

1993

# Michael D. Darby v. Washington Terrace City, a political subdivision of the State of Utah : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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OF APPEALS

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DOCKET NO. 930701 CA

IN THE UTAH COURT OF APPEALS

MICHAEL D. DARBY,  
Plaintiff and Appellant,

vs.

WASHINGTON TERRACE CITY,  
a political subdivision of  
the State of Utah,

Defendant and Appellee,

Case No: 930701-CA

Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM AN ORDER ENTERED BY THE SECOND JUDICIAL  
DISTRICT COURT, WEBER COUNTY, STATE OF UTAH,  
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,  
THE HONORABLE MICHAEL J. GLASMANN, JUDGE

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FILED

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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MICHAEL D. DARBY,	)	
	)	
Plaintiff and Appellant,	)	
	)	
vs.	)	Case No: 930701-CA
	)	
WASHINGTON TERRACE CITY,	)	Priority No. 15
a political subdivision of	)	
the State of Utah,	)	
	)	
Defendant and Appellee,	)	

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### JURISDICTIONAL STATEMENT

Appellee, Washington Terrace City (hereinafter "City"), agrees with the jurisdictional statement of Appellant, Michael D. Darby.

### ISSUES PRESENTED FOR APPEAL

The City accepts the issues presented by Darby on page 2 of his brief with the exception of Issue "d" because Darby did not raise this issue before the trial court and, accordingly, cannot raise it on appeal before this tribunal. See Smith v. Iversen, 848 P.2d 677 (Utah Ct. App. 1992). The City also accepts Darby's stated standard of review.

In addition to the three issues presented by Darby, it is also appropriate for this court to address a fourth issue: namely, that Darby was properly terminated for persistently refusing to obey the orders of his superior officers. Although the City briefed and argued this issue before the trial court, that court did not address this issue in its order of dismissal. This appellate court, however, can affirm the trial court's grant of summary judgment on any proper ground. See Bagshaw v. Bagshaw, 788 P.2d 1057, 1060 (Utah Ct. App. 1990); Allphin Realty v. Sine, 595 P.2d 860, 861 (Utah 1979).

### STATEMENT OF THE CASE

The City agrees with Darby's Statement of the Case.

### STATEMENT OF FACTS

1. Michael D. Darby, at all times relevant, was a police officer with the Washington Terrace Police Department. See R. 020.

2. In the fall of 1990, the Department began having serious problems with Officer Darby involving his failure to report for work when scheduled, his unprofessional appearance of his person and his squad car, and his general unwillingness or inability to perform his responsibilities as a police officer. See R. 38-39 (Affidavit of Lt. Richard Cope at paragraph 3).

3. On December 23, 1990, Officer Darby failed to show up for his scheduled shift and appeared approximately five and one-half hours late. See R.39 (Affidavit of Cope at paragraph 4).

4. As a result of the December 23, 1990 incident, Washington Terrace Chief of Police Tracy and Lt. Richard Cope met with Officer Darby on December 24, 1990. In that meeting, Officer Darby admitted his various problems, blamed such problems on his personal life and suggested that he receive a written reprimand for being late on December 23. See id.

5. On December 27, Lt. Cope prepared a written report regarding the December 23 tardiness of Officer Darby. That report was submitted by Lt. Cope to Chief Tracy. See id.; see also R. 47-48 (Affidavit of Chief Tracy at paragraph 4); R. 52 (Cope's written report).

6. On December 30, 1990, Officer Darby again did not report for work as scheduled and ultimately showed up for work one and one-half hours late. See R.39 (Affidavit of Cope at paragraph 5).

7. As a result of the December 30, 1990 incident, Lt. Cope again wrote a report to Chief Tracy regarding Officer Darby's tardiness. Id. at paragraph 6; see also R.48 (Affidavit of Tracy at paragraph 6); R. 54 (Cope's second written report).

8. As a result of the two tardy incidents, Chief Tracy submitted a written warning, dated December 31, 1990, to Officer Darby which warning included proposed corrective action on a job performance sheet. Chief Tracy indicated that any further incidents of Officer Darby's failure to timely report for his shift within one year would result in his termination. See R.48 (Affidavit of Tracy at paragraph 7); see also R. 56 (Tracy's written warning).

9. In mid-June of 1991, Lt. Cope assigned a traffic accident report to Officer Darby with orders that Darby complete the report within the next 30 days. See R. 39 (Affidavit of Cope at paragraph 7).

10. On July 14, 1991, Chief Tracy delivered a written reprimand to Officer Darby regarding Officer Darby's failure to comply with the corrective action on the job performance sheet which had been delivered to Officer Darby on December 31 of 1990.

In his written warning of July 14, 1991, Chief Tracy ordered Officer Darby to seek personal counseling within the next ten days to attempt to straighten out his life. See R. 48-49. (Affidavit of Tracy at paragraph 8); see also R. 59 (Tracy's written reprimand).

11. On July 19, 1991, the traffic accident report assigned to Officer Darby in mid-June of 1991 had not been completed and Lt. Cope then ordered Darby to complete the report immediately. See R. 39 (Affidavit of Cope at paragraph 8).

12. On August 1, 1991, Officer Darby showed up late for a shooting board meeting. See R. 39 (Affidavit of Cope at paragraph 9).

13. On August 2, 1991, Officer Darby showed up 45 minutes late for his patrol shift. See R. 40 (Affidavit of Cope at paragraph 10).

14. On August 7, 1991, Officer Darby did not show up for a shooting qualification meet when he was required to do so, requiring him to shoot with the second group later that day. See id. (Affidavit of Cope at paragraph 11).

15. On August 10, 1991, Officer Darby took a 22 caliber rifle into evidence from a suspect alleging that he believed it was stolen, but failed to indicate this in his report and did not place the gun properly into the evidence lock-up. See id. (Affidavit of

Cope at paragraph 12).

16. On August 10, 1991, Officer Darby seized a checkbook as evidence, but again failed to properly put the checkbook into the evidence lock-up and filled out an inaccurate report indicating that the checkbook was, in fact, in the evidence lock-up. See id. (Affidavit of Cope at paragraph 13).

17. On August 13, 1991, Lt. Cope reassigned the checkbook case to Officer Gathercoal and again ordered Officer Darby to place the checkbook into the evidence lock-up in order for Officer Gathercoal to complete the investigation. See id. (Affidavit of Cope at paragraph 14).

18. On August 14, 1991, the owner of the 22 caliber rifle asked Officer Darby about the status of the rifle and Officer Darby said he had to run the rifle through the office of Alcohol, Tobacco, and Firearms and would get back with the owner. See id. (Affidavit of Cope at paragraph 15).

19. On August 16, 1991, Lt. Cope ordered Officer Darby to return the rifle to the owner immediately. See id. (Affidavit of Cope at paragraph 16).

20. On August 18, 1991, Officer Darby was 43 minutes late for his patrol shift. See id. R.40-41 (Affidavit of Cope at paragraph 17).

21. On August 19, 1991, Lt. Cope again ordered Officer Darby

to put the checkbook into the evidence lock-up. See R. 41 (Affidavit of Cope at paragraph 18).

22. On August 20, 1991, Lt. Cope obtained an incomplete traffic accident report from Officer Darby, discovered that the rifle was still in the police office behind a filing cabinet, and discovered that the checkbook had been turned in, but that no proper evidence slip was included with the checkbook. See id. (Affidavit of Cope at paragraph 19).

23. On August 21, 1991, after reviewing the great number of problems that Officer Darby was experiencing during July and August 1991, Chief Tracy wrote to Officer Darby and ordered him to answer various charges of incompetence, ineptitude, and insubordination made by other officers. See R. 49 (Affidavit of Tracy at paragraph 9); see also R. 61 (Tracy's letter of 8/21/91).

24. Officer Darby responded to Chief Tracy's written report with a written letter of August 29, 1991. See id. (Affidavit of Tracy at paragraph 10). see also R. 65 (Darby's letter).

25. On September 3, 1991, Chief Tracy wrote to Officer Darby and terminated him based upon various matters contained in his letter of August 21 and Darby's response of August 28. See id. at paragraph 11; See also R. 70 (Tracy's letter of 9/3/91).

26. A review board affirmed Chief Tracy's termination of Officer Darby pursuant to the procedures of the Washington Terrace

Police Department. See R.49 at paragraph 12.

#### SUMMARY OF ARGUMENTS

In Point I of its Argument, the City explains that the authorities cited by Darby in his brief are not accepted Utah Law. Rather, Utah law indicates that municipalities' interpretations of their employment manuals should be deferentially reviewed by trial courts. For the purpose of clarity, the City will not constantly weave this deferential standard into its arguments made throughout its brief. Rather, the City will analyze Darby's termination neutrally under Berube v. Fashion Center Ltd., which case and its progeny have been accepted by Utah courts as guidance for wrongful termination cases in the private sector.

In Point II of its brief, the City explains that Darby was properly dismissed as a police officer for the "less serious offense" of consistently failing to report for work on time and for the "serious offense" of persistently refusing to follow the instructions of a superior officer. With respect to the former reason, it is undisputed that the City warned Darby, after he reported late for two shifts in December of 1990, that he would be terminated if he were late for his shift within the next year. In August of 1991, Darby was late for several of his assigned shifts. As a result, and pursuant to his warning eight months earlier, Darby was terminated from his employment with the City.

Darby was also properly terminated for the "serious offense" of persistently refusing to obey the orders of his superior officers. Beginning in June of 1990, Darby was given at least three assignments that he failed to follow through on, despite persistent requests for his superior officers to do so. As a result of those failures, Darby was dismissed, pursuant to the Manual, for the "serious offense" for persistently refusing to obey a superior officer, which allows the City to terminate Darby without prior warning.

Finally, In Point III of its brief, the City explains that, under Utah Law, the City's findings of fact concerning Darby's violations of the Manual's provisions are entitled to deferential review by a trial court. Under Russell v. Ogden Union Railway & Depot Co., 122 Utah 107, 247 P.2d 257 (Utah 1952), the City need not prove that Darby, in fact, failed to follow his superior officers' orders. Rather, the City need only prove that it had substantial evidence from which it reasonably concluded that such conduct had occurred. The trial court's job, therefore, is to determine whether the City acted reasonably in relying on substantial evidence in making its decision to terminate Darby. Failing some evidence of pretext, Officer Darby cannot reargue the veracity of such facts before the trial court and, accordingly, such facts could reasonably support his termination as a police officer.

## ARGUMENT

POINT I: THE CASES AND AUTHORITIES CITED BY DARBY AT THE BEGINNING OF HIS BRIEF DO NOT ACCURATELY REFLECT CURRENT UTAH LAW. IN FACT, UTAH LAW INDICATES THAT MUNICIPALITIES' INTERPRETATIONS OF THEIR EMPLOYMENT MANUALS SHOULD BE DEFERENTIALLY REVIEWED BY TRIAL COURTS.

In his brief, Darby sets forth various principles which he alleges govern the Personnel Manual at issue in this case. Because Darby's claims were plainly deficient even under ordinary contract principles, the City assumed for purposes of its motion for summary judgment that the Manual constituted a contract between the City and Darby. For purposes of clarity, however, certain misperceptions in Darby's preamble should be noted.

First, Darby's assertions overlook the fact that he has offered no evidence as to how the Manual came into effect, whether it was formally adopted, which department(s) it was intended to govern, etc. Absent such evidence, Darby's claim that the manual is "binding" on the city has no support.

Darby's citation to case law from other jurisdictions also ignores the special rules governing Darby's employment (and termination) as a police officer in a third-class city. Under Utah law, members of police departments in cities of the third class are not governed by the state classified civil service program. See Utah Code Ann. § 10-3-1001, et seq. Washington Terrace City is a

city of the third class, as it has a population of less than 60,000. See Utah Code Ann. § 10-2-301.

Utah Code Annotated, Section 10-3-1105, provides: "All appointive officers and employees of municipalities, other than members of the police departments, fire departments, heads of departments, and superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided." This Court and the Utah Supreme Court have construed that provision as not allowing an appeal (or judicial review) of the merits of a discharge from an excepted position. Ward v. Richfield City, 798 P.2d 757 (Utah 1990), affirming Ward v. Richfield City, 776 P.2d 93 (Utah Ct. App. 1989).

In Ward, this Court and the Utah Supreme Court affirmed summary judgment in favor of the defendant Richfield City, which had dismissed the plaintiff as the city chief of police. Referring to Section 10-3-1105, the Utah Supreme Court noted that, as the head of a department, the plaintiff had no right to appeal his discharge. See Ward, 798 P.2d at 759. The same conclusion would be required for Darby, a "member[] of [a] police department," also an expressly exempted position under Section 10-3-1105.

This Court also held in Ward that because the mayor and city council had the authority to appoint the plaintiff to the position of chief of police, the same body had the inherent authority to

dismiss him from that position without a hearing, notice, or cause. See Ward, 776 P.2d at 96. The Court noted that "[w]hen an individual is appointed by an official 'the office is held during the pleasure of the authority making the appointment, and ... no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer.'" Id. (citation omitted). The statute upon which the Court relied currently provides:

In cities of the third class and towns, the chief of police or marshal shall exercise and perform such duties as may be prescribed by the governing body. The chief of police or marshal shall be under the direction, control and supervision of the mayor. The chief of police or marshal may with the consent of the mayor, appoint assistants to the chief of police or marshal.

Utah Code Ann. § 10-3-918 [formerly 10-3-916] (emphasis provided).

Under this Court's analysis in Ward, the fact that the Washington Terrace police chief had the statutory authority to appoint subordinates necessarily granted him the authority to discharge the same subordinates without notice, hearing or cause. The chief's inherent authority to appoint and dismiss cannot be restricted by a city's adoption of a general personnel manual. In Hutchison v. Cartwright, 692 P.2d 772 (Utah 1984), a sheriff fired one of his deputies for alleged misconduct during a deposition. The Utah Supreme Court upheld summary judgment for the county on a

wrongful discharge suit brought by the deputy. Among other holdings, the court reaffirmed that the statutory authority to appoint necessarily includes the power to dismiss without notice or hearings. See Hutchison, 692 P.2d at 773-74. The appellant, however, argued that "[t]he sheriff voluntarily limited his authority by adopting the Beaver County Personnel Policy as the internal policy of the sheriff's department." See id. at 774. The Supreme Court rejected that theory, stating there was no evidence

that the county's policies and procedures were adopted and ratified either formally or informally by the sheriff as binding on his department in all cases. Nor is there anything in the records suggesting that any county ordinance adopted by the Beaver County commissioners made the policy applicable to the sheriff's department. The mere utilization of part of a county procedure by the sheriff in one particular instance cannot be equated by adoption of the entire policy of which that procedure is a part. Under such circumstances, we cannot say that the sheriff has relinquished his power to summarily discharge.

Id.

The Hutchison court's conclusion that county commissioners could not unilaterally restrict the sheriff's inherent authority to appoint and dismiss deputies applies with equal force in this case, where the police chief was statutorily empowered to appoint subordinates. The Manual in this case does not include any language indicating an intent to override the inherent authority to

appoint and dismiss certain positions in certain departments.<sup>1</sup>

In addition to its silence regarding the special principles governing police officers in cities of the third class, Darby's brief fails to recognize the widely held principle that deference is given to the interpretation of a municipal ordinance by those charged with administering it. See Texas National Theaters, Inc. v. City of Albuquerque, 97 N.M. 282, 639 P.2d 569, 573 (1982); Fisher v. City of Gresham, 69 Or.App. 411, 685 P.2d 486, 489 (1984); Eastlake Community Council v. City of Seattle, 64 Wash.App. 273, 823 P.2d 1132 (1992), review denied, 119 Wash.2d 1005, 832 P.2d 488 (1992). Courts generally refuse to

intrude into or interfere with the discretionary functions or the policies of other departments of government. Accordingly, the courts will not so interfere with the actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights.

Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d 1338, 1340 (Utah 1980). A "reasonable latitude of judgment and discretion is essential" for local governments to exercise their express and

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<sup>1</sup> It is doubtful whether a personnel manual purporting to restrict such statutory authority could be valid. A city may not attempt to enact ordinances conflicting with state statutory provisions. See State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980); Hutchinson v. Cartwright, 692 P.2d 772 (Utah 1984).

implied powers. State v. Hutchinson, 624 P.2d 1116, 1124 (Utah 1980).

To sustain a claim arising out of the City's selection and interpretation of its own personnel manual, a claimant must overcome the presumption of reasonableness and deference given to the City's implementation of that function. In this case, Darby's claims were plainly deficient even under ordinary contract principles. Consequently, the district court was not asked to apply the special rules which ordinarily would apply in light of Darby's position as a police officer in a third-class city. The court found that no genuine issue of material fact existed, and that the City was entitled to summary judgment as a matter of law. For the reasons set forth below, this Court should affirm.

POINT II: OFFICER DARBY WAS PROPERLY TERMINATED  
FROM HIS EMPLOYMENT WITH THE WASHINGTON  
TERRACE POLICE DEPARTMENT.

Under Utah law, assuming that Darby was not an at-will employee, and assuming public employees are subject to at least the same laws as private employees, Darby could be terminated from his employment by the Washington Terrace Police Chief pursuant to the terms of his employment contract. See Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044-46, 1050 (Utah 1989). An employee's employment contract can consist of any representation made to the employee concerning the terms of his or her employment as contained

in personnel manuals. See id. In this case, Darby's discharge comports with the guidelines set forth in the Washington Terrace Police Personnel Manual. See Exhibit "C" to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment (hereinafter "the Manual") (This document is attached to the Record on Appeal but is not separately paginated).

The Manual, under the section governing "Personnel Discipline Procedures" provides:

Grounds for discipline. A peace officer holding a permanent appointment may be demoted, reduced in pay, suspended, or discharged, for:

- a. Neglect of duty;
- b. Disobedience of a reasonable order;
- c. Misconduct;
- d. Inefficiency or inability to satisfactorily perform assigned duties. . . .

See Manual at p. 18. Additionally, the Manual also provides factors for evaluating the penalties for each offense. See id. at page 13. The Manual provides that a member of the police force may be "discharged" without warning for any "serious offense" committed by the police officer. Id. The Manual defines "serious offenses" as "stealing, striking supervisor, harming others or property, persistently refusing to obey, and illegal conduct." Id. (Emphasis added). For "less serious offenses," which the Manual does not

define, the penalties include imposition of progressive disciplinary procedures. Id. However, such progressive discipline procedures can result ultimately in "discharge" of the police officer. Id.

A. Officer Darby Was Properly Discharged From His Employment Based Upon His "Less Serious Offenses" of Consistently Failing to Report for Work on Time.

As indicated above, police officers may be discharged for "less serious offenses" provided that progressive discipline first take place with respect to those offenses. As indicated in the Statement of Facts, Officer Darby reported late for two different shifts on December 23, 1990 and December 30, 1990. See R. 20, paragraph 20, and R. 21, paragraph 6. As a result of those two failures to report for his shift on time, Officer Darby was reprimanded and warned that a similar failure within one year's time could result in his termination. See R. 21 at paragraph 8. From August 1, 1991 through August 18, 1991, Officer Darby was again late for several of his shifts. See R. 22, paragraph 14, and R. 23, paragraph 21. Those failures to report for his shift, together with his prior reprimand and warning, properly supported his dismissal.

1. The Manual does not mandate that discipline take place immediately after the violation has occurred. However, assuming the Manual does

mandate timely discipline, Darby's dismissal complied with the Manual's advisory language.

In Point 1 of his Brief, styled "Timely Discipline," Darby argues that the City did not timely discipline him following the four occasions on which he reported late for duty during August of 1991. See Appellant's Brief, Point I, Pages 21-23. Apparently, Darby believes that he should have been terminated immediately after any one of the four tardy incidences rather than on August 21, 1991. Darby's alleged support for that argument is based on the personnel discipline procedures found in the Manual. See Brief of Appellant at Page 23. Darby, however, has misquoted the provision which he relies upon in making this argument to read: "Discipline shall be administered as soon after the need for action is discovered and confirmed as due process will allow." See id. (Emphasis added). That provision, however, actually reads that "Discipline should be administered as soon after the need for action is discovered and as due process will allow." See Manual at page 11, paragraph D (emphasis added). Therefore, the Manual's language is advisory, not mandatory. See Thurston v. Box Elder County, 835 P.2d 165, 169 (Utah 1992).

Assuming, arguendo, that the Manual does require "timely" discipline, the undisputed facts indicate that Darby was timely disciplined. Darby has acknowledged that on December 31, 1990, he was reprimanded, demoted, and placed on a one-year probation with

the warning that if there were "any further incidents of failure to report within one-year, you will be terminated." See R. 121, paragraph 10. Darby also has admitted that "any one of the cited August 1991 violations could sustain Darby's dismissal without further warning." R. 137. Three days after his August 18, failure to timely report for work, Darby was issued a "failure to take corrective action" memorandum by Chief Tracy which served as a basis for his termination on September 3. See R.49, R.63. Therefore, Darby was timely disciplined for his repeated tardiness pursuant to the prior warning and the one-year probation.

2. The City did not "warehouse" unrecorded violations to support its termination of Darby.

In Point 2 of his Brief, Darby alleges that "a necessary consequence of the City's failure to timely discipline Darby for his tardiness during August 1991 was that unrecorded violations accrued under the Manual." See Brief of Appellant, page 23. As such, according to Darby, that failure to timely enforce discipline against Darby "resulted in Manual defined supervisor acquiescence for Darby's tardiness on August 1, 2 and 7, 1991." See id. To support his argument, Darby relies on Section 1-19 of the Manual which states:

A superior officer cannot use several minor infractions of a subordinate as justification for a major disciplinary action if no recorded

action has been taken in the past for the violation of the minor infractions.

See Manual, p. 29, Section 1-19. Darby's reliance on Section 1-19 is misplaced. As quoted above, that section provides that several minor infractions cannot justify major disciplinary actions unless documented disciplinary action was taken in the past. As explained above, however, Darby's past infractions were documented. In fact, Darby was expressly warned that further absenteeism or tardiness within one year would result in his termination. Thus, the dictates of Section 1-19 were met and the City was justified in terminating Darby based upon the prior warning it had given him.

3. Darby's termination was neither sporadic nor inconsistent with the Manual's advisory provisions.

In Point 3 of his Brief, Darby argues that his termination in August was an inconsistent and sporadic enforcement of the warning he was given eight months earlier. As explained above, that warning advised Darby that he would be terminated if he were late for his shift within one-year.

In support of his argument concerning sporadic and inconsistent enforcement of the Manual's provisions, Darby relies on four grounds: first, Darby relies on the "warnings" provision found on page 14 of the Manual which advises that "for minor infractions, superior officers should warn members, orally or in

writing, what to expect if the infraction were to occur again." See Manual p. 14, paragraph 5 (emphasis added). Second, Darby relies on the "lax enforcement of rules" paragraph of the Manual which advises that "law enforcement administrators should consider past enforcement of a rule and how widely the rule has been disseminated and is known among members in deciding a just and proper disciplinary procedure." See Manual p. 14, paragraph 6 (emphasis added). Third, Darby relies on his characterization of comments made by the trial judge on June 16, 1993 during the court's bench ruling. See Brief of Appellant, page 25. Fourth, Darby relies on several of his answers to the City's interrogatories which allegedly show treatment of other officers inconsistent with his termination.

In response to the first two grounds of Darby's argument, it is clear that each provision relied on by Darby is advisory not mandatory. See Thurston v. Box Elder County, 835 P.2d 165, 169, (Utah 1992). As such, neither of those provisions are inconsistent with the City's warning and subsequent termination of Darby. Furthermore, the Manual specifically provides that an officer's past record may be considered when imposing appropriate disciplinary measures. See Manual, p. 13, paragraph 2. That provision also provides that the "type, frequency and pattern" of past offenses are valid considerations in weighing appropriate

disciplinary measures. See id. Together, these three provisions allow superior officers a degree of flexibility in fashioning appropriate forms of discipline based upon the officer's past offenses. Rather than accept this fact, Darby argues that his interests would be better served had he been terminated immediately after his first failure to report for shift on August 1, 1991. His argument, however, is unsupported by the actual language of the Manual.

Darby's third ground for his "sporadic and inconsistent" argument is based on his rendition of the trial court's dicta during its June 16, 1993 bench ruling. According to Darby:

The trial court stated that the City was not obligated to strictly enforce the disciplinary action provisions of the Manual and that it had not done so because of concern and sympathy for Darby's professional and personal circumstances.

See Brief of Appellant at p. 25. This court must legitimately question Darby's rendition of the trial court's language. To get the full flavor of the trial court's words, it is necessary to examine the actual text of the trial court's bench ruling:

In this case we have egregious examples of tardiness, with the first two instances in particular. And it seems to the court that the actions taken by the City were within generally the intent and spirit of the Manual, of trying to work with the officer, let him know that the can't show up for work five and a half hours or an hour and a half late.

And that he was given progressive discipline in the sense that he was warned. He had a meeting with the chief and his Lieutenant supervisor. He was given a written reprimand. When he didn't solve that problem he was demoted. He was demoted from a Sergeant, which is a severe reprimand but it is short of terminating him. That he was warned at that time very specifically if you continue with that behavior you will be terminated.

And counsel tries to turn the argument that, well he shouldn't have been terminated because it is until July and August before that problem comes up again, and when the problem first surfaces he is not terminated immediately. I think that it is human nature for employers to try and not terminate people. They know they have got a Manual. I think they want to avoid legal problems. But also I think they have the individual's situation in mind.

And again, what happened here is that the officer, as I recall the facts, starts out with some tardiness not as serious as it got to be by the month of August and that the City, until they are pushed to that point, they don't terminate him. But at that point they step back and look at everything that has happened, and based on their progressive discipline of him decide that they have had enough, and terminated him.

See June 16, 1993, Bench Ruling (Addendum to Appellant's Brief).

As this court can easily see, the trial court's actual language differs remarkably from Darby's rendition. The trial court was not, as suggested by Darby, construing the Manual to read any differently that it actually does.

The fourth ground for Darby's "sporadic and inconsistent"

argument relies on his answers to certain interrogatories. See Brief of Appellant at p. 25. However, Darby never explains how those answers to interrogatories support any inconsistent or sporadic enforcement of the Manual's provisions as applied against him. In fact, Darby never addresses the fact that any other officers received the same warning he received and had it carried out any differently than it was carried out with respect to Darby. More fundamentally, however, and as explained above, the Manual's provisions relied upon by Darby are advisory and allow superior officers some leeway in fashioning appropriate remedies for various offenses. As explained above, Darby's past conduct with respect to absenteeism and tardiness was quite extensive. His past record figured heavily into his termination. In fact, officer Darby had prior notice that any future tardiness would result in his termination. Despite that notice, Darby failed to timely report to work and ultimately was terminated as a result of that tardiness. Similarly, and as explained below, despite persistent requests to carry out his assignments, Darby failed to comply with his superior's orders.

4. Darby offers no evidence that his termination was an "excessive penalty." In fact, Darby failed to raise this argument with the trial court and, accordingly, cannot do so on appeal.

Darby's fourth Point is styled "Excessive Penalty." Darby

offers no specific argument or evidence to support his position. Rather, he alleges generally that his dismissal was an excessive penalty. Darby never raised this allegation with the trial court and, therefore, he is precluded from arguing this issue on appeal. See Smith v. Iversen, 848 P.2d 677 (Utah Ct. App. 1992).

As explained by the City throughout this brief, Darby is attempting to avoid the consequence of a very clear warning in December of 1990 that he would be terminated within the following year if he again reported late for any of his shifts. Rather than accept that consequence, Darby attempts to impose an interpretation of the Manual which is unsupported by both the Manual's language as well as Utah law. Simply stated, it is not an excessive penalty to be terminated after being warned that such termination will take place in the event that certain conditions occur. Darby, not the City, caused that condition to occur.

B. Darby Was Properly Discharged For His  
Persistent Refusal to Obey the Directives  
of His Superior Officers.

As indicated above, the persistent refusal of an officer to obey departmental directives is considered a "serious offense" for which the police officer may be discharged without warning. See Appellee's Brief, supra, at page 15. At least three of the facts outlined in the Statement of Facts rise to the level of failing to obey a direct order of a superior officer and would warrant Darby's

dismissal including: First, Officer Darby failed to complete an accident report within the time period given by Lt. Cope and further failed to properly finish that report after being reminded that he was delinquent in doing so. See R. 21, paragraph 10, R. 22 paragraph 12, and R. 23, paragraph 23. Second, Officer Darby failed to properly place a checkbook into evidence and failed to properly fill out a report indicating the checkbook was in evidence. See R. 22-23, paragraph 17. Furthermore, Officer Darby twice failed to place the checkbook into evidence after being ordered to do so by Lt. Cope on August 13, 1991 and August 19, 1991. See R. 23. paragraph 23. Third, Officer Darby seized a 22 caliber rifle, but failed to indicate such seizure on his report and did not put the gun properly into the evidence lock-up. See R. 22, paragraph 16. Additionally, Officer Darby refused to respond to a direct order of August 16, 1991, by Lt. Cope who ordered Darby to return the rifle to its owner immediately. See R. 23, paragraph 20. That gun was subsequently found in a detective's office on August 20, 1991. See R. 23, paragraph 23.

Based upon these three incidents of persistently refusing to obey orders, Officer Darby could be discharged without warning. Accordingly, his termination was justified.

It is important to note that Darby was given prior notice of his persistent refusal to obey and his termination was timely. As

acknowledged by Darby, during the mid part of January 1991, Chief Tracy delivered to Darby a "Corrective Action on Job Performance memorandum requesting that Darby. . . timely complete required reports and assigned duties." See R. 121, paragraph 12. Darby, therefore, had received prior notice to timely complete his assigned duties. Despite that prior notice, the record clearly indicates that Darby failed to timely carry out orders to return the checkbook (orders given August 13 and 19), to return a rifle to its owner or to put it into the evidence lock-up (order given August 16), and failed to carry out an order given in mid-June to timely complete an action report by July 19. Each of these three incidents demonstrates a persistent refusal to carry out the requests of superior officers.

Darby's disciplinary measures were timely enforced with respect to these violations. Darby acknowledges that he received a "failure to take corrective action" memorandum from Chief Tracy on August 21. That memorandum asked Darby to respond to various allegations. That memorandum was issued only five days after Darby failed to comply with an order to return the rifle and seven days after he failed to comply with an order to return the checkbook. Therefore, Darby's discharge was timely and occurred after Darby had received prior notice of his need to timely complete his duties.

POINT III. FACTUAL ISSUES WERE RESOLVED BY CHIEF TRACY AND THE REVIEW BOARD. UNDER UTAH LAW, THOSE FINDINGS ARE TO BE DEFERENTIALLY REVIEWED BY THIS COURT TO DETERMINE WHETHER THEY ARE SUPPORTED BY A REASONABLE BASIS.

It is undisputed that the facts surrounding Darby's termination were reviewed by both Chief Tracy and the Review Board. Those two entities each had an opportunity to review the facts as related by each party and to base their decisions upon those independent reviews. Under Utah law, the conclusions of such independent fact finders are entitled to deference by the trial court. See Russell v. Ogden Union Ry. & Depot and Co., 122 Utah 107, 247 P.2d 257 (Utah 1952).

In Russell v. Ogden Union Ry. & Depot and Co., supra, the plaintiff-employee was employed under a union contract which provided that no yardman could be suspended or dismissed without first having a fair and impartial hearing and his guilt established. The employee had the right to be represented by an employee of his or her choice. If dismissal was found to be unjust, the employee would be reinstated and paid for all time lost. See Russell, 247 P.2d at 258.

In Russell, an appropriate hearing had been held and the company hearing officer had found that the employee was properly terminated. On appeal, the employee argued that before the court could uphold the firing, the evidence in court must reveal the

employee's guilt. The Utah Supreme Court rejected that contention stating that in any investigation or hearing there must be a trier of fact. In disciplinary matters, the trier of fact is the investigating officer and/or the review board of the employer.

The Russell court considered that if the trier of fact's investigation reveals that the charges made were without substance or were inconsequential, or that the supporting evidence would not justify disciplinary action, then any finding made by the trier of fact would not support the disciplinary action. The credibility of the witnesses is one of the things which the trier of fact must decide. However, the fact finder may not arbitrarily disbelieve credible evidence or base a finding upon mere suspicion or conjecture. See Russell, 247 P.2d at 261-62. If the facts reasonably support the employer's decision, the trial court may not second-guess the employer's conclusion that the employee had violated the terms or conditions of his or her employment contract.

Under Russell, the City need not prove that Darby, in fact, failed to follow his supervisor's requests or orders. Rather, the City need only prove that it had substantial evidence from which it reasonably concluded that such conduct had occurred. It is not the trial court's job in a wrongful termination case to determine whether the employee did or did not violate the terms of his or her employment contract. Rather, the trial court's sole job is to

determine whether the employer acted reasonably in relying on substantial evidence in making its determination that the employee had so acted.

It is undisputed that Darby had an opportunity to present his side of the story, his version of facts, and his theory as to why he was terminated to both Chief Tracy and the Review Board. Both Tracy and the Board based their decision on evidence presented by Darby. Having done so, under Russell, this Court must review that decision with deference. Accordingly, this Court can conclude that Chief Tracy and the Review Board reasonably relied upon substantial evidence and reached a reasonable conclusion based upon such facts. Failing some evidence of pretext, Officer Darby cannot reargue the veracity of such facts before this tribunal.

#### CONCLUSION

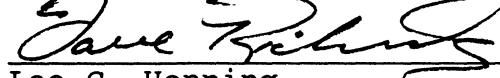
Darby was properly terminated by Washington Terrace City. The City had warned Darby that any further failures to report for his shift on time within one year would result in his termination. Subsequently, Darby reported late for his shifts. Consequently, he was terminated by the City pursuant to its warning. Darby was also properly terminated for persistently refusing to obey the direct orders of superior officers in failing to carry out several assignments given to him in July and August of 1991.

The City's decision to terminate Darby was properly supported

by the Manual and properly based on substantial evidence. The City's review of that evidence is entitled deference by the trial court and the City's interpretation of its Manual's provisions are also to be deferentially reviewed. Even without such deference, however, it is clear that Darby was terminated pursuant to a clear warning which he admits receiving. Therefore, this court should affirm the trial court's grant of summary judgment dismissing Darby's case as a matter of law.

DATED this 16 day of March, 1994.

CHRISTENSEN, JENSEN & POWELL, P.C.

A handwritten signature in dark ink, appearing to read "Lee C. Henning", is written over a horizontal line.

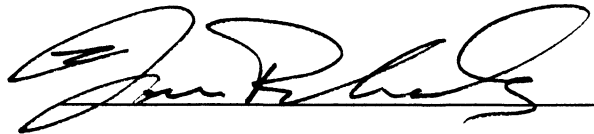
Lee C. Henning

David C. Richards

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellee to be mailed, postage prepaid thereon, to the following, this 16 day of March, 1994:

Phillip C. Patterson  
Attorney for Plaintiff  
427 - 27th Street  
Ogden, Utah 84401

A handwritten signature in black ink, appearing to read "Phillip C. Patterson", written over a horizontal line.

**ADDENDUM:**

June 16, 1993 Bench Ruling of the Second Judicial  
District Court for Weber County, Utah Granting the  
Summary Judgment Motion of the Defendant Washington  
Terrace, the Honorable Michael J. Glasmann, Judge

1 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
2 STATE OF UTAH, IN AND FOR WEBER COUNTY  
3

4 MICHAEL D. DARBY, )  
5 Plaintiff ) Case No.920900158  
6 -vs- ) TRANSCRIPT ON APPEAL  
7 WASHINGTON TERRACE CITY )  
8 Defendant )  
9

10 BE IT REMEMBERED that the above entitled matter came on  
11 for hearing before the Hon. MICHAEL J. GLASMANN, Judge of the  
12 above entitled Court on June 16, 1993.

13 WHEREUPON the following proceedings were had and the  
14 following testimony was adduced, to wit:  
15  
16

17 A p p e a r a n c e s:

18 PHILIP PATTERSON, ESQ., and FINDLY P. GRIDLEY, ESQ.

19 Attorney for Plaintiff;

20 LEE C. HENNING, ESQ.

21 Attorney for Defendant.  
22  
23  
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1           THE COURT: The Court is going to grant the Motion  
2 for Summary Judgment and make some observations.

3           First of all, I think that counsel for the Plaintiff is  
4 taking a hypertechnical, unrealistic view of the manual  
5 enforcement. No offense to you, Mr. Patterson, just in terms  
6 of the argument. The Court believes in viewing this that you  
7 can have different degrees of tardiness.

8           In this case we have very egregious examples of  
9 tardiness, with the first two instances in particular. And it  
10 seems to the Court that the actions taken by the City were  
11 within generally the intent and the spirit of the manual, of  
12 trying to work with the officer, let him know that he can't  
13 show up for work five and a half hours late, or an hour and a  
14 half late.

15           And that he was given progressive discipline in the sense  
16 that he was warned. He had a meeting with the Chief and his  
17 lieutenant supervisor. He was given a written reprimand.  
18 That when he didn't solve that problem that he was demoted.  
19 He was demoted from a sergeant, which is a severe reprimand  
20 but it is short of terminating him. That he was warned at  
21 that time very specifically if you continue with that behavior  
22 you will be terminated.

23           And counsel tries to turn the argument that, well he  
24 shouldn't have been terminated because it is until July and  
25 August before that problem comes up again, and when the

1 problem first surfaces he is not terminated immediately. I  
2 think that it is human nature for employers to try and not  
3 terminate people. They know they have got a manual. I think  
4 they want to avoid legal problems. But also I think they have  
5 the individual's situation in mind.

6 And again, what happened here is that the officer, as I  
7 recall the facts, starts out with some tardiness that's not as  
8 serious as it got to be by the month of August. And that the  
9 City, until they are pushed to that point, they don't  
10 terminate him. But at that point they step back and look at  
11 everything that's happened, and based on their progressive  
12 discipline of him decide they have had enough, and terminated  
13 him.

14 And the Court is satisfied by the undisputed facts. I  
15 don't think on that issue that there is a factual dispute. As  
16 I have heard both of you argue and I have read your memos, it  
17 seems to me those facts are not in dispute.

18 Based on that, I think Summary Judgment is appropriate.

19 Also with regard to the insubordination, there may be an  
20 argument that there is a factual issue based on the different  
21 viewpoint as to how--as to why the officer acted the way he  
22 did with respect to getting a traffic report done, with  
23 respect to handling a rifle and a checkbook. It appeared that  
24 from a procedural point of view the Defendant--the Plaintiff  
25 was certainly given due process of understanding what the

1 City's position was. What his employer's position was, I  
2 should say. And then he was given a review hearing. At  
3 that--at that review hearing those facts were reviewed, and it  
4 was concluded that he was insubordinate. And that was also a  
5 ground that was used to sustain his termination.

6 My decision doesn't require that I get to that point  
7 today because I think just based on the tardiness alone that  
8 that was sufficient basis for his termination as I have  
9 already stated.

10 And so, counsel, I will have to say that if in fact the  
11 appropriate position for this Court is to take an appellate  
12 court review of what the review committee did, then I don't  
13 have any problem with saying that there was insubordination  
14 found. And it appears from the record that there is an ample  
15 basis for that finding. I don't find a problem with that  
16 finding.

17 Mr. Patterson makes an argument though about the City  
18 members being involved in that decision process. If in fact  
19 he is right, there could be a problem I suppose with them not  
20 being as independent of the City's interests as that review  
21 panel should be. And if that were the case, I would have to  
22 say then from a Summary Judgment point of view that on the  
23 issue of insubordination, I don't know that I could say,  
24 viewing the facts in a light most favorable to Officer Darby,  
25 that I can grant Summary Judgment on that at this time. I can

1 if your argument is correct that I take an appellate review  
2 position on that. Do you understand my position?

3 MR. HENNING: I do.

4 THE COURT: All right. With that explanation, I  
5 will ask you to prepare the Order for the Court.

6 Is there anything else, counsel?

7 MR. HENNING: No, your Honor.

8 THE COURT: All right, thank you.

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C E R T I F I C A T E

STATE OF UTAH       )  
                          )   SS:  
County of Weber     )

I, James N. Jones, do hereby certify that I am one of the  
Official Court Reporters for the State of Utah, and a  
competent machine shorthand writer.

That on June 16, 1993, I reported in machine shorthand  
the proceedings had and testimony given in the case entitled  
Michael D. Darby vs. Washington Terrace City.

That thereafter, I reduced my machine shorthand notes to  
typewriting, and the foregoing transcript, pages 1 through 5,  
inclusive, constitutes a full, true and correct transcript of  
the proceedings had and testimony given at said time and  
place.

In witness whereof I have hereunto set my hand this 15th  
day of September, 1993.

---

JAMES N. JONES  
Official Court Reporter

ADDENDUM:

September 3, 1993 Order of Dismissal from the  
Second Judicial District Court for Weber County,  
Utah, The Honorable Michael J. Glasmann, Judge

DISTRICT COURT  
WEBER COUNTY

SEP 21 1993

SEP 7 PM 1 56

Lee C. Henning, #4593  
 CHRISTENSEN, JENSEN & POWELL, P. C.  
 Attorneys for Defendant  
 175 South West Temple, Suite 510  
 Salt Lake City, Utah 84101  
 Telephone: (801) 355-3431

## IN THE SECOND JUDICIAL DISTRICT COURT

WEBER COUNTY, STATE OF UTAH

MICHAEL D. DARBY,	)	
	)	ORDER OF DISMISSAL
Plaintiff,	)	
	)	
	)	
WASHINGTON TERRACE CITY,	)	Civil No. 920900158
a political subdivision of	)	
the State of Utah,	)	Judge David Roth
	)	
Defendant.	)	

SEP 8 1993

Oral argument on Washington Terrace's Motion for Summary Judgment was heard on June 16, 1993. Plaintiff appeared personally and through his counsel of record, Phillip Patterson. Washington Terrace appeared through its counsel of record, Lee C. Henning.

After considering the briefs and affidavits on file and hearing the argument of counsel,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

Plaintiff's complaint is dismissed with prejudice. The grounds for this dismissal are that there are no genuine issues of material fact regarding plaintiff's tardiness and defendant could dismiss plaintiff on that basis. Plaintiff's arguments in this

regard are hyper-technical and do not follow the spirit or the letter of the employment manual.

Having dismissed the plaintiff's complaint on the tardiness grounds, it is not necessary to reach defendant's second argument, that there are no genuine issues of material fact that plaintiff could be dismissed for insubordination.

DATED this 3rd day of September 1993.

BY THE COURT:

By Michael J. Glassman  
Honorable Michael Glassman

CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of June, 1992, a true and correct copy of the foregoing was mailed first-class, postage prepaid to:

Phillip C. Patterson  
Attorney for Plaintiff  
427 - 27th Street  
Ogden, Utah 84401

Karma L. Fathallah

**ADDENDUM:**

Cited portions of Washington Terrace Police  
Personnel Manual

## PERSONNEL DISCIPLINE PROCEDURES

### GENERAL

#### INTRODUCTION

The subject of disciplinary procedures is one that impacts on all employees. Any organization must have a fair and orderly system of discipline to operate effectively. Failure to establish and maintain proper disciplinary procedures subjects a department to a serious loss in potential productivity through low moral, work loss, and high employee turnover.

#### PURPOSE

1. Management has the responsibility to establish the rules and regulations necessary to ensure the attainment of the organization's goals or mission and to protect the welfare of the organization's members.
2. No organization can effectively function without discipline. This is particularly true in law enforcement. Peace officers work in an atmosphere which finds them strongly pressured to maintain law, order and security in society, while constantly remaining under the threat of civil liability and public scrutiny. The accomplishment of this mission is possible only with effective discipline.
3. Discipline provides a frame-work which allows members the confidence and security of knowing the requirements of, and processes for enforcement of, department policy and procedure.

#### DISCIPLINE DEFINED

1. Discipline for the purposes of this paper is defined as a continuing state of good order and behavior. It encourages an individual or group to observe rules, regulations, and procedures that are deemed necessary to the attainment of a departmental goal and/or objective.
2. Discipline is that instruction, training, supervision and command of members with respect to behavior which results in acceptable job performance and morale.

#### POSITIVE AND NEGATIVE DISCIPLINE

1. The application of discipline is both negative and positive.
2. "Positive" discipline is applied through training, direction, supervision, entrustment of responsibilities and motivation and has as an objective, the building of moral, "esprit de corps", professionalism and desire to take the proper action under all circumstances, whether under direct supervision or not.

## Personnel Discipline Procedures

### General

#### Page 2

3. "Negative" discipline relies upon fear of the consequences of failing to obey rules and regulations or carry out department policy. Negative discipline is applied when positive discipline lacks the desired effectiveness, is inappropriate under the existing circumstances or the misconduct is too serious to handle any other way.

### MORALE

1. One of the most important reasons for effective discipline is the developing and maintaining of positive morale on the department.
2. For discipline to be a morale builder, the discipline must be legally consistent, fair, timely and appropriate.
  - A. Legal: A law enforcement administrator cannot discipline any employee contrary to state or federal law. discipline procedures must not violate the employee's federal civil rights. To do otherwise places the supervisor in jeopardy of substantial liability.
  - B. Consistent: The sporadic, inconsistent application of discipline leaves the impression that the disciplinary process is selective and unreliable and that it applies only to some members while exempting others. A consistent, fairly administered disciplinary policy will result in higher moral and increase compliance with department policy and procedure.
  - C. Fair: The acceptance and support of the disciplinary process by department members and success of that policy in the face of Judicial review requires application of due process and fair play.
  - D. Timely: Discipline should be administered as soon after the need for action is discovered and confirmed as due process will allow. Speedy due process and action increases the effectiveness of discipline.
  - E. Appropriate: Action shall be taken according to the objectives of discipline, combining both positive and negative aspects of discipline. Action taken should reflect the seriousness of the misconduct, the past record of the member's conduct and an appraisal of the most recent methods of altering the member's behavior or performance.

### ESTABLISHING DISCIPLINE

Ten steps are ordinarily considered necessary in a proper disciplinary procedure:

- 1) Is it a reasonable rule?

## Personnel Discipline Procedures

### General

Page 3

- 2) Is it a legal rule(re: employees civil rights)?
- 3) Is it a fair rule?
- 4) Has it been properly communicated?
- 5) Has it been consistently enforced?
- 6) Has enforcement been timely? ( The length of time between the time the offense was discovered and the time that discipline took place.)
- 7) Has there been a thorough and unbiased investigation?
- 8) Is there adequate proof/evidence?
- 9) Has there been a proper hearing of the evidence with rights of appeal?
- 10) Is it the proper penalty in view of all relevant considerations?

NOTE: If an administrator's disciplinary action is challenged in court, the court will examine all of these concepts in determining if the administrator's decision will be allowed to stand.

### ADMINISTRATIVE DUE PROCESS

Any employee who suffers an adverse action is entitled to administrative due process to ensure fairness and equity. Administrative due process generally includes the right of the affected person to:

- 1) Be informed in writing, of charges or complaint giving rise to the disciplinary action.
- 2) Reply to the charges.
- 3) To have the reply considered by the administration.
- 4) To have a hearing on the matter.
- 5) To receive a decision within a reasonable amount of time.
- 6) To appeal to a higher body for a review of the decision.
- 7) The hearing must be before an objective, competent, and fair-minded authority, where the affected party can be represented, introduce evidence through documents and testimony, cross-examine witnesses, and where an objective and verbatim copy of the proceedings is made.

### SUMMARY OF RULE VIOLATION AND PENALTIES FOUND IN THIS SECTION

1. The types of rule violations will include, but not be limited to, the following: Unauthorized absenteeism, tardiness, loafing, leaving post, sleeping on the job, assault and fighting, horseplay, insubordination,

SUMMARY OF RULE VIOLATION AND PENALTIES FOUND IN THIS SECTION (cont.)

abusive language, threat or assault, falsifying records, falsifying application, dishonesty, theft, disloyalty, criticism of superior officers and department operations, negligence, unauthorized, hair styles, damage to property, possession or use of drugs or intoxicants on duty, obscene or immoral conduct (unbecoming conduct), gambling, citizen complaints, non-payment of debts, bribes and gratuities, low performance, and incompetence.

2. Also, the types of penalties will include warnings (verbal and written), suspensions, discharge, demotion, transfer, medical certificates, public apologies, and reassignment.

FACTORS IN EVALUATING PENALTIES

1. Nature of the Offense

- A. Serious Offenses

- 1) Stealing, striking supervisor, harming others or property. persistently refusing to obey, illegal conduct.
    - 2) For these types of offenses a member may be discharged without warning.

- B. Less Serious Offenses.

- 1) Calls for milder penalty aimed at correction.
    - 2) Progressive, positive discipline.
    - 3) Supervisor should notify person of wrong and offer assistance, warn before suspension, suspension before discharge.

- C. Degree of penalty should be in keeping with the seriousness of the offense.

2. Member's Past Record.

In considering appropriate disciplinary measures, the discipline hearing board (DHB) or a superior officer, including the chief executive, may take into account the past record of the member. However, the superior officer, chief executive or the DHB may not justify any disciplinary measures of past acts of the member for which he was not notified and/or confronted, which notice or confrontation gave the member a fair opportunity to reply. The type, frequency, and pattern of past offenses

FACTORS IN EVALUATING PENALTIES (cont.)

are valid considerations the superior officer, chief executive, or the DHB may weigh in deciding an appropriate disciplinary measure.

3. Length of Service.

In considering appropriate disciplinary measures, a superior officer, chief executive or the DHB may examine the length and quality of service the member has given to the department.

4. Knowledge of the rules

In considering appropriate disciplinary measures, a superior officer, the chief executive or the DHB may examine the member's knowledge of the rules, the reasonableness of the rules, and the consistency of the department's enforcement of the rules in arriving at a proper penalty for the offense.

5. Warnings

The failure of supervisors to give warnings is a prime reason the courts have not sustained many law enforcement disciplinary actions in the past. For minor infractions, superior officers should warn members, orally or in writing, what to expect if the infraction were to occur again. However, for serious offenses (morally or legally wrong) the chief executive may recommend termination of the member to the discipline hearing board without the benefit of any warnings. Warnings can be oral or written and should be witnessed and initialed by the subject.

6. Lax Enforcement of Rules

Law enforcement administrators should consider past enforcement of a rule and how widely the rule has been disseminated and is known among the members in deciding a just and proper disciplinary procedure. Lax enforcement in the past should have a mitigation effect to the benefit of the member. However, an administrator may begin strict enforcement of a lax rule after giving all members clear notice of intent.

7. Unequal or Discriminatory Treatment.

Assessment of discipline must be consistently applied unless reasonable basis exists for variations. Written directives should be updated and

## Personnel Discipline Procedures

### General

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### FACTORS IN EVALUATING PENALTIES (cont.)

current and should reasonably reflect the daily operations of the law enforcement agency.

### RULES, POLICIES AND PROCEDURES

#### 1. Necessity for Written Directives.

Operations of a police agency are so complex that a systematic procedure for issuing written directives must exist. Directives serve as a foundation for effective discipline. Any analysis of disciplinary procedures must start with an intensive concentration on written directives. Directives establish the level of expected behavior and should be updated and current.

#### 2. Policies Must be Clearly Stated and Understood by All.

A. Policies and procedures should be concise and supervisors should develop a system to assure that everyone affected by an order receives a copy.

B. Supervisors should encourage all employees to give input into the administrative process of establishing directives.

C. Supervisors should use standardized format to avoid difficulty in determining which directives are most authoritative.

#### 3. Directives Must be Legal

A. Directives cannot be contrary to law or prevailing trends of the court.

B. Directives must be periodically reviewed and updated to be current with latest court decisions.

#### 4. Disciplinary Process--Written Reprimand

A. Written Reprimand: When a supervisor or command level officer issues a verbal or written reprimand, he must first verbally explain the nature of the complaint to the accused member.

B. Copies of the reprimand will be distributed as follows:

1) Accused officer.

2) Accused officer's personnel file--department.

3) Accused Officer's personnel file-- division.

4) Chief executive.

4. Disciplinary Process--Written Reprimand (cont.)

- C. Warnings and informal actions prior to formal action being taken can be important in sustaining later formal-disciplinary actions. Many supervisors hamper the disciplinary process through ignorance of the need for, or laziness in submitting, documentation.

RESPONSIBILITY AND AUTHORITY IN DISCIPLINARY FUNCTION

1. Supervisors

- A. Supervisors shall have the authority to take the following action without prior authorization from heigher authority.
- 1) Oral reprimand.
  - 2) Written reprimand.
  - 3) Temporary relief of duty with pay.
    - a) Requires immediate notification of division commander.
- B. Supervisors may also initiate stronger action\_by\_submitting\_written\_reports of misconduct to a higher authority.

2. Higher Authority.

- A. Any person having authority over 1st line supervisors may take the following action:
- 1) Oral Reprimand.
  - 2) Written reprimand.
  - 3) Temporary relief of duty with pay - Written report required.
  - 4) Temporary relief of duty without pay- written report required.
  - 5) Suspension of a maximum of two days off without pay - written report required.
    - a) This action shall follow an informal hearing within 48 hours in which the memoeer is given an opportunity to answer tre allegations against him. The accuser is not to conduct the hearing but may present evidence to support his case.
    - b) The member may appeal an adverse decision to the chief executive who will approve the action, disapprove the action, or refer it for a hearing before a Discipline Hearing Board, (DHB), if action involves more than three days off without pay.

# Personnel Discipline Procedures

## General

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### 2. Higher Authority. (cont.)

- B. Higher supervisors may also initiate stronger action by submitting written reports of misconduct to the chief executive with requests for longer suspensions, demotion, or dismissal. Such actions will be reviewed by the DHB, at the employee's request.

### 3. Internal Affairs Unit.

- A. Each department, however small, should have a formalized procedure to investigate any incident which may require a hearing. An Internal-Affairs Unit. In many instances in smaller departments, this may be the chief executive himself.
- B. The Internal Affairs Unit will, upon request of the chief executive, or any higher supervising authority, investigate any incident or incidents which appear to require such inquiry.

### 4. The Chief Executive.

- A. The Chief-executive may be the Sheriff, the Chief of Police, Director Constable, or Superintendent of any agency...
  - 1) The chief executive may take the following action:
    - a) Oral reprimand.
    - b) Written reprimand.
    - c) temporary relief of duty with pay - written report required.
    - d) Temporary relief of duty without pay - written report required.
    - e) Suspension of a maximum of three days off without pay written report required.
      - 1. This action shall follow an informal hearing within 48 hours in which the member is given an opportunity to answer the allegations against him.
      - 2. The member may appeal an adverse decision for a hearing before a Discipline Hearing board.
    - f) Suspension, with or without pay, up to a maximum of 30 days.
      - 1. Any action approved by the chief executive for more than three days off without pay, shall automatically be heard by a Discipline Hearing Board.
    - g) Dismiss the employee.
      - 1. Any action approved by the chief executive, shall

g) Dismiss the employee (cont.)

automatically be heard by the Discipline Hearing Board.

- 2) In minor disciplinary actions ordered by a supervisor or a higher authority, it is still ultimately the chief executive's authority, delegated by regulation, which results in the disciplinary action.
- 3) The chief executive will therefore be notified when such minor action is taken. The chief executive will then notify the Discipline Hearing Board( if necessary), or take whatever other action is needed as a result of, or to carry out, the discipline.

5. Discipline Hearing Board (DHB)

- A. The DHB in small communities, may be chaired by a member of the city/county board of commissions, the mayor, etc.
- B. The DHB will be responsible for hearing all cases directed to it by the chief executive. Primary responsibilities of the DHB include:
  - 1) Hearing disciplinary cases which may result in dismissal, demotion, or suspension of more than three days off without pay.
  - 2) The DHB reviews will take one of the following actions.
    - a) Reject the member's appeal.
    - b) Remand the case back to the original hearing board for rehearing.
    - c) In serious cases the DHB may recommend that it hear the case in a de novo hearing.
    - d) The DHB will make written findings and recommendations as a result of hearing any cases set before it. The written reports of the DHB will be submitted to the chief executive. Copies will also be distributed according to the provisions set forth in this chapter.

6. Grounds for Discipline or Dismissal

A. Provisions.

- 1) A peace officer holding a permanent appointment may be demoted, reduced in pay, suspended, or discharged for:
  - a) Neglect of duty;
  - b) Disobedience of a reasonable order;
  - c) Misconduct;
  - d) Inefficiently or inability to satisfactorily perform assigned duties;
  - e) Any act hostile to the public service.

## Personnel Discipline Procedures

### General

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#### B. Department Rules and Regulations

- 1) Violations of the department's manuals, general orders, memoranda and other authorized written instructions, rules, regulations or policies are grounds for disciplinary action or dismissal.

#### C. Acts or Omissions Contrary to Good Order

- 1) No arbitrary rules of conduct can be established which will embrace all cases arising in the general discharge of police duties or in the personal activities of the individual employee. Therefore, any other act or omission contrary to good order and discipline shall also be the subject of disciplinary action.

#### D. Criminal Acts.

- 1) Commission of violations of the laws, or ordinances of the United States of America, or the State of Utah, or any political subdivision of the state, are grounds for disciplinary action or dismissal.
- 2) The commission of a felony, a misdemeanor involving drug abuse or moral turpitude, or other serious misdemeanor shall be justification for termination.

### DISCIPLINARY PROCESS MAJOR DISCIPLINE

#### 1. Initial Action

##### A. Document Allegations.

- 1) All information available shall be included in the report.
- 2) The report shall be submitted to the superior officer and/or the chief executive.

##### B. Investigative Allegations.

- 1) Depending on the seriousness and nature of the allegations, the case will be investigated by the Internal Affairs Unit, or by another person specializing in the investigation of a specific crime if criminal conduct is alleged.
- 2) Copies of all investigative reports will be made available to the chief executive and to the Discipline Hearing Board.

##### C. Evaluate Results of the Investigation:

- 1) If, after reviewing the results of the investigation, there appears to be substantial evidence to support the allegations against the member, action will be initiated to the DHB if the

7. Members shall not recommend or suggest to anyone the employment or name of any person, firm, or corporation, as attorney, counsel, or bondsman, except that nothing herein shall be construed as restricting the rights of members of the department in connection with administration of their private affairs.

1-18 Right to Strike

Because the public health, safety and welfare may be adversely affected thereby, no employee shall have the right to engage in or encourage any form of sit-down, slow-down, or in fact any form of work stoppage or strike for any reason, against the community. A refusal by an employee to perform an assignment injurious to his health or physical safety shall not be considered a violation of this section.

1-19 Supervisor acquiescence Relative to Misconduct of Members

A superior officer cannot use several minor infractions of a subordinate as justification for a major disciplinary action if no recorded action has been taken in the past for the violation of the minor infractions.

1-20 Grievance Procedure

Any employee who expresses dissatisfaction outside of the department before attempting to use, or exhausting, the grievance model shall be subject to discipline. Any supervisor found discussing an employee's grievances with another supervisor who may be reviewing or has reviewed the employee's grievance shall be subject to disciplinary action.

If any provision of these procedures and policies or the application thereof be found to be in conflict with any state or federal law, the conflicting parties hereby declared inoperative to the extent of the conflict, but shall not affect the operation of the remainder of these procedures and policies.

**ADDENDUM:**

Cited portions of Record on Appeal

FILED 4 JAN 11 1993

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David C. Richards, #6023  
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IN THE SECOND JUDICIAL DISTRICT COURT

WEBER COUNTY, STATE OF UTAH

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MICHAEL D. DARBY,	)	JAN 04 1993
	)	
Plaintiff,	)	AFFIDAVIT OF LT. RICHARD
	)	COPE
vs.	)	
	)	
WASHINGTON TERRACE CITY,	)	Civil No. 920900158
a political subdivision of	)	
the State of Utah,	)	Judge David Roth
	)	
Defendant.	)	

---

STATE OF UTAH )  
: ss.  
COUNTY OF WEBER )

The affiant after being duly sworn deposes and states that:

1. I am the Lieutenant at the Washington Terrace Police Department.

2. I worked closely with Officer Darby for a number of years and was his supervisor.

3. The department began having serious problems with Officer Darby in the fall of 1990 involving his failure to report to work when scheduled, the unprofessional appearance of his person and squad car, and his general unwillingness or inability to perform

his responsibilities.

4. On December 23, 1990 Officer Darby failed to show up for his shift as scheduled and appeared only after repeated calls by other officers and myself and ultimately showed up for work approximately 5½ hours late. As the result of the incident of the 23rd, Chief Tracy, Officer Darby and myself had a long meeting on December 24th in which Officer Darby admitted his various problems and blamed his problems on his personal life and suggested that he should receive a written reprimand for being late on the 23rd. Chief Tracy asked that I prepare a written report which I did on December 27th and submitted to Chief Tracy.

5. A few days after our meeting, on December 30, 1990, Officer Darby again did not report for work when scheduled and had to be called by the dispatcher and other officers and ultimately showed up for work 1½ late.

6. On December 30, 1990, I again wrote another written report to Chief Tracy regarding the most recent incident.

7. In mid-June of 1991, I reassigned Officer Darby a traffic accident report and ordered him to complete it within the next thirty days.

8. On July 19, 1991 the traffic accident report had still not been completed and I ordered him to complete the report immediately.

9. On August 1, 1991, Officer Darby showed up late for a shooting board meeting.

10. On August 2, 1991, Officer Darby again showed up late for work, 45 minutes.

11. On August 7, 1991, Officer Darby did not show up for shooting qualification meet when he was required to do so.

12. On August 10, 1991, Officer Darby took a 22 calibre rifle into evidence from a suspect alleging that he believed it was stolen, but failed to indicate this in his report and did not put the gun properly into evidence. A true and correct copy of Officer Darby's report is attached hereto as Exhibit A.

13. On August 10, 1991, Officer Darby seized a checkbook as evidence, but again failed to properly put the book into evidence and filled out an inaccurate report indicating that the checkbook was in evidence. A true and correct copy of that report is attached hereto as Exhibit B.

14. On August 13, 1991, I assigned the checkbook case to Officer Gathercoal for investigation and again ordered Officer Darby to place the checkbook into evidence so Officer Gathercoal could complete the investigation.

15. On August 14, 1991, the owner of the 22 calibre rifle asked Officer Darby about the status of the rifle and Officer Darby said he had to run the rifle through the office of alcohol, tobacco and firearms and would get back with him.

16. On August 16, 1991, I ordered Officer Darby to return the rifle to the owner immediately.

17. On August 18, 1991, Officer Darby was 43 minutes late to

work.

18. On August 19, 1991, I again ordered Officer Darby to put the checkbook into evidence.

19. On August 20, 1991, I obtained an incomplete traffic accident report from Officer Darby, found the rifle behind the file cabinet in the detective's office, and found the checkbook turned in, but no proper evidence slip included.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1992.

\_\_\_\_\_  
Lt. Richard Cope

SUBSCRIBED and SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 1992.

\_\_\_\_\_  
NOTARY PUBLIC

Residing at \_\_\_\_\_

My Commission Expires:

\_\_\_\_\_

Report Date: 08-10-91

Report ID# 45896.A10

DR# 911058  
TH# 45896

CODE	OFFENSE DESCRIPTION
2310	Felony Theft (value)

Weapon, Force or Means used

Apparent Motive

Location of Occurrence-  
ST BENEDICT'S

Type Premises-

HOSPITAL

Type Property-

PERSONAL ITEMS/TOOLS

	Date	Time
OCC. ON:	08-09-91	18:00
OR RTWN:	08-10-91	09:00
REPORTED:	08-10-91	09:00

FELONY (X)	INF ( )	OFFICE ( )
MISC. ( )	FIELD (X)	PHONE ( )

Will victim(s) testify ? ( )  
Neighborhood check ? ( )

Connecting reports-

Investigative divisions, units, persons notified-

## ADDITIONAL PEOPLE INVOLVED

CODES: V=Victim, W=Witness, C=Complainant, F=Father, M=Mother, G=Guardian

Code: C	Name: WINGET, DAVID	DOB: 11-11-56	Age: 34
	Addr: 5258 S 2425 E	Sex: M	Race: Eth.
	CSZ: ROY, UT. 84067	HP: 773-6054	WP:
	AKA:	MO:	

## PROPERTY DETAIL

Quan.	Stat.	Article	Manufacturer/Color	Model#/Serial#	UCR	Value
1	S	TOOL				
Owner Code: C		TOOL BOX/ASST'D TOOLS			K	250.00
1	B	MISC.	AMERICA FIRST			
Owner Code: C		BL CHECKBOOK			K	

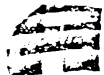
Total Stolen Property Value: 250.00

The Details are as follows:

THIS OFFICER RESPONDED TO ST. BENEDICT'S EMPLOYEE PARKING LOT ON AN AUTO BURGLARY REPORT. THIS OFFICER TALKED WITH THE COMPLAINANT WHO STATED THAT THE UNKNOWN SUSPECTS HAD TAKEN A TOOL BOX WITH ASSORTED TOOLS AND HIS CHECKBOOK. THE COMPLAINANT HAD NO SUSPECTS. THE CHECK BOOK WAS RECOVERED BY OGDEN CITY AND IS IN EVIDENCE.

Supervisor \_\_\_\_\_ PH \_\_\_\_\_ Reporting Officer(s) PH \_\_\_\_\_ Asgmt. \_\_\_\_\_  
 Assigned to: PH \_\_\_\_\_ Asgmt. \_\_\_\_\_ DARBY, MICHAEL D. PC10 PAT  
 Date/Time Reproduced \_\_\_\_\_

Det. W. L. L. \_\_\_\_\_  
 Div. \_\_\_\_\_  
*M. Darby*



Report: 08-10-91  
76-5-107 UCA Terroristic Threat

Report ID# 45897.A10

PH# 45897

Arrestee: AIKENS, RUSSELL KIM  
AKA:  
Age: 38 DOB: 03-19-53 ADULT  
Race: W Eth: Hair: BRO Ht: 602  
Sex: M Eyes: BLU Wt: 150

On: SAT, 08-10-91 at 11:16  
Trans: at  
Addresses: RESIDENCE  
Property:

HP# 394-0860 WP#  
SS# 528-76-8127 Hold for:  
DL# Booked: W C JAIL

----- If Juvenile: -----  
Arrested by: at  
Place:  
Interview:  
Mention appr. by:  
Photos? N Photos? N

Hold Vehicle for:  
Disp. of Vehicle:  
Birthplace:  
Residence Addr: 3505 WASHINGTON BLVD, 5  
Residence City: OGDEN, UT.  
Occupation/Grade:  
Employer/School:

Arrest: RIVERDALE ROAD  
Crime: 300 E 4300 S  
Means:  
Motive:

-----ARRESTED-----  
Date: 08-10-91 Date: 08-10-91  
Time: Time:

Distinguishing Characteristics -  
Clothing Worn -  
Driving (direction) -  
Driving (at or between) -  
Connecting Reports, People etc. -  
Emergency Contact and Phone no. -

#### ADDITIONAL PEOPLE INVOLVED

CODES: V=Victim, W=Witness, C=Complainant, F=Father, M=Mother, G=Guardian

Name: AIKENS, THOMAS DOB: Age:  
Addr: 311 W 4725 S Sex: M Race: W Eth:  
CSZ: WASH. TERRACE, UT. 84405 HP: WP:  
AKA: MO:

Details are as follows:

HIS OFFICER RESPONDED TO THE ABOVE ADDRESS ON A FAMILY FIGHT COMPLAINT. THE SUSPECT HAD LEFT THE RESIDENCE PRIOR TO MY ARRIVAL BUT WAS STOPPED BY ST DAILY OF RIVERDALE. THE COMPLAINANT STATED THAT THE SUSPECT HAD THREATENED TO KILL FAMILY MEMBERS. THE SUBJECT HAS MENTAL PROBLEMS. THE SUSPECT WAS ARRESTED AND BOOKED INTO WEBER COUNTY JAIL.

Rights (if applicable) read by:

PH

Supervisor: PH Reporting Officer(s) PH Assmt. PH  
Assigned to PH Assmt. PH  
Charged as Appr. Refer to Social Agency Admits Prior Record?  
Action suspended. Refer other Law Enr. Denied Yes No  
Charge changed to PH notified

177-1000  
JAN 4 11 43

Lee C. Henning, #4593  
David C. Richards, #6023  
CHRISTENSEN, JENSEN & POWELL, P. C.  
Attorneys for Defendant  
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Salt Lake City, Utah 84101  
Telephone: (801) 355-3431

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IN THE SECOND JUDICIAL DISTRICT COURT  
WEBER COUNTY, STATE OF UTAH

---

MICHAEL D. DARBY,	)	JAN 04 1993
	)	
Plaintiff,	)	AFFIDAVIT OF POLICE CHIEF
	)	GARY W. TRACY
vs.	)	
	)	
WASHINGTON TERRACE CITY,	)	Civil No. 920900158
a political subdivision of	)	
the State of Utah,	)	Judge David Roth
	)	
Defendant.	)	

---

The affiant after being duly sworn deposes and states that:

1. I am the Chief of Police of Washington Terrace City.
2. Our department is a small department and I follow each officer's progress closely.
3. Prior to December of 1990, the department began having serious problems with Officer Darby not showing up for work when scheduled, not maintaining a professional appearance, not maintaining his squad car appropriately, and in many other details of his responsibilities.
4. On December 24, 1990 I learned that Officer Darby had not shown up for his shift on the 23rd and appeared only after repeated

calls by other officers and Lt. Cope. Officer Darby ultimately showed up for work approximately 5½ hours late. On the 24th Lt. Cope, Officer Darby and I met regarding his being late for work on the 23rd. This was a very detailed meeting in which we discussed Officer Darby's problems. I asked Officer Darby what he thought I should do about him and he suggested I give him a written reprimand. I asked Lt. Cope to prepare a written report regarding Officer Darby's being late for work, which was prepared on December 27, 1990 and is attached hereto as Exhibit A.

5. A few days after our meeting, on December 30th, Officer Darby again did not show up for work when scheduled and had to be called by the dispatcher and other officers. He ultimately showed up for work 1½ late.

6. Lt. Cope wrote another report regarding this tardiness, which is attached hereto as Exhibit B.

7. As a result of these two tardiness I wrote the warning dated December 31, 1990 and included the corrective action and job performance sheet, as well as Lt. Cope's two reports to me. See, attached Exhibit C. I evaluated the two letters of reprimand by Lt. Cope and reported to Officer Darby in my own letter that any further incidents of tardiness occurring within one year would result in his termination.

8. Officer Darby continued to have various and sundry problems with his appearance and general job performance. On July 14, 1991 I delivered to him a written reprimand dated July 9, 1991

attached as Exhibit D, regarding his failure to comply with the corrective action on job performance sheet which I had delivered to him on December 31st of the previous year. In my written warning of July 14, 1991, I ordered Officer Darby to seek personal counseling within the next ten days to attempt to straighten out his life.

9. Through July and August of 1991, Officer Darby continued to have problems including insubordination with his second level supervisor, Lt. Cope. These problems began mounting very quickly and I began preparing an additional report which required regular revision based on his continuing conduct. After reviewing the great number of problems Officer Darby had during July and August of 1991, I wrote the August 21, 1991 letter to Officer Darby, attached as Exhibit E, ordering him to answer the various charges of incompetence, ineptitude and insubordination made by other officers.

10. Officer Darby responded to this report in a letter of August 28, 1991, attached as Exhibit F.

11. On September 3, 1991, I wrote Darby a final letter in which I indicated that I would terminate him for the accumulation of these problems, especially the insubordination and the repeated tardiness to work. That letter is attached as Exhibit G.

12. My termination decision was upheld by the review board in a standard hearing.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1992.

\_\_\_\_\_  
Chief Gary W. Tracy

SUBSCRIBED and SWORN to before me this \_\_\_\_ day of \_\_\_\_\_,  
1992.

\_\_\_\_\_  
NOTARY PUBLIC

Residing at \_\_\_\_\_

My Commission Expires:

\_\_\_\_\_

TO: CHIEF GARY TRACY

FROM: LT. RICHARD COPE

SUBJECT: FAILURE TO REPORT FOR SHIFT


DATE: DECEMBER 27, 1990

AT APPROXIMATELY 1410 HOURS ON 12-23-90 OFFICER DAVIS CONTACTED ME AT MY RESIDENCE. OFFICER DAVIS SAID SGT. DARBY DID NOT SHOW UP FOR HIS SHIFT. I ASKED OFFICER DAVIS IF HE TRIED TO CONTACT SGT. DARBY. OFFICER DAVIS SAID, YES. HE ALSO LEFT A MESSAGE FOR SGT. DARBY TO CONTACT HIM AT WORK.

I DRESSED IN MY UNIFORM AND SIGNED ON WITH WEBER DISPATCH AT 1427 HOURS. I THEN RESPONDED TO THE CITY OFFICE TO BRIEF WITH OFFICER DAVIS AND TRIED TO CONTACT SGT. DARBY. I ALSO LOOKED AT MY COPY OF THE SCHEDULE TO MAKE SURE SGT. DARBY WAS SUPPOSED TO WORK THE SHIFT ON 12-23-90 AT 1400 HOURS. THE SCHEDULE SHOWS SGT. DARBY WORKING THE 1400 HOUR TO 2200 HOUR SHIFT. I THEN TRIED TO CONTACT SGT. DARBY AT HIS PLACE OF RESIDENCE. I ALSO LEFT A MESSAGE TO HAVE HIM CALL BACK TO THE DISPATCH FOR THE MESSAGE.

AT 1930 HOURS SGT. DARBY SIGNED ON WITH WEBER DISPATCH. I MET SGT. DARBY AT THE CITY OFFICE AND ASKED HIM WHY HE DID NOT REPORT FOR HIS SHIFT. SGT. DARBY SAID HE FORGOT TO LOOK AT THE SHIFT SCHEDULE. I TOLD SGT. DARBY IF WE WERE NOT SO SHORT ON PERSONNEL, I WOULD SEND HIM HOME WITH PAY UNTIL I COULD DO SOMETHING ABOUT THE PROBLEM.

I FEEL THAT SGT. DARBY SHOULD RECEIVE: 1. THREE DAYS OFF WITHOUT PAY AND 2. A LETTER OF REPRIMAND BE PLACED IN HIS PERSONNEL FILE. I BELIEVE AS A SUPERVISOR OF THE POLICE DEPARTMENT SGT. DARBY SHOULD SET AN EXAMPLE BY WORKING HIS SHIFT ON TIME, HAVING HIS UNIFORM IN GOOD ORDER AND HIS VEHICLE CLEAN. I ALSO BELIEVE SGT. DARBY HAS A HIGHER DEGREE OF RESPONSIBILITY TO THE POLICE DEPARTMENT AS A WHOLE AND TO THE OFFICERS THAT WORK UNDER HIS DIRECTION.

  
LT. RICHARD COPE

TO: CHIEF GARY W. TRACY  
FROM: LT. RICHARD COPE  
SUBJECT: FAILURE TO REPORT FOR SHIFT, FAILURE TO TURN IN LOG AND REPORTS.

DATE: 12-30-90

AT APPROXIMATELY 0610 HRS, 12-30-90, OFFICER HACKWORTH CONTACTED ME BY PHONE AT MY RESIDENCE, HE STATED HE TRIED TO CONTACT SGT. DARBY AT HIS RESIDENCE, AND TRIED HIS PAGER, WITH NO ANSWER ON THE PAGER. THE PERSON WHO ANSWERED THE PHONE STATED SGT. DARBY WAS NOT THERE AT THIS TIME.

I TOLD OFFICER HACKWORTH, TO STAY OUT UNTIL I COULD GET READY FOR WORK. I DRESS, AND CALLED OFFICER HACKWORTH AT 0645 HRS TO PICK ME UP. I THEN DROVE TO THE OFFICE TO BRIEF WITH OFFICER HACKWORTH, AND TO CHECK THE SCHEDULE TO SEE IF SGT. DARBY WAS THE DAY CAR ON THE 30TH OF DECEMBER. (THE REVISED SCHEDULE). IT SHOWS SGT. DARBY WORKING DAY SHIFT. I THEN TRIED SGT. DARBY'S PAGER NUMBER AGAIN. I THEN GOT IN MY PATROL CAR AND DROVE TO OGDEN, SGT. DARBY'S ADDRESS 81 HEALY AVE. THE PATROL CAR WAS PARKING IN THE DRIVEWAY. I THEN RETURNED TO THE CITY OFFICE TO OBTAIN SGT. DARBY'S OLD PHONE NUMBER. AT 0730 HRS I CALLED SGT. DARBY. SGT. DARBY ANSWERED THE PHONE, I INFORMED HIM THAT HE WAS SUPPOSE TO BE WORKING THE DAY SHIFT, HE STATED HE CHECKED, THE SCHEDULE, HE WAS NIGHT SHIFT. I TOLD SGT. DARBY I WOULD CHECK AGAIN. I AGAIN CHECKED THE SCHEDULE IT IN FACT SHOWS, SGT. DARBY WORKING THE DAY SHIFT. SGT. DARBY STATED HE WOULD BE RIGHT OUT.

WHEN SGT. DARBY SIGNED ON I TOLD HIM TO MEET ME AT HILL TOP, SO I COULD TALK TO HIM. SGT. DARBY AND I, MET AT HILL TOP. I AGAIN TOLD HIM IF I WAS NOT SHORT ON PERSONNEL I WOULD SEND HIM HOME. HE STATED HE LOOKED AT THE SCHEDULE, HE WAS NOT WORKING A SHIFT ON SUNDAY. I ASKED HIM WHAT SCHEDULE DID HE LOOK AT. IT MUST NOT HAVE BEEN THE REVISED SCHEDULE. THE SCHEDULE SGT. DARBY MADE UP FOR THE REST OF DECEMBER.

I TOLD SGT. DARBY TO BE IN MY OFFICE 8.00 AM 12-31-90. WHEN I ARRIVED AT THE CITY OFFICE ON 12-31-90 TO CHECK REPORTS, AND LOGS, SGT. DARBY'S LOGS AND REPORTS WERE NOT IN. THIS IS NOT THE FIRST TIME, SGT. DARBY HAS BEEN WARNED ABOUT HIS LOGS AND REPORTS PRIOR TO THIS DATE.

I WOULD RECOMMEND THAT SGT. DARBY BE DEMOTED FOR INEFFECTUALLY AND INABILITY TO SATISFACTORILY PERFORM ASSIGNED DUTIES. THIS IS THE SECOND TIME WITHIN A WEEK PERIOD OF TIME ALSO THE WARNING IN THE PAST.

SGT. DARBY SHOULD RECEIVED A 1) LETTER OR REPRIMAND FOR FAILURE TO SHOW FOR HIS SHIFT, 2) 3 DAYS OFF WITHOUT PAY, AND BE PLACED ON PROBATION FOR A YEAR PERIOD OF TIME.

*Richard Cope*

TO: MICHAEL DARBY  
FROM: GARY W. TRACY, CHIEF OF POLICE  
SUBJECT: DEMOTION, PAY REDUCTION, AND 2 LETTERS OF WRITTEN REPRIMAND.  
DATE: 12-31-90

Mike, as per our meeting on 12-31-90, it is my decision, that you be removed from the position of Sergeant, and you will be reduced in pay accordingly, to your prior place as Police Officer III, Grade 10 Step 22, and 2 letters of written reprimand.

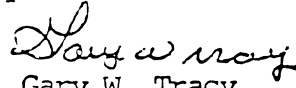
In making my decision, I looked at the two letters, from Lt. Cope on your failure to report for two shifts, 12-23-90, and 12-30-90, as you recall the Lt. , you and I had a meeting on Thursday the 24th on this very situation. At this time you stated you were going to get yourself straightened out. I felt very good about this, but then you don't show up for a shift.

As per our meeting on 12-31-90, I understand what you meant by you cannot be expected to be a Sergeant, cover shifts, and be called out all hours of the day and night. I was in the process of trying to change this.

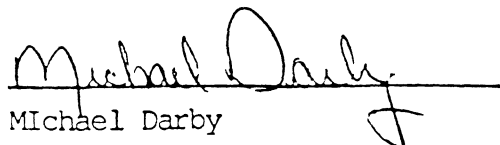
I hope you will take this demotion as a positive experience, and will learn from it. If any further incidents of failure to report for a shift occur within one year you will be terminated.

This letter will remain in your file for one year or 12-31-91.

You may appeal my decision to the City Administrator as per city policy.

  
Gary W. Tracy  
Chief of Police

I have received a copy of this letter and two letters from Lt. Cope

  
Michael Darby

Date 12-31-90

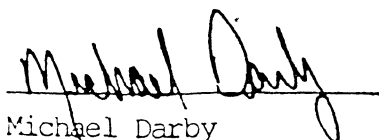
TO: MICHAEL DARBY

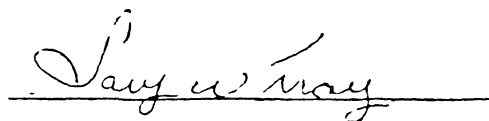
FROM: GARY W. TRACY, CHIEF OF POLICE

SUBJECT: CORRECTIVE ACTION ON JOB PERFORMANCE.

1. You seek personal counseling through employee assistance program, this is voluntary at this point, failure to seek personal counseling will make it mandatory.
2. Professional Appearance.
  1. Uniform will be cleaned and pressed, foot wear needs attention as to worn out and polished.
  2. When you report for work you will be clean shaven.
  3. When in a police vehicle you will be dressed in proper attire, as per Police Dept. Rules and Regulations.
3. Vehicle.
  1. Your vehicle will be kept clean.
    - A. This is in reference to the interior.
4. Instructions.
  1. All reports will be turned in, in compliance with Police Dept. Rules and Regulations.
  2. Tasks assigned will be carried out in a timely manner and turned in when due.

These requests will be followed up on by Lt. Cope and a monthly report submitted to me. Failure to comply with these requests will be dealt with according to Police Dept. Rules and Regulations.

  
Michael Darby

  
Gary W. Tracy  
Chief of Police

TO: MICHAEL DARBY  
FROM: CHIEF GARY W TRACY  
DATE: JULY 9, 1991  
SUBJECT: FAILURE TO FOLLOW RECOMMENDATIONS.

DEAR MIKE:

AS PER THE LETTER GIVEN TO YOU ON YOUR JOB PERFORMANCE WHEN YOU WERE REMOVED FROM THE SERGEANTS POSITION.

**1. PROFESSIONAL APPEARANCE.**

A. UNIFORM WILL BE CLEAN AND PRESS, FOOTWEAR.

1. THIS HAS BEEN AND STILL IS A PROBLEM.

B. WHEN IN A POLICE VEHICLE YOU WILL BE IN PROPER ATTIRE.

1. THIS HAS BEEN AND IS STILL A PROBLEM.

A. WHEN YOU WENT TO THE COUNTY ATTORNEY'S OFFICE ON YOUR HIGH SPEED CASE, YOUR APPEARANCE WAS LESS THAN DESIRABLE, CLOTHES WERE NOT CLEAN, NO SOCKS ON.

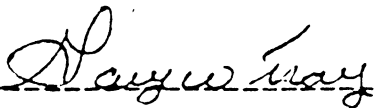
**2. VEHICLE.**

VEHICLE WILL BE KEPT CLEAN, THE INTERIOR WAS A MESS WHEN I PLACED A LETTER TO YOU FROM TOUGH LOVE.

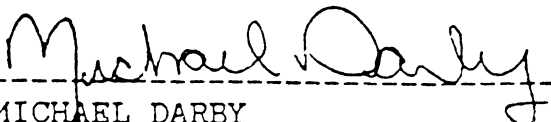
**3. SEEK COUNSELING THROUGH EMPLOYEE ASSISTANCE PROGRAM.**

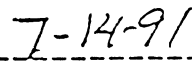
A. YOU WENT TWICE, SINCE THEN I HAVE ASKED YOU ON AT LEAST TWO OCCASIONS, IF YOU HAD GONE BACK, YOU STATED--"NO" BUT I WILL, YOU STILL HAVE NOT DONE THIS.

AS THIS LETTER INDICATES YOU HAVE NOT CARRIED OUT THOSE ITEMS THAT YOU WERE ASKED TO DO. I HAVE CALLED EMPLOYEE'S ASSISTANCE PROGRAM WITH MY CONCERNS AS TO YOUR JOB PERFORMANCE. IT IS NOW MANDATORY THAT YOU SEEK SOME HELP. YOU HAVE 10 DAYS FROM-- RECEIPT OF THIS LETTER TO SEEK HELP IF NOT I WILL TAKE ACTION THAT I DEEM NECESSARY TO CORRECT YOUR JOB PERFORMANCE.

  
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GARY W. TRACY  
CHIEF OF POLICE

  
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MICHAEL DARBY

  
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DATE

TO: OFFICER MICHAEL DARBY

FROM: CHIEF GARY W. TRACY

SUBJECT: FAILURE TO TAKE CORRECTIVE ACTION ON YOUR JOB PERFORMANCE

DATE: AUGUST 21, 1991

I WILL EXPECT A WRITTEN RESPONSE TO THE FOLLOWING ALLEGATIONS MADE AGAINST YOU IN FIVE (5) WORKING DAYS OR ON 8-29-91 BY 5:00 P.M. I HAVE INCLUDED A COPY OF THE CORRECTIVE ACTION THAT YOU SIGNED ON WHAT YOU NEEDED TO DO. I HAVE ALSO INCLUDED THE LETTER YOU RECEIVED WHEN YOU WERE DEMOTED FROM THE SERGEANT'S POSITION.

1. ON 8-2-91 YOU WERE THE 0600 TO 1500 CAR.—YOU MADE A CALL TO WEBER COUNTY 911 DISPATCH AT AROUND 0400 HOURS AND REQUESTED A WAKE-UP CALL AT 0500 HOURS. THE DISPATCH CALLED AND WOKE YOU UP BUT YOU FAILED TO SIGN ON UNTIL APPROXIMATELY 0645 HOURS. YOU WERE TO RELIEVE THE GRAVEYARD CAR AT 0600 HOURS. LT. COPE WAS CALLED BY THE GRAVEYARD CAR AND LT. COPE CAME TO THE OFFICE. SGT. RHODES SPOKE WITH LT. COPE AND HE SAID THAT THE PROBLEM HAD BEEN TAKEN CARE OF.

2. ON 8-11-91 YOU WERE AGAIN THE 0600 TO 1500 CAR AND FAILED TO SHOW FOR WORK UNTIL ABOUT 0610 HOURS. THE GRAVEYARD CAR HAD THE DISPATCH CALL YOU BUT YOU SIGNED ON AS THEY WERE CALLING.

3. ON 8-1-91 YOU CALLED A SHOOTING REVIEW BOARD AS YOU ARE THE CITY ARMOR. THE BOARD CONSISTED OF SGT. RHODES AND OFFICER SATTERTHWAITE. OFFICER WINBERG WAS THE OFFENDING OFFICER. THE BOARD WAS TO CONVENE AT 1300 HOURS ON 8-1-91. THE NIGHT PRIOR TO THE REVIEW BOARD HEARING YOU CALLED SGT. RHODES AT HIS HOME AT 9:50 P.M. AND ASKED IF YOU COULD GO HOME AT 10:00 P.M., AN HOUR EARLY, BECAUSE YOU WANTED THE BOARD TO MEET AT 12:00 P.M. TO REVIEW THE CASE. SGT. RHODES TOLD YOU THAT IT WAS OKAY FOR YOU TO GO HOME EARLY. THE DAY OF THE REVIEW BOARD OFFICER SATTERTHWAITE AND SGT. RHODES WERE AT THE OFFICE AT 12:00 P.M. BUT YOU DIDN'T SHOW. AT 1:00 P.M., THE SCHEDULED TIME OF THE HEARING, YOU HAD STILL NOT ARRIVED. THE HEARING BEGAN AT 1:00 P.M. OFFICER SATTERTHWAITE AND SGT. RHODES CONDUCTED THE HEARING WITHOUT YOU. JUST AS THE HEARING WAS CONCLUDING AT 1:12 P.M. YOU ARRIVED. THEY THEN HAD TO COMPLETELY START OVER. AT THE CONCLUSION OF THE HEARING THE BOARD DISCUSSED THEIR FINDINGS. YOU INSISTED THAT YOU WRITE THE LETTER TO THE ME AND OFFICER WINBERG. SGT. RHODES EXPLAINED TO OFFICER WINBERG THAT HE WOULD RECEIVE THEIR DECISION WITHIN 24 HOURS. YOU TOOK THE REPORTS AND SGT. RHODES' CITY POLICY MANUAL TO HELP WITH WRITING THE LETTER. AS OF 8-13-91 NO LETTER HAS EVEN BEEN WRITTEN BY YOU. SGT. RHODES SPOKE WITH YOU ABOUT GOING HOME EARLY THE NIGHT BEFORE BUT YOU STATED THAT YOU DID NOT LEAVE UNTIL YOUR SHIFT WAS OVER. ON 8-6-91 SGT. RHODES WROTE THE LETTER AND TURNED IT IN TO ME AND OFFICER WINBERG.

✓ 4. ON 8-8-91 SGT. RHODES WAS NOTIFIED BY CITY ATTORNEY ROBERT NEELEY THAT YOU FAILED TO SHOW FOR A SCHEDULED COURT TRIAL IN CITY COURT. SGT. RHODES CONTACTED NINA COLEMAN AND HE WAS ADVISED THAT YOU DID NOT PICK UP YOUR SUBPOENAS. NINA STATED THAT SHE PLACED THE SUBPOENA NOTIFICATION LIST ON THE PATROL ROOM DOOR WITH YOUR NAME ON IT, LETTING YOU KNOW THAT THERE WERE SUBPOENAS THAT NEEDED TO BE PICKED UP. NINA STATED THAT THE SUBPOENAS WERE READY TO BE PICKED UP ON 7-15-91 AND THAT SHE PERSONALLY TOLD YOU AT LEAST 2 TIMES THAT THEY WERE THERE AND YOU FAILED TO PICK THEM UP. SGT. RHODES SPOKE WITH JUDGE JOHN SANDBERG AND HE TOLD HIM THAT HE PERSONALLY ADVISED YOU ON 8-5-91 IN COURT OF THE UPCOMING TRIAL AND THE IMPORTANCE OF YOUR APPEARANCE AND YOU STILL DID NOT PICK UP YOUR SUBPOENAS AND FAILED TO SHOW IN COURT. "THE CASE WAS DISMISSED." "A LETTER FROM JUDGE SANDBERG IS ATTACHED." THE LETTER FROM JUDGE SANDBERG INDICATED THAT YOU MISSED COURT ON 8-8-91, ON 2-2-91 AND ALSO ON 3-7-91, THREE TIMES IN THE PAST SIX MONTHS.

✓ 5. AT THE END OF THE MONTH EACH OFFICER IS REQUIRED TO TURN IN A VEHICLE MAINTENANCE LOG AND ALL OF THE MONTH'S GAS RECEIPTS. ON 8-2-91 SGT. RHODES NOTIFIED YOU, IN PERSON, AND ADVISED YOU THAT HE NEEDED YOUR GAS SLIPS AND LOG. YOU SAID YOU WOULD GET THEM IMMEDIATELY. ON 8-8-91 SGT. RHODES AGAIN ADVISED YOU AND AGAIN ON 8-9-91. AS OF 8-13-91, SGT. RHODES STILL DOES NOT HAVE YOUR LOGS OR GAS RECEIPTS; THEREFORE, SGT. RHODES HAS NOT BEEN ABLE TO TURN IN THE MONTHLY VEHICLE MAINTENANCE REPORT AS HE IS REQUIRED TO DO.

6. ON 8-7-91 ALL DEPARTMENT POLICE OFFICERS WERE REQUIRED TO ATTEND A MANDATORY SHOOTING QUALIFICATION. YOU WERE SCHEDULED TO SHOOT AT 10:00 A.M. AND FAILED TO SHOW AT THE PROPER TIME. YOU HAD ALSO MADE PRIOR ARRANGEMENTS TO ASSIST OFFICER WINBERG IN PREPARING THE SHOOTING RANGE AT 0730 HOURS ON THE DAY OF THE SHOOT. YOU FAILED TO SHOW. JUST PRIOR TO THE 2:00 P.M. SHOOTING SCHEDULE THE POLICE SECRETARY CALLED YOU AT YOUR HOME AND YOU SHOWED UP FOR THE 2:00 P.M. SHOOTING.

✓ 7. A TRAFFIC ACCIDENT FORM, CASE 910765, THAT YOU HANDLED WAS RE-ASSIGNED TO YOU TO FINISH BY 7-19-91. AS OF 8-20-91 THE TRAFFIC ACCIDENT FORM STILL HAS NOT BEEN COMPLETED AND TURNED IN. THIS IS (30) THIRTY DAYS PAST THE DUE DATE. WHY HAS THIS NOT BEEN COMPLETED?

✓ 8. REPORTS AND LOGS HAVE NOT BEEN TURNED IN AT THE END OF YOUR SHIFTS. WHEN LOGS AND REPORT ARE TURNED IN, SEVERAL ITEMS HAVE BEEN LEFT OFF BOTH THE LOGS AND REPORTS. WHY?

✓ 9. ON 8-19-91 YOU WERE SUPPOSED TO APPEAR IN RIVERDALE COURT AT 3:00 P.M. BY A LEGAL SUBPOENA BUT YOU FAILED TO APPEAR. WHY?

✓ 10. LT. COPE HAS SPOKEN TO YOU ABOUT A CHECKBOOK THAT YOU HAVE THAT WAS SUPPOSED TO BE PUT INTO EVIDENCE. IT HAS NOT BEEN PUT INTO EVIDENCE AS OF THIS DATE, 8-20-91. YOUR REPORT CASE #911058 STATES THAT THE CHECKBOOK IS IN EVIDENCE.

11. ON 8-10-91 YOU WERE CALLED ON A CIVIL DISTURBANCE AT THE AIKENS RESIDENCE AT 311 W. 4775 S. YOU TOOK A SEMIAUTOMATIC 22 CAL RIFLE FROM THE RESIDENCE. THIS RIFLE WAS NOT USED IN A CRIME AND HAD NOTHING TO DO WITH THE CALL EXCEPT THAT IT WAS SUPPOSED TO BE STOLEN.

- A. WHY DID YOU TAKE THE RIFLE?
- B. WHY IS THERE NO REPORT ON THIS RIFLE?
- C. WHY WAS THERE NOT A RECEIPT GIVEN TO MR. AIKENS FOR THE RIFLE?
- D. WHY WAS THE RIFLE PLACED INTO EVIDENCE WITH NO EVIDENCE TAG?
- E. WHY DID YOU REMOVE THE RIFLE FROM THE EVIDENCE LOCKER?
- F. ON 8-14-91 MR. AIKENS STOPPED YOU AND ASKED, "WHAT ARE YOU DOING ABOUT THE RIFLE." YOU SUPPOSEDLY TOLD MR. AIKENS THAT YOU WOULD GET BACK WITH HIM. YOU HAVE NOT DONE THIS.
- G. YOU WERE TOLD BY LT. COPE TO RETURN THE RIFLE TO MR. AIKENS ON 8-16-91. WHY WAS THIS NOT DONE?
- H. THE LIEUTENANT FOUND THE RIFLE IN QUESTION STILL IN THE DETECTIVE'S OFFICE ON 8-20-91.

(12) ON 7-14-91 YOU RECEIVED A LETTER FROM ME THAT YOUR JOB PERFORMANCE WAS NOT SATISFACTORY. (LETTER ATTACHED.)—I TALKED WITH SARAH PHILLIPS AT EMPLOYEE ASSISTANCE AND SHE STATED THAT YOU DID NOT SHOW UP FOR YOUR LAST APPOINTMENT. WHY?

13. ON 8-18-91 YOU WERE THE 0600 TO 1500 CAR. YOU WERE TO RELIEVE OFFICER HACKWORTH AT 0600 HOURS AND AT 0640 HOURS OFFICER HACKWORTH RECEIVED A CALL FROM THE DISPATCHER TO CALL YOU AT YOUR HOME, THEN AT APPROXIMATELY 0643 HOURS YOU DID SIGN ON.

RECEIVED A COPY:

Michael D. Darby  
MICHAEL D. DARBY

DATE: 8-22-91

Gary W. Tracy  
GARY W. TRACY, CHIEF OF POLICE

DATE: AUGUST 21, 1991

TO: CHIEF GARY W. TRACY

FROM: OFFICER MICHAEL DARBY

SUBJECT: REPLY TO LETTER OF AUGUST 21, 1991 ON MY JOB  
PERFORMANCE

DATE: AUGUST 28, 1991

The following is the written response requested by you on August 28, 1991 concerning my job performance:

1. On 8-2-91 I was 45 minutes late for the day shift.
2. On 8-11-91 I was not late for the day shift, unless there was a difference in the time given by my watch, and the time given by dispatch.
3. In reference to your written statement that the meeting was to be convened at 1200 hours on 8-1-91: It was my understanding that this was an invitation to go for coffee before the formal meeting, which made it optional. At no time did I request a meeting to be convened at 1200 hours. The shooting board was to be convened at 1300 hours. I was late by a few minutes due to traffic. Upon my arrival at the city office I obtained my materials. I was told that the board members had already gone to the counsel room. When I walked into the room it did not appear that the meeting was over, since Officer Winberg was relating the incidence that led to the canine attack against his person. After Officer Winberg had finished, Sgt. Rhodes, Officer Satterthwaite and I then asked Officer Winberg questions about the incident, after which the board meeting was concluded. I was to write a letter to the Chief within 24 hours concerning the incident because I was on the board; however, I found there was pertinent information pertaining to this incident that needed to be acquired. Section 16-15 Firearms Review panel does not automatically call for a 24 hour conclusion. Review Process 16-17 paragraph three (3) allows a board member to investigate further information. While talking to the animal control officer about the reports coming from the veterinarian a person approached me asking about the dog that had been shot. She stated that the dog had lived in her area and that she has had problems with the dog in question. I requested a written statement from this person. I informed Sgt. Rhodes of this new information. I waited two days for this person to return her statement and then started trying to contact her at her residence. When I finally was able to get a hold of her she told me that it was not the same dog. By this time I had heard the letter was taken care of.
4. On 8-8-91 when I arrived at the city office, I found that I had missed a court date. I recall talking with Judge [redacted] coming trial on Naveez but no date was

mentioned, it was not my intention to miss this trial. As for the dates 2-2-91 and 3-7-91 missing these trail dates are new to me, and I have no recall of it ever being mentioned prior to this letter, of ever seeing them on the subpoena notification list, and to the best of my knowledge I don't remember ever getting a subpoena. When Sgt. Rhodes arrived at the city office the day in question "8-8-91" I advised him that I did not go to court.

5. I did not turn in the milage log. I did advise Sgt. Rhodes that I had lost gas slips and log for the first part of the month.

6. On 8-7-91 I did miss the first shoot that day by oversleeping on my day off. When I was notified by the dispatcher I responded for the second shoot. As for Officer Winberg's claim that I made arrangements to assist, I did. I told Officer Winberg that if he wanted assistance to set up the equipment, for him to give me a call that morning. I did not receive a telephone call. At the range I asked Winberg why he didn't call and he stated "I don't call anybody." If Officer Winberg had called he would have received the assistance he claimed I promised.

7. Traffic Accident Case 91-0765: This case was reported as a stolen vehicle, hit and run. During the investigation I found that this was not a stolen vehicle, hit and run, but that the complainant had loaned his fathers truck to a friend who had hit the garage. After receiving the initial information, I told the complainant to have his parents contact me. I did advise Lt. Cope about this case. Upon receiving this case I tried to make contact with the father of the complainant. I put the case in my box and tried several times unsuccessfully to make contact with the father of the complainant, who was the owner of the property. On 8-22-91 I tried again to make contact. Having no contact with the owner I advised Lt. Cope again and the case is to be closed.

8. I will agree that my reports and logs have not been turned in at the end of the shift. But this has occurred not only with myself but with other department members. If this is a rule that is to be enforced, then it should be enforced on a timely and consistent basis.

9. On 8-19-91 I did miss this court date. I left my subpoena attached to the box in the patrol room and forgot about the court date.

10. At the time I started working the follow-up on this (Auto Burglary) case I advised Lt. Cope and Det. Gathercole that I had information on this case that I needed the checkbook so I could follow up on a suspect. This case is an auto burglary that occurred at ST BENS. HOSPITAL; the checkbook was recovered in a stolen vehicle in Ogden City. After talking with a suspect that was arrested in the stolen vehicle, he gave me information on who

was forging checks out of the stolen checkbook and also more information on who the auto burglars are. I needed the checkbook to show one suspect, to put pressure on have him so he would turn the ones that actually committed the auto burglary at St Bens. I shared information with Det. Gathercole. I also keep Lt. Cope informed. As for the initial report the following words should have been added and it should read: the checkbook is in evidence with the case. As for the supplemental report I have always taken information on the contacts I have made, compiled all this information and it is then placed categorically on the supplementary report. When the results to the case are all in then all items used to obtain information are secured in the evidence locker to await trial. This is the way I worked while in detectives without complaints.

11. On 8-10-91, I was dispatched to 4300 S. 300 E. on a threats complaint. The suspect Russell Aikens was gone from that residence when I arrived and was subsequently arrested on Riverdale Rd. At the time of the arrest, Russell made claims that his brother Tom was in possession of a stolen weapon. I then went to the residence at 311 W. 4775 S. where Tom Aikens resided. Tom told me that he had received a .22 caliber rifle from Russell and that if it was stolen he did not know about it. While at the residence I tried to run checks on the rifle through Weber County Dispatch, but the computers were down.

A. I told Mr. Aikens that the rifle would be taken to the city office so I could run a check through Alcohol Tobacco and Firearms (ATF.). I had probable cause to believe that it was stolen and might disappear if not secured.

B. A report was started, but I had not obtained information off of the rifle. I placed the rifle into the evidence locker so I would not have it in my vehicle when I was dispatched to another call. When I returned I found the evidence locker locked and could not obtain the information for the report.

C. I Went to give Mr. Aikens a receipt but did not have a receipt book. Mr. Aikens stated that he didn't need one as he knew who had the rifle.

D. Upon returning to the office with the rifle, I began to do reports, but was immediately called out. Because I did not wish to carry the rifle with me, I hurriedly placed it in the evidence locker without a tag. Later I returned to the office to tag the rifle and finish reports only to find that the evidence locker was locked (the only key being in the possession of Det. Gathercole, and she was not available). On the 12 and 13 of August I was on my days off. On the 14 and 15th I was unable to obtain the rifle out of the evidence locker.

E. On the 16 of August I obtained the rifle from the evidence locker and ran all the checks I could through ATF and NCIC to see if the rifle was stolen. I requested the name of the person who first purchased the rifle threw ATF.

F. On 8-15-91 I did talk to Mr. Aikens about his brother who had been arrested and what the court had ordered. I

told Mr. Aikens that I still had to do the checks on the rifle.

G. The day I obtained the rifle from the evidence locker (August 16, 1991) and ran the checks Lt. Cope said to take the rifle back. I went by Mr. Aikens residence but found that nobody was home.

H. On 8-16-91 Lt. Cope and I had a discussion about the rifle. Lt. Cope refused to hear my rationale concerning the rifle and wanted it returned.

Since I had not been able to return the rifle on 8-16-91 I left the rifle in the detective Gathercoles office instead of carrying it in my vehicle, and since detective Gathercole was off August 17, 18, 1991, and I was off on August 19, 20, 21, 1991, I did not get the rifle returned. The rifle was later placed into evidence by the lieutenant.

12. On 7-14-91 I received your letter. We discussed the contents of this letter. On 7-15-91 I went to Sarah Phillips's, office (Ms. Phillips of the Employee Assistance Program) and talked with her. Another meeting was to be set since she was going to be on vacation. Ms. Phillips called me to set a date for a meeting. Not having a schedule at hand we set the meeting. On the day of the meeting I was working the afternoon shift alone and was tied up on a call which meant that I was then unable to attend the meeting.

13. 8-18-91: I was late that morning.

Michael Darby

TO: MICHAEL DARBY  
FROM: GARY W. TRACY.. CHIEF OF POLICE

ITEM 1: YOU ADMIT YOU WERE 45 MINUTES LATE FOR WORK ON 8-2-91 ( LETTER DATED 12-31-90 SIGNED BY YOU STATED FAILURE TO REPORT FOR SHIFT ASSIGNED WITHIN ONE YEAR--YOU WOULD BE TERMINATED.) FOR THIS VIOLATION I AM IMPOSING THE FOLLOWING 3 DAYS WITHOUT PAY AND A LETTER OF WRITTEN REPRIMAND

ITEM 2: YOU STATE THAT YOU WERE NOT LATE FOR DAY SHIFT AS PER YOUR WATCH AND DISPATCH TIME THAT YOU SIGNED ON. I WILL ACCEPT THIS.

ITEM 3: YOU STATED THAT YOU DID NOT SET THE MEETING FOR THE BOARD TO MEET AT 12.00 PM, BUT THIS WAS TO GO FOR COFFEE BEFORE THE FORMAL MEETING. IT WAS THE UNDERSTANDING OF SGT. RHODES, AND OFFICER SATTERTHWAITE, THAT ALL OF YOU WERE TO MEET AT 12.00 PM TO DISCUSS THE CASE BEFORE THE FORMAL HEARING. IN FACT THE NIGHT BEFORE THE MEETING YOU CALLED SGT. RHODES AT 21:55 HRS. AND ASK IF YOU COULD GO HOME AN HOUR EARLY BECAUSE WE HAVE TO MEET AT 12.00 PM, SGT. RHODES OK'D THIS, THE NEXT DAY SGT. RHODES STATED TO YOU, YOU ARE LATE FOR THE MEETING, PLUS YOU WENT HOME AN HOUR EARLY SO THAT WE COULD MEET AT 12.00 PM. (YOU STATED YOU DID NOT GO HOME AN HOUR EARLY.) YOU CAME INTO THE MEETING AT APPROXIMATELY 13.12 HRS. THE BOARD HAD JUST ABOUT FINISHED WITH THE MEETING, AND HAD TO GO OVER EVERYTHING AGAIN. AT THAT TIME SGT. RHODES STATED TO OFFICER WINBERG THAT A WRITTEN REPLY WOULD BE GIVEN TO THE CHIEF AND OFFICER WINBERG WITHIN TWENTY FOUR HOURS. THE POLICY DOES NOT STATE THAT THIS MUST OCCUR WITHIN TWENTY FOUR, BUT AT LEAST TWO BOARD MEMBERS AGREED THAT NO POLICY VIOLATION HAD OCCURRED, IN FACT SGT. RHODES STATED THAT HE WOULD WRITE THE RESPONSE OR THAT SATTERTHWAITE SHOULD DO THIS AS HE IS THE APPOINTED MEMBER TO THE BOARD BY THE CHIEF OF POLICE. YOU STATED YOU WANTED TO WRITE THE RESPONSE. YOU STATED THAT YOU WANTED TO INVESTIGATE FURTHER INTO THE SITUATION. SGT. RHODES STATED TO YOU OUR ONLY REQUIREMENT IS TO FIND OUT IF POLICY WAS VIOLATED. SGT. RHODES HAS STATED THAT YOU NEVER TOLD HIM YOU HAD NEW INFORMATION.

I DO NOT KNOW WHAT THE PERSON WHO WAS SUPPOSED TO HAVE HAD PROBLEMS WITH THE DOG HAD TO DO WITH THE QUESTION OF DID OFFICER WINBERG VIOLATE FIREARMS POLICY AT THE TIME THE DOG WAS SHOT.

CONCLUSION YOU WERE AGAIN LATE FOR A MEETING AND DID NOT CARRY OUT YOUR DUTIES IN A TIMELY MANNER. YOU STATED YOU WERE LATE FOR THE MEETING BECAUSE OF TRAFFIC. IT APPEARS THAT YOU SHOULD HAVE LEFT EARLY ENOUGH SO THAT ANY PROBLEMS THAT AROSE YOU WOULD STILL BE ON TIME. SO THAT THREE PEOPLE WOULD NOT HAVE TO SIT AROUND AND WAIT ON YOU. YOU RECEIVE A LETTER OF WRITTEN REPRIMAND.

ITEM 4: YOU STATED THAT YOU HAD NO INTENTION OF MISSING THE TRAIL OF NAVAREZ. YOU RECALL TALKING WITH JUDGE SANBERG, BUT THAT NO SPECIFIC DATE WAS MENTIONED. I WILL ACCEPT THIS. YOU DID NOT

ADDRESS WHY YOU FAILED TO SIGN FOR YOUR SUBPOENA FOR THE NAVAREZ TRAIL WHEN YOU WERE REMINDED BY NINA THAT YOU HAD SUBPOENA TO BE SIGNED AND ALSO IT WAS NOTED TO YOU ON THE PATROL ROOM THAT YOU HAD SUBPOENAS TO BE SIGNED. IN FACT THE PROCEDURE FOR SUBPOENA'S WAS CHANGED BECAUSE YOU DID NOT LIKE THE PROCEDURE THAT WAS BEING USED. THE OLD PROCEDURE WAS THE SECRETARY PLACED THE SUBPOENA IN YOUR BOX IN THE PATROL ROOM, YOU STATED YOU DID NOT KNOW WHEN YOU HAD A SUBPOENA, SO WE CHANGED THE PROCEDURE, THAT YOU HAD TO SIGN WITH THE SECRETARY TO RECEIVE YOUR SUBPOENA. EVEN THAT DOESN'T SEEM TO WORK FOR YOU AS YOU DON'T SIGN FOR THEM WHEN YOU ARE TOLD, AND POSTED THAT YOU HAVE SUBPOENAS. AS FAR AS THE OTHER DATES I WAS NOT AWARE OF THESE UNTIL I RECEIVED THE LETTER FROM THE JUDGE, FOR MISSING COURT ON AUGUST 8TH. A LETTER OF WRITTEN REPRIMAND.

ITEM 5: YOU STATE THAT YOU DID NOT TURN IN GAS SLIPS FOR JULY, BECAUSE YOU LOST THEM. ( FIRST PART OF THE MONTH) YOU STILL HAVE NOT TURNED IN WHAT YOU HAVE. I DO NOT UNDERSTAND HOW YOU CAN LOSE GAS SLIPS WHEN YOU COULD TURN THEM IN WITH YOUR LOG. NO ONE ELSE LOSES A WHOLE MONTH OF GAS SLIPS. YOU HAVE MADE NO EFFORT TO TURN IN YOUR GAS SLIPS THAT YOU HAVE FOR JULY. LETTER OF WRITTEN REPRIMAND.

ITEM 6: YOU STATED YOU MISSED THE TIME YOU WERE SUPPOSED TO SHOOT BECAUSE YOU OVER SLEPT AND IT WAS YOUR DAY OFF. I HAD CHRIS CALL YOU TO TELL YOU TO BE AT THE 14.00 HR SHOOT AND YOU STATED TO CHRIS I DID NOT KNOW ABOUT THE SHOOT.

ITEM 7: YOU STATED THAT YOU HAD PROBLEMS CONTACTING PEOPLE IN THIS CASE. THIS CASE TOOK YOU FROM 6-19-91 TO 8-22-91. I CANNOT BELIEVE THAT THIS CASE TOOK THIS LONG, AND I DO NOT UNDERSTAND WHAT THE CAR BEING STOLEN HAD TO DO WITH THE ACCIDENT REPORT. THE REPORT WAS STILL NOT COMPLETE WHEN YOU TURNED IT IN AND THE LT. FINISHED IT. IT APPEARS THAT YOU SIMPLY FORGOT ABOUT THE REPORT.

ITEM 8: I WILL AGREE WITH YOU ON THIS SITUATION.

ITEM 9: YOU ADMIT THAT YOU MISSED COURT ON 8-19-91, THIS OCCURRED AT THE RIVERDALE COURT, AND I WILL LEAVE THIS UP TO THE JUDGE OF RIVERDALE AS TO WHAT ACTION IS TAKEN, BUT THIS REFLECTS AS PER THE JUDGE'S LETTER THAT THE CITIZENS ARE NOT BEING PROPERLY SERVED.

ITEM 10: ON 8-13-91 THE FELONY THEFT CASE WAS ASSIGNED TO OFFICER GATHERCOLE TO BE FOLLOWED UP. AFTER A BRIEF CONVERSATION WITH YOU ABOUT THE CASE AND INFORMATION CONTAINED IN THE CASE, YOU WERE TOLD TO PLACE THE CHECK BOOK INTO EVIDENCE. AGAIN ON AUGUST 19TH. YOU WERE ORDERED TO PLACE THE CHECK BOOK INTO EVIDENCE. THIS WAS PER A TELEPHONE CALL FROM YOU TO THE LTS. RESIDENCE.

AS OF THIS DATE NO SUPPLEMENT HAS BEEN RECORDED THAT YOU HAVE PLACED THE CHECK BOOK INTO EVIDENCE. YOU RECEIVE A LETTER OF REPRIMAND

ITEM 11: YOU ADMIT THAT YOU TOOK A GUN AS IT WAS POSSIBLY STOLEN, SO THIS MEANT THERE SHOULD HAVE BEEN A REPORT MADE ( NO REPORT), EVIDENCE TAG PLACED ON GUN ( NO EVIDENCE TAG). YOU STATED TO ME THIS GUN WAS NOT EVIDENCE, IT IS. THERE WAS NO RECEIPT GIVEN TO MR. AIKENS WHEN YOU TOOK THE GUN. YOU STATED THE LOCKER WAS LOCKED WHEN YOU RETURNED TO WRITE A REPORT, YOU COULD HAVE WRITTEN A REPORT ON THE RIFLE AND PUT AN EVIDENCE TAG AT THE NEXT DAY POSSIBLE WHEN YOU COULD HAVE CONTACTED MARCIA. YOU STATED YOU DID NOT HAVE A RECEIPT BOOK WITH YOU, HAVE YOU EVER THOUGHT TO MAKE ONE OUT ON A BLANK PIECE OF PAPER?

THE LT. TOLD YOU TO TAKE THE GUN BACK TO MR. AIKENS, YOU TOLD ME THAT YOU PLACED THE GUN BY A FILE CABINET IN MARCIA'S OFFICE BECAUSE YOU WERE TIRED OF HEARING THE LT. BITCH AT YOU. IN READING YOUR REPLY AND WHAT MR. AIKENS STATED THERE IS CONFLICTING STATEMENTS.

I FEEL THAT THIS IS GROSS NEGLIGENCE ON THE HANDLING OF EVIDENCE, AND THEREFORE YOU WILL RECEIVE A WRITTEN LETTER OF REPRIMAND AND THREE DAYS OFF WITHOUT PAY.

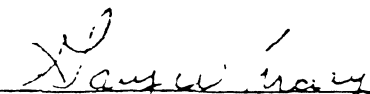
ITEM 12: I WILL ACCEPT YOUR ANSWER.

ITEM 13: YOU ADMIT YOUR WERE LATE FOR WORK 42 MINUTES. LETTER OF WRITTEN REPRIMAND AND 3 DAYS OFF WITH PAY.

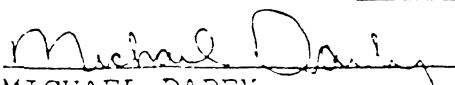
CONCLUSION: MIKE THERE SEEMS TO BE A QUESTION OF YOUR ABILITY TO REMAIN AN EMPLOYEE OF THE WASHINGTON TERRACE POLICE DEPARTMENT. IT IS MY INTENTION THAT YOU BE DISMISSED FROM EMPLOYMENT.

YOU HAVE THE RIGHT TO HAVE THIS APPEALED TO THE D.H.B. BOARD, I WILL EXPECT A NAME FROM YOU WITHIN 5 DAYS OR 9-9-91 AS PER POLICE DEPARTMENT RULES AND REGULATIONS, PAGE 11 PERSONAL DISCIPLINE PROCEDURES SECTION (3) SUB. SECTION (3). THE POLICY STATES THE NAME OF A MEMBER OF THE POLICE DEPARTMENT, YOU MAY NAME SOMEONE FROM ANOTHER POLICE DEPARTMENT IF YOU WISH.

I CANNOT USE OFFICER SATTERTHWAITE TO RUN THIS BOARD AS HE WILL BE CALLED TO TESTIFY SO I AM NAMING THE CITY ADMINISTRATOR AS MY CHOICE. IF YOU HAVE PROBLEMS WITH THIS LET ME KNOW.

  
GARY W. TRACY. CHIEF OF POLICE

I RECEIVED A COPY SEPT 3 1991.

  
MICHAEL DARBY

IN THE UTAH COURT OF APPEALS

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MICHAEL D. DARBY,	)	
	)	
Plaintiff and Appellant,	)	
	)	
vs.	)	Case No: 930701-CA
	)	
WASHINGTON TERRACE CITY,	)	Priority No. 15
a political subdivision of	)	
the State of Utah,	)	
	)	
Defendant and Appellee,	)	

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BRIEF OF APPELLEE

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PAMPHLET OF RELEVANT STATUTES

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Appellee, Washington Terrace City, by and through counsel of record, and pursuant to Rule 24(f) of the Utah Rules of Appellate Procedure, submits the following pamphlet of statutes relied upon by Appellee in its brief. Those statutes include:

Utah Code Ann. § 10-3-1001:     **Subordinates in police, health, and fire departments to be appointed from list.**

The head of each of the police and fire departments of cities of the first and second class and the health officer in cities of the first class shall, by and with the advice and consent of the board of city commissioners, and subject to the rules and regulations of the civil service commission, appoint from the classified civil service list furnished by the civil service commission all subordinate officers, employees, members or agents in his department, and in like manner fill all vacancies in the same.

Utah Code Ann. § 10-2-301:     **Classification of municipalities according to population.**

The municipalities referred to in this act now existing or hereafter organized shall be divided into cities of the first class cities of the second class, cities of the third class and towns. Those municipalities having 100,000 or more inhabitants shall be cities of the first class, and those municipalities having 60,000 or more inhabitants and less than 100,000 shall be cities of the second class, those municipalities having 800 or more inhabitants but less than 60,000 shall be cities of the third class and all municipalities having less than 800 inhabitants shall be towns; but this section shall not lower the class of any municipality which now exists.

Utah Code Ann. 10-3-1105.     **Appointive officers and employees-- Duration and termination of term of office.**

All appointive officers and employees of


municipalities, other than members of the police departments, fire departments, heads of departments, and superintendents, shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided.

Utah Code Ann. § 20-3-918. **Chief of police or marshal in third class cities and towns.**

In cities of the third class and towns, the chief of police or marshal shall exercise and perform such duties as may be prescribed by the governing body. The chief of police or marshal shall be under the direction, control and supervision of the mayor. The chief of police or marshal may with the consent of the mayor, appoint assistants to the chief of police or marshal.

Dated this 16 day of March, 1994.

CHRISTENSEN, JENSEN & POWELL, P.C.

  
David C. Richards  
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Pamphlet of Relevant Statutes to be mailed, postage prepaid thereon, to the following, this 16 day of March, 1994:

Phillip C. Patterson  
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