

2009

John M. Duran v. Department of Technology Services and Career Service Review Board: Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Peggy E. Stone; assistant attorney general; Mark Shurtleff; attorney general; attorneys for appellees. Charles R. Stewart; Schatz, Anderson and Uday; attorney for appellant.

Recommended Citation

Brief of Respondent, *Duran v. Utah Technology*, No. 20090252 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1573

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

No. 20090252-CA

IN THE UTAH COURT OF APPEALS

JOHN M. DURAN,
PETITIONER,

V.

DEPARTMENT OF TECHNOLOGY SERVICES,
CAREER SERVICE REVIEW BOARD, AND
JOHN AND JANE DOES 1-20, INCLUSIVELY,
RESPONDENTS.

**DEPARTMENT OF TECHNOLOGY SERVICES'S
ANSWER BRIEF**

Petition for Judicial Review of a Decision and Final Agency Action of
the Utah Career Service Review Board

Charles R. Stewart
Schatz, Anderson & Uday
American Plaza II
57 West 200 South, Suite 200
Salt Lake City, Utah 84101
Attorney for Petitioner/Appellant

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
Attorneys for
Respondents/Appellees

Oral Argument **Not** Requested

FILED
UTAH APPELLATE COURTS

NFC - 7 2009

No. 20090252-CA

IN THE UTAH COURT OF APPEALS

JOHN M. DURAN,
PETITIONER,

v.

DEPARTMENT OF TECHNOLOGY SERVICES,
CAREER SERVICE REVIEW BOARD, AND
JOHN AND JANE DOES 1-20, INCLUSIVELY,
RESPONDENTS.

**DEPARTMENT OF TECHNOLOGY SERVICES'S
ANSWER BRIEF**

Petition for Judicial Review of a **Decision** and Final Agency Action of
the Utah Career Service Review Board

Charles R. Stewart
Schatz, Anderson & Uday
American Plaza II
57 West 200 South, Suite 200
Salt Lake City, Utah 84101
Attorney for Petitioner/Appellant

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
Attorneys for
Respondents/Appellees

Oral Argument **Not** Requested

LIST OF ALL PARTIES

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

TABLE OF CONTENTS

Table of Authorities	iv
Jurisdiction	1
Issues Presented	2
I. The CSRB's decision	2
II. Admission of the 2003 Corrective Action Plan	3
Statement of the Case	4
Statement of the Facts	6
Interaction with JoAnna Gomberg	6
Interaction with Monica Hulbert	10
Interaction with Lindsay Nielson	11
DTS's Response	13
Summary of Argument	14
Argument	15
I. The CSRB's factual findings are supported by substantial evidence and its decision was reasonable and rational	15
A. Duran failed to marshal the evidence supporting the factual findings	16
B. Substantial evidence supported DTS's decision ..	20

C.	DTS’s decision to terminate Duran’s employment was not an abuse of discretion	21
D.	Termination of Duran’s employment can be affirmed based solely on Duran’s attempts to dissuade a co-worker from putting her concerns about his behavior in writing	24
II.	The CSRB’s decision to allow Duran’s prior corrective action plan into evidence was not reversible error	26
A.	Res judicata does not bar admission of the 2003 CAP	27
B.	CSRB rule specifically allows admission of prior CAP	29
C.	Any error in the CAP’s admission into evidence was harmless	30
Conclusion		31
Certificate of Service		33
Addendum A	Decision and Final Agency Action	
Addendum B	Findings of Fact, Conclusions of Law and Decision	
Addendum C	Relevant DHRM and DTS Rules and Policies	

TABLE OF AUTHORITIES

<i>Bailey v. Desert Fed. Sav. & Loan Ass’n</i> , 701 P.2d 803 (Utah 1985)	28
<i>Career Serv. Review Bd. v. Utah Dep’t of Corr.</i> , 942 P.2d 933 (Utah 1997) . . .	16
<i>Carrier v. Salt Lake County</i> , 2004 UT 98, 104 P.3d 1208	16
<i>Crane v. Indus. Comm’n</i> , 97 Utah 244, 92 P.2d 722 (Utah 1939)	19
<i>First Nat’l Bank v. County Bd. of Equalization</i> , 799 P.2d 1163 (Utah 1990).	17
<i>Holland v. Career Serv. Review Bd.</i> , 856 P.2d 678 (Utah App. 1993)	3
<i>Hurley v. Bd. of Review</i> , 767 P.2d 524 (Utah 1998)	19
<i>Johnson v. Bd. of Review of Indus. Comm’n</i> , 842 P.2d 910 (Utah App. 1992) . .	20
<i>Jones v. Cyprus Plateau Mining Corp.</i> , 944 P.2d 357 (Utah 1997)	26
<i>Joufflas v. Fox Television Stations, Inc.</i> , 927 P.2d 170 (Utah 1996)	26
<i>Larson Limestone Co. v. State</i> , 903 P.2d 429 (Utah 1995)	20
<i>Lucas v. Murray City Civil Serv. Comm’n</i> , 949 P.2d 746 (Utah App. 1997)	31
<i>Macris & Assocs., Inc. v. Neways, Inc.</i> , 2000 UT 93, 16 P.3d 1214	27
<i>Neely v. Bennett</i> , 51 P.3d 724 (Utah App. 2002)	18
<i>Renegade Oil, Inc. v. Progressive Cas. Ins. Co.</i> , 2004 UT App. 356, 101 P.3d 383	22
<i>SMP, Inc. v. Kirkman</i> , 843 P.2d 531 (Utah App. 1992)	28

<i>Sorge v. Office of the Attorney General</i> , 2006 UT App. 2, 128 P.3d 566 . 2, 16, 23	
<i>State v. Daniels</i> , 2002 UT 2, 40 P.3d 611	22
<i>State v. Moore</i> , 802 P.2d 732 (Utah App. 1990)	17
<i>State v. Villarreal</i> , 857 P.2d 949 (Utah App. 1993)	30
<i>Szmaczarz v. Cal. State Personnel Bd.</i> , 79 Cal.App.3d 904 (1978)	23
<i>Thompson-Hayward Chemical Co. v. Cyprus Mines Corp.</i> , 660 P.2d 973 (Kan. 1983)	28
<i>Tolman v. Salt Lake County Attorney</i> , 818 P.2d 23 (Utah App. 1991)	23
<i>Uckerman v. Lincoln Nat'l Life Ins. Co.</i> , 588 P.2d 142 (Utah 1978)	16
<i>Utah Dep't of Corr. v. Despain</i> , 824 P.2d 439 (Utah App. 1991)	23
<i>Valiotis v. Utah Apex Mining Co.</i> , 55 Utah 151, 184 P. 802, 810 (Utah 1919) . .	22
<i>VanLeeuwen v. Indus. Comm'n</i> , 901 P.2d 281 (Utah App. 1995)	17
<i>West Valley v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah App. 1991)	18
<i>Whitear v. Labor Comm'n</i> , 973 P.2d 983 (Utah App. 1998)	18-20

STATUTES

Utah Code Ann. § 63G-4-401(1) (West Supp. 2009)	1
Utah Code Ann. § 67-19a-202 (West Supp. 2009)	28

Utah Code Ann. § 67-19a-302 (West Supp. 2004)	28
Utah Code Ann. § 78A-4-103(2)(a) (West Supp. 2009)	7

RULES

Utah Admin. Code R137-1-2	20
Utah Admin. Code R137-1-21(3)(a)	29
Utah Admin. Code R137-1-21(9)	29
Utah Admin. Code R477-11-(1)(a)	24
Utah Admin. Code R477-11-(1)(e)	25
Utah Admin. Code R477-11-3(1)(e)	30

No. 20090252-CA

IN THE UTAH COURT OF APPEALS

JOHN M. DURAN,
Petitioner,
v.
DEPARTMENT OF TECHNOLOGY SERVICES, ET AL.,
Respondents.

**DEPARTMENT OF TECHNOLOGY SERVICES'S
ANSWER BRIEF**

JURISDICTION

This appeal arises from John M. Duran's grievance filed with the Career Service Review Board (CSRB). On March 4, 2009, the CSRB upheld the Utah Department of Technology Services's (DTS) decision to terminate Duran's employment. R. 000639-668. (*Decision and Final Agency Action*, attached as addendum A). Duran timely filed a petition for review with this Court on March 30, 2009. This Court has jurisdiction to review CSRB decisions pursuant to Utah Code Ann. § 78A-4-103(2)(a) (West Supp. 2009) and Utah Code Ann. § 63G-4-401(1) (West Supp. 2009).

ISSUES PRESENTED

I. The CSRB's decision

The CSRB must affirm an agency's decision to terminate employment if the decision has factual support and is within the bounds of reasonableness. Here, substantial evidence supports the findings that Duran violated agency rules and policies regarding appropriate treatment of co-workers. Duran failed to marshal the evidence in support of those findings. Did the CSRB correctly affirm DTS's decision to terminate Duran's employment?

A. Standard of Review:

This issue involves a mixed question of law and fact that the Court reviews deferentially to determine whether the CSRB decision was reasonable and rational. *Sorge v. Office of the Attorney General*, 2006 UT App. 2, ¶ 17, 128 P.3d 566.

B. Preservation of Issue:

The CSRB issued its *Decision and Final Agency Action* on March 4, 2009. R. 000639-668. Duran filed a petition for review with this Court on March 30, 2009.

II. Admission of the 2003 Corrective Action Plan

A decision to admit or exclude evidence constitutes reversible error only when the likelihood of a different outcome is high enough to undermine confidence in the final result. Here, the CRSB admitted Duran's 2003 corrective action plan (CAP) into evidence as part of his documented work history, but also noted that the CAP had "little or no bearing" on the CRSB's final decision. Did the CRSB commit reversible error by admitting the CAP?

A. Standard of Review:

This issue raises a question of general law that the Court reviews "for correctness, granting no deference to [the CRSB's] decision." *Holland v. Career Serv. Review Bd.*, 856 P.2d 678, 682 (Utah App. 1993).

B. Preservation of Issue:

Duran moved to exclude the CAP prior to the Step 5 hearing. R. 000184-188. DTS responded, R. 000217-226, and the Hearing Officer ruled

that the CAP was admissible. R. 000247-253; 669 pp. 252-260. The CSRB also reviewed the issue at Step 6. R. 000658-659.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The determinative statutes and rules are included in the body of this brief. And relevant DHRM and DTS rules and policies are attached as addendum C.

STATEMENT OF THE CASE

Nature of the Case

DTS terminated Duran's employment, and Duran grieved his dismissal to the CSRB. After a hearing at Step 5, the Hearing Officer upheld DTS's decision. Duran appealed to Step 6, and the CSRB upheld the decision. The CSRB held that substantial evidence supported DTS's decision to end Duran's state employment and that termination was neither excessive nor disproportionate.

Course of the Proceedings and Disposition Below

DTS terminated Duran's employment as a Technical Support Specialist II. R. 000672 Ex. A-14. DTS dismissed Duran for violating various department rules and policies, as well as the Employee Code of Conduct. R. 000672 Ex. A-15 & A-28.

Duran timely grieved his termination to the CSRB. R. 000001-6. Subsequently, CSRB Administrative Law Judge, Katherine A. Fox, conducted a Step 5 evidentiary hearing. R. 000669-670. In her *Findings of Fact and Conclusions of Law and Decision*, the Hearing Officer upheld DTS's decision. R. 000254-297. (attached as addendum B). The Hearing Officer also found that the termination of Duran's employment was not excessive, disproportionate, or otherwise an abuse of discretion. R. 000287.

Later, Duran filed his notice of appeal to the CSRB. R. 000306-309. After hearing Duran's appeal, the CSRB issued its *Decision and Final Agency Action*. The CSRB affirmed, concluding that the Hearing Officer's decision was reasonable, rational, and supported by substantial evidence. R. 000660-661. The CSRB found that the Hearing Officer correctly applied all relevant policies and rules in rendering her decision. The CSRB also found that DTS's decision to terminate Duran's employment was based upon just

cause and to advance the good of the public service. R. 000660-661. Duran timely filed this appeal.

STATEMENT OF FACTS

Duran worked for DTS for approximately two years.¹ R. 000669 pp. 189-190, 242-243. Duran performed computer service work for the Department of Workforce Services (DWS) in DWS's Woods Cross office. R. 000670 pp. 437-439. Duran was the only computer service worker for the office. R. 000670 p. 439. Beginning in April 2004, Duran began a prolonged and documented pattern of disrespectful, offensive, and unprofessional conduct toward certain female co-workers. R. 000672 Ex. A-12.

Interaction with JoAnna Gomberg

Shortly after JoAnna Gomberg started working for DWS in 2004, Duran began asking her to go to lunch or out for coffee and doughnuts. R. 000669 pp. 51-53. Gomberg tried to discourage the invitations, but they

¹ Duran was originally hired in 2000 by the Utah Department of Workforce Services as a Technology Specialist. R. 000669 p. 244; 670 p. 437. By legislative action in 2005, Duran's position, as well as all other technology services' positions within the State, moved to a new department titled the Utah Department of Technology Services. R. 000669 pp. 242-243.

continued. R. 000669 pp. 52-53. Finally, she told Duran that she would not go to lunch with him ever. R. 000669 p. 52. But, despite that strong statement, the invitations never stopped. R 000669 pp. 52-53.

Duran gave Gomberg “up and down” stares, (R. 000669 pp. 42-43) and commented that, “You really dress good,” and that he “liked a girl with a little meat on her.” R. 000669 p. 43. Then Duran started to ask Gomberg personal questions about her boyfriend’s appearance – did he resemble Duran – and asked whether she cheated on him. R. 000669 pp. 45-46; 672 Ex. A-1.

When Duran learned that Gomberg was living with her boyfriend, he started asking her questions about physical intimacy. He asked if “she had been with a lot of guys,” and commented that “I’ll bet you’ve had a lot of boyfriends.” He would ask, “How are things going with your man?” R. 000669 pp. 46, 48-49. And admitted that this was the “type of tactic” he used to “move in with women.” R. 000669 p. 87. This conduct culminated in Duran remarking that because Gomberg lived in the Avenues, it would be easy for the neighbors to see when Gomberg and her boyfriend “were getting romantic.” R. 000669 p. 49.

After a period of flat refusal to answer his personal questions, Gomberg repeatedly told Duran that his comments made her uncomfortable and were

offensive. R. 000669 pp. 44-45. Despite that, Duran still asked personal questions and made inappropriate remarks on an intermittent basis. R. 000669 pp. 44-45.

In 2006, Duran showed Gomberg a new “spy camera” he had for private investigator work. R. 000669 pp. 33-34. He told her that he attached a GPS device to a friend’s wife’s car to track her. R. 000669 pp. 32-33. Then he asked if he could set the camera up at Gomberg’s house. R. 000669 pp. 33-34. Gomberg told Duran, “That’s creepy, I’m leaving.” R. 000669 p. 34. He responded, “What, do you get shy in front of a camera?” R. 000669 p. 34.

The spy camera episode troubled Gomberg so much that she spoke with her father about it, and based on his recommendation, decided to put her objections to Duran’s conduct in writing. R. 000669 p. 93. But before she wrote the letter, Gomberg told Duran what she planned to do. R. 000669 p. 38. When Gomberg told Duran about her plans, he became agitated. R.000669 pp. 38-39. He told her that she should not send him the letter because if she did: 1) a copy would be put in her personnel file and it would follow her for the rest of her career; 2) Duran would retaliate and file a false racial discrimination complaint against her; and 3) everyone in the office, including management, would think that she and Duran had a sexual

relationship. R. 000669 pp. 39-41. Gomberg was so upset and threatened by this conversation that she went outside the office and started to cry because she was “just so scared and overwhelmed.” R. 000669 p. 41. Gomberg reported this conversation to her supervisors. R. 000669 p. 41.

On August 28, 2006, Gomberg sent Duran an email that objected to various topics Duran repeatedly introduced into their conversations. R. 000672 Ex. A-1. She asked Duran to keep their interactions “focus[ed] on professional issues.” R. 00672 Ex. A-1. It also stated that, while the list was not inclusive, she wanted to avoid any future discussions relating to: “1) my physical appearance, the way I dress, and my body type; 2) my relationship with my boyfriend; 3) my current or past level of physical intimacy with anyone; and 4) other women whom you find attractive.” R. 000672 Ex. A-1.

Even after she sent the e-mail, when Duran was in Gomberg’s office, he talked about women in the office, some married, with whom he had presumably slept. He added that, “You know they think we slept together.” R. 000669 pp. 55-56.

Gomberg’s experiences with Duran made her reluctant to ask him for computer help.² She “didn’t want to interact with him at all, for any

²In his Brief, Duran incorrectly notes that after Gomberg’s e-mail to Duran, she was comfortable enough with Duran to give him a ride. Aplt’s

reason, even my computer, even though that was sort of [a] prescribed relationship.” R. 000669 pp. 75-76.

Interaction with Monica Hulbert

In November 2006, Hulbert started working for DWS. During her first week, Duran started asking her personal questions – “not stuff I discuss with people I don’t know”– including questions about what she did on the weekends, the identity of her child’s father, did she drink alcohol, did she party, and did she go to clubs. R. 000669 pp. 111-113.

Next, Duran started asking Hulbert to go to lunch. R. 000669 p. 114. She consistently refused. He then started asking her to go to coffee or dinner. R. 000669 pp. 115-116. Hulbert told Duran that she was not interested in going out with him. R. 000669 p. 116.

In early 2007, Duran complained to Hulbert that his leg or foot hurt and asked, “Do you want to massage it?” When Hulbert said “no,” Duran persisted with “Oh, come on.” Hulbert was near her cubicle and started to walk away to the break room. Duran followed her and continued the

Brief at p. 28. But Gomberg’s testimony shows that she gave Duran a ride before the e-mail, and that even though she did drive him, she did not want to. R. 000669 pp. 35-36.

conversation in front of another co-worker, Renee Johnson, who also walked into the break room. R. 000669 pp. 118-121. Hulbert was offended by the massage incident, and told Gomberg about it. R. 000669 pp. 121-122. They talked about ways Hulbert could discourage Duran from making similar remarks. R. 000669 pp. 121-122.

Duran also talked about cheating on his wife. And he asked Hulbert if she thought it was wrong for Duran to go out with an old female friend. R. 000669 pp. 122-125. The conversations made Hulbert uncomfortable. R. 000669 p. 122-123.

Another time, after the usual invitation and decline, Duran saw Hulbert with another co-worker, Jeff De Juncker. Duran commented that, "Oh, you'll go to his car with him, but you won't go out with me." R. 000669 p. 142. The comment embarrassed Hulbert, and she felt compelled to explain the situation to De Juncker. R. 000669 p. 144. And finally, in early 2007, Hulbert started asking others in the office, like De Juncker, for computer help, in order to avoid Duran. R. 000669 pp. 122-124.

Interaction with Lindsay Nielson

Nielson started working for DWS in June 2006. R. 000669 p. 155. On her first day of work, Duran ogled her. R. 000669 p. 154. Within her first

week of work, Duran started to ask to drive her car on “a persistent daily basis.” R. 000669 pp. 155-156. Then the invitations to lunch started. R. 000669 pp. 155-158. Nielson consistently refused the invitations, indicating that she was married and had no intentions of going to lunch or anywhere with Duran. R. 000669 p. 161.

Duran consistently tried to flirt with Nielson and told her she looked like a “certain model.” The comments offended her, and she did not consider them compliments. R. 000669 p. 158. The comments and lunch invitations continued throughout 2007. R. 000669 pp. 158-161. Nielson told Duran that the comments made her uncomfortable and asked him to stop. R. 000669 158-161.

One day, Nielson wore a short “shrug” sweater over a long white shirt. Nielson and Duran were alone in the break room, and Duran poked her in the middle of the back where the sweater ended and asked her if she purchased the sweater “in the Barbie doll section.” Duran then poked Nielson in her back and said “see, it doesn’t even come down to there.” R. 000669 pp. 162-163. Duran referred to Nielson’s clothing as “Barbie doll sized” on more than one previous occasion, but this time Nielson was “shocked” to the point of being “speechless” that Duran touched her. R. 000669 pp. 163, 168.

Nielson understood that if she objected or was not receptive to Duran's unwanted attention, Duran would stall fixing her computer. R. 000669 pp. 164-165. She feared that, if she confronted Duran, he would not fix her computer in a timely manner. R. 000669 pp. 164-165. She noted that Duran was slow to respond after each "uncomfortable conversation" or unpleasant encounter. R. 000669 pp. 164-165. Nielson was so uncomfortable around Duran that she tried to fix her own computer problems or asked others for assistance before resorting to Duran for help.

DTS's Response

Duran's immediate supervisor learned about Gomberg's e-mail after the spy camera incident and passed the information to human resources. R. 000669 pp. 206-211. Human Resources started an investigation. R. 000669 p. 211. After the investigation, Jim Matsumura wrote an Intent to Dismiss letter that recommended to DTS's Executive Director that Duran's employment be terminated. R. 000669 p. 288. The letter summarized the allegations raised in the investigation showing Duran's "pattern of

inappropriate behavior” and “unlawful and work place harassment of four DWS female employees.” R. 000672 Ex. A-13.³

The Intent to Dismiss letter cited relevant human resource and DTS policies and rules and informed Duran that DTS was firing him for violating those rules and for failing to “maintain agency professional standards, failing to advance the good of the public service, and for just cause.” R. 000672 Ex. A-13.

On July 9, 2007, DTS’s Executive Director held a Step 4 pre-termination hearing. R. 000670 pp. 349-350. And on July 10, 2007, Director Fletcher issued the Final Decision - Dismissal for Cause (Final Decision). R. 000672 Ex. A-14. Thereafter, on July 11, 2007, Duran filed grievance his termination to the CSRB. R. 000001-6.

SUMMARY OF THE ARGUMENT

The CSRB correctly upheld DTS’s decision to terminate Duran’s employment. Duran failed to marshal the evidence in support of the CSRB’s factual findings and cannot challenge them here.

³ Only Gomberg, Hulbert, and Nielson testified at the Step 5 hearing, and the Hearing Officer did not consider any allegations by the employee who did not testify. R. 000259 ¶ 18.

But even if this Court were to ignore every fact that Duran challenges, his conduct toward a co-worker who told him she was going to put her concerns about him in writing – facts that Duran neither challenges nor even mentions in his brief – is enough to affirm his dismissal from state employment.

The CSRB's admission of Duran's prior corrective action plan into evidence does not constitute reversible error. The CAP was part of Duran's documented employment history and admissible by express CSRB rule. But even if the CSRB committed error by admitting the CAP, the error was harmless and cannot constitute grounds for reversal.

ARGUMENT

I. The CSRB's factual findings are supported by substantial evidence and its decision was reasonable and rational.

The CSRB did not err when it upheld DTS's decision to terminate Duran's employment. Duran argues that the CSRB acted arbitrarily and capriciously by adopting unsupported factual findings and upholding his termination. But Duran fails to understand the deferential standard that the CSRB is required to apply to agency decisions. "The CSRB is restricted to determining whether there is factual support for the Department's charges

against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion." *Career Serv. Review Bd. v. Utah Dep't of Corr.*, 942 P.2d 933, 942 (Utah 1997); *Sorge*, 2006 UT App. 2 at ¶ 22.

Here, substantial evidence from the entire evidentiary record supports DTS's allegations that Duran violated DTS and DHRM rules and policies. Based on those factual findings, the CRSB correctly determined that DTS's decision to fire Duran was not an abuse of discretion, but instead was "based upon just cause and to advance the good of the public service." R. 000661. This Court should affirm the CRSB.

A. Duran failed to marshal the evidence supporting the factual findings.

The CSRB's factual findings should be affirmed because Duran failed to marshal the evidence supporting those findings.⁴ This Court has explained

⁴ In addition, Duran's brief completely fails to cite the record. As a general matter, the Court "need not, and will not consider any facts not properly cited to, or supported by the record." *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142, 144 (Utah 1978). Like *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 21, 104 P.3d 1208, the Court might "navigate the record," but should not be required to. Moreover, the Brief incorrectly identifies and attaches exhibits not entered into evidence at the Step 5 hearing. See *DTS's Motion To Strike Extra-Record Material from Appellant's Brief*, filed contemporaneously with this Answer Brief.

that “the process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder.” *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990). Before this Court “will subject an agency’s findings to the substantial evidence test, the party challenging the findings ‘must marshal all the evidence supporting the findings and show that despite the supporting facts, the [agency’s] findings are not supported by substantial evidence.’”

VanLeeuwen v. Indus. Comm’n, 901 P.2d 281, 284 (Utah App. 1995) (quoting *First Nat’l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990)) (bracketed material in original).

Marshaling is an arduous and painstaking process that this Court has compared to becoming the devil’s advocate, where the challenging party must present every scrap of competent evidence *supporting* the challenged finding:

Counsel must remove himself or herself from the client’s shoes and fully assume the adversary’s position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court’s finding resting upon the evidence is clearly erroneous.

Neely v. Bennett, 51 P.3d 724, 727-28 (Utah App. 2002) (quotation marks and citation omitted, emphasis in original); *West Valley v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991).

Duran has fallen well short of his obligation to marshal the evidence supporting the CSRB's decision. Instead, he "merely states those facts most favorable to his position and ignores the contrary evidence. This is not adequate." *Whitear v. Labor Comm'n*, 973 P.2d 983, 985 (Utah App. 1998).

In addition, Duran's challenges to the factual findings are largely semantic, constitute disagreements with the inferences to be drawn from the facts, or are simply not supported. For example, Duran argues that it is improper to call the witnesses who testified about their personal contact with him "complainants" because they never filed formal complaints against him. Besides being wrong, Duran's challenge is entirely beside the point. The record shows that the three co-workers reported Duran's behavior to supervisors and others. R. 000272, 274-275; R. 000669 pp. 31, 34-35, 41-42, 59, 202, 205, 210-211, 218. It also shows that they repeatedly asked Duran to cease the objectionable behavior. R. 000261, 275, 287. Although it is doubtful

that Duran would prefer the term “victims” instead of “complainants,” both terms fit the evidence here.⁵

This Court has made clear that factual findings will not be overturned “[e]ven if another conclusion from the evidence is permissible.” *Whitear*, 973 P.2d at 984; *Hurley v. Bd. of Review*, 767 P.2d 524, 526-27 (Utah 1998); see also *Crane v. Indus. Comm’n*, 97 Utah 244, 92 P.2d 722, 723 (Utah 1939) (court will not disturb reasonable inferences from the fact-finder). But that is exactly what Duran asks the Court to do. He challenges the findings that the co-workers felt threatened or intimidated because none actually used those terms in their testimony. But the Hearing Officer properly made that inference based on the testimony that Duran’s conduct was creepy, threatening, and that the co-workers were scared, overwhelmed, shocked, speechless, uncomfortable, embarrassed, and wanted to avoid Duran to the point that they were reluctant to ask him for computer assistance. See Statement of Facts and section I.B. below.

⁵ Like his defenses at Step 5 and 6, Duran’s challenge to some of the findings is shockingly cavalier. For example, in response to Nielson’s objection to being touched, Duran unabashedly remarks that she likely has “body issues.” Aplt’s Brief at 30. See also *Decision and Final Agency Action* at p. 20 n. 16, R. 000669-668; *Findings of Fact, Conclusions of Law and Decision* at p. 32-33, R. 000254-297.

Accordingly, on the basis of Duran's failure to marshal alone, this Court should hold that the CSRB's factual findings are conclusive. *See Whitear*, 973 P.2d at 985. This Court has no reluctance to affirm based only on a failure to marshal. *Id.* And this Court should affirm the CSRB's determination that DTS's decision to terminate Duran's employment was not an abuse of discretion.

B. Substantial evidence supported DTS's decision.

Substantial evidence supported DTS's decision to terminate Duran's employment. Substantial evidence is "more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Bd. of Review of Indus. Comm'n*, 842 P.2d 910, 911 (Utah App. 1992). Substantial evidence⁶ is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v. State*, 903 P.2d 429, 430 (Utah 1995) (citation and quotation marks omitted).

⁶ The CSRB defines substantial evidence to be "evidence possessing something of substance and relevant consequence, and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. It is evidence that a reasonable mind might accept as adequate to support a conclusion, but is less than a preponderance." Utah Admin. Code R137-1-2.

Although not DTS's burden, some of the many facts supporting DTS's decision to terminate Duran's employment are listed below:

- Duran repeatedly invited co-workers to lunch or coffee after the invitations were refused, and he was asked to stop.
- Duran constantly asked offensive personal questions about co-worker's lives and physical intimacy.
- Duran offered to set up a spy camera in a co-worker's home and continued the conversation despite being told it was creepy.
- Duran made comments about co-workers' body types and the physical attributes that he found personally attractive.
- Duran inappropriately touched a co-worker's back.
- Duran asked a co-worker for a massage and continued to do so even after being told "no" and in front of another employee.
- His co-workers asked him to stop his behavior again and again, but to no avail.
- Duran was the only computer service worker for DWS's Woods Cross Office.
- Duran's office was across the hall from the women's restroom, making it difficult for female co-workers to avoid going near his office.
- Co-workers became reluctant to ask Duran for computer help because they did not want to interact with him.
- Duran was aware of DHRM rules and DTS policies.

- Duran’s conduct made the work environment threatening and intimidating.

Moreover, credibility counts. Credibility assessments will not be overturned on appeal because the fact-finder is in the best position to make those assessments. *See, e.g., State v. Daniels*, 2002 UT 2, ¶ 18, 40 P.3d 611; *Renegade Oil, Inc. v. Progressive Cas. Ins. Co.*, 2004 UT App. 356, ¶ 10, 101 P.3d 383. The Hearing Officer noted that Duran’s “testimony was self-serving at best. Very little of it, if any seemed credible.” *Findings of Fact, Conclusions of Law and Decision* at p. 32, R. 000254-297. The Utah Supreme Court has long recognized that one credible witness is enough to support a factual finding. *See, e.g., Valiotis v. Utah Apex Mining Co.*, 55 Utah 151, 184 P. 802, 810 (Utah 1919). Here, substantial evidence supported DTS’s decision to end Duran’s state employment. This Court should affirm.

C. DTS’s decision to terminate Duran’s employment was not an abuse of discretion.

Because substantial evidence supported DTS’s allegations against Duran, its decision to fire him need only be a valid exercise of discretion. An agency abuses its discretion only when it reaches an outcome that is “clearly

against the logic and the effect of such facts as are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.” *Sorge*, 2006 UT App. 2 at ¶ 22 (quoting *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 26 (Utah App. 1991)). In other words, if “reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the [administrative body] acted within the area of its discretion.” *Utah Dep’t of Corr. v. Despain*, 824 P.2d 439, 448 (Utah App. 1991) (quoting *Szmeciarz v. Cal. State Personnel Bd.*, 79 Cal.App.3d 904, 405-06 (1978)) (alteration in original).

Here, DTS was well within the bounds of its discretion to dismiss Duran. His behavior compromised DTS’s ability to serve its customers. DWS employees tried to solve computer problems on their own or asked others to help them, compromising DWS’s ability to do its work. And, even if the CSRB or this Court might have chosen a different form of discipline, DTS did not abuse its discretion when it chose termination as the appropriate penalty.

D. Termination of Duran's employment can be affirmed based solely on Duran's attempts to dissuade a co-worker from putting her concerns about his behavior in writing.

This Court can affirm the CSRB's decision based only on Duran's attempt to prevent Gomberg from detailing her objections to his conduct in writing. Even if this Court were to ignore all of the other evidence supporting DTS's decision to terminate Duran's employment, his conduct in this instance is more than enough to support his dismissal from state employment.

DHRM rules provide that agency management may discipline any employee for "(a) noncompliance with these rules, agency or other applicable policy, including but not limited to . . . agency professional standards, standards of conduct and workplace policies. Utah Admin. Code R477-11-(1)(a). *See also* Addendum C (providing the text of the relevant DHRM and DTS rules and policies). DTS's code of conduct states that "Employees shall treat their fellow employees respectfully and professionally." R. 000672 Ex. A-15 p 2. DTS employees "shall not engage in unprofessional conduct on . . . the job that compromises the ability of the employee or agency to fulfill professional responsibilities." R. 000672 Ex. A-15 p 4. DTS Policy Code of Conduct, Section 1.2.1.3.2.4. DTS policy also provides that "Employees shall use non-abusive, respectful, and decent language (this prohibits any . . .

activity that is demeaning, belittling, or knowingly offensive to other employees.)” *Id.* at section 1.2.1.2.1.3. R. 000672 Ex. A-15 p 3. And finally, agency management may discipline any employee for “(e) misfeasance, malfeasance, nonfeasance or failure to advance the good of public service.” Utah Admin. Code R477-11-(1)(e).

The record evidence shows that Gomberg told Duran that she was going to put her concerns about his conduct in writing. Upon hearing this, Duran became agitated. He told her that she should not do that because: 1) a copy of the letter would be placed in *her* personnel file and prevent *her* from being hired elsewhere; 2) that he would retaliate and file a false discrimination complaint against her; and 3) that everyone in the office, including management, would think that they had had sexual relations. R. 000669 pp. 39-40. Duran does not challenge those facts, and he neglected to mention them in his brief.

As the CRSB noted, “Mr. Duran’s conduct in this regard can only be described as intimidating, threatening, disrespectful and unprofessional.” R. 000657-658. Duran’s conduct erodes any semblance of workplace trust and disrupts the employees’ work, the work of DTS, and that of DWS. The conduct is in clear violation of DHRM and DTS rules and policies not only governing professionalism and respect, but those proscribing activity that is

demeaning, belittling, or knowingly offensive to other employees. Even in its best light, the conduct was clearly inappropriate and patently offensive under any professional standards or in any work environment.

That conduct standing alone is sufficient ground for this Court to affirm the CRSB's decision to uphold Duran's termination.

II. The CRSB's decision to allow Duran's prior corrective action plan into evidence was not reversible error.

Utah law is clear that an "erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful." *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 360 (Utah 1997) (quoting *Joufflas v. Fox Television Stations, Inc.*, 927 P.2d 170, 173 (Utah 1996)). Harmful error occurs where "the likelihood of a different outcome in the absence of the error is 'sufficiently high so as to undermine confidence in the [final decision].'" *Id.* (quotation omitted). Here, Duran's 2003 corrective action plan (CAP) was properly admitted into evidence as part of his established employment history, but even if the CAP should have been excluded, any error was harmless.

A. Res judicata does not bar admission of the 2003 CAP.

Res judicata, in the form of issue preclusion, does not apply to exclude the 2003 CAP from evidence. Issue preclusion bars re-litigation of issues decided in a prior action and applies only when: 1) the issue challenged in the current case is identical to the issue decided in the prior case; 2) the issues was decided in a final judgment on the merits; 3) the issue was competently, fully, and fairly litigated; and 4) the party against whom issue preclusion is invoked must have been a party or in privity to a party in the first action. *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 37, 16 P.3d 1214. Here, except for the identity of parties, none of the other elements are present.

First, the challenged issues are not identical. DTS's decision to terminate Duran's employment was not based on the allegations and facts supporting to the prior, withdrawn letter of reprimand or the CAP. Instead, DTS's decision hinged on Duran's conduct beginning in 2004. DTS never tried to re-litigate prior alleged discipline or misconduct.⁷

⁷ DTS agreed that a January 29, 2003 intent to reprimand and March 28, 2003 letter of reprimand should be excluded from evidence because the Department of Workforce Services withdrew the letter of reprimand and the CSRB dismissed Duran's appeal of the letter of reprimand, by order dated June 12, 2003, based on the agency's decision to withdraw the discipline.

Second, the prior action neither resulted in a final judgment on the merits, nor were any of the issues competently, fully, or fairly litigated. A judgment is not “on the merits” if it represents a decision on some point other than the issues of law and fact that “must be disposed of in order to determine whether the parties have good claims or defenses under the applicable substantive law.” *Bailey v. Desert Fed. Sav. & Loan Ass’n*, 701 P.2d 803, 804 (Utah 1985) (citing *Thompson-Hayward Chemical Co. v. Cyprus Mines Corp.*, 660 P.2d 973, 976 (Kan. 1983)).

Here, DWS voluntarily dismissed the prior CSRB case because it withdrew Duran’s discipline and chose instead to put Duran on a CAP. In issuing the Order Dismissing Appeal, the CSRB had no authority to prevent the agency from pursuing other discipline or corrective action based on the facts justifying the rescinded written reprimand. The CSRB lacks jurisdiction to review corrective action, having only limited jurisdiction over personnel matters. Utah Code Ann. § 67-19a-202 (1) (a); *see also* Utah Code Ann. § 67-19a-302 (detailing what matters an employee may take to the CSRB). Thus, it follows that the CSRB cannot order an agency to issue or withhold corrective action, and accordingly, there was never any adjudication “on the merits.” *See, e.g., SMP, Inc. v. Kirkman*, 843 P.2d 531, 533 (Utah App. 1992) (industrial commission lacked jurisdiction to review contract claim

directly and therefore res judicata inapplicable). Nor did the CSRB determine any facts or make any decision on whether the letter of reprimand or the CAP were appropriate. Accordingly, res judicata does not bar DTS from introducing the CAP into evidence.

B. CSRB rule specifically allows admission of the prior CAP.

It is well-settled that evidence of prior disciplinary action is appropriate for consideration at the CSRB. Two basic issues are before the CSRB: first, whether the agency's factual allegations are supported by substantial evidence; and second, whether the agency's chosen disciplinary sanction is "excessive, disproportionate or otherwise constitutes an abuse of discretion." *See* Utah Admin. Code R137-1-21(3)(a), (b).

Duran's established employment history is relevant and necessary to the analysis of the second issue—the propriety of the chosen disciplinary sanction. The administrative rules governing the CSRB explicitly provide that "the past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations." Utah Admin. Code R137-1-21(9).

In addition, administrative rules governing the human resource department provide that "when deciding the specific type and severity of

discipline, the agency head or representative may consider the following factors: . . . prior disciplinary/corrective actions; . . . previous oral warnings, written warnings and discussions; . . . [and] the employee's past work record." Utah Admin. Code R477-11-3(1)(e), (f), (g). *See also* Addendum C. Thus, all evidence touching on an employee's past work record, including disciplinary actions, is admissible. The 2003 CAP was part of Duran's documented work history and was admissible. The CSRB correctly refused to exclude it from evidence.

C. Any error in the CAP's admission into evidence was harmless.

Even if admission of the 2003 CAP were error, that error was harmless. Harmless error is one that although properly preserved below and presented on appeal, is sufficiently inconsequential that the court concludes that there is no reasonable likelihood that it affected the outcome of the proceedings. *State v. Villarreal*, 857 P.2d 949, 958 (Utah App. 1993). At its heart, Duran's argument is that if the CAP had not been admitted into evidence, the CSRB would not have upheld DTS's decision to terminate his employment. But Duran cannot show that admission of the 2003 CAP had any affect on the case's final outcome.

Significantly, the CSRB specifically noted that “Mr. Duran’s 2003 corrective action had little or no bearing on the decision in this matter. Even without evidence of Mr. Duran’s 2003 corrective action, the evidentiary record supports the Hearing Officer’s decision in this matter.” R. 00659. There is nothing to indicate a “reasonable likelihood” that admission of the CAP changed the outcome of the case. Nor does the CAP’s admission undermine confidence in the decision. *But see Lucas v. Murray City Civil Serv. Comm’n*, 949 P.2d 746, 757 (Utah App. 1997) (reversible error because exclusion of evidence undermined confidence in commission’s decision to uphold employee’s discharge).

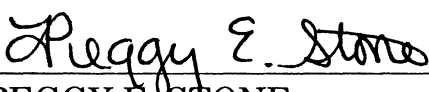
As explained in parts I. B, C, and D above, Duran cannot show that the outcome of the case would have been any different had the CAP been excluded. There is no reversible error here. This Court should therefore affirm the CSRB’s decision upholding the termination of Duran’s employment.

CONCLUSION

The CSRB did not err when it upheld DTS’s decision to end Duran’s state employment. Duran failed to marshal the evidence supporting the

decision. To the extent that this Court considers Duran's factual challenge, the CSRB correctly concluded that substantial evidence supports DTS's decision. And even if the Court were to ignore the facts that Duran challenges, the facts that he neither challenges nor mentions in his brief regarding his behavior in trying to dissuade a co-worker from putting her concerns about his conduct in writing is enough to support the decision to terminate his employment. Finally, because Duran cannot show that any error in the admission of his prior corrective action plan was more than harmless, this Court has no grounds upon which to reverse the CSRB's decision. Accordingly, the Court should affirm the CSRB's final agency action in all respects.

Dated this 7th day of December, 2009.

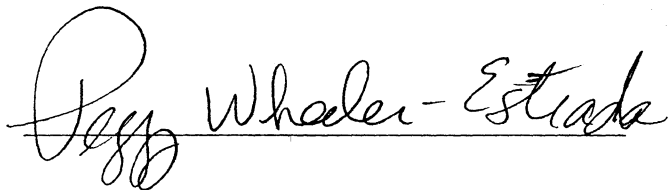


PEGGY E. STONE
Assistant Utah Attorney General
Attorney for Utah Department of Technology
Services

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing, **DEPARTMENT OF TECHNOLOGY SERVICES'S ANSWER BRIEF**, and an electronic copy (searchable pdf) of the brief on computer disk were mailed by U.S. Mail, postage prepaid, to the following this 7 day of December, 2009:

Charles R. Stewart
Schatz, Anderson & Uday
American Plaza II
57 West 200 South, Suite 200
Salt Lake City, Utah 84101
Attorney for Petitioner/Appellant

 Peggy Wheeler-Estade

ADDENDUM A

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

JOHN M. DURAN,	:	
	:	
Grievant and Appellant,	:	DECISION
	:	AND
v.	:	FINAL AGENCY ACTION
	:	
UTAH DEPARTMENT OF	:	
TECHNOLOGY SERVICES,	:	
	:	
Agency and Cross-Appellant.	:	Case No. 10 CSRB 94

On Wednesday, December 17, 2008, the Career Service Review Board (Board and CSRB) completed its final review of the above-entitled case with a hearing involving the parties followed by an executive session. The following Board Members were present and heard oral argument at the hearing and then deliberated in an executive session: Joan M. Gallegos, Acting Chair; John A. Mathews and Kevin C. Timken, Board Members. At this hearing, John M. Duran (Mr. Duran) was present and represented by Charles R. Stewart, Attorney at Law, who presented oral argument on Appellant's behalf.¹ Assistant Utah Attorney General Timothy D. Evans represented the Utah Department of Technology Services (Department and DTS) and presented oral argument on the Department's behalf. Accompanying Mr. Evans as the Department's Representative was Larene Wyss, Human Resource Manager assigned to the Department.

¹The Board notes that at the Step 5 evidentiary hearing in this matter, Mr. Duran was represented by David W. Brown, Attorney at Law. On May 2, 2008, the Hearing Officer issued her *Findings of Fact, Conclusions of Law and Decision* (Step 5 Decision). On May 14, 2008, Mr. Duran filed his *Notice of Appeal from Step 5 to Step 6*. In his appeal, Mr. Duran specifically states: "Comes now the Grievant/Appellant John M. Duran Pro Se and files his Notice of Appeal from Step 5 to Step 6 from a Findings of Fact, Conclusion [sic] of Law and Decision, dated May 2nd, 2008. . . .

Thereafter on May 15, 2008, Mr. Brown filed a *Notice of Withdrawal of Counsel*. By *Motion and Stipulation for Extension of Time to File Appellant Brief* dated September 12, 2008, Richard G. Uday of SCHATZ, ANDERSON & UDAY made an appearance of counsel on Mr. Duran's behalf. Thereafter on November 26, 2008, Charles R. Stewart also of SCHATZ, ANDERSON & UDAY filed a *Substitution of Counsel*.

AUTHORITY

The Board's statutory authority is set forth in *Utah Code Ann.* §§67-19a-101 through -408 of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act at §§67-19-1 *et seq.* The CSRB's administrative rules are published in the *Utah Admin. Code* R137-1-1 through -23. This Board-level or Step 6 appeal hearing is the final administrative review in the State Employees' Grievance and Appeal Procedures for Mr. Duran's appeal from termination of his employment. Both the Board's Step 5 evidentiary and these appellate/Step 6 proceedings are designated as "formal adjudications" pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB's Step 5 and Step 6 hearings. (§§63G-4-101 *et seq.*)

PROCEDURAL BACKGROUND

I. Proceedings Before the Department

Review of the Step 5 evidentiary record in this matter and the appeal briefs filed by the parties establishes that on June 7, 2007, Mr. Duran was given notice of the Department's intent to dismiss (Notice of Intent) him from employment with the Department as a Technical Support Specialist II. (Tr. I at 288-291, 294; Ex. A-13; Step 5 Decision ¶17 at 6; *Brief of Appellant [sic] Appeal from Step Five Decision of Administrative Law Judge* (Duran Brief on Appeal) at Addendum A)² The Department's Notice of Intent was issued by Jim Matsumura, Information Technology Director. (Ex. A-13) This Notice of Intent appropriately informed Mr. Duran of his right to appeal the Department's intent within five working days. (*Id.*) At the time this Notice of Intent was issued, Mr. Duran had been employed by the Department for approximately two years. (Tr. I at 243-244; Duran Brief on Appeal, Addendum A; Step 5 Decision ¶3 at 3)³

²The Board notes that in his brief on appeal to this Board, Mr. Duran refers to himself as Appellant. The Board further notes that the Department cross-appealed the Hearing Officer's Step 5 Decision. Based upon these factors, and for clarity purposes, throughout this decision the Board will refer to Mr. Duran as "Mr. Duran" and the Department as "Department" or "DTS."

³It is clear from the evidentiary record that in 2000, Mr. Duran was originally hired by the Utah Department of Workforce Services as a Technology Specialist. (Tr. I at 243-244; Tr. II at 437; Duran Brief on Appeal, Addendum A; Step 5 Decision ¶¶2, 3 at 3) By Legislative action in 2005, Mr. Duran's position, as well as all other technology services' positions within the State, transitioned to a new department titled the Utah Department of Technology Services. (*Id.*)

The Department's June 12, 2007 Notice of Intent recommended that Mr. Duran's employment be terminated for violation of numerous Department and State workplace policies and procedures. Specifically, the Department's Notice of Intent alleged that over an extended period of time beginning late in 2004, Mr. Duran prolonged a documented pattern of unprofessional, disrespectful and offensive behavior toward identified co-workers. (Ex. A-13) The alleged misconduct outlined in the Notice of Intent included Mr. Duran's persistent pattern of asking female co-workers questions regarding their personal relationships – including inquiries relating to physical intimacy – and recurring comments regarding the physical attributes of his female co-workers. (*Id.*) The Notice of Intent further alleged Mr. Duran continuously pressed female co-workers to go to lunch, dinner or to have coffee with him. (*Id.*) These behaviors allegedly persisted despite repeated refusals from those he asked and numerous requests that all such personal inquiries stop. (*Id.*)

The Notice of Intent also alleged that Mr. Duran's inappropriate and offensive conduct included Mr. Duran's actual touching of a co-worker and his request of a second co-worker that she give him a massage. (*Id.*) In addition, the Notice of Intent specifically alleged that Mr. Duran violated departmental policies governing professional work relationships during a discussion with a female co-worker regarding the placing of a "spy system" in her home. (*Id.*)

As a result of these allegations, the Department charged Mr. Duran with violating Department Policy Code of Conduct (DTS Policy), Sections 1.2.1.2.1.1, 1.2.1.2.1.2, 1.2.1.2.1.3 and 1.2.1.3.2.4 all of which govern generally professional and respectful work relationships. (*Id.*) The Department further alleged that Mr. Duran's conduct violated Department of Human Resource Management (DHRM) Rule R477-9-1(1)(a)(ii), R477-11-1(1)(a), (c) and (e). (*Id.*)

After receiving the Department's Notice of Intent, Mr. Duran appropriately filed a timely appeal with the Department.⁴ (Ex. A-20) On July 9, 2007, a hearing regarding the Department's Notice of Intent to terminate Mr. Duran's employment was held before J. Stephen Fletcher,

⁴DHRM rule R477-11-2(2) provides in pertinent part as follows:

- (2) No employee shall be dismissed or demoted from a career service position unless . . .
 - (a) The agency head or designee shall notify the employee in writing of the specific reasons for the proposed dismissal or demotion.
 - (b) The employee shall have up to five working days to reply. . . .

(Exec. Dir. Fletcher) Chief Information Officer and Executive Director for the Department. (Tr. II at 348-350, 388; Ex. A-14)⁵ On July 10, 2007, Exec. Dir. Fletcher issued the Department's *Final Decision – Dismissal for Cause* (Final Decision) terminating Mr. Duran's employment with the Department. (*Id.*)

In his Final Decision, Exec. Dir. Fletcher specifically found there was adequate cause or reason to terminate Mr. Duran's employment. (*Id.*) In reaching this decision, Exec. Dir. Fletcher stated:

I have considered your response from the July 9, 2007 meeting as well as . . . taken into consideration your comments concerning the allegations raised against you. In the meeting you did not present . . . adequate evidence to reconsider the Department's recommendation.

(*Id.*)

Based upon these factors, Exec. Dir. Fletcher terminated Mr. Duran's employment for:

[N]oncompliance with and for violation of DHRM Rule Employee Conduct, for noncompliance with and for violation of DHRM Rule 477-9-1(1)(a)(ii), DHRM Rule R477-11-1(1)(a), DHRM Rule 477-11-1(1)(e), Department of Technology Services (DTS) Policy Code of Conduct, Section 1.2.1.2.1.1, Section 1.2.1.2.1.2, Section 1.2.1.2.1.3, Section 1.2.1.3.2.4, for failure to maintain agency professional standards, for failure to advance the good of the public service, and for just cause.

(*Id.*)

After making these determinations, Exec. Dir. Fletcher terminated Mr. Duran's employment effective July 10, 2007. (*Id.*) Thereafter, on July 11, 2007, Mr. Duran timely filed an appeal of Exec. Dir. Fletcher's Final Decision with the CSRB.

II. Proceedings Before the Career Service Review Board

As set forth above, on July 11, 2007, Mr. Duran filed a timely appeal with the CSRB challenging the Department's Final Decision terminating his employment. Thereafter, a prehearing/scheduling conference was held identifying the issues in dispute and the facts to be resolved at the Step 5 evidentiary hearing in this matter.⁶ On August 28, 2007, the CSRB

⁵Pursuant to *Utah Code Ann.* § 67-19-18(5)(d), a career service employee with the state of Utah may not be dismissed from employment unless the employee has had an opportunity to be heard by the department head or designated representative.

⁶A Step 5 evidentiary hearing is specifically identified in the CSRB Administrative rules as a *de novo* evidentiary hearing conducted before a hearing officer. (*Utah Admin. Code* R137-1-4.) This hearing allows the parties to provide sworn testimony, cross-examine witnesses and place documents into the official record. (See *Utah Admin. Code* R137-1-21.)

Administrator issued a *Prehearing/Scheduling Conference Summary and Order* (PHC Summary and Order). This order broadly outlined the issues in dispute to be adjudicated at the Step 5 evidentiary hearing and the issues of fact to be resolved.⁷

Prior to the evidentiary hearing in this matter, Mr. Duran filed a motion with the CSRB titled *Grievant's Motion in Limine*. (Motion in Limine)⁸ By this motion, Mr. Duran moved the Hearing Officer to exclude from the hearing evidence pertaining to any disciplinary action against Mr. Duran that had previously been withdrawn or rescinded. In his motion, Mr. Duran also moved to exclude all evidence relating to a 2003 corrective action Mr. Duran was required to complete. Regarding the 2003 corrective action, Mr. Duran argued that because this corrective action was based substantially on the same conduct supporting the Department's withdrawn and rescinded discipline, due process mandated it not be used at the Step 5 evidentiary hearing.

In its opposition to Mr. Duran's Motion in Limine, the Department conceded that the withdrawn and rescinded disciplinary action as well as the intent supporting that discipline could not be used at the Step 5 evidentiary hearing. Indeed, review of the file in this matter establishes that the Department never attempted to place the withdrawn and rescinded discipline or any intent supporting that discipline into the record.

However, while conceding that the withdrawn and rescinded discipline and intent could not be used at the Step 5 evidentiary hearing, the Department nevertheless argued that documents regarding Mr. Duran's 2003 corrective action were admissible as evidence of Mr. Duran's "past employment record." (*Agency Memorandum in Opposition to Grievant's Motion in Limine* at 3) In arguing that Mr. Duran's 2003 correction action was admissible, the Department relied largely on CSRB rule R137-1-21(9) which explicitly allows that:

[T]he past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations.

On April 1, 2008, Hearing Officer Katherine A. Fox (Hearing Officer Fox) issued her *Order on Grievant's Motion in Limine*. By this Order, the Hearing Officer granted Mr. Duran's motion to

⁷The PHC Summary and Order is part of the file maintained and controlled by the CSRB Office.

⁸Mr. Duran's Motion in Limine as well as all memoranda supporting and opposing this motion are part of the file maintained and controlled by the CSRB Office.

exclude from the evidentiary hearing evidence of prior disciplinary action against Mr. Duran that had been withdrawn and rescinded. This order included the intent supporting the previously withdrawn and rescinded discipline. However, the Hearing Officer also ruled that documents relating to Mr. Duran's 2003 corrective action could be used during the Step 5 evidentiary hearing as evidence of his established employment record. Specifically addressing this issue in her order, the Hearing Officer stated:

It is axiomatic that an employee's prior work record, including disciplinary matters, may be relevant in Step 5 proceedings to help assess the reasonableness of the Agency's actions, including application of discretionary factors articulated in the Department of Human Resource Management's rule R477-1-3, and the sanction imposed. See *Utah Admin. Code* R137-1-21(9); R477-11-3(e), (f) and (g); R137-1-21(3)(a) and (b).

On April 3-4, 2008, a Step 5 evidentiary hearing was held before Hearing Officer Fox. At this hearing, Mr. Duran was represented by David W. Brown, Attorney at Law. The Department was represented by Timothy D. Evans, Assistant Utah Attorney General. Mr. Evans was assisted by Ceil Miller, Paralegal with the Office of the Utah Attorney General. Meredith John, Human Resource Specialist with DHRM was present as the Management Representative for the Department. A certified court reporter made a verbatim record of the proceedings and administered oaths to the witnesses.

The statute authorizing the CSRB to hold evidentiary hearings can be found at *Utah Code Ann.* § 67-19a-406. Moreover, because Mr. Duran's employment was terminated, the Department had the burden of proving its case by substantial evidence and the burden of going forward at the evidentiary hearing. (*Utah Code Ann.* § 67-19a-406(2)(a) and (c)) The specific issues adjudicated at the Step 5 evidentiary hearing are twofold. First, did the Department terminate Mr. Duran's employment for just cause or for good of the public service as required by *Utah Code Ann.* § 67-19-18? Second, if the Department's decision to terminate Mr. Duran's employment was not for just cause or for the good of the public service, what is the appropriate remedy? (PHC Summary and Order ¶3 at 2; Step 5 Decision at 2)

At the evidentiary hearing in this matter, the Hearing Officer received evidence relating to the specific charges against Mr. Duran. This evidence included testimony given and documents received concerning Mr. Duran's alleged violations of departmental policies generally governing professional and respectful work relationships.

Specifically, evidence was received at the Step 5 evidentiary hearing relating to the Department's allegation that over a prolonged period of time, beginning in late 2004 and continuing until he was placed on administrative leave, Mr. Duran extended a documented pattern of unprofessional, disrespectful and offensive behavior toward co-workers. This evidence included testimony and documents establishing that during this period, Mr. Duran frequently engaged female co-workers in conversations that were highly personal in nature. These conversations often involved troubling inquiries by Mr. Duran regarding his co-workers' private relationships including inquiries regarding physical intimacy. (Tr. I at 48-49, 112-113; Ex. A-1) Evidence was also received regarding Mr. Duran's recurring comments regarding the physical attributes of certain co-workers and comments regarding what he considered personally attractive. (Tr. I at 43, 48-49, 158-160, 168, 174-175, 184-185; Ex. A-1) Evidence was also presented that many of these highly personal comments continued even after Mr. Duran was asked to cease making them. (Tr. I at 40, 44-48, 54-56; Ex. A-16)

In addition, evidence was received supporting the Department's allegation that Mr. Duran inappropriately touched one female co-worker and requested that a second co-worker massage his leg or foot. (Tr. I at 118-119, 162-164; Exs. A-13, A-16) Mr. Duran persisted in asking for this massage even after the employee had declined his request and in the presence of another co-worker. (Tr. I at 118-121)

There was also evidence presented at the Step 5 evidentiary hearing supporting the Department's allegation that Mr. Duran engaged in highly inappropriate conduct when discussing a spy camera with one of his co-workers. (Tr. I at 31-35, 54, 118) Evidence was received showing that Mr. Duran continued this specific discussion even after being asked by the co-worker to stop because the discussion was "creepy." (*Id.*) Evidence was also received supporting the Department's claims that during this period of time Mr. Duran repeatedly pressed certain female co-workers to go to lunch, dinner or have coffee with him. These requests persisted despite repeated refusals and requests that such inquiries stop. (Tr. I at 51-53, 156-158, 184)

Finally, testimony was given and documentary evidence received at the Step 5 evidentiary hearing relating to the Department's allegations that Mr. Duran's offensive conduct created a threatening and intimidating work environment for co-workers. This evidence included testimony regarding Mr. Duran's comments to a female co-worker after she informed Mr. Duran that she was

going to place her concerns about his conduct in writing. (Tr. I at 31-41, 54-56; Ex. A-16) Specifically, this evidence included testimony that Mr. Duran attempted to intimidate this co-worker by threatening to file a false discrimination complaint against her and by stating that if she memorialized her concerns, management and others in the office would assume they had slept together. (*Id.*) Evidence was also presented indicating that Mr. Duran further attempted to pressure this employee from placing her concerns in writing by stating that the letter would be placed in her file as well and follow her throughout her career. (*Id.*)

At the conclusion of the evidentiary hearing, the Hearing Officer entered her Step 5 Decision dated May 2, 2008. In her Step 5 Decision, the Hearing Officer outlined the evidence presented at the evidentiary hearing and concluded that substantial evidence supported the Department's allegations that Mr. Duran's conduct violated departmental policies governing professional and respectful work relationships. (Step 5 Decision at 35) The Hearing Officer further concluded that Mr. Duran's violations of these departmental policies constituted just cause for terminating Mr. Duran employment and that the Department's decision to terminate Mr. Duran's employment was not "excessive, disproportionate or an abuse of discretion." (*Id.* at 34)

Specifically addressing her finding in this matter, the Hearing Officer concluded:

Looking at the totality of the circumstances and the substantial evidence that was presented at the Step 5 hearing, this hearing Officer finds that Grievant's [Mr. Duran] dismissal was reasonable in light of the charges. The Agency exercised its discretion to decide upon the discipline and the discipline, particularly in light of previous discipline as well as corrective action and other notices and warnings about the same or similar type of inappropriate workplace conduct, is not excessive, disproportionate or an abuse of discretion.

(*Id.*)

Based upon these findings, the Hearing Officer upheld the Department's decision to terminate Mr. Duran's employment and affirmatively denied his appeal. (*Id.* at 35)

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. ISSUES ON APPEAL

In the instant case, both parties appealed the Hearing Officer's decision to Step 6 of the State's Grievance and Appeal Procedures. Mr. Duran filed his appeal on May 14, 2008. The Department filed its cross-appeal on May 16, 2008.

On appeal to this Board, Mr. Duran challenges numerous aspects of the Hearing Officer's Step 5 Decision. Specifically, Mr. Duran argues that many of the factual findings relied upon by the Hearing Officer in upholding the Department's decision to terminate his employment are simply not supported by substantial evidence and therefore the Hearing Officer erred in concluding that Mr. Duran's dismissal was "reasonable in light of the charges." (Duran Brief on Appeal at 2) Mr. Duran also challenges the severity of discipline imposed upon him arguing that "the conduct of the Grievant [Mr. Duran] did not warrant termination, as there was not substantial evidence presented to justify such an extreme form of discipline." (*Id.*)

On appeal Mr. Duran also argues that the Hearing Officer misapplied relevant policies and rules in upholding the Department's decision. In making this argument, Mr. Duran essentially restates his position that the record evidence fails to establish his conduct actually violated established policies governing professional and respectful co-worker interaction or policies specifically proscribing conduct considered harassing, discriminatory, demeaning, offensive or which interferes with professional responsibilities. (Duran Brief on Appeal at 12-15)

Finally, Mr. Duran challenges the Hearing Officer's decision to allow evidence of the 2003 Corrective Action Plan to be received at the evidentiary hearing. (*Id.* at 2, 16) Specifically addressing this issue in his brief, Mr. Duran argues:

The 2003 CAP having been drafted by Agency based on the same offenses alleged in the Written Reprimand . . . and the Career Services Board [sic] having dismissed the Agency's case with prejudice . . . prior records of the action should not be considered by this board, and was error for the hearing officer to have done so.

(*Id.* at 16)⁹

In essence, Mr. Duran challenges the Hearing Officer's finding that substantial evidence supported the principal allegations relied upon by the Department in reaching its decision to terminate his employment. He also argues that because substantial evidence did not support many of the Department's allegations, the hearing Officer erred in finding the Department's termination of his employment was not excessive or disproportionate. Mr. Duran further argues that the Hearing Officer misapplied relevant policies and procedures in upholding the Department's decision to terminate his employment. Finally, Mr. Duran argues that the Hearing Officer erred not only in

⁹CAP is the acronym uniformly recognized within the State for a "Corrective Action Plan."

receiving evidence at the Step 5 evidentiary hearing regarding his 2003 corrective action, but by considering this evidence to reach her decision that the Department's termination of Mr. Duran's employment was reasonable and rational.

Not surprisingly, in its appeal to this Board, the Department does not challenge the Hearing Officer's ultimate decision upholding the Department's termination of Mr. Duran's employment. On appeal, the Department simply argues that the Hearing Officer erred in excluding evidence concerning Mr. Duran's prior convictions at the Step 5 evidentiary hearing. Specifically addressing this issue in its appeal to this Board, the Department argued that: "Grievant's [Mr. Duran's] conviction for a crime of violence was relevant to a determination of a core issue in this case: whether the Agency acted properly in deciding to terminate Grievant's [Mr. Duran's] employment. (*Agency's Brief on Cross-Appeal to Step 6* at 5) However, in its appeal, the Department also stated that "the Board needs to consider this appeal *only* if the Board overrules the Hearing Officer's Step 5 decision upholding the termination of Grievant's [Mr. Duran's] employment." (*Id.* at 2) (Emphasis added.)

As required by statute, the Board reviews and decides the parties' appeals. To the extent required by law, the Board will now review and analyze the facts and issues presented by the parties on appeal and address the dispositive issues raised by the parties.

II. THE BOARD'S APPELLATE STANDARDS OF REVIEW

We review Appellant's appeal under *Utah Administrative Code*, R137-1-22(4)(a)–(c), which reads as follows:

(a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.

(b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes in accordance with the correctness standard, with no deference being

granted to the evidentiary/step 5 decision of the CSRB hearing officer.

(c) Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

Based upon the foregoing, the Board must first determine whether the Hearing Officer's factual findings are reasonable and rational based upon the evidentiary record as a whole and whether those findings are supported by substantial evidence. Next, our task is to review the fact finder's decision to determine whether the Hearing Officer correctly applied "the relevant policies, rules, and statutes according to the correctness standard," giving no deference to the Hearing Officer on this legal issue. Finally, the Board's appellate role is to consider whether the totality of the Department's disciplinary penalty of termination of Mr. Duran's employment is reasonable and rational based upon our determination of the ultimate facts together with the correct application of relevant State policies, rules and statutes which were considered by our Hearing Officer.

BOARD'S REVIEW AND ANALYSIS OF FACTS AND ISSUES ON APPEAL

I. FACTUAL EVENTS CRITICAL TO THE DEPARTMENT'S DECISION TO TERMINATE MR. DURAN'S EMPLOYMENT

As stated above, the Board's first obligation on review is to make a determination of whether the factual findings of the Hearing Officer are reasonable and rational according to the substantial evidence standard. (*Utah Admin. Code* R137-1-22(4)(a)) In the instant case, the Hearing Officer received testimony from numerous witnesses including Mr. Duran himself regarding the Department's allegations that while employed with the Department, Mr. Duran violated several departmental policies and procedures governing professional and respectful work relationships. Documents were also received into evidence supporting the Department's allegations that beginning in late 2004, Mr. Duran extended a documented pattern of unprofessional, disrespectful and offensive behavior toward co-workers. This evidence included not only documents of prior discipline, but numerous other written letters of warning or concern regarding Mr. Duran's inappropriate or unprofessional interaction with co-workers. (Exs. A-2, A-3, A-4, A-5, A-7, A-9, A-12) This documentary evidence also included a letter of concern from a co-worker to Mr. Duran

regarding his inappropriate conduct and the corrective action subject to Mr. Duran's Motion in Limine. (Exs. A-1, A-8, A-11) Finally, the documentary evidence included Department policies and procedures generally governing professional and respectful co-worker interaction and various policy understanding statements signed or acknowledged by Mr. Duran. (Exs. A-15, A-18, A-19, A-21, A-23, A-26)

After carefully considering the testimony given at the evidentiary hearing and reviewing the documents received into evidence, the Hearing Officer issued her decision. This decision set forth several dispositive facts crucial in her decision to uphold the Department's termination of Mr. Duran's employment. (Step 5 Decision ¶¶19, 20, 21, 24, 26, 28, 30, 32 at 6-9) Among the many facts relied upon in upholding the Department's decision to terminate Mr. Duran's employment, the Hearing Officer found that over a prolonged period of time beginning late 2004 and continuing until he was placed on administrative leave, Mr. Duran extended a documented pattern of unprofessional, disrespectful and offensive behavior toward co-workers. (Step 5 Decision ¶¶19, 20, 21, 24, 26, 28 at 6-8) The Hearing Officer found this conduct to include Mr. Duran asking female co-workers highly personal questions including inquiries regarding physical intimacy. (*Id.* ¶¶19, 20, 24, 26 at 6-8) The Hearing Officer further found that Mr. Duran made comments regarding the physical attributes of co-workers and shared with certain co-workers the physical traits he considered personally attractive. (*Id.* ¶¶19, 21, 24, 28 at 6-8) The Hearing Officer also found that many of these highly personal comments continued after Mr. Duran was asked to cease making them. (*Id.* ¶¶19, 20, 24, 26, 28 at 6-8)

The Hearing Officer further found substantial evidence supported the Department's allegation that Mr. Duran inappropriately touched one female co-worker and requested that a second co-worker massage his leg or foot. (*Id.* ¶¶20, 21, 26, 28 at 6-8) The Hearing Officer also found that Mr. Duran persisted in asking for this massage after the employee had repeatedly denied his request. (*Id.* ¶¶20, 26 at 6-8)

The Hearing Officer also found that Mr. Duran continuously pressed certain female co-workers to go to lunch, dinner or have coffee with him and that these requests persisted despite repeated refusals and requests that such invitations stop. (*Id.* ¶¶24, 26, 28 at 7-8) She further found Mr. Duran used inappropriate and offensive language when discussing the placement of a spy camera in a co-worker's home. (*Id.* ¶¶19, 24 at 6-7) Finally, the Hearing Officer found substantial evidence

supported the Department's allegation that after Mr. Duran was told by a co-worker that she was going to memorialize her concerns about his conduct in writing, Mr. Duran engaged in knowingly offensive, unprofessional and intimidating conduct toward this co-worker. The Hearing Officer found this conduct included Mr. Duran threatening that if she did put her concerns in writing, everyone would think they had slept together. (*Id.* ¶24 at 7)

After carefully reviewing the evidentiary record as a whole, including the sworn testimony of the witnesses and the documents submitted into evidence, this Board finds the Hearing Officer's factual findings as set forth in the Step 5 Decision to be reasonable, rational and supported by substantial evidence.¹⁰ In reaching this decision, the Board stresses that it has consistently held that findings made by a factfinder are entitled to a presumption of correctness. (*Chournos v. Utah Department of Workforce Services*, 8 CSRB 74, Step 6 Decision (2004); *Jones v. Utah Department of Public Safety*, 4 CSRB 38, Step 6 Decision (1992); See also, *Parks & Recreation v. Anderson*, 3 PRB 22 at 7-8, Step 6 Decision (1986).)¹¹ In granting such deference to the Hearing Officer's factual findings, the Board notes that it is the Hearing Officer alone who hears the testimony, weighs the evidence and is therefore in the best position to judge the veracity of the witnesses' statements.

In determining the Hearing Officer's factual findings to be reasonable and rational, the Board first notes that during the evidentiary hearing in this matter, persuasive evidence was provided establishing that over an extended period of time, Mr. Duran engaged in a pervasive pattern of asking female co-workers highly personal questions including inquiries regarding their physical intimacy with others. (Tr. I at 48-49, 112-113; Ex. A-1) These inquiries included Mr. Duran specifically asking at least one female co-worker how many boyfriends she had had and further commenting that she must have been "with a lot of guys." (Tr. I at 48-49; Ex. A-1) Mr. Duran's inappropriate

¹⁰CSRB rule R137-1-2 defines substantial evidence to be "evidence possessing something of substance and relevant consequence, and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. It is evidence that a reasonable mind might accept as adequate to support a conclusion, but is less than a preponderance." In addressing this evidentiary standard, courts have found that substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v State*, 903 P.2d 429, 430 (Utah 1995), quoting *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); See also *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah Ct. App. 1989) Substantial evidence "is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Board of Review of Indus. Comm'n*, 842 P.2d 910, 911 (Utah Ct. App. 1992)

¹¹The PRB was the Personnel Review Board, predecessor to the Career Service Review Board.

comments also included his statements that because this co-worker lived in the avenues where the homes are close, the neighbors could easily see "when she and my [her] man were getting romantic." (*Id.* at 49)

Substantial evidence was also received establishing that Mr. Duran frequently commented to co-workers regarding their physical attributes and what he personally found attractive in a woman. (Tr. I at 43, 48-49, 158-160, 168, 174-175, 184-185; Ex. A-1) These comments included Mr. Duran telling one co-worker that he liked "a girl with a little meat on her" and informing another co-worker that she looked like a model and was "Barbie sized." (*Id.* at 43, 158-160, 168, 174-175) Persuasive testimony was also presented establishing that these comments continued over a long period of time and despite frequent requests that such comments cease. (*Id.* at 45-49, 54-56; Exs. A-1, A-16)

Evidence was also presented establishing that Mr. Duran inappropriately touched one female co-worker and requested that a separate co-worker massage his leg or foot. (*Id.* at 118-119, 162-164; Exs. A-13, A-16) Particularly troubling is the evidence that Mr. Duran persisted in asking for this massage well after the employee had said no and that his requests continued in the presence of another co-worker. (*Id.* at 118-121)

Substantial evidence also supports that in late 2004 and continuing until Mr. Duran was placed on administrative leave, he frequently pressed certain female co-workers to go to lunch, dinner or to have coffee with him. (*Id.* 51-53, 156-158, 184) Again, these invitations continued despite repeated and unambiguous requests that they stop. (*Id.*)

The evidentiary record also establishes that in August 2006, Mr. Duran engaged a female co-worker in a discussion about placing a spy camera in her home. When informed by this co-worker that this idea was "creepy," Mr. Duran responded by stating: "What, do you get shy in front of a camera?" (*Id.* at 33-34) The evidence further establishes that Mr. Duran continued to discuss the spy camera with this co-worker even after being requested that he stop. (Tr. I at 33-34, 54) The Board also notes that in his appeal to this Board, Mr. Duran does not deny that these comments were made, but simply dismisses them as an "awkward attempt at humor" or "traditional workplace banter." (Duran Brief on Appeal at 4) After reviewing the testimony regarding this interaction, the Board believes these comments were clearly inappropriate and patently offensive under any professional standards or in any work environment.

Finally, and perhaps most egregious to this Board, is the evidence establishing that Mr. Duran engaged in threatening and in intimidating conduct upon learning that a co-worker planned on writing a letter memorializing her objections to Mr. Duran's behavior. Indeed, the evidence establishes that in an attempt to dissuade this co-worker from memorializing her objections to his conduct, Mr. Duran threatened to file a false discrimination complaint against this employee. (Tr. I at 39-41, 54-56) In furtherance of this intimidating conduct, the evidence also establishes that Mr. Duran told this co-worker that if she memorialized her concerns about his conduct, others in the office – including management – would assume they had had sexual relations. (*Id.*) Finally, as part of this intimidating conduct, Mr. Duran also informed this employee that any letter of concern regarding his misconduct would be placed in her employment file as well and would follow her throughout her career. (*Id.*)

Based upon our careful review of the entire evidentiary record, the Board finds the Hearing Officer's substantive factual findings to be supported by substantial evidence. The record establishes that Mr. Duran engaged in a prolonged pattern of co-worker interaction that was inappropriate and unprofessional. This conduct included statements and actions that were threatening, intimidating, sexually suggestive and otherwise offensive even if viewed in their most positive light. Therefore, based upon the totality of evidence presented at the evidentiary hearing, the Board finds the Hearing Officer's factual findings to be reasonable and rational according to a substantial evidence standard and therefore upholds the Hearing Officer's factual findings.

II. THE DEPARTMENT'S DECISION TO TERMINATE MR. DURAN'S EMPLOYMENT IN LIGHT OF THE ALLEGATIONS SUPPORTED BY SUBSTANTIAL EVIDENCE

In his appeal to this Board, Mr. Duran argues that based on the allegations against him, the Department's decision to terminate his employment was unreasonable and therefore, the Hearing Officer erred in finding that the Department's decision was not excessive or disproportionate. Addressing this issue in his brief, Mr. Duran argues that the "conduct of the Grievant [Mr. Duran] did not warrant termination, as there was not substantial evidence presented to justify such an extreme form of discipline." (Duran Brief on Appeal at 2)

In ruling on whether the Department's decision to terminate Mr. Duran's employment was reasonable and rational in light of the facts of this case, the Board notes that it is affirmatively constrained by Utah court rulings addressing this issue. In *Utah Department of Corrections v.*

Despain, 824 P.2d 439 (Ut. Ct. App. 1991) the Utah Court of Appeals examined the parameters under which the Board may review disciplinary sanctions imposed by departments. At the time of *Despain*, the Board had a rule which stated:

[I]f the hearing officer finds that the action complained of which was taken by the appointing authority was too severe, even though for good cause, the hearing officer may provide for such other remedy or relief as deemed appropriate and in the best interest of the respective parties.¹²

In *Despain*, the Utah Court of Appeals found that this language gave the CSRB the “authority to modify the Department’s sanction *only* if the Department has abused its discretion in imposing that sanction.” (*Id.*) (Emphasis added) In reaching this conclusion, the Court adopted the reasoning set forth in *Szmciarz v. California State Personnel Board*, 79 Cal. App. 3d 904, 145 Cal. Rptr. 396 (1978) wherein that California Court held:

[I]f the penalty imposed was under all the facts and circumstances clearly excessive, this will be deemed an abuse of discretion . . . In determining whether there has been an abuse of discretion the Supreme Court of this state has stated that “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the [administrative body] acted within the area of its discretion.”¹³

In the instant case, this Board has already found that there was substantial evidence to support the substantive factual findings of the Hearing Officer in this case. Applying the facts gleaned at the evidentiary hearing, the Hearing Officer concluded that:

¹²This rule was set forth in *Utah Admin. Code*, R140-1-20(J) (1990). The Board notes that this rule has since been modified and is essentially cabined in the current CSRB R137-1-21(3)(b).

¹³The Board notes with interest that shortly after the Court’s decision in *Despain*, this Board amended its rules and has essentially adopted the specific language set forth in the *Despain* decision. Specifically, at CSRB R137-1-21(3)(b), the Board adopted the following rule:

When the CSRB hearing officer determines in accordance with the procedures set forth above that the evidentiary/step 5 factual findings support the allegations of the agency or the appointing authority, then the CSRB hearing officer must determine whether the agency’s decision, including any disciplinary sanctions imposed, is excessive, disproportionate or otherwise constitutes an abuse of discretion. In making this latter determination, the CSRB hearing officer shall give deference to the decision of the agency or the appointing authority unless the agency’s penalty is determined to be excessive, disproportionate or constitutes an abuse of discretion in which instance the CSRB hearing officer shall determine the appropriate remedy.

Looking at the totality of the circumstances and the substantial evidence that was presented at the Step 5 hearing, this Hearing Officer finds that Grievant's dismissal was reasonable in light of the charges. The Agency exercised its discretion to decide upon the discipline and the discipline, particularly in light of previous discipline as well as corrective action and other notices and warnings about the same or similar type of inappropriate workplace conduct, is not excessive, disproportionate or an abuse of discretion.

(Step 5 Decision at 34)

At the evidentiary hearing in this matter, the Department provided credible evidence explaining the many factors considered before deciding to terminate Mr. Duran's employment. In his testimony at the Step 5 evidentiary hearing, Exec. Dir. Fletcher stated that he considered several discretionary factors in determining the type of discipline to impose against Mr. Duran.¹⁴ In deciding termination of employment was the appropriate discipline to impose in this case, Exec. Dir. Fletcher testified that he considered the severity of Mr. Duran's conduct and the negative impact his conduct had on the Department's ability to serve its customers. (Tr. II at 365-368) Exec. Dir. Fletcher also testified he felt termination of employment was appropriate in this case because Mr. Duran's conduct was creating a general feeling of "fear, intimidation, uncomfortableness . . . that . . . lead me to believe that this was a fairly high severity for that environment." (*Id.*) Finally, Exec. Dir. Fletcher also considered Mr. Duran's prior knowledge – through training and previous written letters of

¹⁴The Board notes that DHRM rule R477-11-3(1) specifically allows executive directors to consider discretionary factors in determining the type and severity of discipline to impose in disciplinary matters. This rule specifically provides as follows:

- (1) When deciding the specific type and severity of discipline, the agency head or representative may consider the following factors:
 - (a) consistent application of rules and standards;
 - (i) the agency head or representative need only consider those cases decided under the administration of the current agency head. Decisions in cases prior to the administration of the current agency head are not binding upon the current agency head and are not relevant in determining consistent application of rules and standards.
 - (b) prior knowledge of rules and standards;
 - (c) the severity of the infraction;
 - (d) the repeated nature of violations;
 - (e) prior disciplinary/corrective actions;
 - (f) previous oral warnings, written warnings and discussions;
 - (g) the employee's past work record;
 - (h) the effect on agency operations;
 - (i) the potential of the violations for causing damage to persons or property.

warning or concern – to establish that Mr. Duran understood the professional standards with which he was expected to comply and that Mr. Duran's failure to conform his conduct with those professional standards necessitated he be terminated from employment. (*Id.*)

Exercising the discretion granted her under R137-1-21(3)(b), the Hearing Officer concluded that the disciplinary sanction of dismissal was not excessive, disproportionate nor an abuse of discretion in this matter. This determination was made only after careful consideration of the evidence presented at the Step 5 evidentiary hearing and the Hearing Officer's finding that the Department's allegations were supported by substantial evidence.

After thoroughly reviewing the evidentiary record, this Board agrees with the Hearing Officer that the Department's decision to terminate Mr. Duran's employment was not excessive or disproportionate. The record establishes that the Department exercised appropriate discretion in finding Mr. Duran's misconduct so severe and disruptive to agency operations that termination of employment was the appropriate sanction. Based upon the established facts of this case, we simply do not find the Department's penalty to be "clearly excessive." Therefore, this Board sustains the Hearing Officer's decision and finds as a matter of law that the Department's termination of Mr. Duran's employment was not excessive, disproportionate nor an abuse of discretion.

III. APPLICATION OF THE RELEVANT POLICIES AND RULES TO THE ESTABLISHED FACTS OF THIS CASE

On appeal to this Board, Mr. Duran also argues that the Hearing Officer erred by incorrectly applying departmental policies and rules in upholding the Department's decision to terminate his employment. Correctly summarizing the Board's obligation when reviewing the Hearing Officer's application of policies and rules to the established facts, Mr. Duran states: "[T]he CSRB, giving no deference to the Hearing Officer, must decide whether the Hearing Officer has correctly applied the relevant policies, rules and statutes, under a correctness of error standard." (Duran Brief on Appeal at 2)

As set forth above, the Hearing Officer made several factual findings regarding Mr. Duran's interaction with and conduct toward his co-workers. After making these factual determinations, the Hearing Officer found Mr. Duran's conduct violated numerous departmental policies and procedures relating generally to professional and respectful co-worker interaction. Specifically, the Hearing Officer found Mr. Duran's conduct violated DTS Policy Section 1.2.1.2.1.1 that requires employees

treat co-workers "respectfully and professionally." (Step 5 Decision ¶10 at 11) She also found Mr. Duran's conduct to be in violation of DTS Policy Section 1.2.1.2.1.2 which prohibits employees from harassing, stalking, discriminating against, or making unwanted advances or sexually suggestive comments to a co-worker. (*Id.* at ¶11 at 11)

The Hearing Officer also found Mr. Duran's substantiated misconduct violated DTS Policy 1.2.1.2.1.3 which requires employees to use decent, respectful and nonabusive language with co-workers and DTS Policy 1.2.1.2.1.4 which prohibits employees from engaging in conduct that compromises an employee's or the agency's ability to fulfill professional responsibilities. (*Id.* at ¶¶12, 13 at 11) Finally, the Hearing Officer also found Mr. Duran's conduct to be in violation of State rules governing professional standards of conduct and misfeasance. (*Id.* at ¶¶7, 9 at 10-11)

After carefully applying these policies and procedures to the facts established by substantial evidence in this matter, the Board upholds the Hearing Officer's legal conclusions. Review of the evidentiary record establishes that Mr. Duran clearly violated departmental policies and procedures governing professionalism and respectful co-worker interaction and that these violations occurred on repeated occasions.

Examples of Mr. Duran's unprofessional and disrespectful conduct begin, but unfortunately do not end, with his recurring inquiries regarding co-workers private lives including questions about sexual intimacy and statements specifying what he found to be physically attractive. These comments were clearly unprofessional, inappropriate, potentially demeaning, vulgar, sexually suggestive and thus in violation of departmental policy proscribing such conduct.

Moreover, Mr. Duran's touching of one female employee and requests from another for a massage not only violated departmental professional standards, but standards of common decency as well. Mr. Duran further violated departmental policy when he engaged a female co-worker in a discussion about placing a camera in her home and informed another employee he had "cheated on his wife."¹⁵

However, of the many examples establishing Mr. Duran's violation of departmental policies governing professionalism, none is more troubling to this Board than the efforts of Mr. Duran to dissuade a co-worker from placing her concerns about his conduct in writing. Mr. Duran's conduct

¹⁵The Board references these specific incidents as illustrative only. The record is replete with other substantiated acts by Mr. Duran that were in violation of departmental policy.

in this regard can only be described as intimidating, threatening, disrespectful and unprofessional.¹⁶ By attempting to dissuade this employee from memorializing her concerns, Mr. Duran violated departmental policies not only governing professionalism, but those proscribing knowingly offensive, abusive, indecent, demeaning or profane comments. (Ex. A-15)

In light of all the substantiated facts of this case and our own review of the policies at issue in this matter, this Board finds the Hearing office correctly applied relevant policies and rules in upholding the Department's decision. Based upon this review, we further find that the Department's decision to terminate Mr. Duran's employment to be reasonable and rational when applying the established facts in this matter to the relevant policies.

IV. REVIEW OF THE HEARING OFFICER'S DECISION TO ADMIT EVIDENCE REGARDING MR. DURAN'S 2003 CORRECTIVE ACTION

As set forth above, Mr. Duran argues the Hearing Officer erred by allowing evidence of his 2003 corrective action to be received at the evidentiary hearing. (Duran Brief on Appeal at 2, 16) Specifically addressing this issue in his brief, Mr. Duran argues:

The 2003 CAP having been drafted by Agency based on the same offenses alleged in the Written Reprimand . . . and the Career Services Board [sic] having dismissed the Agency's case with prejudice . . . prior records of the action should not be considered by this board, and was error for the hearing officer to have done so.

(*Id.* at 16)

Essentially, Mr. Duran argues that evidence of the 2003 corrective action should have been excluded from the evidentiary hearing because it was based primarily on the same conduct that formed the basis of the rescinded discipline. According to Mr. Duran, because the Department determined to discipline him and thereafter – on its own volition – reversed itself and instead imposed corrective action, the Department should be barred from using the substantive facts supporting the corrective action as part of his employment history.

After carefully considering Mr. Duran's argument, the Board finds the Hearing Officer did not err by receiving evidence regarding Mr. Duran's 2003 corrective action at the evidentiary hearing

¹⁶The Board is not surprised that in response to Mr. Duran's attempt to dissuade her from placing her concerns in writing, this co-worker went outside the work premises and began crying because she was "just so scared and overwhelmed." (Tr. I at 41) However, what is surprising to this Board is that Mr. Duran fails to recognize the offensiveness of his conduct and his general belief that much of his conduct amounted to normal "office banter" or "awkward humor."

or considering this evidence in reaching her final decision. In making this finding, the Board first notes that this Board has consistently allowed evidence of an employee's past employment record to be used and considered at a Step 5 evidentiary hearing. Indeed, our own rules explicitly allow evidence of an employee's past employment record whenever a disciplinary penalty is at issue. Specifically, CSRB rule R137-1-21(9) provides that:

[T]he past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations.

In the instant case, we find the provisions of this rule have been met. Substantial evidence supports the Department's allegation that for an extended period of time beginning in late 2004, Mr. Duran prolonged a documented pattern of unprofessional, disrespectful and offensive behavior toward identified co-workers. Based upon this finding, we find no error in the Hearing Officer's admission or consideration of Mr. Duran's 2003 corrective action as part of his established employment history. While it is true this corrective action was based substantially on the same conduct supporting the Department's withdrawn and rescinded discipline, it was nonetheless relevant to assist the Hearing Officer in either mitigating or sustaining the penalty imposed by the Department. Based on these factors, the board finds that the Hearing Officer's consideration of Mr. Duran's 2003 corrective action does not implicate due process protections.

In reaching this decision, the Board also notes however, that Mr. Duran's 2003 corrective action had little or no bearing on the decision in this matter. Even without evidence of Mr. Duran's 2003 corrective action, the evidentiary record supports the Hearing Officer's decision in this matter. Numerous documents were admitted establishing that Mr. Duran knew of the Department's policies in general and its code of conduct in particular and was given training on all relevant policies. There is no question from review of the evidentiary record that Mr. Duran knew and understood what was expected of him. (Exs. A-14, A-18, A-19, A-21, A-23, A-26) Based upon these factors, we agree with the Hearing Officer that based upon the totality of circumstances, the Department's termination of Mr. Duran's employment was reasonable in light of the charges, and not excessive, disproportionate nor an abuse of discretion. (*See generally* Step 5 Decision at 34)

IV. REVIEW OF THE HEARING OFFICER'S DECISION TO EXCLUDE EVIDENCE OF MR. DURAN'S CRIMINAL HISTORY

On appeal to this Board, the Department argues the Hearing Officer erred in excluding evidence at the Step 5 evidentiary hearing regarding Mr. Duran's prior convictions. Specifically addressing this issue in its appeal to this Board, the Department argued that "Grievant's [Mr. Duran's] conviction for a crime of violence was relevant to a determination of a core issue in this case: whether the Agency acted properly in deciding to terminate Grievant's [Mr. Duran's] employment. (Agency Brief on Cross-Appeal at 5)

After carefully considering the Department's arguments regarding this issue, we find the Hearing Officer correctly excluded evidence concerning Mr. Duran's prior convictions at the Step 5 evidentiary hearing. In reaching this decision, the Board primarily notes that Mr. Duran's prior convictions were simply not relevant in determining whether Mr. Duran violated departmental policies and procedures generally governing respectful and professional conduct. Mr. Duran's employment was terminated for violating specific departmental and State policies regarding workplace conduct and that termination was based on specific employment related conduct. The Board believes that admission of Mr. Duran's criminal history is not only irrelevant, but could have potentially created undue bias in the factfinder.

Finally, while the Board recognizes that based upon our ultimate finding in this matter it is practically unnecessary to address the Department's appeal at this time, it nonetheless exercises its discretion to do so. The Board feels that admission of Mr. Duran's prior criminal history would have been improper. For this reason, we uphold the Hearing Officer's decision excluding such evidence from the record and affirmatively deny the Department's appeal.

DECISION

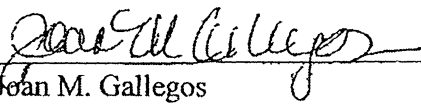
The Board has addressed the issues raised by the parties in their respective appeals. After thoroughly reviewing the evidentiary record and carefully applying the relevant policies and rules at issue in this matter, the Board sustains the Hearing Officer's decision for the reasons set forth herein, and affirmatively denies Mr. Duran's appeal and the Department's appeal to this Board. The Board finds the Hearing Officer's decision to be reasonable and rational and supported by substantial evidence. The Board further finds that the Hearing Officer correctly applied all relevant policies and rules in rendering her decision. Based upon the evidence presented at the Step 5 evidentiary hearing

in this matter, the Board finds the Department's decision to terminate Appellant's employment to be based upon just cause and to advance the good of the public service and upholds the Hearing Officer's decision sustaining Mr. Duran's termination of employment.

DATED this 4th day of March 2009.

DECISION UNANIMOUS

Joan M. Gallegos, Acting Chair
John A. Mathews, Member
Kevin C. Timken, Member


Joan M. Gallegos
Acting Chair

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with *Utah Admin. Code R137-1-22(10)*, and *Utah Code Ann. § 63G-4-302*, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to *Utah Admin. Code R137-1-11*, and *Utah Code Ann. § 63G-4-401 and 403*, Utah Administrative Procedures Act.

CERTIFICATE OF SERVICE

I certify that on this 4th day of March 2009, (1) I emailed the foregoing *Decision and Final Agency Action* (Step 6 Decision) in the matter of *John M. Duran v. Utah Department of Technology Services*, Case No. 10 CSRB 94 to the following:

✓ John M. Duran
4391 West 5375 South
Kearns UT 84118

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

✓ John M. Duran
Appellant
jduran41@comcast.net

✓ Meredith John
Human Resources Specialist
MJOHN@utah.gov

✓ Timothy D. Evans
Assistant Utah Attorney General
Litigation Division
Office of the Attorney General
TEVANS@utah.gov


✓ Ceil Miller
Paralegal
Litigation Division
Office of the Attorney General
CEILMILLER@utah.gov

✓ J. Stephen Fletcher
Executive Director
Department of Technology Services
SFLETCHER@utah.gov

✓ Larene Wyss
Human Resource Manager
LWYSS@utah.gov

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

Charles R. Stewart
Attorney for Appellant
801-579-0606


Claudia L. Jones
Legal Secretary

✓ bcc Barb Alvarado, AP Officer
✓ bcc courtesy copy list
✓ Board

000662

FAX TRANSMISSION

CAREER SERVICE REVIEW BOARD

1120 State Office Building, First Floor
Salt Lake City, Utah 84114-1561
801-538-3048
Fax: 801-538-3139

To: Charles R. Stewart
Attorney at Law
Schatz, Anderson & Uday, LLC

Date: March 4, 2009

Fax #: 9-801-579-0606

Pages: 1, including this cover sheet.

From: Claudia Jones

Subject: *John M. Duran v. Utah Department of Technology Services*
Case No. 10 CSRB 94
Decision and Final Agency Action

If you incur problems with receipt of this transmission, please call. Thank you.

COMMENTS: As there were problems with this transmission, please confirm by return fax that you have received all the pages of this decision.

Thank you.

IMPORTANT PRIVACY NOTICE

This facsimile transmission and/or the documents accompanying it are intended only for the use of the individuals or entities to whom it is addressed. This transmission contains information from the Career Service Review Board which may be privileged, confidential or exempt from disclosure under applicable Federal or State Law. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution, copying or the taking of any action in reliance on the contents of this transmission is strictly prohibited.

If you have received this transmission in error, please notify us immediately at our telephone number listed above.

HP Officejet Pro L7500 All-in-One series

Fax Log for

(801) 538-3139

Mar 04 2009 1:12PM

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
Mar 4	1:11PM	Fax Sent	98015790606	0:27	1	OK

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
Mar 4	1:32PM	Fax Sent	98015790606	1:33	5	OK

(801) 538-3139
Mar 04 2009 1:34PM

Fax Log for

HP Officejet Pro L7500 All-in-One series
99000

FAX TRANSMISSION

CAREER SERVICE REVIEW BOARD

1120 State Office Building, First Floor
Salt Lake City, Utah 84114-1561
801-538-3048
Fax: 801-538-3139

To: Charles R. Stewart
Attorney at Law
Schatz, Anderson & Uday, LLC

Date: March 4, 2009

Fax #: 9-801-579-0606

Pages: 25, including this cover sheet.

From: Claudia Jones

Subject: *John M. Duran v. Utah Department of Technology Services*
Case No. 10 CSRB 94
Decision and
Final Agency Action (Step 6 Decision)

If you incur problems with receipt of this transmission, please call. Thank you.

COMMENTS:

IMPORTANT PRIVACY NOTICE

This facsimile transmission and/or the documents accompanying it are intended only for the use of the individuals or entities to whom it is addressed. This transmission contains information from the Career Service Review Board which may be privileged, confidential or exempt from disclosure under applicable Federal or State Law. If the reader of this transmission is not the intended recipient, you are hereby notified that **any** dissemination, distribution, copying or the taking of any action in reliance on the contents of this transmission is strictly prohibited.

If you have received this transmission in error, please notify us immediately at our telephone number listed above.

HP Officejet Pro L7500 All-in-One series

Fax Log for

(801) 538-3139

Mar 04 2009 12:43PM

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
Mar 4	12:42PM	Fax Sent	98015790606	1:07	4	No document

000666

HP Officejet Pro L7500 All-in-One series

Fax Log for

(801) 538-3139

Mar 04 2009 12:54PM

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
Mar 4	12:52PM	Fax Sent	98015790606	1:36	6	No document

HP Officejet Pro L7500 All-in-One series

Fax Log for

(801) 538-3139

Mar 04 2009 12:58PM

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
Mar 4	12:55PM	Fax Sent	98015790606	3:05	12	OK

ADDENDUM B

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

JOHN M. DURAN,	:	
	:	
Grievant,	:	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW
	:	AND DECISION
v.	:	
	:	
UTAH DEPARTMENT OF	:	
TECHNOLOGY SERVICES,	:	
	:	
Agency.	:	Case No. 29 CSRB/H.O. 433
	:	Hearing Officer: Katherine A. Fox

The Step 5 hearing to determine the above-captioned matter was held April 3-4, 2008, in the State Office Building at the State Capitol Complex in Salt Lake City, Utah, before Katherine A. Fox, Career Service Review Board Hearing Officer (Hearing Officer). John M. Duran (Grievant) was present and represented by David W. Brown, Attorney at Law. The Utah Department of Technology Services (Agency/DTS) was represented by Timothy D. Evans, Assistant Utah Attorney General. Meredith John, Human Resources Specialist, was present as the Management Representative and Ceil Miller assisted Mr. Evans in her capacity as a paralegal for the Office of the Attorney General. A certified court reporter made a verbatim record of the proceedings. Witnesses (four for Grievant including himself and six for the Agency)¹ were placed under oath, and testimony and documentary evidence (one exhibit for Grievant and 18 exhibits for the Agency)² were received into the record. Because Grievant worked for both agencies in a technological capacity, for ease of reference the Department of Workplace Services (DWS) and the Utah Department of Technology (DTS) will be collectively referred to as the Agency at times.

¹Grievant's witnesses included: Melissa Youngman, Jeff DeJuncker and Stephanie Gonzales. Grievant also testified. Witnesses for the Department included: JoAnna Gomberg McNamee, Monica Hulbert, Lindsay Neilson, James (Jim) D. Howard, Jim Matsumura, and J. Stephen Fletcher. At the time of Grievant's dismissal, Ms. McNamee was known as Ms. Gomberg. For clarity, I will refer to Ms. McNamee as Ms. Gomberg for the remainder of this decision.

²Neither party introduced all the exhibits that were originally marked for submission. As a consequence, there sometimes are numbering gaps in the record. Also, only one admitted exhibit was marked as "G" for Grievant, but at least one of the "A" documents (marked for Agency) was submitted on Grievant's behalf.

AUTHORITY

The authority of the Career Service Review Board (CSRB) to hold this Step 5 evidentiary hearing is found at *Utah Code Ann.* § 67-19a-406 and *Utah Admin. Code* R137-1-1 *et seq.* Having heard and reviewed the evidence of record and being otherwise fully advised in the premises, the Hearing Officer (Presiding Officer, *Utah Code Ann.* § 63-46b-2 (1)(h)(i)), now makes and enters the following Findings of Fact, Conclusions of Law and Decision.

ISSUES

Is there a basis in law and in fact to support by substantial evidence the Agency's termination action? If not, what is the appropriate remedy?

PROCEDURAL BACKGROUND

Grievant's attorney filed a *Motion in Limine* on March 17, 2008, to exclude certain evidence from the Step 5 hearing and the Agency filed its *Memorandum in Opposition to Grievant's Motion in Limine* on March 20, 2008. Thereafter in a flurry of activity, Grievant filed a *Reply Memorandum* on March 26, 2008, and the Agency responded with a *Reply Memorandum* on March 28, 2008. Later the same day, Grievant filed an *Objection to Agency's Exhibits and Motion to Strike Agency's Reply Memorandum*. On April 1, 2008, the Agency filed a *Memorandum in Opposition to Grievant's Objection to Agency's Exhibits and Motion to Strike*. The Hearing Officer ruled on the issues in an *Order on Grievant's Motion in Limine* on April 1, 2008.

Grievant's primary argument was that no evidence or testimony pertaining to any disciplinary actions that had previously been withdrawn and dismissed with prejudice should be permitted at the hearing, and that the only proper discipline related evidence should be confined to that occurring in 2006 and thereafter. Grievant also contended that disciplinary evidence prior to 2003 that had not been withdrawn and dismissed should be excluded because it lacked relevance and because Utah Rules of Evidence 401, 402 and 403 allegedly prohibiting admission of such evidence applied. Moreover, because there was substantive overlap between the alleged facts underlying the discipline which had been previously withdrawn and Grievant's subsequent Corrective Action Plan (CAP), counsel argued that due process concerns made admission of CAP evidence improper as well.

The Agency agreed that any discipline occurring in 2003 that had been withdrawn and dismissed should be excluded, but also maintained that evidence of other prior disciplinary actions was relevant insofar as it could properly be considered when weighing the propriety of the final

termination action. In arguing that Grievant's work record, including the 2003 CAP was relevant, the Agency cited *Utah Admin. Code* R477-11-3 (1)(e), (f), and (g) which states: "[w]hen deciding the type and severity of discipline, the agency head ... may consider the following factors: ...prior disciplinary/corrective actions ... previous oral warning, written warning and discussions ...[and] the employee's past work record." The Agency also pointed out that under applicable CSRB provisions, Utah Rules of Evidence did not apply to Step 5 formal adjudications.

The Hearing Officer's ruling addressed these issues. Her order granted Grievant's motion to exclude all disciplinary evidence which previously had been withdrawn and dismissed. The order also denied the motion to exclude Grievant's other (general) work record evidence. Thereafter, during the Step 5 hearing, Grievant reiterated his objections to the CAP being admitted and both attorneys periodically raised similar and related objections to proposed evidence and testimony. Some of these issues will be discussed below.

FINDINGS OF FACT

1. Grievant was a career service employee with the State and qualifies to use these Grievance and Appeal Procedures.

2. Grievant was hired by DWS in 2000 as a Technology aka IT Specialist to assist that department with its technology needs. Grievant had a criminal history and clearly disclosed this information to DWS prior to being hired.

3. Sometime thereafter in 2005, Grievant transitioned from DWS to a newly created agency, DTS.

4. Grievant's office was next to the women's bathroom in the DWS Woods Cross office.

5. Early on in Grievant's employment, James (Jim) Matsumura wrote a Letter of Concern dated September 25, 2000, which Grievant acknowledged receiving on October 18, 2000. The letter addressed Grievant's "language and content of your communication with other employees at DWS." It referenced Grievant discussing his "life experiences . . . that might be construed as intimidating and threatening" and further stated that "comments about criminal behavior ... can be deemed offensive and/or create an atmosphere of intimidation which is inappropriate in the workplace." (Ex. A-7)

6. On January 29, 2003, DWS issued an *Intent to Reprimand* letter. On March 28, 2003, DWS issued a *Letter of Reprimand*. Neither of these documents were considered nor admitted into

evidence on the basis that Grievant had appealed the intended discipline and thereafter, on June 6, 2003, DWS filed a motion for withdrawal (*Motion to Vacate Written Reprimand and Dismissal Before the CSRB*). On June 12, 2003, the CSRB dismissed Grievant's appeal (*Order Dismissing Appeal*) thereby vacating the intended disciplinary action in Case No. 22 CSRB/H.O. 317.³

7. The intended January 29 and March 28, 2003 disciplinary actions were properly removed from Grievant's personnel file pursuant to the provisions in *Utah Code Ann.* § 67-19a-303(4)(c).

8. On April 1, 2003, Grievant acknowledged receiving a *Corrective Action Plan* dated March 25, 2003. The CAP outlined five major areas of concern: (1) customer service; (2) proper use of time, prioritizing work, and completion of work; (3) improvement of team building and team work skills; (4) proper professional behavior in the workplace with regard to creating a positive work environment which means ... avoid[ing] any intimidating conversation, behavior and conduct; and (5) accurate reporting of time and attendance. (Ex. A-8)

9. Section 4 of the CAP stated in pertinent part:

Proper professional behavior in the workplace with regard to creating a positive work environment which means you must avoid intimidating conversation, behavior, and conduct which could lead to violation of Department policies on harassment, hostile workplace issues. Care and concern about your speech and behavior will enhance the professional climate of the work place and instill in others trust and comfort with your work efforts.

- 1) You are not to discuss your criminal history, encounters with law enforcement, and involvement in any criminal behavior with individuals at work or in the presence of other staff, DWS employees, vendors, clients, or business partners. You are not to have any communication with DWS customers or clients who may be in the office for business or services.

³See generally the discussion above under "Procedural Background." This issue was considered prior to the Step 5 hearing. Grievant filed a *Motion in Limine* to exclude, in pertinent part, these particular disciplinary actions among others as well. The *Motion in Limine* also requested that evidence related to the CAP be excluded. The Agency responded and stipulated to exclusion of the January 29 and March 28, 2003 discipline. The Agency did not agree to exclude other past disciplinary evidence nor non-disciplinary evidence such as the CAP. Thereafter, the Hearing Officer issued an *Order on Grievant's Motion in Limine* excluding the January 29 and March 28, 2008 evidence only. Related to the ruling, at the Step 5 hearing, the Hearing Officer also redacted selected portions of other documents admitted into evidence referencing specific incidents which had been the subject of the intended discipline and thereafter withdrawn and dismissed.

- 2) You are to arrange with HR to take and complete by the end of month two of your corrective action period department training on prevention of unlawful harassment.

(Ex. A-8)

10. On May 9, 2003, Jim Matsumura issued a *Letter of Warning* outlining issues relating to Grievant's time and attendance problems. No concerns were expressed over Grievant's inappropriate conduct with female employees. (Ex. A-9)

11. In a memo dated October 15, 2003 to Grievant, Jim Matsumura informed Grievant that he had successfully completed his CAP.

12. On April 1, 2004, Jim Matsumura issued a *Letter of Warning* to Grievant who, while acknowledging receipt of the document, indicated that he denied the allegations. (Ex. A-12) The *Letter of Warning* outlined previous concerns regarding time and attendance problems as well as inappropriate conduct.

13. On February 6, 2006, James Howard drafted and discussed with Grievant a document referred to as a "complaint" or a "verbal complaint" outlining various concerns about Grievant's behavior, including but not limited to "service requests are not addressed timely, sleeping while at work, a lack of approachability and a lack of communication." No concerns were expressed over Grievant's inappropriate conduct with female employees. (Ex. A-2)

14. On February 9, 2006, James Howard issued a *Letter of Warning* which Grievant acknowledged receiving on the same date. The *Letter of Warning* outlines concerns regarding Grievant's conduct two days earlier, i.e., taking long breaks and lunches, napping and poor customer service response. No concerns were expressed over Grievant's inappropriate conduct with female employees. (Ex. A-3)

15. On May 18, 2006, James Howard issued a *Letter of Intent to Discipline* which Grievant acknowledged receiving the following day. The *Letter of Intent to Discipline* primarily addressed the types of issues Grievant was notified about in February, i.e., sleeping on the job. No concerns were expressed over Grievant's inappropriate conduct with female employees. (Ex. A-4)

16. On June 1, 2006, James Howard issued a *Letter of Reprimand* which Grievant acknowledged receiving the following day. The *Letter of Reprimand* was for "displaying

unprofessional behavior as discussed in the letter of intent, including sleeping during work time." No concerns were expressed over Grievant's inappropriate conduct with female employees. (Ex. A-5)

17. On June 7, 2007, Jim Matsumura issued an *Intent to Dismiss* (Intent to Dismiss) letter recommending to the Agency's Executive Director that Grievant be terminated. (Ex. A-13). The letter summarized allegations raised in an investigation indicative of a "pattern of inappropriate behavior" and "unlawful and work place harassment of four [DWS] female employees." There were four sets of employee complaints set forth in the letter, but only three of the complainants testified at the Step 5 hearing.

18. Allegations contained in the complaint by the female employee who did not testify in the Step 5 evidentiary hearing were not considered by the Hearing Officer in reaching this Decision.

19. Agency allegations of misconduct relating to Complainant #1 (JoAnna Gomborg) raised during the investigation and cited in the Intent to Dismiss in pertinent part were: "Asked her about 30 times to have lunch with you in the first eight months of her employment ... although she rejected your advances on each occasion ... continually asked her personal questions such as how many men she had slept with, threatened to set up a spy system at her home . . . resulting in her having to change her residence and told her that you like your women to have some meat on them, with reference to her anatomy."

20. Agency allegations of misconduct relating to Complainant #2 (Monica Hulbert) raised during the investigation and cited in the Intent to Dismiss in pertinent part were: "On or about her fourth day at work ... you asked her for personal information, including her boy friend, her marital status, and the father of her child; pressed her for lunch dates several times and on each occasion she rejected your advances; asked her to have coffee with you several times . . . and she rejected your advances; followed her into the break room and requested that she massage your leg."

21. Agency allegations of misconduct relating to Complainant # 4 (Lindsay Neilson) raised during the investigation and cited in the Intent to Dismiss in pertinent part were: "Ogled her almost every working day in the first month of her employment and continually asked her to drive her car; told her because she was nice, you would take her to lunch and she refused ... you continued to ask her out to lunch; you teased her about her sweater . . . told her that she belonged in the Barbie section ... touched her lower back that was uncovered . . . she was shocked by your behavior and decided to avoid all interactions with you including not asking you for technical assistance... ."

22. The Intent to Dismiss stated that after considering the discretionary factors articulated in DHRM Rule 477-11-3, Grievant was being terminated for: "noncompliance with and for violation of DHRM Rule 477-9-1(1)(a)(ii), DHRM Rule 477-11-(1)(a), DHRM Rule 477-11-(1)(c), DHRM Rule 477-11-(1)(e), Department of Technology Services (DTS) Policy Code of Conduct, Section 1.2.1.2.1.1, Section 1.2.1.2.1.2, Section 1.2.1.3.2.4, for failure to maintain agency professional standards, for failure to advance the good of the public service, and for just cause." (Ex. A-13)

23. On July 10, 2007, J. Stephen Fletcher, DTS Chief Information Officer and Executive Director, issued the *Final Decision - Dismissal for Cause* (Final Decision). (Ex. A-14) The Final Decision stated that Grievant was being dismissed based on the following: "On March 6, 2007, the Department received a complaint from several employees who work for the Department of Workforce Services. The complaint included allegations of unlawful harassment and work place harassment . . . [t]he specific allegations and the Department's recommendation for termination are outlined in the letter of intent issued to you on June 7, 2007. These allegations are violations of work place policies, rules, procedures, or standards." The Final Decision referenced the rules and policies stated in the Intent to Dismiss.

24. Grievant asked JoAnna Gomberg (Ms. Gomberg) to go to lunch, coffee and doughnuts numerous times despite being told "no" every single time. He gave Ms. Gomberg an "up and down stare" on a regular basis and told her such things as "you really dress good" and "I like a woman with a little meat on her." He repeatedly asked her inappropriate and personal questions about her boyfriend and other matters of personal intimacy. He told her that he had been in jail and that he had tough friends and gang friends. He told her about other women in the department with whom he allegedly had sexual relations. Grievant asked Ms. Gomberg if he could install a "SpyCam" at her house and asserted that he was working as a private investigator. After Ms. Gomberg sent Grievant an email expressing her discomfort with his behavior, Grievant informed her that everyone would think they had slept together. He made many other comments to her of an objectionable nature despite being told she was offended.

25. Ms. Gomberg was offended, intimidated and embarrassed by Grievant's relentless and unwanted attentions. She wanted to avoid him and eventually was reluctant to ask him for computer assistance when problems arose.

26. Grievant asked Monica Hulbert (Ms. Hulbert) to go to lunch, coffee and dinner numerous times despite being told "no" every single time. Within the first week of her employment, he began asking her inappropriate and personal questions relating to her marital status and the father of her child. He repeatedly asked her unwelcomed and personal questions about what she did in her spare time, specifically if she went to clubs to drink and "party." He asked to drive her car. He asked Ms. Hulbert to massage his foot and persisted when she declined. He told Ms. Hulbert that he had been in jail, had cheated on his wife, was tracking a spouse who was suspected of being unfaithful, and had been incarcerated. He made many other comments of an offensive nature on a repeated basis to Ms. Hulbert despite being told she found them objectionable.

27. Ms. Hulbert was offended, intimidated and embarrassed by Grievant's relentless and unwanted attentions. She wanted to avoid him and eventually was reluctant to ask him for computer assistance when problems arose.

28. Grievant "ogled" Lindsay Nielson (Ms. Nielson) on her first day of work at DWS and continued to inappropriately "look her up and down." He repeatedly told her that she looked like a model even though she asked him to stop. He repeatedly asked her to lunch even though she told him "no." Grievant continually referred to Ms. Nielson's clothing as "Barbie doll sized" and on one occasion, touched her back to indicate where her "Barbie doll sized" sweater ended. He made many other comments of an offensive nature on a repeated basis to Ms. Nielson despite being told she found them objectionable.

29. Ms. Nielson was offended, intimidated and embarrassed by Grievant's relentless and unwanted attentions. She wanted to avoid him and eventually was reluctant to ask him for computer assistance when problems arose.

30. On one occasion, Grievant asked Jeff DeJuncker (Mr. DeJuncker) and another male co-worker at lunch to discuss the relative attractiveness and physical attributes of female co-workers.

31. Grievant was selective in choosing which female employees he repeatedly subjected to inappropriate comments and conversations. The employees were all young and physically attractive.

32. Grievant took sexual harassment training several times and should have known that his conduct was objectionable and inappropriate in the workplace.

33. Grievant should have realized his conduct was unacceptable because those female employees he targeted repeatedly told him it was.

34. Grievant had been put on written notice at least three times not to reference or discuss his criminal history in the workplace because it could be construed as intimidating and threatening and because it could be deemed offensive and/or create an atmosphere of intimidation which is inappropriate in the workplace. He also had been verbally warned not to reference or discuss his criminal history in the workplace.

35. In accordance with *Utah Code Ann.* § 67-19a-303(4)(c), properly designated disciplinary records were removed from Grievant's personnel file.

CONCLUSIONS OF LAW

1. In CSRB proceedings, a hearing officer may take judicial notice of all CSRB rules, the Department of Human Resource Management (DHRM) rules, Agency rules and policies, and any other relevant statutes, rules and policies without their specific admission in the record of the hearing.

2. The Agency bears the burden of proof that the discipline imposed in this case was for just cause. *Utah Code Ann.* § 67-19a-406(2)(a). The Agency must meet its burden of proof by "substantial evidence." *Utah Code Ann.* § 67-19a-406(2)(c). Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v. State of Utah*, 903 P.2d 429, 430 (Utah 1995) quoting *First National Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); see also *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989). "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Board of Review of Industrial Comm'n*, 842 P.2d 910, 911 (Utah App. 1992).

3. The hearing officer must determine whether the factual findings, as determined by substantial evidence support the allegations made by the Agency, and whether the Agency has correctly applied relevant policies, rules, and statutes. *Utah Admin. Code* R137-1-2. If the factual findings support the allegations, the hearing officer must then determine, giving deference to the Agency's decision, whether the Agency's disciplinary action is excessive, disproportionate or otherwise constitutes an abuse of discretion. *Utah Admin. Code* R137-1-21. In instances where the hearing officer determines the Agency's action is excessive, disproportionate or constitutes an abuse of discretion, the hearing officer shall determine the appropriate remedy.

4. In giving deference to the Agency's decision, the hearing officer is restricted to the standards he or she must apply and therefore cannot substitute his or her own judgment. "The CSRB is restricted to determining whether there is factual support the Department's charges and if so, whether the Departments sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion." *Career Serv. Review Bd. v. Utah Dep't. of Corr.*, 942 P. 2d 933, 942 (Utah 1997). An agency abuses its discretion when it reaches an outcome 'that is clearly against the logic and the effect of such facts as are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.' *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 26 (Utah Ct. App. 1991) (quotations and citations omitted).

5. The initial burden is on the Agency to show that the discipline was not disproportionate to the conduct. *Lunnen v. Dep't. of Transportation*, 886 P.2d 70, 73 (Utah Ct. App. 1994). Thereafter, the burden shifts. Once this burden is met, " [A petitioner] must, at a minimum, carry the burden of showing some meaningful disparity of treatment between [himself] and other similarly situated employees." *Kelly v. Salt Lake City Civil Serv. Comm.*, et al. , 8 P.3d 1048, 1056 (Utah Ct. App. 2000).

6. R477-9-1(1)(a)(ii) states: An employee shall "maintain an acceptable level of performance and conduct on all other verbal and written job expectations." The Agency provided substantial evidence to show that Grievant failed to maintain an acceptable level of conduct on verbal and written job expectations regarding his interactions with co-workers in violation of Agency policy on a repeated basis.

7. R477-11-(1)(a) states that Agency management may discipline any employee for any of the following causes or reasons: "(a) noncompliance with these rules, agency or other applicable policies, including but not limited to . . . agency professional standards, standards of conduct and workplace policies." The Agency provided substantial evidence to show that Grievant failed to comply with applicable rules, policies, professional standards, standards of conduct and workplace policies on a repeated basis.

8. R477-11-(1)(c) states that Agency management may discipline any employee for any of the following causes or reasons: "(c) failure to maintain skills and adequate performance levels." The Agency did not provide substantial evidence to show that Grievant failed to maintain skills or failed to perform adequately.

9. R477-11-(1)(e) states that Agency management may discipline any employee for any of the following causes or reasons: "(e) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service." The Agency provided substantial evidence to show that Grievant's misconduct resulted in misfeasance, malfeasance, nonfeasance and failure to advance the good of the public service.

10. DTS Policy Code of Conduct, Section 1.2.1.2.1.1 states: "Employees shall treat their fellow employees respectfully and professionally." The Agency provided substantial evidence that Grievant failed to treat his fellow employees respectfully and professionally on a repeated basis.

11. DTS Policy Code of Conduct, Section 1.2.1.2.1.2 states: "Employees shall not harass, stalk, discriminate against, or make unwanted advances or sexually suggestive comments to another employee." The Agency provided substantial evidence to show that Grievant harassed, made unwanted advances and made sexually suggestive comments to his co-workers on a repeated basis.

12. DTS Policy Code of Conduct, Section 1.2.1.2.1.3 states: "Employees shall use non-abusive, respectful, and decent language (this prohibits any . . . activity that is demeaning, belittling, or knowingly offensive to other employees.)" The Agency provided substantial evidence to show that Grievant used disrespectful language and made demeaning, belittling and knowingly offensive comments to his co-workers on a repeated basis.

13. DTS Policy Code of Conduct, Section 1.2.1.2.1.4 states: "Employees shall not engage in unprofessional conduct on . . . the job that compromises the ability of the employee or agency to fulfill professional responsibilities." The Agency provided substantial evidence to show that Grievant repeatedly engaged in unprofessional conduct in the workplace that compromised the ability of employees and potentially the Agency to fulfill their professional responsibilities.

14. DHRM Rule R477-11-3 states in pertinent part: "When deciding the specific type and severity of discipline, the agency . . . may consider the following factors: . . . prior disciplinary/corrective actions . . . previous oral warnings, written warnings and discussions . . . [and] the employee's past work record."

15. *Utah Code Ann.* § 67-19a-303 (4) (c) (Employees' rights in grievance and appeals procedures) provides as follows: If any disciplinary action against an employee is rescinded through the grievance procedures established in this chapter, the agency and the Department of Human

Resource Management shall remove the record of the disciplinary action from the employee's agency personnel file and central personnel file.

16. *Utah Admin. Code* R477-10-2 Employee Development (Corrective Action) states in pertinent part:

When an employee's performance does not meet established standards due to failure to maintain skills, incompetence, or inefficiency, and after consulting with DHRM, agency management may take appropriate and documented corrective action in accordance with the following rules:

- (1) The supervisor shall discuss the substandard performance with the employee and determine appropriate corrective action. If a written corrective action plan is developed or a written warning issued, the employee shall sign the plan ... [r]efusal to sign ... shall constitute insubordination subject to discipline.

DISCUSSION

Grievant was hired by DWS in 2000 in a technology capacity to assist that department with its technology needs. Grievant had a criminal background and disclosed this information to DWS prior to being hired. Although the documents themselves were not admitted into evidence, Grievant testified that his annual performance evaluations were largely "satisfactory" or "good" over his course of employment. Other witnesses such as Jim Matsumura and J. Stephen Fletcher did not dispute Grievant's testimony on this issue. It is clear, however, from other documentary evidence admitted into the record that Grievant had recurring workplace issues which DWS and later, DTS repeatedly addressed. Over his course of employment, Grievant worked at several different DWS locations including the Midvale and Woods Cross offices.

On July 1, 2005, the Utah Department of Technology Services (DTS) was created to provide information technology (IT) services to State agencies. These services included but were not limited to "hosting," "desk top management," "application development," ongoing "in-house IT consultation," and other related functions. J. Stephen Fletcher (Exec. Dir. Fletcher) was hired to become the Chief Information Officer and Executive Director of the new organization. Exec. Dir. Fletcher testified that the new agency's primary function was to "partner and consult with State agencies on IT matters" and do it "better" than the old way of housing technology personnel within

the various agencies. Sometime after the new organization was created, Grievant become a DTS employee instead of a DWS employee.⁴

SUMMARY OF GRIEVANT'S ARGUMENTS

Grievant's arguments can be broadly categorized as follows: (1) There was an insufficient factual basis to terminate him and thus, the necessary legal standard of "substantial evidence" has not been met; (2) Some of the alleged facts should not have been relied upon to terminate Grievant, and to the extent they were, his due process rights were violated; (3) Grievant was unaware of certain policies and rules which the Agency alleged he violated and therefore, he should not be held responsible their inadvertent violation; (4) Grievant's conduct did not legally constitute sexual harassment and he should not have been terminated on that basis; and (5) Even if substantial evidence exists in this case, it does warrant termination because that sanction is excessive and disproportionate to the offense. Finally, Grievant argued that since 2006, when he was put on notice of his alleged inappropriate conduct, there has been little, if any, misconduct.

In addressing Grievant's inappropriate workplace conduct, his attorney argued that it was a result of lack of "people skills" rather than sexual harassment or intentional intimidation. Grievant admitted that he "talked too much" and that the Agency should have provided "sensitivity training" when he asked for it. His attorney characterized him as "exercising poor judgment" and being "rough around the edges," but argued that any conflicts were due to personality issues and Grievant "misreading" his co-workers. While some individuals may have found him offensive, Grievant "did not swear or curse, made no threats, and his comments were not sexual in nature." Therefore, Grievant's employment should not have been terminated on the basis of sexual harassment.

Grievant's attorney repeatedly objected to certain documentary evidence and testimony being admitted into the record. Part of the objection was that the evidence was too remote in time to be relevant or not relevant for other reasons. Another basis for objection was that the factual overlap between the basis for the CAP and withdrawn discipline made the former inadmissible. To the extent

⁴Exec. Dir. Fletcher testified that most new DTS hires now are "at will" rather than career service employees to "enhance flexibility and serve the technology needs of State agencies more efficiently." Because Grievant transitioned from DWS to DTS, he was not considered a new "at will" employee and therefore kept his career service status. Though now a DTS employee, Grievant continued to provide IT services for DWS.

that the Hearing Officer relied on such evidence to support a decision, Grievant argued, Grievant's due process rights would be violated.

GRIEVANT'S CORRECTIVE ACTION PLAN (CAP)

It is the role of an employer to bring performance issues to an employee's attention. Not every employment action an agency takes is disciplinary in nature. The purpose of a CAP is not punitive; rather, it is to improve an employee's performance, give the employee an opportunity to resolve the specified issues and bring his or her performance to a successful level. A CAP is clearly within an employer's discretion to issue. See, e.g., R477-10-2 (Employee Development) (Corrective Action). A major difference between a CAP and disciplinary action is that while an employee may not agree with the employer's concerns, a CAP may not be grieved or appealed to the Step 5 evidentiary level of the State's Grievance and Appeal Procedures. An employee's work record, including past disciplinary actions and other actions such as CAP's, however, are relevant factors in an agency's assessment of an appropriate disciplinary action under R477-11-3 (1). This rule provides that an "agency head may consider prior disciplinary/corrective actions . . . and the employee's past work record " in determining the type and severity of discipline. R137-1-21(9) states that "the past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations. " Thus, an employee's work record, including disciplinary actions and other actions such as CAP's, is also relevant in Step 5 evidentiary hearings to assist the hearing officer to determine the reasonableness of an agency's actions.

In this case, there was some factual overlap between the basis for certain disciplinary actions which were withdrawn and dismissed and therefore not properly considered in the Step 5 evidentiary hearing and the CAP. It is the *purpose* for which the overlapping evidence was admitted, however, that controls. This matter is not a criminal proceeding where the doctrine of the "fruit of the poisonous tree" applies. While this evidence cannot be considered in a disciplinary context, as work record evidence, it is permissible in reviewing the "type & severity" of discipline imposed.

THE THREE COMPLAINANTS

A. JoAnna Gomberg MacNamee

Ms. Gomberg began working at DWS in September 2004 as an Employment Counselor with Program Services. Ms. Gomberg was a composed and articulate witness. Ms. Gomberg regularly

interacted with Grievant in order to resolve a number of technology problems. Their initial relationship was more reciprocal at the beginning and she would sometimes engage in short conversations with Grievant, asking him questions as well. As time went on, however, and she became increasingly uncomfortable, Grievant initiated a "vast majority" of their conversations. Shortly after she began working at DWS, Grievant began inviting her to lunch and to go for doughnuts and coffee with him. To discourage these invitations, Ms. Gomberg would ask him, "Aren't you married? Why do you keep asking me out to lunch?" After consistently telling Grievant that she would not go out with him for an extended period of time, she finally told him, "I'm not going to lunch with you today, not ever. Going to lunch could be perceived as a date." After that, Grievant did not ask her to go to lunch as frequently, but the invitations never stopped.

Grievant gave Ms. Gomberg an "up and down eye stare" on a regular basis and made comments such as, "You really dress good." He told Ms. Gomberg that he "liked a girl with a little meat on her." Beginning around the holidays in 2004, Grievant began repeatedly asking Ms. Gomberg questions about her boyfriend. For instance, he asked her about her boyfriend's appearance ("did he resemble Grievant?") and questioned whether she had cheated on her boyfriend. Grievant asked questions of this nature either while Ms. Gomberg was in his office or in the relatively "geographically isolated" area in the computer lab. He made these types of comments and asked inappropriate questions when co-workers were not present. Ms. Gomberg was aware that Grievant made other female employees in the office uncomfortable because she had conversations about it with them.

When Grievant became aware that Ms. Gomberg and her boyfriend were living together, he began asking questions relating to physical intimacy. He asked her "if she had been with a lot of guys" and would make remarks such as, "I'll bet you've had a lot of boyfriends." Grievant asked Ms. Gomberg, "How are things going with your man?" He admitted that this is the "type of tactic" that he used to "move in with women." When Grievant became aware that Ms. Gomberg was residing in the Avenues section of the city where the houses are closely situated, he remarked "how easy it would be for the neighbors to see how close she and her boyfriend were." Ms. Gomberg lost some of her composure while testifying about these conversations, and clearly was humiliated that she had to talk about it.

Grievant also told Ms. Gomberg that he had been in jail. He told her that he had "tough friends and gang friends." He talked to her about safe and unsafe neighborhoods in the area. Pursuant to his request and although she did not want to, Ms. Gomberg gave Grievant a ride to pick up his car from a repair shop. Ms. Gomberg became very uncomfortable during the short trip because of Grievant's comments ("he seemed somewhat incoherent and said he had taken 4-6 Lortab pills for pain that day") and his demeanor ("he was fidgeting and acting strange").

After a short period of just flat refusal to answer his personal questions, Ms. Gomberg told Grievant over and over again that his comments made her uncomfortable and were offensive. She repeatedly asked him not to say things to her that were inappropriate and of a personal nature. Grievant did not ask personal questions or make inappropriate remarks as frequently, but the comments continued on an intermittent basis.

In August 2006, Grievant called Ms. Gomberg into his office and told her to look at herself on a camera or computer screen. He told her that he had a new "spy camera" for private investigator work as he had a job as a private investigator. He explained that he had attached a GPS device to a friend's wife's car to track her whereabouts. The friend was a "client" and the client suspected his wife of cheating on him. He showed Ms. Gomberg a diagram or map on his computer screen. Ms. Gomberg thought that the aerial map may have been a Google Earth image. He then pointed out specific sites where the wife's car had stopped at various times. He asked her if she knew anyone that he could spy on. When she said "no," he asked if he could set up the spy camera at her house. Ms. Gomberg testified that this encounter was particularly upsetting and she left Grievant's office in a very emotional state. Ms. Gomberg was visibly upset at this point in her testimony.

This episode was so disconcerting that Ms. Gomberg discussed it with her father who is an attorney. Her father advised her to put her objections about Grievant's conduct in writing and give it to him. Before Ms. Gomberg wrote Grievant an email, she approached him to tell him that she was going to put her concerns in writing to him. She chose to do so because she knew he would be angry if she did not let him know what she intended to do. When Ms. Gomberg told him, Grievant became very agitated. He told her that she should not send him the email because: (a) a copy would be put into her personnel file and it might prevent her from being rehired somewhere else; (b) he would retaliate and tell others that she had made racist remarks; (c) everyone in the office would think that they had slept together. This encounter left both of them upset.

On August 28, 2006, Ms. Gomberg sent Grievant an email. The email referenced the recent conversation wherein she had approached Grievant 10 days earlier. It objected to various topics Grievant had repeatedly introduced into their conversations. Ms. Gomberg's email stated that at that time, she requested that their discussions "focus on professional issues, and that we eliminate personal jokes" because previous discussions had left her uncomfortable. She explained, "During previous conversations where I felt uncomfortable, I informed you, and you usually respected my request to end the discussion. However, these interactions did not prevent similar conversations of that nature." Ms. Gomberg's email also stated that while the list was not all inclusive, she wanted to avoid any future discussions relating to: "(1) my physical appearance, the way I dress, and my body type; (2) my relationship with my boyfriend; (3) my current or past level of physical intimacy with anyone; and (4) other women whom you might find attractive." (Ex. A-1)

A few days later after the email was sent, Grievant, who had seen Ms. Gomberg, approached her and told her that he had not said that he would put a spy camera in her house. He continued telling her that he would do that only if someone paid him. The relationship between them became even more strained, but Grievant's inappropriate comments slowed dramatically after that. The work relationship became more professional than it had been, but primarily because there was so little interaction between them.

Approximately six weeks after Ms. Gomberg sent the email, Grievant was in her office doing updates on her computer. Grievant brought up the email. He then commented on his previous sexual harassment training. He talked about the women in the department, some married, with whom he had presumably slept. Then Grievant said, "You know they think we slept together." Ms. Gomberg reacted by getting up and leaving her office. At this point in her testimony, Ms. Gomberg grew visibly pale.

Ms. Gomberg said she did not file a grievance against Grievant because she was embarrassed over the difficulties she was having with him and was trying to avoid conflict. At first, she experienced only minor reluctance to ask Grievant to assist her with computer problems. As time went on, Grievant's conduct increasingly affected her willingness to ask him for help. At one point, Ms. Gomberg testified that after a period of time, she did not want to work with Grievant at all.

When questioned about his relationship with Ms. Gomberg, Grievant testified that the "problem" with her started when they "bumped heads and she exploded when she became a lead

[employment counselor]." He denied ever asking her to lunch, but then said he "could" have. Grievant's testimony on this issue was clearly disingenuous. His testimony relating to Ms. Gomberg giving him a ride to pick up his car was not credible either. He said that he never asked her for a ride, but instead, she offered. It is inconceivable to me that she offered to give him a ride where they would be alone given her obvious discomfort with him. He admitted that during the ride, he was "heavily medicated," but that "nothing happened." Grievant's testimony on this latter point was consistent with Ms. Gomberg's.

Grievant denied telling Ms Gomberg, in response to her telling him that she was going to put her concerns about him in writing, that "people will think that we slept together." He also said that he did not recall telling her that if she put her objections in writing he would retaliate by saying she had made racial slurs. His denials are not plausible, particularly in light of the email Grievant sent Mr. Howard (Ex. G-1) and the content of Ms. Gomberg's email to him. Clearly, Grievant was in a state of panic about Ms. Gomberg's email, "Did you read it where she says she doesn't want to pursue it any further ... It says she is not filing a grievance, though. That's good. She says she doesn't want it to be a greavance (sic) etc, also I spoke with her and she didn't want it to go any further may be I can have her call you ... there is no dates or description of what I said and or did. . . ." Contrary to Grievant's assertions, however, Ms. Gomberg's email to him was fairly specific about the types of comments she did not welcome and wanted to avoid in the future.

Grievant testified that he did not tell Ms. Gomberg that he was a private investigator. He said that he was considering whether to engage in this type of outside work and that he had the SpyCam delivered to his office for convenience. His characterization of Ms. Gomberg's response to the SpyCam he had in his office also was not credible. He said that Ms. Gomberg found it "creepy" and then "tripped out" when he merely showed her his house on the camera map. The remainder of their "heated conversation," according to Grievant, consisted of talking about the television show "Cheaters" and his observation that some people use the camera for tracking individuals suspected of cheating on their spouses. He denied telling Ms. Gomberg that he could install it in her house or asking her whether he could install it. He admitted, however, telling Ms. Gomberg that if someone paid him, he would install the camera at her house. He then seemed to think it strange that "she took it personally" and "just walked off" at that point in the conversation. He concluded his testimony on this issue by stating that he never "threatened or intimidated" Ms. Gomberg.

Contrary to Grievant's, I believe Ms. Gomberg's testimony was credible and forthright. Her demeanor and body language were consistent with the difficulty of the subject matter. Moreover, there was no discernable reason for Ms. Gomberg to lie or even exaggerate about her experience.

B. Monica Hulbert

Ms. Hulbert began working at DWS as an employment counselor at the Woods Cross office in November 2006. Grievant asked her on her first day at work about her marital status and whether she had children. During her first week, after he learned that she was not married, he asked her where her child's father was. He began asking her personal questions - "not stuff I discuss with people I don't know" - such as what she did on the weekends, did she drink alcohol, did she "party," did she go to clubs and the like. To most of Grievant's inquiries she had a standard response: "I'm a single mother who attends school and works and I don't have time." Ms. Hulbert found Grievant's persistent question objectionable.

Grievant began inviting her to lunch – offers which she consistently declined. In December 2006 or January 2007, Grievant noticed that she did her homework during lunch and began suggesting that he take her out for coffee or that they go to dinner. When she refused, he asked to bring lunch back to work for her. Ms. Hulbert told Grievant "no" and added that she wasn't interested in going out with him.

At one point, Grievant told her that he was in the process of "tracking" a woman who was cheating on her husband. In January or February 2007, Grievant complained to Ms. Hulbert that his leg or foot hurt. He asked her, "Do you want to massage it?" When she said "no," he persisted with "Oh, come on. " The conversation took place near her cubicle and she began to walk away from him. He followed her into the break room. A co-worker, Renee Johnson, then walked into the break room and Grievant commented to her, "Oh, she's (indicating Ms. Hulbert) too busy to do anything. She works and has a kid and is going to school." Ms. Hulbert rolled her eyes and shook her head at Ms. Johnson.

Ms. Hulbert was particularly offended with Grievant's massage comment. Because she was friends with Ms. Gomberg, she discussed the situation with her. They talked about responses she could make to discourage Grievant from making similar remarks. Grievant continued to make inappropriate comments to Ms. Hulbert. Some of the comments concerned Grievant cheating on his wife and then asking other female employees how they felt about his cheating on his wife. These

"conversations" often occurred outside his office next to the women's bathroom or in Ms. Hulbert's office.

By an instant message he sent to Ms. Hulbert, he asked her if she wanted to download some music from a CD he had. She didn't respond to his instant message because she had a customer in her office at the time. He followed up the instant message, concerned that she hadn't responded and asked her if she was mad at him. Ms. Hulbert did not respond to him at that time. Sometime within the hour, she went to the bathroom. Grievant tried to engage her by asking whether going out to lunch with an old friend who happened to be a woman was wrong. He followed up the unanswered question by telling her that he did not want to tell his wife about his lunch plans because he had cheated on her in the past. These comments made Ms. Hulbert very uncomfortable. Grievant's questions and comments became increasingly more personal in nature. At another point, Grievant told Ms. Hulbert about a tattoo that he had. In conjunction with the tattoo, he told her that he had been in jail.

Another time, in connection with a work issue, Ms. Hulbert was walking out to a co-worker's (Jeff DeJuncker's) car with him to retrieve a picture. Grievant had previously asked her to go to lunch, then coffee, then dinner with him. As usual, Ms. Hulbert said "no." When Grievant saw Mr. DeJuncker and Ms. Hulbert together, he observed in a flippant manner, "Oh, you'll go to his car with *him* but you won't go out with *me*." The comment embarrassed Ms. Hulbert and she felt compelled to explain the situation to Mr. DeJuncker. Beginning in early 2007, whenever possible, Ms. Hulbert began to ask other people in the office such as Jeff DeJuncker for help with her computer problems because she wanted to avoid Grievant.

To counter Ms. Hulbert's testimony, Grievant testified that he "*could* have asked Ms. Hulbert for a foot massage" but that he did not remember. If he asked her, "it was because he was on medication but there was no sexual intent" in his remark. Moreover, as to his other questions of a personal nature, he said that he was just making "small talk" by discussing her marital status, her child and other topics while he worked on her computer.

Like Ms. Gomberg, there was no discernable reasons for Ms. Hulbert to lie or exaggerate about her experiences with Grievant. Like Ms. Gomberg, Ms. Hulbert was very credible. Her testimony had an air of weariness in it when she talked about Grievant's repeated invitations to lunch, coffee and dinner. She became somewhat agitated and uncomfortable when she talked about

Grievant's questions relating to her child's father. It was clear that she did not enjoy describing what occurred between herself and Grievant.

C. Lindsay Nielson

Ms. Nielson began working as a DWS employment counselor in June 2006. Ms. Nielson seemed very self-assured for a young woman and capable of dealing with unpleasant or awkward situations. Similar to Ms. Gombert and Ms. Hulbert, there was no valid reason why she would lie or exaggerate. In fact, Ms. Nielson was as credible as the other two witnesses. On the first day of work, she met Grievant who shortly thereafter proceeded to "look me up and down" and made it obvious that he wanted her to notice that he was ogling her. Within her first week of work, Grievant was asking Ms. Nielson if he could drive her car. He persisted in "asking to drive her car on more or less a daily basis." Within a four to six week period, he began to ask her to go to lunch with him. Ms. Nielson consistently declined his invitations with a short "no." At times, she would respond along the lines of, "Oh, yeah, that sounds like a good idea!" or "I'm sure my husband would really like that!" in a sarcastic manner, indicating that she was married and had no intention of going to lunch or anywhere else with Grievant.

Ms. Nielson testified that she was aware Grievant flirted with other female employees. She also was aware that Grievant made other female employees uncomfortable because she had conversations with them about it. Ms. Nielson said that Grievant was always trying to flirt with her as well, telling her that she resembled a "certain model." She did not consider this to be a compliment and these types of remarks made her very uncomfortable. These types of comments and to a lesser extent, the lunch invitations continued throughout 2007. She would tell him, "Please don't say that" or "That makes me uncomfortable." Grievant would sometimes overtly "ogle" her when she was with a customer, but not when other co-workers were near. She began to avoid walking by his office whenever possible. At one point, he commented to her that he had been incarcerated.

In the fall/winter of 2006, Ms. Nielson wore a short "shrug" type sweater over a long white shirt. Grievant made fun of the sweater. They were alone in the break room (Ms. Nielson was using the microwave) when Grievant poked her in the middle of her back (where the short sweater ended) and commented, "It looks like you got this in the Barbie doll section" and "see, it only comes down to here." Although Grievant had referred to her clothing as "Barbie doll sized" more than once, she was "shocked" that he touched her in this manner. She did not respond because she was embarrassed.

She also was afraid that if she aggressively confronted him, he wouldn't fix her computer or would take longer than necessary in her office to fix it. Nevertheless, she kept her responses to Grievant's continuing inappropriate comments firm and short.

Ms. Nielson explained that if you objected or weren't "receptive" to Grievant's unwelcomed attention, he would later "stall" fixing your computer when a problem arose. For instance, she explained, it might take several requests for assistance before Grievant would respond. If she "instant messaged" him for help, he would ignore the message. If she went to his office to ask for help, she would have to wait several minutes for him to even acknowledge her. Ms. Nielson readily agreed that Grievant's response time was slow whenever everyone in the office was experiencing a similar technology problem. However, she also recognized that Grievant's slow response or non-responsiveness to her occurred after every "awkward conversation " or unpleasant encounter with him. Eventually, Ms. Nielson felt so uncomfortable around Grievant that she would attempt to fix her computer herself or ask others for assistance before resorting to his help.

When questioned about the sweater incident, Grievant observed that Ms. Nielson's shrug type sweater was not "tight fitting" ("just small"), but admitted making the "Barbie doll" comment. Again, he protested, his intent was not sexual in nature. He did not remember poking her in the back, but *if* he did, "the sweater only went to her mid-back." Grievant was adamant: "I never made any advances to her other than friendly." He did not deny any other specific allegation that Ms. Nielson testified about other than in a general way.

Ms. Gomberg, Ms. Hulbert and Ms. Nielson all seemed to share a number of characteristics. They were all new DWS employees who arrived at the workplace after Grievant was hired. They were all relatively young, had pleasant demeanors and were well dressed. They all seemed intelligent and well spoken – and finally, they all were very physically attractive. Of particularly importance, each consistently made it plain over and over again to Grievant that his attentions were not only unwelcome but offensive.

ACTIONS TAKEN BY MANAGEMENT

A. James D. Howard

Mr. Howard is a LAN Administrator at the Agency and has worked 19 years with State government. Mr. Howard was Grievant's immediate supervisor in DTS beginning in 2005. Mr. Howard testified about drafting or helping to draft various documents relating to Grievant's

performance and conduct (Exs. A-2, A-3, A-4, A-5, A-6). Mr. Howard was aware that Grievant had installed a webcam in his office, but did not know that Grievant was "joking about installing this item in some of the homes of the female employees." After becoming aware of the "SpyCam," and Grievant's unwelcomed attentions to female employees, Mr. Howard sent an email (Ex. A-6) to Chuck Butler in the human resources department on August 18, 2006. While he referred his concerns about Grievant's "friendliness" with female employees to human resources for them to handle, he suggested in the email that Grievant attend the next available sexual harassment training. Because Mr. Howard was primarily concerned about conflicts of interest vis-a-vis Grievant's assertions that he was doing outside private investigator work, he talked to Grievant about his alleged surveillance work. Mr. Howard was satisfied that Grievant was not doing this type of work. He told Grievant to take the webcam home however, because there was no legitimate workplace purpose for it. Mr. Howard's role in investigating, addressing and finally terminating Grievant for improper conduct with female employees seems to have been largely peripheral.

B. Jim Matsumura

Mr. Matsumura had been Director of IT Infrastructure at DTS for about two years and prior to that, spent eight years as IT Director with DWS. Mr. Matsumura was Grievant's IT manager at time he hired Grievant and was aware of his criminal past. Mr. Matsumura drafted a *Letter of Concern* dated September 25, 2000 (Ex. A-7). The letter outlined Mr. Matsumura's concerns about Grievant's communication with other DWS employees as follows: "I am referring to references ... and conversations you have had that might be construed as intimidating and threatening. Jokes, or comments about criminal behavior, and discussions of experiences of explicit unlawful conduct can be deemed offensive and/or create an atmosphere of intimidation which is inappropriate in the workplace. I suggest strongly that you keep your past experiences with the criminal justice system very low key ... This memo constitutes, with the discussion with you, Kelly Sharp [Grievant's supervisor at the time] and I had on 25 September 2000, an understanding that any incidents or complaints about the content of your conversations that involve the issues discussed above will not be tolerated... Any evidence that you have violated this understanding will be grounds for termination."

Mr. Matsumura also was responsible for the CAP dated March 25, 2003 (Ex. A-8) which Grievant successfully completed (Ex. A-11). He testified that the CAP addressed performance and

behavioral concerns about Grievant in a number of areas. In pertinent part related to Grievant's conduct, Section 4 of the CAP stated the following:

Proper professional behavior in the workplace with regard to creating a positive work environment which means you must avoid intimidating conversation, behavior, and conduct which could lead to violation of Department policies on harassment, hostile workplace issues. Care and concern about your speech and behavior will enhance the professional climate of the work place and instill in others trust and comfort with your work efforts.

- 1) You are not to discuss your criminal history, encounters with law enforcement, and involvement in any criminal behavior with individuals at work or in the presence of other staff, DWS employees, vendors, clients, or business partners. You are not to have any communication with DWS customers or clients who may be in the office for business or services.

You are to arrange with HR to take and complete by the end of month two of your corrective action period department training on prevention of unlawful harassment.

Grievant satisfactorily completed his CAP with both performance and conduct issues including sexual harassment training.

Section 4 of the Completion of Corrective Action letter to Grievant from Mr. Matsumura dated October 15, 2003, stated: "Proper professional behavior, conduct, and language: This topic we have covered at length. I think we agreed that you have been adequately warned about the need to leave your past legal issues and behavior in the past. You have been instructed not to discuss your past with others in regards your [sic] troubles with the law and criminal behavior. You have admitted, though, you did not intend to harm, some individuals could have taken your comments as threatening, and intimidating . . . You have completed unlawful harassment training on May 23rd. . . ." (Ex. A- 11)

Mr. Matsumura also issued a *Letter of Warning* dated May 9, 2003 (Ex. A-9) addressing Grievant's time and attendance issues.

Mr. Matsumura testified that he decided to recommend Grievant's dismissal based on his concerns about Grievant's improper conduct with female employees. He signed the Intent to Dismiss letter dated June 7, 2007 (Ex. A-13). In testifying about the basis for termination, he said that Grievant's unwelcome attentions and references to his criminal past were recurring issues. It was

evident from the content and tone of his testimony that Mr. Matsumura had lost patience with Grievant.

C. J. Stephen Fletcher

Mr. Fletcher is the Executive Director and CIO of DTS. Prior to coming to Utah to work for DTS in July 2005, he was CIO for the U.S. Department of Education in Washington, D. C. Mr. Fletcher was articulate and well spoken. His testimony reflected his concern for the well being of DTS. Mr. Fletcher explained that prior to the creation of DTS, State agencies could contract with private sector entities for their technology needs or hire IT personnel as agency employees. Mr. Fletcher said that the new State agency was designed to have two functions: (1) partner and consult with other State agencies on their technological needs; and (2) provide necessary IT services. If an agency decides to reject these services for whatever reason, DTS loses that revenue and may then have subsequent problems with the allocation of IT personnel. Because DTS was designed to be a service organization, Mr. Fletcher stressed the importance of appropriate and professional workplace conduct. If DTS services are declined, the Agency fails to meet the purposes for which it was created.

After meeting with Grievant in a Step 4 pre-termination hearing on July 9, 2007, Mr. Fletcher made the final decision to terminate Grievant's employment.⁵ He issued the Final Decision - Dismissal for Cause letter dated July 10, 2007 (Ex. A-14). He testified that Grievant violated DTS Code of Conduct policy 1.2.1.2.1.1 (Relationships with Other Employees -Work Relationships) by failing to "treat . . . other employees respectfully and professionally" when he repeatedly pressed his coworkers for social engagements (going to lunch or doing things after work). He testified that Grievant violated DTS policy 1.2.1.2.1.2 ("Employees shall not harass, stalk, discriminate against, or make unwanted advances or sexually suggestive comments to another employee") by making sexually suggestive comments like "how many times have you cheated on your boyfriend and how

⁵Mr. Fletcher testified that he was troubled by Grievant's inconsistent assertions such as "I didn't show the SpyCam to anyone but Jim Howard" and "My performance has always been good - talk to Jim Matsumura" during the interview. In fact, Mr. Fletcher talked to Mr. Matsumura who "did not have positive feedback on Mr. Duran's workplace performance." Mr. Fletcher also reviewed Grievant's performance evaluations as well. On cross examination, Mr. Fletcher made it clear that Grievant was terminated on the basis of repeated and unacceptable behavior rather than performance problems and that work record evidence of poor performance was an aggravating factor in assessing the discipline rather than a basis for termination.

many men have you slept with?" Grievant also made sexually suggestive comments about his own personal life to female employees. Mr. Fletcher also said that Grievant violated DTS policy by making persistent unwanted advances and harassing other employees in asking them to engage in social activities when those employees consistently refused.

Mr. Fletcher observed that Grievant had violated DTS policy 1.2.1.2.1.3 ("Employees shall use non-abusive, respectful, and decent language. . . .") with one employee in particular when he "ogled" her and made repeated inappropriate comments about her clothing. He continued testifying that this language was offensive and treated the employee like a sexual object. By violating DTS policy 1.2.1.3.2.4 ("Employees shall not engage in unprofessional conduct ... that compromises the ability of the employee or agency to fulfill its professional responsibilities"), Mr. Fletcher was particularly emphatic that Grievant's conduct created an environment where several "DWS employees were so uncomfortable that they went out of their way to avoid him." This made it very difficult for DTS to provide the services that it was supposed to deliver as a customer service organization.

Mr. Fletcher also testified that in addition to violating DTS policies, Grievant had violated DHRM applicable rules cited in the Final Decision. R477-9(1)(a)(ii) (Standards of Conduct) "An employee shall: ... maintain an acceptable level of performance and conduct on all other verbal and written job expectations. ..." Mr. Fletcher testified that Grievant had not complied with this policy due to a lack of professional relationships with DTS customers (i.e. DWS female co-workers) who felt threatened and intimidated by his conduct. In addition, Grievant also violated R477-11-1(1)(a) (noncompliance with these rules, agency or other applicable policies, including but not limited to ... agency professional standards and workplace policies) and R477-11-1(1)(e) (misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service) by his conduct because he made it difficult for DTS to provide an acceptable level of service.

Mr. Fletcher concluded his testimony by stating that he had carefully considered the discretionary factors under R477-11-3 in deciding to terminate Grievant's employment rather than imposing a less severe penalty (such as suspension). He believed Grievant had ample prior notice of his unacceptable behavior including but not limited to talking about his criminal background. He observed that Grievant understood applicable rules and workplace standards. For instance, he said that while Grievant fully understood – or should have understood – that he was not to comment on

his criminal history, he failed to comply with this admonition. Mr. Fletcher considered the repeated nature of Grievant's conduct, his prior disciplinary and corrective actions, as well as previous oral warnings, written warnings and discussions. He thought that Grievant's conduct was indicative of a long-term pattern of unacceptable social interactions and unwanted advances.

Mr. Fletcher testified that he was particularly concerned about the negative effects of Grievant's actions on the Agency's operations and considered the problem severe. If clients avoid using DTS personnel, the Agency was not meeting its mission. The potential of damage to the organization was troublesome to him because, he asserted, DTS could be held liable for Grievant's misconduct. Finally, in addressing how DTS had treated other similarly situated employees, Mr. Fletcher observed that the only other terminations (two of them) had been for performance issues and viewing pornography in the workplace, so that there were no comparable cases.

On cross examination, Mr. Fletcher was resolute that Grievant was terminated on the basis of improper conduct rather than sexual harassment as that term is legally construed. He reiterated that Grievant had been repeatedly instructed not to engage in attempts to engage in social interactions where co-workers had consistently declined his invitations and requests. He said that Grievant's "mannerisms" were offensive and clearly unwelcome. Mr. Fletcher observed that Grievant's behavior, whether it constituted sexual harassment or not, was such that it created a hostile, intimidating environment for his female co-workers.

GRIEVANT'S AWARENESS OF APPLICABLE POLICIES AND RULES

Grievant's attorney argued that it was fundamentally unfair and violated Grievant's due process rights to terminate his employment for violating policies and rules of which he had little or no knowledge. Although Grievant did not testify that he was specifically unaware of the DHRM rules cited in the Intent to Dismiss, he said that while he *may* have opened the email from William Shiflett dated June 30, 2006, he did not remember opening and reading the attachment containing new DTS policies and procedures. (Ex. A-21) The email subject line of Mr. Shiflett's communication read "DTS Policies" and outlined in pertinent part, "Attached is a copy of all internal policies for the Department of Technology Services. I encourage each of you to take this opportunity to review the policies and spend a few minutes discussing them with your supervisor. Please also review . . . which have received some minor changes. " A log accompanying the email in Exhibit A-21 indicates that Grievant both received and opened the email the same day it was sent at

10:23 a.m. If, in fact, Grievant did not take the opportunity to review these policies, it was willful disregard on his part.

A recent CSRB Step 6 Decision has addressed the issue of employee awareness of policies and procedures: *Dian Castagno v. Utah Department of Human Services*, Case No 9 CSRB 8 (2006). In that case, one of the issues was whether the grievant had knowledge of certain agency rules and regulations when she was dismissed for violating the same. The CSRB Board held as follows:

After carefully considering the parties' arguments on appeal . . . the Board agrees that the Hearing Officer erred by requiring the Department prove as a prerequisite to termination . . . that the [employee] actually knew and fully understand her conduct violated Department policy. The Board believes that such a standard would place an inappropriate and unnecessary burden on departments in disciplinary actions based on policy violations.

Indeed, such an evidentiary standard would effectively require departments to prove not only that training was provided and that department policy was readily accessible to employees, but also that the employee actually knew and fully understood how the policy applied in every situation. Employees would be able to avoid justified disciplinary action based on policy violation simply by claiming ignorance or lack of knowledge of the relevant policy...

[The] Board holds that when disciplining an employee for violations of its policies and procedures, it is sufficient when a department notifies its employees through training or disbursement that it has policies employees are expected to comply with and that violation of those policies may result in disciplinary action. To require more than this would place an unmanageable burden on a department . . . and would also create an evidentiary standard that simply could not be proven with any degree of certainty in any evidentiary hearing reviewing a department's disciplinary action.

Castagno at page 13.

Mr. Fletcher testified that his understanding was that all State employees were made aware of DHRM rules and policies at their time of hire and from time to time thereafter. In accordance with Mr. Fletcher's testimony, even assuming that Grievant was unaware of DTS and DHRM rules and policies governing his conduct, he was counseled, trained, and instructed verbally and in writing that certain behaviors for which he was terminated were unacceptable. Grievant clearly should have known better.

GRIEVANT'S DEFENSE

In addition to his own testimony, Grievant called three witnesses to testify on his behalf. The first was Melissa Youngman. Ms. Youngman was a DWS employment counselor at the Woods Cross office for approximately 2-1/2 years. She worked with Grievant. Ms. Youngman was a pleasant looking, well groomed, tall, large woman. She testified that she "saw Grievant on a daily basis and never had an occasion where [her] computer wasn't fixed on a timely basis." She said that Grievant had asked her if he could drive her car, but she took his request as a joke and was not offended or uncomfortable. Ms. Youngman did not indicate if Grievant had asked her to drive her car more than once, however. She said that she had never had a "sexual dialogue" with Grievant and could not recall hearing any sexually oriented conversations he had with others. When asked, "Based on [Grievant's] actions in the workplace, was there a general sense of fear?" she responded "no." However, there was a long hesitation before she answered the question. She then added, "Not so much fear, maybe intimidation, I guess."

Ms. Youngman clarified that Grievant had "strong opinions about religion, abortion, and politics," but said she personally did not engage in these discussions. When discussions related to these topics became heated, Ms. Youngman would leave.

In stark contrast to Ms. Gomberg, Ms. Hulbert and Ms. Nielson, Grievant never asked Ms. Youngman to go to lunch, or dinner, or for coffee with him. She said that there were monthly group lunches and employees, including Grievant, would take turns picking up the food. Not surprisingly, she saw nothing "unprofessional" about these lunches. Ms. Youngman testified that Grievant never said anything to her that made her feel intimidated and had never observed Grievant sexually harassing anyone. She became aware of the webcam in Grievant's office shortly after he installed it. While not feeling intimidated by it, she readily acknowledged that "it was out of the norm" and that she didn't understand why he had the camera set up at work." Ms. Youngman left the Woods Cross office in October 2006 for a position with the Department of Education.

Ms. Youngman's testimony was illustrative of several key factors. First, apparently Grievant was selective about whom he asked to lunch (or coffee or dinner) whether on a repeated basis or not. Second, Grievant also was selective about whom he repeatedly asked to drive their cars. Third, apparently Grievant was available to provide technological assistance on a timely basis to some employees, but not others. Those others seem to be those who found his conduct objectionable.

Finally, just because Grievant did not make comments of a personal nature to Ms. Youngman or ask her inappropriate questions, it does not mean that his treatment of all female co-workers was similar.

Grievant's second witness was Stephanie Gonzales (Ms. Gonzales). Ms. Gonzales was a 27-1/2 year State employee veteran. She worked at the Woods Cross office as an office technician for six or seven years before leaving in June 2007 to work at the Midvale Employment Center. As an office technician, Ms. Gonzales worked at the front counter doing indexing, scanning and the like. She testified that Grievant "worked on her computer more than once." She said that she never had a conversation with him that was sexual in nature or made her fearful, uncomfortable or feel intimidated. Like Ms. Youngman, Ms. Gonzales never witnessed Grievant engaging in improper or offensive conduct ("I never saw him hitting on anyone"). Ms. Gonzales, an assertive woman of some stature who said she was 57-year-old, clearly liked Grievant. She said that she and Grievant sometimes went for coffee together or would pick up coffee for each other. Whenever she was specifically asked about Grievant's alleged misconduct with other co-workers, her testimony became guarded. Otherwise, she made eye contact and exchanged smiles with Grievant during the Step 5 evidentiary hearing.

Ms. Gonzales wryly described Grievant as "friendly and outspoken - he gets along with everybody just like me." Ms. Gonzales proceeded to clarify her remarks; "I didn't think he had personality issues, maybe rough around the edges. People get offended sometimes when I say something but I don't intend it." Of particular interest was the notably long pause after she was asked, "Was there a general atmosphere of being uncomfortable around him?" She finally responded, "I don't know how to answer that. Not that anyone confided in me about." Clearly Ms. Gonzales did not want to say anything negative about her friend. In response to the follow-up inquiry, "Did you ever hear that he was creating problems?" she reluctantly admitted, "I may have sensed that he was."

Grievant clearly enjoyed a positive relationship with Ms. Gonzales, somewhat akin to the relationship that he had with Ms. Youngman. Like Ms. Youngman, Ms. Gonzales also realized that there were problems with Grievant's behavior, but was reluctant to admit it. Finally, just as was the case with Ms. Youngman, the fact that Grievant did not subject Ms. Gonzales to inappropriate conduct does not mean that he treated other female employees the way he treated her.

Grievant's third witness was a male. Jeff DeJuncker, a soft spoken and mild mannered young man who was a DWS Eligibility Specialist, had worked at the Woods Cross office for several years with Grievant. Mr. DeJuncker was nervous and struggled with his testimony. His body language was tight and his hands clenched while he spoke. His responses were tentative and his manner hesitating, indicating that he clearly would have preferred to be elsewhere. He testified Grievant had worked on his computer and on occasion was slow in providing assistance. Mr. DeJuncker attributed the slow response to Grievant being busy with other tasks. When asked if Grievant made him uncomfortable or intimidated him, Mr. DeJuncker said that he may have been uncomfortable on some occasions, but not intimidated. He described himself as "easy going and not easily offended; I know how people are." In describing Grievant, he observed, "His composure – he's kinda overbearing. A personality flaw. Quirky at times and somewhat unconventional. He could be funny." Mr. DeJuncker continued, "Other people may take him differently."

Like Ms. Youngman and Ms. Gonzales, Mr. DeJuncker never saw or heard Grievant sexually harassing anyone or making sexual jokes or innuendoes. He also admitted – albeit reluctantly – that other people in the office had asked him for computer assistance several times because they did not want to ask Grievant. He confirmed Ms. Hulbert's testimony that Grievant had commented to her, "So, you'll go out with him but not with me?" when Grievant saw Mr. DeJuncker and Ms. Hulbert on their way to Mr. DeJuncker's car.

The only time that Mr. DeJuncker (and another male co-worker) went to lunch with Grievant, Grievant made a comment in passing. Mr. DeJuncker said the comment made him a "little uncomfortable," although "it wasn't a big or huge deal." On direct, he said that Grievant had asked him and the other co-worker "who the cutest girl in the office was." Neither Mr. DeJuncker nor the other coworker replied and proceeded to change the subject. On cross examination, Mr. DeJuncker hesitantly reluctantly admitted that in connection with the "cutest girl in the office" comment, Grievant had also said something along the lines of "I like girls with big butts." When pressed, Mr. DeJuncker said that he did not remember the exact language Grievant used, and so he might be "paraphrasing." Finally, Mr. DeJuncker vaguely recalled that Grievant mentioned that he had been in jail and had said something about a fight and martial arts. That conversation took place in the break room during lunch and Mr. DeJuncker did not follow up with questions. He could not remember if other employees were present.

The most obvious difference between Mr. DeJuncker and the three other DWS employees who found Grievant's conduct offensive is, of course, gender. Grievant seems to have confined his objectionable behavior to young, attractive female employees. The fact that Mr. DeJuncker seemed largely unaware of Grievant's inappropriate conduct with these three employees does not mean that it did not occur.

Grievant's testimony relating to his employment history was often disjointed and unclear. For instance, he said he "didn't agree with the CAP and had filed an appeal - or grievance about it." Although performance was not at issue, he testified that a lot of his performance problems (e.g., sleeping on the job, attendance issues, etc.) were due to physical problems and illness. He did not appeal his 2004 and 2006 disciplinary actions on that basis, however, and there was no other evidence in the record other than Grievant's self-serving testimony about his alleged medical impairments. Even though he said that he could not recall asking Ms. Hulbert for a foot massage, he testified that *if* he did, it was because he had some sort of foot injury or condition. Interestingly, Grievant did not ask co-workers who were more favorably disposed to him, like Ms. Youngman, Ms. Gonzales or Mr. DeJuncker, for a massage.

Grievant believed that he was being terminated for sexual harassment based on the content in the Intent to Dismiss letter. He did not think he had sexually harassed anyone by asking them to go to lunch or coffee with him or asking them to drive their cars. Unbelievably, he said that when an employee said "no" to his advances, he did not think that "no" meant "no, not forever" but rather, "no this time but maybe another time." It is difficult to believe that Grievant did not learn that "no means no" in the sexual harassment training sessions he attended. Most of his testimony was self-serving at best. Very little of it, if any, seemed credible. He attributed some of his workplace issues to "personality clashes." It frequently seemed to be a supervisor's or co-worker's fault that they misunderstood his intentions. Grievant's demeanor was insincere when he appeared to be puzzled about his impact on some female employees as he minimized his behavior, "I just talk too much. I thought I had a better rapport with some of them than I apparently had."

Grievant testified that he learned what sexual harassment was by attending sexual harassment training - more than once: "you can't tell nasty jokes or use offensive language (swearing) or make comments about women's sizes related to pregnancy or say they are fat. You can't give a person a compliment like you look nice today." It is nothing short of astounding that while Grievant knew that

workplace comments related to a woman's size are inappropriate, he nevertheless made repeated references to Ms. Nielsen's petite stature in a demeaning and sexualized fashion and told Ms. Gombert that he "liked girls with a little meat on them." He testified that *if* he told Ms. Nielsen that she looked like a model (again, he could not recall making those comments), he meant it as a compliment and perhaps he had just been "too friendly." Grievant said that he had asked to drive other employee's cars simply because he liked cars. Apparently, Grievant only liked some of his co-worker's cars, though, because he did not ask everyone.

Finally, Grievant denied ignoring requests for computer assistance or being slow to respond other than for justified workplace demands stating, "I treated everyone the same." This testimony, however, was closely followed by his comment, "I favored some by offering them access to music but it just wasn't women." He concluded his testimony on direct stating: "I was trying to buy friendship with food and doughnuts. I don't know how to communicate with other people. I asked for sensitivity training. They are taking me wrong. Whatever I need to do to change, I'll do it."

SEXUAL HARASSMENT OR INAPPROPRIATE CONDUCT?

Grievant and his attorney argued that there were insufficient grounds to terminate Grievant's employment for sexual harassment. The Agency countered that Grievant was not terminated for sexual harassment *per se* but rather, for unacceptable and inappropriate conduct. It is unnecessary to determine in this case whether Grievant's actions rose to the level of sexual harassment. Grievant was not charged with sexual harassment and clearly, was not terminated on that basis. However, just as there lies a medium ground between sexual harassment as that term has been defined and developed through statutes, regulations, rules and case law and acceptable workplace banter, there is a medium ground between acceptable workplace banter and offensive, objectionable or inappropriate conduct. The latter is often, but not always, a matter of degree. As Mr. Fletcher testified, asking a co-worker to lunch is not in and of itself harassment. "It's the pressing, the repetition of asking after the co-worker has made it clear that she is not interested." There is ample evidence that Grievant was relentless in his inappropriate pursuit of workplace "friendship." The location of his office next to the women's restroom made it easy for him to engage in unwelcome conversations with female employees on a regular basis.

Despite his protestations that he was just being friendly and talked too much, Grievant's behavior created a hostile, intimidating and offensive working environment, at least for the three

targeted female employees. Whether he intended to create such an environment is irrelevant. Grievant insisted on talking about his criminal history despite the fact that he had been instructed more than once to refrain. He had been warned, verbally and in writing, that he could be subject to discipline, including termination, for continuing to do so. While his intentions may have been different, it is not difficult to see how a co-worker, particularly a young woman new to the workplace, would feel intimidated by such comments. In addition, even if Grievant had not been previously instructed to avoid frequent, personal and inappropriate interactions with coworkers, he should have realized his conduct was offensive and inappropriate because each of the three female employees plainly told him so – over and over and over.

As made evident by his own testimony, Grievant simply did not want accept "no" for an answer. In light of the numerous chances he was given to improve, it appears that Grievant was simply incapable of conforming his behavior to normal, acceptable standards. Within a few weeks of Ms. Gomberg sending Grievant an email telling him that she did not want him to make comments relating to objectionable topics (such as "other women whom you find attractive"), Grievant was in her office, talking about his alleged sexual relations with married, female co-workers, while he worked on her computer.

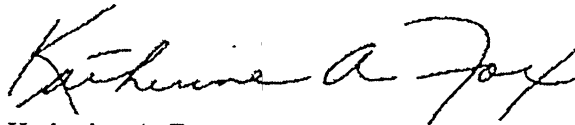
Moreover, his conduct, whether he intended it or not, also had the effect of unreasonably interfering with employees' work performance and impacted and had the potential of impacting the well being of the Agency. Mr. Fletcher's testimony on this issue was clear and convincing. Both Ms. Gomberg and Ms. Nielson testified that after a time, they wanted to avoid Grievant to the point where they sought computer assistance elsewhere (e.g., from Mr. DeJuncker) or attempted to fix problems on their own.

Looking at the totality of the circumstances and the substantial evidence that was presented at the Step 5 hearing, this Hearing Officer finds that Grievant's dismissal was reasonable in light of the charges. The Agency exercised its discretion to decide upon the discipline and the discipline, particularly in light of previous discipline as well as corrective action and other notices and warnings about the same or similar type of inappropriate workplace conduct, is not excessive, disproportionate or an abuse of discretion.

DECISION

I find there is substantial evidence that Grievant violated Agency policies referenced in the charges in the Intent to Dismiss and Final Decision and uphold the Agency's decision to terminate Grievant's employment. For this, and the other foregoing reasons, Grievant's appeal is denied.

DATED this 2nd day of May 2008.



Katherine A. Fox
CSRB Hearing/Presiding Officer

RECONSIDERATION

Any request for reconsideration must be filed in writing with the Career Service Review Board within ten working days upon receipt of this decision. *Utah Administrative Code R137-1-21(12)(b)*.

APPEAL

Any appeal of this formal adjudicative decision must be filed in writing with the Career Service Review Board within ten working days upon receipt of this decision according to *Utah Code §67-19a-407(1)(a)(i)*.

CERTIFICATE OF SERVICE

I certify that on this 2nd day of May 2008, (1) I caused to be mailed, postage prepaid, the foregoing *Findings of Fact, Conclusions of Law and Decision* in the matter of *John M. Duran v. Utah Department of Technology Services*, Case No. 29 CSRB/H.O. 433 to the following:

David W. Brown
Attorney at Law
2880 West 4700 South, Suite F
West Valley City UT 84118-2162

John M. Duran
4391 West 5375 South
Kearns UT 84118

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

Timothy D. Evans
Assistant Utah Attorney General
Litigation Division
Office of the Attorney General
TEVANS@utah.gov

Meredith John
Human Resources Specialist
Utah Dept. of Human Resource
Management
MCALEGORY@utah.gov

J. Stephen Fletcher
Executive Director
Utah Dept. of Technology Services
SFLETCHER@utah.gov

Ceil Miller
Paralegal
Litigation Division
Office of the Attorney General
CEILMILLER@utah.gov

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

David W. Brown
Attorney at Law
801.967.7600

Claudia J. Jones
Claudia J. Jones

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL US

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.Print your name and address on the reverse so that we can return the card to you.Attach this card to the back of the mailpiece, or on the front if space permits.		<p>A. Signature <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>John M. Duran</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
1. Article Addressed to: <i>John M Duran 4391 W 5375 S Kearns UT 84118</i>			
2. Article Number (Transfer from service label) <i>7003 1010 0002 2488 9917</i>			

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-154

Sent To *John M Duran*
Street, Apt. No.,
or PO Box No. *4391 W 5375 S*
City, State, ZIP+4 *Kearns UT 84118*

000289

ADDENDUM C

EXHIBIT A-15

DTS POLICY 2000-0001 **Code of Conduct**

Status: Active Policy
Effective Date: June 8, 2006 through June 30, 2008
Revised Date: N/A
Approved By: J. Stephen Fletcher, CIO
Authority: *Utah Admin. Code R477-10; Utah Admin. Code R-477-11; Utah Admin. Code R477-14; DTS POLICY 2000-0002 Employee Relations; DTS POLICY 2000-0005 Dismissal of Schedule A Employees*

1.1 Purpose

This policy is to promote a working environment that ensures employee ethical and professional conduct and brings out the full potential of each employee.

1.1.1 Background

The success of the Department of Technology Services (DTS) is dependant upon the trust, credibility, and confidence earned from employees, clients, and stakeholders. This trust and credibility is obtained by adhering to commitments, displaying honesty and integrity, and reaching Department goals through honorable conduct.

This Code of Conduct applies to all work-related activities of Department employees. Employees are expected to conform to this Code and relevant professional standards and to comply with all applicable laws, rules, and policies. Conduct that violates approved professional standards or other laws may be unethical and subject to employee discipline, even if it is not specifically listed in this policy. By complying with this policy, employees protect their integrity and reputation as well as that of the State of Utah, the Department, the Department's clients, and their associates.

1.1.2 Scope

This policy applies to all employees of DTS.

1.1.3 Exceptions

None.

DURAN PRD 0098

1.2 Policy

It is the policy of DTS that all employees of the Department adhere to the following standards.

1.2.1 Standards

1.2.1.1 Fostering Good Client Relations

1.2.1.1.1 Relationships with Clients and Vendors

- 1.2.1.1.1.1** Employees shall avoid relationships or commitments that would knowingly be detrimental to the interests of the State.
- 1.2.1.1.1.2** Employees shall not use their positions, or information acquired through their positions, to coerce or otherwise influence clients or vendors to provide favors for themselves or others.

1.2.1.1.2 Managing Records and Information

- 1.2.1.1.2.1** Employees shall respect and protect the confidentiality and privacy of records and information, and shall not use information contained in a private, controlled, or protected record for personal purposes.
- 1.2.1.1.2.2** Employees shall not tape or record any activities except as permitted by law or policy and approved by DTS management.
- 1.2.1.1.2.3** Employees shall not knowingly violate any State or federal laws (including the Government Records Access and Management Act (GRAMA)) that specify when and how clients, other agencies, and the public may inspect or copy the Department's records, including client records.
- 1.2.1.1.2.4** Employees shall not falsify or wrongfully destroy any record, report, or claim, or knowingly enter, or cause to be entered, any false or improper information in Department records.

1.2.1.2 Relationships with Other Employees

1.2.1.2.1 Work Relationships

- 1.2.1.2.1.1** Employees shall treat their fellow employees respectfully and professionally.
- 1.2.1.2.1.2** Employees shall not harass, stalk, discriminate against, or make unwanted advances or sexually suggestive comments to

another employee.

- 1.2.1.2.1.3 Employees shall use non-abusive, respectful, and decent language (this prohibits any profanity or vulgar language or activity that is demeaning, belittling, or knowingly offensive to other employees).
- 1.2.1.2.1.4 Employees shall respect the religious values and cultural differences of their colleagues.
- 1.2.1.2.1.5 Employees shall not be insubordinate or disloyal to appropriate orders of a manager or supervisor. An employee may seek assistance from the HR Director if the employee believes they have received an inappropriate order.
- 1.2.1.2.1.6 Employees shall avoid slanderous or malicious gossip.

1.2.1.2.2 Supervisory Relationships

- 1.2.1.2.2.1 Supervisors or other administrators shall treat subordinates with respect and dignity.
- 1.2.1.2.2.2 Supervisors or other administrators shall create an open and supportive environment where employees feel comfortable raising issues and questions consistent with DTS employee relations policy.
- 1.2.1.2.2.3 Supervisors or other administrators shall encourage and facilitate the professional development of employees in fulfilling their job duties within available resources.
- 1.2.1.2.2.4 Supervisors or other administrators shall not exploit other employees for personal favors or gain.
- 1.2.1.2.2.5 Supervisors or other administrators shall not use their position of authority to harass, stalk, discriminate against, or become involved in sexual relationships with another employee.
- 1.2.1.2.2.6 Supervisors or other administrators shall report instances of questionable or unethical behavior to the DTS HR Office.

1.2.1.3 Personal Work Ethics

1.2.1.3.1 Laws, Rules, and Regulations

Employees will obey applicable civil or criminal laws, regulations, rules, or policy governing their work or professional activities.

DURAN PRD 0100

1.2.1.3.2 Professional Competence

- 1.2.1.3.2.1** Employees shall truthfully represent to their employer, clients, and prospective clients their professional credentials and licensure, education, training, and experience.
- 1.2.1.3.2.2** Employees shall report through appropriate channels any known or suspected treatment toward employees or clients that is unlawful or against policy, such as abuse, discrimination, stalking, or harassment.
- 1.2.1.3.2.3** Employees shall support a work environment that is safe from all forms of violence, including domestic violence perpetrated within the workplace.
- 1.2.1.3.2.4** Employees shall not engage in unprofessional conduct on or off the job that compromises the ability of the employee or agency to fulfill professional responsibilities.
- 1.2.1.3.2.5** Employees shall not cause damage to public property or waste public resources, supplies, or funds, or use public property for personal or private advantage in violation of the Acceptable Use of Information Technology Resources Policy through negligence or willful misconduct.
- 1.2.1.3.2.6** Employees shall not use State resources for personal gain.

1.2.1.3.3 Performance of Duties

- 1.2.1.3.3.1** Employees shall perform their assigned duties during the full schedule for which they are being compensated.
- 1.2.1.3.3.2** Employees shall not engage in any activity that could be considered a dereliction of duty, including, but not limited to, absence without leave, abuse of leave, neglect of standard performance, willful delays or neglect to perform assigned duties and responsibilities, inattention to duty, or leaving their work area unattended or inappropriately attended.
- 1.2.1.3.3.3** Employees shall not participate in, condone, conceal, or be associated with dishonesty, fraud, misrepresentation, or theft.
- 1.2.1.3.3.4** Employees shall not consume or use alcohol or illegal substances, or be under the influence of alcohol or illegal substances, while on compensated work time, while on-call, on State property, or while operating any vehicle while on duty.
- 1.2.1.3.3.5** Employees shall not consume any controlled substance, as

defined in Utah Code § 58-37-2(1), that impairs the employee's ability to safely perform his or her duties during compensated work time, while on-call, on State property or while operating a State vehicle. An employee desiring an exception to this policy shall submit a written request for approval to his or her immediate supervisor with an explanation as to how the duties may be temporarily changed or limited to ensure the employee's safety and the safety of others.

- 1.2.1.3.3.6 Employees shall not unlawfully manufacture, dispense, possess, or distribute any controlled substance or alcohol during working hours, on State property, or while operating any vehicles while on duty.
- 1.2.1.3.3.7 Employees shall not solicit unauthorized contributions nor distribute unauthorized materials during work hours.

1.3 Procedures

1.3.1 Reporting Violations

Employees shall immediately report suspected violations of this Code through their immediate Supervisor. If for any reason that is not possible, the report should be directed to the Office of Human Resources or the Executive Director.

1.3.2 Violations of Code

Depending on the circumstances, the violation, and the degree of the employee's culpability, the Department may take one or more of the following agency actions, consistent with Human Resource Management Rule R477-10 and/or 11:

- Corrective Action
- Disciplinary Action (which may include dismissal)
- Referral of the Matter to Law Enforcement, or the Office of the Attorney General, for Possible Legal Action (including criminal prosecution)
- Termination of Employment

Department administrators shall consult with the Office of Human Resources regarding the most appropriate action to take in response to an employee's violation of this Code. When a violation results in an employee corrective or disciplinary action, the employee's Supervisor shall place documentation of the violation, and the resulting action, in the employee's official personnel file, consistent with Human Resource Management Rules.

If an employee's violation of this Code results in either personal gain to that employee, or personal harm or loss to a client, the State, or another employee, disciplinary action is generally warranted. If the employee's Supervisor decides not

to take disciplinary action, the Supervisor shall document the violation, the gravity of the violation, and the extent of the resulting gain or losses, and the reasons why disciplinary action was not warranted in the particular situation.

Employees who are subject to a law suit resulting from violations of this policy or other acts that are illegal or out of the scope of State employment duties may not be indemnified under the Governmental Immunity Act.

1.4 Related Documents

- Utah Code §58-37-2(1)
-

Document History

Originator:	Larene Wyss, DTS-HR
Next Review:	May 15, 2008
Reviewed Date:	N/A
Reviewed By:	N/A



R477- 9 Employee Conduct

R477-9. Employee Conduct.

9-1. Standards of Conduct.

An employee shall comply with the standards of conduct established in these rules and the policies and rules established by agency management.

- (1) Employees shall apply themselves to and shall fulfill their assigned duties during the full-time for which they are compensated.
 - (a) An employee shall:
 - (i) comply with the standards established in the individual performance plans;
 - (ii) maintain an acceptable level of performance and conduct on all other verbal and written job expectations;
 - (iii) report conditions and circumstances, including controlled substances or alcohol impairment, that may prevent the employee from performing their job effectively and safely;
 - (iv) inform the supervisor of any unclear instructions or procedures.
- (2) An employee shall make prudent and frugal use of state funds, equipment, buildings, and supplies.
- (3) An employee who reports for duty or attempts to perform the duties of the position while under the influence of alcohol or nonprescribed controlled substances shall be subject to corrective action or discipline in accordance with R477-10-2, R477-11 and R477-14.
 - (a) The agency may decline to defend and indemnify an employee found violating this rule, in accordance with Section 63-30-36 (c)(ii) of the Utah Governmental Immunity Act.
- (4) An employee shall not drive a state vehicle, or any other vehicle, on state time while under the influence of alcohol or controlled substances.
 - (a) An employee who violates this rule shall be subject to corrective action or discipline pursuant to R477-10-2, R477-11 and R477-14.
 - (b) The agency may decline to defend or indemnify an employee who violates this rule, according to Section 63-30-36(3)(c)(i) of the Utah Governmental Immunity Act.

9-2. Outside Employment.

- (1) State employment shall be the principal vocation for a full-time employee governed by these rules. An employee may engage in outside employment under the following conditions:
 - (a) Outside employment must not interfere with an employee's efficient performance in his state position.

R477- 11 Discipline

R477-11. Discipline.

11-1. Disciplinary Action.

- (1) Agency management may discipline any employee for any of the following causes or reasons:
 - (a) noncompliance with these rules, agency or other applicable policies, including but not limited to safety policies, agency professional standards, standards of conduct and workplace policies;
 - (b) work performance that is inefficient or incompetent;
 - (c) failure to maintain skills and adequate performance levels;
 - (d) insubordination or disloyalty to the orders of a superior;
 - (e) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service;
 - (f) any incident involving intimidation, physical harm, or threats of physical harm against co-workers, management, or the public;
 - (g) no longer meets the requirements of the position.
- (2) All disciplinary actions of career service employees shall be governed by principles of due process and Title 67, Chapter 19a. The disciplinary process shall include all of the following, except as provided under Subsection 67-19-18(4):
 - (a) The agency representative notifies the employee in writing of the proposed discipline and the underlying reasons supporting the intended action.
 - (b) The employee's reply must be received within five working days in order to have the agency representative consider the reply before discipline is imposed.
 - (c) If an employee waives the right to respond or does not reply within the time frame established by the agency representative or within five days, whichever is longer, discipline may be imposed in accordance with these rules.
- (3) After a career service employee has been informed of the reasons for the proposed discipline and has been given an opportunity to respond and be responded to, the agency representative may discipline that employee, or any career service exempt employee not subject to the same procedural rights, by imposing one or more of the following:
 - (a) written reprimand;
 - (b) suspension without pay up to 30 calendar days per incident requiring discipline;
 - (c) demotion of any employee through one of the following methods:

R477- 11 Discipline

- (c) The employee shall have an opportunity to be heard by the agency head or designee. The hearing before the department head or designee shall be strictly limited to the specific reasons raised in the notice of intent to demote or dismiss.
 - (i) At the hearing the employee may present, either in person, in writing, or with a representative, comments or reasons as to why the proposed disciplinary action should not be taken. The agency head or designee is not required to receive or allow other witnesses on behalf of the employee.
 - (ii) The employee may present documents, affidavits or other written materials at the hearing. However, the employee is not entitled to present or discover documents within the possession or control of the department or agency that are private, protected or controlled under Chapter 63-2, the Governmental Access and Records Management Act.
- (d) Following the hearing, the employee may be dismissed or demoted if the agency head finds adequate cause or reason.
- (e) The employee shall be notified in writing of the agency head's decision. Specific reasons shall be provided if the decision is a demotion or dismissal.
- (3) Agency management may place an employee on paid administrative leave pending the administrative appeal to the agency head.

11-3 Discretionary Factors.

- (1) When deciding the specific type and severity of discipline, the agency head or representative may consider the following factors:
 - (a) consistent application of rules and standards,
 - (b) prior knowledge of rules and standards,
 - (c) the severity of the infraction,
 - (d) the repeated nature of violations;
 - (e) prior disciplinary/corrective actions,
 - (f) previous oral warnings, written warnings and discussions,
 - (g) the employee's past work record,
 - (h) the effect on agency operations,
 - (i) the potential of the violations for causing damage to persons or property.

KEY: discipline of employees, dismissal of employees, grievances, government hearings
Date of Enactment or Last Substantive Amendment 2006
Notice of Continuation June 11, 2002