District Court, Adams County, Colorado 1100 Judicial Center Drive Brighton, Colorado 80601	**COURT USE ONLY**
Plaintiff: Ashton Steely v. **Defendants:** MICHAEL MARTINEZ, in his official capacity as City Manager of the City of Brighton; and CITY OF BRIGHTON, a Colorado Municipal Corporation	Case Number: 2022CV31503 Division: C

DATE FILED: February 16, 2023 2:12 PM
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ORDER RE: MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO C.R.C.P. 12(b)(1)

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to C.R.C.P. 12(b)(1) filed on December 13, 2022. Plaintiff filed a Response on January 3, 2023. Defendants filed a Reply on January 9, 2023. The Court, having read the briefs and reviewed the file, and otherwise being informed in the premises, hereby rules as follows:

BACKGROUND

This case arises out of Plaintiff's termination from the Brighton Police Department on July 22, 2022.

Plaintiff seeks judicial review of the decision to terminate her pursuant to C.R.C.P. 106(a)(4).

Defendants seek to dismiss the Complaint pursuant to C.R.C.P. 12(b)(1). Defendants seek dismissal of the Complaint on the grounds that Plaintiff's termination was not a quasi-judicial act subject to review under C.R.C.P. 106(a)(4).

LEGAL STANDARD – C.R.C.P. 12(b)(1)

Pursuant to C.R.C.P. 12(b)(1), a complaint or claim may be dismissed for lack of subject matter jurisdiction. The plaintiff has the burden of proving jurisdiction. *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 927 (Colo. 1993). Subject matter jurisdiction is a court's power to resolve a dispute in which it renders judgment. *Trans Shuttle, Inc. v. Pub. Utils.*

Comm'n, 58 P.3d 47, 50 (Colo. 2002). "Whether a court possesses such jurisdiction is generally only dependent on the nature of the claim and the relief sought." *Id.* Accordingly, "it is the facts alleged and the relief requested that decide the substance of a claim, which in turn is determinative of the existence of subject matter jurisdiction." *Id.*

Under C.R.C.P. 12(b)(1), "[i]f the motion is a factual attack on the jurisdictional allegations of the complaint, . . . the trial court may receive any competent evidence pertaining to the motion." *Trinity*, 848 P.2d at 924. "Because Rule 12(b)(1) permits a trial court to make its own factual findings in determining its subject-matter jurisdiction, it necessarily permits the trial court to hold an evidentiary hearing to resolve any factual dispute upon which the existence of jurisdiction may turn." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

"[E]vidence outside the pleadings may be considered to resolve a jurisdictional challenge." *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006).

A court should resolve any factual disputes concerning the existence of jurisdiction under Rule 12(b)(1). *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993).

LEGAL STANDARD – C.R.C.P. 106(a)(4)

C.R.C.P. 106(a)(4) states in pertinent part:

> "(4) Where, in any civil matter, any governmental body or officer . . . exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:
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> (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

Administrative or ministerial action is not subject to review under C.R.C.P. 106(a)(4).S*ee Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988); *Carpenter v. Civil Serv. Comm'n.*, 813 P.2d 773, 776 (Colo. App. 1990).

Judicial review under C.R.C.P. 106(a)(4) is limited to judicial and quasi-judicial agency action. *See, e.g., State Farm Mut. Auto. Ins. Co. v. City of Lakewood*, 788 P.2d 808 (Colo. 1990).

Whether a government decision is quasi-judicial or ministerial depends on the nature of the government decision and the process utilized to reach that decision. *Sherman v. City of Colorado Springs Planning Comm'n*, 763 P.2d 292 (Colo. 1988).

"Where a governmental decision is likely to affect the rights and duties of specific individuals, and the decision is to be reached through the application of preexisting legal

standards or policy considerations to present or past facts developed at a hearing, the governmental body is generally acting in a quasi-judicial capacity." *Sherman, supra, citing Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village,* 757 P.2d 622 (Colo. 1988).

> "The most common test [distinguishing ministerial acts from quasi-judicial acts] is to determine whether the function under consideration involves the exercise of discretion and requires notice and hearing. If these elements are present the 'finding' is generally a quasi-judicial act; if any of them are absent it is generally an administrative act." *City of Englewood v. Daily*, 407 P.2d 325, 361 (Colo. 1965).

"Traditionally, the law has accorded employers, including government agencies, broad discretion in the discharge of employees who are terminable at will." *Widder v. Durango Sch. Dist. No. 9-R,* 85 P.3d 518, 526-27 (Colo. 2004).

"The general rule is that, absent a violation of constitutional rights, judicial review is not available to review the firing of an employee who is terminable at will." *Fremont Re-1 Sch. Dist. v. Jacobs,* 737 P.2d 816, 819 (Colo. 1987).

UNDISPUTED FACTS

1. On or about July 22, 2022, the then Chief of Police Paul Southard terminated Plaintiff's employment with the City of Brighton Police Department. [Exhibit B; Complaint, ¶¶ 5 and 11].

2. The decision to terminate Plaintiff was made on the recommendation of Deputy Chief Domenico, and after a pre-discipline hearing was held whereat Plaintiff was permitted to respond to the recommendation for termination. Plaintiff presented at the hearing with her attorney. [Exhibit B].

3. On August 5, 2022 Plaintiff submitted a timely Notice of Appeal pursuant to the Brighton Employee Handbook Section 16.02. to Defendant Michael Martinez ("Martinez") as the City Manager for the City of Brighton. [Exhibit C; Complaint, ¶7].

4. On August 25, 2022 Plaintiff submitted a response letter to dispute the allegations against her and to dispute her termination. [Exhibit D].

5. On October 11, 2022 Defendant Martinez, acting as City Manager, issued a decision upholding the termination. [Exhibit E].

6. The City of Brighton Discipline Policy states in pertinent part as follows:

   1008.12 POST-DISCIPLINE ACTIONS The Police Department post-discipline process is governed by the City of Brighton Policies and Procedures Handbook, **XVII APPEAL PROCEDURES**.

[Exhibit F].

7. The Appeal Procedures set forth in the Employee Handbook state in pertinent part as follows:

> **16.01. Appeals**: Full-time and regular part-time employees who have completed their probationary period or extension thereof, may appeal a suspension, demotion, or dismissal by following the procedures prescribed herein. The resolution of appeals arising from suspension, demotion, or dismissal shall be guided by the established appeal procedures as set forth in this handbook. . .
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> **16.03. Pre-Appeal Procedures**:
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> A. The City Manager will provide written notification to the employee (or the employee's representative) and the Department Director (or the Department Director's representative) of the filed appeal.
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> B. Within fourteen (14) calendar days of the written notification from the City Manager, the employee, Department Director and Human Resources Department shall submit to the City Manager and all other involved parties any materials or records for the City Manager to consider in deciding the appeal. Within twenty-one (21) calendar days of the original written notification from the City Manager, the employee may submit to the City Manager and all other involved parties any supplemental materials or records to the City Manager in rebuttal to any materials previously submitted. The City Manager shall base his/her decision on the records submitted. No oral testimony will be allowed.
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> **16.04. Determination:**
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> A. The City Manager will review the submitted materials and records submitted. The City Manager will endeavor to consider only relevant and trustworthy material and will reject any material that the City Manager determines is irrelevant or untrustworthy. The City Manager will render a written decision containing the City Manager's findings, conclusions, and final determination. In considering the appeal on the disciplinary action, the City Manager may 1) confirm the disciplinary action; or 2) reconsider the disciplinary action and either a) reinstate the employee, b) impose a lesser penalty, or c) refer the matter back to the Department Director for further consideration.
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> B. The City Manager *may* convene any of the parties involved or request additional documents for further clarification and discussion before rendering

> a final decision. *The City Manager's decision will be final for purposes of judicial review and no further internal appeal may be made.*

[Exhibit G, pp. 41, 42; Exhibit 1 (Emphasis added)].

The Brighton Employee Handbook also provides in pertinent part as follows:

> **4.01. Policy and Objectives**: All appointments with the City of Brighton are at will. New appointments shall be subject to the satisfactory completion of a probationary or trial period. This applies not only to the first appointment of a new employee but also to any subsequent appointments in connection with a promotion . . .

[Exhibit G, p. 10].

The Brighton City Charter states in pertinent part:

> **7.3 POWERS AND DUTIES**. The City Manager shall be responsible to the Council for the proper administration of all affairs of the City placed in the City Manager's charge. The City Manager shall have the following powers and duties: . . .
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> (F) Exercise supervision and control over all administrative departments . . .

ANALYSIS

Defendants make several arguments as to why the decision made by Defendant Martinez to uphold the termination of Plaintiff was not a judicial or quasi-judicial act and is not reviewable pursuant to C.R.C.P. 106(a)(4)[1].

Defendants argue that because Plaintiff was an at will employee judicial review of her termination is not reviewable. Defendants rely on *Widder v. Durango Sch. Dist. No. 9-R,* 85 P.3d 518, 526 (Colo. 2004).

Defendants also argue that termination of an employee is generally deemed an administrative act and, therefore, not reviewable under C.R.C.P. 106(a)(4). Defendants rely on *Hoffman v. City of Fort Collins*, 489 P.2d 355 (Colo. App. 1971); *Chellsen v. Pena*, 857 P.2d 472, 475 (Colo. App. 1992) and *Bourgeron v. City & Cty. of Denver*, 159 P.3d 701, 705 (Colo. App. 2006).

[1] Defendants further note that the City is named as a Defendant separate and apart from Martinez. Defendants assert that because the only decision being challenged is Defendant Martinez's decision to uphold Plaintiff's termination, any action against the City has no basis in fact. Plaintiff does not address this argument, nor does Plaintiff offer any argument in support of her claim against the City.

Plaintiff asserts that her Complaint meets the threshold for judicial review under C.R.C.P. 106(a)(4) and C.R.S. §24-4-106.

Plaintiff also argues that the decision to terminate Plaintiff is quasi-judicial because it was the result of a process including notice and an opportunity to be heard. Plaintiff also argues that the Brighton City Policy for appeals supports review under C.R.C.P. 106(a)(4) because it states that the "City Manager's decision will be final for purpose of judicial review and no further internal appeal may be made." [Appeals Procedures, Exhibit 1, p. 2, §16.04(B)][2].

As a preliminary matter, the Court notes that C.R.S. §24-4-106 is the judicial review provision of the State Administrative Procedure Act (APA). Section 24-4-106 provides "prompt judicial remedy to persons or parties adversely affected or aggrieved by agency actions." But the APA only applies to state agencies having statewide jurisdiction. *See*, C.R.S. §24-4-107 ("This article applies to every agency of the state having statewide territorial jurisdiction. It applies to every other agency to which it is made to apply by specific statutory reference . . .") Because the City of Brighton is not a state agency having statewide territorial jurisdiction, and neither party has pointed to any statute specifically applying the APA to the City of Brighton, and further, because Plaintiff has not asserted a claim under C.R.S. §24-4-106, the Court does not find section 24-4-106 to be applicable to this matter.

The Court finds that while the cases cited by Defendants stand for the general proposition that an at-will employee's termination is not subject to judicial review, those cases do not stand for the proposition that an at-will employee's termination is not subject to review *pursuant to C.R.C.P. 106(a)(4).* In fact, in *Widder*, 85 P.3d 518, one of the cases relied upon by Defendants, the court found that although the employee in that case was an at-will employee, he was entitled to the pre-termination processes as set forth in the collective bargaining agreement in place, and that those procedures, which were followed, rendered the Board's decision to terminate Widder reviewable under C.R.C.P. 106(a)(4).

Widder was a school district employee who was terminated for inappropriate physical contact with a child. Before Widder was terminated he was advised of the recommendation for termination. He was also advised that he was entitled to a hearing and would be entitled to legal representation at the hearing. Widder was also entitled to pre-termination procedures including (1) a copy of the complaint, information regarding procedures used on the investigation and the ultimate resolution from the investigation, and (2) two weeks' notice of termination and the right to request a hearing, and (3) entitlement to a hearing in front of the Superintendent or his designee.

The *Widder* court held that the Board's decision to terminate Widder was properly reviewed under C.R.C.P. 106(a)(4) because the Board's decision was quasi-judicial in nature. The *Widder* court noted that the Board was acting on the recommendation made after an

[2] Plaintiff makes note of the fact that the process for appeals includes a statement that the City Manager's decision will be *final for purposes of judicial review*. Implicit in this reference appears to be the argument that somehow this reference makes the decision subject to judicial review. Without a clear statement that the decision is intended to be reviewable pursuant to C.R.C.P. 106(a)(4), this statement, in and of itself, does not lead to the conclusion that review under C.R.C.P. 106(a)(4) is appropriate in this case.

adjudicatory hearing, where Widder had notice and at which he had an opportunity to be legally represented and present evidence.

While *Widder* does not stand for the general proposition that Plaintiff's termination in this case is not reviewable under C.R.C.P. 106(a)(4), it, along with other cases cited by Defendants, particularly, *Hoffman v. City of Fort Collins, supra*, and *Chellsen, supra*, provide helpful guidance as to whether the actions to terminate Plaintiff were quasi-judicial in nature.

> In *Hoffman v. City of Fort Collins, supra*, the Plaintiff's termination as a terminated police officer from the City of Fort Collins, was held not to be reviewable pursuant to C.R.C.P. 106(a)(4). The *Hoffman* Court held that the City Manager's decision to terminate the Plaintiff, after recommendation from the Chief of Police was purely administrative in nature. In reaching this decision the court found significant the fact that the City Charter did not provide for a hearing or review of dismissals ordered by the City Manager. In reaching this conclusion the Hoffman court cited with approval 2 E. McQuillin, Municipal Corporations s 12.267 (3rd ed. 1968):
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> 'The general rule is that if the act of removal is executive, not judicial or quasi-judicial, it is not reviewable by certiorari. It has been ruled that if the law makes no provisions for hearing, but gives power to remove *and only requires that reasons therefor be stated in writing and filed, and if the officer desires, he may be given an opportunity to explain*, the removal act is 'executive' so far as the right to review by certiorari is concerned.'
>
> [Emphasis added].

Similarly, in *Chellsen v. Pena*, 857 P.2d 472, the court held that the termination of probationary firefighters was not reviewable under C.R.C.P. 106(a)(4). In *Chellsen* 6 former Denver firefighters were dismissed after the end of their probationary period. The Chief of the Fire Department recommend dismissal to the Manager of Safety based on the probationary firefighter's failure to complete one or more of 11 test batteries. The Manager of Safety then recommended dismissal. The Civil Service Commission approved the dismissal.

In determining that the dismissal of the probationary firefighters was not a quasi-judicial act the court noted that there was no requirement in the Denver City Charter or the Civil Service Commission regulations for notice and a hearing and that there was no right to appeal dismissals. The court also noted that the probationary firefighters were not permitted to give *any* input into the dismissal decision.

Plaintiff's attempt to distinguish *Chellsen* is without merit. The fact that the employees in *Chellsen* were probationary was not central to the Chellsen court's determination that their dismissal was not reviewable under C.R.C.P. 106(a)(4). And, while the probationary officers were not permitted to give any input not their dismissal, and here Plaintiff was given that opportunity, the other two factors relied upon by *Chellsen*, (the lack of a statutory, regulatory or

other right to notice and a hearing before the City Manager's decision and the lack of a right to appeal that decision) exist here.

Plaintiff's sole factual assertion that Defendant Martinez' actions were quasi-judicial in nature is her assertion that Defendant Martinez acted in a quasi-judicial capacity "when he reviewed the full internal affairs file and, after deliberation, rendered a decision . . ." Plaintiff argues that Defendant Martinez's actions were similar to a judge in an adjudicatory bench trial in that he served as fact finder and ultimate decision maker.

First, pursuant to *Hoffman*, which Plaintiff does not address, Defendant Martinez's actions of reviewing the internal affairs file and rendering a decision are not considered quasi-judicial.

Second, the Court does not agree that the actions of Defendant Martinez are analogous to the actions of a trial judge rendering a decision in a bench trial. A trial court's actions in a bench trial are conducted only after both parties are given an opportunity to be heard and present evidence. Here, based on Plaintiff's own factual assertions, there was no opportunity to be heard or present testimony to Defendant Martinez[3].

Third, like a fact relied upon by the *Hoffman* court, Plaintiff has pointed to no provision in the Brighton City Charter which provides for a hearing or review of dismissals ordered by the City Manager. Also, as was the case in *Hoffman*, and as conceded by Plaintiff at page 3 of her Response, the City of Brighton's Charter places the final authority with the City Manager for supervision and control of all City administrative departments and that supervision and control plainly include decisions regarding terminations. Finally, like the case in *Hoffman*, Plaintiff has pointed to no provision in the Brighton City Charter that provides for a civil service system.

Given the similarities between this case and *Hoffman*, the Court finds *Hoffman* compelling.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss is **GRANTED**.

This case is dismissed with prejudice for lack of jurisdiction.

SO ORDERED THIS THE 16th day of February, 2023

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[3] The record before this Court is that Defendant may have convened the parties prior to his decision, but he was not required to do so. In addition, while the Plaintiff submitted two written letters in connection with her appeal, this opportunity to explain does not mean Defendant Martinez's actions were not executive or administrative. See, 2 E. McQuillin, Municipal Corporations s 12.267 (3rd ed. 1968), cited with approval by *Hoffman, (*"It has been ruled that if the law makes no provisions for hearing, but gives power to remove *and only requires that reasons therefor be stated in writing and filed, and if the officer desires, he may be given an opportunity to explain*, the removal act is 'executive' so far as the right to review by certiorari is concerned.").

BY THE COURT:

_____

District Court Judge