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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

MICHAEL JOHN MCGOWAN, JR.,
and BETH ANN MCGOWAN,
husband and wife,

Plaintiffs,

v.

CITY OF ASOTIN and DOES I
through X,

Defendants.

Defendants.

Superior Court No.
13-2-00151-4

COA No. 334287

APPELLANT'S BRIEF

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Appeal from the Superior Court of the State of Washington
in and for the County of Asotin

Honorable John W. Lohrmann, Presiding

Scott Chapman

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APPELLANT'S BRIEF

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I.

TABLE OF CASES AND AUTHORITIES

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(citing Cleveland Bd. of Educ. V. Loudermill 470 U.S. 532, 538, 84
L.Ed.2d 494, 105 S.Ct. 1487 (1985))..... 10

Chase v. Civil 193 Wn, App. 143, 151-52 159 P.3d 444, ____
(Ct. App. III 2007)..... 11

Danielson v. Seattle, 108 Wn. 2d 798, (citing Loudermill, 470
U.S. at 542-43, 545-46 12

Briggs v. Nova Services, 166 Washington 2d 794, 801-802 (2009) 13

Section 41.12 et seq, Revised Code of Washington4, 6, 7,
12, 13

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Section 41.12.020, Revised Code of Washington..... 6, 7

Section 41.12.080, Revised Code of Washington..... 7

Section 41.12.090, Revised Code of Washington..... 8

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2 I.

3 INTRODUCTION
4

5 This appeal involves Summary Judgment granted in favor of defendant
6 herein. (CP. 20 & 21)
7

8 Plaintiff Michael McGowan caused to be filed a complaint against the
9 defendant, City of Asotin alleging violation of RCW41.12, wrongful discharge,
10 and/or Breach of Contract (CP. 1)
11

12 Judge Lohrmann presiding herein ruled the above referenced statutory
13 section did not apply herein and Michael McGowan was not entitled to rely on
14 application of said statute. (CP. 20) As a result thereof entered an order granting
15 defendant's motion for summary judgment (CP. 21).
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19 II.

20 ASSIGNMENT OF ERROR
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22 Did the Superior Court err in granting Summary Judgment to the
23 defendant based solely on application of Section 41.12 et seq.
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3 III.
4 STATEMENT OF THE CASE

5 On August 8, 2008, McGowan was formally offered employment as a law
6 enforcement officer and up until the time of his termination worked for the
7 Defendant, City of Asotin in a loyal, efficient, and highly capable manner. (CP.
8 16)
9

10 On March 5, 2009, McGowan received his six-month evaluation. The
11 written evaluation reflects exemplary conduct, work ethic, and character he was
12 removed from probation and given a \$50.00 raise. (CP. 16)
13

14 On October 19, 2010, McGowan received written notice of his
15 termination. The letter concludes that your affiant “lack[s] the necessary skills
16 to meet our expectation”. (CP. 16)
17

18 McGowan was terminated without any grounds in law or fact, and in
19 contravention of applicable Washington Civil Service statutes which amounts to
20 a termination of his employment without grounds or requisite “due process.”
21

22 On August 8, 2008, (the time of his employment) the City of Asotin
23 Police Department had three (3) employees, namely:
24

- 25
- 26 • Chief Reid
 - 27 • William Derbonne
 - 28 • Michael John McGowan, Jr.

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2 Said employees were fully paid policemen inasmuch as during your
3 affiant's tenure they devoted their whole time to police duties. (CP. 16, P. 074)
4

5 At the time of his termination on October 19, 2010, Mike McGowan was
6 not given any form of "pre-termination" hearing notice of proposed disciplinary
7 action, or any opportunity to respond whatsoever. (CP. 16, P. 075)
8

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10 IV.
11 ARGUMENT

12 I
13 APPLICATION OF CIVIL SERVICE STATUTE (RCW 41.12 et. Seq.)

14 Section 41.12.010 of the Revised Code of Washington provides:

15 The provisions of this chapter shall have no application to
16 cities and towns which at the present time have provided for
17 civil service in the police department or which shall
18 subsequently provide for civil service in the police department
19 by local charter or other regulations which said local charter or
20 regulations substantially accomplish the purpose of this
21 chapter, nor to cities having a police force of not more than
22 two persons including the chief of police.

23 Section 41.12.020 of the Revised Code of Washington Provides:

24 If any of the cities or towns referred to in RCW 41.12.010
25 shall at any time repeal the charter provisions or other local
26 acts of said cities or towns providing for civil service for
27 police officers as referred to in RCW 41.12.010, in that event
28 this chapter shall apply to all of such cities and towns which
have at any time abolished civil service for members of the
police department.

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2 At the time of Mike McGowan’s employment Asotin had a personnel
3 system comporting with RCW41.12 et. Seq in effect and applicable to the city
4 at the time of plaintiff’s employment. However, RCW 41.12.020 leaves the
5 statutory scheme applicable to Mr. McGowan despite the cities purported
6 attempt to abolish it.
7

8
9 There is a “private cause” of action afforded the plaintiff for violation of
10 the statute. The most cursory review of case authority is replete with authority.
11 See for example, *Ramm v. City of Seattle*. 113 Wn. App. 431, 53 P. 3rd 1036
12 (2002); *Samuels v. Lake Stevens*, 50 Wn. App. 475, 749 P.2d 187 (1988); *Reed*
13 *v. City of Asotin* 917 F. Supp.2nd 1156 (E.D. Washington 2013). All three of the
14 above cited exemplars involved private individuals seeking application or
15 enforcement of Washington Civil Service code. Interestingly enough *Reed*
16 involved the same defendant in federal court and that decision clearly does not
17 contemplate the statute may not be enforced by private individuals.
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22 Section 41.12.080 of the Revised Code of Washington states:

23 The tenure of everyone holding an office, place, position or
24 employment under the provisions of this chapter shall be only
25 during good behavior, and any such person may be removed
26 or discharged, suspended without pay, demoted, or reduced in
27 rank, or deprived of vacation privileges or other special
privileges for any of the following reasons:

28 (1) Incompetency, inefficiency or inattention to or dereliction
of duty;

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3 (2) Dishonesty, intemperance, immoral conduct,
4 insubordination, discourteous treatment of the public, or a
5 fellow employee, or any other act of omission or commission
6 tending to injure the public service; or any other willful failure
7 on the part of the employee to properly conduct himself or
8 herself; or any willful violation of the provisions of this
9 chapter or the rules and regulation to be adopted hereunder;

10
11 (3) Mental or physical unfitness for the position which the
12 employee holds;

13 (4) Dishonest, disgraceful, immoral or prejudicial conduct;

14 (5) Drunkenness or use of intoxicating liquors, narcotics, or
15 any other habit forming drug, liquid or preparation to such
16 extent that the use thereof interferes with the efficiency or
17 mental or physical fitness of the employee, or which precludes
18 the employee from properly performing the function and
19 duties of any position under civil service;

20 (6) Conviction of a felony, or a misdemeanor, involving moral
21 turpitude;

22 (7) Any other act or failure to act which in the judgment of the
23 civil service commissioners is sufficient to show the offender
24 to be an unsuitable and unfit person to be employed in the
25 public service.

26 Section 41.12.090 of the Revised Code of Washington provides:

27 No person in the classified civil service who shall have been
28 permanently appointed or inducted into civil service under
provisions of this chapter, shall be removed, suspended,
demoted or discharged except for cause, and only upon written
accusation of the appointing power, or any citizen or taxpayer;
a written statement of which accusation, in general terms, shall
be served upon the accused, and a duplicate filed with the
commission. Any person so removed, suspended, demoted or

1
2 discharged may within ten days from the time of his or her
3 removal, suspension, demotion or discharge, file with the
4 commission a written demand for an investigation, whereupon
5 the commission shall conduct such investigation. The
6 investigation shall be confined to the determination of the
7 question of whether such removal, suspension, demotion or
8 discharge was or was not made for political or religious
9 reasons and was or was not made in good faith for cause. After
10 such investigation the commission may affirm the removal, or
11 if it shall find that the removal, suspension, or demotion was
12 made for political or religious reasons, or was not made in
13 good faith for cause, shall order the immediate reinstatement
14 or reemployment of such person in the office, place, position
15 or employment from which such person was removed,
16 suspended, demoted or discharged, which reinstatement shall,
17 if the commission so provides in its discretion, be retroactive,
18 and entitle such person to pay or compensation from the time
19 of such removal, suspension, demotion or discharge. The
20 commission upon such investigation, in lieu of affirming the
removal, suspension, demotion or discharge may modify the
order of removal, suspension, demotion or discharge by
directing a suspension, without pay, for a given period, and
subsequent restoration to duty, or demotion in classification,
grade, or pay; the findings of the commission shall be
certified, in writing to the appointing power, and shall be
forthwith enforced by such officer.

21 All investigations made by the commission pursuant to the
22 provisions of this section shall be had by public hearing, after
23 reasonable notice to the accused of the time and place of such
24 hearing, at which hearing the accused shall be afforded an
25 opportunity of appearing in person and by counsel, and
26 presenting his or her defense. If such judgment or order be
27 concurred in by the commission or a majority thereof, the
28 accused may appeal therefrom to the court of original and
unlimited jurisdiction in civil suits of the county wherein he or
she resides. Such appeal shall be taken by serving the
commission, within thirty days after the entry of such
judgment or order, a written notice of appeal, stating the

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2 grounds thereof, and demanding that a certified transcript of
3 the record and of all papers on file in the office of the
4 commission affecting or relating to such judgment or order, be
5 filed by the commission with such court. The commission
6 shall, within ten days after the filing of such notice, make,
7 certify and file such transcript with such court. The court of
8 original and unlimited jurisdiction in civil suits shall
9 thereupon proceed to hear and determine such appeal in a
10 summary manner: PROVIDED, HOWEVER, That such
11 hearing shall be confined to the determination of whether the
12 judgment or order of removal, discharge, demotion or
13 suspension made by the commission, was or was not made in
14 good faith for cause, and no appeal to such court shall be taken
15 except upon such ground or grounds.

16 It is clear the Civil Service Statute does apply to plaintiff and was not in
17 any way adhered to.

18 The Washington Supreme Court in *Danielson v. Seattle*, 108 Wn. 2d
19 788, 795-96,742 P.2d 717, ___ (1987) (citing *Cleveland Bd. of Educ. V.*
20 *Loudermill* 470 U.S. 532, 538, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985))
21 provides:

22 In *Loudermill*, the Supreme Court held that an Ohio civil Page
23 796 service statute providing for continued employment and
24 dismissal only for cause created a property right in continued
25 employment protected by the due process clause of the federal
26 constitution.

27 *Loudermill*, at 538-39. Similarly, this court has recognized that
28 a due process property interest may arise if “there are such
rules or mutually explicit understandings that support [an
individual's] claim of entitlement to the benefit and that he

1
2 may invoke at a hearing.” *Ritter v. Board of Comm'rs*, 96
3 Wn.2d 503, 509, 637 P.2d 940 (1981) (quoting *Perry v.*
4 *Sindermann*, 408 U.S. 593, 601, 33 L.Ed.2d 570, 92 S.Ct.
5 2694 (1972)). While public employment alone does not create
6 constitutionally protected property interests, see *Yantsin v.*
7 *Aberdeen*, 54 Wn.2d 787, 788, 345 P.2d 178 (1959); *Reynolds*
8 *v. Kirkland Police Comm'n*, 62 Wn.2d 720, 724, 384 P.2d 819
9 (1963); *Olson v. UW*, 89 Wn.2d 558, 564, 573 P.2d 1308
10 (1978); *Giles v. Department of Social & Health Servs.*, 90
11 Wn.2d 457, 460-61, 583 P.2d 1213 (1978); *Williams v. Seattle*
12 *Sch. Dist. 1*, 97 Wn.2d 215, 222, 643 P.2d 426 (1982),
13 protected property interests can arise from express or implied
14 contracts for continued employment, objective representations
15 of tenure, *Ritter*, at 509, or even collective bargaining
16 agreements providing for continued employment, *Washington*
17 *Educ. Ass'n v. State*, 97 Wn.2d 899, 908, 652 P.2d 1347
18 (1982). Thus, constitutionally protected property interests may
19 arise in public employment where civil service laws provide
20 an express or implied “contract” for continued employment.
21 See *Ritter*, at 509.

22 The case of *Chase v. Civil* 193 Wn, App. 143, 151-52 159 P.3d 444, ____

23 (Ct. App. III 2007) states:

24 In *Danielson v. City of Seattle*, 108Wn.2d 788, 797 n. 3, 742
25 P.2d 717 (1987), the court held “an agency's failure to follow
26 its own rules does not per se violate procedural due process,
27 but does so only when the agency's rules represent minimal
28 due process requirements.” The *Danielson* court cited
Cleveland Board of Education v. Loudermill, 470 U.S. 532,
105 S. Ct. 1487, 84 L. Ed. 2d 494 Page 151 (1985) for the
proposition that a court must balance the competing interests
at stake in determining the form of the pretermination hearing
necessary for due process purposes.

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2 grounds for termination/discipline set forth there in constitute a breach of that
3 contract.
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6 III
WRONGFUL TERMINATION

7 The showing required to prevail based upon wrongful termination
8 pursuant to *Briggs v. Nova Services*, 166 Washington 2d 794, 801-802 (2009) is
9 as follows:
10

- 11 1. Employee public policy
- 12 2. Employment action jeopardizing the policy
- 13 3. Dismissal based upon policy protected conduct.
14

15 It is the position of plaintiff, his termination, without following the
16 procedures or establishing the grounds as required by Section 41.12 et seq of the
17 Revised Code of Washington without any indication as to specifically what that
18 cause is or what policy or procedures were violated resulting in termination is
19 contrary to public policy. You can't give somebody something on one hand and
20 take it away with the other. Dismissal based upon unprotected conduct i.e.: one
21 should be able to act in accordance with the recognized policies, procedures, and
22 not be in fear of termination.
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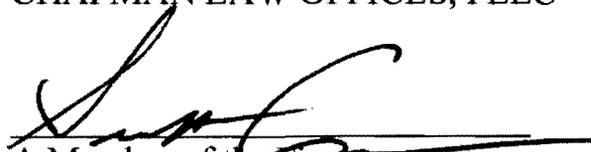
V.

CONCLUSION

For the foregoing reasons the court erred in granting Summary Judgment to defendant, City of Asotin.

DATED this 17 day of August, 2015.

CHAPMAN LAW OFFICES, PLLC


A Member of the Firm

I HEREBY CERTIFY that a true and correct copy of the foregoing was on this 17 day of August, 2015,

- Mailed
- Hand Delivered
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