

2009

John Daniel Thorpe v. Washington City : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

JOHN DANIEL THORPE, A/K/A
DANNY THORPE,

Plaintiff/Appellant,

vs.

WASHINGTON CITY, a municipal
corporation; and UNKNOWN PERSONS
1-10 individually,

Defendants/Appellees.

REPLY BRIEF OF APPELLANT
JOHN DANIEL THORPE, A/K/A
DANNY THORPE

Appellate Case No. 20090798

Appeal from Final Judgment and Order of the Fifth Judicial District Court in
and for Washington County, State of Utah.

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UTAH APPELLATE COURTS

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ARGUMENT

1. The limited case law addressing the interplay of the Governmental Immunity Act of Utah (“UGIA”) and the Utah Protection of Public Employees Act (“WBA”) supports Appellant’s position.
 - A. The cases and authority cited by Appellant have been properly interpreted and applied, and favor Appellant’s position.

Appellee insists that Appellant has “erred” in relying upon *Hall v. Utah State Depart. of Corrections*, 2001 UT 34, 24 P.3d 958, *Fannen v. Lehi City*, 2005 UT App 301U, No. 20040723-CA (Utah Cr. App. June 20, 2009) (mem.) and *Youren v. Tintic School Dist.* 343 F.3d 1296 (10th Cir., 2003) in support of his position that the filing of a notice of claim that includes a WBA cause of action within the 180-day statutory period is sufficient to satisfy the requirement in Utah Code Ann. § 67-21-4(2). In fact, Appellant’s citation to, and analysis of these cases is appropriate and accurate.

Concerning *Hall*, Appellant noted: “The relevance of the *Hall* decision is that even though the UGIA does not protect governmental entities from WBA suits, plaintiffs must still strictly comply with UGIA’s notice of claim requirements regardless of the claim asserted. In the instant case, Appellant did comply with the notice of claim requirements.” [Appellant’s Brief, p. 16]. A discussion of *Hall* is instructive only because it sets the general rule that a cause of action for which governmental immunity has been waived must still be disclosed through the timely filing of a notice of claim per Utah Code Ann. § 63-30d-401 through 403. Appellant complied with this rule.

Appellee argues that the *Fannen* decision contradicts Appellant’s position. This is incorrect. Close attention must be paid to the *Fannen* court’s language. Fannen’s argument was that the WBA’s 180-day statutory limitation is superseded by the language in the UGIA

that provides that “[a] claim against a governmental entity” is barred “unless notice of claim is filed ... within one year after the claim arises.” Utah Code Ann. § 63-30d-402.

Stated in the alternative, Fannen asserted that the UGIA’s one-year notice of claim requirement rendered the WBA’s (shorter) 180-day period filing requirement moot.

Unlike the Appellant in the instant case, Fannen had not filed a *notice of claim* within the 180-day WBA filing period.

The *Fannen* court ruled:

While the WBA creates a cause of action that must be brought within 180 days after the alleged occurrence, the [U]GIA “does not itself serve as the basis for liability or any cause of action.” *Hall v. Department of Corr.*, 2001 UT 34, ¶ 16, 24 P.3d 958. The [U]GIA merely gives a deadline for which notice must be given that there is a claim against the State; it does not prohibit the legislature from imposing a shorter statutory filing date on a cause of action. *Fannen v. Lehi City*, at 301.

After clarifying this rule, the court then pronounced that: “Because Fannen failed to file the *Notice* before the statutory period designated in the WBA, the district court properly dismissed his Whistle Blower claim (emphasis added).” *Id.*

According to the court, it was Fannen’s failure to file the **notice of claim** (*not* the complaint) before the 180-day statutory period mandated by the WBA that justified the dismissal of Fannen’s WBA claim.

Appellee’s position would be defensible if the *Fannen* court had found that the dismissal of the WBA claim was proper because Fannen failed to file a *complaint* within the 180-day period. Instead, the court’s clear implication is that the filing of the notice of claim within the 180-day period would have preserved Fannen’s WBA claim. Appellant did file a notice of claim within the WBA’s 180-day statutory period.

Appellant's purpose in citing to *Youren* was to demonstrate that (at least in one other instance) the issue of whether the filing of a notice of claim within the 180-day WBA period sufficiently preserves a party's WBA claim has been addressed; and the federal district court judge addressing that issue found that the plaintiff in that case met the 180-day statute of limitations for bringing claims under the WBA by filing a timely notice of claim, even though the complaint was not filed until after the 180-day deadline. While the *Youren* decision is not binding or necessarily dispositive, it appears to be the only case on record that specifically mentions this narrow issue—and the brief mention is favorable to Appellant's position.

The fact is that Appellee cannot point to any decision by any court that supports its position that the filing of a notice of claim within 180-days that includes a WBA cause of action is *insufficient* to preserve that cause of action, even when the complaint is filed after 180 days. Appellant has, at least, provided judicial authority for his position.

B. Appellant has clearly explained that the adverse action taken by Appellee was the denial of his reinstatement at the Appeals Board level after he had provided testimony against Mike Shaw at another hearing.

Appellant clearly explained in his Brief that his WBA claim was principally based on the adverse action taken by Appellee when his reinstatement by the Appeals Board was denied. Appellant alleges that this decision was a result of his prior testimony against Mike Shaw at another employee's review hearing. This allegation was made in Appellant's Verified Complaint.

Appellee insists on repeating the stale argument that Appellant admitted in his deposition that he was *not* terminated for “blowing the whistle” on Mike Shaw. In fact, Appellant claims that the adverse action was the denial of his reinstatement and benefits by the Appeals Board because Appellant had testified in a separate earlier hearing and had alleged that Mr. Shaw had wasted public funds, property and manpower. [R. 18-19].

Appellee suggests that Appellant “caused” the trial court to misunderstand the allegation in Appellant’s Verified Complaint. The facts contained in paragraphs 152-57 of the Complaint are as follows:

152. During the course of Plaintiff’s employment, Plaintiff became aware that Defendant Unknown Persons 1-10 were wasting public funds, property, or manpower belonging to Defendant Washington City.
153. Plaintiff notified Defendant Washington City, specifically at Ritch Johnson’s administrative hearing before the Appeals Board, that Defendant Unknown Persons 1-10 (including Mike Shaw) were wasting public funds, property or manpower.
154. During the week of October 13, 2004, Plaintiff, along with other employees of Defendant Washington City, were instructed by Rodger Carter, City Manager of Washington City, that it would be better if the employees did not attend or testify at Mr. Rich Johnson’s appeal hearing.
155. On November 18, 2004 Plaintiff appeared before the Appeals Board and testified during Mr. Johnson’s appeal hearing that Defendant Unknown Persons 1-10, including Mike Shaw, had wasted public funds, property, or manpower belonging to Defendant Washington City and had used them for personal gain.
156. Following Plaintiff’s testimony at Mr. Johnson’s hearing before the Appeals Board, Plaintiff’s own appeal was denied.
157. Defendants’ decision regarding Plaintiff’s appeal was made in retaliation for Plaintiff’s prior testimony at Mr. Johnson’s appeal hearing regarding Defendants waste of public funds, property, or manpower.

In Appellant’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment [R. 239-263], Appellant did indicate that he was “terminated in connection with his reports that Mike Shaw had wasted public funds, property or manpower belonging to

Defendant Washington City and had used them for personal gain.” [R. 246]. While this claim mentions the “termination” that resulted from Appellant’s reporting of Mike Shaw’s actions, this is just a broad reference to fact that the ratification of the termination by the Appeals Board was in retaliation for Appellant’s reporting at Mr. Johnson’s hearing.

Appellee argues that Appellant’s mere reference to paragraphs 152-57 of the original Verified Complaint was insufficient to avoid summary judgment. However, in *Pentecost v. Harward*, 699 P.2d 696 (Utah, 1985), the court held that a verified complaint, sworn to upon personal knowledge was sufficient to controvert an affidavit filed by a defendant in support of a motion for summary judgment. In *Pentecost*, a tenant sued the manager and the unknown owner(s) of the apartment in which she lived for forcibly evicting her and her two children and for retaining her furniture and personal possessions, all without resort to judicial process. The defendant property manager, filed a verified answer to the tenant’s verified complaint and later moved for summary judgment, supporting his motion with an affidavit. The tenant/plaintiff filed no counter-affidavit, relying instead on her complaint, which contradicted both defendants answer and the affidavit accompanying his motion for summary judgment. The district court granted the defendant’s motion on the ground that no counter-affidavit had been filed. The Utah Supreme Court, however, held that the tenant/plaintiff’s verified complaint, which controverted the facts set forth in the defendant’s affidavit, created a material issue of fact for resolution at trial. *Id.* at 698-99.

In Appellant’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, Appellant refers directly to paragraphs 152-57 of the Verified Complaint. Those paragraphs unequivocally affirm that Appellant suffered an adverse employment action at

the Appeals Board level because of his prior testimony against Mike Shaw at Mr. Johnson's own Appeals Board hearing. [R. 246]

The affirmation in Appellant's Memorandum in Opposition to Defendant's Motion for Summary Judgment that he was "terminated in connection with" reporting on Mike Shaw is admittedly a bit vague. However, this affirmation is followed by citation to paragraphs 152-57, which specifically controvert Appellee's argument that no adverse employment action had been taken because of Appellant's report of Mike Shaw's abuses. The district court erred in granting summary judgment in favor of Appellee when Appellant's Verified Complaint created direct issues of material fact.

2. The Appeals Board's scope of review and authority to provide remedies is limited.

A. The *Hatton-Ward* decision clearly militates in favor of Appellant's position.

Appellee characterizes the second issue on appeal as follows: "The district court lacked jurisdiction to review the Board's decision or the conduct of the hearing." This specific framing of the issue, however, is an over-simplification of what Appellant has actually argued in his brief-in-chief.

Appellant's position is that a terminated municipal employee *may* challenge termination by filing for review with the designated appeal board and then *may* appeal a board's decision to the Court of Appeals for review. If the terminated employee opts for direct appellate review from an appeals board of the decision, then this Court would have jurisdiction to review such an appeal. *However*, if such a review and/or appeal is *not* taken, the aggrieved employee may still have his or her general statutory, common law, or contract

claims heard by a district court of general jurisdiction.

Appellant's position also rests on the argument that Utah Code Ann. § 10-3-1105 and 1106 (hereinafter, sometimes referred to as "section 1105" and "section 1106") provide a specific and *limited* review procedure and a limited panoply of remedies for aggrieved employees. In other words, the Legislature did not intend appeals boards established under section 1106 to serve as surrogate district courts or to limit a municipal employee's rights to file certain claims with a district court.

In his brief-in-chief, Appellant cited extensively to *Hatton-Ward v. Salt Lake City Corporation*, 828 P.2d 1071 (Utah App. 1992) because that case is the closest analogue to the present case. In *Hatton-Ward*, a former police officer brought a Whistleblower Act claim pursuant to Utah Code Ann. § 67-21-1 against Salt Lake City Corporation ("City") and the Chief of Police. Hatton-Ward did not seek reinstatement of his position, but instead sought damages under the Whistleblower Act. *Id.* at 1072.

The district court dismissed the suit because Hatton-Ward failed to "exhaust his administrative remedies" before the Civil Service Commission ("Commission") as required by Utah Code Ann. § 10-3-1012.

Utah Code Ann. § 10-3-1012(2) provides in relevant part:

Any person suspended or discharged may, within five days from the issuance by the head of the department of the order of suspension or discharge, appeal to the civil service commission, which shall fully hear and determine the matter.

Once a matter is heard by the Commission and a final decision is entered, Utah Code Ann. § 10-3-1012.5 provides that the civil service employee may appeal the decision to this Court:

Any final action or order of the commission may be appealed to the Court of Appeals for review. The notice of appeal must be filed within 30 days of the issuance of the final action or order of the commission. The review by Court of Appeals shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority.

The City argued (and the district court agreed) that Hatton-Ward did not comply with the administrative procedure set forth in Utah Code Ann. § 10-3-1012, and that therefore, the district court was precluded from hearing his WBA claim.

In reversing the dismissal, this Court found that Hatton-Ward was not required to exhaust his administrative remedies by bringing the matter before the Commission prior to filing his claim in district court.

This Court based its decision on the following factors:

1. The language in Utah Code Ann. § 10-3-1012 does not specifically require an employee to first bring a WBA claim to the Commission before filing an action in state court. Such an implied requirement would make it difficult, if not impossible, to bring a claim in state court within the required 180 days of the alleged violation.
2. The plain language of the WBA vests jurisdiction in the state court (not the Commission) to hear claims based on that Act.
3. The language of Utah Code Ann. § 10-3-1012 allows the Commission and Court of Appeals to consider *only* the issue of whether the discharge should stand and related questions of back pay and seniority rights. Remedies such as attorney's fees, civil damages and civil fines are not mentioned and the Commission is not empowered to provide

any remedy other than reinstatement

4. The exhaustion of administrative remedies is not required when the remedy sought is one that the administrative body is not empowered to provide. *Hatton-Ward*, 828 P.2d at 1073-74.

In the instant case, Appellant readily acknowledges that the municipal employee provisions (found in Utah Code Ann. § 10-3-1105 and Utah Code Ann. § 10-3-1106) govern rather than the Civil Service Statute at issue in *Hatton-Ward*. Appellant also realizes that unlike Hatton-Ward (who bypassed the entire administrative process), Appellant did timely file a petition to appeal his termination to the Appeals Board and was allowed to present his arguments concerning the termination at the April 6, 2005 hearing. Finally, Appellant has multiple claims (including a WBA claim), whereas Hatton-Ward appears to have filed only a WBA claim.

Notwithstanding the factual differences between the present case and *Hatton-Ward*, the analysis of the Civil Service Statute and the rationale underpinning the court's reversal of the district court in *Hatton-Ward* are fully applicable to the present case on appeal.

Appellee readily admits that Utah Code Ann. § 10-3-1012.5 is “nearly identical to” Utah Code Ann § 10-3-1106, which is at issue in the present case. [Brief for Appellee Washington City, p. 36]. Both sections require the filing of an appeal to this Court within 30 days of the issuance of the final action or order. Both sections indicate that this Court shall conduct a review of the “record” created at the administrative level to determine if the Commission (or appeal board as the case may be), “abused its discretion or exceeded its authority.”

While it is true that Utah Code Ann. § 10-3-1105 provides that a municipal employee may be subject to a wider variety of negative employment actions (e.g. discharge, suspension over two days without pay, or involuntary transfer to a position with less remuneration as provided by section 1106) than a civil service employee (Utah Code Ann. § 10-3-1012 mentions only suspension and removal), both sections 1105 and 1012 specifically refer to a procedure whereby the employee may seek review of an adverse employment decision by an appellate body (the Commission in the case of section 1012 and an appeal board in the case of section 1105). As already noted, both of these review processes ultimately allow the aggrieved employee to seek review of any decision rendered by the appeal board or Commission by this Court.

Due to the close proximity of the Civil Service Statute to the municipal employee statute—both as to location in Title 10, subsection 3 of the Utah Code, and as to structure and language—it is reasonable and appropriate to apply the *Hatton-Ward* analysis of the Civil Service Statute to the municipal employee statute at issue in this appeal.

Each of the four major points relied upon by this Court in *Hatton-Ward* are equally applicable in this case:

1. Other than the claim for reinstatement and back-wages, the language in section 1106 does not specifically require Appellant to first bring any of his other claims (including his WBA claim) to the Appeals Board before filing an action in state court. Even though Appellant did initially file a petition for review of his termination with the Appeals Board, nothing in section 1106 mandates that he must bring other potential claims or continue the review

process by appealing the Appeals Board decision to the Utah Court of Appeal.

2. The plain language of the WBA vests jurisdiction in the state court (not the board of appeals) to hear claims based on that Act. Similarly, the UGIA provides that “[t]he district courts have exclusive, original jurisdiction over any action brought under this chapter.” Utah Code Ann. § 63-30d-501.

Accordingly, the district court has specific statutory jurisdiction over each of Appellant’s claims (other than a claim for reinstatement and back pay).

3. The language of section 1106 allows the board of appeals and Court of Appeals to consider *only* the issue of whether the discharge should stand and related questions of back pay and seniority rights. Remedies such as attorney’s fees, civil damages and civil fines are not mentioned and the board of appeals is not empowered to provide any remedy other than reinstatement.

4. The exhaustion of administrative remedies is not required when the remedy sought is one that the administrative body is not empowered to provide. As this Court expressly noted in *Hatton-Ward*, the Commission was only statutorily empowered to determine whether the remedy of reinstatement was appropriate—not whether other damages, claims, remedies, attorney’s fees or costs were warranted. Because the language of the municipal employee statute as codified in Utah Code Ann. § 10-3-1105 and 1106 grants the exact same limited remedy of reinstatement for reviewing appeals boards, the same reasoning applied in *Hatton-Ward* should apply in the instant case and Appellant should be entitled to bring his other claims before the district court.

During the April 5, 2005 administrative hearing,¹ the scope of the review by the Appeals Board was strictly for purposes of considering whether Appellant's termination was justified or whether he should be reinstated.² The Appeals Board made no determination of the majority of Appellant's claims or remedies subsequently raised in his civil complaint (including Breach of Contract, Due Process, Unjust Enrichment, WBA, and Private Attorney General).

Appellant's March 19, 2004 letter appealing his termination concludes with the following language:

To avoid litigation I am requesting you revoke the termination, give me the months of retirement benefits I should have earned during my workers comp injury (9/1/03 to 2/9/04). I will then submit my resignation effective 2/9/04. I don't believe I am asking for anything I am not entitled to. If you have any questions please feel free to contact me.

Appellant makes no mention of any other potential claims or issues—and in fact, the Appeals Board did not take evidence or make any decision with respect to all of the legal claims that were subsequently raised when Appellant filed his Complaint

¹ References to the April 6, 2005 administrative hearing conducted before the Washington City Employee Appeals Board in the *Matter of the Appeal of the Termination of John Daniel Thorpe's Employment* are designated "[Admin. H. Tr. ____]". Documents introduced during the administrative hearing are designated "[Admin. H. Ex. ____]."

² Hearing Officer Bill Ronnow stated that "...[Appellant] was terminated by Washington City from his employment in Washington City, and pursuant to the personnel rules and regulations he has requested an appeal hearing. That's the purpose of this hearing." [Admin H. Tr. 6]. Bryan Pattison, counsel for Appellee stated "...the City had no choice but to terminate Mr. Thorpe's employment. Now, this was a reasonable decision, was a decision based on the evidence and cause, and this board should uphold that decision. [Admin H. Tr. 9]. When reading the decision of the Appeals Board to uphold termination, Danice Bulloch stated "After deliberation of the Appeals Board in the purpose of the—determining whether the termination of Danny Thorpe was arbitrary and capricious or it was not supported by law, it was a unanimous affirming that the Washington City acted accordingly to the findings..." [Admin H. Tr. 180]

in district court.

In conclusion, the same rationale that supported this Court's reversal in *Hatton-Ward* is equally applicable to this case. The Appeals Board was not empowered to hear the subsequent claims brought by Appellant when he filed his Complaint. In any case, the Appeals Board did not consider those claims during the April 6, 2005 hearing, but only the claim for reinstatement. Furthermore, Appellant was not required to appeal the Appeals Board's decision to this Court, and Appellant did not lose his right to bring his other claims before the district court simply because he did not appeal the issue of reinstatement to this Court. For these reasons, the district court erred in dismissing Appellant's claims.

B. Section 1106 provides for review of the limited issue of whether the adverse employment action is justified and/or back pay is warranted.

In its Brief, Appellee invokes concepts such as "constitutional limitations on district court jurisdiction" and "statutory construction" in arguing that section 1106 provides the *exclusive* legal recourse for a terminated municipal employee to bring any and all claims against an employer. Appellee asserts five points against Appellant's position that he had the right to pursue his various statutory and common-law claims in district court:

1. Appellant's construction of section 1106 ignores the statute's plain language;
2. Appellant's construction ignores the constitutional limitation on district court jurisdiction;
3. Appellant's construction ignores the structure and purpose of the statute;
4. Appellant's construction favors a general statute over a more specific one;
5. Appellant's construction renders the statute superfluous.

Appellant will address each of the foregoing points in order.

i. Appellant's construction of section 1106 does not ignore or contradict the statute's plain language.

While Appellee correctly argues that the Utah Court of Appeals is the only court with authority to review a municipal employee appeals board decision (see Utah Code Ann. § 10-3-1106(6)), Appellee mistakenly infers that this means that a municipal employee *is required* bring any and all claims (whether based in statute or common law) before the appeals board initially, and then, on direct review, to the Utah Court of Appeals.

As already noted in this Reply Brief, this Court's decision in *Hatton-Ward* directly addressed the scope of review offered by both the Commission (under the Civil Service Statute) and the Utah Court of Appeals in cases involving the termination or suspension of civil servants. *See Hatton-Ward*, 828 P.2d at 1073-74. As with the Civil Service Statute, section 1106 offers municipal employees the same sort of right to limited review to determine whether the adverse employment action was supportable. Furthermore, as with the Civil Service Statute, section 1106 permits appeals boards to offer a narrow remedy to an employee—reinstatement and salary reimbursement for any period of time that the employee was discharged, suspended, or transferred to a position of less remuneration. *See* Utah Code Ann. § 10-3-1106(5)(b). Thus, the Appeals Board in this case has no authority to address penalties, damages, attorney's fees or costs afforded by other statutes, common law or contract claims.

Appellee's mistaken assumption is that section 1106 grants broad authority to an appeals board to hear *every possible claim* that an aggrieved employee might have regardless of the legal basis for those claims and that the appeals board is the *only* body entitled to initially

adjudicate these claims. This assumption cannot be correct because it would require appeals boards to have the skill, knowledge and expertise to function, in essence, as district courts in understanding and applying a possibly complex variety of laws. The appeals boards simply do not have the level of training or knowledge to act as *de facto* district courts inasmuch as most of these boards are comprised of individuals who have had no legal training.

Moreover, while section 1106 allows an appeal board to investigate a termination and an employee to confront witnesses and examine the evidence to be used at the review hearing, none of the formal procedural mechanisms (such as pleadings, motions, discovery) ensured by the Utah Rules of Civil Procedure come in to play. It is unreasonable to suggest that the Legislature intended municipal employees to forfeit their right to vindicate all legal claims in a district court in favor of an administrative proceeding governed by boards that have limited or no legal experience and training.

Appellee argues that the Legislature's failure to mention any other avenue of redress (e.g. the district court) in Section 1106 results means that the Legislature intends to affirmatively exclude any body other than the appeals boards from initially hearing and adjudicating *every possible* claim that an aggrieved employee might have. It is true that "under rules of statutory construction, the expression of one thing is the exclusion of another." See *Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875). However, Appellee's mistake is in supposing that Section 1106 governs *every possible* claim that an aggrieved employee might have rather than just a claim for reinstatement termination and past salary reimbursement as specifically permitted by section 1106.

Appellant has no disagreement with the position that section 1106 provides a specific

mechanism for municipal employees to seek review of a termination, suspension, or involuntary transfer through the appeals board process, with a final review by the Utah Court of Appeals. This route is available for an employee who might seek reinstatement and/or payment of back pay. Nevertheless, a former employee is not precluded from bringing other statutory or common-law claims in district court, since the appeals board process can provide only the limited remedies of reinstatement and reimbursement of salary. This interpretation is entirely consistent with the plain meaning of Utah Code Ann. § 10-3-1106(2)(a) which provides that an employee “may...appeal the discharge, suspension without pay, or involuntary transfer to...the appeal board...”

ii. Appellant’s construction of section 1106 does not ignore constitutional limitations on district court jurisdiction

Appellee’s constitutional argument can be summarized as follows: (1) in Utah, a district court’s grant of original jurisdiction in all matters is limited by statute (i.e. district courts do not have unlimited jurisdiction), (2) Utah Const. art. VIII, § 5 indicates that district courts have authority to review a lower tribunal’s ruling only if provided by statute, (3) section 1106 contains no language that allows district courts the jurisdiction to review a decision by the appeals board. [Brief of Appellee, pp. 23-24].

Based on these three points, Appellee broadly extrapolates that district courts do not have “jurisdiction to review matters arising from municipal employee appeals boards.” [Brief of Appellee, p. 24]. It is important to note that this conclusion rests upon an unstated (and mistaken) assumption³—that an appeals board created under section 1106 is statutorily

³ In fact, this somewhat muted assumption is the central flaw in each of Appellee’s arguments based on statutory construction, constitutional limitations, superfluity (etc.).

empowered to provide *total and exclusive relief* to an aggrieved employee for *any and all claims* that the employee may have. As previously argued, when applied to section 1106, the *Hatton-Ward* decision easily disposes of this faulty assumption.

Simply summarized, if a municipal employee chose to appeal her termination, suspension, or transfer to a lower-paid position, she would be entitled to do so under section 1106. The scope of such a review by the appeal board would possibly entail a period of investigation, culminating in a hearing where evidence may be provided and witnesses examined to allow the appeal board to “fully hear and determine the matter which relates to the cause for the discharge, suspension, or transfer.” [Utah Code Ann. § 10-3-1106(3)(b)(ii)]. If the appeals board found in favor of the employee, she would receive either (1) her salary for the period of time during which she was discharged or suspended without pay; or (2) any deficiency in salary for the period during which she was transferred to a position of less remuneration. [Utah Code Ann. § 10-3-1106(5)(b)]. If the appeals board did not find in her favor, she would have recourse to the Utah Court of Appeals for review to determine whether the appeals board abused its discretion or exceeded its authority. [Utah Code Ann. § 10-3-1106(6)].

Nothing in the applicable language gives the appeals board any jurisdictional authority other than to review whether the adverse employment action was supportable and to order payment of back pay if the action was not. Even in the instant case, where Appellant did file for review of his termination, section 1106 does not require an employee to consolidate any and all claims, regardless of their nature or bases, into the appeals board review process. An employee is fully entitled to have other statutory, contract or common-law claims heard by a

district court.

An employee could ostensibly forego any request for reinstatement or review (as the plaintiff did in *Hatton-Ward*), and proceed directly to district court to file any number of statutory, common-law, or contractual claims. Alternatively, an employee might seek review and reinstatement by initiating the section 1106 process. If the appeals board affirmed the termination, there is nothing in section 1106 that requires the employee to seek review by the Utah Court of Appeals of the appeals board decision. In fact, the only reason that an employee would proceed to the Utah Court of Appeals would be for the end purpose of having the Court reverse the appeals board and permit reinstatement and/or order the payment of any owing salary.

iii. Appellant's construction of section 1106 does not ignore the structure and purpose of the statute.

Appellee both misunderstands and misrepresents Appellant's position. As previously argued, section 1106 is permissive in that a terminated employee is *not* required to seek reinstatement and back pay. A terminated employee may proceed to district court with any number of statutory, contract, or common law claims if he did not seek to be reinstated.

Alternatively, if a terminated employee wished to seek reinstatement and back pay, he would be required to follow the procedure outlined in 1106 and petition the designated appeal board. However, even if a terminated employee initially sought reinstatement through review, he would *not* forfeit his right to bring claims based on other statutes or law (at any stage of the review process) *where the remedy ultimately sought was not one that an appeal board could grant*. Thus, section 1106 would only require an employee to appeal to the Utah Court of Appeals if he still wished to be reinstated and/or paid back pay after being denied such by

the appeals board. If the employee wished to seek *other* remedies not contemplated by section 1106 such as statutory damages, attorney's fees, or other penalties after his appeal to the appeals board was denied, he would be entitled to do so and would not be limited to an appeal to the Utah Court of Appeals.

Appellee goes to great lengths to show that the word "may" is not always permissive. [Brief of Appellee, pp. 24-28]. Well and good; but Appellee has proverbially strained at a gnat and swallowed a camel.

Utah courts recognize several exceptions to the standard requirement that a party must exhaust his administrative remedies. Exhaustion is not required where: (1) there is irreparable injury, (2) there is a likelihood of oppression or injustice, (3) exhaustion would serve no purpose, or is futile, or (4) an administrative agency or officer has acted outside of the scope of its defined, statutory authority. See *Salt Lake City Mission v. Salt Lake City* 2008 UT 31, ¶7, 184 P.3d 599.

The question is whether Appellant was still required to appeal his termination to the Court of Appeals once he decided that he did not wish to seek reinstatement of his employment, but to sue based on other legal theories. Appellant asserts that once he determined that he would not seek reinstatement, he was entitled to bring his other claims because the exhaustion of his remedy (i.e. appealing to the Utah Court of Appeals) would serve no purpose and because the specific remedies (damages, fees, etc.) sought by Appellant were not ones that the Appeals Board or the Utah Court of Appeals could provide.

This is reason why Appellant has argued that term "may" in section 1106 with respect to an appeal to the Utah Court of Appeals is permissive.

iv. **Appellant's construction of section 1106 does not impermissibly favor a general statute over a more specific one.**

At the outset, it is important to correct Appellee's characterization of Appellant's claim as a mere "wrongful discharge" claim. Although such a simplification and conflation of Appellant's *actual* claims is convenient for Appellee and helps "grease the wheels" of its argument, Appellant is entitled by law to formulate and assert his own claims in a way he deems fit. It is not the Appellee's place to re-define what Appellant has actually asserted and claimed.

Appellee labors to emphasize a conflict between Appellant's interpretation of the applicability of the UGIA to the present case and section 1106. In fact, no conflict exists. An individual who was *seeking reinstatement of his position* as a municipal employee would be entitled to utilize the review process contained in 1106. That individual would have no need to resort to the UGIA because he would not be seeking to sue a governmental entity (or employee of the entity) at that juncture—he would be seeking reemployment. On the other hand, an individual who chose not to seek reinstatement (or abandoned the effort during the review process) would be required to follow the strictures of the UGIA, including the filing of a notice of claim.

The question of whether the government may be immune from certain claims under Utah Code Ann. § 63G-7-201 and Utah Code Ann. § 63G-7-301 is not at issue in this appeal. Appellant has articulated six causes of action which remain active in his original Verified Complaint. Appellee is not entitled to make a new immunity challenge for the first time on appeal.

v. Appellant's construction of section 1106 does not render the municipal employee statute superfluous.

At the risk of belaboring a point that has been repeated throughout this Reply Brief, Appellant has clearly explained how section 1106 is both useful and economical in situations where a municipal employee wishes to challenge an adverse employment action *and* to be reinstated and/or receive back pay. Section 1106 provides a more expeditious and less-expensive way for the employee to challenge the reasons for the termination, suspension or transfer.

Importantly, section 1106 prohibits an employee from being discharged, suspended without pay or involuntarily transferred to a position with less remuneration because of the employee's political or religious beliefs or when officers, governing bodies or department heads are changed (i.e. arbitrary or politically/religiously motivated adverse employment actions).

If for example, an employee was terminated due to her religious beliefs, ostensibly she could petition for review in hopes of the appeal board overturning the decision and reinstating her. If the appeal board upheld the decision to terminate, certainly she could appeal to the Utah Court of Appeals for review. *Alternatively*, the employee would not be foreclosed from bringing any state or federal statutory claims related to the discriminatory action and would not be precluded from doing so just because she had initially sought reinstatement.

Section 1106 contains no language that would indicate that it is preclusive (other than that an employee seeking reinstatement or back pay must petition for review) or that it provides the sole recourse for an employee who may have wide and sundry claims resulting

from his employment or from the adverse employment action.

Accordingly, section 1106 serves a definite and useful purpose for municipal employees who want their jobs back, their suspensions or job transfers reconsidered. For those employees who seek other remedies and/or who do not want reinstatement, an appeals board consisting of individuals who are not trained in law or procedure, is not the “last stop.”

C. Section 1106 does serve a public policy interest, but not to the exclusion of municipal employees’ right to vindicate their claims.

Appellee posits a reasonable argument in favor of the benefits of having a streamlined review process for municipal employees who wish to appeal an adverse employment action. Nevertheless, when pushed to its logical limits, Appellee’s position (if adopted) would mean that a municipal employee would never have the ability to bring claims (including state and federal statutory claims) of any sort before a competent court of general jurisdiction. Instead, that employee would have to present all of his claims, no matter what the level of complexity or sophistication, before an appeals board for determination.

It is interesting to note that Appellee never seems to go so far in its Brief as to say that the *type* of claims or issues that an employee might bring before an appeals board are limited in any way; but certainly, Appellee does think that regardless of the type of claims or issues involved, the appeals board is the “gatekeeper” on the path to any remedy that the employee might seek. As pointed out earlier in this Brief, *Hatton-Ward* disposes of this position. Simply stated, there are some claims and issues that an appeals board cannot and should not hear—if only because the remedy sought cannot be awarded by such a board.

Obviously, a balance must be struck between providing a streamlined process for

municipal government employees (and the municipalities themselves) to address conflicts over termination, suspension, or transfers and the rights of an individual open access to court and to vindicate claims. Section 1106 serves a definite purpose in striking the balance. Appellee fails to consider that on occasion, the review process might actually result in an agreeable solution for both the employee and the municipality, thus reducing the time and expense of a fully-fledged lawsuit. In any case, the section 1106 review process helps correct any obvious and clear situations where the adverse employment action was based on something like political, religious or internal disagreements.

CONCLUSION

This Court should reverse the trial court's grant of Summary Judgment on those claims outlined herein.

Respectfully submitted this 19th day of April 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2010, I served two copies of the foregoing **REPLY BRIEF OF APPELLANT JOHN DANIEL THORPE, A/K/A DANNY THORPE** by the following method on the person(s) listed below:

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Addendum 1

Determinative Statutes

DETERMINATIVE STATUTES

10-3-1012. Suspension or discharge by department head -- Appeal to commission -- Hearing and decision.

(1) All persons in the classified civil service may be suspended as provided in Section **10-3-912**, or removed from office or employment by the head of the department for misconduct, incompetency, failure to perform duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission.

(2) Any person suspended or discharged may, within five days from the issuance by the head of the department of the order of suspension or discharge, appeal to the civil service commission, which shall fully hear and determine the matter.

(3) The suspended or discharged person shall be entitled to appear in person and to have counsel and a public hearing.

(4) The finding and decision of the civil service commission upon the hearing shall be certified to the head of the department from whose order the appeal is taken, and shall be final and immediately enforced by the head.

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10-3-1012.5. Appeal to Court of Appeals -- Scope of review.

Any final action or order of the commission may be appealed to the Court of Appeals for review. The notice of appeal must be filed within 30 days of the issuance of the final action or order of the commission. The review by Court of Appeals shall be on the record of the commission and shall be for the purpose of determining if the commission has abused its discretion or exceeded its authority.

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

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

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

(a) an officer appointed by the mayor or other person or body exercising executive power in the municipality;

(b) a member of the municipality's police department or fire department who is a member of the classified civil service in a first or second class city;

(c) a police chief of the municipality;

(d) a deputy police chief of the municipality;

(e) a fire chief of the municipality;

- (f) a deputy or assistant fire chief of the municipality;
- (g) a head of a municipal department;
- (h) a deputy of a head of a municipal department;
- (i) a superintendent;
- (j) a probationary employee of the municipality;
- (k) a part-time employee of the municipality; or
- (l) a seasonal employee of the municipality.

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

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

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

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

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

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

(3) (a) Each appeal under Subsection (2) shall be taken by filing written notice of the appeal with the municipal recorder within 10 days after:

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

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

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

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

- (4) An employee who is the subject of the discharge, suspension, or transfer may:
- (a) appear in person and be represented by counsel;

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

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

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

(b) If it finds in favor of the employee, the board shall provide that the employee shall receive:

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

(ii) any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

(6) (a) A final action or order of the appeal board may be reviewed by the Court of Appeals by filing with that court a petition for review.

(b) Each petition under Subsection (6)(a) shall be filed within 30 days after the issuance of the final action or order of the appeal board.

(c) The Court of Appeals' review shall be on the record of the appeal board and for the purpose of determining if the appeal board abused its discretion or exceeded its authority.

(7) (a) The method and manner of choosing the members of the appeal board, the number of members, the designation of their terms of office, and the procedure for conducting an appeal and the standard of review shall be prescribed by the governing body of each municipality by ordinance.

(b) For a municipality operating under a form of government other than a council-mayor form under Chapter 3b, Part 2, Council-Mayor Form of Municipal Government, an ordinance adopted under Subsection (7)(a) may provide that the governing body of the municipality shall serve as the appeal board.