

1996

James Desanti v. State of Utah for the Utah Department of Transportation : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT

IN THE UTAH COURT OF APPEALS

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A10

DOCKET NO. 960371-CA

JAMES DESANTI,
Appellant,

vs.

STATE OF UTAH FOR THE UTAH
DEPARTMENT OF TRANSPORTATION,
Appellee.

Case no. 960371-CA

Priority 15

BRIEF OF APPELLANT, JAMES DESANTI

APPEAL FROM THE GRANTING OF A
MOTION TO DISMISS BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH,
THE HONORABLE FRANK G. NOEL PRESIDING

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AUG 30 1996

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JAMES DESANTI,	:	
	:	
Appellant,	:	
	:	
vs.	:	
	:	
	:	
STATE OF UTAH FOR THE UTAH	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	Case No. 960371-CA
Appellee.	:	
	:	Priority 15
	:	
	:	

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STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to § 78-2a-3(2), U. C. A., which provides for jurisdiction in the Court of Appeals over appeals from District Court review of informal adjudicative proceedings of state agencies.

ISSUES PRESENTED FOR REVIEW

Did the district court err in holding that a challenge to an arbitrary and capricious personnel evaluation system of the Utah Department of Transportation was not an informal adjudicative proceeding?

Did the district court err in ruling it did not have jurisdiction over a petition for judicial review arising out of a challenge to the structure of the system of personnel evaluations within the Utah Department of Transportation?

This appeal arises from the granting of a motion to dismiss brought under Rule 12(b)(6). Consequently, the standard of review for the issues presented is that this court should construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in favor of the plaintiff including accepting as true the material allegations of the complaint. The trial court's ruling should be affirmed only if it clearly appears that the plaintiff can prove no set of facts to support his claim. *Heiner v. S.J. Grove & Sons Company*, 790 P.2d 107 (Utah App. 1990); *Wright v. University of Utah*, 876 P.2d 380

(Utah App. 1994). No deference need be given to the ruling of the district court as the review here is under a correctness standard for which this court may freely substitute its judgment. *Russell v. Standard Corporation*, 898 P.2d 263 (Utah 1995).

That these issues were raised in the district court is found by examining the plaintiff's Memorandum in Opposition to Motion to Dismiss found at R., p. 20 and in the Minute Entry of the court found at R, p. 43.

DETERMINATIVE STATUTES AND RULES

The controlling statutes and rules are reproduced in the addendum. Those statutes and rules which are reproduced are as follows:

§ 63-46b-1(d)

§ 63-46b-1(2)(e)

§ 63-46b-15

67-19-3(3) and (4)

67-19-18(3)

67-19-30

67-19a-301(3)

67-19a-302

§ 78-3-4(5)

R477-14(1)(6)

Rule 81(d), Utah Rules of Civil Procedure

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff was at all relevant times an employee of the Utah Department of Transportation, an agency of the State of Utah. Plaintiff challenged the system of personnel evaluation within UDOT by grievance and appeals the refusal of the Third District Court to find jurisdiction for judicial review of his grievance.

B. Course of Proceedings

On August 24, 1995, plaintiff filed a Petition for Judicial Review of an Administrative Action in the Third Judicial District Court. The nature of the petition was a challenge to the personnel evaluation system of the Utah Department of Transportation, which challenge had been grieved through the agency and denied. No discovery on the case was done as the state responded to the petition by filing a motion to dismiss on September 21, 1995. Oral argument was held and the court granted the motion to dismiss on March 11, 1996, by minute entry. The formal order of dismissal was entered April 22, 1996 and a notice of appeal was filed on May 21, 1996.

C. Statement of Facts

As this case was dismissed on a motion under Rule 12b(6) prior to an answer to the complaint being filed, the facts available are not well developed in the record and are limited to that contained in the pleadings.

The pleadings show that James DeSanti was an employee of the State of Utah working in the Utah Department of Transportation located in Salt Lake County, Utah. Mr. DeSanti was working as a mechanic in the UDOT shops.

Mr. DeSanti was given a performance review by his supervisor for the period of July, 1994 through April, 1995. Performance evaluations allowed for rating of an employee in nine areas of work criteria. Only one of two ratings may be given in each of these areas. Those ratings are "M" for met expectations and "DN" for did not meet expectations.

Mr. DeSanti was rated favorably ("M") in six of the nine areas of rating. He was rated unfavorably ("DN") in three areas of evaluation. Despite the favorable areas of rating being numerically greater than the unfavorable areas of rating, he was rated overall "DN" for the rating period. He alleges that this substandard overall rating has caused him to suffer loss of pay and other negative consequences of a poor performance review.

Mr. DeSanti filed a timely grievance of the performance evaluation alleging that the overall evaluation of "DN" is arbitrary and capricious and not supported by the facts of his job performance. He argued that there were no guidelines in place to tell a supervisor how to make an overall evaluation under such circumstances, nor were there guidelines concerning whether any specific rating criteria may be weighted against other evaluation criteria.

DeSanti also raised in his grievance that the rating form used anticipates an interview between an employee and the rater. No interview took place so DeSanti was not able to address and rebut allegations of substandard performance in the three areas in which he was rated "DN".

Finally, DeSanti argued that the person making the rating was not a supervisor during the entire rating period and the rating was arbitrary and capricious in that a person who had not observed his performance for the entire rating period was able to give him a negative rating without guidelines. DeSanti also raised a due process argument in that he has never been given an itemization of date, time, and place of any act which constituted unsatisfactory performance leading to the "DN" ratings. He argued in his grievance that he was unable to respond to defend his performance and that he was not told what work standard had been violated and how he failed to meet that standard.

UDOT treated the grievance as an informal adjudicative proceeding. Judicial review of such proceedings is in the District Court, so DeSanti sought review there. The District Court dismissed the petition for reasons discussed at length in this brief.

Emphasis is made that DeSanti does not seek judicial review of the substance of the evaluation. Rather, he appropriately seeks judicial review of the system of evaluation in this action.

Mention should be made that since this appeal was filed, DeSanti's employment was terminated by the state, which relied in part on this disputed evaluation to do so. The termination is pending review by the Career Services Review Board.

SUMMARY OF ARGUMENTS

Plaintiff details in this brief step by step the legal framework of his personnel evaluation and the resulting grievance. Plaintiff shows that the challenge to the personnel evaluation system is an authorized topic of grievance. Citation is given to establish that his grievance is designated by the state as an informal adjudication for which the district courts have jurisdiction. It was error for the district court to hold that there was not an informal adjudicative proceeding and that the district court did not have jurisdiction to consider a petition for review of that proceeding.

ARGUMENT

A. Introduction

In order to correctly analyze the issues presented, one must first understand the legal context in which the issues arise. Put simply, DeSanti received an adverse personnel evaluation and, instead of challenging the merits of the evaluation, challenged the evaluation system as arbitrary and capricious and thereby an infringement of his property interest in public employment.

DeSanti grieved with management that he would be rated under such a system to the highest level within the Utah Department of Transportation (UDOT). He then sought judicial review in the district court. The response of the State was to argue that DeSanti was seeking only a review of the merits of his personnel evaluation and that such a challenge was not subject to judicial review. R, p. 15.

The district court agreed with the state and held that the substance of a personnel review was not an informal adjudication for which the district courts had jurisdiction. R, p 50. The motion to dismiss was granted.

What follows is analysis showing that the district court missed the legal point completely in that DeSanti was not challenging the substance of the actual rating he was given but appropriately challenged the employee rating system itself which led to his adverse evaluation. Judicial review is appropriate under those circumstances.

B. Legal Setting of the Grievance

As a general statement, a career service public employee has a constitutionally protected property interest in continued employment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532(1985). That interest may be deprived only by procedures reflecting due process of law. *Lopez v. Career Services Review Board*, 834 P.2d 568 (Utah App. 1992); R477-11-1(2). The State of

Utah has established a system of personnel management for its employees governed generally by the Utah State Personnel Management Act found in Title 67, Chapter 19 of the Utah Code. Regulations implementing this act are found in the Utah Administrative Code at R477-1 et seq.

Career service employees are persons who have completed a probationary period and received career service status. See § 67-19-3(3) and (4). Authority is granted by § 67-19-9 for the adoption of a system of evaluation of career service employees.

Section 67-19-30 provides that employees filing a grievance concerning employment matters shall comply with the procedural requirements of the Utah Administrative Procedures Act found in Title 63, Chapter 46b, and with the provisions of Title 67, Chapter 19a, which provides for creation of the Career Service Review Board and grievance and appeal procedures.

Turning to Title 67, Chapter 19a, it is seen that any career service employee may submit a grievance based upon a charge of "injustice or oppression". § 67-19a-301(3).

While the right to grieve a matter pertaining to public employment appears to be broad in Utah, § 67-19a-302 limits the level of appealability of charges submitted under a grievance. This statute provides that certain disputes may be appealed to all levels of grievance procedure, meaning that they may be considered by the Career Services Review Board. See, *Lunnen v. Utah Depart-*

ment of Transportation, 886 P.2d 70 (Utah App. 1994). Certain matters not itemized in the statute may be grieved only to the level of the department head. § 67-19a-302. The decision of the department head is final and may not be appealed to the Career Services Review Board.

The state personnel regulations designate the grievance process as an informal proceeding within the meaning of the Utah Administrative Procedures Act found in Title 63, Chapter 46b. See R477-14(1)(b). The district court, in turn, has jurisdiction for review of agency informal adjudication proceedings under § 78-3-4(5) and § 63-46b-15. See *Lopez v. Career Service Review Board*, 834 P.2d 568 (Utah App. 1992). This section cross-references to Title 63, Chapter 46b for procedural rules. Put simply, Title 78 creates jurisdiction in the district courts and Title 63 identifies the procedure to be followed in judicial review of informal agency adjudication.

In summary, a Utah public employee has constitutional protection for public employment. The due process attaching to that right is implemented by certain statutes which grant the employee a right to grieve an "unjust" situation, provide that such a grievance is informal adjudication, and further provide that the district courts have the power to review such adjudication.

C. The District Court Erred

1. The Court Failed to Apply the Correct Standard of Review. The district court dismissed the claim under Rule 12(b)(6) holding that the plaintiff failed to state a claim as a matter of law because judicial review of a personnel action is not available and that the remedy was appeal to the Career Services Review Board. In fact, close examination of the law shows that the district court was incorrect.

In reviewing the action of the district court, it must be remembered that the court was considering a motion to dismiss under Rule 12(b)(6). The standard the district court was to have applied was that the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in plaintiff's favor. *Russell v. Standard Corporation*, 898 P.2d 263 (Utah 1995). Similarly, this court should construe the complaint in the light most favorable to the plaintiff and conclude that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claims made. *Heiner v. S.J. Groves & Sons Company*, 790 P.2d 107 (Utah App. 1990). This rule of review includes accepting the material allegations of the complaint as true. *Wright v. University of Utah*, 876 P.2d 380 (Utah App. 1994). Applying this standard of review, the district court was obligated to accept as true all of the facts alleged in the complaint including that there were no

guidelines for personnel evaluations concerning how a supervisor was to rate overall the employee, what weight was given to any individual criteria and the fact that favorable ratings were numerically greater than unfavorable ratings. Also to be accepted as true was that there was no explanation of and opportunity to rebut allegations of substandard work. See Petition in addendum. Having those facts in mind, there are several reasons to conclude the district court ruled incorrectly.

First, applying the law outlined above, the grievance on its face, as described in the petition, attacked the unjust situation of an arbitrary and capricious personnel evaluation system. DeSanti is in the difficult position of proving a negative, but there exists no rules or guidelines in place to tell a supervisor how to weight the evaluation criteria in a personnel evaluation and what to do when the positive evaluations on criteria of an evaluation are numerically superior to the negatively evaluated criteria. The negative impact on him of this evaluation as pled in the petition shows that absent such guidelines the overall evaluation of a "DM" was arbitrary. This issue cannot be resolved by a motion to dismiss as the petition states facts which would support relief, if true.

2. A grievance for unjust conditions may be judicially reviewed. It is extremely important to remember that the issue presented on this appeal is not whether Mr. DeSanti deserved on the merits a better personnel review nor is the decision of whether the

system is arbitrary and capricious now before this court. The issue to be considered and resolved here is whether the district court erred in not taking evidence and holding that there was no right of review for this particular kind of grievance.

As pointed out above, § 67-19a-302 provides that a grievance for unjust conditions may not be appealed to the Career Services Review Board. The statute says that final decision of such appeal resides with the department head. The next logical analytical step is to consider whether there is district court jurisdiction over the final decision of the department head by means of a petition for judicial review.

Article VIII, Section 5 of the Utah Constitution provides that the district courts of the state have original jurisdiction in "all matters" except as limited by the Constitution or by statute. In other words, the district courts always have jurisdiction unless some legal reason can be identified to deny jurisdiction.

This constitutional grant of jurisdiction is supported in these circumstances by § 78-3-4(5) declaring that the district courts have jurisdiction to review agency adjudicative proceedings.

As explained above, the grievance process is an informal adjudication by specific definition contained in R477-14(1)(b). Consequently, the decision of the department head which is final for those grievances which are not authorized to go to the Career Services Review Board is a final decision resulting from an

informal proceeding for which district courts have a power of review under § 78-3-4(5) which interacts with § 63-46b-15.

In summary, determining whether there can be judicial review of the grievance presented is difficult only in the sense that one needs to carefully trace through statutes in different parts of the Utah Code as opposed to having to make a tortured interpretation of the code. The legal framework is clear. The grievance process for matters alleged to arise out of injustice or oppression stops within the agency at the agency head and because those kinds of grievances have been designated as informal adjudication, they are clearly reviewable by the courts. Having found that the subject matter is subject to judicial review, the only remaining question is what court has jurisdiction. That topic is addressed next.

3. The district court has jurisdiction. The district court granted the motion to dismiss by finding that § 63-46b-1(2)(e) was the source of authority to act contrary to the general rule that the district courts always have jurisdiction. This section provides that the Utah Administrative Procedures Act applies to every agency in the State of Utah but does not govern "applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions". The logic of the State in its motion to dismiss adopted by the district court was that this petition for judicial review was actually concerning an internal personnel action and so outside

the jurisdiction of the court. This reasoning is fatally flawed for several reasons.

First, § 63-46b-15 specifically provides that the district courts have jurisdiction to review "all" final agency actions resulting from informal adjudicative proceedings. If the ruling of the district court is correct that the challenge to a system of evaluation is an internal personnel action within the meaning of § 63-46b-2(e), then the statutes conflict within the same chapter. The conflict is that § 63-46b-2 would end a grievance at the department head level while § 63-46b-15 states that the district courts have jurisdiction to review "all" proceedings and this proceeding has been designated as an informal proceeding by regulation.

The obvious way to harmonize these statutes is to conclude that when an internal personnel action not involving informal adjudication is at issue, the district courts would not review the action. Put in the affirmative, harmony between the statutes is achieved when the word "all" is given effect and interpreted to mean that if an agency has designated an action as an informal adjudication that the district courts may review that adjudication. That is, of course, exactly what happened here and jurisdiction should be found.

This proposed construction is more legitimate than finding no right of review because it promotes due process. The state's interpretation would be that an arbitrary and capricious

evaluation system may be set up and no employee may challenge it in the courts because the right of final decision would rest with the department head who has responsibility for implementing the challenged evaluation system. By construing towards judicial review, the courts protect the property interest of the public employee in the employment from arbitrary and capricious action.

Second, the sub-section just preceding, § 63-46b-1(2)(d), provides that the Administrative Procedures Act does not apply to state agency actions to "evaluate" students or teachers in any school. Obviously, the legislature could have used the word "evaluate" in the very next sentence pertaining to personnel actions and did not choose to do so. The clear implication is that the legislature had in mind evaluations and yet only referred to internal personnel actions. The logical conclusion is that challenge to an evaluation system was not intended to be an internal personnel action.

Intertwined into the error in analysis is the confusion by the district court of the difference between jurisdiction and procedure. The jurisdiction of the district courts to review agency adjudication is found in Title 78 as explained above. The procedure to be followed is found in Title 63. A reading of Title 63, Chapter 46b, and Title 78, Chapter 3, shows that even if one assumes the challenge to the personnel system is a requested review of internal personnel actions, there is a gap between the statutes. The gap is created by the district court interpretation of § 63-

46b-1(2)(e). The gap is that Title 78 and § 63-46b-15 clearly contemplate jurisdiction over all informal agency adjudication but the district court found that sub-section 1(2)(e) denied jurisdiction when there is no jurisdictional language in that subsection. What § 63-46b-1(2) says is that this procedural statute does not apply in certain circumstances. With jurisdiction fully in place, one is then left to determine what is the appropriate procedure for district court review of an informal personnel action.

Fortunately, the framers of the Utah judicial system provided a mechanism by which this gap can be closed. Once again, if one starts with the presumption that jurisdiction always exists unless there is a specific statute to the contrary, a source of procedure is found in Rule 81(d) of the Utah Rules of Civil Procedure. This rule provides that the Rules of Civil Procedure shall apply to the judicial review of any administrative action except as a statute may be in conflict.

The ruling of the court finding that § 63-46(b)-1(2)(e) denies jurisdiction works only if you blur the lines between jurisdiction and procedure. The Utah Administrative Procedures Act is not a jurisdictional statute. Consequently, even if this court were to find that an internal personnel action was being reviewed, there is no statute identified which actually removes jurisdiction from the district courts. This problem is obviously a drafting oversight on a highly technical matter but an examination and close reading of the statutes can lead only to the conclusion that

jurisdiction to review this informal agency adjudication still exists because Title 78 creates it.

That DeSanti does not ask the court to review an internal personnel action in the sense of focusing on the review itself is demonstrated by the relief requested by DeSanti in his petition. DeSanti does not ask the court to change the "DN" he received to a "M". Instead, DeSanti asks the court to declare null and void the performance rating given and to order back pay because the rating scheme itself did not give adequate notice and opportunity to respond to adverse information, lacked adequate guidelines to control how a supervisor weights criteria and reaches an overall rating for the rating period, and fails to tell a supervisor what to do when the positive ratings numerically are greater than the negative ratings.

This court should order the district court to allow discovery and conduct judicial review of the personnel evaluation system.

CONCLUSION

The issues presented in this appeal are, admittedly, technical and detailed, but important consequences for DeSanti result from allowing a personnel evaluation to stand which was issued in an arbitrary and capricious manner. Straightforward analysis presented here requires reversal of the district court. DeSanti's grievance was authorized by law and the agency has

officially designated the grievance as an informal adjudication. There is no right to appeal to the Career Services Review Board as suggested by the district court because the issue presented does not fall within the enumerated issues contained in statute for the Career Services Review Board, and the Utah Constitution and implementing statutes are clear that the district courts have jurisdiction for review of informal agency adjudication. See *Kirk v. Division of Occupational and Professional Licensing*, 815 P.2d 242 (Utah App. 1991). The district court erred by taking too much out of the language of a procedural statute to find there was no jurisdiction. This court is respectfully requested to reverse the Third District Court's ruling and allow for a full and fair proceeding of judicial review to determine whether the UDOT personnel evaluation system was arbitrary and capricious so that it inappropriately infringed upon the protected property interest of Mr. DeSanti in his job.

DATED this 29th day of August, 1996.

KIPP AND CHRISTIAN, P.C.




GREGORY J. SANDERS, ESQ.
Attorneys for Petitioner

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 30th day of August, 1996, I caused two true and correct copies of the foregoing **Brief of Appellant, James DeSanti** to be mailed, postage prepaid, to the following:

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Assistant Attorney General
P. O. Box 140857
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A handwritten signature in dark ink, appearing to read 'R. Thompson', is written over a horizontal line.

ADDENDUM

A. Petition for Judicial Review

4/10/2011
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FILED
STATE OF UTAH
FOR

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JAMES DESANTI,	:	
	:	
Plaintiff,	:	PETITION FOR JUDICIAL
	:	REVIEW OF ADMINISTRATIVE ACTION
vs.	:	
	:	
STATE OF UTAH FOR THE UTAH	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	
Defendant.	:	

950905998 AA

JUDGE FRANK G. NOEL

Petitioner, James DeSanti, hereby petitions the court as follows:

PARTIES

1. James DeSanti is an employee of the State of Utah working in the Utah Department of Transportation. His employment is located in Salt Lake County, Utah.
2. The Utah Department of Transportation, an agency of the State of Utah, is the employer of the petitioner.

JURISDICTION

3. Mr. DeSanti has exhausted all administrative requirements concerning the subject matter herein by appealing a grievance to the level of his department head as provided in §67-19a-302 of the Utah Code.

4. This court has jurisdiction to review this matter de novo as it arises from an informal adjudicative proceeding as provided in §63-46b-15.

GENERAL ALLEGATIONS

5. The mailing address of James DeSanti is P.O. Box 668, Farmington, Utah 84025.

6. The responding agency is the Utah Department of Transportation located at 4501 South 2700 West, Salt Lake City, Utah 84119. The final agency action to be reviewed is the affirmation of a negative performance review by letter dated July 25, 1995, a copy of which is attached for clarification.

7. The person who was a party to the informal adjudicative proceeding was James DeSanti. The other party is the Utah Department of Transportation as it acted through supervisors of Mr. DeSanti.

8. A copy of the written final agency order (decision) is attached as required by §63-46b-15(2)(a)(v).

RELEVANT FACTS

The following facts are stated to be relevant in conformance with §63-46b-15(2)(a)(vi):

9. The petitioner is a mechanic working in the shops of the Utah Department of Transportation.

10. Mr. DeSanti was given a performance review for the period of July, 1994 through April, 1995.

11. The performance review allows for rating of an employee in nine areas. The ratings scheme allows only two ratings. These ratings are "M" for met expectations and "DN" for did not meet expectations.

12. Mr. DeSanti was rated favorably in six areas of rating and unfavorably in three areas of rating. Despite the favorable areas of rating being numerically greater than the unfavorable areas of rating, he was given an overall "DN" for the rating period which has caused him to have suffered loss of pay and other negative consequences of a poor performance review.

13. Mr. DeSanti filed a timely grievance of the performance review alleging the following legal and factual defects:

a. The overall evaluation of "DN" is arbitrary and capricious and not supported by the facts of his job performance.

b. Entry of an overall negative evaluation when the favorable ratings were numerically greater than the negative ratings is arbitrary and capricious in the absence of guidelines concerning whether ratings may be weighted and, if so, what weight is to be given to any particular rating area.

c. The rating form used anticipates an interview between an employee and the rater. No such interview took place so there was no opportunity to address and rebut allegations of substandard performance.

d. The person making the rating was not a supervisor during the entire rating period. Consequently, the rating is arbitrary and capricious in that an unqualified person did the rating.

e. No notice of unsatisfactory performance has been given in that there has been no itemization of date, time and place of any act of DeSanti which constituted unsatisfactory performance despite the request for such information. Consequently, DeSanti was unable to respond to defend his performance in that he was not told specifically what work standard had been violated.

REQUEST FOR RELIEF

The following statement is made in conformance with §63-46b-15(2)(a)(vii) and (viii):

14. Petitioner hereby requests the court to declare null and void the performance rating given, to order back pay commensurate with pay lost because of an unfavorable performance rating, to order the State of Utah to rate Mr. DeSanti only under a rating scheme in which adequate notice and an opportunity to respond is given in a rating system in which there are adequate guidelines to control how a supervisor weights and reaches an ultimate rating for the rating period.

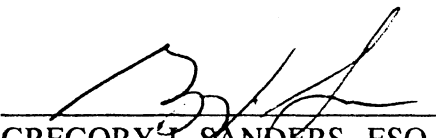
15. Petitioner is entitled to relief in that he has exhausted his remedies through the grievance system available to an employee and the Utah Department of Transportation has not given him the relief requested. The negative rating is not supported by the facts, the system used does not comply with the Human Resources Management Rules, the rating scheme is arbitrary and capricious in that it does not provide guidelines to supervisors on how to weight

various areas of rating in order to reach an overall rating conclusion, and in that petitioner has a protected property interest in his public employment so that the failure to give him adequate notice and an opportunity to rebut negative information while rating him in an arbitrary and capricious manner is a denial of due process of law and is inconsistent with the policy of the State of Utah that employees be evaluated in a fair manner.

Wherefore, petitioner requests the court to enter the relief above stated and to grant petitioner such attorney's fees and costs as may be appropriate in law and in fact.

DATED THIS 24th day of August, 1995.

KIPP AND CHRISTIAN, P.C.



GREGORY J. SANDERS, ESQ.
Attorneys for Petitioner



State of Utah

DEPARTMENT OF TRANSPORTATION

Michael O. Leavitt
Governor
Thomas R. Warne
Executive Director
Clint Topham
Deputy Director

4501 South 2700 West
Salt Lake City, Utah 84119-5998
(801) 965-4000
Fax: (801) 965-4338

Commission
Glen E. Brown
Chairman
Todd G. Weston
James G. Larkin
Ted D. Lewis
Hal M. Clyde

July 25, 1995

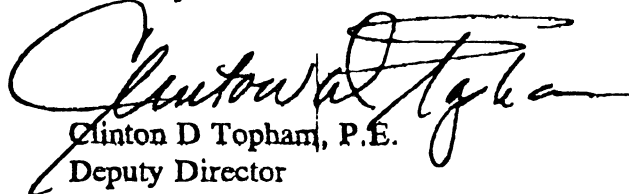
Mr. Jim DeSanti
P.O. Box 668
Farmington, Utah 84025

Dear Mr. DeSanti:

I have reviewed your grievance concerning your 1995 annual performance review. The annual rating period for all employees was from July 1994 to April 1995. Over half of that time, you were on corrective action. I have reviewed the documentation concerning your grievance, and I concur with the overall "Did Not Met Expectations" made by the supervisory staff in Maintenance.

I encourage you to look to the future instead of back. I recommend that you work with your supervisors and follow the performance plan so you will receive a "Met Expectations" rating at your next annual review.

Sincerely,



Clinton D Topham, P.E.
Deputy Director

CDT/jbl

cc: Career Services Review Board
Sheldon McConkie, Operations Engineer
Lester R. Jester, Engineer for Maintenance
Alan Lake, Human Resources Manager



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B. Minute Entry

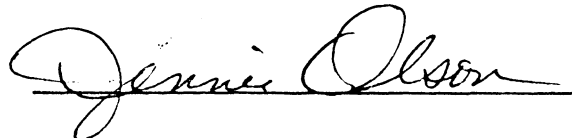
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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following on this 12 day of March, 1996.

Gregory J. Sanders
KIPP & CHRISTIAN
Attorney for Plaintiff
City Centre I, Suite 330
175 East 400 South
Salt Lake City, UT 84111-2314

Mark L. McCarty
Assistant Attorney General
Attorney for Defendant
Utah Attorney General
4120 State Office Building
Salt Lake City, UT 84114-0811

A handwritten signature in cursive script, reading "Jennie Olson", is written over a horizontal line.

C. Order

MARK L. McCARTY (6001)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
Attorneys for Defendant
4120 State Office Building
Salt Lake City, Utah 84114
Telephone: (801) 538-9500

FILED DISTRICT COURT
Third Judicial District

APR 22 1996

By Pat. Jones
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JAMES DESANTI,	:	ORDER
Plaintiff	:	
-v-	:	Civil No. 950905998
STATE OF UTAH, UTAH	:	Judge: FRANK G. NOEL
DEPARTMENT OF TRANSPORTATION,	:	
Defendant.	:	

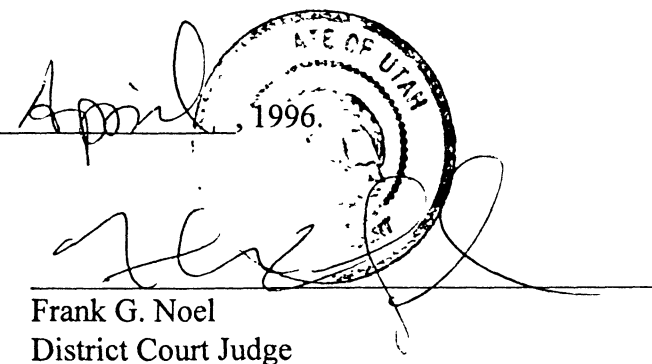
This matter came regularly before the court on Defendant's Motion to Dismiss Plaintiff's Petition for Judicial Review of Administrative Action. Plaintiff was seeking review of a performance evaluation given by a State Agency. The Agency filed a Motion to Dismiss claiming that a performance evaluation is an internal personnel action within an agency concerning its own employees, and therefore the court has no jurisdiction to hear the matter. The court reviewed the Motion to Dismiss together with the memos filed in connection therewith, and oral argument was held in this matter on January 5, 1996. The court hereby makes the following:

ORDER

The court finds that a performance evaluation given by a State Agency is not an **“informal adjudicative proceeding”** as defined under the Utah Administrative Procedures Act (UAPA), §63-46b et seq. Performance evaluations are internal personnel actions within an agency concerning its own employees, and the court has no jurisdiction to review those actions in accordance with Utah Code Ann. §63-46b-1(2)(e).

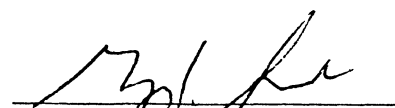
Defendant’s Motion to Dismiss is hereby granted, and Plaintiff’s Petition is hereby dismissed.

DATED this 22 day of April, 1996.



Frank G. Noel
District Court Judge

Approved as to form:



Gregory J. Sanders
Attorney for Plaintiff

D. Portions of Title 63

63-46b-1. Scope and applicability of chapter.

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state of Utah and govern:

- (a) all state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all agency actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and
- (b) judicial review of all such actions.

(2) This chapter does not govern:

- (a) the procedures for promulgation of agency rules, or the judicial review of those procedures or rules;

- (b) the issuance of any notice of a deficiency in the payment of a tax, the decision to waive penalties or interest on taxes, the imposition of, and penalties or interest on, taxes, or the issuance of any tax assessment, except that this chapter governs any agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of those actions;

- (c) state agency actions relating to extradition, to the granting of pardons or parole, commutations or terminations of sentences, or to the rescission, termination, or revocation of parole or probation, to actions and decisions of the Psychiatric Security Review Board relating to discharge, conditional release, or retention of persons under its jurisdiction, to the discipline of, resolution of grievances of, supervision of, confinement of, or the treatment of inmates or residents of any correctional facility, the Utah State Hospital, the Utah State Developmental Center, or persons in the custody or jurisdiction of the Division of Mental Health, or persons on probation or parole, or judicial review of those actions;

- (d) state agency actions to evaluate, discipline, employ, transfer, reassign, or promote students or teachers in any school or educational institution, or judicial review of those actions;

- (e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions;

- (f) the issuance of any citation or assessment under Title 35, Chapter 9, Utah Occupational Safety and Health Act of 1973, and Title 58, Chapter 55, Utah Construction Trades Licensing Act, except that this chapter governs any agency action commenced by the employer, licensee, or other person authorized by law to contest the validity or correctness of such a citation or assessment;

- (g) state agency actions relating to management of state funds, the management and disposal of school and institutional trust land assets,

63-46b-15. Judicial review — Informal adjudicative proceedings.

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

E. Portions of Title 67

67-19-3. Definitions.

As used in this chapter:

(1) "Agency" means any department or unit of Utah state government with authority to employ personnel.

(2) "Career service" means positions under schedule B as defined in Section 67-19-15.

(3) "Career service employee" means an employee who has successfully completed a probationary period of service in a position covered by the career service.

(4) "Career service status" means status granted to employees who successfully complete probationary periods for competitive career service positions.

(5) "Classified service" means those positions subject to the classification and compensation provisions of Section 67-19-12.

(6) "Committee" means the Human Resources Advisory Committee created by this chapter.

(7) "Controlled substance" means controlled substance as defined in Section 58-37-2.

(8) "Department" means the Department of Human Resource Management.

(9) "Employee" means any individual in a paid status covered by the career service or classified service provisions of this chapter.

(10) "Examining instruments" means written or other types of proficiency tests.

(11) "Executive director," except where otherwise specified, means the executive director of the department.

(12) "Probationary employee" means an employee serving a probationary period in a career service position but who does not have career service status.

(13) "Probationary period" means that period of time determined by the department that an employee serves in a career service position as part of the hiring process before career service status is granted to the employee.

(14) "Probationary status" means the status of an employee between the employee's hiring and the granting of career service status.

67-19-18. Dismissals and demotions — Grounds — Disciplinary action — Procedure — Reductions in force.

(1) Career service employees may be dismissed or demoted only to advance the good of the public interest, and for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

(2) Employees may not be dismissed because of race, sex, age, physical handicap, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.

(3) The director shall establish rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(4) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (5).

(5) (a) No career service employee may be demoted or dismissed unless the department head or designated representative has complied with this subsection.

(b) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion.

(c) The employee has no less than five working days to reply and have the reply considered by the department head.

(d) The employee has an opportunity to be heard by the department head or designated representative.

(e) Following the hearing, the employee may be dismissed or demoted if the department head finds adequate cause or reason.

(6) (a) Reductions in force required by inadequate funds, change of workload, or lack of work are governed by retention rosters established by the director.

(b) Under those circumstances:

(i) The agency head shall designate the category of work to be eliminated, subject to review by the director.

(ii) Temporary and probationary employees shall be separated before any career service employee.

(iii) (A) Career service employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first.

(B) Retention points for each career service employee shall be computed according to rules established by the director allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment.

(iv) A career service employee who is separated in a reduction in force shall be:

(A) placed on the reappointment roster provided for in Subsection 67-19-17(2); and

67-19-30. Grievance resolution — Jurisdiction.

(1) Employees shall comply with the procedural and jurisdictional requirements of this section, Title 63, Chapter 46b, Administrative Procedures Act, and Title 67, Chapter 19a, Grievance and Appeal Procedures, in seeking resolution of grievances.

(2) All grievances based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, commission, or condition shall be governed by Title 67, Chapter 19a, Grievance and Appeal Procedures, and Title 63, Chapter 46b, Administrative Procedures Act.

(3) All grievances involving classification or schedule assignment shall be governed by Section 67-19-31 and are designated as informal adjudicative proceedings as defined by Title 63, Chapter 46b, Administrative Procedures Act.

(4) All grievances by applicants for positions in state government involving an alleged discriminatory or prohibited employment practice shall be governed by Section 67-19-32 and Title 63, Chapter 46b, Administrative Procedures Act.

(5) A "grievance" under this chapter is a request for agency action for purposes of Title 63, Chapter 46b, Administrative Procedures Act.

GRIEVANCE AND APPEAL PROCEDURES

67-19a-301. Charges submissible under grievance and appeals procedure.

(1) This grievance procedure may only be used by career service employees who are not:

- (a) public applicants for a position with the state's work force;
- (b) public employees of the state's political subdivisions;
- (c) public employees covered by other grievance procedures; or
- (d) employees of state institutions of higher education.

(2) Whenever a question or dispute exists as to whether an employee is qualified to use this grievance procedure, the administrator shall resolve the question or dispute. The administrator's decision is reviewable only by the Court of Appeals.

(3) Any career service employee may submit a grievance based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, omission, or condition for solution through the grievance procedures set forth in this chapter.

History: C. 1953, 67-19a-301, enacted by L. 1989, ch. 191, § 11; 1991, ch. 101, § 5.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, added Subsections (1) and (2) and designated the former section as Subsection (3).

Effective Dates. — Laws 1989, ch. 191 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

67-19a-302. Levels of appealability of charges submissible under grievance and appeals procedure.

(1) A career service employee may grieve promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of grievance procedure.

(2) (a) A career service employee may grieve all other matters only to the level of his department head.

(b) The decision of the department head is final and unappealable to the board.

F. Portions of Title 78

**78-3-4. Jurisdiction — Transfer of cases to circuit court —
Appeals — Jurisdiction when court does not
exist.**

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) Under the general supervision of the presiding officer of the Judicial Council and subject to policies established by the Judicial Council, cases filed in the district court, which are also within the concurrent jurisdiction of the circuit court, may be transferred to the circuit court by the presiding judge of the district court in multiple judge districts or the district court judge in single judge districts. The transfer of these cases may be made upon the court's own motion or upon the motion of either party for adjudication. When an order is made transferring a case, the court shall transmit the pleadings and papers to the circuit court to which the case is transferred. The circuit court has the same jurisdiction as if the case had been originally commenced in the circuit court and any appeals from final judgments shall be to the Court of Appeals.

(4) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.

(5) The district court has jurisdiction to review agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings.

(6) When a circuit court is given original or appellate jurisdiction of a matter and no such court exists in the county of proper venue, the district court shall have jurisdiction. Notwithstanding Section 78-3-14.5, criminal fines and forfeitures collected in such cases shall be distributed as if filed in the circuit court. Notwithstanding Section 78-3-16.5, civil filing fees in such cases shall be the same as if filed in the circuit court. The party filing a pleading or other document shall, at the time of filing, provide proof that the pleading or other document qualifies for the circuit court fee.

G. Portions of R477

H. Rule 81, U.R.C.P.

R477-14. Personnel Adjudicatory Proceedings.

R477-14-1. Informal Proceedings.

R477-14-1. Informal Proceedings.

(1) The following proceedings are designated as informal proceedings under the Utah Administrative Procedures Act, Utah Code Ann. Section 63-46b-4:

(a) Determinations regarding application, qualification, and consideration of public applicants for positions with state government.

(b) Any agency action not exempted under the Utah Administrative Procedures Act, Section 63-46b-1 or not subject to the grievance process found in Title 67, Chapter 19a.

(2) The following procedures shall govern informal adjudicatory proceedings:

(a) No response needs to be filed to the notice of an agency action or request for agency action.

(b) The agency shall hold a hearing only when required or permitted by statute.

(i) Parties shall request a hearing within ten days after receiving notice of an agency action or a request for agency action.

(ii) If no hearing is requested within ten days, a hearing shall only be held at the discretion of the agency head.

(iii) A hearing shall be held only after agency management provides timely notice of the hearing.

(c) All hearings held under this rule are open to all parties involved in the action.

(d) Only parties named in the notice of an agency action or a request for agency action shall be permitted to testify, to present evidence, and to comment on the issues.

(e) No discovery, either compulsory or voluntary, shall be permitted except that all parties to the action have access to all relevant information in the agency's files and if investigatory information and materials are not restricted by law.

(f) No person may intervene in an agency action unless federal statutes or rules require agencies to permit intervention.

(g) Within 30 days after the close of a hearing held under this rule, or after the failure of a party to request a hearing, the agency head shall issue a written decision stating the decision, the reasons for the decision, any notice of a right to judicial review, and the time limits for filing an appeal to the appropriate district court.

(i) The agency head's decision shall be based on the facts in the agency file. If a hearing is held, the

PART XI.

GENERAL PROVISIONS.

Rule 81. Applicability of rules in general.

(a) **Special statutory proceedings.** These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) **Probate and guardianship.** These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein, including the enforcement of any judgment or order entered.

(c) **Procedure in city courts and justice courts.** These rules shall apply to civil actions commenced in the city or justice courts, except insofar as such rules are by their nature clearly inapplicable to such courts or proceedings therein.

(d) **On appeal from or review of a ruling or order of an administrative board or agency.** These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) **Application in criminal proceedings.** These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.