Case Law

May 2014 - Present

Employment Law

- Brown v. Sandy City Appeal Board
  - 2014 UT App 158; 330 P.3d 767
- Hollenbach v. Salt lake City Civil Service Commission
  - 2015 UT App 116
- Barrett v. Salt Lake County
  - 754 F.3d 864 (10th Cir. 2014)

Brown Case Facts

- Detective with 17 years, positive formal reviews "exemplary."
- Also had a history of difficulty getting along with other detectives.
- April 2012, chief placed Brown an paid administrative leave based on chief's perception that Brown wasn't psychologically fit for duty.
- Referred to psychologist: diagnosed with personality disorder with paranoid features.
- Zelig reached this conclusion, in part, by looking to California's POST standards for guidance regarding police officer personality disorders.

Brown Case Facts

- Brown was given 12 weeks medical leave for treatment, obtained from social worker.
- After 12 weeks, Brown remained on medical leave, which was unpaid. Brown used accrued sick and medical leave. Brown was terminated on same day accrued leave was exhausted, February 4, 2013, because Brown provided insufficient evidence of rehabilitation. Also a "Leave Without Pay policy."
- During his leave period, Brown sought reevaluation. On July 30, 2012, Brown requested that Zelig and the Police Chief release Zelig's report and the data underlying it to another psychologist, Dr. Blum, for purposes of reevaluating Brown's fitness for duty. Sandy City released those materials to Blum **almost four months after the request**, on November 26, 2012. Blum concluded Brown was fit for duty but they didn't meet until 3 days after termination.

Brown's Appeal: Board Findings

- Brown failed to submit any credible evidence that he was fit for duty prior to the time that Mr. Brown had exhausted his [medical] leave, and his accrued sick leave and vacation leave.
- Chief had "no choice" but to terminate in light of Leave Without Pay Policy.
- Letter submitted by social worker and subsequent report from Blum were "not credible."

Brown's Challenges on Appeal

- Standard of review: Abuse of discretion.
- Zelig's reliance on California POST standards for assessing fitness for duty was flawed because California is not Utah.
  - Court: California Post Standards enabled Zelig to assess whether Brown, given his impairment, was still able to perform the job since Utah hasn't posted similar standards to aid in psychological evaluation. "Zelig's consideration of the California POST standards as analogous to the way that a court might use case law from sister jurisdictions—not as binding authority but as a reference to consider how other courts have analyzed and resolved a particular issue."

Brown's Challenges on Appeal

- Zelig failed to take into account 17 year history, and good relationships with other officers in department.
  - Court: Zelig's report demonstrates otherwise.
- Board abused its discretion when it noted that Brown's surreptitious recording of supervisors, which he admitted to at the hearing, "is consistent with [Zelig's] opinion regarding Mr. Brown's paranoia."
  - Court: Board lacked any psychological expertise, should not have expanded upon Zelig's conclusions in this fashion. [A]n agency or board may not sit as a silent witness where expert testimony is required to establish an evidentiary basis for its conclusions . . . "). But finding was dicta. Board gets a pass.

Brown's Challenges on Appeal

- Brown informally requested reevaluation by leaving a voice mail message with the chief before termination. Board's finding that this effort to be inadequate was in error.
  - Court: Not so. Board explained a procedure to get another evaluation must be in writing, Brown's counsel knew this.
- Brown blamed City for taking 4 months to release records for reevaluation as cause for failure to obtain timely evaluation.
  - Court: Brown still had 5 months to get reevaluation done, and did not until too late.

Hollenbach case facts.

- Hollenbach was a patrol officer. Responded to nighttime call in July 2011 which was made by off duty officer working security. Woman had approached security guard to inquire about how to obtain custody of her child, whom she feared was in danger.
- Hollenbach responded, talked to complainant (unconfirmed) didn't talk with caller. Hollenbach received some custodial papers but didn't read them. Didn't try to establish contact with child. Turned complainant away because courts were closed. Closed call as a "no case," no report filed.

- HOLLENBACH V. SALT LAKE CITY CIVIL SERVICE COMMISSION

Hollenbach Case Facts.

- Hollenbach found by Chief to have violated two policies: Performance of Duty and Core Values, Service to the Community. Chief suspended without pay for 60 hours.
- Hollenbach had received prior suspension of 40 hours for violating same policies on another case.

Hollenbach Case Facts

- During hearing before Appeals Board, Hollenbach attempted to issue several subpoenas which the Board denied.
- Board was given Hollenbach's entire personnel file which contained some letters suggesting he may "snap" emotionally, following his prior suspension. A board member had ex parte conversation with Deputy Chief about whether Board should be concerned. Deputy Chief stated there is no concern with Hollenbach's emotional state, and Board member went back to impartially reviewing the case.

Hollenbach's Appeal, Board Findings

- No discussion in opinion except to say Board affirmed discipline.

Hollenbach Challenges on Appeal.

- Commission's refusal to allow him to take certain depositions and to have a number of subpoenas issued deprived him of due process.
- Ex parte conversation between a member of the Commission and one of the Police Department's witnesses violated his right to due process.
- Both challenges arise under due process, so no deference by Court on review.

Hollenbach: Court Restates Due Process Strd.

- Civil service employees have property right to continued employment.
- Employees 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 [discipline], coupled with a full post –discipline hearing.
- Fundamental requirement of due process is the opportunity to be heard at meaningful time, in a meaningful manner.

Hollenbach's Due Process Challenges

- Depositions would have shown discipline was pretext because Hollenbach was affiliated with Utah Fraternal Order of Police.
  - Court: Hollenbach was permitted to call witness to advance this theory. Hollenbach fails to demonstrate how denial of depositions would have yielded other evidence that wasn't cumulative.
- Hollenbach charges, and Commission acknowledges Ex Parte communication was improper.
  - Court: Yes it was. Hollenbach must demonstrate impropriety must prejudice him in some way. Hollenbach has not done so.

Hollenbach Abuse of Discretion Challenge

- Hollenbach challenges whether findings where supported by substantial evidence, and whether Board's decision to uphold determination was abuse of discretion.
  - Court: Hollenbach "makes no real attempt to demonstrate that the Commission made erroneous findings." Instead, he highlights facts in his favor to show conduct didn't warrant discipline. The task on review is to determine whether "the Commissions findings, upon which the charges are based are supported by substantial evidence." Plenty on record to support decision.

Hollenbach Abuse of Discretion Challenge

- Hollenbach argues there was "virtually no way" he could have abided by vague policy language.
  - Court: Hollenbach is not unfamiliar with Chief's standards or policy. Prior punishment for same policy violations made clear to Hollenbach what standards were.
  - Evidence advanced by City was Chief made standards "perfectly clear," albeit verbally.
- Hollenbach argument that punishment was disproportionate.
  - Incident in question was less than one month after prior imposition of discipline for 40 hours. 60 hours "was latest step in program of progressive discipline." Incident in question was 4th incident where Hollenbach received discipline. "Hollenbach had repeated substandard conduct that led to appropriate progressive discipline."

Barrett Case Facts

- Salt Lake County employee, "helped" a colleague pursue a sexual harassment complaint against her boss.
- "The complaint was entirely warranted but some in management apparently didn't like the publicity."
- Barrett was an employee for 14 years, with positive reviews each year. Supervisor who hired sexual harasser.
- "According to Mr. Barrett, his superiors thought him a noisy troublemaker and began a campaign to have him discharged or demoted." After he was demoted, Mr. Barrett brought this lawsuit alleging that the county violated Title VII by retaliating against him for helping a coworker vindicate her civil rights. See 42 U.S.C. § 2000e-3(a).

Barret Basis for Appeal

- In appealing on the grounds that a litigant is entitled to Judgment as a Matter of Law (JMOL), the sole question is, "has the plaintiff presented enough evidence to warrant a jury finding that the adverse employment action taken against him was taken in retaliation for his protected civil rights activity?"

Barrett Finding

- County had laid out McDonnell Douglas framework to argue it was entitled to JMOL, which is:
  1) "prima facie" case of retaliation under McDonnell Douglas doctrine must present evidence of three things — that he engaged in protected activity, that he suffered an adverse employment action, and that a close causal link exists between the two.
  2) If but only if the plaintiff can do all this, the ball bounces to the employer's court. Employer must present proof that it took the adverse action against the plaintiff for a legitimate, non-retaliatory reason.
  3) If the employer succeeds at that, the ball returns to the plaintiff who must show the employer's stated reasons are pre-textual. (i.e. the mixed motive rebuttal).

Barret Finding (What a snarky court looks like)

- "But while clearly demonstrating its familiarity with pre-trial motions practice in Title VII cases, the county here betrays a lack of familiarity with post-trial practice. Maybe it's because so few cases make it to trial these days." Wow.
- **McDonnell Douglas and its burden-shifting framework play no role in assessing post-trial JMOL motions.**
- **"Neither is the county's procedural misstep its only problem. Even had the county asked us to decide the underlying JMOL question rather than apply the McDonnell Douglas proxy it would've been no better off for it. After trial, of course, we are obliged to view the evidence in the light most favorable to the jury's verdict."** And doing that in this case we quickly encounter ample evidence from which a rational jury could have found that Mr. Barrett suffered unlawful retaliation in violation of Title VII — just as this jury did."

Barrett Translation

- Barrett had sufficient evidence to make out prima facie case, County's evidence of business reason was strong, too. Court wouldn't even examine this evidence in the context of a post trial (JMOL) motion.

Barrett's Other Holdings

- Equitable relief to cure demotion: District court decided to leave Mr. Barrett in his current (demoted) position but to require the county to reinstate his pre-retaliation pay grade. The county decries this result as affording Mr. Barrett the "windfall" of more pay for less work.. When the county chose to hire someone to replace the wrongfully demoted Mr. Barrett it bore the risk that the day might come it would have to restore Mr. Barrett as much as possible to his former position. That day has come.
- Court did agree some attorney's fees assessed by trial court were in error, but awarded attorney's fees to Barrett on appeal.

Civil Procedure

- Morning Side Developers, LLC. V. Copper Hills Custom Homes.
  - 2015 UT App. 99
- Advanced Forming Technologies, LLC v. Permacast LLC.
  - 2015 UT App 7

Morningside Facts

- Morningside (developers) failed to pay Copper Hills (contractor) for its work on Morningside's property. Copper Hills recorded mechanics' liens against each of the parcels and ultimately filed eight separate lien foreclosure actions. In October 2007, Morningside filed suit against Copper Hills for breach of contract, fraud, and related claims. In October 2009, Morningside's claims and Copper Hills' foreclosure claims were consolidated into a single action. Soon after, Copper Hills' attorney withdrew.
- 2010: Court issues Order to Show Cause.

Morningside Procedure

- In 2010, Court issues first Notice of Order to Show Cause.
- Utah R. Jud. Admin. 4-103(2) ("If a certificate of readiness for trial has not been served and filed within 330 days of the first answer, the clerk shall mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution."
- Copper Hills begs to keep case alive, promises to file an amended complaint. Court permits Copper Hills to file Motion to amend within 30 days of hearing. Copper hills files motion, but doesn't file amended complaint. Case goes silent again.

Morningside Procedure

- On November 18, 2011, the district court issued another Order to Show Cause (the second OSC). This time, neither party appeared at the hearing, and on January 26, 2012, the district court dismissed the case without prejudice (the January 2012 Dismissal). Copper Hills moved to set aside dismissal order because they didn't get notice of hearing (second attorney had withdrawn). On September 25 2012, Court set aside second order, **but said the case would be dismissed if no party submitted certificate of readiness for trial within 90 days**.

Morningside Procedure

- Copper Hills files an amended complaint, adding 25 additional parties, and files a certificate of readiness for trial within 90 days.
- District Court is now ticked off.
- Court issues Order to Show Cause to determine why second order of dismissal should not be reinstated. Holds hearing and orders case dismissed with Prejudice.

Morningside Procedure Problem

- **Original order of dismissal was issued pursuant toUtah R. Jud. Admin. 4-103(2). When it was reinstated, it wasn't altered. Dismissal pursuant to this rule is without prejudice.**
  - **Panos v. Smith's Food & Drug Ctrs., Inc., 913 P.2d 363, 364–65 (Utah Ct. App.1996).**
- **URCP Rule 41(b), on the other hand, "a trial court has the discretion to dismiss an action with prejudice for failure to prosecute without justifiable excuse."**

Morningside Procedure Result

- Thus, dismissal with prejudice would be appropriate only if the Final Dismissal were a new order issued under URCP Rule 41(b).
- Note: At 3rd Order to Show Cause Hearing, the parties argued over whether case should be dismissed with Prejudice under URCP Rule 41 (b). Morningside's briefing invoked Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975), which is the seminal case for deciding whether dismissal with prejudice is proper. Court intended dismissal with prejudice but reached mistaken result by "reinstating" prior dismissal.

Advanced Facts

- Under a licensing agreement between the litigants, Advanced sued, for breach of contract and interference with economic and contractual relations. Suit was filed in February 2009 after the original deadlines for discovery had passed, both AFTEC and Permacast stipulated –and the district court approved- an open-ended discovery period that was never modified.

Permacast Procedure

- June 2012, Permacast moved for summary judgment, arguing AFTEC "failed to provide any evidence showing damages on either its breach of contact claim or its economic interference claim." AFTEC replied that while contract was in effect, it spent over $500,000 in advertising allocable to Permacast.
- District Court: damaged alleged not sufficiently broken down into "actual damages" and an expert would be required to establish damages. Because AFTEC hadn't sought a continuance under URCP Rule 56(f) to provide expert testimony, trial court granted motion for summary Judgment.

Permacast Result

- True that AFTEC will eventually need an expert to establish damages. This doesn't cause AFTEC to lose at this stage.
- Motion for Summary Judgment is based on theory litigant is "entitled to judgment as a matter of law." Permacast asserted only that AFTEC had thus far "failed to provide any evidence showing damages." Permacast has not demonstrated that AFTEC has suffered no damages as a matter of law.
- In light of open ended discovery. AFTEC not yet required to provide evidence of damages, so need for motion to continue so AFTEC could obtain an expert was misplaced.

Law Enforcement

- Hawker v. Sandy City
  - 591 Fed. Appx. 669, and concurring opinion at: 774 F.3d 1243 (10th Cir. 2014).
- Salt Lake City v. Gallegos
  - 2015 UT App 78

Land Use: Cellular Towers

- T-MOBILE SOUTH, LLC v. CITY OF ROSWELL, GEORGIA.
- 135 S. Ct. 808 (2015)

T-Mobile Facts

- In February 2010, T-Mobile applied to build a new, 108-foot-tall cell phone tower on 2.8 acres of vacant residential property in Roswell (City). City ordinances require that any cell phone tower proposed for a residential zoning district must take the form of an "alternative tower structure"—an artificial tree, clock tower, steeple, or light pole—that, in the opinion of the City Council (City Council or Council), is "compatible with the natural setting and surrounding structures" and that effectively camouflages the tower.

T-Mobile Facts

- Hearing before Council: Motion to deny application unanimously passed. Different Councilmembers articulated different thoughts about the application:
  - other carriers had sufficient coverage in the area and that the City did not need to level the playing field for petitioner. "[b]ottom line" was that he did not think it was "appropriate for residentially zoned properties to have the cell towers in their location."
  - difficult to believe that the tower would not negatively impact the area and doubted that it would be compatible with the natural setting.
  - concerns about the lack of a backup generator for emergency services, and did not think the tower would be "compatible with this area."
  - One councilmember just "impressed with the information put together by both sides."

T-Mobile Motion

- Finally, a motion made to deny the application. She said that the tower would be aesthetically incompatible with the natural setting, that it would be too tall, and that its proximity to other homes would adversely affect the neighbors and the resale value of their properties. The motion was seconded, and then passed unanimously.

T-Mobile Denial Procedure

- Two days after meeting where application denied the City's Planning and Zoning Division informed petitioner by letter that the application had been denied and that minutes from the hearing would be made available. The detailed minutes were published 26 days later.

T-Mobile Holding

- We hold that localities must provide or make available their reasons, but that those reasons need not appear in the written denial letter or notice provided by the locality. Instead, the locality's reasons may appear in some other written record so long as the reasons are sufficiently clear and are provided or made accessible to the applicant **essentially contemporaneously** with the written denial letter or notice.

T-Mobile Reasoning

- The requirement that localities must provide reasons when they deny applications is underscored by two of the other limitations on local authority set out in the Act. Localities "shall not unreasonably discriminate among providers of functionally equivalent services," and may not regulate the construction of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications Commission's] regulations concerning such emissions." 47 USCS § 332 (c)(7)(B)(i)(I), (iv) Again, it would be considerably more difficult for a reviewing court to determine whether a locality had violated these substantive provisions if the locality were not obligated to state its reasons.

T-Mobile Reasoning

- The Act requires localities to provide reasons when they deny cell phone tower siting applications, but that the Act does not require localities to provide those reasons in written denial letters or notices themselves.
- In this case, the City provided its reasons in writing and did so in the acceptable form of detailed minutes of the City Council meeting.
- City did not provide its written reasons **essentially contemporaneously** with its written denial. Instead, the City issued those detailed minutes 26 days after the date of the written denial and just 4 days before petitioner's time to seek judicial review would have expired. The City therefore did not comply with its statutory obligations.

T-Mobile Dissent

- Roberts Dissent: The statute at issue in this case provides that "[a]ny decision . . . to deny a request . . . shall be in writing and supported by substantial evidence contained in a written record." 47 U. S. C. §332(c)(7)(B)(iii). The Court concludes that the City loses this case not because it failed to provide its denial in writing. It did provide its denial in writing. Nor does the City lose because the denial was not supported by substantial evidence in a written record.

T-Mobile Dissent

- Roberts: But this is not a "the sky is falling" dissent. At the end of the day, the impact on cities and towns across the Nation should be small, although the new unwritten requirement could be a trap for the unwary hamlet or two. All a local government need do is withhold its final decision until the minutes are typed up, and make the final decision and the record of proceedings (with discernible reasons) available together.

T-Mobile Concurring

- Alito: use of "substantial evidence" by Congress intended to invoke "administrative law principles." One such principle, as the Court explains, is the requirement that agencies give reasons. I write separately, however, because three other traditional administrative law principles may also apply.
  - First, a court must "uphold a decision of less than ideal clarity [***26] if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U. S. 281, 286, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974). In the context of 47 U. S. C. §332(c)(7), which leaves in place almost the entirety of a local government's authority, a succinct statement that a permit has been denied because the tower would be esthetically incompatible with the surrounding area should suffice. Nothing in this statute imposes an opinion-writing requirement.

T-Mobile Concurring

- Second, even if a locality has erred, a court must not invalidate the locality's decision if the error was harmless. "In administrative law, as in federal civil and criminal litigation, there is a harmless error rule." Here, for instance, I have trouble believing that T-Mobile South, LLC—which actively participated in the decision making process, including going so far as to transcribe the public hearing—was prejudiced by the city of Roswell's delay in providing a copy of the minutes.
- Third, the ordinary rule in administrative law is that a court must remand errors to the agency "except in rare circumstances." Nothing we say today should be read to suggest that when a locality has erred, the inevitable remedy is that a tower must be built. The Court has not passed on what remedial powers a "court of competent jurisdiction" may exercise. §332(c)(7)(B)(v). This unanswered question is important given the federalism implications of this statute.

Hawker Facts

- Juvenile 9 years old stole iPad from his school. Guardian told him to take it back and confess. When he arrives, he gets into physical exchange with school officials, who call police. Officer arrives, finds Juvenile sitting in hallway. Principal states he wants theft charges filed against Juvenile.
- Officer approached C.G.H. and told him: "We can do this the easy way by you talking to me, or we can do this the difficult way or hard way by you not talking to me." C.G.H. looked up at her but said nothing. Officer "grabbed" his arm and "yanked" him up off the floor. In response, C.G.H. grabbed her arm. Officer put him in a twist-lock, pushed him against the wall, and handcuffed him. Sometime after pulling up Juvenile but before using twist lock. Juvenile resisted. Juvenile grabbed arm after twist lock was applied and allegedly attempted to grab officer's gun.
- Later that day; Juvenile was treated for a possible hairline fracture to his left clavicle (collarbone). C.G.H. suffered anxiety and post-traumatic stress as a result of his encounter.

Hawker Issue & Framework

- The issue turns on whether Officer use of the twist-lock was "'objectively reasonable" in light of the facts and circumstances confronting [her], without regard to [her] underlying intent or motivation. This isn't a government immunity case.
- In considering this question, the Fourth Amendment does not require police to use the least intrusive means in the course of a detention, only reasonable ones.
- Non-exclusive factors relevant to our excessive force inquiry: [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.

Hawker Holding

- First factor weighs in favor of Hawker. Crime at issue was Class B misdemeanor theft, a relatively minor offense.
  - Quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007) "because the officer confronted suspect "who had committed a misdemeanor in a particularly harmless manner, . . . the level of force that was reasonable for him to use" was reduced."

Hawker Holding, Continued

- The second and third factors, however, weigh against the Hawkers. Albrand could objectively and reasonably view Juvenile grabbing Officer's arm as resisting arrest and escalating a tense situation. For safety, it was objectively reasonable for Officer to deescalate the situation and command Juvenile's compliance by using a twist-lock. Juvenile was alleged to have grabbed gun. Court didn't accept this as fact explicitly but seemed to recognize Juvenile's behavior endangered safety of others.
- The facts in this case are unfortunate in all respects. In any event, given Juvenile's resistance, Officer's actions in this case simply do not rise to the level of a constitutional violation.

Hawker Concurring Opinion was Published

- "But for the current state of the law, I would dissent. Given our present jurisprudence in this circuit, however, I agree with the result my colleagues reach and accordingly respectfully concur. I write separately to express my disagreement with our jurisprudence, which stems from what I consider to be an improperly and inadequately developed state of the law for treating childhood criminal behavior. It is time for a change in our jurisprudence that would deal with petty crimes by minors in a more enlightened fashion and would not automatically extend qualified immunity for conduct such as occurred in this case."

Hawker Concurring Opinion, Continued.

- Police presence in Schools is pervasive. Police presence in schools is of course intended to serve the best interests of students and communities. Situations such as those at Sandy Hook and Columbine, as well as fears of rising school violence in recent decades, necessitate security in American schools.
- But, it does not follow from the necessity of school security officers that elementary school children of a tender age need to be manhandled into a criminal law system in which they are treated as if they were hardened criminals and with a lack of finesse.

Hawker Concurring Opinion

- We should change course and instead leave it to the factfinder to determine whether the handcuffing of six- to nine-year-old children is excessive force rather than giving schools and police a bye by holding them immune from liability. A more enlightened approach to elementary school discipline by educators, police, and courts will enhance productive lives and help break the school-to-prison chain.

Gallegos Facts

- Anthony Mark Gallegos was convicted of failing to stop at the command of law enforcement, a class A misdemeanor. Utah Code Ann. § 76-8-305.5
- Caller reported several men, 2 wearing red clothing, were "wrestling in an alleyway."
- As the uniformed Officer arrived at the address in his marked police car, he saw a vehicle driving away. As he followed, the vehicle circled the block and stopped across from a home at the address to which he was responding. The home was next to an alleyway. Two men, one of whom was wearing a red shirt, exited the vehicle. The Officer aimed his patrol car's spotlight at the men and shouted, "Gentlemen, stop." The men failed to comply and went inside the home.

Gallegos Facts

- The Officer then saw Gallegos and one other man in the adjacent alleyway. Gallegos was wearing a shirt with red stripes. After making eye contact with the men, the Officer started to point, but before he said or did anything else, the two men turned and ran away.
- Officer chased (1/2 block), searched alleyway and after a few seconds, Gallegos came out from behind the shed and surrendered. The Officer testified that Gallegos said something to the effect of, "Sorry, I didn't realize you were a cop." Gallegos complied with the Officer's instructions and submitted to a search, found scrapes on hands and arms, but nothing else.

Gallegos Explanation

- His clothing, scrapes, and location imply that he was injured in an altercation, but the nature of his participation is obscured, allowing no more than speculation that Gallegos had been involved in a crime in a role that would motivate him to flee to avoid arrest. Here, no one was fighting when the Officer arrived, and other than Gallegos's flight, there was no evidence suggesting the possibility Gallegos was a willing participant in a criminal altercation was more likely than the possibility he was an unwilling or innocent victim of an assault.

Gallegos Issue

- Fleeing § 76-8-305.5 is a class A misdemeanor if actor flees from or otherwise attempts to elude law enforcement officer: (1) after the officer has issued a verbal or visual command to stop; (2) for the purpose of avoiding arrest.

Gallegos Finding:

- The trial court's conclusion that, "the mere fact of taking off from a police officer" was sufficient to meet the requirements of the statute suggests that the court believed the City was required to prove only that Gallegos fled after the Officer's command to stop. But, the statute also requires that the defendant have fled with a particular intent—for the purpose of avoiding arrest. Court concludes the evidence failed to meet this standard.

GRAMA

- Salt Lake City Corp. v. Haik
  - 2014 UT App 193

Haik Facts

- Haik wanted to review documents generated by a water law attorney who reviewed water rights and related agreements held by a city.
- Denial was based on the fact that attorney work product was privileged because it was reasonably in anticipation of litigation.
- Records Board granted Haik's request for review of documents, City appealed to District Court.
- District court performed in camera review of the withheld records and found them protected as "attorney work product and contain mental impressions, legal theories, and advice concerning anticipated litigation." (Citing Utah Code Ann. § 63G-2-305(17).

Haik's Challenges

- Haik challenges district court's jurisdiction, contends only "requesters" are permitted to appeal.
  - Court:: 63G-2-701 broadly permits a district court to review the decision of an appeals board, "Appeals of the decisions of the appeals boards established by political subdivisions shall be by petition for judicial review to the district court. The contents of the petition for review and the conduct of the proceeding shall be in accordance with Section[] . . . 63G-2-404." Doesn't matter who appellant is.

Haik's Challenges

- Summary Judgment challenge to letter: Didn't put Haik on notice of grounds for denial because basis for denial referenced wrong statute (typo).
  - Court: 63G-2-205 states notice "shall contain" basis records will be withheld and a citation to the statutes that exempt records from disclosure.
  - "'[S]hall' is generally presumed to indicate a mandatory requirement, [but] it has also been interpreted as merely directory." Aaron & Morey, 2007 UT 24, ¶ 14 n.2, 156 P.3d 801.
  - Intent is to ensure denial noticed contain "adequate notice of the basis" for denial. 63G-2-205 calls for "substantial compliance" with notice requirements. Denial needs enough information for requester to understand reasons for decision, provided requester not prejudiced by government failure to strictly comply with requirements.

Haik's Challenges

- Haik claims material facts in dispute. Referred to dismissed litigation against SLC which was dismissed, argued dismissal meant there was no "imminent" litigation.
  - Court looked at same facts and reached opposite result. Court: dismissal order shows City was threatened with litigation, which was more than enough.

Rights of Way

- San Juan County v. United States Dept. of Interior, et al.
  - 754 F.3d 787 (10th Cir. 2014)

San Juan Facts

- Salt Creek Road is an unimproved 12.3-mile road intertwined with the creek bed in Salt Creek Canyon. The state and county wish to use their claimed right-of-way to prevent the United States from closing the Salt Creek Road to vehicle traffic. The road is the primary way for tourists to reach several scenic sites within the Canyonlands National Park, including Angel Arch.

San Juan Federal Legal Framework

- Revised Statute (R.S.) 2477. The statute read simply: HN1 "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Congress enacted R.S. 2477 in 1866.
  - This was a standing offer to build roads on public lands.
- Congress reserved Canyonlands National Park in 1964, clearly preventing new rights-of-way across these public lands, it made the reservation "subject to valid existing rights."

San Juan State Legal Framework

- The question of whether R.S. 2477 right-of-way has been accepted (by a state) is a question of federal law. However, “to the extent that state law provides convenient and appropriate principles for [implementing] congressional intent," federal law "borrows" from it to "determin[e] what is required for acceptance of a right of way.“
- Utah Law: “A highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years." Lindsay Land & Live Stock, 285 P. at 648 (quoting ch. 12, Laws of Utah 1886, § 2); accord Utah Code Ann. § 72-5-104(1).

San Juan Legal Issue

- Could County prove 10 years of continuous and uninterrupted use for 10 years?
- Evidence at trial: (1) residential and grazing uses at a site south of the road beginning in the late 1880s or early 1890s; (2) cattle herding and grazing in Salt Creek Canyon starting around 1891 and increasing gradually through the 1950s; (3) nascent uses of the canyon by boy scouts and tourists beginning as early as 1950; and (4) some uranium mining and oil exploration in the mid- to late-1950s.
  - Court: insufficient evidence of a state road before closure.

San Juan challenges on Appeal

- Feds: court lacked jurisdiction under Federal Quiet Title Act. "Congress . . . limited the waiver" of sovereign immunity in the Quiet Title Act to actions filed within twelve years of the date of accrual. Feds "closed" road to state when it opened Canyonlands park.
  - Court: Because the public continued to have access to Salt Creek Road consistent with the claimed right-of-way, neither of the United States' claimed road closures provided the county with sufficient notice of the United States' claim of a right to exclude the public, as would be necessary to assert a claim of exclusive ownership to Salt Creek Road. First limited access was in 1995. State claim in 2005 was timely.

San Juan challenges on Appeal

- State: challenge finding evidence insufficient to establish state road. District Court held insufficient evidence of "continuous use." State: continuous use is established if the public uses road as often (or in-often) as the public needs to, without interruption.
- The state and county resist this interpretation of Utah law. In their view, two 2008 cases from the Utah Supreme Court, *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768 (Utah 2008), and *Utah County v. Butler*, 2008 UT 12, 179 P.3d 775 (Utah 2008), announced a new interpretation of the "continuous public use as a public thoroughfare for a period of ten years" standard. They argue these cases should [**26] not be interpreted, as we have done, in accord with Utah's prior case law because the Utah Supreme Court specifically intended to jettison its prior standard as unworkable. *See* *Okelberry*, 179 P.3d at 774. **Appeal from bench trial is de novo.**

San Juan Challenges on Appeal

- Court response to state claims under Okelberry:
  - Continuous" in this context means "without interruption." *Wasatch County v. Okelberry*, 2008 UT 10, 179 P.3d 768, 774 (Utah 2008). It includes any frequency of uninterrupted use, so long as the use occurs "as often as the public finds it convenient or necessary." *Id.* at 774. *But [**24] see Heber City Corp. v. Simpson*, 942 P.2d 307, 312 (Utah 1997) (applying "convenient or necessary" as an inquiry to the *purposes* of use rather than the *frequency* of use).
  - Okelberry can "plausibly" be read as state alleges, but Court won't accept it as binding.

San Juan Challenges on Appeal

- Court: before Okelberry no question that case law held frequency of use was probative of whether "continuous use" was established.
- State's argued lenient standard clashes with the common-law standard, it also eliminates the effect of the limiting phrase "for the construction of highways" in the text of R.S. 2477: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted" (emphasis added). Thus, the "as often as the public finds convenient or necessary" standard departs from Congress' intent in enacting R.S. 2477. The limiting phrase "for the construction of highways" should be read as congruent with the common-law understanding of "public thoroughfare"13 and the multi-factor common-law analysis exemplified in Lindsay Land. 285 P. at 648;