

1993

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Patterson & Barking; Philip C. Patterson; Attorney for Appellant.

Christensen, Jensen & Powell; Lee C. Henning; David C. Richards; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Darby v. Washington Terrace City*, No. 930701 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5604

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

020701 CA

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,)	Priority No. 15
Defendant and Appellee,)	

BRIEF OF APPELLANT

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

CHRISTENSEN, JENSEN & POWELL
Lee C. Henning - 4593
David C. Richards - 6023
Attorneys for Appellee
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

PATTERSON & BARKING
Philip C. Patterson - 2540
Attorney for Appellant
427 - 27th Street
Ogden, Utah 84401
Telephone: (801) 394-7704

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,)	

BRIEF OF APPELLANT

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

CHRISTENSEN, JENSEN & POWELL
Lee C. Henning - 4593
David C. Richards - 6023
Attorneys for Appellee
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

PATTERSON & BARKING
Philip C. Patterson - 2540
Attorney for Appellant
427 - 27th Street
Ogden, Utah 84401
Telephone: (801) 394-7704

LAW OFFICES OF
CHRISTENSEN, JENSEN & POWELL

RAY R. CHRISTENSEN
JAY E. JENSEN
ELWOOD P. POWELL*
RICHARD L. EVANS**
ROGER P. CHRISTENSEN
DALE J. LAMBERT
L. RICH. HUMPHREYS
TODD S. WINEGAR†
DENTON M. HATCH
WILLIAM J. HANSEN
M. DOUGLAS BAYLY
PHILLIP S. FERGUSON
ROBERT K. HILDER
GAINER M. WALDBILLIG
CRAIG V. WENTZ††
LEE C. HENNING
WESLEY M. LANG
KELLY H. MACFARLANE
KARRA J. PORTER
MARK L. ANDERSON
RUSSELL G. WORKMAN
DAVID C. RICHARDS
JAY R. LARSEN
STACEY L. HAYDEN

A PROFESSIONAL CORPORATION
175 SOUTH WEST TEMPLE, SUITE 510
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 355-3431
FAX (801) 355-3472

E. R. CHRISTENSEN
(1886-1979)

*ALSO LICENSED IN WASH., D.C. AND COLORADO
**ALSO LICENSED IN CALIFORNIA
†ALSO LICENSED IN ARIZONA
††ALSO LICENSED IN WASHINGTON STATE

March 17, 1994

FILED

MAR 21 1994

COURT OF APPEALS

Clerk of the Court
Utah Court of Appeals
230 East 500 South, #400
Salt Lake City, Utah 84102

Re: Darby v. Washington Terrace
Case No: 930701-CA

Dear Clerk:

On March 16, 1994, Washington Terrace City filed its Appellee's brief. That brief contains record citations to the Affidavits of Chief Tracy and Lt. Cope. Those affidavits are contained in the record, respectively, at pages 47-50 and at pages 38-41. You will note, however, that those affidavits at that part of the record are unsigned. Identical affidavits are contained elsewhere in the record which are signed. Specifically, the Affidavits of Tracy and Cope are contained, respectively, at pages 83-86 and pages 75-78.

If you have any questions or concerns, please do not hesitate to call.

Cordially,

CHRISTENSEN, JENSEN & POWELL, P.C.

David C. Richards
David C. Richards /v.f.

DCR/vf
cc: Phil Patterson

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii
JURISDICTION STATEMENT	1
ISSUES PRESENTED FOR REVIEW.	1
STATEMENT OF THE CASE.	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT.	14
ARGUMENT	18

POINT 1

WASHINGTON TERRACE CITY VIOLATED THE PROCEDURAL
AND SUBSTANTIVE DUE PROCESS GUARANTEES WITHIN ITS
WASHINGTON TERRACE CITY POLICY PERSONNEL MANUAL
AND THEREBY WRONGFULLY DISCHARGED DARBY FROM HIS
EMPLOYMENT BECAUSE:

(a) THE CITY DID NOT TIMELY DISCIPLINE DARBY
WITHIN A TIMEFRAME REASONABLY CONNECTED TO THE
OCCURENCE OF EACH RULE VIOLATION ALLEGEDLY
COMMITTED BY HIM, 18

(b) THE CITY "WAREHOUSED" MULTIPLE UNRECORDED
MINOR INFRACTIONS COMMITTED BY DARBY TO JUSTIFY THE
REMOVAL ACTION TAKEN AGAINST HIM, 18

(c) THE CITY SUBJECTED DARBY TO DISPARATE
TREATMENT IN THAT THE CITY HAD HISTORICALLY FAILED
TO SANCTION DARBY AND/OR HIS PROFESSIONAL PEERS
FOR LIKE OR SIMILAR CONDUCT OR HAS OTHERWISE
CONSISTENTLY IMPOSED DISCIPLINE LESS SEVERE THAN
THE REMOVAL PENALTY FOR LIKE OR SIMILAR CONDUCT,
AND 18

(d) THE CITY SELECTED A PENALTY WHICH WAS
EXCESSIVE AND UNREASONABLE MEASURED AGAINST THE
DISCIPLINARY ACTION AGENDA OF ITS MANUAL. 18

CONCLUSION 27

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 City, The Honorable Michael J. Glasmann,
Judge29

September 3, 1993 Order of Dismissal from the
Second Judicial District Court for Weber County,
Utah, The Honorable Michael J. Glasmann, Judge. . . .30

Cited portions of Washington Terrace Police
Personnel Manual.31

TABLE OF AUTHORITIES

	<u>Page No.</u>
<u>Appeal of Fugere</u> , 592 A.2d 518 (N.H. 1991)	
<u>Bautch v. Red Owl Stores, Inc.</u> , 278 N.W.2d 328 Minn. 1978).	21
<u>Bell v. Civil Service Commission</u> , 515 N.E.2d 248 (Ill.App. 1987).	18, 20
<u>Brennan v. Dept. of Local Affiars</u> , 786 P.2d 426 (Colo.App. 1989)	20
<u>Cosgrve v. Comm. Liquor Control Board</u> , 43 P.Cmwlt. 1, 401 A.2d 605 (1979)	19
<u>Denberg v. Loretto Heights College</u> , 694 P.2d 375 (Colo.App. 1984)	21
<u>Foster v. Springfield Clinic</u> , 410 N.E.2d 604 (Ill.App. 1980).	21
<u>Fulton v. Tennessee Walking Horse Breeders Assoc. of America</u> , 476 S.W.2d 644 (Tenn. 1972)	20
<u>Higgins v. Salt Lake County</u> , 855 P.2d 231 (Utah 1993). . .1,	25
<u>Mead Johnson Co. v. Review Board of Indiana</u> , 463 N.E.2d 537 (Ind.App. 1984).	20
<u>Ness v. Glasscock</u> , 781 P.2d 137 (Colo.App. 1989)	18
<u>State, Administrative Office of Courts v. Richford</u> , 161 N.J.Super 165, 391 A.2d 531 (1980).	18
<u>Thompson v. St. Regis Paper Co.</u> , 102 Wash.2d 219, 685 P.2d 1081 (1984)	19
<u>Thurston v. Box Elder County</u> , 835 P.2d 165 (Utah 1992) . 19,	27
<u>Transamerica Cash Review, Inc. v. Dixie Power & Water, Inc.</u> , 789 P.2d 24 (Utah 1980).2

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,)	

JURISDICTION STATEMENT

This case was originally appealed to the Utah Supreme Court pursuant to the appellate jurisdiction provisions of UCA §78-2-2(2)(j) (as amended, 1992). This case was thereafter transferred to this Court from the Supreme Court pursuant to UCA §78-2a-3(2)(k) (as amended, 1992).

ISSUES PRESENTED FOR APPEAL

In reviewing a grant of summary judgment, the appellate court uses the facts and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party. Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993). Since a summary judgment is granted as a matter of law, the appellate court reviews the trial court's conclusions of law for their correctness without according deference to the trial

court's legal conclusions. Transamerica Cash Review, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 27 (Utah 1990). The following issues are presented for appeal:

I

Did Washington Terrace City violate the due process guarantees within its Washington Terrace City Police Personnel Manual and thereby wrongfully discharge Darby from his employment because:

(a) The City did not timely discipline Darby within a timeframe reasonably connected to the occurrence of each rule violation allegedly committed by him,

(b) The City "warehoused" multiple unreported minor infractions committed by Darby to justify the removal action take against him,

(c) The City subjected Darby to disparate treatment in that the City has historically failed to sanction Darby and/or his professional peers for like or similar conduct or has otherwise inconsistently imposed discipline less severe than the removal penalties for like or similar conduct, and

(d) The City selected a penalty which was excessive and unreasonable measured against the disciplinary action agenda of The Manual?

STATEMENT OF THE CASE

This is a wrongful discharge from public employment case. The appellant Darby was a Washington Terrace City career status police officer at the time the city police chief recommended Darby's employment termination. Darby appealed this termination recommendation to a three member disciplinary hearing board convened under the Washington Terrace Police Personnel Manual ("The Manual"). This board affirmed the recommendation of the chief of police to discharge Darby. Darby's city employment was then terminated by the police chief. In accordance with Manual directives, Darby appealed the dismissal decision to the Washington Terrace City Council. The City Council affirmed Darby's employment termination.

This case was commenced by Darby in the Weber County District Court upon express and implied contract theories arising out of the employment relationship which had been conducted between the City and Darby under The Manual. The City's immunity from suit is waived by UCA §63-30-5(1) (1991) and governmental notice of claim requirements under UCA §63-30-5(1) (1991) are not applicable because this case is postured on contract law. The civil service commission administration provisions of UCA §10-3-1001 et.seq. (1983) do not apply to the parties because Washington Terrace City is a Utah city of the third class. UCA §10-2-301 (1987)

The City moved for summary judgment against Darby alleging that his employment conduct provided good cause grounds under The Manual to invoke disciplinary action and that the severity of this conduct warranted his dismissal consistent with Manual standards. Darby opposed the City's summary judgment motion alleging that the City had obtained his dismissal without complying with The Manual's due process safeguards.

The trial court awarded the City summary judgment and dismissed Darby's complaint ruling that the City had complied with its Manual and that removal was an appropriate penalty.

STATEMENT OF FACTS

This Statement of Facts is drawn primarily from the following parts of the trial court record which are found within a bound document captioned "Plaintiff's Exhibits To His Memorandum Of Authorities Opposing Defendant's Motion For Summary Judgment":

Ex. "A" - Darby's Washington Terrace City Personnel
Records

Ex. "B" - Darby's Answers to Defendant's First Set of
Interrogatories and Darby's Replies to
Defendant's First Set of Request for Admissions
and Request for Production of Documents

Ex. "C" - Cited portions of the Washington Terrace Police
Personnel Manual

Ex. "D" - Affidavit of Michael D. Darby

These exhibits, while part of the record on appeal, have not been separately paginated.

Darby was employed by the City on October 15, 1985 as a career service status police officer under the City's personnel rules and regulations. (Plt's.Ex."A"at 1-Prsnl.Recs.) Darby was appointed to the rank of sergeant on May 14, 1990. (Plt's.Ex."A"at 17-Prsnl.Recs.) Prior to the receiving the May 14, 1990 promotion to sergeant, Darby had received four within grade merit pay step increases and received a satisfactory or above rating on all of his annual performance appraisals. (Plt's.Ex."A"at 2-16-Prsnl.Rec.)

On December 23, 1990 Darby did not report for duty at the beginning at the 1400 hour shift. (Plt's.Ex."D"at 2-Plt's.Aff. ¶7) Darby reported for duty at 0930 hours and thereafter completed a full duty shift. (Plt's.Ex."A" at 18-Prsnl.Recs, Plt's.Ex."B"at 22-23,Ans.to Ints. #15) Lt. Cope, Darby's second-level supervisor, did not then take disciplinary action except to tell Darby that he would have sent him home with pay if personnel had been available to cover Darby's shift. (Plt's.Ex."A"at 18-Prsn'l.Recs., Plt's.Ex."B"at 22-23-Ans.to Ints.#15)

Chief Tracy, Lt. Cope and Darby met on December 24, 1990 to discuss the December 23, 1990 tardiness event. No disciplinary action -- warning, suspension, discharge, demotion -- was taken at this meeting and no statements were made that any action was contemplated. (Plt's.Ex."A"at 20-Prsnl.Recs.,Ex."C"at 22-23-Plt's.Ans.to Ints.#15, Ex."D"at 2-Plt's.Aff.¶7,8) Lt. Cope thereafter prepared and delivered to Chief Tracy a December 27, 1990 "Failure to Report for Shift" memorandum recommending

disciplinary action against Darby for his tardiness on December 23, 1990. (Plt's.Ex."A"at 18-Prsnl.Recs.) This memorandum criticised Darby for the appearance of his uniform and vehicle without providing offending date(s) and why Darby's uniform appearance and vehicle were not acceptable. Darby did not receive a copy or notice of this memorandum when it was received by Chief Tracy. (Plt's.Ex."B"at 22-23-Ans.to Ints.#15,Ex."D"at 2-3-Plt's.Aff.¶7,8) No disciplinary action was taken on this memorandum when it was received by Chief Tracy. (Plt's.Ex."A"-Prsnl.Recs.,Ex."B"at 25-Ans.to Ints.#18)

On December 30, 1990, Darby did not report for duty at the beginning of his 0600 hour shift. (Plt's.Ex."A"at 19-Prsnl.Recs.Ex."D"at 2-3-Plt's.Aff.¶7) Darby reported to work at 0730 hours after Lt. Cope telephoned Darby at his home. (Plt's.Ex."A"at 19-Prsnl.Recs.) Before completing a full duty day, Darby and Cope met for coffee at which time Cope did not discipline Darby except to say once again that he would have sent Darby home if personnel had been available to cover Darby's absence. (Plt's.Ex."A"at 19-Prsnl.Recs., Ex."B"at 22-23,25-Ans.to Ints.#15,18) Lt. Cope delivered to Chief Tracy a December 30, 1990 "Failure to Report for Shift, Failure to Turn in Log and Reports" memorandum recommending Darby's demotion from his sergeant's position, a letter of reprimand, a three day suspension and a one year probation. (Plt's.Ex."A"at 19-Prsnl.Recs.) Darby did not receive a copy or notice of this memorandum when it was received by Chief Tracy. (Plt's.Ex."A"at 19-Prsnl.Recs,Plt's.Ex."D"at 2-Plt's.Aff.¶7,8, Plt's.Ex."B"at 22-23-Ans.to Ints.#15)

A December 31, 1990 meeting was held among Darby, Chief Tracy and Lt. Cope where Chief Tracy demoted Darby from his sergeant's position and placed Darby on a one year probation because of Darby's tardiness on December 23, 1990 and December 30, 1990. (Plt's.Ex."A"at 20-Prsnl.Recs.,Plt's.Ex."B"at 22-23-Ans.to Ints.#15) At this meeting, Darby saw for the first time Lt. Cope's December 27, 1990 and December 30, 1990 memorandum. (Plt's.Ex."D"at 2-3-Plt's.Aff.¶7) Darby acknowledged ongoing marital difficulties at the meeting. He further identified that the police department had been understaffed by two officers and one sergeant for which his overall work product had suffered because of the extra duty hours and duties which he had been required to assume. (Plt's.Ex."A"at 22-23-Prsnl.Recs.,Plt's.Ex."B"at 22-23-Ans.to Ints.#15) Chief Tracy did not challenge the accuracy of Darby's position and informed Darby that he had been attempting to correct the understaffing issue. (Plt's.Ex."A"at 20-Prsnl.Recs., Plt's.Ex."B"at 22-23-Ans.to Ints.#15)

To confirm what had occurred among Darby, Lt. Cope and Chief Tracy at the December 31, 1990 meeting, Darby received within this meeting a December 31, 1990 "Demotion, Pay Reduction and Two Letters of Reprimand" memorandum. (Plt's.Ex."A"at 20-Prsnl.Recs.) This writing states in material part that "if any further incidents of failure to report for a shift occur within one year you will be terminated". (Plt's.Ex. "A"at 20-Prsnl.Recs.) Darby's position at the December 31, 1990 meeting is specifically evidenced by his undated "Dismissal As Sergeant"

letter which was placed into his personnel file on January 10, 1991. (Plt's.Ex."A"at 22-23-Prsnl.Recs.)

During the mid part of January 1991, Chief Tracy additionally delivered to Darby a "Corrective Action on Job Performance" memorandum requesting that Darby:

- (a) seek professional counseling through the City's employee assistance program,

- (b) maintain his professional appearance,

- (c) maintain the appearance of his vehicle, and

- (d) timely complete required reports and assigned duties.

(Plt's.Ex."A"at 24-Prsnl.Recs.) This writing states in material part that "These requests will be followed up on by Lt. Cope and a monthly report submitted to me". (Plt's.Ex."A"at 24-Prsnl.Recs.) This corrective action memorandum drafted as a "request" does not identify that any rule violations had actually occurred and, if so, the nature and date of their occurrence. Darby's personnel records were then devoid of any such documented rule violations. (Plt's.Ex."A"-Prsnl.Recs.)

On July 14, 1991, Chief Tracy delivered to Darby a July 9, 1991 "Failure to Follow Recommendations" memorandum stating that Darby had not been:

- (a) maintaining his professional appearance,

- (b) keeping clean the interior of his police vehicle, and

- (c) continuing his employee assistance counseling.

(Plt's.Ex."A"at 25-Prsnl.Recs.) This memorandum was not based upon any documented rule violatons within Darby's personnel file or upon any discusstions which had occurred among Darby, Lt. Cope

or Chief Tracy. (Plt's.Ex."B"at 2-3-Ans.to Ints.#1) Darby had, moreover, not been presented with any thirty day non-compliance reports from Lt. Cope following Darby's receipt of Chief Tracy's January 1991 "Corrective Action on Job Performance" memorandum. (Plt's.Ex."A"-Prsnl.Recs.) Chief Tracy's memorandum did not allege that Darby had been failing to complete required reports and duty assignments. (Plt's.Ex."A"at 25-Prsnl.Recs.) Darby met personally with Chief Tracy and challenged the accuracy of the July 9, 1991 memorandum except to admit that the interior of his vehicle had been disheveled on the date inspected by Chief Tracy. (Plt's.Ex."B"at 27-29-Ans.to Ints.#21) Darby specifically identified that Chief Tracey's criticism of his uniform attire -- wearing levis -- was a practice of other officers in the police department for which disciplinary action had never been invoked. (Plt's.Ex."B"-at 27-29-Ans.to Ints.#1,21) Following Darby's July 1991 meeting with Chief Tracy, no further personnel action was taken against Darby under the July 9, 1991 "Failure to Follow Recommendations" memorandum. (Plt's.Ex."A"-Prsnl.Recs.)

Within the discribed July 1991 meeting between Darby and Chief Tracy, Darby informed Tracy for the second time that working relationships between him and Lt. Cope were poor and had been steadily deteriorating since Darby's December 1990 demotion from sergeant. (Plt's.Ex."B"at 27-29-Plt's.Ans.to Ints.#21, Plt's.Ex."D"at 3-Plt's.Aff.¶9-11) During March 1991, Darby had asked Sergeant Rhodes to intervene but Lt. Cope had refused to participate in any reconciliation effort. (Plt's.Ex."D"at 3-

Plt's.Aff.¶9,10) Darby's similar request to Chief Tracy for intervention had been ignored. (Plt's.Ex."B"at 5-6-Ans.to Ints.#1) At their July 1991 meeting, Chief Tracy refused for a second time to directly assist in the resolution of the professional difficulties ongoing between Lt. Cope and Darby. (Plt's.Ex."D"at 3-Plt's.Aff.¶10) This refusal was made notwithstanding Darby's assertion that a substantial amount of his difficulties within the department had originated from his working relationship with Lt. Cope and that no amount of Darby's attendance in the City's employee assistance program would resolve this professional friction. (Plt's.Ex."B"at 28-29-Ans.to Ints.#21, Ex."D"at 3-Plt's.Aff.¶10)

On August 1, 1991 Darby appeared ten to twelve minutes late for a scheduled 1:00 o'clock p.m. three officer panel shooting review board hearing at the City's offices. (Plt's.Ex."B"at 16-Ans.to Int.#7) Darby had scheduled the meeting as the police department armorer. One of the three officers on the panel was Sergeant Rhodes, Darby's first-level supervisor. (Plt's.Ex."A"at 26-Prsnl.Recs.) The meeting was started approximately five minutes before Darby's arrival and was completed approximately twenty minutes later. (Plt's.Ex."A"at 26-Prsnl.Recs.)

On August 2, 1991, Darby reported forty-five minutes late for his assigned duty shift. (Plt's.Ex."A"at 26,29-Prsnl.Recs., Plt's.Ex."B"at 12-13-Ans.to Ints.#5) When Darby arrived at the City's offices, he met with Lt. Cope and learned that an officer

had telephoned Lt. Cope that Darby had not reported for duty as opposed to this officer first telephoning Darby. (Plt's.Ex."B" at 12-13-Plt's.Ans.to Ints.#5) Lt. Cope agreed that the officer should have first telephoned Darby before involving Lt. Cope as a second-level supervisor. (Plt's.Ex."B"at 12-13-Ans.to Ints.#5) Lt. Cope and Darby then took a coffee break where nothing else was mentioned or said about the tardiness event. (Plt's.Ex."B" at 12-15-Ans.to Ints.#5) Specifically, neither Chief Tracy nor Lt. Cope informed Darby that this tardiness had or would invoke the employment termination admonition contained within Chief Tracy's December 31, 1990 "Demotion, Pay Reduction and Two Letters of Written Reprimand" memorandum. (Plt's.Ex."D"at 2-3-Plt's.Aff.¶5-7)

On August 7, 1991, Darby did not appear at his scheduled morning time for a department ordered police officers' shooting qualification. (Plt's.Ex."B"at 16-Ans.to Ints.#8). August 7, 1991 was a scheduled off duty day for Darby and he overslept his morning shooting assignment. He was notified by dispatch and attended the shooting qualification that same day with one of the scheduled afternoon groups. (Plt's.Ex."B"at 16-Ans.to Ints.#8) Darby was not notified by any superior officer that this conduct would be enforced as a violation of personnel rules and regulations. (Plt's.Ex."B"at 16-Ans.to Ints.#8)

Darby reported forty-three minutes late for his August 18, 1991 assigned 0600 hours duty shift. (Plt's.Ex."B"at 19,20-Rply. to Adms.J) Chief Tracy Delivered to Darby an August 21, 1991 "Failure to Take Corrective Action on Your Performance" letter

which identifies thirteen rule violations allegedly committed by Darby under The Manual from mid-July 1991 through mid-August 1991. (Plt's.Ex."A"at 26-28-Prsnl.Recs.) The four occasions when Darby reported late for duty within the first eighteen days of August 1991 are included within this August 21, 1991 letter. Chief Tracy's letter was Darby's first notice that disciplinary action was being considered against him for any or all of the alleged thirteen rule violations. (Plt's.Ex."B"at 12-13,16,22-23,25-Ans.to Ints. #5,8,15,21) Darby delivered to Tracy his August 28, 1991 "Reply to Letter of August 21, 1991 on My Job Performance" letter by which he responded to each of the alleged thirteen rule violations. (Plt's.Ex."A"at 29-32-Prsnl.Recs.) Darby acknowledged that he did not report to duty when scheduled for each of the four August 1991 work assignment dates. (Plt's.Ex."A"at 29,32-Prsnl.Recs.)

Tracy thereafter delivered to Darby on September 3, 1991, a letter within which Tracy concluded that Darby had committed nine rule violations under the The Manual and that the cumulative affect of these violations compelled him to recommend Darby's employment termination. (Plt's.Ex."A"at 33,35-Prsnl.Recs.) The four days that Darby reported late for scheduled assignments during August 1991 comprised four of the nine rule violations used by Tracy. (Plt's.Ex."A",supra.)

Within his September 3, 1991 employment termination letter, Tracy identified for Darby the disciplinary penalty which

each rule violation warranted under The Manual. (Plt's.Ex."A", supra.-Prsnl.Recs.) The four cited instances of "unauthorized tardiness" were assessed by Tracy as follows;

(a) August 1, 1991 shooting review board -- ten to twelve minutes late -- "a letter of written reprimand". (Plt's.Ex."A" at 33-Prsnl.Recs.),

(b) August 2, 1991 -- reported forty-five minutes late for work -- "3 days without pay a letter of reprimand". (Plt's.Ex."A" at 33-Prsnl.Recs.),

(c) August 7, 1991 shooting qualification meet -- qualified with an afternoon group rather than at his scheduled morning time -- no specific discipline imposed. (Plt's.Ex."A" at 34-Prsnl.Recs.), and

(d) August 18, 1991 -- reported forty-three minutes late for work "letter of written reprimand and 3 days off with pay". (Plt's.Ex."A" at 35-Prsnl.Recs.)

The City's summary judgment motion is not based upon all of the nine rule violations advanced by Chief Tracy. Rather, the defendant's summary judgment motion isolates four instances under The Manual's rule violation category of "unauthorized absenteeism, tardiness" and three instances under The Manual's rule violation category of "persistently refusing to obey" a superior officer to argue that it had sufficient reason to fire Darby. The four cited instances of "unauthorized absenteeism, tardiness" are the four occasions that Darby appeared late for

scheduled duty assignments during August 1991. The three instances cited for "persistently refusing to obey" are based upon three separate investigations which Darby had been conducting within the June 1991 through August 1991 timeframe. (Plt's.Ex."A"at 36-Prsnl.Recs.)

The trial court awarded summary judgment to the City and dismissed Darby's complaint upon the limited basis that the four occasions during August 1991 when Darby reported late for scheduled duty assignments, coupled with the two days during December 1990 that he had reported late for work, were sufficient to sustain his employment termination under The Manual. (Brief App.--June 16, 1993 Bench Ruling & September 3, 1993 Order of Dismissal) The trial court's considerations did not reach whether Darby had been insubordinate by Manual definition, within any of the three occasions cited by the City within its summary judgment motion. (Brief App.-supra.) The trial court found that these circumstances were the object of material factual dispute whereas the four events of reported tardiness were not. (Brief App.-June 16, 1993 Bench Ruling)

SUMMARY OF LEGAL ARGUMENT

The sole issue on appeal is whether the trial court correctly awarded summary judgment to the City on the basis that Darby reported late for scheduled duty assignments on four separate occasions during the first eighteen days of August 1991 when further considered with the two days that Darby had been

disciplined for reporting late to work on December 23 and 30, 1990. The trial record is without dispute that Darby was tardy on each occasion cited by the City.

The four incidents of tardiness relied upon by the City occurred on August 1, 1991, August 2, 1991, August 7, 1991 and August 18, 1991. Chief Tracy's August 21, 1991 "Failure to Take Corrective Action on Your Job Performance" letter provided Darby with his first notice that disciplinary action against him was contemplated for any or all of the four cited events. Using this letter as the marking date for the commencement of disciplinary action against Darby, the following delays occurred from each rule violation date:

August 1, 1991 -- twenty day delay

August 2, 1991 -- nineteen day delay

August 7, 1991 -- fourteen day delay

August 18, 1991 -- three day delay

The Manual provides:

B. 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 the discipline. (Plt's.Ex."C"at 11-The Manual)

The Manual further provides:

Code of Conduct

1-19 Supervisors Acquiescence Relating to Misconduct of Members

A. A superior officer cannot use several minor infractions of a subordinate as justification for a major disciplinary action if no reported action has been taken in the past for the violation of the minor infraction. (Plt's.Ex."C"at 29-The Manual)

The due process safeguards within The Manual provide for the mitigation of disciplinary sanctions as the result of lax or sporadic rule enforcement with the following language:

6. Lax Enforcement of Rules

Law enforcement administrators should consider past enforcement of the 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. (Plt's.Ex."C"at 14-The Manual)

Eight months accrued from when Darby was disciplined for tardiness in December 1990 to when the onset of this same rule violation conduct occurred again in August 1991. Notwithstanding the admonition within Chief Tracy's December 31, 1991 disciplinary action letter that Darby would be terminated ". . . if any further incidents of failure to report for a shift occur within one year . . .", this condition was not enforced against Darby until the City had allowed four occurrences of tardiness to accrue without any form of disciplinary action having been taken.

The City failed to apply the due process protections of its Manual to Darby. The City's enforcement actions against Darby were neither timely nor consistent. Whether or not the City intended the result, supervisor acquiescence occurred as to his tardiness on August 1, 1991, August 2, 1991 and August 7, 1991. Darby's tardiness of August 18, 1993 is not sufficient to obtain a dismissal given the City's failure to discipline

previously. Darby's Answers to the City's First Set of Interrogatories and his Replies to the City's First Set of Request for Admissions further identify five specific circumstances where the police department failed to invoke disciplinary action against other officers for absenteeism and tardiness of a nature no less significant than that committed by Darby. (Plt's.Ex."B"at 2-3-Ans.to Ints.#1)

The trial court opined that the City allowed Darby's tardiness violations to accrue without disciplinary action because of sympathy and concern for his professional and personal circumstances. (Brief App.--June 16, 1993 Bench Ruling) This position contradicts the due process protections built into The Manual and defeats the very purpose for which The Manual was enacted -- the fair, timely and uniform administration of personnel regulations sufficient for the City and its police department members to develop objectively shared understandings and expectations. (Plt's.Ex."C"-The Manual) Darby was wrongfully terminated from employment. The City's unequal and sporadic enforcement of its Manual against Darby, without benefit of mitigation circumstances, has required Darby to assume the entire burden of the conduct which both he and the City created and thereafter perpetuated.

ARGUMENT

WASHINGTON TERRACE CITY VIOLATED THE DUE PROCESS GUARANTEES WITHIN ITS WASHINGTON TERRACE CITY POLICE PERSONNEL MANUAL AND THEREBY WRONGFULLY DISCHARGED DARBY FROM HIS EMPLOYMENT BECAUSE:

(a) THE CITY DID NOT TIMELY DISCIPLINE DARBY WITHIN A TIMEFRAME REASONABLY CONNECTED TO THE OCCURENCE OF EACH RULE VIOLATION ALLEGEDLY COMMITTED BY HIM,

(b) THE CITY "WAREHOUSED" MULTIPLE UNRECORDED MINOR INFRACTIONS COMMITTED BY DARBY TO JUSTIFY THE REMOVAL ACTION TAKEN AGAINST HIM,

(c) THE CITY SUBJECTED DARBY TO DISPARATE TREATMENT IN THAT THE CITY HAD HISTORICALLY FAILED TO SANCTION DARBY AND/OR HIS PROFESSIONAL PEERS FOR LIKE OR SIMILAR CONDUCT OR HAS OTHERWISE CONSISTENTLY IMPOSED DISCIPLINE LESS SEVERE THAN THE REMOVAL PENALTY FOR LIKE OR SIMILAR CONDUCT, AND

(d) THE CITY SELECTED A PENALTY WHICH WAS EXCESSIVE AND UNREASONABLE MEASURED AGAINST THE DISCIPLINARY ACTION AGENDA OF ITS MANUAL.

Certain general principles and rules of law apply to the City and its police officers from the employment relationship created by The Manual. The Manual's personnel policies and rules must be obeyed by both the City and its police officers. Ness v. Glasscock, 781 P.2d 137, 139 (Colo.App. 1989) (Personnel policies for public employees adopted pursuant to charter or statute are binding on adopting governmental entities and public employees); Bell v. Civil Service Commission, 515 N.E.2d 248, 252 (Ill.App. 1987) (In public employment disciplinary proceedings, public body must comply with its own rules and public employees being disciplined are entitled to rely upon those rules); State, Administrative Office of Courts v. Richford, 391 A.2d 531, 161 N.J. Super. 165 (1980) (Departure from procedures outlined in statutes and regulations for the

administration of personnel actions may not be authorized on grounds of estoppel, Cosgrove v. Comm. Liquor Control Board, 43 Pa.Cmwlth. 1, 401 A.2d 605 (1979) (Statutory civil provisions require exclusive adherence in involuntary termination of employment proceedings). The case law mandate that both the employer and the employee must equally adhere to published personnel rules and regulations has been expressed by the Utah Supreme Court in Thurston v. Box Elder County, 835 P.2d 165, 169 (Utah 1992) where it quoted with approval the following language from Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 230, 685 P.2d 1081, 1088 (1984):

It would appear that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees justifiably rely on the express policies and, thus, justifiably expect that the employers will do the same. Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.

. . .
Therefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises.

The result follows that public employers must comply with their published disciplinary rules and provisions as a condition to selected penalties withstanding judicial scrutiny. Mead Johnson Co. v. Review Board of Indiana, 463 N.E.2d 537, 538-539 (Ind.App. 1984) (Whether an employer waived an established disciplinary sanction for certain conduct by an employee depends upon the factual posture of each case); Brennan v. Dept. of Local Affairs, 786 P.2d 426, 427 (Colo.App. 1989) (When a governmental agency promulgates rules governing the discharge of its employees, it must strictly comply with those rules); Bell v. Civil Service Commission, 515 N.E.2d 148, 252-253 (Ill.App. 1987) (Civil Service Commission failed to follow its own rules which mandated progressive corrective discipline in discharging employee - Department was required under administrative code to correct employee's problem of improper completion of time reports prior to discharge - employee received neither oral nor written reprimand prior to initiation of discharge proceedings).

Private sector employment cases likewise hold that an employer's selection of sanctions against an offending employee can be sustained only if the employer has complied with its disciplinary action procedures. Fulton v. Tennessee Walking Horse Breeders Assoc. of America, 476 S.W.2d 644, 653 (Tenn. 1972) (Employer, by continuing to keep employee in its employment in same capacity for two or three years during which time it

gave him a ten year employment contract and also increased his salary, even though contents of allegedly objectionable letter by such employee had been made to its board of directors, waived its right to rely upon employee's writing of such letter as reason for discharging him and terminating his contract of employment), Bautch v. Red Owl Stores, Inc., 278 N.W.2d 328, 331 (Minn. 1978) (Employer's condonation of an employee's wrongful conduct is mitigating factor which may cause employer to waive its right to discharge employee on basis of such conduct), Foster v. Springfield Clinic, 410 N.E.2d 604, 609 (Ill.App. 1980) (Single act of improper conduct by employee, if known by employer and employer does not discharge employee, the employer condones the misconduct), Denberg v. Loretto Heights College, 694 P.2d 375 (Colo.App. 1984) (If an employer elects not to discharge an employee for a material breach of contract, such breach is not, of itself, cause for a future discharge action).

"Absenteeism, tardiness" is a "less serious offense" rule violation under The Manual which does not allow the City to discharge an offending employee without warning. (Plt's.Ex."C"at 13-The Manual) The City is accordingly obligated to impose discipline aimed at correction before the disciplinary action for this rule violation can progress to discharge. The Manual states,

Factors in Evaluating Penalties

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, warned before suspension, suspension before discharge.
(Plt's.Ex."C"at 13-The Manual)

Chief Tracy's September 3, 1991 letter recommending Darby's employment separation acknowledges that tardiness and/or absenteeism must be repetitive before The Manual's discharge penalty may be invoked. (Plt's.Ex."A"at 33-35-Prsnl.Recs.)

The four occasions upon which Darby reported late for duty assignments during August 1991 certainly place him within the progressive discipline provisions of The Manual. Notwithstanding, the City either failed or chose not discipline Darby for any of the Manual defined rule violations. Discipline was never timely invoked.

Using Chief Tracy's August 21, 1991 "Failure to Take Corrective Action on Your Job Performance" letter as the marking date for the commencement of disciplinary action against Darby, the following delays accrued from each rule violation date:

August 1, 1991 -- twenty day delay

August 2, 1991 -- nineteen day delay

August 7, 1991 -- fourteen day delay

August 18, 1991 -- three day delay

These enforcement delays, with the exception of the August 18, 1991 occurrence, conflict with the due process protections of The Manual which provide:

D. Timely:

Discipline shall 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.
(Plt's.Ex."C"at 11-The Manual)

2

(Warehousing Unrecorded Violations)

The Manual prohibits police department supervisors from accumulating minor unrecorded violations to justify a major disciplinary action as follows:

1-19

Supervisor's Acquiescence Relating 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.
(Plt's.Ex."C"at 29-The Manual)

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. Whether or not the City intended the result, its failure to timely enforce discipline against Darby resulted in Manual defined supervisor acquiescence for Darby's tardiness on August 1, 2 and 7, 1991.

3

(Sporadic and Inconsistent Enforcement)

Darby's failure to report for work when scheduled on August 18, 1991 was timely enforced by Tracy's August 21, 1991 letter to Darby. The issue accordingly arises whether Darby's tardiness on August 18, 1991, when coupled with his punishment for the same rule violation on December 23 and 30, 1990, can

sustain the City's selection of The Manual's dismissal sanction.
The Manual provides,

5. Warnings

The failure of supervisors to given 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 disciplinary 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 the rules 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 for the benefit of the member. However, an administrator may begin strict enforcement of a lax rule after giving all members clear notice of intent.

Eight months accrued from when Darby was twice disciplined for tardiness during December 1990 to when the same Manual prohibited conduct occurred during August 1991. Notwithstanding that Darby was warned within Chief Tracy's December 31, 1990 disciplinary action letter that he would be terminated ". . . if any further incidents of failure to report for a shift occur within one year . . .", the City allowed four occurrences of tardiness to accrue before disciplinary action was invoked. The City thereafter grouped impermissibly each of these Manual defined violations to sustain the dismissal sanction. The City's enforcement actions

against Darby were neither timely nor consistent.

Darby's Answers to the City's First Set of Interrogatories and his Replies to the City's First Set of Request for Admissions further identified that the City's police department has chronically failed with other officers to consistently and uniformly administer The Manual. (Plt's.Ex."B"at 2-10,12-13-Ans.to Ints.#1,2,5) These documents identify five circumstances where the police department failed to invoke disciplinary action against other officers for absenteeism and tardiness equal in severity to that committed by 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. (Brief App.-June 16, 1993 Bench Ruling) This position nullifies the due process safeguards built into The Manual. Not only does the trial court's position automatically impute good faith dealing to the City, it allows the City to circumvent, at will, The Manual's due process protections by invoking an argument that its sense of fair play does not have to be synonymous with The Manual's due process standards. By imputing good faith dealing to the City, the trial court incorrectly weighed the fact issues within the City's summary judgment motion. Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993). By allowing the City to define, at its convenience, fair play outside the due process protections of its

Manual, the trial court excused the police department from administering The Manual to create objective employee expectations that its provisions will be administered consistently, uniformly and equally.

4
(Excessive Penalty)

Material fact issues exist whether Darby's dismissal was an appropriate penalty measured by The Manual's due process standards that discipline should be timely and consistently imposed and that unenforced minor infractions should not be used to sustain a major disciplinary action. An argument is present that Darby knew or should have known that repeated absenteeism would eventually compel his dismissal. Accordingly, Darby does not deserve to invoke The Manual's due process protections because this result allows form to prevail over substance. In other words, Darby's reliance on due process technicality is not due process under The Manual.

Darby's arguments are not a hypertechnical use of The Manual's enforcement provisions. His arguments are based upon the plain and ordinary meaning The Manual's language. His position is uniformly recognized and enforced by the judicial system. The Manual's personnel policies and procedures must be obeyed by both the City and its police officers. (cases cited, infra.) These policies and procedures are binding upon both the

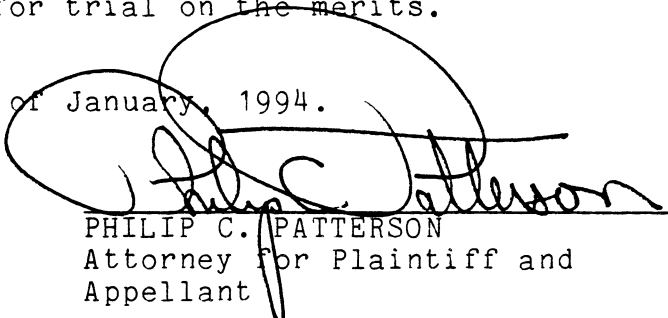
public employee and the adopting governmental entity. A public body must comply with its own rules and a public employee being disciplined is entitled to rely upon those rules. These principles have been recognized by the Utah Supreme Court in Thurston v. Box Elder County. 835 P.2d 165 (Utah 1992).

Material fact issues are present that the City's police department has not consistently and uniformly applied The Manual's enforcement provisions to Darby and other officers. The administration of The Manual provides for mitigation of penalty enforcement against Darby. The City's selection of the dismissal sanction requires Darby to assume the entire burden of conduct which both the City and Darby created and thereafter perpetuated. This result neither promotes due process within the public employment sector nor the due process safeguards of The Manual.

CONCLUSION

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 10 day of January, 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,)	

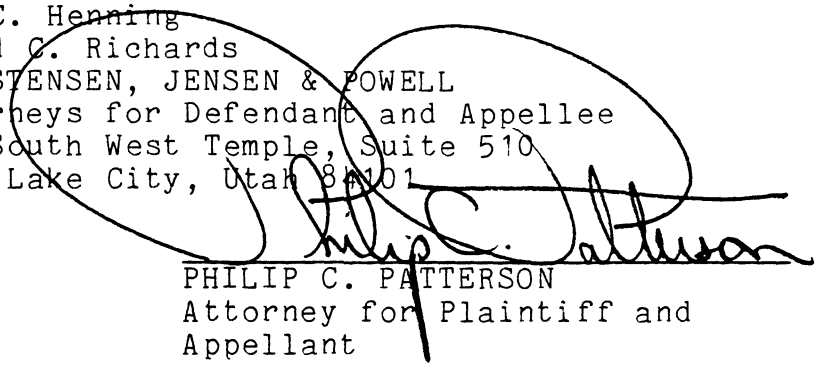
CERTIFICATE OF SERVICE

This is to certify that on the 10 day of January, 1994,
I mailed eight copies of the Appellant's Brief by U.S. Mail,
first class, postage prepaid to the following:

Clerk of the Court of Appeals
230 South 5th East #300
Salt Lake City, Utah 84102

and four copies were mailed by U.S. Mail, first class, postage
prepaid to the following:

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


PHILIP C. PATTERSON
Attorney for Plaintiff and
Appellant

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 City, 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
24
25

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.

9 ---0---

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

20 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 18th 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. Patterson

ADDENDUM:

Cited portions of Washington Terra ██████████
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,

Personnel Discipline Procedures

General

page 4

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

Personnel Discipline Procedures

General

page 5

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

Page 6

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.

Personnel Discipline Procedures

General

Page 7

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 member is given an opportunity to answer the 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

Page 8

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

Page 10

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 Relating 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.