

2010

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

Utah Court of Appeals

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UTAH STATE COURT OF APPEALS

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LORIN BLAUER,

Petitioner,

vs.

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

Respondents.

Case No. 20101048-CA

Agency Case No. 10 CSRB 100 (Step 6)  
Administrative Appeal No. 10 CSRB 100

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PETITIONER'S REPLY BRIEF

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UTAH APPELLATE COURTS

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## INTRODUCTION

Petitioner Lorin Blauer submits the following reply brief in connection with his Petition for Review of decisions entered by the Utah Career Service Review Board (“CSRB”) herein, and in response to the “Answer Brief” submitted on behalf of Utah Department of Workforce Services (“DWS”) and CSRB ON June 9, 2011.

## ARGUMENT

**POINT I: CSRB IMPROPERLY DECLINED JURISDICTION OVER PETITIONER’S CLAIMS OF WORKPLACE DISCRIMINATION, AND DID NOT FIND IN FAVOR OF UTAH DEPARTMENT OF WORKFORCE SERVICES IN CONNECTION THEREWITH.**

In response to CSRB’s refusal – for the third time, in the face of three separate mandates from the judiciary – to hear Petitioner Lorin Blauer’s grievance concerning workplace discrimination on jurisdictional grounds, Respondents argue that (1) CSRB actually did not decline jurisdiction at all, but denied Petitioner’s discrimination claims on their merits, Petitioner having failed to present substantial evidence in support thereof; (2) Utah law afforded Petitioner no “private right of action” to grieve DWS’ violation of workplace rules governing discrimination and harassment; and (3) despite prior rulings by the Third Judicial District Court for Salt Lake County, State of Utah, this Court and the and the Utah Supreme Court to the contrary, CSRB properly declined jurisdiction to hear Petitioner’s claims of workplace rules violations relating to discrimination. The first and third of these were dealt with in Petitioner’s opening brief, and will be revisited only briefly here; the second is raised for the first time, in the eight-year history of this dispute, by Respondents’ Answering Brief, and is utterly without merit.



**A. CSRB Did Not Pass on the Merits of Petitioner's Discrimination Claim.**

At page 7, paragraph 7 of his Findings of Fact, Conclusions of Law, Decision and Order (R. 1566-1576; Petitioner's opening brief at Appendix Attachment 3), CSRB Hearing Officer James H. Beadles stated the following:

Perhaps the heart of Mr. Blauer's claims is that DWS violated personnel rules relating to Utah Admin. Code R. 477-15 on spells out the state's general prohibition and workplace harassment. *The evidence shows that DWS denied Mr. Blauer's request for an accommodation due to an alleged disability.* Mr. Blauer did not appeal this decision to any higher level. *However, even though the bulk of Mr. Blauer's evidence and comments relate to this issue, the CSRB is without jurisdiction to hear it.*

(Emphasis added.)<sup>1</sup> The remainder of Hearing Officer Beadles' analysis concerning Petitioner's discrimination claim has nothing to do with whether he presented substantial

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<sup>1</sup> The hearing officer's observation that Mr. Blauer "did not appeal this decision to any higher level" is vague and confusing, as Mr. Beadles does not identify the "decision" to which he refers, nor does he link it to any evidence of discrimination presented at the hearing. It is true that, in the summer of 2003, Mr. Blauer (at the recommendation of his superior) made an application for workplace accommodation to DWS' ADA officer, Chuck Butler, *relative to his then-existing working conditions*; also, that Mr. Blauer did not appeal from Mr. Butler's September 5, 2003 letter decision (Agency Exh. 6), which nominally found that Mr. Blauer did not qualify for ADA accommodation *but recommended it anyway* – there being thus no reason to pursue an appeal. Four days thereafter, though, Mr. Blauer received Tani Downing's September 9, 2003 "reassignment" to full-time adjudicative duties which Mr. Blauer could not fulfill due to disability. It was to this renewed and expanded act of discrimination, occurring *after* Mr. Butler's September 5 letter, and to its impact on his ability to continue as a DWS employee, that "the bulk of Mr. Blauer's evidence and comments" related. *See* Petitioner's Brief at Statement of Facts ¶¶ 12, 15, 17-21, 25-28, 31-39, and citations to the record therein.

The hearing officer's observation, in fact, seems to mirror DWS' suggestion, elsewhere in these proceedings, that by not appealing Mr. Butler's September 5, 2003 letter nominally denying ADA accommodation, Mr. Blauer somehow waived his claim of discrimination arising from events which happened after September 5. In addition to being illogical, this argument disregards the separate claim, made elsewhere in these proceedings by DWS, that neither Mr. Blauer nor any other state employee in Utah *has*

evidence in support thereof or not. It discusses solely the legal arguments repeatedly asserted by DWS and CSRB before the Third District Court, this Court, and the Utah Supreme Court – all of which had previously rejected these arguments, and ordered CSRB to hear Petitioner’s discrimination claims on their merits.

In its Step Six Decision, Order and Final Agency Action (R. 1946-1977, Petitioner’s opening brief at Appendix Attachment 4), CSRB expressly affirmed the hearing officer’s legal analysis, citing to and quoting the foregoing language, and articulating its approval of the hearing officer’s jurisdictional conclusion (*see* Decision, Order and Final Agency Action at pp. 25-27), again citing two arguments urged by DWS before the district court, this Court and the Supreme Court before being ordered, upon remand, to hear Petitioner’s claims on their merits. In response to this last, CSRB’s decision stated the following:

Regarding hearing officer Beadles’ jurisdictional determinations, the Board acknowledges that prior decisions of the CSRB regarding jurisdiction have been overturned with affirmative remands for the CSRB to hear appellant’s personnel rule violation grievances on their merits. *However, the CSRB’s prior jurisdictional determinations were not related to Utah Code Ann. Section 35A-5-107(15) which provides that the Utah Anti-Discrimination Act is the “exclusive” remedy for discrimination claims.* Instead, the CSRB’s prior jurisdictional decisions were based substantively on administrative waiver and findings that appellant had not raised these issues prior to Step Five of the state’s grievance and pre-appeal procedures . . . in essence, the jurisdictional deficiencies raised by Hearing Officer Beadles in his Step Five decision are different than those raised in prior CSRB

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any rights under ADA, that act having no application to Utah state employees – thus rendering Mr. Butler and his office non-entities, and any decision on his part (or any appeal therefrom) a non-event. Even the most glaring inconsistency seems no obstacle for DWS in this matter – it will adopt whatever position it must as expedient to the moment, so long as the cumulative effect is to avoid having its misconduct scrutinized on the merits.

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decisions. Importantly in *Blauer v. Utah Department of Workforce Services*, 2008 Utah App. 84 (*Blauer III*), the Court of Appeals limited its jurisdiction remand to CSRB by including the “CSRB erred by considering jurisdictional issues that have already been decided by the district court.”

(Decision, Order and Final Agency Action at p. 28).

It is unfathomable, in light of the foregoing record, that CSRB and DWS now ask this Court to conclude that, in fact, its mandate was somehow followed, and Petitioner was afforded a final decision and determination of his discrimination claims on their merits through a sustainable finding that he had failed to produce substantial evidence in support thereof. The hearing officer made no such determination. His only reference to the merits of Petitioner’s claims plainly acknowledges that Petitioner *was* subjected to discrimination – R. 1566-1576 at p. 7, ¶ 7; Petitioner’s opening brief at Appendix Attachment 3. The suggestion that CSRB, at one and the same time, declined jurisdiction of Petitioner’s discrimination grievance (for the third time), and yet somehow passed on the merits thereof, is not only logically inconsistent, but completely absurd.

In its Step Six decision (Decision, Order and Final Agency Action, R. 1946-1977), CSRB does make the following observation:

Based upon the facts elicited at the evidentiary hearing on this matter and our examination of the relevant personnel policy at issue in this claim, we find appellant failed to establish the department violated state personnel rules governing unlawful harassment, discrimination or retaliation. This determination is made under a correctness standard which allows the board to review the hearing officer’s conclusions under a correctness standard and with little difference to legal determinations.

No explanation is given for this statement. CSRB did not enter any findings of its own in support of its statement; it does not state that it is overruling the hearing officer’s

determination that, in fact, Petitioner was the victim of discrimination.<sup>2</sup> No explanation is offered as to what “conclusions” of the hearing officer are being reviewed *de novo* in connection therewith – the hearing officer’s only legal conclusions concerning Mr. Blauer’s discrimination claim was that he was somehow still without jurisdiction to pass on it. R. 1566-1576 at pp. 7-9. To the extent that, without explanation, CSRB was reversing the hearing officer’s observation concerning discrimination against Petitioner and substituting its own judgment, CSRB offers no factual findings in support thereof. To the extent that CSRB, incident to Step Six of Petitioner’s grievance, *did* make unspecified and unstated findings in that regard, they are clearly against the manifest weight of the evidence – as a matter of law (and for reasons set out at pp. 36-41 of Petitioner’s opening brief), DWS’ discriminatory conduct toward him was established not only by substantial evidence, but by overwhelming evidence presented to the hearing officer.<sup>3</sup>

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<sup>2</sup> Under Utah Admin. Code R. 137-1-22(4). CSRB was first to make a determination “whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard...When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.” No such determination was made in this instance.

<sup>3</sup> At pp. 27-28 of their Answering Brief, Respondents raise the all-too-common cry that Petitioner has failed to marshal the evidence. The Court is referred, in this regard, to pp. 24-29 of Petitioner’s opening brief. As more fully demonstrated in Petitioner’s opening brief, none of his evidence succeeds in dislodging the substantial evidence presented before the hearing officer (and clearly accepted by him) that Petitioner was the victim of workplace discrimination by being deliberately reassigned to full time duties which medical disabilities precluded him from performing – and which would ultimately destroy his health. No marshalling of evidence can displace that fact. It is, in fact,

If CSRB's Step Six decision *is* viewed as a substitution of its own findings for those of its hearing officer, it is submitted that this court should afford that substitution no deference whatever; indeed, the reverse is true. The Court of Appeals, like any appellate tribunal, will defer to a lower tribunal on findings of fact due to the lower tribunal's opportunity to hear evidence, observe and evaluate the credibility of witnesses, etc. – *see 438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, 99 P.3d 801; *Best v. Daimler Chrysler Corp.*, 2006 UT App.304, 141 P.3d 624. CSRB's Step Six review in this case, however, was not based on its own evidentiary hearing, but was limited to a review of the record before the hearing officer (Utah Code Ann. § 67-19a-408 (2009); Utah Administrative Code at R. 137-1-22(4)). It took no new evidence, and neither heard nor evaluated the credibility of any new witnesses – indeed, the scope of its review precluded such procedure (*Id.*). CSRB, in effect, conducted a lower appellate review of the hearing officer's decision, the scope of which was limited to a determination of whether “the factual findings of CSRB's hearing officer are reasonable and rational according to the substantial evidence standard” – Utah Admin. Code R. 137-1-22(4) (a) While CSRB's Step Six decision made no finding that Mr. Beadle's decision failed this standard, this Court should at the very least review any implication of such finding *de novo* for correctness, and more appropriately construing facts most favorably to the determination of the actual trier of fact, who found substantial evidence of discrimination – precisely as, for example, the Utah Supreme Court would review such a decision of this Court on writ

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noteworthy that Respondents cite to no scrap of evidence presented before the hearing officer, but left out of Petitioner's brief, which would excuse DWS' conduct.

of certiorari – *Archuleta v. Hughes*, 969 P. 2d 409 (Utah 1998); *England v. Horbach*, 944 P. 2d 340 (Utah 1997)<sup>4</sup>.

To explore the evidentiary underpinnings of any hypothetical ruling on the merits of Petitioner’s discrimination claim, however, is to ignore the realities of proceedings below. Once again, CSRB – at both the Step Five and Step Six stages – has abnegated jurisdiction over Petitioner’s claims of violation, by DWS, of workplace rules regarding discrimination and harassment. In so doing, CSRB violated the mandate of this Court, and reversal is in order.

**B. Petitioner is Not Without a Private Right of Action to Address DWS’ Violation of Workplace Rules Relating to Discrimination and Harassment.**

Respondents devote four and one-half pages of their Answering Brief to an argument never before raised in any proceeding relating to this matter: Petitioner has no “private right of action” to address DWS’ violation of workplace rules relating to discrimination and harassment. The argument suffers two fundamental failings.

**1. Utah Code Ann. § 67-19a-101, et seq. (2003) Affords Petitioner the Private Right of Action to Grieve Violation of Workplace Rules.**

Under Utah Code Annotated Section 67-19a-202(1)(a) (2003), the Utah Career Service Review Board was constituted for the purpose of “review[ing] appeals from Career Service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules,

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<sup>4</sup> Petitioner is aware of the decision of *Allen v. Department of Workforce Services, et al.*, 2005 UT App.186, 112 P. 3d 1238, but submits that the dicta therein concerning the standard of review of an administrative appeals board’s factual findings disregards the lack of any fundamental rationale or reason for deferential review, as suggested above.

issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.” That Petitioner Lorin Blauer was a “career service employee” has never been challenged.<sup>5</sup> That he has timely pursued a grievance of DWS’ violations of personnel rules relating to discrimination and harassment through all six levels of the grievance and appeals procedure specified at Utah Code Ann. § 67-19a-301, *et seq.* (2003) is likewise undisputed. Upon CSRB’s disposition of his Level Six grievance, Petitioner filed his petition with this Court pursuant to Utah Code Ann. § 78A-4-103(2) (a).

DWS has participated, and defended itself, in this process every step of the way. Its suddenly-emerging claim that, after all administrative remedies have been exhausted, Petitioner never had a “private right of action” for DWS’ violation of personnel policies and workplace rules at all, borders on the frivolous.

**2. Respondents’ “No Private Right of Action” Argument Is Foreclosed by This Court’s Prior Decision of March 13, 2008.**

Even if there had, at some point, been some legal infirmity in Petitioner’s pursuit of a private right of action for vindication of his rights as a career service employee, the time for Respondents to invoke that infirmity has long since passed. This Court expressly held, in its decision of March 13, 2008 (Petitioner’s Opening Brief at Appendix, Attachment 9), that “[w]e conclude that the district court determined that

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<sup>5</sup> “Career service employee” is defined at Utah Code Ann. § 67-19-3(3) as “an employee who has successfully completed a probationary period of service in a position covered by the Career Service.”



Blauer's claims had been raised in such a way that there were no jurisdictional deficiencies at the agency or district court level. Thus, the district court's order of remand was an order to consider Blauer's claims on the merits. The DWS and the CSRB did not challenge the district court's conclusions regarding jurisdiction through an appeal to this court. As a result, district court's conclusions became the law of the case, and the CSRB was bound by the district court's legal conclusions and mandates." Respondents' current argument completely disregards, and stands in defiance of, this Court's mandate on remand from the prior appeal.

**C. Respondents' Remaining Jurisdictional Arguments Have Been Ruled Upon and Rejected by Three Separate Courts, Including This One.**

Pages 33-35 of Respondents' Answering Brief continues to parrot the arguments which it has been unsuccessfully making in this proceeding for years: that CSRB lacked jurisdiction to hear Petitioner's claim of violation of R. 477-15-1, *et seq.* Respondents defend their intransience before this Court, as they did in the previous administrative proceedings, by insisting that the language of this Court's prior ruling did not *really* mean what it said – that questions of jurisdiction were still fair game for argument and decision-making purposes for the Career Service review board.

This Court could not possibly have been any clearer in its mandate on remand:

We conclude that the district court determined that Blauer's claims had been raised in such a way *that there were no jurisdictional deficiencies at the agency or district court level.* Thus, the district court's order of remand was an order to consider Blauer's claims on the merits."

Memorandum Decision of March 13, 2008 (Petitioner's Opening Brief at Appendix, Attachment 9) at p. 2 (emphasis added). The message was crystal clear: Petitioner Lorin



Blauer was entitled to a determination of the merits of his claim of workplace discrimination and harassment under R. 477-15-1, et seq., and to appropriate relief. Respondents' continual evasion of the responsibility placed directly upon CSRB by this Court's prior ruling (as well as that of the Third District Court and the Utah Supreme Court) is incomprehensible under the circumstances.

Respondents continue to argue that the repeated judicial rejections of its jurisdiction argument do not foreclose the hearing officer's disposition, claiming that the rulings of the Third District Court, the Utah Court of Appeals, and the Utah Supreme Court relate only to jurisdictional infirmities expressly addressed by the Third District Court (*see* Answering Brief at pp. 35-36). This claim completely disregards the course of proceedings before those bodies, and the express language of this Court's last declaration on the matter. In Respondents' brief to this Court in the prior proceeding (R. 1831-1935 at Exhibit 12, pp. 25-26), DWS made the exact same argument which Respondents make now. This Court rejected that argument, however, and ordered that Grievant's claims herein be remanded for determination by CSRB *on their merits*. Respondents' Petition for Writ of Certiorari to the Utah Supreme Court from this Court's opinion (R. 1831-1935 at Exhibit 13, pp. 13-14) made the same argument – that Petitioner's exclusive remedy for violation of workplace rules relating to discrimination was under Utah's Anti-Discrimination Act. By denying certiorari, the Utah Supreme Court confirmed the mandate issued by the Court of Appeals. In short, CSRB has been directed by three separate courts of competent jurisdiction to consider Petitioner's discrimination claims on their merits. That mandate has now been disregarded three times. Petitioner is entitled to

appropriate relief based on the hearing officer's finding of fact that he was the object of discrimination.

Respondents continue to chant their mantra that "jurisdictional deficiencies may be raised at any point in proceedings" (Respondents' Answering Brief at p. 35). What they refuse to acknowledge is that claims of jurisdictional deficiency *have been* raised in this proceeding, and have been rejected by the courts. This is now law of the case. Respondents' cited case authority does not authorize or justify open rebellion against prior declarations of this court.

As a final note, Petitioner would ask this Court to consider Respondent's strenuous opposition to Petitioner's Motion to Consolidate this case before the CSRB with his case currently pending in Third District Court. Petitioner had filed a discrimination claim with UALD in 2003, received a "notice of right to sue" and filed suit in Third District Court. That case is being held in abeyance pending the outcome of this case at CSRB. Knowing that CSRB disclaimed jurisdiction for discrimination and failure to accommodate claims, Petitioner moved to consolidate the two cases in order to save precious judicial resources and to have his case heard in a forum where jurisdiction would not be an issue. Respondents resisted, insisting that CSRB hear the matter. Now, once again, CSRB (at DWS' urging) has refused to make a decision on the merits of Petitioner's discrimination claim on the specious argument that it lacks jurisdiction; that only UALD has jurisdiction to hear the matter.

Precious Court resources are wasted by this matter being continually remanded to the CSRB and repeatedly appealed to this Court, for remand once again to the CSRB, in a never-ending, time-wasting, resource-draining cycle.

**POINT II: THE HEARING OFFICER IMPROPERLY EXCLUDED PETITIONER'S REBUTTAL EVIDENCE CONCERNING WORKPLACE ACCOMMODATION OPTIONS OPEN TO DWS.**

In response to Petitioners' assignment of error to the hearing officer's refusal to admit rebuttal testimony that, in fact, DWS could have placed him in a position within DWS which would have accommodated his disabilities, Respondents claim that (1) the argument was not preserved at the administrative level, and is therefore beyond this Court's subject matter jurisdiction, and (2) the testimony would have been irrelevant and argumentative. Neither claim has merit.

**A. Petitioner's Assignment of Error Was Preserved at the Administrative Level.**

Concerning Respondents' first claim – that Petitioner's assignment of error concerning the exclusion of evidence was not preserved at the administrative level – the Court is referred to Petitioner's opening Level 6 brief before CSRB (R. 1616-1742) at pp. 41-42.

**B. The Hearing Officer's Exclusion of Evidence Was Neither Irrelevant Nor Harmless Error.**

Concerning the relevance of Petitioner's offered testimony concerning potential positions within DWS which his disabilities would still let him perform, and the prejudicial nature of the hearing officer's error in excluding that evidence, the Court is referred to pages 24-29 of Petitioner's opening brief concerning DWS' supposed

justification of its discrimination against Petitioner based on his disability. Both Mr. Blauer's supervisor, Tani Downing, and executive director, Raylene Ireland, testified that the conducting of hearings full-time by Petitioner was the only way that they *could* "accommodate" his disability (TR. at 794-795). Petitioner – a 23-year employee with DWS – retook the stand prepared to testify that, in fact, DWS had other options available which could have accommodated his disability, in compliance with Utah Admin. Code R. 477-15-1, et seq. (2003). How Respondents can now take the position that the hearing officer's refusal to permit that testimony was somehow irrelevant or harmless error is incomprehensible. As Mr. Blauer's representative attempted to proffer, that testimony would have proven indisputably that reasonable accommodation was not only available, but easily accomplished (R. TR at 932). Petitioner's testimony would have proven, to any rational mind, that DWS' "accommodation" was, in fact, discrimination.

**POINT III: THE HEARING OFFICER IMPROPERLY FOUND THAT DWS HAD NOT VIOLATED UTAH ADMIN. CODE R. 477-10-1, *ET SEQ.* BY FAILING TO DEFINE PROPER JOB PARAMETERS FOR PETITIONER.**

Respondents' Answering Brief seeks to defend CSRB's rejection of Petitioner's claim that DWS failed to follow governing administrative law in defining its job parameters by arguing (essentially) that DWS' belated issuance of a performance plan in June of 2003 constituted a *nunc pro tunc* remedy; and that this, coupled with prior informational and verbal interviews, was sufficient to overcome DWS' disregard of governing law.

Respondents' rationale (as well as that employed by CSRB and its hearing officer at the administrative level) was addressed at pages 44-46 of Petitioner's opening brief. Once again, the standard as established by administrative law in 2003 was emphatic in its requirement that, like all agencies of state government, DWS was required to formulate, publish and maintain *performance plans* for each employee, and that performance reviews and valuations be conducted according to the employee's meeting of objective, measureable standards of performance and conduct established by the performance plan – see R 477-10-1 (2003). No cited evidence in the record – whether marshaled in Petitioner's opening brief or set out in Respondents' Answering Brief – dislodges the fact that this was not done in Petitioner's case; that he was subjected to an unsuccessful job rating, and put on corrective action, based on charges of deficient work performance which had either been corrected, or shown by Petitioner (and acknowledged by DWS) to be groundless; that Petitioner was nonetheless rated "unsuccessful" in 2003 based on claims that he was "not carrying [his] share of the workload" – an observation which, upon confrontation, his supervisor, Tani Downing, could not explain or quantify (TR. at 288-289); that, by letter dated September 5, 2003, executive director, Raylene Ireland, openly admitted that DWS had not articulated required standards of performance against which Petitioner's job performance could be measured (Grievance Exhibit 39); but that, even after the "unsuccessful" rating was retracted, Petitioner was transferred to an assignment to conduct administrative hearings full-time, even though disabilities preventing him from performing in that position – all on the claim that he continued to meet unmeasurable and unarticulated performance standards (Grievance Exhibit 38).

None of the justifications offered by Respondents, either at the administrative level or before this Court, change any of the foregoing. Petitioner's job description was intermittent and inadequate. By admission of his own superiors, neither his immediate supervisor nor the executive director of his department could even articulate objective, measurable standards against which his performance could be evaluated. Yet, because he supposedly failed to meet these unmeasurable and undisclosed expectations, Petitioner was reassigned to a position which he could not perform – a scenario which his treating physician characterized as “a blueprint to destroy the man” (TR. at 565-566).

**POINT IV: THE HEARING OFFICER ERRED IN RULING THAT, AS A MATTER OF LAW, TANI DOWNING'S SEPTEMBER 9, 2003 “NOTICE OF REASSIGNMENT” WAS NOT A GRIEVABLE “WRITTEN REPRIMAND” UNDER GOVERNING LAW.**

In attempting to justify CSRB's prehearing rejection of Petitioner's challenge to written reprimands placed in his personnel file, Respondents have taken the singular step of completely rewriting the applicable statutory standard in order to fit their proposed argument. Citing to federal case law which actually interprets the elements of federal discrimination laws, Respondents argue that (1) Tani Downing's September 9, 2003 notice of reassignment (Grievance Exhibit 38) did not result in a “demotion” (this point having been decided by a prior decision of this Court); (2) as a result, it did not constitute “adverse job action” (importing standards from federal case law interpreting federal discrimination statutes); and (3) it was therefore not a “written reprimand.” Respondents' leaps of logic are unsustainable under even minimal scrutiny.

Once again, Utah Code Ann. § 67-19-a-202(1) (a) expressly afforded CSRB jurisdiction to hear appeals from career service employees and agencies of decisions relating to written reprimands. Neither the statute nor any interpretive case law limits CSRB's authority to written reprimands which result in "disciplinary action [that] effects a significant change in [the employees] employment status" (Respondent's Answering Brief at p. 40). By its language and terminology, clear intent and result, Tani Downing's September 9th 2003 memorandum was in the nature of a reprimand; served as a reprimand and as a basis for remedial or corrective action by intent if not technical definition and was the grounds for the employment action which fundamentally altered Petitioner's job assignment beyond his ability to perform.

Moreover, Petitioner's grievance of his supervisor's written reprimand was clearly not barred by the doctrine of "*res judicata*" – to the contrary, it was expressly preserved by orders of the Third District and this Court in prior stages of this proceeding. By Order dated August 16, 2004, the Third District Court remanded Petitioner's grievance of his written reprimands to CSRB for determination (R. 1676-1685, Petitioner's opening brief at Appendix, Attachments 6 and 7); by its ruling of March 13, 2008, this Court overturned CSRB's rejection of that claim and ordered it heard on its merits (R. 1699-1702, Petitioner's opening brief at Appendix, Attachment 9). The doctrine of "issue preclusion" (the branch of *res judicata* invoked by Respondents – see Respondents' Answering Brief at p. 41) relates only to discreet and specific issues actually litigated and finally determined in a prior proceeding. The question of whether Tani Downing's September 9, 2003 reassignment memorandum was or was not a "written reprimand" has

not been decided in any prior case; indeed, it has been preserved through all stages of the instant proceeding. Accordingly, the doctrine has no application. See *Oman v. Davis School District*, 2008 Utah 70, ¶ 28, 194 P.3d 956; *Youren v. Tintic School District*, 2004 UT App.33, 86 P.3d 771. This Court's prior pronouncement that the memorandum did not constitute a "demotion" cannot be equated to a prior determination, in another and concluded proceeding, that it did not constitute a "written reprimand" – particularly when this Court's own prior pronouncements have expressly remanded that question to CSRB for determination.

Respondents likewise mount a "public policy" argument as justification for the observations in Tani Downing's September 9, 2003 memorandum, relying on the 1981 New York decision of *Holt v. Board of Education of Weeetuck Central School District*, 52 N.Y.2d 625, 422 N.E.2d 499 (Ct. App. N.Y. 1981). The *Holt* decision, however, dealt with a memorandum placed in teachers' personnel files for the purpose of calling their attention to "a relatively minor breach of school policy" in order to "encourage compliance with that policy in the future" – 15 N.Y.2d at 634. Ms. Downing's September 9, 2003 memorandum (Grievance Exhibit 38), by contrast, leveled charges of serious ethical violations and job misconduct at Petitioner, offered as justification for revoking his traditional duties as Legal/Enforcement Counsel III, and confining him to the duties of a full-time administrative law judge – a position which he was precluded by disability from fulfilling. The *Holt* decision observed that the memorandum questioned were intended as encouragement, not castigation – "the purpose is to warn, and hopefully to instruct – not to punish" (*Id.*). It is hard to imagine a more punitive act which Tani



Downing could have leveled at Petitioner than reassigning him to work which existing disability precluded him from performing.<sup>6</sup> Incident to her memo, Downing knowingly forced him to perform tasks which she knew or should have known, because of the direct and consistent directions and warnings of his doctor, would cause him lancinating and distracting pain (Grievant Exhs. 22-25), causing him to fail at those assigned tasks and forcing him ultimately to fail at his job. Worse still, Tani Downing's September 9, 2003 memorandum threw into Petitioner's face charges of serious job performance deficiencies which had been previously considered, and either remedied or shown to be groundless; in several instances, they have been retracted by Tani Downing herself. Yet they resurfaced as justification for reassigning him to sedentary job duties expressly precluded by his health care provider, without a scrap of medical evidence to controvert the fact that he could not perform in that position. At the very least, the hearing officer should have put DWS to the burden of proving that the contents of the reprimand were valid – Utah Code Ann. § 67-19a-406(2) (a) (2003).

### CONCLUSION

Respondents' Answering Brief, simply put, is a collection of arguments, both old and new, which have been either expressly rejected or foreclosed by prior rulings of this Court. The Utah State Career Service Review Board refused to afford Petitioner the

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<sup>6</sup> In the case of *Gutman v. Board of Education of City School District of the City of New York*, 18 Misc. 3d 609, 852 N.Y. Supp. 2d 658 (S. Ct. N.Y. Cnty, N.Y. 2007), New York's Supreme Court distinguished the *Holt* decision, observing that the written reprimands in that case "chastised petitioner for serious misconduct," and did not "encourage [petitioners] to improve their performance or . . . to instruct them as to future matters" (18 Misc. 3d at 615). As such, the notices in the *Gutman* decision were held to be grievable written reprimands.

procedure and remedy which, by express ruling of this Court, he was entitled to receive. On that basis, the Step Six ruling of the Career Service Review Board should be reversed, and Petitioner compensated with back pay and benefits, retroactive to September 9, 2003. As an alternative, and to the extent permitted by governing law, this matter should be remanded for joint consideration with Petitioner's pending action in Third District Court, it having become clear that CSRB is unwilling to honor this Court's directives on remand.

DATED this 8<sup>th</sup> day of July, 2011.

JONES WALDO HOLBROOK & McDONOUGH PC

By: 

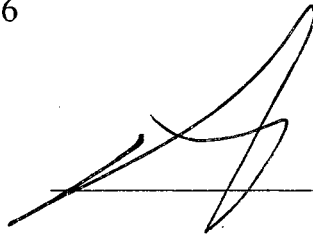
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing  
Petitioner's Reply Brief was hand delivered to the following this 8<sup>th</sup> day of July, 2011:

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