2002

J. Scott Ockey v. Christena White : Brief of Appellant

Utah Court of Appeals

CHRISTENA WHITE
440 EAST BROADWAY #25
SALT LAKE CITY, UTAH 84111

IN THE UTAH COURT OF APPEALS

J. SCOTT OCKEY PLAINTIFF/APPELLEE,	}	
	}	DISTRICT COURT NO. 010909255
V	}	APPELLANT COURT NO. 20030110
CHRISTENA WHITE DEFENDANT/APPELLANT.	}	20021073

APPELLANT'S BRIEF

LIST OF PARTIES

PLAINTIFF/APPELLEE	DEFENDANT/APPELLANT
J. SCOTT OCKEY	CHRISTENA WHITE

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JURISTICTIONAL STATEMENT

This Court has jurisdiction as a matter of right to hear and determine this appeal.

STATEMENT OF ISSUE AND STANDARDS OF REVIEW

Whether or not the court abused its discretion by awarding a default judgment against defendant, Ms. White when she was improperly served.

Whether or not the summons and complaint are fatally defective, because to contain Pertinent information, which is required under *Rule 10(a) of the Utah Rules of Civil Procedures.*

Whether or not the service is fatally defective, because the summons and complaint fails to contain pertinent information on it.

Whether or not the court's rendering a default judgment against Ms. White without hearing the case was an abuse of discretion.

Whether or not the default judgment should be set aside and the action dismissed against defendant, Ms. White.

Whether or not the standards as outlined in *Lucas v. Murray City* apply to all public and private entities, to include the courts.

CONSTIUTIONAL OR STATUTORY PROVISIONS

Article 1 § 7 of the Utah State Constitution (Due Process)

No person shall be deprived of life, liberty, or property, without due process of law.

Article 14 § 14 of the United States Constitution {Due Process}

No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law.

PROCEDURAL PROVISIONS

Rule 3(a)(1), Utah Rules of Civil Procedures

How commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4.

Rule 4(c)(2), Utah Rules of Civil Procedures

If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

Rule 4(b), Utah Rules of Civil Procedures

Under *Rule 3(a)(1)* The complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause.

Rule 56, Utah Rules of Civil Procedures

Permits a court to reconsider a grant of summary judgment when the party seeking reconsideration presents legal theories that have not been considered already, and presents material facts that have not been considered before this court at the time of the original decision to grant summary judgment.

Rule 12(b), Utah Rules of Civil Procedures

Every defense, in law or fact, to claim relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. ...
2. ...
3. ...
4. Insufficiency of Process,
5. Insufficiency of Service of Process,
6. ...

STATEMENT OF THE CASE

This action is to dismiss the Summons, Complaint and its subsequent service due to a fatally defective summons. The Summons and/or Complaint failed to contain pertinent information. On the summons and/or complaint, which is required under the *Utah Rules of Civil Procedures.*

The court and plaintiff continues to ignore the *Utah Rules of Civil Procedures* when they litigate cases. The courts and plaintiff have policies and procedures to comply with and the court and the plaintiff continue to willfully ignore those rules and procedures.

STATEMENT OF FACTS

1. On 25 July 2002, Defendant filed a Motion to dismiss the action, because the Plaintiff failed to have the Defendant properly served.

2. On 16 October 2002, the court signed an order granting the plaintiff's Summary Judgment. The court prior to this never considered the Defendant's Motion to Dismiss.

3. On 31 October 2002, Defendant filed a Motion to Reconsider Grant of Summary Judgment.

4. On 29 November 2002, the court denied the Defendant's Motion to Reconsider Grant Of Summary Judgment.

ARGUMENT(S)

It is the position of the defendant that the summons together with the copy of the Complaint and the subsequent service of these documents are fatally defective, because They do not contain pertinent information on them, which is required under the *Rule 10(a) Of the Utah Rules of Civil Procedures.*

In this case the plaintiff failed to do so and their mistake could and must be classified as fatal.

The defendant can attack a fatally defective summons and its service at anytime. The court failed to obtain jurisdiction over defendant, Ms. White because of improper service the court and plaintiff failed to comply with the Utah Rules of Civil Procedures as established by the Utah State Supreme Court.

In addition to this the plaintiff failed to ensure that the required information was Contained in the summons and/or complaint the defendant's rights under Article 1 § 7 of The Utah State Constitution and Article 14 of the United States Constitution to due process.

These Requirements are necessary for any defendant to properly defend, if it is not provided then one cannot be required to properly defend the matter. Furthermore, because the court failed to ensure that the defendant, Ms. White was improperly served, violated her rights under Article1 § 7 of the Utah State Constitution and Article 14 of the United States Constitution to due process. These requirements are necessary for any defendant to properly defend, if it is not provided then one cannot be required to properly defend the matter.

These matters are more fully disputed below.

POINT 1

DEFENDANT CAN ATTADCK FATALLY DEFECTIVE SUMMONS AND SERVICE AT ANYTIME

Pursuant to the provisions of *Rule 12(b) of the Utah Rules of Civil Procedures* it states,

"Every defense, in law or fact, to claim relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader is made by motion:

7. ...

8. ...

9. ...

10. Insufficiency Of Process,

11. Insufficiency of Service of Process,

12. ..."

The rule is clear at the point of the pleader the following defenses may be made by motion:

a. Insufficiency of Process and

b. Insufficiency of Service of Process.

The service process server failed to annotate their name, date, time, and official Title if any, which is required under *Rule 4(k*

) of the Utah Rules of Civil Procedures

And Utah Code Annotated § 78-12a-2(3).

POINT II
COURT FAILED TO OBTAIN JURISTICTION

Rule 4(g) of the Utah Rules of Civil Procedures states.

Five days after service of process, proof thereof shall be made by written admission or waiver of service by person to be served, duly acknowledged or otherwise proved, is purposed to safeguard against entering default judgment against persons except where it is satisfactorily appears that they that they have consented thereto.

Defendant Ms. White was not properly served in this action. The court Does not have jurisdiction over a party who has been improperly served. The court in *Locke v. Peterson,* 285 P2d 111 and *Callahan v. Sheafer* 877 P.2d 1259.

Plaintiff failed to file a Return of Service which is in violation of *Rule 4(h) of the Rules of Civil Procedure*. There was no written admission or waiver filed with the court within the five days of service from the service processor, plaintiff, or plaintiff's Attorney.

There was no written admission or waiver filed with the court within The five days of service from the service processor, plaintiff, or plaintiff's Attorney.

The Plaintiff then failed to file an Answer to the Motion for dismissal and Proceeded to file a Summary Judgment Motion nine months later not in the 120 day Allotted time from the court. This is required under *Rule (4) of the Utah Rules of Civil Procedures.*

By the clear language of the rule"..., at the option of the pleader be made motion". The defendant clearly followed this rule.

Therefore, the defendant can attack the case at any time by motion pursuant to the language of the rule. The defendant moves this court for an order reversing the lower court default judgment and dismissing this action all together, because the court should have never entered a default judgment against the defendant when there was absolutely no evidence to show that she was properly served and the plaintiff and his attorney new the time allowed in filing Answers and Motions in a case is not nine months.

Therefore, Under *Rule 4(b) of the Utah Rules of Civil Procedure* the court should Have dismissed this action based on the Summons and Complaint not being served within The 120 days.

The court abused its discretion when it entered a default judgment against the Defendant Ms. White, when many of the proper Rules of Civil Procedure have been Violated in this action. Therefore, the court never obtained jurisdiction over defendant, Ms. White because of improper service, process, and procedure.

Therefore, the court clearly abused its discretion by entering a default Judgment against Ms. White, where the court did not have jurisdiction to enter A default judgment against her. The court in *Garcia v. Garcia*, 712 P.2d 288

Stated,

"The requirements of this rule relating to service of process are jurisdictional".

The court in the defendant 's Ms. White's case never obtained jurisdiction over defendant, because of improper service and procedure, the record clearly reflects this.

Therefore, this case must be dismissed and the defendant moves this court To reverse the decision of the lower court.

POINT III

THE COURTS ABIUSE AND DISCRETION NOTWITHSTANDING UNRESOLVED ISSUES AND FACT

There are numerous genuine issues and facts of material facts at issue in this case, Which was required to be resolved before any Summary Judgment could be issued In accordance with *Rule 56 of the Utah Rules of Civil Procedures* as interpreted by *Salt Lake City Corp. v. James Constructors, Inc. 761 P2d 42 (Utah Ct. app. 1988).*

In the Reconsidering the Motion for Granting the Summary Judgment there Lists numerous issues that need to be resolved and heard before granting of the Summary Judgment. The Reconsideration for Granting the Summary Judgment Motion has already been made available to you who were included in the Docketing Statement.

POINT IV

PLAINTIFF AND COURT FAILED TO COMPLY WITH PROCEDURES AS ESTABLISHED BY THE UTAH SUPREME COURT

The Utah State Supreme Court has established procedures for which the court, its officials and all attorneys or pro se litigants are required to perform when litigating a case before the court. The court in turn is required to ensure that the procedures are being adhered to, but they don't. The *Utah Rules of* Civil Procedures clearly establish what a litigant is required to do.

The Utah Supreme court in *Lucus v. Murray City (Civil Service Commission)*, 949 P.2d 746 states,

"Any public entity who has rules, regulations or policies must comply with them and the employee has a right to rely on them".

The court's by definition is a public entity. The court and the parties' have procedures imposed upon them by the Utah Supreme Court by and through the *"Utah Rules of Civil Procedures". Rule 1(a) of the Utah Rules of Civil Procedure* clearly states,

"These rules shall govern the procedures in the courts of the State of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or equity..."

Rule 10(a) of the Utah Rules of Civil Procedures mandate that all pleadings or other papers filed with the court must contain the specified information as contained in the rule. In other cases the courts have ruled that if the information as required buy the rule is missing it renders the pleading fatally defective and the court fails to obtain jurisdiction over the defendant and the case must be dismissed.

The court must impose and mandate upon the lower court that they and the parties' must adhere to the procedures as they are mandated. The defendant moves this court to impose the same standards as delineated in *Lucas* upon all public and private entities alike and to impose that they must comply with the policies, rules and procedures they establish and if they do not then they adversely affected persons who can challenge the action.

CONCLUSION

In conclusion, the court records and dockets reflect everything that has happened in this matter. The pleading fail to contain pertinent and necessary information as outlined *in Rule 10(a) of the Utah Rules of Civil Procedures.* If the information as required under the rule is missing it would render the summons, complaint and its subsequent service fatally defective and the case must be dismissed.

The court in Lucas, supra, mandated that any public entity that had rule and policies must comply with those rules and policies. This would include the courts. The court is a public entity and has rules and procedures called, *"The*

Utah Rule of Civil Procedures". The high court ruled that the public entity had to comply with its rules, policies and procedures and the employee had a right to rely on them. The defendant's position is that this case applies here. The court is a public entity and a litigant has a right to rely on the rules, policies and procedures, which apply to the court. They are required to comply all the time and the other litigants have a right to rely on those rules, policies and procedures.

The court was provided a copy of the Reconsideration of the Summary Judgment Motion. In accordance with *Rule 56 of the Utah Rules of Civil Procedures* this case should have had the opportunity to be heard as interpreted by *Salt Lake City Corp. v. James Constructors, Inc. 761 P2d (Utah Cy. App. 1988).* These issues were never heard and under these grounds there should be an immediate dismissal.

Because the plaintiff failed to ensure that the required information was contained in the summons and/or complaint the defendant's right under Article 1§ 7 of the United States Constitution and Article 14 of the United States Constitution to due process. These requirements are necessary for any defendant to properly defend the matter. Furthermore, because the court failed to ensure that the defendant, Ms. White was properly served, violated her rights under Article 1 § 7 of the United State Constitutions and Article 14 of the United States Constitution to due process. These requirements are necessary for any defendant to properly defend, if it is not provided then one cannot be required to properly defend the matter.

Therefore, the court must rule that the summons and/ or complaint have pertinent information, which is mandatory under the rules and governing the time allowed to file the written notice with the courts, and the rules pertaining to the amount of time allowed to file an Answers and Complaints within a decent time frame, even if it is not within the time allowed by the courts, not 9 months when it should have been within 120 days. All of these issues brought before the court makes the service fatally defective. The defendant also believes that the court should make the provisions as outline in Lucas applicable to all entities, public or private. The defendant moves the court to dismiss this action.

Dated this 2nd day of April 2003.

Respectfully Submitted,

Christena White

CERTIFICATE OF SERVICE BY MAIL

I certify that on this 1st day of April 2003, I personally placed a true and correct copy of the "Appellant Brief", in a sealed envelope. I further placed the same in the United States Postal Service and addressed it to the following:

Jeremy M. Hoffman
Young, Adams & Hoffman, LLP
170 South Main Street, Suite 1025
Salt Lake City, Utah 84101-1654

Signature

527, 535 (Utah 1993); *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985); *Campbell v. State Farm Mutual Auto. Ins. Co.*, 840 P.2d 130, 137 (Utah App.), *cert. denied*, 853 P.2d 897 (Utah 1992); *accord Heredia*, 279 Cal.Rptr. at 518 (the duty to defend ends with the policy limits, assuming no prejudice attaches to the insured); *Johnson*, 248 Cal. Rptr. at 417 (if insurer tenders its policy limits in response to the demand of its insured prior to the initiation of litigation arising from an accident, insurer generally has no further duty to defend); *Kantack v. Progressive Ins. Co.*, 618 So.2d 494, 497 (La.Ct. App.1993) (an insurer must make every effort to avoid prejudicing its insured by the timing of its withdrawal).

In this case, Farmers paid the policy limit of $500 to Simmons before any action was brought by Clayson. In fact, Farmers paid the policy limit within twelve days after receiving Simmons's demand for payment. Clayson's suit was filed ten months after Simmons received payment. *See Johnson*, 248 Cal.Rptr. at 417 (stating that because insurer paid policy limits within two weeks of insured's demands and litigation began some six months thereafter, court found no further duty to defend). Farmers did not abandon Simmons mid-course in litigation, and Simmons suffered no prejudice because Farmers refused to defend her. Having paid the limits of liability in settlement of her claim, Farmers's duty to defend Simmons came to an end.

Duty of Good Faith

[10] Simmons also asserts that Farmers breached the constructive duty of good faith and fair dealing when it issued her an insurance policy with a $500 deductible on a car valued at $350 and when it failed to defend Simmons in the suit brought by Clayson. Because these issues were not raised below, we will not consider them on appeal. *See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993); *Smith v. Iversen*, 848 P.2d 677, 677 (Utah 1993); *Wade v. Stangl*, 869 P.2d 9, 11 (Utah App.1994); *Jenkins v. Weis*, 868 P.2d 1374, 1380 (Utah App.1994).

CONCLUSION

Simmons's appeal was from a final appealable order, thus we have jurisdiction to hear this appeal. The trial court properly determined the insurance policy provided $500 collision coverage for damage to the horse trailer. Further, the trial court also properly refused to require Farmers to defend Simmons against Clayson's suit because it had already paid the policy limits to Simmons. We do not address the issues concerning Farmers's duty of good faith and fair dealing because they were not raised below. Accordingly, we affirm.

BENCH and GREENWOOD, JJ., concur.

Geraldine CALLAHAN, Plaintiff and Appellant,

v.

John D. SHEAFFER, Jr., and Dart, Adamson & Kasting, Defendant and Appellee.

No. 930518-CA.

Court of Appeals of Utah.

July 1, 1994.

Client brought legal malpractice action against attorney and law firm. The Third District Court, Salt Lake County, Leslie A. Lewis, J., entered summary judgment for attorney and firm, and client appealed. The Court of Appeals, Jackson, J., held that client's prior legal malpractice action "failed" within meaning of savings statute when it was dismissed without prejudice by trial court for failure to serve summons and complaint within 120 days of filing, rather than upon expiration of 120-day period and, thus, her action, filed within one year of dismissal, was timely

Reversed and remanded.

1. Appeal and Error ⇐842(2)

As summary judgment, by definition, decides only questions of law, Court of Appeals reviews trial court's conclusions for correctness.

2. Appeal and Error ⇐863

Court of Appeals gives no deference to trial court's determination of issues on summary judgment.

3. Limitation of Actions ⇐95(11)

Statute of limitations for legal malpractice begins to run when alleged act of legal malpractice is discovered or, in exercise of reasonable care, should have been discovered. U.C.A.1953, 78-12-25.

4. Limitation of Actions ⇐130(9)

For purposes of savings statute, client's initial legal malpractice action "failed" when it was dismissed without prejudice by trial court for failure to serve summons and complaint within 120 days of filing, rather than upon expiration of 120-day period 155 days before dismissal, and, thus, her action, filed within one year of dismissal, was timely; dismissal for failure to timely serve summons and complaint was not automatic, but, rather, depended upon application of party or trial court's own initiative, and possibility existed that client could have preserved initial action even after she failed to make timely service. Rules Civ.Proc., Rules 4(b), 6(b); U.C.A. 1953, 78-12-25, 78-12-40.

See publication Words and Phrases for other judicial constructions and definitions

5. Pretrial Procedure ⇐560

Failure of cause of action for failure to serve summons and complaint within 120 days of filing is not automatic; dismissal depends upon application of any party or upon court's own initiative, and, unless and until dismissal, party may preserve action under proper circumstances as trial court may enlarge time for service if appropriate motion is made and failure was result of excusable neglect. Rules Civ.Proc., Rules 4(b), 6(b).

Lynn P. Heward, Salt Lake City, for appellant.

Michael F. Skolnick and Carman E. Kipp, Salt Lake City, for appellee.

Before BENCH, JACKSON and GARFF,[1] JJ.

OPINION

JACKSON, Judge:

Plaintiff Geraldine Callahan appeals the trial court's grant of summary judgment in favor of defendants. We reverse.

FACTS

Callahan retained attorney John Sheaffer to represent her in a divorce proceeding that commenced in April 1987. She urged Sheaffer to take the necessary steps to preserve her rights under her husband's retirement plan. On January 21, 1988, Callahan discovered that her husband irrevocably changed his beneficiary designation under the plan, thereby eliminating Callahan's survivor interest. On July 26, 1991, Callahan filed a legal malpractice suit against Sheaffer and his law firm. The trial court dismissed the complaint without prejudice on January 27, 1992, for failure to serve a summons within 120 days of the filing as required by Rule 4(b) of the Utah Rules of Civil Procedure. On May 21, 1992, Callahan filed another malpractice suit against Sheaffer and his law firm. The court, however, ruled that the statute of limitations had run and granted summary judgment in favor of defendants. Callahan appeals the summary judgment.

ANALYSIS

[1, 2] Because summary judgment, by definition, decides only questions of law, we review the trial court's conclusions for correctness. *HCA Health Servs. v. St. Mark's Charities*, 846 P.2d 476, 481 (Utah App.1993). We give no deference to the trial court's

1. Senior Judge Regnal W. Garff, acting pursuant to appointment under Utah Code Ann. § 78-3-24(10) (1992).

determination of issues on summary judgment. *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993).

[3] This case requires us to determine the applicability of the savings statute, Utah Code Ann. § 78–12–40 (1992), to the statute of limitations on a legal malpractice action. Utah Code Ann. § 78–12–25 (1992) allows four years in which to bring an action for legal malpractice. *Merkley v. Beaslin*, 778 P.2d 16, 18 (Utah App.1989). The statute of limitations begins to run when the alleged act of legal malpractice is discovered, or, in the exercise of reasonable care, should have been discovered. *Id.* at 18–19. The savings statute states:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Utah Code Ann. § 78–12–40 (1992). Thus, to resolve the matter before us, we must determine when the statute of limitations began to run, when Callahan commenced her cause of action, when her cause of action "failed," and when she commenced her new action.

[4] It is undisputed that on January 21, 1988, Callahan discovered the alleged negligence that prompted her to file a legal malpractice suit. Under *Merkley*, this is when the statute of limitations on her action began to run. *Merkley*, 778 P.2d at 18–19. It is also undisputed that on July 26, 1991, Callahan commenced her legal malpractice action by filing a complaint with the trial court. Rule 4(b) of the Utah Rules of Civil Procedure states that when a civil complaint is filed with the court,

> the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice *on application of any party or upon the court's own initiative.*

Utah R.Civ.P. 4(b) (emphasis added). Callahan did not serve the summons and complaint within the 120 days. Approximately 155 days later, on January 27, 1992, the court dismissed the complaint. Thus, the question before us is whether Callahan's cause of action "failed" in late November 1991 when the 120 days expired, or on January 27, 1992, when the court dismissed the complaint. We hold that Callahan's cause of action failed on January 27, 1992, the day the court dismissed it.

[5] Rule 4(b) has undergone several changes since it came into effect. A change of some significance to this case occurred when Rule 4 was amended to add language stating that a cause of action was "deemed dismissed" for failure to serve a summons within the mandated period of time. At the time of the case before us, the "deemed dismissed" language had been removed from the rule. The relevance of this change is that for the time period when an action was "deemed dismissed" for lack of proper service, failure of a cause of action for savings statute purposes was automatic under Rule 4(b). The "deemed dismissed" language meant that once the time period for service of summons elapsed, no further action was necessary for the cause of action to be dismissed. Before the "deemed dismissed" language was added to Rule 4(b), and as we hold today, after the "deemed dismissed" language was removed from Rule 4(b), failure of a cause of action under Rule 4(b) is not automatic.[2] As Rule 4(b) states, dismissal of

2. This holding is supported by *Luke v. Bennion*, 36 Utah 61, 106 P. 712 (Utah 1908). The *Luke* court analyzed the application of a savings statute with virtually identical language to the one at issue today. The *Luke* court cited a Georgia case in which service of process was required within 20 days of declaring a cause of action. Service was not timely, and the issue in the case was whether the improper service of process "was not only ground for dismissing the suit, but ipso facto terminated the action." *Id.* 106 P. at 713–14. The *Luke* court, referring to the Georgia case, stated, "the suit 'did not come to termination the moment the time expired within which the clerk might have annexed a process to the petition. We think that the suit did not come

the cause of action after the time for service of a summons has elapsed depends upon some action, namely, the "application of any party or upon the court's own initiative." Utah R.Civ.P. 4(b). In the case before us, such action was not taken until January 27, 1992, when the court, apparently on its own initiative, dismissed the complaint.

Defendants argue that "the savings statute does not hinge on dismissal of an action, but rather upon failure of an action." They argue further that Callahan's complaint "failed" after the 120-day period for service of a summons expired. We disagree. Rule 6(b) of the Utah Rules of Civil Procedure allows the trial court discretion to enlarge the time allowed for service of summons or other actions, even after the prescribed time for such action has expired, if the appropriate motion is made and if the failure was the result of excusable neglect. Thus, unless and until a cause of action is dismissed, a party who fails to serve a summons in a timely fashion may preserve the action under proper circumstances. Because the possibility existed that Callahan's cause of action might have been preserved even after she failed to serve the summons within the prescribed 120 days, her cause of action was alive until the court dismissed it on January 27, 1992. This is the date when her cause of action "failed." Callahan commenced her new action against defendants for legal malpractice on May 21, 1992.

We now turn our attention to the application of the savings statute. The savings statute "permits a plaintiff whose action has been dismissed on non-substantive grounds to file a new complaint within one year of the date of dismissal, if the dismissal has occurred after the statute of limitations for plaintiff's action has run." *Moffitt v. Barr*, 837 P.2d 572, 573 (Utah App.1992); *see also Hansen v. Department of Fin. Inst.*, 858 P.2d 184, 187 (Utah App.1993) (noting failure of a cause of action before statute of limitations had expired prevented invocation of savings statute). In this case, the four-year statute of limitation on Callahan's legal malpractice action began to run on January 21, 1988. Callahan commenced her cause of action on July 26, 1991, before the statute of limitations expired. Her cause of action failed on January 27, 1992, when the trial court affirmatively dismissed it. Thus, under the savings statute, Callahan had until January 26, 1993, to renew her cause of action. Callahan commenced her action on May 21, 1992, well within the allotted time. Accordingly, the trial court improperly granted summary judgment in favor of defendants on the ground that Callahan's action was untimely. Thus, we reverse the trial court's order granting summary judgment and remand this matter to the trial court for further proceedings.

BENCH and GARFF, JJ., concur.

Janet R. COX (Rex), Plaintiff and Appellant,

v.

K. Norman COX, Defendant and Appellee.

No. 920818-CA.

Court of Appeals of Utah.

July 5, 1994.

Decree of divorce was entered by the Fourth District Court, Utah County, Lynn W. Davis, J., and wife appealed. The Court

to a termination until the court, on the motion of the defendant in the suit, dismissed it.'" *Id.* 106 P. at 714 (quoting *Winn v. Booker*, 22 Ga. 359 (1857)). In *Asknith v. Ellis*, 85 Utah 103, 38 P.2d 757, 759 (1935), the Utah Supreme Court stated that an action is pending, 'not only until the plaintiff has failed to serve a summons within one year thereafter, or within a reasonable time, or until he has otherwise failed to prosecute the action with due diligence, but until something is done to put it out of court.' *Id.* Although the court was not referring specifically to the Utah rule requiring service of summons, it is clear that the Utah Supreme Court required some action to dismiss, or 'put a cause of action out of court.'

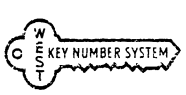
court, and on February 25, 1985, Judge Wilkinson signed a notice stating that "if the appeal is not perfected by the 29th of March, 1985, then this notice shall serve as a dismissal of the appeal with prejudice by order of the Court." [1] On April 1, 1985, by minute entry, Judge Wilkinson dismissed the case and remanded it to circuit court for disposition of sentence. Also on April 1, 1985, Judge Fishler signed an order granting defendant a fourteen-day extension for filing a brief. Thereafter, on April 22, 1985, Judge Wilkinson signed yet another order dismissing the appeal.

From the foregoing facts, it would appear that defendant's appeal was properly dismissed at the district court level. However, we do not reach the merits of that decision in view of jurisdictional limitations on our review of cases which originate in circuit court. We have consistently held that under U.C.A., 1953, § 78-3-5, decisions of the district court on appeal from circuit courts are final except in cases involving a constitutional issue. *State v. Taylor*, Utah, 664 P.2d 439 (1983).

Before this Court, defendant urges that Judge Wilkinson's order of April 1, 1985, conflicted with the extension granted by Judge Fishler on the same date. Defendant claims that the motion for extension was submitted on March 29, 1985, and that the entry of conflicting orders on April 1 1985, was due to a mistake on the part of the court clerk. In so claiming, defendant has not raised a constitutional issue.

The appeal to this Court is therefore dismissed.

STEWART, J., concurs in the result.



1. The deficiencies noted included failure to file a transcript and failure to file a statement of points and authorities. By its terms the order appears to be self-executing.

Lou Dean GARCIA, Plaintiff and Respondent,

v.

Charles William GARCIA, Defendant and Appellant.

No. 19349.

Supreme Court of Utah.

Jan. 10, 1986.

Former husband petitioned to obtain relief from operation of a divorce decree directing him to pay child support. The Third District Court, Salt Lake County, Dennis Frederick, J., denied petition, and husband appealed. Following initial affirmance, rehearing was granted. The Supreme Court held that: (1) service of process on husband at time that he was incarcerated in state prison, by leaving summons with prison officer, was ineffective, so that court was without jurisdiction to enter original decree of divorce, and (2) petition filed some ten years after entry of decree was not too late.

Reversed and remanded.

1. Divorce ⇐78

Service of process on prisoner by leaving summons with prison officer was not valid under portion of Rules Civ.Proc., Rule 4(e)(1) permitting service by leaving copy at defendant's usual place of abode with some person of suitable age and discretion "there residing."

2. Process ⇐58

Where service is on appointed agent, agent must normally have been appointed for the specific purpose of receiving process, but agent may also be authorized by law to receive service of process. Rules Civ.Proc., Rule 4(e)(1).

1. Process ⇐58

Prison officer was not authorized agent for service of process on a prisoner. Rules Civ.Proc., Rule 4(e)(1).

4. Divorce ⇐65

Trial court was without jurisdiction to enter decree of divorce where there was no effective service of process. Rules Civ. Proc., Rule 4(e)(1).

5. Judgment ⇐386(3)

Where judgment is void because of fatally defective service of process, the time limitations of Rules Civ.Proc., Rule 60(b), relating to motion for relief from judgment, have no application.

6. Divorce ⇐308

Petition for relief from operation of decree of divorce directing former husband to pay child support, on ground that court which entered decree lacked jurisdiction because there was no effective service of process, was not too late even though filed some ten years after entry of the decree.

Mary C. Corporan, Salt Lake City, for defendant and appellant.

Lou Dean Garcia, Salt Lake City, pro se.

PER CURIAM.

This case is here on rehearing granted for the purpose of addressing the question of jurisdiction. Appellant seeks reversal of an order of the trial court denying him relief from operation of a decree of divorce.

The parties were married on October 17, 1968. On December 17, 1968, respondent bore a child. Respondent sought and obtained a decree of divorce on March 14, 1973, at a time when appellant was incarcerated in the Utah State Prison.[1] The default decree awarded custody of the child to respondent and ordered appellant to pay $65 per month child support, beginning sixty days after his release from prison.

1. Appellant was convicted of burglary and grand larceny in May 1969.

In January 1981, appellant was released from prison. Appellant sought the services of a lawyer in 1983 apparently after state welfare recovery services sought to enforce the support obligation specified in the decree of divorce. Counsel filed a "Motion for Order of Relief from Judgment" and a "Petition for Modification of Divorce Decree," both of which were denied by the trial court. This appeal followed.

Appellant argues that the divorce decree should be set aside under Rule 60(b)[2] since he was not properly served with process. The return of process, signed by a deputy sheriff, states that appellant was served by delivering a copy of the summons and complaint to "Mr. Johnson, head of State Prison personnel office." Appellant contends that he never received a copy of the summons and complaint and that, in any event, service upon a prison officer does not constitute effective service of process on a prisoner.

Rule 4(e)(1) provides for personal service as follows:

> Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place of abode with some person of suitable age and discretion there residing; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

Under the foregoing rule, appellant could have been served by delivering a copy of the summons to him personally. Case law of other jurisdictions generally favors this type of civil service of process on prisoners. *See White v. Underwood*, 125 N.C. 25, 34 S.E. 104 (1899); *Merchant's Administrator v. Shry*, 116 Va. 437, 82 S.E. 106 (1914); *Steindler Paper Co. v. Charlevoix Circuit Judge*, 234 Mich. 288, 207 N.W. 896 (1926). Appellant was not served in this manner in the instant case.

[1] The rule also permits service "by leaving such copy of his usual place of

2. All references to Rules herein are to Utah Rules of Civil Procedure.

abode with some person of suitable age and discretion there residing." Service was not made under this provision since the summons was left with a prison officer who clearly did not reside at appellant's usual place of abode.[3]

[2, 3] The final method by which process may be served under Rule 4(e)(1) is "by delivering a copy to an agent authorized by appointment or by law to receive service of process." Where service is upon an appointed agent, the requirements are rather stringent: the agent must normally have been appointed for the specific purpose of receiving process. *See* Wright & Miller, Federal Practice and Procedure: Civil § 1097. Appellant has appointed no such agent in the instant case. An agent may also be authorized by law to receive service of process. Arguably, a county sheriff or jailer might receive service of process for prisoners in their custody under U.C.A., 1953, § 17-22-6, but there is no parallel statute covering persons incarcerated in the state prison. Appellant therefore has no authorized agent who could receive service for him.

[4] Under the foregoing analysis, the attempted service on appellant was fatally defective. There being no effective service of process, the court was without jurisdiction to enter the original decree of divorce.[4]

[5, 6] Although respondent has not filed a brief in this matter, it might be argued that appellant's motion to set aside the decree is too late. Rule 60(b) provides, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action: (5) the judgment is void; .... The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken.

Under subsection (4), a party has only three months to challenge a judgment where jurisdiction is obtained on constructive service (pursuant to Rule 4(f)). *See* 7 Moore's Federal Practice ¶ 60.32; *People v. One 1941 Chrysler*, 81 Cal.App.2d 18, 183 P.2d 368 (1947). Even under subsection (5) a void judgment seemingly must be challenged within a "reasonable time." But where the judgment is void because of a fatally defective service of process, the time limitations of Rule 60(b) have no application. *Woody v. Rhodes*, 23 Utah 2d 245, 461 P.2d 465 (1969).

This is consistent with holdings under the Federal Rules, after which our Rules were patterned. As noted in Wright & Miller, Federal Practice and Procedure: Civil § 2862:

> Rule 60(b)(4) [the equivalent to Utah Rule 60(b)(5)] authorizes relief from void judgments.[5] Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense.

3. We need not decide whether appellant's "usual place of abode" is his family residence or the prison. For guidelines on this topic *see* 32 A.L.R.3d 112, at § 16.

4. The requirements of Rule 4 relating to service of process are jurisdictional. *See Martin v. Nelson*, Utah, 533 P.2d 897 (1975); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164 (1971); *Fibreboard Paper Products v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

5. In a later paragraph in the cited reference, it is explained that a judgment is not void because it is merely erroneous. A judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or the parties, or if it acted in a manner inconsistent with due process of law.

either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

By the same token, there is no time limit on an attack on a judgment as void. The one-year [three-month, in Utah] limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion A void judgment cannot acquire validity because of laches on the part of the judgment debtor.

Because we have concluded that the trial court had no jurisdiction to enter the divorce decree in the first instance, the order denying relief from judgment must be, and is reversed. The case is remanded for entry of judgment vacating the decree of divorce because of the ineffective service of process In view of our holding that the decree is void for lack of jurisdiction, we need not address points raised in the petition for modification

No costs awarded

STATE of Utah, Plaintiff and Respondent,

v.

Shauna Maurine HARMON aka Shauna Johnson, Defendant and Appellant.

No. 20358.

Supreme Court of Utah.

Jan 14 1986.

Defendant was convicted before the Second District Court, Weber County, John F Wahlquist, J of attempted robbery and she appealed. The Supreme Court held that the trial court's failure to instruct jury on elements of "attempt" was prejudicial error.

Reversed and remanded.

Criminal Law ⇐1173.2(2)
Robbery ⇐27(7)

Trial court's failure to instruct jury on elements of "attempt" in charge of attempted robbery was prejudicial error. U.C.A.1953, 76–4–101, 76–6–301.

David M. Bown, Salt Lake City, for defendant and appellant.

David L. Wilkinson, Atty. Gen., Salt Lake City, for plaintiff and respondent.

PER CURIAM:

Defendant was convicted by a jury of attempted robbery in violation of U.C.A., 1953, §§ 76–6–301 and 76–4–101. She appeals, citing as her single issue error by the court in refusing her proffered instruction on the elements of attempt. We reverse.

Defendant was charged by information with robbery, but at the trial, the court granted the State's motion to instruct the jury on the lesser included offense of attempted robbery. In its instructions to the jury, however, the court merely inserted the word "attempted" before the word "robbery" in the previously prepared instruction on the elements of the robbery and read it to the jury as an instruction on the elements of attempted robbery. As a result, the court failed to instruct the jury on the specific elements of attempt contained in U.C.A., 1953, § 76–4–101. Specifically, the court failed to instruct that in order to convict of attempted robbery the jury must find, beyond a reasonable doubt, that defendant's conduct constituted a "substantial step" toward commission of the offense and that the substantial step

WASATCH LIVESTOCK LOAN CO. v. DISTRICT COURT IN AND FOR UINTAH COUNTY et al.

No. 5576.

Supreme Court of Utah.

June 14, 1935.

1. Process ⇐34

Summons served on defendant in district court action *held* fatally defective for failure to allege that complaint had been filed with clerk of court or that complaint would be filed with clerk within ten days (Rev. St. 1933, 104-5-1, 104-5-2).[1]

2. Certiorari ⇐36

Defendant in district court action who was served with fatally defective summons and whose motion to quash summons and service thereof was denied *held* entitled to relief by certiorari in Supreme Court.[2]

Proceeding by the Wasatch Livestock Loan Company against the District Court of the Fourth Judicial District in and for Uintah County, and others, for writ of certiorari to review an order denying a motion to quash the summons in an action brought by the defendant Annie Bowden, as administratrix of the estate of Joseph H. Bowden, deceased, against the Wasatch Livestock Loan Company.

Order annulled, and District Court restrained from taking further proceedings.

Thomas & Thomas, of Salt Lake City, for plaintiff.

Ray E. Dillman, of Roosevelt, for defendants.

FOLLAND, Justice.

A writ of certiorari was issued to review an order of the district court of Uintah county denying plaintiff's motion to quash summons and service thereof in an action brought by the defendant Annie Bowden, as administratrix of the estate of Joseph H. Bowden, deceased, against Wasatch Livestock Loan Company. Plaintiff filed a brief in support of its petition. Defendant filed no brief but has submitted the cause without brief or argument. The record in the case from the district court is now before us. The summons served on defendant in the district court case omits to state whether a complaint had already been filed or whether one would thereafter be filed, thereby wholly failing to indicate and to advise the defendant therein how the action had been commenced, whether by service of summons or by filing a complaint. The defendant therein appeared specially and moved to quash the summons. This motion was denied by the trial court.

[1, 2] The statute requires that a summons shall indicate by its contents the manner in which the action is commenced. By R. S. Utah 1933, 104-5-1, an action may be commenced either by the filing of a complaint with the clerk of the court in which the action is brought, or by service of summons. By section 104-5-2 the appropriate language to be used in either case is specified; that is, the summons must indicate the precise manner in which the action is commenced by stating in express words "which has been filed with the clerk of said court," if the action be commenced by the filing of a complaint, or "which, within ten days after service of this summons upon you, will be filed with the clerk of said court," if commenced by service of summons. The summons served on defendant in the district court action failed to state either alternative, and was therefore fatally defective. Farmers' Banking Co. v. Bullen, 62 Utah, 1, 217 P. 969. Plaintiff is entitled to relief in this court. Glassmann v. Second District Court, 80 Utah, 1, 12 P.(2d) 361.

On the record in this case the court below should have quashed and set aside the summons and the alleged service thereof. The order of the district court of Uintah county denying the motion to quash and requiring the defendant to answer within ten days is annulled, and the defendant district court and the judges thereof are restrained from further proceeding in the cause of Annie Bowden, as Administratrix of the Estate of Joseph H. Bowden, Deceased v. Wasatch Livestock Loan Company, until such time as jurisdiction of said defendant is conferred upon that court. Costs are awarded to plaintiff herein against individual defendants.

ELIAS HANSEN, C. J., and EPHRAIM HANSON, MOFFAT, and WOLFE, JJ., concur.

[1] Farmers' Banking Co. v. Bullen, 62 Utah, 1, 217 P. 969.

[2] Glassmann v. Second District Court, 80 Utah, 1, 12 P.(2d) 361.

3 Utah 2d 415

Whitland T. LOCKE, Ralph O. Williams and Hayne L. Jarrard, Plaintiffs and Respondents,

v.

L. R. PETERSON, Defendant and Appellant.

No. 8329.

Supreme Court of Utah.

July 15, 1955.

Motion to set aside default judgment. The Third District Court, Salt Lake County, Clarence E. Baker, J., refused to set aside default judgment, and petitioner appealed. The Supreme Court, Wade, J., held that where copy of summons left with defendant after he was served with original was not exact copy of original and was defective and would not have conferred jurisdiction, and original copy filed with clerk was proper and would have conferred jurisdiction, situation created sufficient confusion that motion to set aside default and judgment against defendant should have been granted.

Judgment reversed and cause remanded with directions to set aside default and proceed to trial on merits.

1. Judgment ⇐124

Rule which provides that within five days after service of process, proof thereof shall be made by written admission or waiver of service by person to be served, duly acknowledged or otherwise proved, is purposed to safeguard against entering default judgment against persons except where it satisfactorily appears that they have consented thereto. Rules of Civil Procedure, rule 4(g).

2. Process ⇐149

Any proof which sufficiently establishes that written admission or waiver of service of process has been made is sufficient if so regarded by the court. Rules of Civil Procedure, rule 4(g).

3. Process ⇐149

Where attorney delivered process, and defendant signed original copy of summons in presence of attorney, and it was represented to the court that such was signature of defendant, rule which provides that within five days after service of process, proof of service shall be made by written admission or waiver of service by person to be served, duly acknowledged or otherwise proved, was satisfied. Rules of Civil Procedure, rule 4(g).

4. Process ⇐24

Where copy of summons left with defendant was not true copy of original and did not state whether complaint had already been filed with clerk of court or whether such filing was to be made in future, defendant was entitled to rely on his copy for such information, and as his copy of summons failed to make definite statement regarding filing, it was fatally defective and jurisdiction of person served was not conferred. Rules of Civil Procedure, rule 4(g).

5. Judgment ⇐138(3)

Where copy of summons left with defendant after he was served with original was not exact copy of original and was defective and would not have conferred jurisdiction, and original copy filed with clerk was proper and would have conferred jurisdiction, situation created sufficient confusion that motion to set aside default and judgment against defendant should have been granted. Rules of Civil Procedure, rule 4(g).

6. Judgment ⇐135

In case of uncertainty, default judgments should be set aside to allow trial on merits.[1]

Grant Macfarlane, Max G. Halliday, Salt Lake City, for appellant.

Earl D. Tanner, Salt Lake City, for respondents.

WADE, Justice.

This is an appeal by L. R. Peterson, defendant, from the trial court's refusal to set aside a default judgment. On August 26, 1954, Earl D. Tanner, attorney for plaintiffs Whitland T. Locke, Ralph O. Williams and Hayne L. Jarrard, respondents here, handed to defendant a summons

1. Utah Commercial & Savings Bank v. Turnbo, 17 Utah 198, 53 P. 1033

and purported copy thereof requesting him to sign the following statement which was typewritten on the front of both the original and the copy

> "Receipt of this summons is acknowledged this 26th day of August, 1954, and service of the same is accepted
>
> "L R Peterson"

Peterson signed both the original and the purported copy, the original he returned to Tanner and retained the purported copy The original contained the following provision

> "You are hereby summoned and required to serve upon Anderson, Taylor and Tanner, Plaintiff's attorneys * * * an answer to the complaint within 20 days after service of this summons upon you If you fail so to do, judgment by default will be taken against you for the relief demanded in said complaint, ~~which has been filed with the clerk of said court, and a copy of which is hereto annexed and herewith served upon you (or)~~ which, within 10 days after service of this summons upon you will be filed with the clerk of the above court."

The above part which is crossed out was crossed out in the original summons but was not crossed out in the copy so that part of the copy read as follows "* * * for the relief demanded in said complaint, which has been filed with the clerk of said court, and a copy of which is hereto annexed and herewith served upon you (or)* which, within 10 days after service of this summons upon you will be filed with the clerk of the above court"

Plaintiffs' attorney duly filed the original summons with the required copies of the complaint with the clerk of the court and defendant failed to appear and his default and default judgment were entered against him on October 6, 1954 On January 4, 1955 appellant served notice of his intention to move the court to set aside the default judgment Two problems are presented 1 Does the proof of service of summons meet the requirements of the Utah Rules of Civil Procedure? 2 Should the court have set the default and judgment aside and allowed him to answer on the merits? We consider these problems in the above order

1 Rule 4(g) of U R C P provides that: "Within 5 days after service of process, proof thereof shall be made as follows

* * * * * *

"(4) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved"

[1–3] It is undoubtedly true that this requirement is purposed to safeguard against entering the default of persons except where it satisfactorily appears that they have consented thereto Assuming that the term "duly acknowledged" requires acknowledgement before a notary public or other officer entitled to administer oaths, the related phrase used in the same context "otherwise proved" also imports some proof upon which the court may safely conclude that the appearance is genuine Subdivision (4) deals only with the manner of proof of a "written admission or waiver of service by the person to be served" It has nothing to do with the manner of proof of other kinds of service mentioned in Subdivisions (1), (2) or (3) as contended by defendant Any proof which sufficiently establishes that a written admission or waiver of service has been made is sufficient if so regarded by the court Here the defendant signed the statement in the presence of the attorney, who is an officer of the court, in whom the court can properly repose confidence, and who in turn represented to the court that such was the signature of the defendant That was unquestionably sufficient proof to satisfy the requirements of the above rule.

[4] 2 On the second point we conclude that the court should have set the default and judgment aside and allowed the defendant to answer on the merits The copy of the summons which was left with the defendant was not a true copy of the original and did not state whether the complaint had already been filed with the clerk of the court or whether such filing was to be made in the future This court has at least twice held that where the sum-

mons failed to make a definite statement of that fact it was fatally defective and did not confer upon the court jurisdiction of the person served.[1] In this case the original summons did make such a statement but the copy left with the defendant merely stated that the complaint had been filed or would within 10 days be filed. The copy left with the defendant is the instrument on which he was entitled to rely for such information.

[5, 6] Thus we have filed a proper summons, receipt of which is accepted which conferred jurisdiction of the defendant on the court. However if a true copy of the summons which was left with the defendant had been filed it would have been defective and would not have conferred jurisdiction. This situation created sufficient confusion that the motion to set aside the default and judgment against the defendant should have been granted and he should have been allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits.[2]

Reversed and remanded with directions to set aside the default and the judgment against the defendant and to allow him to file his answer on the merits and proceed to trial. Costs to the appellant.

McDONOUGH, C. J., and CROCKETT, J., concur.

WORTHEN, J., concurs in result.

HENRIOD, Justice (concurring in result).

I concur in the result and agree with the principle enunciated by Mr. Justice WADE to the effect that a signed statement admitting service of process satisfies Rule 4 (g) (the signer thus submitting himself to the court's jurisdiction), but I cannot concur with the reasons assigned by the main opinion why the judgment should have been vacated.

The only determinative point on appeal is whether or not defendant should have been relieved of a default judgment because of excusable neglect. The main opinion says the judgment should have been set aside because the copy of the summons received by defendant was not a true copy in that it did not advise whether a complaint had been filed or would be filed within ten days. I cannot see how this circumstance possibly could be ground for vacating the judgment on the basis of excusable neglect, since, at the worst, defendant could assume only that the complaint would be filed within ten days and it would be a simple matter to check to determine if the filing had been made within that time, after which the defendant would have ten days to plead if it had been filed. Failure to make such inquiry hardly could be said to be excusable neglect.

However, it appears that the copy of the summons bore a case number different from that on the complaint and court records, that the defendant left the state the day after he was served, and that he took steps to request the vacation of the judgment as soon as he learned of it. The case number on the summons was one that had been assigned to a case which touched the same subject matter, but in which no action was taken against defendant. Under such circumstances, defendant's failure to answer easily could have been the result of excusable neglect under the Utah case cited by the majority opinion,—a case somewhat similar factually,—and such as to result in an abuse of discretion on the part of the trial court in failing to relieve the defendant of the default.

1. See Wasatch Livestock Loan Co. v. District Court in and for Uintah County, 86 Utah 422, 46 P.2d 399; Farmers' Banking Co. v. Bullen, 62 Utah 1, 217 P. 969.

2. Utah Commercial & Savings Bank v. Trumbo, 17 Utah 198, 53 P. 1033.

Norman BARBER and Helen Barber, Plaintiffs and Appellees,

v.

The EMPORIUM PARTNERSHIP, et al., Defendants, Third-Party Plaintiffs, and Appellants,

v.

N. George DAINES and Daines & Kane, Third-Party Defendants and Appellees.

No. 880410.

Supreme Court of Utah.

Oct. 16, 1990.

Rehearing Denied Nov. 16, 1990.

Creditor sought renewed judgment against debtor and debtor counterclaimed alleging creditor failed to offset proceeds of execution sale. Creditor added claim to determine validity of execution sale and debtor added third-party complaint against creditor's attorney for abuse of legal system. The First District Court, Cache County, Venoy Christoffersen, J., renewed the original judgment, dismissed debtor's counterclaim and third-party complaint, ordered sanctions against debtor's attorney, and noted that ruling on whether execution sale proceeds would be applied to judgment would be made later. Debtors appealed. The Supreme Court, Durham, J., held that: (1) renewal of judgment was not effective against partnership or general partner who were not served; (2) matters in debtor's counterclaim and third-party complaint could not be relitigated; and (3) attorney sanctions were justified.

Affirmed in part and vacated in part.

1. Bankruptcy ⇨2395

Action to renew judgment against debtor does not violate automatic stay provisions of Bankruptcy Code; renewal is not an attempt to enforce, collect, or expand original judgment. Bankr.Code, 11 U.S.C.A. § 362(a)(1).

2. Partnership ⇨375

Service on limited partnership may be obtained through service on general partner, but service must be directed to defendant partnership and intended as service on partnership. Rules Civ.Proc., Rule 4(e)(5).

3. Partnership ⇨375

Service on partner as individual, but not as agent or representative of partnership, brought in only individual and limited partnership never became a party. Rules Civ.Proc., Rule 4(e)(5).

4. Judgment ⇨868(2)
Partnership ⇨375

Failure to serve general partner who was jointly, rather than jointly and severally, liable on debt precluded renewal of judgment against him, but did not affect renewal of judgment against two general partners who were served. U.C.A.1953, 48-1-12.

5. Judgment ⇨720

Issues in counterclaim and third-party complaint which had been disposed of in previous final judgment could not be relitigated in action to renew judgment.

6. Attorney and Client ⇨24

Sanctions were warranted against attorney who persisted in pursuing and seeking remedies after all relevant legal issues were settled and thus burdened adverse party with expense of legal fees to answer matters that had previously been adjudicated.

Raymond N. Malouf, Logan, for defendants, third-party plaintiffs and appellants.

N. George Daines, Logan, for third-party defendants and appellees.

N. George Daines, Logan, pro se.

DURHAM, Justice:

Appellants challenge a trial court order renewing a judgment against them and dismissing their counterclaim and third-party claim. They also challenge a judgment for sanctions against their attorney. We affirm but vacate the renewal of the judgment against Don White.

This case has a long and tortured history. Appellees Norman and Helen Barber originally filed a complaint in January 1979, seeking payment of a promissory note executed by appellants Von Stocking and Don White as general partners of The Emporium Partnership. In a judgment dated April 18, 1979, the trial court found for the Barbers and ordered appellants to pay the amount of the note plus interest. Appellants challenged the enforceability of that judgment in an appeal before the court of appeals. *Barber v. The Emporium Partnership*, 750 P.2d 202 (Utah Ct.App. 1988). They specifically challenged the award of post-judgment interest and attorney fees and the determination that the partnership agreement did not preclude recovery. That appeal was dismissed because it was untimely. *Id.* at 203.

As of March 1987, appellants still had not satisfied the judgment. The Barbers filed a complaint at that time to renew the judgment to avoid its lapse under the statute of limitations. Utah Code Ann. § 78-12-22 (1987). After appellants' motion to dismiss was denied, they answered the complaint and filed a counterclaim. In their counterclaim, they alleged that the Barbers failed to offset the judgment by the value of property purchased by the Barbers in an execution sale ($20,000). The Barbers purchased residential property in which they believed Raymond Malouf, one of the appellants here and also appellants' attorney, had an interest. The purchase was an attempt to recover part of their original judgment against Malouf, but his interest in the property was later disputed.

The Barbers then amended their complaint to add two causes of action, making the complaint for renewal their first cause of action. Their second cause of action included a request pursuant to rule 69(g)(2) of the Utah Rules of Civil Procedure for a judicial determination of whether the $20,000 execution sale was valid.[1] Upon answering the amended complaint, appellants amended their counterclaim and added a third-party complaint against the Barbers' counsel for abuse of the legal system in pursuing the Barbers' claims.

The Barbers moved for partial summary judgment on their first cause of action and for dismissal of appellants' counterclaim and third-party complaint. They also moved for sanctions against Raymond Malouf as appellants' attorney for continuing to pursue settled issues. The trial court granted the Barbers' motion for partial summary judgment, dismissed the counterclaim and third-party complaint, and ordered Malouf to pay $3,000 in sanctions. The trial judge renewed the original judgment, finding $40,884.96 the total amount due.[2] The judge held that the issues raised in appellants' counterclaim and third-party complaint had no basis in law or fact because they had been disposed of in the trial court's previous rulings and the court of appeals' decision. The judge also noted that a later ruling would be made pursuant to Utah Rule of Civil Procedure 69(g)(2) as to whether the Barbers' bid on the Malouf interest in the residential property should be counted as a partial satisfaction of the judgment.

Appellants argue that renewal of the judgment against the partnership violated the automatic stay provisions of 11 U.S.C. § 362(a)(1), because the partnership was in bankruptcy when the action was initiated. This section provides an automatic stay for

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

1. The Barbers state in their brief that they are willing to credit this amount toward the judgment if the execution sale is found to be valid.

2. This amount included the principal plus accrued interest up to March 27, 1987. The trial judge's order also allowed for interest that would accrue from the date of the order. The trial judge subtracted from the total due an interest payment of $866.47 made by appellants on December 31, 1984.

The purpose of the automatic stay is to "protect the debtor from his creditors" by providing relief from collection proceedings which would "impair the debtor's ability to successfully reorganize under Chapter 11 and to fairly meet outstanding obligations to all creditors." *Rogers v. Rogers*, 671 P.2d 160, 164 (Utah 1983); *see also Utah Farm Prod. Credit Ass'n v. Labrum*, 762 P.2d 1070 (Utah 1988) (construing the automatic stay provisions in a case affirming an order finding attorney Raymond Malouf—coincidentally an appellant and attorney in this case—in contempt of court for unlawfully converting funds).

Although this court has never addressed the question of whether the automatic stay provisions apply to renewal of a judgment, there is other pertinent authority. The United States Court of Appeals for the Second Circuit recently held that the automatic stay provisions do not "prohibit acts to extend, continue, or renew otherwise valid statutory liens." The court explained its holding:

> Action by a lienholder [to extend a lien] does not result in an enlargement of the lien, nor does it threaten property of the estate which would otherwise be available to general creditors. To the contrary, extension under [the New York statute] simply allows the holder of a valid lien to maintain the status quo—a policy not adverse to bankruptcy law, but rather in complete harmony with it.

In re Morton, 866 F.2d 561, 564 (2d Cir. 1989).

State courts similarly have interpreted the automatic stay provisions. In *Marine Midland Bank v. Herriott*, 10 Mass.App. 743, 412 N.E.2d 908, 910 (Mass.App.Ct. 1980), the Massachusetts Appeals Court held that where "the focus of the suit [in the non-bankruptcy court] is relief other than the actual collection of a debt, the judicial proceeding need not be stayed because the order of [that] court will not interfere with the bankruptcy proceedings." The California Court of Appeal relied on this language in *Barnett v. Lewis*, 170 Cal.App.3d 1079, 1088, 217 Cal.Rptr. 80, 85 (Cal.Ct.App.1985), noting that the automatic stay would not apply to an "action to renew a judgment [because it] would not have been a direct attempt to *collect*."

[1] An action to renew a judgment does not violate the automatic stay provisions of the bankruptcy code. A renewal is not an attempt to enforce, collect, or expand the original judgment. When the Barbers sought to renew their judgment against The Emporium Partnership, they were only trying to maintain the status quo by preventing the judgment's lapse under the statute of limitations. The original judgment against the partnership was final before the partnership went into bankruptcy. Renewing the judgment did not affect the partnership's assets or its ability to fairly deal with all its creditors and therefore was not automatically stayed.[3]

[2, 3] Appellants also argue, however, that renewal of the judgment as against the partnership was improper because the partnership was not served. Service on a limited partnership may be obtained through service on a general partner. *See* Utah R.Civ.P. 4(e)(5); *Summa Corp. v. Lancer Industries, Inc.*, 577 P.2d 136, 137 (Utah 1978). However, the service must be directed to the defendant partnership and intended as service on the partnership. Here, the summons and complaint were served only on an individual defendant, thereby bringing him in as a party. They were not served on him as an agent or representative of the partnership, and the partnership therefore never became a party.

[4] Appellants challenge the renewal of the judgment because Don White, one of the general partners, was not served. It is true that the judgment against White cannot be renewed without proper service on him.[4] Failure to serve White, however, has

3. Of course, even if the Barbers' action against the partnership had been automatically stayed, the renewal judgments against the partners would not have been affected.

4. The Barbers concede that the judgment is joint rather than joint and several. Utah Code Ann. § 48-1-12 (1989). This means that each defen-

tion, take action to that end. In acting on its own motion, the court must proceed with judicial discretion. Its ruling will not be disturbed on appeal unless it is manifest from the record that the court's discretion has been abused.[1]

We believe and hold that in the instant case the trial court did not abuse its discretion, but on the contrary acted with judicial propriety looking to the interests of all litigants and in promoting their causes with reasonable dispatch,—certainly in preventing indiscriminate jostling and clogging of court calendars. (Emphasis supplied.)

CROCKETT, C. J., and CALLISTER, TUCKETT and ELLETT, JJ., concur.

23 Utah 2d 249

Bill S. WOODY, dba Woody Drilling Company, Plaintiff and Appellant,

v.

Bert RHODES and Vaughn Rhodes, Defendants and Respondents.

No. 11732.

Supreme Court of Utah.

Nov. 21, 1969.

The First District Court, Box Elder County, Lewis Jones, J., set aside a default judgment and plaintiff appealed. The Supreme Court, Tuckett, J., held that where sheriff's return showed that summons was served on one defendant by leaving copy of summons and complaint with his wife but deputy sheriff at time of service endorsed on copy left with wife that it was served on another defendant who although resident of another state was temporarily within county, service of summons was invalid.

Affirmed.

1. Process ⇐153

Where sheriff's return showed that summons was served on one defendant by leaving copy of summons and complaint with his wife but deputy sheriff at time of service endorsed on copy left with wife that it was served on another defendant who although resident of another state was temporarily within county, service of summons was invalid.

2. Judgment ⇐153(1)

Where service of summons was fatally defective, judgment entered pursuant thereto was without force or effect and court could properly set it aside even though motion to set aside default judgment was not made within three months period as required by rules. Rules of Civil Procedure, rule 60(b).

3. Judgment ⇐153(1)

Rule relating to filing motion to set aside default judgment within three months of entry of judgment has no application where default judgment was entered after invalid service of process. Rules of Civil Procedure, rule 60(b).

Ted S. Perry, Logan, for plaintiff-appellant.

Richard F. Gordon, Brigham City, for defendants-respondents.

TUCKETT, Justice.

The plaintiff commenced this action in the court below seeking to recover on a promissory note and also on an oral contract to drill a well for the defendants. Complaint was filed on February 15, 1968, and the summons was served on February 20, 1968, by a deputy sheriff of Box Elder

1. See also: Beckman v. Beckman, 88 Idaho 522, 401 P.2d 810 (1965); Harris v. Harris, 65 Nev. 342, 196 P.2d 402 (1948); Horn v. California-Ore. Power Co. 221 [illegible]; Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964); 5 Moore's Fed.Prac., Sec. 41.11(2), 1114; Link v. Wabash R.R. Co. 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.

County The sheriff's return shows that the summons was served on the defendant Vaughn Rhodes by leaving a copy of the summons and complaint with Mrs Vaughn Rhodes, wife of the defendant However, the deputy sheriff at the time of service endorsed on the copy of the summons left with Mrs Vaughn Rhodes the following: "Served this summons and complaint on the within named defendant Bert Rhodes on the 20th day of February, 1968, at Tremonton, Box Elder County, Utah" Bert Rhodes, who was a resident of the State of Nevada, was temporarily in Box Elder County, Utah, and upon his return home he took the copy of the complaint and summons with him A judgment by default was entered against the defendant Vaughn Rhodes on April 2, 1968, and the action was dismissed as against the defendant Bert Rhodes Vaughn Rhodes learned of the default judgment in January of 1969, and thereafter in April of that year filed a motion to set aside the default judgment The defendant also filed an answer and counterclaim

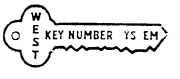
[1–3] After a hearing by the court, the court vacated and set aside the judgment It is the plaintiff's contention here that the provisions of Rule 60(b), Utah Rules of Civil Procedure, required that the defendant file his motion within a period of not more than three months after entry of the judgment It is quite apparent in this case that the facts show an invalid service of summons [1] The endorsement upon the summons which indicated that the defendant Bert Rhodes was being served would surely tend to mislead the defendant Vaughn Rhodes as to whether or not he was the person required to answer The service of summons being fatally defective, the judgment entered pursuant thereto is without force or effect and the court acted properly in setting it aside The three-months provision provided for in Rule 60(b) has no application to this situation

The plaintiff further contends that the order of the court setting aside the judgment also dismissed his action We do not interpret the order of the court as going that far. It appears that the defendant having answered and filed his counterclaim has now submitted himself to the jurisdiction of the court, and the court can now proceed to hear the case on its merits The defendant and respondent here does not claim that the plaintiff's complaint has been dismissed

The order of the court below setting aside the judgment by default is affirmed and the case is remanded to that court for further proceedings The respondent is entitled to costs

CROCKETT, C J, and CALLISTER and HENRIOD, JJ, concur

ELLETT, J, concurs in the result.



23 Utah 2d 252

Ennis D. COVERT, Plaintiff and Appellant,
v.
KENNECOTT COPPER CORPORATION, a New York corporation, Defendant and Respondent.
No. 11503.

Supreme Court of Utah
Nov 24, 1969

Action against husband's employer by widow to recover damages for emotional distress allegedly resulting from the mutilation of her husband's body during attempt to remove him from feeder compartment of ore crusher. The Third District Court, Salt Lake County, Stewart M Hanson, J, dismissed action on defendant's motion for summary judgment and

1 Columbia Trust Co v Steiner, 71 Utah 498, 267 P 788; Lashbrook v Copen Tax Commission v Larsen 100 Utah 103, 110 P 2d 558

Edward J. LUCAS, Petitioner,

v.

MURRAY CITY CIVIL SERVICE COMMISSION and Murray City Corporation, Respondents.

No. 960803–CA.

Court of Appeals of Utah.

Nov. 28, 1997.

City police officer appealed from decision of the city civil service commission, affirming his termination. The Court of Appeals, Wilkins, Associate P.J., held that: (1) commission violated police officer's due process rights by excluding from post-termination hearing evidence of retaliatory discharge; (2) substantial evidence failed to support commission's finding that officer lied about his gun's position, used to support dishonesty charge; and (3) even assuming officer was dishonest regarding placement of his gun, termination was so disproportionate to dishonesty charge that it amounted to abuse of chief's discretion.

Reversed.

Bench, J., concurred in result and filed opinion.

1. **Constitutional Law** ⇨277(2)

City police officer, as civil service employee, had property interest in continued employment subject to due process protection; Utah statute grants civil service employees security against discharge without cause. U.S.C.A. Const.Amend. 14; U.C.A. 1953, 10–3–1012.

2. **Constitutional Law** ⇨277(1)

Property interests subject to due process protection are created and their dimensions are defined by existing rules or understandings that stem from independent source such as state law. U.S.C.A. Const.Amend. 14.

must have more than abstract need, desir unilateral expectation of it; she must h legitimate claim of entitlement to U.S.C.A. Const.Amend. 14.

4. **Constitutional Law** ⇨278.4(5)

Officers and Public Employees ⇨7

If property interest in continued pu employment exists, then public employe entitled to procedures comporting with n mum requirements of due process, as pro ed in Constitution; however, if no prop interest exists, then employee must rely s ly upon any procedural protections affo by contract, ordinance, or state stat U.S.C.A. Const.Amend. 14.

5. **Constitutional Law** ⇨278.4(5)

Municipal Corporations ⇨185(4, 6)

City police officer was entitled to process by way of oral or written notic charges, explanation of city's evidence, portunity to respond to charges in somet less than full evidentiary hearing before mination, and full post-termination hearin meaningful time, as provided in Utah sta U.S.C.A. Const.Amend. 14; U.C.A.1953 3–1012.

6. **Constitutional Law** ⇨278(1.1)

Essential principle of due process quires that deprivation of any signif property interest be preceded by notice opportunity for hearing appropriate to ture of case. U.S.C.A. Const.Amend. 14

7. **Constitutional Law** ⇨251.6

Post-deprivation procedures, while constitutionally guaranteed, must cor with due process requirements providin fair hearing. U.S.C.A. Const.Amend. 14

8. **Officers and Public Employees** ⇨

In disciplinary proceedings, public must comply with its own rules and emp being disciplined is entitled to rely those rules.

9. **Constitutional Law** ⇨278.4(5)

Municipal Corporations ⇨185(3)

City police department's failure to

ment policy and completion of investigation within 46 days did not give rise to due process violation per se, where, other than asserting delay, officer revealed nothing about delay and failed to provide any evidence that delay was unreasonably prolonged. U.S.C.A. Const.Amend. 14.

10. **Constitutional Law** ⇐278.4(5)
Municipal Corporations ⇐185(6)

City police department complied with its policy, requiring written notification to police officer of allegations and rights and responsibilities relative to internal affairs investigation prior to investigation, and thus, due process was not violated; although officer did not receive written notice of either allegations of excessive force or dishonesty before initial interview, officer had actual notice of charges, was able to respond to them before termination, received written notice of charges before termination and failed to establish how these procedural errors were harmful. U.S.C.A. Const.Amend. 14.

11. **Constitutional Law** ⇐278.4(5)
Municipal Corporations ⇐185(9)

City civil service commission violated police officer's due process rights by excluding from post-termination hearing evidence of retaliatory discharge, where such evidence directly related to credibility of two of three witnesses upon whose testimony commission relied in reaching its decision and witness' credibility was directly relevant and material to commission's fair evaluation of termination decision made by one witness. U.S.C.A. Const.Amend. 14.

12. **Municipal Corporations** ⇐185(9)

City civil service commission's decision to grant city's motion in limine without providing any findings, conclusions, or reasoning was arbitrary and capricious, and thus, commission abused its discretion in granting motion excluding evidence of retaliatory discharge of police officer.

13. **Administrative Law and Procedure** ⇐485

Agency's failure to make adequate findings of fact in material issues renders its findings arbitrary and capricious unless evidence is clear, uncontroverted and capable of only one conclusion.

14. **Municipal Corporations** ⇐218(8)

City civil service commission is local, municipal tribunal of limited jurisdiction, not subject to Utah Administrative Procedures Act (UAPA) or bound by formal rules of evidence and procedure. U.C.A.1953, 63–46b–1 et seq.

15. **Municipal Corporations** ⇐218(8)

Although city civil service commission is not bound by formal rules of evidence and procedure, it is not above the law; in absence of formal legal rules, commission must determine what evidence should, in fairness, be admitted and evidence must be legally relevant, in that it has some probative weight and reliability.

16. **Appeal and Error** ⇐842(6)

Whether certain evidence is relevant is question of law, which Court of Appeals reviews under correction-of-error standard.

17. **Witnesses** ⇐363(1)

Testimony reflecting on bias and motives of witness is admissible at trial.

18. **Municipal Corporations** ⇐185(12)

City civil service commission's error in excluding from post-termination hearing evidence of retaliatory discharge in violation of police officer's due process rights was not harmless, where proffered evidence directly related to credibility of two of three witnesses upon whose testimony commission relied in reaching its decision and had commission heard such evidence, there was substantial likelihood of different outcome. U.S.C.A. Const.Amend. 14.

19. **Appeal and Error** ⇐1050.1(1), 1056.1(1)

Erroneous decision to admit or exclude evidence does not constitute reversible error unless error is harmful.

20. **Municipal Corporations** ⇐185(12)

Although city civil service commission may have erred in excluding from police officer's post-termination hearing audiotape of arrestee, which officer intended to use for impeachment purposes, error was harmless, where officer had access to but failed to avail

himself of other means available to impeach arrestee.

21. **Municipal Corporations** ⇐185(8)

City civil service commission did not exceed its authority by either deferring to independent advisor's legal advice or acquiescing to advisor's active participation in police officer's post-termination hearing, where ultimate responsibility for all these matters rested with commission and it was at liberty to rely upon advice of its chosen legal advisor.

22. **Officers and Public Employees** ⇐72.31

City civil service commission's authority on review of disciplinary decisions involves inquiries as to whether facts support charges made by department head, and, if so, whether charges warrant sanction imposed.

23. **Municipal Corporations** ⇐185(10)

Substantial evidence failed to support city civil service commission's finding that police officer lied about his gun's position, used to support dishonesty charge; arrestee gave inconsistent statements regarding placement of gun and unsubstantiated allegations of excessive force, other officer stated that he did not see gun pointed at arrestee, and officer consistently maintained that he perceived his gun to be holstered, but recognized possibility that it could have been unholstered and pointed at floor.

24. **Municipal Corporations** ⇐218(9)

Substantial evidence standard applies when Court of Appeals reviews factual findings of city civil service commission in disciplinary proceeding.

25. **Administrative Law and Procedure** ⇐791

"Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince reasonable mind to support conclusion.

See publication Words and Phrases for other judicial constructions and definitions

26. **Municipal Corporations** ⇐218(9)

Court of Appeals defers to city civil service commission's findings in disciplinary

27. **Municipal Corporations** ⇐185(11)

Discipline imposed for employee misconduct is within sound discretion of city police chief.

28. **Municipal Corporations** ⇐185(11)

City police chief abuses his discretion in imposing discipline on employee if punishment exceeds range of sanctions permitted by statute or regulation, or if, in light of all circumstances, punishment is disproportionate to offense.

29. **Municipal Corporations** ⇐185(11)

Pursuant to city civil service commission's rules and regulations, providing that discipline is vested in appointing power, that progressive discipline shall be administered by appointing power and that severity of offense will determine steps required for progressive discipline, use of progressive discipline is committed to police chief's discretion, based on chief's determination of severity of offense.

30. **Municipal Corporations** ⇐185(1)

Even assuming city police officer was dishonest regarding placement of his gun, termination was so disproportionate to dishonesty charge that it amounted to abuse of chief's discretion, where charge was based on unsubstantiated claim of excessive force which never determined gun placement, evidence supporting charge was slim and inconsistent, other officers disciplined solely for dishonesty were suspended and officer's service record was exemplary.

Bryon J. Benevento and D. Matthew Moscon, Salt Lake City, for Petitioner.

H. Craig Hall, Murray, and Dennis C. Ferguson, Salt Lake City, for Respondents.

Before WILKINS, Associate P.J., and DAVIS and BENCH, JJ.

OPINION

WILKINS, Associate Presiding Judge:

Petitioner Edward J. Lucas appeals the decision of the Murray City Civil Service

mination as a Murray City Police Officer. We reverse the Commission's decision and reinstate Lucas with back pay.

BACKGROUND

Lucas served as a police officer for the Murray City Police Department (Department) from July 1, 1985 through August 21, 1996. During that time, Lucas was considered by his superiors to be an outstanding officer. His service record shows that he had always met or exceeded the Department's expectations and that he received all available merit raises. In addition, Lucas's exemplary service earned him the "Merit of Honor" award—the most prestigious award presented to an officer. He is the only officer in the Department to have ever received this honor. Until August 1996, Lucas had never been reprimanded, disciplined, or investigated by internal affairs.

On August 21, 1996, the Department fired Lucas for allegedly lying during an internal affairs investigation regarding an allegation that Lucas had used excessive force while searching an arrestee. The internal affairs investigation arose from the circumstances surrounding the May 27, 1996 arrest of Martin Spegar.

On the evening of May 27, Officers Snow, Johnson, and Lucas were dispatched to a Murray City car dealership to investigate a vehicle burglary in progress. Upon arriving, Officer Snow saw two males running through a parking lot adjacent to the dealership and climbing over a wall. Within moments, Officer Snow received information that three suspects had been apprehended. Officer Johnson had one suspect, Dustin Garcia, in custody, and Officer Lucas had apprehended the others, Michael Hamblin and Spegar. Because it was dark and raining, the officers performed only a basic pat down search at the scene before taking them to the Murray City Police Department. Lucas transported Spegar without incident, and was, as Spegar stated, very courteous.

At the station, Spegar and Hamblin were placed in adjoining offices. Garcia was placed in an interview room about twenty to thirty feet away from both Spegar and Hamblin. Officer Johnson searched Hamblin, Officer Snow searched Garcia, and Officer Lucas "kept an eye on Spegar." During that time, Officer Lucas performed a more thorough search and asked Spegar to empty his pockets. After Officer Snow saw Spegar emptying his pockets, he walked into the room to take Spegar's statement and Officer Lucas left. Nothing was said. Eventually, all three suspects were searched, mirandized, interviewed, and taken to jail. En route to the jail, Officer Snow noted that Spegar was not upset and was joking with his friends.

A few days later, Lieutenant Fondaco, Lucas's superior, received a letter about Lucas's alleged conduct during Spegar's search. Spegar's written statement alleged:

> [Officer Lucas] told me to stand up and empty my pockets onto the table, and also to take off my hat. He then asked me to wait before I did it. He [illegible] for a minute and took out his gun from his holster and pointed it in the direction of my head. He was standing about three feet away from me. He then [said] "I dare you to pull out a gun because if you do I swear that I will [ ] kill you," and that your brains will be splattered on the wall!
>
> I then [said] "Hey man, I might be crazy trying to break into cars, but I'm not going to pull anything on you."
>
> [Lucas] said, "I don't care, but I am that crazy."

On June 10, 1996, Lieutenant Fondaco began an internal affairs investigation into Officer Lucas's alleged use of excessive force. During the investigation, Lucas was interviewed on two separate occasions. During the first interview, conducted by Lieutenant Fondaco, Lucas described the incident as follows. Lucas stated that he walked into the room where Spegar was being held. He unhandcuffed Spegar and told him to empty his pockets. Instead of reaching for his pocket, Spegar reached for the crotch area of his pants. Lucas testified that he believed that Spegar may have been going for a weapon because he knew, as a result of his cursory search of Spegar at the scene, that Spegar had something in his pocket. Immediately, Lucas reacted by pushing Spegar away, yelling "put your hands on the wall," and reach-

ing for and unsnapping his weapon. He stated that he believed that he started to pull his gun out, but that it remained in the holster. At that point, Lucas searched Spegar's legs and crotch, and then asked Spegar to empty his pockets, which contained pliers, a flashlight, and other miscellaneous items.

At some time during the internal affairs investigation, Officer Snow gave a written statement regarding what he observed. Officer Snow related that after searching Garcia and taking his statement in the interview room, he went down the hall toward the office in which Spegar was being held. Officer Snow paused briefly before entering the office when he noticed that Officer Lucas had his gun out of its holster and pointed at the ground, in a "low ready position." He saw Spegar standing sideways, not looking directly at Officer Lucas. He watched as Spegar took off his hat and noticed a flashlight and pliers on the table. Officer Snow stated that as he entered the room to take Spegar's statement, Officer Lucas holstered his weapon and then left. He stated he did not hear or observe anything that had happened before and stated he did not see Officer Lucas point his gun at Spegar. In addition, Officer Snow filed a police report and did not mention any of the events he observed between Officer Lucas and Spegar because, as he stated, "I hadn't even considered it a policy violation."

Garcia asserted that while in the interview room, about twenty to thirty feet away, he overheard Lucas threaten Spegar. However, Hamblin, who was in the office next to Spegar, heard nothing. Moreover, Officer Snow, who was en route from Garcia's room to Spegar's room, also heard nothing.

As a result of this information, the focus of the internal affairs investigation became whether Lucas had been dishonest during the excessive force investigation. As part of the investigation, both Lucas and Spegar agreed to take a polygraph test on July 11, 1996. During the polygraph test, Spegar initially stated that Lucas had pointed the gun at his head. Then, as the interview progressed, he stated that, looking back, the gun may have been pointed at him or elsewhere such as toward the floor. Spegar did however, state that Lucas's gun was definitely out of its holster. During Lucas's polygraph test, Lucas stated that he still perceived that his gun was holstered, but that he had no reason to doubt Officer Snow's statement. Both interviews were transcribed. Lucas's polygraph test could not be administered because "yes" and "no" questions could not be posed; Spegar's test was inconclusive.

After reviewing this information, Lieutenant Fondaco concluded that Officer Lucas had been dishonest and, on July 26, 1996, recommended that he be discharged. On August 5, 1996, Officer Lucas received a pretermination notice listing four grounds for discharge: (1) dishonesty in denying the events which occurred concerning a service weapon; (2) excessive force; (3) improper search techniques; and (4) conduct unbecoming an officer. On August 7, 1997, Chief Killian conducted Lucas's pretermination hearing. During that hearing, Lucas tried to address each of the grounds for termination, although the record shows that even the Chief was unclear as to what evidence supported the charge of "improper search techniques." In discussing the charges, Lucas again explained:

> Spegar is in my custody. I start to pat him down. He's got something protruding from his pocket. I grab it and pull on it. He starts yelling. What's wrong? He's not saying anything, just smiles. It's kind of weird. Pulled on it again, obvious discomfort. Well, it's dark here, I can't see what's going on. It's raining. It's inappropriate to do this here. I'm not going to unhandcuff him outside in the street to let him empty his pockets, and I'm not sticking my hand down in there. I don't know if it's a blade. I don't know what's going on. So, obviously it's going to be something he's gonna have to do. I'm going to do that in a well-lit situation, in the department, so I chose to transport him as such. Handcuff him in my front seat where I could keep an eye on him where if he does make any further movements, I can take appropriate action.
>
> . . . .
>
> I believe he has sharp devices in his pocket which may injure myself or himself be-

cause of previous occurrences out in the field. Okay, the instructions were clearly given. The first thing he does is put both hands directly down in his crotch, the location of choice for people out in the street to carry a weapon. Now in direct correspondence with my training, I react. My hand goes up, and I keep him away from [me]. My hand goes for my weapon. I unsnap it, and it starts to come out. Now at this point, this is where we have a problem because I am leaning forward pushing against the wall telling him to get his hands against the wall, "what the hell do you think you're doing?" ... My perception when I was questioned about it, it's in the holster. Yes, it's ready to come out because I am acting accordingly, according to my training, and I'm ready to do whatever is necessary.

On August 21, 1996, Chief Killian ordered Lucas's discharge based on dishonesty, specifically the "untruthful statements" made by Lucas during the course of the internal affairs investigation and during the pretermination hearing. Lucas timely appealed to the Civil Service Commission, which scheduled a hearing on November 19, 1996.

Before that hearing, the Commission heard argument on Murray City's "Motion in Limine" to exclude from the hearing any evidence regarding Lucas's claim of a retaliatory discharge and to exclude witnesses, which Lucas argued would testify in support of this claim. Lucas claimed that Lieutenant Fondaco and Chief Killian's motives for recommending and then ordering his discharge were based on claims of police misconduct he had filed with the Utah Attorney General's office.[1] Without any reasoning, findings, or conclusions, the Commission granted the motion.

After the hearing on November 19, 1996, the Commission affirmed Chief Killian's decision to terminate Officer Lucas, finding his statements regarding the use of his weapon both inconsistent and incredible because his statements had "changed substantially" from interview to interview. Officer Lucas appeals the Commission's decision.

STANDARD OF REVIEW

Our review of the Commission's final order, which affirmed Officer Lucas's discharge from the Department, is limited to "determining if the commission has abused its discretion or exceeded its authority." Utah Code Ann. § 10-3-1012.5 (1996); *Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm'n,* 908 P.2d 871, 874 (Utah Ct.App. 1995).

ANALYSIS

Lucas challenges on several grounds the Commission's decision to affirm his discharge. Initially, Lucas asserts this case should be remanded to the Commission for a new hearing because the Commission violated his due process rights by: (1) failing to comply with the Department's policy and procedure during Lucas's disciplinary hearing; (2) excluding audiotape evidence required to impeach Spegar's testimony; (3) excluding evidence in support of Lucas's claim of retaliatory discharge; and (4) allowing its legal advisor to participate in the capacity of a commissioner. In addition, Lucas asserts he should be reinstated with back pay because (1) insufficient evidence exists to support the dishonesty charge, and (2) termination is a disproportionate punishment for such a charge.

I. PROPERTY INTEREST DUE PROCESS ANALYSIS

[1] Lucas argues he has a property inter-

1. Lucas's claim of retaliatory discharge is based on claims of misconduct that he and another officer filed with the Utah Attorney General's office against Lieutenant Fondaco and the Department. According to Lucas, Lieutenant Fondaco often used excessive force against arrestees and was involved in a bid-rigging scheme involving vehicle repair underpricing. These claims, Lucas alleges, infuriated Chief Killian," who demanded the claims be dropped and demanded to know the identities of the officers making the allegations. According to Lucas and two other witnesses, Chief Killian was aware that Lucas had made the allegations of misconduct. In response, the City provided affidavits from Chief Killian and Lieutenant Fondaco, in which both stated they did not know the identity of the claimants.

est in continued public employment,[2] entitling him to notice and an opportunity to be heard before any deprivation of that interest. The City argues Lucas was afforded due process consistent with that required in Utah Code Ann. § 10–3–1012 (1996) and that any procedural defect was immaterial to the Commission's determination that Lucas's discharge was appropriate. Before addressing the specific due process arguments, we must first determine if Lucas has a property interest in continued public employment, which interest cannot be deprived except pursuant to constitutionally adequate procedures. In addition, we must determine to what process Lucas is entitled.

[2, 3] The Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of property without due process of law.[3] *See* U.S. Const. amend. XIV, sec. 1. While the Constitution guarantees due process before the deprivation of property interests, such interests are not created by the Constitution. Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." *Id.*

[4] In *Board of Regents v. Roth*, the United States Supreme Court stated that public employees have a property interest in continued employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge. *See id.* at 576–78, 92 S.Ct. at 2708–10. If a property interest in continued employment exists, then the employee is entitled to procedures comporting with the minimum requirements of due process, as provided in the Constitution. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985) (" '[M]inimum [procedural] requirements [are] a matter of federal law[;] they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' " (quoting *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980))). If no property interest exists, then the employee must rely solely upon any procedural protections afforded by contract, ordinance, or state statute.

In this case, we look to state law, specifically the Civil Service statute, Utah Code Ann. § 10–3–1012 (1996), to determine whether Lucas has a property interest in continued employment as a police officer absent "sufficient cause" for discharge. Section 10–3–1012 provides, in pertinent part:

> All persons in the classified civil service may be suspended as provided in Section 10–3–912, or removed from office or employment by the head of the department for *misconduct, incompetency, failure to perform his [or her] duties, or failure to observe properly the rules of the department*, but subject to appeal by the suspended or discharged person to the civil service commission ... which shall fully hear and determine the matter.

Utah Code Ann. § 10–3–1012 (1996) (emphasis added). The statute specifically lists the reasons for which a civil service employee may be discharged. The reasons supporting discharge are clearly directed at employee behavior that "is detrimental to the efficiency of the employing agency." *Arnett v. Kennedy*, 416 U.S. 134, 162–63, 94 S.Ct. 1633, 1648–49, 40 L.Ed.2d 15 (1974) (interpreting statute providing for discharge for "such cause as will promote the efficiency of the service" to prohibit discharge "without cause"). This language, with "unmistakable clarity," grants civil service employees security against discharge "without cause," *id.* at 154, 94 S.Ct. at 1644, and thus limits both the department

2. The Utah Supreme Court has referred to public employment as a property right requiring due process upon discharge. *See Worrall v. Ogden*

3. The Utah Constitution guarantees the same protection under article I, section 7

head's and the Commission's discretion in making employment decisions. *See Marvin v. King*, 734 F.Supp. 346, 354 (S.D.Ind.1990) (stating Commission cannot base discharge on "arbitrary matter [upon] which employers of at-will employees are free to base their employment decisions"); *Boreen v. Christensen*, 267 Mont. 405, 884 P.2d 761, 767 (1994). Therefore, as a civil service employee, Lucas had a vested right to continued employment absent a legal cause for termination.

II. PRE-DEPRIVATION & POST-DEPRIVATION DUE PROCESS

[5–7] Because section 10–3–1012 confers upon civil service employees a property interest in continued employment, we must determine what process is due. The essential principle of due process requires that a deprivation of any significant property interest "be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656–57, 94 L.Ed. 865 (1950) (emphasis added) "An employee's right to fair notice and an opportunity to 'present his [or her] side of the story' before discharge is not a matter of legislative grace, but of 'constitutional guarantee.'" *Loudermill*, 470 U.S. at 541, 105 S.Ct. at 1493. Post-deprivation procedures, while not constitutionally guaranteed, must comport with due process requirements providing for a fair hearing. *See Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1496 (stating due process requires post-termination administrative procedures "at a meaningful time" as provided by statute), *see also Bunnell v Industrial Comm'n*, 740 P.2d 1331, 1333 (Utah 1987) ("[E]very person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal.").

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the United States Supreme Court determined what process is due a discharged employee with the right to continued employment. In doing so, the Court balanced the competing interests at stake, including "the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of erroneous termination." *Id.* at 542–43, 105 S.Ct. at 1493; *accord Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). In light of these interests, the Court concluded that before termination, minimum due process entitles an employee to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to present his or her side of the story in "'something less' than a full evidentiary hearing." *Loudermill*, 470 U.S. at 542, 545, 105 S.Ct. at 1493, 1495 (quoting *Mathews*, 424 U.S. at 343, 96 S.Ct. at 907). In addition, because the Ohio statute, which created the property interest in public employment, also provided for a full post-termination hearing, the *Loudermill* Court also determined that due process in that case required a full, timely post-termination hearing.[4]

4. As the Utah Supreme Court has stated
> Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances It is flexible and requires such procedural protections as the particular situation demands In an analysis of a procedure, an important factor is the risk of an erroneous deprivation of a private interest through the procedures, and the probable value, if any, of additional or substitute procedural safeguards

Worrall, 616 P.2d at 602 The *Loudermill* Court also recognized the flexibility of due process, stating that the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures The Court stated that in some instances a post-deprivation hearing will satisfy due process requirements *See Cleveland Bd of Educ v Loudermill*, 470 U S 532, 542 n 7, 105 S Ct 1487, 1493 n 7, 84 L Ed 2d 494 (1985) And, in some instances, as *Loudermill* establishes, both pretermination and post-termination procedures are required However, Justice Marshall emphasized in his concurrence in *Loudermill* that due process requires more, in that, before a decision is made to terminate employment an employee should be entitled to test the strength of the evidence by confronting and cross-examining adverse witnesses *See id* at 548–49, 105 S Ct at 1496–97 (Marshall, J , concurring) He argued that better pretermination procedures would ensure against the risk of an erroneous deprivation, resulting in lost wages and undue delay *See id* at 549, 105 S Ct at 1497 (Marshall, J , concurring) However al-

Applying *Loudermill*, we conclude that under both the Fourteenth Amendment and the provision in section 10–3–1012 for a post-termination hearing, Lucas is entitled to due process by way of oral or written notice of the charges, an explanation of the employer's evidence, an opportunity to respond to the charges in "something less" than a full evidentiary hearing before termination, coupled with a full post-termination hearing "at a meaningful time." *Loudermill*, 470 U.S. at 546–47, 105 S.Ct. at 1495–96; *see also Mondt v. Cheyenne Police Dep't*, 924 P.2d 70, 82 (Wyo.1996) (requiring full evidentiary hearing and examination of witnesses as provided by statute). It is a clear abuse of discretion for the Commission to exercise its discretion in such a way as to deny due process to a party appearing before it. *See Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 (Utah Ct.App.1991).

We therefore address Lucas's due process arguments in light of both constitutionally and statutorily required pre- and post-termination due process procedures.

A. City's Failure to Comply with Its Rules and Regulations in Course of Disciplinary Action

[8] Pretermination due process requires notice of the charges, an explanation of the evidence, and an opportunity to respond. To give effect to these constitutional protections, public agencies such as the Department and the Commission promulgate rules and regulations governing disciplinary procedures. "In disciplinary proceedings, a public body must comply with its own rules and an employee being disciplined is entitled to rely upon those rules." *Bell v. Civil Serv. Comm'n*, 161 Ill.App.3d 644, 113 Ill.Dec. 439, 443, 515 N.E.2d 248, 252 (1987). Lucas asserts that the Department deprived him of due process by failing to comply with its own procedures that limit the time to conduct an internal affairs investigation and that provide for written notice of the allegations. *See Worrall*, 616 P.2d at 601, 602 (stating officer had property interest in continued employment requiring due process through established guidelines to terminate that employment).

[9] First, Murray City Police Department Policy 555, III(E) requires the Department complete internal affairs investigations within thirty days. The record shows that the investigation here lasted about forty-six days, violating Department policy. However, beyond merely asserting that a delay occurred, Lucas reveals nothing about the delay and fails to provide any evidence that the delay was unreasonably prolonged. A mere delay alone in conducting an internal affairs investigation does not rise to the level of a constitutional violation per se. *See, e.g., Loudermill*, 470 U.S. at 547, 105 S.Ct. at 1496 (holding that nine-month delay in post-termination hearing is not unconstitutionally lengthy per se).

[10] Second, Murray City Police Department Policy 555, III(G) requires that "[p]rior to any interview of an accused member as part of an Internal Affairs Investigation, the member will be given written notification of the allegations, and their rights and responsibilities relative to the investigation." Lucas argues he received inadequate notice of the charges against him in that before his initial interview, he was not informed or given written notice of the excessive force investigation, and, when the investigation changed focus to dishonesty, he was not told orally or in writing.

Although the record shows the Department failed to strictly comply with its procedure, the fundamental requirements of due process were met. Lucas did not receive written notice of either allegations of excessive force or dishonesty; however the record shows that Lucas did in fact have notice of the pending charges and was able to respond to the charges before the termination was implemented. First, although hesitantly, Lieutenant Fondaco told Lucas that the initial interview was based on an allegation of excessive force and, during the interview, Lieutenant Fondaco read Spegar's written

though arguing due process should provide more protection before termination, Justice Marshall concurred to the extent the parties in *Loudermill* requested only notice and an opportunity to be heard. *See id.* at 548, 105 S.Ct. at 1496 (Marshall, J., concurring).

statement to Lucas. Second, the transcript of Lucas's polygraph test interview clearly shows Lucas's knowledge of Spegar's complaint and Officer Snow's statement. In fact, Lucas repeatedly clarified that his original statement was not "dishonest" and that he "does not lie." Third, prior to termination, Lucas was formally notified in writing of the charges against him. And, finally, he was afforded a pretermination hearing in which he specifically addressed each charge and the evidence against him.

Furthermore, Lucas fails to establish how these procedural errors were harmful, e.g., he did not have time to prepare for the hearing or, how these procedures would have resulted in a different outcome absent such errors. *See, e.g., Loudermill,* 470 U.S. at 547, 105 S.Ct. at 1496; *cf. State v. Knight,* 734 P.2d 913, 920 (Utah 1987) ("[T]he likelihood of a different outcome must be sufficiently high to undermine confidence in [the decision]."); *State v. Villarreal,* 857 P.2d 949, 958 (Utah Ct.App.1993) (stating evidence must be "sufficiently inconsequential that we conclude there is no 'reasonable likelihood that the error affected the outcome of the proceedings' " (quoting *State v. Verde,* 770 P.2d 116, 120 (Utah 1989)), *aff'd,* 889 P.2d 419 (Utah 1995)). Under the facts of this case, we cannot say that Lucas was denied due process when the record shows that Lucas had actual notice of the excessive force and dishonesty charges, received written notice of the charges against him, and had a pretermination opportunity to respond to the charges.

B. Commission's Exclusion of Retaliatory Discharge Evidence

[11] Lucas argues the Commission failed to provide him with a full and fair post-termination hearing by excluding evidence supporting his theory of retaliatory discharge. Before Lucas's post-termination hearing, the Department moved to exclude all evidence supporting his claim that his discharge was based on Lieutenant Fondaco's and Chief Killian's alleged bias and retaliatory motives. The Commission, without making any findings or providing any reasoning, granted the Department's motion.

[12, 13] Lucas challenges the exclusion of the retaliatory discharge evidence, arguing that the Commission erred in excluding evidence of Lieutenant Fondaco's and Chief Killian's alleged biases and retaliatory motives, which Lucas claims are admissible under Rule 608 of the Utah Rules of Evidence and Utah Code Ann. § 78–24–1 (1996).[5] The City counters by arguing such evidence was irrelevant and immaterial to the Commission's limited inquiry—whether Lucas was dishonest, and whether the charge of dishonesty warranted Lucas's discharge.

[14] Before addressing Lucas's argument, we recognize that the Civil Service Commission is a local, municipal tribunal of limited jurisdiction. *See Piercey v. Civil Serv. Comm'n.* 116 Utah 135, 141, 208 P.2d 1123, 1125–26 (1949); *Salt Lake City Corp.,* 908 P.2d at 875. The Commission is neither a court of law nor a state administrative agency subject to the Utah Administrative Procedures Act (UAPA). *See Tolman,* 818 P.2d at 26 n. 3 (stating UAPA only applies to state, not local, agency action). In addition, as a municipal administrative body, the Commission is not bound by formal rules of evidence and procedure. *See* Murray City Civil Service Commission, Rules and Regulations 13–10 (1996) ("At all hearings the Commis-

5. Lucas also argues that the Commission erred in granting the City's motion to exclude the evidence without giving any reasoning and without making any findings or conclusions to support its decision. This court has emphasized that an administrative agency must make findings of fact that are sufficiently detailed so as to permit meaningful appellate review. *See Adams v. Board of Review of Indus. Comm'n,* 821 P.2d 1, 4 (Utah Ct.App.1991). For us to meaningfully review the Board's findings, the findings must be "... sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." The failure of an agency to make adequate findings of fact in material issues renders its findings "arbitrary and capricious" unless the evidence is "clear, uncontroverted and capable of only one conclusion." " " *Id.* at 4–5 (quoting *Nyrehn v. Industrial Comm'n,* 800 P.2d 330, 335 (Utah Ct.App.1990) (citations omitted)). In this case, the Commission's decision granting Murray City's Motion in Limine without providing any findings, conclusions, or reasoning was arbitrary and capricious. Therefore, the Commission abused its discretion.

sion will determine the admissibility of evidence and shall use as near as it deems practicable the rules of evidence followed in the Courts in this State."); *cf. Pilcher v. State Dep't. of Soc. Servs.*, 663 P.2d 450, 453 (Utah 1983) ("Administrative proceedings are usually conducted with greater flexibility and informality than judicial proceedings[, thus,] [r]igid adherence to judicial procedures in administrative proceedings is generally inappropriate because it ignores basic differences between judicial and administrative procedures.").

[15, 16] However, although the Commission is not bound by formal rules of evidence and procedure, it is not above the law. *See Tolman*, 818 P.2d at 31. In the absence of formal legal rules, the Commission must "determine what evidence should, in 'fairness,' be admitted." *Id.* The evidence must be legally relevant, in that it has " 'some probative weight and reliability.' " *Id.* (citation omitted). "Whether certain evidence is relevant ... is a question of law, which we review under a correction-of-error standard." *State v Gonzalez*, 822 P.2d 1214, 1216 (Utah Ct.App.1991).

In this case, evidence relating to Chief Killian's and Lieutenant Fondaco's credibility, i.e., evidence of bias and retaliatory motives, is relevant and material to the Commission's review of Chief Killian's decision to discharge Lucas. Lucas argues that Chief Killian's decision and Lieutenant Fondaco's recommendation to discharge him were based on retaliation. It is widely recognized that an employer's motive is a key element of retaliatory discharge. *See Lihosit v. I & W, Inc.*, 121 N.M. 455, 913 P.2d 262, 265 (N.M.Ct.App.1996). Moreover, under both the Utah Rules of Evidence and Utah law, evidence of a witness's motive or bias is admissible to challenge that witness's credibility.

[17] Rule 608(c) of the Utah Rules of Evidence provides that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Similarly, Utah Code Ann. § 78–24–

> in every case[,] the credibility of the witness may be drawn into question, by the manner in which he [or she] testifies, by the character of his [or her] testimony, or by evidence affecting his [or her] character for truth, honesty or integrity, or by his [or her] motives, or by contradictory evidence.

Utah case law supports the well established principle that testimony reflecting on the bias and motives of a witness is admissible at trial. *See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 459 (Utah 1993); *State v. Hackford*, 737 P.2d 200, 203 (Utah 1987); *State v. Leonard*, 707 P.2d 650, 656 (Utah 1985); *State v. Patterson*, 656 P.2d 438, 438 (Utah 1982). Although the Commission is not bound by formal rules, due process requires that in a full post-termination hearing, an employee be given an opportunity to introduce evidence and cross-examine witnesses, which includes challenging witness credibility. *See Post v. Harper*, 980 F.2d 491, 493 (8th Cir.1992).

In this case, the Commission's role is limited to either affirming or reversing the *Chief's* decision to terminate Lucas, a decision based in part on Lieutenant Fondaco's recommendation. The Commission relied on the testimonies of Chief Killian, Lieutenant Fondaco, and Martin Spegar in reaching its decision to affirm the Chief's discharge order. The excluded evidence of Chief Killian's and Lieutenant Fondaco's intent, bias, and motives directly relates to their credibility The Commission's exclusion of the retaliatory discharge evidence prevented Lucas from challenging the credibility of two primary witnesses. In addition, the Commission's failure to consider evidence challenging Chief Killian's credibility effectively prevented the Commission from properly reviewing the Chief's decision to terminate Lucas. *See Tolman*, 818 P.2d at 32 (holding County Career Services Council's failure to consider terminated employee's legal contentions prevented fair review of county attorney's decision to terminate employee). Therefore, the Commission erred in excluding Lucas's evidence of retaliatory discharge because that evidence was relevant to Chief Killian's credibility and to the Commission's review of the

Board of

Review of Indus. Comm'n, 748 P.2d 569, 572 (Utah 1987) (holding Commission erred in excluding critically relevant and material testimony).

[18, 19] Murray City, however, argues that even if the Commission erred in excluding the evidence regarding Lucas's claim of retaliatory discharge, the error was harmless. Murray City correctly notes that "[a]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful." *Cal Wadsworth Constr. v. St. George*, 898 P.2d 1372, 1378 (Utah 1995). However, as stated above, the evidence Lucas proffered directly relates to the credibility of Chief Killian and Lieutenant Fondaco, two of the three witnesses whose testimony the Commission relied upon in reaching its decision. In addition, because the Commission is limited to either affirming or reversing the Chief's decision, his credibility, motives, and bias are directly at issue. Had the Commission heard the retaliatory discharge evidence, there is a substantial likelihood of a different outcome sufficient to undermine our confidence in the Commission's decision to affirm Lucas's discharge. *See Harline v. Barker*, 912 P.2d 433, 442 (Utah 1996).

Thus, because the credibility of both Lieutenant Fondaco and Chief Killian is directly relevant and material to the Commission's fair evaluation of the Chief's decision to terminate Lucas, the Commission erred in excluding the evidence supporting Lucas's claim of retaliatory discharge. The Commission thereby violated Lucas's right to due process in excluding the evidence of retaliatory discharge and preventing Lucas from effectively challenging witness credibility.

C. Commission's Exclusion of Audiotape for Impeachment Purposes

[20] During the tape-recorded polygraph interview, Spegar acknowledged that he could have been mistaken as to the placement of Lucas's gun, stating the gun could have been pointed at his head, his torso, or down at the floor. However, during cross-examination at the post-termination hearing, Spegar denied making that statement and testified that he knew the gun was pointed directly at him. Lucas attempted to impeach Spegar by playing the tape-recording of Spegar's polygraph interview. The Commission, however, via its legal advisor's sua sponte ruling, excluded the audiotape for lack of foundation, concluding that Spegar could not authenticate his own voice.

We agree the Commission may have erred in excluding the audiotape evidence for lack of foundation. *See* Utah R. Evid. 901(b)(5) (allowing party to authenticate own voice); *see, e.g., People v. Williams*, 16 Cal.4th 635, 66 Cal.Rptr.2d 573, 589, 941 P.2d 752, 768 (1997) (stating audiotape admissible upon detective's testimony that he was party to recorded conversation). However, the Commission did not prevent Lucas from impeaching Spegar. Lucas had access to, but failed to avail himself of, other means available to impeach Spegar at the time he testified, e.g., the transcribed copy of the polygraph interview. The transcription was later admitted into evidence, but never used to impeach Spegar. Therefore, the error was harmless. *See State v. Knight*, 734 P.2d 913, 920 (Utah 1987); *accord Villarreal*, 857 P.2d at 957–58.

D. Commission's Authority to Allow Legal Advisor's Active Participation

[21] Lucas argues that the Commission exceeded its statutorily limited authority in allowing its legal advisor to actively participate, question, and make sua sponte rulings as to the admissibility of evidence during the hearing. We disagree. There is nothing in either the statute creating the Commission's authority, Utah Code Ann. §§ 10-3-1001 to -1013 (1996), or the Murray City Civil Service Commission's Rules and Regulations to preclude or limit the Commission's use of a legal advisor. Further, because the Commission must deal with both evidentiary rules and legal issues, advice from independent legal counsel may in many cases be necessary. A conflict would arise if the Commission's legal advisor simultaneously served as both an advocate and an advisor. *See Hamilton v. City of Mesa*, 185 Ariz. 420, 916 P.2d 1136, 1143 (Ariz.Ct.App.1995). However, absent a showing of any actual bias or partiality, there is no due process violation. *See, e.g., id*

(holding city manager seeking advice from independent legal advisor, absent showing of actual bias or partiality, insufficient to establish due process violation). In this case, the Commission did not exceed its authority by either deferring to the independent advisor's legal advice or acquiescing to the advisor's active participation in the hearing. The ultimate responsibility for all these matters rests with the Commission, and it is at liberty to rely upon the advice of its chosen legal advisor.

III. COMMISSION'S REVIEW OF CHIEF'S DECISION

[22] Section 10–3–1012 states the Commission "shall fully hear and determine" appeals of suspension or termination brought by civil service employees. The Utah Supreme Court, in *Vetterli v. Civil Service Commission*, 106 Utah 83, 145 P.2d 792 (1944), established that the Commission's review of disciplinary decisions involves two inquiries: (1) do the facts support the charges made by the department head, and, if so, (2) do the charges warrant the sanction imposed? *See id.*, 145 P.2d at 796; *In re Discharge of Jones*, 720 P.2d 1356, 1361 (Utah 1986). If the Commission answers no to either of these inquiries, it must reverse the department head's actions.

A. Factual Basis for Dishonesty Charge

[23, 24] We first address whether the facts support the charge of dishonesty. In addressing this issue, we must determine the appropriate standard of review to be applied to the Commission's findings. As stated above, the Commission is a local, municipal agency regulating employment in the police, fire, and health departments; it monitors hiring, promotion, suspension, and termination in those city agencies. *See* Utah Code Ann. §§ 10–3–1001 to –1011 (1996); *accord Salt Lake City Corp.*, 908 P.2d at 875. The Commission also hears appeals from department heads' suspension and termination decisions. *See* Utah Code. Ann. §§ 10–3–1012 to –1012.5 (1996). Although the Commission is not subject to UAPA, it functions similarly to such state administrative agencies as the Career Service Review Board. *See, e.g., Kent v. Department of Employment Sec.*, 860 P.2d 984, 985 (Utah Ct.App.1993) (stating sole purpose of Career Service Review Board is reviewing agency decisions regarding career service employees). Therefore, we adopt and apply the "substantial evidence" standard applicable to a state administrative agency's findings of fact.

[25, 26] The Commission's findings, upon which the charges are based, must be supported by substantial evidence viewed in light of the whole record before us. *See Larson Limestone Co. v. State*, 903 P.2d 429, 430 (Utah 1995). Substantial evidence " 'is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.' " *Id* (quoting *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990)); *see also A.M.L. v. Department of Health*, 863 P.2d 44, 47 (Utah.Ct.App.1993) (stating evidence is not substantial if overwhelmed by other evidence or based on mere conclusion). It is more than a mere " 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v Board of Review of Indus. Comm'n*, 842 P.2d 910, 911 (Utah.Ct.App.1992) (citation omitted) We do not review the Commission's findings de novo or reweigh the evidence. *See Larson Limestone*, 903 P.2d at 431. Instead, we defer to the Commission's findings on issues of credibility.

Based on our examination of the whole record, we cannot say the Commission's finding that Lucas lied about his gun's position is supported by substantial, competent evidence. Initially, we note that the allegation of dishonesty arose from, as Murray City acknowledged in its brief, an unsubstantiated claim of excessive force. The internal affairs investigation into Lucas's use of excessive force was never completed and never ruled upon by the Commission. In addition, the evidence presented in support of the excessive force charge was inconsistent and uncorroborated. For instance, Spegar, who is the only eyewitness to Lucas's alleged use of excessive force, gave many inconsistent statements regarding the circumstances sur-

rounding his arrest and subsequent search.[6] Particularly questionable are Spegar's statements that Lucas's gun could have been pointed at his head, his torso, below his waist, or at the ground. At the hearing, Spegar testified that although he "didn't look over at [Lucas]," he "knew" the gun was pointed at him, but he could not "justify whether it was at [his] head or not." In addition, Spegar's claim that Lucas threatened to "blow his brains all over the wall" was allegedly corroborated by Garcia who testified to hearing the threat in the interview room approximately twenty to thirty feet away from Spegar. However, Hamblin, who was detained in the office next to Spegar, and Officer Snow, who had just left Garcia in the interview room and was en route to take Spegar's statement, heard nothing.

In addition, the Commission heard and relied upon the statements of Chief Killian and Lieutenant Fondaco, the credibility of whom Lucas was prevented from challenging. The post-termination hearing transcript shows that Lieutenant Fondaco's and Chief Killian's testimony on the dishonesty issue was largely conclusory and speculative as they testified mainly regarding their perceptions of the evidence. For example, without any proof, and contrary to the testimony of the only eyewitness, Chief Killian testified that "I know [the gun] wasn't two inches from the holster," and Lieutenant Fondaco testified that "I am of the firm belief that Officer Lucas took his gun out of his holster, pointed it at Marty Spegar and then denied that fact to me in an internal affairs investigation."

In support of the charge of dishonesty, the Commission relied primarily upon its finding that Lucas lied about his gun's position during his search of Spegar. Specifical Commission found "Officer Lucas's ments regarding the holstering and stering of his weapon to be inconsiste not credible[, and to have] ... change stantially in subsequent interviews fro statement initially given Lieutenant F co." The Commission based its finding Lucas's three transcribed interviews an testimony given during the post-termin hearing.

Contrary to the Commission's finding, cas's statements regarding the events rounding Spegar's arrest, his subseq search, and the position of Lucas's whether holstered or unholstered, were sistent. The transcripts of Lucas's int views and hearing testimony reveal that clearly and consistently maintained that perceived his gun to be holstered, but rec nized the possibility his gun could have be unholstered and pointed at the floor, as w nessed by a fellow officer.

The evidence shows that the internal a fairs investigation of Lucas began with a allegation of excessive force. In a writte statement, Spegar alleged:

> [Officer Lucas] told me to stand up an empty my pockets onto the table, and als to take off my hat. He then asked me t wait before I did it. He [illegible] for a minute and took out his gun from his holster and pointed it in the direction of my head. He was standing about 3 feet away from me. He then [said,] "I dare you to pull out a gun because if you do I swear that I will . . kill you," and that my brains will be splattered on the wall!

Based on this allegation, Lieutenant Fondaco initiated the internal affairs investigation. In the first of three interviews, Lieutenant Fondaco read the above allegation to Lucas and

6. Spegar gave four statements regarding the allegation of excessive force—the written statement sent along with the claim of excessive force, the oral interview with Lieutenant Fondaco, Spegar's transcribed answers from the polygraph test, and his testimony at Lucas's post-termination hearing. Reviewing the record, Spegar's statements—particularly those describing his searches, the gun's placement, his demeanor, and exactly when he discussed the incident with his friends—vary from one statement to the next and are inconsistent as a whole. For instance, at the hearing, Spegar for the first time related that he had been searched up against the wall before Lucas pulled out his gun, he stated that he was both thoroughly and cursorily searched at the scene of the arrest, that he had nothing in his pockets when Lucas searched him at the station, although Officer Snow testified that he saw several items, including pliers, emptied from his pocket, that the gun was both pointed at his head and that it was not, that he did not remember where the gun was, and that it was just pointed in his general direction or at his waist

asked "Is any of that true?" The following is the exchanged dialogue.

> LUCAS: The part that I had searched him, yes it is. And when I went to search him, he took his other hand, and he was going right down, he had baggies on you know. And he hadn't been adequately searched yet. He went right down to his crotch so I unsnapped my gun and said "don't do that." So then I put him against the wall and I searched him. But as far as that other crap, no.
>
> FONDACO: Okay. So, you unsnapped your gun, put him against the wall and searched him, but you never took your gun out of the holster.
>
> LUCAS: No, I unsnapped it you know because I didn't know what he was doing. As soon as his hand came out, you know that was it. It was done. I put him against the wall and I searched his crotch real good you know. I said "what the heck are you doing." . . a scratch. I said, well that's pretty stupid, you know. I'm here searching you for weapons and stuff and you put your hand down your pants, you know. He said, yeah that was pretty stupid.
>
> FONDACO: So, I just want to make sure I'm right. You unsnapped your weapon, left it in the holster, then put him on the wall, patted him down again, and then had him empty his pockets, but your weapon never came out of the holster. You never pointed your weapon at him? You never pointed your weapon at his head?
>
> LUCAS: No.
>
> FONDACO: You never threatened to kill him?
>
> LUCAS: No.

Shortly after, Officer Snow gave a written statement, in which he acknowledged seeing Lucas with his gun out of its holster, at his side, pointing down at the ground. Lucas was interviewed a second time, in conjunction with a polygraph test he agreed to take, and a third time, by Chief Killian in Lucas's pretermination interview. In both interviews, Lucas's version of the events surrounding Spegar's arrest and subsequent search remained consistent. In both interviews, Lucas acknowledged the possibility that his gun could have been unholstered and pointed at the floor. However, consistent with his original interview, he repeatedly stated that he perceived his gun had been holstered.

In his second interview, Lucas stated.

> .. I had my hand on him. Had my weapon unsnapped, and I was leaning forward. I'm not looking down at my gun to see exactly where it is you know. In hindsight maybe the officer walking by, he said my gun was out and pointed down. That's understandable. He may have seen it. It is possible because when I'm leaning forward, I'm not paying attention over there....
>
> Like I said, I had it unsnapped, I had a full grasp on it, leaning on him, leaning forward as he went to the wall. In my perception and I asked about it, is all I did is grab [my gun], but you know in hindsight, if I'm leaning forward and my adrenalin is up and I got my gun uncocked as you will, it [could] likely come out. Then I get another officer who I have never known to be deceptive saying that he saw it clear leather, and I told him to always be honest, and if that's what he saw, that's what he saw and to stick with it because I have nothing to hide. And I don't.
>
> But, whenever I was asked about it, I said it was in my holster, and that's my perception. Now I'm getting information contrary to that so it makes me think, now I have doubts.

During his pretermination interview, Lucas stated:

> [W]hen I was interviewed [by] Lieutenant Fondaco, I clearly told him that the gun didn't come out of the holster. It was in my holster, unsnapped. I'm leaning forward, pushing this guy away from me, so I'm leaning away, and my gun is in and out, sliding up and down. It could have been beside me, it could have been pointing at the floor. My perception was it was in the holster. But, now I have an officer who says he walks by and sees it pointed at the floor, okay. I'm not real clear on that okay.

. . . .

> I was sure it didn't come out of the holster. Then the other parameters are introduced. Is it possible? Yes, it is possible. Am I sure? No, I'm not sure. It could be possible because my focus is on this son of a gun now that's toying with me, not on [the exact placement of my gun] by two or three inches.

Finally, during the post-termination hearing, Lucas testified at length that he believed then and now that his gun was holstered. Lucas stated,

> I told him that when I was interviewed by Lieutenant Fondaco, I told him that I was 100 percent sure that my gun never left my holster. When I came out of the interview and met with Officer Snow, Officer Snow told me that he saw me with my gun pointed to the floor. At that point, I had doubts.

Lucas clearly testified that to his knowledge, his gun was holstered. However, he recognized that Snow's statement raised doubts in his mind about his own perception of his gun's position.

Based on our review of the record, Spegar's inconsistent statements regarding the placement of Lucas's gun—pointed at his head, torso, or the floor, the unsubstantiated allegation of excessive force, Officer Snow's statement that he did not see Lucas's gun pointed at Spegar, combined with Lucas's statements, the Commission's finding that Lucas lied is not supported by substantial evidence. However, even if we were to assume that Lucas lied about the position of his gun—holstered or unholstered and pointed at the ground—dismissal for the charge of dishonesty under these circumstances is neither compelled nor supported by the record.

B. Termination Disproportionate to Charge

[27, 28] Lucas argues that, under the facts of this case and in light of his outstanding service record, termination is an excessive disciplinary action for his alleged offense. In determining whether the charges warrant the disciplinary action taken, we acknowledge that discipline imposed for employee misconduct is within the sound discretion of the Chief. *See In re Dismissal of Jones*, 720 P.2d at 1363 (stating Chief manage and direct his officers, and thus best position to know whether their ac merit discipline). This discretion is abu however, if the punishment exceeds range of sanctions permitted by statut regulation, or if, in light of all the circ stances, the punishment is disproportion to the offense. *See id.*; *see also Boyce United States*, 211 Ct.Cl. 57, 543 F.2d 1: 1295 (1976) (" 'If a penalty is so harsh as constitute an abuse, rather than an exerc of discretion, it cannot be allowed to stand (citations omitted)).

[29] Initially, Lucas argues that t Chief and the Commission abused their d cretion by violating the policy and procedu requiring progressive discipline and imposi a punishment exceeding that permitted u der the rules and regulations. Section 11- of the Murray City Civil Service Commis sion's Rules and Regulations, provides, i pertinent part:

> Basic responsibility for discipline is veste in the appointing power of each depart ment and not in either the Civil Service Commission or the Mayor. Progressive discipline which normally involves a verbal reprimand, written reprimand, suspension and termination shall be administered fairly and consistently by the appointing power. Severity of the offense will determine the steps required for progressive discipline.

Murray City Civil Service Commission Rules and Regulations, § 11-1 (1996). Clearly, Murray City adheres to a progressive discipline policy; however, the rule does not mandate the use of progressive discipline in every situation.

The Nebraska Supreme Court in *Percival v. Department of Correctional Services*, 233 Neb. 508, 446 N.W.2d 211 (1989), interpreted a rule similar to the one in this case and held that the use of progressive discipline is discretionary with the department director. In *Percival*, the State Personnel Board demoted and transferred an employee within the Department of Correctional Services. *See id.*, 446 N.W.2d at 214. The employee argued

that the degree of discipline imposed was contrary to the state's policy of progressive discipline. *See id.* at 213. Nebraska's personnel rules and regulations provided that "disciplinary actions are prescribed in a progressive manner[;] however, the nature and severity of the violation will dictate the level of discipline imposed." *Id.* The rule recommended the department's use of progressive discipline, except where an employee commits an offense of "serious magnitude." *Id.* The court interpreted this provision, which is similar to the rule applicable to this case, as giving the department director discretion in implementing the steps of progressive discipline. *See id.; see also Brougham v. City of Normandy*, 812 S.W.2d 919, 924 (Mo.Ct.App. 1991) (interpreting ordinance adhering to principles of progressive discipline to be guide rather than mandate); *Battiste v. Department of Soc. Servs.*, 154 Mich.App. 486, 398 N.W.2d 447, 450 (1986) ("Progressive discipline may be utilized at the discretion of the commission ... where an agency is given discretion to 'suspend or dismiss' an employee 'for cause.' "). We follow the *Percival* court's reasoning and hold that the use of progressive discipline is committed to the Chief's discretion, based on the Chief's determination of the severity of the offense.

Moreover, under the Murray City Police Department Policies and Procedures, § 555, IX (A), an officer may be disciplined, which includes termination, for untruthfulness in an internal affairs investigation. Under the Department's stated policies, the Chief may impose a range of punishment from reprimand to termination for the charge of dishonesty. We agree with Murray City's statement that police officers are "in a position of trust" and are thus "held to the highest standards of behavior." *Paulino v. Civil Serv. Comm'n.*, 175 Cal.App.3d 962, 221 Cal.Rptr. 90, 96 (1985). "[H]onesty and credibility are crucial to [an officer's] proper performance of his [or her] duties." *Id.; see also Ackerman v. California State Personnel Bd.*, 145 Cal.App.3d 395, 193 Cal.Rptr. 190, 193 (1983) (" 'Dishonesty in such matters of public trust is intolerable.' " (citation omitted)). As such, under the Department's rules and regulations, the Chief has discretion to order termination rather than progressive discipline in cas involving dishonesty.

[30] Both the Commission's and the D partment's rules, however, require that a discipline be administered fairly and cons tently. *See* Murray City Service Comm sion's Rules and Regulation, Section 11 (1996); *see also* Murray City Police Depa ment Policies and Procedures, § 520, I (re erating policy that "like penalties be impos for like offenses"). The record reveals th in only one other case has an officer bee discharged for dishonesty. In that case, th officer, with two-and-one-half years of exper ence, falsified police reports, falsified worl er's compensation claims, falsified propert reports, and damaged City property to cove the lies. However, in the two other case involving the sole charge of dishonesty, on officer was suspended for one day, and th other officer was suspended for two weeks

In light of all the circumstances, we con clude that, even assuming that Lucas wa dishonest regarding the placement of hi gun—holstered or unholstered—termination is so disproportionate to the charge that i amounts to an abuse of the Chief's discretion First, the dishonesty charge was based on a unsubstantiated claim of excessive force— which never conclusively determined the placement of Lucas's gun. Second, the evi dence supporting the dishonesty charge was slim and inconsistent. Third, the record shows that other officers disciplined solely for dishonesty were suspended rather than discharged. Finally, Lucas's service record is exemplary. Lucas has served as a Murray City police officer for twelve years. During that time, Lucas's record shows that he had at all times met or exceeded the Department's expectations, and, based on the comments in the service record, Lucas was considered an excellent officer. According to Lucas's record, there is no evidence of any oral or written reprimands, warnings, or disciplinary action taken against him. To the contrary, the record shows that Lucas is the only Murray City police officer to have received the Merit of Honor award.

Even assuming that Lucas was dishones about the position of his gun, termination was so disproportionate under the facts o

this case to the charge of dishonesty that it amounted to an abuse of the Chief's discretion. Therefore, the Commission abused its discretion in affirming the Chief's decision ordering that Lucas be terminated.

CONCLUSION

Under Utah Code Ann. § 10–3–1012, a civil service employee has a vested property interest in continued employment absent sufficient cause for discharge. Therefore, before termination, a civil service employee is entitled to due process requiring oral or written notice of the charges, an explanation of the employer's evidence, an opportunity to respond to the charges in "something less" than a full evidentiary hearing before termination, coupled with a full post-termination hearing "at a meaningful time."

We conclude that Lucas's due process rights were not violated by the delay in the internal affairs investigation, the lack of written notice of the allegations where Lucas had actual notice, the exclusion of the audiotape evidence for impeachment purposes, or the Commission's use of a legal advisor. However, because evidence supporting Lucas's retaliatory discharge claim was directly relevant and material to Chief Killian's and Lieutenant Fondaco's credibility and was required for the Commission's proper review of Chief Killian's decision, the Commission's exclusion of such evidence violated Lucas's due process right to a full and fair hearing.

In addition, we conclude the Commission abused its discretion in affirming Chief Killian's decision to discharge Officer Lucas. First, the Commission's finding that Officer Lucas was dishonest was not supported by substantial evidence. Second, even if the evidence supported such a finding, termination is so disproportionate to the charge of dishonesty under the facts of this case as to amount to an abuse of the Chief's discretion.

The decision of the Commission upholding Chief Killian's termination of Officer Lucas is reversed. Officer Lucas is reinstated with back pay.

DAVIS, P.J., concurs.

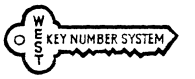
BENCH, Judge (concurring in the result):

I fully concur with the analysis captioned "Factual Basis for Dishonesty Charge" in section III of the main opinion. As set forth therein, the evidence simply does not support the Commission's finding that Lucas lied about the position of his gun when he searched Spegar at the station. That discussion being dispositive, I would not opine about other aspects of the case.

As recognized by the main opinion, Lucas asks alternatively for reinstatement or a new hearing. He first contends that the Commission should be reversed and that he should be reinstated with back pay because the facts do not support termination for the dishonesty charge and, in any event, termination is disproportionate to the charge. As an alternative argument, he contends that he is entitled to another hearing because his rights to due process were violated.

I share some of the main opinion's concerns over whether Lucas was afforded due process at the hearing before the Commission. I am particularly bothered by the Commission's exclusion of evidence that Lucas was discharged out of retaliation for having filed misconduct claims against Lieutenant Fondaco and the Murray City Police Department. However, given our decision to reinstate Lucas without any further hearing, the discussions about due process and proportionality are mere dicta, which may or may not be correct.

I therefore concur only in the result.



KUNZ & COMPANY dba Kunz Outdoor Advertising, a California corporation, Plaintiff and Appellee,

v.

STATE of Utah, DEPARTMENT OF TRANSPORTATION, Defendant and Appellant.

No. 970216–CA.

Court of Appeals of Utah.

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Outdoor advertising corporation sought order declaring signs on property adjacent to

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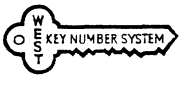

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