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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Stephen Gesell,

Plaintiff,

v.

City of Cottonwood, a municipal corporation, Tim Elinski, an individual, Jesus Rodriguez, an individual, Scotty Douglass, an individual, Jennifer Winkler, an individual, Amanda Wilber, an individual, and Helaine Kurot, an individual,

Defendants.

Case No: 3:24-cv-08090-DWL

DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S COMPLAINT AND TO STRIKE REFERENCES TO PRIVILEGED/CONFIDENTIAL MATERIAL

Pursuant to Federal Rule of Civil Procedure 12(b)(5) and (6), Defendants City of Cottonwood (the "City"), Tim Elinski ("Elinski"), Jesus Rodriguez ("Rodriguez"), Scotty Douglass ("Douglass"), Jenny Winkler ("Winkler"), Amanda Wilber ("Wilber"), and Helaine Kurot ("Kurot," and collectively, "Defendants"), move for partial dismissal of Plaintiff's Complaint for failure to state a claim. Attached is a certification that undersigned counsel made efforts to confer with counsel for Plaintiff before filing this Motion as required by LRCiv. 12.1(c).

Plaintiff's Amended Complaint ("Complaint") misstates the law, mischaracterizes

the record, and attempts to assert non-existent claims (such as seeking civil relief for alleged violations of a criminal statute). As a further flaw, Plaintiff failed to comply with the requirement to serve the individual defendants with a notice of claim, which is a prerequisite to asserting state law claims against public employees. Finally, Plaintiff has improperly disclosed material that is protected by the attorney-client privilege (the City's privilege) and confidential under Arizona's open meeting law. The bulk of Plaintiff's claims fall short of meeting the *Twombly/Iqbal* plausibility standard.

FACTUAL BACKGROUND

This lawsuit arises from the City's decision to terminate Plaintiff's employment as Chief of Police based on the findings of two independent investigations. [Exhibits 1 and 2][1] The first investigation involved a female Detective's allegations of sex and disability discrimination. The Arizona Civil Rights Division ("ACRD") investigated the matter and made the following findings:

- [Plaintiff] testified that he could never justify giving [the female Detective] any type of concession like putting her back [in Investigations as a Detective.]
- [The female Detective] returned to work in June 2022 and instead of resuming her role as Detective, she was informed by [Plaintiff] that she would be reassigned to Patrol Officer supervision by a Field Patrol Officer. The reassignment . . . resulted in a 5% salary decrease for [the female detective] and a less favorable shift assignment that included weekend swing shifts.
- [Plaintiff] claimed the reassignment was done to reacclimate [the female Detective] to the duties of a Police Officer[.] [But] when a male Detective returned from a three month leave of absence, he was not required to complete any time with a Field Training Officer and was immediately assigned to the Investigations Unit as a Detective[.]
- Despite having a full release without restrictions from a medical practitioner, [Plaintiff] claims that the female Detective's "mental health was a concern."
- [Plaintiff] testified, under oath, that female employees are "emotional," that two of the management-level female staff made their supervisory decisions based on "relationships rather than more pragmatic approaches… [or] logical outcomes," that one female supervisor "broke down in a meeting

[1] This Court may take judicial notice of the investigations by the Arizona Civil Rights Division and Osborn Maledon, because Plaintiff relies upon the investigations in his Complaint. *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) ("On a motion to dismiss, we may consider materials incorporated into the complaint or matters of public record."). [Compl. at ¶¶ 11–12, 25, 38–39] In addition, the findings of the Arizona Civil Rights Division are a public record that is appropriate for judicial notice.

> emotionally," and that another female employee was an "emotionally driven person."

[ACRD Reasonable Cause Determination, attached as **Exhibit 1**]

Based in part on the foregoing, the ACRD found reasonable cause to believe that the female Detective was the victim of unlawful discrimination in violation of the Arizona Civil Rights Act ("ACRA"). [*Id*.] Thereafter, the law firm of Osborn Maledon independently investigated Plaintiff's conduct during an interaction with Deputy City Manager Rodriguez, and reached the following conclusions:

> After receiving an email from then-Interim City Manager Rodriguez telling him that he did not need to attend the executive session and observing the Council decide, based on advice from attorney Christina Werther, that he should not participate in the executive session, Chief Gesell angrily confronted Mr. Rodriguez after the Council meeting, in the presence of Council Members, City employees and the public, demanding to be told why he had not been permitted to attend the executive session. Unhappy with Mr. Rodriguez's explanation, he walked away from Mr. Rodriguez yelling "this is a travesty" and "is not over." Chief Gesell did so in a manner that left Mr. Rodriguez with the impression that he could be at risk of physical harm if the situation were not diffused. In so doing, Chief Gesell violated the following policies:
>
> 1. Section 8: Insubordination.
> 2. Section 8: Discourtesy to another employee.
> 3. Section 8: Acts detrimental to the mission of the City.
> 4. Section 8: Acts that bring discredit to the City.
> 5. CPD Policy Manual Section 321.5.8(i) – acts bringing discredit to the Department.
> 6. CPD Policy Manual Section 321.5.9(f) – discourteous, disrespectful treatment of any member of the City.
> 7. CPD Policy Manual Section 321.5.9(m) – acts unbecoming a member of the Department, contrary to good order, or which tend to reflect unfavorably on the Department.

[Compl. at ¶ 35; Osborn Maledon Report of Investigation at 5–6, attached as **Exhibit 2**]

The City terminated Plaintiff's employment based on the investigation results.

I. THE *TWOMBLY/IQBAL* PLEADING STANDARD REQUIRES MORE THAN MERE CONCLUSIONS.

Federal Rule of Civil Procedure 8 mandates that every complaint include enough facts to, "give the defendant fair notice of what the… claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). A complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotations omitted).

To survive a motion to dismiss, Plaintiff must plead a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Although the Court must assume all factual allegations in the Complaint as true and view them in a light most favorable to the nonmoving party, the Court does not need to accept any legal conclusions as true. *Id.* at 678. Most of Plaintiff's claims fail to meet the plausibility standard.

II. PLAINTIFF'S STATE LAW CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS ARE BARRED FOR NON-COMPLIANCE WITH ARIZONA'S NOTICE OF CLAIM STATUTE.

Plaintiff's state law claims against the individuals are fatally flawed for non-compliance with Arizona's Notice of Claim Statute. Before suing a public entity or employee for claims under Arizona law, a plaintiff must file a notice of claim that complies with A.R.S. § 12-821.01. *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 62 (App. Ct. 2010). The purpose of the notice of claim statute is "to provide the government entity with an opportunity to investigate the claim, assess its potential liability, reach a settlement prior to litigation, budget and plan." *Fidler v. Arizona*, No. CV-22-00300-PHX-DWL, 2022 WL 16649520, at *8 (D. Ariz. Nov. 3, 2022).

Pursuant to A.R.S. § 12-821.01, a notice of claim must be filed "with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure. . . ." A.R.S. § 12-821.01(A). Failure to strictly comply with the statute's service requirement requires dismissal of the suit. *Falcon ex rel. Sandovol v. Maricopa Cnty.*, 213 Ariz 525, 527 (2006); *Deer Valley Unif. Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295 (2007) ("Claims that do not comply with A.R.S. § 12-821.01.A are statutorily barred.").

Under Arizona Rule of Civil Procedure 4.1(d), service of an individual may be accomplished by doing any of the following:

> (a) delivering a copy of the summons and of the complaint to the individual personally;
>
> (b) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

> (c) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Simon, 225 Ariz. at 61 ("To perfect his claims against an individual officer, Simon had to deliver a notice of claim to the officer personally, an individual of suitable age and discretion residing with the officer, or the officer's appointed agent."). Plaintiff failed to comply with the service requirements for individuals.

As to Wilber, the City's Human Resources Director, she is not listed as an addressee in the notice of claim. [Notice of Claim (excluding exhibits) at 1, attached as **Exhibit 3**; Declaration of Wilber at ¶¶ 3–4, attached as **Exhibit 4**][2] Plaintiff never even attempted to deliver a copy to her. [Exhibit 4 at ¶¶ 3–7] Accordingly, all state law claims against Wilber should be dismissed. *Florian v. Perkinson*, No. 05-CV-2067-PHX-FJM, 2007 WL 1317263, at *2 (D. Ariz. May 4, 2007) ("Even if we assume that the alleged attachments to the August 2, 2004 notice letter provide sufficient factual allegations to adequately inform the defendants of the nature of the claims, plaintiffs' attempted notice fails to comply with § 12–821.01 in several respects. First, the letter was addressed to the City of Quartzsite and Ed Jaakola only. Therefore, from its face, the letter does not purport to provide notice to defendants Ponce, Perkinson, Field or Buckelew.").

The remaining individual Defendants are listed in Plaintiff's Notice of Claim but

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[2] The Court may properly consider the notice of Claim because it is a public record *Hasbrouck v. Yavapai Cnty.*, No. CV-20-08112-PCT-DWL, 2021 WL 321894, at *1 n. 3 (D. Ariz. Feb. 1, 2021) (taking judicial notice of a notice of claim as a "matter[] of public record that can be readily verified and cannot reasonably be questioned"); *Phoenix Newspapers, Inc. v. Ellis*, 159 P.3d 578, 582 (Ariz. Ct. App. 2007) (under Arizona law, a "Notice of Claim is a public record"). In addition, this Court has also found it proper to consider declarations submitted to show non-compliance with A.R.S. § 12-821.01:

> Ludwig's motion to dismiss is more like the procedural defense under Rule 12(b)(5) for insufficient process than a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See McGrath v. Scott*, 250 F.Supp.2d 1218, 1236 (D.Ariz.2003) ("A.R.S. § 12–821.01(A)'s requirement for filing a notice of claim constitutes a 'procedural rather than a jurisdictional requirement.' . . . Because Ludwig's notice argument does not arise under Rule 12(b)(6), his motion is not subject to conversion to a motion for summary judgment. The Court may consider the exhibits submitted by both parties for the purposes of Ludwig's notice of claim argument.

Taraska v. Ludwig, No. CV-12-2544-PHX-DGC, 2013 WL 655124, at *4 (D. Ariz. Feb. 21, 2013) (footnote omitted).

were not properly served in accordance with Rule 4.1(d). In a fatal misstep, Plaintiff delivered copies of all notices to the Deputy City Clerk—a delivery method that Arizona courts have deemed inappropriate for individuals. *Simon*, 225 Ariz. at 61 (rejecting state law claims where the plaintiff failed to serve notice of claim on individual defendants or their authorized agent). [Declaration of Tim Elinski at ¶¶ 2–7, attached **Exhibit 5**; Declaration of Jesus Rodriguez at ¶¶ 2–6, attached as **Exhibit 6**; Declaration of Scotty Douglass at ¶¶ 2–10, attached as **Exhibit 7**; Declaration of Jenny Winkler at ¶¶ 2–7, attached as **Exhibit 8**; Declaration of Helaine Kurot at ¶¶ 2–7, attached as **Exhibit 9**; and Declaration of Evette Skerrett at ¶¶ 2–10, attached as **Exhibit 10**]

This Court has repeatedly found noncompliance with A.R.S. 12-821.01 under similar circumstances. In *Andrich v. Kostas*, the Court rejected Plaintiff's attempt to serve individual police officers when only the City Clerk was served. No. CV-19-02212-PHX-DWL, 2020 WL 377093, at *6 (D. Ariz. Jan. 23, 2020). The Court dismissed the state law claims against the individuals, reasoning as follows:

> Many Arizona courts have recognized that a party seeking to sue a government employee must personally serve the employee with the NOC—service upon the City Clerk, or the receptionist at the office where the government employee happens to work, is insufficient. *See generally Udd v. City of Phoenix*, 2018 WL 6727267, *4-7 (D. Ariz. 2018) (canvassing cases). Also, Plaintiffs' reliance on Lee is misplaced because there's been no suggestion (let alone evidence) that they mailed their NOCs to the home addresses of [the officers]. Regardless of whether the NOCs pertaining to Officers Kostas and Peters were sent to the City Clerk by mail or in person, the transmission was ineffective because it went to the wrong recipient.

Id.

In *Drake v. City of Eloy*, this Court concluded that a notice of claim was improperly served when it was delivered to the individual defendant's supervisor:

> "Simply because Crane is employed by the City of Eloy and Pitman is his supervisor does not give Pitman actual or apparent agency authority to accept service on Crane's behalf. Plaintiffs have not alleged that Crane represented that Pitman had authority to accept service on his behalf. Plaintiffs do not dispute that Crane was not served face-to-face. Absent evidence that Crane was served in a manner prescribed by Rule 4.1(d) or that Crane gave Pitman actual or apparent authority to accept service on his behalf, the Court cannot conclude that Crane was properly served."

No. CV-14-00670-PHX-DGC, 2014 WL 3421038, at *2 (D. Ariz. July 14, 2014).

During the parties' required meet and confer, held prior to the filing of Plaintiff's Amended Complaint, Plaintiff's counsel explained that the process server was instructed to ask the City Clerk if the Clerk was authorized to accept service on behalf of the individuals, and that the Clerk told the process server that she was so authorized, which is why the documents were only served on the Deputy City Clerk. Even if this is exactly how the communication happened (which the Deputy Clerk denies in her sworn declaration), service on the individuals indisputably fails as a matter of law. [Exhibit 10 at ¶¶ 2–7] The Deputy City Clerk is only legally authorized to receive service for the City and has no actual or apparent authority to accept service for any other person. [Exhibit 10 at ¶ 10] No amount of representation by the Clerk that she could accept personal service for other city employees changes that as a matter of law.

The decision in S*trickler v. Arpaio* is instructive. No. CV-12-344-PHX-GMS, 2012 WL 3596514, at *2 (D. Ariz. Aug. 21, 2012). There, the District of Arizona found it unpersuasive that an administrative employee allegedly agreed to accept service on behalf of the individual. *Id.* As the Court explained:

> Plaintiff's process server attests that the receptionist at the MCSO's administrative office agreed to accept service on behalf of Deputy Edwards–El. (Doc. 18–1, ¶¶ 2–4). Nonetheless, that Deputy Edwards–El is employed by the MCSO does not give the MCSO actual or apparent agency authority to accept notices of claims on his behalf. *See DeBinder v. Albertson's, Inc.*, 06–CV–1804–PCT–PGR, 2008 WL 828789 (D.Ariz. Mar.26, 2008) ("The delivery of a notice of claim via certified mail to the police department, 'Attn: Corporal Eric Clevinger' does not meet statutory requirements.") … Plaintiff concedes that Edwards–El was not served "face to face." (Doc. 18 at 8). In addition, he has not alleged facts which make is plausible that the receptionist at the MCSO—or the MCSO itself for that matter—is Edwards–El's agent. Therefore, even if the receptionist agreed to accept service of process on his behalf, this was not sufficient to constitute service of the notice of claim on "both the employee individually and [ ] his employer."

Other decisions confirm that service upon an individual's employer is improper – absent authorization by the individual – even where the recipient states that he or she is permitted to accept service. *Crick v. City of Globe*, 606 F. Supp. 3d 912, 918 (D. Ariz. 2022) ("Numerous cases have established that there are few, if any, exceptions to the

service requirement, even where the individual accepting service incorrectly informs the process server that he or she can accept service…."). By the same token, the Court in *Rodriguez-Wakelin v. Barry* found that it was improper to deliver individual notices to the Tucson City Clerk. No. CV-17-00376-TUC-RM, 2018 WL 5255184, at *2 (D. Ariz. Oct. 22, 2018) ("The parties have not identified any law authorizing the Tucson City Clerk to accept service of notices of claims against individual City employees, and the Court is not aware of any.") Similarly, in *Stuart v. City of Scottsdale*, the Court rejected state law claims against individuals where the notices were delivered to the City Clerk:

> As the Clerk of the City of Scottsdale is not an agent "authorized by appointment or by law" to accept notice for Defendants in their individual capacities, this was insufficient for the purposes of A.R.S. § 12-821.01(A). *See Simon*, 234 P.3d at 629 (holding that providing notice to a city clerk did not constitute notice on individual police officers). As a result, Plaintiffs have not adequately complied with the notice of claim statute regarding Defendants Washburn or Anderson in their individual capacities. *See Falcon ex rel. Sandoval*, 144 P.3d at 1256 (holding that delivering notice to a single member of a county board of supervisors did not provide notice to the remaining members of the board because they were not authorized to accept service for the remaining members).

No. CV-20-00755-PHX-JAT, 2021 WL 3675220, at *3 (D. Ariz. Aug. 19, 2021).

The fatal flaws in this case are indistinguishable. The notices were not delivered to the individual Defendants or their residences. [Exs. 4–5] The individual Defendants did not authorize the Deputy City Clerk to accept service on their behalf. [Exs. 4–6] There can be no debate that Plaintiff's delivery of the notices to the Clerk's office did not satisfy the notice of claim statute. And, it is too late for Plaintiff to cure his non-compliance. Plaintiff's claims accrued on or before the termination of his employment, which occurred in September 2023. He was required to serve a notice of claim no later than March 12, 2024. [Compl. at ¶ 69] Because the 180-day filing deadline has passed, Plaintiff's state law claims against the individuals must be dismissed with prejudice.

III. PLAINTIFF'S SECTION 1983 CLAIMS ARE LEALLY FLAWED.

A. Plaintiff Cannot Satisfy The *Monell* Standard For Municipal Liability.

For Count VI of the Complaint, Plaintiff asserts that Defendants violated his due process rights under the United States Constitution by allegedly terminating his

employment without providing due process. This claim fails as to the City based on Plaintiff's inability to satisfy the standard for municipal liability. Municipalities cannot face liability under Section 1983 based on the theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Instead, to establish municipal liability, a plaintiff must prove that (1) the alleged unconstitutional act was committed pursuant to a formal governmental policy or longstanding practice or custom, or (2) the violation was committed or ratified by an official with final policy-making authority. *Id*. at 694.

In this case, Plaintiff's Complaint is devoid of any facts even remotely suggesting that the City has a policy or custom of violating employees' rights under the Due Process Clause. Thus, the viability of Plaintiff's federal due process claim against the City rests on his ability to demonstrate that the challenged actions were committed or ratified by a final policymaker. To qualify as a final policymaker for the purpose of establishing municipal liability, it is not enough that an individual has the authority to make employment decisions, such as terminating or demoting employees for misconduct. Instead, a final policymaker must have the authority to develop personnel policies. As the Ninth Circuit has explained:

> Municipal liability does not attach. . . unless the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official - even a policy-making official - has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

Gillette v. City of Eugene, 979 F.2d 1342, 1349 (9th Cir. 1992) (internal quotation marks omitted). The question of whether an individual possesses final policymaking authority under this standard is to be decided by the Court as a matter of law. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989).

Plaintiff alleges that Elinski, Rodriguez, Douglass, Winkler, and Wilber denied him due process in connection with his termination. In a critical omission, however, Plaintiff has not alleged any facts demonstrating that the individual Defendants had the authority to create personnel policies regarding terminations/due process, as required to qualify as a final policymaker under Ninth Circuit precedent. Instead, Plaintiff relies on

the following vague and conclusory allegations, which are insufficient to meet the plausibility threshold required by *Twombly* and *Iqbal*:

> Here, the City was well aware of what the employees and agents were doing when they placed [Plaintiff] on leave and terminating him claiming the policies for discipline were being followed when in fact, they were not. Further, as the Mayor, City Manager, City Attorney and City Council were involved in the process and decision, the actions represented official policy.

[Compl. at ¶ 122]

These are precisely the type of perfunctory legal conclusions masquerading as factual allegations that cannot support a viable claim. *Iqbal*, 556 U.S. at 678 ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation."); *Twombly*, 550 U.S. at 555 ("Plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

The decision in *Ledvina v. Town of Marana* is instructive on this issue. No. CV-14-01989-TUC-CKJ, 2015 WL 464384 (D. Ariz. Feb. 4, 2015). There, this Court rejected a *Monell* claim that was based on the same type of conclusory allegations relied upon by Plaintiff, reasoning as follows:

> Plaintiff's Complaint does no more than state conclusory allegations not entitled to a presumption of truth when considered during a motion to dismiss and it does not offer adequate (or any) factual foundation upon which these conclusions rest. The Complaint baldly alleges that: (1) Defendant maintained policies and/or long standing practices or customs that resulted in the violation of Plaintiff's rights; (2) those policies, practices, and customs were inadequate; and (3) those policies, practices, and customs demonstrated deliberate indifference. (Doc. 1 at 5.) All three of these allegations are legal conclusions, and none of them are supported by any factual matter that could "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged[.]"

Id. at *8–9 (emphasis added).

Plaintiff's Complaint is devoid of any facts demonstrating that the individual Defendants had the authority to establish personnel policies regarding discipline, terminations, or due process.

Plaintiff's failure to establish that Elinski, Rodriguez, Winkler, Douglass, and/or Wilber qualify as final policymakers is unsurprising, as only the City Council possesses such authority. Notably, the City Council has adopted policies requiring that non-probationary, classified employees be afforded due process when terminated. In particular, the City of Cottonwood Employee Manual (the "Employee Manual"), which was adopted by resolution, contains the following provisions:

- The City follows all state and federal laws and guidelines. In the case of inconsistencies or changes to the law, the law supersedes any policies outlined in this manual and the City will follow the law until such time the employee manual is revised to again comply with the updated law.
- This employee manual does not deny any employee their civil or political liberties as guaranteed by the United States and Arizona Constitutions.
- The Personnel Board hears appeals of employees' grievances, disciplinary actions, and dismissals in accordance with City policy and the policies set forth in this Employee Manual.

[Excerpts from Employee Manual at 3–4, attached as **Exhibit 11**] The Employee Manual also describes the permissible grounds for discipline, provides for pre-termination notice and an opportunity to be heard, and establishes an impartial personnel board to hear post-termination appeals. [*Id*. at 5–12] Furthermore, the Employee Manual states that it *may only be amended through approval of the City Council*. [*Id*. at 4]

The ability of the individual Defendants to terminate Plaintiff was constrained by policies adopted by the City Council, thereby confirming that they do not qualify as final policymakers. *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ("When an official's discretionary decisions are constrained by policies not of that official's making," such official is not a final policymaker for purpose of municipal liability); *see, e.g.*, *Hofmann v. City & Cnty. of San Francisco*, 870 F. Supp. 2d 799, 804 (N.D. Cal. 2012) (holding that a Police Chief did not have final policy-making authority because the Chief was bound by the City Commission's rules regarding promotions).[3]

[3] The alleged involvement of Mayor Elinski in the denial of due process does not change this result. Setting aside the complete absence of any facts regarding Mayor Elinski's alleged conduct, he cannot, as a matter of law, act independently of the council as a whole. The City Council may only create policy through a majority vote at a properly

Plaintiff cannot cure this pleading defect because final policymaking authority resides exclusively with the City Council, and there is no allegation (nor can there be) that the Council acted on Plaintiff's employment. Plaintiff cannot prevail on his Section 1983 claim against the City. *Yadin Co. v. City of Peoria*, No. CV-06-1317-PHX-PGR, 2008 WL 906730, at *4–6 (D. Ariz. Mar. 25, 2008) (Section 1983 claim dismissed when plaintiff failed to plead sufficient facts to meet the standard for municipal liability).

B. Plaintiff's Due Process Claims Fail Because He Did Not Have a Constitutionally Protected Property Interest in His Employment.[4]

Plaintiff's due process claim is substantively flawed as to all Defendants. To begin, Plaintiff has no protected property interest in his position as Chief of Police. "The Due Process Clause does not create substantive rights in property." *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are defined by existing rules or understandings that stem from an independent source such as state law"). Instead, the Due Process Clause provides property rights and procedural protection only when an individual is deprived of a constitutionally protected property interest, as defined by reference to state law. *Portman*, 995 F.2d at 904; *Roth*, 408 U.S. at 577 (recognizing that the Due Process Clause provides procedural protections as "a safeguard of the security of interests that a person has already acquired in specific benefits."). Thus, the starting point in analyzing a due process claim is whether a protected property interest exists, as defined by state law.

Plaintiff's due process claim relies upon the procedural rights purportedly guaranteed to him by the Arizona Peace Officer Bill of Rights ("POBOR"). A short legislative history is necessary. The POBOR provides certain protections to peace

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noticed, formal council meeting. A.R.S. § 38-431.01(A) ("All legal action of public bodies shall occur during a public meeting.").

[4] "Longstanding precedent establishes the same standard applies to due process claims under the Arizona and Federal Constitutions." *State v. Shephard*, No. 1 CA-CR 19-0271, 2020 WL 2768994, at *4 (Ariz. Ct. App. May 28, 2020); *Carlson v. Arizona State Pers. Bd.*, 214 Ariz. 426, 431 (Ct. App. 2007) (using same analysis for state and federal due process clauses). Therefore, Defendants' arguments for dismissal apply with equal force to both the federal and Arizona due process claims.

officers in Arizona—*i.e.*, procedural protections during an internal investigation, notice and an opportunity to be heard before termination of employment, a requirement that terminations be supported by "just cause," and the opportunity for a post-termination appeal. A.R.S. 38-1101 *et seq*. As enacted in 2014, POBOR provided as follows:

> A peace officers bill of rights is established. This article does not preempt agreements that ***supplant, revise or otherwise deviate from*** the provisions of this article, including written agreements between the employer and the law enforcement officer or the law enforcement officer's lawful representative association.

A.R.S. § 38-1102 (2014) (emphasis added). In other words, law enforcement agencies and their employees could enter into an at-will employment agreement that supplanted, revised, or otherwise deviated from POBOR's protections. This was the case when Plaintiff was hired as Chief of Police. Under the City's ordinances: "The police chief shall be appointed by and shall serve at the pleasure of the city manager." [Cottonwood City Code at Section 2.44.030, attached as **Exhibit 12**] Therefore, Plaintiff was an at-will employee based on the terms of his implied employment contract with the City. A.R.S. § 23-1501(A) (The public policy of this state is that: 1. The employment relationship is contractual in nature.").

In 2022, the Legislature amended § 38-1102 to read as follows:

> The peace officers bill of rights is established. This article ***outlines the minimum rights*** given to peace officers in this state. This article does not preempt agreements that ***supplement or enhance*** the provisions of this article, including written agreements between the employer and the law enforcement officer or the law enforcement officer's lawful representative association.

A.R.S. § 38-1102 (2022) (emphasis added). As amended, POBOR sets a floor that establishes "minimum rights." Therefore, law enforcement agencies and their employees may no longer "supplant" or "deviate from" the POBOR by contract. Rather, they may only "supplement or enhance" the rights guaranteed under the POBOR, effectively eliminating at-will employment for most peace officers.

Plaintiff's due process claim necessarily turns on the assumption that the POBOR, as amended in 2022, applies to his employment—*i.e.*, that the amendments to

the POBOR preempt Plaintiff's at-will employment agreement with the City.[5] This is incorrect. Both the presumption against retroactivity and the Contract Clauses to the U.S. and Arizona Constitutions prohibit the retroactive application of the 2022 POBOR amendments to Plaintiff. As a result, Plaintiff was an at-will employee of the City at the time of his termination and had no property interest in his employment.

1. The Presumption Against Retroactivity Precludes The Retroactive Application Of The Amended POBOR To Plaintiff.

"Under Arizona law, when the legislature enacts a statute, the default rule is that the statute, once effective, applies only prospectively. In other words, courts apply a 'canon of construction' that 'statutes are presumed to have a prospective and not a retroactive effect.'" *Krol v. Indus. Comm'n of Ariz.*, 255 Ariz. 495, 499–501 (Ct. App. 2023). This "presumption against retroactivity[] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 562. Indeed, the Legislature has codified the presumption against retroactivity. A.R.S. § 1-244 ("No statute is retroactive unless expressly declared therein.").

The Arizona Court of Appeals in *Krol* outlined three exceptions to the presumption: (1) the Legislature can expressly declare that a statute applies retroactively, (2) a statute may be merely procedural and therefore not affect substantive rights, or (3) a statute impacts a judicial, administrative, or other proceeding that has not yet occurred. 533 P.3d at 562.

Plaintiff cannot overcome this presumption. Just last week this Court concluded that the presumption against retroactively applies to the POBOR:

> First, there is nothing in either version of Ariz. Rev. Stat. § 38-1102 or its implementing legislation that expressly declares that the 2022 amendment should apply retroactively. Rather, the statute is silent as to retroactive application. This alone commands the Court to employ the presumption in this case. This is particularly true given the Legislature's directive that "[n]o statute is retroactive unless expressly declared therein." Ariz. Rev.

[5] Plaintiff was hired by the City prior to the enactment of the September 24, 2022 POBOR amendments, as evidenced by the Complaint's discussion of Plaintiff's conduct as Chief of Police in June 2022. [Compl. at ¶¶ 26, 45, 56]

> Stat. § 1-244. As *Krol* instructs, "if the statutory language is unclear as to retroactivity, we use one—and just one—interpretative tool: we employ the presumption against retroactivity." 533 P.3d at 562. Here, the Legislature could have easily included language ensuring that the 2022 amendment—which admittedly significantly altered the statute's protections—would apply retroactively. But the Legislature did not do so. In the absence of *any* express declaration that the statute applies retroactively, the Court will not go beyond the plain text of the amendment to reach a different conclusion. The Court applies these clear principles and finds that the presumption against retroactivity applies.
>
> …The next two exceptions are also inapplicable. First, the statute is not merely procedural. Rather, as both parties discuss, the 2022 amendment directly impacts the substantive rights of peace officers employed in Arizona. Here, whether the 2022 amendment applies to Plaintiff Blunt directly impacts whether his at-will employment agreement remains valid, or if the amended protections of the POBOR apply. That goes to the heart of Plaintiff's substantive rights, and in turn, his § 1983 claim. Therefore, this exception does not apply.
>
> …The third exception is similarly inapplicable. Arizona typically allows for "statutory changes in procedures or remedies" to apply to proceedings already pending. *State Comp. Fund of Ariz. v. Fink*, 233 P.3d 1190, 1192 (Ariz. Ct. App. 2010). However, as discussed, this amendment goes beyond a mere procedural amendment. Accordingly, this exception does not apply.

[Order at 6, *Blunt vs. Town of Gilbert*, No. CV-23-02215-PHX-SMB (D. Ariz. May 28, 2024), attached as **Exhibit 13**]

Therefore, Plaintiff was legally an at-will employee of the City under his implied employment contract and had no property interest in his employment.

2. The Contract Clauses To The U.S. And Arizona Constitutions Prohibit The Retroactive Application Of The Amended POBOR.

The U.S. Constitution restricts the power of the States to disrupt contractual arrangements. *Sveen v. Melin*, 584 U.S. 811, 818-19 (2018); U.S. Const. Art. I, § 10, cl. 1 ("No State shall enter into any... Law impairing the Obligation of Contracts[.]"). The Arizona Constitution imposes similar restrictions on state power and is generally construed in a manner consistent with its federal counterpart. *See* Ariz. Const., Art. 2, § 25 ("No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted."); *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242

Ariz. 108, 116 (2017) (relying on federal and state case law to resolve argument made under Arizona Contract Clause); *State v. Helmer*, 203 Ariz. 309, 310 (Ct. App. 2002).

The threshold issue to determine whether the Contracts Clauses have been violated is "whether the…law has operated as a substantial impairment of a contractual relationship." *Sveen*, 138 S. Ct. at 1821–22; *see also Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, 293 (Ct. App. 1998) ("[Arizona's] contract impairment clause only limits the legislature's ability to impair obligations under existing contracts."). In answering this question, the Court considers "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822.

Retroactively applying the 2022 POBOR amendment would undermine the employment contract formed between the City and Plaintiff at the time of hiring. Plaintiff willingly accepted at-will employment with the City. Retroactively applying §38-1102 to negate this contractual term would substantially impair their contractual relationship. *Cf. Kendall-Jackson Winery v. Branson*, 82 F. Supp. 2d 844, 872–73 (N.D. Ill. 2000) (restriction on right to terminate their liquor distribution agreements at-will constituted a substantial impairment in violation of the Contract Clause).

If a statute substantially impairs contractual rights, as is the case here, it cannot be applied retroactively unless it would advance a "significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822 (finding substantial impairment and then analyzing "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Id.* (internal citations omitted); *In re LaFortune*, 652 F.2d 842, 846 (9th Cir. 1981) ("But where the impairment is substantial, then the nature and purpose of the legislation must be examined to determine whether the governmental interests justify the impairment."). These circumstances do not exist. It is critical that the City have trust and confidence in the leadership of the police department – the only municipal department empowered to take away a person's life or liberty – particularly where, as here, misconduct is at issue. The City must be able to act

rapidly and expediently to make a change if there is a loss of confidence in a police chief's leadership ability, without being hamstrung by cumbersome procedural restrictions. For these reasons, the Contract Clauses of the federal and state Constitutions prohibit the 2022 amendments to POBOR from retroactively applying to overcome the at-will employment agreement between the City and Plaintiff. As a result, Plaintiff had no property interest in his employment, as required to invoke due process.[6]

C. Plaintiff Cannot Rely On State Statutes Or Investigative Procedures To Support A Procedural Due Process Claim.

As a further deficiency with Plaintiff's due process claim, Plaintiff improperly conflates constitutional due process with the procedural requirements of the POBOR. In describing the basis for his claim, Plaintiff asserts:

> Here, Defendants violated [Plaintiff's] rights under A.R.S. § 38-1101 et seq. by not providing him the required notice of the investigation, the proper notice and ability to appear at the "Executive Session," the appeal remedy authorized by statute, and/or due process under state and/or federal law. They further violated his rights when they failed to comply with A.R.S. § 38-431.01 by going beyond the stated purpose and notice.

[Compl. at ¶ 119]

Contrary to Plaintiff's misguided assumption, state procedural requirements are not synonymous with the protections of the Constitution. Instead, as a general rule, a violation of state law or procedures does not lead to liability under § 1983. *Campbell v. Burt*, 141 F.3d 927, 930 (9th Cir. 1998); *Garzon v. City of Bullhead*, No. CV-10-8151-PHX-GMS, 2011 WL 3471215, at *3 (D. Ariz. Aug. 8, 2011).

Furthermore, courts have recognized that an investigation does not trigger due process rights; rather, due process only attaches when there is a proposed deprivation of a protected property interest. *See Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 523 (10th Cir. 1998) ("[T]he fact that University administrators conducted an investigation without Professor Tonkovich's knowledge does not implicate procedural due process because he ultimately received notice of the charges and a meaningful opportunity to

[6] Judge Brnovich's Order stated, "Due to the Court's finding on the applicability of the presumption, the Court will not analyze the potential applicability of the Contract Clauses." Ex. 12 at 9.

respond in the hearing. . . ."); *Cadorna v. City & County of Denver*, No. 04CV01067-REBCBS, 2006 WL 1659064, at *2 (D. Colo. June 8, 2006) ("Although plaintiff describes his pre-termination due process claims as involving defendant's allegedly faulty and biased investigation of the charges against him, such allegations do not implicate constitutional due process rights."); *Ramirez-De Leon v. Mujica-Cotto*, 345 F. Supp. 2d 174, 188 (D.P.R. 2004) ("[I]nvestigations conducted by administrative agencies, even when they may lead to criminal prosecutions, do not trigger due process rights[;] there must also be an adjudication.") (citation omitted). Indeed, this Court has recognized that "allegations of a biased pre-termination investigation do not implicate constitutional due process rights." *McClarty v. Tolleson*, No. CV-16-00065-PHX-DJH at p. 10 (D. Ariz. Sep. 16, 2016). Thus, Plaintiff cannot assert viable due process claims based on the POBOR or the manner in which the investigations were conducted.

D. Plaintiff Has Not Pled Sufficient Facts To State A Viable Substantive Due Process Claim.

In a further attempt to state a constitutional claim, Plaintiff asserts that Defendants violated his right to substantive due process, which "forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with the rights implicit in the concept of ordered liberty." *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1072 (D. Ariz. 2012). Among other deficiencies, Plaintiff has failed to identify the nature of the purported violation. Instead, he relies on vague and conclusory allegations that lump together multiple defendants and claims and are devoid of any factual support, such as stating: "Defendants violated Plaintiff's constitutional rights under the United States Constitution, Fourteenth Amendments and Ariz. Const. art. II, § 4 as to procedural due process and substantive due process as well as violated his rights under Arizona statutes as set forth herein. The conduct shocks the conscience depriving Plaintiff of a property interest, employment, as well as violated procedural and statutory rights." [Compl. at ¶ 115] This is hardly the

type of factual allegation that raises the right to relief above a speculative level. *Iqbal*, 129 S. Ct. at 1945.

Simply put, Plaintiff relies on the same kind of "unadorned, the-defendant-unlawfully-harmed-me accusations" that the Supreme Court found deficient in *Iqbal*. *Id.* at 1949. There, the plaintiff alleged that the defendants "knew of, condoned, and willfully and maliciously" subjected him to "harsh conditions of confinement as a matter of policy," on "account of his religion, race, and/or national origin and for no legitimate penological interest." *Id*. at 1951. The Supreme Court rejected these allegations, stating:

> These bare assertions, much like the pleading of conspiracy in Twombly, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy "because of," not merely "in spite of," its adverse effects upon an identifiable group. As such, the allegations are conclusory and not entitled to be assumed true.

Id. (internal citations and quotations omitted).

Plaintiff's bald assertions regarding purported constitutional violations by Defendants do not support a viable substantive due process claim. "To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). If a plaintiff shows a deprivation of such an interest, the plaintiff must next demonstrate that the harmful conduct "shocks the conscience." *Rosenbaum v. Washoe Cnty*., 663 F.3d 1071, 1079 (9th Cir. 2011). "This requires more than merely arbitrary or capricious conduct that violates state law." *DeGroote v. City of Mesa*, No. CV07-1969-PHX-MHM, 2009 WL 485458, at *4 (D. Ariz. Feb. 26, 2009). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity," and "[t]hese fields likely represent the outer bounds of substantive due process protection." *Nunez*, 147 F.3d at 871 n.4 (citations omitted).

The Complaint asserts only "formulaic recitations" of a substantive due process claim but fails to identify what, if anything, about Defendants' alleged conduct was so contrary to the principles of law that it shocks the conscience. The claim fails.

E. Plaintiff Has Failed To State Any Plausible Due Process Claim Against The Individual Defendants.

Plaintiff alleges that five individual Defendants violated his due process rights (Elinski, Rodriguez, Douglass, Winkler, and Wilber), but he has not pled sufficient facts to provide fair notice of the alleged grounds for liability. Thus, he has once again failed to raise the right to relief above a speculative level.

To establish personal liability, a plaintiff must establish that an individual defendant was an "integral participant" in the alleged deprivation of constitutional rights. *Maa v. Ostroff*, No. 12-CV-00200-JCS, 2013 WL 1703377, at *27 (N.D. Cal. Apr. 19, 2013). This means that "liability cannot attach to 'a mere bystander' who had 'no role in the unlawful conduct." *Id*. Moreover, it is not enough for a plaintiff to make blanket allegations of a "team effort" to commit the allegations. *Chuman v. Wright*, 76 F.3d 292, 294–94 (9th Cir. 1996) (trial court erred by instructing jury that individual liability could be found by the deprivation of rights resulting from a "team effort").

As the court observed in *Robbins v. Okla. ex rel. Dep't of Human Servs*: "In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual capacities. Therefore, it is particularly important in such circumstances that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." 519 F.3d 1242, 1249–50 (10th Cir. 2008). Plaintiff's Complaint utterly fails to adhere to this concept. Plaintiff has made little effort to parse out the conduct of each individual Defendant. Instead, he lumps multiple Defendants together, alleging that: "Defendants were acting under color of law at all relevant times and are not entitled to qualified immunity based on their actions."; Defendants violated Plaintiff's

constitutional rights[.]; "Here, there was no mistake made by the Defendants but instead, they engaged in a coordinated effort to terminate and falsely disparage [Plaintiff.]; and "Here, Defendants violated [Plaintiff's] rights under A.R.S. § 38-1101 et seq." [Compl. at ¶¶ 115–16, 119] Given the Complaint's use of the collective term "Defendants" but with no distinction as to what acts are attributable to whom, it is impossible for any of the individuals to ascertain what particular unconstitutional acts they are alleged to have committed. Without additional allegations setting forth each individual Defendants' purported conduct, Plaintiff has failed to plead a viable Section 1983 claim against Elinski, Rodriguez, Douglass, Winkler, and Wilber.

F. The Individual Defendants Are Qualifiedly Immune.

The individual Defendants are entitled to qualified immunity from liability under Section 1983 unless Plaintiff establishes that they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity is a question of law, not a question of fact, and "ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When correctly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Here, even if his due process theory had legal support (it does not), the alleged denial of due process is not clearly established, insofar as the Contracts Clause barred Plaintiff from acquiring a property interest in his position as Chief of Police. Furthermore, Plaintiff has failed to plausibly establish that each individual Defendant was an integral participant in the alleged constitutional violations. *Blankenhorn v. City of Orange*, 485 F.3d 463, 481, n.12 (9th Cir. 2007).

The *Twombly/Iqbal* pleading standard applies with particular force in qualified immunity cases because of the special interest in resolving the affirmative defense at the earliest possible stage of litigation. *Harlow*, 457 U.S. at 818. The Section 1983 claims

against Elinski, Rodriguez, Winkler, Douglass, and Wilber should be dismissed based on the scarcity of facts demonstrating that each of them personally engaged in a knowing violation of clearly established law.

IV. PLAINTIFF CANNOT ASSERT A VIABLE AEPA CLAIM BASED ON HIS COMPLAINT ABOUT WINKLER'S INADVERTENT DISCLOSURE.

For Count II of the Complaint, Plaintiff alleges, in part, that the City violated the Arizona Employment Protection Act ("APEA") by terminating his employment in retaliation for disclosing that Winkler inadvertently sent him a confidential e-session recording. [Compl. at ¶¶ 33, 87–91] These allegations do not support a viable claim.

Under A.R.S. § 23-1501(A)(3)(c)(ii), an employer may not terminate an employee in retaliation for:

> The ***disclosure*** by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of this state [.]

(emphasis added). According to Black's Law Dictionary, the term "disclosure" means: "The act or process of making known something that was previously unknown; a revelation of facts[.]" Plaintiff made no such "disclosure" regarding Winkler.

As background, on June 26, 2023, Winkler inadvertently sent Plaintiff an audio recording that included a confidential executive session of the Cottonwood City Council. A few days later, on July 7, 2023, City Manager Douglass emailed Plaintiff, stating:

> Chief – It has come to our attention that the recording of Council's May 9, 2023 Special Meeting that was provided to you on June 26, 2023, as a supplement to the June 15 NOI included a recording of Council's Executive Session with attorney Steve Coleman for legal advice on resolution of the Dever v. Cottonwood matter. The inclusion of the recording of the Executive Session was inadvertent as such material is privileged and not subject to release.
>
> Therefore, I am directing you to destroy the copy that was provided to you on June 26 and confirm back to me in writing that this has been done and that you have not circulated any copies of the recording.
>
> If you would like to receive a copy of the May 9, 2023 Special Meeting with the Executive Session redacted, please let our City Attorney know and she will have one prepared for you.

In response, Plaintiff wrote:

> Yes, we planned on disclosing that today. Jenny had informed me that IT could not put the audio in a format I can access on an Apple product. I was

> informed IT couldn't do it for some reason so I had someone convert it. I have a copy as does Mike, my representative. I have complied with your directive and deleted my copy and shared the content of this email with Mike.

[Emails re: disclosure, attached as Exhibit E to Plaintiff's Compl.]

Two weeks later, on July 21, 2023, Plaintiff made a written complaint to the City regarding Winkler's inadvertent disclosure, stating: "While I don't believe Ms. Winkler made the original mistake intentionally, it was certainly a **grossly negligent violation of ARS 38-431.02**[.]" [*Id.*] In a fatal flaw, however, Plaintiff was not reporting information that was *previously unknown to the City*—as required to satisfy the definition of "disclosure." Rather, Plaintiff was parroting back information that *the City reported to him* in an earlier communication.

To construe AEPA as protecting Plaintiff's conduct would produce bizarre and unintended results. Any employee facing potential termination – as Plaintiff was at the time of his report – could simply regurgitate a matter of public knowledge and then be insulated from consequences for misconduct.

This Court has commented on the risks of retaliation claims being abused:

> [P]laintiffs are filing retaliation claims with "ever-increasing frequency." *Nassar*, 133 S. Ct. at 2531. Accordingly, the stronger "but-for causation" standard serves to close the door on employees seeking to file even more frivolous retaliation claims by disallowing an employee, who perceives his or her own impending termination, to "shield against [those] imminent consequences" by pursuing some form of protected activity.

Shaninga v. St. Luke's Med. Ctr. LP, No. CV-14-02475-PHX-GMS, 2016 WL 1408289, at *11 (D. Ariz. Apr. 11, 2016). The Court should protect against similar abuse here.

The legislature enacted AEPA to protect genuine whistleblowers. This Court should not construe AEPA in a manner that would allow employees to weaponize the statute by reporting *known information*.[7] Instead, this Court should dismiss the claim that Plaintiff was retaliatorily discharged for making a complaint against Winkler based on information that, as Plaintiff was aware, the City already possessed.

[7] It is worth repeating that this is not case in which the plaintiff was unaware that the alleged wrongdoing was already known to the employer—circumstances that may justify different result. Instead, Plaintiff repeated information *that the City provided to him*.

V. PLAINTIFF'S CRIMINAL TAMPERING CLAIM DOES NOT EXIST.

Putting aside the dubious nature of the allegations in Count IV – that the former City Manager committed a felony by forwarding a written complaint without the exhibits, while still preserving a complete copy for the City – Plaintiff cannot bring a civil claim based on an alleged violation of a criminal statute. [Compl. at ¶ 41]

As the source of this claim, Plaintiff relies on A.R.S. § 13-2407(A), which establishes criminal penalties for falsifying or altering a public record. The statute states, in pertinent part: "A person commits tampering with a public record if, with the intent to defraud or deceive, such person knowingly: 1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record[.]"

In Arizona, "[t]he general rule is that no private cause of action should be inferred based on a criminal statute where there is no indication whatsoever that the legislature intended to protect any special group by creating a private cause of action by a member of that group." *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 294 (Ct. App. 1994) (internal quotation marks omitted). Here, Plaintiff has made no attempt to explain how a generally applicable criminal prohibition on tampering with public records authorizes him to bring a private action. He cites neither text nor legal authority suggesting that he belongs to a special group that the statute was enacted to protect. Nor does the plain language of the statute evince any such legislative intent. On this basis alone, the Court should dismiss Count III of the Complaint. *Robertson v. Bacolas*, No. 1 CA-CV 22-0734, 2023 WL 8055688, at *3, n. 1 (Ariz. Ct. App. Nov. 21, 2023) ("If Robertson intended to assert a stand-alone claim for vulnerable adult abuse under A.R.S. § 13-3623, the claim fails because that statute is in the criminal code and Robertson does not explain how the statute creates a private right of action."); *Warne v. Kenney*, No. 1 CA-CV 18-0374, 2019 WL 1467981, at *2 (Ariz. Ct. App. Apr. 2, 2019) ("Warne also cites Arizona's anti-wiretapping statutes, codified at A.R.S. §§ 13-3001 through 13-

3019, to argue that RPNow amounts to unlawful interception of communication. Warne does not show that these criminal statutes can support a private cause of action."); *Granillo v. Pinnacle W. Cap. Corp.*, No. 2 CA-CV 2021-0126, 2022 WL 1468779, at *4 (Ariz. Ct. App. May 10, 2022) ("The property owners' claims stemming from criminal statutes, including A.R.S. §§ 13-1502 (criminal trespass) and 13-1802 (theft), do not create private rights of action or remedy.").

Even putting aside the non-existence of this claim, Plaintiff has failed to plead sufficient facts to plausibly establish a violation by Wilber or Winkler.

VI. PLAINTIFF'S DEFAMATION IS BASED ON A NON-ACTIONABLE STATEMENT OF OPINION AND/OR RHETORICAL HYPERBOLE.

For Count V of the Complaint, Plaintiff alleges that Defendant Kurot, a member of the City Council who observed Plaintiff's confrontation with Rodriguez, defamed him by stating that: "[Plaintiff] 'threatened' Defendant Rodriguez and Defendant Elinski and he had 'crossed the line.'" [Compl. at ¶¶ 64, 112] To prove defamation, Plaintiff must establish by a preponderance of the evidence that: (1) Kurot made a defamatory statement of fact about him; (2) the statement was false; (3) the statement was published to a third party; and (4) the statement caused Plaintiff to be damaged. *Morris v. Warner*, 160 Ariz. 55, 62 (Ct. App. 1988).

Plaintiff must prove ***by clear and convincing evidence*** that Kurot acted with actual malice. *Turner v. Devlin*, 174 Ariz. 201, 204 (1993) (treating police officer as a public official) (emphasis added); *Currier v. W. Newspapers, Inc.*, 175 Ariz. 290, 292 (1993) (describing burden of proof for public officials to recover for defamation); *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343 (1989) ("Police and other law enforcement personnel are almost always classified as public officials."); *Rosales v. City of Eloy*, 122 Ariz. 134, 135–36 (Ct. App. 1979) (police officer "was a 'public official' under the law governing libel and slander."). To satisfy this heightened burden, Plaintiff must demonstrate that Kurot knew the challenged statement was false or acted in reckless disregard for the truth or falsity of the statement. *Turner*, 174 Ariz. at 204.

When faced with a defamation claim, the Court acts as a gatekeeper protecting the right to free speech from meritless litigation to avoid a chilling effect on free expression. *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 107–08 (Ct. App. 2017). In that role, the Court must first determine whether a statement is capable of bearing a defamatory meaning by considering the surrounding circumstances. *Id*. In doing so, the Court must evaluate the circumstances from the point of view of a reasonable person. *Id*.

As the Arizona Court of Appeals has further recognized:

> [A] communication is not actionable if it is comprised of 'loose, figurative, or hyperbolic language' that cannot reasonably be interpreted as stating or implying facts 'susceptible of being proved true or false.' . . . This limitation 'provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation.' '[V]igorous epithet[s],' personal characterizations of manner, and 'rhetorical political invective [or] opinion,' therefore are not actionable."

Pinal County v. Cooper ex rel. County of Maricopa, 238 Ariz. 346, 351 (Ct. App. 2015). Plaintiff's claim is based on precisely this type of non-actionable speech.

Plaintiff contends that he was defamed based on Kurot's alleged statement that he "threatened" two other individuals and "crossed the line." [Compl. at ¶¶ 64, 112] As a starting point, Merriam-Webster's dictionary defines "threatened" as:

> 1 : to utter threats against
> 2 a : to give signs or warning of : PORTEND
> the clouds threatened rain
> b : to hang over dangerously : MENACE
> famine threatens the city
> 3 : to announce as intended or possible
> the workers threatened a strike
> 4 : to cause to feel insecure or anxious
> felt threatened by his brother's success[8]

To be defamatory, a statement must bring a person into disrepute, contempt, or ridicule, or must impeach his honesty, integrity, virtue, or reputation. *Turner*, 174 Ariz. at 203–04; Restatement (Second) of Torts § 559 (1977) (statement is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the

[8] Merriam-Webster.com, https://www.merriam-webster.com/dictionary/threaten.

community or to deter third persons from associating or dealing with him."). Given the myriad definitions of "threatened," some of which are wholly innocuous, it cannot be said that the alleged statement was the type that would bring a person into disrepute, contempt, or ridicule unless it was combined with an indication malicious or unlawful intent, such as "threatened to kill."

As a further flaw, the statement boils down to non-actionable opinion and/or rhetorical hyperbole. The Arizona Supreme Court's decision in *Turner* is instructive. 174 Ariz. at 204. There, a police officer questioned a high school student while investigating a possible case of child abuse. The following day, the school nurse wrote a letter complaining of the officer's behavior, stating: "[T]he officer demanded that the student stand against the wall. The student was interrogated as if he, the victim, had committed an illegal act. The officer was rude and disrespectful, and his manner bordered on police brutality. . . . There is no excuse for this outdated, uneducated behavior on the part of so important a group as our Police Department." *Id*. at 210.

The Supreme Court found that the nurse's statements were not actionable. As an initial matter, the court held that "[b]ecause there is a great need for uninhibited dialogue concerning the actions of so important an arm of government, especially with regard to the treatment of children, [the challenged statements] must be provable as false before a defamation action can lie." *Id*. at 205. The court then resoundingly rejected the defamation claim for failure to meet this standard:

> The letter reveals nothing more than [the nurse's] subjective impression of Turner's "manner." The statements alleged to be defamatory contain no factual connotations that are provable. Devlin's characterizations of Turner's tone of voice as a "demand[ ]," of his interview as like a criminal interrogation, of his demeanor as "rude and disrespectful," and of his "manner" as "border [ing] on police brutality" and, by implication, as "outdated" and "uneducated" are plainly her personal impression of Turner's interview methods.
>
> Surely, if Devlin perceived Turner's "demand" as a "request," Turner would not have objected. Similarly, a description of his interrogation as "questioning" would have drawn no protest. Nor would there be grounds for legal complaint had Devlin reported that his manner was "impolite" and his techniques "uninformed" rather than "rude," "disrespectful," "outdated," and "uneducated." To determine whether Turner demanded or requested the child to stand, whether his inquiry was more like a criminal interrogation rather

> than questioning, whether his manner was rude, disrespectful, outdated, and uneducated as opposed to something less offensive all lie beyond the realm of factual ascertainment or proof. Finally, instead of describing Turner's manner as "border[ing] on police brutality," if Devlin had chosen an analogy not so close to home (for example, bordering on barbarianism), the subjective nature of her criticism would be unassailable.
>
> We can conceive of no objective criteria that a jury could effectively employ to determine the accuracy of Devlin's assessment. Whether her assessment is true or false is simply "not the kind of empirical question a factfinder can resolve." Unlike the word "communist," where the adherence to party doctrine can be used to evaluate the accuracy of the characterization, absent an implication of physical abuse, Devlin's comments have no bench mark with which to judge their accuracy. . . .
>
> According to Devlin's letter, Turner grossly mishandled what apparently should have been a sensitive and delicate investigation. She chose words that could effectively convey her strong disapproval. To be actionable, however, such words must be capable of being reasonably interpreted as stating actual facts about Turner. *See Milkovich*, 497 U.S. at 16–17, 110 S.Ct. at 2704–05, 2706 (holding that reference to negotiation technique as "blackmail" was nonactionable rhetorical hyperbole); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988) (holding that the First Amendment precluded recovery for emotional distress for advertisement parody that "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284–86, 94 S.Ct. 2770, 2781–82, 41 L.Ed.2d 745 (1974) (holding that use of the word "scab," with a definition that included "traitor," was "merely rhetorical hyperbole" and was not a basis for a defamation action under federal labor law)). This requirement "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Devlin's depiction of Turner's interview as like a criminal interrogation that bordered on police brutality falls within this protection.
>
> Devlin's letter did not accuse Turner of physical abuse or brutality. Instead, Devlin characterized his interview as an interrogation conducted as if the student had committed an illegal act and characterized his manner as bordering on police brutality. Use of the words "manner," "as if," and "bordered"—and indeed the entire letter—do not describe or imply an accusation of physical conduct and clearly let the reader know that the characterizations were not meant to be precise. . . .
>
> In our view, "even the most careless reader" would have perceived Devlin's description as "no more than rhetorical hyperbole, a vigorous epithet" used to criticize Turner's behavior. *Bresler*, 398 U.S. at 14, 90 S.Ct. at 1542; *see also Thuma v. Hearst Corp.*, 340 F.Supp. 867, 869, 871–72 (D.Md.1972) (reference to police shooting as "cold-blooded murder" was hyperbole used to voice disapproval for what the speaker believed to be an unjustified shooting); *Fleming*, 454 N.E.2d at 101 (reference to the police as "dictators and Nazis" was non-actionable rhetoric used to criticize behavior, not a statement of fact); *Orr v. Lynch*, 60 A.D.2d 949, 401 N.Y.S.2d 897, 899 (App.Div.) (report that police "opened fire" and "gunned down" suspect was non-actionable rhetorical hyperbole)[.]

Id. at 206–08 (internal citations partially omitted).

Similarly, Kurot's alleged statement that Plaintiff "threatened" Rodriguez and "crossed the line" is qualitatively indistinguishable from the nurse's characterizations of the officer's manner as "border[ing] on police brutality" and of his methods as "outdated" and "uneducated." Kurot is not alleged to have accused Plaintiff of threatening or committing a specific act of violence. Instead, Kurot's statement amounts to nothing more than her subjective impression of Plaintiff's demeanor and conduct and, therefore, is not susceptible to being empirically proven as true or false.

Indeed, as a further indication that dismissal is appropriate, decisions from numerous jurisdictions have rejected defamation claims based on the word "threatening," including the District of Arizona. *See, e.g.*, *Hernandez v. Scottsdale Hotel Grp. LLC*, No. CV-20-00349-PHX-DWL, 2020 WL 6827745, at *3–4 (D. Ariz. Nov. 20, 2020) (dismissing defamation claim based on defendant's description of plaintiff's email as "threatening" because it was a subjective impression and not provably false); *Galland v. Johnston*, 2015 WL 1290775, *5–6 (S.D.N.Y. 2015) (statements that defendant found plaintiff's emails to be "threatening and disturbing" and that plaintiff "chooses to run his business in a threatening manner" were not susceptible to being proven false); *Ward v. Jeff Props.*, LLC, 2010 WL 346459, *5 (N.C. Ct. App. 2010) ("In this context ... defendant's characterization of plaintiff's conduct as harassment, pestering, threatening, irritating, and nonsense amounts to statements of opinion or rhetorical hyperbole that are not actionable...."); *Benigni v. County of St. Louis*, 1995 WL 146822, *1 (Minn. Ct. App. 1995) ("Sharp's statement that Benigni was harassing and threatening was his characterization of Benigni's demeanor and behavior. Such characterizing of another's demeanor and behavior is a matter of opinion and…not subject to a defamation claim.").

VII. PLAINTIFF'S POBOR CLAIM IS PROCEDURALLY AND SUBSTANTIVELY FLAWED.

For Count I of the Complaint, Plaintiff alleges that the City violated the POBOR, which governs the process by which law enforcement officer misconduct is investigated and disciplined. *See* A.R.S. §§ 38-1101 to 1106. As noted above, the POBOR requires

law enforcement agencies to make certain disclosures before conducting an investigative interview. In addition, the POBOR establishes an administrative right of appeal for certain terminations, demotions, and unpaid suspensions.

The POBOR expressly grants a right of judicial review in only two narrow circumstances, neither of which applies here. First, if on appeal an independent board or hearing officer recommends reinstating or otherwise rejecting the demotion or termination of a law enforcement officer, and the final decision maker rejects that recommendation, the officer has a right to *de novo* review of that decision in superior court. A.R.S. § 38-1107(A). Second, if there is no administrative review mechanism available, a law enforcement officer may bring an action in superior court for *de novo* review of the disciplinary action. A.R.S. § 38-1107(B).

Here, there is no allegation that a final decisionmaker rejected a disciplinary recommendation. Moreover, POBOR expressly states that the second option is unavailable to an at-will police chief. A.R.S. § 38-1107(F). POBOR does not create any private right of action that is available to Plaintiff under the facts of this case. *See* Ex. 12 at 10; *Hinchey v. Horne*, No. CV13-00260-PHX-DGC, 2013 WL 4543994, at *12 (D. Ariz. Aug. 28, 2013) (the peace officer bill of rights "does not appear to provide for a private right of action"); *Hernandez v. City of Phoenix*, 482 F. Supp. 3d 902, 921 (D. Ariz. 2020), *aff'd in part, rev'd in part and remanded*, 43 F.4th 966 (9th Cir. 2022) ("Because no provision of the Peace Officer's Bill of Rights authorizes a private right of action under the facts as alleged, the Court will dismiss this claim with prejudice.").

As an additional flaw, Plaintiff has not alleged any POBOR violation. Plaintiff repeatedly gripes that he was not given notice of his alleged discriminatory conduct towards a female Detective and an opportunity to respond prior to his termination. [Compl. at ¶¶ 52, 58–59, 62] This argument misses the mark. The POBOR requires certain disclosures *prior to an investigative interview of a subject*. A.R.S. § 38-1104(A)(2). In this case, the City never conducted an internal investigation on Plaintiff regarding the allegations of gender and disability discrimination, so the POBOR was not

triggered. Instead, the City relied on the findings of the ACRD—the governmental agency charged with investigating violations of the ACRA. Therefore, his assertion that the City did not comply with POBOR's disclosure requirements fails.[9]

To the extent Plaintiff contends that he was improperly denied the right to appeal his termination, this claim fails for three significant reasons. First, as discussed at Section III.B, *supra*, Plaintiff was an at-will employee. As such, he did not have appeal rights under the POBOR. Second, as previously noted, the POBOR disclaims any cause of action by a police chief to challenge the denial of appeal. A.R.S. § 38-1107(F). Third, the POBOR establishes a 35-day statute of limitations for challenging the unavailability of an appeal. A.R.S. § 38-1107(D). Here, Plaintiff waited more than six months to commence this lawsuit. Accordingly, any POBOR challenge is time-barred.

VIII. PLAINTIFF CANNOT RECOVER PUNITIVE DAMAGES FROM A GOVERNMENTAL ENTITY.

In his request for relief, Plaintiff seeks an award of punitive damages against all Defendants. However, Plaintiff has overlooked that municipalities are immune from liability for punitive damages under state and federal law. 42 U.S.C. § 1981a(b)(1); *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981) (holding that municipalities are immune from punitive damages under civil rights laws); A.R.S. § 12-820.04 ("Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages.").

IX. THIS COURT SHOULD STRIKE ALL REFERENCES TO CONFIDENTIAL AND/OR PRIVILEGED COMMUNICATIONS.

Pursuant to Federal Rule of Civil Procedure 12(f), Defendants move to strike all references to confidential and/or privileged communications in Plaintiff's Complaint.

As previously discussed, the former City Attorney inadvertently disclosed a recording of a confidential executive session of the Cottonwood City Council. Shortly thereafter, upon discovering the error, the City instructed Plaintiff to destroy the

[9] Plaintiff was interviewed by the City's outside investigator regarding his conduct towards Rodriguez, but Plaintiff does not dispute that the City complied with POBOR's disclosure requirements prior to this interview.

recording. [Exhibit E to Plaintiff's Compl.] Plaintiff claimed to have complied with this directive, but has nevertheless referenced confidential/privileged communications from the executive session throughout the Complaint. [*Id.*] The inclusion of this material was improper, since it is legally protected from disclosure. *See, e.g.*, *Rosenfield v. GlobalTranz Enterprises, Inc.*, No. CV 11-02327-PHX-NVW, 2012 WL 12538606, at *1 (D. Ariz. Jan. 27, 2012) ("The attorney-client privilege 'protects confidential communications between attorneys and clients[ ] which are made for the purpose of giving legal advice.'"); A.R.S. 38-431.03(A) ("Minutes of and discussions made at executive sessions shall be kept confidential except from: 1. Members of the public body that met in executive session. 2. Officers, appointees or employees who were the subject of discussion or consideration pursuant to subsection A, paragraph 1 of this section. 3. The auditor general on a request made in connection with an audit authorized as provided by law.").

To the extent Plaintiff believes the City Council exceeded the scope of the executive session, the proper remedy (as set forth in Arizona's open meeting law) is to request an *in camera* inspection of the meeting minutes. *See* A.R.S. § 38-431.03(F) ("Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information."). Plaintiff does not have free license to publicly disclose the content of an executive session based on his own self-serving opinion that the session was improper.

Furthermore, even if the City Council exceeded the confines of the executive session (which the City denies), the communications involved legal advice regarding a pending administrative matter at the ACRD and, therefore, were covered by the attorney-client privilege. [Minutes of May 9, 2023 Meeting of Cottonwood City Council, attached as **Exhibit 14** ("Discussion Regarding The Reasonable Cause Determination Of The

Arizona Civil Rights Division In Dever v. City Of Cottonwood-Police Department (No. Crd-2022-0550). Pursuant To Arizona Revised Statutes Section 38-431.03(A)(3) And (4), The Council May Vote To Convene In Executive Session For Legal Advice To Provide Instruction To Legal Counsel.")] Plaintiff was notified of this status by the City, and the City preserved the privilege by clawing back the recording of the executive session upon learning of the inadvertent disclosure. [Exhibit E to Plaintiff's Compl.]

This Court should strike the following paragraphs of Plaintiff's Complaint based on the inclusion of confidential and/or privileged material: 25, 26, 28, 44, and 46. *Rosenfield*, 2012 WL 12538606, at *2 ("Because the Court agrees that paragraphs 44, 46, 47, and 48 contain information protected by the attorney-client privilege, the Court will grant Defendants' Motion to Strike (Doc. 4) and related requests to strike the privileged material from Plaintiff's response (Doc. 8) and from the state court record.").

CONCLUSION

Defendants respectfully request that the Court dismiss the following claims in Plaintiff's Complaint: all state law claims against the individual Defendants; the Section 1983 claims against all Defendants; Count I against the City; and Count II against the City, to the extent it is based on Plaintiff's report regarding Winkler. In addition, Defendants request that this Court strike paragraphs 25, 26, 28, 44, and 46 of the Complaint.

RESPECTFULLY SUBMITTED this 10th day of June, 2024.

PIERCE COLEMAN PLLC

By /s/ *Justin S. Pierce*
Justin S. Pierce
Joseph D. Estes
7730 E. Greenway Road, Ste. 105
Scottsdale, AZ 85260
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2024, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing, causing a copy to be electronically transmitted to the following ECF registrants:

LAW OFFICES OF KIMBERLY A. ECKERT
Kimberly A. Eckert
keckert@arizlaw.biz
Attorney for Plaintiff

By: /s/ *Mary Walker*

CERTIFICATE OF CONFERRAL

In accordance with Local Rule 12.1(c) and this Court's Preliminary Order (Doc. 3), undersigned counsel certifies that, prior to the filing of Defendant's Motion for Partial Dismissal of Plaintiff's Complaint and to Strike References to Privileged/Confidential Material, the parties engaged in an extensive meet and confer telephone call, which resulted in Plaintiff's Amended Complaint. Following the filing of the Amended Complaint, undersigned counsel e-mailed Plaintiff's counsel that the deficiencies had not been cured, and offered to have another phone call, or otherwise exchange e-mails as necessary to further meet and confer on the issue. Plaintiff's counsel never responded to that e-mail, but instead, filed what Defendants will demonstrate is a tactically abusive and frivolous motion for disqualification in its forthcoming response to that motion. Therefore, the parties were unable to agree that the challenged claims are curable by a permissible amendment and Defendants' Motion to Dismiss is ripe for consideration by the Court.

/s/Justin S. Pierce
Justin S. Pierce

June 6, 2024
Date

Stephen Gesesll v. City of Cottonwood, et al

3:24-cv-08090

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OFFICE OF THE ARIZONA ATTORNEY GENERAL

KRIS MAYES
ATTORNEY GENERAL

CIVIL LITIGATION DIVISION
DIVISION OF CIVIL RIGHTS SECTION

LESLIE ROSS
ACTING CHIEF COUNSEL

April 25, 2023

SENT U.S. MAIL AND EMAIL
Cottonwood Police Department
c/o Stephen B. Coleman, Esq.
PIERCE COLEMAN
7730 East Greenway, Suite 105
Scottsdale, AZ 85260
steve@piercecoleman.com

Re: Kiedi Dever v. Cottonwood Police Department
CRD No. CRD-2022-0550; EEOC No.: 35A-2022-00415

Dear Mr. Coleman:

Accompanying this letter is a copy of the Determination of the Civil Rights Division in the above-referenced matter. This Determination is based upon the investigation conducted by this Division.

You and your client are invited to participate in settlement discussions to determine if this matter can be resolved. If you would like to do so, please contact the Litigation Section at (520) 209-4311 to speak with Assistant Attorney General, Maura Hilser, assigned to this case. Your response is required within five (5) days of your receipt of this letter.

Sincerely,

Maura Hilser

Maura Hilser
Assistant Attorney General

MH/edw
Enclosure

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

KRIS MAYES
ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

Kiedi Dever, Charging Party, v. City of Cottonwood- Police Department, Respondent.	Complaint No. CRD- 2022-0550 **REASONABLE CAUSE DETERMINATION**

The Arizona Civil Rights Division (the "Division") issues the following order pursuant to Arizona Revised Statutes (A.R.S.) Section 41-1481(B). The Division investigated Kiedi Dever's charge of discrimination and finds the following facts are sufficient to establish reasonable cause to believe Respondent violated the Arizona Civil Rights Act ("ACRA"). Other relevant facts are known to the Division but not provided because they are not necessary to meet the burden of this finding.

Background Facts

City of Cottonwood is a municipality in Yavapai County with a population of approximately 12,000. The City of Cottonwood Police Department is a department of the City of Cottonwood. The City of Cottonwood, through the Cottonwood Police Department (collectively "CPD"), employs Charging Party Keidi Dever, and is an employer subject to the ACRA under A.R.S. § 41-1461(7)(a).

Charging Party Kiedi Dever ("Dever") began working with CPD as a Communications Specialist on August 13, 2006. Dever became a sworn Police Officer in 2012 and became a Detective in 2020. Dever is an employee protected by the ACRA under A.R.S. § 41-1461(6)(a), and a qualified individual with a disability under A.R.S. § 41-1461(5),(12).

Charge of Discrimination

Dever timely filed a charge of discrimination with the Division on May 25, 2022, alleging sex-based discrimination in employment. Dever is one of three female police officers at CPD. Specifically, Dever alleged that she was subjected to different terms and conditions of employment and a hostile work environment because of her sex, in violation of A.R.S. § 41-1463(B)(1,2). Dever

amended her charge of discrimination to include allegations alleging disability-based discrimination, retaliation, and other aggrieved individuals.

Investigation

The investigation revealed the following facts that support a finding that CPD engaged in unlawful employment practices against Dever:

- Dever was subjected to hostility from, and unwarranted disciplinary actions by, male CPD supervisors.
- Sergeant Sinn ("Sinn") often talked down to female CPD employees, including but not limited to Dever. He routinely demeaned Dever, and often complained about her, including but not limited to calling her stupid.
- Dever was routinely critiqued by her immediate supervisor Sergeant Scott ("Scott") for perceived performance issues, although she had previously received praise in annual reviews by other supervisors for those same performance characteristics.
- In January 2022, Dever informed Scott of her exposure to traumatic incidents and her interest in seeking mental health treatment. Scott told Dever that she "should leave the Detective position" because it was "too much" for her.
- Dever independently sought mental health treatment and was thereafter diagnosed with post-traumatic stress disorder ("PTSD").
- While on leave for PTSD, CPD assigned a male employee to temporarily fill Dever's position. Email communications from CPD in January and February 2022 reflect CPD's intent for the assignment to be temporary; however, that male employee remains in the Detective position.
- In or around January 2022, CPD employees submitted responses to a CPD anonymous survey. The responses included but are not limited to statements such as, "the city should be proactive in looking into the females supervised by Commander Braxton," "the same with Sergeant Chad Sinn he is creating a hostile work environment within the department…employees are afraid to speak out in fear of backlash with them being higher ups," and "there is concerns (sic) how Commander Braxton treats his female subordinates…"
- In response to the survey, Human Resources Director Amanda Wilber ("Wilber") interviewed seven female employees of CPD, but no male employees. Wilbur did not interview Sinn or Braxton.
- Through Wilber's interviews, CPD confirmed that an employee "witnessed Sergeant Sinn speaking very disrespectfully to Kiedi Dever." After correction by a female CPD Sergeant, the witness believed Sergeant Sinn's "behavior has accelerated and gotten worse."
- Wilber concluded in part that CPD's work environment "indicates intimidation [and] bullying" and acknowledged that "the perception of discrimination exists with female subordinates of Commander Braxton and Sergeant Sinn," but

ultimately held: "[I]t seemed the behaviors are not based on sex. Behaviors may be directed un-proportionately towards different positions based on the reports of employees. All females in certain areas has (sic) similar experiences, however, some females from stand-alone positions did not experience feeling discriminated against."

- On May 25, 2022, Dever filed an initial charge of discrimination with the Division, alleging that CPD subjected her to sex-based discrimination and harassment.
- In June 2022, Dever was released to return to full duty with no restrictions by a licensed psychologist based on an independent medical examination.
- In an email dated June 13, 2022, Chief of Police Steve Gesell ("Gesell") stated that returning Dever to Detective was inappropriate because it "conflicts with the allegations alluded to in the AG [charge of discrimination] potentially placing the employee and employer is [sic] avoidable positions before more is known."
- During his interview with the Division, Gesell testified that he could never justify giving Dever "any type of concession like putting her back [in Investigations as a Detective.]"
- Dever returned to work in June 2022 and instead of resuming her role as Detective, she was informed by Gesell that she would be reassigned to Patrol Officer with supervision by a Field Patrol Officer. The reassignment from Detective to Patrol Officer resulted in a 5% salary decrease for Dever and a less favorable shift assignment that included weekend swing shifts.
- Gesell claimed the reassignment was done to reacclimate Dever to the duties of a Police Officer, but without Dever in the CPD Criminal Investigations Unit, the Investigations Unit contained only male Detectives.
- When a male Detective returned from a three month leave of absence, he was not required to complete any time with a Field Training Officer and was immediately assigned to the Investigations Unit as a Detective, initially on light duty, and eventually returned to full duty.
- Another male Officer took a leave of absence for a Traumatic Brain Injury. When asked about this Officer, Gesell could not remember if he was required to ride with a Field Training Officer, but stated that if he did, it was only for "one or two shifts." Gesell ordered Dever to be supervised by a Field Training Officer for several weeks.
- Despite having a full release without restrictions from a medical practitioner, Gesell nonetheless claimed that Dever's "mental health was a concern."
- During the Division's investigation, Gesell testified, under oath, that female employees are "emotional," that two of the management-level female staff made their supervisory decisions based on "relationships rather than more pragmatic approaches… [or] logical outcomes," that one female supervisor "broke down in a

meeting emotionally," and that another female employee was an "emotionally driven person."

Inferential Disparate Treatment

The Division finds reasonable cause to believe CPD discriminated against Dever on the basis of sex in violation of A.R.S. § 41-1463(B)(1).

Disability Discrimination

The Division finds reasonable cause to believe CPD discriminated against Dever on the basis of disability in violation of A.R.S. § 41-1463(B)(1).

Retaliation

The Division finds reasonable cause to believe CPD retaliated against Dever for engaging in protected activity by filing a charge of discrimination against CPD with the Division, in violation of ARS § 41-1464(A).

Conclusion

Having determined that reasonable cause exists to believe unlawful employment practices have occurred, the Division now invites the parties to join with it in an effort to resolve this matter through conciliation. The confidentiality provisions of Arizona law apply to all information shared and received during conciliation. The Arizona Civil Rights Act prohibits retaliation against employees for making a charge, testifying, or participating in any manner in a Division investigation. ARS § 41-1464 (A).

The parties may indicate their willingness to engage in conciliation by contacting the Division at (602) 542-5263 within five (5) working days.

Date: 04/25/2023

Arizona Civil Rights Division

By: _____

Linda Bohlke, Compliance Manager
Civil Rights Division

OSBORN MALEDON
ATTORNEYS AT LAW

TO: Scotty Douglass

FROM: Geoffrey M.T. Sturr

DATE: September 5, 2023

RE: Report of Investigation

Osborn Maledon, P.A. was retained by the City of Cottonwood to conduct an investigation of Chief of Police Steve Gesell's conduct on May 9, 2023. This is the report of that investigation.

Course of Investigation

The investigation was conducted by Geoffrey Sturr with the assistance of paralegal Michelle Burns. Chief Gesell was interviewed on July 7, 2023. He had previously received written notice of the investigation. The interview was recorded. Chief Gesell submitted a written statement on July 12, 2023. The following individuals were also interviewed: Mayor Tim Elinski (June 20, 2023); Vice Mayor Debbie Wilden (July 19, 2023); Council Member Stephen De Willis (July 18, 2023) Council Member Lisa DuVernay (July 17, 2023); Council Member Helaine Kurot (July 17, 2023); Council Member Jackie Nairn (July 17, 2023); Deputy City Manager Rudy Rodriguez (June 20, 2023); Human Resources Director Amanda Wilber (July 19, 2023); Commander Chris Dowell (July 18, 2023); and attorney Christina Werther (June 23, 2023).

Findings

1. On the morning of May 9, 2023, Chief Gesell was informed, and confirmed by reviewing an agenda on the City's website, that the City Council would discuss at a special meeting that evening a Reasonable Cause Determination the Arizona Attorney General's Civil Rights Division had issued to the City on April 25, 2023.

2. One item on the posted agenda was "[d]iscussion regarding the reasonable cause determination of the Arizona Civil Rights Division in *Dever v. City of Cottonwood Police Department* (No. CRD-2022-0550)." An accompanying document identified the subject of the agenda item as a "legal update" regarding the Reasonable Cause Determination and stated as background information: "Staff and legal counsel will provide the City Council with an update regarding the reasonable cause determination," and that the "Council may vote to convene an executive session."

3. Chief Gesell had previously been informed by then-City Attorney Steve Horton that the Reasonable Cause Determination had been issued and had received a copy.

4. Chief Gesell was concerned that he had not been informed that the Council would be discussing the Reasonable Cause Determination during the special meeting. He believed he should be present to answer Council Members' questions about its content.

5. As Chief Gesell stated in his July 12, 2023 written statement, when he learned of the special meeting, he speculated that then-Interim City Manager Rudy Rodriguez had not informed him of the meeting or invited him to attend because Mr. Rodriguez was "attempt[ing] to discredit me before the new city manager arrived the following Monday."

6. Chief Gesell called Council Member DuVernay to discuss the agenda, to confirm the Reasonable Cause Determination had been provided to Council members, and to express his desire to participate in the Council's executive session.

7. Chief Gesell spent time that afternoon preparing documents and information to present to the Council regarding the Reasonable Cause Determination.

8. At 5:00 p.m., Mr. Rodriguez sent an email to Chief Gesell and Human Resources Director Amanda Wilber which stated: "At tonight's executive session, we will have City Council and lawyers present. Amanda should also be present in the executive meeting. Chief, if you planned to attend, there will be no need at the executive session. Thanks. Rudy."

9. Chief Gesell did not respond to Mr. Rodriguez's email or seek to speak with Mr. Rodriguez about his desire to participate in the Council's executive session. When interviewed, Chief Gesell stated that Mr. Rodriguez's email "raised [his] concern significantly that this was a malicious, opportunistic attempt to defame me or discredit me before the new city manager arrived." Chief Gesell's July 12, 2023 written statement similarly states that Mr. Rodriguez's email "bolstered" his speculation that Mr. Rodriguez was excluding him from the executive session as "an opportunistic attempt to discredit [him] just prior to the new city manager's arrival."

10. The investigation found no evidence whatsoever to support Chief Gesell's speculation about the reasons Mr. Rodriguez informed Chief Gesell he did not need to attend the executive session.

11. At 5:53 p.m., Chief Gesell sent a text message to Council Member Kurot which read: "FYI. Rudy is attempting to keep me out of your executive session. It is either incompetence or malicious intent or both. I'm going to call him out if invited in. Horton is possibly involved but I'm speculating. Get me in please."

12. At 6:30 p.m., the Council began a work session. Chief Gesell and Commander Dowell attended the work session.

13. At the conclusion of the work session and before the special meeting began, Mayor Elinski spoke to Chief Gesell about the Council going into executive session to discuss the Probable Cause Determination. Commander Dowell was present and observed their interaction. During that discussion, Chief Gesell told Mayor Elinski that Mr. Rodriguez was attempting to "block" him from presenting information to the Council in executive session and stated that he must participate in the executive session to ensure Council heard his comments on the Probable Cause Determination. Mayor Elinski described Chief Gesell's demeanor as irritated and agitated. Commander Dowell said Chief Gesell was angry, curt, disrespectful and rude when he spoke to Mayor Elinski.

14. At the outset of the Council's discussion of the Probable Cause Determination a Council Member suggested that Chief Gesell be present during executive session to answer questions. Outside counsel Christina Werther advised the Council that the focus of the executive session was narrow, stating "[t]his is for legal advice . . . [b]ut . . . is not about the investigation itself. This is about where we're at now with the determination and . . . how we move forward with the settlement." After a Council Member asked whether the Council could, after going into executive session, ask questions of Chief Gesell, Ms. Werther advised that the Council could "go into executive session, [and] if the Chief is willing to be available and stick around . . . we can bring him back in . . . again . . . if you want to either bring him into session or we come back out into open session." When Chief Gesell was asked if he would leave the Council chambers and wait outside, he said he would do so. He and Commander Dowell then left Council chambers.

15. While the Council was in executive session, Chief Gesell waited outside. When interviewed, Chief Gesell stated he was "very upset and . . . trying to control his emotions." Commander Dowell stated that Chief Gesell was "fuming," "very upset," and "angry."

16. After meeting in executive session, the Council did not seek to ask questions of Chief Gesell and adjourned the special meeting. Amanda Wilber sent Chief Gesell a text message saying the Council would not be calling him.

17. When Mr. Rodriguez was leaving Council chambers he was confronted by Chief Gesell. Mr. Rodriguez described Chief Gesell as noticeably agitated. He stood 12-18 inches from him, speaking with a raised voice. When asked if he felt physically threatened, Mr. Rodriguez stated that he did not immediately feel threatened but felt he needed to diffuse the situation, and that if the incident had gone any longer he would have been concerned. In his written statement, Chief Gesell stated he was "confused, frustrated and suspected malice," and "believe[d] the volume of [his] voice was slightly elevated."

18. Chief Gesell asked Mr. Rodriguez why he had not been allowed to participate in the executive session. Mr. Rodriguez sought to defuse the situation by stating he would get back to him the following day, but Chief Gesell insisted on receiving an answer. Mr. Rodriguez told Chief Gesell that the session involved a legal matter that did not warrant the Chief's participation, and that his participation would not have been in the Council's and the City's best

interests. Chief Gesell stated that he believed his own reputation and that of the Police Department were on the line.

19. Chief Gesell then walked away, visibly angry.

20. Mr. Rodriguez observed Ms. Werther leaving the Council Chamber and was concerned that Chief Gesell would confront her, but Chief Gesell did not do so.

21. As Chief Gesell was crossing the street he yelled to Mr. Rodriguez "this is a travesty" and "this is not over Rudy."

22. Mr. Rodriguez went to his office and remained there for 20 minutes to ensure that another confrontation with Chief Gesell would not occur.

23. Chief Gesell's interactions with Mr. Rodriguez were observed by two Council Members. Council Member Kurot stated that when Mr. Rodriguez exited the building "the Chief lost his mind" and "came after" Mr. Rodriguez "yelling and screaming." She was close enough to see this but couldn't understand everything that was said. She left before their conversation ended. Council Member DuVernay observed Chief Gesell's discussion with Mr. Rodriguez from a distance and recalled that Chief Gesell's expression was terse and that he was evidently unhappy, but appeared to be speaking professionally.

24. After speaking with Mr. Rodriguez, Chief Gesell called Amanda Wilber. During that phone call Chief Gesell told Ms. Wilber he had "ripped Rudy a new one" and admitted he had yelled at Mr. Rodriguez. He told Ms. Wilber that Mr. Rodriguez, Mayor Elinski and Ms. Werther had colluded in preventing him from speaking to the Council about the Probable Cause Determination. He went on to criticize Mr. Rodriguez's job performance.

25. The following day, Chief Gesell sent a text to Mr. Rodriguez which read: "Rudy, I was beyond frustrated last night with the sequence of events. I owe you an apology for my tone. I get passionate when good is trampled by falsehood and self interest. FYI Pierce Coleman provided a logical rationale of an open meetings violation if I was allowed to answer questions. Totally made sense but was not conveyed prior or at the meeting. If you got the rationale from Steve H, he apparently erred."

26. On May 11, 2023, Chief Gesell was asked to meet with Mr. Rodriguez and Ms. Wilber. When interviewed, Chief Gesell stated that he "expected to get a letter of reprimand for some alleged type of policy violation which I thought in my mind would be unfounded and would not make [Mr. Rodriguez] look good [and which] [i]n the end . . . would backfire on him." When he was informed he was being placed on administrative leave, Chief Gesell told Mr. Rodriguez that the decision to place him on administrative leave was "weak" and "incompetent" and reflected Mr. Rodriguez's poor decision making.

Conclusions

Chief Gesell's conduct violated City policies set forth in the City of Cottonwood Employee Manual Section 8 – Corrective Action and the Cottonwood Police Department Policy Manual.

A. After receiving an email from then-Interim City Manager Rodriguez telling him that he did not need to attend the executive session, Chief Gesell speculated without any justification that Mr. Rodriguez was seeking to harm his standing with the incoming City Manager by excluding him from the executive session. Chief Gesell then sent a text message to Council Member Kurot alleging that Mr. Rodriguez was either incompetent or was acting with malicious intent to harm him by excluding him from the executive session. His text message made speculative allegations that former City Attorney Steve Horton had colluded with Mr. Rodriguez to prevent him from participating in the executive session. He asked Council Member Kurot to get him into the executive session and threated to "call out" Mr. Rodriguez if he was permitted to participate in the executive session. By ignoring Mr. Rodriguez's email and seeking assistance from a City Council member to attend the executive session, by making baseless allegations against senior City officials, and by threatening to "call out" Mr. Rodriguez if allowed to attend the executive session, Chief Gesell violated the following policies:

1. Section 8: Insubordination.
2. Section 8: Acts detrimental to the mission of the City.
3. Section 8: Acts that bring discredit to the City.
4. CPD Policy Manual Section 321.5.8(i) – acts bringing discredit to the Department.
5. CPD Policy Manual Section 321.5.9(m) – acts unbecoming a member of the Department, contrary to good order, or which tend to reflect unfavorably on the Department.

B. After receiving an email from then-Interim City Manager Rodriguez telling him that he did not need to attend the executive session, Chief Gesell told Mayor Elinski in a conversation before the Council's special meeting that Mr. Rodriguez was attempting to block him from presenting information to the Council in executive session and insisted that he attend the executive session. He was angry, curt, disrespectful and rude in his communications with Mayor Elinski. In so doing, Chief Gesell violated the following policies:

1. Section 8: Insubordination.
2. Section 8: Discourtesy to another employee.
3. Section 8: Acts detrimental to the mission of the City.
4. Section 8: Acts that bring discredit to the City.
5. CPD Policy Manual Section 321.5.8(i) – acts bringing discredit to the Department.
6. CPD Policy Manual Section 321.5.9(f) – discourteous, disrespectful treatment of any member of the City.

7. CPD Policy Manual Section 321.5.9(m) – acts unbecoming a member of the Department, contrary to good order, or which tend to reflect unfavorably on the Department.

C. After receiving an email from then-Interim City Manager Rodriguez telling him that he did not need to attend the executive session and observing the Council decide, based on advice from attorney Christina Werther, that he should not participate in the executive session, Chief Gesell angrily confronted Mr. Rodriguez after the Council meeting, in the presence of Council Members, City employees and the public, demanding to be told why he had not been permitted to attend the executive session. Unhappy with Mr. Rodriguez's explanation, he walked away from Mr. Rodriguez yelling "this is a travesty" and "is not over." Chief Gesell did so in a manner that left Mr. Rodriguez with the impression that he could be at risk of physical harm if the situation were not diffused. In so doing, Chief Gesell violated the following policies:

1. Section 8: Insubordination.
2. Section 8: Discourtesy to another employee.
3. Section 8: Acts detrimental to the mission of the City.
4. Section 8: Acts that bring discredit to the City.
5. CPD Policy Manual Section 321.5.8(i) – acts bringing discredit to the Department.
6. CPD Policy Manual Section 321.5.9(f) – discourteous, disrespectful treatment of any member of the City.
7. CPD Policy Manual Section 321.5.9(m) – acts unbecoming a member of the Department, contrary to good order, or which tend to reflect unfavorably on the Department.

D. After receiving an email from then-Interim City Manager Rodriguez telling him that he did not need to attend the executive session and observing the Council decide, based on advice from attorney Christina Werther, that he should not participate in the executive session, Chief Gesell told Human Resources Director Amanda Wilber that Mr. Rodriguez, Mayor Elinski and Ms. Werther had colluded in preventing him from speaking to the Council about the Probable Cause Determination. In so doing, Chief Gesell violated the following policies:

1. Section 8: Acts detrimental to the mission of the City.
2. Section 8: Acts that bring discredit to the City.
3. CPD Policy Manual Section 321.5.8(i) – acts bringing discredit to the Department.
4. CPD Policy Manual Section 321.5.9(m) – acts unbecoming a member of the Department, contrary to good order, or which tend to reflect unfavorably on the Department.

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CITY OF COTTONWOOD
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November 2, 2023

City of Cottonwood
City Council
Mayor Tim Elinski
Jennifer Winkler, City Attorney
Jesus Rodriguez, Deputy City Manager
Scott Douglass, City Manager
Councilmember Helaine Kurot
827 N. Main St.
Cottonwood, Arizona 86326

Steve Coleman
Pierce Coleman PLLC
7730 E. Greenway Road, Suite 105
Scottsdale, AZ 85260

Geoffrey M.T. Sturr
Osborn Maledon, P.A.
2929 N Central Avenue
Phoenix, AZ 85012

Re: Stephen Gesell v. City of Cottonwood et al
DEMAND FOR PRESERVATION OF RECORDS
NOTICE OF CLAIM PURSUANT TO A.R.S. §12-821.01

Dear Persons and Entities listed above:

On behalf of Stephen Gesell, former Chief of Police for the City of Cottonwood, I am serving this Notice of Claim pursuant to A.R.S. §12-821.01. Per the statutory requirement, this claim can be settled for $625,000.00. As you are aware, if we do not obtain a resolution prior to 60 days from

the date of service through payment of the demand or if we receive your denial prior to that time, we will be pursuing a lawsuit.

This matter involves wrongful termination and related issues set forth herein. We are making a demand for preservation of all records including but not limited to official and personal communications related to this matter.

Notably at the outset, the letter from the City of Cottonwood stating that Mr. Gesell has no appeal rights under A.R.S. §33-1107 is incredibly unlawful and whoever your legal advisor is should be seriously reviewed. It is only the judicial review that is not applicable to a chief. Mr. Gesell followed A.R.S. §33-1106.

We are also aware of violations as to several other law enforcement officers at the hands of the City Council and their legal advisors. These matters will likely be a basis for the punitive damages that Mr. Gesell will also be seeking. The Council has used the executive session excuse to violate the open meeting law and to violate individuals' rights, an action that cuts to the heart of the intentional harm caused to Mr. Gesell and others.

Background Information Supporting Claim

Beginning in May of 2023, City of Cottonwood Mayor Tim Elinski and then Interim City Manager Jesus "Rudy" Rodriguez attempted to leverage a ACRD findings report to disparage the Cottonwood Police Department and its Chief of Police by manipulating the City Council. The Findings report was placed on the agenda in a City Council Executive Session without my client's knowledge and despite Chief Gesell providing solicited direction to Steve Horton, the former City Attorney, to enter conciliation ten days prior. He was unaware at that time that Mayor Elinski had instructed Mr. Rodriguez to exclude him from the May 9, 2023 meeting. Suspecting malicious intent, he contacted two Councilmembers who were perplexed that he was not included, considering they had been given no context to the inflammatory report.

Mr. Rodriguez sent an email to the H.R. Director one hour prior to the meeting and instructed her to attend and to tell Chief Gesell he was not permitted in the meeting. The mayor asked Chief Gesell if he would be available to answer questions at the executive session just prior to its start and he agreed. Despite that action, Mayor Elinski misled Chief Gesell and the Council by acting as if he wanted Chief Gesell to be included in the executive session. Despite the protests of multiple Councilmembers, he was not allowed to join. After the meeting, Chief Gesell contacted Mr. Rodriguez to find out why he was excluded. Mr. Rodriguez admitted he and the Mayor were attempting to influence the balance of the City's elected body. Mayor Elinski also admitted this plan in an email authored later that week stating he did not want Chief Gesell to insert himself into the discussion, despite the fact that the session involved the ACRD complaint.

Two days later, Chief Gesell was placed on administrative leave by Mr. Rodriguez at the request of Mayor Elinski. No reason was listed. Mr. Rodriguez was only an interim City Manager and the

new City Manager Scotty Douglas was a few days away from beginning his position. It was well known that Mr. Rodriguez and Chief Gesell had a long history of not agreeing on issues impacting the City and it appears to have been a parting shot for past professional conflicts involving Chief Gesell, Mr. Rodriguez and his staff. In addition, Mayor Elinski has a history of acting outside the legal process required for a municipality and placing his personal objectives over his professional duties. He is subject to a recall effort and we are aware of four active ACRD civil rights complaints involving Mayor Elinski, including one from Cottonwood City Councilmember Lisa Duvernay.

When the new City Manager Scotty Douglass and new City Attorney Jennifer Winkler began working, the evidence will show that they both chose to support the mayor's malicious direction amplifying the retaliatory efforts. Ms. Winkler recklessly sent Chief Gesell the audio of the May 9th Executive Session as an amendment to the Notice of Investigation. [redacted]

In that "executive session," despite the statute not being followed, [redacted] without cautionary restraint by the two Pierce-Coleman attorneys. [redacted] This false narrative would later be weaponized against my client. The preclusion of the Chief from this session eliminated the ability to challenge the false claims and correct misperceptions cast during the meeting. The executive session resulted in numerous statutory violations that most likely will end up with numerous lawsuits due to the unlawful content of that session. The recording was released by Ms. Winkler and instead of simply owning up to what she had done, she tried to bully Chief Gesell and his family about the disclosure and attempted to conceal, minimize, and deflect her mistake which resulted in Chief Gesell filing a retaliatory complaint with the HR department, supported by emails and notations attached as evidence.

Mr. Steve Coleman assumed responsibility for that investigation, however, Chief Gesell has never seen a report or any resolution. Ms. Winkler exposed the City to liability and likely violated A.R.S. §38-510 (a), a class 1 misdemeanor, yet we are unaware of any repercussions she faced from the City Council. Instead, Chief Gesell was placed on Administrative Leave and provided a Notice of Investigation that set forth no terminable events. Despite my client's repeated objections to conclusions in Mr. Geoffrey Sturr's report, the full investigative report was withheld until the Chief insisted on seeing a copy prior to agreeing to settlement terms. During a recorded conversation with Mr. Coleman, he falsely stated "there is no report" though it has been determined that the investigation was completed weeks earlier. There were multiple offers to settle without releasing this report that were rejected based on the belief that the report was misleading if not flat out false. When it was received, it was clear that Mr. Sturr's report was tailored to meet his client's narrative. Further, even if the listed allegations and findings were legitimate, which is denied, they are not cause for terminating any employee, much less a chief of police with a sterling record of public service.

Mr. Douglass claims he consulted with Ms. Winkler, who was the subject of the Chief's retaliatory complaint, in his July 25th email to Council. The email implies Ms. Winkler advised him to send it to Mr. Coleman rather than leave that task to the HR Director as is standard practice. It was around this same time that Chief Gesell discovered Mr. Douglass had altered his Winkler complaint by removing the ten page email attachment and his notations from a singular PDF document, rescanning the document, and then sending the altered Complaint to the Council as if it were in the original form, thus altering a public record.

Councilmember Kurot defamed Mr. Gesell when she told Councilmember Duvernay that Mr. Gesell "threatened" Mr. Rodriguez and the Mayor he had "crossed the line." Additional notices of claim may be served if it is determine that others made defamatory remarks about Mr. Gesell.

As discussed in more detail below, I have enclosed some of the relevant documents for your review of this Notice of Claim:

A. Administrative Leave Notice- Served by Rodriguez on May 11th with no details;

B. Notice of Investigation- Received undated via Fedex five weeks after being placed on leave and signed by Mr. Douglass;

C. Chief Gesell's Statement submitted to Osborn Maledon Attorney Geoffrey Sturr on July 12, 2023 which includes a summary of the chronology of events up to the July 7th interview with Mr. Sturr;

D. Retaliatory Complaint against Jennifer Winkler (Original form);

E. False statements and emails by Rodriguez and Mayor Elinski regarding Chief Gesell's alleged conduct;

F. Retaliatory Complaint/Commission of a Crime Complaint regarding Mr. Douglass;

G. Settlement Offer Response to Steve Coleman;

H. Notice of Intent to Terminate; and

I. Notice of Termination.

Arizona Attorney General Civil Rights Division Matter ("ACRD")

As I am sure you are aware, a complaint was made to the ACRD by Cottonwood police officer Keidi Dever, and Chief Gesell was interviewed as part of that matter, represented by a Pierce Coleman attorney. As information is further uncovered and we are made aware of additional violations, there may be a claim against the State of Arizona. The City of Cottonwood contracted with the law firm Osborn Maledon in what should have been a legitimate investigation. However, it appears to have been manipulated to be some basis for Mr. Gesell's termination. As established prior to the unlawful termination proceeding, [redacted] This is particularly disturbing considering Mr. Coleman aggressively aided the City's efforts in terminating Chief Gesell and likely contributed to the content in both the Letter of Intent and Termination notice in addition to other terse correspondence signed by Mr. Douglass.

[redacted] the Council may be unaware that Chief's Gesell's intentions were also shared with (then) City Manager Ron Corbin and Human Resources Director Amanda Wilber. Mr. Corbin and Ms. Wilber did not receive any disciplinary action to our knowledge and instead Ms. Wilber aided in the unlawful termination. Chief Gesell was unlawfully terminated and publicly cast as a rogue administrator who discriminates against female employees with disabilities. This false narrative has destroyed Chief Gesell's reputation and character such that his future career path is forever damaged.

Jim Ledbetter represented Officer Dever related to the Craig-Tiger Act last year. Previously unknown to Chief Gesell, Mr. Ledbetter told Mr. Horton that the ACRD would take issue with not returning Officer Dever to her assignment and Mr. Horton flippantly disagreed with him. The officer's claims had been discussed via phone and email for months preceding the ACRD findings report [redacted] Mr. Rodriguez, HR Director Amanda Wilber, or the former City Manager Ron Corbin.

Despite this information, the City has used Mr. Gesell as a scapegoat, either unknowingly or intentionally, to be determined once discovery is complete. This assessment is supported by the fact that the ACRD ADA issue was never included in the City's contracted investigation or any other document preceding Mr. Douglass's letter of intent to terminate my client. Additionally, long after the conclusion of Mr. Sturr's investigation, Mr. Coleman again asserted his opinion that the ADA violation was an "unintentional and technical error" during mandated training sessions with multiple City employees. During the mandated training sessions, Mr. Coleman told

Commander Braxton, Sergeant Sinn and Sergeant Scott that the one ADA finding was an obscure technicality that he would have advised against if he had been consulted [redacted]. Once again, there were no other disciplinary actions connected with the ACRD findings report taken against any other employee and yet my client was terminated.

The eleventh hour inclusion of the ACRD report with the letter of Intent to Terminate dated September 7th is a blatant violation of A.R.S. §38-1104 which requires that before any interview in a termination investigation that "the employer shall provide the law enforcement officer with a written notice informing the officer of the alleged facts that are the basis of the investigation, the specific nature of the investigation, the officer's status in the investigation, all known allegations of misconduct that are the reason for the interview and the officer's right to have a representative present at the interview." Here, the ACRD report was never provided as a basis for the disciplinary investigation nor was it included in Mr. Sturr's findings.

[redacted] his intentions were made clear to the Human Resources Director and the City Manager, there was unsupported blame placed on him in what was a personal vendetta by the Mayor, Mr. Rodriguez and Councilmember Kurot, facilitated by Mr. Douglass, Ms. Winkler and Mr. Coleman. The reasons given in the termination letter also referred to the May 9 incident and then referenced that he "discriminated" against a "female detective." The termination letter also blatantly violated Arizona law by making false legal conclusions about Chief Gesell's rights under Arizona law.

Wrongful Termination

There is a strong legal basis for Mr. Gesell's wrongful termination case as well as other related counts. The following is not intended as a complete list of factual or legal claims but is provided as required under A.R.S. §12-821.01 to provide you with the facts sufficient to make a decision on the claim.

Appeal of the Termination

Chief Gesell was notified of his termination on September 14, 2023. Pursuant to A.R.S. §38-1106, he timely appealed the decision. Instead of following the proper procedures for such an appeal as set forth in Arizona law, the City Manager falsely replied that Chief Gesell was not entitled to an appeal because he was the Chief of Police. However, a plain reading of the statutes states that only an officer employed by a state agency is excluded.

Had the City followed the law and evaluated his appeal, serious statutory and constitutional violations would have been publicly exposed, hence we believe it is for that reason that the appeal was denied by the City Manager. We are extremely confident the appeal would have

shown the following violations by the City and that the other people subject to this Notice of Claim. Mr. Sturr's "investigation" will be shown to have been intentionally biased to conform to the City's false narrative. One particular concern is that although the Attorney General's ACRD report was completely excluded in both the Notice of Investigation (received on June 16th) and completely absent in Mr. Sturr's September 5 improper report, it was included in the basis for Mr. Gesell's termination. The Notice of Investigation related solely to the alleged conduct on May 9, 2023. The Notice of Intent to Terminate referred to the May 9 incident and the alleged discrimination. At no time over the four months my client was on administrative leave was the ACRD report referenced as a concern. In fact, Mr. Coleman repeatedly only referenced the Chief's tone of voice when speaking to Mr. Rodriguez as the justification for termination during several recorded phone calls.

Lack of any Lawful Justification as Required by A.R.S. §38-1103

As the City and its legal advisors should be aware, the statute states that "a law enforcement officer is not subject to disciplinary action except for just cause." None of the exceptions apply here as Chief Gesell was not employed by the State of Arizona or an agency of the State but by a municipality. Here, there is clearly no just cause for the termination. We believe it originated with some personal or professional bias against Chief Gesell and culminated in retaliation for the reporting unlawful behavior by some of the people named herein.

The reasons given by the City of Cottonwood for the termination, are specifically responded to as follows:

1. Events of May 9 and
2. The discriminatory treatment of a female detective.

Given these two articulated reasons, there was no just cause for the termination. Further, the tone and language in the Notice of Termination by Scotty Douglass is not only completely unprofessional, but the Notice also shows clear bias and an attempt to justify what is a decision based on information which Mr. Douglass knew very well to be false. It did not end there- Mr. Douglass doubled down to try and justify his outrageous behavior by sending another letter on September 21, 2023, defaming my client and calling him "dishonest" and trying to somehow retroactively supplement the denial of Chief Gesell's right to appeal and desperately add additional evidence in an unavailing attempt to support termination.

Events of May 9:

As Chief Gesell repeatedly tried to convey, the false information in the Termination Letter should have been addressed on an appeal, however, he was denied that right. Had due process been followed, he would have been able to present his case on appeal and dispute these false claims. Despite the unsupported legal conclusions in the Notice of Termination and the September 21 letter from Mr. Douglass, Chief Gesell was entitled to due process and equal

protection under the law based on A.R.S. §38-1101 et seq. despite Chief Gesell being an "at will employee" as you claim. Due process requires "notice and an opportunity to be heard in a meaningful manner and at a meaningful time," including about the sanction imposed. *Wassef v. Ariz. State Bd. of Dental Exam'rs*, 242 Ariz. 90, 93 ¶ 12, 393 P.3d 151, 154 (App. 2017) When an employee has a property right in continued employment, that right cannot be deprived without due process. *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, ¶ 14, 153 P.3d 1055, 1059 (App. 2007); see Ariz. Const. art II, § 4. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 535 (1985) ("a public employee who can be discharged only for cause" has a right to due process).

ACRD Complaint:

The decision that Chief Gesell discriminated against a female detective is highly disputed. Astoundingly, your City Manager, Human Resources Director [redacted] were aware of what Chief Gesell's plan was and either agreed or failed to advise him that he would commit a technical ADA violation. In fact, these same attorneys later held employee training sessions in which they acknowledged that the alleged violation was based on some obscure ruling and that it was a technicality. These actions by the attorneys with knowledge that Chief Gesell's actions were not discriminatory were apparently either ignored by Mr. Douglass and the two aforementioned Council members or not disclosed by the attorneys. The investigation by the AG failed to interview the subordinate PD managers involved and was grossly inaccurate. Discovery will determine what transpired with the State as well as why the City of Cottonwood was not interested in the truth but instead, intended to malign the high-performing police department my client led for over seven years.

Failure to Conduct the Appeal

As stated above, the refusal to follow the appeal process is in and of itself a basis for wrongful termination under A.R.S. §23-1501 which states that "(b) The employer has terminated the employment relationship of an employee in violation of a statute of this state." As the statute authorized an appeal as part of the process that was not permitted, there is an additional basis for the wrongful termination. This claim is in addition to the failure to establish the statutorily required just cause provision in A.R.S. §38-1103 as well as terminating Chief Gesell after violating the Open Meeting laws, falsifying official records, retaliation, and altering the outcome of investigations. As A.R.S. §38-1101 et seq. does not provide a remedy to law enforcement officer for the violation of the statute for not allowing an appeal, Mr. Gesell has the right to bring a tort claim for wrongful termination.

Under A.R.S. §38-1106, a law enforcement officer that prevails in an appeal where a termination has been reversed shall be awarded retroactive compensation from the date of the officer's separation to the date of reinstatement. The only time a Chief is excluded from the process is the right to judicial review of the appeal and as such, the wrongful termination is the appropriate method and there is no other administrative remedy to pursue. We strongly believe, however,

that had an appeal been allowed as was his right under the law, Mr. Gesell would have been reinstated with back pay. Whoever provided the legal advice that Chief Gesell was not entitled to an appeal does not understand the basic statutory rights. The only reference to exclusion of a Chief is under A.R.S. §38-1107 as to judicial review of the appeal.

If an appeal had proceeded as Mr. Gesell was entitled to, he would have obtained the audio recordings of interviews conducted throughout the alleged investigation. A red flag is clear in that the City Manager has informed Mr. Gesell that his interview was the only interview recorded. An appeal would also have allowed questioning of others interviewed to overcome this egregious error or intentional decision by Mr. Sturr not to record each interview if in fact that is what occurred. Mr. Gesell requested as part of this appeal that the complete investigation including all recordings as was his right under A.R.S. §38-1106(a) and the Notice of Claim hereby includes a demand for presentation of those records which unfortunately is necessary given that public records have already been altered.

Retaliation Claims

Mr. Gesell discovered manipulation of other council members by Mayor Elinski and interim City Manager Rodriguez after Mr. Gesell complained about suspected retaliation by then Interim City Manager Jesus "Rudy" Rodriguez. Mr. Gesell reported violation of critical City policies and criminal acts under A.R.S. §38-510(A) and A.R.S. §13-2407(A)(2) by City Manager Douglass. These Complaints were dated July 21, 2023 and August 29, 2023. They were "mishandled" by Human Resources and never addressed or investigated. Mr. Gesell received the Notice of Intent to Terminate on September 7, one week after filing a complaint revealing Mr. Douglass' unlawful act of altering a government document that contained the complaint against Ms. Winkler. Beyond attempting to minimize Ms. Winkler's conduct, Mr. Douglass removed key email threads that illuminated the Chief's unsuccessful attempts to receive a copy of an email sent by the former City Attorney that would show Douglass, Rodriguez and Steve Coleman knew Chief Gesell had provided direction to enter conciliation administratively without Council action. This information had been withheld from Council to further defame and cast aspersions toward Chief Gesell.

A.R.S. §23-1501 provides for a wrongful termination claim if the "employer has terminated the employment relationship of an employee in retaliation for any of the following:

(ii) The disclosure by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of this state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or statutes of this state or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision.

Defamation

While some of the investigative matters are protected and may be the subject of absolute or qualified immunity, any publication of those matters that contain false claims about Mr. Gesell constitute defamation. Further, if only qualified immunity exists, we will be able to show malice or bad faith. *See S.H. Kress & Co. v. Self*, 22 Ariz.App. 230, 232, 526 P.2d 754, 756 (1974). We will be closely exploring the context of any and all of these statements as they diminish my client's character and professional reputation. These false documents have been shared via print and TV media outlets both in Arizona and in the Chief's hometown in California. Acts of malice, even if contained within internal documents originally, are still defamatory. The latest evidence of this libelous assault can be found in Mr. Douglass' September 21, 2023 correspondence on City of Cottonwood letterhead. In this document Mr. Douglass challenged my client's record as a highly respected ethical and principled leader by falsely claiming he had been untruthful in a desperate attempt to retroactively cast the perception that the termination was justified.

Furthermore, Council Member Kurot's false claim that Chief Gesell "crossed the line" and "threatened" the Mayor and Mr. Rodriguez is also defamatory. Though Mr. Sturr chose not to explore this when he interviewed Ms. Kurot, the investigation revealed zero proof of the damaging rumor she had spread. Councilmember Kurot herself provided no evidence to support her reckless claim. As we further investigate, we anticipate other examples of defamation may arise.

Tampering With Public Records

City Manager Scotty Douglass was provided a Complaint by Mr. Gesell about Ms. Winkler's release of the May 9 executive session and her attempt to place blame on Chief Gesell. Mr. Douglass was required by law to keep documents submitted to the City in the original form or disclose any alterations. However, Mr. Douglass printed the singular PDF then destroyed 10 pages before rescanning the remaining four pages. He then sent the surreptitiously altered retaliatory complaint to the entire council without any of the supportive attachments that he received, passing it off as a complete and official record that had been submitted by Mr. Gesell. A.R.S. §13-2407 is a criminal statute that makes it a felony to tamper with a public record.

Open Meeting Law Violations

On May 10, 2023, during what was labeled as "executive session" to discuss the report from the ACRD, the City Council and the actors named herein openly violated Arizona law regarding executive sessions. We know this as Jennifer Winkler, the City Attorney, released the recordings and thus made the information public. [redacted]

[redacted]

The purported reason for this executive session fell under A.R.S. §38-431.03(1)(3) "Discussion or consultation for legal advice with the attorney or attorneys of the public body." However, the City Council clearly proceeded under A.R.S. §38-431.03(a)(1) which required that it provide the officer, appointee, or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting. Prior to conducting the executive session, not only did the Council not advise Chief Gesell or others they would be discussing personnel matters, but they also specifically precluded Chief Gesell from appearing. Had he been advised, he would have demanded as was his right under the statute, that the discussion or consideration occur at a public meeting.

What we know from that session is that any subsequent attempt to include Mr. Gesell's role in the ACRD complaint and findings was unwarranted. Specifically, the information contained (for the first time) in both the letter of intent and notice of termination that failure to return Officer Dever to her position as a basis for the termination runs contrary to the known facts. [redacted]

In this case, Chief Gesell sought to appear before the City Council considering the Council had been given no context to the ACRD report and there would be obvious questions. Following the Mayor's deceptive statements, Chief Gesell was excluded from the meeting with the justification being stated as the Council was "just getting legal advice." Legal Direction only was emphasized multiple times as rationale for excluding the Chief. However, HR Manager Amanda Wilber was included in the "executive session" as well as attorneys from Pierce Coleman PLLC. The executive session turned into a violation of the Open Meetings law. [redacted]

[redacted] There were numerous clear open meeting law violations in this session that have caused harm to both my client and multiple Cottonwood PD employees who may still be unaware of what occurred as the City has failed to notice them before or months after the May 9th meeting.

Punitive Damages

"In appropriate circumstances, punitive damages may be recovered in an action for wrongful discharge in violation of public policy. . . ." *Thompson v. Better-Bilt Aluminum Prods. Co., Inc.*, 171 Ariz. 550, 555-56 (1992). To obtain punitive damages, a plaintiff must prove that Defendants' "evil hand was guided by an evil mind." *Rawlings v. Apodaca,* 151 Ariz. 149, 162 (1986). An evil mind can be found where (1) "defendant intended to injure the plaintiff[,]" or (2) "although not intending to cause injury, defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." Id. "While the necessary `evil mind' may be inferred, it is still this `evil mind' in addition to outwardly aggravated, outrageous, malicious, or fraudulent conduct which is required for punitive damages." *Thompson,* 171 Ariz. at 556 (citation omitted). Here, there is more than sufficient evidence for Mr. Gesell to pursue a punitive damage claim in any lawsuit. There is ample evidence the City built a case they knew was fictitious and maliciously harmed my client. More evidence will be uncovered during discovery.

Legal Claims

While this list is in no way required or exhaustive, I am summarizing the likely legal claims that will be made if this matter does not settle.

• Wrongful Termination pursuant to A.R.S. §23-1501 based on the violation of A.R.S. §38-1101 et seq. violations;

• Wrongful Termination based on Retaliation, reporting of wrongful disclosure, Tampering with Public Records, of A.R.S. §23-1501;

• Violation of Executive Session- failure to provide adequate notice etc., failure to include Chief Gesell, falsifying the basis for going into executive session or exceeding the bounds of a lawful executive session; I further direct you to A.R.S. §38-431.07 which states that under the POBR rules, had Chief Gesell been permitted to appeal, he would have sought the disclosure of the executive session;

• Tampering with a public record; A.R.S. §13-2407 states that a person commits tampering with a public record if, with the intent to defraud or deceive, such person knowingly: 1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record. . . "Public record" is defined as a record is a "public record" which is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done. *Mathews v. Pyle,* 251 P.2d 893, 75 Ariz. 76 (1952). Here, the City was required to maintain the Complaint filed by Mr. Gesell against Ms. Winkler but instead, Mr. Douglass surreptitiously altered that document before presenting it to Council;

• 42 U.S.C. § 1983 Civil Rights violation, constitutional violations for failing to follow state statutory rights;

• Defamation, this claim requires that a plaintiff show the defendant published a false and defamatory communication and that the defendant "(a) knows that the statement is false and it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them." *Rowland v. Union Hills Country Club*, 757 P.2d 105, 110 (Ariz. Ct. App. 1988) (citation omitted). To be published, a communication must be made to a third party. *Dube v. Likins*, 167 P.3d 93, 104 (Ariz. Ct. App. 2007).

Damages

My client has suffered significant damages due to the destruction of his reputation and the loss of income AS SET FORTH ABOVE. Punitive damages will also be likely to the City and individuals for violating the statutes referenced above. His ability to find other employment or contract work following his highly successful 34 year law enforcement career has now been destroyed due to the actions of the people listed herein.

Conclusion

My client seeks justice, and to be made whole from the damage he suffered. Chief Gesell will resolve this matter for the amount of $625,000.00 which is approximately three years of his anticipated salary and all benefits. Please feel free to contact me regarding your position on this matter.

Sincerely,

Kimberly A. Eckert
Attorney for Chief Steve Gesell

Declaration of Amanda Wilber

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am the Human Resources Director / Risk Manager for the City of Cottonwood.

3. I am familiar with Stephen Gesell's November 2, 2023 notice of claim (the "Notice").

4. I am not listed as an addressee in the Notice.

5. The Notice was never personally delivered to me by any agent of Stephen Gesell or Kimberly Eckert.

6. The Notice was never delivered to my personal residence.

7. I have never authorized the Cottonwood City Clerk or Deputy City Clerk to accept service of legal documents on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

5/13/2024
Date

Amanda Wilber
Amanda Wilber

Declaration of Tim Elinski

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am the Mayor of the City of Cottonwood.

3. I am familiar with Stephen Gesell's November 2, 2023 notice of claim (the "Notice").

4. My best recollection is that I received a copy of the Notice from former City Manager Scotty Douglass or former City Attorney Jenny Winkler.

5. The Notice was never personally delivered to me by any agent of Stephen Gesell or Kimberly Eckert.

6. The Notice was never delivered to my personal residence.

7. I have never authorized the Cottonwood City Clerk or Deputy City Clerk to accept service of legal documents on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

May 15 2024
Date

Tim Elinski

Declaration of Jesus Rodriguez

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am the Deputy City Manager for the City of Cottonwood.

3. I am familiar with Stephen Gesell's November 2, 2023 notice of claim (the "Notice").

4. The Notice was never personally delivered to me by any agent of Stephen Gesell or Kimberly Eckert.

5. The Notice was never delivered to my personal residence.

6. I have never authorized the Cottonwood City Clerk or Deputy City Clerk to accept service of legal documents on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

05/13/2024
Date

Jesus Rodriguez

Declaration of Scotty Douglass

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am the former City Manager for the City of Cottonwood.

3. I am familiar with Stephen Gesell's November 2, 2023 notice of claim (the "Notice").

4. On or about November 3, 2023, while I was employed as City Manager, the City Clerk, Tami Mayes, informed me that the Clerk's Office had received delivery of a box containing copies of the Notice.

5. I asked that the box be brought to me, which it was.

6. The copies of the Notice were addressed to me, the City of Cottonwood, Cottonwood City Council, Mayor Tim Elinski, Jennifer Winkler, Jesus Rodriguez, Councilmember Helaine Kurot, Steve Coleman, and Geoffrey M.T. Sturr.

7. I asked other City staff to assist with distribution of the copies of the Notice to the employees and councilmembers listed therein.

8. The Notice was never personally delivered to me by any agent of Stephen Gesell or Kimberly Eckert.

9. The Notice was never delivered to my personal residence.

10. I have never authorized the Cottonwood City Clerk or Deputy City Clerk to accept service of legal documents on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

5/14/2024
Date

Scotty Douglass

Declaration of Jenny Winkler

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am the former City Attorney for the City of Cottonwood.

3. I am familiar with Stephen Gesell's November 2, 2023 notice of claim (the "Notice").

4. While employed as City Attorney, a City employee brought a box containing multiple copies of the Notice to my office.

5. The Notice was never personally delivered to me by any agent of Stephen Gesell or Kimberly Eckert.

6. The Notice was never delivered to my personal residence.

7. I have never authorized the Cottonwood City Clerk or Deputy City Clerk to accept service of legal documents on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

May 10, 2024
Date

Jenny Winkler
Jenny Winkler

Declaration of Helaine Kurot

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am an elected member of the Cottonwood City Council.

3. I am familiar with Stephen Gesell's November 2, 2023 notice of claim (the "Notice").

4. I was given a copy of the Notice by then-City Attorney Jenny Winkler.

5. The Notice was never personally delivered to me by any agent of Stephen Gesell or Kimberly Eckert.

6. The Notice was never delivered to my personal residence.

7. I have never authorized the Cottonwood City Clerk or Deputy City Clerk to accept service of legal documents on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

5/17/24
Date

Helaine Kurot

Declaration of Evette Skerrett

1. This declaration is based upon my own personal knowledge. I would so testify if called to do so.

2. I am the Deputy City Clerk for the City of Cottonwood.

3. On or about November 3, 2023, I accepted delivery of a box from a process server in my capacity as Deputy City Clerk.

4. The box contained approximately six copies of a notice claim (the "Notices"). The Notices were dated November 2, 2023, and had the following the caption:

Re: Stephen Gesell v. City of Cottonwood et al
DEMAND FOR PRESERVATION OF RECORDS
NOTICE OF CLAIM PURSUANT TO A.R.S. § 12-821.01

5. The Notices were addressed to the City of Cottonwood, Cottonwood City Council, Mayor Tim Elinski ("Elinski"), Jennifer Winkler ("Winkler"), Jesus Rodriguez ("Rodriguez"), Scott Douglass ("Douglass"), Councilmember Helaine Kurot ("Kurot"), Steve Coleman, and Geoffrey M.T. Sturr.

6. The Notices indicated that they were prepared by Kimberly Eckert on behalf of Stephen Gesell.

7. The person who delivered the box never asked if I had authority to accept delivery on behalf of the individuals named in the Notices, and I never represented that I or the Clerk's Office had such authority.

8. Once I received the box, I contacted Tami Mayes, the City Clerk, for instructions and she advised me that then-City Manager Douglass stated he would take care of the box, that I was to keep a copy for the City Clerk's office and deliver the box to Douglass.

9. I delivered the box to Douglass in his office, and he advised me he would take care of it.

10. I have never been appointed as the authorized agent to accept service on behalf of Elinski, Winkler, Rodriguez, Douglass, or Kurot in their individual capacities.

I declare under penalty of perjury that the foregoing is true and correct.

5/16/24
Date

Evette Skerrett

City of Cottonwood – Employee Manual

2007 EDITION Including Revisions Number 1. Effective November 7, 2008

City of Cottonwood

Arizona

Employee Manual

2007 EDITION

Effective June 2007
Revision No. 1 Effective Nov. 7, 2008

SECTION 16:

PERSONNEL BOARD

A. **Purpose:** To establish the City policy on the duties and responsibilities of the Personnel Board. The Personnel Board hears appeals of employees' grievances, disciplinary actions, and dismissals in accordance with City policy and the policies set forth in this Employee Manual. The Personnel Board is also active in employee recognition programs.

B. **Policy:**

1. The Personnel Board of the City of Cottonwood shall consist of members from the following sources:

   a. A representative of the Human Resources Department, appointed by the City Manager, to serve as permanent secretary of the Personnel Board with no voting rights. It is the responsibility of the Human Resources Manager to coordinate the activities of the Personnel Board, including but not limited to, all correspondence, recording the official minutes of meetings, the scheduling of meetings, and all other related activities.

   b. Five members, three of whom shall be elected by the employees of the City, to serve a two year term, and two citizens at large, shall be appointed by the City Council, and all five members shall serve a two year term, commencing the first week of January, every other year.

   c. The five board members will elect a chairman during the first week of January, every other year.

2. **Election of Personnel Board:** The election of the employees to serve on a two year term, shall be on an informal basis, with each full time City official (excluding the Mayor and City Council) and employee having an opportunity to vote for the appropriate officials and employees of his choice. Nomination ballots will be distributed with the employees' paychecks at the appropriate time. The ballots shall be tabulated by the City Clerk's office and shall be counted no later than five (5) working days after distribution of ballot forms. Citizens at large shall be selected from applications received from local board solicitations.

Section 1:

EMPLOYMENT RIGHTS AND RESPONSIBILITIES

I. General Employee Rights and Responsibilities:

A. Generally:

1. This employee manual does not form a contract of employment between the City of Cottonwood and any individual employee.

2. This employee manual supersedes any previous versions of the employee manual. Updates to this manual may be made through approval of the City Council.

3. The City follows all state and federal laws and guidelines. In the case of inconsistencies or changes to the law, the law supersedes any policies outlined in this manual and the City will follow the law until such time the employee manual is revised to again comply with the updated law.

4. This employee manual does not deny any employee their civil or political liberties as guaranteed by the United States and Arizona Constitutions.

II. Administrative Regulations:

A. Administrative Regulations outside the purview of this Employee Manual may be added at the discretion of the City Manager to give further guidance, direction, or clarification to employees regarding the overarching intent of approved policies within the Employee Manual.

III. Equal Employment Opportunity:

A. The City complies with applicable federal, state, and local laws governing non-discrimination in employment and provides equal employment opportunities to all employees and applicants for employment without regard to race, color, religion, sex, national origin, age, disability, sexual orientation, genetic testing, gender identity or expression, status as a veteran, or any other class protected under the law. This applies to all terms and conditions of employment, including, but not limited to, hiring, placement, promotion, termination, layoff, recall, transfers, leaves of absence, compensation, training, and other employment related decisions.

SECTION 8:

CORRECTIVE ACTION

I. **Generally**.

A. The City strives to use progressive corrective action to provide each employee the opportunity to correct unacceptable behavior using the lowest degree of disciplinary intervention. However, the City reserves the right to combine or skip steps depending on the particular facts of each situation and the nature of the offense.

B. All corrective action shall be documented, with a copy forwarded to the Human Resources Department and the affected employee.

II. **Grounds for Corrective Action**. Following is a non-exhaustive list of grounds for corrective action:

- Conviction of a felony, a crime involving moral turpitude, or a crime that impacts an employee's ability to perform her or his job
- Discourtesy to another employee or to a member of the public
- Violence or threats of violence
- Discrimination or harassment, sexual or otherwise
- Dishonesty
- Falsification of documents or records, including an employment application
- Failure to perform job duties
- Insubordination
- Misuse of City property or funds
- Neglect of duty
- Negligence
- Prohibited political activities
- Violation of the City's and/or Department's policies, rules, or regulations
- Misuse of leave
- Unauthorized absenteeism
- Unauthorized tardiness
- Any act, error, or omission detrimental to the mission of the City
- Any action, on or off the job, that brings discredit to the City

III. **Appeal of Certain Corrective Actions**.

A. Eligibility.

1. Only full-time, non-probationary employees may appeal disciplinary actions as set forth in this policy.

2. Part-time, seasonal, temporary, and probationary employees are at-will and may not appeal any disciplinary action.

3. Employees who serve at the pleasure of the City Manager or City Council are at-will and may not appeal any disciplinary action.

4. Any employee who held appeal rights prior to the revision of this policy will continue to have appeal rights so long as the employee continues to serve in her or his position.

B. Non-Appealable Actions.

1. Verbal Counseling: A verbal counseling shall be documented and documents a conversation between an employee and the employee's supervisor, including the date the counseling took place, the parties to the conversation, and the content of the conversation.

2. Letter of Instruction: A letter of instruction advises an employee of performance deficiencies and sets forth or clarifies performance expectations.

3. Written Reprimand: A written reprimand advises an employee of performance deficiencies, outlines a corrective action plan, and advises the employee that further disciplinary action may be taken if the issue is not corrected.

4. Administrative Leave with Pay: The City may place an employee on leave with pay pending an investigation into allegations of misconduct. Administrative leave with pay is not disciplinary in nature. Such leave shall not exceed 30 calendar days, absent written approval of the City Manager. Employees are expected to abide by the City's policies and any instructions while on administrative leave.

5. Reductions in Force: Reductions in force are not disciplinary in nature and are not appealable.

C. Appealable Actions.

1. Suspension without Pay: A suspension without pay is the involuntary removal of an employee from the workplace for a period of time. A suspension without pay shall not exceed 30 working days.

2. Disciplinary Demotion. A disciplinary demotion is the movement of an employee to a lower position classification as a result of a

disciplinary decision. This may include, but is not limited to, a reduction in position level, rank, pay, or responsibilities.

3. Termination: Termination is the involuntary removal of an employee from City employment.

IV. Pre-Disciplinary Process for Appealable Actions.

A. Generally.

1. The following process shall be followed when taking an appealable action against an eligible employee.

2. Prior to each step in the process, the Department Head shall consult with the Human Resources Director and the City Attorney.

B. Notice of Intent to Discipline.

1. Prior to taking disciplinary action, the Department Head shall issue a written notice of intent to discipline to the employee, setting forth the proposed disciplinary action, the reason for the proposed disciplinary action, the rules, policies, and/or procedures implicated, and the date, time, and location for the pre-disciplinary conference.

2. If a suspension without pay is proposed, the notice shall indicate the anticipated duration.

C. Pre-Disciplinary Conference.

1. The employee's supervisor, the employee's Department Head, and a human resources representative shall meet with the employee at the place and time set forth in the notice of intent to discipline. The purpose of the pre-disciplinary conference is to allow the employee an opportunity to respond, verbally or in writing, to the allegations and intended disciplinary action.

2. The employee may choose to have a co-worker attend the pre-disciplinary conference. The co-worker may serve only as a silent observer.

3. The information presented by the employee during the pre-disciplinary conference shall be considered by the Department Head in determining the appropriate discipline, if any.

4. An employee's failure to attend the pre-disciplinary conference or otherwise respond within the time set forth in the notice of intent to discipline shall constitute a waiver her or his right to do so.

D. Disciplinary Decision.

1. Following the pre-disciplinary conference, the Department Head shall issue her or his written decision.

2. The written decision shall identify the disciplinary action to be imposed, if any, the dates of the disciplinary action, the reason for the disciplinary action, the rules, policies, and/or procedures implicated, and any instructions the employee is to follow. The disciplinary action shall also set forth the employee's appeal rights, if any.

3. The Department Head shall brief the City Manager after issuing the disciplinary decision.

V. Appeal Process.

A. Initiation of the Appeal Process.

1. Should the Department Head's disciplinary decision result in an appealable action, the employee may appeal the decision to the Personnel Board.

2. The employee must file a written appeal with the Human Resources Director within seven calendar days of the Department Head's written disciplinary decision. The appeal must include the grounds for appeal and the relief sought. The employee must also indicate whether he or she will be represented by legal counsel during the appeal process.

3. Upon receipt, the Human Resources Director shall forward the appeal to the City Manager, the City Attorney, and the Department Head.

4. The Human Resources Director shall work with the employee, City Attorney, and Personnel Board to arrange the hearing. The parties shall use reasonable efforts to hold the hearing within 60 calendar days of the request for an appeal.

5. The employee may withdraw her or his appeal at any time. Once an appeal is withdrawn, the appeal process cannot be reinstated.

B. Representation of the Parties.

1. The employee may represent herself or himself or be represented by legal counsel.

2. If the employee has retained legal counsel, communication will be directed to the employee's attorney.

3. The City may be represented by the City Attorney or an attorney or representative acting on the City's behalf.

4. Each party is responsible for its own attorneys' fees.

5. The Personnel Board will be represented by legal counsel at any pre-hearing conference and the hearing. The Board may enter executive session for the purpose of obtaining legal advice from its counsel.

C. Pre-Hearing Submissions, Disclosures, and Procedures.

1. All parties involved, including board members and employees, shall keep the information disclosed to them confidential.

2. At least 14 calendar days prior to the hearing, each party shall disclose the following to the other party:

   a. a statement of how much time the party anticipates needing to present its case, including for an opening statement, the examination of witnesses, and a closing argument;
   b. a list of all witnesses the party intends to call at the hearing and a brief summary of the witness's anticipated testimony;
   c. a one-page summary of the issues to be presented at the hearing; and
   d. all exhibits the party intends to introduce at the hearing, along with a table of contents identifying each exhibit.

3. At least 10 calendar days prior to the hearing, each party shall deliver seven sets of the items identified in Section V(C)(2) in three-ring binders to the Human Resources Department for delivery to the Personnel Board's Secretary.

4. In its discretion, the Personnel Board may set a pre-hearing conference to discuss any issues identified by the Board or the parties.

5. The Personnel Board shall not have authority to issue subpoenas. City employees, who are timely disclosed as witnesses, will be made available to testify at the hearing.

D. Hearing Procedures.

1. Except for hearings involving sworn peace officers, an appeal hearing shall be closed to the public, unless the employee requests in writing that it be held in a public session. Hearings involving sworn peace officers shall be open to the public, unless the officer has requested that the hearing be closed.

2. The hearing shall be recorded.

3. The hearing shall proceed as follows:

   a. The Personnel Board Chairperson shall excuse all non-party witnesses from the hearing room.
   b. The City or its legal representative will make an opening statement.
   c. The employee or his or her legal representative will make an opening statement.
   d. The City or its legal representative will present its witnesses, who will be subject to examination, cross-examination, and re-direct.
   e. The employee or his or her legal representative will present her or his witnesses, who will be subject to examination, cross-examination, and re-direct.
   f. The City or its legal representative will present any rebuttal witnesses, who shall be subject to examination, cross-examination, and re-direct.
   g. The employee or his or her legal representative will make a closing argument.
   h. The City or its legal representative will make a closing argument.

4. Testimony shall be given under oath or affirmation administered by the Personnel Board Chairperson.

5. The hearing shall be informal without strict adherence to the rules of evidence. Nonetheless, the Personnel Board may exclude irrelevant, untimely disclosed, or otherwise improper evidence.

6. The Personnel Board may question the witnesses.

7. If the employee fails to attend the hearing, the employee's appeal shall be forfeited and the Department Head's disciplinary decision shall stand.

8. The City bears the burden of proof, by a preponderance of the evidence, in establishing the propriety of the disciplinary action imposed.

E. Post-Hearing Deliberations.

1. At the conclusion of the hearing, the Personnel Board will convene in executive session to deliberate and discuss the evidence presented. The executive session shall be attended only by the Board members present during the hearing and the Board's counsel and Secretary.

2. When the Board's deliberations conclude, the Board shall vote in an open meeting on a recommendation to the City Manager. The Board may recommend any of the following actions:

   a. Uphold the Department Head's disciplinary decision.
   b. Reinstate the employee to her or his position with backpay and restored benefits.
   c. Impose lesser discipline.

3. The Board's recommendation shall be based on the majority vote of the Board members present for the hearing.

4. The Board shall make its recommendation based solely on the evidence presented at the hearing.

5. Within seven calendar days, the Board shall send a written recommendation to the City Manager, including the facts it relied upon and findings. The recommendation shall be provided to Board counsel, the employee, the City's legal counsel, the Department Head, and the Human Resources Director.

6. The Board shall not discuss any aspect of the appeal outside the appeal process.

F. Any part of this Section V may be adjusted to comply with any statutory or contractual rights applicable to certain employees, including pursuant to the Peace Officer Bill of Rights.

VI. The City Manager's Decision.

A. Except as required by A.R.S. § 38-1101 et seq., the City Manager shall accept the Board's factual findings and recommendation unless the findings and recommendation are clearly erroneous. The determination of whether the factual findings and recommendation are clearly erroneous rests within the sole discretion of the Manager, however, any decision by the Manager that deviates from the factual findings and recommendation of the Board shall include a detailed statement of reasons for doing so.

B. The City Manager will issue the final decision in writing within seven calendar days of receipt of the Personnel Board's recommendation. A copy of the final decision shall be provided to each party, the Personnel Board, and forwarded to the Human Resources Department for inclusion in the employee's personnel file.

C. The City Manager's decision is final and non-appealable.

2.44.030 - Officers—Appointment.

The police chief shall be appointed by and shall serve at the pleasure of the city manager. Police officers shall be appointed as may from time to time be deemed necessary for the safety and good order of the city. The police chief shall serve in an exempt position.

(Ord. No. 644, § 2, 10-16-2018)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Brian Blunt, et al., Plaintiffs, v. Town of Gilbert, et al., Defendants.	No. CV-23-02215-PHX-SMB **ORDER**

Pending before the Court is Defendants' Motion to Dismiss (Doc. 5). Plaintiffs filed a response (Doc. 6) to which Defendants replied (Doc. 7). After considering the parties' arguments and relevant case law, the Court will grant Defendants' Motion.

I. BACKGROUND

Plaintiff Brian Blunt served as a police officer in the Town of Gilbert (the "Town") for approximately twenty years. (Doc. 1-3 at 3–4 ¶¶ 7–14.) During that time, he held various positions of increasing authority. (*Id.*) In May 2021, the Town of Gilbert Police Department (the "Department") extended an offer of employment to Plaintiff Blunt for the position of Commander, which he accepted. (Doc. 5-2.) Upon his promotion, he signed an offer letter that specified that his employment would be "at-will." (*Id.*) The letter clarified that this meant "that both you and the Town will be free to separate the employment relationship at any time, with or without cause or notice." (*Id.*)

In March 2023, the Town conducted an employee engagement survey. (Doc. 1-3 at 4 ¶ 14.) (*Id.* ¶ 15.) In response to feedback on Plaintiff in this survey, the Department

retained an external human resources firm to investigate. (*Id.* ¶ 15.) In May 2023, Plaintiff Blunt's supervisor informed him that he would face an internal investigation resulting from allegations that Plaintiff Blunt made "inappropriate, unprofessional, offensive, hostile, and/or harassing statement and/or actions to Gilbert Police Department employees." (*Id.* ¶ 16.) Plaintiff agreed to an interview with the outside investigator, but the Town later cancelled that interview. (*Id.* at 4–5 ¶¶18–22.)

Based on results from the investigation, Plaintiff Blunt was terminated from his position on September 7, 2023. (*Id.* at 5 ¶ 23.) Plaintiff Blunt requested, but was not given, a copy of the internal investigation. (*Id.* ¶ 24.) Plaintiff Blunt also requested a pre-termination hearing, but his request was denied. (*Id.* ¶ 25.) In response, Plaintiff Blunt filed the instant lawsuit in Maricopa County Superior Court, alleging violation of his procedural and substantive due process rights under the Peace Officers' Bill of Rights ("POBOR"), violation of the POBOR itself, and a claim of unconstitutional and/or unlawful customs, policies, and failure to train. (*See generally* Doc. 1-3.) Plaintiff Blunt also seeks a writ of mandamus ordering the Town to rescind Plaintiff's termination and provide him with a pre-deprivation hearing. (*Id.* at 12 ¶ 85.) Defendants removed to federal court (Doc. 1) and filed this Motion (Doc. 5).

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief," so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This requirement is met if the pleader sets forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Plausibility does not equal "probability," but requires "more than a sheer possibility that a defendant has acted

unlawfully." *Id.* A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss if it contains sufficient factual matter, which, if accepted as true, states a claim to relief that is "plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In ruling on a Rule 12(b)(6) motion to dismiss, the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). However, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). A court ordinarily may not consider evidence outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *See United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). "A court may, however, consider materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Id.* at 908.

III. DISCUSSION

The Complaint alleges four counts. (*See* Doc. 1-3.) The Court will discuss each in turn.[1]

A. Count I: Procedural Due Process

Count I alleges a 42 U.S.C. § 1983 claim for a violation of Plaintiff Blunt's procedural due process rights as they relate to POBOR. (Doc. 1-3 at 7–8 ¶¶ 43–54.)

[1] The second named Plaintiff, the Arizona Conference of Police and Sheriffs ("AZCOPS") is a labor organization of which Plaintiff Blunt is a member. Although the claims focus on actions allegedly taken against Plaintiff Blunt, the Court will refer to both individually and collectively as appropriate.

Plaintiff Blunt contends that he has a property interest in his continued employment through the POBOR. (Doc. 6 at 3–4.) Plaintiffs allege that Defendants did not comply with POBOR by not following specific procedures and affording Plaintiff certain protections against termination. (*Id.*)

Defendants primarily assert that the POBOR as amended in 2022 does not apply to Plaintiff. (Doc. 5 at 3.) This argument stems from the fact that as an at-will employee, Plaintiff was not entitled to any of the procedural due process protections contained in the POBOR. (*Id.*) Defendants assert that the presumption against retroactivity, along with the Contract Clauses of both the United States and Arizona Constitutions, prohibit the retroactive application of the amended POBOR to Plaintiff. (*Id.* at 5.) Plaintiffs counter that the POBOR clearly applies to Plaintiff Blunt's termination because at-will agreements violate the amended POBOR. (Doc. 6 at 6–7.) Plaintiffs further argue that the presumption against retroactivity and the Contracts Clause do not apply. (*Id.* at 7–13.) The Court agrees that the presumption against retroactivity applies.

To begin, the threshold issue is whether Plaintiff Blunt has a constitutionally protected property interest. *See Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008) ("To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due."). A legitimate claim of entitlement arises where the property or liberty interest is created by state law, such as a statute that limits grounds for termination. *See id.*

Under Arizona law, a contract providing for a set term of employment creates a "property interest which cannot be extinguished without conforming to the dictates of procedural due process." *See* Ariz. Rev. Stat. § 23-1501 ("[t]he employment relationship is severable at the pleasure of either the employee or the employer unless . . . [there is] a written contract to the contrary"). "If employment is at-will, then the claimant has no property interest in the job." *Haglin v. City of Algona*, 42 F. App'x 55, 57 (9th Cir. 2002) (citing *Brady v. Gebbie*, 859 F.2d 1543, 1548 (9th Cir. 1988)); *see also Cleveland Bd. of*

Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (cleaned up).

Here, the POBOR is the state law at issue. Initially passed in 2014, the POBOR provides certain protections to certified peace officers in Arizona. A.R.S. § 38-1101 *et seq.* These protections are primarily procedural and include protection during an internal investigation, notice and opportunity to be heard before termination of employment, and an opportunity for a post-termination appeal. *Id.* In its original form, the statute provided as follows:

> A peace officers bill of rights is established. This article does not preempt agreements that *supplant, revise or otherwise deviate from* the provisions of this article, including written agreements between the employer and the law enforcement officer or the law enforcement officer's lawful representative association.

Ariz. Rev. Stat. § 38-1102 (2014) (emphasis added). In short, this language allowed law enforcement agencies and their employees to enter into employment agreements that supplanted, revised, or otherwise deviated from the terms of the POBOR without causing an issue. However, in 2022, the Legislature amended this portion of the statute to read:

> The peace officers bill of rights is established. This article outlines the *minimum rights* given to peace officers in this state. This article does not preempt agreements that *supplement or enhance* the provisions of this article, including written agreements between the employer and the law enforcement officer or the law enforcement officer's lawful representative association.

Ariz. Rev. Stat. § 38-1102 (2022) (emphasis added). This amendment became effective on September 24, 2022. This amended language explicitly set the floor of minimum rights that peace officers are granted in Arizona. It also removed the ability for law enforcement agencies and their employees to "supplant, revise, or otherwise deviate from" the statute. Instead, the statute now only allows them to "supplement or enhance" the terms of the POBOR. *Id.*

This amended language gives rise to the question of whether the new requirements apply *only prospectively* to new agreements, or instead *also* apply backward to existing agreements. Generally, "[u]nless a statute is expressly declared to be retroactive, it will not govern events that occurred before its effective date." *State v. Coconino County Superior Ct. (Mauro)*, 678 P.2d 1386, 1391 (Ariz. 1984). Therefore, absent a clear expression of retroactivity, a newly enacted law applies *only prospectively*. *State v. Fell*, 115 P.3d 594, 600 (Ariz. 2005). The Arizona Court of Appeals recently reaffirmed this principle, stating "[u]nder Arizona law, when the legislature enacts a statute, the default rule is that the statute, once effective, applies only prospectively. In other words, courts apply a 'canon of construction' that 'statutes are presumed to have a prospective and not a retroactive effect.'" *Krol v. Ariz. Indus. Comm'n*, 533 P.3d 557, 561–62 (Ariz. Ct. App. 2023) (quoting *Gietz v. Webster*, 50 P.2d 573, 576 (Ariz. 1935)).

The presumption is also not a new creation. The "presumption is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 562 (cleaned up). Indeed, the Legislature has explicitly codified the presumption against retroactivity. *See* Ariz. Rev. Stat. § 1-244 ("No statute is retroactive unless expressly declared therein."). And notably, this presumption also finds support in federal law. *See Talaie v. Wells Fargo Bank, NA*, 808 F.3d 410, 411–12 (9th Cir. 2015) (noting that the United States Supreme Court has established a presumption against retroactive application of legislation that can only be overcome "where Congress expresses a clear and unambiguous intent to do so.").

As the Arizona Court of Appeals outlined in *Krol*, there are three exceptions to the presumption. First, the Legislature can expressly declare that a statute applies retroactively. *Krol*, 533 P.3d at 562. Second, the statute may be merely procedural and therefore not affect substantive rights or rights not yet vested. *Id.* And third, the presumption will not apply when the statute impacts a judicial, administrative, or other proceeding that has not yet occurred. *Id.*

The exceptions provide a natural starting point for analyzing the presumption's

application to the POBOR. First, there is nothing in either version of Ariz. Rev. Stat. § 38-1102 or its implementing legislation that expressly declares that the 2022 amendment should apply retroactively. Rather, the statute is silent as to retroactive application. This alone commands the Court to employ the presumption in this case. This is particularly true given the Legislature's directive that "[n]o statute is retroactive unless expressly declared therein." Ariz. Rev. Stat. § 1-244. As *Krol* instructs, "if the statutory language is unclear as to retroactivity, we use one—and just one—interpretative tool: we employ the presumption against retroactivity." 533 P.3d at 562. Here, the Legislature could have easily included language ensuring that the 2022 amendment—which admittedly significantly altered the statute's protections—would apply retroactively. But the Legislature did not do so. In the absence of *any* express declaration that the statute applies retroactively, the Court will not go beyond the plain text of the amendment to reach a different conclusion. The Court applies these clear principles and finds that the presumption against retroactivity applies.

The next two exceptions are also inapplicable. First, the statute is not merely procedural. Rather, as both parties discuss, the 2022 amendment directly impacts the substantive rights of peace officers employed in Arizona. Here, whether the 2022 amendment applies to Plaintiff Blunt directly impacts whether his at-will employment agreement remains valid, or if the amended protections of the POBOR apply. That goes to the heart of Plaintiff's substantive rights, and in turn, his § 1983 claim. Therefore, this exception does not apply.

The third exception is similarly inapplicable. Arizona typically allows for "statutory changes in procedures or remedies" to apply to proceedings already pending. *State Comp. Fund of Ariz. v. Fink*, 233 P.3d 1190, 1192 (Ariz. Ct. App. 2010). However, as discussed, this amendment goes beyond a mere procedural amendment. Accordingly, this exception does not apply.

Having disposed of the exceptions, the Court turns to the presumption's effect on the facts of this case. The timeline of events supports application of the original POBOR.

Plaintiff Blunt signed the at-will employment agreement in May 2021—well before the 2022 statutory amendment. This agreement was permissible under the original version of the statute. The at-will agreement is certainly at odds with the protections outlined in the POBOR, but it was an agreement that could "supplant, revise or otherwise deviate" from those protections. Ariz. Rev. Stat. § 38-1102 (2014). Put simply, at the time Plaintiff Blunt signed his employment agreement, the Town was legally permitted to offer an at-will employment agreement.

Plaintiffs argue that signing the agreement prior to the statute's enactment does not implicate the presumption. (Doc. 6 at 8.) Plaintiffs instead argue that the date of the injury, meaning when the statute was allegedly violated, is what matters. (*Id.*) Here, Plaintiffs contend that the improper investigation of Plaintiff Blunt, along with his termination and denial of appeal, all occurred after the 2022 amendment became effective. (*Id.*) However, this reading is simply not supported in any of the case law articulating the presumption. *See Krol*, 533 P.3d at 562–63; *Fell*, 115 P.3d at 600; *Gietz*, 50 P.2d at 576. Plaintiffs cite *Krol* for this proposition, but the *Krol* court stated that because the Legislature clearly provided when the amendment at issue applied, the application of the amendment *does not* hinge on the date of injury. 533 P.3d at 563. Here, the POBOR is silent as to any retroactive effect and also does not include any language about the date of an alleged injury. Therefore, given the explicit case law on the presumption and the Court's guidance on interpreting statutes, the presumption must apply.

Plaintiffs' other arguments against the presumption also fail. First, whether the offer letter mentions the POBOR is irrelevant. When an employee, such as a police officer, agrees to a term of at-will employment, they are by contract agreeing that the employer could terminate the employment relationship at any time—with or without cause. As discussed, this term was permitted under the applicable version of the POBOR at the time Plaintiff Blunt signed the letter. Moreover, no portion of the POBOR requires that its terms be listed in any employment documentation of a peace officer. Second, Plaintiffs note two exceptions to POBOR relating to probationary employees and officers employed by an

agency of the state. (Doc. 6 at 13–14.) However, Defendants never argued that either of these exceptions applied. Instead, Defendants' argument pertains to retroactivity and the potential exceptions concerning that doctrine. (Doc. 5 at 5–7.)

In short, the presumption against retroactivity squarely applies. The employment agreement stands as written, and Plaintiff Blunt was legally an at-will employee of the Town. In turn, Plaintiff Blunt did not have a constitutionally protected interest in his employment. *See Haglin*, 42 F. App'x. at 57. The 2022 amendment does not retroactively apply to the agreement or preempt the employment agreement between Plaintiff Blunt and the Town. Accordingly, because Plaintiff Blunt lacks a constitutionally protected interest in his employment, Count I will be dismissed with prejudice. Due to the Court's finding on the applicability of the presumption, the Court will not analyze the potential applicability of the Contract Clauses.

B. Count II: Substantive Due Process

In Count II, Plaintiffs allege a § 1983 claim based on a denial on substantive due process. (Doc. 1-3 at 9–10 ¶¶ 64–71.) Plaintiffs allege that Defendants "recklessly permitted an internal investigation to occur" and in turn denied Plaintiff Blunt of his rights to meaningful process under the POBOR. (*Id.* at 10 ¶¶ 58–60.)

To prove a violation of substantive due process rights under the Fourteenth Amendment, Plaintiff must show that a state actor deprived Plaintiff of a protected interest in life, liberty, or property and that the state actor did so by behavior that "shocks the conscience." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). Behavior that shocks the conscience is described as "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

As discussed above, Plaintiff Blunt has failed to show that he holds a constitutionally protected interest in his continued employment. *See also Haglin*, 42 F. App'x. at 57. For this reason, he fails the threshold inquiry. Accordingly, the Court will also dismiss Count II with prejudice.

C. Count III: POBOR Claim

In Count III, Plaintiffs assert an independent state law claim for the alleged POBOR violation. (Doc. 1-3 at 9–10 ¶¶ 64–71.) However, the POBOR does not afford a general private right of action. *See Hinchey v. Horne*, No. CV13-00260-PHX-DGC, 2013 WL 4543994, at *12 (D. Ariz. Aug. 28, 2013) ("[The POBOR] does not appear to provide for a private right of action."). The only two circumstances in which the POBOR authorizes judicial review is (1) de novo review of termination when a law enforcement agency reverses the decision or recommendation of a hearing officer, administrative law judge, or appeals board; or (2) where there is no hearing officer, administrative law judge, or appeals board, to review the termination in the first instance. *Hernandez v. City of Phoenix*, 482 F. Supp. 3d 902, 920 (D. Ariz. 2020), *rev'd on other grounds*, 43 F.4th 966 (9th Cir. 2022); Ariz. Rev. Stat. § 38-1107(A)–(B).

Defendants argue that neither of these scenarios are present here. (Doc. 5 at 11.) Plaintiffs do not respond to this argument. (*See* Doc. 6.) Accordingly, the Court considers this issue waived. *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.") (cleaned up). Even if the Court were to consider this argument, Plaintiff Blunt was an at-will employee of the Town and not subject to the protections of the amended POBOR. For these reasons, the Court will also dismiss Count III with prejudice.

D. Count IV: Unconstitutional and/or Unlawful Customs, Policies and Failure to Train

In Count IV, Plaintiffs allege that the Town and Defendant Williams failed to adequately train Defendant Soelberg "in the appropriate, lawful and constitutional policies, procedures and protocols for investigating, processing, handling and managing internal investigation under his control." (Doc. 1-3 at 10 ¶ 74.)

To properly allege failure to train under § 1983, a plaintiff must show (1) he was deprived of a constitutional right; (2) the municipality had a training policy that amounts

to deliberate indifference of the constitutional rights of the person trained is likely to come into contact with; and (3) the constitutional injury would have been avoided had the municipality properly trained the employee. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007). "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Accordingly, "[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 62 (cleaned up).

Here, Plaintiff cannot meet the first element of this claim. To begin, "failure to train" is not a standalone cause of action. The alleged failure to train must be tied to a specific constitutional harm or deprivation of rights. *See Flores v. City of Los Angeles*, 758 F.3d 1154, 1158–59 (9th Cir. 2014). In other words, failure to train is not a free-standing claim, but instead is inextricably linked to imposition of liability under § 1983. *Id.* As discussed above, Plaintiff has failed to establish a § 1983 violation. As the Town's at-will employee, Plaintiff Blunt did not have a constitutionally protected interest in his employment. For an at-will employee like Plaintiff Blunt, the Town was not required to provide the protections of the POBOR nor train its employees to implement these protections. Plaintiffs do not allege any other facts to show any other constitutional violations under these policies or customs. (Doc. 1-3 at 10–11 ¶¶ 72–78.)

Plaintiffs also assert these claims under state law. (Doc. 1-3 at 10.) To the extent this claim also involves a state law claim, it fails. Arizona law similarly does not recognize a stand-alone failure to train claim. To hold an employer for negligent hiring, retention, or supervision, the employee must have committed a tort. *Mulhern v. City of Scottsdale*, 799 P.2d 15, 18 (Ariz. Ct. App. 1990). In turn, if the tort against the employee fails, an employer cannot be negligent as a matter of law for that tort. *Kuehn v. Stanley*, 91 P.3d 346, 352 (Ariz. Ct. App. 2004). Here, Plaintiffs cannot show that Defendant Williams committed any constitutional violation—much less one stemming from the Town's failure to train him. Reading the Complaint broadly to include a "negligent investigation" claim

also fails under Arizona law. *See Archer v. Partners in Recovery LLC*, No. CV-18-01885-PHX-DWL, 2019 WL 3253175, at *3 (D. Ariz. July 19, 2019) (finding that there is no negligent investigation claim under Arizona law). In short, Plaintiffs' Complaint fails to provide allegations that meet any state law requirements. Accordingly, the Court will dismiss Count IV with prejudice.

E. Writ of Mandamus

Plaintiffs also request a writ of mandamus ordering Defendants to rescind Plaintiff Blunt's termination and provide him with a pre-deprivation hearing and an appeal process. (Doc. 1-3 at 11–12 ¶¶ 79–87.) "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Sears v. Hull*, 961 P.2d 1013, 1016 (Ariz. 1998); Ariz. Rev. Stat. § 12-2021. A court cannot issue a writ of mandamus if the public officer is not specifically required by law to perform the act. *See id.*

Here, because Plaintiff Blunt was an at-will employee of the Town, he was not entitled to the POBOR's protections. Additionally, he did not have a constitutionally protected property interest in his continued employment. Therefore, the Town did not fail to perform any act that the law specifically imposes. The Court cannot, and will not, issue a writ of mandamus, and accordingly denies Plaintiffs' petition for mandamus relief.

F. Duplicative Defendants

Additionally, Defendants request the Court dismiss the official capacity Defendants as redundant. (Doc. 5 at 15.) Plaintiffs have named Michael Soelberg in his official capacity as Chief of Police of the Gilbert Police Department along with Nathan Williams in his official capacity as the Human Resources Executive Director of the Town of Gilbert. (*See* Doc. 1-3.) Of course, the relevant local government entity—the Town—is also a named defendant. (*Id.*) Defendants argue that because of this, Soelberg and Williams are redundant defendants that must be dismissed. (Doc. 5 at 15.) Plaintiffs do not respond to this argument. (*See* Doc. 6.) Given the analysis above, the Court will dismiss all the claims. As a result, these Defendants, and in fact the entire case, will be dismissed.

IV. LEAVE TO AMEND

Federal Rule of Civil Procedure 15(a) requires that leave to amend be "freely give[n] when justice so requires." Leave to amend should not be denied unless "the proposed amendment either lacks merit or would not serve any purpose because to grant it would be futile in saving the plaintiff's suit." *Universal Mortg. Co. v. Prudential Ins. Co.*, 799 F.2d 458, 459 (9th Cir. 1986). Therefore, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (cleaned up). Given the Court's finding on the application of the presumption against retroactivity, Plaintiffs cannot show a constitutional injury. Allegation of additional facts regarding Plaintiff Blunt's investigation and termination will not change this circumstance. Accordingly, the Court will not permit Plaintiffs to amend the Complaint.

V. CONCLUSION

For the above reasons,

IT IS HEREBY ORDERED granting Defendants' Motion to Dismiss (Doc. 5). All Counts will be dismissed with prejudice.

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment consistent with this Order and terminate this case.

Dated this 28th day of May, 2024.

Honorable Susan M. Brnovich
United States District Judge

MINUTES OF THE SPECIAL MEETING FOLLOWING THE WORK SESSION OF THE CITY COUNCIL OF THE CITY OF COTTONWOOD, ARIZONA, HELD MAY 9, 2023, AT 6:30 P.M., AT THE COTTONWOOD COUNCIL CHAMBERS BUILDING LOCATED AT 826 NORTH MAIN STREET, COTTONWOOD, ARIZONA.

Mayor Elinski called the special meeting to order at 7:50 p.m. Roll call was taken as follows:

COUNCIL MEMBERS PRESENT

Tim Elinski, Mayor
Debbie Wilden, Vice Mayor
Stephen DeWillis, Council Member
Lisa DuVernay, Council Member
Helaine Kurot, Council Member
Jackie Nairn, Council Member

STAFF MEMBERS PRESENT

Rudy Rodriguez, Interim City Manager
Christina Estes-Werther, Pierce Coleman, PLLC
Tami S. Mayes, Acting City Clerk
Ryan Bigelow, Library Manager
Amanda Wilber, Human Resources Director
Steve Coleman, Pierce Coleman, PLLC (via telephone)

ITEMS FOR DISCUSSION, CONSIDERATION, AND POSSIBLE LEGAL ACTION:

PRESENTATION, DISCUSSION, AND ADOPTION OF THE CITY OF COTTONWOOD'S STRATEGIC PLAN 2023-2025

Mr. Rodriguez stated we had a meeting in January concerning the Strategic Plan update. Every two years we make more extensive updates than in previous years. There was a lot of good interaction among the staff that culminated in the presentation tonight.

Mr. Bigelow stated we're here tonight for the adoption of your '23-'25 Strategic Plan. This is a product of a two-day retreat in January with Ken Kilday and Leaders Cut. We had a follow-up discussion at a work session in April and, since April, staff has had discussions with both the leadership and the executive teams. This is a list of 164 initiatives. We won't be going through each of them individually tonight. If it is approved, we will give it to our Marketing and Public Information Specialist, Laura Herrera, to put it into a format that is a little more beautiful. That should be coming back to you at a June Council meeting so you will get to see the final product if it is adopted tonight. I will go through some highlights with you. I will note that the staff has been in contact with the new City Manager about this project. Scotty (Douglass) has ideas on how to implement, particularly, tracking and performance indicators. He'd also like to note that we'll be coming back to you and the public, probably quarterly, with strategic updates on what we're working on now and what that looks like.

Mr. Bigelow presented a PowerPoint presentation for the Strategic Plan for '23-'25. There were not a lot of changes made as far as strategic directives. We combined Strategic Directive Number 1 and Number 2, and we created and initiated a new Directive Number 5. Each directive has five elements; the actual directive, the highest level; a clarifying statement; some key priorities; guiding principles; and the strategic initiative, which is what staff does.

Your five Strategic Directives:

1) Building Quality of Life through Sustainable Growth and Development
2) Lead with Environmental Stewardship
3) Prioritize our Infrastructure
4) Furthering Financial Accountability and Transparency
5) Initiate and Maintain Opportunities for Collaboration, Education, Communication, and Legislative Advocacy

Strategic Directive Number 1: Building Quality of Life through Sustainable Growth and Development.

"Cottonwood will provide opportunities for our residents and local businesses to ensure the City's economic future, vitality, diversity, and quality of life."

Key priorities: economic development, workforce development, housing, airport, tourism, citizen engagement, parks and trails, events, police and fire, and recreation opportunities. This is the old Strategic Number 1 and 2 combined.

Guiding principles: Focus on business retention; start and end with the City is open for business; explore more diversity in housing solutions; the airport as an economic driver; promote sustainable tourism; support and promote citizen engagement; support outdoor economics; prioritize public safety outreach; and encourage and develop community pride.

Strategic Directive Number 2: Lead with Environmental Stewardship.

"Cottonwood will actively work to ensure the sustainability of our natural resources in a manner that promotes the diverse use and accessibility to our natural resources."

Key priorities: Water, wastewater, stormwater, stewardship of local natural resources, and management of open spaces.

Guiding principles: Support local programs to increase the culture of conservation; maximize the injection and reuse of reclaimed water, pursue opportunities to acquire surface water rights; encourage the responsible use of Cottonwood's natural resources; complete a feasibility assessment for modifying the Mingus Wastewater Treatment Plant to treat affluent to potable water standards for direct, potable reuse; and develop and maintain a Fire Department fuels mitigation program to support fire-wise communities and City parks and recreation sites and facilities in coordination with Public Works.

Strategic Directive Number 3: Prioritize our Infrastructure.

"Cottonwood will develop, maintain, and improve the City's infrastructure."

Key priorities: Streets and sidewalks, traffic circulation and public transportation; wastewater treatment; and City facilities.

Guiding principles: Continue to prioritize infrastructure projects in Cottonwood; prioritize our public transportation; maximize the injection and reuse of reclaimed water; and continue to prioritize the City's infrastructure projects.

Strategic Directive Number 4: Furthering Financial Accountability and Transparency.

"Cottonwood will foster a culture of transparency and fiscal responsibility that maintains a long-range perspective."

Key priorities: Budget, finance, physical resources, and employees.

Guiding principles: Create a grant financial tracking and accounting policy; embrace a healthy and productive work environment; remain fiscally conservative; recruit and retain highly qualified employees; maintain physical resources; ensure updated budget information is available to the community; and secure alternative funding sources.

Strategic Directive Number 5: Initiate and Maintain Opportunities for Collaboration, Education, Communication, and Legislative Advocacy.

"The City of Cottonwood commits to working collaboratively with legislators, governments, and community partners toward shared goals."

Key priorities; regional collaboration, legislative advocacy, awareness and education, and citizen outreach. Highlights of the guiding principles: Strengthen and expand our role in GAMA (Greater Arizona Mayors Association); collaborate with other Verde Valley citizens and towns to create a nonprofit housing development organization; encourage Council Member participation in one of the five legislative policy committees; monitor legislative activities concerning short-term rentals.

Vice Mayor Wilden moved to adopt the City of Cottonwood Strategic Plan 2023-2025. The motion was seconded by Council Member Kurot.

A roll call vote on the motion was taken as follows:

	Yes	No		Yes	No
Council Member DeWillis	X		Council Member Nairn	X	
Council Member DuVernay	X		Vice Mayor Wilden	X	
Council Member Kurot	X		Mayor Elinski	X	

The motion unanimously carried.

DISCUSSION REGARDING THE REASONABLE CAUSE DETERMINATION OF THE ARIZONA CIVIL RIGHTS DIVISION IN DEVER V. CITY OF COTTONWOOD—POLICE DEPARTMENT (NO. CRD-2022-0550). PURSUANT TO ARIZONA REVISED STATUTES SECTION 38-431.03(A)(3) AND (4), THE COUNCIL MAY VOTE TO CONVENE IN EXECUTIVE SESSION FOR LEGAL ADVICE TO PROVIDE INSTRUCTION TO LEGAL COUNSEL.

Ms. Estes-Werther stated this will be for legal advice. This is something we've already discussed, and we'll have Mr. Steve Coleman on the phone to give you more information. This is not about the investigation itself. This is about where we are now with the determination and how we move forward with the settlement.

Mayor Elinski asked, if Council has questions specific for the Chief, how can we get our questions answered; through legal Council or through Amanda Wilber?

Ms. Estes-Werther stated this is just about where we are at with the determination. This isn't about rehashing how they got there and it is not an investigation by Council to try to find out what happened. This is the determination from the Civil Rights Division and how the Council wants to move forward, any liabilities, risks, et cetera. It is fairly narrow. The determination has already been made. We'll discuss it more in executive session. There will be a much more extensive description of the process, how they made the determination, what the liabilities and risks are, and what options you have moving forward, but the determination has already been made. If there is something about processing generally, you can bring it back for another executive session. This one is specific to this determination. It is just legal advice. If you want to give the attorneys direction, obviously, you can.

Mayor Elinski stated we can't vote in executive session.

Ms. Estes-Werther stated there are no votes in executive session. You would come back out into open session if you want to make any type of votes. Again, it's really more for legal advice and direction.

Mayor Elinski stated we'll do the executive session in Council Chambers, and we'll ask Chief Gesell to stick around.

Chief Gesell exited the Council Chambers.

Mayor Elinski moved to move into executive session. The motion was seconded by Council Member DeWillis and carried unanimously.

Steve Coleman and Scotty Douglass joined the executive session via telephone.

Council entered into executive session at 8:12 p.m., returning to open session at 9:02 p.m.

Mayor Elinski moved to give our legal counsel the direction as discussed in executive session. The motion was seconded by Vice Mayor Wilden.

A roll call vote on the motion was taken as follows:

	Yes	No		Yes	No
Council Member DeWillis	X		Council Member Nairn	X	
Council Member DuVernay	X		Vice Mayor Wilden	X	
Council Member Kurot	X		Mayor Elinski	X	

The motion unanimously carried.

ADJOURNMENT

Mayor Elinski moved to adjourn. The motion was seconded by Council Member Nairn and unanimously carried.

The special meeting was adjourned at 9:03 p.m.

Tim Elinski, Mayor

ATTEST:

Tami S. Mayes

Tami S. Mayes, City Clerk

CERTIFICATION OF MINUTES

I hereby certify that the attached is a true and correct copy of the minutes of the special meeting of the City Council of the City of Cottonwood held on May 9, 2023. I further certify that the meeting was duly called and that a quorum was present.

Tami S. Mayes
Tami S. Mayes, City Clerk

9-5-23
Date