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Aaron Rosen v. City of Saratoga Springs : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

AARON ROSEN, an individual, Petitioner, **v.** CITY OF SARATOGA SPRINGS, a Utah municipal corporation, and CITY OF SARATOGA SPRINGS EMPLOYEE APPEALS BOARD, Respondents.	BRIEF OF PETITIONER Appeal No. 20110497

APPEAL FROM THE CITY OF SARATOGA SPRINGS EMPLOYEE APPEALS BOARD DECISION DATED MAY 10, 2011

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The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(a) and Utah Code Ann. § 10-3-1106.

ISSUES FOR REVIEW

First Issue: Did the Appeal Board err by failing to consider whether the demotion of Petitioner was the proportionate and appropriate discipline for Petitioner's alleged conduct?

Standard of Review: Correctness. The Appeal Board's failure to issue a finding on proportionality was legal error. This Court reviews an appeal board's "legal decisions for correctness." *Howick v. Salt Lake City Employee Appeals Bd.*, 2009 UT App 334, ¶ 3, 222 P.3d 763 (citations omitted).

Second Issue: Did the Appeal Board err in denying Petitioner's motion for adverse inference where the City was unable to produce requested physical evidence?

Standard of Review: Generally speaking, "applying a specific standard of review for evidentiary rulings has proven problematic given the necessary analysis of factual issues, legal issues, and a mixture of both." *Trolley Square Associates v. Nielson*, 886 P.2d 61, 67 (Utah Ct. App. 1994). In this case, the Appeals Board did not identify a specific legal basis for denying Petitioner's motion. If the Appeals Board was required to grant Petitioner a favorable inference, then the appropriate standard of review ought to be one of correctness. If the Appeals Board had discretion to grant or reject the motion, then the appropriate

standard of review is one of abuse of discretion. *State v. Bernards*, 2007 UT App 238, ¶ 14,166 P.3d 626.

Third Issue: Did the Appeal Board exceed its authority and taint the proceedings by receiving and reviewing the City's proposed exhibits weeks before the hearing and even before the matter was formally appealed by Petitioner, which included documents that ultimately were not admitted at the hearing?

Standard of Review: In determining whether the Appeal Board exceeded its authority, this court should review "for legal error, without deference." *Tasters Ltd., Inc. v. Dept. of Employment Sec.*, 863 P.2d 12, 19 (Utah Ct. App. 1993).

Fourth Issue: Were the Appeal Board's findings upholding demotion of Petitioner supported by substantial evidence?

Standard of Review: This Court's standard of review is whether the facts are supported by substantial evidence. *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746, 758 (Utah Ct. App. 1997).

APPLICABLE STATUTES AND RULES

The following statute is of central importance to the appeal: Utah Code Ann. § 10-3-1106. The full text of this statute is included in Addendum attached hereto.

STATEMENT OF THE CASE

On February 26, 2011, Petitioner Aaron Rosen ("Rosen") was demoted from his position as corporal of the City of Saratoga Springs Police Department ("City") to that of a

top step officer. R. 46-47. On March 7, 2011, Rosen appealed his demotion to the City of Saratoga Springs Employee Appeals Board ("Appeal Board") pursuant to Utah Code Ann. § 10-3-1106. R. 1. A two-day hearing before the Appeal Board was conducted on April 7 and April 19, 2011. R. 53. On May 10, 2011, the Appeal Board issued its decision upholding Rosen's demotion. R. 52-58. On June 7, 2011, Rosen filed a petition for review with the Utah Court of Appeals, challenging the Appeal Board's decision. *See* Appellate Docket.

STATEMENT OF THE FACTS

On January 18, 2011, Rosen was attempting to tuck in his uniform shirt into his pants in a private office when his pants fell to his knees. R. 2. This occurred in the presence of a male co-worker and a female co-worker named Christy Soper ("Soper"). *Id.* Although Rosen's shirttails covered any objectionable areas, Soper reported the incident. R. 24. The next day on January 19, 2011, Rosen was interviewed by Sgt. Kerry Cole, who was assigned to investigate the matter. R. 26. After obtaining Rosen's account of the incident, Sgt. Cole spoke to Rosen about further contact with Soper. R. 59: 173:7-12. According to Sgt. Cole, Rosen was told to limit his contact with Soper to "professional contact" only. *Id.* According to Rosen, Sgt. Cole instructed Rosen not to have any contact with Soper regarding the January 18 incident or the corresponding investigation until it had been completed. R. 59: 314:15-315:6. The audio and video of the interview between Rosen and Sgt. Cole was recorded by the City. R. 59: 167:18-23. Although Sgt. Cole prepared a report containing his

findings, it does not mention Sgt. Cole's alleged instruction to Rosen regarding contact with Soper. R. 26-28.

On January 26, Rosen left circus tickets he had obtained by virtue of his part-time employment at a radio station in Soper's work mailbox. R. 3; 59: 322:8-14. The next day, Rosen noticed the tickets were no longer there and assumed Soper had taken and used them. R. 59: 325:14-23. In fact, upon finding the tickets, Soper had immediately given them to Sgt. Cole. R. 59: 73: 14-17.

On January 28, Rosen met with Chief Gary Hicken to discuss the disposition of Sgt. Cole's investigation. R. 28. Chief Hicken told Rosen he believed the January 18 incident had been an accident and issued Rosen a verbal counseling, the City's lowest form of discipline. R. 59: 327:21-25. Although Rosen had given Soper the circus tickets two days earlier, Chief Hicken did not mention them in the January 28 meeting. R. 59: 251:3-6. However, Chief Hicken gave Rosen permission to apologize to Soper. R. 59: 278:1-8.

On January 31, Rosen attempted to apologize to Soper, but Soper left the room and avoided Rosen's efforts. R. 59: 83:7-16. On February 2, Rosen again met with Chief Hicken. R. 59: 252:23-253:23. This time, Chief Hicken spoke with Rosen about future contact with Soper. R. 59: 254:1-9. According to Chief Hicken, Rosen was told to have nothing but "professional contact" with Soper. *Id.* According to Rosen, Chief Hicken stated that Rosen would not be able to achieve a "resolution", that Rosen needed to "move on", should "let it go", act as if the January 18 incident had "never happened," and be professional

in his contact with Soper. R. 59: 330:22-331:7, 333:21-25.

On February 5, Rosen was working his part-time job at the radio station. R. 59: 340:6-11. The radio station was holding a contest where individuals could call in and win tickets to an upcoming concert. R. 59: 338:16-25. Pursuant to an earlier request for event tickets by Soper, and as he had done many times in the past for other co-workers, Rosen reserved concert tickets for Soper and two other City employees. R. 59: 323:8-10; 339:1-11. At that time, Soper's name was also inadvertently submitted into a database for the drawing of the contest's grand prize. R. 59: 339:20-340:5. Through sheer coincidence, Soper's name was drawn, and Soper was identified on air as the winner of the grand prize. *Id.* Once the mistake was discovered, Soper's name was withdrawn, and she never received the concert tickets or the grand prize. R. 11.

On February 7, the City placed Rosen on administrative leave while it conducted a second investigation into Rosen's contact with Soper since the January 18 incident. R. 59: 341:5-7. Effective February 26, 2011, Rosen was demoted from his position as corporal to that of a top step officer, which was accompanied by a reduction in Rosen's annual salary. R. 44-45, R. 59: 303:7-12. In the notice of demotion, the City asserted Rosen violated City policy when he (1) placed circus tickets in Soper's mailbox; and (2) entered Soper's name into the prize database. R. 45. The primary allegation was that in taking these actions, Rosen failed to follow direct orders by both Sgt. Cole and Chief Hicken to limit future contact with Soper to that of a professional nature. R. 44-45. No other reasons for the demotion were

identified. *Id.*

Rosen appealed the termination to the Appeal Board pursuant to *Utah Code Ann.* § 10-3-1106. R. 1. A two-day hearing before the Appeal Board was conducted on April 7 and April 19, 2011. R. 53. At the hearing, Rosen informed the Appeal Board that he had requested a recording of the January 19 interview with Sgt. Cole, and that Sgt. Cole had promised to produce it, but that the City had failed to do so. R. 59: 315:13-316:2; R. 59: 319:3-25, 332:4-7. On that basis, Rosen moved for an adverse inference. Specifically, Rosen argued that the Appeal Board should infer from the City's failure to produce that the interview recording would have supported Rosen's position that he never received a no-contact order from Sgt. Cole on January 19. R. 59: 39:13-40:2. The Appeal Board denied the motion, stating that the City's failure to produce was not intentional. R. 59: 50:5-7; 59: 48:16-21.

In a ruling dated May 10, 2011, the Appeal Board upheld the demotion of Rosen. R. 52-58.

SUMMARY OF THE ARGUMENT

I. Proportionality.

The Appeal Board was required to determine "whether discipline is appropriate and second whether the particular discipline meted out is proportionate to the offense." *Salt Lake City Corp. v. Salt Lake City Civil Service Com'n.,* 908 P.2d 871, 876 (Utah Ct. App. 1995).

Rosen introduced proportionality evidence at the Appeal Board hearing, including a summary of all internal investigations that had been conducted within the department from 2007 to 2011 and their corresponding discipline. However, the Appeal Board made no attempt to analyze the proportionality of Rosen's demotion and certainly did not comment on the evidence submitted by Rosen. As a result, the Appeal Board abused its discretion and its decision should be reversed. *See Lucas*, 949 P.2d at 763 (reversing termination decision, in part, based on "an abuse of the Chief's discretion.").

II. Adverse Inference.

In civil matters, "a negative inference about missing documentation is to be drawn against the party who should have had possession of...the unproduced records". *Keiter v. Keiter*, 2010 UT App 169, ¶ 13, 235 P.3d 782. Rosen was disciplined in part because he allegedly violated Sgt. Cole's order of January 19. Rosen's recollection of the purported order was different. He thus requested the recording of the January 19 interview. The City failed to produce the recording and Rosen moved for an adverse inference. Rosen asked the Appeal Board to infer that Rosen's account of the January 19 interview was correct. The Appeal Board denied the motion, stating it did not believe the City had intentionally destroyed the evidence.

The policy reasons for adverse inferences apply to appeal board hearings. Cities should be deterred from purposely destroying important evidence that would support employee defenses at appeal board hearings. In addition, cities should not be allowed to

benefit from their inability to produce documentation they have lost or misplaced by simply substituting the evidence in question with the testimony of city witnesses.

The Appeal Board's denial of Rosen's motion was error. That error prejudiced Rosen because the Appeal Board ultimately issued a finding that mirrored Sgt. Cole's account of the January 19 interview. Had the Appeal Board accepted Rosen's version of the January 19 interview, the final outcome would likely have been different, as there is no dispute Rosen followed the directive he recalled receiving. Because the Appeal Board's actions constitute harmful error, its decision affirming the demotion should be reversed. *See Lucas*, 949 P.2d at 757 ("[A]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful.").

III. The Appeal Board Tainted the Proceeding by Reviewing Evidence in Advance.

At the hearing on April 7, 2011, Rosen became aware for the first time that counsel for the City had sent a packet of proposed exhibits to the members of the Appeal Board at least a month prior to the hearing. The Appeal Board reviewed the City's proposed exhibits prior to the hearing and were "familiar with the facts" even before any witness had testified. These exhibits included documents that ultimately were not admitted at the hearing, including documents that discussed "older offenses" of Rosen that hadnot been identified by the City as bases for the demotion.

The Appeal Board's early review of the evidence violated Utah Code Ann. § 10-3-1106(3) and (4). Employees are afforded the right to "examine the evidence *to be considered*

by the appeal board" and to seek the exclusion of objectionable evidence. *Id.* This suggests evidence should not be presented to an appeal board until the hearing, after the employee has had the opportunity to examine and object to the evidence. Several statements made by Appeal Board members indicate they were improperly influenced by having reviewed the City's evidence in advance.

The Appeal Board's advance review of the City's evidence tainted the hearing and caused irreversible prejudice to Rosen. As a result, the Appeal Board's decision should be reversed or, in the alternative, the decision should be reversed and remanded for a new hearing.

IV. Substantial Evidence.

The Appeal Board upheld Rosen's demotion for various reasons; however, many of those findings are not supported by substantial evidence.

The Appeal Board found that on January 19, 2011, Sgt. Cole ordered Rosen to "have only 'professional' contact with [Soper]." R. 54. The Appeal Board found Rosen had violated this order by (1) leaving a circus ticket in Soper's work mailbox; and (2) responding to an email Soper had sent to all officers in the department.

It was unreasonable for the Appeal Board to conclude that Sgt. Cole ordered Rosen to "have only 'professional' contact with [Soper]." R. 54. The City should have granted Rosen's motion for an adverse inference. In addition, Sgt. Cole's own direct testimony makes it clear he never gave Rosen an order. Sgt. Cole used the words "it would be best"

in describing his statement to Rosen. These words are not consistent with an order or directive.

The Appeal Board should not have considered the email from Rosen to Soper at all because that conduct was not stated as a reason for Rosen's demotion. When the City demoted Rosen, it delivered the Demotion Letter to Rosen. The Demotion Letter articulated two reasons for the demotion. The email was not one of them. The Appeal Board should have limited its consideration to the allegations identified in the Demotion Letter.

The Appeal Board made two findings that have no factual support in the record. First, the Appeal Board found that on an unspecified date between January 19 and February 2, Rosen "was again instructed by Sgt. Cole to stay away from the [Soper] and to leave her alone" and "was instructed to give the situation time to cool off." R. 55. The Appeal Board also found that Chief Hicken met with officer Rosen on January 28, 2011, and "instructed him to limit his contact with [Soper] to 'professional' contact only." R. 55. Because it is impossible to determine whether the Appeal Board would have concluded Rosen was insubordinate but for its findings concerning non-existent orders, the only realistic remedy is to reverse or remand for a new hearing.

The Appeal Board found that on February 2, 2011, Chief Hicken instructed Rosen "to have nothing but professional contact with [Soper] and specifically, that Officer Rosen was not to try to resolve the issue any further with [Soper]." R. 55. The Appeal Board found Rosen violated this order when he "entered [Soper]'s name into a radio station give-away

contest where he worked as a disc jockey" and Soper's name was announced over the air. R. 56.

The Appeal Board's finding on this issue is not supported by substantial evidence because Rosen did not "contact" Soper after February 2. Furthermore, the undisputed evidence was that Soper's name was inadvertently entered into the prize database. It was a stretch and abuse of discretion for the Appeal Board to conclude Rosen's post-February 2 actions constituted "contact" with Soper.

ARGUMENT

I. THE APPEAL BOARD ERRED BY FAILING TO CONSIDER WHETHER ROSEN'S DISCIPLINE WAS PROPORTIONATE TO THE ALLEGED OFFENSE.

One of the most critical responsibilities of municipal appeal boards is to determine "whether discipline is appropriate and second whether the particular discipline meted out is proportionate to the offense." *Salt Lake City Corp.*, 908 P.2d at 876. Indeed, in determining whether discipline is warranted, an appeal board must determine whether it is "(1) appropriate to the offense and (2) consistent with previous sanctions imposed by the [City]." *Ogden City Corp. v. Harmon*, 2005 UT App 274, ¶ 16, 116 P.3d 973. Reversal is appropriate if the sanction is "so clearly disproportionate to the charges as to amount to an abuse of the [City's] discretion." *In re Discharge of Jones*, 720 P.2d 1356, 1363 (Utah 1986).

"When the [appeal board] determines...that the discipline meted out is disproportionate to the offense, it must reverse the department head's decision." *Salt Lake*

City Corp., 908 P.2d at 876.

At the hearing below, Rosen introduced proportionality evidence. One of the key pieces of evidence was a summary of all internal investigations that had been conducted within the department from 2007 to 2011, together with the corresponding discipline for each such investigation. R. 42-43. The evidence showed that the vast majority of all discipline meted out by the City – for all kinds of conduct – consisted of verbal reprimands and written reprimands. Chief Hicken acknowledged that his disciplinary options included "counseling, a supervisor's log,...an action plan,...additional training,...verbal counseling,...written reprimand...suspension, demotion, termination." R. 59: 256:14-17.[1] However, the City had never demoted an officer prior to Rosen.[2] R. 59: 255:25-256:2.

In its decision, the Appeal Board acknowledged Rosen's claim that "the discipline he received was not proportionate to his alleged offense nor was it consistent with other discipline meted out by the City." R. 52. But inexplicably, the Appeal Board made no

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[1] The City did introduce evidence to rebut Rosen's proportionality evidence. Chief Hicken testified that in the history of the Saratoga Springs Police Department there had never been an incident factually comparable to the one at issue. R. 59: 257:2-6. The Chief also testified that his department had never dealt with an incident where direct orders had been violated. R. 59: 258:18-259:1.

[2] While the City had terminated two police officers in the past, the circumstances surrounding those incidents were substantially distinguishable from Rosen's circumstances. The first officer was a probationary employee and thus had no standing in his employment position. R. 59: 258:10-17. Furthermore, that officer had admitted to criminal conduct, not merely violating City policy. *Id.* The second officer had been placed on an action plan as an opportunity to correct the unwanted behavior. R. 59: 255:23-258:7. When that officer failed to correct his behavior, his employment was terminated. *Id.*

attempt to analyze the proportionality of Rosen's demotion and certainly did not comment on the evidence submitted by Rosen.[3] In this way, the Appeal Board failed to undertake one of its primary responsibilities, that of determining whether Rosen's discipline was "appropriate and...proportionate to the offense." *Salt Lake City Corp.,* 908 P.2d at 876. Moreover, the Appeal Board failed to issue any findings of fact on proportionality. These failures warrant a reversal of the Appeal Board's decision and the reinstatement of Rosen.

Findings of fact are necessary for both this Court and Rosen to experience a meaningful appeal. Indeed, "the importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency." *Milne Truck Lines, Inc. v. Public Services Com'n of Utah*, 720 P.2d 1373, 1378 (Utah 1986). Without findings of fact, this Court "cannot perform its duty of reviewing the [agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action."[4] *Id.* The failure to issue findings of fact on a material issue is, in and of itself, arbitrary and capricious:

> This court has emphasized that an administrative agency must make findings of fact that are sufficiently detailed so as to permit meaningful appellate review. For us to meaningfully review the Board's findings,

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[3] The Appeal Board concluded its analysis by simply stating: "The demotion of Officer Rosen from corporal to top step level police officer with accompanying reduction in pay is therefore upheld insofar as the decision was reasonable under the circumstances, and the discipline was warranted and supported by the evidence." R. 58.

[4] Additionally, without findings of fact on proportionality, Rosen cannot fulfill his obligation of marshaling the evidence.

> the findings must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion of each factual issue was reached. The failure of an agency to make adequate findings of fact in material issues renders its findings arbitrary and capricious unless the evidence is clear, uncontroverted and capable of only one conclusion.

Lucas, 949 P.2d at 755 n.5 (internal quotations and citations omitted). The proportionality evidence Rosen submitted could reasonably be viewed as showing Rosen was disciplined much more harshly than was the norm. At a minimum, the proportionality evidence was not clear, uncontroverted and capable of only one conclusion. Thus, the Appeal Board's unexplained determination that the demotion "was reasonable under the circumstances, and the discipline was warranted and supported by the evidence" was arbitrary and capricious. R. 58.

This court has equated arbitrary and capricious action on the part of an appeal board with an abuse of discretion. *See Lucas*, 949 P.2d at 755 n.5 (finding civil service commission's granting of motion "without providing any findings, conclusions, or reasoning was arbitrary and capricious" and, therefore, an abuse of discretion). Where an appeal board abuses its discretion, reversal is the proper remedy. *Id.*, at 763 (reversing termination decision, in part, based on "an abuse of the Chief's discretion."); *see also Burr v. Dept. of Corrections*, 2005 WL 851653, *1 (Utah Ct. App. 2005) (unreported).

Furthermore, it is axiomatic that this Court will reverse an agency's findings of fact "if the findings are not supported by substantial evidence." *Fragomeno v. Dept. of*

Workforce Services, 2011 UT App 100, ¶ 2, 250 P.3d 1043; *citing Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997). In other words, reversal is proper where an agency's findings of fact differ from the evidence that was actually introduced. It follows, then, that this Court should reverse an appeal board's implicit conclusion on proportionality when the board fails to make any findings at all on that issue.

II. THE APPEAL BOARD ERRED BY DENYING ROSEN'S MOTION FOR ADVERSE INFERENCE WITH RESPECT TO THE AUDIO RECORDING THE CITY FAILED TO PRESERVE AND/OR PRODUCE.

On January 19, 2011, Rosen was interviewed by Sgt. Cole, who was assigned to investigate the January 18 incident. After obtaining Rosen's account, Sgt. Cole spoke to Rosen about further contact with Soper. Sgt. Cole testified that during the discussion he ordered Rosen to limit contact with Soper to "professional contact" only. On the other hand, Rosen testified that Sgt. Cole had only instructed him not to discuss the January 18 incident or pending investigation until the investigation had been completed. The audio and video of the interview between Rosen and Sgt. Cole were recorded by the City.

At the hearing, Rosen informed the Appeal Board that he had requested a recording of the January 19 interview with Sgt. Cole but that the City had failed to produce it. The City acknowledged on the record that at one time it had the recording, but that it had been unable to locate it. R. 59: 167:10-168:7. On that basis, Rosen moved for an adverse inference, contending that from the City's failure to produce the recorded interview, the Appeal Board should infer that the interview, if produced, would support Rosen's position that Sgt. Cole

had not issued a "professional contact only" order. Rosen further clarified that according to Utah case law, the reasons behind the inability to produce were irrelevant, and that it did not matter whether the destruction or misplacement of evidence was intentional or not. R. 59: 49:1-13.

The Appeal Board denied the motion, stating: "So intentionally being destroyed, I'm not sure that's a possibility or that's not what happened. So I think as a group, I don't think we are going to look at that, even though there's case law that we are going to look at that negatively..." R. 59: 48:16-21. The Appeal Board also held that it would allow Sgt. Cole to simply testify as to what instructions he gave Rosen during the January 19 interview. R. 59: 50:8-17.

The testimony elicited at the hearing following the Appeal Board's denial of the motion supported Rosen's motion for an adverse inference. Sgt. Cole testified that although the interview had been recorded, he had thereafter been unable to locate the recording:

> Cole: The room is recorded audibly and visually, and it's an automatic recording system. You don't have to turn anything on. That's going 24/7, and it's on a loop. So whatever you record, you go back and you pull that piece of information off. ...
>
> Q. Was this particular interview with [Rosen] recorded?
>
> Cole: I'm sure it was, yes.
>
> Q. Were you able to locate it?
>
> Cole: I was not able to locate it on the recording, and I have to

> admit I didn't go back and check a second and third time. ... It did get recorded, I believe. I was not able to find it. I did not make a copy of the recording.

R. 59: 167:12-168:7. Rosen testified that he had directed a written request for a copy of the recording in question to Sgt. Cole. R. 59: 315:13-23. Sgt. Cole responded that the recording should still be on the computer and that he would make it available to Rosen. R. 59: 315:25-316:2. Nevertheless, the recording was never produced.

In civil matters, the failure to preserve evidence is governed by Utah Rule of Civil Procedure 37(g), which states in relevant part:

> Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty.

Rule 37(b)(2) states in relevant part: "the court in which the action is pending may take such action in regard to the failure as are just, including the following: deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order..."

Utah Rule of Evidence 1002 states that "[a]n original writing, recording, or photograph is required in order to prove its content..." Utah Rule of Evidence 1004 states:

> An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, *and not by the proponent* acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(c)** *the party against whom the original would be offered had control of the*

> *original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing*; or **(d)** the writing, recording, or photograph is not closely related to a controlling issue.

(Emphasis added). With respect to missing evidence, the Utah Supreme Court has clearly stated as follows:

> [E]ven in cases where the failure to procure [evidence] is inadvertent, the only fair way to address the missing evidence is to direct the fact-finder that the [requesting party] [is] entitled to a favorable inference in place of the missing evidence. This remedy will serve the dual purpose of mitigating any prejudice experienced by the [the requesting party] and providing a sufficient deterrent to others who may be tempted to purposely destroy important evidence.

Kilpatrick v. Bullough Abatement, Inc., 2008 UT 82, ¶ 39, 199 P.3d 957; *see also Keiter*, 2010 UT App 169 at ¶ 13 ("a negative inference about missing documentation is to be drawn against the party who should have had possession of...the unproduced records"). Each of these authorities was identified by Rosen to the Appeal Board, yet Rosen's motion was still denied. R. 59: 40:1-7.

Although appeal boards are not strictly bound by either the Utah Rules of Civil Procedure or the Utah Rules of Evidence, the policy considerations behind those rules apply equally to appeal board hearings. Cities should be deterred from purposely destroying important evidence that would support employee defenses at appeal board hearings. They should further be prohibited from benefitting from a failure to disclose critical evidence – whether inadvertent or not – by simply substituting the evidence in question with the

testimony of witnesses. This is particularly true in administrative actions that do not provide for formal discovery or depositions and where rules of evidence are already relaxed.

The Appeal Board's denial of Rosen's motion was error. Moreover, the error prejudiced Rosen because ultimately the Appeal Board issued a finding that mirrored Sgt. Cole's account of his January 19 instruction to Rosen. Had the Appeal Board accepted the version of the January 19 order most favorable to Rosen – that Sgt. Cole merely instructed Rosen not to discuss the investigation with Soper until it was completed – the final outcome would likely have been markedly different, as there is no dispute Rosen followed that directive. Because the Appeal Board's actions constitute harmful error, its decision affirming the demotion should be reversed. *See Lucas*, 949 P.2d at 757 ("[A]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful.").

III. THE APPEAL BOARD EXCEEDED ITS AUTHORITY AND TAINTED THE PROCEEDINGS BY RECEIVING AND REVIEWING THE CITY'S PROPOSED EXHIBITS IN ADVANCE OF THE HEARING.

Utah Code Ann. § 10-3-1106(3)(b)(ii) states: "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." Subsection (4) states:

> 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.

(Emphasis added). The language "examine the evidence *to be considered* by the appeal board" suggests that the evidence should not be presented to the appeal board until the time of the hearing when the employee has the opportunity to examine such evidence and determine whether it is objectionable. At that time, the employee would have the opportunity to seek the exclusion of objectionable evidence.

Here, Rosen was afforded no such opportunity. At the hearing on April 7, 2011, Rosen became aware for the first time that counsel for the City had sent a packet of proposed exhibits to the members of the Appeal Board at least a month prior to the hearing. R. 59: 16:20-17:1 The Appeal Board admitted that it had received and reviewed the City's proposed exhibits prior to the hearing and that they were "familiar with the facts" even before any witness had testified. *Id.* These exhibits included documents that ultimately were not admitted at the hearing, including documents that discussed "older offenses" of Rosen that had transpired well prior to the January 18 incident in question, and had not been identified by the City as bases for the demotion at issue. R. 59: 37:5-14. After a discussion on the matter, the City ultimately agreed it would "not bring in the older offenses" and would limit the evidence to the conduct that transpired from January 18, 2011 and forward. R. 59: 37:9-14.

Unfortunately, by that time the damage had been done. At least one board member expressed some concern over the prior allegations[5], stating "I'm trying not to let the whole

[5] The prior allegations also involved wardrobe malfunctions.

pants thing bother me and influence me. But I've got one hand, and my pants aren't falling down all the time." R. 59: 20:22-25. Another board member commented on Rosen's guilt before any evidence had been presented, stating: "It seems to me that we are talking about insubordination, and he was insubordinate in my opinion – or allegedly." R. 59: 24:9-11. Because no evidence had yet been submitted, the board member could only have been basing his opinion of guilt from his review of the City's materials.

Rosen submits that the Appeal Board's advance review of the City's evidence, much of which was objected to and never introduced, tainted the hearing and caused irreversible prejudice to Rosen. Furthermore, the City's providing of the evidence ahead of time violated Utah Code Ann. § 10-3-1106. For these reasons, the Appeal Board's decision should be reversed or, in the alternative, the decision should be reversed and remanded for a new, impartial hearing.

IV. MANY OF THE APPEAL BOARD'S FINDINGS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In upholding the demotion, the Appeal Board made several factual findings against Rosen. This Court should review those findings using a substantial evidence standard and in light of the entire record. *Lucas*, 949 P.2d at 758. Substantial evidence is relevant evidence a reasonable mind "might accept as adequate to support a conclusion." *Allen v. Dept. of Workforce Services*, 2005 UT App 186, ¶ 18, 112 P.3d 1238. Reversal is appropriate if the Appeal Board's findings are not supported by substantial evidence. *Drake*,

939 P.2d at 181.

In this case, the Appeal Board upheld Rosen's demotion for various reasons. The Appeal Board's findings, discussed in turn below, are not supported by substantial evidence.

A. Sgt. Cole's January 19 Statement Was Not an Order.

The Appeal Board found that on or about January 19, 2011, Sgt. Cole ordered Rosen to "have only 'professional' contact with [Soper]." R. 54. The Appeal Board found that Rosen had violated this order on two separate occasions:

> On or about January 25, 2011, Officer Rosen left a Circus ticket with a hand-written note affixed to it for [Soper] in her Department box. The note said, "Sorry so late!- Enjoy." [Soper] reported the ticket to her supervisor. (Ex. 2.) Officer Rosen acknowledged in his testimony that he left the Circus ticket for [Soper] in her Department box, with the handwritten note attached.

R. 54.

> On or about January 26, 2011, [Soper] issued a Department-wide interoffice email requesting information relating to a license plate issue. Officer Rosen emailed a response to [Soper] in an effort to communicate with her. (Ex. 3.) Officer Rosen acknowledged in his testimony that he sent the responsive email despite that he had no pertinent information about the license plate which was the subject of [Soper]'s email.

R. 54-55. Consistent with Rosen's obligation to marshal the evidence, the following testimony was adduced at the hearing in support of the Appeal Board's finding on this issue:

1. Sgt. Cole testified that he "told [Rosen]...it would be best if you don't have any contact with her,...only have professional contact with her, nothing away from that."

R. 59: 173:7-12.

2. In an interview conducted at POST on February 11, 2011, Sgt. Cole had the following exchange with Rosen regarding the January 19 order:

> Cole: And at the very end of that, I gave you a directive. Do you remember what that was?
>
> Rosen: I don't. Basically what I recall was you said that I have no -- to not talk about it or have any dealings with it, and that the chief would get back with me on it and explain what was going to happen from there as far as that.
>
> Cole: Okay. You don't remember I said to you, you shouldn't talk to [Soper] unless it's business, professional?
>
> Rosen: On a professional level.
>
> Cole: Right.
>
> Rosen: Right.
>
> Cole: Do you remember that?
>
> Rosen: Yeah.

R. 59: 176:6-21.

3. Sgt. Cole testified he told Soper and Kim Wright, Soper's supervisor, that Rosen "couldn't have contact with [Soper]," but Sgt. Cole couldn't remember his exact words. R. 59: 177:12-178:2.

4. Soper testified that Sgt. Cole told her Rosen "was to have no contact with [Soper] at all. And that if any contact was made or anything happened, that [Soper] was to

directly report to [Sgt. Cole]. R. 59: 69:5-8.

5. Kim Wright testified that Sgt. Cole told her that "there should be no contact whatsoever between [Rosen and Soper]." R. 59: 143:3-7. [Delete??]

6. On January 25, 2011, Rosen left circus tickets in Soper's work mailbox. R. 3. Rosen did not dispute this.

7. On January 26, 2011, Rosen replied to Soper's work-related email stating "Omgosh!!! That's hysterical! I figured we could leave it there to see how long it would be before it starts to disintegrate!? You have a smashing day too- thanks for the smile!" R. 4. Again, Rosen did not dispute this.

Notwithstanding the above, it was unreasonable for the Appeal Board to conclude that on January 19 Sgt. Cole ordered Rosen to "have only 'professional' contact with [Soper]." R. 54. First, had the City produced the recording of the January 19 hearing, the parties and Appeal Board would not have been in the position of trying to recollect what had been said months prior. For the reasons stated supra, the Appeal Board should have granted Rosen's motion for an adverse inference and given credence to Rosen's accounting of the conversation.

Moreover, Sgt. Cole's own direct testimony makes it clear he never gave Rosen an order. Sgt. Cole testified that when he instructed Rosen to have only professional contact with Soper, he further explained that the instruction was to remain in place "until this was resolved." R. 59: 203:16-22. Sgt. Cole believed that resolution occurred when he submitted

his findings concerning the January 18 incident to Chief Hicken. R. 59: 203:23-204:23. Sgt. Cole also used the words "it would be best" in describing his statement to Rosen.[6] Although those words are consistent with advice or a recommendation, they are not consistent with an order or directive. If Sgt. Cole's statement could best be described as advice or a recommendation, Rosen could not have committed insubordination by failing to heed it.

Even assuming Sgt. Cole's statement was an order, the Appeal Board should not have considered the January 26 email from Rosen to Soper in its analysis of whether the order was violated because that conduct was not stated as a reason for Rosen's demotion. On February 16, 2011, the City issued a letter of intent to discipline ("Demotion Letter"), identifying the conduct for which Rosen was being demoted. R. 44-45. The Demotion Letter only identified two allegations: (1) placing of the circus tickets in Soper's mailbox; and (2) entering Soper's name in the radio contest. *Id.* No other allegations of insubordination were identified in the Demotion Letter.

The authority of an appeal board is defined in Utah Code Ann. § 10-3-1106:

> 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* ... .

(Emphasis added). Thus, in a case of employee discipline, an appeal board's role is to consider the merits of the underlying cause for that discipline. It stands to reason that where

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[6] Sgt. Cole testified he told Rosen "it would be best if you don't have any contact with her,...only have professional contact with her, nothing away from that." R. 59: 173:7-12.

a municipality has articulated specific reasons for the discipline (*i.e.*, the "cause" of the discipline) in a discipline letter or other document, the appeal board can only consider evidence regarding those stated reasons. On the other hand, the language of Utah Code Ann. § 10-3-1106 can only mean that an appeal board exceeds its authority if it considers additional "reasons" not articulated in the relevant disciplinary documentation.

This interpretation of Utah Code Ann. § 10-3-1106 is consistent with the fundamental requirements of due process, which is triggered because Rosen has a recognized property right in his job. Utah Code Ann. § 10-3-1105(1). "Due process, at a minimum, requires timely notice and opportunity for hearing appropriate to the nature of the case". *Becker v. Sunset City*, 2009 UT App 197, ¶ 7, 216 P.3d 367 (citations and internal quotations omitted). When the City demoted Rosen, the only notice Rosen received was the Demotion Letter. Consequently, Rosen only received proper due process with respect to the allegations outlined in that letter.

Furthermore, 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." *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909 (Utah 1993) (emphasis added). Thus, Rosen received proper due process to the extent he had the opportunity to prepare a defense against the allegations outlined in the Demotion Letter.

At the hearing, Rosen asserted the evidence of the January 26 email was improper and that the Appeal Board should limit its consideration to the allegations identified in the Demotion Letter. R. 59: 519:1-11. Instead, the Appeal Board did consider the email and issued a specific finding indicating that action violated the orders given to Rosen. R. 54-55.

Because the Appeal Board improperly exceeded its authority in considering reasons unrelated to Rosen's demotion, Rosen respectfully submits the Appeal Board's ruling is fatally flawed. Indeed, it is impossible to determine what the Appeal Board's decision would have been had it not considered evidence of the email. For these reasons, this Court should reverse the Appeal Board's decision and reinstate Rosen to the position of corporal. *Turner v. Lone Peak Public Safety Dist.*, 2010 UT App 168, ¶ 1, 235 P.3d 797 (On appeal, reversal is appropriate if the Appeal Board "abused its discretion or exceeded its authority").

B. Sgt. Cole Did Not Give a Second Order to Rosen.

The Appeal Board found that Rosen violated Sgt. Cole's January 19 order, as well as Chief Hicken's February 2 order. However, the Appeal Board also found that on an unspecified date between January 19 and February 2, Rosen "was again instructed by Sgt. Cole to stay away from [Soper] and to leave her alone" and "was instructed to give the situation time to cool off." R. 55. This finding is meaningful because it references alleged insubordinate conduct, precisely the kind of conduct for which Rosen was demoted. Critically, however, the record is devoid of any evidence supporting such a finding.

Although Sgt. Cole testified he ordered Rosen to limit his contact with Soper on

January 19, he never testified about a purported second order. R. 26; R. 59: 173:7-12. According to the record, the next time Sgt. Cole spoke to Rosen about Soper was in a February 11 interview, after all of the alleged misconduct had already occurred and Rosen had been placed on administrative leave. R. 31, 50. Unfortunately, it is impossible to determine whether the Appeal Board would have arrived at the same conclusions concerning insubordination had it not believed Rosen violated a non-existent order. Under the circumstances, the only realistic remedy is to reverse or remand for a new hearing.

C. Chief Hicken Did Not Issue a No-contact Order on January 28.

It is bad enough that the Appeal Board made one finding that was unsupported by the record. However, the Appeal Board also made a second finding based entirely on phantom evidence:

> On or about January 28, 2011, Chief Hicken met with officer Rosen regarding the pants incident ant to close the IA investigation. During that meeting, he verbally counseled Officer Rosen and instructed him to limit his contact with [Soper] to "professional" contact only.

R. 55. This finding is not supported by even a scrap of evidence. On the contrary, Chief Hicken testified he did not recall speaking to Rosen about making contact with Soper prior to February 2. R. 59: 252:10-14. He further testified that as far as he was concerned, any no-contact directive issued by Sgt. Cole on January 19 would have terminated as of January 28. R. 59: 250:4-251:2. While Chief Hicken described his "professional contact" directive of February 2, he provided no testimony of a prior, similar directive. All of this is consistent with Chief Hicken's admission that during the January 28 discussion, Chief Hicken actually

gave Rosen permission to speak to Soper. R. 59: 278:1-5.

Again, it is impossible to determine whether the Appeal Board would have arrived at the same conclusions concerning insubordination had it not believed Rosen violated a non-existent order; therefore, reversal or remand is the only appropriate remedy.

D. Chief Hicken's February 2 Order Was Not Violated.

The Appeal Board found on February 2, 2011, Chief Hicken instructed Rosen "to have nothing but professional contact with [Soper] and specifically, that Officer Rosen was not to try to resolve the issue any further with [Soper]." R. 55. The Appeal Board found that Rosen violated this order:

> [A]fter the meeting with Chief Hicken, Officer Rosen nonetheless engaged in further contact with [Soper] which was not limited to "professional" contact as directed. On or about February 5, 2011 and after him meeting with Chief Hicken, Officer Rosen entered [Soper]'s name into a radio station give-away contest where he worked as a disc jockey. [Soper] won the contest and her name was read over the air as the winner of "Riverdance" tickets. Officer Rosen admitted this conduct during his testimony.

R. 56. The following testimony was adduced at the hearing in support of the Appeal Board's finding on this issue:

1. Chief Hicken testified that on February 2 he told Rosen that "there's to be no contact other than professional contact, which would mean, you know, if she had some record issues or something you normally do as a police officer in the field. That would be it. Everything else would be unacceptable." R. 59: 254:3-9.

2. On February 7, 2011, Chief Hicken sent an email to Sgt. Cole stating:

> On Feb. 2nd I ordered Cpl. Rosen to have no further contact with...Soper regarding the IA case in which he was disciplined... I ordered him to have nothing but professional contact with her and nothing else...This was clear and unmistakable direction. Anything which falls outside of "professional contact" can be considered a violation of a direct order.

R. 21.

3. On February 5, 2011, Rosen reserved concert tickets for Soper and two other co-workers and Soper's name was inadvertently submitted into a database for the drawing of the contest's grand prize. R. 59: 339:1-11, R. 59: 339:20-340:5.

4. Soper's name was drawn, and Soper was identified on air as the winner of the grand prize. *Id.*

The Appeal Board's finding on this issue is not supported by substantial evidence because entering Soper's name into a contest does not equate to "contact".[7] Furthermore, the undisputed evidence was that Soper's name was inadvertently entered into the prize database. Specifically, during the course of his investigation, Sgt. Cole emailed a radio station employee about the incident. Sgt. Cole testified that, according to the employee, Soper's name had been "mistakenly" put into the prize drawing. R. 59: 194:18-196:6. It was a stretch and abuse of discretion for the Appeal Board to conclude that entering Soper's name into a contest constituted "contact" with Soper.

---

[7] On February 7, 2011, Rosen stated to Soper "congratulations, you got tickets to River Dance...you won them through K-Bull 93." R. 59: 337:20-25. However, Rosen was never disciplined for making this statement, as the City did not mention it in the Demotion Letter. Furthermore, the Appeal Board did not make a finding concerning the February 7 conversation or give any indication that it factored into the Appeal Board's decision.

CONCLUSION

For the foregoing reasons, Petitioner Aaron Rosen respectfully requests that he be reinstated to his former position as corporal with the City of Saratoga Springs Police Department, together with applicable back pay and benefits from February 26, 2011, the date of his demotion.

DATED this 21 day of December 2011.

KESLER & RUST

Ryan B. Hancey
Attorneys for Petitioner Aaron Rosen

RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because it contains 8,695 words.

DATED this 21 day of December 2011.

KESLER & RUST

Ryan B. Harvey

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 **BRIEF OF PETITIONER** this 21st day of December 2011.

____ FEDERAL EXPRESS
____ U.S. MAIL
____ HAND DELIVERY
____ TELEFAX TRANSMISSION

Rebecca Goldhardt

Kevin Thurman
CITY OF SARATOGA SPRINGS
1307 N. Commerce Drive, Ste 200
Saratoga Springs, Utah 84045
Attorney for Respondent City of Saratoga Springs

ADDENDUM

Utah Code
Title 10 Utah Municipal Code
Chapter 3 Municipal Government
Section 1106 Discharge, suspension without pay, or involuntary transfer -- Appeals -- Board -- Procedure.

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.

Amended by Chapter 19, 2008 General Session
Amended by Chapter 115, 2008 General Session
Download Code Section Zipped WordPerfect 10_03_110600.ZIP 11,728 Bytes

<< Previous Section (10-3-1105) Next Section (10-3-1107) >>

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CITY OF SARATOGA SPRINGS

EMPLOYEE APPEALS BOARD

IN RE: APPEAL OF AARON ROSEN	DECISION

Pursuant to Utah Code Ann. §10-3-1106 and in accordance with City Policies, Section X, ¶4 ("Employee Appeal Process"), the Employee Appeals Board of the City of Saratoga Springs ("EAB") hereby UPHOLDS the decision to demote Officer Rosen from corporal to top step level police officer with an accompanying reduction in pay.

Upon review of the evidence presented at the hearing and on review of the recording of the pre-disciplinary hearing which was submitted by the parties to the EAB for review post-hearing, the EAB issues its Findings and Decision as follows:

PROCEEDINGS

Appellant Aaron Rosen is an officer and full time employee of the Saratoga Springs City (the "City") Police Department. Officer Rosen filed an appeal of the decision of the City Police Department (the "Department") and Chief Gary Hicken (the "Chief") to demote him from corporal to top step police officer with an accompanying decrease in pay. Officer Rosen's basis for appeal was two-fold: 1) He was not given an order and he was not insubordinate; and, 2) the discipline he received was not proportionate to his alleged offense nor was it consistent with other discipline meted out by the City. Officer Rosen filed his written appeal with the City Recorder within ten (10) days of the City and the Chief's disciplinary action according to the City's appeal procedures. That written appeal was forwarded to the EAB.

On April 7 and April 19, 2011, a hearing was held before the EAB at which Officer Rosen and his counsel, Ryan Hancey of Kestler & Rust were present. Also present was the City and its counsel, Lindsay Jarvis. During the course of proceedings, the EAB was advised by independent counsel, Elizabeth M. Peck of Peck Law, LLC. The EAB took and received evidence, and it fully heard the matter before rendering its decision. The EAB also heard argument of Officer Rosen's and the City's counsel at the opening and close of evidence on the matter. Following the hearings and upon review of the exhibits submitted during the course of the hearings, the EAB rendered its decision by secret ballot according to City policy and Utah Code Ann. §10-3-1106.

EAB FINDINGS

Based on the evidence presented to the EAB at the hearings on April 7 and 19, 2011, the EAB makes the following findings:

1. On or about January 18, 2011, Officer Rosen was involved in an incident where a female coworker complained to the City that Officer Rosen (then, Corporal Rosen) had dropped his pants in a public location within the Department offices where others, including the co-worker, could view him (the "pants incident"). (Ex. 1.) The co-worker testified about the pants incident, her complaint, and about Officer Rosen's subsequent efforts to communicate and make contact with her.

2. In his testimony to the EAB, Officer Rosen acknowledged his condict in regards to the pants incident, but he described the conduct as an accidental "wardrobe malfunction" that occurred when he unbuckled his pants to tuck in his uniform shirt and the pants inadvertently dropped below his waist. Officer Rosen also submitted a written response in regards to the pants incident during the IA investigation which subsequently ensued. (Ex. 6.)

3. At the time of the pants incident, Officer Rosen was already undergoing another unrelated Internal Affairs ("IA") investigation; the first IA investigation resulted in a verbal warning.

4. The Chief testified that the pants incident caused "the biggest disruption in the Department's history."

5. On or about January 19, 2011, a second IA investigation was commenced regarding the pants incident: IA-11-003. Sgt. Kerry Cole was the investigating officer. Sgt. Cole testified that during his investigation, he informed Officer Rosen to have only "professional" contact with the complaining co-worker.

6. The IA investigation into the pants incident also resulted in a Disciplinary Report and corrective action of a verbal reprimand on or about January 28, 2011 to Officer Rosen for violation of Department Rules and Regulations 2.0 Personal Conduct. (Ex. 12.)

7. After Officer Rosen was directed by Sgt. Cole to limit his contact with the co-worker to "professional contact" only, Officer Rosen nonetheless continued to make contact with the female co-worker which was not "professional." Evidence of Officer Rosen's contact efforts with the co-worker was presented to show the following:

a. On or about January 25, 2011, Officer Rosen left a Circus ticket with a hand-written note affixed to it for the co-worker in her Department box. The note said, "Sorry so late! –Enjoy." The co-worker reported the ticket to her supervisor. (Ex. 2.) Officer Rosen acknowledged in his testimony that he left the Circus ticket for the co-worker in her Department box, with the handwritten note attached.

b. On or about January 26, 2011, the co-worker issued a Department-wide interoffice email requesting information relating to a license plate issue. Officer Rosen emailed

a response to the co-worker in an effort to communicate with her. (Ex. 3.) Officer Rosen acknowledged in his testimony that he sent the responsive email despite that he had no pertinent information about the license plate which was the subject of the co-worker's email.

8. Officer Rosen was again instructed by Sgt. Cole to stay away from the co-worker and to leave her alone. He was instructed to give the situation time to cool off.

9. On or about January 28, 2011, Chief Hicken met with Officer Rosen regarding the pants incident and to close the IA investigation. During that meeting, he verbally counseled Officer Rosen and instructed him to limit his contact with the co-worker to "professional" contact only. During that meeting the Chief also agreed to allow Officer Rosen to apologize to the co-worker. Chief Hicken testified that he was unaware of the contacts made by Officer Rosen on or about January 25 and 26, 2011.

10. In the January 28, 2011 meeting, Chief Hicken agreed that Officer Rosen could apologize to the co-worker, which Officer Rosen tried to do on or about January 31, 2011. However, the co-worker testified that she refused Officer Rosen's request to meet with her to apologize because she did not want his apology or contact with Officer Rosen.

11. Chief Hicken testified that he met with Officer Rosen again on February 2, 2011, after Chief Hicken learned of the contacts made by Officer Rosen and his efforts to apologize. During the February 2, 2011 meeting, Chief Hicken instructed Officer Rosen to have no further contact with the co-worker regarding the IA case and pants incident. He further instructed Officer Rosen to have nothing but professional contact with the co-worker and specifically, that Officer Rosen was not to try to resolve the issue any further with the co-worker. The Chief also testified that he sent an email to Sgt. Cole on or

about February 7, 2011 regarding his meeting with Officer Rosen explaining the instructions he gave to Officer Rosen on February 2, 2011; that email was introduced at the hearing. (Ex. 9.)

12. Officer Rosen acknowledged in his testimony that Chief Hicken directed him to have only professional contact with the co-worker. However, after meeting with Chief Hicken, Officer Rosen nonetheless engaged in further contact with the co-worker which was not limited to "professional" contact as directed.

13. On or about February 5, 2011 and after his meeting with Chief Hicken, Officer Rosen entered the co-worker's name into a radio station give-away contest where he worked as a disc jockey. The co-worker won the contest and her name was read over the air as the winner of "Riverdance" tickets. Officer Rosen admitted this conduct during his testimony.

14. Officer Rosen acknowledged that on or about February 16, he was issued a letter of intent to discipline by the Chief. (Ex. 17.) He further testified that on or about February 24, 2011, Officer Rosen participated in a pre-disciplinary hearing with the Chief and City counsel, Lindsay Jarvis. Officer Rosen acknowledged that he recorded the pre-disciplinary hearing, and that recording was presented to the EAB for review post-hearing.

15. Officer Rosen was issued a final discipline in the form of demotion from corporal to top step police officer with accompanying reduction in pay.

16. Officer Rosen acknowledged having voluntarily issued a written statement to his co-workers regarding his demotion in which he acknowledged his conduct, his demotion, and he apologized for the disruption he caused within the Department. (Ex. 22.)

DECISION TO UPHOLD DISCIPLINE

The EAB determines that based on the evidence presented to it by the City and Officer Rosen, the disciplinary action of demotion of Officer Rosen to top step police officer with accompanying reduction in pay was warranted and supported by the evidence. As such, the disciplinary action taken by the Department and Chief Hicken are upheld. The testimony and other evidence submitted showed that Officer Rosen had received verbal counseling for his conduct regarding the pants incident, and that he was further instructed on more than one occasion by both Sgt. Cole and by Chief Hicken not to have contact with the co-worker other than "professional" contact. Officer Rosen nonetheless engaged in intentional contacts with the co-worker by giving her circus tickets, and his entry of the co-worker's name in a radio station contest for Riverdance tickets. These contacts were not "professional" contacts with the co-worker. Rather, the contacts made by Officer Rosen were of a personal nature and they were made after he was instructed to limit his contacts to professional contacts only. Officer Rosen's continued personal contacts with the co-worker, after having been instructed to limit his contacts to professional only, caused significant disruption in the Department. Officer Rosen acknowledged that although he was instructed to limit his contacts with the co-worker to professional contacts only, he failed to do so. Officer Rosen also acknowledged to his co-workers that he was accountable for his conduct which resulted in a demotion, and that his conduct and its consequences had caused disruption within the Department.

Officer Rosen's performance history included at least two IA investigations resulting in verbal counseling for violations of the Department's Rules and Regulations. His subsequent failure to follow specific instructions and the Chief's direct orders to leave his co-worker alone and to limit his contact with her to professional contact only is insubordination, which is a serious offense. Officer Rosen's conduct created a significant disruption within the Department, and it further illustrates his poor

judgment, and an inability to lead others by his example. The EAB therefore agrees with the Chief's decision to discipline and demote Officer Rosen. The demotion of Officer Rosen from corporal to top step level police officer with accompanying reduction in pay is therefore upheld insofar as the decision was reasonable under the circumstances, and the discipline was warranted and supported by the evidence.

DATED this 10th day of May, 2011.

By:
Brent Call, Member
Employee Appeals Board
City of Saratoga Springs

CERTIFICATE OF DELIVERY

I hereby certify that on the 10th day of May, 2011, I hand delivered to the office of the City Recorder for the City of Saratoga Springs the foregoing DECISION in the Appeal of Aaron Rosen.

Brent Call, Member
Employee Appeals Board
City of Saratoga Springs

#11

CITY OF

SARATOGA SPRINGS
POLICE DEPARTMENT
CHIEF GARY HICKEN

February 16, 2011

Letter of Intent to Discipline

On February 16, 2011 I received the completed Internal Affairs investigation 11-003. The investigation was completed by Sergeant Cole. The investigation was supplemental to an on-going Internal Affairs investigation involving an incident that occurred on January 18, 2011, where, according to Corporal Rosen, while adjusting his clothing, his pants slipped from his hands and dropped down to his knees. The incident occurred in the Sergeant's office while the door was open and was observed by Records Clerk Soper. While Corporal Rosen claimed the incident was accidental, rather than immediately apologizing for the incident, Corporal Rosen made an inappropriate joke at Ms. Soper's expense. He was subsequently disciplined for that on January 28, 2011 and was verbally counseled regarding that conduct.

After the verbal counseling, I learned additional information that led to the supplemental investigation, including information that Corporal Rosen had dropped his pants in front of a fellow officer on at least one prior occasion. In addition, during the investigations Corporal Rosen was ordered by both Sergeant Cole and myself not to have any contact with Clerk Soper outside of professional contact and as required in the performance of his duties. On January 28, 2011 he asked if he could apologize to Clerk Soper and I told him he could do that in a very brief casual way if it was acceptable to Clerk Soper. After hovering in Ms. Soper's work area for quite a few minutes, Ms. Soper's supervisor informed me that Ms. Soper did not wish to speak with him. I also informed Corporal Rosen on Wednesday, February 2, 2011 that Clerk Soper did not want to have a discussion with him regarding the issue in any manner including an apology. I ordered him at that time he should have no discussion or involvement with Clerk Soper in any way other than the scope of his employment. I told him he was not going to get the resolution he wanted and ordered him to have no contact other than professional involvement.

On January 26, 2011 Clerk Soper received a ticket to the circus that had been left in her box with a note attached from Corporal Rosen stating "sorry so late, enjoy." This was in violation of his previous directed order. On February 7, 2011 Clerk Soper had been told by Corporal Rosen she had won tickets to "Riverdance" from the radio station Corporal Rosen works for part time. Corporal Rosen confirmed that he entered Ms. Soper's name in the prize data base without her knowledge or consent. This was also a violation of the order which I had given him on February 9, 2011

Sergeant Cole's investigation and my review find the following:

1. Corporal Rosen violated Saratoga Springs Rules and Regulations 3.15 (B) Following Orders/Insubordination when he placed the circus ticket in Clerk Soper's mailbox.

2. He also violated 2.0 Personal Conduct, and 2.24 Respect for the same reason.

3. He also violated Rules and Regulations section 3.0 Duty Requirements where he failed to use sound judgment for the same reason.

4. Corporal Rosen was also found insubordinate by violating Rules and Regulations 3.15 (B) on February 7, 2011 when he intentionally entered Clerk Soper's name in a prize data base without her knowledge and consent which lead to her name being announced over the K-Bull radio as a winner of "Riverdance" tickets. This was also a violation of 2.0 Personal Conduct, 2.24 Respect, and 3.0 Duty Requirements / Judgment for the same reason.

The above violations were all sustained by Sergeant Cole and myself and require significant discipline. Therefore, it is my intent to discipline Corporal Rosen by demoting him from Corporal to top step Police Officer as of February 26, 2011. The salary/pay change will be reflected the next pay period beginning March 6, 2011. Upon that demotion he will be assigned to the Patrol Squad determined by Management staff. After which an action plan will be put in place by the supervising Sergeant.

According to section 4.36 Pre-Disciplinary Action Procedure, you are being given written notice regarding the intent to discipline for the listed sections and the nature and rationale for the decision. According to section 4.0 of the Saratoga Springs Rules and Regulations and section 4.56 of the City of Saratoga Springs appeal process, you have 10 days in which to request an appeal to this discipline. Until that decision has been made you will return to work on February 16, 2011 and work your normal shift and are again ordered to have no contact directly or indirectly either on or off duty with Clerk Soper except within the scope of your employment.

Respectfully,

G. Hicken

Gary Hicken
Chief of Police
Saratoga Springs Police Department

GH/kw