

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA

BLAINE CLARK,

Plaintiff,

v.

THE CITY OF DUBOIS, JENNIFER JACKSON, PAT REASINGER, ELIOTT GELFAND, and DUSTIN ROY,

Defendants.

: CIVIL DIVISION
:
: Case No. 2024-1052-CD
:
: **DEFENDANTS' PRELIMINARY**
: **OBJECTIONS TO PLAINTIFF'S**
: **COMPLAINT**

: Filed on Behalf of:
: ALL DEFENDANTS

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NOTICE TO PLEAD

TO: BLAINE CLARK, PLAINTIFF

You are hereby notified that you are required to file a response to the enclosed **Preliminary Objections** within Twenty (20) Days from service hereof, or a default judgment may be entered against you.



Thomas E. Breth, Esquire

KP
FILED
M 11:30 KP
OCT 22 2024
ICE Atty. Breth
BRIAN K. SPENCER
PROTHONOTARY & CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA

BLAINE CLARK,	:	CIVIL DIVISION
	:	
Plaintiff,	:	No.: 2024-1052-CD
	:	
v.	:	
	:	
THE CITY OF DUBOIS, JENNIFER	:	
JACKSON, PAT REASINGER, ELIOTT	:	
GELFAND, and DUSTIN ROY,	:	
	:	
Defendants.	:	
	:	
	:	
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NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND AGAINST THE CLAIM SET FORTH IN THE FOLLOWING PAGES, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS AFTER THIS ANSWER AND NEW MATTER ARE SERVED, BY ENTERING A WRITTEN APPEARANCE PERSONALLY OR BY ATTORNEY AND FILING IN WRITING WITH THE COURT YOUR DEFENSES OR OBJECTIONS TO THE CLAIMS SET FORTH AGAINST YOU. YOU ARE WARNED THAT IF YOU FAIL TO DO SO, THE CASE MAY PROCEED WITHOUT YOU AND A JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT WITHOUT FURTHER NOTICE FOR ANY CLAIM IN THE ANSWER AND NEW MATTER OR FOR ANY OTHER CLAIM OR RELIEF REQUESTED BY THE PLAINTIFF(S). YOU MAY LOSE MONEY OR PROPERTY OR OTHER RIGHTS IMPORTANT TO YOU.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE AN ATTORNEY, OR CANNOT FIND ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
c/o Clearfield County Courthouse
2nd and Market Streets
Clearfield, PA 16830
(814) 765-2641

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA

BLAINE CLARK,	:	CIVIL DIVISION
	:	
Plaintiff,	:	Case No. 2024-1052-CD
	:	
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	:	
THE CITY OF DUBOIS, JENNIFER	:	
JACKSON, PAT REASINGER, ELIOTT	:	
GELFAND, and DUSTIN ROY,	:	
	:	
Defendants.	:	

DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

AND NOW, comes Defendants, by and through their legal counsel, Thomas E. Breth, Esquire, and Matthew P. Gieg, Esquire, of the law firm Dillon McCandless King Coulter & Graham LLP, to file the within Preliminary Objections to Plaintiff's Complaint averring in support thereof as follows¹:

RELEVANT FACTUAL ALLEGATIONS

1. Plaintiff's Complaint contains six (6) counts, to wit: Count I: 42 U.S.C. § 1983 (Violation of Procedural Due Process); Count II: Violation of Pennsylvania's Whistleblower Law; Count III: Breach of Contract (Termination without Just Cause); Count IV: Breach of Contract (Failure to Pay Wages and Other Remuneration Owed for Remainder of Contract Term) Pled in the Alternative to Count III; Count V: Intentional Interference with Contractual Relations; and Count VI: Civil Conspiracy.

¹ Defendants incorporate their Preliminary Objections by reference as if fully set forth at length herein.

2. Plaintiff alleges that the City of DuBois entered into an Employment Agreement with Plaintiff that extended Plaintiff's "tenure as the Police Chief" for four years, from January 1, 2023, to December 31, 2026. *Complaint* ¶10.

3. Plaintiff attached a copy of the "Employment Agreement," which allegedly extended Plaintiff's "tenure as the Police Chief" as Exhibit "A" to the Complaint. *Complaint* ¶10.

4. Section 2 – Term of the Employment Agreement states in relevant part as follows:

"... in fixing the term of this Agreement, the Parties do not intend to alter the fact that under the Third Class City Code, the Chief of Police serves at the pleasure of the Manager and Council. ... and may be removed from the Chief of Police position by the Manager and Council at any time and without cause in accordance with the Third Class City Code." *Complaint* ¶10, *Exhibit "A" Sec. 2.*

5. Plaintiff further alleges that on February 15, 2024, the Mayor and City Council, with the knowledge and apparent approval of City Manager Nasuti, placed former Police Chief Clark on paid administrative leave. *Complaint* ¶32

6. Plaintiff further alleges that in a February 27, 2024 letter, City Manager Nasuti provided former Police Chief Clark with a Notice of Charges and stated that former Police Chief Clark had an opportunity to respond at a Loudermill hearing scheduled for March 1, 2024. *Complaint* ¶33.

7. Plaintiff further alleges that "[a]t the so-called Loudermill hearing on March 1, 2024, the Interim City Solicitor never provided former Police Chief Clark with an opportunity to ask questions or respond in a meaningful fashion to the charges lodged against him in the Loudermill Letter." *Complaint* ¶39.

8. Plaintiff further alleges that on April 8, 2024, City Council voted to terminate his employment with the City. *Complaint* ¶43 and ¶46.

9. Plaintiff further alleges that on April 15, 2024, he received a letter from Mayor Reasinger notifying him that his employment with the City had been terminated. *Complaint* ¶46.

Defendants' First Preliminary Objection

Count III: Breach of Contract (Termination without Just Cause)
Count IV: Breach of Contract (Failure to Pay Wages and Other Remuneration
Owed for Remainder of Contract Term)
Pa. R. Civ. P. 1028(a)(4) Legal Insufficiency of a Pleading (Demurrer)

10. Defendants incorporate the preceding paragraphs as if fully set forth at length herein.

11. The Pennsylvania Rules of Civil Procedure authorize preliminary objections in the nature of a demurrer for legal insufficiency of a pleading. Pa.R.C.P. 1028(a)(4).

12. Count III and Count IV of Plaintiff's Complaint fails to state a cognizable claim for breach of contract against Defendants.

13. Plaintiff first alleges that an Employment Agreement between him and the City of DuBois extended Plaintiff's "tenure as the Police Chief" for four years, from January 1, 2023, to December 31, 2026. *Complaint* ¶10.

14. In Count III, Plaintiff alleges in relevant part "the City terminated [Plaintiff] without just cause, the City breached the Employment Agreement and is liable to [Plaintiff] for breach of contract." *Complaint* ¶ 74.

15. In Count IV, Plaintiff alleges "[p]ursuant to the Employment Agreement, the City was obligated to compensate former Police Chief Clark up to and including December 31, 2026, regardless of whether the City terminated former Police Chief Clark or the particular reason(s) why the City terminated former Police Chief Clark." *Complaint* ¶ 77.

16. In Count IV, Plaintiff further alleges "in terminating former Police Chief Clark prior to the expiration of his contractual term of employment, the City breached the Employment Agreement and is liable, among other things, to former Police Chief Clark for his wages and other forms of remuneration for the balance of the remainder of the contractual term, or until December 31, 2026." *Complaint* ¶ 80.

17. “[T]o successfully maintain a cause of action for breach of contract requires that the plaintiff establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages”. *Gorski v. Smith*, 812 A.2d 683, 692 (Pa. Super. 2002).

18. As an appointed employee of the City of DuBois, Plaintiff was at all times an at-will employee subject to summary removal.

19. In fact, Section 2 – Term of the Employment Agreement clearly states this fact:

“... in fixing the term of this Agreement, the Parties do not intend to alter the fact that under the Third Class City Code, the **Chief of Police serves at the pleasure of the Manager and Council. ... and may be removed from the Chief of Police position by the Manager and Council at any time and without cause in accordance with the Third Class City Code.**” *Complaint* ¶ 10, Exhibit “A” Sec. 2. (emphasis added).

20. Pennsylvania law is abundantly clear that appointed public employees do not and cannot have a contractual right to their continued employment.

21. In the seminal *Scott v Philadelphia Public Authority* case², the Pennsylvania Supreme Court held “. . . an appointed public employee takes his job subject to the possibility of a summary removal by the employing authority. **He is essentially an employee-at-will.**” 166 A.2d 278, 280 (Pa. 1960) (emphasis added).

22. In *Scott*, the Pennsylvania Supreme Court explained the important public policy basis for their holding, stating in relevant part as follows:

“...[G]ood administration requires that the personnel in charge of implementing the policies of an agency be responsible to, and responsive to those charged with the policy-making function, who in turn are responsible to a higher governmental authority, or to the public itself, whichever selected them. This chain of responsibility is the basic check on government possessed by the public at large. The power to dismiss summarily is the assurance of such responsibility.”

² Notably, “[t]he Pennsylvania Supreme Court has taken every opportunity to reaffirm the importance of *Scott* and state that it is still applicable and good law.” *Guerra v Redevelopment Auth. of Phila.*, 273 A.3d 1284, 1290 (Pa. Super. 2011).

Id. (internal citations omitted).

23. In the instant matter, the “employing authority” was the City of DuBois, subjecting Plaintiff to removal at any time and for any reason by the City Manager and the City Council.

24. The City Manager and the City Council are “responsible to” the public who selected them and enjoy the power to dismiss summarily as a check on that responsibility.

25. Plaintiff, as an appointed public employee pursuant to the Third Class City Code, is an at-will employee.

26. “As a general rule, a common-law cause of action for wrongful termination is not recognized in Pennsylvania for an at-will employee.” *Davenport v. Reid*, 785 A.2d 1058, 1063; *see also Paul v. Lankenau Hosp.*, 569 A.2d 346 (Pa. 1990).

27. Accordingly, Plaintiff has failed to state a claim on which relief can be granted for what he styles as “termination without just cause.”

28. Plaintiff’s allegation that the Employment Agreement “extended his tenure” is nonsensical.

29. In *Scott*, the Supreme Court of Pennsylvania held the following regarding tenure in public employment:

“Tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis, is, where it exists, a matter of legislative grace.” *Id.*

30. “In general, the legislature has conferred tenure as an integral part of a comprehensive governmental employment scheme such as those embodied in the Civil Service Act or the Teacher Tenure Acts.” *Id.*

31. “Furthermore, where the legislature has intended that tenure should attach to public employment, it has been very explicit in so stating.” *Id.*

32. Pursuant to the Optional Third Class City Charter Law, the City of DuBois's plan of government is a council-manager plan, and the enabling legislation contained within said plan neither creates nor confers upon a chief of police tenure or a legal right to continued employment; rather, the plan specifically states that "[t]he City Manager shall . . . [a]ppoint and have power to remove department heads [such as a chief of police]", so there is no legislative conferral of tenure relative to Plaintiff.

33. The Commonwealth Court has also remarked that "in no way has the [Pennsylvania state] legislature provided that a [public employee], who is also a non-union, non-civil service employee, has been thereby provided with a right in employment." *Pivarnik v. Commonwealth, Dep't of Transp.*, 474 A.2d 732, 735 (Pa. Commw. 1984).

34. Plaintiff's contract, then, did not grant him tenure.

35. Accordingly, Defendants have breached no contractual duty where Plaintiff has no contractual right to continued employment or remuneration.

36. Alternatively, should this Court find that Plaintiff's contract granted him tenure, the contract would be void *ab initio*.

37. Furthermore, "[i]n Pennsylvania, public employees are employees-at-will and subject to summary dismissal unless the legislature has explicitly conferred tenure as an integral part of a comprehensive governmental employment scheme. . . Therefore, public employers do not have power, unless conferred by statute, to enter into employment contracts which prevent them from summarily dismissing their employees at will." *Bolduc v Bd. of Supervisors*, 618 A.2d 1188, 1189 (Pa. Commw. Ct. 1992).

38. No statute exists which would allow the City Manager and City Council to enter into a contract conferring tenure on one of their employees.

39. To the extent this Court reads the Employment Agreement to confer tenure to Plaintiff, the same would be unenforceable and invalid in its entirety. *See Scott* at 281 (The Court found that no legislative authority to confer tenure existed, meaning the subject contract was invalid and unenforceable in its entirety).

40. Because a claim for breach of contract requires the existence of a contract, should the Court find the Employment Agreement referenced in the Complaint void *ab initio* because it impermissibly granted tenure, then, as a matter of law, Plaintiff cannot assert a breach-of-contract claim premised upon the same.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' First Preliminary Objection and dismiss Count III and Count IV with prejudice

Defendants' Second Preliminary Objection
Count II: Violation of Pennsylvania's Whistleblower Law
Pa. R. Civ. P. 1028(a)(4) Legal Insufficiency of a Pleading (Demurrer).

41. Defendants incorporate by reference the preceding paragraphs as if fully set forth at length herein.

42. Count II of Plaintiff's Complaint alleges "the City, acting by and through Councilwoman Jackson, Councilman Gelfand, and/or Mayor Reasinger terminated former Police Chief Clark for reporting—or being in the process of reporting—wrongdoing by the members of the City Council in violation of Pennsylvania's Whistleblower Law." *Complaint* ¶ 66.

43. Section 3(a) of the Whistleblower Law, 43 P.S. § 1423(a), states in relevant part as follows:

Persons not to be discharged -- No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste. 43 P.S. § 1423(a).

44. An employee asserting a whistleblower claim “must show by a preponderance of the evidence that, prior to the alleged reprisal, [he or she] or a person acting on behalf of the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.” 43 P.S. § 1424(b).

45. In addition, “[t]he employee asserting a claim under the Whistleblower Law must demonstrate ‘by concrete facts’ or surrounding circumstances that the report . . . led to . . . [the employee’s] dismissal, such as that there was specific direction or information received not to file the report or that there would be adverse consequences because the report was filed”. *Vasil v. Dep’t of Military & Veterans Affairs*, 230 A.3d 529, 537 (Pa. Commw. 2020).

46. Plaintiff contends that since he was “about to issue, or was in the process of issuing” parking citations to Councilman Gelfand and Councilwoman Jackson and “was in the process of preparing to file criminal charges against Mayor Reasinger,” these anticipatory citations and filings constituted the reporting of “wrongdoing.” *Complaint* ¶¶ 59, 60 & 61.

47. In evaluating whether a Plaintiff has pleaded a legally sufficient cause of action under the Whistleblower Law, Courts focus primarily upon whether a plaintiff avers sufficient facts to establish a causal connection between the “reporting” of wrongdoing or waste to the employer and the plaintiff-employee’s termination. *Golashevsky v. Dep’t of Env’tl. Prot.*, 720 A.2d 757 (Pa. 1998).

48. In *Golashevsky*, the Court concluded that the plaintiff did not establish the requisite causal connection between the plaintiff’s “report” and termination, observing that “[Plaintiff did] not allege that his supervisors threatened to fire him or to impose any other adverse consequences because of his report, nor [did plaintiff] establish any other ‘concrete facts’ to

connect the report with the dismissal Instead, in attempting to show a causal connection, [plaintiff] relied solely on vague and inconclusive circumstantial evidence”. *Id.* at 759.

49. Like *Golashevsky*, the Plaintiff herein provides no concrete facts whatsoever demonstrating a causal connection between his claimed “reporting of wrongdoing” and the termination of his employment; rather, the nexus suggested by Plaintiff between his alleged reporting of wrongdoing and the termination of his employment is not only circumstantially implausible but, in addition, Plaintiff’s conclusory labeling of the substantive information contained in the Loudermill letter as “pretextual” only serves to further erode any causal connection claimed by Plaintiff under the Whistleblower Law.

50. Accordingly, Count II of Plaintiff’s Complaint is legally insufficient and fails to present a prima facie case under the Whistleblower Law.

WHEREFORE, Defendants respectfully request that this Court sustain Defendants’ Second Preliminary Objection and dismiss Count II of the Complaint with prejudice.

Defendants’ Third Preliminary Objection
Count V: Intentional Interference with Contractual Relations
Pa. R. Civ. P. 1028(a)(4)— Legal Insufficiency of a Pleading (Demurrer)

51. Defendants incorporate by reference the preceding paragraphs as if fully set forth at length herein.

52. Pennsylvania Rule of Civil Procedure 1028(a)(4) authorizes preliminary objections in the form of a demurrer for legal insufficiency of a pleading. Pa.R.C.P. 1028(a)(4).

53. Count V of Plaintiff’s Complaint attempts to state a claim for intentional interference with contractual relations against Defendants.

54. Plaintiff alleges in relevant part, that “[i]n terminating [Plaintiff], Councilman Gelfand, Councilwoman Jackson, and Mayor Reasinger engaged in a course of conduct that was

specifically designed to nullify and void the Employment for no legitimate basis.” *Complaint* ¶ 86.

55. The elements of a cause of action for intentional interference with a contractual relation, whether existing or prospective, are as follows:

- a. the existence of a contractual, or prospective contractual relation between the complainant and a third party;
- b. purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
- c. the absence of privilege or justification on the part of the defendant; and
- d. the occasioning of actual legal damage as a result of the defendant’s conduct.

Pelagatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. 1987) (emphasis added).

56. Importantly, the tort for contractual interference involves a *third-party* interfering with a contract.

57. Here, Plaintiff alleges contractual interference on the part of Defendants when Plaintiff and Defendants were parties to the contract.

58. Defendants simply cannot interfere with their own contract. The Pennsylvania Supreme Court has stated as much.

59. The Court explained, “an action lies only in contract for defendant’s breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action.” *Salsberg v. Mann*, 310 A.3d 104, 122 (Pa. 2024) (internal citations omitted).

60. Further, the Court “recognized that all successful claims for the tort [of intentional interference with a contract] . . . require the relationships to ‘exist between third parties and a plaintiff.’” *Id.*, citing *Glazer v. Chandler*, 200 A.2d 416, 418 (Pa. 1964).

61. “Stated another way. . . a party cannot interfere with its own contract.” *Id.* (internal citations omitted).

62. Accordingly, Plaintiff has no claim for intentional interference with a contract against Defendants where Plaintiff and Defendants are parties to the contract in question.

63. Plaintiff has thus failed to state a claim for intentional interference with contractual relations upon which relief can be granted.

64. Moreover, as set forth previously, the contract between Plaintiff and Defendants is void *ab initio* because Plaintiff, as an appointed public employee, at all times material hereto, was an at-will employee with no contractual right to his continued employment.

WHEREFORE, Defendants respectfully request that Defendants' Third Preliminary Objection to Count V of the Complaint be sustained and that Count V of the Complaint be dismissed with prejudice.

Defendants' Fourth Preliminary Objection

Count VI: Civil Conspiracy

Pa. R. Civ. P. 1028(a)(4) – Legal Insufficiency of a Pleading (Demurrer).

65. Defendants incorporate by reference the preceding paragraphs as if fully set forth herein.

66. Plaintiff alleges, in part, that “[i]n terminating [Plaintiff], Council[man] Gelfand, Councilwoman Jackson, and Mayor Reasinger abused their authority as members of the Council, essentially acted in an individual capacity, and conspired among each other to terminate the Employment Agreement for reasons related purely to personal animus, thereby committing the tort of intentional interference with contractual relations.” *Complaint* ¶ 93.

67. Plaintiff then alleges that City Manager Nasuti and Assistant Police Chief Roy “aided and abetted” “Council[man] Gelfand, Councilwoman Jackson, and Mayor Reasinger in their scheme to terminate former Police Chief Clark’s employment.” *Complaint* ¶¶ 94 & 95.

68. “In order for a claim of civil conspiracy to proceed, a plaintiff must ‘allege the existence of all elements necessary to such a cause of action.’” *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006), *citing Rutherford v. Presbyterian Univ. Hosp.*, 612 A.2d 500, 508 (Pa. Super. 1992).

69. “The Pennsylvania Supreme Court set forth the elements of civil conspiracy in *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 211, 412 A.2d 466, 472 (1979): ‘It must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure, is an essential part of a conspiracy cause of action; this unlawful intent must also be without justification. Furthermore, a conspiracy is not actionable until some overt act is done in pursuance of the common purpose or design . . . and actual legal damage results.’” *Id.* (internal citations omitted).

70. Further, “absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.” *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 650 (Pa. Super. 2000), *citing Pelagatti v. Cohen*, 536 A.2d 1337, 1342 (Pa. Super. 1987).

71. Plaintiff has failed to plead the necessary elements of a civil conspiracy claim.

72. At the outset, Defendants have not committed an unlawful act in ending Plaintiff’s employment with the City of DuBois.

73. As set forth at length previously, Plaintiff, as an appointed public employee, is an employee at-will and is “subject to summary dismissal for a good reason, a bad reason or no reason at all . . .” *See Davenport* at 1063.

74. Moreover, Plaintiff predicates his claim for civil conspiracy on the allegation that Defendants conspired to commit the tort of intentional interference with a contract.

75. For the reasons set forth in Defendants' Third Preliminary Objection, Plaintiff has no recoverable claim against Defendants for intentional contractual interference.

76. It follows, then, that Plaintiff has no claim for civil conspiracy to commit intentional inference with a contract. *See McKeeman, supra*.

77. In addition, "[a] single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves. *Grose v. Proctor & Gamble Paper Prod.*, 866 A.2d 437, 441 (Pa. Super. 2005).

78. Plaintiff claims Defendants, the City of DuBois, the elected Mayor of the City of DuBois, elected councilmembers of the City of DuBois, and the appointed Assistant Police Chief of the City of DuBois, conspired amongst one another.

79. This assertion is legally impossible as all Defendants are effectively the City of DuBois, and the City of DuBois cannot conspire with itself.

80. As a result, Plaintiff's claim for civil conspiracy must fail as legally insufficient.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Fourth Preliminary Objection and dismiss Count VI with prejudice.

Defendants' Fifth Preliminary Objection

Count I: 42 U.S.C. § 1983 (Violation of Procedural Due Process)

Pa. R. Civ. P. 1028(a)(4) – Legal Insufficiency of a Pleading (Demurrer).

81. Defendants incorporate by reference the preceding paragraphs as if fully set forth herein.

82. Plaintiff alleges that he was "terminated . . . in violation of the right to procedural due process guaranteed in the Fourteenth Amendment to the United States Constitution and giving rise to a cause of action for violation of that right pursuant to 42 U.S.C. § 1983". *Complaint*, ¶ 55.

83. Plaintiff alleges his Employment Agreement “vested [Plaintiff] with a constitutionally protected property interest in continued employment for purposes of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.” *Complaint*, ¶ 50.

84. “To state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment’s protection of ‘life, liberty or property,’ and (2) the procedures available to him did not provide ‘due process of law.’” *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006)

85. “To have a property interest in a job, . . . a person must have more than a unilateral expectation of continued employment; rather, [h]e must have a legitimate entitlement to such continued employment.” *Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005), citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

86. “State law determines whether such a property interest exists.” *Id.*

87. “In Pennsylvania, public employees are employees-at-will who serve at the pleasure of their employers and are subject to summary dismissal. . . .” *Hilborn v. Cordaro*, 2007 U.S. Dist. LEXIS 76879 at *11 (M.D. Pa. 2007).

88. Contrary to Plaintiff’s assertion, Plaintiff’s Employment Agreement did not provide him with a property interest in his continued employment.

89. The legislature has not granted appointed Police Chiefs of Third-Class Cities with tenure.

90. The express language of the Employment Agreement echoes the fact that Plaintiff is an at-will employee subject to summary removal “from the Chief of Police position by the

Manager and Council at any time and without cause in accordance with the Third Class City Code.” *See Complaint Exhibit A, Sec. 2.*

91. Without a legitimate entitlement to continued employment, Plaintiff has no property right in his continued employment as Police Chief.

92. Therefore, Defendants cannot have violated his procedural due process rights in terminating his employment as Police Chief.

93. Moreover, despite not enjoying a property right in his continued employment, Plaintiff was, in fact, provided a Notice of Charges, a *Loudermill* Hearing, and a notice that his employment had been terminated.

94. Plaintiff’s contentions otherwise are disingenuous.

95. For these reasons, Plaintiff has failed to state a claim upon which relief can be granted for a violation of his due process rights under the Fourteenth Amendment.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants’ Fifth Preliminary Objection and dismiss Count I with prejudice.

Defendants’ Sixth Preliminary Objection

**All Counts - Failure of a Pleading to Conform to Law or Rule of Court
Pa. R. Civ. P. 1028(a)(4) – Legal Insufficiency of a Pleading (Demurrer).**

96. Defendants incorporate by reference the preceding paragraphs as if fully set forth herein.

97. Pa.R.C.P. 1019(i) provides that “[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.”

98. Paragraph 39 of Plaintiff's Complaint avers that "[a]t the so-called Loudermill hearing on March 1, 2024, the Interim City Solicitor never provided former Police Chief Clark with an opportunity to ask questions or respond in a meaningful fashion to the charges lodged against him in the Loudermill Letter."

99. Plaintiff attended the Loudermill hearing with legal counsel William Shaw and Stacy Parks of the Shaw Law Group.

100. The Loudermill hearing was held on March 13, 2024, and a record of the Loudermill hearing was transcribed by Lacey C. Scott of Sargent's Court Reporting Services. A true and correct copy of the Loudermill hearing transcript is attached hereto as Exhibit "1."

101. At all times relevant to Plaintiff's Complaint, Plaintiff and Plaintiff's legal counsel know of the existence of the Loudermill hearing transcript.

102. Starting on page 5, line 18 of the transcript, legal counsel for Chief Clark acknowledges his, Attorney Parks', and Chief Clark's presence at the hearing, and then the City's Interim Solicitor makes introductory comments with Mr. Shaw responding as follows:

ATTORNEY SHAW: My name is William Shaw, Jr. I am counsel for Chief Clark. Seated to my left is Attorney Stacy Parks, my partner. We are with the Shaw Law Group. Also counsel for Chief Clark. And of course to her left is Blaine Clark.

INTERIM SOLICITOR: Thank you. Today is March 13th, 2024. It's almost 25 minutes before 10 o'clock a.m. We had scheduled an opportunity to speak with Chief Clark as part of the city's investigation regarding allegations that were provided to the city in the form of a letter from Assistant Chief of Police Dustin Roy, R-O-Y, dated February 14th, 2024. Counsel has been provided – Bill, you have a copy of this, don't you?

ATTORNEY SHAW: Yes. Yes.

INTERIM SOLICITOR: Counsel has been provided a copy of the letter. In addition, there was a reference to an alleged incident that occurred at Sheetz in August of 2022. That reference came out of criminal charges filed against the former city manager. That was provided to counsel. So there was going to be questions with respect to both of those.

In addition, the chief received a copy of what we commonly refer to as a Loudermill hearing, L-A-U-D-E-R-M-I-L-L (sic), dated February 27th, 2024. It was originally scheduled to occur on Friday March 1st, 2024 at 10 o'clock a.m.

Through correspondence between counsel we were able to coordinate a mutually convenient date and time for the interview and the Loudermill hearing, which is today's date and time.

We have had a brief conversation off the record and it's my understanding that the chief is not going to answer questions today either in the investigation or the Loudermill hearing.

ATTORNEY SHAW: That is correct.

INTERIM SOLICITOR: Okay. We have had a conversation with respect to Garrity. The city has offered to provide a Garrity letter to the chief. My understanding, Bill, is he still going to decline to answer questions even under that circumstance?

ATTORNEY SHAW: Yes.

INTERIM SOLICITOR: Okay. That's fine. Anything else you want to put on the record?

103. Despite Mr. Shaw's repeated indication that Chief Clark would not answer any questions as part of the City's investigation into the allegations against him nor as part of the Loudermill hearing, Mr. Shaw asked the City Treasurer, Lisa Labrasca Becker, to testify on behalf of Chief Clark.

104. Treasurer Labrasca Becker's testimony is included within the transcript of the Loudermill hearing.

105. In Count I of Plaintiff's Complaint, Plaintiff asserts a violation of his procedural due process right.

106. At the time relevant to Plaintiff's Complaint, Plaintiff, and Plaintiff's legal counsel, knew that a transcript of the Loudermill hearing existed, but failed to attach a copy of the transcript in violation of Pa.R.C.P. 1019(i).

107. The transcript of the Loudermill hearing clearly contradicts the sworn averments contained in Count I of Plaintiff's Complaint.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Fifth Preliminary Objection and dismiss Count I with prejudice.

Defendants' Seven Preliminary Objection
All Counts - Failure of a Pleading to Conform to Law or Rule of Court
Pa. R. Civ. P. 1028(a)(4) – Legal Insufficiency of a Pleading (Demurrer).

108. Defendants incorporate by reference the preceding paragraphs as if fully set forth herein.

109. The *capacity* in which five (5) of the six (6) named Defendants in this action have been sued by Plaintiff, as unmistakably evidenced *via* a plain reading of Plaintiff's Complaint, reveals that the following named Defendants – Jennifer Jackson, Pat Reasinger, Elliott Gelfand, Chris Nasuti, and Dustin Roy (collectively referred to as the official capacity defendants “the OCD”) – are not properly joined as defendants in this action; resultantly, the OCD must be dismissed from this action and the caption modified accordingly.

110. Pa.R.C.P. 2102(b) provides that “[a]n action *shall* be brought by or against a political subdivision *in its name . . .*” (emphasis added).

111. Pa.R.C.P. 76 defines the term “political subdivision” [as] “any county, *city*, borough, incorporated town, township, school district, vocational school district, county institution district or municipal or other local authority” (emphasis added).

112. “Personal-capacity suits seek to impose personal liability upon a government official for actions he [or she] takes under color of state law Official-capacity suits, by contrast, ‘generally represent only another way of pleading an action against an entity of which an officer is an agent’”. *Kentucky v Graham*, 473 U.S. 159, 165 (1985).

113. “To determine whether the defendant has been sued in his [or her] individual or official capacity, the court must look to the complaint and the course of the proceedings to determine whether the defendant has been sued in his [or her] individual or official capacity.” *Flagg v. Int’l Union, Sec., Police, Fire Professionals of Am., Local 506*, 146 A.3d 300 (Pa. Commw. 2016) (citing *Colvin v. McDougall*, 62 F.3d 1316, 1317 (11th Cir. 1995)).

114. Reported decisional law instructs that when squarely presented with the question of whether a defendant named in an action is being sued in an “official-capacity suit” or a “personal-capacity suit,” courts’ fact-finding inquiries as to the capacity in which a defendant has been sued closely examine the plaintiff’s manner of addressing, referencing, and characterizing a named defendant within and throughout the Complaint, as well as the type and frequency of Plaintiff’s use of other qualifying descriptors when referencing a named defendant.

115. For example, in concluding that the named defendant in *Colvin* – a sheriff – was sued in his official capacity rather than his individual capacity, the Court emphasized that, *inter alia*, the defendant was referred to in the Complaint as follows: “The defendant, John J. McDougall, is and was at all times material hereto, the Sheriff of Lee County, Florida, an agent for both the Lee County Board of Commissioners, and the Lee County Sheriff’s Department.” *Colvin*, 62 F.3d at *1317.

116. Similarly, in *Faust v. Commonwealth*, 592 A.2d 835, 836 (Pa. Commw. 1991), the Court was persuaded that the named defendants, in that case, were being sued in their official, not individual, capacities by pointing to the following language used in the Complaint: “The complaint specified the exact employment titles of the ten employees and that they were named in their official capacities. *The complaint further alleged that, at all relevant times, the individual defendants were acting as agents and employees of the [employer]*” (emphasis added).

117. *Stephano & Quick v. Twp. of St. Thomas*, 39 Pa. D. & C.3d 563 * (C.C.P., Franklin County 1985) further demonstrates the consistent methodology that is routinely employed by courts to determine if a named defendant has been sued in his or her official or individual capacity; in looking to the language used by Plaintiff in the Complaint, the court in *Stephano* emphasized that “[n]o individual or personal liability of the supervisors or members is alleged [anywhere in the Complaint].” *Id.* at *583 (citing *Warrington Sewer Co. v. Achenbach, et al.*, 25 Bucks Co. T Ron. 176, 177 (1974) and *Zambelli v. Neshaminy School District*, 4 D. & C.3d 577, 578 (1978)).

118. Applying these legal principles compels the conclusion that the OCD has been sued in their *official* capacities; consequently, Plaintiff has improperly joined the OCD as Defendants under *Kentucky v. Graham*, 473 U.S. 159 (1985), since joining the OCD is the functional equivalent of the City of DuBois and unnecessarily redundant.

119. Like the Complaint in *Colvin*, the section of Plaintiff’s Complaint entitled “PARTIES” identifies and labels the OCD in their official capacities. *See* Complaint at ¶ 3 (“At all times pertinent hereto, Councilwoman Jackson was serving on the City’s Council”); *see also* Complaint at ¶ 4 (“At all times pertinent hereto, Mayor Reasinger was serving as the City’s Mayor”); *see also* Complaint at ¶ 5 (“At all times pertinent hereto, Councilman Gelfand was serving on the City’s Council”); *see also* Complaint at ¶ 6 (“At all times pertinent hereto, Mr. Nasuti was serving as the City’s Interim Manager”); *see also* Complaint at ¶ 7 (“At all times pertinent hereto, Mr. Roy was serving as the City’s Assistant Police Chief”).

120. Furthermore, Defendants Jennifer Jackson, Pat Reasinger, Elliott Gelfand, Chris Nasuti, and Dustin Roy are referred to in their respective official capacities throughout the entire Complaint.

121. Defendant Jennifer Jackson is referred to *only* as Councilwoman Jackson throughout the Complaint. See Complaint at ¶¶ 3, 17, 19, 20, 21, 22, 23, 24, 25, 26, 30, 60, 62, 63, 66, 86, 87, 88, 89, 93, 94, 95, and 96.

122. Defendant Pat Reasinger is referred to *only* as Mayor Reasinger or the Mayor throughout the Complaint. See Complaint at ¶¶ 4, 25, 27, 28, 29, 30, 31, 32, 34, 35, 45, 46, 52, 53, 54, 55, 56, 61, 62, 63, 66, 86, 87, 88, 89, 93, 94, 95, and 96.

123. Defendant Elliott Gelfand is referred to *only* as Councilman Gelfand throughout the Complaint. See Complaint at ¶¶ at 5, 11, 12, 13, 14, 15, 17, 18, 25, 30, 45, 59, 62, 63, 66, 86, 87, 88, 89, 93, 94, 95, and 96.

124. Defendant Chris Nasuti is referred to *only* as City Manager Nasuti throughout the Complaint. See Complaint at ¶¶ 6, 14, 23, 27, 32, 33, 34, 35, 63, 94, and 96.

125. Defendant Dustin Roy is referred to *only* as Assistant Police Chief Roy throughout the Complaint. See Complaint at ¶¶ at 7, 35, 36, 37, 38, 64, 73, 95, and 96.

126. Additionally, like *Stephano*, nowhere in Plaintiff's Complaint is there an allegation that any of the OCD are individually or personally liable. See *ad damnum* clauses, COUNT I, COUNT II, COUNT V, and COUNT VI.

127. Pa.R.C.P. 2102(b), controlling decisional law, and persuasive decisional law cited herein instruct that the OCD must be dismissed and released from this action as named defendants, with prejudice, and the caption of this matter must be amended accordingly.


WHEREFORE, Defendants respectfully request that Preliminary Objection Seven be SUSTAINED; that Defendants Jennifer Jackson, Pat Reasinger, Elliott Gelfand, Chris Nasuti, and Dustin Roy be dismissed as named Defendants in the within action for being improperly joined;

and that the Court amend the caption of this action to reflect that said Defendants are removed and released from this action.

Respectfully Submitted,

**DILLON McCANDLESS KING
COULTER & GRAHAM, LLP**

Dated: October 21, 2024

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