

2010

Lorin Blauer v. Utah Department of Workforce Services : Reply Brief

Utah Court of Appeals

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Case No. 20101048

IN THE UTAH COURT OF APPEALS

LORIN BLAUER,

Petitioner,

v.

UTAH DEPARTMENT OF WORKFORCE SERVICES, and UTAH
CAREER SERVICE REVIEW BOARD,

Respondents.

ANSWER BRIEF ON APPEAL FROM CAREER SERVICE REVIEW BOARD'S
DECISION, ORDER AND FINAL AGENCY ACTION.

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List of All Parties

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

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Respondent's Answer Brief

Petitioner, Lorin Blauer, appeals to this Court for the fourth time, this time challenging actions by the Utah Department of Workforce Services (DWS) that occurred prior to Petitioner's July 2004 termination, which this Court previously upheld on procedural grounds.

Statement of Jurisdiction

The CSRB possesses general jurisdiction to consider alleged personnel rule violations under Utah Code Ann. § 67-19a-202(1)(a) (West 2009). This Court possesses jurisdiction to review a final agency action under Utah Code Ann. § 78A-4-103(2)(a) (West 2009). But because Petitioner lacked a private right of action to substantively remedy alleged disability discrimination at the CSRB, it lacked subject matter jurisdiction to order any specific relief regarding those claims. *See* Utah Admin Code R.137-1-5(1) (2001); *see also* Utah Ann. § 34A-5-107(15) (West 2003) and § 67-19-32 (West Supp. 2003). Consequently, as to those claims, this Court's subject matter jurisdiction is also limited. *See Hom v. Utah Dep't of Pub. Safety*, 962 P.2d 95, 99 (Utah App. 1998) (when matter falls without court's jurisdiction, it possesses only authority to dismiss it).

Counter Statement of Issues Presented

1. No Private Right of Action

A. Whether Petitioner possesses a private right of action to substantively remedy alleged disability discrimination at the CSRB.

B. Whether the CSRB possesses subject matter jurisdiction to substantively remedy a disability discrimination claim that the Utah Legislature has reserved to the exclusive jurisdiction of the Utah Anti-Discrimination and Labor Division (UALD).

Standard of Review

Interpretation of a private right of action or remedy presents a question of law that this Court reviews for correctness. *See Buckner v. Kennard*, 2004 UT 78, ¶ 41, 99 P.3d 842, 853 (whether statute provides private right of action presents question of statutory interpretation). The scope of the CSRB's subject matter jurisdiction also presents a question of law this Court reviews for correctness, giving no deference to the hearing officer or Board below. *See Blauer v. Dep't of Workforce Servs.*, 2005 UT App 488, ¶ 14, 128 P.3d 1204 (*Blauer I*); *Blauer v. Dep't of Workforce Servs.*, 2007 UT App. 280, ¶ 4, 167 P.3d 1102 (*Blauer II*).

2. Job Performance Parameters

Whether the CSRB correctly determined that DWS sufficiently defined Petitioner's job performance parameters during face-to-face meetings between Petitioner and his supervisor.

Standard of Review

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

3. No Written Reprimand

Whether the CSRB correctly determined that a memorandum that altered Petitioner's job assignment, but not his pay, benefits, or job title did not constitute a written reprimand, and further, that this Court's decision upholding that change of assignment as a proper extension of Petitioner's job functions was res judicata on Petitioner's claim before the CSRB.

Standard of Review

Whether the job assignment memorandum constitutes a written reprimand issue has the same standard of review as Issue 2., above. Whether res judicata bars this action presents a question of law that the

Court reviews for correctness. *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 17, 16 P.3d 1214.

4. Proper Rejection of Rebuttal Testimony

Whether the hearing officer appropriately precluded Petitioner's rebuttal testimony that was irrelevant and argumentative?

Standard of Review

This Court reviews a challenge to the admission of rebuttal testimony for an abuse of discretion. *See Green v. Louder*, 2001 UT 62, ¶ 19, 29 P.3d 638.

Preservation of the Issues

Petitioner raised the first three issues in his motion for reconsideration. R 27-149. This Court determined that Petitioner adequately preserved those claims and directed that they be set for hearing. *Blauer v. Dep't of Workforce Servs.*, 2008 UT App. 84 (*Blauer III*). Those claims were heard at a Step 5 evidentiary hearing and were later reviewed at Step 6. R. 1566-1576; 1946-1974.

Petitioner failed to advance the fourth issue (rebuttal testimony) to the CSRB at Step 6 and he has failed to exhaust his administrative remedies or to preserve that issue for review on appeal.

Determinative Statutes and Rules

The determinative statutes and rules are stated in the body of this brief. DWS has attached a relevant copy of Utah Admin. Code R. 477-15 at addendum A.

Statement of the Case

Petitioner seeks judicial review of a final agency action that dismissed three, alleged personnel rule violation claims. In part, the CSRB dismissed Petitioner's disability discrimination claims because he failed to establish that DWS violated its personnel rules, and also, because the CSRB lacked subject matter jurisdiction over those claims. The CSRB also found that DWS appropriately defined Petitioner's job parameters during several face-to-face meetings between Petitioner and his supervisor, and that a change of assignment memorandum that Petitioner's supervisor issued in September 2003 did not constitute a written reprimand, but was a proper allocation of employee resources.¹ Petitioner asks this Court to reverse those decisions and to order specific relief. DWS maintains the Court should affirm them.

¹ Petitioner also contends that the Step 5 hearing officer erred when he precluded Petitioner's irrelevant and argumentative rebuttal testimony. Petitioner did not advance that claim on Step 6 and he therefore failed to exhaust his administrative remedies regarding that claim. *See infra*, discussion at p .

Statement of Facts

Procedural History

This appeal stems from Petitioner's September 2003 grievance and claim that DWS demoted him when Petitioner's supervisor changed his day-to-day job assignment. R. 13-17. This Court previously upheld that job assignment as a proper allocation of employee resources, *see Blauer I*, 2005 UT App. 488, ¶ 32, 128 P.3d 1204, but the Court also remanded six personnel rule violation claims for a hearing on the merits. *See Blauer III*, 2008 UT App. 84 (unpublished). A hearing officer held that hearing for four days in 2009. Dissatisfied with that result and with the CSRB's final agency action that upheld the hearing officer's findings and conclusions as reasonable, rationale and supported by substantial evidence, Petitioner seeks further review here.

Petitioner's Position, Performance Plans and 2001/ 2002 Performance Evaluations

Petitioner became employed by DWS in 1980, where he worked as legal counsel III until his termination in November 2004. R. 2138 at 600. Petitioner understood that his job duties would not remain the same in perpetuity. *Id.* Throughout, Petitioner's job duties waxed and waned depending upon DWS's needs and included contracts, garnishments,

bankruptcies, subplan reviews, prosecution board, and conducting unemployment insurance hearings. R. 2138 at 600-602; *Blauer I*, 2005 UT App. 488, ¶ 2.

Petitioner received annual performance reviews 1999-2003, and he received updated performance plans in 1999-2000 and 2000-2001. Those plans stated that conducting administrative hearings comprised a “core duty” of Petitioner’s position. R. 2138 at 606, 608; 2140, Exs. A-2 and G-34.² Virginia Smith (Smith), Petitioner’s then-supervisor rated his job performance and gave Petitioner a “successful” performance appraisal. Smith noted, however, that Petitioner was falling asleep during work hours, R. 2140 Ex G-13, and told Petitioner that if “a medical condition” caused him to fall asleep he “need[ed] to contact the DWS ADA coordinator, Leslee

² In 2005, this Court found that DWS consistently assigned Petitioner – as well as other legal counsel III – to preside over administrative hearings. *Blauer I*, 2005 UT App. at ¶ 8. Further, the Court determined

[t]he number of weeks DWS assigned [Petitioner] to hearings and the number of weeks [Petitioner] held hearings varied each year. For instance, in 2000, [Petitioner] presided over six to twenty hearings a week for thirty-six weeks, with most weeks falling between eleven and eighteen hearings. In 2003, DWS assigned [Petitioner] to three to fourteen hearings a week for nineteen weeks, with eight being the typical number of hearings per week.

Id. at ¶ 9.

Hintze, to discuss any possible accommodations needed.” *Id.* at 2. Petitioner did not seek an accommodation. R. 2138 at 613.

And though she rated Petitioner’s overall performance as successful, Smith also noted her concern that Petitioner was often hard to find, that he often worked with his door shut; and that although Petitioner always did what he was asked to do, he did little to “go beyond that” and as a result was “not fully integrated into DWS.” R. 2140, Ex. G-13 at p. 2. Petitioner did not grieve or respond to those comments, but he indicated that he agreed. *Id.*, Ex. G-13 at p. 3.

Petitioner did not receive an updated performance plan in 2001-02. He was also not aware and did not complain of that fact. R. 2138 at 613-14.

Tani Downing (Downing) replaced Smith as Director of the Division of Adjudication for the Department of Workforce Services in January 2002, and became Petitioner’s new supervisor. R. 2138 at 614; R. 2139 at 761.

Downing first reviewed Petitioner’s job performance in June 2002. Downing gave Petitioner a “successful” performance rating, but she also noted that he continued to fall asleep during work hours, and that Petitioner was not “carrying the workload that [his] co-attorneys [carried].” R. 2140, Ex. G-14. In response, Petitioner reported that falling asleep was “not a medical condition . . . just something that happens.” R. 2140 Ex G-15 at 2.

Respecting his workload, Petitioner wrote:

I consider the Performance Evaluation process now utilized to be flawed and demoralizing. To help solve the problem, since I best understand my job and the dynamic fluctuations of my workload, I will conduct an analysis of my position and identify the elements of the job, reasonable standards of performance and criteria for evaluating my performance for my supervisor's consideration. I will then meet with my supervisor to discuss a resolution. In the meantime, I appreciate my weekly meetings with Tani to discuss my work assignments thereby helping her understand what I do.

Id. Petitioner did not seek an accommodation or complete an analysis of his position and performance criteria. R. 2138 at 617.

Petitioner's 2003 Job Duties and Performance

In the subsequent year, the workload for all agency legal counsel increased. R. 2138 at 618, 619; 2139 at 765 - 773; 2140 Ex A-25. Petitioner did not know the size of the caseloads carried by his peers. R. 2136 at 83-84.

Petitioner continued to meet weekly with Downing during this time to discuss his job assignments and performance. R. 2136 at 209. In March and April 2003, Downing reallocated part of Petitioner's job functions to other counsel, and in March 2003, she assigned Petitioner to conduct eight administrative hearings per week. R. 2136 at 227, 246.³

³

Downing testified that she first assigned Petitioner to conduct ten hearings per week, but that he immediately complained that was "too many" and Downing reduced the assignment to eight hearings per week. R. 2139 at 781.

Downing next reviewed Petitioner's job performance in June 2003, and gave him an "unsuccessful" job rating because:

Your workload is still significantly less than your peers who have had to pick up some of your workload. You have indicated that you are unable to perform a commensurate workload as your peers because of a health reason. But you have not gotten an ADA accommodation despite our many discussions that if this health issue is affecting you in this manner you needed to get [it]. Otherwise, you are expected to perform a full workload

Lorin, I have tried to work with you this past year to help you be successful. I had hoped that your performance could be increased through informal meetings and discussions. We have met often, and for some time weekly. We have discussed your need to become more efficient with your time and assignments and carry more of your share of the workload.

2140 Ex G-16 at 2.

At that meeting, Petitioner presented Downing with a June 2004 letter from Petitioner's physician. R. 2140, Ex. G21 ; 2137 at 301. Downing did not read or accept the letter, but she took Petitioner to meet with Chuck Butler, DWS's ADA coordinator, and advised Petitioner that if he believed he required an ADA accommodation, he needed to seek that from Mr. Butler, not from Downing. R. 2137 at 301; 2138 at 493-94. Petitioner began the process of seeking an ADA accommodation that day. *See infra*, Facts at pp. 14-17.

Petitioner also complained to the Workforce Appeals Board chair about this assignment, telling her that if he had to conduct more administrative hearings, Petitioner would not be able to complete his board work. *Id.* 781-82.

Petitioner timely grieved that performance appraisal. R. 2140 Ex G-17, and challenged his “unsuccessful” classification and also complained that he did not have a current performance plan in place. *Id.* at 5. That grievance did not express the need for a disability accommodation or state that Petitioner was unable to work due to a medical condition:

My concern, however, in this response is not about reasonable accommodation as I can – and have been – performing the essential functions of my position at a highly successful level . . .

Id. at 1.

Downing gave Petitioner an updated 2003-2004 performance plan two days later. Petitioner agreed that plan was substantively the same as his prior performance plans, R. 2138 at 626, and also that his receipt of that plan resolved Petitioner’s complaint that he did not have a current performance plan in place. *Id.* at 656; 657.

Downing rejected Petitioner’s request to reverse her “unsuccessful” rating. R. 2140 Ex G-33. Petitioner advanced his grievance to Step 4.

While that grievance was pending, Petitioner and his advocate Tom Cantrell (Cantrell) met with Downing and Joanne Campbell, a Human Resource Specialist, on August 20 to discuss ways to alter Petitioner’s job assignment. R. 2140 Ex G-32; 2139 at 903. That discussion occurred at

Petitioner's request and was not part of a corrective action plan. R. 2139 at 908.

The same day, Cantrell emailed Downing to thank her for the "productive and helpful meeting." R. 2140, Ex. A-4. Cantrell stated that Petitioner was "not enthused about the idea of becoming a full time ALJ," but maintained that opinion was based not on concern over a reasonable accommodation, but because Petitioner did not believe that assignment would "utilize his highest certifications, qualifications, [or] skill level . . ." *Id.* Downing responded on August 27, 2003, in a memorandum that recounted the ongoing discussion regarding Petitioner's job assignment and that stated that Downing would not alter Petitioner's job assignment until Butler reached a decision on Petitioner's application for ADA Accommodation. R. 2140 Ex A-5.

On September 5, DWS's executive director, Raylene Ireland, granted Petitioner's grievance and elevated his performance appraisal two points to "successful." R. 2140 Ex G-39. Ireland remarked that she was giving Petitioner "the benefit of the doubt" based on Petitioner's claim that due to his lack of an updated performance plan, Petitioner also lacked guidance respecting performance standards and expectations. R. 2140 Ex G-39 at 1, 2.

Ireland made clear that it was Petitioner's supervisor's responsibility to determine "the best utilization of [Petitioner's] skills for [his] own good as well as for the good of the department." *Id.* at 2. Ireland issued her Step 4 decision the same day that Chuck Butler denied Petitioner's ADA accommodation request. Ireland was not aware that Petitioner had sought that accommodation. R. 2139 at 839.

Petitioner did not appeal Ireland's grievance determination. R.2139 at 840.

Petitioner's Application for ADA Accommodation

Petitioner was free to submit any information that he desired in support of his accommodation request. R. 2138 at 662. Petitioner sought and submitted letters from his family physician, Dr. Dennis Peterson (Dr. Peterson), including a July 26 letter in which Dr. Peterson responded to questions posed by Chuck Butler. R 2140 Ex G-22.⁴ Dr. Peterson submitted other letters at Petitioner's request, R 2140, Exs G-21 and G-23, but testified that he was not aware of the purpose of those letters, or whether anyone at DWS received them. R. 2137 at 406, 414.

In each letter, Dr. Peterson described Petitioner's physical limitations and also suggested ways in which he believed those limitations could be

⁴ Dr. Peterson also spoke by phone with Chuck Butler. R.

“accommodated.” In part, Dr. Peterson diagnosed Petitioner as suffering from obstructive sleep apnea, sciatica, and coronary artery disease. R. 2140 Ex. G-22. Respecting Petitioner’s sleep apnea and sciatica, Dr. Peterson recommended:

OSA and Sciatica – for years, he has already been accommodated for these challenging conditions in the form of assignments for the Workforce Appeals Board which lend themselves to review and preparation while being up and mobile Emphasizing the use of ‘mobile mentation’ should continue to be mutually beneficial by optimizing his output in both quality and quantity. Therefore, I recommend that his assignments be selected in such a way as to avoid, as much as possible, his functioning in [] sedentary settings . . .

Id.

To address Petitioner’s coronary concerns, Dr. Peterson stated:

CAD – in light of recent precipitation of chest pain by a stressful work environment, I recommend a clear, reasonable delineation of what comprises a full 40 hour work load for an experienced attorney in [Petitioner’s] specialty. Known and understood expectations will eliminate a major source of stress.

Id.

At the Step 5 hearing, Dr. Peterson testified that he made recommendations respecting proposed accommodations by asking Petitioner what he believed he could do. R. 2137 at 423-24.

Dr. Peterson also testified: (1) that when he submitted the July 26

letter, he did not know the purpose of Butler's questions; (2) that he performs disability determinations "occasional[ly] at most;" (3) that he did not perform any functional capacity testing to determine Petitioner's physical capacities; (4) that he did not speak with any of Petitioner's supervisors to determine Petitioner's job requirements; and (5) that he did not know the legal definition of the term "essential function." R. 2137 at 403-407, 411; *see* 42 U.S.C. § 12101 et seq.

Dr. Peterson agreed that he did not know and that Petitioner did not inform him (1) Petitioner was not required to sit for more than an hour at a time when conducting administrative hearings; (2) most hearings were conducted by telephone; and (3) by assigning Petitioner to conduct 20 administrative hearings per week, Downing had given him clear instructions as to what constituted a forty-hour workweek. R. 2137 at 407-408.

Dr. Peterson stated that all of the information that he received respecting Petitioner's job functions, working conditions, or workplace hostility came from Petitioner. R. 2138 at 423-24.

Finally, Dr. Peterson testified that Petitioner was not disabled "from an orthopedic standpoint." R. 2137 at 430.

Chuck Butler denied Petitioner's accommodation request by letter dated September 5, 2003. That letter reiterated Dr. Peterson's recommendations that Petitioner receive job assignments that "[do] not require [him] to sit for longer than an hour" and that Petitioner be given "an assignment wherein [he had] a clear understanding of [workplace] expectations." R. 2140 Ex A-6. Butler stated,

While we are not required to make an accommodation, I am providing this information to Tani in the event she may want to consider the doctor's request in making any future job assignments.

Id.

Downing was not involved in making Petitioner's ADA determination. However, Butler did provide Downing with a copy of his letter. R. 2138 at 493-94; 2139 at 789, 818, 910.⁵

Petitioner's Change of Job Assignment

With Petitioner's grievance and accommodation requests being resolved, Downing issued Petitioner a September 9, 2003 change in job assignment memorandum. That memo assigned Petitioner to conduct

⁵ In December 2004, Petitioner filed suit in the Third District Court for alleged ADA violations, among other claims. *See Blauer v. DWS*, Case No. 04092727. That court dismissed Petitioner's ADA claims in October 2006. R. 1761-1762. Petitioner also filed suit in federal court in July 2004, but he voluntarily dismissed that case the following November. *See Blauer v. DWS, et al*, U.S. District Court No. 2:04cv401.

unemployment hearings on a full-time basis, but made clear that only his duties were being altered, but that his job title, pay and benefits would remain unchanged. R. 2140 Ex G-38.

Downing intended that change of assignment to meet both DWS's and Petitioner's needs. The assignment allowed Petitioner to stand up or walk around while performing his work. R. 2139 at 789, 790. It provided Petitioner with clear expectations and enabled him to plan, organize and, schedule his work week. And the assignment provided DWS with objective criteria against which to judge Petitioner's performance. *Id.* at 790, 791, 796, 798, 799; 2140 Ex 38.

The physical demands for conducting hearings were light. Ninety-plus percent of the hearings were done by speaker phone with the participants on the phone. Most hearings lasted an hour, leaving Petitioner free to take breaks or stand up at any time during the course of a hearing. R. 2139 at 764, 797.

Before assigning Petitioner to conduct hearings full-time, Downing met with and considered job assignment proposals from Petitioner and Cantrell. R. 2139 at 791-793; R. 2140 Exs G-32. Each of Petitioner's proposals included a combination of duties, but few administrative hearings. R. 2140, G-32; R. 2138 at 510-512; 2139 at 793. Downing rejected the first option, comprised

primarily of contribution work, because it would require Petitioner to sit for more than an hour at a time and because Petitioner's performance would be subjectively rated. R. 2139 at 794. Downing rejected the second option, comprised primarily of Workforce Appeals Board work, because the board chair previously complained to Downing about the quality of Petitioner's work and had advised Downing that if Petitioner were given that assignment, the chair would hire her own legal counsel. R. 2139 at 794-95; 782; 787-788.

In addition to those, Downing testified that she considered other potential assignments, but rejected them because the performance evaluation standards were based on subjective criteria. R. 2139 at 794-95.

Petitioner's assignment was neither permanent, disciplinary, nor a corrective action. The assignment was also not made in retaliation for Petitioner having filed a grievance or sought an accommodation. *Id* at 791, 796, 797, 801, 808, 845, 905, 908.

Petitioner's Second Grievance

Petitioner grieved this new assignment on September 12, claiming among others, that it constituted a demotion. R. 2140 Ex G-40. On September 26, Ireland granted Petitioner a hearing on that grievance, although one was not required. R. 2139 at 841; 2140 Ex G-44. Immediately

following that hearing, Petitioner went on sick leave and never returned to work. R. 2140 Ex A-12; 2138 at 672, 673; *see supra* n. 6.

Ireland issued her Step 4 Decision denying Petitioner's second grievance in October and found that the change of assignment did not constitute a demotion. R. 2140 Ex G-44. Petitioner advanced his grievance to Step 5.

Step 5 Proceedings

The CSRB administrator dismissed Petitioner's grievance for lack of jurisdiction. R. 20-26. Petitioner moved for reconsideration, and for the first time, raised six alleged personnel rule violations, three of which are the subject of this action. R. 27-149.

The administrator denied Petitioner's request and Petitioner sought judicial review in the district court. R. 276-282; 2140, Ex. A-13. The district court agreed that DWS did not demote Petitioner and it dismissed that claim, but the district court remanded Petitioner's personnel rule violation claims to the CSRB for "consideration." R. Ex. A-14. Petitioner appealed that decision here.

This Court affirmed the district court's finding that Petitioner was not demoted. *Blauer I*, 2005 UT App. 488, ¶ 32. Later, Petitioner moved the

CSRB to set a hearing regarding the rule violation claims that the district court had remanded.⁶

The parties met informally to determine the issues to be adjudicated on Step 5 and to set discovery dates. R. 1954. Thereafter, DWS moved to dismiss the remanded claim because Petitioner had failed to grieve them at the department level, and because the claims had been resolved in ancillary proceedings. *Id.*

A hearing officer granted DWS's motion in December 2006 because "the CSRB ha[d] no jurisdiction to go back and somehow hear claims not raised with the proper entity more than three and one-half years ago. . ." R. 665, 1955-1956. The hearing officer also determined that Petitioner's July 2003 grievance resolved Petitioner's job performance parameter claim, R. 664, 1956, and that because in *Blauer I* this Court rejected Petitioner's complaint

⁶ In the time intervening Petitioner's appeal of his demotion grievance and his request for a hearing to address the alleged personnel rule violations, Petitioner took approved medical, FMLA, and long-term disability leave, and never returned to work. *See* R. 1786; 2137 at 371, 379, 388; 2140, Ex A-18. To retain employment following medical leave, Utah law requires an employee to return to work within one year of starting that leave. *See* Utah Admin Code. R 477-7-17. Petitioner did not return to work within that time and on November 3, 2004 DWS terminated his employment. Petitioner grieved that termination and it was upheld following a Step 5 evidentiary hearing and a Step 6 appeal. Petitioner filed an untimely appeal of the Step 6 decision that this Court dismissed for lack of jurisdiction, concluding that it could no consider the CSRB's decision upholding the termination. *See Blauer II*, 2007 UT App. 280.

that his supervisor had assigned him tasks outside of Petitioner's job, that decision was res judicata and barred the CSRB from relitigating that issue. R. 664-65; 1956; *see Blauer I*, 2005 Ut App. 488, ¶ 32.

Petitioner appealed that dismissal here. This Court held that because the district court had previously determined that Blauer had preserved his personnel rule violation claims, the CSRB erred in dismissing them. The Court remanded those claims for a hearing on the merits. R. 1956-1957, *Blauer II*, 2008 UT App 84.

Prior to the Step 5 hearing and after considering memoranda from both parties, the hearing officer ruled that the September 2003 change of assignment memorandum did not constitute a written reprimand and that DWS bore no burden to prove the basis for that memorandum. But the hearing officer agreed to accept additional evidence or argument from Petitioner to controvert that finding. R. 1456-1458.

The hearing officer conducted a Step 5 evidentiary hearing on November 18, 19, 23, and December 7, 2009 regarding Petitioner's personnel rule violation claims.⁷ At the conclusion of that hearing, the hearing officer

⁷ Petitioner raised six personnel rule violations on Step 5, but advanced only three of those claims in his Step 6 appeal. Those are the only claims before this Court and they include (1) DWS's alleged failure to define Petitioner's job performance parameters in violation of Utah Admin Code R 477-10-1; (2) DWS's alleged harassing and retaliatory conduct toward Petitioner in

entered his finding of facts and conclusions of law, decision and order. R. 1566-1576. In relevant part, the hearing officer determined that: 1) DWS appropriately defined Petitioner's job performance parameters in face-to-face meetings between Petitioner and his supervisor and that Petitioner therefore "suffered no harm" by DWS's failure to provide him with an updated performance plan, R. 1574; 2) the CSRB lacked subject matter jurisdiction to adjudicate Petitioner's disability discrimination claims, R. 1575; and 3) Petitioner failed to meet his burden to show the change of assignment memorandum constituted a written reprimand as a matter of law. R. 1574.

Petitioner appealed those rulings and advanced his grievance to Step 6. R. 1616-1742. The matter was fully briefed and the CSRB held oral argument on October 5, 2010. R. 1748-1826; 1831-1935.

On December 20, 2010 the CSRB issued its decision, order and final agency action and upheld all of the findings and conclusions that the hearing officer reached at Step 5. R. 1946-1974. In addition, the CSRB expressly found that Petitioner failed to carry his burden to prove that DWS violated the State's personnel policies against disability discrimination. R.1969-70.

violation of Rules 477-15-2, -3; and (3) Petitioner's claim that the September 2003 change of job assignment memorandum constituted a "written reprimand" grievable under Utah Code Ann. § 67-19a-302(1) (West Supp. 2003). R. 1566-1576, Step 5 Decision and Order; R. 1946-1974 Step 6 Final Agency Action.

Summary Argument

The CSRB – and the Step 5 hearing officer before it – properly adhered to this Court’s mandate and conducted a hearing on the merits of Petitioner’s personnel rule violation claims. Thereafter, the CSRB correctly concluded that DWS did not violate the State’s general policy precluding discrimination and unlawful harassment when DWS denied Petitioner’s request for a reasonable accommodation and thereafter, altered Petitioner’s job duties. But those findings were not necessary, because Petitioner lacks a private right of action to substantively remedy a violation of those rules, thus depriving the CSRB of jurisdiction to grant Petitioner specific relief.

The CSRB also correctly concluded that DWS adequately defined Petitioner’s job performance parameters in the several face-to-face meeting that Petitioner’s supervisor conducted. Too, DWS remedied Petitioner’s concern over the lack of performance plan when his supervisor provided Petitioner with an updated plan and the executive director sustained Petitioner’s underlying employee grievance.

This Court previously upheld DWS’s actions in issuing Petitioner a change of job assignment memorandum and that decision is res judicata here. Moreover, that memorandum, that merely altered Petitioner’s day-to-day job

functions, but did not effect his job title, pay, or benefits did not constitute a written reprimand as a matter of law.

Finally, Petitioner failed to adequately exhaust his administrative remedies respecting his claim that the hearing officer erred by excluding Petitioner's rebuttal testimony, and this Court lacks jurisdiction to review the same. But should the Court find that Petitioner preserved that claim, Petitioner failed to show that the proffered testimony was in the nature of rebuttal, or if it was, that its admission would have changed the outcome at the CSRB below.

Argument

I. The CSRB Correctly Dismissed Petitioner's Disability Discrimination Claims.

A. The CSRB adhered to this Court's appellate mandate.

Petitioner contends the CSRB ignored this Court's prior mandate and failed to conduct a hearing on the merits of Petitioner's claim that DWS violated the State's personnel rules against unlawful discrimination and workplace harassment. Petitioner is mistaken.

Following remand from this Court, the hearing officer conducted a lengthy evidentiary proceeding on all of Petitioner's personnel rule claims, including his claim that DWS retaliated against him in violation of Utah

Administrative Code Rules 477-15-2, and -3. The hearing officer heard live testimony from Petitioner and his physician and received documentary evidence in support of those claims. The hearing officer did not deny Petitioner the opportunity present evidence of alleged discrimination, but in his findings and conclusions, he remarked that the “heart” of Petitioner’s grievance and the “bulk” of his evidence related to Petitioner’s claim that DWS discriminated against him by assigning him to conduct administrative hearings on a full time basis. *See* R.1572, Step 5 Decision and Order at 7.

Converse to Petitioner’s claim, the hearing officer did not revisit whether Petitioner adequately preserved his discrimination claims – that issue had already decided by the district court. Instead, the hearing officer correctly determined that regardless of the evidence that Petitioner presented on the merits, the UALD, not the CSRB, possessed the exclusive authority to substantively remedy Petitioner’s claim that DWS discriminated against him based on an alleged disability. R.1572-73, Decision and Order at p. 7-8 (citing Utah Code Ann. § 67-19a-102 (dissatisfied with employer’s discrimination response, a grievant may file complaint with UALD); *id.* at § 34A-5-107 (filing action with UALD under Utah’s ADA provides “exclusive remedy” under state law to redress disability discrimination); and Utah Admin. Code R. 137-1-5

(“The CSRB and CSRB hearing officers have no jurisdiction over [discrimination] claims.”))

Even if the hearing officer erred by not deciding⁸ whether Petitioner proved the alleged rule violations, any error was remedied by the CSRB at Step 6. *See* R. 1968-1970, Final Agency Action at 26-28. The CSRB expressly noted and then meticulously adhered to this Court’s mandate by reviewing all of the evidence presented and finding that Petitioner did not meet his burden to prove that DWS violated rule 477-15-2 or -3. *Id.* It was only *after* making that determination, that the CSRB examined and then upheld the hearing officer’s jurisdictional order. R. 1970-71, Final Agency Action at 28-29.

Because that finding is correct, it should be upheld.

⁸ At pages 24 and 36 of his brief, Petitioner incorrectly states that the hearing officer found Petitioner demonstrated that DWS violated those rules. In part, Petitioner contends that the hearing officer’s statement that “[t]he evidence shows that DWS denied Mr. Petitioner’s request for an accommodation due to an alleged disability,” equates to an express finding of fact and conclusion of law that DWS engaged in unlawful discrimination and harassment. *See* Petitioner Br. at p. 24. But that excerpt is plain on its face and states only the hearing’s officer’s recitation of procedural facts; Petitioner claimed to suffer from an alleged disability for which he sought an accommodation that DWS denied. That excerpt neither states nor infers – and the hearing officer was not called on to find – (1) that Petitioner is, in fact, disabled as that term is defined by federal law; (2) that Petitioner was entitled to a reasonable accommodation; (3) that the requested accommodation was reasonable under the law or circumstances; or (4) that DWS unlawfully or unreasonably denied Petitioner’s request.

This Court should not permit Petitioner to make so much out of so little.

B. The CSRB's factual findings are supported by substantial evidence and its decision is reasonable and rational.⁹

The CSRB correctly dismissed Petitioner's disability discrimination claims because substantial evidence from the entire record supports the CSRB's determination that DWS did not violate Rules 477-15- -2, or -3. This Court should affirm.

1. Petitioner failed to adequately marshal the evidence supporting the CSRB's factual findings.

The CSRB's factual findings should be affirmed because Petitioner has failed to adequately marshal the evidence supporting them. "[T]he process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder." *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990). Before the Court "will subject an agency's findings to the substantial evidence test, the party challenging the findings 'must marshal all the evidence supporting the findings *and show* that despite the supporting facts, the [agency's] findings are not supported by substantial evidence.'" *VanLeeuwen v. Indus. Comm'n*, 901 P.2d 281, 284 (Utah App. 1995) (emphasis added) (quoting *First Nat'l Bank v. County Bd. of*

⁹ At page 24 of his brief, Petitioner erroneously contends that the CSRB did not find that Petitioner failed to demonstrate discrimination under R. 477-15-2 and 3.

Equalization, 799 P.2d 1163, 1165 (Utah 1990)) (bracketed material in original).

Petitioner has attempted to meet that burden, but he has fallen short of this Court's requirement. In argument, Petitioner underscored facts most favorable to his position and ignored the other, contrary evidence.¹⁰ He thus failed "show" that despite contrary evidence, the CSRB's findings have no substantial support. See *VanLeeuwen*, 901 P.2d at 284. "This is not adequate." *Whitear v. Labor Comm'n*, 973 P.2d 983, 985 (Utah App. 1998).

For that failure alone, the CSRB's factual findings are conclusive. See *Whitear*, 973 P.2d at 985. The Court should affirm the CSRB's determination that Petitioner failed to prove that DWS violated either rule guarding against disability discrimination.

2. Substantial evidence supported DWS's actions.

Even still, substantial evidence supports the CSRB's conclusion that

¹⁰ Petitioner focuses largely on self-serving statistics that support his claim. But even Petitioner agreed that in 2002 and 2003, the workload for all of DWS's legal counsel increased, and further, that Petitioner did not know the size of the caseload carried by his colleagues. R.2136 at 83-84; 2138 at 618-19; 2139 at 765-73; and R. 2140, Ex. A-25. Petitioner also laments that job assignment memorandum represents Downing's failed attempt to place Petitioner on corrective action. Downing and Campbell's testimony rebuts that claim. R. 2139 at 791, 796-97, 801, 808, 905, 908. Moreover, this Court has previously found the change of job assignment was proper and within the scope of Petitioner's duties. *Blauer I*, 2005 UT 488, ¶ 32.

DWS did not discriminate or retaliate against Petitioner in violation of Rules 477-15-2 and -3. Substantial evidence is “more than a mere ‘scintilla’ of evidence and something less than the weight of the evidence.” *Johnson v. Bd. of Review of Indus. Comm’n*, 842 P.2d 910, 911 (Utah App. 1992). It is “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Larson Limestone Co. v. State*, 903 P.2d 429, 430 (Utah 1995) (citation and quotation marks omitted).

Read in its entirety, the substantial evidence does not show that Downing took action on September 9, 2003 to discriminate against Petitioner, or because Petitioner sought a reasonable accommodation. Instead, that evidence shows that Downing issued the change of assignment memo and altered Petitioner’s job functions to meet Petitioner’s specific needs, and also, to respond to a growing trend in DWS’s workload and a spiraling trend in Petitioner’s ability to complete that work.

C. Petitioner Lacks a Private Right of Action to Substantively Remedy Disability Discrimination at the CSRB.

But those findings, though correct, are inconsequential because Petitioner lacks a private right of action to remedy disability discrimination at the CSRB. Utah Administrative Code Rule 477-15 does not guarantee Petitioner any substantive remedy at law; instead, that rule cites only the

State of Utah's broad policy against unlawful discrimination. Petitioner selectively quotes from Rule 477-15; for the Court's information and convenience, DWS has provided a copy of the entire Rule at addendum A to this brief.

That rule, entitled "Unlawful Harassment Policy and Procedure," contains six subsections, each with a separate heading. Rule 477-15-1, entitled "Purpose" states

It is the State of Utah's *policy* to:

- (1) provide all employee's a working environment that is free from unlawful harassment based on race, religion, national origin, color, sex, age, disability, or protected activity under the antidiscrimination statute; and
- (2) comply with state and federal laws regarding discrimination based on unlawful harassment.

Utah Admin Code R. 477-15-1 (West Supp. 2003) (emphasis added). In turn, R. 477-15-2, entitled "Policy" contains six subparts that 1) define the term unlawful harassment; 2) describe the types of behavior that constitute unlawful harassment; and 3) state that an employee who engages in unlawful harassment shall be subject to corrective action or discipline, and may be referred for criminal prosecution. *Id.* at R.477-15-2.

Subsection R. 477-15-3, entitled "Retaliation," provides that no person may retaliate against an employee who opposes a practice barred under the

policy, or who has filed a charge or participated in an investigative proceeding. That subsection also states that an employee who engages in unlawful retaliation shall be subject to corrective or disciplinary action. *Id.* at R. 477-15-3.

Subsections R. 477-15-4 and -5 set out the proper complaint and investigative procedures, respectively. And finally, subsection R.477-15-6 sets out the protocols for proper record keeping under the rule. *Id.* at R. 477-15-4 to -6.

Bereft is any provision granting specific relief or a right of action to an employed aggrieved by discrimination. Absent specific direction from the language of a statute or rule, Utah's courts are loathe to imply a private right of action. *See Miller v. Weaver*, 2003 UT 12, ¶20, 66 P.3d 592; *see also Young v. Salt Lake City Sch. Dist.*, 2002 UT 64, ¶ 64, 52 P.3d 1234; *J.H. v. West Valley City*, 840 P.2d 115, 125 (Utah 1992); *Broadbent v. Bd. of Educ. of Cache County*, 910 P.2d 1274, (Utah App. 1996). This reluctance, the Utah Supreme Court has held, is particularly strong when the Legislature has already designated a method of resolution through an administrative agency specifically empowered to handle the issue. *Miller*, 2003 UT 12, ¶ 20.

Here, a method to remedy unlawful disability discrimination exists. The Utah Antidiscrimination Act, Utah Code Ann. § 34A-5-101 et seq.,

prohibits discriminatory employment practices, and states that an appeal to the UALD constitutes the “exclusive remedy” for an employee who has suffered unlawful discrimination. *Id.* § 34A-5-107(15).

Moreover, a private right of action is one that belongs to a person, individually, as opposed to being enforceable on behalf of a general population. *See Buckner v. Kennard*, 2004 UT 78, ¶ 38, 99 P.3d 842; *see also* Utah Admin Code. R. 477-15-1 (stating Utah’s broad policy against unlawful harassment). And even when a rule “grants a private right of action, the scope of the right may not include all remedies.” *Buckner*, 2004 UT 78, ¶ 38.

The thrust of Rule 477-15 is procedural. Its purpose is stated on its face and includes the State’s policy to provide its employees with a working environment free from discrimination or unlawful harassment, and states the procedures a state agency must follow when a charge of discrimination is made. Petitioner does not seek to enforce that general policy; he seeks, instead, back pay, benefits and attorney fees. Nothing on the face of the rule states or implies such a remedy.¹¹ But those damages can be obtained, if at all, by first complying with Utah’s Antidiscrimination Act. The CSRB’s

¹¹ Conceivably, the only substantive remedy available under Rule 477-15 is an action to subject an employee who violates that policy to discipline or corrective action. *See* Utah Admin. Code. R. 477-15-2(3), -3(2).

decision is sound and based on a plain reading of the rule. It should be affirmed.

D. The CSRB Lacks Subject Matter Jurisdiction to Substantively Adjudicate Disability Discrimination Claims.

1. Only the UALD possesses jurisdiction to remedy unlawful harassment and discrimination.

The CSRB correctly determined that Utah's Antidiscrimination and Labor Division, not its Career Service Review Board, is vested with the subject matter jurisdiction to adjudicate workplace discrimination claims. The CSRB correctly dismissed Petitioner's disability discrimination claims. That decision is sound and should be affirmed.

Utah's Personnel Management Act dictates the procedures that a career service employee who alleges unlawful discrimination or harassment must follow to remedy that claim. *See* Utah Code Ann. § 67-19-32 (West 2003). At its core, the Act directs the employee to initiate a complaint to the UALD, not the CSRB:

(1) A[] . . . career service employee . . . who alleges a discriminatory or prohibited employment practice as defined in Section 34A-5-106 may submit a written grievance to the department head where the alleged unlawful act occurred.

(2) Within ten working days after a written grievance is submitted under Subsection (1), the department head shall issue a written response to the grievance stating his decision and the

reasons for the decision.

(3) If the department head does not issue a decision within ten days, or if the grievant is dissatisfied with the decision, the grievant may submit a complaint to the Division of Antidiscrimination and Labor, pursuant to Section 34A-5-107.

Id.

In turn, the Antidiscrimination and Labor Act, Utah Code Ann. § 34A-5-107 (West Supp. 2003), reiterates those procedures, and states further that they constitute, “the *exclusive remedy* under state law for employment discrimination based upon . . . (i) disability.” *Id.* at § 34A-5-107(15) (emphasis added); *See Buckner*, 2004 UT 78, ¶ 37 (appeal to the UALD constitutes the “exclusive remedy for an employee claiming a violation of the statute.”).

Finally, the Utah Personnel Management Rules make clear that the CSRB has no jurisdiction to substantively remedy discriminatory or prohibited employment practices. But Rule 137-1-5 states, in unmistakable language, that the CSRB has not jurisdiction over disability discrimination claims:

Claims alleged to be based upon a legally prohibited practice as set forth in Section 34A-5-106, including employment discrimination on the basis of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, or disability, are not admissible under these grievance procedures. *The CSRB and CSRB hearing officers have no jurisdiction over the preceding claims.*

Utah Admin Code R. 137-1-5(1) (emphasis added).

A plain reading of those statutes and rules supports the CSRB's jurisdictional decision. That decision should be upheld here.

2. Jurisdiction has not already been decided by this Court.

Petitioner claims this Court previously vested the CSRB with jurisdiction to substantively remedy his discrimination claims. That claim is without merit. *See Blauer III*, 2008 UT App. 84.

In *Blauer III*, this Court determined that Petitioner's rule violation claims were "preserved." *Id.* The Court did not address or express any opinion respecting whether the CSRB possessed jurisdiction to substantively remedy Petitioner's discrimination claims. But this Court found that the CSRB had erred "by considering jurisdictional issues that have already been decided by the district court." *Id.*

The CSRB's authority and the scope of its jurisdiction is determined by the legislature, not the courts. *See* Utah Code § 67-19a-202; *see also Olson v. Utah Dept. of Health*, 2009 UT App 303, 221 P.3d 863. The legislature has expressly defined and limited that jurisdiction by statute.

"[A] lack of jurisdiction can be raised by the court or either party at any time." *Bradbury v. Valencia*, 2000 UT 50, ¶ 8, 5 P.3d 649. At Step 5, the hearing officer properly addressed this jurisdictional question and correctly

concluded that “the CSRB is without jurisdiction to hear” and “is without authority to review [Petitioner’s] claims of discrimination, including retaliation.” R. 1572-73, Decision and Order at 7-8. The CSRB correctly determined that decision was not erroneous. R. 1969-71, Final Agency Action at 27-29. DWS urges the Court to do the same.

II. The CSRB Properly Dismissed Petitioner’s Job Performance Parameters Claim.

Petitioner’s July 2003 employee grievance addressed his job performance standards and Petitioner’s complaint that he was “working under a performance plan that was put in place some years ago.”¹² R. 2140 Ex. G-39. Downing promptly considered and resolved that claim when she gave Petitioner a new performance plan on June 18, 2003. *Id.* at Ex G-33. And prior to that, Downing made Petitioner aware of his job assignments and DWS’s expectations in weekly meetings that she held with Petitioner in 2002-2003. Despite those facts -- that Petitioner must accept -- he claims the CSRB erred when it found that DWS satisfied the substantive provisions of Utah Admin. Code R. 477-10-1. But the CSRB’s decision is correct.

¹² Petitioner prevailed on that grievance and, presumably because he won, he did not appeal from Agency Director Ireland’s decision. R. 2140, Ex G-39; 2139 at 840:18-23.

A. Substantial evidence supports the CSRB's findings and conclusions.

Petitioner received annual performance evaluations during his employment. R. 2138 at 606. In most years, those evaluations successfully rated Petitioner's performance. But in 2001 and 2002, Petitioner's supervisors, Smith and Downing, respectively, began to note a downward trend in Petitioner's work. They brought that concern to Petitioner's attention. R. 2140, Exs. G-13 & G-14.

In 2001, Petitioner did nothing to challenge that statement; but he agreed with Smith's evaluation. R. 2140, Ex. G-13 at p. 3. In 2002, Petitioner responded:

I consider the Performance Evaluation process now utilized to be flawed and demoralizing. To help solve the problem, since I best understand my job and the dynamic fluctuations of my workload, I will conduct an analysis of my position and identify the elements of the job, reasonable standards of performance and criteria for evaluating my performance for my supervisor's consideration. I will then meet with my supervisor to discuss a resolution. In the meantime, I appreciate my weekly meetings with Tani to discuss my work assignments thereby helping her understand what I do.

R. 2140 Ex G-15 at 2. Petitioner failed to offer DWS with input regarding the elements of his job or performance standards.

Petitioner had a performance plan in place in 1999-2000 and 2000-

2001. R. 2140, Ex A-2; Ex G-34. That plan was not updated for 2001-2002, but Petitioner was neither aware of this fact, nor did he complain about it. R. 2138, 613:24-25, 614:1-2. And despite having challenged DWS's "[p]erformance [e]valuation process as flawed" in June 2002, Petitioner took no steps to learn or complain of the fact he also had no new performance plan in 2002-2003. R. 2138 at 617:24-25, 618:1-18.

Despite the lack of a renewed plan, prior to and after Petitioner's June 2002 performance evaluation, Downing met weekly with Petitioner weekly in 2002 and 2003 "to discuss [his] work assignments:"

Q. After the 2002 performance review that you had with Mr. Blauer that's memorialized in G-14, did you schedule weekly meetings with Mr. Blauer to review his work?

A. Yes.

Q. In those meetings with Mr. Blauer, did you discuss performance expectations?

A. Yes.

R. 2139 at 777:8-15.

And within days of submitting his July 2003 grievance, Downing gave Petitioner a 2003-2004 performance plan. R. 2140, Ex G-17; Exhibit G-33. Petitioner admits that plan was substantively the same as his prior performance plans. R. 2138

Petitioner also admits that the part of his July 2003 grievance that complained of the lack of current performance plan was resolved when he received that plan:

Q. You admit that the part of your first grievance that no current performance plan was in place was resolved?

A. Yes. She brought me that – that 2003-2004 performance plan and so that would be a performance plan.

R. 2138 at 656:21-25; 657:1.

The hearing officer correctly concluded that although DWS may have been dilatory in providing a performance plan, “Mr. Blauer suffered no harm from the failure and any claim for relief due to the omission is moot.”¹³ R. 1753, Decision and Order at 9. And on that evidence, the CSRB correctly upheld the hearing officer’s conclusion that “[Blauer’s] job performance parameters were properly defined.” R. 1966-67, Final Agency Action at 24-25. Those findings are correct and the CSRB determination was reasonable and rational. Petitioner’s challenge to his job performance parameters should be denied.

¹³ In response to Petitioner’s Step 4 grievance, Executive Director Ireland gave Petitioner the “benefit of the doubt,” that the lack of a current performance plan drove Petitioner’s performance problems. Ireland therefore elevated Petitioner’s performance rating to “successful.” R. 2140 Ex. G-39.

III. The CSRB Correctly Determined That the September 9, 2003 Job Assignment Memorandum Was Not a Written Reprimand

A written warning or other memorandum constitutes adverse, or disciplinary action “only if it affects a significant change in [Petitioner’s] employment status.” *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1224 (10th Cir. 2006); *see also Tapia v. City of Albuquerque*, 170 Fed. Appx. 529, 2006 WL 308267 at *3 (10th Cir. Feb. 10, 2006) (what constitutes adverse action “is inherently fluid and fact-based,” but “a mere inconvenience or an alteration of job responsibilities will not suffice.”). Here, Downing’s September 9, 2003 memorandum altered Petitioner’s day-to-day job assignment, but not his job title, benefits, or rate of pay. That memorandum did not change Petitioner’s employment status. It also did not constitute a written reprimand. The CSRB’s similar conclusion is correct. It should be affirmed.

A. Res Judicata Bars This Claim.

The CSRB lacks jurisdiction to review non-disciplinary action. The CSRB possesses jurisdiction to review disciplinary action, such as dismissals, demotions, suspensions, and written reprimands. *See Utah Code. Ann. § 67-19a-202(1)(a)*. Petitioner first challenged the change of assignment memorandum in September 2003, and claimed that it constituted a demotion

– a disciplinary action subject to the CSRB’s jurisdiction. The CSRB Administrator disagreed and he **dismissed** that grievance. Petitioner sought judicial review in the state district court. There, the court determined the memorandum did not constitute a demotion and it too dismissed Petitioner’s grievance. Dissatisfied, Petitioner appealed the district court’s determination here. This Court found the change memorandum was not a demotion, i.e., it was not a disciplinary action, but a proper allocation of employee resources. *See Blauer I*, 2005 UT App, ¶ 32.

That decision is final. It is binding on Petitioner and DWS. And, it precludes Petitioner from challenging the change memorandum for a second time here.

The doctrine of res judicata promotes the finality of judgments and embraces two branches – issue preclusion and claim preclusion. *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 28, 194 P.3d 956. Issue preclusion, provides that a court’s final decision on an issue actually litigated and necessarily decided in a previous suit is conclusive on that issue in subsequent litigation. *Id.*, ¶¶ 31-32; *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The doctrine is more than a court management tool, but is intended to relieve parties of the cost and vexation of multiple suits, conserve judicial resources, and encourage reliance on judgments. *Id.* ¶ 28.

Issue preclusion applies when (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See id.*; also *Youren v. Tintic School District*, 86 P.3d 771 (Utah App.), *cert. denied*, 94 P.3d 929 (Utah 2004). Each element is satisfied.

The CSRB's decision and this Court's order *Blauer I* constitute a final adjudication on the merits of Petitioner's demotion (disciplinary) claim. The parties are identical in each action. The prior proceedings afforded a full and fair opportunity to litigate the issue at controversy here. And, the determinative issue – whether the change memorandum was disciplinary or a proper exercise of DWS's discretion – was decided by the CSRB and this Court.

The Court should bar Petitioner's attempt to challenge the change of assignment memorandum for a second time, but the Court should bar that claim.

B. Public Policy Bars Petitioner's Claim.

Previously, this Court also recognized that sound public policy belies

Petitioner's claim:

Our decision is buttressed by the adverse policy implications of concluding that DWS demoted Blauer. First, a decision in favor of demotion could limit a supervisor's capability to alter responsibilities based on changing department needs within a given set of job functions, hindering management's flexibility. Second, a finding of demotion would place limitations on an employer's ability to make probationary assignments. Finally, in making a demotion determination, we would provide employees with a means of claiming "demotion" anytime an employer assigns them to a task they do not like or wish to perform.

Id. at ¶ 35.

Those policy considerations apply with equal force here. Too, they are shared by other courts.

In *Holt v. Bd. of Educ. Of Webutuck Central Sch. Dist.*, 52 N.Y.2d 625, 634 (N.Y. 1981), the New York Court of Appeals considered Holt's claim that a letter she received from a school administrator that was critical of Holt's performance constituted a written reprimand subject to appeal. Rejecting that claim, the New York court observed:

[C]ritical evaluations . . . fall within the permissible range of administrative evaluation. While the language of the administrators' letter may appear to some to be in the nature of a "reprimand" within the literal meaning of the word, it falls far short of the sort of reprimand contemplated by the statute. Although the sharply critical content of the letter is unmistakable, the purpose of such communications – to call to the teacher's attention a relatively minor breach of school policy and to encourage compliance with that policy in the future – is also clear. The purpose is to warn, and hopefully to instruct – not to punish.

Holt, 52 N.Y.2d at 634. The court continued,

Such an informal warning serves, we believe, as a useful tool to help the administrator correct minor problems before they grow into major ones. Should [an administrator] be deprived of this informational means of policy enforcement, one of two situations will ultimately prevail. The [administration] must either overlook all minor infractions and allow them . . . or must initiate a formal disciplinary action to remedy [them] ... Surely, the Legislature has not expressly limited [the agency] to a policy choice between extremes of permissiveness and strictness. Common sense dictates that another, more moderate, option should be available.

Id. at 633.

Even in the sole case that Petitioner cites, the court recognized the practical difference between issuing a reprimand and giving constructive criticism. That case, *Gordon v. Horsley*, 86 Cal.App.4th 336, 102 Cal. Rptr.2d 910 (Cal. Ct. App. 2001), is at once distinguishable from and beneficial to the ruling at issue here.

There and as part of larger employment action, Gordon, a deputy sheriff, received a letter from the county sheriff that “went beyond criticizing Gordon; it specifically removed privileges that are accorded other peace officers.” 102 Cal.Rptr.2d at 917. That did not simply warn; its restrictions were strictly enforced against Gordon, resulting in “disadvantage, harm, loss [and] hardship” *Id.* at 918. Despite that fact, the California court commented that not all written comments from an employer rose to such a

level. But the court recognized the difference between a “performance evaluation containing negative comments,” and imposition of “specific restrictions” on an employee’s powers as result of “misconduct.” *Id.* at 919.

Here, the change of assignment memorandum did not adversely affect Petitioner. It reallocated his duties. And though that memorandum contained comments, critical in nature, those comments were meant to “warn” Petitioner of problematic job performance and to guide him to an acceptable alternative.

The change memorandum was not punishment. It was not restrictive. And it was not issued as result of employee misconduct. But the record makes clear that Downing issued the memorandum to meet DWS’s and Petitioner’s needs. The CSRB’s conclusion is sound, reasonable and rational. The Court should affirm it.

IV. The CSRB’s decision to preclude Petitioner’s rebuttal testimony was not reversible error but Petitioner failed to preserve that claim.

Petitioner contends the Step 5 hearing officer committed reversible error when he precluded Petitioner from offering his rebuttal testimony. Beyond that bald assertion, Petitioner has not shown that the hearing officer’s ruling was error, or if so, why it was harmful. But this Court need not address this claim because by failing to advance it to Step 6, Petitioner

did not exhaust his administrative remedies in the CSRB below.

A. Petitioner Failed to Exhaust His Administrative Remedies and this Court Lacks Subject Matter Jurisdiction to Review this Claim.

In Utah, a party protesting agency action must exhaust all administrative remedies before seeking judicial relief. The purpose of that doctrine is “to allow an administrative agency to perform functions within its special competence - to make a factual record, to apply its expertise, and to correct its own error so as to moot judicial controversies.” *Hom v. Utah Dep’t of Public Safety*, 962 P.2d 95, 99 (Utah App. 1998) .

Here, the Grievance and Appeal Procedure Act (GAPA) expressly limits the CSRB’s and a reviewing court’s subject matter jurisdiction to matters properly exhausted in the agency below. *See Hom*, 962 P.2d 95, 99 (Utah App. 1998) (GAPA explicitly prohibits judicial review of employee grievance when employee fails to process grievance in timely manner.) Unless an employee can show excusable neglect, “if the employee fails to process the grievance to the next step within the time limits established by this part, he has waived his right to process the grievance or obtain judicial review of the grievance.” Utah Code Ann. § 67-19a-401(4)(a) (West 2004). But “[w]here the legislature ha[s] imposed a specific exhaustion requirement, courts will strictly enforce it.” *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 6;

see also *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 17, 67 P.3d 466 (“[s]trict enforcement . . . dictates that if a party ‘fails to exhaust [its] administrative remedies prior to filing suit, the suit must be dismissed.’” (citation omitted)).

Although raised on appeal, Petitioner did not exhaust his administrative remedies by raising this antecedent challenge to the hearing officer’s evidentiary determination at Step 6. Petitioner has accordingly waived any challenge to the hearing officer’s ruling. That failure to strictly adhere to GAPA’s statutory framework deprives this Court of jurisdiction over Petitioner’s claim. See *Salt Lake City Mission*, 2008 UT 31, ¶ 6. This Court should dismiss it.

**B. The Hearing Officer’s Decision to Preclude
Petitioner’s Rebuttal Testimony that Was Irrelevant
and Argumentative was Not Error.**

Rebuttal evidence is “evidence tending to refute, modify, explain, or otherwise minimize or nullify the effect of the opponent’s evidence.” *Green v. Louder*, 2001 UT 62, ¶ 23 , 89 P.3d 638 (quoting *Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993)). Petitioner’s proffered testimony was not offered to rebut Downing’s testimony about jobs that she considered, but rejected in 2003. Instead, that testimony was intended to explain – from Petitioner’s perspective in 2009 – the skills and jobs that Petitioner believed he could have performed in September 2003. The hearing officer appropriately

concluded that testimony was not germane to decisions that DWS reached, and about which Petitioner first complained, six years prior. The hearing officer properly precluded it.

Should this Court find that the proposed testimony was proper rebuttal, the hearing officer's decision should stand. Utah law is clear that an "erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful." *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 360 (Utah 1997) (quoting *Joufflas v. Fox Television Stations, Inc.*, 927 P.2d 170, 173 (Utah 1996)). A harmful error occurs where "the likelihood of a different outcome in the absence of the error is 'sufficiently high so as to undermine confidence in the [final decision].'" *Id.* (quotation omitted). Conversely, an error is harmless when although *properly preserved below and presented on appeal*, the error is sufficiently inconsequential that there is no reasonable likelihood [it] affected the outcome of the proceedings. *State v. Villarreal*, 857 P.2d 949, 958 (Utah App. 1993) (emphasis added).

Here, Petitioner and his physician testified at length respecting Petitioner's alleged limitations and need for a workplace accommodation. And while under direct examination, Petitioner identified and explained the several recommendations that he proposed, but that Downing rejected in

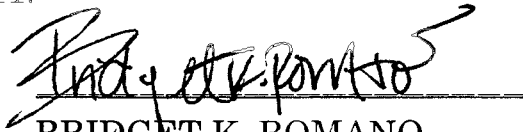
August 2003. *See* R. 2138 at 509-512. Even the hearing officer remarked that the “heart” of Petitioner’s evidence and the “bulk” of his evidence and testimony regarded his disability claims. That is for naught, because Petitioner did not to offer at Step 5, and he has to point here, to any evidence that DWS discriminated against him when Chuck Butler rejected his accommodation request and Downing appropriately reallocated Petitioner’s job functions.

Petitioner’s attempt, in 2009, to offer evidence of an accommodation that he failed to pursue and that DWS never considered would not change that result. The hearing officer’s decision was neither an abuse of discretion nor reversible error. The Court should affirm it.

CONCLUSION

Petitioner has failed to carry his burden to show the CSRB erred by denying his personnel rule violation claims. But the CSRB’s decision and order and final agency action is reasonable, rational, and correct in all respects. Accordingly, the Court should affirm it.

DATED this 9th of June, 2011.

A handwritten signature in black ink, appearing to read "Bridget K. Romano", is written over a horizontal line.

BRIDGET K. ROMANO
Assistant Utah Attorney General

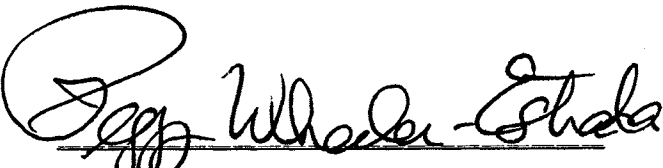
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **ANSWER**

BRIEF was served by U.S. Mail this 9th day of June, 2011 to the following:

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Peggy Wheeler-Estrada

ADDENDUM A

R477. Human Resource Management, Administration.

R477-15. Unlawful Harassment Policy and Procedure.

R477-15-1. Purpose.

It is the State of Utah's policy to:

(1) provide all employees a working environment that is free from unlawful harassment based on race, religion, national origin, color, sex, age, disability, or protected activity under the anti-discrimination statute; and

(2) comply with state and federal laws regarding discrimination based on unlawful harassment.

R477-15-2. Policy.

(1) Unlawful harassment means discriminatory treatment based on race, religion, national origin, color, sex, age, protected activity or disability. Discrimination based on unlawful harassment will not be tolerated. Violators shall be subject to corrective action or disciplined and may be referred for criminal prosecution. Discipline may include termination of employment.

(2) Unlawful harassment includes the following subtypes:

(a) behavior or conduct in violation of R477-15-2(1) that is unwelcome, pervasive, demeaning, ridiculing, derisive, or coercive, and results in a hostile, offensive, or intimidating work environment;

(b) behavior or conduct in violation of R477-15-2(1) that results in a tangible employment action being taken against the harassed employee.

(3) The imposition of corrective action and discipline is governed by R477-10-2 and R477-11.

(4) An employee shall be subject to corrective action or discipline for unlawful harassment towards another employee, even if that harassment occurs outside of scheduled work time or work location, provided that the harassment meets the requirements of R477-15-2(2).

(5) Individuals affected by alleged unlawful harassment may, but shall not be required to, confront the accused harasser before filing a complaint.

(6) Once a complaint has been filed, the accused shall not communicate with the complainant regarding allegations of harassment.

R477-15-3. Retaliation.

(1) No person may retaliate against any employee who opposes a practice forbidden under this policy, or has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this policy, or is otherwise engaged in protected activity.

(2) Any act of retaliation toward the complainant, witnesses or others involved in the investigation shall be subject to corrective action or disciplinary action. Prohibited actions include:

(a) open hostility to complainant, participant or others involved;

(b) exclusion or ostracism of the complainant, participant or others;

- (c) creation of or the continued existence of a hostile work environment;
- (d) discriminatory remarks about the complainant, participant or others;
- (e) special attention to or assignment of the complainant, participant or others to demeaning duties not otherwise performed;
- (f) tokenism or patronizing behavior;
- (g) discriminatory treatment;
- (h) subtle harassment; or
- (i) unreasonable supervisory imposed time restrictions on employees in preparing complaints or compiling evidence of unlawful harassment activities or behaviors.

R477-15-4. Complaint Procedure.

Individuals affected by unlawful harassment may file complaints and engage in an administrative process free from bias, collusion, intimidation or retaliation.

(1) Individuals who feel they are being subjected to unlawful harassment should do the following:

- (a) document the occurrence;
- (b) continue to report to work; and
- (c) identify a witness, if applicable.

(2) An employee may file an oral or written complaint of unlawful harassment with their immediate supervisor, any other supervisor within their direct chain of command, the agency human resource office or the Department of Human Resource Management.

(3) Any complaint of unlawful harassment shall be acted upon following receipt of the complaint.

(a) Complaints may be submitted by any individual, witness, volunteer or other employee.

(b) Complaints may be made through either verbal or written notification and shall be handled in compliance with confidentiality guidelines.

(c) Any supervisor who has knowledge of unlawful harassment shall take immediate, appropriate action and document the action.

(4) If an immediate investigation by the agency is not warranted, a meeting shall be held with the complainant, the supervisor or manager of the appropriate division, and others as appropriate to communicate the findings and management's resolution of the complaint.

R477-15-5. Investigative Procedure.

(1) The investigative procedures established by agencies shall allow the complainant to make specific requests relating to the investigation process and about the person or persons who will conduct the investigation. The agency shall attempt to comply with these requests, but may take whatever action necessary and appropriate to resolve the complaint.

(2) Preliminary reviews and investigations must be conducted in accordance with procedures issued by the Department of Human Resource Management.

(3) Results of Investigation

(a) If the investigation reveals that disciplinary action is warranted, the agency head shall take appropriate action as

provided in R477-11.

(b) If an investigation reveals evidence of criminal conduct in unlawful harassment allegations, the agency head or Executive Director, DHRM, may refer the matter to the Attorney General's Office or County or District Attorney as appropriate.

(c) If an investigation of unlawful harassment reveals that the accusations are unfounded, the findings shall be documented, the investigation terminated, and appropriate parties notified.

(d) Investigations shall be conducted by qualified individuals based on DHRM standards.

R477-15-6. Records.

(1) A separate protected record of all unlawful harassment complaints shall be maintained and stored in the agency's human resource office, DHRM office or in the possession of an authorized official. Removal or disposal of records in the protected file may only be done with the approval of the agency head or Executive Director, DHRM, and only after minimum timelines specified herein have been met. Records shall be kept for: a minimum of three years from the resolution of the complaint or investigative proceeding.

(2) Supervisors shall not keep separate files related to complaints of unlawful harassment.

(3) All information contained in the complaint file shall be classified as protected pursuant to requirements of Section 63-2-304, Government Records Access and Management Act.

(4) Information contained in the unlawful harassment protected file shall only be released by the agency head or Executive Director, DHRM, when in compliance with the requirements of law.

(5) Participants in any unlawful harassment proceeding shall treat all information as protected.

(6) Final disposition of unlawful harassment cases shall be communicated to appropriate parties.

R477-15-7. Training.

(1) Agencies shall comply with the Unlawful Harassment Prevention Training Standards set by DHRM. As a minimum, these shall contain:

- (a) course curriculum standards;
- (b) training presentation requirements;
- (c) trainer qualifications; and
- (d) training records management criteria.

KEY: administrative procedures, hostile work environment

Date of Enactment or Last Substantive Amendment: July 3, 2001

Notice of Continuation: June 11, 2002

Authorizing, and Implemented or Interpreted Law: 67-19-6; 67-19-18; ; Governor's Executive Order on Sexual Harassment, March 17, 1993