

2009

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

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Timothy Evans; assistant attorney general; Mark Shurtleff; Utah attorney general; attorneys for respondents/appellees.

Charles R. Stewart; Schatz, Anderson Uday, LLC; attorney for petitioner/appellant.

Recommended Citation

Brief of Appellant, *Duran v. Utah Technology*, No. 20090252 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1576

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

IN THE UTAH COURT OF APPEALS

[illegible][illegible][illegible][illegible]

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.

Court of Appeals No: 20090252

[illegible]

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

Timothy Evans (10389) Assistant Utah Attorney General Mark Shurtleff Utah Attorney General 160 East 300 South P.O. Box 140856 Salt Lake City, Utah 84114-0856 <i>Attorney for Respondents/ Appellees</i>	Charles R. Stewart SCHATZ, ANDERSON & UDAY, LLC American Plaza II 57 West 200 South, Suite 200 Salt Lake City, Utah 84101 <i>Attorney for Petitioner/ Appellant</i>
---	--

Timothy Evans (10389) Assistant Utah Attorney General Mark Shurtleff Utah Attorney General 160 East 300 South P.O. Box 140856 Salt Lake City, Utah 84114-0856 <i>Attorney for Respondents/ Appellees</i>	Charles R. Stewart SCHATZ, ANDERSON & UDAY, LLC American Plaza II 57 West 200 South, Suite 200 Salt Lake City, Utah 84101 <i>Attorney for Petitioner/ Appellant</i>
---	--

JOHN DURAN.

V.

Respondents/Appellees.

Court of Appeals No: 20090252

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

Timothy Evans (10389)
Assistant Utah Attorney General
Mark Shurtleff
Utah Attorney General
160 East 300 South
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Attorney for Respondents/ Appellees

Charles R. Stewart
 SCHATZ, ANDERSON & UDAY, LLC
 American Plaza II
 57 West 200 South, Suite 200
 Salt Lake City, Utah 84101
Attorney for Petitioner/ Appellant

PARTIES TO THIS PROCEEDING

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

TABLE OF CONTENTS

PARTIES TO THIS PROCEEDING	ii
INTORODUCTION	1
JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW.....	1
DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS	3
A. State Statutory and Administrative Provisions.....	3
B. Federal Case Law.....	3
C. State Case Law	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
(1) Finding of Fact 1 -5.....	4
(2) Finding of Fact 6-7	5
(3) Finding of Fact 8-9	6
(4) Finding of Fact 10-11	7
(5) Finding of Fact 12-14	8
(6) Finding of Fact 15-17	9
(7) Finding of Fact 18-19	10
(8) Finding of Fact 20	11
(9) Finding of Fact 21	12
(10) Finding of Fact 22	13
(11) Finding of Fact 23-24	14
(12) Finding of Fact 25	15

(13) Finding of Fact 26	16
(14) Finding of Fact 27	17
(15) Finding of Fact 28-29	18
(16) Finding of Fact 30-31	19
(17) Finding of Fact 32-34	20
(18) Finding of Fact 35	21
SUMMARY OF ARGUMENT	21
ARGUMENT	23
Point I The Utah CSRB 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 CSRB, dated June 21, 2003	23
Point II The action taken Utah Career Service Review Board was not supported by substantial evidence when viewed in light of the whole record before the court.....	26
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 Service Review Board was incorrect in that they were arbitrary or capricious in upholding the hearing officer's decision.....	40
CONCLUSION	46
CERTIFICATE OF SERVICE	47
ADDENDUM 1: Decision by the Utah Career Service Review Board entered June 28, 2006	
ADDENDUM 2: Denial of Petitioner's Request for Reconsideration dated July 27, 2006	
ADDENDUM 3: Exhibits	

TABLE OF AUTHORITIES

CASES

<u>North Salt Lake v. St. Joseph Water & Irrigation Co.</u> , 223 P.2d 577, 582-83 (Utah 1950).	25
<u>Salt Lake Citizens Congress v. Mountain States Co.</u> , 846 P.2d 1245,1251 (Utah 1992)	3, 25
<u>State v. Genovesi</u> , 871 P.2d 547 (Utah Ct. App. 1993).....	2
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994).....	2
<u>State v. Ramirez</u> , 817 P.2d 774 (Utah 1991).....	2
<u>State v. Wanosik</u> , 2001 UT App¶ 241 P.3d 615.....	2
<u>Stevenson v. Goodson</u> , 924 P.2d 339 (Utah 1996).....	3, 23
<u>United States v. Utah Constr. & Mining Co.</u> , 384 U.S. 394 (1996).....	3
<u>Utah Department of Administrative Services v. Public Service Commission</u> , 658 P.2d 601, 621 (Utah 1983).....	25

STATUTES

Utah Code Ann. §63G-4-403(g).....	3
Utah Code Ann. § 67-19a-201	1
Utah Code Ann. § 67-19a-303(4)(c).....	5, 17
Utah Code Ann. § 78A-4-103(2)(a).....	1

RULES

Utah R. Admin. P. 477-9-1(1)(a)(ii)	13
Utah R. Admin. P. 477-11-1-(a).....	13
Utah R. Admin. P. 477-11-1(c).....	13
Utah R. Admin. P. 477-11-1-(e).....	13
Utah R. Admin. P. 477-11-3	3, 13
Utah R. Admin. P. 477-17-3(a)	3

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. Nielson 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 "parry." 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 verses 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

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 the 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 then 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 _____ day of November, 2009.

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 APPELLANT to the Utah Court of Appeals, 450 South State Street, P.O. Box 140230, Salt Lake City, Utah, 84114-0230, as well as a copy of this same 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.
