

1998

Steven Whited v. Utah Department of Human Services and the Career Service Review Board: Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Stephen G. Schwendiman; Assistant US Attorney General; Attorney for Respondents.

Philip C. Patterson; Patterson Barking & Thompson; Atotrney for Petitioner.

Recommended Citation

Legal Brief, *Whited v. Utah Department of Human Services*, No. 981412 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1712

This Legal Brief 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.

**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT
K F U
50**

IN THE UTAH COURT OF APPEALS. A10

DOCKET NO. 981412-CA

STEVEN WHITED,)
)
 Petitioner,) **PETITION FOR REHEARING OF THE**
) **PETITIONER STEVEN WHITED**
) **Appellate Case No. 981412-CA**
vs.)
)
 UTAH DEPARTMENT OF HUMAN) **Priority No. 14**
 SERVICES AND THE CAREER)
 SERVICE REVIEW BOARD,)
)
 Respondents,)

**APPEAL FROM A STATE OF UTAH CAREER SERVICE REVIEW BOARD
DECISION AND FINAL AGENCY ACTION**

STEPHEN G. SCHWENDIMAN - 1281
ASSISTANT U.S. ATTORNEY GENERAL
ATTORNEY GENERAL'S OFFICE PUBLIC
AFFAIRS DIVISION
Attorney for Utah Department of Human Services
160 East 300 South, 5th Floor
Salt Lake City, UT 84114

PHILIP C. PATTERSON - 2540
PATTERSON BARKING & THOMPSON
Attorney for Petitioner
427 - 27th Street
Ogden, UT 84401

FILED

OCT 27 1998

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STEVEN WHITED,)	
)	
Petitioner,)	PETITION FOR REHEARING OF THE
)	PETITIONER STEVEN WHITED
)	Appellate Case No. 981412-CA
vs.)	
)	
UTAH DEPARTMENT OF HUMAN)	Priority No. 14
SERVICES AND THE CAREER)	
SERVICE REVIEW BOARD,)	
)	
Respondents,)	

APPEAL FROM A STATE OF UTAH CAREER SERVICE REVIEW BOARD
DECISION AND FINAL AGENCY ACTION

STEPHEN G. SCHWENDIMAN - 1281
ASSISTANT U.S. ATTORNEY GENERAL
ATTORNEY GENERAL'S OFFICE PUBLIC
AFFAIRS DIVISION
Attorney for Utah Department of Human Services
160 East 300 South, 5th Floor
Salt Lake City, UT 84114

PHILIP C. PATTERSON - 2540
PATTERSON BARKING & THOMPSON
Attorney for Petitioner
427 - 27th Street
Ogden, UT 84401

INTRODUCTION

The Petitioner Steven Whited petitions the Utah Court of Appeals for rehearing pursuant to *Rule 35, Utah Rules of Appellate Procedure*. This petition for rehearing asks the Utah Court of Appeals to reverse the conclusion of law made within its October 13, 1998 Amended Memorandum Decision that the selection of the dismissal penalty by the Utah Department of Human Services was not so disproportionate to the charges against Whited that it amounted to an abuse of agency discretion.

Whited does not challenge the Court's determination that the multiple charges against Whited constituted intimidation under *Rule 477-11-1(1)(f), State of Utah Human Resource Management Rules (July 1996 Ed.)*. Whited challenges only the legal correctness of the Court's conclusion that:

. . . the CSRB properly determined that the sanction imposed by DHS for the misconduct was not excessive, disproportionate or an abuse of discretion, given the chronic and extreme nature of the misconduct in light of several warnings received and disregarded by petitioner regarding the inappropriateness and likely consequences of his behavior. . .

ARGUMENT

THE UTAH DEPARTMENT OF HUMAN SERVICES ABUSED ITS DISCRETION WHEN IT SELECTED THE EXCESSIVE AND DISPROPORTIONATE DISMISSAL PENALTY TO DISCIPLINE WHITED FOR THE FIRST TIME FOLLOWING A 15 MONTH COURSE OF CONDUCT BETWEEN WHITED AND THE AGENCY WHEREIN THE AGENCY HAD RELIED UPON UNDOCUMENTED ORAL WARNINGS TO RESPOND TO WHITED'S REPETITIVE MISCONDUCT.

The October 13, 1998 Amended Memorandum Decision of the Court identifies only that

Whited's "...misconduct, in itself, contravenes such basic and commonly understood rules of workplace behavior that any reasonable employee would have known that it was unacceptable and could result in disciplinary action". The Court's decision fails to acknowledge the agency's pervasive failure to:

(1) invoke any form of disciplinary action against Whited during the 15 months prior to its selection of the dismissal penalty notwithstanding that Whited' intimidating misconduct was both continuing and repetitive, and

(2) none of the successive oral warnings provided to Whited were documented by the agency when administered or were otherwise concurrently entered in Whited's personnel record.

A consequence of the Court's decision is that the agency has been excused from all accountability for its 15 months of chronic failure to administer the disciplinary action provisions within *Rule 477-11-1, State of Utah Human Resource Management Rules*. The Court has ruled correctly that Whited had a duty to obey which he disregarded repeatedly. The Court's decision, however, fails to affirm that the agency had both a concurrent and equal duty to supervise Whited through the timely and responsive use of published management rules. The agency disregarded repeatedly this duty. The Court's decision places upon Whited the entire consequence of a chronically flawed course of dealing between the agency and Whited for which the repeated derelictions of each party contributed.

Rule 477-11-1, State of Utah Human Resource Management Rules provides:

...
(1) Agency management may discipline any employee for any of the following reasons:

...

- (f) any incident involving intimidation, physical harm against co-workers, management, or the public.

Rule 477-11-1(2) describes the procedures by which a state agency must notify an employee in writing of the proposed discipline with supporting reasons. *Rule 477-11-1(3)* identifies the forms of discipline which an agency may invoke for offending conduct which falls within the scope of the disciplinary actions provisions of *Rule 477-11-1* as follows:

After a career service employee has been informed of the reasons for the proposed discipline and has been given an opportunity to respond and be responded to, the agency representative may discipline that employee, or any non-career service employee not subject to the same procedural rights, by imposing one or more of the following:

- (a) Written reprimand,
- (b) Suspension without pay up to 30 calendar days per incident requiring discipline,
- (c) Demotion of any employee to one of the following methods:
 - ...
- (d) Dismissal.
 - ...

Not every incident of employee created intimidation requires disciplinary action from an agency. Conversely, repeated and continuing incidents of perceived employee created intimidation do mandate agency imposed discipline under *Rule 477-11-1*.

The agency's allegations that Whited's chronic misconduct caused co-workers "... to fear for their safety, leave their offices, lock their doors and call for protection" cannot be reconciled factually or legally with the agency's repeated selection of nondisciplinary warnings for its response

to Whited's misconduct. Warnings, no matter how explicit and no matter how often given, can never acquire the legal status or the actual notice impact of disciplinary action. The repeated decision made by the agency to confine its personnel actions to informal warnings contradicted its management obligations to Whited under the disciplinary action provisions of *Rule 477-11-1*. As a matter of law, the accumulated informal warnings used by the agency were an inadequate personnel response to provide Whited with sufficient notice that his continuing and repetitive conduct would next invoke the dismissal sanction.

If the agency used correctly nondisciplinary warnings to respond to Whited's continuing intimidating conduct, then Whited's conduct was never sufficiently severe to warrant disciplinary action whether considered either by individual episode or cumulatively. If DHS used incorrectly the informal warning action to respond to both and individual and accumulated circumstances of Whited's misconduct, then the agency is guilty of using repeatedly a nondisciplinary personnel action which was a chronically inadequate and equivocal response to Whited's actions. If the latter proposition is correct, the agency abused its discretion when it chose to invoke disciplinary action for the first time by selecting the dismissal penalty after 15 months of accumulated misconduct.

Rule 477-11-1(3)(e) provides the following direction to an agency when imposing disciplinary action:

When deciding the specific type and severity of the discipline to administer to any employee, the agency representative may consider the following factors:

- i. Consistent application of rules and standards,
- ii. Prior knowledge of rules and standards,
- iii. The severity of the infraction,

- iv. The repeated nature of violations,
- v. Prior disciplinary/corrective actions,
- vi. Previous oral warnings, written warnings and discussions,
- vii. The employee's past work record,
- viii. The effect on agency operations, and
- ix. The potential of the violation for causing damage to persons or property.

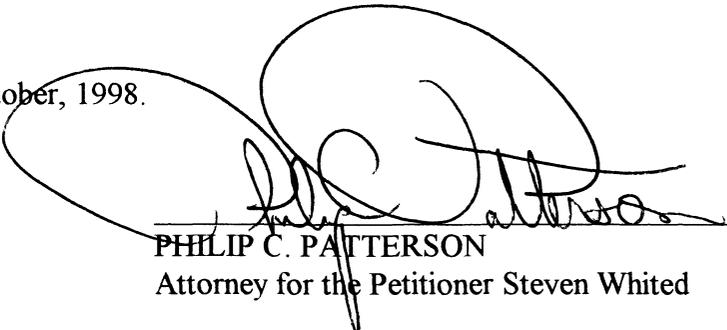
The agency's use of the dismissal sanction to discipline Whited for the first time after responding to 15 months of continuing misconduct through the repeated selection of nondisciplinary oral warnings, both contradicts and defeats the objectives of *Rule 477-11-1(3)*. As a matter of law, the agency should not be absolved of responsibility for its chronic failure to have brought Whited's offending conduct within the formal disciplinary action provisions of *Rule 477-11-1* with the expulcatory argument that Whited's conduct was so flagrant that a person of right mind would have known better than to pursue conduct which exceeded the bounds of acceptable professional/social behavior.

Approving the agency's selection of the dismissal penalty allows the agency to escape from a 15 month history of undocumented, sporadic and inconsistent informal personnel actions which lacked cohesion, which never invoked any form of disciplinary action until the dismissal penalty was selected during January 1997. This failure provided no direction to Whited about what the agency deemed to be offensive and nonconforming grievance activity conduct. The agency's selection of the dismissal penalty during January 1997 is an excessive sanction and evidences an abuse of agency discretion.

CONCLUSION

Accumulated informal warnings should never be allowed to provide the personnel platform from which to invoke for the first time the ultimate disciplinary action of dismissal. The Amended Memorandum Decision of the Court allows a state agency to circumvent the disciplinary action provisions within *Rule 477-11-1, Human Resource Management Rules*. This result follows because the Court's decision allows accumulated informal warnings to acquire a legal status equal to formal disciplinary action.

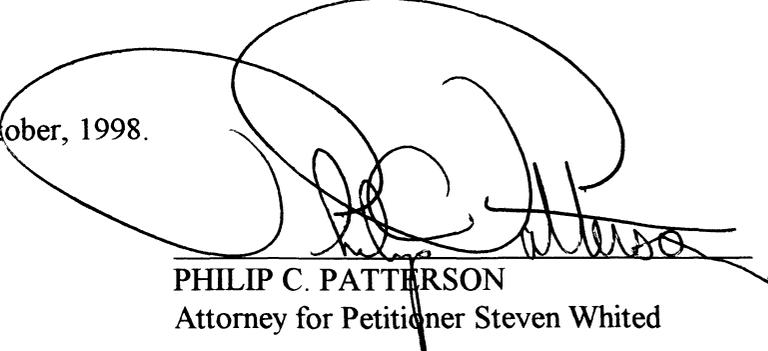
DATED this 27 day of October, 1998.


PHILIP C. PATTERSON
Attorney for the Petitioner Steven Whited

CERTIFICATION

I am the retained attorney of record for the petitioner Steven Whited. I certify that this Petition for Rehearing has been presented to the Utah Court of Appeals in good faith and not for delay.

DATED this 27 day of October, 1998.


PHILIP C. PATTERSON
Attorney for Petitioner Steven Whited

FILED

Utah Court of Appeals

OCT 13 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Steven Whited,)	AMENDED MEMORANDUM DECISION ¹
)	(Not For Official Publication)
Petitioner,)	
)	
v.)	Case No. 981412-CA
)	
Utah Department of Human)	
Services, and the Career)	F I L E D
Service Review Board,)	(October 8, 1998)
)	
Respondents.)	

Original Proceeding in this Court

Attorneys: Philip C. Patterson, Ogden, for Petitioner
Jan Graham and Stephen G. Schwendiman, Salt Lake
City, for Respondents

Before Judges Davis, Wilkins, and Orme.

PER CURIAM:

This case is before the court on its own motion for summary disposition. We affirm the Career Service Review Board's Decision and Final Agency Action.

Petitioner seeks review of the decision of the Career Service Review Board ("CSRB") sustaining the decision of the Department of Human Services ("DHS") dismissing petitioner from employment "for cause" and "to advance the interests of public service." Petitioner asserts that the sanction of dismissal was excessive, disproportionate and an abuse of discretion under the facts of the case.

In reviewing a decision of the CSRB, this court must determine whether the CSRB appropriately reviewed the DHS's action to determine whether there is factual support for the charges, and, if so, whether the sanction of dismissal is so

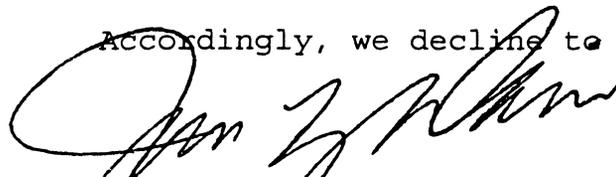
1. This Amended Memorandum Decision replaces the Memorandum Decision in Case No. 981412-CA issued on October 8, 1998.

disproportionate to those charges that it amounts to an abuse of discretion. Lunnen v. Utah Dept. Of Trans., 886 P.2d 70, 72 (Utah Ct. App. 1994).

Pursuant to CSRB rules and regulations codified in the Utah Administrative Code, a career service employee may be disciplined for "incident[s] involving intimidation, physical harm or threats of physical harm against co-workers, management or the public." Utah Admin. Code 477-11-1(1)(f) (1997). Discipline may include written reprimand, suspension, demotion or dismissal. Utah Admin. Code 477-11-1(3) (1997). This court acknowledges that the discipline imposed for employee misconduct is within the sound discretion of the imposing agency. Lucas v. Murray City Civ. Serv. Comm'n, 949 P.2d 746, 761 (Utah Ct. App. 1997).

In the case at hand, petitioner was dismissed for misconduct. Specifically, petitioner was demanding, combative, hostile, and argumentative in meetings and telephone conversations with co-workers, supervisors and nondepartmental personnel to the point of causing them to fear for their safety, leave their own offices, lock their doors and call for protection. The CSRB properly determined that such misconduct constitutes intimidation under Rule 477-11-1(1)(f). Further, the CSRB properly determined that the sanction imposed by DHS for the misconduct was not excessive, disproportionate or an abuse of discretion, given the chronic and extreme nature of the misconduct in light of several warnings received and disregarded by petitioner regarding the inappropriateness and likely consequences of his behavior. The misconduct, in itself, contravenes such basic and commonly understood rules of workplace behavior that any reasonable employee would have known that it was unacceptable and could result in disciplinary action.

Accordingly, we decline to disturb the CSRB's decision.



James Z. Davis
Presiding Judge



Michael J. Wilkins,
Associate Presiding Judge



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13TH day of October, 1998, a true and correct copy of the attached AMENDED MEMORANDUM DECISION was deposited in the United States mail to:

PHILIP C. PATTERSON
PATTERSON & BARKING
427 27TH ST
OGDEN UT 84401

CAREER SERVICE REVIEW BOARD
ROBERT N. WHIT
1120 STATE OFFICE BUILDING
BUILDING MAIL,

and a true and correct copy of the attached AMENDED MEMORANDUM DECISION was hand-delivered to a personal representative of the Attorney General's Office to be delivered to:

JAN GRAHAM
ATTORNEY GENERAL
STEPHEN G. SCHWENDIMAN
ASSISTANT ATTORNEY GENERAL
HEBER M WELLS BLDG
160 E 300 S #500
SALT LAKE CITY UT 84114



Judicial Secretary

AGENCY CASE NO.: CAREER SERVICE REVIEW BOARD , 6 CSRB 59
APPEALS CASE NO.: 981412-CA

CERTIFICATE OF MAILING

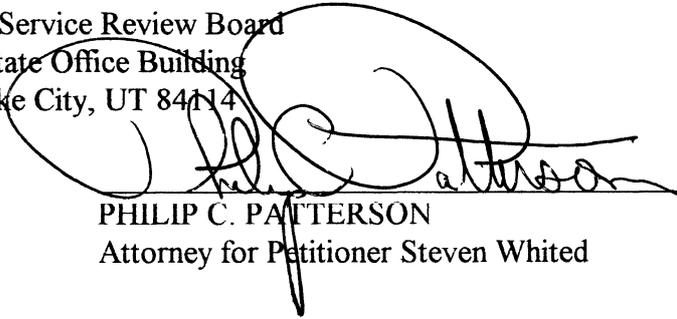
This is to certify that on the 27 day of October, 1998, I personally delivered an original and six copies of the foregoing Petition for Rehearing of the Petitioner Steven Whited to the following:

Utah Court of Appeals Clerk
450 South State
P.O. Box 140210
Salt Lake City, Utah 84114-0210

and that two copies were mailed to the following parties:

Stephen G. Schwendiman
Assistant US Attorney General
Attorney General's Office Public Affairs Division
Attorney for Utah Department of Human Services
160 East 300 South, 5th Floor
Salt Lake City, UT 84114

Robert N. White
Career Service Review Board
1120 State Office Building
Salt Lake City, UT 84114



PHILIP C. PATTERSON
Attorney for Petitioner Steven Whited