

2010

# Michael Fierro v. Park City Municipal Corporation, Park City Employee Transfer and Discharge Appeal Board : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL FIERRO, an individual,  
  
Petitioner,

v.

PARK CITY MUNICIPAL  
CORPORATION, a Utah municipal  
corporation, and PARK CITY  
EMPLOYEE TRANSFER AND  
DISCHARGE APPEAL BOARD,  
  
Respondents.

REPLY BRIEF OF PETITIONER

Appeal No. 20100104

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APPEAL FROM THE PARK CITY APPEAL BOARD DECISION DATED  
DECEMBER 20, 2010

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## ARGUMENT

### **I. THE APPEAL BOARD EXCEEDED ITS AUTHORITY UNDER UTAH CODE ANN. § 10-3-1106 BY CONSIDERING EVIDENCE BEYOND THE SCOPE OF ITS SUBJECT MATTER JURISDICTION.**

#### **A. Appeal Board Jurisdiction is Limited to Reasons and Misconduct Articulated in the Relevant Underlying Termination Documentation.**

Chief Carpenter furnished Fierro with a memorandum which notified Fierro his employment with the City was terminated and identified specific reasons for that decision.<sup>1</sup> That memorandum incorporated by reference Cpt. Rick Ryan's "findings," which were attached, and stated that "[b]ased on the findings, your employment with Park City Police Department is terminated effective immediately." Pet'r Ex. 9 (emphasis added). In other words, the reasons articulated in Cpt. Ryan's findings were the sole basis for the termination.

On appeal, the City argues that the termination memorandum was *not* "an exhaustive evaluation of all grounds for dismissal, which would bar Park City from considering other issues, evidence or information in reviewing the propriety of Fierro's termination." *See* Brief of Appellee, p. 37. The City thus claims it can terminate an employee for specific reasons detailed in a written memorandum and then, at the appeal board hearing, introduce evidence

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<sup>1</sup>The City takes issue with Fierro's characterization of Chief Carpenter's memorandum and the attached findings of Cpt. Ryan as the "termination memorandum," stating that "there simply is no termination memo, termination letter, or any other document which purports to be an exhaustive analysis of each and every instance of Fierro's misconduct found in the course of the IA Investigation." *See* Brief of Appellee, p. 37. This is merely semantics. Regardless of what the document is called, its purpose and effect was to notify Fierro that he was terminated and to enumerate the reasons for the termination.

of additional alleged misconduct to bolster its original termination decision. The City further asserts it is proper for an appeal board to use the additional alleged misconduct as a basis for affirming the termination. Those arguments fail for several reasons.

First, as noted above, the termination memorandum specifically stated that Fierro was being terminated “[b]ased upon [Cpt. Ryan’s] findings” and nothing else. The City’s current position contradicts the very language of the termination memorandum.

Second, the Utah statute which confers jurisdiction upon municipal appeal boards to hear and consider merit employee appeals states, in relevant part, as follows:

The 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* ... .

Utah Code Ann. § 10-3-1106(3)(b)(ii) (Emphasis added). It follows, then, that any evidence that is not a “cause for the discharge” is beyond the appeal board’s jurisdiction and cannot be considered.<sup>2</sup> In this case, the appeal board considered evidence that was not articulated in Cpt. Ryan’s findings and, therefore, not a “cause for the discharge.” In doing so, the appeal board “exceeded its authority,” which is by itself a basis for reversal. *Utah Code Ann.* § 10-3-1106(6)(c).

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<sup>2</sup>The City questions Fierro’s citation to *Pearson v. South Jordan Employee Appeals Bd.*, 2009 UT App 204, ¶ 14, 216 P.3d 996, stating that *Pearson* is “not even marginally on point...” However, Fierro cited *Pearson* for the proposition that “the Board’s authority is limited to the review of merit employee grievances pursuant to section 10-3-1106.” In other words, an appeal board’s authority is strictly limited to “determin[ing] the matter which relates to the cause for the discharge...” See § 10-3-1106(3)(b)(ii).

Third, in order for due process to be served, a public employee must be able to rely on the reasons articulated in a municipality's termination decision. It should be noted that, going into an appeal board hearing, a public employee is much more disadvantaged than a typical party to litigation. For example, a municipality has unlimited time and resources to conduct an investigation, interview knowledgeable parties, and otherwise build its case. On the other hand, once a public employee is terminated, he or she has just ten days in which to file an appeal. *Utah Code Ann.* § 10-3-1106. Thereafter, the appeal board must conduct a hearing within the "remarkably short time frame" of fifteen days after receiving the appeal. *Becker v. Sunset City*, 2009 UT App 197, ¶ 8, 216 P.3d 367; *see also Utah Code Ann.* § 10-3-1106. To make matters worse, the public employee has no right to written discovery or depositions prior to the hearing.

For these reasons, written documentation of a termination (such as Chief Carpenter's termination memorandum) is absolutely critical to a public employee's defense. Public employees must be able to rely on the reasons articulated in the termination documentation as constituting the municipality's case for the underlying discipline. Although public employees are not litigants in the traditional sense, they ought to, at a minimum, benefit from the basic fairness the rules of civil procedure were designed to foster. *See Glacier Land Co., L.L.C. v. Claudia Klawe & Assoc.*, 2006 UT App 516, ¶ 35, 154 P.3d 852 ("One of the primary goals of the discovery process is 'to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly, and

expeditiously as possible.”) (citations omitted). This is also in keeping with Utah law regarding the requirement of due process in an administrative setting. *See Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909 (Utah 1993) (with respect to agency action “due process ... requires that the [individual] know what information the [agency] will be considering at the hearing and that the [individual] know soon enough in advance to have a reasonable opportunity to prepare responses and rebuttal of inaccuracies.”).

In sum, Fierro urges this court to clarify the jurisdictional parameters Utah Code Ann. § 10-3-1106 provides to municipal appeal boards and, in so doing, hold that such jurisdiction is limited to reasons and misconduct articulated in the relevant underlying termination documentation.

**B. Objections to Subject Matter Jurisdiction Can be Raised at Anytime and Cannot be Waived.**

The City argues that, by introducing exhibits “containing information directly bearing on the child sex abuse case”, Fierro waived his jurisdictional argument. *See* Brief of Appellee, p. 38-39. However, objections regarding subject matter jurisdiction can be raised at any time and cannot be waived. *Housing Auth. v. Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724 (“questions regarding subject matter jurisdiction may be raised at any time...”); *see also Chen v. Stewart*, 2004 UT 82, ¶ 34, 100 P.3d 1177 (subject matter jurisdiction cannot be waived). Furthermore, Fierro only introduced those exhibits to defend against improper evidence presented by the City in its case-in-chief.

**C. The Improper Reasons Were Not Articulated in the Termination Memorandum.**

The City contends at least nine of the ten Improper Reasons referenced in Fierro's opening brief were, in fact, addressed in the termination memorandum.<sup>3</sup> In so doing, the City attempts to stretch the language in that document beyond the bounds of reasonableness.<sup>4</sup>

The City asserts that Improper Reasons 1-4 were in fact detailed in the termination

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<sup>3</sup>Fierro asserts the Appeal Board considered – and based its affirmation of the termination on – at least ten instances of alleged conduct which were not articulated in the termination memorandum (collectively, the “Improper Reasons”). They include the following:

1. Fierro knew the criminal suspect and had a personal relationship with him.
2. Fierro had a “personal conflict of interest” in the case.
3. Fierro visited the suspect in jail in his capacity as religious leader.
4. Fierro used his position as a police officer to gain access to the jail.
5. Fierro communicated with the suspect about the alleged crime.
6. Fierro disclosed to investigators information he had obtained from the suspect.
7. Fierro told Det. Jarman he knew the suspect and would be surprised if the suspect had committed the alleged crime.
8. Fierro commented on the “active imagination” of the alleged victim.
9. Fierro made statements to other officers that could have improperly influenced the investigation.
10. Fierro attempted to remove the international call block from his work phone without authorization.

<sup>4</sup>The sole bases for termination identified in the termination memorandum were as follows: (1) Fierro allegedly exceeded his light duty responsibilities by conducting “in depth investigations;” (2) Fierro was “insubordinate and disrespectful” in email exchanges he had with Chief Carpenter; (3) Fierro misrepresented himself “at least in the eyes of Cpt. Farnsworth” in gaining access to the jail; (4) Fierro was untruthful in interviews with Chief Carpenter and Sgt. Little; and (5) Fierro provided confidential information to a third party, in violation of the city's confidentiality policy and the Law Enforcement Code of Ethics. Pet'r. Ex. 10.

memorandum (specifically, in Cpt. Ryan's attached findings). That is incorrect. While Cpt. Ryan noted the criminal suspect was clergy of Fierro, that relationship was never identified as misconduct or a reason for termination. Furthermore, Cpt. Ryan only mentioned Fierro's visit to the jail in the context of "Fierro misrepresent[ing] himself" to the officer at the jail, not in the context of a purported conflict of interest. Notably, that assertion of misrepresentation was not even presented by the City at the appeal board hearing, let alone proved with actual evidence, and was not cited by the Appeal Board in its decision.

The City also contends that Improper Reasons 5-6 were included in the termination memorandum because Cpt. Ryan "reference[d] Fierro's conversation with Detective DeBotelho..." *See* Brief Appellee, p. 40. That is misleading. Cpt. Ryan's findings contain one sentence about that conversation: "[Fierro] was untruthful about discussing the case with Detective DeBotelho when he said he had not discussed it with him but in fact did." Pet'r. Ex. 10. In other words, Cpt. Ryan found Fierro was dishonest about whether he in fact had such a conversation with Det. Debotelho, but never criticized what was actually discussed.

The City further incorrectly asserts that Improper Reasons 7-9 were included in the termination memorandum by Cpt. Ryan's reference to the August 13, 2009 email Fierro sent to Detective Jarman. While it is true Cpt. Ryan mentioned that email once in his findings, he again did so in the context of dishonesty, but without criticizing the actual content of the email: "Fierro denied having communication with Jarman about the case when in fact he exchanged emails with Jarman..." Pet'r. Ex. 10.

The City's contention that the Improper Reasons were articulated in the termination memorandum and, therefore, that Fierro had reason to know they formed a basis for his termination is simply unsupported by the termination memorandum itself.

## **II. TERMINATION WAS DISPROPORTIONATE TO THE ALLEGED MISCONDUCT.**

The appeal board is charged with making two inquiries: (1) whether the facts support the charges; and (2) whether the sanction is appropriate to the offense and consistent with previous sanctions. *Lucas v. Murray City Civil Service Com'n*, 949 P.2d 746, 758 (Utah Ct. App. 1997); *Harmon v. Ogden City Civil Serv. Com'n*, 2007 UT App 336, ¶ 8, 171 P.3d 474. Both prongs are critical in determining whether a termination ought to be upheld or reversed. To ensure a meaningful appeal, an appeal board's findings on those two prongs must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Lucas*, 949 P.2d at 755 fn.5.

In this case, the Appeal Board stated in its ruling that "the termination was proportionate to Officer Fierro's misconduct, and it was warranted and supported by the evidence." R. 82. The Appeal Board then went on to analyze why the termination was "supported by the evidence." *Id.* However, other than its initial conclusory statement, the appeal board never analyzed whether termination was proportionate discipline. Thus, there is no finding Fierro can object to for purposes of this portion of his appeal. That failure renders the appeal board's conclusion on proportionality "arbitrary and capricious" unless

the evidence is “clear, uncontroverted and capable of only one conclusion.” *Lucas*, 949 P.2d at 755 fn.5. Fierro respectfully submits that, for the reasons asserted in his original brief, the limited evidence introduced on proportionality did not meet the lofty *Lucas* standard.

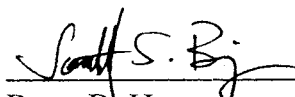
Moreover, if the Improper Reasons are excluded from the analysis, termination was not proportionate discipline for the remaining allegations. The appeal board recognized this by stating Fierro’s termination was “based on the stand alone issue of Officer Fierro’s misconduct in regards to the investigation of the child sex abuse case” and later concluding that the remaining allegations only “warranted discipline.” R. 82.

### CONCLUSION

For the foregoing reasons, Petitioner Michael Fierro respectfully requests that he be reinstated to his position as police officer with the Park City Police Department, together with applicable back pay and benefits from October 9, 2009, the date of his termination.

DATED this 26<sup>th</sup> day of May 2011.

KESLER & RUST

  
for Ryan B. Hancey  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be delivered by the method(s) and to the person(s) indicated below a true and correct copy of **REPLY BRIEF OF PETITIONER** this 20<sup>th</sup> day of May 2011.

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