

OFFICE OF THE CITY ATTORNEY  
SOUTH SALT LAKE CITY

Memorandum

TO: Mayor and City Council  
FROM: Paul H. Roberts, Deputy City Attorney  
DATE: 4/17/2015

RE: DRAFT AMENDMENTS TO SUBSECTION 2.60.040(F) – Appeals in Cases of Employee Discipline

Earlier this year, City Attorney Creswell informed the Council of the need for an updated Personnel Code. This amendment constitutes the first in several changes which will be requested.

Accompanying this memorandum is a proposed amendment to the subsection which governs appeals from decisions regarding the discipline of City merit-status employees. As this may be a new issue for several members of the City Council, a brief explanation of merit protection is warranted.

Background

Utah State Law has established merit status for full-time, non-appointed municipal employees who have completed a period of probation. *See* Utah Code Ann. § 10-3-1105 & 10-3-1106. The statute specifically exempts several positions by name (e.g., police chief, city engineer, a head of a municipal department or that person's deputy), and some by description (e.g., a part time employee, seasonal employee, probationary employee). *Id.* § 10-3-1105(2)(c)-(d).

Merit-status employees cannot be discharged, suspended without pay, or involuntarily transferred to a position with less remuneration without providing an appeal process for the affected employee. *Id.* § 10-3-1106(1) & (2)(a). Conversely, appointed employees may be discharged at any time, without the need to establish good cause. This section is largely seen as protection for line employees from termination as a result of changes in department heads or elected officials. The United States Supreme Court has stated that in the presence of such a statutory regimen, public employees have a property interest in continued employment absent sufficient cause for discharge. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). And before the government may deprive someone of a property interest, due process must be afforded to that person, necessitating a process for notice, hearing and appeals.

Notably, certain actions are exempt from statutory protection without reference to the severity of the results, including layoffs, reorganization, reduction in force, or non-disciplinary reasons. Utah Code Ann. §§ 10-3-1105(1)(b) & (4), 10-3-1106(8)(b). Thus, if a department is reorganized so that a function is no longer maintained or needed, the official performing that function may be released without any right to appeal.

The statute specifically vests certain decisions in the City Council. Specifically, it provides that the Council may determine the method and manner of choosing a hearing officer or members of an appeal board, the procedures for conducting the appeal, and the standard of review. *Id.* § 10-3-1106(7)(a).

City Appeal Procedures & Proposed Amendments

The City Council previously vested authority to resolve such appeals through the City's Administrative Hearing Process. S. Salt Lake Ord. § 2.60.040(F)(1)(a). This process provides a venue with fact-finding and determinations by a law-trained, disinterested non-employee. The hearing is conducted in the

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informal setting of an administrative hearing, which makes arbitration of such matters accessible to those who are not law-trained. By statute, appeals from the city review process are directed to the Utah Court of Appeals. Utah Code Ann. § 10-3-1106(6).

It has been several years since the procedures for employee appeals have been considered by the Council. This memo will briefly explain the changes.

The first set of changes (pp. 4-5) emphasizes that certain actions are non-appealable, including measures of intervention like verbal warnings, written reprimands or suspensions lasting less than two days. It also specifically exempts appeals in the same manner as state statute, such as terminations or transfers in cases of reduction in force or reorganization or for non-disciplinary termination or reassignment. The code also specifically provides that there is no appeal if an employee is terminated or reassigned as a result of a loss of federal or state certification of licensure which is essential to their job.

The next changes are related to ALJ appeal procedures:

- (1) Provides for continuances of hearing dates for good cause
- (2) Allows ALJ to retain its own experts, as needed
- (3) Specifically notes that court rules do not apply to administrative hearings
- (4) Prevents pre-hearing motions, with the exception of motions to continue and for production of records
- (5) Bifurcates disciplinary hearings into two phases:
  - a. City presents facts supporting charge upon which discipline was based
    - i. Burden of production and persuasion is on City
    - ii. Must prove charges by preponderance of evidence
  - b. At conclusion of first phase, ALJ rules on charges
    - i. If all charges sustained, then proceeds to second phase
    - ii. If no charges are sustained, then overturns disciplinary decision
    - iii. If only some charges are sustained, it is referred back to Department Director to make a new decision on discipline
  - c. During second phase, employee must establish an abuse of discretion in choosing the discipline.
    - i. Burden of production and persuasion is on Employee
    - ii. Must establish an abuse of discretion by clear and convincing evidence (higher standard than preponderance)
- (6) Establishes standards for fitness for duty determinations (termination, transfer to position with less pay)
  - a. Burden of production and persuasion is on City
  - b. Must establish that action was warranted based upon the circumstances
  - c. Burden of proof is preponderance of evidence
- (7) Describes what happens when an employee's disciplinary action is overturned (payment of back pay, reinstatement, etc).
- (8) Establishes the manner in which the ALJ's decision is rendered final and appealable.

If you have any questions, please feel free to contact me.

cc: City Recorder