

2009

John Duran v. Utah Department of Technology Services, an agency of the State of Utah, and Utah Career Service Review Board : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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JOHN DURAN,

V.

Respondents/Appellees.

Court of Appeals No: 20090252

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IN THE UTAH COURT OF APPEALS

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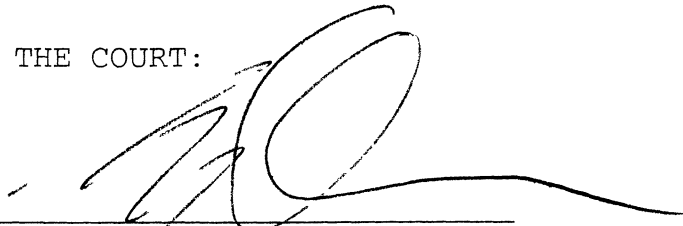
John M. Duran,)	
)	ORDER
Petitioner,)	
)	Case No. 20090252-CA
v.)	
)	
Department of Technology)	
Services, Career Service)	
Review Board, and John and)	
Jane Does 1-20 inclusive,)	
)	
Respondents.)	
)	

This matter is before the court on the Department of Technology Services, Career Service Review Board's motion to strike Exhibits A-10, A-13, and A-14, which are contained in the addendum to John M. Duran's opening brief. The Department asserts that such documents were not part of the underlying record. John M. Duran did not file a response to the motion.

IT IS HEREBY ORDERED that the Department's unopposed motion to strike is granted. The court will disregard Exhibits A-10, A-13, and A-14, which are contained in the addendum to John M. Duran's opening brief. Because the court can appropriately disregard the exhibits in its review of the case, there is no need to file corrected briefs.

DATED this 22nd day of January, 2010.

FOR THE COURT:



Gregory K. Orme, Judge

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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Dated this January 22, 2010.

By 
Judicial Assistant

Case No. 20090252
District Court No. 10 CSRB 94

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.

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Court of Appeals No: 20090252

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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PARTIES TO THIS PROCEEDING

Petitioner-appellant is John Duran. Nominally, respondents-appellees are the Utah Career Service Board and Utah Department of Technology Services.

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INTRODUCTION

Petitioner John Duran seeks review of a decision by the Utah Career Service Review Board entered March 4th, 2009 (Addendum at Attachment).

JURISDICTION

By this Petition, Petitioner seeks review of orders issued by the Utah Career Service Review Board ("CSRB"), an administrative body created under Utah Code Annotated Section 67-19a-201. The CSRB ruling followed a formal adjudicative proceeding, upholding Mr. Durans's termination from his employment as a Technology Specialist with the Utah Department of Technology Services. Jurisdiction obtains pursuant to Utah Code Annotated Section 78A-4-103(2)(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether the Utah Career Services Review Board correctly ruled that Res Judicata was not a bar to considering allegations, warnings, and discipline predicated on the same facts addressed in an earlier Order Dismissing Appeal of The Career Services Review Board, dated June 21, 2003.
2. Whether the action taken Utah Career Services Review Board was supported by substantial evidence when viewed in light of the whole

record before the court.

3. Whether 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 standard of review for Issues 1 is that conclusions of law are reviewed by Utah appellate courts under a correction of error standard granting no deference to legal conclusions. State v. Pena, 869 P.2d 932 (Utah 1994); State v. Wanosik, 2001 UT App 241¶ 31 P.3d 615.

The standard of review for Issue 2 and 3 is the same. "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 Ct. App. 1993).

DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS

1. State Statutory and Administrative Provisions

Utah Code Ann. §63G-4-403(g)
Utah Rules of Administrative Procedure 477-11-3
Utah Rules of Administrative Procedure 477-7-17(3)(a)

2. Federal Case Law

United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1996)

3. State Case Law

Stevenson v. Goodson, 924 P.2d 339 (Utah 1996)
Salt Lake City Citizens Congress v. Mountain States Tel. & Tel. Co.,
846 P.2d 1245 (Utah 1992)

STATEMENT OF THE CASE

On June 7, 2007, Mr. Duran was given a notice of the Department's intent to dismiss him from employment . On July 11, 2007, Mr. Duran filed a timely appeal of the Department's Final Decision terminating his employment. On April 3-4, 2008, a Step 5 evidentiary hearing was conducted. On May 2nd, 2008 the Step 5 hearing officer issued a denial of the appeal. Mr. Duran made a timely appeal to the Career Services Review Board which on December 17, 20008 held an evidentiary hearing on the appeal. On March 4, 2009, the Board issued a decision upholding the lower Step 5 decision regarding

Mr. Duran's termination. On November 9, 2009, Mr. Duran made a timely appeal to this court.

STATEMENT OF FACTS

Finding of Fact #1:

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

Finding of Fact #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.

Finding of Fact #3:

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

Finding of Fact #4:

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

Finding of Fact #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)

Finding of Fact #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.

Finding of Fact #7:

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

Substantial Evidence Contrary to This Finding:

The intended January 29 and March 28, 2003 disciplinary action in fact was **not**

removed from the Grievant's disciplinary file, contrary to the provisions of U.C.A. 67-19a-303(4)(c), as evidenced by the provision of the record of the action provided by the Agency in discovery to the Grievant.

Finding of Fact #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)

Finding of Fact #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.
- 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.

Finding of Fact #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.

Finding of Fact #11:

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

Finding of Fact #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.

Finding of Fact #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.

Finding of Fact #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.

Finding of Fact #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.

Finding of Fact #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.

Finding of Fact #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 workplace 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.

Finding of Fact #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.

Finding of Fact #19:

Agency allegations of misconduct relating to Complainant #1(JoAnna Gomberg) 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."

Substantial Evidence Contrary to This Finding:

The first three State's witnesses are labeled "Complainant #1, #2 & # 4, when in fact none of them filed complaints, and all three repeatedly testified that they did not wish to file complaints. This description of the witnesses is inaccurate and misleading. It was Human Resources that contacted the witnesses. See for example Page 137, lines 2 through 7.

Although Grievant concedes that these allegations were recited in the Intent to

Dismiss, it is important to note that nowhere in Ms. Gomberg's testimony at the Level 5 hearing was there any reference to her to having to change her residence as a result of the Grievant's statement that he could set up a spy camera in her house. Ms. Gomberg never testified that she felt threatened, and the comment was not of the type to be inherently threatening, particularly within the context of merely showing Ms. Gomberg the camera at his desk and asking her first if she knew anyone he could spy on. See Ms. Gomberg's testimony at page 33, line 22 through page 34 line 2. Although the Grievant's awkward attempt at humor may have made Ms. Gomberg uncomfortable, there was nothing inherently threatening about it.

Similarly, the Grievant's questions regarding the number of boy friends Ms. Gomberg had in the past would perhaps not qualify as traditional workplace banter, and may not have been artfully phrased, but again, nowhere is there in the record "continues questions regarding how many men Ms. Gomberg had slept with.

Finding of Fact #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."

Substantial Evidence Contrary to This Finding:

In Ms. Hulbert's testimony at the Level 5 Hearing she stated that the question about children, family, and marital status were "normal talking stuff." See page 112, Lines 8 through 12 & page 141, Lines 9 through 14. It was also Ms. Hulbert's testimony that the Grievant's questions regarding the father of her child made her feel no more than "a little awkward". See page 142, Lines 4 through 10, and "a little personal in that area" see page 112, Lines 16 through 22. These are not "facts" that have any bearing on a charge of harassment. Similarly, simply asking a coworker to share lunch or a coffee break does not support an accusation of harassment.

Finding of Fact #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 ..."

Substantial Evidence Contrary to This Finding:

Ms. Nielson stated both under direct and cross examination that when the Grievant touched her back to indicate where the sweater ended that there was another shirt covering her back. See Page 174, Lines 1 – 10. Grievant concedes Ms. Neilson avoided asking for technical assistance, but at the Level 5 Hearing there was testimony only one incident of any of the Agency's witnesses actually receiving computer assistance from anyone other than the Grievant.

Finding of Fact #22:

The Intent to Dismiss stated that after considering the discretionary factors articulated in Utah Rules of Administrative Procedure 477-11-3, Grievant was being terminated for: "noncompliance with and for violation of Utah Rules of Administrative Procedure 477-9-1(1)(a)(ii), Utah Rules of Administrative Procedure 477-11-1(a), Utah Rules of Administrative Procedure 477-11-1(c), Utah Rules of Administrative Procedure 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."

Finding of Fact #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.

Finding of Fact #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 "Spy Cam" 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.

Substantial Evidence Contrary to This Finding:

Nowhere in Ms. Gomberg's testimony does she state the Grievant stared at her even once, in any way. The list provided of "objectionable" comments is in fact an extant list of the comments, and there were no "other" comments recited in Ms. Gomberg's testimony.

Finding of Fact #25:

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

Substantial Evidence Contrary to This Finding:

Nowhere in Ms. Gomberg's testimony does she state that she was offended by the Grievant conduct. Nowhere in Ms. Gomberg's testimony does she state that she intimidated by the Grievant's conduct. Grievant concedes Ms. Neilson avoided asking for technical assistance, but at the Level 5 Hearing there was testimony of only one incident

of any of the Agency's witnesses actually receiving computer assistance from anyone other than the Grievant.

Finding of Fact #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.

Substantial Evidence Contrary to This Finding:

Nowhere in Ms. Hulbert's testimony is there any mention of her being offended or that his words or conduct was offensive. In addition, the only use of the word "objectionable" during Ms. Hulbert's testimony was by the Agency's attorney in the following context:

Q. Were there other conversations that you found somewhat personal in that way or

any way objectionable?

A. There was a conversation about what I do on the weekends, if I go out to clubs drinking, partying, I guess, that sort of thing on the weekends, not too much more about-- you know, just a general question, I think, about if I had a boyfriend or where my ex-boyfriend was. That was about--in that area about it.

See Page 113, Lines 11-22.

Further, the Grievant never asked Ms. Hulbert to drive her car, and her testimony at the Level 5 Hearing made no reference to such a request.

Finding of Fact #27:

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

Substantial Evidence Contrary to This Finding:

Nowhere in Ms. Hulbert's testimony at the Level 5 hearing did she state that the Grievant's words or actions offended her, intimidated her, or embarrassed her. Grievant concedes that Ms. Hulbert did state that was reluctant to ask the Grievant for computer assistance, but points out the she only on one occasion sought computer assistance from someone other than the Grievant. See Page 123 Line 6 -22.

Finding of Fact #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.

Substantial Evidence Contrary to This Finding:

There was no testimony by Ms. Nielson at the Level Five Hearing that the Grievant continued to inappropriately look her up and down. There was no testimony by Ms. Nielson that the Grievant words or conduct were offensive or objectionable. The list provided of "objectionable" comments is in fact an extant list of the comments, and there were no "other" comments recited in Ms. Nielson's testimony.

Finding of Fact #29:

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

Substantial Evidence Contrary to This Finding:

Nowhere in Ms. Nielson's testimony at the Level 5 hearing did she state that the Grievant words or actions offended her, intimidated her, or embarrassed her.

Finding of Fact #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.

Finding of Fact #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.

Substantial Evidence Contrary to This Finding:

The Hearing Officer would appear to be expressing her own opinion regarding the aesthetic merits of the agency's witnesses versus the attractiveness of the Grievant's witness. The Hearing Officer's subjective analysis is not only distasteful, but also irrelevant because the Grievant was not terminated for sexual harassment, and the Agency was free to pick and chose its witness and could easily have shaped the overall appearance of their witness pool since it was Human Resources that decided which employees to interview, none of them being complainants despite having been labeled as such by the

Hearing Officer.

Finding of Fact #32:

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

Substantial Evidence Contrary to This Finding:

The Grievant was not terminated for sexual harassment, so such training was irrelevant.

Finding of Fact #33:

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

Substantial Evidence Contrary to This Finding:

What the Grievant was told repeatedly was no, when he asked the witnesses out to lunch. It was the Grievant's mistaken belief that the "no" was only for that occasion. It was also Ms. Gomberg's testimony that after she sent the Grievant a letter regarding topics of conversation that made her feel uncomfortable that his comments their conversations slowed dramatically. See Page 53, Lines 14 & 15.

Finding of Fact #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.

Substantial Evidence Contrary to This Finding:

The Grievant's mentioning of having been in prison is irrelevant because he was not terminated for insubordination, and none of the witnesses testified that his passing mention of that part of his past made them feel threatened, intimidated, or uncomfortable in any way.

Finding of Fact #35:

In accordance with Utah Code Annotated Section 67-19a-303(4)(c), properly designated disciplinary records were removed from Grievant personnel file.

Substantial Evidence Contrary to This Finding:

Records regarding discipline, Corrective Action Plans, and other records pursuant to a 2003 attempted termination that was dismissed with prejudice and with specific instructions regarding the necessity of their removal were repeatedly referenced by the Hearing Officer at both the Level Five Hearing and in support of her Findings of Facts and Conclusion Law Decision. They had not been removed from the file as ordered as they were provided to the Grievant during discovery.

SUMMARY OF ARGUMENT

Warnings, reprimands, a Corrective Action Plan, and other documents and testimony that were improperly relied upon by both the Agency and the Hearing Officer were either included in or based on issues addressed in the Order Dismissing Appeal of the Career Services Review. Board Dated June 21st 2003. The Order specifically stated “[T]his grievance is hereby dismissed with prejudice, meaning that it can not be raised again” and that the Depart was expressly ordered to “remove” the record of the disciplinary action from the employee’s agency personnel file and central personnel file. See Addendum C. These same documents and testimony were relied upon by the Career Service Review Board (CSRB) at the Step 6 Decision now being reviewed by this court.

The action taken Utah 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.

ARGUMENT

POINT I

THE UTAH CAREER SERVICE REVIEW BOARD INCORRECTLY RULED THAT RES JUDICATA WAS NOT A BAR TO CONSIDERING ALLEGATIONS, WARNINGS, AND DISCIPLINE PREDICATED ON THE SAME FACTS ADDRESSED IN AN EARLIER ORDER DISMISSING APPEAL OF THE CAREER SERVICES REVIEW BOARD, DATED JUNE 21ST 2003.

The Supreme Court of Utah has clearly articulated the standard for establishing res judicata;

The party seeking to invoke this doctrine must satisfy four requirements:

First, the party must show that the issue challenged in the case at hand is identical to the issue decided in the previous action. Second, the issue in the previous action must have been decided in a final judgment on the merits. Third, the issue in the previous action must have been competently, fully, and fairly litigated. Fourth, the opposing party in the action at hand must have been either a party or privy to the previous action.

Stevensen v. Goodson, 924 P.2d 339, 353 (Utah 1996)

The 2003 Corrective Action Plan (CAP) having been drafted by Agency based on the same offenses alleged in the Written Reprimand and attempted termination, and the allegation that notice and identical actions were involved, and the Career Services Board

having dismissed the Agency's case with prejudice, and with explicit instructions that the Department "remove the record of the disciplinary action from the employee's agency personal file," prior records of the action should not be considered by this board, and was error for the Hearing Officer to have done so. To do otherwise would be to render Career Services Board instruction pointless. As discussed below, Mr. Mastumura, the drafter of the documents in question and the Grievant's supervisor at the time, admits in his own testimony that they were based on the identical facts as the dismissed case.

The Hearing Officer's contention that the records of the action not having been removed, contrary to the Board's explicit instruction, that they can now be used for "type and severity" of discipline is nonsensical. It is these records and disciplinary actions that were anticipated by the afore-mentioned instructions by the Board. Not only does res judicata apply as a matter of law, these actions having been dismissed, but mere removing of the decision and action letters would have no need to be removed precisely because they were dismissed. It would be the underlying reports and accusations that would be prejudicial, as they are now here, and it would these types of documents that the Board would be attempting to insulate the vindicated Grievant from. Instead, these documents affected by the dismissal were improperly relied upon by both the Agency and the Hearing Officer.

Mr. Matsumura acknowledged that his views and opinions were based on events,

actions, warnings, and discipline that were either determined to be unfounded and therefore dismissed with prejudice and ordered removed from the Grievant personnel file by the Career Services Review Board, or by other document and proceedings such as the 2003 CAP which Mr. Matsumura acknowledged under cross-examination was predicated on the identical issues which had been found groundless and dismissed with prejudice. See Page 297-298, Lines 4-13, Page 309-310 Lines 15-4 & Page 320, Lines 18-24.

Our courts have also made it clear that *res judicata* is as applicable in administrative actions as it is courts of law;

Indeed, the doctrine of *res judicata* has been applied to administrative agency decisions in Utah since at least 1950. North Salt Lake v. St. Joseph Water & Irrigation Co., 223 P.2d 577, 582-83 (Utah 1950).^{FN3} In Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 621 (Utah 1983), we held, “[T]he principles of *res judicata* apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy.

Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co. 846 P.2d 1245, 1251 (Utah 1992). Any Agency policy to the contrary regarding admissible evidence to establish notice or prior consistent conduct is subordinate to this rule of law.

Similarly the Step 5 Hearing officer’s and the Step 6 CSRB effort to rely on the

alleged facts and documents in the 2003 Agency action which was dismissed with prejudice for purposes of notice or determining the appropriateness of discipline is unfounded. It is well established that although a judge at sentencing has wide latitude as to which facts and evidence may be considered in order to determine the appropriate punishment, including prior conduct that was not admissible at trial, the judge may not consider evidence relied in a matter, which resulted in an acquittal or was dismissed with prejudice. In the case at bar that is essentially what the Step 5 Hearing officer's and the Step 6 CSRB have done in using the facts underlying the dismissed 2003 action to satisfy notice and prior conduct requirements for Mr. Duran's termination. It was inappropriate both then and now.

POINT II

THE ACTION TAKEN UTAH CAREER SERVICES REVIEW BOARD WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN VIEWED IN LIGHT OF THE WHOLE RECORD BEFORE THE COURT.

When the testimony of the witnesses at the Step 5 review hearing and the associated documents are correctly stated and evaluated it is clear that the findings of the Hearing Officer and the Review Board are not supported.

JoAnne Gomberg

It must again be pointed out as a preliminary matter, that it is undisputed that it was the Human Resources Department that contacted these three witnesses, not the other way

around. Not one of them ever filed a complaint with the Department, despite once again being titled “complainants” by the Hearing Officer.

The Hearing Officer again misstates the witness’ testimony. Nowhere in Ms. Gomberg testimony does she state or imply that the Grievant ever gave her an “up and down eye stare”, let alone on a regular basis. Based on the witness’ testimony the Grievant concedes that his conversations eventually made her uncomfortable.

In August of 2007 Ms. Gomberg sent the Grievant an email articulating topics that she considered upsetting or inappropriate for discussion. This email resulted in a tense and heated exchange between the two, but according to Ms. Gomberg’s testimony as a result of this direct and frank communication, conversations with the Grievant “slowed dramatically.” This is consistent with Ms. Gomberg’s other testimony regarding the Grievant’s frequent invitations for lunch, that when she unambiguously stated that not only did she not want to have lunch with him then, but that she never intended to have lunch with him in the future, that there was a similar change in his behavior. Ms. Gomberg also stated in her testimony that she understood that none of these invitations were “dates” and that conversations and comments she caused her to feel uncomfortable at times was mere joking around. See Page 84, Lines 9 & 19. This testimony helps explain why when filling out the Human Resources forms that she again reiterated she did not wish to file a grievance.

It also bears mentioning that although Ms. Gomberg stated that the conversations just prior to and immediately subsequent to her email made her particularly nervous and embarrassed, as confrontations often due, she nonetheless felt comfortable enough to give the Grievant a ride home alone in her car, that same month, despite her clearly established willingness to tell the Grievant no when she wished.

As was the case with all three Agency witness, upon specific questioning on the subject of the Grievant's criminal past, Ms Gomberg stated that while discussing safe and unsafe neighborhoods in her area the Grievant warned her about potentially unsafe neighborhoods he was aware of based on time he had spent in prison and persons he new as a consequence of that experience. Ms. Gomberg neither offered this information, nor seemed affected by it in any way. She certainly expressed no sense of intimidation or discomfort with what was essentially a one time passing remark.

Ms. Hulbert

Again the Hearing Officer misstates the witness' testimony. Contrary to the Hearing Officer's assertion that questions regarding her family, children, and marital status "objectionable," Ms. Hulbert's testimony was actually "normal talking stuff." See Page 112, Lines 8 though 12 & Page 141, Lines 9 through 14. It was also Ms. Hulbert's testimony Grievant questions regarding the father of her child made her feel no more than "a little awkward". See Page 142, Lines 4 through 10, and "a little personal in that area"

see Page 112, Lines 16 through 22. The word “objectionable” was neither used nor implied.

As was the case with Ms. Gomberg, Grievant concedes that based on Ms. Hulbert’s testimony at the Level 5 hearing his conduct may have at times made her uncomfortable, and the incident involving his teasing her about massaging his foot in front of a coworker “irritated” her. It is also important that this event resulted in Ms. Hulbert only once asking someone other than the Grievant to work on her computer, never caused her to file any complaint or grievance, and the Grievant comments and conversation were described and characterized by her as “joking or flippant”.

As was the case with Ms. Gomberg, Ms. Hulbert made no mention of the Grievant discussing his criminal past until specifically questioned by the Agency’s attorney about the matter. Again, as was the case with Ms. Gomberg the witness stated it only came up once, in passing, during a conversation regarding a tattoo that had some connection with his having at one time been in jail, “ that was about it.” See Page 127, Line 11. Ms Hulbert seemed to have regarded the one time comment as totally unremarkable, and certainly neither threatening nor intimidating in any way.

Ms. Nielson

The Hearing Officer again misstates the witness’ testimony, claiming that Ms. Nielson testified that the Grievant “would sometimes overtly ogle her when she was with

477-9-1

a customer, but not when other co-workers were there.” In fact, her testimony was that on one occasion, when a supervisor was either right there or nearby, “he looked me up and down.” What the Hearing Officer is perhaps confused by was Ms. Nielson’s testimony that in addition to her perception that she had received an “inappropriate look” from the Grievant, it was also her opinion that she received such “inappropriate” glances from customers with such regularity that she had an entire process planned for dealing with these “inappropriate glances” she so regularly received from customers.

In addition it was Ms. Nielson’s testimony that seemingly flattering and innocuous comments regarding her looking a like model or an actress caused her to be “uncomfortable.” On another occasion when the Grievant commented on how short her sweater was, and touched her clothed back to indicate where the sweater ended and the shirt showed under, she was “shocked” to the point of being “speechless”. With out being uncharitable, Ms. Nielson’s testimony could lead one to believe that she may be unusually sensitive to “body issues”, and prone to ascribing motives and actions to conduct others might reasonably seem unremarkable.

It was Ms. Nielson’s testimony that because she was uncomfortable around the Grievant she avoided using him. Contradicting the Hearing Officer’s characterization of her testimony, this did not result in her requesting assistance from anyone else, merely in her attempting to resolve computer problems she could fix herself, by herself.

Like the first two witnesses, Ms. Nielson made no mention of the Grievant discussing his criminal past until pointedly questioned on that issue. As was the case with the first two witnesses, Ms. Nielson was unaffected by the fact that on the one occasion the Grievant “ briefly mentioned it during a conversation, he didn’t go into very much detail.” Again, there was no mention of intimidation or sense of being threatened.

Also like the first two witnesses Ms. Nielson made it clear that her feeling “ uncomfortable” did not cause her to file a complaint or grievance, that it was once again Human Resources that contacted her.

James D. Howard

Mr. Howard was the Grievant immediate supervisor. It was his testimony that although he had passes along to Human Resources a reference to the Grievant’s “friendliness with some of the female employees” his primary concern was the possible conflict of interest of the Grievant’s rumored private investigative work. He testified that was why he did not bother to include any mention of the “friendliness” in his warning to the Grievant. Mr. Howard apparently did not feel the matter warranted anything more than perhaps some training, and did not suggest any type of discipline or investigation.

Jim Matsumura

Mr. Matsumura was the Director of the IT Department and unlike Mr. Howard was very interested in the Grievant conversations with the three witnesses, placing great

emphasis on earlier directions not to discuss the topic of his criminal past and incarceration. Referencing a letter of concern that he had drafted and directed to the Grievant, stating that in 2000 several unnamed co-workers had claimed that such discussions made them feel threatened, Mr. Matsumura exhibited a degree of indignation that was completely out of proportion to the passing mention of his past as recounted by the witnesses. It is important to note as reflected in the transcript that the Grievant was not dismissed for insubordination, and none of the witnesses testified as to the least bit of concern regarding the Grievant's mentioning of the topic. It would appear that it was only Mr. Matsumura that attached any significance to the brief mention of this topic.

Mr. Matsumura further disclosed in testimony that it was this perceived disregard for his instructions that was one of the two reasons, along with "unwanted attentions". It is therefore clear, based on Mr. Matsumura's own testimony, that he gave equal weight in his decision to terminate the Grievant to something that neither the witnesses nor the Grievant's immediate supervisor even took notice of for his decision to terminate the Grievant. It is important to note again that the Grievant was not terminated for insubordination.

It should also be pointed out that besides the aforementioned "letter of concern" in which unnamed co-workers, whose names Mr. Matsumura was unable to recall at the hearing, there is no articulated agency purpose rationally related to a legitimate

government purpose for restricting the Grievant's freedom of speech. It surely requires something more than a "because I say so" for a state agency to forbid an employee from even mentioning his past. The preposterous and arbitrary nature of such a restriction of the Grievant's right to exercise free speech is born out by the Agency's own witnesses who expressed no concern what so ever regarding the few passing mentions of the Grievant past.

It was the Hearing Officer's comment that "It was evident from the comment and tone of his testimony that Mr. Matsumura had lost patience with the Grievant." that colors and informs his testimony. Given that it had been many years since the Grievant had any interaction with Mr. Matsumura, it is evident that this strong visceral reaction to the Grievant was not based primarily on the facts at hand, but rather then on past events. However, based on Mr. Matsumura's own testimony, this basis was improper. Mr. Matsumura acknowledged that his views and opinions were based on events, actions, warnings, and discipline that were either determined to be unfounded and therefore dismissed with prejudice and ordered removed from the Grievant personnel file by the Career Services Review Board, or by other document and proceedings such as the 2003 CAP which Mr. Matsumura acknowledged under cross-examination was predicated on the identical issues which had been found groundless and dismissed with prejudice. See Page 297-298, Lines 4-13, Page 309-310 Lines 15-4 & Page 320, Lines 18-24.

To the Degree to which any weight is given to the facts underlying the 2003 Corrective Action Plan it is important to note that there was internal investigation done by the Office of Internal Audit finding that as a result of the interviews they were unable to corroborate any evidence of Mr. Duran creating a fearful or intimidating work place environment. (exhibit A -13) That finding resulted The Deputy Director decision not follow through in the intent to terminate. (exhibit A-14). Nevertheless Mr. Duran followed through on the Corrective Action Plan put in place as result of the uncorroborated assertions and successfully completed the plan in October of 2003 (exhibit A-15)

Given the fact that the three Agency witnesses and the Grievant immediate supervisor never took any action against the grievant, perhaps their titles should be exchanged, with Mr. Matsumura labeled as the complainant and the three women merely considered witnesses, in recognition of who the moving parties actually are.

Stephen Fletcher

Stephen Fletcher is the Executive Director of the IT Department and reviewed Mr. Matsumura's decision to terminate the Grievant. It must first be clarified that Mr. Fletcher misstated one of the witness' testimony, stating that Grievant "ogled her on a regular basis" and "treated her as a sexual object". See Page 355, Lines 10-17. As has pointed been out previously, the witness testified that the Grievant had on one occasion "looked

her up and down.”

More troubling is Mr. Fletcher’s assertion that there was the “general feeling at that site was one of—of, oh, fear intimidation.” See Page 367, Lines 19-22. Those terms were never used by any of the non-complaining “complainant” witness, nor were there any other evidence offered to support such an extreme statement. Mr. Fletcher’s assertion, although patently and unarguably untrue, certainly helps explain why he determined that termination was the only appropriate remedy.

In later testimony under cross-examination Mr. Fletcher admitted that it was Mr. Matsumura’s statements regarding past behavior, allegations that were the foundation of discipline that was determined to be unsupported by any evidence, and there fore dismissed with prejudice and removed from the personnel file, that inappropriately colored his opinion of the Grievant. This improperly considered information informed his decision to uphold Mr. Matsumura’s termination order. See Page 376, Lines 6-25.

Mr. Fletcher also testified that his decision was based on previous discipline and corrective actions, as well as previous Sexual Harassment Trainings, and that as such constituted notice to the Grievant. As has been clearly established, these records should have been removed from the Grievant file and cannot have been considered as corrective action See for example Pages 377-388, Lines 17 – 14. Also, the Grievant was not terminated for sexual harassment, making the notice provided by the training irrelevant

questionable as support.

Based on the testimony given at the Level 5 Hearing the Grievant concedes that his comments and questions directed to the three witnesses made them uncomfortable, and at times even embarrassed. Though never his intent, that was the result. As the Hearing Office pointed out, it is the effect on the co-workers that is the only relevant issue. However, that then begs the issue, does the level of discomfort described by the witnesses warrant termination, not a letter of concern, no letter of warning or a letter of reprimand, no corrective action plan, not even a suspension to underscore the gravity of the issue. No, instead the Grievant was immediately terminated despite the fact that no co-worker ever filed a complaint.

As the Hearing Officer pointed out in her decision, Co-worker conversation fall along a range, from office banter to out right harassment. It is the Grievant position that so to can levels of feelings of being uncomfortable around a co-worker. At one end of the spectrum might be not wishing to go to lunch with that person, further along that line might be avoiding the person when possible in the office, all the way through to filing a complaint or quitting. In the Grievant case it would appear that out of approximately thirty employees, Human Resources was able to produce only three at the Level 5 Hearing that would seem to fall somewhere in the middle of the uncomfortable range. Of course the Grievant was able to produce the same number of witnesses from the department who

were not only comfortable around the Grievant, but enjoyed his company. The fact that the Hearing Officer found these witnesses to be less physically attractive the Agency's witnesses makes them no less credible, nor is the Grievant willing to cede their relative aesthetic merit.

The only warnings the Grievant received that are properly before the Hearing Board are a letter from Mr. Matsumura incorporating the prior charges that had been dismissed, and a statement that there was a concern regarding possible inappropriate conversation, though with no detail regarding the topics dated April 1, 2004. See Exhibit 12, and a 2006 action regarding not bringing the video camera back to the office, a request the Grievant complied with. Although the grievant received several other communications from his supervisors, none mentioned any continuation of the conduct referenced in the letter from three years before and the majority stated he was doing well as established, leading the Grievant to reasonably assume that his conduct was proper.

As the Grievant's witnesses explained, the Grievant is a rather blunt and direct character, an attribute that some co-workers enjoyed, and some clearly did not. The Grievant acknowledges that he came from a rough background, had a troubled early life, and spent time in prison paying his debt for that conduct. In the following years the Grievant has made great strides in life, educating himself and becoming an IT professional. Unfortunately one does not escape completely unscathed from a past like

this, and the Grievant has a manner of expression that can make some people uncomfortable. It is important to remember though that for example when Ms. Gomberg was clear and direct regarding never wishing to have lunch with the Grievant, and delineating what she felt to be inappropriate topics, that Grievant largely respected these unambiguous requests. Although the Grievant appears to have difficulty on picking up on the hints most people use for such communication, he did comply when it was made clear.

There is no reason to believe, given the Grievant response to Ms. Gomberg's direction regarding subjects and comments that made her comfortable, that a clear warning or Corrective Action Plan from his supervisors would be given even greater attention and response that he had already demonstrated when so directed by a co-worker.

Utah Rule of Administrative Procedure 477-11-3 articulates the nine factors that may be considered when deciding the type and severity of discipline that is appropriate in an action; consistent application of rules and standards, prior knowledge of rules and standards, the severity of the infraction, the repeated nature of violations, prior disciplinary actions, previous oral/written warnings & discussion, the employees' past work record, the effect on agency operations, the potential of the violations for causing damage to persons or property.

In this case the Grievant was unaware and had no knowledge that his frequent asking of co-workers to lunch or coffee could be deemed a violation of any rule or

standard. Similarly, he had no prior knowledge that what he considered banter or small talk could be considered a violation of any rule or standard in that he never used profanity or sought any sexual contact.

Although there were three witnesses that testified that the Grievant's conduct made them uncomfortable around him, none of sought to file a complaint. This complaint sans complainant(s) indicates that this might be a situation that needed to be addressed, but not a severe infraction warranting discipline of this severity.

Although the Grievant had been subjected prior discipline/corrective actions, the facts were not identical to the case here, and the prior action was dismissed with prejudice, expressly ordered not to raise again. The only admissible warning was a letter the Grievant received more than three years prior regarding some inappropriate conversation, but with no more detail than that one statement. In other performance reviews and supervisor communication there was no mention of the problem continuing, leaving the Grievant under the reasonable belief that his conduct was proper.

Although Mr. Fletcher provided great detail regarding his "perceived fears" for future impact based on Grievant's actions, they are at a minimum highly speculative, if not hysterical. Based on the testimony of the Agency's own witnesses, the only actual effects of the Grievant's actions was that they were less likely to seek his assistance, and in a single instance one witnesses testified to once having a co-worker assist her.

Although this is certainly not the preferred situation, it is one of little actual effect on the agency, and one that would have been particularly amenable to a corrective action plan.

In short, to terminate an employee of more than seven years with minimal notice, and no warning or opportunity to change his behavior, based not on the filing of complaints by co-workers but on the identifying by management of three individuals that felt uncomfortable around the Grievant, and were therefore less likely to request his assistance, is not supported by the substantial weight of the admissible evidence, and is therefore disproportionate and excessive.

POINT III

BY MISSTATING, MISCHARACTERIZING, AND MISAPPREHENDING THE FACTS IN THIS CASE, AS WELL AS 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 errors made by the Step 5 Hearing Officer in both the description of testimony as well as of the evidence are well documented above. Therefore to the degree to which CSRB relied on the Step 5 findings and representations, the Step 6 Decision and Action is similarly flawed. However the CSRB in the hearing process engaged in additional mischaracterization as well. In the CSRB Decision section labeled Factual Events Critical To The Department's Decision To Terminate Mr. Duran's Employment, in the first

paragraph the CSRB makes the following finding;

Documents were also received into evidence supporting the Departments allegations that beginning in late 2004, Mr. Duran extended a documented pattern of unprofessional, disrespectful, and offensive behaviors **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**. (emphasis added)

(Page 11 of the CSRB Step 6 Decision)

The CSRB then listed exhibits A-2, A-3, A4, A-5, A-7, A-9, A12 as the documentary evidence (id). However a review of these exhibits find this a gross mischaracterization of the evidence. Exhibit A-2 memorializes a series of problems with Mr. Duran response time, sleeping in his office, cleaning his office, and documenting breaks. The only mention of interaction with coworkers is under Approachability "John will work to encourage office employees to report their computer issues, he will be as hospitable as possible." (exhibit A-2) This is conduct in no way consistent with CSRB's characterization, and would possibly a constructive suggestion for the vast majority workplace IT computer support personnel.

Exhibit A-3 is nothing more than a letter of warning to Mr. Duran of the above cited memo from the month prior noting that he had taken a two hour lunch break and during that morning was seen with his feet up on his deck apparently sleeping. This then would be of no relevance to any interaction with coworkers. (exhibit A-3)

Exhibit A-4 is a letter of intent to discipline based on Mr. Duran again having been observed with his feet up on his desk and apparently asleep some three months later. Again, this exhibit in no way supports the CSRB's assertion regarding Mr. Duran's allegedly unprofessional, disrespectful, and offensive behaviors toward co-workers. (exhibit A-4)

Exhibit A- 5 is memo regarding the same incident cited above notifying Mr. Duran of Mr. Howard's intent to take action by way of Letter of Reprimand. The reason stated is Mr. Duran's failure to respond to the Letter of Intent cited above. Still another exhibit having no relevancy to the conducted alleged in Decision by CSRB or argued by the Agency. (exhibit A-5)

Exhibit A-7 is memo from September 25, 2000, in which Jim Matsumura warns Mr. Duran any mention of past experiences in the criminal justice system be kept "low key." This warning is made in the context of being aware of such conversations and Mr. Matsumura opinion that such discussion "might be construed as intimidating and threatening." It is important to note that there was no allegation that there was any complaint having been made suggesting that any coworker had felt intimidated or threatened, or that Mr. Matsumura himself believed such discussion were threatening or intimidating. Only the mere possibility that such an inference could be draw. (exhibitA-7). It is important to note that although all three female witness were thoroughly questioned

on this matter as discussed above, not one of them made any mention of having felt intimidated or threatened by the brief mention of Mr. Duran's experience with the criminal justice system.

Exhibit A-9 is the Letter of Warning discussed in Exhibits A-4 and A-5. The letter memorializes Mr. Duran's attendance over a period of six weeks. There is not a single mention of any co-worker interaction. Once again, this exhibit in no way supports the assertion of fact by the CSRB regarding Mr. Duran's interaction with coworkers, and is a gross mischaracterization of the evidence. (exhibit 9)

That all of the exhibits enumerated as supporting the assertion in the above cited list are misstatements, mischaracterizations, and misapprehensions the evidence is all the more dispositive given the title of the subsection "Factual Events Critical To The Department's Decision To Terminate." These exhibits demonstrate neither conduct nor notice sufficient to justify a decision to terminate.

Additional exhibits are offered in support of the same on page 12 of the CSRB Step 6 Decision, Exhibits A-1, A-8, A-11. The first exhibit is an email from Gomberg in which lists behavior that makes her uncomfortable, and a request that he cease such behavior. Given that Mr. Gomberg testimony cited above that after the letter she was sufficiently comfortable around Mr. Duran to give him a ride home in her car argues against any stronger inference and is merely cumulative of her own testimony in the transcript.

Exhibit A-8 and A-11 have no mention other than the above-discussed mention of Mr. Duran's past experience with criminal justice system. Of all of these exhibits listed by the CSRB, it is only the one email that is even relevant to these proceedings.

The CSRB then goes on to recount a number of findings by the Step 5 Hearing Officer as supporting of their decision. As has clearly been established, the Step Hearing Officers Findings of fact were as in accurate as their own discussed at length above.

On page 14 of the CSRB Decision makes similar characterizations of evidence and exhibits that are in fact not supported by the cited evidence. For example the CSRB cites to pages 51-53, 156-158, 184 of Step 5 transcript as supporting the proposition that in regards to lunch dinner or coffee "these invitations continued despite repeated and unambiguous requests they stop." In fact the cited pages recite no such disregarded requests.

In the second section of the CSRB's Decision the Board relies on Mr. Fletcher's assertion that termination was appropriate do to the negative impact on the Departments *ability to serve its customers and the high severity of fear, intimidation, and* uncomfortableness created by Mr. Duran. Mr. Fletcher's opinion as discussed earlier in this brief is not supported by the facts. Similarly, neither is Mr. Fletcher's assertion that sufficient notice had been provided by previous letters of concern or warning. Such notice did not exist, was not enumerated by Mr. Fletcher, by the Step 5 Hearing Officer, the

CSRB. Therefore, the decision of Mr. Duran's Termination was not supported by substantial evidence.

The third section of CSRB Decision is entitled, Application of the Relevant Policies and Rules to the Established Facts. Given the documented errors of both the Step 5 Hearing Officer as well as the CSRB in establishing the facts in this case, the application of policies and rules can not be anything other than flawed. The Decision states the Step 5 Hearing Officer found "Mr. Duran's substantial misconduct violated DTS policy which requires "decent, respectful, and non-abusive language." It has not been alleged, let alone proven that Mr. Duran ever used indecent language, swore, or even told an off color joke. CSRB in the same section makes a finding that discussions of coworkers private lives, and statements about what he found to be physically attractive rose to the level of being "clearly unprofessional, inappropriate, potentially demeaning, vulgar, and sexually suggestive." This exaggerated assertion is no more supported by the evidence than is the accusation that discussions with coworkers included "questions about sexual intimacy" The one question to a coworker regarding how many boyfriends she had and the statement regarding the proximity of homes in the Avenues and the resulting lack of privacy is another example of carefully selecting a few statements to fabricate exaggerated and unsupported conclusions.

CONCLUSION

As a consequence and in light of the foregoing reasons, the Mr. Duran requests this court reverse the Career Service Review Board decision and the Level 5 Hearing Decision and find that the Agency acted arbitrarily capriciously when it terminated the Mr. Duran's employment, and requests the Career Service Review Board to remand to the Department with instructions to reinstate the Mr. Duran with full back pay and benefits, with costs and fees to be awarded.

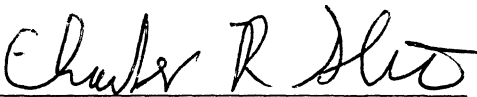
DATED this 9 day of November, 2009.

A handwritten signature in cursive script, appearing to read "Charles R. Stewart", written over a horizontal line.

Charles R. Stewart
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Stephanie Boston, hereby certify that I have caused to be mailed/delivered three true and correct copies of the foregoing BRIEF OF APPELANT 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 Brief of Appealant 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 9th day of November, 2009.


Charles R. Shio
For Stephanie Boston

ADDENDUM 1

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

JOHN M. DURAN,	:	
	:	DECISION
Grievant and Appellant,	:	AND
	:	FINAL AGENCY ACTION
v.	:	
	:	
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 *Szmaczarz 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:

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

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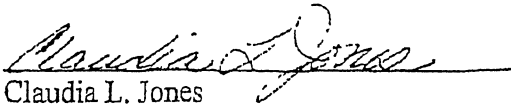
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Claudia L. Jones
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ADDENDUM 2

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

JOHN M. DURAN,

Grievant,

v.

**UTAH DEPARTMENT OF
TECHNOLOGY SERVICES,**

Agency.

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION**

**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(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(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. Gomborg 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. Gomborg'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. Gomborg'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. Gomborg, 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. Gomborg 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. Gomborg reacted by getting up and leaving her office. At this point in her testimony, Ms. Gomborg grew visibly pale.

Ms. Gomborg 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. Gomborg testified that after a period of time, she did not want to work with Grievant at all.

When questioned about his relationship with Ms. Gomborg, 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. Gombert, there was no discernable reasons for Ms. Hulbert to lie or exaggerate about her experiences with Grievant. Like Ms. Gombert, 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. Gomberg 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

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. Gomberg that he "liked girls with a little meat on them." He testified that *if* he told Ms. Nielson 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.

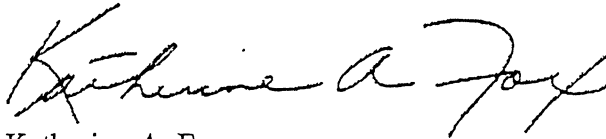
Moreover, his conduct, whether he intended it or not, also had the effect of unreasonably interfering with employees' work performance and impacted and had the potential of impacting the well being of the Agency. Mr. Fletcher's testimony on this issue was clear and convincing. Both Ms. Gomberg and Ms. 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.

A handwritten signature in black ink, appearing to read "Katherine A. Fox". The signature is fluid and cursive, with the first name being the most prominent.

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

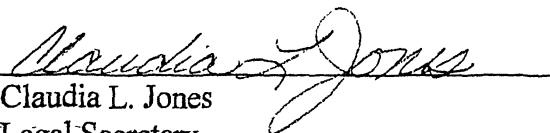
J. Stephen Fletcher
Executive Director
Utah Dept. of Technology Services
SFLETCHER@utah.gov

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

Timothy D. Evans
Assistant Utah Attorney General
801.366.0101


Claudia L. Jones
Legal Secretary

ADDENDUM 3

EXHIBIT A-1

From: Joanna Gomberg
To: Duran, John
Date: 8/28/2006 5:09 PM
Subject: letter

CC: Leiker, Kathleen
John,

Recently, you and I had a discussion about the kinds of jokes and conversations that have taken place between us. I am giving you this letter to summarize that discussion. I am not filing a grievance at this time, simply substantiating our conversation.

On August 18, 2006, I approached you about the nature of our conversations. I requested that our discussions focus on professional issues, and that we eliminate personal jokes. You indicated that you understood my request and would adhere to it.

I explained that some of our conversations have made me uncomfortable. 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.

To clarify, the following topics are examples of the topics I would like to avoid in the future:

- *My physical appearance, the way I dress, and my body type
- *My relationship with my boyfriend
- *My current or past level of physical intimacy with anyone
- *Other women whom you find attractive

While the list above provides examples of the types of conversations that make me uncomfortable, it is not intended to be a comprehensive list. I am requesting that we avoid these and similar non-work related topics.

I have appreciated your willingness to accommodate my request on this issue.

Joey

JoAnna Gomberg
Lead Employment Counselor
South Davis Office
(801) 298-6635

Problem: Where are you?

1. Complaints that you are not available and the office does not know where you are.

a. Lunch and Breaks

John will post RETURN TIME for LUNCH + BREAK on HIS OFFICE DOOR.

b. Sick

John will send an EMAIL to the OFFICE OVER WSNJODAY BY 8AM WHEN HE IS SICK.

c. Scheduled Leave

John will ~~send~~ post SCHEDULED LEAVE on a CALENDAR on HIS OFFICE DOOR.

d. Sleeping at work / PHONE

IF John DECIDES TO SLEEP AT WORK, THAT IS RESTRICTED TO LUNCH + BREAKS. A NOTE ON THE DOOR WILL INDICATE

Problem: Service response

HIS 'RETURN' TIME. HE WILL SET AN ALARM. ^{AND SHUT HIS DOOR!!}

2. Service requests are not addressed timely. HE WILL GIVE ATTENTION TO OFFICE REQUESTS OVER ANY PERSONAL CALLS.

JIM H. MEETINGS ARE CONFERENCE CALLS on THURSDAY @ 10AM.

a. Prompt Service response

John will work to IMPROVE HIS RESPONSE TIMES

b. Action on known computer problems. ↓

PLEASE ADVISE JIM HOWARD on ANY ISSUES UNRESOLVED.

c. Software, Virus, Patch updates and upgrades

John will ASSESS WITH AUTOMATIC UPDATES. WHEN NEEDED, ~~THIS~~ MAY REQUIRE REBOOTING THE PC. HE WILL COMPLETE ALL ^(SW) UPDATES NEEDED.

d. Communication: No status of long term (over 24 hours) PC problems

John will REPORT THE STATUS OF 'OVER 24 HOURS' COMPUTER PROBLEM TO THE EMPLOYEE AFFECTED + THEIR SUPERVISOR.

e. Approachability

John will work to ENCOURAGE OFFICE EMPLOYEES TO REPORT THEIR COMPUTER ISSUES. HE WILL BE AS

3. LAN Room is cluttered and messy. HOSPETABLE IN POSSIBLE

John will CLEAN HIS OFFICE + REPAIR THE HP PRINTER

Jim Howard 1-6-2006

John

DATE: February 9, 2006
TO: John Duran
FROM: James Howard
SUBJECT: Letter of Warning

I am writing this letter of warning to express my concerns regarding the 2-hour lunch taken without prior authorization on February 7th, and the unprofessional behavior exhibited on the same date.

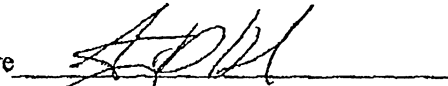
At 11:30 on February 7th I was informed that you were napping most of the morning and were unresponsive to requests made by office staff. I was informed that you took more than one break in the morning. I was informed that you left for lunch at 11:30 AM at the latest. I sent an Instant Message at 11:45 asking if you were in your office. I then traveled to your office, which takes about 35 minutes from my office. I remained in the South Davis office with Scott Moffitt until after 1:30 PM which verified a 2-hour lunch. I received a response to my Instant Message at 2:00 PM, which indicated a 2.5-hour lunch.

Office staff have been complaining that you are not responsive to computer service requests. During that morning, you were in your office with your feet up on your desk, chair tilted back, and eyes closed. You were not leaving your office to investigate service requests and complaints. This indicates to the office staff, a lack of concern and poor customer service response.

On January 6th we discussed and formatted a work agreement that included the following:
"John will post return times for lunch & breaks on his office door"
"If John decides to sleep at work, that is restricted to lunch and breaks. A note on his door will indicate his 'return' time. He will set an alarm & shut his door!!"
"John will work to encourage office employees to report their computer issues. He will be as hospitable as possible."

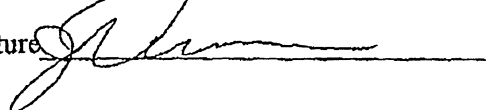
If this problem continues, corrective action and or disciplinary measures may be taken.

Supervisor's signature



Date 2-9-06

Employee's signature



Date 02/09/06



State of Utah

JON M. HUNTSMAN, JR.
GovernorGARY R. HERBERT
Lieutenant GovernorDepartment of
Workforce ServicesTANI PACK DOWNING
Executive DirectorCHRISTOPHER W. LOVE
Deputy DirectorJOHN E. NIXON, CPA
Deputy Director

May 18, 2006

TO: Johnny Duran

FROM: Jim Howard

SUBJECT: Letter of Intent to Discipline

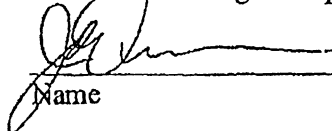
On May 17, 2006, an employee approached you for computer assistance. They found you at your desk, with your feet up, sleeping. I have counseled and warned you about this behavior on at least two occasions. Therefore, it is my intention to recommend disciplinary action in the form of a written reprimand in accordance with DHRM Rule R477-11-1 (1) (a) *noncompliance with these rules, agency or other applicable policies, including but not limited to safety policies, agency professional standards and workplace policies; and (e) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service.*

You were given a verbal warning on January 6, 2006 about this same type of behavior. We developed a formatted work agreement that included a statement that if you decide to sleep at work, it must be done during break and lunch time. In addition, a return time note would be posted on your door, and you would close your door. You were given a written warning on February 9, 2006. The warning was issued due to my continued concerns about your unprofessional behavior, specifically, putting your feet up on your desk and sleeping. In the letter of warning, I again addressed the need for you to post a return note on your door and close your door when taking a nap.

John, this type of behavior is unacceptable. Employees depend on you when there are computer concerns and/or questions. Any additional valid complaints will result in disciplinary action up to and including termination.

You have five working days from the date you receive this letter to respond to me in writing. I will consider your response prior to implementing the disciplinary action.

Please acknowledge receipt of this letter by signing below.


Name

05/19/06
Date



State of Utah

JON M. HUNTSMAN, JR.
GovernorGARY R. HERBERT
Lieutenant GovernorDepartment of
Workforce ServicesTANI PACK DOWNING
Executive DirectorCHRISTOPHER W. LOVE
Deputy DirectorJOHN E. NIXON, CPA
Deputy Director

June 1, 2006

TO: Johnny Duran

FROM: Jim Howard

SUBJECT: Letter of Reprimand

Recently, you were notified of my intent to consider disciplinary action due to unacceptable behavior. You did not respond to the letter of intent to discipline. Therefore, I am proceeding with disciplinary action in the form of a Letter of Reprimand. I am taking this action in accordance with DHRM R477-11-1 (1) (a) *noncompliance with these rules, agency or other applicable policies, including but not limited to safety policies, agency professional standards and workplace policies; and (e) misfeasance, malfeasance, nonfeasance or failure to advance the good of the public service.*

This is not the first time we have addressed this behavior. You were given a verbal warning on January 6, 2006 in addition to a written warning on February 9, 2006. If you continue displaying unprofessional behavior as discussed in the letter of intent, including sleeping during work time, this will be elevated to a higher level of discipline, which may include termination.

Please be aware that state regulations provide you the opportunity to appeal this decision to Greg Gardner within 20 working days from the date signing this letter.

I am aware of this discipline being imposed and understand the grievance process available to me.


 06/02/06
Name/Date

EXHIBIT A-6

From: Chuck Butler
To: Howard, Jim
Date: 8/18/2006 8:43 AM
Subject: Re: John Duran

He could attend the segment at the next new hire orientation scheduled for 9/5/06. Peggy Young shows and discusses this topic vs just showing a film.

>>> Jim Howard 8/18/2006 8:35 AM >>>
Two items from Woods Cross:

I received a call from Kathy. John has been getting friendly with one of the female employees at the Woods Cross office. Her dad is an attorney and has advised her to write a letter to John saying something about how his companionship is not welcome. Kathy is asking for a copy of the letter. I will forward as soon as I receive my copy.

He also has been telling employees that he is doing surveillance work after hours. He has purchased a small webcam and is apparently showing staff some of the videos taken through the webcam. He is joking about installing this item in some of the homes of the female employees. This is making some of the employees uncomfortable. Kathy reminded some of them that the ceilings of the bathrooms are solid and make it difficult to hide an object like the webcam.

I have talked to John about after hours work and he has denied he is otherwise employed. I will ask again when he comes in today. It's 8:30 so he's late if he is coming in.

I can talk to John about the second item and have him take the webcam home. He showed it to me last week but I did not consider how he might be using it. Because of the nature of the problems I also wanted to include Chuck in this. I will contact John first thing when he arrives and explain what he is doing for the office. I also want him to attend the next sexual harassment training available. Do you know where and when that will be scheduled? If you get me the tapes I could probably do a adequate job of that training.

I'll CC Kathy to correct any inaccuracies.

Thanks,

Jim H.
801 626-3558

Memo

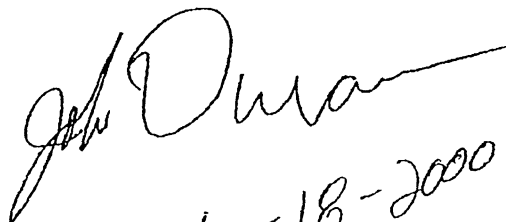
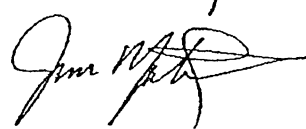
To: John Duran
From: Jim Matsumura
Date: 25 September 2000
Subject: Letter of Concern

This letter of concern deals with the language, and content of your communication with other employees at DWS. I am referring to references you are making to your life experiences 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. Part of good performance is your ability to work as a team member. Teams need to work in an atmosphere of trust and respect. You need to concentrate on the work you were hired to do. If you do this, I believe you can and will be a very productive member of our staff.

This memo constitutes, with the discussion you, Kelly Sharp 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. You are currently a probationary employee. Probation is part of the selection process and helps us determine whether or not career service status will be granted. Any evidence that you have violated this understanding will be grounds for termination.

cc: Kelly Sharp


10-18-2000

18 Oct 2000

39903
207
④

DATE: 25 March 2003

TO: John Duran

SUBJECT: Corrective Action Plan

After considering your behavior and work performance, I believe it is necessary to place you on corrective action for a period of six months to improve your performance in the following areas: 1) customer service; 2) proper use of time, prioritizing work, and completion of your work; 3) improvement of your team building and team work skills; 4) proper professional behavior in the workplace with regard to creating a positive work environment which means you must avoid any intimidating conversation, behavior, and conduct; and 5) accurate reporting of time and attendance.

Corrective Action Issues

1. Customer Service: It has been reported that on several occasions you have exercised questionable judgment as you addressed customer service issues. The necessity of owning a problem and seeing that a customer needs are addressed regardless of who is to blame or what caused the problem is essential to helping you meet your job duties.

Corrective Action Steps:

You are to discuss with you supervisor on a weekly basis what you can do to improve your customer service skills.

1) A log of all service requests or projects you have received must be kept. (See work log attached and information required for this log.) Your weekly work log will be recorded in electronic format and sent to your supervisor via email each Friday or close of workweek. This log will be one of the items of discussion during your weekly supervisor conference during the corrective action period.

2) Read and answer information contained in the Exceptional Service Handout. You should complete this within one month of receipt from your supervisor.

3) Make proper notification to your customers and supervisor regarding any changes in work schedule, time off, or circumstances when you will not be available for your normal work assignment.

2. Proper use of time and prioritizing work. Staying focused on your work assignments to ensure completion of your work: Timely completion of your work assignments will enhance and maximize your value to your customers and the department. You can accomplish this by

implementing the following measures and reporting this to your supervisor.

Corrective Action steps:

You are to report weekly or as required by your supervisor showing your compliance to the following:

- 1) You are to limit the time spent visiting with staff. You should complete your work assignment or duties and move to your next assignment or return to your office or cubicle. You are also restricted to your assigned work location and are not to visit other DWS locations or administrative locations without your supervisor's permission
 - 2) You are to closely adhere to a one-hour non-compensated lunch break and to one fifteen-minute break every four hours worked. You are also to limit your email use to work related communications.
 - 3) You are to review your work log and report any problems or reasons for delays on those assignments.
 - 4) You are to complete upgrades, enhancements, and patches or fixes in a timely manner as prescribed by your supervisor. *(Working with Jim Howard)*
 - 5) Your supervisor will interview staff and supervisors to determine your fulfillment of this corrective action step.
 - 6) Your performance plan refers to a number of measures and expectations regarding requirements of your core duties. Your supervisor will periodically review these performance measures with you. Difficulty in achieving minimum levels in any core duty measurement or expectation may require additional corrective action steps to help you meet those standards.
3. Improvement of your team building and teamwork skills. Your ability to work with other members of WIT and the staff assigned as your customers is important to accomplish the missions of WIT and Workforce Services. Some expectations for successful performance are outlined in your Performance Plan. You are to participate in team workload and processes. You are to commit to a common purpose/objective of the team. You must exhibit respect for each team member and your customers. You should share your expertise.

Corrective Actions Steps:

- 1) You are to read the book "The Team Handbook" and report to your supervisor things you have learned from this book. It is expected you read chapters one and two during the first month and after that one chapter a month to the completion of this corrective action period. You should have this book assignment completed by the end of your six-month corrective action plan.

- 2) Your supervisor will get reports from managers and supervisors. He will supply their feedback to you regarding your team building and teamwork skills.
- 3) You are to support region staff meetings and conduct yourself in a professional and respectful manner.
- 4) ~~You are to support and participate in attending general staff and other meetings.~~
4. 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.

Jim April 2003

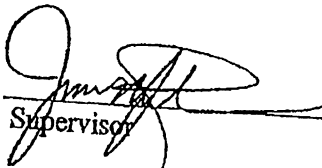
Corrective Action Steps:

- 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.
 - 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.
 - 3) You are to arrange with HR to take and complete by the end of month six of your corrective action period department training on violence in the workplace.
 - 4) You are to report in your weekly supervisor conference if you have complied with this part of your corrective action plan. Your supervisor will also get input from managers and supervisors working at your location to get feedback on this corrective step.
5. Accurate reporting of time and attendance: In order to ensure and encourage timeliness and completion of work assignments, reporting of time and attendance will be more closely supervised and monitored.

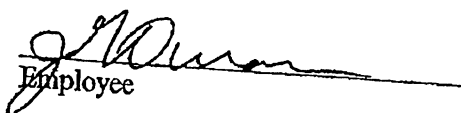
Corrective Action Steps:

- 1) You are to send an email to your supervisor at the beginning and end of each workday noting that you are signing in or signing out.
- 2) You are to promptly report your work time at the close of each period.
- 3) You are to send an electronic copy of your time sheet to your supervisor at the close of each pay period.

This plan is not designed to punish, rather, its purpose is to help you improve your performance and provide better service to your customers. I want you to succeed at your job. I feel the training and broader perspective on your job will enhance your efforts and lessen the stress associated with managing your workload. I believe with effort you will be more successful and find your job even more rewarding. Failure to comply with these requirements and corrective action steps will lead to further corrective action or can lead to disciplinary action up to and including termination from employment.


Supervisor

01 April 2003
Date


Employee

04/01/03
Date



State of Utah
Department of
Workforce Services

MICHAEL O. LEAVITT
Governor

OLENE S. WALKER
Lieutenant Governor

193003

RAYLENE IRELAND
Executive Director

DARIN BRUSH
Deputy Director

BLAINE CRAWFORD
Deputy Director

To: John Duran
From: Jim Matsumura
Date: May 9, 2003
Subject: Letter of Warning

This memo is a letter of warning regarding your time and attendance and the need for accuracy in reporting information on your time sheet correctly. According to your corrective action plan you are to report time and attendance accurately and arrive and leave for work at specified times. According to my records, you were late arriving for work or returning from lunch as listed below. I have added your time off from work on list for the record. This time off is from the end of March. You also did not report your time correctly on the five separate instances as listed on this Letter of Warning.

April 3, 2003 Lunch
April 4, 2003 Arrival late to work
April 7, 2003 Arrival late to work
April 9, 2003 Arrival late to work
April 9, 2003 Lunch (late to work and return from lunch: time sheet issue)
April 14, 2003 to April 18, 2003 (Off work for Foot problems)
April 21, 2003 Arrival late to work
April 21, 2003 (Left work at 11:36am for Car issues time Sheet issue)
April 22, 2003 Lunch
April 23, 2003 (Left work at 4:27pm for Car issues time sheet issue)
April 24, 2003 Arrival late to work
April 25, 2003 Arrival late to work
April 28, 2003 Arrival late to work
April 28, 2003 Did not check out from work
April 29, 2003 Lunch (Time sheet issue)
May 1, 2003 Lunch (Time sheet issue)
May 5, 2003 Arrival late to work, lunch,
May 6, 2003 Off Work (Did not report to Center staff of his absence as instructed)
May 7, 2003 Arrival late to work (picking up car)
May 8, 2003 Arrival late to work

Visit Log - John Duran Corrective Action

Updated 9/12/2003

Date	Items Discussed	Ck
1 Apr 2003	<ol style="list-style-type: none"> 1. John Introduced to Kathy Leiker 2. We discussed the projects scheduled for this office. (JCR Centurion, upgrade of Testing PCs, learn the front desk phone system, server back-up procedures. 3. John requested items from his cubicle. 4. We discussed the letter of reprimand. 5. We discussed in detail the corrective action plan. 6. We agreed not to make general staff meetings and infrastructure group meeting mandatory as part of the team work issue. 7. I encouraged John to adhere to the cor 	
4 Apr 2003	<ol style="list-style-type: none"> 1. Looked over work logs and discussed work for the week. 2. John is working on the customer service notes and reading them as required by corrective action. 3. John is taking the customer service training on mind leaders. 4. We discussed the training machines. 	
11 Apr 2003	<ol style="list-style-type: none"> 1. John indicated again the progress he was making on the mindleaders customer service training. 2. We reviewed the work logs. 3. I spoke to Debra Nordfelt about Johns work and she indicated she seemed to be doing a good job. 4. I spoke to John again about attendance and sending his email when he arrives to work, leaves and returns from lunch, and when he leaves for the day. 	
21 Apr 2003	<ol style="list-style-type: none"> 1. John will bring a doctors note regarding the 4 days off last week with his foot problems. 2. No work logs to review because of the time off. 3. Discussed time and attendance briefly. 	
29 Apr 2003	<ol style="list-style-type: none"> 1. Received doctors note for time off. 2. Reviewed work logs with John. Discussed what was happening with open requested. Only a few. 3. Discussed why training machines were taking this amount of time to complete. John indicated that the QWIZ licensing piece was the delay. 4. I spoke to the front desk workers and they indicated John was helpful and seems to be doing a fine job. 	

12 May 2003	<p>1. Did not review work logs because no work to review. I instructed John to send work logs even though there were not any service requests to report.</p> <p>2. Discussed time sheet accuracy and time off. John indicated that he might have to take a day off each month to get personal items done. I indicated that appropriate and reasonable use of time off was okay and would be approved. I also indicated that though he had several doctors notes and reasons, he needed to be careful of excessively time off.</p> <p>3. Discussed Kathy Leiker's email about John having the 15th off and note notifying the EC staff his absence. John consented to put a calendar on his door.</p> <p>4. Completed Testing machine assignment.</p>	
23 May 2003	<p>1. John Attended the unlawful harassment training at the Clearfield Office. He has completed on of his corrective action measures. May 23, 2003.</p> <p>2. Completed Workplace Violence CD training and fulfilled one of his corrective action steps here.</p> <p>3. Notified John regarding the letter of warning for time and attendance. This letter will be forthcoming.</p> <p>4. John believes the corrective action is intended to terminate him and not correct his behavior. We discussed the corrective action and the letter of reprimand. John indicates he did talk about his past criminal history and joked with his co-workers but he indicated this occurred prior to warnings given to him. Talked with John about concerns with the things people say about him. I told John that I will get him a letter of understanding or counsel in a few weeks.</p> <p>John expressed concerns that people talk about him. He said he has always had to endure the words and actions of people that were intended to demean him.</p>	
June 6, 2003	<p>John and I met and discussed his performance plan. We completed his performance plan and review.</p> <p>I presented John with a letter of warning regarding his time and attendance and reporting of his time. There has been several instances where he has left early, been off work, and not reported the time correctly on his time sheet. I indicated how serious this issue was and John said he would work on it. He will work at informing the EC staff of his whereabouts.</p> <p>We reviewed his work log and discussed completion of his work.</p>	

	I reviewed a letter from his doctors note regarding time off that John had recently taken.	
June 18, 2003	<p>John and I reviewed information in the team work Workbook. We discussed what he needed to do on maintenance kits for printers. John indicated that he was working on the Centurion Guard installs. He said they would soon be complete.</p> <p>We reviewed John work logs for the past week.</p> <p>John reported that the FAX phone issue was being resolved.</p> <p>John reported that the resource room was now completed.</p>	
July 3, 2003	<p>We discussed Johns continued health issues. He said the doctor has him on antibiotics. We discussed his work log and what he was completing. John indicated he was working on a FAX server problem with ITS. The problems occurred after ITS had made some changes with their circuit. We discussed some items in the Team Work Workbook.</p> <p>I discussed with John the time off issues. I am concerned still with the number of days is taking off. We discussed ways he could minimize days off by taking a single days off occasional to conduct business, run errands, etc. I also discussed with John my concerns about his time and attendance.</p>	
July 17, 2003	<p>I discussed with John the New Horizons training and explained that the free classes were a compensation for problems with previous ZEN training but not necessarily to be used by those who attended the training earlier in the year for ZEN. He would get his training but it required the coupons or other funding through DWS.</p> <p>ZEN almost completed. John told me he was working on some minor issues.</p> <p>We reviewed the work log. He had a few other printer issues but he was not real busy. He indicated that he was staying on top of the work.</p> <p>John's health issues with his stomach were discussed as far as what his doctor had told John.</p> <p>John asked for permission to bring up a Linux machine. I told him to let me know when. He was instructed to keep it patched</p>	

	<p>and installed with correct fixes.</p> <p>John gave me the info about who to call if I needed information about his illness. He gave me the number of Jennifer 801-357-7014 Dr Johns is his physician. I told John I didn't need to call. He was asked to bring the correct documentation when he was not able to be at work.</p>	
July 23, 2003	<p>John reported that he was still having stomach problems. He was off the antibiotics now. He also indicated that he would always have his foot problems. That was something he would have to put up with. He indicated that it would not hinder his work performance.</p> <p>John reported that the serverabend which had recently occurred was due to ARCSERVE. He worked with Neil Smedley to resolve this issue.</p> <p>John indicated that he was moving some machines and completing the testing machines.</p> <p>John told me he was staying in his office when not working. He is not talking to people about his past. He did this at North Admin as he reported but not at the South Davis site. He did not want to get into the same problems that brought him here.</p> <p>John indicated that ZEN has been installed and it is working.</p>	
Aug 6, 2003	<p>John indicated that in addition to his stomach problems, he was also struggling with shoulder problems. He indicated it was because he was getting old. John told me that his shoulder wouldn't affect his work but that he just was falling apart.</p> <p>We reviewed some medical papers which he had for time off.</p> <p>His work logs looked okay. Again he did not have a lot of issues to resolve.</p>	
Aug 11-15, 2003	John was at training so we did not meet. He attended a Linux basic training class offered at New Horizons.	
Aug 18, 2003	John was absent from work today. He is scheduled for surgery on August 19, 2003. It is anticipated according to his doctors not that he may be off until mid-September 2003.	
Sept 5, 2003	I visited with John. He is doing better he says. He was restricted from heavy lifting by his doctor and I indicated that he must follow the recommendation of his doctor in this case. I discussed with John briefly about his current health. We agreed that this week he should start slow and work about 4 hours per	

	day He should continue on this work log and duties. He is still supposed to email me on his arrival, lunch time, and departure.	
Sept 12, 2003	I did not meet with John this week. He did send in his weekly work log John is on light duty. He is working 4 hours a day and coming into work at about 9:00am.	



Michael O. Leavitt
Governor

Raylene Ireland
Executive Director

Greg Garner
WIT Director

State of Utah

DEPARTMENT OF WORKFORCE SERVICES

Admin North

Workforce Information Technology

140 E 300 S
Salt Lake City, Utah 84111
(801) 526-9528
(801) 526-9250 (fax)

Equal Opportunity Employer

To: John Duran
From: Jim Matsumura
Date: October 15, 2003
Subject: Completion of Corrective Action

This letter marks the completion of your corrective action which began on March 25, 2003 and explains the need to adhere and maintain performance expectations outlined and addressed by the corrective action plan.

The following areas of performance were addressed during the corrective action period: customer service, prioritizing work and completing work, team work skills, proper professional behavior and avoiding intimidating conversation or behavior, and accurate reporting of time and attendance.

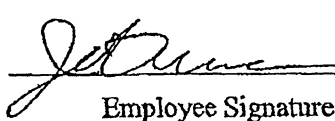
1. Customer Service: You did a good job completing work assignments and reporting your efforts on the daily work logs. You completed the Exceptional Service handout and discussed this booklet with me. You notified customers and your supervisor of changes in work schedule with the exception of the May 15th incident where the manager and supervisor were unaware of your whereabouts. Reports from supervisors and staff regarding your customer service have been positive.
2. Prioritizing work and completion of work: Here again you have done a good job completing assignments and projects. From your own reports and that of supervisors you have limited your non-business interaction and conversation with other staff. You have done a good job in staying in your own work area when not involved with service requests or work assignments. Again, your work log shows adequate response to work requests. There was some concern over upgrades and patches being completed in a timely manner. Part of this slower response was due to your illness. I remind you that you need to continue to keep desktops updated and patched. Overall you met the expectations regarding your core job duties.
3. Team building skills: You have completed this corrective measure successfully. I have received no complaints regarding this aspect of your performance. We didn't spend adequate time working through the "Team Work Handbook", but I think we have discussed this facet of your job sufficiently during the past six months.

4. 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 troubles with the law and criminal behavior. You have admitted, though you did not intend any harm, some individuals could have taken your comments as threatening, and intimidating. The incident at Green Street with David Sedei, your former supervisor, whatever happened, tarnishes both of you and leaves questions about professional trust which questions of trust neither of you need or deserve.

You have completed unlawful harassment training on May 23rd at the Clearfield office. You have taken the Violence in the Workplace self directed training. I have also checked with Kathy Leiker on occasion and she has expressed satisfaction with your conduct and professional behavior at the South Davis office.

5. Accurate Reporting of Time and Attendance: During the corrective action plan period you were given a letter of warning regarding your time and attendance. Inaccurate time and attendance was reported on your time sheets. Your efforts since the letter of warning was issued have been satisfactory. Please note that concerns with regard to your attendance and accurate reporting of time were raised with the original corrective action plan. During the corrective action period you did send an email reporting your arrival and departure from work including lunches. You have also completed this corrective action step satisfactorily.

Over the last six months, I have seen marked improvement. It is my expectation that you continue to meet successful performance levels and avoid reoccurrences of concerns addressed by corrective action plan. Should you fail to do so, it will be necessary to take further corrective action or disciplinary action up to and including termination of employment.

 11/07/03
Employee Signature

 7 Nov 2003
Supervisor/Manager Signature

Cc: Jim Howard
Employee file



State of Utah
Department of
Workforce Services

RAYLENE IRELAND
Executive Director

DARIN BRUSH
Deputy Director

BLAINE CRAWFORD
Deputy Director

Governor
OLENE S. WALKER
Lieutenant Governor

EXHIBIT A-13

CONFIDENTIAL MEMORANDUM REPORT

TO: Kevin Beutler
Director of Human Resources

FROM: Office of Internal Audit

DATE: March 5, 2003

SUBJECT: Personnel Investigation Facts

Introduction and Methodology.

On February 3, 2003, a request for a personnel investigation was made of DWS Internal Audit. We were asked to interview individuals involved in the incidents leading to the Written Reprimand dated January 29, 2003 and the Notice of Intent to Terminate Employment dated January 30, 2003 given to John Duran. We focused attention on two issues:

1. Cited need for improvement in professional conduct and interaction with fellow Workforce Services employees.
2. Alleged incidents that occurred between John Duran, Angela Madsen and Dave Sedei at the Green Street Social Club on January 24, 2003 after work hours.

We conducted face-to-face interviews with thirteen employees of DWS who were identified as having direct knowledge of the aforementioned areas of concern and 3 additional individuals provided written accounts. In addition, we spoke with Dave Sedei and John Duran.

Investigation Facts.

The cited need for improvement in professional conduct and interaction with fellow Workforce Services employees consisted of concerns over Mr. Duran's behavior as cited in a Letter of Concern dated September 9, 2000:

References you are making to your life experiences 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. . .

Some individuals interviewed stated that initially they felt intimidation when Mr. Duran directed comments to them; however we were unable to obtain validation that this fear is prevalent in the current work environment. Several interviewees stated they believed the jokes and comments are just part of Mr. Duran's personality and that it constitutes an attitude of bravado. Mr. Duran stated he participated in mutual banter about his background and life experiences and accepted jokes because he wanted to "fit in." He further stated he knew he was "different" and would have a difficult time fitting in with his coworkers.

The second area of concern centered on the alleged incidents at the Green Street Social Club. We interviewed individuals identified as being at the club on the afternoon. The Notice of Intent to Terminate Employment cites one incident between Angela Madsen and John Duran that was "intense and threatening." Both Ms. Madsen and Mr. Duran deny this statement and we found no corroborating information other than that reported by Mr. Sedei. Further, we found no one who had first-hand knowledge of the interaction between John Duran and his supervisor Dave Sedei. Mr. Sedei alleges Mr. Duran threatened to "put a gun to his head and kill him" when he intervened in the interaction between Ms. Madsen and Mr. Duran. Both of these individuals report they were having an animated conversation albeit a friendly one when Mr. Sedei approached Mr. Duran from the back. Mr. Sedei then grabbed Mr. Duran's arm and Mr. Duran reports Mr. Sedei as saying "you're next" possibly indicating a turn at a pool game. Mr. Duran denies the alleged threat and reports he said "don't ever touch me!" Mr. Duran states that he has no tolerance of individuals touching him and this interaction at the bar made him angry. All accounts report Mr. Duran promptly left while the rest of the individuals remained at the party.

Summary.

As a result of our interviews, we were unable to obtain corroborating evidence of a workplace environment where Mr. Duran made his coworkers feel fear or intimidation through actions or veiled statements implying harm. His coworkers expressed discomfort at Mr. Duran's comments and behavior but have come to accept that "this is just how John is." Ms. Madsen denied any harm from her interaction with Mr. Duran at the Green Street Social Club and stated that she did not feel threatened or intimidated. Further, we were unable to obtain corroboration of the alleged verbal threat, although Mr. Duran acknowledges the interaction between he and his supervisor was not appropriate. The nature of the physical environment as well as the psychological and emotional status of the individuals at the party that afternoon precludes us from obtaining clear and definitive evidence of what happened at the Green Street Social Club

CC: Blaine Crawford
Scott Steele
JoAnne Campbell
Tani Downing
Craig Bunker



Governor

OLENE S. WALKER
Lieutenant Governor

EXHIBIT A-14

State of Utah
Department of
Workforce Services

RAYLENE IRELAND
Executive Director

DARIN BRUSH
Deputy Director

BLAINE CRAWFORD
Deputy Director

March 24, 2003

via Certified Mail

John Duran
2115 Summeridge Drive #31
Taylorsville, Utah 84118

Dear John:

You have been on administrative leave pending an internal investigation into an incident that resulted in your manager, Jim Matsumura generating a letter of intent to terminate your employment. The investigation has been completed, and as a result of the findings, the following actions are being taken.

We will not follow through with the termination and will bring you back to continue working as a technical support specialist. You will be assigned to the Woods Cross Employment Center. Jim and I both feel strongly that you must make a change in your attitude and your behavior if you are to succeed in your future employment with the department. He will be working with you to help you make these changes. You will, therefore, be on corrective action when you return. In addition, you will receive a letter of reprimand.

I have set up a time for us to discuss this issue and to outline the conditions of your return. The meeting will be held on Monday, March 31, 2003 at 1:30 p.m. in my office. Please contact Mary Gehman at 526-9207 to confirm your attendance.

I look forward to seeing you then and sincerely hope that you make a commitment to following the directions of your supervisor to avoid further incidents and disciplinary action.

Sincerely,

Blaine Crawford
Deputy Director



State of Utah

EXHIBIT A-15

DEPARTMENT OF WORKFORCE SERVICES
Admin North

Workforce Information Technology

140 E 300 S
Salt Lake City, Utah 84111
(801) 526-9526
(801) 526-9250 (fax)

Michael O. Leavitt
Governor

Raylene Ireland
Executive Director

Greg Garner
WIT Director

Equal Opportunity Employer

To: John Duran
From: Jim Matsumura
Date: October 15, 2003
Subject: Completion of Corrective Action

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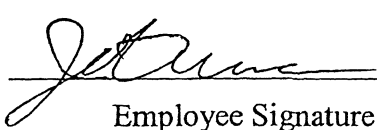
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 11/07/03
Employee Signature

 7 Nov 2003
Supervisor/Manager Signature

Cc: Jim Howard
Employee file