

2004

# Leatham v. Utah Department of Corrections : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF  
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DOCKET NO. 20040376

IN THE UTAH COURT OF APPEALS

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DAN LEATHAM, ROBERT E. STEELE )	BRIEF OF APPELLANTS/
TIM SLOCUM, HAROLD W. JOHNSON )	PETITIONERS
and W. FRED HURST )	
)	
Appellants/Petitioners, )	
)	
vs. )	
)	
UTAH DEPARTMENT OF )	Case No. 20040376
CORRECTIONS and THE CAREER )	
SERVICE REVIEW BOARD of the )	
State of Utah, )	
)	
Respondents/Agencies. )	
)	

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ADDENDUM TO BRIEF OF APPELLANTS/PETITIONERS  
DAN LEATHAM, ROBERT E. STEELE, TIM SLOCUM,  
HAROLD W. JOHNSON AND W. FRED HURST

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APPEAL FROM THE UTAH CAREER SERVICE REVIEW BOARD

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UTAH APPELLATE COURTS  
NOV 29 2004

IN THE UTAH COURT OF APPEALS

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(1998).

Exhibit A

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

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W. FRED HURST, HAROLD W.	:	
JOHNSON, DANIEL LEATHAM,	:	DECISION
TIMOTHY SLOCUM, and ROBERT E.	:	AND
STEELE,	:	FINAL AGENCY ACTION
	:	
Grievants and Appellants,	:	
	:	
v.	:	
	:	
UTAH DEPARTMENT OF	:	
CORRECTIONS,	:	
	:	Case Nos. 7 CSRB 65 (Step 6)
Agency and Respondent.	:	19 CSRB/H.O. 273 (Step 5)

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On Wednesday, January 21, 2004, the Career Service Review Board (Board and CSRB) completed its appellate review of the above-entitled case with a hearing involving the parties and an executive session. The following Board members were present and heard oral argument at the hearing and deliberated in an executive session: Blake S. Atkin, Chair, Joan M. Gallegos, and Felix J. McGowan. At the hearing Appellants Daniel Leatham, Timothy Slocum, and Robert E. Steele (Grievants/Appellants)<sup>1</sup> were present and represented by Phillip W. Dyer, Attorney at Law, who presented oral argument on Appellants' behalf. Carey A. Seager, Attorney at Law, was also present and assisted Mr. Dyer at Counsel's table. Assistant Attorney General Robert L. Steed, represented the Department of Corrections (Department and DOC)<sup>2</sup> with Linda Whitney and

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<sup>1</sup>Messrs. W. Fred Hurst and Harold Johnson were not present at this Board hearing. However, they are proper parties to this appeal and are specifically referenced whenever the Board refers to "Appellants" in this *Decision and Final Agency Action*.

<sup>2</sup>Mr. Steed wrote the *Agency's Response to Grievants' Step 6 Brief on Appeal to the Career Service Review Board from the Remand Decision of the Step 5 Hearing Officer (Agency's Response Brief After Remand)* and presented oral argument on behalf of the Department at the January 21, 2004 Board hearing. However, Assistant Attorney General Patrick B. Nolan represented the Department at the "Remand" evidentiary hearing held in front of Hearing Officer K. Allan Zabel on December 5, 2002. Mr. Nolan also represented the Department during Appellants' initial appeal to the Board of the Hearing Officer's October 12, 2001, *Decision on Agency's Motion to Dismiss and Motion in Limine Including Findings of Fact, Conclusions of Law, and Decision (Decision 1)*. This representation included preparing a brief on behalf of the Department and presenting oral argument at the initial Board hearing held on August 7, 2002. Prior to Mr. Nolan, the Department was represented by Assistant Attorney General Daryl Bell as well.

Lori Worthington present as the Department's management representatives.

### AUTHORITY

The Board's statutory authority is set forth in the *Utah Code Annotated* at §§ 67-19a-101 through -408 (*Supp. 1998*) (hereinafter *Utah Code*) of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act (USPMA) at §§ 67-19 *et seq.* The CSRB's administrative rules are published in the *Utah Administrative Code* at R137-1-1 through -23 (*Supp. 1998*). This Board-level or Step 6 appeal hearing is the final administrative review in the State Employees' Grievance and Appeal Procedures for Messrs. Hurst, Johnson, Leatham, Slocum and Steele's appeal of the denial of their salary and personnel rule violation grievance. Both the Board's evidentiary/Step 5 and these appellate/Step 6 proceedings are designated as "formal adjudications" pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB's Step 5 and Step 6 hearings. (§§ 63-46b *et seq.*)

### PROCEDURAL BACKGROUND

On January 30, 1998, Appellants filed a grievance with the Department concerning "on-call compensation" and violation of State personnel rules.<sup>3</sup> Appellants' January 30, 1998 "Statement of Grievance" provides specifically as follows:

Statement of Grievance:

State of Utah Human Resource Management Rule (July 1997) R777-8.(8)(c) **Working Conditions, Hours Worked On-call Time**, states:

"On-call time: Employees required by agency management to be available for on-call work shall be compensated for on-call time at the rate of 1 hour for every 12 hours the employee is on-call."

We have been required by our employer to be on "24 hour call".

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Mr. Bell filed the original *Motion to Dismiss and Motion in Limine* (Motion to Dismiss) which were granted by the Hearing Officer on October 12, 2001. (*Decision 1*) Mr. Bell also prepared the *Memoranda in Opposition to Grievant's Motion for Reconsideration* which the Hearing Officer denied on December 26, 2001. (*Decision on Motion for Reconsideration*) Finally, Assistant Attorney General David Gardner also represented the Department for a brief period of time during these proceedings.

<sup>3</sup>The Board is cognizant of the continued uncertainty as to the specific date Appellants filed their grievance in this matter. Therefore, as set forth more fully at pages 13-15 below, the Board finds that Appellants filed their initial grievance with the Department on Friday, January 30, 1998. This finding is made pursuant to CSRB rule R137-1-22(4)(a).

We have not been receiving 1 hour of compensation for every 12 hours we have been required to be "On-call".

Remedy or Relief Sought:

We want to be made whole for the lost "On-call" compensation we have not received.<sup>4</sup>  
The CSRB received this grievance on Thursday, February 5, 1998.<sup>5</sup>

On February 6, 1998, Appellant's received a Level III grievance response from Frederick Van Der Veur, Director, Division of Institutional Operations for the Department.<sup>6</sup> In his response, Mr. Van Der Veur specifically denied Appellants' requested relief and alerted them of the opportunity to advance their grievance to the next level of the State's Grievance and Appeal Procedures. (*Utah Code Ann. § 67-19a-101 et seq.*; CSRB rule R137-1-14)<sup>7</sup> The CSRB received

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<sup>4</sup>At the time Appellants filed this grievance, DHRM rule concerning "on-call" compensation provided as follows:

*On-call time: Employees required by agency management to be available for on-call work shall be compensated for on-call time at a rate of 1 hour for every 12 hours the employee is on-call.*

*(i) Time is considered "on-call time" when the employee has freedom of movement in personal matters as long as he/she is available for call to duty.*

*(ii) Employees record on-call time as "on-call paid" not as "hours worked" on their time sheet, and shall be paid the following pay period. Any time actually worked during the on-call period is recorded in increments of 15 minutes as "hours worked" in addition to on-call time.*

Department of Human Resource Management (DHRM) rule R477-8-6(8)(c)(i)(ii)

<sup>5</sup>Though not specifically specified in the Appellants' "Statement of Grievance," it is clear that Appellants seek compensation for "On-call time" for a period of four years preceding the date they filed their grievance. (Tr. at 131; Grievants' *Step 6 Brief on Appeal to the Career Service Review Board from the Remand to the Step 5 Hearing Officer* at 15 (*Appellant's Step 6 Brief on Appeal After Remand*), Grievants' *Memorandum of Points and Authorities in Opposition to Agency's Motion to Dismiss and in Limine* at 6-7 (*Appellant's Opposition to Motion to Dismiss*), *Decision 1* at 4, Grievants' *Step 6 Brief on Appeal to the Career Service Review Board from the Decisions of the Step 5 Hearing Officer* at 9, and 9 at n.10 (*Appellant's Initial Step 6 Brief on Appeal*), *Findings of Fact Conclusions of Law and Decision After Remand* at 6, 8, n.1 (*Decision2*))

<sup>6</sup>This response dated February 6, 1998, serves as conclusive proof that the Department received Appellant's grievance sometime prior to February 6, 1998.

<sup>7</sup>In his February 6, 1998 response, Mr. Van Der Veur also stated that he was "waiving the level I and II responses due to the multiple supervisors involved and my belief that this claim should be addressed at the Department level."



Mr. Van Der Veur's Level III response on February 11, 1998.<sup>8</sup>

Thereafter, Appellant's appropriately advanced their grievance to the executive director of the Department.<sup>9</sup> On July 30, 1999, Appellants, through their legal counsel, Mr. Phillip W. Dyer, filed a motion to amend their grievance to assert a claim of overtime compensation under Article XVI, Section 6, of the *Utah Constitution*.<sup>10</sup> This section of the *Utah Constitution* provides in pertinent part that "eight hours shall constitute a day's work on all works or undertakings carried on or aided by the State, County, or Municipal governments. . . ." In connection with this motion, Appellants asserted, through their counsel, that Article XVI, Section 6, entitled them to compensation at a rate of time and one-half (1/2) for any and all work performed in excess of eight hours per day.<sup>11</sup>

On February 7, 2000, R. Spencer Robinson (ALJ Robinson), Administrative Law Judge for the Department, issued his order denying Grievants' *Motion to Amend*.<sup>12</sup> In his denial, ALJ Robinson reasoned that because "on-call hours" are not hours actually worked nor are they part

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<sup>8</sup>This Level III grievance response is part of the file maintained by the CSRB.

<sup>9</sup>Though CSRB rule R137-1-14 uses the term "steps" to describe a grievance as it progresses through the State's Grievance and Appeal Procedures, the Department of Corrections commonly refers to these steps as "levels". Thus, executive director or department level grievances are referred to as Level IV grievances by the Department of Corrections.

<sup>10</sup>This motion and the accompanying memorandums of support and opposition to it are also part of the file maintained by the CSRB and is specifically referenced in the Department's *Final Order* dated January 19, 2001, and by the Hearing Officer in *Decision 1*.

<sup>11</sup>It is not entirely clear from Appellants' *Motion to Amend* and the accompanying memoranda how Appellants came up with a computation rate of "time and one-half (1/2)" in connection with their Article XVI, Section 6, *Utah Constitution*, claim. The only reference the Board could find in the memoranda supporting this compensation rate was at page 8 of Appellants' *Reply Memorandum in Further Support of Motion to Amend Grievance* dated August 20, 1999, wherein Appellants assert that such compensation would be "in keeping with the development of modern law. . . ."

The Board notes that in *Decision 1*, the Hearing Officer addressed this issue pursuant to the motions filed with him and held that it was "an unacceptable reach" for Appellants to rely on Article XVI, Section 6 of the *Utah Constitution* to support their claim for compensation at a rate of one and one-half (1/2) for all times that they were "on-call". Careful review of Appellants' *Initial Step 6 Brief on Appeal* indicates that Appellants are not challenging this specific aspect of *Decision 1* in their appeal to this Board.

<sup>12</sup>ALJ Robinson originally denied Appellants' *Motion to Amend* on November 3, 1999. However, he allowed Appellants to file additional or supplemental memoranda for him to review in reconsideration of his order. After reviewing the additional memoranda, ALJ Robinson issued his final order on February 7, 2000. Again, these documents are part of the file maintained by the CSRB.

of the work day, Article XVI, Section 6, of the *Utah Constitution*, did not apply to Grievants' requested remedy that they be "made whole for the lost 'on-call' compensation we [they] had not received." (*Id.*)

On May 9, 2000, an evidentiary Level IV hearing concerning Appellants' grievance was held before ALJ Robinson. This hearing was held as part of the Department's internal grievance procedure and in consonance with the rules established by the CSRB at R137-1-15 and under the authority of *Utah Code Ann.* § 67-13-28.

On May 22, 2000, ALJ Robinson entered his *Report and Recommendation* wherein he recommended that Appellants be compensated for "on-call time" in accordance with DHRM rule R477-8-6(8)(c)(i) which requires an employee to be compensated for "on-call time" at a rate of 1 hour for every 12 hours the employee is on call.<sup>13</sup> However, in his *Report and Recommendation*, ALJ Robinson specifically limited Appellants' recovery to "on-call pay for a period of 20 days back from the date they filed the grievance"<sup>14</sup> and prospectively from the date of filing, if the evidence shows they were 'on-call.'"<sup>15</sup>

As authorized in Department policy,<sup>16</sup> Appellants then requested that the executive director for the Department review the ALJ's *Report and Recommendation*. (Agency Ex. 3)<sup>17</sup> On January 19, 2001, Executive Director Mike Chabries (Exec. Dir. Chabries) entered his *Final Order* accepting and adopting the findings and conclusions of ALJ Robinson. (Agency Ex. 4) Specifically, Exec. Dir. Chabries decided that Appellants were in fact "on-call by virtue of being assigned a commute vehicle, or, in Mr. Slocum's case, by virtue of his POST order." (*Id.*) He then ordered that

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<sup>13</sup>For the precise wording of the DHRM rule regarding "on-call" compensation at the time Appellants filed their grievance see footnote 4.

<sup>14</sup>In reaching this decision, ALJ Robinson focused primarily on *Utah Code Ann.* § 67-19a-401(5) and the CSRB decision in *Karber v. Utah Dep't of Corrections*, Case No.6 CSRB 57 addressing this statute.

<sup>15</sup>*Report and Recommendation*, Agency Exhibit 3 ¶¶ 3, 5 at 4.

<sup>16</sup>In accordance with departmental policy, either party may request a meeting with the Executive Director to review the ALJ's *Report and Recommendation*. This request must be done within five working days upon receipt of the *Report and Recommendation*. If review of the Report and Recommendation is not requested within the five working days of receipt, it becomes the final order for the Department.

<sup>17</sup>It is clear from the documents on file with the CSRB that after ALJ Robinson entered his *Report and Recommendation*, the parties attempted to mediate this matter. These attempts were unsuccessful and on January 12, 2001, Mr. Dyer sent a facsimile to ALJ Robinson requesting that the matter be referred to the Executive Director for a final order. (Agency Ex. 4)

Appellants be permitted to submit amended time sheets listing “on-call time” back 20 days from the date they filed their grievance and then forward to include the time Appellants could establish they were “on-call.” (*Id.*) In reaching this decision, Exec. Dir. Chabries also limited the compensation to be paid to Appellants for any “on-call time” to “1 hour’s pay for every 12 hours they were ‘on-call’ during that time period.” (*Id.*)<sup>18</sup>

In his Final Decision, Exec. Dir. Chabries also elected to not exercise discretion to go back more than 20 working days from the date the grievance was filed in awarding this “on-call” compensation. (*Id.*)<sup>19</sup> Finally, with respect to Appellants’ motion to amend their grievance to include claims under Article XVI, Section 6, *Utah Constitution*, Exec. Dir. Chabries concluded that “‘on-call time,’ since it is not hours worked, is not part of the work day. Therefore, Article XVI, Section 6, is not applicable.” (*Id.*)

On February 5, 2001, Appellants timely filed their appeal of Exec. Dir. Chabries’ *Final Order* with the CSRB.

#### **PROCEEDINGS BEFORE THE CAREER SERVICE REVIEW BOARD**

In addressing the involved proceedings before the CSRB in connection with this matter, the Board makes special note of the numerous motions and memoranda filed in this case. The proceedings before the CSRB began when Appellants filed their appeal of the Department’s *Final Order* with the CSRB on February 5, 2001. Thereafter, on May 2, 2001, the Department filed its *Motion to Dismiss and Motion in Limine* with accompanying memoranda of points and authority in support of each with the CSRB.<sup>20</sup>

In its motion, the Department moved to dismiss Appellants’ grievance primarily on the basis that pursuant to Exec. Dir. Chabries’ *Final Order*, Appellants had been granted the remedy they

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<sup>18</sup>Though Exec. Dir. Chabries does not cite to any specific law or rule in making this determination, it is evident that he is referring to DHRM rule R477-8-6(8)(c)(i) which was cited in ALJ Robinson’s *Report and Recommendation* which requires that an employee who is to be available for “on-call” work shall be compensated for “on-call time” at a rate of 1 hour for every 12 hours the employee is “on-call”. (Agency Ex. 3, ¶ 9 at 4-5)

<sup>19</sup>As discussed briefly at footnote 3 above, and more fully at pages 13-15 below, the Board, pursuant to CSRB rule R137-1-22(4)(a), is correcting the factual findings in this case to find that Appellants filed their grievance on January 30, 1998. Both ALJ Robinson and Exec. Dir. Mike Chabries found that Appellants filed their grievance on February 11, 1998. (Agency Exs. 3, 4)

<sup>20</sup>These motions and memoranda were filed at the prehearing conference held on May 2, 2001, before then Administrator Robert N. White.

sought “to the full extent of the law.” (*Memorandum in Support of Motion to Dismiss* at 6) In making this argument, the Department relied primarily on *Utah Code Ann.* § 67-19a-401(5) and CSRB rule R137-1-2.<sup>21</sup>

In its motion to dismiss, the Department essentially argued that absent excusable neglect, any claim by Appellants for “on-call” compensation that extended beyond 20 working days from the date the grievance was filed was “barred by the statute of limitations imposed on the filing of employee grievances.” (*Reply to Memorandum in Opposition to Motion in Limine and Motion to Dismiss* at 4 (*Reply for Motion to Dismiss*)) The Department argued that since Appellants failed to meet the requirements of “excusable neglect,” it acted appropriately and lawfully in limiting Appellants’ recovery of “on-call” compensation to 20 working days from the date Appellants filed their grievance. (*Reply from Motion to Dismiss* at 5)

In their opposition to the Departments motion to dismiss, Appellants argued that the 20-day time limit for filing grievances under *Utah Code Ann.* § 67-19a-401(5) governs jurisdiction only and does not limit “the scope of their remedy to twenty (20) days prior to the filing of their grievance.” (*Appellants’ Opposition to Motion to Dismiss* at 7) Instead, Appellants argued that the scope of their recovery should include “on-call time” for a period of four years preceding the date on which they filed their grievance.<sup>22</sup>

Appellants further argued that limiting their eligibility to recover “on-call” compensation to the 20 days preceding the date they filed their grievance, violates the “open courts” provision of the *Utah Constitution*. (*Id.* at 3 n.8) Finally, Appellants argued that the Department’s conduct allegedly designed to discourage Appellants from requesting “on-call” compensation bars them from asserting that Appellants’ grievance was “untimely filed.” (*Id.*)

After considering the Department’s motion and the memoranda in support and opposition

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<sup>21</sup>*Utah Code Ann.* § 67-19a-401(5) provides as follows:

(5)(a) *Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:*

(i) *within 20 working days after the event giving rise to the grievance; or*

(ii) *within 20 working days after the employee has knowledge of the event giving rise to the grievance.*

(b) *Notwithstanding Subsection (5)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.*

<sup>22</sup>See footnote 5 at page 3 above.

thereto, the Hearing Officer entered his *Decision 1* on October 12, 2001. In this written decision, the Hearing Officer upheld the Department's *Final Order* concluding that "Grievants have received all on-call compensation to which they are entitled under the laws and rules applicable to their grievance." (*Decision 1* at 3)

Specifically addressing these laws, the Hearing Officer concluded that: "The time limitations contained in §67-19a-401(5)(a), *Utah Code*, constitute a limit on the scope of relief that can be granted Grievants . . . The CSRB and its hearing officer do not have jurisdiction to consider allegations of improper conduct or knowing violations of statute and policy that were not timely grieved." (*Id.*)

On October 30, 2001, Appellants filed a *Motion for Reconsideration* pursuant to *Utah Administrative Code* R137-1-21(12). On December 26, 2001, the Hearing Officer entered his decision denying Appellants' *Motion for Reconsideration*.

On January 2, 2002, Appellants timely appealed the Hearing Officer's *Decision 1* to the Board. In their initial appeal to the Board, Appellants challenge the Hearing Officer's *Decision 1* on two primary grounds. First, Appellants argue that the Hearing Officer erred in sustaining the Department's *Final Order* limiting Appellants' compensation for "on-call time" to the 20 working days preceding the filing of their grievance. (*Appellants' Initial Step 6 Brief on Appeal* at 5) In making this argument, Appellants essentially argue that limiting Appellants' relief to the 20 working days preceding the filing of their grievance violates the Open Courts provision contained in the *Utah Constitution*. (*Id.* at 5-6)<sup>23</sup> In connection with this limitation of action argument, Appellants argue alternatively that the Hearing Officer erred by not finding that the Department acted "arbitrarily and capriciously" in not awarding Appellants' "on-call time" compensation back one year from the filing of their grievance under *Utah Code Ann. § 67-19a-401(5)(b)*.<sup>24</sup> (*Id.* at 10-11)

Second, Appellants argue that because an evidentiary hearing was not held prior to the Hearing Officer's *Decision 1*, his decision is more appropriately characterized as an "informal

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<sup>23</sup>At page 6 of their *Initial Step 6 Brief on Appeal*, Appellants specifically cite to Article I, Section 11, of the *Utah Constitution*.

<sup>24</sup>In their *Initial Step 6 Brief on Appeal*, Appellants do not specifically cite to *Utah Code Ann. § 67-19a-401(5)* in making this alternative argument. However, it appears clear from this argument and from Appellants' reference to the Department's *Report and Recommendation*, that this is in fact the statute they are relying upon for their alternative position that the Department should have awarded back pay for "on-call" compensation for at least one year preceding the date they filed their grievance.

adjudicative proceeding,” thereby allowing Appellants “to file a petition with the District Court for a trial de novo from the Department’s Step 6 decision in this matter.” (*Id.* at 13)<sup>25</sup>

On Wednesday, August 7, 2002, the Board completed its Step 6 review of Respondents’ initial appeal with a hearing involving all the parties and by meeting in an executive session. On October 3, 2002, the Board issued its *Order of Remand* in this case. This Order was made pursuant to CSRB rule R137-1-22(7).

In its *Order of Remand*, the Board specifically remanded this case to the Hearing Officer to make an “evidentiary determination on the sole issue as to whether there was excusable neglect allowing the Grievants to *wait* until January or February 1998 to file their grievance concerning ‘on-call time’.” (Emphasis added) By its Order, the Board specifically left it to the discretion of the Hearing Officer to determine whether there was excusable neglect sufficient to allow Grievants to wait until January or February 1998 to file their grievance. In addition, the Board left it to the Hearing Officer to decide whether to obtain this evidence through affidavits, stipulated facts, or sworn testimony. (*Order of Remand*) On Thursday, December 5, 2002, the Hearing Officer held an evidentiary hearing on the issue of “excusable neglect.”

## STANDARDS OF REVIEW AND ISSUES ON APPEAL

### A. REMANDED EVIDENTIARY ISSUES AND DECISION ON REMAND

As set forth above, an evidentiary hearing regarding “excusable neglect” was held on Thursday, December 5, 2002. At the hearing, Appellants were represented by Phillip W. Dyer, Attorney at Law. Appellants Harold W. Johnson, Daniel Leatham, Timothy Slocum and Robert Steele were present at the evidentiary hearing. Appellant W. Fred Hurst was not present. The Department was represented by Assistant Attorney General Patrick B. Nolan. Assisting Mr. Nolan and acting as the Department’s management representatives were David Salazar, Human Resource Director for the Department, and Linda Whitney, Human Resource Manager for the Department.

The statute authorizing the CSRB to hold an evidentiary hearing can be found at *Utah Code*

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<sup>25</sup>As directly quoted above from their *Initial Step 6 Brief on Appeal*, Appellants refer to the “Department’s Step 6 Decision in this matter.” The Board believes this to be a typographical error and that in fact the Appellants are referring to the Hearing Officer’s Step 5 decision rendered after motions and accompanying memoranda were filed. In reaching this conclusion, the Board cites to Grievants’ *Initial Step 6 Reply Brief* wherein they reference CSRB rule R137-1-17 which specifically incorporates *Utah Code Ann.* § 67-19a-403(2)(b) and *Utah Code Ann.* § 63-64b-4. CSRB rule R137-1-17(5) and *Utah Code Ann.* § 63-46b-15 and 17 allow the State’s District Courts to “review by trial de novo all final agency actions resulting from informal adjudicative proceedings. . . .”

*Ann.* § 67-19a-406. Moreover, because Appellants are challenging the Department's denial of salary authorized under State personnel rules, they have the burden of proving their case by substantial evidence and the burden of going forward. (*Utah Code Ann.* § 67-19a-406(2)(b) and (c)) At the remanded evidentiary hearing, the sole issue was whether there was excusable neglect allowing the Grievants to wait until January or February 1998 to file their grievance concerning "on-call time." (*Order of Remand*)

At this evidentiary hearing, testimony was heard and evidence received concerning the issue of "excusable neglect." Specifically, there was testimony given and documentary evidence received concerning the reasons why Appellants did not file their grievance concerning "on-call time" until January or February 1998. In connection with this testimony, there was also testimony given and documentary evidence received relating to Appellants' "on-call" status both at the time Appellants filed their grievance and for many years preceding the date of that filing.

At the conclusion of this evidentiary hearing, the Hearing Officer entered his *Findings of Fact, Conclusions of Law and Decision After Remand (Decision 2)* dated January 8, 2003. In making this Step 5 decision, the Hearing Officer thoroughly examined the evidence presented at the evidentiary hearing and carefully considered the legal arguments raised by the parties.

After considering the evidence presented at the evidentiary hearing and examining the relevant statutes and rules governing excusable neglect in the filing of employee grievances, the Hearing Officer entered his Step 5 decision essentially concluding that Grievants had received all the "on-call" compensation to which they were entitled under the statutes and rules applicable to their Grievance.<sup>26</sup> In connection with this decision, the Hearing Officer specifically concluded that "Grievants did not have excusable neglect under *Utah Code* § 67-19a-401(5)(a) and *Utah Administrative Code* R137-1-13(3) for the late filing of their grievance." (*Decision 2* at 6)

As in *Decision 1*, the Hearing Officer again concluded that "the CSRB and its Hearing

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<sup>26</sup>In *Decision 2*, the Hearing Officer specifically found that "Grievants [Appellants] are entitled to on-call compensation for any time they can prove by satisfactory evidence that they served on call beginning at a point 20 working days prior to February 5, 1998, and continuing thereafter for as long as they were required to be on call." (*Id.* at 12) As stated previously, pursuant to CSRB rule R137-1-22(4)(a), the Board is correcting this factual finding to find that Appellants filed their grievance on January 30, 1998. The Board is, however, sustaining the Hearing Officer's ultimate legal conclusion upholding the Department's *Final Order* that Appellants are entitled to "on-call" compensation only for the 20 working-day period prior to the date they filed their grievance for those periods of time that they were in "on-call" status as defined by DHRM rule at the time they filed their grievance.

Officer do not have jurisdiction to consider allegations of improper conduct or knowing violations of statute and policy that were not timely grieved” and that the time “limitations contained in §67-19a-401(5)(a), *Utah Code*, are jurisdictional and constitute a limit on the scope of relief that can be granted to Grievants.” (*Decision 2* at 5-6) Finally, the Hearing Officer also concluded that the time limitation contained in *Utah Code Ann. § 67-19a-401(5)(b)* is jurisdictional and creates an ultimate time limit on the scope of relief that can be granted by State agencies and the CSRB when considering grievances. (*Id.* at 5, 12)<sup>27</sup>

## B. ISSUES ON APPEAL

In their appeal to the Board of the Hearing Officer’s *Decision After Remand (Decision 2)*, Appellants appropriately reassert the issues raised in their initial appeal of the Hearing Officer’s *Decision 1*.<sup>28</sup> Specifically, Appellants reassert that the Hearing Officer erred in sustaining the Department’s *Final Order* limiting Appellants’ compensation for “on-call time” to the 20 working days preceding the filing of their grievance. (*Appellants’ Initial Step 6 Brief on Appeal* at 5)<sup>29</sup> In addition, Appellants argue that the Hearing Officer’s *Decision 1* is an “informal adjudicative proceeding” thereby mandating that Appellants file a petition with the District Court for a “trial de novo” of the Hearing Officer’s *Decision 1*. (*Appellants’ Initial Step 6 Brief on Appeal* at 5, 10, 13)

In addition to these issues already before the Board, Appellants also now appeal several aspects of the Hearing Officer’s *Decision 2*. Specifically, Appellants argue that the Hearing Officer

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<sup>27</sup>In *Decision 2*, the Hearing Officer set forth five conclusions of law relative to this case. At Footnote 2 of *Appellants’ Reply Brief After Remand*, Appellants object to all but one of these conclusions of law as being “beyond the scope” of the issues to be addressed on remand. The Board notes, but does not share Appellants’ concerns on this issue. Careful review of the Hearing Officer’s Conclusions of Law as set forth in *Decision 2* reveals that these conclusions are essentially restatements of the Hearing Officer’s Conclusions of Law as set forth in *Decision 1* relating to the scope of relief to which Appellants are entitled and were fully briefed and argued by the parties prior to the remanded hearing. Moreover, because they are conclusions of law, the Board will review them giving no deference to the Hearing Officer’s decision on these legal issues. (*Utah Administrative Code* R137-1-22(4)(c))

<sup>28</sup>Footnote 1 of *Appellants’ Brief After Remand* provides as follows:

*Pursuant to the CSRB’s Order of Remand dated October 3, 2002, and Order limiting briefing issues dated July 1, 2003, Grievants have limited this Step 6 Brief to the issues raised by Decision 2. However, the issues previously briefed by the parties are still properly before the CSRB for final disposition.*

<sup>29</sup>In support of this argument, Appellants rely heavily on the Open Courts provision contained in Article I, Section 11 of the *Utah Constitution* and *Utah Code Ann. § 67-19a-401(5)*.



erred in concluding that Appellants did not have excusable neglect for the late filing of their grievance and thus sustaining the Department's *Final Decision* limiting their recovery for "on-call time" to the 20 working days prior to the date they filed their grievance.

In addition, Appellants assert that the Hearing Officer erred in deciding "issues of law" that were not argued or briefed at the remand hearing. (*Appellants' Brief on Appeal After Remand* at 3) Specifically, Appellants argue that the Hearing Officer erred in addressing the event giving rise to Appellants' grievance and applying *Utah Code Ann.* § 67-19a-401(5)(b) in his analysis of this case. (*Id.* at 3-4, n.6)

Finally, Appellants argue that the Hearing Officer erred in "'revising' his prior finding of fact regarding the filing date of the grievance." (*Id.* at 5-6) These issues will be addressed in the remainder of this *Decision and Final Agency Action*.

### C. THE BOARD'S APPELLATE STANDARDS OF REVIEW

We review Appellant's appeal under *Utah Administrative Code*, R137-1-22(4)(a)-(c), (*Supp. 2003*), 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, including the totality of the sanctions imposed by the agency, 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 decisions of the Hearing Officer are 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 the Hearing Officer.

## **BOARD REVIEW AND ANALYSIS OF FACTS AND ISSUES ON APPEAL**

### **A. GRIEVANCE FILING DATE**

As set forth above, on May 22, 2000, the Department's ALJ entered his *Report and Recommendation* concerning Appellants' grievance. Pursuant to this *Report and Recommendation*, ALJ Robinson recommended to the Department's executive director, that Appellants be compensated for "on-call time" in accordance with DHRM rule which, both then and now, requires an employee to be compensated for "on-call time" at a rate of 1 hour for every 12 hours the employee is on call. (Agency Ex. 3) In making this recommendation, however, ALJ Robinson specifically limited Appellants recovery to "on-call pay for a period of 20 days back from the day they filed their grievance and prospectively from the date of filing if the evidence shows they were 'on-call.'" (*Id.* at 6) In his *Report and Recommendation*, ALJ Robinson specifically found that Appellants filed their grievance "on or about February 11, 1998." (*Id.* at 1)

On January 19, 2001, Exec. Dir. Chabries issued his *Final Order* accepting and adopting the findings and conclusions of ALJ Robinson. (Agency Ex. 4) Exec. Dir. Chabries then allowed Appellants to amend their time sheets listing "on-call time" back 20 days from the date they filed their grievance and then forward to include the time Appellants could establish they were "on-call." (*Id.*) Though only specific as to Appellant Slocum, in his *Final Order*, Exec. Dir. Chabries "accepted" February 11, 1998, as the date Appellants filed their grievance. (*Id.*)

Relying on *Utah Code Ann.* § 67-19a-401(5)(a) and the Department's *Final Order* allowing Appellants to amend their time sheets listing "on-call time" back 20 days from the date they filed their grievance, the Hearing Officer – in *Decision 1* – concluded that Appellants had "received all on-call compensation to which they are entitled under the laws and rules applicable to their grievance." (*Decision 1* at 3) In reaching this decision however, the Hearing Officer specifically

found that Appellants had filed their original grievance on January 30, 1998.<sup>30</sup> (*Id.* at 1)

In *Decision 2*, however, the Hearing Officer revised this finding of fact to find that: “The Hearing Officer must conclude that the date a copy was received in the office of the CSRB, February 5, 1998, is the proper date of the grievance.” (*Decision 2* at 12)<sup>31</sup> After making this finding of fact, the Hearing Officer then concluded that Appellants’ recovery on their grievance was limited by *Utah Code Ann.* § 67-19a-401(5)(a) to a period of 20 working days “prior to February 5, 1998, and continuing thereafter as long as they were required to be on-call.” (*Id.*)

After carefully reviewing the evidentiary record, the Board is correcting the Hearing Officer’s *Decision 2*, finding of fact regarding when Appellants filed their initial grievance. The Board is taking this action pursuant to CSRB R137-1-22(4)(a). In reaching this decision, the Board notes that although the Board agrees with the Hearing Officer’s legal conclusion that *Utah Code Ann.* § 67-19a-401(5) limits the scope of relief to which Appellants are entitled to the 20 working-day period prior to the date they filed their grievance, it does not believe the evidentiary record supports the Hearing Officer’s *Decision 2* finding that Appellants filed their grievance on February 5, 1998.

In reaching this decision, the Board notes that the Department, in both its *Motion to Dismiss* and *Motion in Limine*, states that Appellants filed their grievance on January 30, 1998. In addition, in the *Department’s Initial Brief on Appeal* dated June 14, 2002, the Department again acknowledges that Appellant’s filed their initial grievance on January 30, 1998.

Moreover, the grievance itself, is signed by Appellants on January 30, 1998. The file maintained by the CSRB also establishes that the Department’s Level III response is dated February 6, 1998. Finally, the record clearly establishes that Appellants’ grievance dated January 30, 1998, was received at the office of the CSRB on February 5, 1998. Based upon this evidence, the Board concludes that the grievance was clearly filed with the Department prior to February 5, 1998.

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<sup>30</sup>The Board notes that in its statement of facts set forth in its *Memorandum in Support of Motion to Dismiss*, the Department asserts that Appellants filed their grievance on January 30, 1998. However, in its *Reply to Motion to Dismiss*, the Department alternatively asserts that Appellants filed their grievance on February 11, 1998. (*Reply to Motion to Dismiss* at 2) *Appellants’ Opposition to Motion to Dismiss* is silent relative to the issue of when Appellants filed their grievance, but importantly, does not object to *any* of the Statements of Facts set forth in the Department’s *Memorandum in Support of Motion to Dismiss*, including the Department’s statement of fact that the Appellants filed their grievance on January 30, 1998.

<sup>31</sup>The Hearing Officer reached this finding notwithstanding assurances made at the evidentiary hearing that he would not alter his original finding of fact that January 30, 1998, was the date Appellants filed their grievance. Specifically addressing this issue at the evidentiary hearing, the Hearing Officer stated “. . . I am going to stand on the original finding of fact which I made of January 30, 1998.” (Tr. at 24)

Based upon the foregoing, the Board is correcting the Hearing Officer's *Decision 2*, to find that Appellants filed their initial grievance on January 30, 1998. This decision is supported by the memoranda and briefs submitted in this case and is consistent with the Hearing Officer's finding of fact set forth in *Decision 1*. In reaching this decision, the Board also notes that despite Appellants' challenge to this finding, the Department presented no argument in its *Response Brief After Remand* to support the Hearing Officer's *Decision 2* finding that Appellants filed their initial grievance on February 5, 1998. Based upon these facts, the Board corrects the record to indicate that Appellants filed their initial grievance on January 30, 1998.

#### **B. TIME LIMITATIONS ON EMPLOYEE GRIEVANCES**

As set forth at footnote 21 above, *Utah Code Ann.* § 67-19a-401(5) provides as follows:

(5)(a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:

(i) within 20 working days after the event giving rise to the grievance; or

(ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.

(b) Notwithstanding Subsection (5)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

In both *Appellants' Opposition to the Department's Motion to Dismiss* and their *Initial Step 6 Brief on Appeal*, Appellants argue that as a matter of law *Utah Code Ann.* § 67-19a-401(5) governs only jurisdiction and does not limit the scope of recovery available to Appellants. Appellants essentially argue that because *Utah Code Ann.* § 67-19a-401(5) does not limit the scope of recovery available, they are entitled to recover "on-call" compensation for a period of four years preceding the date they filed their grievance. (Tr. at 131)<sup>32</sup>

In support of this argument, Appellants assert that the statutory provisions of *Utah Code Ann.* § 67-19a-401(5) regarding the time frames in which an employee may submit a grievance are discretionary in nature and that by in enacting this statute, the Legislature "did not create a, per se statute of limitations." (*Appellants' Opposition to Motion to Dismiss* at 6-7) In making this argument, Appellants concluded that:

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<sup>32</sup>See footnote 5 above.

While U.C.A. § 67-19a-401(5) may effectively operate to preclude the CSRB from exercising jurisdiction in some circumstances, the Legislature did not impose a blanket prohibition on the filing of a grievance because of the obvious potential for the same to be held an unconstitutional denial of access to the courts.

(*Id.* at 7)

In *Decision 1*, the Hearing Officer granted the Department's motions. In his *Decision 1*, the Hearing Officer agreed with the Department that the time limitations contained in *Utah Code Ann.* § 67-19a-401(5)(a) are jurisdictional and specifically limit the scope of relief available to Appellants to the 20-day period prior to the date they filed their grievance. (*Decision 1* at 6) Based upon this legal conclusion and the Department's *Final Order* permitting Appellants to submit amended time sheets listing their "on-call time" for the 20 working-day period prior to the date they filed their grievance, the Hearing Officer held that "Grievants [Appellants] had received all on-call compensation to which they are entitled under the laws and rules applicable to their grievance."

(*Id.* at 3)

In their appeal to this Board, Appellants challenge the Hearing Officer's legal conclusion that *Utah Code Ann.* § 67-19a-401(5) limits the scope of relief available to Appellants to the 20 working days preceding the filing of their grievance. (*Appellants' Initial Brief on Appeal* at 5) Specifically addressing this issue, Appellants argue that "the Hearing Officer has unconstitutionally applied the twenty (20) day 'statute of limitations' to Grievants because such statute is unreasonable and therefore, unconstitutional . . ." and that such a finding "results in an unconstitutional application of the Open Court's clause" of the *Utah Constitution*. (*Initial Brief on Appeal* at 7; citing *Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985)).

After carefully reviewing the Hearing Officer's decisions in this matter and considering the parties' arguments, the Board upholds and thus sustains the Hearing Officer's decisions on this issue. In reaching this decision, the Board finds that *Utah Code Ann.* § 67-19a-401(5) clearly establishes mandatory time frames regarding when an employee may submit a grievance under the State's Grievance and Appeal Procedures codified at *Utah Code Ann.* § 67-19a-101 *et seq.*

This statute plainly requires that, absent excusable neglect, an employee **must** submit their grievance for review either within 20 working days of the event giving rise to the grievance or within 20 working days after the employee has knowledge of the event giving rise to the grievance. (*Utah Code Ann.* § 67-19a-401(5)(a)) (Emphasis added) Moreover, this section further jurisdictionally bars consideration of **any** grievable event occurring "more than one year after the event giving rise to the

grievance.” (*Utah Code Ann. § 67-19a-401(5)(b)*) (Emphasis added)

The Board finds that the language of this statute allows for no discretion as to when an employee may submit their grievance. These limitation periods are mandatory and jurisdictionally bar consideration of any grievances not filed within the specified time frames.<sup>33</sup>

In addition, the Board sustains the Hearing Officer’s decisions that absent excusable neglect, the provisions of *Utah Code Ann. § 67-19a-401(5)*, limit the scope of relief that can be granted to a grievant to the 20 working-day period immediately preceding the date the grievance is filed. In reaching this decision, the Board relies on the plain language of the statute and its prior decision in *Karber v. Utah Dep’t of Corrections*, 6 CSRB 57 (1997).

In *Karber*, the Board considered the scope of relief available to an employee seeking recovery of “excess hours” for a period of time extending back approximately one and one-half years. In its decision in *Karber*, this Board ruled that the scope of relief available to *Karber* was limited to the 20-day period immediately prior to the date he filed his grievance. The Board further reasoned that *Karber’s* grievance was untimely filed as to any period of time predating that 20-day period. (*Id.* at 9, 13)

By this decision, the Board reaffirms and upholds its prior decision in *Karber*. Both the department and the CSRB are limited in the scope of relief they can grant to the 20-day time period immediately preceding the date a grievance is filed. In interpreting the statute in this way, the Board is treating *Utah Code Ann. § 67-19a-401(5)* no different from other statutes of limitation. As with all limitations on action, an aggrieved individual may either comply with the time limits imposed by the statute and thus secure the opportunity for redress, or ignore the time limitations and be precluded from any available remedy. The Board simply has no jurisdiction over grievable events that are not timely grieved.

### C. THE EVENT GIVING RISE TO THE GRIEVANCE

In the instant case, there is little factual dispute that Appellants were in “on-call” status, and thus entitled to “on-call” compensation as allowed by DHRM rule R477-8-6(c)(i),<sup>34</sup> on numerous

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<sup>33</sup>For a discussion regarding this ruling and the Open Courts provision of the *Utah Constitution*, see page 27 below.

<sup>34</sup>As set forth in footnote 4 above, this rule requires that employees in “on-call” status be compensated for “on-call time” at a rate of 1 hour for every 12 hours the employee is “on-call.” The Board recognizes that this Rule has been amended since Appellants filed their grievance. For the precise wording of this Rule at the time Appellants filed their Grievance, see footnote 4 above.

occasions and for many years prior to the date they filed their grievance. (*Decision 2* at 8 and at 8 n.1; Tr. at 129, 153; Agency Ex. 3 at 2; *Memorandum in Support of Motion to Dismiss* ¶¶ 6-9 at 3-4)<sup>35</sup> Indeed, Appellant Leatham testified that he had a cell phone and a commute vehicle beginning in either 1987 or 1988. (Tr. at 129) He further testified that he had a pager for a longer period of time than that. (*Id.*) Likewise, Appellant Steele testified that he had been assigned a commute vehicle and was required to carry a cell phone and a pager for approximately 20 years. (*Id.* at 153)<sup>36</sup>

Taking all these factors into considerations, the Board concludes that a new grievable event occurred in this case each time the State failed to pay Appellants any “on-call” compensation to which they were entitled. Precisely for this reason, the Board does not believe that any singular “event” gave rise to the Appellant’s grievance in this case. Instead, the Board finds, similar to its decision in *Karber*, that each separate pay day in which Appellants were entitled to “on-call” compensation, but did not receive it, became a new grievable “event” subject to a new 20-day grievance period under *Utah Code Ann.* § 69-19a-401(5).

In the instant case, this Board has already corrected the Hearing Officer’s factual determination to find that Appellants filed their grievance on January 30, 1998.<sup>37</sup> Therefore, absent excusable neglect, this Board is jurisdictionally limited to the relief it can grant to the 20 working-day period immediately preceding the date Appellants filed their grievance. By so finding, the Board affirms that it does not have jurisdiction over grievable events that are not timely grieved under the State’s Grievance and Appeal Procedures.

#### **D. EXCUSABLE NEGLECT**

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<sup>35</sup>As the Hearing Officer correctly found, Appellants seek a remedy going back four years from the date they filed their grievance which would relate their grievance back to January 1994. (Tr. at 131) The facts of this case establish that Appellants were in “on-call” status for at least the four years prior to filing their grievance.

<sup>36</sup>Mr. Johnson testified similarly, but did not specifically mention what year he was assigned a commute vehicle or when he was first required to carry a pager and cell phone. (*Id.* at 146) Appellant Slocum turned in his commute vehicle in February 1996, but was in “on-call” status after that pursuant to his POST order requiring him to “carry a pager and respond to service upon activation during day or night.” (Agency Ex. 3 ¶ 8 at 2)

<sup>37</sup>Though thoroughly addressed above, the Board notes that nowhere in either their *Initial Step 6 Brief on Appeal* or their *Brief on Appeal After Remand* do Appellants argue for an earlier grievance filing date than January 30, 1998.

Having already determined that the “event” giving rise to Appellants’ grievance occurred each pay period the Department failed to pay “on-call” compensation to which Appellants were entitled, the Board must now determine whether Appellants’ neglect in waiting until January 30, 1998, to file their grievance is “excusable.” Before addressing Appellants’ actions in waiting until January 30, 1998, to file their grievance, the Board will first briefly address *Utah Code Ann.* § 67-19a-401(5)(b) that provides: “Notwithstanding Subsection (5)(a) [excusable neglect], an employee may not submit a grievance more than one year after the even giving rise to the grievance.”

As stated previously, one of the Board’s obligations on appeal is to review the hearing officer’s decision to determine whether relevant policies, rules and statutes were correctly applied. In making this legal determination, the Board gives no deference to the hearing officer’s decision. (CSRB rule R137-1-22(4)(b)) In his *Decision 2*, the Hearing Officer specifically found that *Utah Code Ann.* § 67-19a-401(5)(b) jurisdictionally bars both the Department and the CSRB from considering an employee grievance submitted more that one year after the “event giving rise to the grievance,” even in situations where excusable neglect is an issue. (*Id.* at 6) The Board agrees with the Hearing Officer’s decision on this issue.

Moreover, the Board does not find, as Appellants argue, that the Hearing Officer’s ruling on this issue in *Decision 2* went beyond the scope of the issue remanded to him.<sup>38</sup> The Board’s *Order of Remand* dated October 3, 2002, ordered that an evidentiary determination be made by the Hearing Officer “as to whether there is excusable neglect allowing Grievants to *wait* until January or February 1998 to file their grievance concerning on-call time.” (Emphasis added)<sup>39</sup>

In making his legal conclusion concerning excusable neglect, the Hearing Officer was simply emphasizing that even if he “found that Grievants had excusable neglect for the delay in filing their grievance,” such neglect would not allow the filing of their grievance more than one year from the

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<sup>38</sup>Regarding this legal issue, Appellants argue: “In *Decision 2*, the H.O. spends much time addressing the following issues: . . . 2) does any grievant’s excusable neglect toll the one (1) year statute of limitation/repose contained in U.C.A. 67-19[a]-401(5)(b) (1999)? Obviously, Grievants’ counsel was not given advance notice by the H.O. that he believed . . . the foregoing issues were encompassed within the CSRB’s Remand Order.” (*Brief on Appeal After Remand* at 3-4, n.6)

<sup>39</sup>In their appeal to this Board, Appellants maintain that because an evidentiary hearing was not held prior to the Hearing Officer’s *Decision 1*, his decision should have been characterized as an “informal adjudicative proceeding” allowing Appellants to “file a petition with the District Court for a trial de novo. . . .” Based upon the remanded evidentiary hearing held in this matter on December 5, 2002, the Board now considers this argument moot.



date of the “event” giving rise to their grievance. (*Decision 2* at 6)

The Board finds no error by the Hearing Officer in addressing this legal issue in *Decision 2* and upholds his legal conclusion on this matter. Specifically, the Board finds that the statute setting forth the time frames in which an employee may submit a grievance are mandatory and under no circumstances may a grievance be submitted more than one year after the “event” giving rise to the grievance. Based upon this statute, the Board finds that both the Board and its hearing officers are jurisdictionally limited in the scope of relief they can grant by *Utah Code Ann.* § 67-19a-401(5).

Having thoroughly addressed the jurisdictional limitations cabined in *Utah Code Ann.* § 67-19a-401(5), the Board will now address excusable neglect as it specifically relates to Appellants’ case. After thoroughly reviewing the evidentiary record as a whole, the Board notes that Appellants have essentially advanced two discordant reasons for waiting until January 30, 1998, to file their grievance.<sup>40</sup>

First, Appellants assert that they were not aware of their entitlement to “on-call” compensation until January 1998. (*Appellants’ Opposition to Motion to Dismiss*, ¶6 at 5) In connection with this argument, Appellants argue that they were misled by the Department regarding their entitlement to “on-call” compensation and filed their grievance shortly after concluding that they were in fact entitled to such compensation. (*Id.*; Tr. at 115, 117, 127, 132-133, 140, 150, 157; *Decision 2* ¶ 20 at 5)

Conversely, Appellants assert that they had a reasonable fear of retaliation by the Department that prevented them from filing their grievance in a timely manner. Appellants argue that this fear was ongoing creating a legal basis for waiting until January 30, 1998, to file their grievance. (Tr. 121-122, 141-144, 159-162; *Appellants’ Brief on Appeal After Remand* at 14-21; *Opposition to Motion to Dismiss* at 8)

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<sup>40</sup>The Board finds troubling the inherent inconsistency of the reasons advanced by Appellants for waiting until January 30, 1998, to file their grievance. This concern is based primarily on the Board’s view that Appellants cannot simultaneously assert “they were not aware they could claim on-call time until shortly before they filed the grievance” and simultaneously argue that, but for their fear of retaliation by the Department, they would have filed their grievance sooner. (Compare *Appellants’ Opposition to Motion to Dismiss* at ¶6 at 5 and *Appellants’ Brief on Appeal After Remand* at 22 with *Appellants’ Brief on Appeal After Remand* at 13-20) The Board finds these inconsistencies to exist even if – as Appellants claim – they were misled by the Department regarding their entitlement to such compensation. Lack of knowledge, regardless of the reason, is simply inconsistent with their argument that absent fear of retaliation they would have filed their grievance sooner. This later argument necessarily embodies knowledge of their entitlement to such compensation.

Prior to addressing these specific reasons advanced by Appellants for waiting until January 30, 1998, to file their grievance, the Board will briefly address the statutes and rules regarding “excusable neglect.” The Board notes in its review of the statutes and rules concerning “excusable neglect,” that the specific statute setting forth the time frames in which an employee must file a grievance does not define the term “excusable neglect.” (*Utah Code Ann.* § 67-19a-401(5)) Indeed, the specific language of this statute states that: “Unless the employee meets the requirements of excusable neglect *established by rule* . . .” (Emphasis added) Based upon the plain language of this statute, it is clear that the Legislature gave to the CSRB the authority to promulgate rules defining “excusable neglect.” (*Id.*)

CSRB rules regarding “excusable neglect” provide that:

“Excusable Neglect” means the exercise of due diligence by a reasonably prudent person and constitutes a failure to take proper steps at the proper time, not in consequence of the person’s own carelessness, inattention, or willful disregard in the processing of a grievance, but in consequence of some unexpected or unavoidable hindrance or accident.

(CSRB rule R137-1-2)

The only other rule touching upon “excusable neglect” can be found at CSRB rule R137-1-13(3)(a) which provides as follows:

- (a) the administrator or appointed CSRB hearing officer shall determine the applicability of the excusable neglect standard on the basis of good cause.

Using our rules as the foundation, the Board will now consider whether the reasons advanced by Appellants for waiting until January 30, 1998, to file their grievance constitute “excusable neglect.” Before doing so however, the Board notes its agreement with the Hearing Officer that “excusable neglect cases are ‘highly fact intensive.’” (*Citing West v. Grand County*, 942 P.2d 337 (Utah 1997)) Moreover, the Board notes that factfinders are given broad discretion in making excusable neglect determinations. (*Id.*) The Board also agrees with the Hearing Officer concerning the scope and applicability of the Board’s definition of “excusable neglect.” This definition incorporates the provisions of CSRB rule R137-1-13(3)(a) in that “excusable neglect” contemplates an “unexpected or unavoidable hindrance” for not filing a grievance timely. The Board believes an unexpected or unavoidable hindrance normally involves circumstances that are essentially beyond a person’s control which equates to “good cause.” *See Riesbeck v. HCA Health Services of Utah* 2 P.3d 447 (Utah 2000)

Addressing first Appellants' contention that they "were not aware of their entitlement to on-call compensation pursuant to DHRM rule R477-8-6(a)(c)(i) until January of 1998," the Board notes its agreement with the Hearing Officer's conclusion that Appellants "lack of awareness of their legal rights vis-a-vis the on-call time is not the same as lack of knowledge of the on-call time itself." (*Decision 1* at 8) As previously discussed, Appellants knew they were in "on-call" status for at least four years prior to the filing of their grievance. (*Decision 2* at 8, 8 n.1; Tr. at 129, 146, 153; Agency Ex. 3 ¶¶ 8-9 at 2) Appellants also knew that they were not being compensated for being in "on-call" status.

Addressing the issue of what triggers the running of a period of limitations, the Utah Court of Appeals held in *Anderson v. Dean Witter Reynolds*, 920 P.2d 575 (Utah Ct. App. 1996) that it is the event, not the discovery of a legal theory on which one may make a claim, that triggers the running of a period of limitations. (*Id.* at 576) In the instant case, the event triggering the running of the limitation period occurred each separate pay period in which Appellants' were entitled to "on-call" compensation, but did not receive it. Appellants alleged lack of knowledge concerning their entitlement to "on-call" compensation under DHRM rule simply does not stop the running of the limitation periods set forth in *Utah Code Ann.* §67-19a-401(5). This statute clearly and unambiguously requires that absent excusable neglect, employees must file their grievance within 20 working days of the "event" giving rise to the grievance or within 20 working days after the employee has knowledge of such "event."

The Board reaches this decision while recognizing that Appellants assert that the Department engaged in misleading conduct allegedly impairing Appellants' ability to ascertain their entitlement to "on-call" compensation while in "on-call" status. In support of this argument, Appellants rely primarily on the fact that, prior to July 1997, the Department told Appellants not to submit time sheets because they were exempt employees under the Fair Labor Standards Act (FLSA) and thus not entitled to any compensation beyond their regular salary. (Tr. at 136; Agency Ex. 3 ¶ 2 at 1; *Appellants' Opposition to Motion to Dismiss* at ¶ 1 at 4; *Appellants' Reply Brief After Remand* at 6 n.8) Appellants further argue that this "misleading conduct" continued even after July 1997, when the Department "all of a sudden" switched their position and had Appellants fill out time sheets, but limited the compensation Appellants received for being in "on-call" status to those times that they were the Officer in Charge (OIC). (Tr. 130, *Memorandum in Support of Motion to Dismiss*

¶10 at 4)<sup>41</sup>

The Board does not believe these factors are sufficient to constitute an unavoidable hindrance allowing Appellants to wait until January 30, 1998, to file their grievance. In support of this position, the Board notes that the DHRM rule regarding “on-call” compensation was readily available, not only to Appellants, but to all public employees at all times relevant to this matter. Moreover, it is undisputed that in July 1997, when the new Executive Director for the Department took over, Appellants were again required to submit time sheets and began receiving “on-call” compensation for those periods of time they were “on-call” as the OIC. (Tr. at 130, 136; Agency Ex. 3 ¶ 2 at 1; *Appellants Reply Brief After Remand* at 6-7)

In the instant case, the Board simply does not find, to the extent that Appellants argue such, that their lack of knowledge of entitlement to “on-call” compensation constitutes excusable neglect enabling them to wait until January 30, 1998, to file their grievance. As stated previously regarding this issue, lack of knowledge of an “event” tolls the limitation periods for filing grievances; failure to recognize that an “event” is grievable does not. Based upon the foregoing, the Board upholds the Hearing Officer’s decisions on this issue.

Appellants second contention for waiting until January 30, 1998, to file their grievance is that their fear of retaliation by the Department prevented them from filing their grievance in a more timely manner and that this fear was sufficient to constitute “excusable neglect” under CSRB rules. (*Appellants’ Brief on Appeal After Remand* at 14-20) After conducting an evidentiary hearing on the remanded issue of “excusable neglect,” the Hearing Officer issued his *Decision 2* on January 8, 2003. In this decision, the Hearing Officer examined whether the Appellants’ alleged fear of retaliation for filing a grievance was sufficient to constitute “excusable neglect” under CSRB rules.

Specifically addressing this issue, the Hearing Officer concluded that Appellants’ “fear of retaliation prior to July 1997, was sufficient on the facts of this case to constitute unavoidable hindrance, and imbued Grievants failure to file a timely grievance with excusable neglect for purposes of § 67-19[a]-401(5)(a). (*Decision 2* at 10) However, in reaching this decision, the Hearing Officer specifically limited his finding of “excusable neglect” to the time period prior to July 1997, when Mr. Pete Haun (Exec. Dir. Haun) became the executive director of the Department.

In reaching his decision that Appellants lacked “excusable neglect” after July 1997, the

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<sup>41</sup>See footnote 30 at 14 above.

Hearing Officer in his *Decision 2* focused on the significant efforts made by Exec. Dir. Haun to create an atmosphere where employees of the Department would feel free to file grievances and deal with concerns in an environment free of retaliation or reprisal. The efforts emphasized by the Hearing Officer included Exec. Dir. Haun's numerous visits to the Department's facilities and his use of the Department's in-house newsletter to let employees know of his desire to improve working conditions within the agency and specifically let employees know that there would be no retaliation for filing grievances. In specific relation to Appellants, the Hearing Officer focused on Exec. Dir. Haun's request that Appellants and others submit time sheets for the hours they worked and starting in July 1997 compensated Appellants for the period of time they were in "on-call" status as OICs. (*Decision 2* ¶ 11 at 4, 10-11)

In reviewing the Hearing Officer's decision on this issue, the Board must first determine whether the Hearing Officer's factual findings are supported by the evidentiary record. (*Utah Admin. Code* R137-1-22(4)(a)) In making such a determination, this Board has consistently held that the findings of the fact finder are entitled to a presumption of correctness. (*Jones v. Utah Dep't of Public Safety*, 4 CSRB 38 (Step 6) (1992); *See also Pace v. Utah Dep't of Public Safety*, 7 CSRB 64 at 15-16 (Step 6) (2002); *Parks and Recreation v. Anderson*, 3 PRB 22 at 7-8 (1986).)

In the instant case, the Hearing Officer heard testimony from Appellants Leatham, Johnson, Steele and Slocum. He also heard testimony from then Exec. Dir. Haun, ALJ R. Spencer Robinson and others. The Hearing Officer was in the best position to hear this testimony, weigh the evidence given, and judge the veracity of the witnesses' statements. At the conclusion of the evidentiary hearing in this matter, the Hearing Officer entered his final decision concluding that Appellants did not have "excusable neglect" to wait until January 30, 1998, to file their grievance. In reaching this decision, the Hearing Officer essentially concluded that Appellants' alleged fear of retaliation after July 1997 was not reasonable and that there was an "inherent inconsistency" in Appellants claim that they "continued to fear possible retaliation after July 1997, while simultaneously reporting on-call time for which they were compensated." (*Id.* at 11)<sup>42</sup>

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<sup>42</sup>The Board does not agree with Appellants that "it [the Board] is in as good a position as the Hearing Officer to determine the challenged finding of fact based on the transcript and exhibits," or that it "should review the finding of fact *ne novo*." (*Appellants' Brief on Appeal After Remand* at 9) Careful review of his decision clearly indicates that the Hearing Officer considered all the evidence and weighed the credibility of the witnesses before entering his decision. Indeed, the Hearing Officer specifically references the conflicting testimony which Appellants assert he did not address in his *Decision 2*. (*Decision 2* at 10-12)

After carefully reviewing the evidentiary record, including the sworn testimony of the witnesses and the documents entered into evidence, the Board sustains the Hearing Officer's conclusion that Appellants did not have "excusable neglect," based upon concerns of retaliation, for waiting until January 30, 1998, to file their grievance.

In reaching this decision, the Board cites to the evidentiary record which establishes that immediately after taking office, Exec. Dir. Haun visited every region and every departmental facility and spoke with "hundreds and hundreds" of the Department's employees informing them of his open-door policy and his desire to improve working conditions within the Department. (Tr. at 174, 181, 205) In connection with these meetings, Exec. Dir. Haun emphasized that employees should feel free to file grievances and deal with employment concerns in an environment free of retaliation or reprisal and that his intent was to do a complete revision of the staff discipline and grievance procedures including a rescission of the general order prohibiting the ALJ from hearing employee grievances. (Tr. at 183; Agency Ex. 3 ¶15 at 3, Agency Ex. 5; *Appellants' Opposition to Motion to Dismiss* ¶ 5 at 5) The evidence also establishes that Exec. Dir. Haun used the Department's in-house newsletter to inform employees of his intent to revise the Department's discipline and grievance procedure and even requested input from the employees on such revisions. (Tr. at 175, 182; Agency Ex. 5)

The record also establishes that after Mr. Haun became Executive Director for the Department in July 1997, Appellants began submitting time sheets and were compensated variously for the time they were in "on-call" status as OICs. (Agency Ex. 3 ¶2 at 1; *Memorandum in Support of Motion to Dismiss* ¶ 2 at 2, *Appellants' Reply Brief After Remand* at 6)<sup>43</sup> Moreover, the facts of this case establish that shortly after Mr. Haun became Executive Director of the Department, Appellant Leatham met with him to discuss individual issues unrelated to this grievance. (Tr. at 123, 132-133) Indeed, when testifying concerning his initial meeting with then Exec. Dir. Haun, Appellant Leatham specifically testified that if he had known he was eligible for "on-call" compensation, he would have brought it up with Exec. Dir. Haun during this initial meeting. (*Id.* at 132-133)

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<sup>43</sup>Agency Exhibit 3, which was admitted into evidence without objection and as part of the record, establishes that beginning with pay period 13 of 1997, Appellants' Leatham and Steele submitted time sheets listing "on-call" hours. Appellants' Johnson and Hearst began submitting time sheets in pay period 14 of 1997. The hearing transcript on page 158 indicates that Appellant Slocum first submitted his time sheet listing "on-call" hours in December of 1997. These facts are not disputed anywhere in the evidentiary record.

Based upon these factors, the Board finds that in reaching his conclusion that after Mr. Haun became Executive Director, Appellants did not have “excusable neglect” to wait until January 30, 1998, to file their grievance, the Hearing Officer did not abuse the broad discretion granted to him to make this determination. His decision is reasonable and rational and supported by the evidentiary record. Moreover, the Hearing Officer clearly weighed and considered the conflicting evidence before reaching his decision. (*Decision 2* at 10-12) For these reasons the Board sustains the Hearing Officer’s finding that Appellants lacked “excusable neglect” based on fear of retaliation after Mr. Haun became executive director of the Department.<sup>44</sup>

As the Board has determined that Appellants lacked “excusable neglect” for filing their grievance more than six months after Mr. Haun became the Executive Director of the Department, it is not necessary for it to reach the Hearing Officer’s decision that Appellants met the standard for “excusable neglect” prior to July 1997. (*See Decision 2* at 12)<sup>45</sup> Even assuming, however, Appellants’ fear of retaliation under the previous administration would bring them within the definition of “excusable neglect,” the Board finds those fears reasonably should have dissipated after Mr. Haun became Executive Director. The Board reaches this decision in light of the evidentiary record cited above establishing the significant efforts made by Exec. Dir. Haun to create an atmosphere where employees could feel free to file grievances without fear of retaliation or reprisal and the fact that Appellants filed their grievance more than six months after Mr. Haun became the Executive Director.

The Utah Legislature, in creating a forum for employees to seek redress from problems connected with their employment, set specific and unambiguous limits on the time frames in which a grievance can be filed and the relief that can be granted. These limitations are set forth at *Utah Code Ann.* § 67-19a-401(5).

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<sup>44</sup>To the extent that the Hearing Officer’s decision can be read to find that had Appellants filed their grievance before July 1997, they would have been entitled to four years of “on-call” compensation, the Board is modifying that decision pursuant to CSRB rule R137-1-22(4)(b) and (8)(c). As stated previously, an employee may never submit a grievance more than one year after the event giving rise to the grievance. (*Utah Code Ann.* § 67-19a-401(5)(b)) Based upon this law, even assuming the actions of the previous administration would bring Appellants’ failure to file within the definition of “excusable neglect,” the scope of their remedy would not extend beyond one year from the date Appellants filed their grievance.

<sup>45</sup>Though they never appealed this finding, in their *Response Brief After Remand*, the Department expresses concerns with this conclusion stating that: “Though the Agency questions certain legal aspects of his opinion as addressed below, the end result of his decision is legally correct.” (*Id.* at 13-14)

In addition, the Legislature also enacted prohibitions concerning reprisals against career service employees for use of the State's Grievance and Appeal Procedures. Cabined in all these statutory provisions, the Board finds a Legislative process designed to promote a fair, thorough and expeditious means to resolve concerns related to public employment. (*See generally Taylor v. Utah State Training School* 775 P.2d 432) (Utah Ct. App.) (1989))

This process specifically contemplates that employees be able file grievances free of fear of retaliation or reprisal. At the same time, however, this process also does not permit employees to sit on their rights and deprive State agencies or the CSRB of the ability to address or rectify employee concerns or management mistakes at the earliest possible date. Failure to adhere to either of these mandates runs afoul of the State's Grievance and Appeal Procedures Act.

In reaching our decision herein, the Board notes that the statutory framework set forth in the State's Grievance and Appeal Procedures Act can only protect an employee from actual retaliation not from fear, whether real or supposed, of such retaliation. By failing to file their grievance when the "event" occurred, Appellants essentially stripped the CSRB or its Hearing Officer of the ability to protect them against actual retaliation. The Board cannot allow this conduct any more than it could allow retaliation or reprisal against an employee exercising his or her right by submitting a grievance. This Board feels that any other ruling by it in the instant case would only foster what the statute explicitly prohibits. For this reason, the Board finds as a matter of law, that fear of retaliation in and of itself, is insufficient to establish "excusable neglect" under our rules.<sup>46</sup>

Finally, the Board does not believe that the Hearing Officer's decision violates the Open Courts provision of the *Utah Constitution* as applied to Appellants.<sup>47</sup> In reaching this decision, the Board reiterates that the 20-day limitation on employee grievances has been a threshold requirement of the State's Grievance and Appeal Procedures for many years. As stated by the Hearing Officer:

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<sup>46</sup>Because the Board agrees with the Hearing Officer's conclusion that Appellants did not have "excusable neglect" for filing their grievance more than six months after Mr. Haun became the Executive Director of the Department, it is unnecessary for it to examine the Hearing Officer's conclusion that Appellants had "excusable neglect" prior to Mr. Haun becoming the Executive Director of the Department. However, to the extent that our decision herein modifies the Hearing Officer's conclusion relative to "excusable neglect" prior to 1997, the Board does so pursuant to CSRB rule R137-1-22(4)(b) and -(8)(c).

<sup>47</sup>The Board recognizes the Article VIII, Section 2 of the *Utah Constitution* reserves solely to the Utah Supreme Court the authority to declare any law unconstitutional. Based upon this fact, the Board is extremely hesitant to address this issue and will do so only to the extent that this provision applies to Appellants.



The underlying tenant [sic] of the grievance system and the time limits imposed on the filing of grievances is to encourage grievances at the point of a “grievable event” in order to allow the State to resolve those grievances at the earliest possible time. *See Taylor v. Utah State Training School*, 775 P.2d 432 (Utah App. 1989). When a grievable event occurs, such as a denial of on-call pay to which an employee is otherwise entitled, the employee is obligated to file a timely grievance or lose his/her right to grieve. This limitation is not a violation of the “open courts” provision of the Utah Constitution. Indeed State employees have a remedy with ultimate court review, provided they follow the rules applicable to that remedy. . . .

*(Decision on Grievants’ Motion for Reconsideration and Supplemental Decision on Agency’s Motion to Dismiss at 3 (Reconsideration Decision))*

In the instant case, the facts establish that Appellants filed their grievance on January 30, 1998. As a result of this grievance, Appellants were permitted to submit amended time sheets listing “on-call time” back 20 days from the date they filed their grievance and the forward to include the time Appellants could establish they were “on-call.” (Agency Ex. 4) It is clear that Appellants were heard on their grievance and were granted a recovery, albeit less than they sought. As with all limitations on action, an individual may either comply with the time limits imposed and secure his claims or ignore those limitations and be precluded from any available remedy. In the instant case, the Hearing Officer found no violation of the Open Courts provision of the Utah Constitution. (*Decision 1* at 5) Appellants’ arguments have failed to persuade us otherwise. The Hearing Officer’s decision on this issue is thus sustained.

### DECISION

After careful review of the entire evidentiary record, the Board sustains the Hearing Officer’s decision that Appellants are entitled to “on-call” compensation for any time that they were in “on-call” status beginning at a point 20 working days prior to the date they filed their grievance and continuing thereafter for as long as they were required to be on-call. The Board hereby corrects the Hearing Officer to find that Appellants filed their grievance on January 30, 1998. The Board further upholds the Hearing Officer’s decision that *Utah Code Ann.* § 67-19a-401(5) jurisdictionally limits the scope of relief that can be granted to the 20 working-day period immediately preceding the date a grievance is filed and that the CSRB does not have jurisdiction over grievable events that are not timely grieved under the State’s Grievance and Appeal Procedures. Finally, the Board finds the

Hearing Officer's conclusion that Appellants did not have "excusable neglect" to wait until January 30, 1998, to file their grievance to be both reasonable and rational and supported by the evidentiary record.

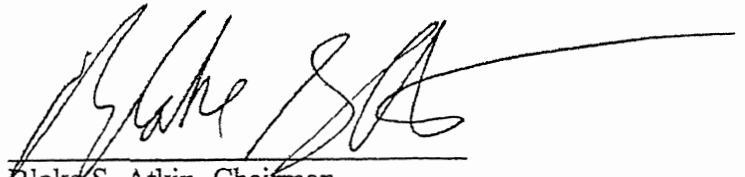
DATED this 14th day of April 2004.

DECISION UNANIMOUS

Blake S. Atkin, Chair

Joan M. Gallegos, Member

Felix J. McGowan, Member

A handwritten signature in black ink, appearing to read "Blake S. Atkin", written over a horizontal line.

Blake S. Atkin, Chairman  
Career Service Review Board

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with *Utah Administrative Code*, R137-1-22(10), and *Utah Code* §63-46b-13, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to *Utah Administrative Code*, R137-1-11, and *Utah Code*, §63-46b-14 and -16, Utah Administrative Procedures Act.

## CERTIFICATE OF SERVICE

I certify that on this 15th day of April 2004, (1) I prepared for mail through the U.S. Postal Service the foregoing *Decision and Final Agency Action* in the matter of *W. Fred Hurst, Harold W. Johnson, Dan Leatham, Tim Slocum, and Robert E. Steele v. Utah Department of Corrections* to the following:

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✓Harold W. Johnson  
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West Jordan UT 84084

✓Robert E. Steele  
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Santaquin UT 84655

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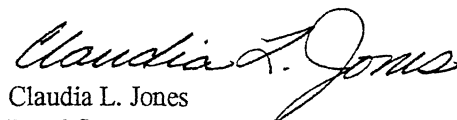
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Claudia L. Jones  
Legal Secretary

*cc Courtesy Decision Group*

000519

Exhibit B

**BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD**

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<b>W. FRED HURST, DAN LEATHAM, ROBERT E. STEELE, TIM SLOCUM, and HAROLD W. JOHNSON,</b>	:	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AFTER REMAND</b>
<b>Grievants,</b>	:	
<b>v.</b>	:	
<b>UTAH DEPARTMENT OF CORRECTIONS,</b>	:	
<b>Agency.</b>	:	<b>Case No. 19 CSRB/H.O. 273 Hearing Officer: K. Allan Zabel</b>

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On May 2, 2001, the Department of Corrections (Agency), by and through its attorney of record, Daryl L. Bell, Assistant Attorney General, filed a Motion to Dismiss and a Motion *in Limine*. Both motions were accompanied by supporting memoranda. On June 25, 2001, Grievants, by and through their attorney of record, Phillip W. Dyer, filed a memorandum in response to the Agency's motions and memoranda. On July 31, 2001, Mr. Bell filed a reply memorandum. Neither party requested oral argument. On October 12, 2001, the Hearing Officer issued his decision granting the Agency's motions. Grievants appealed the Step 5 decision to the Career Service Review Board (Step 6). After briefing by the parties and oral argument, the Board remanded the case to the Step 5 Hearing Officer "to make an evidentiary determination on the sole issue as to whether there was excusable neglect allowing Grievants to wait until January or February 1998 to file their grievance concerning on-call time."

A hearing was held on December 5, 2002, to take evidence as to the issue of excusable neglect. Patrick Nolan, Assistant Attorney General, was present as counsel for the Agency. David Salazar, Human Resource Director, and Linda Whitney, Human Resource Manager, were present as management representatives for the Agency. Phillip Dyer was present as counsel for Grievants. Grievants Harold W. Johnson, Daniel Leatham, Timothy Slocum and Robert E. Steele, were present. Grievant W. Fred Hurst was not present. A certified court reporter made a verbatim

evidence were received into the record.

### AUTHORITY

The authority of the Career Service Review Board (CSRB) to consider this matter is found at *Utah Code*, §67-19a-202 (2000), and *Utah Administrative Code*, R137-1-1 *et seq.* (2000). The authority of the CSRB to remand this case to the Step 5 Hearing Officer, and for the Hearing Officer to consider the matter on remand, is found at *Utah Administrative Code*, R137-1-22(7).

Having heard and reviewed the evidence of record and being otherwise fully advised in the premises, the Hearing Officer [Presiding Officer, *Utah Code*, Subsection 63-46b-2(1)(h) (2000)], now makes and enters the following Statement of the Issues, Supplemental Findings of Fact, Conclusions of Law, and Decision.

### STATEMENT OF THE ISSUES

The sole issue to be considered on remand is whether there was excusable neglect allowing Grievants to wait until January or February 1998 to file their grievance concerning entitlement to compensation for on-call time.

### SUPPLEMENTAL FINDINGS OF FACT

NOTE: The Findings of Fact contained in the Hearing Officer's decision issued October 12, 2001, are herewith supplemented by the following Findings.

1. Grievants were entitled to compensation for on-call time during the period of time when they were required to carry pagers during off-duty hours, and when they were assigned commute vehicles. Grievant Slocum had a commute vehicle until February 1996. Thereafter, Grievant Slocum continued to be on call by reason of a Post Order. Grievants Leatham, Steele, Johnson and Hurst were on call by virtue of the requirement to carry pagers and the assignment of commute vehicles. These four Grievants had commute vehicles from 1994 to January 1998.

2. Since 1990 the Agency has had 4 Executive Directors." Their terms of office were as follows:

Name	Term of Office	
	From	To
Gary DeLand	-----	1/4/92
Lane McCotter	1/4/92	7/11/97
Pete Haun	7/23/97	1/2/01
Mike Chabries	1/6/01	Present

transferred either arbitrarily or as retaliation for filing grievances or complaints.

4. Prior to 1992, there was an occasion when an employee identified as Mr. Lund was ordered by the Executive Director to delete unfavorable information from a report about an employee who was under investigation at the time. The employee refused to obey the order, and ended up resigning from the Agency.

5. On one occasion prior to July 7, 1997, the Agency Administrative Law Judge (ALJ) reported more than 80 hours on his time sheet for a two-week period. The Executive Director ordered the hearing officer to change his time sheet to show 80 hours worked for the time period. The ALJ altered his time sheet to show 80 hours, but submitted it with a statement that he was submitting a false time sheet. The ALJ worked in the same general area as the office of the Executive Director, and observed the Executive Director react angrily to the statement, but then signed the time sheet.

6. The Agency ALJ was once threatened with termination by the same Executive Director for issuing a Report and Recommended Decision concerning an Agency employee.

7. During the same Executive Director's last year in office, and some time after the ALJ had been threatened with termination for the Report and Recommendation, the Executive Director issued a General Order prohibiting the ALJ from hearing any employee grievances. This was a significant change in duties for the ALJ, as he had for many years prior to the new General Order, routinely heard employee's grievances and made Reports and Recommendations for the Executive Director.

8. About two months after the General Order was issued, as the ALJ was giving employee training to a group of Agency employees, he explained the General Order to the employees. One employee asked, "How can we get a fair hearing?"

9. The ALJ was given a written reprimand by the same Executive Director on the last day of that Director's administration. The ALJ felt that the reprimand was in retaliation for his open disagreement with several of the Director's actions concerning Agency employees.

10. Prior to becoming Executive Director in July 1997, Pete Haun had worked for the federal government in the Salt Lake City area for 25 years, in the field of pardons and parole. He then worked on the Utah Board of Pardons from 1989 until his appointment as Executive Director of the Agency. During these years, Mr. Haun became aware of some of the attitudes and perceptions of employees in the Agency.

General Order that prohibited the ALJ from hearing employee grievances. Mr. Haun instituted an open door policy, and over the years of his administration, he visited many Agency facilities and talked to hundreds of employees. He used the RAP Sheet, which was an Agency internal newsletter, meetings with employees, and word of mouth to let the employees know they could file grievances without fear of retaliation.

12. In October 1997, Mr. Haun wrote in the *RAP Sheet*, the Agency's in-house newsletter:

"Some of the immediate steps we have taken to promote positive working conditions for employees include a top-to-bottom review of the Code of Conduct, and a complete revision of staff discipline and grievance procedures. Before the changes are adopted, we will ask for suggestions and employee review. We will make these changes available for your review by the beginning of December."

This information was repeated in a general way in the same newsletter, in a section entitled "Do You Have Any Recommendations?"

13. Mr. Haun felt that the Bureau of Investigations within the Agency was generally perceived by Agency employees as somewhat "high-handed" in its dealings with Agency employees. It even investigated itself. He therefore decided to reorganize the Bureau. This decision caused a degree of dissatisfaction in some of the management employees of the Bureau, including some of the Grievants.

14. Approximately 150 audits of the Agency led to the conclusion that the Agency was out of compliance with State laws, rules or policies in approximately 182 areas. One of these areas was the use of commute cars by Agency management employees. Mr. Haun's decision to discontinue the use of commute cars was to put the Agency in compliance with State requirements.

15. On December 16, 1997, Mr. Haun issued a letter to employees of the Gunnison facility, advising the employees of his intent to visit the facility and meet with employees. As a response to communications he had previously received, Mr. Haun specifically stated that retribution against employees for stating concerns or problems would not be tolerated.

16. After making the announcement of his planned visit to the Gunnison facility, Mr. Haun received an anonymous call or letter saying that people would not come forward out of fear. Mr. Haun's prior experience with anonymous communications led him to believe there was no merit to the claim.



17. Mr. Haun's personal studies indicated to him that it may take time to change an institutional culture. Mr. Haun felt this was particularly true for an institutional culture as deeply seated as the Agency's.

18. A current employee of the Agency, Mr. Lebounty, was involuntarily transferred twice during the 1990's. The second involuntary transfer occurred during Mr. Haun's administration.

19. One of the Grievants, Harold Johnson, who was serving as Deputy Warden in July 1997 when Mr. Haun became Executive Director of the Agency, saw several staff members who were transferred, demoted or dismissed after filing grievances prior to Mr. Haun's administration.

20. One of the Grievants, Daniel Leatham, heard a rumor after his commute car was taken away, that the cars were taken away because the Agency did not want to be obligated for on-call pay. Mr. Leatham thereafter researched whether on-call time was compensable for management employees. After concluding that on-call time was compensable for himself and others in his situation, Mr. Leatham told his fellow Grievants about his conclusion. Mr. Leatham's research occurred during the first or second week of January 1998.

21. State employees have been entitled to on-call pay by *Utah Administrative Code* (1997) R477-8-6(8)(c)(i) or its predecessors since at least 1991.

22. Grievants filed their grievance with the Department Head, Mr. Haun, on February 5, 1998.

23. When the grievance reached Executive Director Haun's level, he remanded it to Scott Carver, an employee in the Division of Institutional Operations, with an invitation to Grievants to mediate the matter with Mr. Carver.

24. After receiving the invitation from Mr. Haun to mediate their grievance, Grievants met with Mr. Carver. At some point in the meeting between Mr. Carver and Grievants, Mr. Carver told Grievants that he, Carver, would not have filed a grievance because "that's just something you don't do over this kind of issue."

### CONCLUSIONS OF LAW

1. The time limitations contained in §67-19a-401(5)(a), *Utah Code*, are jurisdictional and constitute a limit on the scope of relief that can be granted to Grievants.

2. The time limitation contained in §67-19a-401(5)(b), *Utah Code*, is jurisdictional and constitutes an ultimate limit on the scope of relief that can be granted by State agencies and the CSRB when considering grievances.

3. The CSRB and its hearing officer do not have jurisdiction over improper conduct or knowing violations of statute and policy that were not timely grieved.

4. Grievants did not have excusable neglect under *Utah Code* §67-19a-401(5)(a) and *Utah Administrative Code* R137-1-13(3) for the late filing of their grievance.

5. Both the Agency and the CSRB are limited by *Utah Code* §67-19a-401(5)(a) to granting relief for a period of 20 working days before February-5, 1998, and for all pay periods since that date for which Grievants can establish by satisfactory evidence the amount of on-call time for which compensation is owed them under the provisions of *Utah Administrative Code* (1997) R477-8-6(8)(c)(i).

### DECISION

As noted in the original Step 5 decision, Grievants argue that they should be entitled to recover on-call pay going back for a period of four years from the date of their grievance. They base this argument on a theory that the 20-day time limit for filing grievances [§67-19a-401(5)] only governs *jurisdiction*, and not the scope of recovery. That issue was fully discussed in the original Step 5 decision.

The issue now to be decided is whether Grievants had excusable neglect for filing their grievance more than 20 working days after the “event” or action which gave rise to their grievance. The time at which the event arose in this case was discussed in some detail in the original Step 5 decision. The Hearing Officer notes that even if it is found that Grievants had excusable neglect for the delay in filing their grievance in this case, excusable neglect does not extend beyond one year from the date of the event giving rise to the grievance. *Utah Code* §67-19a-401(5)(b) provides:

(b) Notwithstanding Subsection 5(a) [excusable neglect], an employee may not submit a grievance more than one year after the event giving rise to the grievance.

This provision is clearly jurisdictional, in that it prohibits the consideration of any grievance that is filed more than one year after the date of the event which is grieved.

Grievants seek compensation for on-call time as provided in *Utah Administrative Code* R477-8-6-(7)(c), as it existed during the years Grievants were assigned to be on call. The Agency’s ALJ found as fact in his Report and Recommendation to the Agency’s Executive Director that Grievants had an objective fear of retaliation if they filed a grievance over the issue of on-call compensation at any time prior to July 1997. The undersigned Hearing Officer, for purposes of considering the Agency’s Motion to Dismiss, accepted this finding in the original Step 5 decision.

the period of time for which Grievants were entitled to on-call compensation by going back 20 working days from the date the grievance was filed. The filing date of the grievance was found by the ALJ to be February 11, 1998. The question of when the grievance was filed will be considered at another point in this decision. It is sufficient for purposes of considering when the grievable event occurred, that the event is not determined by the date of filing of the grievance.

In the original Step 5 decision, this Hearing Officer found that the grievable event or action in this case occurred when the new Executive Director, Pete Haun, invited grievances in July 1997. But this conclusion was based on the Hearing Officer's analysis of the case under the doctrine that when considering a motion to dismiss, the evidence will be viewed in a light most favorable to the nonmoving party. Now that an evidentiary hearing has been held to gather evidence on the issue of excusable neglect, it becomes necessary to also determine when the event giving rise to the grievance actually occurred.

In *Karber*, 6 CSRB 57 (Step 6), 1997, the CSRB dealt with the question of whether ongoing discussions constitute the event, or if the event or action occurs when the final agency notice is issued after discussions have been completed. The *Karber* decision established that the event or action occurred when the notice was issued. There was no comparable notice or action taken in the instant case.

We are given further guidance on the issue of what is the event or action in the case of *Kurt Zimmerman v. Department of Environmental Quality*, CSRB Case No. J.H. 52 (1991), which was cited in the original Step 5 decision of this case, and which, like the instant case, involved a question of compensation for on-call time. In *Zimmerman*, the CSRB Hearing Officer concluded that "an action took place when Grievant started carrying a pager and received compensatory time for doing so." In the instant case, Grievants did not receive compensation in any form for their on-call time prior to July 1997. However, as noted in the original Step 5 decision, they knew they were on call when they were given pagers and told to be available at any time whenever the pager was activated.

Unfortunately, little evidence was offered as to when Grievants were first told that they would be on call during their off-duty hours. However, neither side disputes that Grievants served on call prior to July 1997. One Grievant, Mr. Steele, testified that he carried a pager or cell phone for about 20 years. The Agency ALJ found, in his Report and Recommendation, that all of the Grievants were entitled to compensation for on-call time during the period of time when they were

in sometime in February 1996. Thereafter, Grievant Slocum continued to be on call by reason of a Post Order. Grievants Leatham, Steele, Johnson and Hurst were on call by virtue of the requirement to carry pagers and the assignment of commute vehicles. These four Grievants had commute vehicles from 1994 to January 1998. Grievants seek as their remedy compensation for on-call time going back four years from the date of their grievance.

For purposes of this decision it is concluded that each of the Grievants carried a pager, had a commute car, or was otherwise under a duty, by virtue of their management or supervisory responsibilities, to be on call for four years prior to filing their grievance. Therefore, the action or event pertinent to this case occurred at the time Grievants entered into a duty to be on call, or when the State instituted its policy of compensating FLSA exempt employees for on-call time, whichever occurred later.

Inasmuch as *Zimmerman*, which involved compensation for on-call time of an FLSA exempt employee, was decided in 1991, there can be no dispute that it was state policy to pay on-call compensation four years prior to the filing of the grievance herein. Thus, the action or event which gave rise to the instant grievance occurred four or more years prior to the filing of the grievance.<sup>1</sup>

Having determined when the event giving rise to the grievance occurred, we are left with the need to determine the basic issue for which this case was remanded; that is, did Grievants have excusable neglect for the delay in filing their grievance? If, as concluded above, the action or event occurred in 1994, the Agency, the CSRB Hearing Officer, and the CSRB itself would have no jurisdiction to hear the instant grievance, because it was clearly filed more than one year after the event. However, this case is not that simple and we must, therefore, understand the meaning of the term “excusable neglect” as that term is used in *Utah Code* §67-19a-401(5)(a).

First, we look to the statutory provision itself. §67-19a-401(5)(a) contains no language that could be construed as a definition of the term. However, 401(5)(a) states “Unless the employee meets the requirements for excusable neglect **established by rule . . .**” [Emphasis added.] Thus, the CSRB was given authority by the Legislature to make rules governing the requirements for excusable

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<sup>1</sup> While there may be some dispute as to this conclusion, the only evidence presented in the evidentiary hearing on the point was Mr. Steele’s testimony that he had carried a pager or cell phone for about 20 years. However, the Agency ALJ’s Report and Recommendation, with its Findings of Fact, was submitted as evidence by the Agency. Grievants seek a remedy going back four years, which would take their grievance back to sometime in 1994. Inasmuch as the Agency’s evidence supports Grievants’ claim of being on call from 1994 on, there appears to be no dispute between the parties that the point in time when the action or “event” from which the grievance arose occurred in 1994. It may even have occurred earlier than 1994, but Grievants’ claim only goes back the four years.

governing ‘definitions of terms, phrases, and words used in the grievance process established by this chapter[.]’

CSRB R137-1-2 defines excusable neglect as follows:

“Excusable Neglect” means the exercise of due diligence by a reasonably prudent person and constitutes a failure to take proper steps at the proper time, not in consequence of the person’s own carelessness, inattention, or willful disregard in the processing of a grievance, but in consequence of *some unexpected or unavoidable hindrance* or accident. [Emphasis added.]

This definition is consistent with court decisions from the federal and numerous state jurisdictions. See *Words and Phrases*, “Excusable Neglect.”

There have been no court decisions in Utah specifically addressing the definition of “excusable neglect” as used in *Utah Code* §67-19a-401(5)(a) or in *Utah Administrative Code* R137-1-2. However, the Utah Supreme Court’s decision in the case of *Reisbeck v. HCA Health Services of Utah*, 2 P.3rd 447 (Utah 2000), provides an illuminating analysis of the term “excusable neglect” as used in Rule 4(e) of the Utah Rules of Civil Procedure (URCP). That rule pertains to the grounds on which a late appeal may be allowed in the appellate courts of Utah. While not directly on point with the issue presented by the instant case, it gives some indication of the Court’s view of what constitutes excusable neglect.

The Court noted that the standards applicable to excusable neglect and good cause, as those terms are used in URCP 4(e), are separate, if not distinct, standards. The court stated:

By this standard, it is apparent rule 4(e) permits a trial court to extend the time for filing a notice of appeal based on two general categories of justification: (1) excusable neglect, which is an *admittedly neglectful delay* that is nevertheless excused by special circumstances; or (2) good cause, which pertains to special circumstances that are *essentially beyond a party’s control*. [Emphasis in original.]

*Reisbeck*, at 450. The court further explained that “good cause remains a more liberal standard.” *Id.*

The CSRB definition of excusable neglect actually combines elements of both excusable neglect and good cause. It clarifies that the delay in filing a grievance or moving it forward cannot be the result of the grievant’s own carelessness, inattention or willful disregard of the grievance

process, and requires that the delay must be excusable.

an accident. A hindrance is generally defined as an impediment or obstacle to any action. See *Webster's Twentieth Century Dictionary* (1937), or *Webster's New International Dictionary* (1988 Edition). In this case, Grievants contend that their delay was caused by an unavoidable hindrance, referring specifically to their fear of retaliation if they filed a grievance.

The *Reisbeck* court quoted with approval the holding in the case of *West v. Grand County*, 942 P.2d 337 (Utah 1997), that excusable neglect cases are "highly fact intensive." The facts of the instant case, as presented at the evidentiary hearing, compel the conclusion that prior to July 1997, there was genuine cause for fear of retaliation at the Agency. However, did that fear constitute an unavoidable hindrance to filing the grievance?

§67-19-3.1 of the Utah State Personnel Management Act provides, in pertinent part, as follows:

(1) The department shall establish a career service system designed in a manner that will provide for the effective implementation of the following merit principles:

\* \* \*

(g) providing a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

\* \* \*

(2) The principles in Subsection (1) shall govern interpretation and implementation of this chapter.

To allow an administration to create or maintain an atmosphere in which employees are afraid to exercise their rights and lay claim to benefits for which they qualify, because they know that such an exercise will result in adverse personnel action, is contrary to the intent and purpose of the Personnel Management Act. Therefore, this Hearing Officer must agree with Grievants that fear of retaliation prior to July 1997 was sufficient on the facts of this case to constitute an unavoidable hindrance, and imbued Grievants' failure to file a timely grievance with excusable neglect for purposes of §67-19-401(5)(a).

This brings us to the crux of this case, which is whether the fear of retaliation was justified by the facts of the case from July 1997 to the date on which Grievants finally filed their grievance. To summarize the facts, without minimizing the reality of the atmosphere in which Grievants worked, we know the following: The new Executive Director in July 1997, Pete Haun, came to the Agency with an awareness of its culture of personnel administration. Mr. Haun immediately made changes such as rescission of the General Order prohibiting the Agency ALJ from hearing employee

Grievants were told to report on-call time for periods when each was the Officer-in-Charge.

Mr. Haun made it clear that there would be no retaliation for filing of grievances. He made an extensive effort to let employees know that he wanted to improve working conditions in the Agency.

The Hearing Officer notes that Grievant Leatham testified he was told for nine years that as an FLSA exempt employee, he was not entitled to on-call compensation. Had the Agency, through any of its management employees, intentionally or negligently withheld from Grievants the knowledge of their entitlement to on-call compensation, such conduct could, in some circumstances, constitute an unavoidable hindrance which would invoke the excusable neglect standard on behalf of Grievants. However, in this case the knowledge of a right or entitlement to on-call compensation was not limited to a select few in the Agency. Rather, it was a matter of State administrative rule, which was open to all employees and to all members of the public. Furthermore, Grievants began reporting a portion of their on-call time in July 1997, after Mr. Haun became the Agency Executive Director. Thus, Grievants' contention that they did not know of their right to claim on-call compensation is not convincing.

In addition, Grievant Leatham testified that after he turned in his commute car, he heard a rumor that the commute cars were taken away so the Agency would not have to pay on-call compensation. Mr. Leatham then decided to research the issue and learned of his entitlement to on-call compensation. The result of his research clearly shows that the information was readily available at any time, had he or any of the other Grievants chosen to look at the State rules governing on-call compensation.

Mr. Haun acknowledged in his testimony that an agency culture is not changed quickly. According to his own studies, such a change may take as many as seven years to be fully implemented. Assuming the validity of Mr. Haun's observations, the facts remain that the State administrative rule governing on-call compensation was readily available to Grievants at any time. What is more important, Grievants became aware of their entitlement to some form of on-call compensation in July 1997, when they began reporting such time during periods when they were the Officer-in-Charge.

Finally, there is an inherent inconsistency in Grievants' argument that they continued to fear possible retaliation after July 1997, while simultaneously reporting on-call time for which they were compensated. Considering all of the foregoing facts, the Hearing Officer feels compelled to

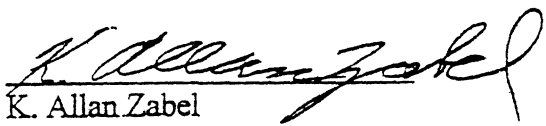
grievance.

In its Remand Order, the Board noted in a footnote that the actual date on which the grievance was filed is unclear. The Agency concluded that it was filed on February 11, 1998. The grievance itself was dated January 30, 1998. The CSRB received a copy of the grievance on February 5, 1998. Although the question of when the grievance was actually filed with the Agency was discussed in the evidentiary hearing after remand, no additional evidence was offered, and the parties continued to disagree on the issue. In the absence of any evidence from the Agency establishing when the grievance was actually received in the office of the Executive Director, the Hearing Officer must conclude that the date a copy was received in the office of the CSRB, February 5, 1998, is the proper date of the grievance.

### DECISION

The grievance to the Agency Head in this case was filed on February 5, 1998. Grievants met the standard for excusable neglect in failing to file a grievance for on-call compensation prior to the 14<sup>th</sup> pay period in July 1997, when they began reporting on-call time. Grievants were not, however, subject to unavoidable hindrance after the 14<sup>th</sup> pay period in 1997, and therefore did not meet the excusable neglect standard after that time. Therefore, Grievants are entitled to on-call compensation for any time they can prove by satisfactory evidence that they served on call beginning at a point 20 working days prior to February 5, 1998, and continuing thereafter for as long as they were required to be on call.

DATED this 8th day of January 2003.

  
K. Allan Zabel  
Hearing Officer  
Career Service Review Board

### RECONSIDERATION

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

### APPEAL

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



Exhibit C

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Dan Leatham, Bob Steele, Tim Slocum,  
Bill Johnson, and Fred Hurst,  
Petitioners,

Report and Recommendation

Case No. 98 HLH 5-G

vs.

Department of Corrections,  
Division of Institutional Operations,  
Respondent

ALJ R. Spencer Robinson

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The parties appeared before this ALJ on May 9, 2000. Mr. Phillip W. Dyer represented the grievants. Mr. Ed Kingsford represented the Department. The hearing was held as part of the Department's internal grievance procedure, in consonance with the rules established by the Career Service Review Board under 67-19a-203, and under the authority of 64-13-28.

An audio tape record of the hearing was made. The parties called witnesses, who testified under oath, and introduced documents into evidence. The record was left open to allow Mr. Dyer to submit totals of the dollar amounts his clients claiming. That information arrived on May 10 and 11, 2000. The record was then closed. Based on the evidence provided by the parties, and information in the records of the Department, this ALJ makes the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. The grievants were career service employees at the time of filing the grievance on or about February 11, 1998. Messrs. Leatham, Steele, Slocum, and Hurst are presently employed by the Department of Corrections. Mr. Johnson retired after the filing of the grievance.
  2. Grievants were all part of the upper management of the Division of Institutional Operations during the times relevant to this grievance. They were told they were FLSA exempt. For most of the time since 1994 they were not required to complete time sheets. They began completing time sheets in July of 1997. The time sheets were for periods when they served as the Officer In Charge. They claimed and received on-call pay as listed on those time sheets.
  3. Grievants were given pagers in order to facilitate contact with them. They were expected to respond if the pager was activated. They were expected to remain within the range of
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the pager unless on approved leave or if they had permission of their supervisors.

4. While on the pagers, grievants were able to remain at their homes, shop, dine out, attend movies, go to church, and engage in other personal activities. The grievants had to plan for alternative means for family members to return home should they be paged and asked to come in. There were times personal activities were interrupted by pages. The frequency of these interruptions was not established by the evidence.
5. Grievants were assigned commute vehicles. Documents introduced by the grievants establishes they had approved commute vehicles in 1995. The Request of Commute Authorization forms bear the signatures of former Division of Institutional Operations Director J. Terry Bartlett and former Executive Director O. Lane McCotter. An illegible signature appears on the line for the Department of Administrative Services Representative.
6. Department records contain Request for Commute Authorization for all the grievants signed by former Division of Institutional Operations Director Terry Bartlett and former Executive Director O. Lane McCotter on March 31, 1997. No signature from a DAS representative appears on the copies of these documents. Department records contain DF-61's from January of 1998 for Messrs Steele, Hurst, and Johnson with vehicle information matching that listed on the above noted Requests for Commute Authorization for those gentlemen.
7. Mr. Slocum testified that in February of 1996 he turned in his commute vehicle.
8. Mr. Slocum's Post Order, FW 08 Deputy Bureau Chief - Support Services Bureau - Draper Site, states the incumbent shall Acarry a pager and respond to service upon activation during day or night. FW 08/02.01 (E)(1)(g).
9. Mr. Leatham testified he had a commute vehicle through 1998. Mr. Steele testified he had a commute vehicle from 1994 to January of 1998. Mr. Johnson testified he had a commute vehicle from 1994 to 1998. Mr. Hurst testified he had a commute vehicle from 1994 to 1998. Documents within the Department of Corrections indicate these grievants lost their commute vehicles at the end of January 1998.
10. Beginning in pay period 13 in 1997 Messrs Leatham and Steele submitted time sheets listing on-call hours. Messrs Johnson and Hurst did so in pay period 14 of 1997. Mr. Slocum did so in pay period 25 of 1998. They were compensated for the on-call time listed on the time sheets. These time sheets reflect grievants' assignment as the Officer in Charge (OIC).
11. Under the previous administration the grievants did not submit time sheets. It was their understanding that the previous administration did not want hours worked documented.

The grievants understood part of the reason for them not submitting time sheets was that they were considered FLSA exempt.

12. The grievants had a subjective fear of retaliation if they challenged the practices of the previous administration. The grievants had been subject to transfers and had seen others transferred. They drew the inference that individuals challenging the previous administration would experience retaliation.
13. In 96 OLM 6-D, an employee of the Department was served an Administrative Complaint informing her she was being demoted and transferred. She requested a hearing, as provided in AE 03. An audit of her position and activities followed. She was then served an Amended Administrative Complaint informing her that her employment would be terminated. Following the hearing, an employee in the office of Division of Institutional Operations Director Bartlett, who participated in the audit, made a comment to this ALJ. She said that if the subject of the disciplinary action had not appealed the original Administrative Complaint that the Department would not have pursued the matter further, despite the information the audit produced. This ALJ noted the comment in his Report and Recommendation.
14. The grievants= fear of retaliation if they had filed a grievance under the previous administration was objectively reasonable.
15. The new administration, which took office in July of 1997, stated it would not retaliate against people who filed grievances and that if employees had grievances they should file them. No evidence was produced to show these representations have proven false. If the grievants harbored fears of retaliation for filing this grievance, they were not objectively reasonable.
16. The grievants also testified they were not aware they could claim on-time until shortly before they filed the grievance.

#### CONCLUSIONS OF LAW

1. Grievants were all career service employees at the time they filed the grievance, and thus were eligible to use the grievance process.
2. It is the event, not the discovery of a legal theory on which one may make a claim, that triggers the running of the period of limitations. Grievants discovery of a legal theory does not control. See Anderson v. Dean Witter Reynolds, 920 P.2d 575 (Utah Ct.App. 1996).
3. Absent excusable neglect, 67-19a-401 permits the filing of a grievance Aonly if the employee submits the grievance@ within twenty working days of the event giving rise to

the grievance or knowledge of the event. This ALJ agrees with the CSRB interpretation of this statute in *Karber v. Utah Department of Corrections*, 6 CSRB 57 (1997). Filing within twenty working days is mandatory. Failure to timely file is jurisdictional.

4. Assuming the actions of the previous administration would bring the grievants failure to file within the definition of excusable neglect, the current administration=s statements regarding grievances, and the seven month period the grievants had to observe the response of the administration to grievances before they filed, takes them outside of excusable neglect.
5. Grievants are eligible for on-call pay for a period of twenty working days back from the date they filed the grievance, and prospectively from the date of filing, if the evidence shows they were on-call.
6. Management has the discretion to go back one year from the date the grievants filed. See 67-19a-401 (5)(b).
7. Article XVI, Section 6 of the Utah State Constitution does not apply in this case. Grievants requested remedy was to be made whole for lost on-call compensation. Time spent on-call does not fall within the definition of hours worked found in R477-1-1 (3). Being on-call is not part of the work day.
8. The extent of interference with grievants time, based on the evidence in the record, does not establish grievants were on-call as that term has been interpreted by the federal courts in FLSA cases. See *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10<sup>th</sup> Cir. 1988), *Boehm v. Kansas City Power & Light Co.*, 868 F.2d 1182 (10<sup>th</sup> Cir. 1989) and *Renfro v. City of Emporia*, 948 F.2d 1529 (10<sup>th</sup> Cir. 1991), *Gilligan v. City of Emporia*, 986 F.2d 410, (10<sup>th</sup> Cir. 1993), *Andrews V. Town of Skiatook*, 123 F.3d 1327, 123 F.3d 1327 (10<sup>th</sup> Cir. 1997).
9. At the time the grievance was filed, R477-8-6(8)(c)(i) read as follows:

AOn-call time: Employees required by agency management to be available for on-call work shall be compensated for on-call time at a rate of 1 hour for every 12 hours the employee is on-call.

(i) Time is considered Aon-call time@ when the employee has freedom of movement in personal matters as long as he/she is available for call to duty.@

(ii) Employees record on-call time as Aon-call paid@ not as Ahours worked@ on their time sheet, and shall be paid the following pay period. Any time actually worked during the on-call period is recorded in increments of 15 minutes as Ahours worked@ in addition to on-call time.@

10. Following this becoming an issue, DHRM amended its rule. Effective in June of 1998 R477-8-6 (c) read:
- (c) On-call time: Employees required by agency management to be available for on-call work shall be compensated for on-call time at a rate of 1 hour for every 12 hours the employee is on-call. (i) Time is considered "on-call time" when the employee has freedom of movement in personal matters as long as he/she is available for call to duty. (ii) An employee must be directed by his supervisor, either verbally or in writing, that he is on call for a specified time period. Carrying a beeper or cell phone shall not constitute on call time without a specific directive from a supervisor. (iii) The employee shall record the hours spent in on call status on his time sheet in order to be paid.
11. Under either definition of Aon-call@ Mr. Slocum=s Post Order puts him in that status. He is entitled to on-call pay during the twenty working day period prior to February 11, 1998. Management has the discretion, but not the duty, to compensate him during the year preceding the filing of his grievance. Mr. Slocum is also entitled prospectively to on-call pay until his Post Order or assignment changed, or until he was expressly instructed to disregard that portion of his Post Order, or in some other way put on actual notice that someone with the authority to do so had altered his duties as the Deputy Warden of Support Services. Mr. Slocum should submit amended time sheets reflecting those periods when he was on-call. This ALJ retains jurisdiction to take evidence on the issues regarding Mr. Slocum=s status prospectively from February 11, 1998, if necessary.
12. Messrs Leatham, Steele, Johnson, and Hurst are entitled to on-call pay for the twenty working day period prior to February 11, 1998, during which they were assigned a commute vehicle. Management has the discretion, but not the duty, to compensate them during the year preceding the filing of this grievance. One of the conditions in the Division of Administrative Services (DAS) rules for being given a commute vehicle is being on-call. See DAS Rule 15.4, section 8, which requires the employee being given the commute vehicle to be on-call as defined in R477-8-6 (c). Rule 15.4 incorporates the DHRM definition of on-call by reference. The meaning of on-call must be the same whether the issue is a commute vehicle or pay. The grievants cannot be on-call in order to qualify for the commute vehicle, but not on-call for purposes of pay. Messrs Leatham, Steele, Johnson, and Hurst should submit amended time sheets reflecting those periods when they were on-call by virtue of having a commute vehicle.
- 13.
14. Inasmuch as the parties may not have anticipated the bases for this ALJ=s decision, jurisdiction is retained to clarify or supplement the record.

#### DISCUSSION

This ALJ previously denied the grievants= motion to amend to include Article XVI, Section 6 of the Utah Constitution. Nothing coming forth since that decision on February 7,

2000, has altered this ALJ's decision regarding the motion to amend.

Had the motion to amend been granted, it is unlikely the FLSA multiplier of time and one-half would have been applied to the time grievants were on-call. Federal courts interpreting and applying the FLSA did not characterize the grievants' circumstances as compensable under the FLSA. In this ALJ's view, being made whole is receiving one hour of pay for every twelve hours of on-call, not time and one-half their hourly pay for every hour outside of regular hours. It seems logical that if the FLSA concept of time and one-half is to be invoked, the FLSA concept of on-call should also apply. The grievants do not meet the FLSA on-call standard.

As set forth above, this ALJ finds he has jurisdiction to address the requested remedy back twenty working days from the date the grievance was filed. The Executive Director has the discretion to go back one year. Arguments that other periods of limitation should be applied in this forum were not persuasive.

This ALJ recommends the grievants be compensated for on-call time during the twenty working day period preceding the filing of their grievance, and prospectively to the extent they can establish eligibility for compensation under the legal basis set forth in this Report and Recommendation. This ALJ recommends no additional compensation be granted.

Dated this twenty-second day of May 2000.

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R. Spencer Robinson  
Administrative Law Judge  
Utah Department of Corrections

### NOTICE OF APPEAL RIGHTS

Either party may request a meeting with the Executive Director to review this Report and Recommendation. The granting of such a review is discretionary, and is not a new hearing. It must be requested within five working days from receipt of the Report and Recommendation.

Executive Director review must be requested in writing. Employee requests constitute a written waiver of the time period imposed for the Executive Director to respond at Level 4 of the grievance process. Requests by the Division Director shall be accompanied by a written waiver of the time limits from the employee.

If review is not requested within five working days of receipt of the Report and Recommendation, it will become the Final Order. This Order is final except in the following matters: promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violation of personnel rules, issues concerning the equitable administration of benefits, reduction in force and disputes concerning abandonment of position. These matters may be appealed to the Career Service Review Board by employees dissatisfied with the Department's decision.



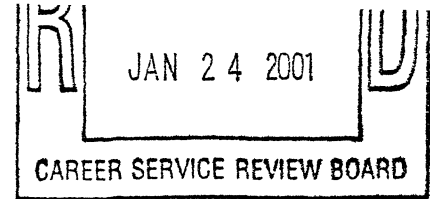
Exhibit D



Michael O. Leavitt  
Governor  
H.L. Haun  
Executive Director

STATE OF UTAH  
DEPARTMENT OF CORRECTIONS  
EXECUTIVE OFFICE

6100 South Fashion Place Boulevard - Suite 400  
Murray Utah 84107  
(801) 265-5512  
FAX (801) 265-5726



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Dan Leatham, Bob Steele, Tim Slocum,  
Bill Johnson, and Fred Hurst,  
Petitioners,

Final Order

Case No. 98 HLH 5-G

vs.

Department of Corrections,  
Division of Institutional Operations,  
Respondent.

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Both parties appealed the recommendation of the Administrative Law Judge. Former Executive Director Haun met with the grievants. On September 6, 2000, Mr. Haun remanded the case to Division of Institutional Operations Scott Carver with an invitation to the grievants to mediate this matter.

On January 12, 2001, Mr. Philip Dyer, the attorney for the grievants, sent a facsimile transmission to the ALJ. He stated that on behalf of his clients he declined any further efforts to mediate the matter and asked the ALJ to refer it to me for a Final Order.

The grievants' requested remedy is compensation for being on-call, dating four years back from the filing of the grievance. They argue that they should receive 1 and ½ times their hourly pay for every hour they were on-call. Their argument is based, in part, on Article XVI, Section 6 of the Utah State Constitution. They claim that since eight hours constitutes a day's work, the carrying of the pager and responding to it when activated constituted work. They also seek the multiplier of time and ½ by drawing on the Fair Labor Standards Act.

This was not part of the original grievance. They moved to amend the grievance to include Article XVI, Section 6. The ALJ rejected the argument, citing R477-1-1 (3), which defines actual hours worked as, "Time spent performing duties and responsibilities associated with the employee's job assignments." It goes on to state that "on-call time" is excluded from hours worked. I agree with the ALJ that on-call time, since it is not hours worked, is not part of the work day. Therefore, Article XVI, Section 6 is not applicable.

There is also an issue about the period of limitations applicable in this case. The grievants have asserted the period of limitations is four years. I disagree. The applicable period is twenty working days from the event or knowledge of it. See 67-19a-401.

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000023

I accept those findings and conclusions of the ALJ necessary to find that the grievants were on-call by virtue of being assigned a commute vehicle, or, in Mr. Slocum's case, by virtue of his Post Order. I find there is no excusable neglect justifying the failure to file earlier. I will not exercise discretion to go back more than twenty working days from the date the grievance was filed.

Based on that, I order that Mr. Leatham, Mr. Steele, Mr. Johnson, and Mr. Hurst, be permitted to submit amended time sheets listing on-call time back twenty working days from the date they filed their grievances until the time they surrendered their commute vehicles at the end of January of 1998. They are to be paid one hour's pay for every twelve hours they were on-call during that period of time.

Mr. Johnson is no longer an employee. Therefore, he cannot be paid from payroll. He must be paid through accounts payable. He must sign an agreement accepting responsibility for the taxes.

Mr. Slocum shall also be permitted to submit amended time sheets for the period of twenty working days back from February 11, 1998, and prospectively until his Post Order or assignment changed, or until he had actual notice his duties as Deputy Warden of Support Services no longer included carrying a pager and responding to it on activation, day or night. If there is a dispute between Mr. Slocum and the Division of Institutional Operations as to when he ceased to be eligible for on-call pay based on his Post Order, either party may request a hearing before the ALJ. That hearing shall be limited to establishing when his Post Order or assignment changed, or when he had actual notice that his duties as Deputy Warden of Support Services no longer included carrying a pager and responding to it on activation, day or night.

Dated this 19 day of January, 2001.

UTAH DEPARTMENT OF CORRECTIONS



Mike Chabries  
Executive Director

98 HLH 5-G

NOTICE OF APPEAL RIGHTS

If you are dissatisfied, you may appeal this Final Order to the Career Service Review Board in accordance with law and the rules of the CSRB. Notice of appeal must be filed within ten working days of receipt of the Final Order. **Failure to file a timely appeal to the Career Service Review Board may result in dismissal of the appeal.**

Exhibit E

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay, and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party

1896

## Exhibit F

**67-19-3.1. Principles governing interpretation of chapter and adoption of rules.**

(1) The department shall establish a career service system designed in a manner that will provide for the effective implementation of the following merit principles:

(a) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(b) providing for equitable and competitive compensation;

(c) training employees as needed to assure high-quality performance;

(d) retaining employees on the basis of the adequacy of their performance and separating employees whose inadequate performance cannot be corrected;

(e) fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, or disability, and with proper regard for their privacy and constitutional rights as citizens;

(f) providing information to employees regarding their political rights and the prohibited practices under the Hatch Act; and

(g) providing a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

(2) The principles in Subsection (1) shall govern interpretation and implementation of this chapter.

2000



Exhibit G

receiving the positive test results or be subject to further disciplinary procedures established by rule of the executive director in accordance with Section 67-19-34. 1990

#### 67-19-39. Exemptions.

Peace officers, as defined under Title 53, Chapter 13, Peace Officer Classifications, acting in their official capacity as peace officers in undercover roles and assignments, are exempt from the provisions of this act. 2002

#### 67-19-40. Repealed.

1997

#### 67-19-41. Cost-Savings Suggestions Pilot Program — Forms — Application — Evaluation — Awards.

(1) There is created the Cost-Savings Suggestions Pilot Program.

(2) The department shall:

(a) consult with state agencies to select two to four state departments or divisions to participate in the pilot program;

(b) create a form for an employee to make suggestions that will save costs for an employee's agency; and

(c) distribute the form to the participating state agencies for distribution to employees.

(3) An employee of a participating agency with a cost-saving suggestion shall:

(a) complete the form outlining the cost-saving suggestion; and

(b) submit it to the employee's agency director and the department.

(4) (a) (i) An agency director who receives a cost-saving suggestion from an employee shall, within 30 days, evaluate the suggestion to determine if the suggestion is feasible and might result in savings for the agency.

(ii) If the suggestion cannot be adequately evaluated within 30 days, the agency director may extend the evaluation period for an additional 30 days by notifying the employee and the department of the extension.

(b) (i) The department shall submit the suggestion to the panel of examiners for the Utah Quality Service Award Program.

(ii) The panel of examiners for the Utah Quality Service Award Program shall:

(A) review the suggestion and submit their comments to the agency director;

(B) if the suggestion appears to have application to agencies beyond the agency in which the suggestion originated, refer the suggestion to other agencies to which the suggestion may apply; and

(C) approve or deny the suggestions as eligible for cost-saving awards as defined in Subsection (8).

(5) After completing the evaluation, the agency director shall notify the employee and the department, in writing, that the suggestion:

(a) will be implemented; or

(b) will not be implemented, with a statement explaining why it will not be implemented.

(6) If the cost-saving suggestion is implemented, the agency director shall:

(a) notify the department that the agency will implement the suggestion;

(b) provide to the department an estimate of the potential annual cost savings to the agency;

(c) give the employee making the suggestion an initial cash award of no less than \$100 and no more than \$200, as determined by the agency director;

(d) forward information describing the implemented suggestion and the agency's calculation of the annual cost saving to the Division of Finance; and

(e) if directed by the Division of Finance, calculate the actual annual cost saving for a period of one year after the suggestion has been implemented.

(7) The Division of Finance shall:

(a) review and verify the agency's cost-saving calculation; and

(b) report its findings to the department.

(8) (a) The panel of examiners for the Utah Quality Service Award Program in the department shall review the calculated cost savings of the suggestion and the report of the Division of Finance and, if appropriate, authorize the agency to award 10% of the annual cost savings, not to exceed \$5,000, to the employee.

(b) The agency may use the balance of the cost savings to enhance programs and not to be used for bonuses, other compensation, training, or travel.

(9) The department and the participating agencies shall report to the Government Operations Interim Committee by September 1, 2003, concerning the results of this pilot program. 2000

## CHAPTER 19a

### GRIEVANCE AND APPEAL PROCEDURES

#### Part 1

#### General Provisions

Section  
67-19a-101. Definitions.

#### Part 2

#### Career Service Review Board

67-19a-201. Career Service Review Board created — Members — Appointment — Removal — Terms — Organization — Per diem and expenses.  
67-19a-202. Powers — Jurisdiction.  
67-19a-203. Rulemaking authority.  
67-19a-204. Administrator — Powers.

#### Part 3

#### Grievance and Appeal Procedures

67-19a-301. Charges submissible under grievance and appeals procedure.  
67-19a-302. Levels of appealability of charges submissible under grievance and appeals procedure.  
67-19a-303. Employees' rights in grievance and appeals procedure.

#### Part 4

#### Procedural Steps to Be Followed by Aggrieved Employee

67-19a-401. Time limits for submission of appeal by aggrieved employee — Voluntary termination of employment — Group grievances.  
67-19a-402. Procedural steps to be followed by aggrieved employee.  
67-19a-403. Appeal to administrator — Jurisdictional hearing.  
67-19a-404. Administrator's responsibilities.  
67-19a-405. Prehearing conference.  
67-19a-406. Procedural steps to be followed by aggrieved

## Section

- employee — Hearing before hearing officer  
— Evidentiary and procedural rules.
- 67-19a-407. Appeal to Career Service Review Board.
- 67-19a-408. Career Service Review Board hearing — Evidentiary and procedural rules.

## PART 1

## GENERAL PROVISIONS

**67-19a-101. Definitions.**

As used in this chapter:

- (1) "Administrator" means the person employed by the board to assist in administering personnel policies.
- (2) "Board" means the Career Service Review Board created by this chapter.
- (3) "Career service employee" means a person employed in career service as defined in Section 67-19-3.
- (4) "Employer" means the state of Utah and all supervisory personnel vested with the authority to implement and administer the policies of the department.
- (5) "Grievance" means:
  - (a) a complaint by a career service employee concerning any matter touching upon the relationship between the employee and his employer; and
  - (b) any dispute between a career service employee and his employer.
- (6) "Supervisor" means the person to whom an employee reports and who assigns and oversees the employee's work.

1991

## PART 2

## CAREER SERVICE REVIEW BOARD

**67-19a-201. Career Service Review Board created — Members — Appointment — Removal — Terms — Organization — Per diem and expenses.**

- (1) There is created a Career Service Review Board
- (2) (a) The governor shall appoint five members to the board no more than three of which are members of the same political party.
- (b) The governor shall appoint members whose gender and ethnicity represent the career service work force.
- (3) (a) The governor may remove any board member for cause.
- (b) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.
- (4) The governor shall ensure that appointees to the board:
  - (a) are qualified by knowledge of employee relations and merit system principles in public employment; and
  - (b) are not:
    - (i) members of any local, state, or national committee of a political party;
    - (ii) officers or members of a committee in any partisan political club; and
    - (iii) holding or a candidate for a paid public office.
- (5) (a) Except as required by Subsection (b), the governor shall appoint board members to serve four-year terms beginning January 1.
- (b) Notwithstanding the requirements of Subsection (a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of board members are staggered so that approximately half of the board is appointed every two years.

- (c) The members of the board shall serve until their successors are appointed and qualified.
- (6) Each year, the board shall choose a chair and vice chair from its own members.
- (7) (a) Three members of the board are a quorum for the transaction of business.
- (b) Action by a majority of members when a quorum is present is action of the board.
- (8) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
- (b) Members may decline to receive per diem and expenses for their service.

1996

**67-19a-202. Powers — Jurisdiction.**

- (1) (a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about 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 that have not been resolved at an earlier stage in the grievance procedure.
- (b) The board has no jurisdiction to review or decide any other personnel matters.
- (2) The time limits established in this chapter supersede the procedural time limits established in Title 63, Chapter 46b, Administrative Procedures Act.
- (3) In conjunction with any inquiry, investigation, hearing, or other proceeding, any member of the board may:
  - (a) administer oaths;
  - (b) certify official acts;
  - (c) subpoena witnesses, documents, and other evidence; and
  - (d) grant continuances pursuant to board rule.

1991

**67-19a-203. Rulemaking authority.**

The board may make rules governing:

- (1) definitions of terms, phrases, and words used in the grievance process established by this chapter;
- (2) what matters constitute excusable neglect for purposes of the waiver of time limits established by this chapter;
- (3) the application for and service of subpoenas, the service and filing of pleadings, and the issuance of rulings, orders, determinations, summary judgments, transcripts, and other legal documents necessary in grievance proceedings;
- (4) the use, calling, attendance, participation, and fees of witnesses in grievance proceedings;
- (5) continuances of grievance proceedings;
- (6) procedures in jurisdictional and evidentiary hearings, unless governed by Title 63, Chapter 46b, the Administrative Procedures Act;
- (7) the presence of media representatives at grievance proceedings; and
- (8) procedures for sealing files or making data pertaining to a grievance unavailable to the public.

1999

**67-19a-204. Administrator — Powers.**

- (1) The governor shall appoint a person with demonstrated ability to administer personnel policies to assist the board in performing the functions specified in this chapter
- (2) (a) The administrator may:
  - (i) assign qualified, impartial hearing officers on a per case basis to adjudicate matters under the jurisdiction of the board;

(ii) subpoena witnesses, documents, and other evidence in conjunction with any inquiry, investigation, hearing, or other proceeding; and

(iii) upon motion made by a party or person to whom the subpoena is directed and upon notice to the party who issued the subpoena, quash or modify the subpoena if it is unreasonable, requires an excessive number of witnesses, or requests evidence not relevant to any matter in issue.

(b) In selecting and assigning hearing officers under authority of this section, the administrator shall appoint hearing officers that have demonstrated by education, training, and experience the ability to adjudicate and resolve personnel administration disputes by applying employee relations principles within a large, public work force.

1995

### PART 3

#### GRIEVANCE AND APPEAL PROCEDURES

##### 67-19a-301. Charges submissible under grievance and appeals procedure.

(1) This grievance procedure may only be used by career service employees who are not:

- (a) public applicants for a position with the state's work force;
- (b) public employees of the state's political subdivisions;
- (c) public employees covered by other grievance procedures; or
- (d) employees of state institutions of higher education.

(2) Whenever a question or dispute exists as to whether an employee is qualified to use this grievance procedure, the administrator shall resolve the question or dispute. The administrator's decision is reviewable only by the Court of Appeals.

(3) Any career service employee may submit a grievance based upon a claim or charge of injustice or oppression, including dismissal from employment, resulting from an act, occurrence, omission, or condition for solution through the grievance procedures set forth in this chapter.

1991

##### 67-19a-302. Levels of appealability of charges submissible under grievance and appeals procedure.

(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 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.

1991

##### 67-19a-303. Employees' rights in grievance and appeals procedure.

(1) For the purpose of processing a grievance, a career service employee may:

(a) obtain assistance by a representative of the employee's choice to act as an advocate at any level of the grievance procedure;

(b) request a reasonable amount of time during work hours to confer with the representative and prepare the grievance; and

(c) call other employees as witnesses at a grievance hearing.

(2) The state shall allow employees to attend and testify at the grievance hearing as witnesses if the employee has given reasonable advance notice to his immediate supervisor.

(3) No person may take any reprisals against any career service employee for use of grievance procedures specified in this chapter.

(4) (a) The employing agency of an employee who files a grievance may not place grievance forms, grievance materials, correspondence about the grievance, agency and department replies to the grievance, or other documents relating to the grievance in the employee's personnel file.

(b) The employing agency of an employee who files a grievance may place records of disciplinary action in the employee's personnel file.

(c) If any disciplinary action against an employee is rescinded through the grievance procedures established in this chapter, the agency and the Department of Human Resource Management shall remove the record of the disciplinary action from the employee's agency personnel file and central personnel file.

(d) An agency may maintain a separate grievance file relating to an employee's grievance, but shall discard the file after three years.

1991

### PART 4

#### PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE

##### 67-19a-401. Time limits for submission of appeal by aggrieved employee — Voluntary termination of employment — Group grievances.

(1) Subject to the standing requirements contained in Part 3 and the restrictions contained in this part, a career service employee may have a grievance addressed by following the procedures specified in this part.

(2) The employee and the person to whom the grievance is directed may agree in writing to waive or extend grievance steps 2, 3, or 4 or the time limits specified for those grievance steps, as outlined in Section 67-19a-402.

(3) Any writing made pursuant to Subsection (2) must be submitted to the administrator.

(4) (a) 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 in this part, he has waived his right to process the grievance or to obtain judicial review of the grievance.

(b) 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 in this part, the grievance is considered to be settled based on the decision made at the last step.

(5) (a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:

(i) within 20 working days after the event giving rise to the grievance; or

(ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.

(b) Notwithstanding Subsection (5)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

(6) A person who has voluntarily terminated his employment with the state may not submit a grievance after he has terminated his employment.

(7) (a) When several employees allege the same grievance, they may submit a group grievance by following the procedures and requirements of this chapter.

(b) In submitting a group grievance, each aggrieved employee shall sign the complaint.

(c) The administrator and board may not treat a group grievance as a class action, but may select one aggrieved employee's grievance and address that grievance as a test case.

1999

**67-19a-402. Procedural steps to be followed by aggrieved employee.**

(1) (a) A career service employee who believes he has a grievance shall attempt to resolve the grievance through discussion with his supervisor.

(b) Within five days after the employee discusses the grievance with him, the employee's supervisor may issue a verbal decision on the grievance.

(2) (a) If the grievance remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the supervisor's verbal decision, the employee may resubmit the grievance in writing to his immediate supervisor within five working days after the expiration of the period for response or receipt of the decision, whichever is first.

(b) Within five working days after the employee's written grievance is submitted, the employee's supervisor shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) Immediately after submitting the written grievance to his supervisor, the employee shall notify the administrator of the board that he has submitted the written grievance.

(3) (a) If the written grievance submitted to the employee's supervisor remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his agency or division director within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within five working days after the employee's written grievance is submitted, the employee's agency or division director shall issue a written response to the grievance stating his decision and the reasons for the decision.

(4) (a) If the written grievance submitted to the employee's agency or division director remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his department head within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within ten working days after the employee's written grievance is submitted, the department head shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) The decision of the department head is final in all matters except those matters that the board may review under the authority of Part 3.

(5) If the written grievance submitted to the employee's department head meets the subject matter requirements of Section 67-19a-302 and if the grievance remains unanswered for ten working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to the administrator within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

1991

**67-19a-403. Appeal to administrator — Jurisdictional hearing.**

(1) At any time after a career service employee submits a grievance to the administrator under the authority of Section

67-19a-402, the administrator may attempt to settle the grievance informally by conference, conciliation, and persuasion with the employee and the agency.

(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.

(3) (a) If the administrator holds a jurisdictional hearing, he shall issue his written decision within 15 days after the hearing is adjourned.

(b) If the administrator chooses to conduct an administrative review of the file, he shall issue his written decision within 15 days after he receives the grievance

1991

**67-19a-404. Administrator's responsibilities.**

If the administrator determines that the grievance meets the jurisdictional requirements of Part 3, he shall:

(1) appoint a hearing officer to adjudicate the complaint; and

(2) set a date for the hearing that is either:

(a) not later than 30 days after the date the administrator issues his decision that the board has jurisdiction over the grievance; or

(b) at a date agreed upon by the parties and the administrator.

1989

**67-19a-405. Prehearing conference.**

(1) The administrator may require the presence of each party, the representatives of each party, and other designated persons at a prehearing conference

(2) At the conference, the administrator may require the parties to:

(a) identify which allegations are admitted and which allegations are denied;

(b) submit a joint statement detailing:

(i) stipulated facts that are not in dispute;

(ii) the issues to be decided; and

(iii) applicable laws and rules;

(c) submit a list of witnesses, exhibits, and papers or other evidence that each party intends to offer as evidence; and

(d) confer in an effort to resolve or settle the grievance.

(3) At the conclusion of the prehearing conference, the administrator may require the parties to prepare a written statement identifying:

(a) the items presented or agreed to under Subsection (2); and

(b) the issues remaining to be resolved by the hearing process.

(4) The prehearing conference is informal and is not open to the public or press.

1989

**67-19a-406. Procedural steps to be followed by aggrieved employee — Hearing before hearing officer — Evidentiary and procedural rules.**

(1) (a) The administrator shall employ a certified court reporter to record the hearing and prepare an official transcript of the hearing.

- (b) The official transcript of the proceedings and all exhibits, briefs, motions and pleadings received by the hearing officer are the official record of the proceeding
- (2) (a) The agency has the burden of proof in all grievances resulting from dismissals, demotions, suspensions, written reprimands, reductions in force, and disputes concerning abandonment of position
- (b) The employee has the burden of proof in all other grievances
- (c) The party with the burden of proof must prove their case by substantial evidence
- (3) (a) The hearing officer shall issue a written decision within 20 working days after the hearing is adjourned
- (b) If the hearing officer does not issue a decision within 20 working days, the agency that is a party to the grievance is not liable for any claimed back wages or benefits after the date the decision is due
- (4) The hearing officer may
  - (a) not award attorneys' fees or costs to either party,
  - (b) close a hearing by complying with the procedures and requirements of Title 52, Chapter 4, Open and Public Meetings,
  - (c) seal the file and the evidence produced at the hearing if the evidence raises questions about an employee's character, professional competence, or physical or mental health,
  - (d) grant continuances according to board rule, and
  - (e) decide questions or disputes concerning standing in accordance with Section 67-19a-301

1996

**67-19a-407. Appeal to Career Service Review Board.**

- (1) (a) The employee or the agency may appeal the hearing officer's decision on a grievance to the board if
  - (i) the appealing party files a notice of appeal with the administrator within ten working days after the receipt of the decision or the expiration of the period for decision, whichever is first, and
  - (ii) the appealing party meets the requirements for appeal established in Subsection (2)
- (b) The appealing party shall submit a copy of the official transcript of the hearing to the administrator
- (2) The employee or the agency may appeal the hearing officer's decision on a grievance to the board only if the appealing party alleges that
  - (a) the hearing officer did not issue a decision within 20 working days after the hearing adjourned,
  - (b) the appealing party is dissatisfied with the decision,
  - (c) the appealing party believes that the decision was based upon an incorrect or arbitrary interpretation of the facts, or
  - (d) the appealing party believes that the hearing officer made an erroneous conclusion of law

1989

**67-19a-408. Career Service Review Board hearing — Evidentiary and procedural rules.**

- (1) The board shall
  - (a) hold a hearing to review the hearing officer's decision not later than 30 days after it receives the official transcript and the briefs,
  - (b) review the decision of the hearing officer by considering the official record of that hearing and the briefs of the parties, and
  - (c) issue its written decision addressing the hearing officer's decision within 40 working days after the record for its proceeding is closed
- (2) In addition to whatever other remedy the board grants, it may order that the employee be placed on the reappointment roster provided for by Section 67-19-17 for assignment to another agency

- (3) If the board does not issue its written decision within 40 working days after closing the record, the agency that is a party to the grievance is not liable for any claimed back wages or benefits after the date the decision is due

- (4) The board may not award attorneys' fees or costs to either party

- (5) The board may close a hearing by complying with the procedures and requirements of Title 52, Chapter 4, Open and Public Meetings

- (6) The board may seal the file and the evidence produced at the hearing if the evidence raises questions about an employee's character, professional competence, or physical or mental health

1996

**CHAPTER 19b****SUGGESTION AWARDS PROGRAM [REPEALED]****67-19b-101 to 67-19b-303. Repealed.**

1993

**CHAPTER 19c****EMPLOYEE RECOGNITION****Section**

67-19c-101 Department award program

**67-19c-101. Department award program.**

- (1) As used in this section
  - (a) "Department" means the Department of Administrative Services, the Department of Agriculture and Food, the Department of Alcoholic Beverage Control, the Department of Commerce, the Department of Community and Economic Development, the Department of Corrections, the Department of Workforce Services, the Department of Environmental Quality, the Department of Financial Institutions, the Department of Health, the Department of Human Resource Management, the Department of Human Services, the Insurance Department, the National Guard, the Department of Natural Resources, the Department of Public Safety, the Public Service Commission, the Labor Commission, the State Board of Education, the State Board of Regents, the State Tax Commission, and the Department of Transportation.
  - (b) "Department head" means the individual or body of individuals in whom the ultimate legal authority of the department is vested by law
- (2) There is created a department awards program to award an outstanding employee in each department of state government
- (3) (a) By April 1 of each year, each department head shall solicit nominations for outstanding employee of the year for his department from the employees in his department
- (b) By July 1 of each year, the department head shall
  - (i) select a person from the department to receive the outstanding employee of the year award using the criteria established in Subsection (c), and
  - (ii) announce the recipient of the award to his employees
- (c) Department heads shall make the award to a person who demonstrates
  - (i) extraordinary competence in performing his function,
  - (ii) creativity in identifying problems and devising workable, cost-effective solutions to them,
  - (iii) excellent relationships with the public and other employees,
  - (iv) a commitment to serving the public as the client, and

## Exhibit H

**67-19a-202. Powers — Jurisdiction.**

- (1) (a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about 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 that have not been resolved at an earlier stage in the grievance procedure.  
(b) The board has no jurisdiction to review or decide any other personnel matters.
- (2) The time limits established in this chapter supersede the procedural time limits established in Title 63, Chapter 46b, Administrative Procedures Act.
- (3) In conjunction with any inquiry, investigation, hearing, or other proceeding, any member of the board may:
  - (a) administer oaths;
  - (b) certify official acts;
  - (c) subpoena witnesses, documents, and other evidence; and
  - (d) grant continuances pursuant to board rule. 1991



## Exhibit I

**67-19a-303. Employees' rights in grievance and appeals procedure.**

(1) For the purpose of processing a grievance, a career service employee may.

(a) obtain assistance by a representative of the employee's choice to act as an advocate at any level of the grievance procedure;

(b) request a reasonable amount of time during work hours to confer with the representative and prepare the grievance; and

(c) call other employees as witnesses at a grievance hearing.

(2) The state shall allow employees to attend and testify at the grievance hearing as witnesses if the employee has given reasonable advance notice to his immediate supervisor.

(3) No person may take any reprisals against any career service employee for use of grievance procedures specified in this chapter.

(4) (a) The employing agency of an employee who files a grievance may not place grievance forms, grievance materials, correspondence about the grievance, agency and department replies to the grievance, or other documents relating to the grievance in the employee's personnel file.

(b) The employing agency of an employee who files a grievance may place records of disciplinary action in the employee's personnel file.

(c) If any disciplinary action against an employee is rescinded through the grievance procedures established in this chapter, the agency and the Department of Human Resource Management shall remove the record of the disciplinary action from the employee's agency personnel file and central personnel file.

(d) An agency may maintain a separate grievance file relating to an employee's grievance, but shall discard the file after three years.

## Exhibit J

## PART 4

PROCEDURAL STEPS TO BE FOLLOWED BY  
AGGRIEVED EMPLOYEE**67-19a-401. Time limits for submission of appeal by aggrieved employee — Voluntary termination of employment — Group grievances.**

(1) Subject to the standing requirements contained in Part 3 and the restrictions contained in this part, a career service employee may have a grievance addressed by following the procedures specified in this part

(2) The employee and the person to whom the grievance is directed may agree in writing to waive or extend grievance steps 2, 3, or 4 or the time limits specified for those grievance steps, as outlined in Section 67-19a-402

(3) Any writing made pursuant to Subsection (2) must be submitted to the administrator

(4) (a) 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 in this part, he has waived his right to process the grievance or to obtain judicial review of the grievance

(b) 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 in this part, the grievance is considered to be settled based on the decision made at the last step

(5) (a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance

(i) within 20 working days after the event giving rise to the grievance, or

(ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance

(b) Notwithstanding Subsection (5)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance

(6) A person who has voluntarily terminated his employment with the state may not submit a grievance after he has terminated his employment

(7) (a) When several employees allege the same grievance they may submit a group grievance by following the procedures and requirements of this chapter

(b) In submitting a group grievance, each aggrieved employee shall sign the complaint

(c) The administrator and board may not treat a group grievance as a class action, but may select one aggrieved employee's grievance and address that grievance as a test case

## Exhibit K

## Career Service Review Board

### **R137-1-2. Definitions.**

Terms defined in Section 63-46b-2 of the Utah Administrative Procedures Act (UAPA) are incorporated by reference within this rule. In addition, other terms which are used in this rule are defined below:

“Excusable Neglect” means the exercise of due diligence by a reasonably prudent person and constitutes a failure to take proper steps at the proper time, not in consequence of the person’s own carelessness, inattention, or willful disregard in the processing of a grievance, but in consequence of some unexpected or unavoidable hindrance or accident.

## Exhibit L



Department of Human Resource Management (DHRM) rule R477-8-6(8)(c)(i)(ii)

*On-call time: Employees required by agency management to be available for on-call work shall be compensated for on-call time at a rate of 1 hour for every 12 hours the employee is on-call.*

*(i) Time is considered "on-call time" when the employee has freedom of movement in personal matters as long as he/she is available for call to duty.*

*(ii) Employees record on-call time as "on-call paid" not as "hours worked" on their time sheet, and shall be paid the following pay period. Any time actually worked during the on-call period is recorded in increments of 15 minutes as "hours worked" in addition to on-call time.*



CERTIFICATE OF MAILING

STATE OF UTAH                    )  
  ) ss.  
COUNTY OF SALT LAKE    )

Carey A. Seager, being duly sworn, deposes and says:

That she served the   **ADDENDUM TO THE BRIEF OF**  
**APPELLANTS/PETITIONERS** upon the following parties by  
placing two (2) true and correct copies thereof in an  
envelope addressed to:

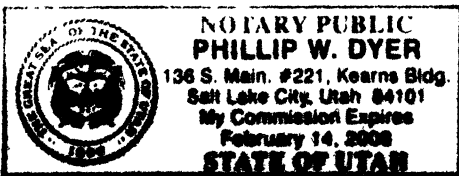
Robert E. Steed, Esq.	Career Service Review Board
Brent A. Burnett, Esq.	ATTN: Robert N. Thompson,
Assistant Attorney General	Administrator
160 East 300 South, 5 <sup>th</sup> Flr.	1120 State Office Building
P.O. Box 140857	Salt Lake City, Utah 84114
Salt Lake City, UT 84114-0857	

and mailing the same, sealed, with first class postage  
prepaid thereon, in the United States Mail at Salt Lake  
City, Utah, on the 29<sup>th</sup> day of November,  
2004.

Carey Seager  
SUBSCRIBED AND SWORN to before me this 29<sup>th</sup>  
day of November, 2004.

My Commission expires:

2-14-2008



[Signature]  
Notary Public  
Residing at: Salt Lake County, UT