

1993

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

Utah Court of Appeals

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930701 CA

IN THE UTAH COURT OF APPEALS

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

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REPLY BRIEF OF APPELLANT

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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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ARGUMENT

POINT 1

THE ADMINISTRATIVE DECISION MADE BY THE CITY TO TERMINATE DARBY'S POLICE OFFICER EMPLOYMENT IS NOT ENTITLED TO A DEFERENTIAL STANDARD OF JUDICIAL REVIEW BECAUSE AN ADEQUATE RECORD OF THESE ADMINISTRATIVE PROCEEDINGS WAS NEVER PLACED BEFORE THE TRIAL COURT:

(a) TO ESTABLISH THE FINDINGS OF FACT UPON WHICH DARBY'S TERMINATION DECISION WAS BASED, AND/OR

(b) TO ESTABLISH THAT THE CITY ADDRESSED THE LEGAL ISSUES RAISED BY DARBY TO CHALLENGE THE REASONABLENESS OF HIS DISMISSAL

The Third Point within the City's Appellee Brief raises the threshold issue of the appropriate deference required of the trial court and of this court in reviewing the City's administrative decision to terminate Darby's police officer employment. Pursuant to the Washington Terrace Police Manual

("The Manual"), Chief Tracy recommended Darby's employment termination on September 3, 1991. (Plt'f.Ex."A" at 33,35-Persnl.Recs.) Darby thereafter appealed Tracy's dismissal recommendation to a three member disciplinary hearing board convened under The Manual and consistent with the directives of Tracy's September 3, 1991 letter. (Plt'f.Ex."A", supra. at 35,36) Each member of the disciplinary hearing review board prepared written findings of fact. (Brief Add. at Ex."A", "B", & "C") The chairman of the disciplinary hearing board stated at the end of his findings of fact "It is the board's recommendation 2 in favor and 1 opposed, that the recommendation by Chief Tracy to terminate Michael Darby be sustained". (Brief Add. at Ex."A")

Neither the record of the hearing held before the three member disciplinary hearing board or the separate findings of fact prepared by each of its three members were made part of the record assembled before the trial court. Tracy thereafter terminated Darby's employment on October 15, 1991, and pursuant to The Manual, advised Darby of his right to appeal Tracy's termination decision to the Washington Terrace City Council. (Plt'f.Ex."A" at 37-Persnl.Rec.) The city council unanimously sustained Tracy's termination decision on November 19, 1991 with the following relevant language:

. . .  
After careful consideration of the facts presented and evaluation of the Disciplinary Hearing Board transcripts and records, we reached a unanimous decision to sustain Chief Tracy's recommendation to terminate your employment with Washington Terrace City. (Plt'f.Ex."A", supra. at 38)



Whatever disciplinary action record was considered by the city council, this record was not put before the trial court as part of the City's December 31, 1992 summary judgment motion.

Darby commenced this action to obtain judicial review of the City's termination decision made under the administrative appeal provisions of The Manual without according any judicial review deference to the City's termination decision. The City argues that Darby's termination decision should be accorded latitude and deference and should be sustained if the administrative hearing record reveals evidence supporting the charges against Darby and if the dismissal sanction is not so clearly disproportionate to the charges as to amount to an abuse of discretion. see, In Re Discharge of Jones, 720 P.2d 1356,1363 (Utah 1986).

Darby denies that the deferential standard of judicial review accorded to agency personnel actions within In Re Discharge of Jones, 720 P.2d 1356,1363 (Utah 1986) applies to him because the trial court lacked an adequate administrative record to address the reasonableness of the City's dismissal decision. see, Denver & Rio Grande Railroad Co. v. Central Weber Sewer Improvement District, 4 Utah2d 105, 287 P.2d 884,887 (1955) (incomplete administrative record); Department of Community Affairs v. Utah Merit Systems Council, 614 P.2d 1259,1961 (Utah 1980) (incomplete hearing transcript). The City cites Russell v. Ogden Rwy & Depot & Co., 122 Utah 107, 247 P.2d 257 (Utah 1952)

as authority for its argument that the City's termination decision should be accorded a standard of deferential judicial review. Without further arguing the applicability of Russell to this case, it is evident that the disciplinary action proceeding in that case had been completely recorded and transcribed and was before both the trial court and the Utah Supreme Court. 247 P.2d at 258.

Darby's administrative hearing record was not placed before the trial court. Even though the findings of fact prepared by each member of the disciplinary hearing board were not before the trial court, these findings disclose that the board failed to address any of Darby's legal arguments that:

(a) Disciplinary procedures against him were not timely invoked,

(b) The charges against him evident disparate treatment because other police department employees have not been disciplined for like or similar conduct, and

(c) Dismissal is an excessive punishment because mitigation factors were not considered. (Tr. at 004-Complaint; Brief Add.at Ex."A","B",& "C")

The City may not rely upon findings that contain only ultimate conclusions which do not disclose if its disciplinary hearing board and city council ever actually considered and determined Darby's legal claims. Tolman v. Salt Lake County Attorney, 818 P.2d 23,32 (UtahApp. 1991). In Milne v. Public Serv. Comm'n, 720 P.2d 1373,1378 (1986) the Utah Supreme Court stated:

(An administrative body) cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that (an administrative body) make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the step by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. . .without such findings, this Court cannot perform its duty of reviewing (an administrative body's) order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.

The result follows that the City's decision to terminate Darby's employment should be judicially reviewed de novo without any deference accorded to the administrative proceedings conducted by the City. A complete record of this administrative proceedings was never placed before the trial court by the defendant as part of its summary judgment motion. Moreover, the findings of fact made by each of the disciplinary hearing board members do not establish that the City ever actually considered the legal arguments made to it by Darby.

## POINT 2

THE MANUAL CONFIRMS THAT DARBY WAS A CAREER POLICE STATUS POLICE OFFICER WHOSE EMPLOYMENT TERMINATION COULD BE OBTAINED ONLY FOR MANUAL DEFINED GOOD CAUSE REASONS AND ONLY BY COMPLIANCE WITH ITS DISCIPLINARY ACTION PROVISIONS.

The City argues for the first time on appeal that Darby was an at-will employee and that his dismissal did not have to conform to The Manual's disciplinary action provisions. The Answer filed by the City in this action admits that The Manual defined Darby's employment status and that its disciplinary action provisions controlled his removal from city employment. (Tr.at 009-011) Moreover, the City never argued within its December 31, 1992 summary judgment motion and supporting memorandum that Darby was an at-will employee. (Tr. at 019,073) Within the memorandum supporting the City's summary judgment motion the City stated:

The basis of this Motion for Summary Judgment is that it is undisputed that the defendant had sufficient reason to fire plaintiff. Defendant relies primarily on two categories of conduct. First, that plaintiff persistently refused to obey a superior officer, Lt. Cope, regarding various matters during the month immediately preceding his termination. Second, that officer Darby was properly discharged for his consistent failure to report for work on time. (Tr.at 020)

Since the City did not raise the employment at-will issue before the trial court, it should be precluded from arguing this issue on appeal. Smith v. Iverson, 848 P.2d 677 (Utah at 1992).

The City's argument that The Manual does not control the substantive and procedural due process issues in this case incorrectly applies the holding in Hutchison v. Cartwright, 692 P.2d 772 (Utah 1984) and Ward v. Richfield City, 776 P.2d 93 (Utah at 1989), affirmed on appeal at 798 P.2d 757

(Utah 1990). These cases confirm only the general common law rule that public employment is at-will unless modified by state legislative enactments or by a local government policies and procedures manual which prohibits the termination of public employees other than for cause. Ward v. Richfield City, 776 P.2d 93,97 (Utah at 1989). The United States District Court for the District of Utah has applied Utah law in Palmer v. City of Monticello, 731 F.Supp. 1503 (D.Utah 1990) to confirm that the common law employment at-will status of third class city police officers can be modified to an employment relationship subject to termination only for cause based upon a city's enactment and use of a policy and procedures manual defining the grounds for disciplinary action to include the stated grounds for involuntary dismissal. 731 F.Supp. at 1507.

The City's arguments that Darby was an at-will employee are neither timely nor substantively correct.

### POINT 3

THE CITY SHOULD NOT BE ACCORDED ANY JUDICIAL  
DEFERENCE IN THE INTERPRETATION AND ADMINISTRATION  
OF THE MANUAL .

The City incorrectly cites case law authority, not connected to the administration personnel rules and regulations, that the City's interpretation of The Manual should be subject to limited judicial review. This argument has been rejected by the Utah Supreme Court in Thurston v. Box Elder County, 835 P.2d 165,169 (Utah 1992) with its approval of the holding in

Thompson v. St. Regis Paper Co., 102 Wash.2d 219,230, 685 P.2d 1081,1088 (1984). Reference should be made to Darby's appeal brief at 18-19 for the appropriate development of this argument and the citation of conforming case law authorities from sister state jurisdictions.

POINT 4

DARBY'S CONDUCT WITHIN HIS ASSIGNED INVESTIGATION OF A TRAFFIC ACCIDENT, HIS INVESTIGATION OF AN AUTOMOBILE BURGLARY AND HIS INVESTIGATION TO VERIFY OWNERSHIP OF A .22 CALIBER RIFLE DID NOT CONSTITUTE A PERSISTENT REFUSAL TO OBEY THE ORDERS OF A SUPERIOR OFFICER.

The trial court's September 3, 1993 Order of Dismissal awarding the City summary judgment specifically did not consider the City's argument that there were no genuine issues of material fact that Darby could be dismissed for insubordination. (Tr. at 155-156). Because the fact pattern underlying the City's claims that Darby had persistently refused to obey the orders of a superior officer was not considered by the trial court as part of the defendant's December 31, 1992 summary judgment motion proceeding, this fact pattern should not now be argued to this Court or otherwise entertained by it. L & A Drywall, Inc. v. Whitmore Constr. Co., 608 P.2d 626 (Utah 1980) (Where a party pursues a motion for summary judgment on one claim, he may not, on appeal, either justify the award of such motion or challenge its denial on the basis of a separate and distinct claim.) Bonham v. Morgan, 788 P.2d 497 (Utah 1989) (By

definition, summary judgments do not resolve factual issues -- the Supreme Court reviews conclusions of law only, without according deference to the trial court's legal conclusions).

The City's decision to argue a fact pattern before this court which was not considered by the trial court, nonetheless compells Darby to submit the argument set forth below. During June 1991, Lt. Cope assigned a traffic investigation to Darby (Case No. 910765) with instructions to complete the final report on or before July 19, 1991. (Plt'f.Ex."D"at 16-Ans. to Ints. #9) As of July 1991, Darby had not filed the report. Lt. Cope knew that the investigation file remained in Darby's possession and that Darby was continuing his efforts to locate witnesses. (Plt'f.Ex."D"at 17-Ans. to Ints. #9) At a point subsequent to July 19, 1991, Lt. Cope removed the investigation file from Darby's box, Darby advised Lt. Cope that he could not locate the required witnesses, and it was agreed that the file would be closed. (Plt'f.Ex."B" at 17-Ans. to Ints. #9) Darby received no instructions or orders from Lt. Cope subsequent to July 19, 1991 regarding the disposition of the case. (Plt'f.Ex."D", supra) Chief Tracy's August 21, 1991 failure to take corrective action memorandum was Darby's first notice (31 days delay) that his investigation conduct was considered by either Lt. Cope or Chief Tracy to be a disobedience of a reasonable order. (Plt'f.Ex."D" at 4-Plt'f.Aff.¶11) Chief Tracy's September 3, 1991 memorandum proposing Darby's employment separation did not assign any

disciplinary action to this alleged misconduct. (Plt'f.Ex."A"at 34-Persnl.Rec.)

On August 10, 1991 Darby responded to a civil disturbance complaint at a Washington Terrace residence. (Plt'f.Ex."D"at 20-Ans.to Ints.#12) One of the witnesses interviewed by Darby claimed that one of the family members had acquired possession of a stolen .22 calibre rifle. (Plt'f.Ex."A"at 31-Prsnl.Rec.) Darby took possession of the weapon to ascertain its ownership registration. (Plt'f.Ex."A", supra.) The rifle's apparent owner declined the need for a receipt from Darby. (Plt'f.Ex."A", supra.) Darby was unable to resolve the ownership issue on August 10, 1991 because the registration search through the Federal Bureau of Alcohol, Tobacco and Firearms had not been completed. (Plt'f.Ex."A", supra.) An investigation report was started by Darby but was not filed because the rifle's ownership had not been determined. (Plt'f.Ex."A", supra.) Darby placed the rifle into the evidence locker, without an evidence tag, for the balance of the duty day to avoid leaving it unsecured in his vehicle. (Plt'f.Ex."B"at 20-Ans.to Ints.#12) Evidence is secured by a one-way locking system to which Detective Gathercall had exclusive access as the evidence officer. (Plt'f.Ex."D", supra.) Gathercall was not on duty when Darby completed his working day. (Plt'f.Ex."B", supra.) Darby was off duty on August 12 and 13 and he did not remove the rifle from the evidence locker when returned to duty on August 14 and 15 because



of the press of his other work duties. (Plt'f.Ex."B", supra.) On August 16, Darby completed assembling his registration inquiry to the Bureau of Tobacco and Firearms, discussed the nature and scope of his investigation with Lt. Cope and was instructed by Lt. Cope to either place the rifle into evidence or return the rifle to the individual from whom he had taken it as part of terminating the investigation. (Plt'f.Ex."D"at 6-Plt'f.Aff.¶14) Darby was unable to return the rifle on August 16 because no one was present at the Washington Terrace home when he appeared there. (Plt'f.Ex. "D", supra.) Darby placed the rifle in Officer Gathercall's office at the close of Darby's August 16 duty shift where the rifle remained in Gathercall's office on her scheduled August 17 and 18 off duty days. (Plt'f.Ex."A"at 32-Persnl.Recs.) Darby was off duty on August 19, 20 and 21. (Plt'f.Ex."A", supra.) Chief Tracy's August 21, 1991 failure to take corrective action memorandum was Darby's first notice (five day delay) that he had "refused to obey Lt. Cope's August 16, 1991 order to either place the rifle into evidence or to return the rifle as part of terminating his investigation". (Plt'f.Ex."D"at 6-Plt'f.Aff.#14) Chief Tracy assigned to this alleged misconduct the disciplinary action penalty of ". . . a written reprimand and three days off without pay". (Plt'f.Ex."A"at 35-Persnl.Recs.)

On August 10, 1991 Darby responded to an automobile burglary where the automobile owner identified the loss of a check book and a tool box. (Plt'f.Ex."D"at 19-Ans.to Ints.#12)

On August 13, 1991, Detective Cope telephoned Darby and instructed Darby to bring the checkbook to the city offices for the purpose of allowing the owner to ascertain if any checks were missing from the checkbook. (Plt'f.Ex."D"at 4,5-Plt'f. Aff.#12) Darby complied with this order, met with the checkbook's owner and reported these events to Lt. Cope. (Plt'f.Ex."D", supra.) Neither Detective Gathercall nor Lt. Cope ordered Darby to discontinue his investigation nor did either one of them order Darby to place the checkbook into evidence. (Plt'f.Ex."D"at5-Plt'f.Aff.#13) Lt. Cope never criticized Darby's investigation procedures, never requested that Darby terminate his investigation involvement and never ordered that Darby place the checkbook into evidence until approximately August 19, 1991. (Plt'f.Ex."D"at 5-Plt'f.Aff.#13) On approximately August 19, 1991 Lt. Cope telephoned Darby at the latter's home and ordered Darby to bring the checkbook to the city offices and to place the checkbook into evidence. (Plt'f. Ex."D", supra.) Darby complied with this order within one hour following Lt. Cope's telephone call. (Plt'f.Ex."D", supra.) After Darby had placed the checkbook into evidence, an argument occurred between Darby and Lt. Cope within which Darby questioned why Lt. Cope wanted the checkbook placed into evidence. (Plt'f. Ex."D", supra.) Lt. Cope stated only that he wanted his order obeyed. (Plt'f.Ex."D", supra.) Chief Tracy's August 20, 1991 failure to take corrective action memorandum was Darby's first

notice that he had refused to obey either an August 13, 1991 order from a superior officer (eight days delay) or an August 19, 1991 order to place the checkbook into evidence. (Plt'f.Ex."D", supra.) Chief Tracy's September 3, 1991 letter proposing Darby's employment separation assigned to this alleged misconduct the disciplinary penalty of ". . . a letter of reprimand". (Plt'f.Ex."A"at 34-Persnl.Recs.)

Material issues of fact exist between the City's use of the identified three events to establish Darby's insubordination and Darby's representations of the same three events. Such material issues of fact properly preclude the award of summary judgment on the legal issue of whether the City had sufficient grounds under The Manual to obtain Darby's employment dismissal for persistently refusing to obey the orders of a superior officer. Snyder v. Merkley, 693 P.2d 64,69 (Utah 1984). The trial court correctly declined to consider the legal issue of insubordination because of the underlying controverted fact pattern.

The Manual's disciplinary action provisions identify "persistently refusing to obey" as a "serious offense" for which ". . .a member may be discharged without warning". (Plt'f.Ex."C" at 13-The Manual) The Manual further requires a subordinate officer to regard a request of a superior officer as an order. The Manual instructs that less "serious offenses" require both a "milder penalty aimed at correction" and the use of "progressive,

positive discipline" which obligates a supervisor to ". . .notify person of wrong and offer assistance, warn before suspension, suspension before discharge". (Plt'f.Ex."C", supra.)

The rule violations category of "less serious offenses" is not expressly defined like that of "serious offenses" but comparative assistance for its application derives from The Manual's summary cataloging of rule violations under the heading of "summary of rule violation and penalties found in this section". (Plt'f.Ex."C"-The Manual at 12,13) The result follows that the rule violation of "insubordination" is not a "serious offense" allowing for discharge without warning unless a persistent refusal to obey has been demonstrated. Evidence of a persistent refusal to obey necessarily requires a superior officer to establish that the subordinate officer has been provided timely and documented notice that earlier action(s) have been identified as insubordinate.

Darby maintains that he timely obeyed all orders from Lt. Cope. A substantial fact pattern exists in the trial court record to support Darby's position. If Lt. Cope considered Darby's failure to complete the accident investigation report by July 19, 1991, he failed to discipline Darby within any proximity to the provided date. The same result applies to Lt. Cope's August 13 and 19, 1991 orders for the investigation handling of the checkbook and the August 16, 1991 order for the disposition of the rifle. If Lt. Cope considered insubordinate Darby's

conduct on any one of these three occasions, the City failed to meet its obligation to discipline Darby and to timely impose and document personnel action. The City's attempts to establish the repetition of Darby's insubordination violate The Manual's prohibitions that a superior officer cannot use several minor infractions to justify a major disciplinary action if no recorded action has been taken in the past for the violation of the minor infractions. (Plt'f.Ex."C"-The Manual at 29).

#### POINT 5

THE RECORD BEFORE THE TRIAL COURT ESTABLISHES THAT THE CITY'S DECISION TO DISMISS DARBY WAS AN EXCESSIVE PENALTY AND THAT DARBY ARGUED THIS LEGAL ISSUE BEFORE THE TRIAL COURT.

The City incorrectly argued both that Darby had presented no evidence that his dismissal from employment is an excessive penalty under The Manual and that Darby is arguing this legal issue for the first time on appeal. (Appellee's Brief-Point II. A.IV.) Darby does not deny that he reported late for the scheduled assignments and duty days identified in this action. By definition under The Manual, Darby's failure to report for work when scheduled subjects him to disciplinary action under The Manual. Dismissal, however, is an unreasonable and excessive penalty within the circumstances of Darby's employment tenure because the City failed to consider the following mitigating factors provided for within the disciplinary action provisions of The Manual:

1. The Manual's regulations had been sporadically, inconsistently and unequally enforced against Darby and his fellow law enforcement officers, and

2. The Manual's disciplinary action provisions had not been timely enforced against Darby, and

3. Darby's conduct had never constituted a persistent refusal to obey the orders of a superior officer for which Darby was placed on timely notice.

This excessive penalty argument was presented by Darby within his April 2, 1993 Memorandum of Authorities Opposing Defendant's Motion for Summary Judgment. (Tr.at 112) Disciplinary action provisions within The Manual provide that lax enforcement, inconsistent enforcement and discipline which is not timely administered are appropriate factors for mitigating the severity of a disciplinary action which could be otherwise justifiably imposed. (Tr.at 113-115; Plt'f.Ex."C"at 13-15-The Manual)

The City did not properly administer its Manual. Those instances where Darby reported late for duty arguably presented genuine concern to Darby's supervisors in their administration of the police department. Darby has never argued that he is beyond disciplinary action. His nonconforming conduct, however, should be balanced against the nonconforming conduct of the City arising from improper administration of the disciplinary action provisions within The Manual.

POINT 6

THE CITY TERMINATED DARBY'S EMPLOYMENT  
WITHOUT PROVIDING HIM THE MANUAL'S PROCEDURAL  
AND SUBSTANTIVE DUE PROCESS PROTECTION.

The City argues that Chief Tracy's December 31, 1990 "Demotion, Pay Reduction and Two Letters of Reprimand" memorandum provided Darby with clear and unmistakable knowledge that he would be terminated from police department employment "if any further incidents of failure to report for a shift occur within one year . . ." (Plt'f.Ex."A"at 20 Persnl.Recs.) Without arguing the enforceability or legality of this December 31, 1990 personnel action, Darby accrued four instances of "unauthorized absenteeism, tardiness" under The Manual on August 1, 1991, August 2, 1991, August 7, 1991 and August 18, 1991. Any one of these events, by definition under chief Tracy's December 31, 1990 disciplinary action letter, was sufficient to effect Darby's removal. If the City's position is to be believed, Darby was, moreover, prior to and during this same timeframe, repeatedly disobeying the orders of a superior officer within the completion of a traffic report, the investigation of an allegedly stolen firearm and a check forgery investigation. Notwithstanding this apparent onslaught of offensive professional behavior, three levels of supervision over Darby within the Washington Terrace police department (Darby's duty sergeant, Lt. Cope and Chief Tracy) took no personnel action against Darby and chose to remain silent. The trial court characterized this inaction and silence with the following language:

And council 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. (App.Brief Add. at 2,3)

Such an explanation is inadequate. It moreover negates the professional agenda and objectives of The Manual and effectively states that the City may ignore The Manual when it unilaterally determines that its best interests or those of an employee so dictate. The Manual is an employer created document. If The Manual is merely an advisory publication or its application is discretionary with the employer on a case by case basis, clear language to this effect should be within its text.

The City presents Darby as a police officer whose conduct exceeded all bounds of professional reasonableness and who knew or should have known that severe employment sanctions were forthcoming. Stated conversely, the City's position is that Darby allowed it no choice but to terminate his employment. Yet, why did three levels of supervision over Darby remain silent and take no action until eleven events of alleged misconduct had accrued over a period of time exceeding thirty days? Was the City intentionally warehousing allegations against Darby to sustain a dismissal action? Was the City's conduct or failure to act any less professional than Darby's? Was Darby's conduct as egregious as the City now claims? Was Darby a merely symptomatic



example of a police department whose administrative and supervisory structure was impaired?

The Manual is not a complex and technical compilation of personnel rules and regulations. Its provisions are understandable and amenable to practicable application. Darby's dismissal does not reconcile with the due process protections built into The Manual for both the benefit of the employer and of the employee.

#### CONCLUSION

Neither the City's decision to terminate Darby nor its administration of The Manual should receive a deferential standard of judicial review. Darby was terminated from his police officer employment without the City providing him the procedural and substantive due process protections within The Manual. The September 3, 1993 Order of Dismissal entered by the Weber County District Court should be set aside with this case remanded to the trial court for trial on the merits.

DATED this 9 day of May, 1994.

  
PHILIP C. PATTERSON  
Attorney for Plaintiff and  
Appellant

IN THE UTAH COURT OF APPEALS

---

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

---

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of May, 1994,  
I hand carried four copies of the Reply Brief of Appellant to the  
following persons:

Lee C. Henning  
David C. Richards  
CHRISTENSEN, JENSEN & POWELL  
Attorneys for Appellee  
175 South West Temple, Suite 510  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
PHILIP C. PATTERSON  
Attorney for Plaintiff and  
Appellant

EXHIBIT "A"

Disciplinary Hearing Review Board Findings of  
Fact and Decision made by R. Pearce Shelton

WASHINGTON TERRACE DISCIPLINARY HEARING BOARD FOR  
MICHAEL D. DARBY CONDUCTED THURSDAY, OCTOBER 3, 1991,  
AT CITY HALL AND BEGINNING AT 2:30 P.M.

DISCIPLINARY HEARING BOARD MEMBERS

Chairman K. Pearce Shelton, Ronald D. Nelson, and Donny Archuleta.

OTHERS PRESENT

Michael D. Darby, Mr. Darby's Attorney Philip C. Patterson, City Attorney Robert L. Neeley.

WITNESSES

Police Chief Gary W. Tracy, Lieutenant Richard Cope, Sergeant Randy Rhodes.

The following questions were considered by the Board:

1. Did these events happen as charges?

None were denied! There was a great effort to make each charge appear small and unimportant. No single item was grounds for dismissal, but taken together, there is a powerful argument for dismissal.

2. What unacceptable actions are contained in the charges?

A. Neglect of Duty:

1. Late to work twice.
2. Failure to appear in court twice - 1 case was dismissed. Letter from Judge Sandberg indicated 2 other times failed to appear in court.
3. Failure to show up for shooting qualification.

B. Inefficiency or Inability to Satisfactorily Perform Assigned Duties:

1. Didn't follow evidence procedure twice.
2. Didn't finish reports.
3. Didn't do the dog shooting report.
4. Didn't do car maintenance and gas report.
5. Failed to turn in logs and reports at the end of shifts.

3. What duty does an officer owe a department?

- A. Be there on time.
- B. Follow policies and procedures.
- C. Complete assignments.
- D. Show an attitude of caring and cooperation.

I feel these charges show Michael Darby has not lived up to any of these duties.

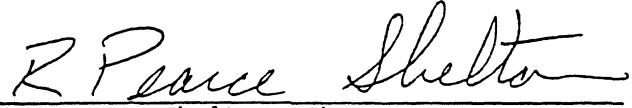
These failures did not occur in an atmosphere of business as usual according to the Police Chief's letter dated 12-31-90:

1. Michael was demoted and reprimanded for failure to show up for two shifts. He also received 2 other letters of reprimand.
2. He was told if he failed to report for a shift within one year he would be terminated. Counseling was recommended at that time and furnished by the City through the Employee Assistance Program.

He was given 7 months to straighten out his work. In the July 9, 1991 letter, he was again advised that his work was not satisfactory. Counseling was then mandated. His response to this warning was the 12 charges that resulted in this hearing.

DECISION

It is the Board's recommendation, 2 in favor and 1 opposed, that the recommendation by Chief Tracy to terminate Michael Darby be sustained.

  
\_\_\_\_\_  
R. Pearce Shelton, Chairman

Date 14 Oct 91

EXHIBIT "B"  
Disciplinary Hearing Review Board Findings of  
Fact and Decision made by Donny W. Archuleta

October 9, 1991

TO: Pearce Shelton, City Administrator  
Washington Terrace City  
Disciplinary Hearing Board Chairman

FROM: Donny W. Archuleta  
Weber County Deputy Sheriff  
Disciplinary Hearing Board Member

SUBJECT: Findings of fact from Disciplinary Hearing Board  
conducted on October 3, 1991.

Item 1: Reporting late for work, August 2, 1991. Officer Darby admitted being 45 minutes late for work.

Item 2: Reporting late for work. Officer Darby's explanation was accepted by Chief Tracy so this item is not at issue.

~~Item 3: Late for Shooting Review Board and failing to file the Board's decision within 24 hours. Officer Darby admits being 10-15 minutes late for the hearing due to traffic.~~

Officer Darby's reason for not writing the letter within 24 hours was due to further investigation on his part after being told by Sgt. Rhodes that no further investigation was warranted.

~~Item 4: Failure to attend court (Washington Terrace). Officer Darby stated he knew the case was up-coming and had even talked to the judge about it, but Officer Darby failed to pick up his subpoena and/or make sufficient note of the trial date.~~

Item 5: Failure to turn in gas slips. Officer darby stated he lost the gas slips and could not relocate them.

Item 6: Missing assigned time for qualification shoot. Officer Darby stated he overslept on his day off and had to be called by dispatch to respond to the second hour qualification.

Item 7: Failure to file written report on vehicle accident. Officer Darby stated he had trouble locating some of the people involved in this case, but no follow-up or supplemental report was filed stating this fact. Officer Darby did state that he informed Lt. Cope that the case should be closed.

Disciplinary Hearing Board  
Page Two

Item 8: Failure to turn in logs at end of shift. Officer Darby's explanation was accepted by Chief Tracy so this item is not at issue.

Item 9: Failure to attend court (Riverdale). Officer Darby stated he left his subpoena in the office and forgot about the court date.

Item 10: Failure to properly log evidence (checkbook). Officer Darby stated he had the evidence in his possession for approximately 10 days before logging it into Evidence. Officer Darby appeared to be conducting a follow-up investigation which was outside the scope of his current job description and needed the checkbook for this purpose.

Although Officer Darby's handling of this piece of evidence was outside of what this officer would call "common sense" or "practice" of handling of evidence, ~~it would appear that he did not violate the police department's written policy on evidence handling.~~ Chapter 14, 14-1.

Item 11: Failure to properly log evidence (rifle) Officer Darby stated that through a series of missing the evidence custodian and days off, this item was never tagged or logged into evidence. Officer Darby stated during his testimony that he carries an ample supply of evidence tags in his patrol car and had even tagged the checkbook from the previous case, but failed to do so with the rifle. Officer Darby failed to give a receipt to the person from which the rifle was taken. Officer Darby was told repeatedly to log the rifle into evidence or return it, but neither was done.

Item 12: Failure to attend job counseling. Officer Darby's explanation was accepted by Chief Tracy, so this item is not at issue.

Item 13: Reporting late for work, August 18, 1991. Officer Darby admitted being 43 minutes late for work.



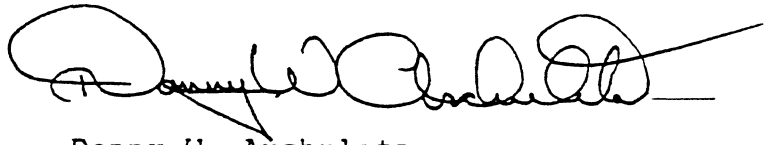
Disciplinary Hearing Board  
Page Three

SUMMARY: After careful consideration of the testimony and reading through the list of charges and answers, it is apparent that Officer Darby falls under the grounds for discipline or dismissal of the Washington Terrace Police Department Manual, Personnel Discipline Procedures, page nine, subsection six, letter A #1 as follows:

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
- e) Any act hostile to the public service

Officer Darby, by his own admission, clearly violated a, b, and d of Section 6 of the Washington Terrace Police Department Manual. Therefore, appropriate disciplinary action should be taken.

A handwritten signature in black ink, appearing to read "Donny W. Archuleta", with a long horizontal line extending to the right.

Donny W. Archuleta  
Weber County Deputy Sheriff  
Disciplinary Hearing Board Member

EXHIBIT "C"  
Disciplinary Hearing Review Board Findings of  
Fact and Decision made by Ronald D. Nelson

TO: PEARCE SHELTON. D.H.B. CHAIRMAN

FROM: RONALD D. NELSON. D.H.B. MEMBER

1. ITEMS 1,2,3,6,AND 13 OF CHIEF TRACY'S LETTER DATED AUGUST 21, 1991, OFFICER DARBY WAS CHARGED WITH BEING LATE. OFFICER DARBY ADMITS TO BEING LATE WITH EXPLANATIONS.

A. THIS RULE HAS NOT BEEN CONSISTENTLY AND UNIFORMLY ENFORCED THROUGHOUT THE DEPARTMENT. FROM THE TESTIMONY THERE APPEARS MUCH DISCRIMINATION IN THE WAY IT HAS BEEN APPLIED. CHIEF TRACY IN HIS TESTIMONY STATES THAT HE REMEMBERS TWO MEMBERS OF HIS DEPARTMENT WHICH HAVE BEEN DISCIPLINED FOR BEING LATE: OFFICER DARBY AND OFFICER DEARDEN. BOTH HAVE BEEN LATE A FEW TIMES. SECRETARY CHRIS POTEET HAS BEEN LATE OVER 20 TIMES AND MISSED THREE DAYS OF WORK WITHOUT CALLING IN HAS NEVER EVEN BEEN GIVEN DAYS OFF WITHOUT PAY; IN FACT HAS ONLY BEEN GIVEN ONE REPRIMAND. THIS APPEARS TO BE DISCRIMINATION! POLICE OFFICERS CAN ONLY BE HELD TO A HIGHER STANDARD WHERE IT INVOLVES POLICE POWERS AND SPECIAL POLICE FUNCTIONS. FUNCTIONS THAT APPLY TO ALL WORKERS i.e. BEING ON TIME FOR WORK APPLY EQUALLY TO ALL WORKERS AND THEY MUST BE HELD TO THE SAME STANDARD. CHIEF TRACY STATED THAT AS AN EEO EMPLOYER THIS WAS TRUE.

WE ON THE BOARD WERE GIVEN NO PROOF THAT EVEN VERBAL WARNINGS WERE GIVEN PRIOR TO WRITTEN REPRIMANDS. IT IS MY UNDERSTANDING THAT ALL VERBAL WARNINGS MUST BE DOCUMENTED ACCORDING TO CITY POLICY, AND THAT THE DEPARTMENT HAS A PROGRESSIVE DISCIPLINARY POLICY.

IT DOESN'T APPEAR THAT THIS IS BEING FOLLOWED.

I WOULD RECOMMEND THAT TO ENFORCE THIS POLICY WOULD BE DISCRIMINATORY, UNTIL A MEETING WAS HELD AND AN ANNOUNCEMENT MADE THAT THIS LAX POLICY WILL NOW BE ENFORCED STRICTLY AND UNIFORMLY. THEN FOLLOW THROUGH IS PARAMOUNT.

I RECOMMEND THAT NO ACTION BE TAKEN AGAINST MR DARBY AT THIS TIME.

2. ITEMS 10, AND 11 OF CHIEF TRACY'S LETTER. OFFICER DARBY IS CHARGED WITH MISHANDLING OF EVIDENCE.

YOUR POLICY IS LACKING IN INSTRUCTIONS ON HOW TO HANDLE EVIDENCE. THERE IS NO DISTINCTION MADE ON HANDLING DIFFERENT TYPES OF EVIDENCE. THERE IS NO TIME LIMIT SET FOR WHEN EVIDENCE IS ATTAINED, WHEN IT SHOULD BE PLACED INTO LOCKERS AND TAGGED OR IDENTIFIED. ONCE EVIDENCE IS IN IT DOESN'T GIVE A PROCEDURE FOR REMOVING IT FOR USE IN FURTHER INVESTIGATIONS AND THEN PLACING IT

BACK IN. ONCE A CASE IS FINISHED IN WHAT TIME PERIOD AND HOW DO YOU DISPOSE OF EVIDENCE?

ITEM 10 THE CHECKBOOK. OFFICER DARBY RECEIVES THE CHECKBOOK CORRECTLY AND WANTS TO USE IT TO ASSIST IN THE INVESTIGATION OF ANOTHER CRIME. OFFICER DARBY SAYS THAT HE KEPT LT COPE INFORMED. LT COPE IS SO BUSY "THERE ARE SO MANY THINGS GOING PAST" HE IS NOT SURE WHETHER OFFICER DARBY TOLD HIM OR NOT. OFFICER DARBY STATES THAT HE HAS BEEN WORKING THIS WAY FOR MANY YEARS. IT HAS BECOME A CUSTOM.

IF THERE WAS A PROBLEM THEN IT SHOULD HAVE BEEN CORRECTED YEARS AGO THROUGH PROGRESSIVE DISCIPLINE AS THE POLICY MANUAL STATES. IT OBVIOUSLY HAS NOT BEEN CONSISTENTLY ENFORCED IN THE PAST.

THERE MAY HAVE BEEN A LACK OF COMMUNICATION, BUT THAT'S ALL. I THINK HE THOUGHT HE HAD LT. COPE'S PERMISSION. I RECOMMEND NO DISCIPLINARY ACTION.

~~ITEM 11 THE GUN WAS TAKEN INTO EVIDENCE FOR PROPER REASONS. A REPORT WAS STARTED BUT OFFICER DARBY WAS GIVEN A CALL WHICH TOOK PRECEDENCE OVER THE REPORT. THE GUN WAS PLACED IN THE EVIDENCE LOCKER HURRIEDLY AND WAS NOT TAGGED. WHEN OFFICER DARBY CAME BACK TO FINISH THE REPORT HE COULD NOT GET BACK INTO THE EVIDENCE LOCKER TO GET THE REST OF THE INFORMATION TO MAKE OUT THE REPORT. AFTER SOME DAYS OFF HE RETRIEVED THE GUN. LT. COPE GAVE INSTRUCTIONS TO WRITE THE REPORT OR RETURN THE RIFLE. OFFICER DARBY THEN TRIED TO RETURN THE RIFLE AND FOUND THE OWNER WAS NOT AT HOME. HE LEFT THE GUN IN A LOCKED OFFICE TO BE RETURNED TO THE OWNER LATER AS THE LT. REQUESTED.~~

IF THEY WANTED A REPORT THEN I THINK THAT LT. COPE'S ORDER WAS NOT CLEARLY GIVEN. I RECOMMEND NO DISCIPLINARY ACTION.

### 3. ITEMS 4 AND 9 COURT ATTENDANCE.

ITEM 9 THE RIVERDALE COURT CASE. CHIEF TRACY SAID THAT HE WOULD LEAVE ANY DISCIPLINE UP TO THE RIVERDALE COURT JUDGE IN HIS LETTER TO OFFICER DARBY DATED SEPT 3, 1991.

ITEM 4 THE WASHINGTON TERRACE CASE AUGUST 8, 1991. OFFICER DARBY ADMITTED MISSING THE CASE. CHIEF TRACY STATES THAT OTHER OFFICERS IN HIS DEPT HAVE OCCASIONALLY MISSED A CASE AND NO ACTION THAT HE KNEW OF HAS BEEN TAKEN.

YOUR POLICY MANUAL STATES THAT THE PROGRESSIVE AND TIMELY DISCIPLINE SHOULD BE USED.

I DON'T THINK THE DISCIPLINE WAS TIMELY. I THINK THE LETTER OF REPRIMAND WAS INAPPROPRIATE AS IT WAS NOT PROGRESSIVE.

FOR THESE REASONS I RECOMMEND NO DISCIPLINE!

4. ITEMS 3, 10, AND 11. FAILURE TO FOLLOW ORDERS

ITEM 3. OFFICER DARBY VOLUNTEERED TO WRITE THE LETTER AND IN A DISCUSSION BETWEEN ALL THREE BOARD MEMBERS, SGT. RHODES THOUGHT IT WAS TO BE IN WITHIN 24 HOURS. OFFICER DARBY THEN GOT OTHER INFORMATION WHICH HE THOUGHT WAS PERTINENT. OFFICER DARBY THEN TALKED TO SGT. RHODES AND UNDERSTOOD HE WAS TO FOLLOW IT UP. ORDER NOT CLEAR. DISCIPLINE NOT TIMELY.

ITEM 10. THE LT. ONLY REMEMBERED ORDERING OFFICER DARBY TO BRING THE CHECKBOOK IN ONE PHONE CALL THE DAY HE BROUGHT IT BACK. THE LT. THOUGHT HE MAY HAVE MADE ANOTHER PHONE CALL THE SAME DAY BUT HE WASN'T SURE. NO VIOLATION OCCURRED!

ITEM 11. AS PER NUMBER 2 ITEM 11 OF THIS PAPER LT. COPE'S ORDER WAS NOT CLEARLY GIVEN.

I RECOMMEND THAT NO ACTION BE TAKEN FOR REASONS STATED IN EACH ~~ITEM.~~

5. ~~ITEM 5. OFFICER DARBY IS CHARGED WITH LOOSING GAS-REPORTS.~~ OFFICER DARBY ADMITS TO THIS. ~~THE BOARD WAS NOT SHOWN ANY PROOF OR DOCUMENTATION THAT WARNINGS HAD BEEN GIVEN AS PER CITY POLICY. I FEEL THAT WITHOUT DOCUMENTATION IT IS HARD TO RECOMMEND ANYTHING BUT A WARNING BUT I WOULD RECOMMEND AT LEAST THAT, ALONG WITH THE PROPER PAPER WORK.~~

6. ITEM 6. OFFICER DARBY IS CHARGED WITH NOT MAKING HIMSELF AVAILABLE FOR TRAINING. OFFICER DARBY WAS LATE HOWEVER HE DID MAKE THE TRAINING SESSION AS DIRECTED. HE DID MAKE THE SHOOT AND DID QUALIFY.

IN MY OPINION, NO VIOLATION OCCURRED

7. ITEM 7. TRAFFIC CASE 91-0765. OFFICER DARBY HAS TAKEN A LONG TIME WITH THIS CASE. IN HIS TESTIMONY HE STATED HE HAS HAD TROUBLE GETTING A HOLD OF ONE OF THE MAIN VICTIMS, HE HAS KEPT HIS SUPERIORS ADVISED THE WHOLE TIME, LT. COPE ATTESTED TO THIS. CHIEF TRACY STATED IN HIS TESTIMONY THAT BY POLICY THERE WAS NO TIME LIMIT ON ACCIDENT INVESTIGATIONS, THAT THEY SOMETIMES TOOK TIME IF YOU HAD A PROBLEM. LT. COPE THEN TESTIFIED THAT HE WAS FINALLY ABLE TO DO WHAT OFFICER DARBY HAD BEEN HAVING SO MUCH TROUBLE WITH. HE WAS ABLE TO CATCH THE VICTIM AT HOME GET THE INFORMATION AND FINISH THE ACCIDENT REPORT.

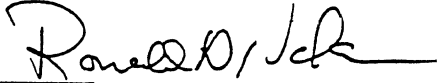
IN CHIEF TRACY'S LETTER OF SEPTEMBER 3, 1991, HE ASSESSED NO VIOLATION HERE. I CONCUR,, I SEE NO VIOLATION HERE.

8. ITEM 12. THE EMPLOYEE ASSISTANCE COUNSELING. OFFICER DARBY

TESTIFIED THAT HE IS STILL SEEING THE EMPLOYEE ASSISTANCE  
COUNSELOR MS. PHILLIPS.

MY CONCLUSION TO THIS IS THAT TERMINATION OF THIS OFFICER WOULD  
BE GROSSLY UNFAIR BECAUSE THE DUE PROCESS PROVIDED FOR BY THE  
WASHINGTON TERRACE POLICIES AND PROCEDURES MANUAL HAS NOT BEEN  
FOLLOWED. THERE HAS BEEN NO CONSISTENT APPLICATION OF POLICY IN  
THE DEPARTMENT, WHICH COULD ONLY LEAD TO LAX BEHAVIOR ON THE PART  
OF EMPLOYEES, AND WHEN DISCIPLINE IS AVAILED TO ONLY ONE MEMBER,  
THE ACTION CAN THEN BE REGARDED AS BOTH DISCRIMINATORY AND  
PREJUDICIAL. I RECOMMEND THAT THIS OFFICER RECEIVE A WRITTEN  
WARNING FOR HIS FILE AS PER ITEM 5. NO OTHER DISCIPLINARY ACTION  
IS WARRANTED.

RONALD D. NELSON

A handwritten signature in cursive script, appearing to read "Ronald D. Nelson", written over a horizontal line.

D.H.B. MEMBER

EXHIBIT "D"  
November 19, 1991 Washington Terrace City  
Council Decision on Appeal Hearing

# Washington Terrace City

275 East 4425 South  
Washington Terrace, Utah 84405-5899  
(801) 393-8681

NOV 21 1991

**City Administrator**  
R Pearce Shelton

**Mayor**  
Scott A. Coates

**Council**  
Richard Jackson  
Tracy Kap  
Lois Richins  
Don Todd  
Hal Torman

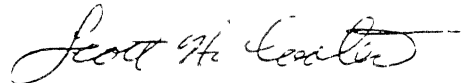
November 19, 1991

Michael D. Darby  
317 N. Harrison Blvd.  
Ogden, Utah 84404

SUBJECT: Decision on Appeal Hearing

We, the Mayor and City Council, met on Friday, November 15, 1991, to make the decision on your appeal. After careful consideration of the facts presented and evaluation of the Disciplinary Hearing Board transcripts and records, we reached a unanimous decision to sustain Chief Tracy's recommendation to terminate your employment with Washington Terrace City.

Sincerely,



Scott A. Coates  
Mayor

SAC/shg

cc Defendant's Attorney Philip C. Patterson  
City Attorney Robert L. Neeley  
Chief Gary W. Tracy  
City Council



EXHIBIT "E"

April 2, 1993 Affidavit of Michael D. Darby  
opposing the motion for summary judgment made  
by Washington Terrace City

PHILIP C. PATTERSON - 2540  
PATTERSON & BARKING  
Attorneys for Plaintiff  
427 - 27th Street  
Ogden, Utah 84401  
Telephone: (801) 394-7704

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

---

MICHAEL D. DARBY,	)	
	)	AFFIDAVIT OF
Plaintiff,	)	MICHAEL D. DARBY
vs.	)	Civil No. 920900158
WASHINGTON TERRACE CITY,	)	Judge Michael J. Glasmann
a political subdivision of	)	
the State of Utah,	)	
Defendant.	)	

---

STATE OF UTAH     )  
                          ss.  
COUNTY OF WEBER    )

MICHAEL D. DARBY, being first duly sworn, respectfully represents the following:

1. This Affidavit has been made by me to respond to the affidavit of Lt. Richard Cope and the affidavit of Chief Gary W. Tracy made in support the defendant's January 5, 1993 motion for summary judgment.

2. The information contained in this Affidavit is based upon my personal knowledge and the review of those records which are part of the defendant's January 5, 1993 summary judgment motion.

3. I was one of two Washington Police Department officers who were promoted to the rank of sergeant during May 1990. Officer Hackworth is the other officer who received the promotion to sergeant.

4. Officer Hackworth resigned his sergeant's position not later than sixty days after his promotion.

5. Upon Officer Hackworth's resignation, my duties and responsibilities were necessarily increased beyond what I would have otherwise been obligated to perform within a scheduled duty day. These circumstances were further aggravated when the department became understaffed by two officers during the fall and winter months of 1990-91.

6. If any problems existed with my professional conduct during the fall and winter months of 1990, such circumstances were the direct product of me attempting to reconcile my marriage with the increased duties and extended duty hours I was committing to the department. Of equal importance is that neither Lt. Cope nor Chief Tracy advised me during this timeframe that my professional conduct, to include the appearance of my uniform and of my vehicle, required corrective action.

7. I did report late for duty on December 23, 1990 and on December 30, 1990. Lt. Cope's December 27, 1990 and December 30, 1990 memorandum to Chief Tracy recommending discipline for my tardiness was my first notice from Lt. Cope that he was dissatisfied with my professional appearance and the quality of my work performance.

8. The working relationship between me and Lt. Cope was markedly strained by the dates upon which he prepared his December 27 and December 30, 1990 memorandums recommending disciplinary action against me. The memoranda significantly increased the then existing difficulties between me and Lt. Cope if for no other reason than Lt. Cope did not first approach me before involving Chief Tracy. I believed that Lt. Cope owed me the professional respect of confronting me as my second-level supervisor before involving Chief Tracy.

9. After my December 31, 1990 demotion, working conditions did not improve between me and Lt. Cope. On or about March 14, 1990, I asked my first-level supervisor, Sgt. Rhodes, to intervene and set up a meeting which would involve both me and Lt. Cope. Sgt. Rhodes informed me that Lt. Cope refused to talk with me. I asked directly for Chief Tracy's help. Chief Tracy declined to intervene.

10. Working relationships between me and Lt. Cope continued to deteriorate into the summer of 1991. At the time I received the July 9, 1991 Failure To Follow Recommendations letter from Chief Tracy, I informed Chief Tracy that the continuing difficulties between me and Lt. Cope were not in the best interests of the department and needed to be resolved. I specifically asked Chief Tracy for his help. Chief Tracy once again declined. Chief Tracy's apparent view was that any professional difficulties I had in the department were because of

unresolved problems in my personal life. Chief Tracy was unable to understand that his order for me to receive counselling through the City's employee assistance program could do nothing to resolve the professional difficulties between me and Lt. Cope.

11. I have never disobeyed an order from Lt. Cope. Lt. Cope did provide me with a traffic investigation during mid June 1991 for which he wanted a report completed by July 19, 1991. I did not complete the report on or before July 19, 1991 and Lt. Cope knew that I had not. From the date that the investigation was assigned to me, I continuously informed Lt. Cope of the progress of my investigation. Lt. Cope knew I had the investigation file in my possession subsequent to July 19, 1991. Lt. Cope never informed me that I had violated his order by not completing the investigation report on or before July 19, 1991. The only significant conversation I had with Lt. Cope about this case subsequent to July 19, 1991 was that I could not locate all of the witnesses incident to which Lt. Cope and I agreed that the case should be closed.

12. Within paragraph 14 of Lt. Copes' affidavit, Lt. Cope states that I disobeyed his August 13, 1991 order to place into evidence a checkbook which I had in my possession. Lt. Cope's statement is incorrect. On August 13, 1991, Lt. Cope telephoned me at my home and advised me that he had just completed a telephone conversation with the owner of the checkbook who wanted to determine what checks, if any, had been removed from the

checkbook. Lt. Cope asked me to bring the checkbook into the city offices and provide the checkbook owner with the required information. I did what Lt. Cope instructed me to do and thereafter advised Lt. Cope of what had occurred. Nothing within my August 13, 1991 conversation with Lt. Cope can be construed as an order disobeyed by me to place the checkbook into evidence.

13. Paragraph 18 of Lt. Cope's affidavit identifies an August 19, 1991 telephone call made by Lt. Cope to my home within which he ordered me to place the checkbook into evidence. The paragraph is correct for what is stated. Within the hour, I appeared at the Washington Terrace City offices and placed the checkbook into evidence with an evidence tag. Lt. Cope's statement within paragraph 19 that the checkbook had been placed into evidence but without a proper evidence slip is not correct. I complied fully with Lt. Cope's order. After placing the checkbook into evidence, Lt. Cope and I argued about why he wanted the checkbook placed into evidence. Neither Lt. Cope nor Officer Gathercall ever objected to my possession of the checkbook or my investigation involvement with the automobile burglary case until Lt. Cope made the August 19, 1991 telephone call. During this entire timeframe, Lt. Cope and Officer Gathercall were continuously informed by me about the progress of my investigation. Neither officer ever informed me that I was not complying with police department evidence identification and management procedures.

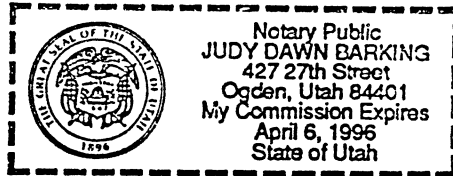
14. Lt. Cope states within paragraph 16 of his affidavit that he ordered me on August 19, 1991 to immediately return the .22 calibre rifle to the individual from whom I had taken it. Lt. Cope's statement is correct but is likewise incomplete. On October 16, 1991, Lt. Cope ordered me to either place the .22 calibre rifle into evidence or to immediately return the rifle to the individual from whom I had taken it as part of terminating my investigation. I was effectively given an "either/or" choice. I chose to obey Lt. Cope's August 16, 1991 order by returning the rifle and terminating the investigation. What happened from August 16, 1991 forward is set forth within my August 28, 1991 Reply to Letter of August 21, 1991 on my Job Performance letter.

15. Lt. Cope's affidavit makes repeated references to my identification and management of police department evidence which he states was contrary to department procedures. Lt. Cope's statements are incorrect because they ignore the substantial extent to which the police department did not maintain, much less follow, evidence identification and handling procedures. In point of fact, the police department has never enforced its evidence procedures. My answers to the defendant's first set of interrogatories identify multiple circumstances where evidence procedures were not followed with the acquiescence or consent of superior officers.

DATED this 2<sup>nd</sup> day of April, 1993.

  
MICHAEL D. DARBY  
Plaintiff

SUBSCRIBED and sworn to before me this 2<sup>nd</sup> day of  
April, 1993.



Judy Dawn Barking  
Notary Public