

2008

# Julie Ann Olson v. Utah Department of Health : Brief of Petitioner

Utah Court of Appeals

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Nan T. Bassett; Kip and Christian; Attorney for Plaintiff.

Peggy E. Stone; Assistant Utah Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorney for Defendant/Petitioner.

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No. 20080937

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IN THE UTAH COURT OF APPEALS

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JULIE ANN OLSON,  
Plaintiff and Respondent,

v.

UTAH DEPARTMENT OF HEALTH,  
Defendant and Petitioner.

---

UTAH DEPARTMENT OF HEALTH'S OPENING BRIEF

---

Interlocutory appeal from an order denying a motion for summary  
judgment of the Third Judicial District Court, Salt Lake County,  
the Honorable Joseph C. Fratto presiding

---

NAN T. BASSETT  
KIPP & CHRISTIAN  
10 EXCHANGE PLACE, 4<sup>TH</sup> FLOOR  
SALT LAKE CITY, UT 84111  
ATTORNEY FOR PLAINTIFF

PEGGY E. STONE (6658)  
Assistant Utah Attorney General  
MARK L. SHURTLEFF (4666)  
Utah Attorney General  
160 East 300 South, Sixth Floor  
PO Box 140856  
Salt Lake City, Utah 84114-0856  
Telephone: (801) 366-0100  
Attorney for Defendant/Petitioner

ORAL ARGUMENT REQUESTED

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UTAH APPELLATE COURTS

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No. 20080937

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PEGGY E. STONE (6658)  
Assistant Utah Attorney General  
MARK L. SHURTLEFF (4666)  
Utah Attorney General  
160 East 300 South, Sixth Floor  
PO Box 140856  
Salt Lake City, Utah 84114-0856  
Telephone: (801) 366-0100  
Attorney for Defendant/Petitioner

ORAL ARGUMENT REQUESTED

## **LIST OF ALL PARTIES**

All of the parties are listed on the cover of this Brief.

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JURISDICTION

This Court possesses jurisdiction over this appeal under Utah Code Ann. § 78A-4-103(2)(a) (West Supp. 2008) (granting Court jurisdiction over orders in appeals from the district court review of informal adjudicative proceedings of the Career Service Review Board). On December 8, 2008, this Court entered an order granting the Department of Health's (DOH) petition for interlocutory appeal from the denial of its motion for summary judgment. R. 177.

## ISSUE PRESENTED

The Utah State Personnel Management Act defines demotion as a “disciplinary action resulting in a reduction of an employee’s current actual wage” and provides that a “nondisciplinary movement of an employee to another position without a reduction in the current actual wage” is not a demotion. Utah Code Ann. §§ 67-19-3(7)(a), (b). Here, the district court construed the statute to provide that a transfer could be a demotion even if it did not result in a reduction of an employee’s current actual wage if it was a “disciplinary transfer.” Did the District Court properly construe Section 67-19-3(7)?

### **A. Standard of review**

A district court’s denial of summary judgment based on undisputed facts constitutes a ruling of law, which this Court reviews for correctness, without deference to the district court. *Estate Landscape & Snow Removal Specialists, Inc., v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322, 326 (Utah 1992). And this Court reviews a district court’s



interpretation of a statute for correctness. *Blackner v. Dep't of Transp.*, 2002 UT 44, ¶8, 48 P.3d 949.

## **B. Preservation of issue**

DOH raised this issue in its motion for summary judgment. R. 79; 84-87. The district court entered a *Memorandum Decision* denying the motion on October 27, 2008. R. 167-171. A copy of that order is attached as Addendum A.

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

The following statutory provision is attached as Addendum B to this brief:

Utah Code Ann. § 67-19-3(7)

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This is an interlocutory appeal from the district court's denial of DOH's motion for summary judgment. Olson sought judicial review of the CSRB Administrator's decision that the CSRB lacked jurisdiction

over her grievance. R. 1-22. The district court ruled that it had to determine whether Olson's transfer was disciplinary before it concluded whether the CSRB properly dismissed the grievance. R. 170.

### **Course of the Proceedings and Disposition Below**

Olson filed a grievance with the CSRB after DOH demoted her. R. 3; 83. But before the CSRB hearing, DOH rescinded Olson's demotion and restored Olson to her pay level at the time of the demotion and restored all benefits associated with the restoration of salary, including back-pay, retirement and 401k contributions. R. 83; 102. DOH also moved to dismiss the CSRB action, arguing that because Olson suffered no reduction in "current actual pay" she was not demoted and therefore the CSRB lacked jurisdiction over the grievance. R. 83; 104-05.

The CSRB administrator conducted an administrative review of the file and agreed with DOH that Olson was not demoted. R. 84 He dismissed the case based on a lack of jurisdiction. R. 108-115. A copy of that order is attached as Addendum C.

Olson sought judicial review with the district court. R. 1-22. DOH filed a motion for summary judgment. R. 79-80. After full briefing and oral argument, R. 166, the district court denied the motion on October 21, 2008. R. 167-170. DOH timely filed a petition for interlocutory appeal, R. 178, and this Court granted the petition on December 8, 2008. R. 177.

### STATEMENT OF FACTS

Prior to September 27, 2006, DOH employed Olson as the Director of the Bureau of Managed Health Care. R. 3; 82. On July 27, 2006, Olson received a proposed disciplinary action in the form of a demotion dated July 19, 2006. R. 3; 82. On August 1, 2006, Olson submitted a reply to the proposed disciplinary action and was granted a hearing before Dr. Richard Melton regarding the proposed demotion. R. 3; 82.

On September 25, 2006, Dr. David Sundwall, DOH's Executive Director, issued a final decision approving the discipline and instituting a demotion. R. 3; 83. Olson was reassigned to research assistant position and her current pay was reduced one step or eighty cents (.80)

per hour. R. 3; 83; 99-100. In October, Olson filed a request for agency action before the CSRB challenging her demotion. R. 3; 83. The CSRB set an evidentiary hearing on the grievance for May 22 and 23, 2007. R. 4; 83.

Before the hearing, DOH advised Olson that it was rescinding her demotion, that her one step pay decrease would be reinstated back to September 27, 2006, and that all benefits associated with the restoration of salary, including retirement and 401k contributions, would be restored. R. 4; 83; 102. Olson would continue in the research assistant position at the same pay level and with precisely the same benefits she had enjoyed prior to the rescinded demotion. R. 83; 102.

On the same date, DOH filed a motion to dismiss the grievance before the CSRB arguing that the CSRB lacked jurisdiction because DOH had rescinded Olson's demotion. R. 83; 104-05. On June 7, 2007, Mr. Robert Thompson, the CSRB administrator, issued his order dismissing the grievance because DOH's actions constituted an administrative transfer and not a demotion since there was no loss of any current actual wage. R. 84; 108-15. Olson appealed Administrator Thompson's decision to the Third Judicial District Court. R. 1-22.

## SUMMARY OF THE ARGUMENT

The CSRB correctly dismissed Olson's grievance for lack of jurisdiction because Olson was not demoted. Section 67-19-3(7) provides that a demotion occurs only when the employee suffers a reduction in current actual wage. DOH rescinded Olson's demotion when it restored her pay, awarded her her back-pay, and restored all associated retirement benefits and 401k contributions associated with that pay. The district court erred when it construed the statute to create an additional definition for demotion to include "disciplinary transfers" without a reduction in current actual wage.

## ARGUMENT

The CSRB has exclusive and limited administrative jurisdiction to hear career service employees' grievances relating only to termination, suspension or demotion. *See* Utah Code Ann. § 67-19a-201(1). Olson's transfer did not constitute a termination or suspension and, therefore,

the only basis that the CSRB could have had jurisdiction over her grievance was if her transfer was a demotion.

Thus, this case turns on the meaning of “demotion” found in Utah Code Ann. § 67-19-3(7)(a) (West Supp. 2008). The statute provides that:

7(a) “Demotion” means a **disciplinary** action resulting in a **reduction of an employee’s current actual wage**.

(b) “Demotion” **does not mean:**

- (i) a nondisciplinary movement of an employee to another position without a reduction in the current actual wage; or
- (ii) a reclassification of an employee’s position under the provisions of Subsection 67-19-12(3) and rules made by the department.

(Emphasis added).

When this Court interprets any statute, the rules of statutory construction require the Court to look first “to the statute’s plain language, and give effect to the plain language, unless the language is ambiguous.” *Blackner*, 2002 UT 44 at ¶ 12. And the Court gives “effect to each term according to its ordinary and accepted meaning.” *Pace v. St. George City Police Dep’t*, 2006 UT App. 494, ¶ 6, 153 P.3d 789. Here, the statute’s plain language is clear and unambiguous. A

demotion requires a reduction in current actual pay, and without that pay reduction, there is no demotion.

Prior to 2006, the Legislature left the term demotion undefined. But the Department of Human Recourse Management (DHRM) promulgated rules defining demotion. The DHRM rules drew a distinction between an involuntary transfer, which was not grievable, and a demotion, which was. To be a demotion, the rule required that there be a reduction in the actual current pay.

DHRM's distinction was tested in 1999 by this Court in *Draughon v. Dept. of Fin. Inst.*, 1999 UT App. 42, 975 P.2d 935. In *Draughon*, the grievant had been transferred from the position of Financial Institutions Manager to Financial Institutions Specialist. Although grievant's "current pay" was unchanged, the new position was arguably less prestigious and had a lower pay range associated with it. The CSRB, just as it did in this case, denied the grievant a hearing on the basis that it lacked jurisdiction over what it viewed as an involuntary administrative transfer instead of a demotion. *Id.* at ¶ 3.

This Court reversed, finding that the Utah Personnel Management Act did not support DHRM's definition of demotion, nor did the Act draw

the distinction between demotion and involuntary transfer found in the DHRM rule. *Id.* at ¶¶ 10-11. At that time, the only section of the Act defining demotion was § 67-19-18(1), which stated that career service employees may be dismissed or demoted “to advance the good of the public service” or “for just cause[s].” *Id.* at ¶ 6. The Act imposed no other clear definition of demotion, and the *Draughon* court fashioned its own. The court found that an involuntary transfer to a new position was a demotion if the new position “has less status, fewer responsibilities, a lower pay range, and will ultimately result in commensurately lower retirement benefits” even if the grievant suffered “no immediate loss of pay.” *Id.* at ¶ 10.

In 2006, and with the *Draughon* decision before it, the Legislature amended the Act to specifically define “demotion.” Following DHRM’s rule prior to *Draughon*, the Legislature determined that in order to be a “demotion,” a disciplinary action must result “in a reduction of an employee’s current actual wage.” Utah Code Ann. § 67-19-3(7)(a).

The 2006 amendment also addressed and rejected the *Draughon* court’s holding that a transfer resulting in a loss of duties or to a less prestigious position, or a transfer to a position which was on a lower



wage scale, should be defined as a demotion even though no current wages were actually lost. Pursuant to § 67-19-3(7)(b), a movement or transfer of an employee from one position to another “without a reduction in the current actual wage” is, by definition, a “nondisciplinary movement” and not a demotion. By amendment, the Legislature restored DHRM’s distinction between an involuntary transfer and a demotion.

The 2006 legislative amendment foreclosed the avenue used by the *Draughon* court to define demotion. In *Draughon*, because there was no legislative definition of demotion, the court took the opportunity to construct its own. The Legislature has now filled that void, rejected the *Draughon* court’s definition, and defined the term “demotion” consistent with the original DHRM rule. Simply, if there is no loss in the employee’s current actual wage, a transfer or reassignment is not a demotion, whether disciplinary or not.

The district court below used § 67-19-3(7)(b)(i) to create its own additional definition of demotion for what the district court called a “disciplinary transfer” even if there was no reduction in the current actual wage. The statute does not support such an exception. Subsection

(a) makes it clear that a “disciplinary action” can be a demotion only if it results in a reduction of current actual wages. Subsection (b) responded to the *Draughon* court’s holding that a transfer could be a demotion even if it did not result in a reduction in the current actual wage, if it resulted in a loss of duties or prestige or a shift to a different pay scale.

Subsection (b)(i) merely addresses and rejects that holding. It provides that a transfer cannot be a demotion if it is: 1) nondisciplinary; and 2) “without a reduction in the actual current wage.”

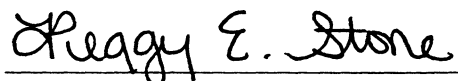
The district court ignored the statute’s plain language. A demotion requires an accompanying loss of current actual pay. The district court created an additional definition of “demotion” and thereby improperly expanded the CSRB’s limited jurisdiction.

Neither the trial court nor this Court can “ignore or strike down an act because it is either wise or unwise. The wisdom or lack of wisdom is for the legislature to determine.” *Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 22, 61 P.2d 989 (quoting *Masich v. United States Smelting, Ref. & Mining Co.*, 113 Utah 101, 126, 119 P.2d 612 (1948)). The district court’s decision should be reversed.

## CONCLUSION

The district court improperly ignored the statute's plain language to create an additional definition of demotion. This Court should reject the district court's faulty statutory construction and reverse the district court's denial of DOH's motion for summary judgment.

Dated this 4<sup>th</sup> day of February, 2009.



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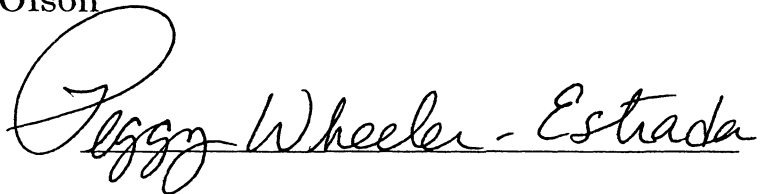
PEGGY E. STONE

Assistant Utah Attorney General  
Attorney for Defendant/Petitioner Utah  
Department of Health

## CERTIFICATE OF SERVICE

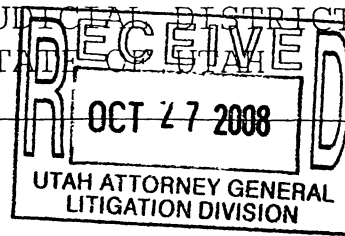
This is to certify that I mailed two copies of the foregoing,  
UTAH DEPARTMENT OF HEALTH'S OPENING BRIEF, to the following this  
4<sup>th</sup> day of February, 2009:

Nan T. Bassett  
KIPP AND CHRISTIAN, P.C.  
10 Exchange Place, 4<sup>th</sup> Floor  
Salt Lake City, UT 84111  
Attorney for Julie Ann Olson

  
Peggy Wheeler-Estrada

# **ADDENDUM A**

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



JULIE ANN OLSON,  
Plaintiff/Petitioner,

vs.

UTAH DEPARTMENT OF HEALTH,  
Defendant/Respondent.

MEMORANDUM DECISION

Case No. 070910001

Hon. JOSEPH C. FRATTO, JR.

The above-entitled matter comes before the Court pursuant to Defendant's Motion for Summary Judgment. The Court heard oral argument with respect to the motion on October 2, 2008.

Following the hearing, the matter was taken under advisement.

The court having considered the motion, memoranda, exhibits attached thereto and for the good cause shown, hereby enters the following ruling.

Pursuant to Utah Code Ann. § 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) "Controlled substance" means controlled substance as defined in Section 58-37-2.

(7) (a) "Demotion" means a disciplinary action resulting in a reduction of an employee's current actual wage

(b) "Demotion" does not mean:

(I) a nondisciplinary movement of an employee to another position without a reduction in the current actual wage; or

(ii) a reclassification of an employee's position under the provisions of Subsection 67-19-12(3) and rules made by the department.

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

(9) "Disability" means a physical or mental disability as defined and protected under the Americans with Disabilities Act, 42 U S C Section 12101 et seq

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

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

(12) "Executive director," except where otherwise specified, means the executive director of the Department of Human Resource Management

(13) "Human resource function" means those duties and responsibilities specified

(a) under Section 67-19-6,

(b) under rules of the department, and

©) under other state or federal statute.

(14) "Market comparability adjustment" means a salary range adjustment determined necessary through a market survey of salary ranges of a reasonable cross section of comparable benchmark positions in private and public employment.

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

(16) "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.

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

(18) "Temporary employee" means career service exempt employees on schedule AJ, AI, or AL under Section 67 19 15

(19) "Total compensation" means salaries and wages, bonuses, paid leave, group insurance plans, retirement, and all other benefits offered to state employees as inducements to work for the state

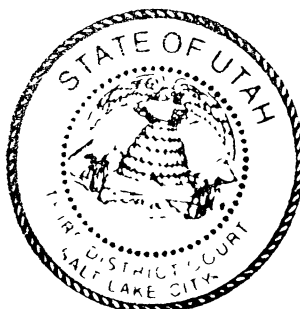
In the instant, it is undisputed Ms Olson was transferred



as part of the "disciplinary action of demotion." While it is true that, eventually, Ms. Olson had her wage together with all back wages restored to her, her reassignment was, nonetheless, part of the disciplinary action. Indeed, unlike *Draughon v. Department of Fin. Insts.*, 1999 UT App 42, P2 (Utah Ct. App. 1999), where Appellant was told the involuntary reassignment was made "to better utilize his skills," Ms. Olson was specifically told that she was transferred as part of the disciplinary action of demotion. This said, the statute specifically states that a "Demotion" does not mean "a nondisciplinary movement of an employee to another position without a reduction in the current actual wage." The Court must presume the legislature used each word advisedly and since the word "nondisciplinary" is utilized, there is a question of fact as to whether the CSRB properly applied the statute in this case where the movement was disciplinary.

Based upon the forgoing, Defendant's Motion for Summary Judgment is, respectfully denied. The Court does not reach the constitutional issues at this juncture

DATED this 21<sup>st</sup> day of October, 2008.



JOSEPH C. FRATTO, JR.  
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070910001 by the method and on the date specified.

METHOD NAME

Mail	NAN T BASSETT Attorney PLA 10 EXCHANGE PLACE 4TH FLR SALT LAKE CITY, UT 84111
Mail	GLEN E DAVIES Attorney DEF 160 E 300 S 6TH FLR P O BOX 140856 SALT LAKE CITY UT 84114

Dated this 22 day of Oct, 2008.

CEM  
Deputy Court Clerk

# **ADDENDUM B**

**C**

West's Utah Code Annotated Currentness

Title 67. State Officers and Employees

▣ Chapter 19. Utah State Personnel Management Act (Refs &amp; Annos)

→ § 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) "Controlled substance" means controlled substance as defined in Section 58-37-2.
- (7)(a) "Demotion" means a disciplinary action resulting in a reduction of an employee's current actual wage.
- (b) "Demotion" does not mean:
  - (i) a nondisciplinary movement of an employee to another position without a reduction in the current actual wage; or
  - (ii) a reclassification of an employee's position under the provisions of Subsection 67-19-12(3) and rules made by the department.
- (8) "Department" means the Department of Human Resource Management.
- (9) "Disability" means a physical or mental disability as defined and protected under the Americans with Disabilities Act, 42 U.S.C. Section 12101 et seq.

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

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

(12) "Executive director," except where otherwise specified, means the executive director of the Department of Human Resource Management.

(13) "Human resource function" means those duties and responsibilities specified:

(a) under Section 67-19-6;

(b) under rules of the department; and

(c) under other state or federal statute.

(14) "Market comparability adjustment" means a salary range adjustment determined necessary through a market survey of salary ranges of a reasonable cross section of comparable benchmark positions in private and public employment.

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

(16) "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.

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

(18) "Temporary employee" means career service exempt employees on schedule AJ, AI, or AL under Section 67-19-15.

(19) "Total compensation" means salaries and wages, bonuses, paid leave, group insurance plans, retirement, and all other benefits offered to state employees as inducements to work for the state.

#### CREDIT(S)

Laws 1979, c. 139, § 9; Laws 1983, c. 332, § 1; Laws 1986, c. 113, § 1; Laws 1988, c. 122, § 15; Laws 1990, c. 280, § 1; Laws 1991, c. 204, § 1; Laws 1995, c. 130, § 1, eff. May 1, 1995; Laws 1996, c. 192, § 1, eff. April 29, 1996; Laws 2002, c. 7, § 1, eff. May 6, 2002; Laws 2005, c. 181, § 22, eff. July 1, 2006; Laws 2006, c. 139, § 24, eff. July 1, 2006.

U.C.A. 1953 § 67-19-3

Page 3

U.C.A. 1953 § 67-19-3, UT ST § 67-19-3

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# **ADDENDUM C**

**BEFORE THE CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH**

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<b>JULIE ANN OLSON,</b>  <b>Grievant,</b>  <b>v.</b>  <b>UTAH DEPARTMENT</b> <b>OF HEALTH,</b> <b>Agency.</b>	: : : : : : : : : : :	<b>AN ADMINISTRATIVE REVIEW OF</b> <b>THE FILE PURSUANT TO</b> <b>SUBSECTION 67-19a-403(2)(b)(ii),</b> <b>AND</b> <b>FINAL AGENCY ACTION</b> <b>BY INFORMAL</b> <b>ADJUDICATIVE PROCEEDING</b>  <b>Case No. J.H. 163</b>
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On October 23, 2006, Nan E. Bassett (Ms. Bassett), Attorney at Law, filed a *Request for Agency Action* (Appeal) with the Career Service Review Board (CSRB) on behalf of Julie Ann Olson (Grievant) requesting that the Utah Department of Health's (Department) decision to move Grievant from her position as a Program Manager in the Bureau of Managed Health Care<sup>1</sup> to a position of Research Consultant III with a simultaneous 1-step salary decrease be reviewed at Step 5 of the State's Grievance and Appeal Procedures for career service employees. Grievant is appealing to the CSRB a final decision signed by David N. Sundwall, M.D. (Exec. Dir. Sundwall) effective September 27, 2006. After receiving Grievant's timely appeal of the Department's final decision, the CSRB Administrator noticed a prehearing conference to be held November 15, 2006.<sup>2</sup>

**PROCEEDINGS BEFORE THE CAREER SERVICE REVIEW BOARD**

On Tuesday, November 21, 2006, the parties met with the CSRB Administrator in a prehearing/scheduling conference (PHC). Grievant was represented at this PHC by Ms. Bassett. The Department was represented by Assistant Utah Attorney General Timothy D. Evans (Mr. Evans).<sup>3</sup> At this PHC, the parties mutually agreed on dates to exchange witness lists and documents expected

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<sup>1</sup> The Bureau of Managed Health Care is a division organizationally located in the Utah Department of Health.

<sup>2</sup>Based upon scheduling conflicts with the parties, this prehearing/scheduling conference was rescheduled to November 21, 2006.

<sup>3</sup>At this PHC, Mr. Evans indicated that Assistant Utah Attorney General Glen E. Davies (Mr. Davies) would be representing the Department in any further proceedings in this matter.



to be used at any evidentiary hearing in this matter. The parties also agreed to hold a status conference on Friday, March 2, 2007, to determine the parties' readiness for an evidentiary hearing.

On Friday, March 2, 2007, a status/prehearing conference was held. During this conference, the parties mutually agreed to hold a Step 5 evidentiary hearing in this matter on Tuesday, May 22, and Wednesday, May 23, 2007. Thereafter, on Wednesday, May 16, 2007, the Department filed with the CSRB a *Motion to Dismiss* (Motion) on the basis that the CSRB no longer had jurisdiction over this matter. This Motion was based on the fact that the Department had elected to "rescind the demotion of Grievant by reinstating her salary . . . together with all retirement benefits associated with that salary" retroactive to September 27, 2006, the date Grievant's loss of salary became effective.

Specifically addressing this matter in its Motion, the Department argued:

With the reinstatement of the salary, the action of the Department no longer constitutes a demotion under § 67-19-3(7) Utah Code Ann. (1953 as amended) and the CSRB therefore has no jurisdiction over what is now effectively simply an administration transfer.

(Motion at 2)

On May 25, 2007, Grievant filed an *Opposition of Julie Ann Olson to Respondent's Motion to Dismiss* (Opposition Memorandum). In her Opposition Memorandum, Grievant argues that even with the restoration of her former actual wage, back pay and benefits, the Department's actions constitute a demotion under Utah law. In making this argument, Grievant first argues that because her current position has lower maximum salary range, she had been demoted. This is true Grievant argues regardless of the Department's restoration of her former actual wage with back pay and benefits. Summarizing this argument, Grievant argues that salary range "cannot be separated from an hourly pay rate when considering 'actual wage'." (Opposition Memorandum at 3)<sup>4</sup> Second,

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<sup>4</sup>This argument is essentially a restatement of the argument previously presented in *Draughon v. Dep't of Financial Institutions et al* (975 P.2d 935 (Ut. Ct. App. (1999)) wherein Draughon was reassigned to a position having a lower salary range with no reduction in his current actual wage. The then administrator of the CSRB dismissed Draughon's appeal to the CSRB finding he had not been demoted as that term was defined under Utah Department of Human Resource Management (DHRM) rules. After appeal to the courts, the Utah Court of Appeals ruled that Draughon had been demoted even though DHRM rules defined demotion as requiring a loss of wage. It is important to note that these *Draughon* decisions, both at the CSRB and at the Utah Court of Appeals, have little application to the present case in that the statute at issue in the *Draughon*

Grievant argues that her reassignment was a demotion because it was initiated for disciplinary purposes. (*Id.*) Grievant argues that her reassignment under these circumstances constitutes a demotion because the statutory definition of demotion also provides:

- (b) “Demotion” does not mean:
  - (i) a nondisciplinary movement of an employee to another position without a reduction in the current actual wage;

(*Utah Code Ann.* § 67-19-3(7)(b)(I))

Third, Grievant argues her reassignment to a position to having a lower salary range without a reduction in her current actual wage violated *Utah Code Ann.* § 67-19-3.1 which requires DHRM to establish a career service system providing, among other things, equitable and competitive compensation for State employees and fair treatment in all aspects of human resource administration. Grievant argues that her reassignment to a position having a lower maximum salary rate violates these principles. Finally, Grievant argues that dismissal of her appeal at this time would implicate due process protections in that she would be effectively deprived of the “opportunity to be heard at a meaningful time and in a meaningful manner.” (Citing *V-1 Oil Co. v. Department of Environmental Quality, Division of Solid and Hazardous Waste*, 939 P.2d 1192 (Utah 1997).)<sup>5</sup>

### JURISDICTIONAL REVIEW

*Utah Admin. Code* R137-1-17(1) provides that:

- (1) **Procedural Issues.** The administrator shall determine the following: timeliness, standing, direct harm, *jurisdiction*, and eligibility of the issues to be advanced, and any other procedural matter or jurisdictional controversies according to [*Utah Code Ann.*] Sections 67-19a-403 and 67-19a-404. (Emphasis added)

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decisions was entirely devoid of any legislative definition regarding demotion.

<sup>5</sup>In support of this argument, Grievant argues that the parties have known the hearing date since November 21, 2006, pursuant to a prehearing conference. Review of the administrative file maintained and controlled by the CSRB establishes that no hearing was set at the initial prehearing conference held on November 21, 2006. Instead, the administrative file establishes that the hearing date was not set until Friday, March 2, 2007, when the parties participated in a second prehearing or status conference with the CSRB Administrator. At that time, the parties mutually agreed to hold an evidentiary hearing in this matter on Tuesday, May 22, and Wednesday, May 23, 2007.

Specifically addressing these procedural issues, *Utah Admin. Code* R137-1-17(6) provides that:

The administrator may, pursuant to an administrative review of the procedural facts and circumstances of a grievance case, summarily dispose of a case on the ground that:

\* \* \*

(f) the issue grieved does not qualify to be advanced beyond step 4;

These administrative rules are in consonance with *Utah Code* that affirmatively requires the CSRB Administrator to make jurisdictional determinations. Specifically, *Utah Code Ann.* § 67-19a-403(2)(a) provides that:

(2) (a) When an employee submits a grievance to the administrator under the authority of Section 67-19a-403, the administrator *shall* determine:

- (i) whether or not the employee is a career service employee and is entitled to use the grievance system;
  - (ii) *whether or not the board has jurisdiction over the grievance;*
  - (iii) whether or not the employee has been directly harmed; and
  - (iv) the issues to be heard.
- (b) In order to make the determinations required by Subsection (2), the administrator may:
- (i) hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both; or
  - (ii) conduct an administrative review of the file.

(Emphasis added)

Based upon these statutory and administrative requirements, I have conducted an administrative review of the file. An administrative review of the file is an informal adjudicative proceeding under *Utah Code Ann.* § 63-46b-4 and *Utah Admin. Code* R137-1-17. Based upon these facts, the decision set forth herein is appealable to the district court that has jurisdiction to review

by trial *de novo* all final agency actions resulting from informal adjudicative proceedings (*Utah Code Ann.* § 63-46b-15) (*Alumbaugh v. White*, 800 P.2d 825 Utah Ct. App. 1990)

### DISCUSSION

An administrative review of the file in the instant case establishes that effective September 27, 2006, the Department assigned Grievant to a position within the Department that had a lower maximum salary range from the one she held prior to this new assignment. (Request for Agency Action, Ex. A-1)<sup>6</sup> In addition to assigning Grievant to a different position, the Department also reduced Grievant's actual wage from \$29.92 per hour to \$29.12 per hour. These departmental actions were formalized in Exec. Dir. Sundwall's written decision dated September 25, 2006, and became effective September 27, 2006. As set forth above, on May 16, 2007, the Department notified Grievant by letter that they were modifying their previous decision dated September 25, 2006. This May 16, 2007 letter was signed by A. Richard Melton, Deputy Director of the Department and specifically provided as follows:

David N. Sundwall, Executive director of the Department of health, has designated me as the Acting Director to advise you that the Department has concluded . . . to rescind your demotion and to reinstate your salary from a Step 66 – \$29.12 per hour to a Step 67 – \$29.92 per hour retroactive back to September 27, 2006, the effective date of the prior demotion. This will include the retroactive reinstatement of all retirement benefits based upon the higher salary.

(Attachment to Motion to Dismiss)

As a result of these events, the Department moved to dismiss Grievant's appeal before the CSRB arguing that because Grievant had not been demoted as that term is defined in *Utah Code Ann.* § 67-19-3(7), the CSRB lacks jurisdiction to review and decide Grievant's appeal and must therefore dismiss this action.

As contemplated by statute, my obligation as CSRB Administrator is to determine "whether or not the Board has jurisdiction over the grievance." (*Utah Code Ann.* § 67-19a-403(2)(a)(ii)) This determination is governed by Utah law which limits the Board's jurisdiction to "appeals from career service employees . . . of decisions about promotions, dismissals, *demotions*, suspensions, written

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<sup>6</sup>Grievant's Request for Agency Action was part of the file maintained and controlled by the CSRB

reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning the abandonment of position . . .” (*Utah Code Ann.* § 67-19a-202(1)(a), 67-19a-302(1) (Emphasis added) The CSRB has no jurisdiction to review or decide any other personnel matters. (*Utah Code Ann.* § 67-19a-202(1)(b))

*Utah Code Ann.* § 67-19-3 (7)(a) defines demotion as “a disciplinary action resulting in a reduction of an employee’s current actual wage.” This same section further provides that demotion does not mean “a nondisciplinary movement of an employee to another position without a reduction in the current actual wage.” (*Utah Code Ann.* § 67-19-3(7)(a)(b)(ii)) Moreover, DHRM rule R477-1(31) defines demotion as a “disciplinary action resulting in a reduction in an employee’s actual current wage.”

After carefully reviewing these statutory provisions and administrative rules regarding demotion of a career service employee, it is clear that Grievant has not been demoted as that term is defined by law. In the instant case, an administrative review of the file establishes that while Grievant has in fact been placed in a position having a lower maximum salary range, this placement ultimately has not resulted in a reduction in her “*current* actual wage.” (Emphasis added) This conclusion is necessitated by the Department’s retroactive restoration of Grievant’s salary and corresponding benefits. Absent a reduction in Grievant’s current actual wage, there is simply no demotion under a plain reading of State law.

Moreover, I am not persuaded by Grievant’s argument that the Department’s placement of Grievant in a position with a lesser “number of steps before her hourly rate would max out” constitutes a demotion.<sup>7</sup> In reaching this conclusion, I rely upon the statutory provisions from which a career service employee’s protected rights derive. These statutory provisions clearly protect career service employees against, and allow the CSRB jurisdiction to review, agency disciplinary actions that result in a reduction of an employee’s “current actual wage.” Nowhere do these same statutes create an interest against or give the CSRB the right to review movements, reassignments or transfers

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<sup>7</sup>On page 3 of her Opposition Memorandum, Grievant states that as a result of the Department’s actions “the current wage Julie was earning as a director carried with it a greater number of steps before her hourly rate would max out.” This argument inherently recognizes that the Department’s placement of Grievant in a Research Consultant III position resulted in a lesser number of steps available to Grievant before her “hourly rate” would max out.

of career service employees whose current actual wage has not been reduced. This is true regardless of the motivation generating the Department's decision to move, reassign or transfer such an employee. Absent specific statutory protections shielding against these movements, the CSRB simply has no jurisdiction to review or decide the appropriateness of these movements because they are simply not a "demotion" as that term is lucidly defined by statute. (See *Utah Code Ann.* § 67-19a-202 and 67-19-3(7)(a))

While it is clear in the instant case that the Department's initial movement of Grievant to the Research Consultant III position was a demotion because it was accompanied by a reduction in Grievant's "current actual wage," this demotion has been "rescinded" not only by the clear language of the Department's May 16, 2007 letter, but also by the Department's retroactive reinstatement of Grievant's former actual wage and corresponding benefits.

Moreover, even assuming the Department's decision to move or reassign Grievant was for disciplinary purposes, such action by the Department does not amount to a "demotion" as defined by statute. As stated previously, absent a reduction in the employee's "current actual wage," there is simply no demotion over which the CSRB had jurisdiction. In addition, DHRM rule contemplates that positions may be filled by transferring or reassigning employees as long as such transfers or reassignments do not include a reduction in the employee's current actual wage. (*Utah Admin. Code* R 477-4-6(1)) Absent a specific statutory provision guarding against the actions taken by the Department in this case, the Board simply has no jurisdiction to review or decide Grievant's appeal.

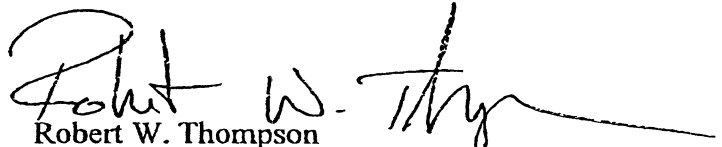
Finally, I do not find the Department's actions in this case implicate DHRM's requirement of providing equitable and competitive compensation in connection with its establishment of a career service system. In the instant case, there is no evidence that the "system" assigning the salary range to the Department's Research Consultant III position is inequitable or noncompetitive. Moreover, the CSRB is jurisdictionally unqualified to determine whether or not the system established by DHRM or the Department's actions in relation to that system allow for fair treatment of applicants or employees. Finally, the CSRB also lacks jurisdiction to decide whether DHRM has met its statutory mandate to establish and implement a career service system. While there may be an avenue to review whether DHRM has adequately designed and provided a system implementing these career

service principles, it is not at the CSRB whose jurisdiction is limited by *Utah Code Ann.* § 67-19a-202 *et seq.*

### DECISION

After thoroughly reviewing the file associated with this grievance and carefully considering the motions and memoranda on file in connection with the Department's *Motion to Dismiss*, I find the CSRB no longer has jurisdiction to review or adjudicate this appeal. Utah law specifically limits the CSRB's jurisdiction to the review and consideration of demotions of career service employees. In the instant case, Grievant was not demoted as that term is defined by statute. Based upon these factors, Grievant's appeal before the CSRB is dismissed with prejudice.

It is so ORDERED this 7th day of June 2007.

  
Robert W. Thompson  
Administrator

### RECONSIDERATION

This administrative review of the file constitutes final agency action under *Utah Code*, §63-46b-13, Utah Administrative Procedures Act. A party may request reconsideration by the Administrator of the Career Service Review Board within 20 days from the date of issuance (i.e., signature date), by stating specific grounds upon which relief is requested.

### JUDICIAL REVIEW

Judicial review of an administrative review of the file under §67-19a-403(2)(b)(ii) is reviewable in District Court according to *Utah Code*, §63-46b-14 and 15. The appealing party of this informal adjudication and final agency action may file with either The District Court in which the party resides or The Third District Court where the seat of state of Utah government is located.

## CERTIFICATE OF SERVICE

I certify that on this 8th day of June 2007 (1) I caused to be mailed, postage prepaid, the foregoing *Administrative Review of the File Pursuant to Subsection 67-19a-403(2)(b)(ii), and Final Agency Action by Informal Adjudicative Proceeding* in the matter of *Julie Ann Olson v. Utah Department of Health* to the following:

Nan T. Bassett  
Attorney at Law  
KIPP AND CHRISTIAN P.C.  
10 Exchange Place, Suite 400  
Salt Lake City UT 84111-2759

Julie Ann Olson  
358 East 1700 South  
Kaysville UT 84037

(2) I sent an E-mail of the original document to the following:

Ruthann Bowen  
Paralegal  
Office of the Attorney General  
[RBOWEN@utah.gov](mailto:RBOWEN@utah.gov)

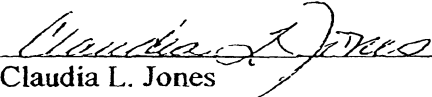
Patti Walsh  
HR Director  
[PWALSH@utah.gov](mailto:PWALSH@utah.gov)

Glen E. Davies  
Assistant Utah Attorney General  
Office of the Attorney General  
[GCDAVIES@utah.gov](mailto:GCDAVIES@utah.gov)

(3) I faxed a copy of the original document to the following:

Nan T. Bassett  
Attorney at Law  
KIPP AND CHRISTIAN, P.C.  
801.359.9004

Glen E. Davies  
Assistant Utah Attorney General  
Office of the Attorney General  
801.366.0101

  
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Claudia L. Jones  
Legal Secretary