

2010

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

Utah Court of Appeals

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UTAH STATE COURT OF APPEALS

LORIN BLAUER,

Petitioner,

vs.

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

Respondents.

Court of Appeals No. 20101048

Agency Case No. 10 CSRB 100 (Step 6)

Administrative Appeal No. 10 CSRB 100

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INTRODUCTION

Petitioner Lorin Blauer seeks review of the following Decisions entered by the Utah Career Service Review Board (“CSRB”) in the above-referenced proceedings:

CSRB’s Hearing Officer’s Order Regarding Allocation of Burden of Proof, issued September 30, 2009 herein (R. 1456, Appendix at Attachment 1); the Hearing Officer’s Order Motion for Reconsideration of Burden of Proof, issued November 16, 2009 (R. 1537, Appendix at Attachment 2); the Career Service Review Board Hearing Officer’s Findings of Fact, Conclusions of Law, Decision and Order (Step 5 Decision), issued January 7, 2010 (R. 1566, Appendix at Attachment 3); and CSRB’s Order and Decision of the Respondent Utah Career Service Review Board issued in this matter on December 20, 2010 (R. 1946, Appendix at Attachment 4).

JURISDICTION

By this petition, Petitioner seeks review of orders entered by CSRB, an administrative body created under Utah Code Ann. § 67-19a-201, following formal adjudicative proceedings before the CSRB Hearing Officer, and then before the CSRB itself. Jurisdiction obtains pursuant to Utah Code Ann. § 78-2(a)-3(2)(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether CSRB properly declined to rule on Plaintiff’s claim of violation of Utah Administrative Code R. 477-15-2 and 3 on jurisdictional grounds. This was a conclusion of law, which this Court should review *de novo* for correctness (*see*

Ameritemps, Inc. v. Utah Labor Comm'n, 2007 UT 8, ¶ 6, 152 P.3d 298; *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147).

2. Whether the hearing officer erred in precluding Grievant's offered rebuttal testimony concerning what accommodations could have been made to permit him to retain his employment with DWS. The complete preclusion of rebuttal testimony is reviewed *de novo* for correctness – *State v. Martin*, 2002 UT 34, 44 P. 3d 805.

3. Whether CSRB erred in concluding that, under the facts as presented, DWS representatives had not failed to define Mr. Blauer's job performance parameters in violation of Utah Administrative Code R. 477-10-1, et seq. This decision is reviewable for correctness – *see Ae Clevite, Inc. v. Labor Comm'n*, 2000 UT App 35, ¶ 6, 996 P.2d 1072 (absent a grant of discretion, appellate courts use correction of error standard in reviewing agency's application of statutory term).

4. Whether the Hearing officer erred in concluding that, as a matter of law, letters critical of Mr. Blauer's job performance constituted "written reprimands" under Utah Code Ann. § 67-19a-302(1). This matter was determined by the hearing officer pursuant to motion ruling on September 30, 2009, as affirmed in the Findings of Fact, Conclusions of Law, Decision and Order issued January 7, 2010, and is therefore reviewed *de novo* for correctness – *Heber Light & Power Co. v. Utah Public Service Comm.*, 2010 UT 27; *Salt Lake City v. Weiner*, 2009 UT A 249, 219 3d 72).

DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS

Blauer v. Department of Workforce Services, ___P.3d___, 2008 WL 660522 (Utah App.), 2008 UT App 84

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Utah Code Ann. § 67-19a-202(1)(a) and (3)
Utah Code Ann. § 67-19a-302(1)
Utah Code Ann. § 67-19a-403
Utah Code Ann. § 67-19a-408

Utah Administrative Code R477-10-1, *et seq.*
Utah Administrative Code R-477-3-2 and 3
Utah Administrative Code R-477-15-2 and 3
Utah Administrative Code R-477-2-5
Utah Administrative Code R-477-7-7

STATEMENT OF THE CASE

This proceeding began in the fall of 2003, with Petitioner Lorin Blauer appealing his reassignment from his prior duties as Legal/Enforcement Counsel III to duties comprising the equivalent of a full-time Administrative Law Judge, despite documented medical evidence that he was precluded by disability from fulfilling the assigned position or duties. By ruling dated November 12, 2003, CSRB declined jurisdiction of the grievance, claiming that it was not reviewable by CSRB under existing law (R. 20, Appendix at Attachment 5).

Mr. Blauer then filed an action before the Third Judicial District Court styled: *Blauer v. Utah Dept. of Workforce Services* (Civil No. 040900221), seeking *de novo* review of CSRB's ruling. By Memorandum Decision dated August 16, 2004, the Court remanded Mr. Blauer's six claims of personnel rule violations incident to his reassignment for consideration by CSRB (R. 1676, Appendix at Attachment 6). The Court's remand of Mr. Blauer's personnel rule violation claims was reflected in Order dated December 8, 2004 (R. 1683, Appendix at Attachment 7).

Upon remand to CSRB, Respondent Utah Dept. of Workforce Services moved to dismiss the claims remanded to CSRB, again on jurisdictional grounds. By decision dated December 6, 2006, CSRB again dismissed the remanded claims, again ruling that CSRB had no jurisdiction to hear them (R. 659, Appendix at Attachment 8).

Mr. Blauer then appealed CSRB's December 6, 2006 decision to this Court. By Memorandum Decision dated March 13, 2008, this Court reversed CSRB's decision and remanded Mr. Blauer's claims of personnel rule violations to CSRB for a hearing on the merits (R. 1699, Appendix at Attachment 9). Respondent DWS unsuccessfully petitioned the Utah Supreme Court for a writ of certiorari to review the Court of Appeals' decision (R. 1904, Appendix at Attachment 10). By Order dated August 6, 2008, the Utah Supreme Court denied DWS' petition for writ of certiorari (R 1720, Appendix at Attachment 11).

Mr. Blauer's grievance was finally scheduled for hearing before Hearing Officer James H. Beadles commencing November 18, 2009. Prior to the hearing, however, and in response to motions concerning the burden of proof on one claim, Mr. Beadles ruled that, as a matter of law, none of DWS' challenged written declarations concerning Mr. Blauer's job performance constituted "written reprimands" under Utah law (Appendix at Attachments 1 and 2).

Evidence was taken November 18, 19, 23, and December 7, 2009. On January 7, 2010, Hearing Officer James H. Beadles issued his Findings of Facts, Conclusions of Law, Decision and Order (Appendix at Attachment 3). Mr. Blauer thereafter filed his Notice of Step 6 Appeal on January 19, 2010; CSRB issued its ruling thereon by

memorandum decision dated December 20, 2010 (R. 1946, Appendix at Attachment 4).

Petitioner then petitioned this Court on January 3, 2011 (R. 2032).

STATEMENT OF FACTS

A. Background Facts

1. Mr. Blauer first accepted employment with DWS' predecessor in the fall of 1980 (TR at 69-70). By 1998, Mr. Blauer had for some time occupied the position of Legal/ Enforcement Counsel III, and worked with Supervisor Virginia S. Smith (TR at 79; Grievant Exh. 5).

2. The position of Legal/Enforcement Counsel III was generally described in a job description issued by the Utah State Dept. of Human Resource Management (TR at 86-89; Grievant Exh. 6). It described the overall purpose and distinguishing characteristics of the title, listed certain examples of tasks associated with that title, itemized knowledge, skills and abilities required, and set out other requirements for the title (Grievant Exh. 6), adding "other tasks as assigned" (TR at 95-96; Grievant Exh. 6 at p. 1).

3. In concert with his supervisor, therefore, Mr. Blauer worked out an agreed-upon job description for his particular responsibilities, summarized in a "position description questionnaire" (TR at 89-90; Grievant Exh. 5). Mr. Blauer's responsibilities, as set out in the position description questionnaire, include the following: (a) 50% Workforce Appeals Board ("Properly advises the Board on all issues which may affect each decision and all issues raised on appeal to the Board. Researchs [sic] issues of law for Board cases as necessary. Draft decisions of the Board, when requested. Represents

the Board before the Court of Appeals.”); (b) 20% information release (“Provides legal support and advise to the Department and the Disclosure Officer on information release issues and confidentiality of information collected or housed in the Department for every program administered by the Department, including disclosure requirements of the Government Records Access and Management Act. Responds to subpoenas, court orders, and other requests for information.”); (c) 10% general unemployment insurance and employment security issues (“Provide legal support to the Department on issues pertaining generally to unemployment insurance and employment security, including vocational training, job search and placement.”); (d) 10% special assignments (“Provides legal counsel for the Department in the form of formal and informal legal opinions and carries out special assignments as requested by the Director”); and (e) 10% training (“Provides training to Department employees and external customers. Receives training”). Grievant Exh 5. Mr. Blauer’s position description questionnaire was never revised after March of 1998 (TR at 183).

4. In addition to the position description questionnaire, Mr. Blauer was furnished with periodic Performance Plans on an annual basis for specific periods (TR at 516-517 and Grievant Exh. 34). Mr. Blauer, however, had no Performance Plan in place between June 30, 2001, and July 1, 2003 (TR at 526-529; Grievant Exhs. 33 and 34).

5. Over the course of his years of service to DWS as Legal/Enforcement Counsel III, Mr. Blauer would occasionally hold unemployment insurance administrative hearings (TR at 95). These typically entail two hearings per week, with hearings extending occasionally to four hearings per week if circumstances required it (TR at 97-

99). Mr. Blauer did not object to these assignments, as they were occasional in nature, and were shared by another attorney with Mr. Blauer's same job title (TR at 480-484) – he was desirous of being helpful team player, and, at that time, those duties caused him no physical injury or discomfort (TR at 487). Mr. Blauer was never asked to hold administrative hearings full time prior to September of 2003, however (TR at 100).

6. During the course of his employment with DWS, Mr. Blauer had annual performance reviews (TR at 138). Prior to 2003, all of Mr. Blauer's performance reviews rated him between "successful" and "highly successful" (TR at 138-148; Grievant Exhs. 10-14). The annual performance appraisals occasionally made suggestions concerning areas in which Mr. Blauer might improve performance; Mr. Blauer responded to these accordingly (Grievant Exhs. 10-13). In his performance appraisal for the period July 1, 2000, through June 30, 2001, for instance, Mr. Blauer's supervisor, Virginia Smith, noted concerns about Mr. Blauer falling asleep in meetings (TR at 149-150; Grievant Exh. 13 at 2). Mr. Blauer was later diagnosed with sleep apnea (TR at 150-151) – a condition which, if left untreated, contributes to sleepiness as well as reduced performance (TR at 311-313 and Grievant Exh. 22). He thereafter sought treatment, and commenced sleeping with the breathing assistance of a prescribed CPAP machine in February of 2003, which addressed the problem (TR at 150-151, 300-301 and Grievant Exhs. 23-25). Also, in performance appraisals prior to 2003, Mr. Blauer was apprised of concerns regarding frequent visits by Administrative Representative Tom Cantrell (Grievant Exh. 13 at 2). Mr. Blauer had been meeting with Mr. Cantrell periodically in response to a recommendation of a prior supervisor, Alan Zabell, that those

administrative representatives who represent claimants in DWS hearings receive “mentoring” (TR at 178-180); in response to his 2001 performance appraisal, however, Mr. Blauer discontinued his mentoring activities with Mr. Cantrell (TR at 180-181). In certain performance appraisals, Mr. Blauer was censured for failing to meet federally-mandated “red letter” dates for the issuance of decisions on the few ALJ hearings which he held during that time period (TR at 157; Grievant Exh. 12 at 2). In response to this observation, Mr. Blauer established that, in fact, decisions on the few administrative hearings which he conducted were timely submitted to typists, but not always transcribed by the “red letter” deadline (TR at 157, 269-270; Grievant Exh. 12 at 2-3, 17).

7. During his time as Legal/Enforcement Counsel III to DWS, Mr. Blauer worked in concert with between three and four other attorneys sharing that title, their duties and responsibilities fluctuating as job demands evolved (TR at 159-173). During that time period, Mr. Blauer picked up the following additional responsibilities: (a) bankruptcy counsel (TR at 165-166); (b) acting director for DWS adjudications (TR at 166); (c) contract review (TR at 169); (d) contract officer (*id.*); (e) contributions and garnishments (which included authorized use of signature stamp on garnishment documents – *see* paragraphs 51-52, below) (TR at 169-170); (f) subplans (TR at 172); (g) prosecution board (*id.*); and (h) legislative drafting in connection with unemployment insurance tax (TR at 175-176). During this time period, Mr. Blauer’s workload was increasing significantly (TR at 174-177). From documents produced by DWS itself, it was demonstrated at the hearing that, from 2001 to 2002, Board cases handled by DWS’s Legal/Enforcement Counsel III spiked from 585 to 819 (TR at 234-236; Grievant Exh.

19). Between 1998 and 2002, moreover, lower authority hearings jumped from 5,451 per year to 10,641 per year (TR at 235-236; Grievant Exh. 19). Between 2000 and 2002, Workforce Appeals Board cases (which accounted for 50% of Mr. Blauer's responsibilities under his 1998 position description questionnaire – see Grievant Exh. 5) jumped 69% (TR at 283; Grievant Exh. 20).

8. Tani Downing took over as director of the Division of Adjudication for DWS in January of 2002 (TR at 761). By that time, Mr. Blauer's job description, as set out in his position description questionnaire of 1998, had become outdated due to the addition of other responsibilities as set out above (TR at 183-184). Nevertheless, Ms. Downing did not rework Mr. Blauer's position description questionnaire, or give him a revised performance plan/evaluation until July 18, 2003 (TR at 185-186, 513; Grievant Exh. 33).

9. Ms. Downing's first performance appraisal for Mr. Blauer was given to him on June 21, 2002 (TR at 187-188; Grievant Exh. 14), which rated him at 60 points – the highest numerical designator for "successful," and one point lower than necessary to achieve "highly successful" (Grievant Exh. 14 at 1). Nevertheless, Ms. Downing observed that Mr. Blauer was difficult to find during working hours; that his percentages of meeting "red letter" dates on hearing decisions was below target in two areas; that his proofreading needed to improve, etc. (Grievant Exh. 14 at 2). In addition, Ms. Downing observed that "it does not appear that you are carrying the workload that your co-attorneys are carrying and we will evaluate all the attorneys' work to try to make each workload more equitable" (Grievant Exh. 14 at 2).

10. Mr. Blauer responded to his June 2002 performance appraisal in writing (TR at 193 and Grievant Exh. 15), pointing out – and describing in detail – that his workload had been significantly increased since formulation of his position description questionnaire in 1998 (Grievant Exh. 5); that his workload assignment for the Workforce Appeals Board had remained constant; that certain red letter dates had been difficult or impossible to meet, as the dates had been either prior to or on the date of the hearing; that his duties frequently took him away from his office, but that he attempted to account for his whereabouts during business hours; and that he denied and resented the claim that he was not carrying his fair share of the workload (TR at 193-199 and Grievant Exh. 15)¹.

11. Mr. Blauer received no reply from Ms. Downing to his written response (TR at 199). Mr. Blauer, however, showed his June 2002 performance appraisal to Workforce Appeals Board Chairman Becky Thomas, who was surprised and offended that he had not been rated “highly successful” (TR at 199-200).

12. During March of 2003, Ms. Downing assigned Mr. Blauer to conduct ten administrative hearings per week – more than double what he had performed previously (TR at 219 and 246; Grievant Exh. 17 at 2). This change increased pain due to a sciatic nerve condition in his back, rendering the performance impossible (TR at 246). In

¹ In fact – and from documents produced by DWS itself – it was demonstrated at the hearing that, from 2001 to 2002, Board cases handled by DWS’s Legal/Enforcement Counsel III spiked from 585 to 819 (TR at 234-236; Grievant Exh. 19). Between 1998 and 2002, moreover, lower authority hearings jumped from 5,451 per year to 10,641 per year (TR at 235-236; Grievant Exh. 19). Between 2000 and 2002, Workforce Appeals Board cases (which accounted for 50% of Mr. Blauer’s responsibilities under his 1998 position description questionnaire – *see* Grievant Exh. 5) jumped 69% (TR at 283; Grievant Exh. 20).

addition, his performance suffered due to sleep apnea and coronary heart disease (TR at 299-302 and Grievant Exh. 21). His assignment was thereafter reduced to eight hearings per week – still too much for his back condition (*Id.*).

13. On June 27, 2003, Ms. Downing presented Mr. Blauer with his performance appraisal for the period between July 1, 2002, and June 30, 2003 (TR at 2002-2003; Grievant Exh. 16). Mr. Blauer was rated at 39 points – 2 points below that necessary to achieve a “successful” classification (TR at 202 and 204; Grievant Exh. 16 at 1).

14. Prior to receiving the 2003 performance appraisal, Mr. Blauer had not had input from Ms. Downing regarding any performance deficiencies – for some time period, he had met with her on a weekly basis, but these meetings had tapered off, and had never resulted in any indication that his performance was substandard in any way (TR at 209-210).

15. Mr. Blauer had obtained, from his attending physician, Dr. Dennis R. Peterson, MD, a letter dated June 4, 2003, concerning a coronary artery disease condition, and the sleep apnea syndrome discussed above, to present to Ms. Downing during his performance appraisal in June of 2003, with the intent of discussing workload assignment in light thereof (TR at 299-302 and Grievant Exh. 21). Ms. Downing, however, declined to look at the letter, announcing that “this is an ADA issue, and needs to go to the ADA coordinator” (TR at 302, l. 2-3). Ms. Downing then presented Mr. Blauer with the information contained in the 2003 appraisal, permitted him to read it, and mark whether he agreed or disagreed; there was no other discussion (TR at 231-232).

16. Mr. Blauer thereafter prepared a written response to the 2003 appraisal, in which he challenged the various charges in the appraisal, including the following: (a) that, as of 2003, he was handling nearly triple the Board caseload over 1998 figures, according to DWS records; (b) that he had taken on an additional 221 cases for the Board over the prior year, his case load having increased from 222 to 443 in one year alone; (c) that charges in the 2003 performance appraisal concerning “cut and paste” were both inaccurate and inappropriate, as the adoption of language from briefs in a memorandum decision was a standard – and welcome – practice in the judiciary; (d) that the imposition of ten (or eight) administrative hearings per week constituted a “sudden, dramatic increase of one-half an ALJ workload”; (e) that he was not missing the “red letter” dates indicated in the 2003 performance appraisal due to delays in typing, hearing continuances, and other factors; and (f) that “I have never received from you a current performance plan where I may timely know of your expectations of me” (TR at 219 and Grievant Exh. 17).

17. Mr. Blauer also obtained additional letters from his physician, Dr. Dennis Peterson, MD, which further detailed his condition (TR at 312-313, 322; Grievant Exh. 22 and 23). In his letters, Dr. Peterson diagnosed Mr. Blauer with three conditions: severe obstructive sleep apnea, left sciatica, and coronary artery disease with angina pectoris (Grievant Exh. 22). With respect to the sleep apnea, Dr. Peterson observed the following:

Mr. Blauer experiences significant oxygen deprivation while sleeping. This typically induces fatigue, daytime drowsiness, and facile dropping off to sleep when sitting, quietly reading, or attending meetings.

Id. Concerning the sciatica, Dr. Peterson stated that it caused “lancinating pain down left lower extreme extremity to the toes. This is exacerbated by prolong sitting.” *Id.*

Concerning coronary artery disease with angina pectoris, Dr. Peterson observed that it was “induced by stress.” *Id.* Concerning mitigation of these conditions, Dr. Peterson stated that the sleep apnea condition “has been improving since implementation of the CPAP therapy”; that sciatica had been “responding to strengthening, exercise, manipulation, acupuncture and avoidance of prolonged sitting”; and the coronary artery disease had been responding to “exercise, medication minimizing cardiac output by blocking adrenalin, and avoidance of stress.” *Id.* Dr. Peterson then made the following recommendation:

OSA and sciatica – for years, he has already been accommodated for these challenging conditions in the form of receipt of assignments for the Workforce Appeals Board which lend themselves to review and preparation while being up and mobile...Emphasizing use of ‘mobile mentation’ should continue to prove 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 the sedentary settings in which his disability has the highest probability of degrading the quality of his life and the quantity and quality of his work. It seems a natural recommendation arising from an understanding of the nature of his problems.

(Grievant Exh.22 at p. 2)². Dr. Peterson’s recommendations were echoed in a companion letter also dated July 26, 2003 (Grievant Exh.23).

² Dr. Peterson’s July 26, 2003 letter (Grievant Exh.22) was preceded by a telephone conversation between Dr. Peterson and ADA Specialist Chuck Butler (TR at 347), in which Mr. Butler accused Dr. Peterson of working on Mr. Blauer’s personal behalf, which Dr. Peterson strongly denied (TR at 347-348).

18. Both of Dr. Peterson's July 26th, 2003 letter were delivered to DWS; however, Ms. Downing acknowledged that she did not review them, referring them instead to ADA coordinator Chuck Butler (TR at 818).

19. Ms. Downing replied in writing to Mr. Blauer's July 16, 2003 response to the 2003 performance appraisal (TR at 227) (Grievant Exh.18). In her reply, Ms. Downing acknowledged that several of the charges in Mr. Blauer's 2003 performance appraisal had been unfounded; nevertheless, she refused to change his rating to "successful" "because you have not been able to carry a workload commensurate with the other attorneys in the office." (Grievant Exh.18).

20. During the next few days, Mr. Blauer experienced stress-related reactions leading to believe that he might be having a coronary arrest; accordingly, he sought care at the hospital emergency room (TR at 323-325; 632-634). In the wake of this episode, Dr. Peterson again wrote to DWS on July 31, 2003 (TR at 323; Grievant Exh. 24), stating the following:

As you know, Lorin suffers Coronary Artery Disease with Angina Pictorus, which is induced by stress. Currently he is experiencing severe stress brought on apparently by unresolved issues regarding his performance appraisal and related grievance/appeals; and his request for accommodation, which I am involved in as his primary care physician. It is important that Lorin minimize stressful circumstances which increase adrenalin-induced cardiac output and create potential catastrophe. In light of recent precipitation of chest pain by stresses related to his grievance/appeal, I strongly recommend that Lorin be placed on paid administrative leave until the grievance and related issues are satisfactorily resolved.

Exh. 24.

21. On August 15, 2003, Mr. Blauer, through his representative, Tom Cantrell, contacted DWS in writing concerning the pending appeal of the 2003 performance appraisal (TR at 499-500; Grievant Exh. 31). In his letter, Mr. Cantrell stated the following:

JoAnn feels that accommodation for Lorin's disabilities or issues regarding his current job assignments should not be discussed. That is up to you, of course, but please be aware that a requested resolution of Lorin's grievance regarding his performance appraisal is also the main accommodation we are requesting for his health issues, and would likely resolve the controversy regarding his job assignments; that is that Lorin have a proper, accurate, and timely job description; a performance plan that reflects his job description; and a proper performance appraisal – with the attending proper and timely discussions – as required by DHRM Rule. To resolve that issue may well resolve all issues.

(Grievant Exh. 31).

22. On August 20, 2003, Mr. Blauer and his representative, Tom Cantrell, met with Ms. Downing and JoAnn Campbell (then Human Resource Specialist with the Department of Human Resource Management – TR at 902) to discuss options (TR at 245-246; 287-291). At that time, Mr. Blauer's grievance of the 2003 appraisal had not yet been resolved (TR at 246).

23. During the meeting, Ms. Downing mentioned for the first time the prospect of assigning Mr. Blauer to full-time ALJ duties, carrying 20 cases per week, with no other duties (TR at 290-291). While the imposition of full-time ALJ duties on Mr. Blauer was thus discussed at that time as an appropriate "corrective action" (Grievant Exh. 16 at 2), it was made clear that it was not being imposed at that time (TR at 641, lines 12-23).

24. During the August 20, 2003 meeting, Mr. Blauer challenged Ms. Downing's statement that he was not carrying his fair share of the workload, asking what she believed his fair share should be; Ms. Downing's response was, "What do you think your fair share is?" (TR at 288-289). Mr. Blauer's representative, Tom Cantrell, pointed out to Ms. Downing that Mr. Blauer did not know what the other attorneys were doing, that only Ms. Downing did and was asking her what his fair share was. Ms. Downing still refused to tell him what his "fair share" was (TR at 289-290)³. In a follow up conversation with JoAnn Campbell immediately following the August 20, 2003 meeting, Mr. Blauer made clear that the sciatic nerve condition precluded holding ALJ hearings full time (TR at 294-295). Ms. Campbell told Mr. Blauer that corrective action was not "all that bad", and that Ms. Downing "just wants you to be an ALJ until you retire" (TR at 293-294).

25. Following the meeting of August 20, 2003, Mr. Blauer submitted to DWS written alternative proposals for workload allocation (TR at 508-509; Grievant Exh. 32).

³ While Ms. Downing apparently had no idea what Mr. Blauer's actual workload was at the time of the August 20, 2003 meeting, it is recently emerged that, during the summer of 2003, Ms. Downing requested and received percentage figures concerning changes in workload at DWS between 2000 and 2002, which were itemized in a memorandum dated July 23, 2003, never shared with Mr. Blauer (TR at 280-283; Grievant Exh. 20). The legal memorandum gives percentage increases in various types of legal work done within DWS for time period in question; however, back up information, and actual case load information, is not presented. (Grievant Exh. 20). Comparison of the 69% increase in Workforce Appeals Board cases reflected on Grievant Exh. 20 with the actual numbers of such cases reflected on Grievant Exh. 19, however, demonstrates a significant increase in Mr. Blauer's workload during that period, of which Mr. Blauer himself was handling 46% (TR at 453). The 195% increase in unemployment information release work reflected on Grievant Exh. 20 (as assigned exclusively to Mr. Blauer) further demonstrates the increase in workload, although he was able to shift the major portion of it to paralegal assistants (TR at 458; Grievant Exh. 20).

The suggestion, however, were rejected by DWS (TR at 542, 544) – by e-mail dated August 27, 2003, Tani Downing declined Mr. Blauer’s proposals for workload accommodation, observing that she was “under no obligation to try to negotiate Lorin’s future workload or extend the time period for the grievance” (TR at 645, 646; Agency Exh.5).

26. By letter ruling dated September 5, DWS Executive Director Raylene Ireland issued a Level 4 Grievance Response (TR at 456; Grievant Exh. 39). In her September 5, 2003 letter ruling – and despite Mr. Blauer’s repudiation of all charges addressed therein (see above) – Ms. Ireland reprimanded Mr. Blauer for the following: (a) falling asleep in meetings; (b) not carrying the workload of other attorneys; and (c) not meeting other, unspecified “performance standards” (Grievant Exh. 39). Ms. Ireland included the following comments in her letter ruling:

While I agree that many of the required standards are not quantified nor do they have quality standards, I also believe that most highly educated professionals know what is expected without having everything spelled out in detail.

(Grievant Exh. 39; emphasis added). Nevertheless (and for reasons unstated), Ms. Ireland reversed Ms. Downing’s “unsuccessful” rating in Mr. Blauer’s 2003 appraisal, and afforded him a “successful” rating (Grievant Exh. 39). His appeal having been granted, Mr. Blauer did not pursue his first grievance further (TR at 549).

27. On the same day that Ms. Ireland’s letter issues, Chuck Butler, DWS’s ADA Coordinator declined Mr. Blauer’s request for reasonable accommodation by letter dated September 5, 2003 (TR at 661-662; Agency Exh.6). While his letter failed to take into

account Dr. Peterson's expressed concerns, Mr. Butler relayed Dr. Peterson's letters (Grievant Exhs. 21-24) to supervisor, Tani Downing, to be taken into account in future job assignments, and recommended that he be accommodated (TR at 683, 789). Mr. Butler's letter afforded Petitioner no appeal rights (Agency Exh. 6).

28. On September 9, 2003 – four days following Executive Director Ireland's favorable disposition of his first grievance – Mr. Blauer received from Ms. Downing, a memorandum entitled "Change of Assignment" (TR at 545; Grievant Exh. 38). The September 9, 2003 memorandum commenced with the following:

Effective today you will be assigned to conduct UI hearings full-time with no change in job title or pay rate...Starting with the next hearing passout, you will receive 14 hearings to conduct. Thereafter, your weekly passout will be increased until, by the week of October 6, you are conducting a full load of hearings equal to the amount of the other staff holding hearings.

(Grievant Exh. 30 at p. 1). Ms. Downing dismissed all information submitted to DWS and Chuck Butler by Mr. Blauer and Dr. Peterson with the following observation:

In Chuck Butler's response to your ADA accommodation request, he indicates that 'after reviewing the information provided by your physicians, and consulting with the ADA coordinator for the State of Utah, I have determined that your limitations do not rise to a level requiring a ADA accommodation . . . and I must deny your request . . . your physicians have recommend [sic] that you be given an assignment that does not require you to sit for longer than an hour at a time without being able to move around . .

(Grievant Exh. 38 at 1). *None of the submittals by Dr. Peterson on Mr. Blauer's behalf contained any of the recommendations quoted above – see Grievant Exhs. 21-24.*

29. The September 9, 2003 change of assignment repeated the charge of "falling asleep in meetings" (though this had been resolved by Mr. Blauer's adoption of the C-PAP machine in February of 2003 – TR at 151-152, 553-554), and that he was "not

carrying the load of the other attorneys” (although neither Ms. Downing nor anyone else could quantify or substantiate this charge, beyond the use of a percentage sheet without backup, which told none of the actual story of relative workloads among Legal/Enforcement Counsel at DWS – TR at 447-457; Grievant Exh. 20) . In addition, the September 9, 2003 memorandum again references federally-mandated criteria on timeliness (even though Ms. Downing had retracted her charges in connection with this claim in her reply to Mr. Blauer’s memorandum concerning his 2003 appraisal – *see* Grievant Exh.18). Grievant Exh. 38 at 2.

30. The September 9, 2003 memorandum, however, also asserted charges never before confronted by Mr. Blauer. Specifically: (a) Mr. Blauer was using a signature stamp “in violation of Rule 11 of the Utah Rules of Civil Procedure” (Grievant Exh. 38 at 2); (b) the Chair of the Board of Review [Becky Thomas] “has felt that she has had to make the same editing corrections on your decisions over the years and that you have not taken the initiative to learn from them and eliminate the errors from subsequent decisions” (*Id.*); and (c) “You have been authorizing access to wage data over the years without strict compliance with Subsection 35A-4-312(6)” (*Id.*). Concerning Ms. Downing’s charge that Mr. Blauer had violated Rule 11, Utah Rules of Civil Procedure by permitting his signature stamp to be used on “thousands of documents”, the practice was limited to the issuance of garnishments – a long-standing practice at DWS (TR at 557-558) . Concerning Ms. Downing’s charge that Mr. Blauer had violated Utah Code Ann. § 35A-4-31(6), both Mr. Blauer and Mr. John Levanger (then Internal Audit Manager and Disclosure Officer for DWS) testified that they conferred regularly concerning the release

of the information covered by that section and assured compliance therewith (TR at 63-64; 558-559). Concerning Ms. Downing's charge that Mr. Blauer's work needed to be rewritten, the only edits which have been brought to Mr. Blauer's attention had been matters of style, not substance (TR at 559-560); Workforce Appeals Board Chairman Becky Thomas had, in fact, been highly complimentary of Mr. Blauer's work output (TR at 200-201).

31. By written notice dated September 12, 2003, Mr. Blauer (through his representative, Tom Cantrell) appealed his change of assignment (TR at 562-563; Grievant Exh. 40). His appeal stated the following:

You are already aware that Lorin's known disabilities (whether ADA qualifying or not) may encumber the successful accomplishment of the specific combination of duties you've assigned him. His doctors have already made it clear to the Department that this combination of duties will exacerbate his physiological problems. We have made alternative proposals and suggestions which you have rejected with little or no discussion or negotiation. Even the Department's ADA Coordinator suggested that you consider his doctor's request in making his job assignments, yet you seem to disregard them.

32. By the time of his appeal, Mr. Blauer had also made clear to DWS that he could not function in a full-time administration law judge capacity due to his disabilities :

Q. Where you given any alternative by your doctor that would enable you to become a full-time ALJ?

A. No.

Q. Why not?

A. Because I could not see how I could get out and walk, like you testified here, while holding hearings. I couldn't take notes, I couldn't control the telephone, the recorder deal with all the documents and be pacing around the room. It just made no sense.

(TR at 563, l. 22, through 564, l. 19).

33. Upon receiving the September 9, 2003 Change of Assignment memorandum, Mr. Blauer (as indicated in the above-quoted testimony) consulted with his attending physician concerning options, and received the following response:

Dr. Peterson made the statement, he says, I tell him what the limitations are and they seem to use it as a blueprint to destroy the man. He effectively said that in his letters to the Department. He said, I'm ordering him off the job until these issues are resolved and that seems to be in the hands of the Department, not Lorin, or words to that effect.

(TR at 565, l. 25 through 566, l. 7). By application dated October 14, 2003, therefore, Mr. Blauer sought medical leave under the Family and Medical Leave Act of 1993, with supporting documentation from Dr. Peterson (TR at 330-333; Grievant Exh. 25). In his letter supporting the FLMA application of October 14, 2003, Dr. Peterson stated the following:

The Patient is intolerant of prolong sitting. It causes progressively severe and distracting pain in the back radiating down the left leg. My recent clear recommendation to department [sic] was to avoid this. To my astonishment that recommendation seems to have been used as a blueprint to create situation in which he cannot successfully function. Hence, his workplace has been transformed into one which is physically punishing . . . I have instructed him to avoid such a situation.

(Grievant Exh. 25 at 2). Concerning Mr. Blauer's ongoing Coronary Artery Disease, Dr. Peterson observed the following:

This individual is status post-coronary stent placement. He is at risk of exacerbation of this condition caused by stress. Currently, his work environment has become exceptionally stressful.

34. Dr. Peterson also asserted complications arising from generalized anxiety disorder. (Grievant Exh. 25 at 2).

35. By letter ruling dated September 15, 2003, Executive Director Raylene Ireland declined Mr. Blauer's grievance of the September 9, 2003 reassignment (TR at 677; Agency Exh. 8). In her letter ruling, Ms. Ireland dismissed Dr. Peterson's letters (which she admitted never to have read – TR at 860) (Agency Exh. 8 at 1). By e-mail dated September 16, 2003, Mr. Blauer appealed Ms. Ireland's September 15, 2003 letter ruling (TR at 679; Agency Exh. 9).

36. On October 14, 2003 (following a hearing – TR at 577; Grievant Exh. 44). Ms. Ireland announced her decision to uphold Ms. Downing's September 9, 2003 reassignment. Ms. Ireland dismissed completely the concerns voiced by Mr. Blauer's attending physician:

In assigning these duties, Tani considered the original recommendations of your physicians even though your medical problems were determined not to meet the guidelines for an ADA accommodation. According to Chuck Butler, ADA Coordinator, these recommendations included "the ability to move around and to have an assignment wherein you have a clear understanding the expectations, what comprises a full 40-hour workload for an experienced attorney, allows you to adequately organize and plan your work and provide you timely supervision, instructions and training.

(Grievant Exh. 44 at 2). (Again, not one of these representations had been contained in any of the submittals by Dr. Peterson – Grievant Exhs. 22-25.)

37. Mr. Blauer continued to attempt to return to work with DWS while still complying with medical directives concerning the duties which he could and could not fulfill. By letter dated November 6, 2003, his physician attempted to notify DWS Human Resources Director Kevin Beutler concerning restrictions imposed by Mr. Blauer's disabilities (TR at 362; Grievant Exh. 26):

In order to accommodate his sciatica, Lorin should do no more than two hearings a week (or similar limitation of duties that require him to sit or stand for extended periods of time); but he must take an ambulatory break every 40 minutes at minimum. By “ambulatory” I mean leaving his desk and walking about – not just standing at his desk or moving a few feet in either direction. . . . in order to accommodate his coronary condition and other medical issues that can be exacerbated by undue stress, Lorin should be insulated from the current management style of Tani Downing.

I have repeatedly stated that Lorin can perform his traditional – or similar – duties with these accommodations. He can work out of his home as he has done in the past to accommodate his sciatica and his other health issues. I recommend that he be placed on FMLA sick leave, not because he couldn’t work, but to protect his health because of the letters from the Department revealing that they were forcing him to perform a combination of duties that I specifically advised against under conditions that were unnecessarily stressful.

(Grievant Exh. 26; emphasis added)

38. By letter dated June 4, 2004, Mr. Blauer again attempted to return to work under conditions that would accommodate his disabilities. He was declined by letter of June 18, 2004 from Tani Downing (TR at 383; Grievant Exh. 28), in which she dismissed Mr. Blauer’s disability circumstances with the assumption that his attending physician was unaware of accommodations which had been offered (Grievant Exh. 28); Dr. Peterson testified, however, that he was aware of what had been offered, and stated that it was insufficient (TR at 384-387).

39. Mr. Blauer was never given to understand that the reassignment effectuated by the September 9, 2003 memorandum was other than permanent – no subsequent written or verbal communication suggest as much (TR at 682-683; Grievant Exh. 28).

40. DWS presented its case in chief at the hearing on December 7, 2009. The bulk of DWS’s evidence attempted to establish that Mr. Blauer’s disabilities could not be

accommodated through reassignment; when Mr. Blauer attempted, on redirect, to address this charge, however, he was precluded from testifying as to what could have been done by DWS to accommodate his disabilities (TR at 931-933).

B. Marshaling of Evidence

As noted in the Argument below, Petitioner Blauer takes the position that all issues before this Court are mistakes of law, and not dependent on a reversal of any finding of fact by CSRB or its hearing officer. Nevertheless, the following marshaling of evidence is offered in connection with the Agency ruling.

Violation of Utah Administrative Code R. 477-15-2 and 3.

Neither the hearing officer nor CSRB found that Petitioner Blauer had failed to demonstrate discrimination under R. 477-15-2 and 3 -- indeed, Hearing Officer James H. Beadles concluded that “the evidence shows that DWS denied Petitioner’s request for an accommodation due to an alleged disability” (Appendix at Attachment 3, p. 7), but declining to rule on jurisdictional grounds (*Id.*). In its Decision, Order and Final Agency Action (Appendix at Attachment 4), CSRB does not dispute this statement, nor substitute any finding of its own stead thereof, making clear instead that its ruling is one of law (Attachment 4 at p. 28).

Nevertheless, in the interest of completeness, Petitioner offers the following evidence which *might* have sustained a finding that Petitioner was not the victim of a refusal to accommodate disability by DWS:

1. Dr. Peterson wasn’t familiar with the legal definition of the term “essential functions,” using the term in his correspondence as a lay person (TR at 411, 433).

2. Dr. Peterson prepared Petitioner's FMLA request form (Exhibit G25) from conversations with Petitioner (TR at 421-425).

3. Dr. Peterson did not know that 25% of administrative law hearings are canceled (TR at 436, 797). Dr. Peterson did not know that administrative law hearings often take less than one hour, and that Petitioner could move around during such hearings (TR at 436-437).

4. Petitioner "may have" conducted 10-20 hearing per week at some point in 1999-2000, although he did not believe this to be the case (TR at 607-608).

5. Hospital records of Petitioner's emergency room visit on July 22, 2003 (Agency Exh. 3) state that Petitioner reported increasing discomfort over a period of days (TR at 633); Petitioner did not recall discussing work problems with the attending physicians (TR at 634).

6. Petitioner was not assigned to hold 20 hearings per week until September 9, 2003, after the August 20, 2003 meeting with his supervisor; it was not called a corrective action (TR at 642-643).

7. In an email dated August 21, 2003 to supervisor Tani Downing, Petitioner's representative, Tom Cantrell, stated that Petitioner was "not enthused" to assume the duties of an administrative law judge (TR at 644, Agency Exh. 4).

8. In her letter ruling on Petitioner's first grievance, issued September 5, 2003 (Grievant Exh. 39), Raylene Ireland correctly noted that Petitioner had not sought ADA accommodation prior to receiving his 2003 performance evaluation (TR at 654).

9. By letter dated September 5, 2003, ADA Director, Chuck Butler, declined Petitioner's ADA accommodation request (Agency Exh. 6, TR at 662-663).

10. Respondent DWS arranged for a standup desk for Petitioner (TR at 664).

11. On September 9, 2003, Tani Downing issued a reassignment memo, in which she reiterated many charges against Petitioner's job performance (Grievant Exh. 38, TR at 668-670).

12. As an ALJ, Petitioner knew that he would be able to schedule his own cases, and would be aware of weekly expectations (TR at 670); also, that other aspects of such position would be predictable (TR at 671-672).

13. Petitioner never performed 20 hearings per week after his September 9, 2003 reassignment -- he was first off sick, and then applied for leave under the Family Medical Leave Act (TR at 672-674).

14. By email dated September 12, 2003, Petitioner, through his representative, Tom Cantrell, appealed his September 9, 2003 reassignment (Grievant Exh. 40, TR at 674-675).

15. By letter of response dated September 15, 2003 (Agency Exh. 8), Executive Director Raylene Ireland, declined Petitioner's request for accommodation, claiming that, to her understanding, the directives of Petitioner's physician had been met (TR at 677).

16. Petitioner admitted that his first grievance (which had included the fact that he had no performance plan in place) was not appealed after he received a successful rating thereon by Executive Director Raylene Ireland's September 5, 2003 ruling (Grievant Exh. 39)(TR at 656-657).

17. Tani Downing did not remember whether, in response to the March 2003 assignment to conduct additional administrative law hearings, Petitioner raised any health issues; she remembers only that he believed he was being assigned too many hearings(. (TR at 781).

18. After delivering Petitioner's June, 2003 performance appraisal, Tani Downing tried to place him with the UI Department; they stated, however, that they preferred Mr. Bunker (TR at 787).

19. According to Ms. Downing, Appeals Board Chair, Becky Thomas, stated that, if Petitioner were assigned to work with her department, she would hire her own counsel (TR at 787-788).

20. In her decision concerning Petitioner's request for accommodation after his September 9, 2003 reassignment, Tani Downing did not review Dr. Peterson's letters, but only Mr. Butler's accommodation refusal letters of September 5, 2003 (Agency Exhibit 6) (TR at 789).

21. Respondents commissioned an ergonomic work station review (Agency Exh. 10) (TR at 680, 789-790).

22. Following hearing of Petitioner's grievance, Executive Director Ireland issued a letter ruling dated October 14, 2003, in which the grievance was denied (Grievant Exh. 44, TR at 690).

23. According to testimony of supervisor Tani Downing, it was imperative for her to be able to modify staff assignments to meet the needs of the department and the public (TR at 762).

24. Administrative law hearings can be done by telephone, and while moving around (TR at 764, 797-798).

25. A 16-page affidavit signed by Tani Downing in the Third District Court action referenced above (Agency Exh. 25) was received into evidence (TR at 773). It describes numerous reassignments within DWS, and complaints against Petitioner as described in her September 9, 2003 letter (Grievant Exh. 38).

26. In the summer of 2003, Tani Downing claimed to have found evidence that Petitioner did non-DWS work (TR at 788).

27. According to Ms. Downing, Petitioner's September 9, 2003 reassignment (Grievant Exh. 18) was not a corrective action plan (TR at 782).

28. According to Ms. Downing's testimony, she rejected Petitioner's job reallocation proposal of August 20, 2003 (Grievant Exh. 32) because it would have involved sitting too long (TR at 794). Ms. Downing likewise rejected Petitioner's proposal concerning appeals board sub plan review work (Grievant Exh. 32) as it lacked objective criteria (TR at 795).

29. According to Ms. Downing, she never intended to assign Petitioner to conduct administrative law hearings full time as a permanent position (TR at 796).

30. According to Ms. Downing, Tiffany Vincent's hire (documented in Grievant Exh. 42) having been planned prior thereto, and was only awaiting fiscal approval (TR at 799-800). It was not intended to replace Petitioner. (Id.)

31. According to Ms. Downing, she intended no retaliation against Petitioner (TR at 801); nor was Petitioner subjected to hostility or harassment (TR at 802).

32. According to Ms. Downing, she did not bring other employees into meetings with Petitioner in order to intimidate him (Id.).

33. According to Executive Director Raylene Ireland, her September 5, 2003 letter (Grievant Exh. 39) properly referred Petitioner to Chuck Butler as a proper source for ADA accommodations (TR at 839).

34. Ms. Ireland testified that she was unaware of any retaliation against, harassment of, Petitioner (TR at 845).

35. H.R. Specialist JoAnn Campbell testified that she met in August of 2003 with Petitioner, Mr. Cantrell and Tani Downing to discuss job options (TR at 903). According to Ms. Campbell, no decisions were made in that meeting (TR at 904).

36. Ms. Campbell did not tell Mr. Blauer that his reassignment to conduct administrative law hearings full time was a permanent transfer (Id.).

37. Ms. Campbell testified that she knew of no harassment or retaliation against Petitioner (TR at 905).

Violation of Utah Administrative Code R477-10-1 (Failure to Define Job Performance Parameters)

38. Performance plans were given to Petitioner for fiscal year 1995 – 1996 (Grievant Exh. 37); fiscal year 1999-2000 (Agency Exh. 2); fiscal year 2000-2001 (Grievant Exh. 34); and fiscal year 2003-2004 (Grievant Exh. 33).

39. Petitioner recognized that his job descriptions would not remain the same at perpetuity (TR at 600-601). He recognized that his position description questionnaire (Grievant Exh. 5) did not guarantee this (Id.).

40. Petitioner acknowledged different performance plans, but stated that he had no other position description questionnaire (TR at 603).

41. Petitioner's performance plan for 1999-2000 (Agency Exh. 2) correctly noted that core duties included conducting informal hearings (TR at 605-606).

42. Petitioner's performance plan for 2000-2001 had the same provision (Grievant Exh. 34; TR at 608).

43. Virginia Smith's performance appraisal for 2000-2001 (Grievant Exh. 13) talked about Petitioner falling asleep in meetings, closing his door and meeting with Tom Cantrell (TR at 612-613).

44. During fiscal year 2001-2002, Petitioner did not realize that he had no performance plan in place, and didn't complain with respect thereto (TR at 614). Petitioner also did not complain when no performance plan was in place for fiscal year 2002-2003 (TR at 617-618).

45. Responding to his performance evaluation for fiscal year 2001-2002 (Grievant Exh. 14), Petitioner stated that he would do analysis of his position and submit it for review, but did not do so (TR at 617).

46. In the 2001-2003 range, the work load increased for all DWS attorneys (TR at 618-619).

47. For a brief period, Petitioner had weekly meetings with Tani Downing, after which she discontinued those meetings (TR at 622).

48. Petitioner's performance plan for fiscal year 2003-2004 (Grievant Exh. 33) was similar in many respects to his performance plan for fiscal year 1999-2000, other than differences cited in the record (TR at 626-627).

49. According to Tani Downing, the duties of legal counsel expressly included the conducting of administrative hearings (TR at 763-764).

50. According to Ms. Downing, the position description questionnaire (Grievant Exh. 5) is a recruiting tool, not a guarantee of duties (TR at 785).

51. According to Ms. Downing, had Petitioner complained about not having a performance plan in place for 2001-2003, he would have received one (TR at 786).

52. According to Ms. Downing, Petitioner's 2003-2004 performance plan was functionally identical to his performance plan for 2000-2001 (Id.).

Finding That Letters Critical of Petitioner's Job Performance Constituted "Written Reprimands" Under Utah Code Ann. § 67-19a-302(1)

53. According to Ms. Downing, Petitioner's June 30, 2003 performance appraisal (Grievant Exh. 16) was not intended as a written reprimand (TR at 808).

54. According to Ms. Downing, her reassignment of September 9, 2003 (Grievant Exh. 38) was not a written reprimand (Id.).

55. According to Executive Director Raylene Ireland, her September 5 ruling on Petitioner's first grievance (Grievant Exh. 39) was no a written reprimand (TR at 845).

56. According to Ms. Ireland, her ruling on Petitioner's second grievance (Grievant Exh. 44) was not a written reprimand (TR at 846).

SUMMARY OF ARGUMENT

CSRB improperly concluded – for the third time, and despite repeated judicial rulings to the contrary – that CSRB had no jurisdiction to hear Petitioner’s claim that DWS had violated the provisions of Utah Administrative Rule 477-15-2 and 3, precluding discrimination, harassment or retaliation in the workplace. This Court’s decision and order of March 13, 2008 (Appendix at Attachment 9) made clear that, under the law of the case, CSRB was clothed with jurisdiction to hear all claims before it, and was to decide them on their merits.

Based on the overwhelming weight of evidence before CSRB, the determination should have been (and, in fact, was made) that Petitioner Blauer was the victim of DWS’ violations of R. 477-15-2 and 3, and relief should have been fashioned accordingly.

At the very least, Petitioner should have been granted the opportunity to present rebuttal evidence disproving DWS’ asserted (but unproven) claim that it had no available positions which would have accommodated Petitioner’s disability.

Despite its express admissions, DWS was improperly held not to have violated Utah Administrative Code R. 477-10-1, et seq. by failing to define proper job parameters for Petitioner Blauer. By undisputed evidence, he had no valid performance plan in place during the very period in which he was accused of performance deficiencies – yet, even after successfully challenging an “unsuccessful” job rating in the summer of 2003, he was moved to a position impossible of performance due to disability, the excuse being continued claims of performance deficiencies unmeasured against any objective standard.

CSRB improperly disallowed Petitioner's final remanded claim, that he was the subject of "written reprimands" the substance of which he challenged. Without legal authority or basis, the hearing officer held, in advance of hearing, that no writing criticizing Petitioner's performance constituted a "written reprimand" under governing law. All applicable standards, however, establish that, at the very least, the September 9, 2003 reassignment memo (Grievant's Exhibit 38) constituted a "written reprimand," and that DWS should have borne the burden of justifying its content before CSRB.

ARGUMENT

POINT I: CSRB IMPROPERLY DECLINED JURISDICTION OVER PETITIONER'S CLAIMS OF WORKPLACE DISCRIMINATION

A. CSRB Improperly Disregarded This Court's Mandate Concerning the Exercise of Jurisdiction Over Petitioner's Claims of Workplace Rule Violations

CSRB Hearing Officer James Beadles' Findings of Fact, Conclusions of Law, Decision and Order (Appendix at Attachment 3), sustained by CSRB's Decision, Order and Final Agency Action (Appendix at Attachment 4) mark the third time that CSRB has claimed to lack jurisdiction to hear Petitioner's charges of workplace rule violation based on Utah Administrative Code R. 477-15-2 and R. 477-15-3, which preclude discrimination, harassment or retaliation on the basis of disability against Utah State employees, despite repeated directives to the contrary from every level of the Utah State judiciary. The position was first stated in CSRB's order of November 12, 2003 (Appendix at Attachment 5) and reversed by the Third District Court in the 2004 action (Appendix at Attachments 6 and 7); second, by CSRB's Order of December 6, 2006

(Appendix at Attachment 8), reversed by this Court in 2008 (Appendix at Attachment 9) and by the Utah Supreme Court on petition for certiorari (Appendix at Attachments 10 and 11). The message from the courts has been clear: CSRB does have jurisdiction to hear Petitioner's claim and must hear and adjudicate them *on their merits*. This Court's last pronouncement in this regard expressly directed CSRB to hear *all* issues remanded from the District Court, and decide them on their merits (Appendix at Attachment 9). Therein, this Court wrote that the doctrine of law of the case barred CSRB from declining jurisdiction over Petitioner's harassment and retaliation claim:

Based on [the] language in the [Trial Court's] Order, 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. The DWS and the CSRB did not challenge the District Court's conclusions regarding jurisdiction through an appeal to this Court. As a result, the District Court's conclusions became the law of the case, and the CSRB was bound by the District Court's legal conclusions and mandates. The CSRB therefore erred by considering jurisdictional issues that already been decided by the District Court.

Accordingly, we reversed the CSRB's dismissal of Blauer's six claims on jurisdictional grounds and remand the case to the CSRB for a hearing on the merits.

(Attachment 9, p. 3). In so ruling, the Court relied on the case of *Jensen v. IHC Hospitals, Inc.*, 2003 Utah 51, 83 2d 1076, which stated the following:

The "law of the case" doctrine specifies that when a legal 'decision [is] made on an issue during one stage of the case,' that decision 'is binding in successive stages of the same litigation.' Particularly when an appellate court makes a pronouncement on a legal issue, '[t]he lower court must not depart from the mandate . . .' This is true even if the lower court 'believe[s] that the issue could have been better decided in another fashion.' 2003 Utah 51 at ¶ 67.

Hearing Officer Beadles' belief that the jurisdictional issue could (or should) have been decided in such a way to preclude him from hearing Petitioner's claims under R. 477-15-2 and 3 long ago ceased to be a governing factor. This matter was remanded by this Court with a specific mandate: to hear all six of Petitioner's grievances on their merits. CSRB has repeatedly attempted to divest itself of jurisdiction to hear this claim. It has been told three times that it may not do so. As such, Mr. Beadles ruling placed CSRB in open and express defiance in this Court's mandate; CSRB's affirmance of that ruling necessitates the relief petitioned for here.

CSRB's decision (Attachment 4) attempts to avoid the clear import of this Court's mandate by reaching all the way back to the District Court's Memorandum Decision of August 16, 2004 (Attachment 6), parsing the wording of the ruling, and suggesting that it did not entirely dispose of jurisdictional questions. In so reasoning, though, CSRB ignores completely the District Court's subsequent declaration (Attachment 7), this Court's Ruling of March 13, 2008 (Attachment 9), and the Supreme Court's denial of certiorari (Attachment 11). CSRB, in other words, places itself directly at odds with, and in rebellion against, this Court's express finding that "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" (emphasis added). This Court's meaning is clear and inescapable. CSRB, though, is apparently intent upon substituting its own judgment, and that of its hearing officer, for the Court's directive.

B. The Hearing Officer's Finding of Discrimination is Supported by Substantial Evidence in the Record; Any Contrary Finding – Even if Made – Would Have Been Without Substantial Support in the Record.

DWS's conduct toward Mr. Blauer on September 9, 2003 was governed by Utah Administrative Code R. 477-15-1, *et seq.* as it read at that time.⁴ R 477-15-1 provided the following:

It is the State of Utah's policy to . . . provide all employees a working environment that is free from unlawful harassment based on race, religion, national origin, color, sex, age, disability, or protective activity under anti-discrimination statute . . .

R 477-15-2 provided a broad definition of unlawful harassment based upon disability:

(1) Unlawful harassment means discriminatory treatment based on race, religion, national origin, color, sex, age, protective activity or disability. . .

(2) Unlawful harassment includes the following subtypes:

(a) behavior or conduct in violation of R. 477-15-2(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 R. 477-15-2(1) that results in an tangible employment action being taken against the harassed employee.

R. 477-15-3, as it read in 2003, dealt with the topic of 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 the policy or has otherwise engaged in protected activity.

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

⁴ R 477-15-1, *et seq.* has since been revised; those revisions, however, cannot be retroactively applied to defeat Mr. Blauer's vested rights at the time of his reassignment – *Olsen v. Samuel McIntyre Investment Company*, 956 2d 257 (Utah 1998).

(c) creation of or the continued existence of a hostile work environment;

...

(g) discriminatory treatment.

The prohibitions set out in the foregoing regulatory framework are more than broad enough to encompass DWS's conduct toward Mr. Blauer as set out in the evidence described above. Mr. Blauer's own testimony, buttressed by that of his attending physician, Dr. Dennis Peterson, and documentation introduced into the record, established that Mr. Blauer's well-established work patterns (which permitted movement, work from home, use of a treadmill, reviewing tapes while in motion, etc.) were deliberately disrupted by decisions from Tani Downing, who became Mr. Blauer's supervisor in early 2002. In March of 2003, Ms. Downing elected to assign Mr. Blauer to conduct 10 administrative unemployment insurance hearings per week in lieu of his prior duties. In response, Mr. Blauer approached his attending physician, seeking a letter explaining the problems imposed by Ms. Downing's decision. When he attempted to present these to Ms. Downing at his June, 2003 performance appraisal meeting, however, she refused to even review the information, deferring him to Chuck Butler, DWS's ADA coordinator. Mr. Blauer caused his physician, Dr. Peterson, to interface directly with Mr. Butler, furnishing both verbal and written information concerning Mr. Blauer's disabilities, and explaining that Ms. Downing's reassignment could not accommodate them. Mr. Blauer's conditions worsened over the Summer of 2003 (due both to the imposition of the adjusted work schedule and the stress imposed by the 2003 performance appraisal, and his pending appeal therefrom – *see* below), culminating in a

visit to the emergency room at the end of July with symptoms of coronary arrest. At this point, Mr. Blauer's physician notified DWS that Mr. Blauer's conditions needed to be accommodated, or that he needed to be removed from the work environment entirely.

It was against this backdrop that, on September 9, 2003, Ms. Downing made the deliberate decision to reassign Mr. Blauer to perform administrative hearings full-time – 15 per week to begin with, 20 per week thereafter (the standard workload for an administrative law judge). Mr. Blauer, his administrative representative, Tom Cantrell, and Dr. Peterson and (later) Mr. Blauer's legal counsel all attempted to explain to DWS that the reassignment flew directly in the face of documented medical evidence concerning Mr. Blauer's disabilities. But DWS would hear none of it: Mr. Blauer would come to work as a full-time ALJ, or not at all. His prior duties, which he had performed – according to express documentation maintained by DWS itself – in a successful manner for over 23 years were to be stripped from him, and he was to be saddled with tasks which he was physically and physiologically incapable of performing due to disability. His physician sponsored his application for leave under the Family Medical Leave Act, based on the very situation created by Ms. Downing's September 9, 2003 reassignment.

DWS offered not a shred of medical evidence to refute any of the foregoing – no other treating or examining physician, no independent medical exam, not even treatise evidence on Petitioner's conditions. Yet DWS has steadfastly maintained that, in shifting Mr. Blauer from responsibilities which he successfully carried out since the 1980's, to responsibilities which documented medical evidence established that he could not

perform, it had done nothing wrong. DWS's protestations of justification (to the extent even relevant, given the breath of the regulatory framework as set out above) are transparent and unavailing.

Ms. Downing attempted to construct a scenario under which full-time administrative hearing were the only thing to which Mr. Blauer could possibly be assigned. She protested, moreover, that Mr. Blauer's reassignment to the sedentary life of full-time ALJ was actually *consistent* with his physician's stated limitations. Both claims are equally preposterous. Mr. Blauer had successfully performed his traditional mix of duties (which had initially included those assignments provided by his 1998 position description questionnaire, and had expanded to include additional duties thereafter) in a successful manner – year after year, performance evaluations establish this fact. To the extent that performance deficiencies were raised in prior performance appraisals, they were either shown to be incorrect, or dealt with in constructive fashion. Suggestions of falling asleep in meetings (dealt with by sleep apnea treatment in early 2003), use of a signature stamp (consistent with long-standing department policy), production of inferior work product (directly refuted by Workforce Appeals Board Chairman Becky Thomas), missing of “red letter” deadlines (conclusively demonstrated to be a function of scheduling and typing delays) and the like, were all shown to be red herrings. As for the claim that his “reassignment” was consistent with directives of Mr. Blauer's physician, one need only read the letters from Dr. Peterson introduced into evidence to see that his concerns were not met in the least by DWS' actions.

This left DWS with the vague and unquantified suggestion that Mr. Blauer was “not carrying his share of the workload”. When first faced with this suggestion, Mr. Blauer asked sensibly enough what his share of the workload should be; Ms. Downing’s only response was to turn the question back on Mr. Blauer, asking him what *he* thought it should be. At the same time, however, she issued an assignment to departmental employee Connie Dumas to assemble figures concerning workload growth and percentages between 2000 and 2002. The result did nothing to support Ms. Downing’s contentions; to the contrary, it demonstrated that area over which Mr. Blauer had primary or exclusive responsibility had indeed exploded during the time period, while areas over which other Legal/Enforcement Counsel III attorneys had primary responsibility may or may not have grown commensurately.

Simple logic also undermines the “justification” argument apparently urged by DWS in support of its discrimination against Mr. Blauer. If his writing was indeed substandard, why place him in the position of a full-time ALJ issuing more written opinions than ever? If he had trouble meeting “red-letter” deadlines, why saddle him with 20 cases per week? If he was indeed “not pulling his share of the workload”, why press him into a standard workload for an administrative law judge when documented medical evidence established that the type of sedentary working conditions incident to such a position would aggravate existing physical conditions, and actually impair or prevent adequate performance of the required workload? DWS’s professed justifications do not stand up to even the most casual scrutiny.

While the simple fact of discrimination based on disability is established by the foregoing, and is sufficient to establish both harassment and retaliation under the regulatory framework cited above, Ms. Downing's actual motives are also inescapably established by the evidence. The reassignment of Mr. Blauer to conduct administrative hearings full-time was contemplated, at least as of August 20, 2003, as a "corrective action" for Mr. Blauer's having failed to achieve a successful rating in his 2003 performance appraisal. Effective September 5, 2003, Mr. Blauer succeeded in reversing Ms. Downing on this point. Yet four days later, Ms. Downing imposed the very "corrective action" previously contemplated (although not imposed) as the result of the revoked "unsuccessful" rating – despite been put on notice that Mr. Blauer was precluded by disability from performing the task which she was assigning him. At the same time, Mr. Blauer was barred from his workplace for the first time if out on sick leave, and his legal representative cautioned directly not to be on premises as he had in the past.

C. Petitioner's Claim is Not Barred by Chuck Butler's Letter of September 5, 2003

Both DWS and CSRB have made much of the fact that, by letter dated September 25, 2003 (Agency Exh. 6) ADA coordinator, Chuck Butler, denied Petitioner Blauer's request (made prior to that date) for reasonable accommodation, and that Mr. Blauer took no appeal from that decision. Such reliance is clearly misplaced, for several reasons.

First and foremost, Supervisor Downing's September 9, 2003 "Reassignment" Memorandum (Grievant Exh. 38) constituted a separate and distinct act of discrimination

(albeit based on the same disabilities which had been addressed to Mr. Butler). The act of discrimination complained of here did not even occur until four days after Mr. Butler's letter.

Second, the legal status of, and appeal rights attending, Mr. Butler's decision have never been made clear in this proceeding. According to arguments made by DWS to the Third District Court in 2006, Mr. Butler's position should not even exist—state employees *have* no rights under the ADA. Certainly, neither DWS nor CSRB has pointed to any statute or regulation which clothed Mr. Butler's office with the right to adjudicate and determine claims arising under R477-15-1, et. seq. As such, Mr. Butler's September 5, 2003 letter is a legal nullity regardless of its content.

Third, it is clear from the record that Petitioner Blauer was unaware of Mr. Butler's office or authority until informed thereof by his superiors (*see* Statement of Facts at ¶ 19, above), and was not notified that he *had* any appeal rights from Mr. Butler's September 5, 2003 decision. The letter itself contains no notification that if any such appeal rights. This is a significant omission, given that, by definition, Mr. Butler's determination of Petitioner's disability claim constituted an "adjudicative function" under the Utah Administrative Procedures Act (*see V-1 Oil Company v. Department of Environmental Quality*, 939 P.2d 1192, 1196 (Utah 1997)). Whether characterized as the product of a formal or informal adjudicative proceeding under the UAPA, Mr. Butler's decision should, by law, have been accompanied by express notice of Petitioner's appeal rights—*see* Utah Code Ann. § 63G-4-203(i)(iii); Utah Code Ann. §§ 63G-4-208(1)(e)-(g).

Finally, Mr. Blauer's five-day appeal period under Utah Code Ann. § 67-19a-401, *et seq.*, had not even run when, on September 9, 2003, Mr. Butler's determination was superseded by Ms. Downing's September 9, 2003 Memorandum of Reassignment (Grievant Exh. 38), from which Petitioner *did* pursue an appeal.

Mr. Blauer's claim that DWS violated Utah Administrative Code R. 477-15-2 and 3 by subjecting him to discriminatory treatment, by imposing a tangible employment action against him in light of his disability, and by creating hostile work environment, was overwhelmingly established by the evidence.

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

As noted above, evidence presented at the hearing of this matter overwhelmingly established discrimination against Petitioner based on disability. DWS attempted, in its case in chief, to offer justification through the testimony of supervisor Tani Downing, suggesting (though no concrete proof was offered) that Petitioner's disabilities could not be accommodated within the department. While Petitioner did present evidence that his representative, Tom Cantrell, had actually proposed alternate job assignments, which had been turned down without reasonable explanation by Ms. Downing (*see* Statement of Facts at ¶ 26, above), Petitioner was denied outright the opportunity to retake the stand on rebuttal and outline available job options which would have accommodated his own, as well as his attending physician's, concerns. Petitioner's representative repeatedly

proffered the nature of the evidence be brought forward, but the hearing officer declined, ruling the evidence irrelevant and argumentative. *See* TR at 931-933.

The hearing officer's ruling in this regard may be deemed harmless error, given DWS' lack of probative evidence that it had no alternative options for Petitioner in the fall of 2003, yet declined Petitioner's proposals in that regard. *See* Statement of Facts at ¶ 26, above. The proffered evidence, however, was directly probative of DWS' failure to honor its obligations under R. 477-15-1 through R. 477-15-3. To that extent, it was not irrelevant, nor was it argumentative.

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

At pages 6-7 of his Findings, Conclusions, Decision and Order (Appendix at Attachment 3), Hearing Officer Beadles concluded that, because Mr. Blauer (for some unspecified period of time) met weekly with his Supervisor, Tani Downing, he therefore received verbal feedback concerning his performance; further, that through the issuance of annual performance appraisals, DWS gave Mr. Blauer written feedback concerning his performance. This, concluded the hearing officer, satisfied the requirements of Utah Administrative Code R. 477-10-1, *et seq.* On the basis of this alone, the hearing officer concluded that DWS had not violated R. 477-10-1, *et seq.* in connection with Mr. Blauer's performance, and dismissed Mr. Blauer's grievance in this regard. CSRB's final order (Appendix at Attachment 4) echoed the hearing officer's assessment, recognizing

that, “while admittedly not in exact compliance with [sic] personnel rule” (Order at p. 24), DWS satisfied the “substantive provisions” of the rule (Id.).

Again, CSRB needs to look to Utah Administrative Code R. 477-10-1 as it read in 2003. As enacted at that time, R. 477-10-1 imposed upon DWS the following responsibilities:

Agency management shall develop an employee performance management system consistent with these rules and subject to approval by the executive director, DHRM . . .

An acceptable performance management system shall satisfy the following criteria:

(a) performance standards and expectations for each employee shall be specifically written in a performance plan by August 30 of each fiscal year.

(b) managers or supervisors provide employee with regular verbal and written feedback *based on the standards of performance and conduct outlined in the performance plan* . . .

(Emphasis added). R. 477-10-2 (2003) then provided the following:

When an employee’s performance does not meet *established standards* due to failure to maintain skills, incompetency, or inefficiency, agency management shall take appropriate, documented, and clearly labeled corrective action . . .

(Emphasis added).

The hearing officer’s findings that Mr. Blauer received both written and verbal feedback concerning his performance does not resolve the problem. It is undisputed that, for a number of years prior to 2001, Mr. Blauer had been furnished and annual performance plan/evaluation. It is also undisputed, however, that no such performance plan or evaluation was in place in 2002-2003 (*see* Statement of Facts at paragraph 6, above). The only official information issued by DWS (or, for that matter, DHRM) was

the overall job description for Legal/Enforcement Counsel 3 (Grievant Exh. 6), and Mr. Blauer's specific position description questionnaire from 1998 (Grievant Exh. 5). The former was far too vague and general to satisfy the requirements of R. 477-10-1; the latter was, by the overwhelming weight of evidence, hopelessly outdated by 2003.

Yet Mr. Blauer was taken to task, in his 2003 performance appraisal, for performance deficiencies ranging from specific (and rebutted) claims of job performance deficiency to amorphous claims that he was "not carrying [his] share of the workload", etc. Based on these vague observations – none of them having any basis in a performance plan then in effect – Mr. Blauer was rated "unsuccessful", and targeted for "corrective action". When, on September 5, 2003, Director Raylene Ireland reversed Ms. Downing's "unsuccessful" rating (thereby obviating the need for the "corrective action" previously contemplated by his supervisor), Ms. Tani Downing nonetheless implemented the substance of the contemplated corrective action, reassigning Mr. Blauer to become a full-time ALJ (in the face of medical evidence that he could not perform in that position – *see* above), and citing as justification the same performance issues supporting her overturned 2003 performance appraisal.

In short, Mr. Blauer finds himself where he is today not only due to discrimination, but because his supervisor took adverse job action against him based upon undefined and unsupported claims of deficient job performance, with no job performance plan in place against which he could measure that performance.

**POINT IV: THE HEARING OFFICE ERRED IN FAILING TO FIND
THAT TANI DOWNING'S SEPTEMBER 9, 2003 "NOTICE**

**OF REASSIGNMENT” CONSTITUTED A GRIEVEABLE
“WRITTEN REPRIMAND” UNDER GOVERNING LAW**

The final issue remanded by the Utah Appellate Court for determination on its merits was whether one or more of the written declarations in Mr. Blauer’s personnel file constituted “written reprimands”, grievable pursuant to Utah Code Ann. § 67-19a-202(1)(a). In motions before the hearing officer prior to the hearing, Mr. Blauer raised the question concerning who bore the burden of proof on this issue. In response, the hearing officer raised *sue sponte* the question whether the documents which were the subject of Mr. Blauer’s motion were “written reprimands” within the meaning of the statute at all. The hearing officer issued an order on September 30, 2009 (Appendix at Attachment 1) which, although titled only “Order Regarding Allocation of Burden of Proof” concluded that, as a matter of law, none of the foregoing documents constituted a “written reprimand” under governing law. He cited no Utah statutory or case law in support of his position (relying only on language and a 1981 decision out of New York, dealing with a written performance evaluation of a school teacher). He simply reasoned that the term “written reprimand” could not logically be extended to the documents in question. It is submitted that, at least with respect to the September 9, 2003 “change of assignment” memorandum (Grievant Exh. 38), the hearing officer committed legal error in reaching the conclusions he did. CSRB, in its final Order (Appendix at Attachment 4) affirmed the hearing officer without adding any substantive rationale.

The term “written reprimand” as used at Utah Code Ann. § 67-19a-202(1)(a), and at Utah Code Ann. § 67-19a-406(2)(a) is not defined in the statute; neither does any

reported Utah decision offer any definition. Accordingly, the words used must be given their common, ordinary and literal meaning –*Parks v. Utah Transit Authority*, 2002 Utah 55, 53 3d 473; *State v. Martinez*, 52 3d 1276 (Utah 2002); *Boulder Mountain Lodge, Inc. v. Town of Boulder*, 983 2d 570 (Utah 1999).

As the hearing officer himself acknowledges, “all the documents are written and, in a broad, dictionary sense, they are ‘reprimands’.” (Appendix at Attachment 1, p. 1.) As such, in the absence of any expressed or implied intent by the Utah Legislature confining the terms used beyond their ordinary and common meaning, the documents must be deemed “written reprimands”, the correctness of which was successfully challenged by Mr. Blauer at the hearing. They were reprimands, they were in writing, and they were shown to be wrong. DWS had the burden of their justification.

The hearing officer attempted to rely on the fact that three of the documents were in fact responses to communication from Mr. Blauer, and should therefore not be construed as “written reprimands”. Even if this distinction is held valid, however, it cannot apply to Grievant Exh. 38: the September 9, 2003 “Change of Assignment Memorandum”. That document was unsolicited by Mr. Blauer, was a direct assault on his competency and expertise as Legal/Enforcement Counsel III for DWS, and was intended and offered as an explanation for the imposition of what Ms. Downing herself had previously characterized as a “corrective action” (even though the reason for that “corrective action” had been revoked by the Department Director). Nothing in the hearing officer’s rationale can explain away the nature and character of that document as a “written reprimand” under any reasonable reading of the term.

In the case of *Gordon v. Horsley*, 86 Cal. A 336, 102 Cal. Rptr. 2d 910 (Ct. of A, First Dist., Div. 3, Calif. 2001), the Grievant and Appellant, a San Mateo County Deputy Sherriff, commenced an administrative grievance procedure against the Sherriff's office issuance of a letter to the Grievant, stating that "as the Sherriff, it is my responsibility to manage and monitor the sworn officers in my department . . . although you were reinstated with full pay and benefits of a Deputy Sherriff, I have grave concerns that you have demonstrated poor judgment and decision making ability both on and off duty. Therefore, you will not be issued a duty firearm. In addition, you are prohibited from carrying a concealed firearm and from exercising Peace Officer duties during your off duties hours." The California Court of Appeals held that the foregoing language clearly constituted the letter a "written reprimand", referring to the Webster's definition of "reprimand" as "a severe or formal reproof", which last term is further defined as "criticism for a fault" – 86 Cal. App. 4th at 348.

The September 9, 2003 memorandum of reassignment is similar to (although more sweeping than) the letter in the *Gordon* decision. It recognizes that Mr. Blauer had been exonerated from prior charges of "unsuccessful" performance; nevertheless, the memorandum goes on for pages criticizing Mr. Blauer's work for reasons which, as demonstrated at length at the hearing, were either false, overstated or previously retracted. There is simply no basis for concluding that it did not constitute a "written reprimand" under governing law. DWS should have been put to the task of either establishing it or withdrawing it.

CONCLUSION

Lorin Blauer observes the same thing that he has been observing since this matter began in 2003: at some point, at some level, the Utah Department of Workforce Services needs to be answerable on the merits for the action for which it took against him. He has attempted to be heard on this issue time and again, before Federal and State courts, administrative agencies, etc. Finally, Mr. Blauer had a hearing on the merits – only to be told that, based on jurisdictional questions long since decided in his favor, and on legal questions improperly applied, he was once again turned away empty-handed.

It is long past time for this to end. This Court should reverse CSRB's rulings in this matter, and order Mr. Blauer compensated with back pay and benefits, retroactive to September 9, 2003.

DATED this 31st day of March, 2011.

JONES WALDO HOLBROOK & McDONOUGH PC

By: 

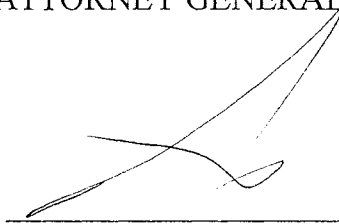
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
Petitioner's Brief was hand delivered to the following this 31st day of March, 2011:

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Tab 1

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

LORIN BLAUER,

Grievant,

v.

UTAH DEPARTMENT OF
WORKFORCE SERVICES,

Agency.

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ORDER REGARDING
ALLOCATION OF BURDEN
OF PROOF

Case No. 28 CSRB/H.O. 408

Hearing Officer: James H. Beadles

Grievant alleges that the following documents constitute "written reprimands" as that term is used in *Utah Code Ann.* § 67-19a-406(2) and that, therefore, the Department bears the burden of proof in establishing that they were filed appropriately.¹

1. A memorandum from Tani Downing to Grievant dated July 25, 2003, with the subject line, "Response to Grievance."
2. Correspondence to Grievant from Raylene Ireland, dated September 5, 2003, with the subject line, "Level Four Grievance Response."
3. A memorandum entitled "Change of Assignment," dated September 9, 2003.
4. A letter from Raylene Ireland to Grievant, dated October 14, 2003, regarding the assignment of various duties and a hearing held on the issue on September 26, 2003.

The Hearing Officer is persuaded that none of the documents identified constitute a "written reprimand" in the sense meant by the legislature. Obviously, all the documents are written and, in a broad, dictionary sense, they are "reprimands." However, to equate all such documents with a "written reprimand" under Subsection 67-19a-406(2) would transform all letters and performance evaluations containing a critical comment into a disciplinary document subject to due process.

Further, all the items listed in Subsection 67-19a-406(2) are actions initiated by a department.

Except for the Change of Assignment memorandum of September 9, 2009, all the documents that Grievant challenges are responses to Grievant rather than pro-active actions of the Department. It

¹Grievant suggests that there may be other documents deserving to be called "written reprimands." However, he specifically challenged these items in his Clarification.

makes sense that, if the government is the original instigator of an action, it should bear the burden of proving that the action was taken in accordance with law. In none of them did the Department act in an affirmative, pro-active fashion to use them as separate, independent methods of discipline. Indeed, as the Department points out, the second document of the three, i.e., the September 5, 2003 Ireland memorandum, was a victory for Mr. Blauer, overturning his direct supervisor's performance rating.²

It appears that what Grievant actually requests is that all critical comments be subject to review by the Career Service Review Board. This cannot have been what the legislature intended when it established the merit protection system. In a claim similar to Grievant's, the Court of Appeals of New York concluded that a performance evaluation of an educator was not subject to that state's stringent due process demands because, while the evaluation was clearly critical of the teacher's performance, it was not a reprimand as that jurisdiction's laws defined the term.

While the language of the administrators' letters 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 formal reprimand contemplated by the statute. Although the sharply critical content of the letters 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.

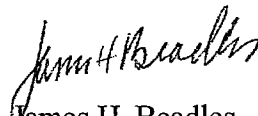
Holt v. Bd. of Educ. Of Webutuck Central School Dist., 52 N.Y.2d 625, 634 (N.Y. 1981).

As that court also stated, the protection afforded by New York's teacher tenure system should not be interpreted as "insulating tenured teachers from all written critical comment from their supervisors." *Id.* Similarly here, Utah's system of merit protection affords employees protection from arbitrary and illegally imposed discipline, but it does not require an employer to refrain from discussing an employee's performance, however critical that discussion may turn.

²Although the Change of Assignment memo was issued by the Department and not a response to Grievant, the Utah Court of Appeals has already upheld the Department's Change of Assignment. *Blauer v. Dept. of Workforce Services*, 2005 UT App 488. Given the appellate court's approval of the Department's substantive action, it would be inappropriate for the CSRB's Hearing Officer to try to undo that action by reviewing it as an improper written reprimand. Whether viewed as a written reprimand or a simple re-allocation of duties, the Utah Court of Appeals has already ruled that the September 9, 2003 Change of Assignment memo did not violate Grievant's rights.

Consequently, the critical letters referred to by Grievant do not appear to constitute written reprimands as that term is defined by Utah law. Therefore, the Department does not bear the burden of proof regarding them. Consistent with the appellate court decision establishing the six (6) issues remaining to be heard, however, the Hearing Officer will hear any additional evidence or argument that Grievant may wish to introduce regarding its claim that the communications are "written reprimands" subject to CSRB jurisdiction.

DATED this 30th day of September 2009.



James H. Beadles
CSRB Presiding/Hearing Officer

CERTIFICATE OF SERVICE

I certify that on this 30th day of September 2009, I emailed the foregoing *Order Regarding Allocation of Burden of Proof* in the matter of *Lorin Blauer v. Utah Department of Workforce Services*, Case No. 28 CSRB/H.O. 408, to the following:

✓ Brian Blake
Paralegal
Office of the Attorney General
BBLAKE@utah.gov

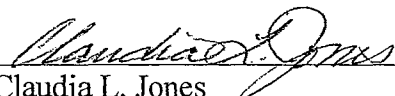
✓ Lorin Blauer
Grievant
ljblauer@msn.com

✓ Tom Cantrell
Utah Legal Advocates
tom@tomcantrell.com

✓ Philip S. Lott
Assistant Utah Attorney General
Office of the Attorney General
Litigation Division
PHILLOTT@utah.gov

✓ Vincent C. Rampton
Attorney At Law
Vrampton@joneswaldo.com

✓ Jennifer Wakefield
Human Resources Specialist
JWAKEFIELD@utah.gov



Claudia L. Jones
Legal Secretary

Tab 2

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

LORIN BLAUER,

Grievant,

v.

UTAH DEPARTMENT OF
WORKFORCE SERVICES,

Agency.

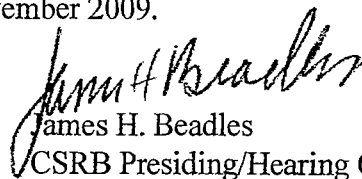
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:ORDER REGARDING
MOTION FOR RECONSIDERATION
OF BURDEN OF PROOFCase No. 28 CSRB/H.O. 408
Hearing Officer: James H. Beadles

In a filing made on November 9, 2009, nine days before the hearing is scheduled to begin in this matter, Grievant requests the Hearing Officer to change his mind regarding which party should bear the burden of proof on Issue No. 6 of the six-item list of issues to be reviewed at the hearing - "Critical letters from DWS representatives remaining in Grievant's personnel file constitute "written reprimands," grievable to CSRB pursuant to UCA § 67-19a-302(1)." The purported legal grounds for the requested switch is the alleged existence of "newly discovered evidence."

Grievant claims that this "new" evidence consists of e-mails between his non-attorney Tom Cantrell and Tani Downing and his attorney representative, Vince Rampton and John Levanger. (Blauer Affidavit at 1). By no reasonable definition of the term does this qualify as "newly discovered." Not only did Grievant have access to the information all times, as he admitted running across it while organizing documents for the hearing, but they consist of documents from his legal (and apparently, non-legal) representatives. If those documents had such important significance, it was their duty to call them to his prompt attention and to the Hearing Officer's.

Regardless, the Hearing Officer has reviewed Grievant's request, including the purportedly newly-remembered documents and concludes that there is no reason to amend the September 30 order regarding allocation of the burden of proof. Consequently, the request is denied.

DATED this 16th day of November 2009.


James H. Beadles
CSRB Presiding/Hearing Officer

CERTIFICATE OF SERVICE

I certify that on this 16th day of November 2009, I emailed a copy of the *Order Regarding Motion for Reconsideration of Burden of Proof* in the matter of *Lorin Blauer v. Utah Department of Workforce Services*, Case No. 28 CSRB/H.O. 408, to the following:

Brian Blake
Paralegal
Office of the Attorney General
BBLAKE@utah.gov

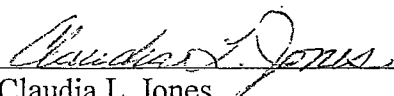
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Vincent C. Rampton
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JWAKEFIELD@utah.gov



Claudia L. Jones
Legal Secretary

Claudia Jones - Lorin Blauer v. Utah Department of Workforce Services -- Order Regarding Motion for Reconsideration of Burden of Proof

From: Claudia Jones
To: Blake, Brian; Cantrell, Tom; ljblauer@msn.com; Lott, Philip; RAMPTON', 'VINCE; Wakefield, Jennifer
Date: Monday, November 16, 2009 12:51 PM
Subject: Lorin Blauer v. Utah Department of Workforce Services -- Order Regarding Motion for Reconsideration of Burden of Proof
Attachments: Blauer, Lorin 16 Oct 2009 Order.pdf; Blauer, Lorin mc10.pdf; Claudia Jones.vcf

Security: Confidential

Case No. 28 CSRB/H.O. 408

Attached are the "Order Regarding Motion for Reconsideration of Burden of Proof" and "Certificate of Service" in this matter. These copies are the only ones you will receive unless you request a hard copy by return email.

Dear Messrs. Blauer, Cantrell and Rampton: Please reply to this email to confirm that you have received these documents.

Thank you

Claudia L. Jones
Career Service Review Board
1120 State Office Building
P.O. Box 141561
Salt Lake City, Utah 84114-1561
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801-538-3048

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Tab 3

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Case No. 28 CSRB/H.O. 408
Hearing Officer: James H. Beadles

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84.¹

SKB merely for a "hearing on the merits." Mr. Blauer had

It appears both parties agree that, due to the unique posture of this case, these six issues serve as the functional equivalent of written grievances. Consequently, rather than base the presentation of evidence and argument on the original grievances, the evidentiary hearing flowed from that court-established recitation of issues. Both parties developed their arguments along the same lines and these Findings of Fact, Conclusions of Law, Decision & Order will be similarly structured.

AUTHORITY

Utah Code Ann. § 67-19a-406 provides the CSRB statutory authority to hear grievances from career service employees. That statutory authority is more fully developed by administrative rule. Specifically, the CSRB Administrator is delegated the power to appoint a hearing officer to take testimony and accept documentary evidence regarding the factual issues. From that evidentiary record, the law charges the appointed hearing officer with the duty to issue Findings of Fact, Conclusions of Law, Decision and Order.

STATEMENT OF THE ISSUES, BURDEN OF PROOF, AND SCOPE OF REVIEW

By virtue of the 2008 appellate court remand decision, the sole issues in this matter are as follows:

1. DWS representatives failed to properly define job performance parameters, in violation of *Utah Admin. Code* R-477-10-1, *et seq.*,
 2. DWS assigned job tasks to Grievant falling outside his job description, in violation of *Utah Admin. Code* R-477-3-2, 3;
 3. DWS engaged in unlawful harassment of, and retaliation against, Grievant in connection with his grievances, in violation of *Utah Admin. Code* R-477-15-2, 3;
 4. DWS failed to properly maintain personnel records concerning Grievant's performance, and refused access to alleged documentation supposedly reflecting negatively on his job performance (which they claimed to be in his personnel file) in violation of *Utah Admin. Code* R-477-2-5;
-
5. DWS denied Grievant administrative leave, in violation of *Utah Admin. Code* R-477-7-7;
 6. Critical letters from DWS representatives remaining in Grievant's personnel file constitute "written reprimands," grievable to CSRB pursuant to *Utah Code Ann.* § 67-19a-302(1).

Before the evidentiary hearing began, both parties filed memoranda providing their beliefs regarding which party would bear the burden of proof on each issue. The only contested issue, however, was No. 6. Mr. Blauer argued that statements in various letters from DWS employers constituted “written reprimands,” which, under state law, are considered discipline and, thus, would require a showing of substantial evidence by DWS. After reviewing the parties’ writings on the matter, however, the Hearing Officer ruled that the documents alleged to be written reprimands did not, in fact, meet that definition. Therefore, Mr. Blauer, not DWS, had the burden of proof on all issues.

Due to the complexity and long-term existence of this case in various incarnations, it is also appropriate to set out what this particular hearing is not about and what it will not review. First, the CSRB is not a super appellate court and will neither review, evaluate, nor attempt to overturn the actions of any court. Second, this Hearing Officer will not revisit any previous decision of the CSRB or any previous decision of DWS that is not part of the six listed issues.

Consequently, the CSRB lacks the power to conclude that DWS’s change of assignment was wrongful. The Utah Court of Appeals already has ruled that DWS was within its authority to take this action. *Blauer v. Dep’t of Workforce Services*, 2005 UT App 488 ¶ 34. For that reason, Issue No. 2, (“DWS assigned job tasks to Grievant falling outside his job description, in violation of Utah Administrative Code R-477-3-2 and 3”) is no longer subject to review. Indeed, the intermediate appellate court specifically concluded that “there was no change in job or position, but rather a reallocation by DWS of Blauer’s then existing job responsibilities.” *Id.* at ¶ 34. Res judicata compels this conclusion. There is no substantive difference in the issues listed in Issue No. 2 and the relevant *Blauer* opinion. At most, they are rewordings of the same complaint, i.e., that DWS directed Mr. Blauer to perform more of one kind of work than he had previously performed. The parties are the same; the issue was squarely presented, and decided, in the appellate court opinion; and there is a final judgment on the merits. *Youren v. Tintic School District*, 2004 UT App 33 ¶ 2.

Similarly, the CSRB cannot reinstate Mr. Blauer to his position at DWS regardless of the factual findings or legal conclusions made as a result of this hearing. DWS terminated Mr. Blauer for failing to return to work after one year of being on disability. The Utah Court of Appeals has affirmed that termination (*Blauer v. Dep’t of Workforce Services*, 2007 UT App 280 § 13) and the

CSRB lacks the constitutional or statutory authority to overturn that affirmance.² Mr. Blauer attempts to ignore that appellate court precedent by instead making a claim based on logic, i.e., that he should be reinstated because DWS's purportedly wrongful conduct started a chain of causation that ultimately led to his being required to take long-term disability and also led to his ultimately being terminated for not returning within a year.

Mr. Blauer's argument fails for both logical and legal reasons in a way that may best be illustrated through an examination of the legal doctrine of proximate causation. As a broad general principle, individuals are responsible only for the actions they directly cause or for which they could be said to be the "proximate cause," which is "that cause which, in natural and continuous sequence (unbroken by an efficient intervening or superseding cause), produces the injury and without which the result would not have occurred." *Crestwood Cove Apartments Business Trust v. Turner*, 2007 UT 48 § 31.

Integral to the idea of causation is the idea of an intervening or superseding cause. Once a chain of causation begins with one event, the responsibility and liability of the person initiating the chain continues unless broken by an intervening or superseding cause, which actually is the proximate cause of the injury. The fact pattern before the Utah Supreme Court in a 1996 decision nicely illustrates the meaning and effect of a superseding cause. The high court, in *Bansanine v. Bodell*, 927 P.2d 675, 676 (Utah 1996), had before it a claim that reckless driving, rather than a gunshot, was the actual, proximate cause of a death. In short, two cars were racing each other on the freeway at high speed, passing each other back and forth and generally exhibiting all the signs of road rage. In response to an obscene gesture from the plaintiff's father, the defendant pulled out a gun and shot him. *Id.* The court concluded that the gunshot was a superseding cause.

Similarly in this case, even assuming (for purposes of argument only) that DWS's purportedly wrongful acts caused Mr. Blauer to take long-term disability in the first place, those acts did not cause Mr. Blauer to fail to return after a year. It was Mr. Blauer's failure to provide a release to

² The Hearing Officer recognizes that the appellate court's decision was based on Mr. Blauer's failure to file a timely notice of appeal rather than on a substantive rejection of his argument. Nevertheless, a decision based on jurisdictional matters is as conclusive and binding as any other.

return to work that caused him to fail to return to work and led directly to his termination.³ Because the termination was the result of a separate, independent event, reversing the termination as a potential remedy for the issues resulting from the events relevant to this matter is neither logical nor appropriate.

STATEMENT OF FACTS

1. Mr. Blauer began working for the Department of Employment Security, the predecessor agency to DWS, in December 1980. At the time of the events giving rise to the relevant six issues, he was a career service employee, entitled to use the CSRB process.

2. Throughout his tenure with DWS, Mr. Blauer's supervisors provided him with various performance plans.⁴ He received them on the following dates and for the following periods:

- A. June 5, 1996 for the period June 1, 1995 to May 31, 1996 (Grievant's Ex. 37);
- B. September 9, 1999, for the fiscal year ending June 30, 2000 (Agency's Ex. 2);
- C. December 29, 2000, for the fiscal year ending June 30, 2001 (Grievant's Ex. 34);
- and
- D. July 18, 2003, for the fiscal year ending June 30, 2004 (Grievant's Ex. 33).

3. Mr. Blauer also received various documents entitled "DWS Performance Appraisal," the latest being given to him on June 21, 2002 (Grievant Ex. 14). Ms. Downing issued this appraisal.

4. After Ms. Downing instructed Mr. Blauer to file for an accommodation with Chuck Butler, DWS's ADA Coordinator, Mr. Blauer did so. Mr. Butler denied the request on September 5, 2003. (Agency Ex. 7). It does not appear that Mr. Blauer appealed this decision to any other level of the Department or other entity.

5. After obtaining an opinion from the Utah Attorney General's Office, DWS Executive Director, Raylene Ireland, denied Mr. Blauer's request for administrative leave, which was requested for medical reasons, on September 26, 2003. (Agency Ex. 12). Mr. Blauer had made his request in

³ During the hearing, Mr. Blauer claimed that DWS's requirement that he provide a medical release was improper. However, the CSRB has already reviewed that claim and found it wanting (*Blauer v. DWS*, Case No. 9 CSRB 83, at 9-15). That issue is not legitimately a part of this hearing.

⁴ These forms were entitled "performance plan/evaluation" and contained space for the review to be provided.

a voice mail message to Tom Patterson, the DWS employee who supervised Administrative Law Judges.

CONCLUSIONS OF LAW & DISCUSSION

1. Mr. Blauer has complied with all time and filing requirements pertinent to the filing of the instant grievance and his grievance is properly before the Hearing Officer.

2. The CSRB's authority is narrow and well defined by statute and rule. The Hearing Officer may not conduct general inquiries into DWS's operations, staffing, or general policies. The hearing is limited to the discrete factual and legal issues of the grievance. *Utah Admin. Code* R137-1-21(2).

3. Mr. Blauer bears the burden of proof on all six issues because they do not involve a dismissal, demotion, suspension, written reprimand, reduction in force, or dispute concerning abandonment of position. *Utah Code Ann.* § 67-19a-406(2) (stating that agency bears burden only on these issues, while a grievant bears burden on all the rest).⁵

4. In order to successfully carry his burden, Mr. Blauer must show that DWS violated applicable statutes or administrative rules.

5. Regarding Issue No. 1, "DWS representatives failed to properly define job performance parameters, in violation of *Utah Admin. Code* R477-10-1, *et seq.*" Mr. Blauer's proffered evidence, which showed that he did not receive annual performance plans for every year of his employment, does not establish a violation of the cited administrative rule. The current rule, *Utah Admin. Code* R477-10-1(2) requires an agency to provide a performance evaluation every fiscal year. In fact, Mr. Blauer did receive annual performance evaluations. However, the rule does not require that the agency give an employee a performance *plan* every fiscal year. The rule also states that an employing agency should give its employees regular written and verbal feedback. At the hearing, Mr. Blauer stated that, for a period of time, he was meeting with his supervisor, Ms. Downing, on a weekly basis. These meetings surely included verbal feedback, which was also given at the regular performance evaluation meetings. There is no question from the evidence collected at the hearing that Mr. Blauer

⁵ The Hearing Officer previously entered an order allocating the burden of proof on all issues to Mr. Blauer.

received regular written feedback during his annual performance evaluations and was able to provide comments on his evaluations, as required by the administrative rule.⁶

6. As discussed above, some of Mr. Blauer's claims were previously resolved adversely to him by the Utah Court of Appeals. Such is the case with Issue No. 2, "DWS assigned job tasks to Grievant falling outside his job description, in violation of *Utah Admin. Code* R-477-3-2 and 3." Relitigation of DWS's authority to assign ALJ job duties to Mr. Blauer is prohibited by res judicata. *Tintic School District*, 2004 UT App 33 ¶ 2.

7. Perhaps the heart of Mr. Blauer's claims is that DWS violated personnel rules relating to *Utah Admin. Code* R477-15. That provision spells out the State's general prohibition on discrimination 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.

This conclusion is compelled by two parts of the law. First, *Utah Code Ann.* § 67-19-32 provides a specific remedy for employees who claim to be the victim of discriminatory treatment. That remedy is to (1) file a claim with the Executive Director of the agency; and (2) assuming a denial

⁶ Though Mr. Blauer did not introduce the 2002/2003 version of *Utah Admin. Code* R477-10 or claim its applicability, the Hearing Officer understands that the older version arguably required a written performance plan by August 30 of every fiscal year. The evidence adduced at hearing indicates that Mr. Blauer did not receive a performance plan for fiscal year 2003 on or before August 30, 2002. However, even assuming that this violated the administrative rule, Mr. Blauer ultimately suffered no harm as Executive Director Ireland gave him a successful performance evaluation for fiscal year 2002-2003. Had the Executive Director not changed his performance evaluation from unsuccessful to successful, the Hearing Officer might have been compelled to grant such a change. Nevertheless, since that relief has already been ordered, no further remedy is available and the claim is moot. *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989) (concluding that a case is moot when the requested relief can no longer affect the rights of the litigants).

Additionally, the "issue" as remanded by the appellate court states that Mr. Blauer's job parameters were not appropriately defined. The claim is not specifically focused on the agency's failure to provide a performance plan. Even though a performance plan may have been missing, the Hearing Officer is not necessarily ready to assume that Mr. Blauer's job performance "parameters" were inappropriately defined. Mr. Blauer admitted during his hearing that, for at least a portion of the time during the fiscal year at issue, he met on a weekly basis to discuss his job performance. This probably constituted more intensive discussion of the job performance "parameters" than would a mere written, annual plan.

at that step, file a complaint to the Division of Antidiscrimination and Labor pursuant to *Utah Code Ann.* § 35A-5-107. Importantly, that statute, in Subsection (15) says that the procedures in Title 35A, Chapter 5 are the “exclusive remedy” for discrimination actions. By affirmatively making the Utah Anti-Discrimination Act (UADA) the “exclusive” remedy in Subsection 35A-5-107(15) and incorporating it into the State’s Personnel Management Act in Section 67-19-32, the legislature clearly stripped the CSRB of any jurisdiction over claims concerning discrimination.⁷

Second, the CSRB’s administrative rules recognize that UADA, not the Personnel Management Act or the Grievance and Appeal Procedures Act, is the appropriate remedy for alleged discrimination. *Utah Admin. Code* R137-1-5. This rule is not an attempt by the CSRB to limit its own jurisdiction, but merely a reflection of the legislature’s decision to do so. Consequently, the CSRB is without authority to review Mr. Blauer’s claims of discrimination, including retaliation.

8. Mr. Blauer presented no evidence relevant to Issue No. 4, “DWS failed to properly maintain personnel records concerning Grievant’s performance, and refused access to alleged documentation supposedly reflecting negatively on his job performance (which they claimed to be in his personnel file) in violation of *Utah Admin. Code* R-477-2-5. ” Since Mr. Blauer had the burden of proof on this issue and failed to provide any proof regarding it, the Hearing Officer is obligated to reject his claim.⁸

9. Mr. Blauer presented insufficient evidence relevant to Issue No. 5, regarding a purported violation of the Utah Administrative Code’s provision on administrative leave. *Utah Admin. Code* R477-7-7 provides several situations in which an agency may give administrative leave. Leave for medical reasons is not included in that long list, though there is a catch-all provision that allows an agency to provide leave “consistent with agency policy.” *Utah Admin. Code* R477-7-7(1)(a)(iv). Mr. Blauer provided no evidence that DWS had agency policy that would have allowed or required

⁷ Subsection 35A-5-107(15) also makes UADA the exclusive remedy for retaliation as well as disability, gender, etc.

⁸ Additionally, *Utah Admin. Code* R477-2-5 lists several categories of documents that the personnel file is to include. Mr. Blauer presented no evidence that his personnel file lacked any of these documents or that DWS refused to provide him access to it. Before and during the hearing, Mr. Blauer referred to a document, ultimately admitted as Grievant’s Ex. 20, which he believes should have been provided to him earlier. Nevertheless, Grievant’s Ex. 20 is not the type of document that R477-2-5 states should be maintained in the personnel record.

Executive Director Ireland to grant him administrative leave under those circumstances. The only evidence presented was from Executive Director Ireland, which showed that she knew of no actual agency policy on the matter and that she relied on an informal opinion of the Attorney General's Office to reach her decision not to grant administrative leave. Mr. Blauer failed to meet his burden of proof on this issue. More fundamentally, since the grant of administrative leave for medical reasons is entirely discretionary under the rules, it is not a mandate and cannot constitute a grievable event. *Lopez v. Career Service Review Bd.*, 834 P.2d 568, 572 (Utah App. 1992) (“[a]bsent a statutory mandate that an employee receive a certain benefit, the employee may not demand it as a right. Since there was no mandate requiring the Commission to allow Lopez to job share, Lopez has failed to identify any personnel rule that was violated by the Commission's refusal to allow him to job share.”).

10. Issue No. 6 concerns a claim that other letters in Mr. Blauer's personnel file constitute written reprimands and are grievable to the CSRB. This claim fails for two reasons. First, Mr. Blauer never introduced his personnel file; therefore, the Hearing Officer does not know what documents are included within it. Additionally, and perhaps most fundamentally, the “critical letters” to which Mr. Blauer appeared to refer in a prehearing motion filed on August 10, 2009, are not written reprimands. The Hearing Officer issued an order relevant to this issue on September 30, 2009, in which the purported letters, at least those to which the Hearing Officer was made aware, were determined not to be “written reprimands.” Though this Order was issued to settle the question of burden of proof, it is relevant here as well because Mr. Blauer presented no evidence to justify changing the Hearing Officer's September 30 decision. Consequently, Mr. Blauer had the burden of proof and failed to meet it.

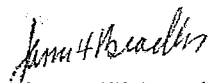
DECISION & ORDER

Mr. Blauer has failed to meet his evidentiary burden of proof on Issues No. 4, 5, and 6. Regarding Issue No. 1, even if the purported claim can be read so narrowly as to only refer to the mere providing of a performance plan, the Hearing Officer may agree that the agency was improperly dilatory. However, Mr. Blauer suffered no harm from the failure and any claim for relief due to the omission is moot. More importantly, the evidence adduced at the hearing leads the Hearing Officer to conclude that his job performance parameters were properly defined via his meetings with his supervisor.

Regarding Issue No. 2, the Utah Court of Appeals has already determined that DWS did not assign Mr. Blauer job duties outside his job description. Under the doctrine of res iudicata, the CSRB is barred from relitigating the issue. The CSRB can provide no relief to Mr. Blauer for Issue No. 3 because the CSRB has no jurisdiction over claims of discrimination, given the legislature's direction to State career service employees to use the "exclusive remedy" offered by UADA.

Consequently, Mr. Blauer's claims are denied in their entirety.

It is so **ORDERED** this 7th day of January 2010.



James H. Beadles

Hearing Officer

Career Service Review Board

RECONSIDERATION

Any request for reconsideration must be filed in writing with the Career Service Review Board within ten working days upon receipt of this decision. *Utah Admin. Code R137-1-21(12)(b)*.

APPEAL

Any appeal of this formal adjudicative decision must be filed in writing with the Career Service Review Board within ten working days upon receipt of this decision according to *Utah Code Ann. §67-19a-407(1)(a)(i)*.

Annette Morgan - RE: Lorin Blauer v. Utah Department of Workforce Services -- Step 5 Decision

From: LORIN R BLAUER <ljblauer@msn.com>
To: <cjones@utah.gov>
Date: Friday, January 08, 2010 10:23 PM
Subject: RE: Lorin Blauer v. Utah Department of Workforce Services -- Step 5 Decision

Received.

Date: Thu, 7 Jan 2010 15:12:05 -0700
From: cjones@utah.gov
To: VRampton@joneswaldo.com; ljblauer@msn.com; tom@tomcantrell.com; bblake@utah.gov; jwakefield@utah.gov; kristencox@utah.gov; phillott@utah.gov
Subject: Lorin Blauer v. Utah Department of Workforce Services -- Step 5 Decision

Case No. 28 CSRB/H.O. 408

Attached are the "Findings of Fact, Conclusions of Law, Decision and Order" and "Certificate of Service." These copies are the only ones you will receive unless you request a hard copy by return email.

Dear Messrs. Blauer, Cantrell and Rampton: Please reply to this email to confirm that you have received these documents.

Thank you,

Claudia L. Jones
Career Service Review Board
1120 State Office Building
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Tab 4

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| <p>LORIN BLAUER,</p> <p>Grievant and Appellant,</p> <p>v.</p> <p>UTAH DEPARTMENT OF</p> <p>WORKFORCE SERVICES,</p> <p>Agency and Respondent.</p> | <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> | <p>DECISION, ORDER AND</p> <p>FINAL AGENCY ACTION</p> <p>Appeal No. 10 CSRB 100</p> <p>Case No. 10 CSRB 100 (Step 6)</p> |
|--|---|--|

¹As explained more fully below, this case is before the CSRB pursuant to an *Order of Remand* from the Utah Court of Appeals dated March 13, 2008.

²The Board notes that at the Step 5 evidentiary hearing in this matter, Mr. Blauer was represented by Tom Cantrell (Mr. Cantrell), Employee Advocate. The Board further notes that throughout the numerous administrative and judicial proceedings in this matter, Mr. Blauer has been

Tr. III at 608; Tr. IV at 761; Ex. G-16; *Grievant's Brief* ¶22 at 13; *Respondent Agency's Step 6 Appellant Brief* (Respondent Brief) ¶13 at 5) This unsuccessful performance appraisal covered the period between July 1, 2002 and June 30, 2003, and was dated June 27, 2003. (Tr. I at 202; Ex. G-16)

On July 16, 2003, Appellant submitted a written response or grievance (Appraisal Grievance) challenging this unsuccessful performance evaluation. (Tr. I at 219; Ex. G-17; *Grievant's Brief* ¶26 at 15) A central concern raised by Appellant in this Appraisal Grievance was that the Department had failed to provide Appellant with a current performance plan identifying the Department's performance expectations of him. Appellant's Appraisal Grievance was directed to Div. Dir. Downing at Step 3 of the State Employees' Grievance and Appeal Procedures. (*Id.*)

In partial response to this Appraisal Grievance, Appellant was given a performance plan governing the Department's performance expectations of Appellant for the upcoming year of 2003-2004. (Tr. III at 626; Ex. G-33; *Agency Brief* ¶15 at 5-6) This 2003-2004 performance plan was presented to Appellant by Div. Dir. Downing on July 18, 2003. (*Id.*)

However, despite finding some of the bases upon which she gave Appellant an "unsuccessful rating" unfounded, on July 25, 2003, Div. Dir. Downing nonetheless formally denied Appellant's Appraisal Grievance. (Ex. G-18) In denying Appellant's Appraisal Grievance, Div. Dir. Downing concluded that: "Despite this correction to your performance evaluation, I still would consider your overall performance to be unsuccessful. . . ." (*Id.*)

Thereafter, Appellant advanced his Appraisal Grievance to the Department's Executive Director Raylene Ireland (Exec. Dir. Ireland) for consideration at Step 4 of the State Employees' Grievance and Appeal Procedures. (Tr. IV at 837-838) After holding a hearing on Appellant's

Appraisal Grievance, Exec. Dir. Ireland reversed Div. Dir. Downing's 2003 performance appraisal by elevating Appellant's 2003 performance from "unsuccessful" to "successful." (Tr. III at 549; Ex. G-39; Grievant's Brief ¶45-49 at 22) A critical factor relied upon by Exec. Dir. Ireland in granting Appellant's Appraisal Grievance and changing his performance appraisal to "successful" was that Appellant had not been provided a performance plan for 2003. Specifically, addressing her reversal of Div. Dir. Downing performance appraisal, Exec. Dir. Ireland stated in part:

[I]n the grievance, and in the meeting, you indicated that you were not fairly rated because you were not aware of any performance problems. You further indicate that you are working under a performance plan that was put in place some years ago and does not accurately reflect your current assignments, nor does it give you the guidance you need to know the expectations.

...

[B]ecause of this dispute regarding perceptions of performance standards . . . I will give you the benefit of doubt and will change the review to the lowest score for "successful."

(*Id.*)

Exec. Dir. Ireland's final decision resolving Appellant's Appraisal Grievance was issued on September 5, 2003. (*Id.*) Because his Appraisal Grievance had been granted and he had received a new performance plan, Appellant did not advance this Appraisal Grievance any further in the State's Grievance and Appeal Procedures. (Tr. III at 549, 656-657; Exs. G-33, G-39; Grievant's Brief ¶46 at 22)

After filing his Appraisal Grievance, Appellant engaged in discussions with the Department regarding various health concerns he was experiencing. (Tr. II at 294-295, 312-314, 322, 347; Tr. III at 508-509, 542-543, 662; Exs. A-6, G-22, G-23, G-31, G-32) These discussions occurred throughout the summer of 2003 and included recommendations from Appellant as to ways he felt the Department could better accommodate his health concerns and also help him continue as a

successful employee. (*Id.*) On September 5, 2003, Appellant was informed by Mr. Chuck Butter (Mr. Butter), the Department's ADA Coordinator, that his request for ADA accommodations had been reviewed and denied. (Ex. A-6) In denying Appellant's request Mr. Butler stated:

After reviewing the information provided by your physicians, and consulting with the ADA Coordinator for the State of Utah, I have determined that our limitations do not rise to a level requiring and ADA accommodation as defined by and covered under the Americans with Disability Act.

...

Therefore, I must deny your request for accommodation.
(*Id.*)

On September 9, 2003, shortly after Appellant's Appraisal Grievance was granted and his performance rating elevated to successful, Appellant received a memorandum from Div. Dir. Downing entitled "Change of Assignment." (Tr. III at 545; Ex. G-38; Grievant's Brief ¶48 at 23) In this memorandum Appellant was informed that, effective immediately, he would be assigned to conduct UI hearings "full-time with no change in job title or pay rate." (Ex. G-38)³ This change of assignment was at least partially designed to adjust Appellant's performance expectations with medical issues raised by Appellant. (Tr. IV at 789-792, 796-799; Exs. G-38, G- 44)

On September 12, 2003, Appellant filed a grievance (Demotion Grievance) regarding this "change of assignment." (Tr. III at 562-563; Ex. G-40) In this Demotion Grievance Appellant essentially argued that the Department's reassignment of his duties constituted a "demotion" for which the Department lacked just cause. (*Id.*) Specifically, Appellant asserted:

Lorin appeals your reassigning him to the duties of a full time Administrative Law Judge. You have assigned him lesser duties that

³It is clear from the language of Ex. G-38 that "UP" is acronym for "Unemployment Insurance" hearings.

are not in his job description and which do not utilize his highest skill levels. Your reassignment is not accommodating; it is disciplinary. *It is a demotion . . .* for cause.

(Ex. G-40)⁴ (Emphasis Added)

On September 26, 2003, Exec. Dir. Ireland conducted a department level hearing on Appellant's Demotion Grievance. (Tr. IV at 847; Ex. G-44) Following this hearing with Exec. Dir. Ireland, Appellant went on approved leave and never returned to work for the Department. (Tr. III at 672-673; Step 6 *Decision and Final Agency Action*, Case No. 9 CSRB 83 at 9)

Thereafter, on October 14, 2003, Exec. Dir. Ireland issued her Step 4 Decision (Final Decision) denying Appellant's Demotion Grievance. (Ex. G-44) Specifically addressing Appellant's claims that the department's reassignment of his duties constituted a demotion, Ex. Dir. Ireland concluded:

You have claimed that this assignment is a demotion. However, I disagree. You retain your title as Legal Counsel and you maintain the same pay and pay range. It is not a demotion. Rather Tani [Division Director Downing] has assigned you duties that are very specific, allow for regular feedback, and help ensure that you maintain a full work load..

(*Id.*) Thereafter, on October 15, 2003, Appellant timely filed an appeal of Exec. Dir. Ireland's Final Decision with the CSRB. Ultimately, this Demotion Grievance is the foundation for the issues presented in this Decision and Final Agency Action.

II. PROCEEDINGS BEFORE THE CSRB AND UTAH COURTS.

As set forth above, on October 15, 2003, Appellant filed an appeal with the CSRB challenging the Department's Final Decision upholding his change of assignments. On October 27,

⁴This grievance was submitted to Div. Dir. Downing through Mr. Cantrell.

2003, Appellant filed an *Amendment to Appeal of Agency's Decision to the Career Service Review Board* with the CSRB.

On November 12, 2003, the Administrator for the CSRB, Robert W. Thompson, (Administrator) conducted an administrative review of the file in accordance with *Utah Code Ann.* § 67-19a-403. As a result of this administrative review, the Administrator determined that the CSRB lacked jurisdiction to review or decide Appellant's claims and therefore dismissed his appeal before the CSRB. Regarding Appellant's claims that the Department's "change of assignments" constituted a demotion, the Administrator concluded in *An Administrative Review Of The File Pursuant To Subsection 67-19a-403(2)(b)(ii), And Final Agency Action By Informal Adjudicative Proceeding* (Informal Jurisdiction Decision) that:

[D]HRM Rule authorizes management to assign, modify, or remove an employee's duties, task, responsibilities under specified circumstances. As long as the department does not reduce employees' immediate salary or salary range in the process of making these modifications or assignments no demotion has in fact occurred under DHRM rules.

(*Id.* at 4)

On December 2, 2003, Appellant, through Mr. Rampton, filed a *Request for Reconsideration of the Administrative Review and Final Agency Action By Informal Adjudicative Proceeding* (Request for Reconsideration). In this Request for Reconsideration, Appellant asked the Administrator to reconsider his jurisdiction decision that Mr. Blauer's job reassignment did not constitute a demotion. In addition, Appellant asserted for the first time that certain departmental actions made concomitant with his "change of assignment" violated personnel rules. Specifically, Appellant argued that the Department violated personnel rules by failing to properly define his job performance parameters; assigning Appellant tasks outside his job description; engaging in unlawful

harassment and retaliation; failing to maintain proper personnel records; and disciplining Appellant without due process by leaving “critical” comments from Div. Dir. Downing and Exec. Dir. Ireland in Appellant’s personnel file.⁵

On December 22, 2003, the Administrator issued a decision on Grievant’s Request for Reconsideration affirming his prior decision regarding demotion. The Administrator also denied Grievant’s personnel rule violation claims believing these claims to be beyond the scope of Appellant’s original grievance and essentially ancillary to the issues previously addressed. (Decision on Grievant’s Motion for Reconsideration at 3)⁶

In January 2004, Mr. Blauer appealed the Administrator’s Informal Jurisdictional Decision to the district court pursuant to *Utah Code* § 63-46b-15. In this district court petition, Appellant asked for a *trial de novo* regarding his alleged demotion and for a determination regarding the alleged personnel rule violation claims raised for the first time in his Request for Reconsideration.

In response to this petition, the Department filed a *Motion to Dismiss*, essentially arguing that by not raising allegations of personnel rule violations until the filing of his *Request for Reconsideration* or at the earliest, prior to Step 5 of the State’s Grievance Procedures, Appellant had administratively waived those claims and was thus jurisdictionally barred from pursuing those claims before the CSRB.⁷ Appellant then filed a *Motion for Summary Judgment* with the district court

⁵Importantly, these newly raised claims of personnel rule violations ultimately became the sole and exclusive issues presented at the Step 5 evidentiary hearing in this matter. (Grievant’s Brief at Ex. 2, 3; Finding of Facts of Conclusion of Law, Decision and Order at 2)

⁶This Decision on Grievant’s Motion for Reconsideration is part of the file maintained and controlled by the CSRB.

⁷While Appellant initially raised his claim regarding violation of Administrative Leave Policy at Step 5 of the State’s Grievance and Appeal Procedures, the Department nonetheless argued this claim was waived as well as because Appellant filed no antecedent grievance at Steps 2, 3, or 4 of

which was followed by a cross-motion for Summary Judgment from the Department.

On August 16, 2004, Third District Court Judge Leslie Lewis (Judge Lewis) issued a Memorandum Decision finding as a matter of law that Appellant had not been demoted. (Grievant's Brief at Ex. 2) However, in this same Memorandum Decision Judge Lewis left open the issue of alleged rule violations related to the Utah Personnel Management Act and remanded those issues to the CSRB for consideration. (*Id.*) Regarding the alleged personnel rule violation claims, Judge Lewis specifically held:

[I]t appears that the only remaining issue is CSRB's refusal to consider the plaintiff's remaining grievances based upon alleged violations of the personnel rules. The Court concludes that the plaintiff, in his request for Reconsideration before the CSRB, preserved all of his remaining allegations concerning the defendant's violations of the Personnel Management Act. **In other words, the Court declines to follow the defendant's reasoning that these grounds for grieving were not raised administratively and are therefore deemed waived** or that this Court has not jurisdiction to consider them.

...

Accordingly, to the extent that the plaintiff's Motion for Summary Judgement seeks a renewed opportunity to have the CSRB consider his grievance related to the alleged violations of the Personnel Management Act, the Court grants the same and remands the matter back to the CSRB.

(*Id.*) (Emphasis added)

On November 30, 2004, Judge Lewis issued an Order reflecting her Memorandum Decision.

(Ex. A-14)⁸ While this November 30, 2004, Order dismissed Appellant's demotion claim, it

the grievance procedures before finally raising this claim with the CSRB at Step 5.

⁸The Board notes that this Order was signed by Judge Lewis on November 30, 2004. However, it is date stamped as filed on December 8, 2004. For clarity, the Board will refer to the order's signature date.

On November 10, 2005, the Utah Court of Appeals issued its decision affirming the district court's grant of summary judgment in favor of the Department. In its decision, the Utah Court of Appeals ruled that in reappropriating Appellant's job responsibilities from part-time to full-time adjudicator, the Department did nothing more than extend one of Appellant's core job functions. Based upon these factors, the Utah Court of Appeals concluded that because Appellant was not demoted as a matter of law, the trial court correctly granted the Department's Motion for Summary Judgment. (*Blauer v. Department of Workforce Services*, 128 P. 3d 1204 (Utah App. 2005) (Blauer I))

On April 26, 2006, Appellant requested the CSRB to set a hearing "on all issues raised in the above matter, and remaining for hearing pursuant to the Order of Judge Leslie Lewis in *Blauer v. Department of Workforce Services* (Civil No. 040900221) dated November 30, 2004."¹⁰ After a series of attempts, a prehearing/scheduling conference was finally held on June 21, 2006. At this prehearing conference, issues to be adjudicated were set and dates for the exchange of documents and motions were established.

On September 29, 2006, the Department filed *Agency's Motion to Dismiss* (Motion to Dismiss) with the CSRB. In this Motion to Dismiss, the Department argued Appellant's personnel rule violation claims must be dismissed either because they were never grieved at the Department level as required by statute or because the claims had been resolved in ancillary proceedings. (Motion to Dismiss at 13-17)

Specifically, the Department argued that the CSRB had no jurisdiction to review or to consider Appellant's claims relating to administrative leave, improper maintenance of personnel

¹⁰ Again, this request is part of the administrative file maintained and controlled by the CSRB.

records, unlawful harassment, or discipline without due process because Appellant never filed antecedent or timely grievances regarding these claims at the Department level. Essentially, the Department argued that by not raising these claims until he filed his *Request for Reconsideration* or at least by Step 5 of the grievance procedures, Appellant had administratively waived his right to have these personnel rule violation claims considered at the CSRB. Addressing these four rule violation claims, the Department summarized in its *Motion to Dismiss* that these allegations: “are contained in neither Mr. Blauer’s first grievance [Appraisal Grievance], nor his second grievance [Demotion Grievance]. Mr. Blauer pursued no antecedent, timely grievance of these allegations. The CSRB has no jurisdiction to consider these allegations.” (*Id.*)

Regarding Appellant’s personnel rule violation claim that the Department failed to define Appellant’s job parameters, the Department argued such claims were resolved when the Department granted Appellant’s Appraisal Grievance and provided him with a current performance plan. (*Id.* at 3-4, 9) Regarding Appellant’s remaining claim that personnel rules were violated when Department assigned Appellant to do adjudications full-time, the Department argued that this claim was conclusively resolved in Blauer I wherein the Utah Court of Appeals held that the reapportionment of Appellant’s job responsibilities were appropriate and did nothing more than extend his core job functions. (*Id.* At 9, 14)

On December 6, 2009, Hearing Officer Katherine Fox (Hearing Officer Fox) entered a *Decision on Agency’s Motion to Dismiss* (Decision) granting the Department’s Motion to Dismiss. In granting the Department’s Motion to Dismiss, Hearing Officer Fox agreed with the Department that Appellant’s failure to file antecedent grievances regarding personnel rule violations prevented the CSRB from reviewing or considering most of Appellant’s personnel rule violation claims.

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Specifically addressing Appellant's failure to grieve these issues at the Department level, Hearing Officer Fox concluded that: [t]he CSRB has no jurisdiction to go back and somehow hear claims not raised with the proper entity more than three and one-half years ago (Decision at 7)¹¹

Hearing Officer Fox also agreed with the Department that Appellant's claim that the Department violated personnel rule by failing to define job parameters was resolved in Appellant's Appraisal Grievance. Addressing this claim in her Decision, Hearing Officer Fox concluded that:

Grievant raised his claims relating to job performance parameters (issue 1) in his first grievance [Appraisal Grievance] and naturally, did not appeal the Step 4 decision in his favor. The CSRB lacks jurisdiction to hear a grievance that was previously resolved in Grievant's favor. In essence, this claim does not exist anymore.

(*Id.* at 6)

Finally, Hearing Officer Fox also agreed that Appellant's claim regarding assigned tasks was resolved by the Utah Court of Appeals in *Blauer I*. Specifically referencing *Blauer I*, which held "[T]he CSRB did not err in declining jurisdiction over Blauer's grievance," Hearing Officer Fox concluded that *res adjudicata* prevented her from further litigating Appellant's job reassignment claim. (*Id.* At 7)

In December 2006, Appellant filed a *Petition for Review of Administrative Agency Decision* with the Utah Court of Appeals.¹² On March 13, 2008, the Utah Court of Appeals, in an unpublished opinion, reversed Hearing Officer Fox's decision and remanded the case to the "CSRB for a hearing

¹¹Importantly, neither the Department's Motion to Dismiss nor Hearing Officer Fox's Decision rely on *Utah Code Ann.* § 35A-5-107(15) which makes the Utah Anti-Discrimination Act (UADA) the exclusive remedy in discrimination actions. Jurisdictional concerns under *Utah Code Ann.* § 35A-5-107 were first raised by Hearing Officer James H. Beadles in a subsequent proceeding at the CSRB.

¹²This matter was appealed to the Utah Court of Appeals because Hearing Officer Fox determined her decision to be a formal adjudicative decision pursuant to CSRB Rule R137-1-17(5).

on the merits.” (Blauer v. Dep’t of Workforce Services, 2008 UT App 84, 85) Specifically, the Court of Appeals concluded that District Court Judge Lewis’ finding that Appellant had not jurisdictionally waived his personnel rule violation grievances by failing to raise them prior to Step 5 of the state’s grievance procedures was the “law of the case.” (*Id.*) Therefore, the CSRB “erred” by considering jurisdictional issues that had *already* been decided by the district court. (*Id.*) (Emphasis added)

After this decision was issued, Appellant sought to have his personnel rule violation claims heard by the Third District Court rather than the CSRB. At a hearing held on April 29, 2009, Third District Court Judge John Paul Kennedy (Judge Kennedy), ruled that it would not disregard the Utah Court of Appeals’ remand decision by hearing Appellant’s personnel rule violation claims. Based upon this ruling, on May 6, 2009, the Department filed *Agency’s Request for Prehearing Conference* with the CSRB.

After the filing of some preliminary motions, an initial Prehearing Conference (PHC) on the Court of Appeals’ *Remand Order* was held before Hearing Officer James H. Beadles (Hearing Officer Beadles). At this PHC dates were settled regarding various issues, including dates for the parties to file a “list of issues” to be decided at any Step 5 evidentiary hearing in this matter.

On August 10, 2009, Appellant complied with Hearing Officer Beadles’ order by filing a *Memorandum - List of Issues* and a *Motion for Recusal and Request for Appointment of Fair and Independent Hearing Officer and Request for Oral Argument*. On August 24, 2009, the Department filed *Agency’s Memorandum in Opposition to Grievant’s Motion for Recusal* and *Agency’s Memorandum in Response to Grievant’s Memorandum-List of Issues*. On September 14, 2009, Hearing Officer Beadles entered his *Order Regarding Motion for Recusal and Issues to Be Heard*,

wherein Hearing Officer Beadles noted agreement between the parties that the issues to be decided at the Step 5 evidentiary hearing were limited to the six specific issues set forth in Judge Lewis' District Court Decision. Hearing Officer Beadles left for further briefing the singular issue of burden of proof in Appellant's disciplinary due process allegation. Finally, Hearing Officer Beadles refused to recuse himself noting no actual bias or conflict with his appointment.

On September 30, 2009, Hearing Officer Beadles entered his *Order Regarding Allocation of Burden of Proof*. This order followed briefing by the parties. In this order, Hearing Officer Beadles decided not just questions regarding burden of proof, but also whether the alleged "critical" comments in Appellant's personnel file from Div. Dir. Downing and Exec. Dir. Ireland, in fact, even constituted disciplinary written reprimands.

Addressing the later issue, Hearing Officer Beadles concluded that "none of the documents identified" by Appellant constituted grievable "written reprimands" in a sense contemplated by the legislature. Essentially, Hearing Officer Beadles concluded that to equate critical comments in Appellant's performance appraisals or in answers to grievances he initiated to discipline would have a negative effect of transforming "all letters and performance evaluations containing critical comment into a disciplinary document subject to due process."

Specifically, addressing this issue in his order Hearing Officer Beadles stated:

[I]tems listed in §§ 67-19(a)-406(2) are actions initiated by a Department. Except for the change of assignment memorandum of September 9, 2009, all the documents that Grievant challenges are responses to Grievant rather than proactive actions by the Department. It makes sense that, if the government is the original instigator of an action it should bear the burden of proof proving that the action was taken with in accordance to law.

...

Indeed, as the Department points out, the second document of the three *i.e.*, the September 5, 2003, Ireland memorandum, was a victory for Mr. Blauer, overturning his direct supervisor's performance rating.

(*Id.* at 1-2)

In making this determination, Hearing Officer Beadles still left open the opportunity for the Appellant to present evidence at the evidentiary hearing that the "critical comments" in his personnel file constituted "written reprimands subject to CSRB jurisdiction." (*Id.*) Further addressing this issue, Hearing Officer Beadles concluded that "consistent with the Appellant Court's Decision . . . the hearing officer will hear any additional evidence or argument that Grievant may wish to introduce regarding its claim that the communications are 'written reprimands' subject to CSRB jurisdiction." (*Id.* at 3)¹³

On November 18, 19, 23 and December 7, 2009, a Step 5 evidentiary hearing was held before Hearing Officer Beadles. At the hearing, Appellant was represented by Mr. Cantrell. The Department was represented by Assistant Utah Attorney General Philip Lott (Mr. Lott). Human Resource Specialist Jennifer Wakefield (Ms. Wakefield), assisted Mr. Lott as the department's management representative. Tracy A. Covington, a certified court reporter with Citi Court, made a verbatim record of the proceeding and administered oaths to the witnesses.

Based on court established recitation of the issues, prior ruling by Hearing Officer Beadles, and agreement of the parties, Appellant bore the burden of establishing personnel rule violations by the Department and the burden of going forward at the evidentiary hearing. (*Utah Code Ann.* § 67-19(a)-406(2)) Specific issues adjudicated at the Step 5 evidentiary hearing were limited solely to

¹³On November 9, 2009, Appellant filed *Grievant's Motion to Reconsider Hearing Officer's Categorization of Issue Number Six*. On November 16, 2009, Hearing Officer Beadles denied this request.

whether the Department violated personnel rules by:

- (1) Failing to define job performance parameters in violation of *Utah Administrative Code* R477-10-1, *et seq.*;
- (2) Assigning job task to Appellant falling outside his job description, in violation of *Utah Administrative Code* R477-3-2(3);
- (3) Engaging in unlawful harassment of, and in retaliation against, Appellant in connection with his grievances, in violation of *Utah Administrative Code* R477-15-2-3;
- (4) Failing to properly maintain personal records concerning Grievant's performance, and refusing access to alleged documentation supposedly reflecting negatively on his job performance (which Appellant claim to be in his personnel file) in violation of *Utah Administrative Code* R477-2-5;
- (5) Denying Grievant Administrative leave in violation of *Utah Administrative Code* R477-7-7; and
- (6) Placing critical letters in Grievant's personnel file constituting "written reprimands" grievable to the CSRB pursuant to *Utah Code Ann.* § 67-19(a)-302(1).¹⁴

At the evidentiary hearing in this matter, Hearing Officer Beadles received evidence related to the several allegations made by Appellant. This evidence included testimony given and documents received concerning the Department's alleged violations of personnel rules.

Specifically, evidence was received at the Step 5 evidentiary hearing relating to Appellant's allegation that the Department failed to properly define job performance parameters. This evidence

¹⁴For clarity and to be consistent with Hearing Officer Beadles' Finding of Fact, Conclusion of Law, Decision and Order, the six separate personnel rule violations numbered 1 through 6 above will sometimes be referred to as Issue1, 2, 3, 4, 5, or 6 to correspond with Appellant's specific Personnel Rule Violation claim.

Evidence was also received regarding the Department's decision to require that Appellant conduct UI hearings "full-time with no change in job title or pay rate." (Ex. G-38) Evidence regarding this claim was not limited to documentary and testimonial evidence but included prior court decisions addressing this claim, holding limpidly that it was within the Department's discretionary powers to assign him UI hearings full-time. (*See* Tr. IV at 789-794, 841; Exs. A-20, G-38, G-40, G-44)

Finally, evidence was received regarding the Department's denial of Appellant's request for administrative leave and Appellant's claim that "critical" comments in his personnel file from Exec. Dir. Ireland and Div. Dir. Downing constituted "written reprimands" for which Appellant received no due process. (Tr. IV at 842-845; Exs. G-18, G-38, G-39, G-44)¹⁵

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At the conclusion of the evidentiary hearing, Hearing Officer Beadles entered his Step 5 *Finding of Fact, Conclusion of Law, Decision and Order* (Step 5 Decision). In the Step 5 Decision, Hearing Officer Beadles outlined the evidence presented at the evidentiary hearing and concluded that Appellant's several claims of personnel rule violation by the Department were not supported by the evidence presented at the Step 5 hearing and therefore dismissed Appellant's claims "in their entirety." (Step 5 Decision at 10) Specifically addressing each claim presented by Appellant, Hearing Officer Beadles concluded:

Mr. Blauer . . . failed to meet his evidentiary burden of proof on Issues No. 4, 5, and 6. Regarding Issue No. 1 . . . if the purported claim can be read so narrowly as to only refer to the mere providing of a performance plan, the Hearing Officer may agree that the agency was improperly dilatory. However, Mr. Blauer suffered no harm from the failure and any claim for relief due to the omission is moot. More importantly, the evidence adduced at the hearing leads the Hearing Officer to conclude that his job performance parameters were properly defined via his meetings with his supervisor.

Regarding Issue No. 2, the Utah Court of Appeals has already determined that DWS did not assign Mr. Blauer job duties outside his job description. Under the doctrine of res judicata, the CSRB is barred from relitigating the issue. The CSRB can provide no relief to Mr. Blauer for Issue No. 3 because the CSRB has no jurisdiction over claims of discrimination, given the legislature's direction to State career service employees to use the "exclusive remedy" offered by UADA.

(*Id.*) Based upon these findings, Hearing Officer Beadles denied all claims of personnel rule violation by the Department and affirmatively denied Mr. Blauer's appeal.

failed to maintain proper personnel records. (*Findings of Fact, Conclusion of Law, Decision and Order* at 8) This determination was not appealed to the Board and is therefore not before the Board for consideration.

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. ISSUES ON APPEAL

In his appeal to the Board, Appellant carefully narrows the issues to be considered on appeal by not challenging several dispositive determinations made by Hearing Officer Beadles in his Step 5 Decision. Specifically, Appellant does not appeal Hearing Officer Beadles' determination that the Department violated department policy by assigning him job tasks "outside his job description." (*See* Grievant's Brief at ¶ 1 through 3 at 2 - 3) Nor does Appellant challenge Hearing Officer Beadles' decision dismissing Appellant's personnel rule violation claim that the Department failed to properly maintain personnel records regarding Appellant or that the Department inappropriately denied Appellant administrative leave. (*Id.*) These issues are therefore resolved.

Instead, Appellant specifically limits his appeal to the three remaining determinations made by Hearing Officer Beadles. First, Appellant argues that Hearing Officer Beadles erred in concluding that, while the Department had in fact denied Appellant's request for accommodation, the CSRB lacked jurisdiction to review or consider this decision pursuant to *Utah Code Ann.* § 35A-5-107(15) which grants the Utah Anti-Discrimination Act (UADA) exclusive remedy over claims of discrimination. Essentially, Appellant argues Hearing Officer Beadles erred in this determination because *Utah Administrative Code* R477-15-2-3 provides Appellant with a separate and distinct basis for claims of harassment or discrimination. (*Id.* at 38-39)

Second, Appellant argues Hearing Officer Beadles erred in factually finding the Department had appropriately defined job performance parameters for Appellant. (*Id.* at 42 - 43) Appellant also challenges Hearing Officer Beadles' alternative conclusion on this claim that, even assuming the Department's action in this regard violated personnel rules requiring defined performance

parameters, such violation was rendered moot when Appellant prevailed on his Appraisal Grievance.

(*Id.* at 3)

Finally, Appellant challenges Hearing Officer Beadles' finding that personnel rules were not violated when the Department placed "critical" comments on documents contained in Appellant's personnel file. Specifically, Appellant challenged Hearing Officer Beadles' finding that such comments are simply not "written reprimands" to which due process attaches. (*Id.* at 46) Appellant also challenges Hearing Officer Beadles' conclusion that Appellant failed to adequately place these comments before him at the evidentiary hearing. (*Id.* At 45 - 48)

As required by statute, it is the Board's responsibility to review and decide appeals from Step 5 decisions. To the extent required by law, the Board will now review and analyze the facts and issues presented by the parties on Appeal and address the dispositive issues necessary to decide this matter.

II. THE BOARD'S APPELLATE STANDARDS OF REVIEW

We review Appellant's appeal under *Utah Administrative Code*, R137-1-22(4)(a)–(c), which reads as follows:

(a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.

(b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes in accordance with the correctness standard, with no deference being

granted to the evidentiary/step 5 decision of the CSRB hearing officer.

(c) Finally, the board must determine whether the decision of the CSRB hearing officer, . . . is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

Based upon the foregoing, the Board must first determine whether the Hearing Officer's factual findings are reasonable and rational based upon the evidentiary record as a whole and whether those findings are supported by substantial evidence. Next, our task is to review the fact finder's decision to determine whether the Hearing Officer correctly applied "the relevant policies, rules, and statutes according to the correctness standard," giving no deference to the Hearing Officer on this legal issue. Finally, the Board's appellate role is to consider whether the hearing officer's decision is reasonable and rational based upon our determination of the ultimate facts together with the correct application of relevant State policies, rules, and statutes which were considered by our Hearing Officer.

BOARD'S REVIEW AND ANALYSIS OF FACTS AND ISSUES ON APPEAL

I REVIEW OF THE HEARING OFFICER'S DETERMINATION REGARDING APPELLANT'S CLAIM THAT THE DEPARTMENT VIOLATED PERSONNEL RULES BY FAILING TO PROPERLY DEFINE HIS PERFORMANCE PARAMETERS.

As stated above, the hearing officer heard testimony and received documents in the instant case relating to Appellant's claim that the Department violated personnel rule by failing to properly define Appellant's job performance parameters as required by *Utah Administrative Code* R477-10-1. (Tr. I at 202, 219; Tr. III. at 608, 626, 656; Tr. IV at 777; Exs. G-14, G-15, G-16, G-17, G-33, G-39) After carefully considering this evidence, Hearing Officer Beadles entered his Step 5 Decision specifically finding the Department had in fact properly defined Appellant's job performance

parameters by meeting with him on a near weekly basis to review current performance and discuss the Department's performance expectations of Appellant. (Step 5 Decision at 6 - 7)

Considering the totality of the evidence presented on this issue, Hearing Officer Beadles found that Appellant's job performance parameters were properly defined by the Department "via his meetings with his supervisor." (*Id.*) Based upon this finding, Hearing Officer Beadles held the Department had substantively complied with the provisions of *Utah Administrative Code* R477-10-1. After reaching these determinations, Hearing Officer Beadles denied Appellant's claim that the Department had failed to properly define job performance parameters as required by personnel rule. (*Id.*)

Alternatively, Hearing Officer Beadles also held that Appellant's claim regarding the failure of the Department to define his performance parameters was resolved when the Department granted Appellant's Appraisal Grievance and provided him with a current performance plan. (*Id.*) Addressing this issue in his Step 5 Decision, Hearing Officer Beadles' found:

"[E]ven assuming that this violated the administrative rule, Mr. Blauer ultimately suffered no harm as Executive Director Ireland gave him a successful performance evaluation for fiscal year 2002-2003. Had the Executive Director not changed his performance evaluation from unsuccessful to successful, the Hearing Officer might have been compelled to grant such a change. Nevertheless, since that relief has already been ordered, no further remedy is available and the claim is moot. *Citing Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989) (concluding that a case is moot when the requested relief can no longer affect the rights of the litigants)."

(*Id.* At 7 nn6)

After carefully reviewing the evidentiary record as a whole, including the sworn testimony of the witnesses and documents submitted into evidence, this Board finds Hearing Officer Beadles' decision regarding this issue to be reasonable, rational and supportive by substantial evidence. In

reaching this decision, the Board first notes that the Department's failure to provide Appellant with a performance plan governing the period between July 1, 2002 and June 30, 2003, was a central concern raised in Appellant's Appraisal Grievance. (Tr. I at 219; Exs. G-17, G-39)

Essentially, Appellant argued in his Appraisal Grievance that a central reason his performance was determined to be unsatisfactory was because he had not been provided with a "current performance plan" and thus did not fully understand the Department's performance expectations of him. (Ex. G-17) Based largely on the Department's failure to provide Appellant with a performance plan for 2003, Exec. Dir. Ireland granted Appellant's Appraisal Grievance and elevated his 2003 performance appraisal from unsuccessful to successful. (Tr. III at 549; Ex. G-39) Indeed, at the evidentiary hearing itself, Appellant testified that his concerns regarding the Department's failure to define his job performance parameters was largely resolved when Exec. Dir. Ireland amended his performance appraisal and provided Appellant with a new performance plan. (Tr. III at 656 to -657)

Based upon the evidence drawn out at the evidentiary hearing, we uphold Hearing Officer Beadles' determination that the substantive portion of this claim was resolved when the Department granted Appellant's Appraisal Grievance and provided him with a current performance plan. For this reason, Hearing Officer Beadles' ruling on this claim is upheld.

We also uphold Hearing Officer Beadles' conclusion that while not providing Appellant with an actual performance plan, the Department nonetheless substantively complied with this rule by meeting with Appellant on a near weekly basis to review his current work and discuss future job performance expectations with Appellant. While admittedly not in exact compliance with personnel rule, the Board finds the measures taken by the Department to define Appellant's performance

expectations satisfied the substantive provisions of *Utah Administrative Code* R477-10-1 and thus upholds Hearing Officer Beadles' decision regarding this claim.

II REVIEW OF THE OFFICER'S DETERMINATION REGARDING APPELLANT'S UNLAWFUL HARASSMENT CLAIM.

In his Step 5 Decision, Hearing Officer Beadles correctly notes that "Perhaps the heart of Mr. Blauer's claims is that DWS violated personnel rules relating to *Utah Admin. Code* R477-15." (Step 5 Decision at 7) Further addressing this issue, Hearing Officer Beadles notes that this administrative rule spells out the State's General prohibition on discrimination and workplace harassment. After addressing this rule Hearing Officer Beadles concludes:

That provision (*Utah Admin Code* R477-15) spells out the State's general prohibition on discrimination 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.

(*Id.*)

Supporting this jurisdictional conclusion, Hearing Officer Beadles first cites to *Utah Code Ann.* § 67-19-32 of the Utah Personnel Act which directs employees who claim to be victim of discriminatory treatment to first file a claim with their executive director; and second, assuming a denial by the executive director, file a complaint with the Division of Antidiscrimination and Labor pursuant to *Utah Code Ann.* § 35A-5-107. (*Id.* at 7 - 8)

A second basis on which Hearing Officer Beadles determined the CSRB was without jurisdiction to hear Appellant's harassment claims was *Utah Admin. Code* R137-1-5 that specifically states the CSRB and its hearing officers have no jurisdiction over "unlawful harassment" claims.

(*Id.*) Based upon these conclusions, Hearing Officer Beadles ruled that "[T]he CSRB can provide

no relief to Mr. Blauer for Issue No. 3 because the CSRB has no jurisdiction over claims of discrimination” (*Id.* at 10)

On appeal to this Board, Appellant challenges the hearing officer’s decision regarding this claim on two primary grounds. First, Appellant asserts that Hearing Officer Beadles’ conclusion regarding jurisdiction contravene prior court determinations that the CSRB has jurisdiction over this matter. Specifically addressing this issue in his brief Appellant states:

The most astounding aspect of the hearing officer’s determination concerning jurisdiction over Mr. Blauer’s claim under R. 477-15-2 and 3, though, is his recitation of jurisdictional issues which have gone before trial courts and appellate courts in this matter on no fewer than three occasions: first, before the Third District Court in the 2004 action on motions for summary judgement; second, before the Court of Appeals in 2008; and finally, before the Utah Supreme Court on unsuccessful petition for writ of certiorari. The message from the courts has been clear: CSRB *does* have jurisdiction to hear Mr. Blauer’s claim and *must* hear and adjudicate them *on their merits*.

Hearing Officer Beadles’ belief that the jurisdictional issue could (or should) have been decided in such a way to preclude him from hearing Mr. Blauer’s claims under R. 477-15-2 and 3 long ago ceased to be a governing (or pertinent) factor. This matter was remanded from the Court of Appeals with a specific mandate: To hear all six of Mr. Blauer’s grievances on their merits. CSRB has repeatedly attempted to divest itself of jurisdiction to hear this claim. It has been told three times that it may not do so. As such, Mr. Beadles ruling places CSRB in open and express defiance in the Court of Appeals mandate.”

(Appellant’s Brief at 40 - 41)

Second, Appellant argues that Hearing Officer Beadles further erred in deciding this issue by failing to understand that Appellant’s discrimination claim is substantively based upon violation of state personnel rule, not upon violation of State or Federal Statutes guarding against unlawful harassment or discrimination.

Specifically addressing this argument in his brief, Appellant states:

Mr. Blauer has invoked the express language of Utah Administrative Code R. 477-15- 2 and 3 (2003) as having been violated by DWS. Had that regulatory provision not been in place, Mr. Blauer would certainly still have had rights under the Utah Antidiscrimination Act; the enactment of R. 477-15- 2 and 3, however, created a separate and discrete basis for claiming harassment and retaliation. It is on the language of that regulatory provision and work place regulation - not the Utah Antidiscrimination Act alone - that Mr. Blauer came before the hearing officer.

(*Id.* at 38)

After carefully reviewing and considering Appellant's arguments on this claim, we are upholding Hearing Officer Beadles' decision denying this claim. In reaching this decision we first examined the personnel rule alleged to have been violated by the Department. This personnel rule sets forth the policy of the State of Utah to provide employees with a working environment free from discrimination and unlawful harassment. It then defines generally what actions constitute unlawful harassment and sets forth a complaint procedure for employees to follow. Finally, this personnel rule sets forth the investigative measures required of the Department after a complaint has been registered.

Importantly, this rule is limited in scope and provides no separate right of remedy for employees outside the statutory framework of *Utah Code Ann.* § 35A-5-107. Instead, this rule merely outlines prohibited employment conduct regarding harassment or discrimination and creates a basis to discipline employees who fail to comport their conduct consistent with the parameters set forth in *Utah Code Admin.* R477-15.

Based upon the facts elicited at the evidentiary hearing in 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 deference to legal determinations.

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. § 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 5 of the State's Grievance and Appeal Procedures.

In essence, the jurisdictional deficiencies raised by Hearing Officer Beadles in his Step 5 Decision are different than those raised in prior CSRB decisions. Importantly, in *Blauer v. Utah Department of Workforce Services*, 2008 UT App 84, (Blauer III) the Court of Appeals limited its jurisdiction remand to the CSRB by concluding the "CSRB erred by considering jurisdictional issues **that have already been decided by the district court.**" (*Id.*) (Emphasis added).

Examination of the "district court's" Memorandum Decision and Final Order establish that the jurisdictional deficiencies raised by the Department at the district court level related to Appellant's failure to grieve personnel rule violation claims prior to advancing those grievances to Step 5 of the State's Grievance and Appeal Procedures. Specifically, in addressing the Department's administrative waiver arguments, Judge Lewis stated in her memorandum decision:

The court concludes that Plaintiff, in his request for reconsideration before the CSRB, preserved all his remaining allegations concerning the Defendant's violations of the Personnel Management Act. In other words, the court declines to follow defendant's reasoning that these grounds for grieving *were not raised administratively* and therefore deemed waived or that, this court has no jurisdiction to consider them.

(Grievant's Brief at Ex. 2) (Emphasis added)

In the instant case, Hearing Officer Beadles' jurisdictional determination regarding Appellant's harassment claim was not based on or connected to any jurisdictional issue that had "already been decided by the district court." Instead, Hearing Officer Beadles found that *Utah Code Ann.* § 35A-5-107 provided the exclusive remedy for Appellant to address his unlawful discrimination or harassment claim and that his sole remedy lay with the Division of Antidiscrimination and Labor pursuant to the Utah Anti-Discrimination Act.

After carefully considering the above factors, we affirm the hearing officer's decision on this issue. Though unnecessary because of our above ruling that the Department had not violated DHRM R477-15, we nonetheless find the hearing officer's decision regarding jurisdiction to be reasonable, rational and a correct application of relevant policies, rules, and statutes.

III. REVIEW OF THE HEARING OFFICER'S DETERMINATIONS REGARDING LETTERS IN APPELLANT'S PERSONNEL FILE

On September 30, 2009, prior to the evidentiary hearing in this matter, Hearing Officer Beadles issued an *Order Regarding Allocation of Proof*. In this order, Hearing Officer Beadles held that none of the "critical" letters or comments referenced by Grievant to support his claim of discipline constituted "written reprimands" as contemplated by Utah law. (Order Regarding Allocation of Proof at 3) In support of this finding, Hearing Officer Beadles noted that:

[A]ll the items listed in §§ 67-19a-406(2) are actions initiated by the

department. Except for the Change of Assignment Memorandum of September 9, 2009, all the documents that Grievant challenges are responses to Grievant rather than proactive actions of the Department.

(*Id.*) Hearing Officer Beadle's further reasoned that to equate the referenced comments contained in these documents to written reprimands "would transform all letters and performance evaluations containing a critical comment into a disciplinary document subject to due process."

(*Id.* at 1)

Specifically, referencing his prior Order Regarding Allocation of Proof in his Step 5 Decision, Hearing Officer Beadles states:

The hearing officer issued a order relevant to this issue on September 30, 2009, in which the purported letters, at least those to which the hearing officer was made aware, were determined not to be 'written reprimands.' Though this order was issued to settle the question of burden of proof, it is relevant here as well because Mr. Blauer presented no evidence to justify changing the hearing officer's September 30 decision.

(Step 5 Decision at 9)

On appeal to this Board, Appellant argues that Hearing Officer Beadles erred in making these determinations, particularly with regards to Div. Dir. Downing's September 9, 2003, "Change of Assignment" memorandum. In challenging the hearing officer's determinations regarding this issue Appellant argues that the term "written reprimand" is not defined in relevant personnel statutes nor in any reported Utah decisions. Accordingly, Appellant argues Hearing Officer Beadles erred in finding these letters, and more particularly the negative comments cabined in these letters, did not constitute "written reprimands" as defined in Utah law.

After carefully considering Appellant's arguments regarding this issue, we uphold the hearing officer's decision that the documents at issue in this matter simply do not constitute "written

reprimands” as contemplated by statute. We agree with Hearing Officer Beadles’ determination, set forth in his Order Regarding Allocations of Burden of Proof, that to equate these documents, and more precisely the comments contained therein, with “written reprimands” would transform all departmental letters and performance evaluations that contained any “critical comments” into disciplinary action subject to due process. This Board is simply unable to find the “critical comments” at issue in this matter constituted written reprimands subject to the State’s Grievance and Appeal Procedures. Therefore, we uphold Hearing Officer Beadles’ decision on this claim.

This decision is buttressed by the fact that none of the referenced letters, or the comments set forth therein, necessarily removed privileges from Appellant or imposed restrictions beyond those already cabined in Appellant’s core job functions. This is especially true in light of the fact that the Utah Court of Appeals has already determined that Div. Dir. Downing’s September 9, 2003, Change of Assignment memorandum “did nothing more than extend one of Mr. Blauer’s core job functions, in response to varying Department needs.” (Blauer I at ¶ 32)

Based upon these factors, Appellant’s claim that “critical” letters or comments remaining in his file constituted “written reprimands” is denied. Hearing Officer Beadles’ decision regarding this issue is upheld.

DECISION

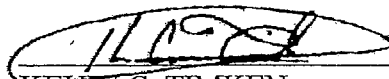
The Board has addressed the remaining issues presented in this case and raised by Appellant in his appeal to the Board. After thoroughly reviewing the evidentiary record and carefully applying the relevant policy and rules at issue in this matter the Board sustains the hearing officer’s decision for the reason set forth herein, and affirmatively denies Mr. Blauer’s appeal to this Board. The Board finds the hearing officer’s decision to be reasonable and rational and supported by substantial

evidence. The Board further finds that the hearing officer correctly applied all relevant policies and rules in rendering his decision. Based upon the evidence presented at the Step 5 evidentiary hearing in this matter, the Board finds that the Department did not violate personnel rules regarding the Department's failure to define job parameters, unlawful harassment, or discipline without due process and upholds the hearing officer's decision denying Appellant's claims in their entirety.

DATED this 20th day of December 2010.

DECISION UNANIMOUS

Kevin C. Timken, Chair
Joan M. Gallegos, Member
Teresa Aramaki, Member



KEVIN C. TIMKEN
Chair

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with *Utah Admin. Code R137-1-22(10)*, and *Utah Code Ann. § 63G-4-302*, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to *Utah Admin. Code R137-1-11*, and *Utah Code Ann. § 63G-4-401 and 403*, Utah Administrative Procedures Act.

RECEIVED

JAN 3 2011

CAREER SERVICE REVIEW OFFICE

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IN THE UTAH COURT OF APPEALS

LORIN BLAUER,

Petitioner,

vs.

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

Respondents.

:
:
:
: PETITION FOR REVIEW OF
: ADMINISTRATIVE AGENCY
: DECISION
:
: Court of Appeals No. _____
:
: Agency Case No. 10 CSRB 100 (Step 6)
: Administrative Appeal No. 10 CSRB 100
:
:
:

Notice is hereby given that Lorin Blauer, Petitioner, pursuant to Utah Code Ann. § 63G-4-401 and 403, Utah Admin. Code R137-1-11, and Rule 14(a), Utah Rules of Appellate Procedure, petitions the Utah Court of Appeals to review the Career Service Review Board's Partial Decision on Grievant's Request for Continuance of Prehearing Conference, Motion for Recusal and Selection of an Impartial Judge, and Request for Oral Argument, issued July 1, 2009 in this matter (Exhibit 1); the Career Service Review Board Hearing Officer's Order Regarding

Motion for Recusal and Issues to be Heard, issued September 14, 2009 herein (Exhibit 2); the Career Service Review Board Hearing Officer's Order Regarding Allocation of Burden of Proof, issued September 30, 2009 herein (Exhibit 3); the Career Service Review Board Hearing Officer's Order Motion for Reconsideration of Burden of Proof, issued November 16, 2009 (Exhibit 4); the Career Service Review Board Hearing Officer's Findings of Fact, Conclusions of Law, Decision and Order (Step 5 Decision), issued January 7, 2010 (Exhibit 5); and the Order and Decision of the Respondent Utah Career Service Review Board issued in this matter on December 20, 2010 (Exhibit 6).

This petition seeks review of all findings, conclusions, decisions and orders entered by the Career Service Review Board herein.

Petitioner requests the Court to direct Respondents to prepare and certify to the Court its entire record, which shall include all the proceedings and evidence taken in this matter.

DATED this 30th day of December, 2010.

JONES, WALDO, HOLBROOK & McDONOUGH

By

Vincent C. Rampton

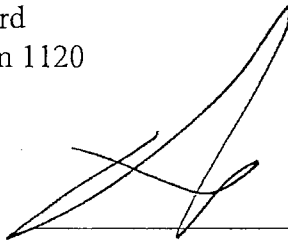
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed
via first class mail, postage prepaid, to the following this 30th day of December, 2010:

Phillip Lott
Assistant Utah Attorney General
Mark L. Shurtleff, Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, UT 84114-0856

Robert Thompson, Chairman
Career Service Review Board
State Office Building, Room 1120
Salt Lake City, UT 84114



Tab 5

BEFORE THE CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH

| | | |
|--|---|---|
| <p>LORIN BLAUER,</p> <p>Grievant,</p> <p>v.</p> <p>UTAH DEPARTMENT OF WORKFORCE SERVICES,</p> <p>Agency.</p> | <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> | <p>AN ADMINISTRATIVE REVIEW OF</p> <p>THE FILE PURSUANT TO</p> <p>SUBSECTION 67-19a-403(2)(b)(ii),</p> <p>AND</p> <p>FINAL AGENCY ACTION</p> <p>BY INFORMAL</p> <p>ADJUDICATIVE PROCEEDING</p> <p>Case No. J. H. 129 (2003)</p> |
|--|---|---|

On Wednesday, October 15, 2003, Tom Cantrell, Utah Legal Advocates, filed an appeal with the Career Service Review Board (CSRB) for and on behalf of Lorin Blauer (Grievant) to have his grievance advanced to Step 5 of the State's Grievance and Appeal Procedures for career service employees. Thereafter, on Monday, October 27, 2003, Mr. Cantrell filed an "Amendment to Appeal of Agency Decision" with the CSRB.

Grievant is appealing a final decision issued by Raylene G. Ireland, Executive Director, Utah Department of Workforce Services (Department), on October 14, 2003. Step 5 of these procedures allows for an evidentiary hearing before a CSRB hearing officer. However, before a Step 5 hearing may occur, the CSRB Administrator is required by law to make a determination of whether the CSRB has jurisdiction over the grievance.

JURISDICTIONAL REVIEW

Utah Code, §67-19a-403(2)(a) states that:

- (2)(a) When an employee submits a grievance to the administrator under the authority of Section 67-19a-402, the administrator shall determine:
 - (i) whether or not the employee is a career service employee and is entitled to use the grievance system;
 - (ii) whether or not the board has jurisdiction over the grievance;
 - (iii) whether or not the employee has been directly harmed; and
 - (iv) the issues to be heard.
- (b) In order to make the determinations required by Subsection (2), the administrator may:

- (i) hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both; or
- (ii) conduct an administrative review of the file

In connection with this jurisdictional determination, *Utah Code*, §67-19a-302 provides that:

- (1) A career service employee may grieve promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of [the] grievance procedure.
- (2)(a) A career service employee may grieve all other matters only to the level of his department head.
- (b) The decision of the department head is final and unappealable to the board.

Finally, *Utah Code*, §67-19a-202(1)(b) further provides that “the board has no jurisdiction to review or decide any other personnel matters.”

Based upon this statutory requirement, I have conducted an administrative review of the file. An administrative review of the file is an informal adjudicative proceeding under *Utah Code*, §63-46b-4 and CSRB rule found at *Utah Administrative Code*, R137-1-17. Based upon these facts, the decision set forth herein is appealable to the district courts that have jurisdiction to review by trial *de novo* all final agency actions resulting from informal adjudicative proceedings. (*Utah Code*, §63-46b-15)

In the instant case, Grievant is appealing Ms. Ireland’s final decision to uphold Grievant’s supervisor’s decision to change his job assignments. In his initial appeal dated September 12, 2003, Grievant asserted through his representative that “Lorin [Grievant] appeals your reassigning him to the duties of a full time administrative law judge. You have assigned him lesser duties that are not in his job description and which do not use his highest skill levels. Your reassignment . . . is a demotion. . . .”

On October 14, 2003, Ms. Ireland issued her written decision denying Mr. Blauer’s grievance. In this decision, Ms. Ireland specifically stated that: “You have claimed that this assignment is a demotion. However, I disagree. You retain your title as legal counsel and you maintain the same pay and pay range. It is not a demotion. Rather Tani [Grievant’s supervisor] has assigned you duties that are very specific, allow for regular feedback, and help ensure that you maintain a full workload.”

Through his representative, Mr. Cantrell, Grievant timely appealed Ms Ireland's final decision with the CSRB. This appeal was received on Wednesday, October 15, 2003. The appeal was then amended on Monday, October 27, 2003.

In his written appeal before the CSRB, Grievant asserts that the modification of his duties is not only a demotion, but alternatively, either a constructive suspension or constructive dismissal as well. As stated previously, statute requires that the CSRB Administrator make an initial determination of whether the CSRB has jurisdiction over the grievance. Based upon this mandate, this decision will address the three separate issues raised in Grievant's appeal of Ms. Ireland's final decision.

First, I will address Grievant's claims that the reassignment of his duties amounted to a demotion. Department of Human Resource Management (DHRM) rule R477-1(34) defines demotion as:

An action resulting in a salary reduction on the current salary range or the movement of an incumbent from one job or position to another job or position having a lower salary range, which may include a reduction in salary. Administrative adjustments and reclassifications are not included in the definition of a demotion.

In the instant case, nowhere does Grievant allege that either his salary or his salary range has been reduced. Instead, Grievant simply asserts that the changes to his duties and responsibilities amount to a demotion because he has been assigned to perform the duties normally associated with those of an administrative law judge.

An administrative review of the file in the instant case establishes that throughout the events giving rise to this grievance, Grievant has maintained his position as a legal counselor with the Department. Moreover, there has been no reduction in his salary nor his salary range. Grievant has simply been assigned differing duties to allow his supervisor to provide "regular feedback" and to ensure that Grievant "maintain a full workload."

DHRM rule R477-3-3 contemplates the very actions the Department took in this case. Specifically, this rule provides that:

Management may assign, modify, or remove any employee task or responsibility in order to accomplish reorganization, improve business practices or process, or for any other reason deemed appropriate by the department administration.

Clearly, DHRM rule authorizes management to assign, modify, or remove an employee's duties, tasks or responsibilities under specified circumstances. As long as the Department does not reduce the employee's immediate salary or salary range in the process of making these modifications or assignments, no demotion has in fact occurred under DHRM rules.

In addition, the facts of this case are distinguishable from *Draughon v. Dept. of Financial Institutions et al*, 975 P.2d 935 (Ut. App. Ct. 1999). In *Draughon*, the Court held that:

Human Resources' rules distinguishing between a "demotion" and an "involuntary reassignment," solely on the basis of an immediate loss of pay, are invalid

Addressing this issue, it should be noted that since the Court's decision in *Draughon*, DHRM has modified its rules so that they no longer make a distinction between a "'demotion' and an 'involuntary reassignment,' solely on the basis of an immediate loss of pay." (*Id.*) Indeed, DHRM's current rules do not even allow "involuntary reassignments." Moreover, DHRM has modified its definition of "demotion" to accord the Court's decision in *Draughon*. As stated previously, DHRM's definition of "demotion" now includes not only an immediate loss of pay, but also movement of a career service employee to a position with a lower salary range, even if such an event does not encompass a loss of salary. Because Grievant maintains his position, immediate salary and salary range in compliance with rule, the Court's decision in *Draughon* has limited application to the facts of this case.

Finally, the Court in *Draughon* cited with approval to *Webster's Ninth New Collegiate Dictionary* to define demotion as "1: to reduce to a lower grade or rank 2: to relegate to a less important position." (*Id.* at 941)

In the instant case, a thorough review of the file establishes that Grievant has not been reduced to a lower grade or rank, nor has he been assigned a different, let alone, less important position. Grievant continues to hold his position or title as "Legal Counsel" and maintains his same pay and pay range. He has simply been assigned duties that management feels would better enable them to provide Grievant with regular feed back and ensure that he maintains a full work load. Based upon these factors, I do not believe the actions the Department took against Grievant amount to a demotion, but instead encompass internal personnel actions over which the CSRB has no jurisdiction.

The second issue raised by Grievant in his appeal to the CSRB is that the actions of the Department amount to a “constructive suspension.” In support of this position, Grievant essentially asserts that the change in his assigned duties exacerbates his “known disabilities” and that he has “been forced to take sick leave and FMLA . . .” because he cannot perform newly assigned responsibilities “without damage to his health and well being.”

These concerns are clearly outside the scope of the limited jurisdiction of the CSRB. They do not involve suspension as that word is normally viewed in the employment context, but instead involve matters uniquely and solely cabined under federal or State law, specifically, the Americans With Disabilities Act and the Family Medical Leave Act. Based upon these factors, the CSRB simply lacks jurisdiction to address Grievant’s alleged “constructive suspension.”

Finally, Grievant asserts that the actions of the Department also amount to a “constructive dismissal.” In support of this position, Grievant asserts that if he is required to perform his newly assigned duties and responsibilities, he will be forced to resign for health reasons.

Like Grievant’s “constructive suspension” allegations discussed above, this matter clearly falls outside the limited jurisdiction of the CSRB. This determination is based on two primary factors.

First, the CSRB does not have jurisdiction to review internal personnel matters relating to job assignments or responsibilities. Reasonable accommodations relating to a disability or a serious health condition are covered under various federal or state statutes including, but not limited to, the Americans With Disabilities Act and the Family Medical Leave Act. Pursuant to these laws, federal and State courts have sole and exclusive jurisdiction to review claims based upon “reasonable accommodation” in the workplace.

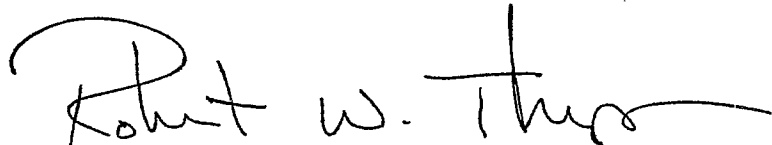
Second, the fact of the matter is, Grievant simply has not yet been dismissed, either actually or constructively, from his employment with the Department. *Utah Code Ann.* §67-19a-401 *et seq.* allows an employee to file a grievance “within twenty working days after the event giving rise to the grievance.” In *Taylor v. State Training School*, 775 P.2d 434, 439-40 (Ut. App. Ct.1989), the Utah Court of Appeals held that the “event giving rise to the grievance” occurs only after the action occurs, “not some prior indication that . . . action will be taken in the future.” (*Id.*) Until such an event or action occurs, there is no grievable event for the CSRB to review.

In the instant case, Grievant has not been dismissed. If or when that event actually occurs, Grievant may well then file an appeal of the Department's decision with the CSRB. Until then, however, there is simply no dismissal over which the CSRB has jurisdiction.

DECISION

After thoroughly reviewing the file associated with this grievance, I find that the CSRB does not have jurisdiction to adjudicate these claims. Other venues including State and/or federal court or agencies may be a more appropriate avenue.

It is so **ORDERED** the 12th day of November 2003.



Robert W. Thompson
Administrator

RECONSIDERATION

This administrative review of the file constitutes final agency action under *Utah Code*, §63-46b-13, Utah Administrative Procedures Act. A party may request reconsideration by the Administrator of the Career Service Review Board within 20 days from the date of issuance (i.e., signature date), by stating specific grounds upon which relief is requested.

JUDICIAL REVIEW

Judicial review of an administrative review of the file under §67-19a-403(2)(b)(ii) is reviewable in District Court according to *Utah Code*, §63-46b-14 and 15, Utah Administrative Procedures Act. The appealing party of this informal adjudication and final agency action may file with either The District Court in which the party resides or The Third District Court where the seat of state of Utah government is located.

CERTIFICATE OF SERVICE

I certify that on this 12th day of November 2003, (1) I caused to be mailed, postage prepaid, the foregoing *Administrative Review of the File Pursuant to Subsection 67-19a-403(2)(b)(ii) and Final Agency Action by Informal Adjudicative Proceeding* in the matter of *Lorin Blauer v. Utah Department of Workforce Services* to the following:

Lorin Blauer
460 North 900 East
Bountiful UT 84010

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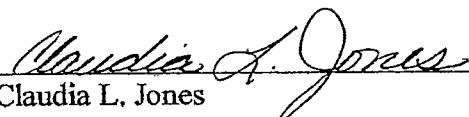
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Claudia L. Jones
Legal Secretary

Tab 6

9-15

FILED DISTRICT COURT
Third Judicial District

AUG 16 2004

SALT LAKE COUNTY
By (S) Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|------------------------------|---|---------------------|
| LORIN BLAUER, | : | MEMORANDUM DECISION |
| Plaintiff, | : | CASE NO. 040900221 |
| vs. | : | |
| UTAH DEPARTMENT OF WORKFORCE | : | |
| SERVICES, | : | |
| Defendant. | : | |

This matter came before the Court for a hearing on June 24, 2004, in connection with various pending Motions filed by both parties, including the defendant's Motion to Dismiss; the plaintiff's Motion for Summary Judgment; the defendant's Cross-Motion for Summary Judgment and the defendant's Rule 56(f) Motion. At the conclusion of the hearing on these Motions, the Court indicated that it would take the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsels' oral argument. Being now fully advised, the Court rules as stated herein.

LEGAL ANALYSIS

The Court first turns to the defendant's Motion to Dismiss. Because of the voluminous nature of the parties' respective legal arguments, the Court will not restate these arguments herein. Rather, the Court will generally indicate that it does not find the

Motion to Dismiss to be well-taken for the reasons indicated in the plaintiff's Opposition Memorandum. Overall, the Court is satisfied that it has the jurisdiction to consider this matter and that the plaintiff has exhausted his available administrative remedies. Accordingly, the defendant's Motion to Dismiss is denied.

Next, the Court addresses the parties' Motions for Summary Judgment on the issue of whether the CSRB should have heard the plaintiff's grievance because he met the jurisdictional threshold of establishing that he had been demoted. In assessing this issue, this Court must determine as a matter of law whether the plaintiff was indeed demoted and whether the Board should now proceed to hold an evidentiary hearing to determine whether he was demoted for cause pursuant to Utah Code Ann. §67-19-18(1).

Again, without restating the parties' detailed arguments on the issue of demotion, the Court concludes that the pivotal inquiry in determining whether a demotion occurred in this case must focus on the plaintiff's salary, salary range and retirement benefits. As the defendant points out, it is undisputed that the plaintiff was never formally reclassified and that his salary, salary range and retirement benefits were completely unaffected by the change in his assignment. The Court concludes that this is determinative evidence that the plaintiff was not demoted and that the CSRB was correct in reaching the same conclusion.

To be clear, in reaching this decision, the Court carefully considered the plaintiff's argument that the Court look to such factors as the change in his status and that his new responsibilities essentially fit the job description for the lower paying and apparently less esteemed position of Administrative Law Judge - Non Juris Doctorate. While the plaintiff argues this position admirably, the fact remains that without a commensurate decrease in salary or a lower salary range (or the loss of retirement benefits), the plaintiff cannot be considered demoted. The Court rules that this conclusion, which is articulated in greater detail in the plaintiff's moving papers, is supported by the definition of demotion (Utah Administrative Code R477-1-1(34)) and the remaining legal authorities discussed by the plaintiff. Accordingly, the Court rules that there are no genuine issues of material fact and that the plaintiff was not demoted as a matter of law. The defendant's Cross-Motion for Summary Judgment on this point is granted.


Given the Court's decisions above, it appears that the only remaining issue is the CSRB's refusal to consider the plaintiff's remaining grievances based upon alleged violations of the personnel rules. The Court concludes that the plaintiff, in his Request for Reconsideration before the CSRB, preserved all of his remaining allegations concerning the defendant's violations of the Personnel

Management Act. In other words, the Court declines to follow the defendant's reasoning that these grounds for grieving were not raised administratively and are therefore deemed waived or that this Court has no jurisdiction to consider them. However, rather than determining whether the violations actually occurred, it appears from the dialogue with the plaintiff's counsel during oral argument, that he would prefer to have these matters transferred back to the CSRB for consideration. Accordingly, to the extent that the plaintiff's Motion for Summary Judgment seeks a renewed opportunity to have the CSRB consider his grievance related to the alleged violations of the Personnel Management Act, the Court grants the same and remands the matter back to the CSRB.

It appears that the foregoing addresses all of the issues raised in the pending Motions. However, if the parties need clarification as to any of the foregoing or if an issue remains unaddressed, the Court requests that counsel direct a letter to the Court's law clerk, Alexandra C. Doctorman, indicating the same. The other side can of course respond to any correspondence directed to the Court.

Counsel for the State is to prepare an Order consistent with, but not limited to, this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 16 day of August, 2004.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

BLAUER V. UTAH DEPT.
OF WORKFORCE SVCS.

PAGE 6

MEMORANDUM DECISION

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 14 day of August, 2004:

Vincent C. Rampton
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Gabrielle Lee Caruso
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H

Tab 7

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FILED DISTRICT COURT
Third Judicial District

DEC 8 2004

By ALAN M. [Signature]
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LORIN BLAUER,

Plaintiff,

vs.

UTAH DEPARTMENT OF
WORKFORCE SERVICES,

Defendant.

**PROPOSED ORDER IN
CONFORMANCE WITH THE
MEMORANDUM DECISION DATED
AUGUST 16, 2003**

Civil No. 040900221
Judge Leslie A. Lewis

For the reasons set forth in the Court's Memorandum Decision dated August 16, 2004,
the Court hereby orders and adjudges:

1. The Defendant's Motion to Dismiss is denied. The Court has Jurisdiction to consider the matter.
2. There is no genuine issue of material fact, and as a matter of law, the Defendant did not demote the Plaintiff when it assigned him to perform the duties of an administrative law judge. The CSRB was correct in reaching this same conclusion. . Accordingly, the Plaintiff's

First Claim for Relief is dismissed with prejudice, with the exception that the allegations in Paragraph 34 subsections ©) through (j) of the complaint which do are not based upon unlawful demotion, and which were also set forth by the Plaintiff in his Motion for Reconsideration (previously filed with the CSRB), are remanded to the CSRB for consideration. Those allegations are: A) DWS violated Utah Administrative Code R477-10-1, et seq by failing to define job performance parameters; B) DWS violated personnel rules by assigning job tasks to Grievant falling outside of his job description, in violation of Utah Administrative Code R477-3-2 and 3; C) DWS representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R477-15-2 and 3; D) DWS representatives violated Utah Administrative Code R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file; E). DWS violated Utah Administrative Code R477-7-7 by denying Grievant administrative leave; and F) Critical letters from Ms. Downing and Ms. Ireland, remaining in Grievant's personnel file constitute "written reprimands, grievable to CSRB pursuant to Utah Code Ann. Sec. 67-19a-302(1).

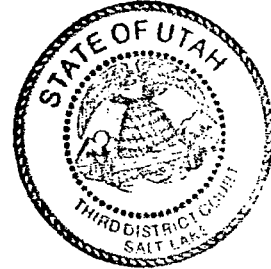
3. The Plaintiff's Second, Third, and Fourth Claims for Relief are based upon an alleged unlawful demotion and are therefore dismissed with prejudice.

240400221

DATED this 30th day of November, 2004.

BY THE COURT:

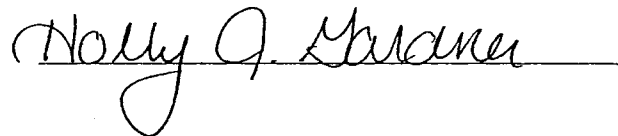
Leslie A. Lewis
THE HONORABLE LESLIE LEWIS



CERTIFICATE OF DELIVERY

I hereby certify that on this 23rd day of November, 2004, I caused a true and correct copy of the foregoing **PROPOSED ORDER IN CONFORMANCE WITH THE MEMORANDUM DECISION DATED AUGUST 16, 2003** to be mailed by United States mail, postage pre-paid, to the following:

Vincent C. Rampton
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444
Attorney for Plaintiff



Tab 8

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

LORIN BLAUER,

Grievant,

V.

**UTAH DEPARTMENT OF
WORKFORCE SERVICES,**

Agency.

• • • • •

DECISION ON AGENCY'S MOTION TO DISMISS

Case No. 28 CSRB/H.O. 408

Pursuant to a telephonic Status/Scheduling Conference held on Friday, October 13, 2006, conducted by the Hearing Officer assigned to adjudicate this issue, oral argument on the Utah Department of Workforce Services' Motion to Dismiss was held on October 24, 2006, at the State Office Building. Present during the hearing were the Grievant, Lorin Blauer and his administrative law representative, Tom Cantrell.¹ Assistant Utah Attorney General Philip S. Lott appeared on behalf of the Agency. Also in attendance were JoAnne Campbell, HR Director of the Utah Department of Human Resources, as the Agency's management representative, and Brian Blake, a paralegal in the Utah Office of the Attorney General. A certified court reporter made a record of the proceedings. No witnesses appeared and no other evidence was received into the record other than that which is already on file.

The sole purpose of this proceeding was to more fully consider the Agency's Motion to Dismiss filed on September 29, 2006, and the Grievant's Response filed October 10, 2006, both of which subsequently followed a Third District Court Memorandum Decision dated August 16, 2004. (Ex. T) As noted by Judge Leslie Lewis in an August 2, 2006 Memorandum Decision, this case presents a "convoluted procedural history." (Ex. Y) While it is unnecessary to reiterate the entire history preceding the issues at hand, some limited recitation is necessary to provide a meaningful context for this decision. All exhibits referred to herein, unless otherwise noted, are appended to the Agency's Motion to Dismiss.

¹Attorney Vincent C. Rampton, who has represented the Grievant in various permutations of this ongoing case, did not attend although notice was duly provided to him.

BACKGROUND

Grievant began working for the Agency as legal counsel in approximately 1980. Over the past three and one-half years, Grievant has filed three grievances with the Career Service Review Board (CSRB), two State court lawsuits, one federal court lawsuit (which he voluntarily withdrew), and two different appeals to the Utah Court of Appeals in connection with his job at the Agency.

THE FIRST GRIEVANCE - PERFORMANCE EVALUATIONS (STEP 4)

In June of 2003, Grievant received a poor performance evaluation from his supervisor Tani Downing (Ms. Downing). He filed a grievance to change the evaluation to "successful" and this grievance was initially denied by Ms. Downing. Part of this grievance included Grievant's claims that he either did not have a Performance Plan in place or that the one in existence was outdated. He also complained that he was being held to unfair performance standards. This latter claim may have been connected with Grievant's ongoing preparation of a request for ADA accommodations but it is unclear.² He subsequently appealed Ms. Downing's initial denial of his grievance to the Agency's Executive Director Raylene Ireland (Exec. Dir. Ireland). (Ex. G) Sometime thereafter, Exec. Dir. Ireland agreed with Grievant's request to upgrade his evaluation and the poor evaluation was changed to "successful."?, the grievance was resolved in Grievant's favor. (Ex. J) Grievant was also given a new Performance Plan at that time. Finally, he was advised to follow through on any ADA accommodation request with the proper department.³

THE SECOND GRIEVANCE - DEMOTION (STEP 4)

In September 2003, after his first grievance had been resolved to his satisfaction, Grievant filed a second grievance, claiming that he had been demoted when he had been recently reassigned to conduct unemployment hearings full-time. First Ms. Downing and then Exec. Dir. Ireland denied this grievance after determining that Grievant had not been demoted.

STEP 5 APPEAL OF THE SECOND GRIEVANCE (DEMOTION)

In October 2003, Grievant appealed his denied grievance, the alleged demotion, to the CSRB. Grievant also appended to this appeal, new claims of "constructive suspension and dismissal,"

²It is unclear, in part, because Grievant expressly wrote at the time, "my concern is not about reasonable accommodations as I can - and have been - performing the essential functions of my position at a highly successful level." (Ex. G).

³Grievant did so and the request was denied (Ex. K).

characterizing the Agency's actions as "discriminatory and retaliatory." No Step 5 formal adjudicative hearing was held. Instead, in November 2003, the CSRB Administrator, under applicable rules, issued an Administrative Review of the File Jurisdictional Decision (Jurisdictional Decision). The Administrator concluded that Grievant's job reassignment did not constitute a demotion as that term is defined under applicable rules and regulations. The Administrator determined that Grievant's reassignment of duties was an "internal personnel action" over which the CSRB had no jurisdiction. The Administrator addressed the newly appended claims of "constructive suspension and dismissal" in the same decision by noting that because these claims were not "ripe" (i.e., Grievant had not been terminated, suspended, or left employment), the CSRB had no jurisdiction.

SEPARATE REQUEST TO AGENCY FOR ADMINISTRATIVE LEAVE

On or about the same time Grievant filed his Second Grievance in September 2003, he also asked the Agency for "administrative leave based on medical considerations." Exec. Dir. Ireland informed him that although he was not entitled to take administrative leave on the requested medical basis, he could apply for leave under the Family Medical Leave Act (FMLA).

PURPORTED STEP 5 APPEAL OF DENIAL OF REQUEST FOR ADMINISTRATIVE LEAVE

In October 2003, Grievant filed an "appeal" to the CSRB of the Agency's denial of his request for administrative leave. A day or two later, he filed an amended version of this "appeal" to the CSRB.

REQUEST FOR RECONSIDERATION OF CSRB'S ADMINISTRATIVE REVIEW OF THE FILE DECISION

In December of 2003, Grievant filed a request for reconsideration of the jurisdictional decision addressing his demotion claims. Grievant asked the CSRB Administrator to reconsider his decision that Grievant's job reassignment did not constitute a demotion, and therefore, the CSRB had no jurisdiction. He also reiterated his claim – raised in the separate purported "appeal" to the CSRB in October 2003 – that he was improperly denied administrative leave. Then, he included the addressed claims of "constructive discharge/dismissal⁴ and discrimination and retaliation" raised in

⁴While Grievant in his motion for reconsideration characterized his claim as constructive discharge/dismissal, it is clear from a review of the file that he intended to include the claim of constructive suspension.

the CSRB demotion appeal. Finally, he asserted four other brand new claims which he had not previously raised: the Agency's failure to define his job performance parameters, the Agency's violation of personnel rules, the Agency's failure to maintain proper personnel records/refusal to access personnel records and critical letter constituting "written reprimands."

MOTION TO DISMISS

This matter came to the CSRB pursuant to Judge Leslie Lewis' (Judge Lewis) Memorandum Decision dated August 16, 2004. (Ex. T) While the court concluded that Grievant was not demoted as a matter of law, it left open the issue of the various alleged personnel rules violations related to the Utah Personnel Management Act such as harassment/retaliation and an improper denial of a request for administrative leave. Judge Lewis determined: (1) these allegations were raised and preserved by Grievant in his previous Request for Reconsideration before the CSRB; and (2) they were not addressed by the CSRB.⁵ The exact language in Judge Lewis' Memorandum Decision is as follows:

[I]t appears that the only remaining issue is the CSRB's refusal to *consider* the plaintiff's remaining grievances based upon alleged violations of the personnel rules (Memorandum Decision, page 3; *emphasis added*). . . . Accordingly, to the extent that the plaintiff's Motion for Summary Judgment seeks a renewed opportunity to have the CSRB *consider* his grievance related to the alleged violations of the Personnel Management Act, the Court grants the same and remands the matter back to the CSRB. (Memorandum Decision, page 4; *emphasis added*.)

The only claims as determined by the district court pursuant to Grievant's Request for Reconsideration of Administrative Review and Final Agency Action with which the CSRB is charged to consider are:

- (1) the Agency violated *Utah Admin. Code* R477-10-1, et seq. by failing to define [Grievant's] job performance parameters;
- (2) the Agency violated personnel rules by assigning job tasks to Grievant falling outside his job description, in violation of *Utah Admin. Code* R477-3-2 and 3;

⁵The Administrator did not address the "extraneous" personnel violation claims in his Decision on Grievant's Motion for Reconsideration for the following reason: "Because I do not find that a demotion in fact occurred, I have limited my discussion . . . I recognize that Grievant's Request for Reconsideration addressed other issues primarily, but not entirely, stemming from the argument that a demotion had occurred. Based upon my decision herein however, it is unnecessary to address these arguments. . . ." (Decision on Grievant's Request for Reconsideration at 3)

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- (3) Agency representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of *Utah Admin. Code* R477-15-2 and 3;
- (4) Agency representatives violated *Utah Admin. Code* R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file;
- (5) the Agency violated *Utah Admin. Code* R477-7-7 by denying Grievant administrative leave; and
- (6) critical letters from Ms. Tani Downing and Ms. Raylene Ireland remaining in Grievant's personnel file constituted written reprimands, grievable to the CSRB pursuant to *Utah Code Ann.* § 67-19a-302(1).

At the outset of this proceeding, Grievant moved to continue oral argument based primarily in the "interests of judicial economy." When questioned, Grievant explained that a motion to consolidate various proceedings had been filed with the Third Judicial District Court but no decision had yet been issued. Mr. Cantrell opined that the motion to consolidate likely would be granted, and that oral argument on Grievant's personnel violation claims should be heard after that time. Although Grievant did not know when the motion to consolidate had been filed, Mr. Lott opined that it had been "a few months ago" and objected to Grievant's request for a continuance. The Agency's attorney argued that Grievant's motion to consolidate was a "separate issue before the judge relating to § 1983 ADA/Utah anti-discrimination claims" and disagreed that the motion would be granted "because the CSRB lacks jurisdiction over such claims." Because this case has been winding its way through various forums for approximately three and one-half years, and because Grievant's argument grounded in the "interests of judicial economy" was speculative, his motion was denied.

Grievant's arguments essentially are twofold. First, Judge Lewis' remand order of August 16, 2004, stating that specified matters relating to alleged violations of personnel rules should be ~~considered by the CSRB, means that, according to the "law of the case," the CSRB must conduct a~~ full hearing on the merits of these allegations to determine their validity, regardless of when and how they were raised in the previous proceedings. Second, Grievant argues that because Judge Lewis ordered the CSRB to *consider* certain claims, it follows that the CSRB must have jurisdiction over the subject matter of those claims.

I do not agree with Grievant's interpretation of Judge Lewis' choice of language. One need not hold a full evidentiary hearing in order to properly assess the merits of Grievant's remaining claims. Indeed, in some instances, that process would border on the ridiculous or violate existing rules as discussed below. Had Judge Lewis' determined that it was mandatory to hold a full-blown Step 5 hearing (a formal adjudicative proceeding) to *consider* Grievant's remaining claims, she easily could have delineated that process. The word "consider" is not identical to the word "hearing." The term "consider" means to "think about carefully" to "study" or "contemplate" or "give thought in order to reach a suitable conclusion." (*Webster's Ninth New Collegiate Dictionary* (1988)) As I read the court's instructions, what must occur in this matter is that the CSRB address, in some fashion, Grievant's remaining claims.

JURISDICTION

I agree with the Agency's arguments that the CSRB is without jurisdiction to hear these issues in a formal adjudicative proceeding. An analogous situation would be where a trial court had granted summary judgment in favor of one party, an appeal was filed and a decision rendered, but then, the losing party goes back to the trial court to file a motion to reconsider the summary judgment decision, and includes claims not previously presented. Moreover, merely recasting former claims - which were already adjudicated - in new window dressing such as "personnel rule violations" does not give them new life.

Like the Agency, I also believe that lack of jurisdiction can be raised at any time. (*Bradbury v. Valencia*, 5 P.3d 649, 650-1 (Utah 2000)) Grievant raised his claims relating to job performance parameters (issue #1 above) in his First Grievance and naturally, did not appeal the Step 4 decision in his favor. The CSRB lacks jurisdiction to hear a grievance that was previously resolved in the Grievant's favor. In essence, this claim does not exist anymore.

Grievant raised his claims relating to assigned tasks outside his job description (issue # 2 above) in his Second Grievance. The CSRB addressed this claim inherently as part of the same demotion grievance when it concluded that the tasks Grievant had been given were properly within his job. The Utah Court of Appeals in *Blauer v. Department of Workforce Services*, 128 P.3d 1204, 1211 (Utah App. 2005), ultimately determined that the assigned tasks were properly within Grievant's job description. The Utah Court of Appeals in *Blauer* succinctly held "[the] CSRB did not

err in declining jurisdiction over Blauer's grievance." (*Id.* at 1204) The CSRB is without jurisdiction to hear this claim based on res judicata (issue preclusion).

Grievant failed to raise his claims of unlawful harassment and retaliation with or without any connection with his request for accommodation of disabilities at any time prior to his Request for Reconsideration (issue #3 above). The CSRB simply has no jurisdiction over these claims pursuant to *Utah Admin. Code* R137-1-5. Such claims by law must be filed with the Utah Anti-Discrimination Division. (*Id.* (See also *Buckner v. Kennard*, 99 P.3d 842, 852 (Utah 2004).) Moreover, these issues simply cannot be raised for the first time at the Step 5 level.

Grievant also failed to raise his claims (issue #4 above) that the Agency failed to [properly] maintain his personnel record and refused him access [to certain documentation] prior to filing his Request for Reconsideration. It is impossible under existing CSRB rules to "reconsider" an issue of this type that was never raised at the Department level. Moreover, Grievant was, in fact, granted access to his personnel files. The only "problem" is that the documents he "supposed" were there, were not. The CSRB is not obligated to hear claims based on mere supposition *after* an employee has been terminated for unrelated reasons.

Grievant's additional claim is that he was improperly denied administrative leave (issue #5 above). He failed to file a Step 4 grievance in connection with this claim and only in his amended purported Step 5 appeal did this claim first appear. As stated above, it is impossible under existing CSRB rules to "reconsider" an issue of this type that was never raised at the Department level. Thus, the CSRB is without jurisdiction to hear this matter.

Finally, Grievant's remaining claim (issue #6 above) had no antecedent grievance and appeared for the first time in his Request for Reconsideration. Grievant asserts that certain of his supervisors' documentation and correspondence constituted "written reprimands." Again, it is impossible under existing CSRB rules to "reconsider" an issue of this type that was never raised at the Agency level. The CSRB has no jurisdiction to go back and somehow hear claims not raised with the proper entity more than three and one-half years ago - the time they were required to be filed.

To the extent the court may require a more detailed analysis, this decision will provide the same below.

ANALYSIS

Issue #1: The Agency violated *Utah Admin. Code* R477-10-1, et seq., by failing to define [Grievant's] job performance parameters.

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Blauer v. Workforce Services, Case No. 2018-000665 (CSRB/HO) 408

000665

DHRM R477-10-1 (a) states: "Performance standards and expectations for each employee shall be specifically written in a performance plan by August 30 of each fiscal year." As noted under "Background" above, the Agency fulfilled any duty it had under R477-10-1 to define Grievant's "job performance parameters/standards" by issuing a new Performance Plan dated July 18, 2003 (Ex. H) pursuant to the First Grievance. Grievant acknowledges this undisputed fact in his Response to Motion to Dismiss wherein he states, beginning on page 10, "It is true that the Grievant's allegation of failure to define job performance standards and failure to have a current performance plan were raised in what the Agency defines as 'the first grievance' and that a Step 4 decision was issued in Grievant's favor." He continues, "It is true that Grievant prevailed on his first grievance and did not appeal beyond the Step 4 Decision because there was no apparent reason to." (Grievant's Response at 11.)⁶ There still is no legitimate basis to revisit this issue and I conclude that the evidence in the record reflects that the Agency did not violate R477-10-1.

Issue #2: The Agency violated personnel rules by assigning job tasks to Grievant falling outside his job description, in violation of Utah Administrative Code R477-3-2 and 3.

DHRM R477-3-2 governs employee job descriptions. Job descriptions are to contain a "job title; distinguishing characteristics; a description of tasks commonly associated with most positions in the job' a statement of required knowledge, skills and other requirements; FLSA status' and other administrative information." R477-3-3 (Assignment of Duties) states that, "Management may assign, modify or remove any employee task or responsibility in order to accomplish reorganization, improve business practices or process, or for any other reason deemed appropriate by the department administration." Although R477-3-2 and 3 were not specifically cited at the time, this issue constitutes the subject matter of Grievant's Second Grievance, i.e., he was reassigned to conduct unemployment hearings full-time. The CSRB Administrator analyzed this issue, albeit in the form of a claim that Grievant was demoted, in his Jurisdictional Decision. He determined that Grievant's

⁶Despite his overt recognition that the Agency did issue job performance standards in accordance with *Utah Admin. Code* R477-10-1, Grievant presents the argument that further consideration of this issue is somehow required because "[T]o the extent that the Step 4 Decision later contributed to Grievant's injury, though, the CSRB does have jurisdiction to further consider these allegations in the context of the current grievance, because the District Court and the Court of Appeals have so determined." (Grievant's Response at 11)

job reassignment was valid and permissible under applicable rules and regulations in that Grievant's job had always included conducting unemployment hearings. Moreover, R477-3-3 expressly allows modifications to an employee's job duties. This is exactly what occurred in Grievant's case.

After the CSRB Administrator had rendered his Jurisdictional Decision, upon Grievant's appeal, the Utah Court of Appeals in *Blauer v. Department of Workforce Services*, 128 P.3d 1204 (Utah App. 2005) further considered this issue. Again, although R477-3-2 and 3 were not specifically cited, the Court concluded however, that the adjudication of unemployment claims were properly within Grievant's core duties that he had previously performed part-time but was now required to perform full-time. The Court observed, "Because of Blauer's previous, and not uncommon, assignments to adjudications, DWS claims that in reapportioning Blauer's job responsibilities from part-time to full-time adjudicator, DWS did nothing more than extend one of Blauer's core job functions, in response to varying department needs. We agree and conclude that DWS's assignments of Blauer to full-time adjudications, a job function DWS had delegated to Blauer, and other Legal Enforcement Counsel III, in the past, "did not constitute a demotion. . . ." *Blauer v. DWS* at 1210. And, "Here, as discussed above, there was no change in job or position, but rather a reallocation by DWS of Blauer's then existing job responsibilities." (*Id.* at 1210) Moreover, a review of Grievant's Performance Plan/Evaluations for the periods July 1, 1999 to June 30, 2000 (Ex. D), July 1, 2000 to June 30, 2001 (Ex. E) and July 1, 2003 to June 30, 2004, reflects that unemployment hearings were a part of Grievant's workload and did not fall outside the DWS Legal Counsel/Administrative Law Judge Performance Plan. (*Id.*)

To this day, Grievant has never mentioned any other "job task" to which he was assigned and which he found objectionable or allegedly violated personnel rules other than conducting unemployment hearings. Even then, it was the increased number of unemployment hearings that he found objectionable.⁷ Because Grievant has not designated any other "job task" which presumably violated personnel rules other than conducting unemployment hearings, and because that very issue

⁷Based on the record submitted to it, the Court of Appeals found that presiding over unemployment hearings in a four-year period from 1999-2003 was a job function DWS consistently assigned to Blauer." (*Id.* at 1210) For instance, in 2000, DWS assigned Blauer to six to twenty hearings a week for 36 weeks and prior to 2003, DWS assigned Blauer to an average of eight hearings a week over the course of nineteen weeks." (*Id.*)

has been decided by both the CSRB and the Utah Court of Appeals, this claim has been repeatedly and conclusively determined.

Issue #3: Agency representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R477-15-2 and 3.

DHRM R477-15-2 governs unlawful harassment. By definition under subsection (1), unlawful harassment means, "discriminatory treatment based on race, religion, national origin, color, sex, age, protected activity or disability." Harassment can result in a hostile, offensive or intimidating work environment under this policy under subsection (2)(a). Such behavior can also result in a tangible employment action being taken against the harassed employee under subsection (2)(b). R477-15-3 prohibits retaliation against an employee, "who has opposed 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." Grievant never raised a harassment claim until he filed his Request for Reconsideration with the CSRB.

R477-15 (Unlawful Harassment Policy and Procedure) sets forth the proper complaint and investigative procedure for employees who believe they have been aggrieved. Grievant failed to avail himself of these proper avenues with his employer at the time he was required to do so. Only now, after Grievant has been terminated for job abandonment and has lost his demotion claim, does he pursue these issues with the CSRB. The CSRB, however, is expressly prohibited from hearing these claims regardless of when they were raised or whether they are raised in conjunction with a disability accommodations' request. (*See Utah Admin. Code R137-1-5*: "Claims alleged to be based upon a legally prohibited practice ... including employment discrimination on the basis of race, color, sex, pregnancy, childbirth ... age ... religion, national origin, or disability, are not admissible under these grievance procedures. The CSRB and the CSRB hearing officers have no jurisdiction over the preceding claims.")

Issue #4: Agency representatives violated Utah Administrative Code R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file.

R477-2-5 governs personnel records. The provision mandates what types of records must be maintained, as appropriate, and how they should be maintained. Subsection (e) specifically permits "copies of any documents affecting the employee's conduct, status or salary. . . ." R477-2-5 also provides a mechanism for employees who feel aggrieved by how their personnel files are being maintained - subsection (4). Grievant, however, never pursued these procedures during the time he worked for the Agency when he was required to do so. Grievant never raised these claims until he filed his Request for Reconsideration with the CSRB.

Moreover, these claims are moot. Grievant was not terminated based on any performance assessments or criteria contained in the Agency's records. He was terminated because he abandoned his job. Grievant was not "demoted" based on performance assessments or criteria contained in the Agency's records. In fact, he was not demoted at all, but merely reassigned to perform duties that were already in his job description. Grievant was not disciplined in any fashion based on performance assessments contained in the Agency records. Indeed, he was never disciplined. The record in this matter reveals that Grievant was allowed access to his personnel file. There were no documents "supposedly reflecting negatively on his job performance" which were relied upon, used or required by the Agency in any actions that it undertook.

Issue #5: The Agency violated *Utah Admin. Code* R477-7-7 by denying Grievant administrative leave.

Absent a specific and designated basis for mandatory approval of administrative leave in the applicable DHRM rules, the granting of administrative leave under R477-7-7 is discretionary and then, only if it is consistent with Agency policy ("Administrative leave may be granted consistent with agency policy.") There is nothing in the record that indicates why Grievant believes that the Agency allegedly violated R477-7-7 when it denied his request for "administrative leave related to medical reasons." Instead, Grievant appears to believe that because he characterized his request as necessary for "medical reasons," that the Agency was obligated to give it to him.⁸

⁸Grievant's written submission on this issue is less than enlightening: "It is true that Grievant was informed by Director Ireland that his request for administrative leave based on medical considerations was denied. The Agency's argument that the rule upon which Grievant relies, R477-7-7, is discretionary and is dependent upon 'agency policy' can be heard by the CSRB because the Courts have so ruled." (Grievant's Response to Motion to Dismiss at 13.) Actually, Grievant misquotes this

There is, however, evidence in the record that the Agency researched Grievant's request and could find no provision that mandated approval of Grievant's request. (Ex. Q) The Agency's response to Grievant indicated that while annual leave, sick leave or FMLA could be used to support an extended absence, Grievant's situation did not require the Agency to grant his request. Bare bone's allegations are insufficient to sustain a claim that the Agency violated R477-7-7, particularly in light of the fact that whether to grant or deny Grievant administrative leave was within the Agency's discretion.

Issue #6: Critical letters from Ms. Tani Downing and Ms. Raylene Ireland remaining in Grievant's personnel file constituted written reprimands, grievable to the CSRB pursuant to Utah Code Ann. § 67-19a-302(1)

Utah Code Ann. § 67-19a-302(1) states that certain State employees may grieve written reprimands. The "critical letters"⁹ to which Grievant alludes allegedly constituting written reprimands are simply a moot issue in this case regardless of whether they were "grievable" under §67-19a-302(1). Grievant was terminated on a basis other than his performance, i.e., job abandonment, where any written reprimand, if issued, played no role. In addition, the issue of whether Grievant was demoted (where written reprimands conceivably may have been relevant) has already been conclusively determined by the Utah Court of Appeals. Thus, whether or not these various letters could be considered "written reprimands" – and could have been grieved on that basis – is irrelevant.

provision. The granting of leave under this rule is not dependent on policy but rather, must only be consistent with policy. At any rate, it still remains discretionary. The CSRB simply does not have jurisdiction over discretionary matters. As stated by the Utah Court of Appeals in *Lopez v. Career Service Review Board*:

“[D]iscretionary personnel powers granted to agencies do not constitute mandates. Absent the statutory mandate that an employee receive a certain benefit, the employee may not demand it as a right . . . Lopez has failed to identify any personnel rule that was violated by the Commission's refusal to allow him to job share. Jurisdiction therefore was properly denied.”

(*Lopez v. Career Service Review Board*, 834 P.2d 658 (Utah Ct. App.) (1992))

⁹The letters to which Grievant refers are attached to the Agency's Motion to Dismiss as Ex. I, Ex. J and other communications from the Agency are all contained in the record.

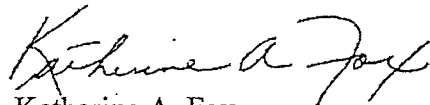
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Moreover, a review in the record of the communications between the Agency and Grievant reflects that they were not designated as "written reprimands" as required by DHRM rules and thus, they could not be used or construed as such in any Agency action. No rule or policy violations were noted in these letters and no adverse action thereafter was based on their content. In fact, Exec. Dir. Ireland's letter (Ex. J) indicates that she reversed Grievant's Performance Evaluation from "unsuccessful" to "successful." The letter from Tani Downing (Ex. I) merely outlines her reasons underlying her "unsuccessful" performance evaluation in responding to Grievant's objection, an evaluation that was later changed to "successful."

DECISION

Based on the foregoing, the Agency's Motion to Dismiss is granted.

It is so ORDERED this 6th day of December 2006.



Katherine A. Fox
CSRB Hearing/Presiding Officer

JUDICIAL REVIEW

Judicial review by the Utah Court of Appeals of this final agency action and decision may be obtained pursuant to *Utah Code* §§63-46b-14 and -16, Utah Administrative Procedures Act. To obtain judicial review, a party must file a petition for judicial review with the Court within 30 days of the date that this order or decision is issued (i.e., signature date).

CERTIFICATE OF SERVICE

I certify that on this 7th day of December 2006, I caused to be mailed, postage prepaid, the foregoing *Decision on Agency's Motion to Dismiss* in the matter of *Lorin Blauer v. Utah Department of Workforce Services* to the following:

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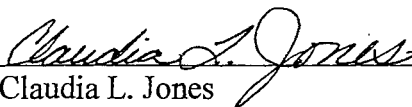
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 Case No. 28 CSRB/H.O. 408
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Tab 9

FILED
UTAH APPELLATE COURTS
MAR 13 2008

IN THE UTAH COURT OF APPEALS

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| | | |
|------------------------------|---|--------------------------------|
| Lorin Blauer, |) | MEMORANDUM DECISION |
| |) | (Not For Official Publication) |
| Petitioner, |) | |
| |) | Case No. 20061177-CA |
| v. |) | |
| |) | |
| Department of Workforce |) | F I L E D |
| Services, and Career Service |) | (March 13, 2008) |
| Review Board, |) | |
| |) | 2008 UT App 84 |
| Respondents. |) | |

Original Proceeding in this Court

Attorneys: Vincent C. Rampton, Salt Lake City, for Petitioner
Mark L. Shurtleff, J. Clifford Petersen, and Robert
W. Thompson, Salt Lake City, for Respondents

Before Judges Greenwood, Bench, and McHugh.

BENCH, Judge:

Lorin Blauer requests judicial review of the Career Service Review Board's (the CSRB) decision to grant the Department of Workforce Services's (the DWS) motion to dismiss six claims regarding the DWS's alleged personnel rule violations. Blauer contends that the CSRB erred by dismissing his claims for lack of jurisdiction because the district court had previously determined that Blauer had preserved his claims and had remanded the claims to the CSRB for consideration on the merits. We reverse and remand.


Pursuant to the law of the case doctrine, the CSRB was precluded from dismissing the remanded claims on jurisdictional grounds.

The "law of the case" doctrine specifies that when a legal "decision [is] made on an issue during one stage of the case," that decision "is binding in successive stages of the same litigation." Particularly when an appellate court makes a pronouncement on a legal issue, "[t]he lower court must not depart from the mandate" This is true even if the lower court "believe[s] that the issue could have been better decided in another fashion."

When the CSRB initially dismissed Blauer's claims against the DWS and denied his request for reconsideration, Blauer petitioned the district court for de novo review of the CSRB's action. See Utah Code Ann. § 63-46b-15(1) (2004) (stating that "district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings"). On review, the district court concluded that the CSRB correctly determined that Blauer had not been demoted and affirmed the CSRB's dismissal of Blauer's demotion grievance. However, the district court rejected the contentions made by the DWS and the CSRB that Blauer's grievances based upon alleged violations of the personnel rules were "not raised administratively and . . . deemed waived or that [the district court] ha[d] no jurisdiction to consider them." In fact, the district court concluded "that [Blauer], in his Request for Reconsideration before the CSRB, preserved all of his remaining allegations concerning the defendant's violations of the Personnel Management Act." (Emphasis added.)

Based on this language in the order, 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. The DWS and the CSRB did not challenge the district court's conclusions regarding jurisdiction through an appeal to this court. As a result, the district court's conclusions became the law of the case, and the CSRB was bound by the district court's legal conclusions and mandates. The CSRB therefore erred by considering jurisdictional issues that had already been decided by the district court.

Accordingly, we reverse the CSRB's dismissal of Blauer's six claims on jurisdictional grounds and remand the case to the CSRB for a hearing on the merits.

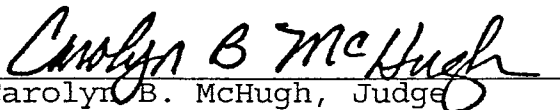


Russell W. Bench, Judge

WE CONCUR:



Pamela T. Greenwood,
Presiding Judge



Carolyn B. McHugh, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of March, 2008, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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Judicial Secretary

TRIAL COURT: DEPT OF WORKFORCE SERVICES, 28 CRSB/408
APPEALS CASE NO.: 20061177-CA

Tab 10

IN THE UTAH SUPREME COURT

LORIN BLAUER,

Plaintiff/Respondent,

v.

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

Defendants/Petitioners.

Case No. _____

(Court of Appeals Case
No. 20061177)

PETITION FOR A WRIT OF CERTIORARI

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IN THE UTAH SUPREME COURT

LORIN BLAUER,

Plaintiff/Respondent,

v.

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

Defendants/Petitioners.

Case No. _____

(Court of Appeals Case
No. 20061177)

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals failed to determine whether it had subject matter jurisdiction to review Lorin Blauer's employment grievances. Instead, it mechanically applied the law of the case doctrine, based on a lower court decision, and remanded the claims to the Career Service Review Board for a hearing on the merits, despite the undisputed facts that the claims were statutorily barred. Was this such a departure from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision?

2. Appellate courts do not issue advisory opinions, which necessarily demands that moot questions not be addressed. During the pendency of this appeal, the Court of Appeals affirmed the termination of Lorin Blauer's employment in a separate appeal. This mooted the grievances in the present appeal, which are based on alleged violations of personnel rules. Was this an error substantial enough to justify this Court's review?

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on March 13, 2008. See Addendum A. The Department of Workforce Services (the Department) filed a petition for rehearing on April 8, 2008, pursuant to an order of the Court of Appeals extending the time to seek rehearing until that date. After ordering a response to the petition for rehearing, the Court of Appeals denied the petition on April 25, 2008. See Addendum B. This Court has jurisdiction to review the Court of Appeals' decision under Utah Code Ann. §§ 78A-3-102 (3)(a) and 102(5) (previously numbered as Utah Code Ann. §§ 78-2-2(3)(a) & (5) (West Supp. 2006)).

DETERMINATIVE PROVISIONS

The following determinative provisions are set forth in Addendum C to this petition.

Utah Code Ann. § 67-19a-202 (West Supp. 2006)

Utah Code Ann. § 67-19a-401 (West 2004)

Utah Code Ann. § 67-19a-402 (West 2004)

Statement of the Case

1. Nature of the Case

This is a petition for judicial review of final agency action of the CSRB. CSRB concluded that it lacked jurisdiction over new issues in Blauer's employment grievance that were raised for the first time in a request for reconsideration. The Court of Appeals reversed, concluding that the law of the case precluded CSRB from dismissing the case on jurisdictional grounds.

2. Course of the Proceedings

In September 2003, the Department of Workforce Services reapportioned Blauer's job duties and assigned him to conduct administrative hearings full time. R. 551-53. Blauer grieved his new

assignment to the Career Service Review Board (CSRB), claiming the assignment was a demotion. R. 554-55. After conducting an administrative review of the file, CSRB concluded that it lacked jurisdiction over the grievance because no demotion had occurred. R. 20-26.

Blauer then filed a request for reconsideration, asking the CSRB to review six new issues – alleged violations of personnel rule – that he had not previously raised in the CSRB proceeding. R. 20-26, 27-149. CSRB declined to consider the six new claims, deeming them to be ancillary to the demotion grievance. R. 276-82. Blauer then filed a petition for review in the district court, and the district court ultimately agreed with the CSRB that no demotion occurred.¹ R. 582-83. But, the court remanded the new claims of alleged personnel rules violations to the CSRB for consideration. R. 583.

Of the six new claims, one was the subject of an earlier grievance within the Department, but had never been appealed to the CSRB. R. 528-33,

¹ The Court of Appeals agreed with the district court, holding that, because Blauer's assignment to conduct hearings full time was not a demotion, "CSRB did not err in declining jurisdiction over Blauer's grievance." *Blauer v. Dep't of Workforce Servs.*, 2005 UT App 488, ¶ 36, 128 P.3d 1204. While that appeal was pending, Blauer's employment was terminated on November 3, 2004, based on his inability to return to work after taking one year of medical leave. The Court of Appeals upheld Blauer's termination. *Blauer v. Dep't of Workforce Servs.*, 2007 UT App. 280, 167 P.3d 1102.

548-49, 642-43, 636. Four of the claims had never been raised in any antecedent grievance either within the Department or with the CSRB. The final claim had never been raised as an antecedent grievance in its own right, but had only been asserted as part of Blauer's demotion grievance. Blauer did not contest those procedural facts, and they are undisputed.

On remand from the district court, the Department moved for dismissal of the six new claims for lack of subject matter jurisdiction because the claims had not been brought within statutory time limits. R. 465-632. By its decision dated December 6, 2006, the CSRB concluded that it lacked jurisdiction to hear the remanded claims. R. 659-71.

3. Disposition Below

The Court of Appeals reversed and remanded to the CSRB to hear Blauer's six personnel grievances on the merits.

Statement of Facts

Blauer, an attorney for the Department, filed a grievance in July 2003 over an unsuccessful performance evaluation. R. 528-33. He also complained about the Department's failure to define job performance standards and

complained that he did not have a current performance plan in place. R. 532; 642-43. That grievance was appealed to the Department's director, who ruled in Blauer's favor and changed the performance evaluation to "successful." R. 548-49. Blauer did not appeal that grievance to the CSRB. R. 636.

In September 2003, the Department reapportioned Blauer's job duties and assigned him to conduct administrative hearings full time. R. 551-53. Blauer grieved his new assignment to the CSRB, claiming the assignment was a demotion. R. 554-55. After conducting an administrative review of the file, the CSRB concluded that it lacked jurisdiction over the grievance because no demotion had occurred. R. 20-26.

Blauer then filed a request for reconsideration, asking the CSRB to review six new issues not previously raised in the CSRB proceeding. R. 27-149. Five of those claims alleged that the Department violated personnel rules. R. 57-62. The other claim requested that the CSRB review some purported written reprimands in Blauer's file. R. 62. Specifically, Blauer alleged that:

- a. the Department failed to define Blauer's job performance parameters (R. 57-58);

- b. the Department assigned job tasks to Blauer outside his job description (R. 29-30);
- c. The Department representatives harassed and retaliated against Blauer for his request for accommodation for disabilities (R. 59-60);
- d. The Department failed to properly maintain Blauer's personnel records and refused him access to documentation in his personnel file (R. 60-61);
- e. The Department improperly denied Blauer administrative leave (R. 61); and
- f. The Department placed negative letters in Blauer's personnel file, thereby effectively issuing written reprimands against him. R. 62.

CSRB denied the motion for reconsideration. It declined to consider the new claims because it deemed those claims to be ancillary to the demotion grievance. R. 276-82.

Blauer filed a petition for review in the district court, and the district court ultimately agreed with the CSRB that no demotion occurred. R. 582-83. The court, however, remanded the new claims of alleged violations of personnel rules to the CSRB for consideration. R. 583. The remand order did not direct the CSRB to hear the claims on the merits:

Accordingly, the Plaintiff's First Claim for Relief is dismissed with prejudice, with the exception that the allegations in Paragraph 34 subsections (c) through (j) of the complaint which . . . are not based upon unlawful demotion, and which were also set forth by the Plaintiff in his Motion for Reconsideration (previously filed with the CSRB), are *remanded to the CSRB for consideration*.

R. 583 (emphasis added).

On remand to the CSRB, the Department moved to dismiss the remanded issues for lack of subject matter jurisdiction. R. 465-632. The CSRB conducted a jurisdictional hearing, where the parties presented memoranda and oral argument to a hearing officer. R. 652-58; 659. The Department attached documentary evidence to its memorandum. R. 483-632. Blauer referred to that evidence in his response but did not submit documentary evidence of his own, although nothing in the record indicates he was precluded from doing so. R. 645. The CSRB concluded, in a decision issued December 6, 2006, that it lacked subject matter jurisdiction to hear the six remanded issues. R. 659-71.

To overturn the CSRB's December 6, 2006 decision, Blauer then commenced two separate legal actions. First, on December 29, 2006, Blauer filed a petition for review with the Court of Appeals, initiating the present

action. Then, on January 3, 2007, Blauer filed a new district court action seeking a trial de novo, of the CSRB's decision.²

ARGUMENT

This Court should grant this petition because the Court of Appeals has rendered a memorandum decision in a case in which it lacks jurisdiction. Acting without jurisdiction is a significant departure from the accepted and usual course of judicial proceedings and warrants review by this Court. In addition, the Court of Appeals also erred by not dismissing the case for mootness. The Court of Appeals' error is further exacerbated because it forces an administrative agency to hear the merits of moot claims over which it likewise has no jurisdiction.

² The complaint also contained a second claim for a declaratory judgment against CSRB and the Department. See Docket, *Blauer v. Utah Dep't of Workforce Servs.*, Third Judicial District Court, Case No. 070900108. The district court dismissed the petition, and Blauer did not appeal.

1. By failing to dismiss the case for lack of jurisdiction, the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

"[Q]uestions regarding subject matter jurisdiction may be raised at any time because such issues determine whether a court has authority to address the merits of a particular case." *Housing Auth. v. Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724. Issues relating to subject matter jurisdiction are threshold questions that should be addressed before resolving other claims. *Id.* The Court of Appeals failed to examine its own subject matter jurisdiction under the undisputed facts of this case. If the Court of Appeals had examined its own jurisdiction, it would have concluded that it lacked subject matter jurisdiction to hear Blauer's six new claims of alleged personnel rule violations. Blauer's failure to preserve and process the new grievances within the statutory time limits deprived not only the CSRB of jurisdiction to hear those claims, but also precluded *any* judicial review of them. Both this Court and the Court of Appeals lack jurisdiction over Blauer's six new claims.

The Grievance and Appeal Procedure Act (GAPA) expressly limits the subject matter jurisdiction of both the CSRB *and* any reviewing court:

"Unless the employee meets the requirements for excusable neglect

established by rule, 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) (emphasis added); *see also Hom v. Utah Dep’t of Public Safety*, 962 P.2d 95, 99 (Utah App. 1998) (stating that “[GAPA] *explicitly prohibits judicial review* of a career service employee’s grievance when the employee has failed to pursue the grievance in a timely manner”) (emphasis added); *see also Southern Utah Wilderness Alliance v. Bd. of State Lands*, 830 P.2d 233, 234 (Utah 1992) (“In the absence of a specific statute granting us jurisdiction over a writ of review from an agency proceeding, we have no jurisdiction.”) This Court recently reaffirmed that “[w]here the legislature has imposed a specific exhaustion requirement . . . we will enforce it strictly.’ Strict enforcement of [a statutory exhaustion] provision dictates that if a party ‘fails to exhaust [its] administrative remedies prior to filing suit, the suit must be dismissed.’” *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 6, --- P.3d --- (quoting *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 17, 67 P.3d 466) (final brackets in original).³

³In addition to the specific exhaustion requirement in GAPA, the Court of Appeals may be similarly barred from hearing the claims under the *common law* doctrine of failure to exhaust administrative remedies. However, because the statutory provision is dispositive, this Court need not examine the common law doctrine.

Even if the CSRB may have been required, under the law of the case doctrine, to hear the merits of the six new claims, the Court of Appeals was not similarly bound. A district court ruling did not relieve the Court of Appeals of its "first duty to determine if it has jurisdiction." *Barney v. Division of Occupational & Prof'l Licensing*, 828 P.2d 542, 543-44 (Utah Ct. App. 1992). Blauer's failure to pursue timely antecedent grievances deprived not only the CSRB of jurisdiction to hear those grievances, but it also deprived the Court of Appeals and this Court of subject matter jurisdiction. *See also* Utah Code Ann. § 67-19a-401(4)(a) (West 2004).

The undisputed record demonstrates that Blauer did not raise antecedent grievances regarding four of the new claims, that he failed to appeal beyond the department head regarding the fifth claim, and that his sixth claim was subsumed by his previous demotion appeal and had never been pursued as a grievance in its own right. Blauer did not dispute these jurisdictional facts, either before the CSRB or the Court of Appeals. Accordingly, he waived any challenge to the undisputed evidence in the record that he had not preserved the grievances as required by GAPA. *See Brown v. Glover*, 2000 UT 89 at ¶ 23, 16 P.3d 540.

Blauer's failure to strictly adhere to GAPA's statutory framework not only deprived the CSRB of subject matter jurisdiction, but it also deprived the

Court of Appeals of subject matter jurisdiction to hear the claims. Due to a lack of jurisdiction, the Court of Appeals had no authority to issue an order remanding the case to the CSRB. *See Barney*, 828 P.2d 542, 543-44 (stating that “[i]f the court concludes it does not have jurisdiction, it retains only the authority to dismiss the action”).

Furthermore, the Court of Appeals would continue to lack subject matter jurisdiction if this matter is appealed again after the CSRB considers the merits of Blauer’s six new grievances. Intervening consideration by the CSRB would do nothing to change Blauer’s failure to preserve his six new grievances for judicial review, because GAPA’s preservation requirements will still not have been met. Indeed, those requirements can never be met because more than a year has passed since the alleged events giving rise to the grievances. *See Utah Code Ann. §§ 67-19a-401(5) & 67-19a-402* (West 2004) (specifying time limits for initiating and processing grievance with employing agency and to CSRB). Similarly, the Court of Appeals would also lack subject matter jurisdiction to hear Blauer’s discrimination claims, because the exclusive remedy for discrimination claims lies with the Division of Antidiscrimination and Labor and a subsequent appeal from that agency, not from the CSRB. *Buckner v. Kennard*, 99 P.3d 842, 852 (Utah 2004) (stating that “the exclusive remedy for an employee claiming a violation of

the UADA [Utah Antidiscrimination Act] is an appeal to the Division of Antidiscrimination and Labor”); *see also* Utah Code Ann. § 34A-5-107(15) (West 2004) (stating that UADA is the “exclusive remedy under State law for employment discrimination”).

By erroneously exercising subject matter jurisdiction and remanding the case to the CSRB, the Court of Appeals would potentially be faced with a jurisdictional dilemma if the case were to be appealed again. The Court of Appeals would either have to erroneously exercise jurisdiction again to review the CSRB’s decision or decline jurisdiction due to Blauer’s failure to preserve the grievances for judicial review. Instead, the Court of Appeals should have declined jurisdiction in the first instance. This Court should grant this petition for certiorari, vacate the Court of Appeals’ memorandum decision, and dismiss the appeal for lack of subject matter jurisdiction.

The Court of Appeals’ disregard of the jurisdictional limitations set by statute is contrary to public policy. When undisputed facts demonstrate an express statutory lack of both agency jurisdiction and court jurisdiction, it is a waste of taxpayer resources to force an agency to nevertheless hear those barred claims. It is particularly wasteful here, because the scope of the district court’s preservation ruling is ambiguous. In citing the district court’s memorandum decision, the Court of Appeals omitted the following

sentence, which at least raises a question as to whether the district court's preservation ruling was limited only to district court jurisdiction or also applied to CSRB's jurisdiction: "In other words, the Court declines to follow defendant's reasoning that these grounds for grieving were not raised administratively and are therefore deemed waived or that this Court has no jurisdiction to consider them." R. 579.

Given this ambiguity, and that the district court's formal order only remanded the claims for consideration, without specifically requiring consideration *on the merits*, and given the undisputed facts demonstrating that Blauer has indeed failed to preserve his grievances, the Court of Appeals' mechanical application of the law of the case doctrine was in error. Instead, the Court of Appeals should have determined that the unique circumstances of this case – implicating subject matter jurisdiction of both the reviewing agency and Utah's appellate courts – constitute an appropriate exception to the law of the case doctrine that would therefore justify relieving the CSRB of the district court's mandate. *See Thurston v. Box Elder County*, 892 P.2d 1034, 1038 (Utah 1995) (stating that "any change with respect to the legal issues governed by the mandate must be made by the appellate court that established it *or by a court to which it, in turns, owes obedience*") (emphasis added).

Since a court can reconsider its *own* prior decision in contravention to the law of the case doctrine “when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice,” *Id.*, then surely the Court of Appeals could have properly overridden a district court’s clearly erroneous jurisdictional determination to avoid a manifest injustice. The Department respectfully asserts that, where the undisputed evidence establishes that neither the CSRB, the district court, nor the Court of Appeals has subject matter jurisdiction, the Court of Appeals’ memorandum decision works a manifest injustice by requiring the CSRB and the parties to undergo the expense of a hearing on the merits. Such a result is particularly unjust, given that this case is now moot and that the Court of Appeals would continue to lack jurisdiction if the case were to be appealed again.

2. The Court of Appeals ruled on a moot case and has ordered CSRB to hear the merits of a moot case

The well-settled and strong judicial policy against issuing advisory opinions dictates that courts refrain from adjudicating moot questions. *Richards v. Baum*, 914 P.2d 719, 720 (Utah 1996). “An appeal is moot if during the pendency of the appeal circumstances change so that the

controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.” *Id.* (quoting *Franklin Fin v. New Empire Dev. Co.*, 659 P.2d 1040, 1043 (Utah 1983)).

After the Department had filed its answer brief in this matter, the Court of Appeals in a separate appeal affirmed the termination of Blauer’s employment with the Department. *Blauer v. Dep’t of Workforce Servs.*, 2007 UT App 280, 167 P.3d 1102 (*Blauer I*). Blauer’s dismissal was for job abandonment and not for any job performance issues that may be directly or indirectly related to this appeal.⁴ Blauer’s six new claims related to job performance parameters, being assigned tasks outside of his job description, access to his personnel file, retaliation for requesting accommodations, and negative letters in his personnel file. R. 29-30, 57-62. Blauer never lost pay nor was he demoted. Thus, any remedy that Blauer may seek for any alleged violations of personnel rules has been rendered moot by his intervening dismissal, which dismissal has now been affirmed on appeal. In particular, any reassignment of job duties – which has been the core remedy sought by

⁴See *Blauer*, 2007 UT App 280 at ¶ 1 (stating that Blauer was dismissed “for his failure to return to work within one year of taking leave”). CSRB noted that Blauer’s intervening dismissal had rendered at least part of Blauer’s claims moot. R. 687. The appeal of Blauer’s dismissal was pending before this Court when CSRB issued its decision in the present matter.

Blauer throughout this and previous appeals – has been rendered moot by Blauer’s dismissal. The CSRB cannot provide Blauer with a remedy with any legal effect. Thus, not only did the Court of Appeals rule on a moot case, it ordered CSRB to conduct a hearing on moot claims. By so doing, the Court of Appeals has so far departed from the usual course of judicial proceedings as to call for a review of the decision by this Court.


CONCLUSION

The Court of Appeals failed to consider its own subject matter jurisdiction when it mechanically applied the “law of the case” doctrine to this case. The Court of Appeals lacked subject matter jurisdiction to hear this appeal because GAPA expressly restricts the subject matter jurisdiction of both CSRB *and* any reviewing court to only those grievances that have been timely preserved and pursued within the employing agency and then subsequently appealed to the CSRB. By not preserving his grievances, Blauer deprived the Court of Appeals of subject matter jurisdiction to hear this appeal, regardless of whether the CSRB was bound by the law of the case to hear the grievances. Alternatively, the Court of Appeals should have

dismissed the appeal because the intervening affirmation of Blauer's dismissal rendered the appeal moot.

The Court of Appeals' compound mistake of deciding a moot case without jurisdiction is substantial enough to warrant review by this Court. Accordingly, the Department respectfully asks this Court to grant this petition.

Dated this 27th day of May, 2008.

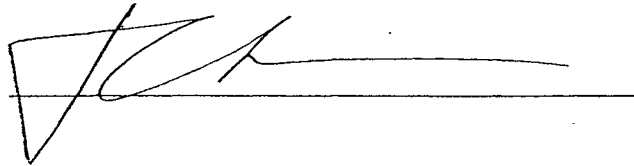

J. CLIFFORD PETERSEN
Assistant Utah Attorney General
Attorney for the Department of
Workforce Services

CERTIFICATE OF SERVICE

This is to certify that I mailed TWO copies of the foregoing *Petition for a Writ of Certiorari* to the following this 27th day of May, 2008:

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A handwritten signature in black ink, appearing to be 'R. Thompson', written over a horizontal line.

Tab 11

IN THE SUPREME COURT OF STATE OF UTAH

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FILED

UTAH APPELLATE COURTS

AUG 06 2008

Lorin Blauer,

Plaintiff and Respondent,

v.

Case No. 20080457-SC
20061177-CA

Utah Department of Workforce
Services, an agency of the State
of Utah, and Utah Career Service
Review Board,

Defendants and Petitioners.

ORDER

This matter is before the court upon a Petition for Writ of
Certiorari, filed on May 27, 2008.

IT IS HEREBY ORDERED pursuant to Rule 51(a) of the Utah
Rules of Appellate Procedure the Petition for Writ of Certiorari
is denied.

For The Court:

Dated

8-6-08


Matthew B. Durrant
Associate Chief Justice