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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAN LEATHAM, ROBERT E. STEELE, TIM SLOCUM, HAROLD W. JOHNSON, and W. FRED HURST,	:	
Petitioners,	:	
v.	:	Case No. 20040376-CA
UTAH DEPARTMENT OF CORRECTIONS and THE UTAH CAREER SERVICE REVIEW BOARD,	:	
Respondents.	:	

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BRIEF OF RESPONDENTS

Appeal of the Final Decision of the Utah Career Service Review Board, an Administrative Agency of the State of Utah

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED BY RESPONDENTS

FILED
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LIST OF ALL PARTIES

To the best of Respondents' knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF RESPONDENTS

STATEMENT OF JURISDICTION

The Decision and Final Agency Action of the Career Service Review Board (CSRB) was entered on April 14, 2004. R. 490-523. The Petitioners' Petition for Judicial Review was filed on May 12, 2004. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(a) (2002) and Utah Code Ann. § 63-46b-14 (1997).

STATEMENT OF THE ISSUES

1. The record supports the CSRB's conclusion that the petitioners did not show excusable neglect for their delay in filing their grievance.

This issue was considered by the CSRB in its Decision and Final Agency Action. R. 504-18.

STANDARD OF REVIEW: This Court reviews an agency's interpretation of its own rules or regulations for abuse of discretion. Ho'land v. CSRB, 856 P.2d 678, 682 (Utah App. 1993). This Court reviews the "CSRB's conclusion for correctness, granting no deference to that agency's decision." Id.

> The CSRB's role in examining the Department's personnel actions is a limited one. The CSRB is restricted to determining whether there is factual support for the Department's charges against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion.

Career Service Review Bd. v. Utah Dep't of Corr., 942 P.2d 933, 942 (Utah 1997).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES & RULES

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.

Utah Administrative Code, R137-1-2

. . .

"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.

. . .

Utah Administrative Code, R137-1-13(3)

(3) Excusable Neglect. The standard of excusable neglect may be offered as a defense to lack of timeliness in processing a grievance or for not appearing at a scheduled proceeding.
(a) The administrator or appointed CSRB hearing officer shall determine the applicability of the excusable neglect standard on the basis of good cause.
(b) All questions are to be resolved at the original level of occurrence.

Utah Administrative Code, R137-1-22(4)

(4) The Board's Standards of Review. The board's standards of review based upon the following criteria:
(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 also 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 according to 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.

Utah Administrative Code, R477-8-6(8)(c)

(c) On-call time: An employee required by agency management to be available for on-call work shall be compensated for on-call time at a rate of one 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 the employee 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.

STATEMENT OF THE CASE

Dan Leatham, Robert E. Steele, Tim Slocum, Harold W. Johnson and W. Fred Hurst filed their employee grievance on January 30, 1998.[1] R. 1-3. In their grievance, petitioners sought compensation for time that they had been required to be "on-call."

---

[1] While dated January 30, 1998, there was confusion over when the grievance was actually filed. The CSRB ruled that it was filed on January 30, 1998, and that decision has not been challenged on appeal. R. 502-4.

Utah's Human Resource Management Rules require that an employee be compensated for time they are required to be "on-call" at the rate of one hour for every twelve hours spent "on-call." Utah Administrative Code, R477-8-6(8)(c). The Department of Corrections granted the grievance, but only allowed retroactive relief for the period of twenty working days prior to the filing of the grievance. R. 23-25.

On appeal to the CSRB, Corrections' decision was affirmed by the hearing officer on October 12, 2001. R. 193-202. Petitioners asked the hearing officer to reconsider his ruling on October 30, 2001. R. 203-14. On reconsideration, the hearing officer amended his prior decision, but again dismissed the appeal. R. 251-57. Petitioners filed a timely appeal with the CSRB. R. 259-60. The CSRB remanded this matter to the hearing officer "to make an evidentiary determination on the sole issue of 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." R. 337.

On remand, the hearing officer made supplemental findings of fact and concluded that the petitioners had not shown excusable neglect for the late filing of their grievance. R. 364-75. On further administrative review, the Hearing Officer's decision was sustained by the CSRB on April 14, 2004. R. 490-523. Petitioners' Petition for Judicial Review was filed on May 12, 2004.

STATEMENT OF RELEVANT FACTS

The following facts are taken from the findings of fact of the hearing officer. The petitioners have not sought to challenge these findings.

1. Grievants were career service employees at the time of filing their original grievance on January 30, 1998. Dan Leatham, Robert E. Steele, Tim Slocum and W. Fred Hurst are presently employed by the Agency. Harold W. (Bill) Johnson retired from the Agency after the filing of the grievance.

2. At all times pertinent herein, Grievants were all employed in upper management positions in the Agency's Division of Institutional Operations. As such, Grievants were all identified, by virtue of their positions, as Federal Labor Standards Act (FLSA) exempt.

3. During the period from 1994 until July 1997, the Agency was under the direction of a prior administration, which did not require Grievants to submit time sheets. Grievants understood that part of the reason they were not expected to submit time sheets was due to their FLSA exempt status.

4. Grievants had a subjective fear that if they challenged the practices of the prior administration, they would possibly be subjected to retaliatory transfers or other actions by the prior administration.

5. The current administration, which came to power in July 1997, notified employees that there would be no retaliation against employees who filed grievances.

6. Grievants began completing and submitting time sheets in July 1997, when the issue of on-call compensation was addressed by the Agency's new management.

7. From July 1997 forward, each Grievant reported on-call time for periods when he served as the Officer in Charge. Each Grievant was compensated for the on-call time he reported on his time sheets.

8. Mr. Mike Chabries, the Agency Executive Director, found as part of his decision at the Step 4 level of this grievance that Mr. Leatham, Mr. Steele, Mr. Johnson, and Mr. Hurst were entitled to on-call compensation beyond the hours they claimed on their original time sheets by virtue of being assigned a commute vehicle. The commute vehicles were approved for these employees on the grounds that they were on-call during off-duty hours.

9. Mr. Slocum was considered to be entitled to on-call compensation by virtue of his Post Order.

10. Each Grievant was allowed to file amended time sheets for additional hours of on-call time. However, Mr. Chabries limited the scope of his decision to the 20-day period immediately preceding the date on which Grievants filed their original grievance, and continuing prospectively until the date on which Mr. Leatham, Mr. Steele, Mr. Johnson and Mr. Hurst turned in their assigned vehicles, which occurred sometime at the end of January 1998.

11. Mr. Slocum was allowed to file amended time sheets for the 20-day period immediately preceding February 11, 1998, and continuing prospectively from that date to such time as Mr. Slocum's Post Order assignment changed, or until he had actual notice that his duties as Deputy Warden of Support Services no longer included carrying a pager and responding on activation, day or night. The date of such occurrence was not identified in Mr. Chabries' decision.

Decision on Agency's Motion to Dismiss and Motion in Limine Including Findings of Fact, Conclusions of Law, and Decision. R. 194-95.

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:

	Term of Office	
Name	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

3. During the 1990's, Grievants had been subjected to arbitrary transfers and had seen others 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 Recommendation 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.

11. One of Mr. Haun's first actions after becoming Executive Director was to rescind the 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."

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 as much as seven years 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 the 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."

Findings of Fact, Conclusions of Law and Decision After Remand. R. 365-68.

SUMMARY OF ARGUMENT

Absent a showing of excusable neglect, a state employee must file a grievance "within 20 working days after the event giving rise to the grievance." Utah Code Ann. 67-19a-401(5)(a)(I) (2000). The statute delegates to the CSRB the authority to define, by rule, what will constitute excusable neglect. Applying the facts of this action to its excusable neglect standard, the CSRB found that the petitioners had failed to demonstrate that the 20 working day statute of limitations should be waived. This decision should be affirmed on appeal.

The CSRB's inquiry was factual in nature. Both the hearing officer and the CSRB considered the facts, including claims of fear and intimidation by prior Agency administrations prevented the petitioners from filing their grievance earlier. This claim was rejected based on the evidence that, from July 1997 to January 30, 1998, during Executive Director Haun's administration of the agency, that no excusable neglect existed for the petitioners delay in filing their grievance. The petitioners failed to marshal the evidence in support of the CSRB's challenged factual finding and their challenge should therefore be rejected.

Nor does the discovery rule require that the statute of limitations be tolled. Petitioners were aware at all times of the facts upon which their claim rested. A belated discovery of a theory of recovery does not the statute of limitations.

ARGUMENT

A state employee's grievance must be filed "within 20 working days after the event giving rise to the grievance" "[u]nless the employee meets the requirements for excusable neglect established by rule." Utah Code Ann. 67-19a-401(5)(a) (2000). The CSRB has defined excusable neglect as "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." Utah Administrative Code R137-1-2.

Petitioners received the relief they sought from the Department of Corrections. But that relief was limited to the statutory period of 20 working days prior to the filing of their grievance. Their appeal only challenges the application of this statute of limitation to how much retroactive relief they should receive.

I. PETITIONERS HAVE FAILED TO MARSHAL THE EVIDENCE TO SUPPORT THEIR CHALLENGE TO THE FACTUAL FINDINGS OF THE CSRB

The CSRB ruled that the petitioners' failure to file their grievance earlier was not the result of excusable neglect. This conclusion was based on a review of the evidence that petitioners claimed showed that their fear of retaliation excused their waiting to file their grievance. The hearing officer found that excusable neglect existed prior to July 1997, due to the atmosphere created and maintained within the respondent department by

its administration. R. 373. But the hearing officer found that this atmosphere changed radically with the appointment as Executive Director of Mr. Haun. The hearing officer found no excusable neglect for the petitioners failure to file their grievance from July 1997 until January 1998. R. 373-75.

In affirming the hearing officer's factual decision, the CSRB explained that the hearing officer's finding that no excusable neglect existed was "reasonable and rational and supported by the evidentiary record." R. 515. The Board reviewed the evidentiary record and found that it supported the hearing officer's decision. R. 514.

> 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.

R. 515 (footnote omitted).

This factual finding is the basis of petitioners' appeal. Brief of Appellants/Petitioners at 12-29. While relying on some facts from the record, the petitioners fail to marshal the evidence that supports the CSRB's conclusion.

A party challenging the factual findings of the CSRB has a duty to marshal the evidence.

> Furthermore, when challenging an agency action as not based upon substantial evidence, appellants have a duty to marshal all of the evidence supporting the findings and show that despite the supporting facts, the [Board's] findings are not supported by substantial evidence.

Road Runner Oil, Inc. v. Bd. of Oil, Gas and Mining, 2003 UT App 275, ¶10, 76 P.3d 692 (alteration in original) (internal quotations omitted); see also Covey v. Covey, 2003 UT App 380, ¶27, 80 P.3d 553 ("In order to successfully challenge the trial court's findings of fact, Almon must first marshal all the evidence in support of the finding[s] and then demonstrate that the evidence is legally insufficient to support the finding[s] even when viewing it in a light most favorable to the court below.") (internal quotations omitted).

Rather than marshal the evidence that supports the CSRB's conclusion, petitioners claim that the CSRB failed to support its conclusions with adequate findings of fact. Brief of Appellants/Petitioners at 28-29. This claim is erroneous. The CSRB relied upon the hearing officer's factual findings that the excusable neglect requirement had not been met. R. 373-75, 515. The CSRB's decision also reviews and cites to the evidence that supports its conclusion. R. 514. It is the petitioners who have failed to marshal this evidence, and all other evidence of record that supports the CSRB's decision.

Petitioners failed to marshal the evidence. Their challenge to the factual finding of the CSRB should therefore be rejected.

II. THE CSRB DID NOT ABUSE ITS DISCRETION IN INTERPRETING ITS OWN EXCUSABLE NEGLECT RULE

The legislature provided an exception to the 20 working day statute of limitations for filing employee grievances. In cases of excusable neglect, a grievance can be filed as much as a year after the event giving rise to the grievance. Utah Code Ann. § 67-19a-401(5) (2000). The term excusable neglect is not defined in the statute. Instead, the CSRB is expressly authorized to define this phrase.

> "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.

Utah Administrative Code, R137-1-2.

Applying its definition of excusable neglect to the facts, the CSRB determined that the petitioners had failed to demonstrate that their delay in filing their grievance was due to excusable neglect. R. 508-17. In interpreting its rule, the CSRB explained that its use of the phrase "some unexpected or unavoidable hindrance" should be read as requiring "circumstances that are essentially beyond a person's control." R. 510.

In Holland v. Career Service Review Board, 856 P.2d 678 (Utah App. 1993) , this Court employed an abuse of discretion standard in reviewing a challenge to the Department of Human Resource Management's (DHRM) interpretation of its own regulation. "Thus, DHRM's application of that rule was reasonable and rational. Accordingly, we conclude that DHRM did not abuse its discretion in determining that

Holland was not eligible for automatic reappointment under that rule." Id. at 682. In the same manner, CSRB's interpretation of its own rules is reviewed for abuse of discretion.

It is left to the discretion of the agency that authored a rule to interpret the same, so long as that interpretation is rational and reasonable. In E.M. v. Briggs, 922 P.2d 754, 757 (Utah 1996), the court held that a school board's interpretation of its own rules would be reviewed only to determine if it was arbitrary or capricious.

This Court, and the Utah Supreme Court, have repeatedly stated that an administrative agency's interpretation of its own rules is entitled to deference and will not be reversed unless it is arbitrary or capricious. Concerned Parents of Stepchildren v. Mitchell, 645 P.2d 629, 633 (Utah 1982) (as a general proposition, an agency's interpretation of its own regulations is entitled to deference); McKnight v. State Land Board, 381 P.2d 726, 730 (Utah 1963) ("Courts usually will not override an administrative agency's interpretation of its own rules unless the interpretation is obviously arbitrary or erroneous"); Ashcroft v. Indus. Comm'n of Utah, 855 P.2d 267, 269-70 (Utah App. 1993) (agency's interpretation of its own rules will not be disturbed unless it "exceeds the bounds of reasonableness and rationality").

This same issue was before the United States Supreme Court in Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982). McCluskey involved the single issue of whether the lower courts had correctly determined that the school

board's construction of the word "drugs" in its rules as including alcoholic beverages was unreasonable. In reversing the lower courts, the Supreme Court explained:

> In any case, even if the District Court's and the Court of Appeals' views of § 11 struck us as clearly preferable to the Board's - which they do not - the Board's interpretation of its regulations controls under Wood v. Strickland. The Chairman of the Board testified that the Board had interpreted § 11 as requiring the suspension of students found intoxicated on school grounds for a number of years prior to respondent's suspension, and it is undisputed that the Board had the authority to suspend students for that reason. We conclude that the District Court and the Court of Appeals plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case.

Id. at 971.

The Supreme Court of Vermont followed the McCluskey decision in Lilly v. Vermont Headmasters Ass'n, Inc., 648 A.2d 810 (Vt. 1993). Lilly involved the proper interpretation of an eligibility rule of the Vermont Headmasters Association (VHA). The plaintiff claimed that the determination that he was ineligible to play high school hockey was invalid due to the VHA's misinterpretation of its policies. The Vermont Supreme Court, following McCluskey, reversed the lower court's substitution of its interpretation of the VHA rule for the VHA's own interpretation.

> The present appeal turns on the determination of whether the VHA has the final say as to the interpretation of its own rules, or if the court is authorized to override the VHA in interpreting a rule in a manner contrary to that expressly stated by the VHA itself.
>
> . . . .
>
> We disagree with the court's substitution of its own interpretation of the rule for that of the VHA where the rule in question was reasonable and related to a goal that the court itself found to be unchallenged.

> Even if the rule in question admits of two interpretations, the VHA, as an educational association entrusted with the regulation of extracurricular activities, is entitled to interpret its rule as it sees fit.

Id. at 811-12.

The CSRB's application of its excusable neglect rule is both reasonable and rational. The petitioners knew that they were spending time in an on-call status. The state rule concerning compensation for on-call time was available to them. The petitioners, from July 1997 on, were being compensated for on-call time when they served as the Officer in Charge. R. 373-74, 510-12.

> 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 conclude that Grievants did not meet the standard of excusable neglect in the filing of their grievance.

R. 374-75.

The CSRB did not abuse its discretion by the manner it interpreted its rule concerning excusable neglect. That decision should therefore be affirmed on appeal.

III. PETITIONERS NEED TO TIMELY FILE THEIR GRIEVANCE WAS NOT TOLLED BY A DISCOVERY RULE

Petitioners' final argument is that the statutory time frame for filing their grievance was tolled. They claim that prior administrations of the department denied that petitioners had a cause of action, or concealed that such a cause of action might exist. Brief of Appellants/Petitioners at 29-30. This argument fails because the discovery rule

deals with a plaintiff's knowledge of the facts underlying a claim and not the plaintiff's knowledge of whether a cause of action exists.[2] Plaintiff cannot make the threshold showing necessary for the use of the discovery rule.

> The first step in determining whether the discovery rule applies is to examine whether the Sevys made the threshold showing that they did not know, nor should have known, of Security Title's negligence at the time of the closing. See id. ([A]n initial showing must be made that plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period.").

Sevy v. Security Title Co., 902 P.2d 629, 634 (Utah 1995).

Mere ignorance of the existence of the cause of action does not permit the plaintiff to use the discovery rule. Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981). The plaintiff must show that he "did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action" before the statute of limitations ran. Bukholz v. Joyce, 972 P.2d 1235, 1237 (Utah 1998); Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995). It was not necessary that petitioners knew all of the facts underlying their claim for on-call compensation, simply that they knew sufficient facts to put a reasonable person on notice of the duty to inquire. Warren v. Provo City Corp., 838 P.2d 1125, 1129-30 (Utah 1992); Anderson v. Dean

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[2] Footnotes 11 and 13 in the Brief of Appellants/Petitioners (pages 12-13) speculate as to possible open courts arguments that might exist. This issue should be disregarded because the petitioners have failed to adequately brief any constitutional claim. "An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." Smith v. Smith, 1999 UT App 370, ¶8, 995 P.2d 14 (quotations and citations omitted);

Witter Reynolds, Inc., 920 P.2d 575, 579 (Utah Ct. App 1996) ("The limitations period is postponed only by belated discovery of key facts and not by delayed discovery of legal theories."). Petitioners only needed to have "sufficient information to apprise [the plaintiffs of the underlying cause of action] so as to put them on notice to make further inquiry if they harbor doubts or questions about the defendant's actions." Berenda v. Langford, 914 P.2d 45, 51 (Utah 1996).

The CSRB and its hearing officer correctly determined that the petitioners had sufficient facts to put them on notice. The state rule dealing with on-call compensation was at all times available. Further, the petitioners had been receiving on-call compensation for time spent as Officer in Charge since July 1997. The CSRB did not err in finding that the 20 working day statute of limitations was not tolled and that decision should be affirmed on appeal.

CONCLUSION

For the reasons presented above, the CSRB's final agency action should be affirmed.

RESPONDENTS DO NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Respondents do not request oral argument and a published opinion in this matter. The questions raised by this petition are not such that oral argument or a published opinion is necessary, though the respondents desire to participate in oral argument if it is held by the Court.

DATED this 22nd day of February, 2005.

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CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF RESPONDENTS, postage prepaid, to the following this 22nd day of February, 2005:

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