

2009

John Duran v. Utah Department of Technology Services and Utah Career Service Review Board: Reply Brief

Utah Court of Appeals

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Brief

IN THE UTAH COURT OF APPEALS

JOHN DURAN,

Petitioner/Appellant,

V.

UTAH DEPARTMENT OF
TECHNOLOGY SERVICES,
an agency of the State of Utah, and
UTAH CAREER SERVICE REVIEW
BOARD,

Respondents/Appellees.

[illegible]

Court of Appeals No: 20090252

REPLY BRIEF OF APPELLANT

APPEAL FROM DECISION OF UTAH CAREER SERVICE REVIEW
BOARD, ENTERED JUNE 28, 2006, AND JULY 27, 2006, UPHOLDING
TERMINATION DECISION OF UTAH DEPARTMENT OF TECHNOLOGY
SERVICES

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Oral Argument Requested

FILED
UTAH APPELLATE
JAN 11 2010

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IN THE UTAH COURT OF APPEALS	
JOHN DURAN,	:
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	:
Petitioner/Appellant,	:
	:
v.	:
	:
UTAH DEPARTMENT OF	: Court of Appeals No: 20090252
TECHNOLOGY SERVICES,	:
an agency of the State of Utah, and	:
UTAH CAREER SERVICE REVIEW	:
BOARD,	:
	:
Respondents/Appellees.	:

Petitioner seeks review of the Order issued by the Utah Career Service Review Board ("CSRБ") following formal adjudicative proceedings upholding Mr. Duran's termination from his employment as a Technology Specialist with the Utah Department of Technology Services. Mr. Duran asserts that the action taken by the CSRБ was not supported by substantial evidence when viewed in light of the whole record before this Court. The CSRБ failed to correct misstatements, mischaracterizations, and misapprehension of the facts of the case made by the Step 5 Hearing Officer in this matter. Further, the CSRБ engaged in additional distortions of the record when it constructively adopted the hearing officer's arbitrary and capricious decision.

SUMMARY OF THE ARGUMENT

Respondent answers Mr. Duran's assertions, at least in part, by claiming that the Court of Appeals should affirm the CSRB's factual findings because Mr. Duran failed to marshal the evidence supporting those findings. To bolster this claim, the state relies on a number of cases and arguments that Mr. Duran urges are not helpful and understate and misrepresent the facts and arguments presented and proffered in Mr. Duran's opening brief.

Mr. Duran inserted in the factual section of his Opening Brief those facts determined as relevant by the Step 5 hearing officer in its entirety (her Findings of Facts) along with his factual complaints (labeled as substantial evidence to the contrary) as to why many of those facts were inappropriately determined. Similarly, in his argument he attacked the Step 6 findings and decision based on both the CSRB's reliance on the Step 5 findings as well as its own distortions of the record. See Point III of his Opening Brief.

Respondent's claim that Petitioner has failed to marshal the evidence is itself misdirected and disingenuous and should not be countenanced by this Court. Importantly, the Respondent's Answer fails to address in any substantive manner Mr. Duran's assertions of misrepresentations and mischaracterizations of the record by supplying any record cites which supply and correct those errors asserted by Mr. Duran. Nor does the Respondent cite to any transcript cites which resolves the

inaccuracy of those erroneous findings of facts and urged by Mr. Duran.

Mr. Duran relies on the facts and arguments submitted his opening brief as well as the following brief reply.

ARGUMENT

THE ACTION TAKEN BY THE CAREER SERVICES REVIEW BOARD WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN VIEWED IN LIGHT OF THE WHOLE RECORD BEFORE THE COURT, AND BY ADOPTING AS CORRECT THE STEP 5 HEARING OFFICER'S MISSTATEMENTS, MISCHARACTERIZATION, AND MISAPPREHENSION OF THE FACTS IN THIS CASE, THE UTAH CAREER SERVICES REVIEW BOARD WAS INCORRECT, IN THAT THEY WERE ARBITRARY OR CAPRICIOUS IN UPHOLDING THE HEARING OFFICER'S DECISION.

The State claims Mr. Duran failed to marshal the evidence supporting the factual finding of the CSRB, and for that reason the Court of Appeals should affirm the CSRB's factual findings. This court has articulated the standard it will use in challenging findings of fact as follows: "To successfully challenge findings of fact, an appellant must prove they are clearly erroneous, i.e. that the findings are against the clear weight of the evidence. Deference to the trial court findings can only be extended when the trial court's factual findings adequately reveal the steps by which the ultimate conclusion is reached." State v. Ramirez, 817 P.2d 774 (Utah 1991); State v. Genovesi, 871 P.2d 547 (Utah App. 1993).

The State in its reply has relied on several cases that are factually distinguishable from the case at bar. In West Valley City v. Majestic Inv. Co. the court points out as the fatal flaw:

[T]he City has presented a general catalogue of evidence. What the City has *not* done is to correlate particular items of evidence with the challenged findings and convince us of the court's missteps in application of the evidence to its findings. The findings, then, have not been shown to be clearly erroneous. In the instant appeal, the challenge to the legal conclusions rises and falls with the factual findings sought to be challenged. Accordingly, we leave undisturbed the court's findings and the conclusions based thereon.

West Valley City v. Majestic Inv. Co. 818 P.2d 1311, 1315 (Utah App. 1991).

Mr. Duran's opening brief, pages 4-22, consists of precisely what the court was calling for in its decision, a complete restatement of the findings of fact found by the level 5 hearing officer, as well as specific evidence from the transcript challenging those findings where relevant. Similarly, in Point III of Mr. Duran's brief the findings of facts are recited along with more than a dozen exhibits listed by the CSRB as supporting those findings and then followed by Mr. Duran's argument to successfully challenge those findings with specific citation to the record (this Step 6 CSRB section is titled "Factual Events Critical To the Departments Decision To Terminate Mr. Duran's Employment"). See opening brief pages 40-44. Mr. Duran has provided the findings of both the hearing officer and the CSRB and is the type of marshaling demanded by the court in Majestic Inv., Co.

For the same reason the Respondents' reliance on Whitewar v. Labor Comm'n is also misplaced, the court holding there as the Respondent correctly cites, is that where the party "merely states those facts most favorable to his position and ignores the contrary evidence. This is not adequate" Whitewar v. Labor

Comm'n 973 P.2d 983, 985 (Utah App. 1998). Quite to the contrary, as established above, Mr. Duran acknowledged the facts relied on in the findings of both steps of reviewers and as asserted by the Respondent, and demonstrates them to lack support in or be contradicted by the record.

In Mr. Duran's opening brief a nearly verbatim recitation of all of the Step 5 hearing officer's finding of facts are repeating, totaling 35 in all. Mr. Duran also where relevant in that fact section challenges 15 of the findings, and where possible provides specific citation to the transcript of the hearing. In those instances where there is no support in the record—where Mr. Duran is challenging that the record does not contain testimony or evidence to support the finding—Mr. Duran so states. Importantly, one cannot cite to the record when the point offered is that the record simply does not contain the support for the finding made by either body. See pages 4-22 of Mr. Duran's opening brief.

Additionally, in Point III of Mr. Duran's opening brief the findings of fact by the CSRB are recited along with more than a dozen exhibits listed by the CSRB as supporting those findings and then followed by Mr. Duran's argument to successfully challenge those findings with specific citation to the record. . See Pages 40-44 of Mr. Duran's opening brief. Each of those challenges contains a record cite where the CSRB made a finding and/or supported that finding with an exhibit contrary to the record/exhibit and a claim where the record is devoid of that evidence when baldly concluded without support.

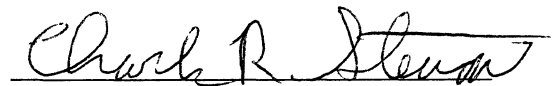
This Court should not permit the Respondent to elevate a burden on the

Petitioner to avoid reaching the merits of Mr. Duran's assertions of error and lack of support for the findings relied on in supporting his termination from employment.

CONCLUSION

Under both the standard for review of the decision to terminate Mr. Duran's employment and the requirement of Mr. Duran to provide the evidence in support of that decision, Mr. Duran meets his requirements as articulated under Ramirez as well as the Respondent's cases discussed above. Review of his claims of error on the merits should follow as Mr. Duran has successfully marshaled the evidence in his opening brief, and thereby subjects the agency's findings to this Court's review.

DATED this 11 day of January, 2010.


Charles R. Stewart
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, hereby certify that I have caused to be mailed/delivered eight true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to the Utah Court of Appeals, 450 South State Street, P.O. Box 140230, Salt Lake City, Utah, 84114-0230, as well as a copy of this same Reply Brief of Appellant to the office of the Utah Attorney General at 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this _____ day of January, 2010.
