support the Appeals Board's finding that Petitioner improperly copied and possessed files from a City computer?

Standard of Review: Question of fact. "When reviewing the factual findings made by an administrative agency, an appellate court will generally reverse only if the findings are not supported by substantial evidence." *Drake v. Industrial Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997).

Fourth Issue: Did the Appeals Board correctly determine that Petitioner violated the appropriate chain of command when he failed to report his concerns regarding photos of Midvale City employees to his superiors?

Standard of Review: Question of fact. "When reviewing the factual findings made by an administrative agency, an appellate court will generally reverse only if the findings are not supported by substantial evidence." *Drake v. Industrial Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997).

Fifth Issue: Did the Appeals Board correctly determine that Petitioner violated the appropriate chain of command when he failed to report his concerns regarding the storage of explosives to his superiors?

Standard of Review: Question of fact. "When reviewing the factual findings made by an administrative agency, an appellate court will generally reverse only if the

findings are not supported by substantial evidence.” *Drake v. Industrial Comm’n of Utah*, 939 P.2d 177, 181 (Utah 1997).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

Respondent does not refer to any constitutional provisions, statutes or ordinances not already listed in Petitioner’s Brief.

STATEMENT OF THE CASE

Nature of Case

After being placed on administrative leave pending an investigation into his official conduct, Petitioner was terminated from his position as a police officer of Midvale City on October 28, 2008. Prior to the decision to terminate Petitioner, after due notice, the Midvale City Police Chief conducted a pre-disciplinary hearing that was attended by Petitioner and his legal counsel. Subsequently, Petitioner was provided with a written Disciplinary Order which enumerated the reasons for his termination, namely several separate violations of Midvale City policy and Midvale Police Department policies and procedures. Petitioner appealed his termination to the Midvale City Employee Appeals Board (“Appeals Board”). After a hearing held over the course of two days, hearing testimony of witnesses and accepting exhibits into the record, the Appeals Board affirmed Petitioner’s termination.

Response to Petitioner’s Statement of Facts

Petitioner’s statement of facts is noticeably void of any facts supporting the Appeals Board’s decision. Accordingly, Petitioner has failed in his burden to marshal the

facts that support the Appeals Board's decision, and then demonstrate how such facts did not constitute sufficient evidence to meet the "substantial evidence" standard. *See Mallinckrodt v. Salt Lake County*, 983 P.2d 566 (Utah 1999) (To prove that a decision is not supported by substantial evidence, the appealing party has the obligation to marshal all of the evidence supporting the findings and show that despite the supporting facts and in light of the conflicting evidence, the findings are not supported by substantial evidence).²

Respondent respectfully submits that, in light of Petitioner's failure to meet its marshaling burden, this Court should hold that the findings of fact supporting Midvale City's decision should not be disturbed. *Showalter Motor Co. v. Dep't of Workforce Servs*, 2004 UT App 220 (Utah Ct. App. 2004).

Respondent's Statement of Facts

1. Petitioner was employed as a police officer with the City of Midvale beginning May 5, 2003. R. at 53—transcript p. 139:13-15.

2. In or about July, 2008, Midvale City was informed that Petitioner had taken possession of photographs of other employees of the Midvale Police Department and had delivered copies of those photographs to the Utah Attorney General because he alleged they contained evidence of criminal activity, without having also informed his supervisors of his concerns regarding the photographs. R. at 4-5.

² Petitioner's failure to marshal the facts is more fully discussed in Section II herein.

3. After some preliminary investigation which raised concerns that Petitioner's possession of those photographs had resulted from improper means, on July 30, 2008, Petitioner was placed on administrative leave pending investigation of his conduct as a police officer with Midvale City (the "City"). R. at 219.

4. The evidence showed that Petitioner had either copied the photographs from a City computer or had taken a disk that belonged to another City employee (not City property), which disk contained the photographs. R. at 69-71.

5. In either case, Petitioner admitted that the photographs were not his, but that he took them and stored them in his personal residence. R. at 70—transcript p. 206:15-207:8.

6. Although Petitioner later claimed that he did not look at the photographs when he copied them (and thus was allegedly unaware of their content), he admitted to the Midvale City administrator, Kane Loader, that he had, in fact, reviewed the photographs when he downloaded them. R. at 141.

7. Petitioner wrote "job security" on the disk containing the photos and took the disk to his personal residence. R. at 6—transcript p. 17-20; R. at 70—transcript p. 209:12-16.

8. Petitioner also admitted that his purpose in downloading the photographs was to give "shit" to the individuals portrayed in the photographs. R. at 141; R. at 70—transcript p. 208:1-8.

9. Petitioner had possession of the photographs for at least six months, and as long as a year (R. at 141; R. at 70—transcript p. 206; R. at 180).

10. In spite of possessing the photographs for such a significant period of time, Petitioner failed to make any report to his superiors regarding his alleged concerns about the content of the photographs.

11. In addition, when Petitioner finally did raise his alleged concerns with the photographs by reporting them to the Utah Attorney General's office in July 2008, it was after his relationship with certain of the individuals in the photographs had soured. R. at 181 (indicating that Petitioner had filed an unrelated complaint against certain individuals in the photographs in June 2008).

12. While Petitioner was on administrative leave, the City became aware of other violations of City and Midvale Police Department policies, including the existence of pornographic material on Petitioner's computer (R. at 6-7—transcript p. 24:20-25:14), and Petitioner's failure to properly handle evidence (R. at 5—transcript p. 18:10-20:14).

13. The City conducted an inventory of Petitioner's vehicle upon placing Petitioner on administrative leave. R. at 5—transcript p. 18:10-14.

14. That inventory disclosed forty-four identification cards, including social security cards and a credit card of varying individuals, some of whom were potential suspects and/or victims of criminal activities. *Id.*

15. Midvale Police Department General Order 13-1 provides that property shall be placed in evidence before the end of an officer's shift and that evidence and property should not be stored in an officer's car, desk, locker, or office. R. at 265.

16. The volume of items found in Petitioner's vehicle demonstrated that Petitioner had been accumulating these evidentiary and property items over a long period of time. R. at 5; transcript p. 20:11-14.

17. The City also had Petitioner's computer reviewed to determine whether it contained anything in violation of City and Midvale Police Department policy. R. at 6—transcript p. 24:20-24.

18. The results of the forensic examination of Petitioner's computer revealed the existence of pornographic material. R. at 6; transcript p. 24:24-25:14.

19. Midvale City policy states that “the use of city (police) owned computer resources to intentionally view, download, or send pornography, sexually explicit materials or materials with sexual content is prohibited.” R. at 271.

20. Although Petitioner claimed that any pornographic material was sent to him without his consent and that he therefore did not *intentionally* view the material, the evidence showed that at least three of the pornographic video files (one of a man and woman having sex, and two of individuals performing oral sex) had been opened and viewed again after the files were originally downloaded to Petitioner's computer, as recently as July 27, 2008. R. at 27; transcript pp. 107:17-108:10.

21. The evidence also showed that Petitioner was in possession of his computer at the times that the pornographic files were downloaded to his computer, as well as at the time such files were accessed and viewed again. R. at 27-28—transcript pp. 108-111.

22. At some point after Petitioner was placed on administrative leave, the City also became aware that Petitioner had previously made a report to the Bureau of Alcohol Tobacco and Firearms regarding the storage of explosives at the Midvale City Police Department and that he had failed to report his concerns to his superiors. R. at 246-249.

23. Once the City was notified by ATF of the storage requirements for the explosives, appropriate measures were taken immediately. R. at 8—transcript pp. 29:21-30:7.

24. Due to the Chief's determination that the totality of Petitioner's policy violations (i.e., mishandling of evidence, possession of the property of another, failure to inform his supervisors of alleged criminal activities and safety violations, and the existence and apparent willful viewing of unauthorized pornographic material on his computer), had resulted in a situation in which the Chief had lost all trust and confidence in Petitioner as an officer, the City terminated Petitioner effective October 29, 2008. R. at 8—transcript p. 32:10-16.

25. The bases for Petitioner's termination were provided in the Disciplinary Order dated October 28, 2008. R. at 222-224.

26. Petitioner appealed his termination to the Midvale City Employee Appeals Board (“Appeals Board”).

27. A hearing before the Appeals Board was held on November 20, 2008 and December 1, 2008.

28. On December 10, 2008, the Appeals Board upheld the termination of Petitioner as the result of his violation of City and Police Department policies and procedures. Findings of Fact and Conclusions dated December 10, 2008.³

SUMMARY OF ARGUMENT

The party challenging the findings of the Appeals Board has the duty to marshal the evidence supporting those findings and to then demonstrate how the evidence did not constitute sufficient evidence to meet the “substantial evidence” standard of review. Petitioner did not do so. Accordingly, the findings of the Appeals Board should not be disturbed.

Even if this Court addresses Petitioner’s challenges to the findings of the Appeals Board, in spite of Petitioner’s failure to marshal the evidence, substantial evidence existed in the record to support the findings of the Appeals Board that (1) Petitioner mishandled evidence in violation of clear Midvale Police Department policy; (2) Petitioner improperly took possession of property that did not belong to him; (3)

³ Respondent acknowledges that the Findings of Fact and Conclusions do not appear to be part of the record. However, as that decision is what forms the basis for Petitioner’s appeal, Respondent agrees that it must be considered herein. Furthermore, the copy attached as Addendum B to Petitioner’s Brief appears to be a true and correct copy of such document.

Petitioner intentionally viewed pornographic material on his computer, in violation of clear Midvale Police Department policy; and (4) Petitioner knowingly and intentionally disregarded his obligation to make reports of alleged criminal activity and safety violations to his superiors and did not comply with the proper chain of command for doing so. Petitioner was not terminated as a result of his reports to the Utah Attorney General's office or the Bureau of Alcohol Tobacco and Firearms. Furthermore, Petitioner's reports to those agencies were not made in good faith. As a result, even if Petitioner's termination was related to such reports, Petitioner is not entitled to the protections of the Utah Protection of Employees Act.

Finally, considerable deference is given to a police chief's choice of punishment because he is in a position to balance the competing concerns in pursuing a particular disciplinary action. When a disciplined officer asserts that he received disparate treatment, that officer is required to present a *prima facie* case showing that the chief's actions were contrary to his prior practice, which Petitioner has failed to do. Petitioner has simply not met his burden of demonstrating that the discipline imposed upon him was disproportionate or unwarranted in relation to the totality of the violations of policy he committed. Accordingly, this Court should affirm the findings of the Appeals Board and its conclusion that Petitioner's termination was an appropriate discipline.

ARGUMENT

I. BURDEN OF PROOF AND STANDARD OF REVIEW

As the party challenging the Appeal Board's decision, Petitioner bears the burden of demonstrating either (1) that the facts do not support the charges made by the Chief or (2) that the charges do not warrant the sanction imposed.⁴ *Greer v. Salt Lake City Civil Serv. Comm.*, 2007 UT App 293 (Utah Ct. App. 2007). When reviewing a disciplinary action involving a police officer, this Court is mindful that "[d]iscipline imposed for employee misconduct is within the sound discretion of the Chief. The Chief must have the ability to manage and direct his officers, and is in the best position to know whether their actions merit discipline." *Kelly v. Salt Lake City Civil Serv. Comm.*, 8 P.3d 1048, 1055 (Utah Ct. App. 2000).

Further, with regard to the first prong of Petitioner's burden, an appellate court will generally reverse factual findings only if the findings are not supported by substantial evidence. *Drake v. Industrial Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997). "Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. *First Nat'l Bank of Boston v. County Board of Equalization of Salt Lake County*, 799 P.2d 1163, 1165 (Utah 1990). This Court does not "substitute its judgment as between two reasonably

⁴ Respondent acknowledges that this appeal is taken from a city employee appeals board rather than the Civil Service Commission. Nevertheless, Respondent concurs with Petitioner that the standards and guidelines established for actions before the Civil Service Commission (and appeals therefrom) are applicable here.

conflicting views, even though [it] may have come to a different conclusion had the case come before [it] for de novo review.” *EAGALA, Inc. v. Dep’t of Workforce Servs.*, 157 P.3d 334, 338 (Utah Ct. App. 2007). It is the province of the Appeals Board to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Appeals Board to draw the inferences. *Id.*

Finally, while Petitioner seeks a finding that the discipline imposed by the City is inconsistent with treatment of other officers, this Court is only required to consider the consistency of treatment of other officers after a “prima facie showing by [Petitioner] that the Chief’s actions in [Petitioner’s] case were contrary to his prior practice.” *Kelly*, 8 P.3d 1048 at 1055. Petitioner has failed to meet these burdens and the decision of the Appeals Board should be affirmed.

II. PETITIONER FAILED TO MARSHAL THE EVIDENCE

Petitioner has failed in its burden of marshaling the facts in the record that support the City of Midvale’s decision, and then demonstrating how such facts did not constitute sufficient evidence to meet the “substantial evidence” standard. *See Mallinckrodt v. Salt Lake County*, 983 P.2d 566 (Utah 1999) (To prove that a decision is not supported by substantial evidence, the appealing party has the obligation to marshal all of the evidence supporting the findings and show that despite the supporting facts and in light of the conflicting evidence, the findings are not supported by substantial evidence).

Petitioner is not allowed to just marshal some of the evidence, but is required to “present ‘every scrap of competent evidence . . . which supports the very findings the appellants resists’ and then ‘ferret out a fatal flaw in the evidence.’” *T.H. v. R.C. (In re E.H.)*, 2006 UT 36, ¶ 64, 137 P.3d 809 (Utah 2006). Petitioner is then required to describe how the evidence presented related to and supported the City’s conclusion:

To appropriately marshal evidence, parties must ‘provide a precisely focused summary of all of the evidence supporting the findings they challenge. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the [deciding body] erred in the assessment of that evidence to its findings.’ Indeed, parties challenging factual findings must ‘fully embrace the adversary’s position’ and play ‘devil’s advocate.’

Parduhn v. Bennett, 2005 UT 22, ¶ 30, 112 P.3d 495 (Utah 2005).

Petitioner lists six issues for review in his Brief of Petitioner, four of which he acknowledges request a review of factual findings made by the Midvale City Employee Appeals Board, with a standard of review that indicates an appellate court will not reverse those factual findings if they are supported by substantial evidence in the record. *See* Brief of Petitioner, Issues for Review #1, 2, 3, and 6. Yet, in spite of this acknowledgement, Petitioner makes no attempt whatsoever to marshal the evidence that supported the City’s factual findings, instead engaging in a recitation of only those facts that support Petitioner’s argument that the City erred in making its findings. This is insufficient to meet Petitioner’s marshaling burden--in light of Petitioner’s failure to any attempt to marshal the facts, this Court should hold that the findings of fact supporting

Midvale City's decision should not be disturbed. *Showalter Motor Co. v. Dep't of Workforce Servs*, 2004 UT App 220 (Utah Ct. App. 2004); *Whitear v. Labor Commission*, 973 P.2d 982, 985 (Utah Ct. App. 1998) (“[p]etitioner merely states those facts most favorable to his position and ignores the contrary evidence. This is not adequate. When a party fails to marshal the evidence, we assume the record supports the Commission’s findings.”) (internal citations omitted).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE APPEALS BOARD’S FINDING THAT PETITIONER VIOLATED POLICE DEPARTMENT POLICY IN HANDLING EVIDENCE

Even if this Court chooses to address Petitioner’s challenges to the Appeals Boards’ factual determinations in spite of his marshaling failure, the record contains substantial evidence that Petitioner violated police department policy in handling evidence.

A. Midvale Police Department Policy Requires Property to be Placed in Evidence Before the End of an Officer’s Shift and Prohibits the Storage of Evidence and Property in an Officer’s Car.

Midvale Police Department General Order Number 13-1 contains the following procedures with regard to Evidence and Property Procedures:

1. Property shall be placed in evidence before the end of an officer’s shift.
2. Evidence and property should not be stored in an officer’s car, desk, locker, or office.

R. at 265.

Upon placing Petitioner on administrative leave, the City performed an inventory of the items in Petitioner's vehicle. R. at 5—transcript p. 18:10-14. That inventory produced forty-four identification cards, including social security cards and a credit card. *Id.* Furthermore, upon review, at least fourteen of the items discovered in Petitioner's vehicle were associated with reported cases within the department. R. at 20: transcript p. 77:24-78:2; R. at 280-290. Another item was a stolen credit card that Midvale City was successful in returning to its owner after finding it in Petitioner's vehicle. R. at 19—transcript p. 75:8-77:1.

B. The Sheer Number of Items of Identification Demonstrated the Severity of Petitioner's Violation of Policy.

The volume of the items found in Petitioner's vehicle demonstrated that this was no small oversight and that Petitioner had been violating the policy regarding the handling of evidence over a long period of time. *See* R. at 5; transcript p. 20:11-14 (Chief Mason testified that "what concerned me is that it was happening on an ongoing basis over a long period of time and it appears that these cards had been transferred from car to car as he was assigned to different cars.").

Although Petitioner attempted to introduce evidence before the Appeals Board (and spends a significant amount of time in his brief discussing the testimony of other officers) that other officers did not comply with the policies regarding handling of evidence, Petitioner points to nothing in the record that remotely suggests that any officer had accumulated the volume of identification that was discovered in Petitioner's vehicle.

Furthermore, Petitioner simply cannot excuse his behavior by pointing to the similar behavior of others.⁵ *See Ogden City Corp. v. Harmon*, 116 P.3d 973, 977 (Utah Ct. App. 2005) (“We cannot agree that a violation of department regulations is justifiable merely because it is common and consensual among the participants; such considerations are relevant only in that they may affect the degree of discipline imposed.”). Petitioner’s violation of policy was significant and ongoing and properly formed a sufficient basis for Petitioner’s discipline.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE APPEALS BOARD’S FINDING THAT PETITIONER IMPROPERLY POSSESSED PROPERTY THAT DID NOT BELONG TO HIM

The record contains substantial evidence to support the Appeals Board’s finding that Petitioner improperly took possession of photographs that did not belong to him.

A. Petitioner Misstates the Finding of the Appeals Board.

Contrary to Petitioner’s Second Issue set forth for this appeal, the Appeals Board did not discipline Petitioner for having committed theft or misappropriation. While it is true that the Appeals Board indicated that Petitioner’s “taking, copying and distributing” private vacation photos of another officer “may” be an act of theft and misappropriation of property of another (Finding of Fact #10), the Appeals Board specifically found that, regardless of whether such actions rise to the level of theft, “an employee does not have the right to copy files from the city’s computer and possess them.” Finding of Fact #11.

⁵ In addition, as discussed in Section VII.A. herein, Petitioner presents no evidence to suggest that Chief Mason knew of any other violations of this policy.

The Appeals Board also made findings with regard to Petitioner's intentions when making such copies, specifically noting that Petitioner had taken the photos with the intent of giving "shit" to the individuals depicted in them, *Id.*, and had "admitted that he wrote on the DVD/CD "Job Security". Finding of Fact #12.

The hearing before the Appeals Board was not a criminal trial. The City did not have a duty to prove Petitioner guilty of theft beyond a reasonable doubt. Rather, it was proper for the Appeals Board to determine that Petitioner acted inappropriately by taking the photographs (whether by copying them from a City computer or by taking a disk that belonged to another employee). *See Baird v. Cutler*, 883 F. Supp. 591, 601 (D. Utah 1995) ("a public employer is not required to follow 'procedures that substantially mirror the evidentiary rules used in court.' Rather, public employers may 'rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores.'").

B. The Appeals Board Found that Petitioner Did Not Have the Right to Copy and Possess the Photographs in Question.

While Petitioner attempts to muddy the waters by claiming that it is unclear to whom the photographs actually belonged (i.e., whether they remained the property of the individual who originally viewed them on the laptop that Petitioner was later assigned, or whether they became City property once that individual relinquished the computer without having deleted them), there is no real dispute as to whether the photographs belonged to Petitioner. He admits they did not. Accordingly, the Appeals Board

properly found that Petitioner acted inappropriately when he then took those pictures to his personal residence and stored them there.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE APPEALS BOARD'S DETERMINATION THAT PETITIONER HAD INTENTIONALLY VIEWED PORNOGRAPHIC MATERIAL ON HIS CITY-OWNED COMPUTER

Similarly, the record contains substantial evidence supporting the Appeals Board's finding that Petitioner intentionally viewed pornographic material on his computer.

A. Midvale Police Department Policy Prohibits the Intentional Viewing, Downloading, or Sending of Pornography.

Midvale Police Department General Order Number 17-3 states as follows:

"The use of city (police) owned computer resources to intentionally *view, download, or send* pornography, sexually explicit materials or materials with sexual content is prohibited." (emphasis added) R. at 271.

In spite of this clear policy, however, several pornographic files were found on Petitioner's computer (people engaged in oral sex as well as an image of people having sex--R. at 27: transcript p. 107-108) when it was reviewed after Petitioner was placed on administrative leave. The existence of these files formed part of the basis for Petitioner's discipline.

B. The Pornographic Materials Were Viewed Voluntarily.

Petitioner argues that the City cannot discipline him because he claims he did not *intentionally* view pornographic materials on his City-issued computer. In making this

argument, Petitioner spends a great deal of time discussing how the files could have come to be downloaded onto his computer without his consent, and claiming that the small number of files on his computer should be taken as an indication that Petitioner did not intentionally view the pornographic files. Neither of these arguments defeats the substantial evidence that supports the finding that Petitioner violated the established policy.

The City did (and does) in fact acknowledge that it is possible for someone to send a pornographic image or file to Petitioner without Petitioner's consent. However, even if the pornographic images were originally sent to Petitioner against his will, Petitioner never addresses the fact that pornographic files originally downloaded on October 18, 2007 and January 29, 2008 were maintained on the computer and were in fact accessed again and viewed on more than one occasion, as late as July 27, 2008. R. at 27—transcript p. 107:13-108:4-10.⁶ The testimony also established that the computer containing the pornographic materials was in Petitioner's possession at all times in question. R. at 27-28—transcript pp. 106:12-111:6. This completely uncontroverted testimony is more than sufficient to establish that Petitioner had intentionally *viewed*

⁶ Craig Hall: "When were they last viewed?" Sgt. Hodgkinson: "They were last viewed on July 27, 2008." Mr. Hall: "All three of them together or one or two or all three?" Sgt. Hodgkinson: "All three of them were viewed on that day."

prohibited pornographic material, regardless of how it may have gotten onto his computer in the first place.⁷

VI. PETITIONER WAS NOT TERMINATED BECAUSE OF HIS REPORTS TO THE ATTORNEY GENERAL AND ATF

Although Petitioner repeatedly claims that he was terminated in violation of the Utah Protection of Employees Act, he does so in clear disregard of the actual decision that he is appealing.

A. The Appeals Board Specifically Held that Petitioner Was Not Terminated Because of His Reports to The Utah Attorney General and ATF.

While it is true that Petitioner's reports to the Utah Attorney General and ATF were discussed during the disciplinary process, it is not true that Petitioner was terminated as a result of making those reports. Petitioner claims to be appealing the decision of the Appeals Board, but fails to acknowledge that the Appeals Board specifically held:

"That the Appellant was not disciplined because he reported suspected crimes to the Utah Attorney General or suspected violations to the ATF but was disciplined for his

⁷ Petitioner's own statements also belie any claim that he wasn't the one who intentionally accessed the files on his laptop as recently as July 27, 2008. *See* R. at 259, a transcript of Petitioner's interview with Bob Shober conducted during the investigation while Petitioner was on administrative leave: Bob Shober: Okay. And What was in the that car? Your personal belongings?" Petitioner: "I had my personal belongings; um there was an AR 15 in there." Bob Shober: "Was your laptop in the?" Petitioner: "No, I had my laptop, I gave that to them cause I take that out cause I don't like leaving sittin. [sic]" Bob Shober: "So, other officers don't have access to your laptop?" Petitioner: "Uh-uh."

failure to report these suspected violation of rules and law to his supervisors and through the appropriate chain of command.” Finding of Fact #26.

B. Petitioner Was Disciplined, In Part, for Not Reporting His Concerns to His Superiors.

Petitioner’s discipline *was*, at least in part, a result of failing to make appropriate reports about his concerns (in addition to his reports to outside agencies) through his chain of command. This distinction is critical. Midvale City is an agency tasked with enforcing the law. Yet, Petitioner did not feel it necessary or appropriate to notify his superiors of alleged criminal activity of its officers.⁸ Midvale also has a compelling need to ensure its officers adhere to their chain of command. “In an organization such as a police department, discipline and respect for the chain of command are critical to accomplishing order and public safety.” *Williams v. Seniff*, 342 F.3d 774 (7th Cir. 2003), *citing Dill v. City of Edmond*, 155 F.3d 1193, 1203 (10th Cir. 1998). “The need for adhering to a chain of command within a police department must not be minimized, for ‘the Chief’s interest in running his department efficiently and in maintaining order and discipline among the ranks’ is crucial in law enforcement.” *Malec v. Klatzco*, 101 F. Supp. 2d 1066 (N.D. Ill. 2000). In fact, because the adherence to the chain of command is so universally known and accepted in the context of a police department, numerous courts have held that officers who violate the chain of command are properly disciplined

⁸ It should be noted that both the Utah Attorney General’s office and POST determined that the pictures did not warrant criminal or disciplinary action. R. at 6—transcript p. 22; R. at 180-182.

(including termination) for doing so, even in light of considerations of First Amendment rights to free speech. *See Mills v. City of Evansville*, 2005 U.S. Dist. LEXIS 17092 (S.D. Ind. 2005) (“A police department ‘is a paramilitary organization built on relationships of trust and loyalty, and as such the judgment of police officials regarding the disruptive nature of an officer’s speech is entitled to considerable-although by no means complete-deference.”); *Tyler v. City of Mountain Home*, 72 F.3d 568 (8th Cir. 1995) (“It has been recognized that a police department has a more significant interest than the typical government employer in regulating the speech activities in order ‘to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence. Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.’”) (internal citations omitted); *Davis v. City of Elk City*, 1992 U.S. App. LEXIS 243 (10th Cir. 1992) (upholding discharge of officer for “going around the chain of command,” bearing “in mind the heightened interest of a police department in maintaining discipline and harmony among employees.”); *Wagner v. City of Holyoke*, 404 F.3d 504 (1st Cir. 2005) (upholding termination for breaches of the police department’s chain of command).

Petitioner claims to have been concerned that a crime had been committed, evidenced by photographs in his possession, yet he failed to notify anyone within his department, whose very jobs are to investigate crime. Similarly, Petitioner claims to have

been concerned about the safety of his fellow officers and individuals in the surrounding area due the improper storage of explosives, yet he failed to bring those concerns to the attention of his superiors, who could have addressed the situation immediately, and instead allowed the alleged dangerous situation to remain unaddressed while awaiting ATF action. Petitioner knowingly and repeatedly chose to ignore his chain of command. This attitude toward a universal standard of behavior, considered crucial in paramilitary organizations such as Midvale City Police Department, rightfully formed part of the cumulative basis for Petitioner's termination. *See Baird v. Cutler*, 883 F. Supp 591 at 606 ("Discipline for failure to abide by reasonable established procedures . . . even when it occurs in connection with 'whistleblowing,' does not constitute a violation of the "Whistleblower Act").

C. The Utah Protection of Employees Act Only Applies to Individuals Who Make Reports in Good Faith.

Furthermore, even if Petitioner's reports to ATF and the Utah Attorney General's office played any part in Petitioner's termination (which they did not), Petitioner is not protected by the Act because his reports were not made in good faith. In this regard, Petitioner errs by omission in his discussion of the protections he alleges he is afforded. Petitioner repeatedly refers to the protections afforded to individuals who reports "a violation of law, rule, or regulation." U.C.A. § 67-21-3(1)(a). However, Petitioner studiously avoids discussing the requirement that the report must be made in good faith. The full text of the provision upon which Petitioner relies states as follows:

(1) (a) An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates *in good faith* the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation adopted under the law of this state, a political subdivision of this state, or any recognized entity of the United States.

(emphasis added).

Although the Utah Protection of Employees Act (the “Act”) doesn’t define “good faith,” other jurisdictions with a good faith requirement in their equivalent of a “whistleblower’s” act, have held that in order to be afforded protection, it must be shown that the “whistleblowing was done in good faith on a concern regarding the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain.” *Yonker v. Centers for Long Term Care of Gardner, Inc.*, 2006 U.S. Dist. LEXIS 8251, *9 (D. Kan. 2006); *Crandon v. State of Kansas*, 897 P.2d 92 (Kan. 1995) (whistle-blowing claim requires that whistle-blowing was made in good faith and not for a corrupt or otherwise specious motive). Black’s Law Dictionary recognizes that “good faith is an intangible and abstract quality with no technical meaning or statutory definition,” but concludes that “in common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.” Black’s Law Dictionary, Sixth Edition.

A careful review of Petitioner’s actions demonstrate that his actions were not taken in good faith.

- Petitioner possessed the photographs for more than six months before he became “concerned” about possible criminal violations. Finding of Fact #11.
- Petitioner claimed that his purpose of making a copy of the pictures was to give “shit” to those individuals in the photos. R. at 71; transcript p. 210:17-18.
- Petitioner claimed to not have viewed all of the photos when he copied them, yet managed to copy all of them onto a disk. Furthermore, Petitioner admitted to the City Administrator that he had indeed viewed the photos when he copied them. R. at 141.
- Petitioner admitted that he wrote “job security” on the disk when he copied the pictures. Finding of Fact #12; R. at 6; transcript p. 17-20; R. at 70; transcript p. 209:12-16.
- Petitioner did not report the photographs to the Utah Attorney General until his relationship with individuals portrayed in the photographs had deteriorated. R. at 141.
- Petitioner claims that his reports to ATF were due to the concern for the safety of Midvale residents, yet even though the explosives were obtained in October 2007 (R. at 183), Petitioner did not make a report to ATF until December 2007 (R. at 186).
- In addition, Petitioner’s failure to report his concerns to his supervisors allowed the alleged dangerous condition to continue while Petitioner awaited action by ATF.

Taken in context, it becomes abundantly clear that Petitioner did not make his reports out of a good faith concern over perceived criminal actions or safety violations. Instead, Petitioner intended all along to utilize the photographs to harass his co-workers, including his superior officers. He simply, eventually, decided that reporting them to the Attorney General’s office was a good method for doing so. Accordingly, even if Petitioner’s reports were the basis for his discipline, Petitioner is not entitled to protection

under the Utah Protection of Employees Act because his actions were not taken in good faith.

VII. PETITIONER'S DISCIPLINE WAS NOT DISPROPORTIONATE

Finally, in light of his numerous policy violations, Petitioner cannot demonstrate that the discipline imposed upon him “exceeded the bounds of reasonableness and rationality.” *Greer v. Salt Lake City Civil Serv. Comm.*, 2007 UT App 293 (Utah Ct. App. 2007) (or, in other words, the second prong of Petitioner’s burden—that of demonstrating that the charges do not warrant the sanction that was imposed).

A. Petitioner Failed to Demonstrate that Other Similarly Situated Individuals Received Disparate Treatment.

This Court is only required to consider the consistency of treatment of other officers after a “prima facie showing by [Petitioner] that the Chief’s actions in [Petitioner’s] case were contrary to his prior practice.” *Kelly*, 8 P.3d 1048 at 1055. Here, although Petitioner argues that he should not have been disciplined for mishandling evidence because other officers did the same, Petitioner has failed to demonstrate that Chief Mason was aware of this failure and treated those officers differently with respect to discipline. This is because the record clearly establishes that Chief Mason was *not* aware of any other officers failing to comply with department policy regarding evidence.⁹

⁹ See, for example, R. at 6: transcript p. 22:2-7 [Craig Hall: “Do you know if it’s a common practice in the department that I.D.’s that have been taken or credit cards or whatever are just left hanging around the department?” Chief Mason: “I’m not aware of that and if, if there’s other officers doing the same thing then they’re in violation of the policy as well.”]; R. at 9: transcript p. 36:11-14 [Ryan Hancey: “Is that a policy you’ve enforced in the past?” Chief Mason: “I haven’t been aware of any other violations in the

In addition, Petitioner fails to acknowledge that it was not a single, isolated incident of mishandling evidence that resulted in his disciplinary action, but rather an indication, based upon the volume and age of the items of identification, that Petitioner had been disregarding the policies with regarding to handling evidence and property for a significant period of time. *See* R. at 5: transcript p. 20:11-14 (Chief Mason: “What concerned me is that it was happening on an ongoing basis over a long period of time and it appears that these cards had been transferred from car to car as he was assigned different cars.”).

B. No One Individual Violation Resulted in Petitioner’s Termination.

Furthermore, Petitioner points to no other officer who was disciplined for a combination of (1) mishandling of evidence; (2) viewing unauthorized pornographic material on his City-owned computer; (3) improperly taking possession of the property of another; and (4) disregard of the chain of command. Accordingly, Petitioner cannot demonstrate that Chief Mason acted contrary to his prior practice. Meaningful disparate treatment can only be found when similar factual circumstances led to a different result without explanation. *Kelly v. Salt Lake City Civil Service Comm.*, 8 P.3d 1048, 1055

past of it.”; R. at 10: transcript p. 37:14-18 [Ryan Hancey: “Do you have any personal knowledge whether or not other officers within the department adhere to the evidence policy as you mentioned earlier?” Chief Mason: “I’m not aware of any other violations.”]; R. at 10: transcript p. 38:12-20 [Ryan Hancey: “Are you aware of whether or not officers instead of booking identification cards put them in the shredder?” Chief Mason: “I’m not aware of that, no.” Ryan Hancey: “Are you aware of whether or not other officers in the department when they get identification cards leave them laying around in various rooms in the police station?” Chief Mason: “I’m not.”].

(Utah Ct. App. 2000). Here, Petitioner has simply failed to demonstrate that the Chief treated him differently than other similarly-situated officers.

C. The Totality of the Circumstances Warranted the Discipline that was Imposed.

In weighing the punishment against the offense, this Court should give deference to the Midvale Police Chief's choice of punishment because, as the head of the police department, he is in a position to balance the competing concerns in pursuing a particular disciplinary action. *Ogden City Corp. v. Harmon*, 116 P.3d 973, 977 (Utah Ct. App. 2005). Given the degree of deference afforded to the chief's determination, this Court should reverse the chief's choice of discipline as unduly excessive only when the punishment is "clearly disproportionate" to the offense. *Id.*

While it certainly arguable that termination may not be warranted by just one of Petitioner's above-enumerated violations of department and/or city policy, the combined weight of the violations cast significant doubt over Petitioner's ability or willingness to abide by the rules and framework within which he was expected to work. Accordingly, Chief Mason concluded that termination was the necessary consequence: "I've got to be able to trust that these officers are treating the public the way the public should be treated, they are treating each other the way each other should be treated and that they are following chain of command and treating their superiors the way that they should be treated and I didn't feel like I could rely on that with him any longer." R. at 9: transcript p. 33:20-34:1. When determining whether Petitioner's discipline was proportional, it is

proper to look at the totality of the violations. *See Greer v. Salt Lake City Civil Serv. Comm.*, 2007 UT App 293 (Utah Ct. App. 2007). Chief Mason testified that, due to the totality of Petitioner's violations of department and city policies, he has "simply lost all trust and confidence in him as an officer."

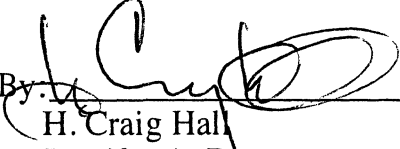
Termination was the proper, and proportionate, discipline in light of the number of violations of policy that had been substantiated.

CONCLUSION

For the foregoing reasons, Midvale City respectfully requests that this Court affirm the decision of the Midvale City Employee Appeals Board, finding that the termination of Petitioner was supported by substantial evidence and that such discipline was proportional to the aggregate nature of Petitioner's actions and violations of both Midvale City and Midvale Police Department policy.

Respectfully submitted this 17th day of August, 2009

CHAPMAN AND CUTLER LLP

By: 
H. Craig Hall
Jennifer A. Brown
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was served on the 17th day of August, 2009, by hand delivery, on the following:

Ryan B. Hancey
Kesler & Rust
68 S. Main Street, 2nd Floor
Salt Lake City, UT 84101

Madan C. Elkhart