

2004

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

Utah Court of Appeals

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Debra J. Moore; J. Clifford Peterson; Assistant Utah Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorneys for Appellee.

Vincent C. Rampton; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

LORIN BLAUER,

Plaintiff and
Appellant,

vs.

UTAH DEPARTMENT OF
WORKFORCE SERVICES, an agency of
the State of Utah,

Defendant and
Appellee.

:
:
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: Court of Appeals Case No. 20040848-CA
:
:
:
: Third District Court No. 040900221
: Judge Leslie A. Lewis
:
:
: Priority No. 14
:
:

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE

Debra J. Moore
J. Clifford Petersen, Assistant Utah
Attorney General
Mark L. Shurtleff, Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114-0856
Telephone: (801) 366-0100
Attorneys for Defendant/Appellee
Department of Workforce Services

Vincent C. Rampton (USB 2684)
Jones, Waldo, Holbrook & McDonough
170 South Main, Suite 1500
Salt Lake City, UT 84101
Telephone: (801) 521-3200
Attorneys for Plaintiff/Appellant Lorin
Blauer

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UTAH APPELLATE COURTS
JUN 17 2005

LORIN BLAUER,	:	
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	:	
Plaintiff and	:	Court of Appeals Case No. 20040848-CA
Appellant,	:	
	:	
vs.	:	
	:	
UTAH DEPARTMENT OF	:	Third District Court No. 040900221
WORKFORCE SERVICES, an agency of	:	Judge Leslie A. Lewis
the State of Utah,	:	
	:	
	:	
Defendant and	:	Priority No. 14
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	:	

Debra J. Moore
J. Clifford Petersen, Assistant Utah
Attorney General
Mark L. Shurtleff, Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114-0856
Telephone: (801) 366-0100
Attorneys for Defendant/Appellee
Department of Workforce Services

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INTRODUCTION

Appellee and Cross-Appellant Department of Workforce Services (“DWS”) has cross-appealed in this matter, ostensibly challenging the lower court’s order remanding certain issues to the Utah State Career Services Review Board for further determination (Court ruling of December 18, 2004, R1193-1195) – see Cross-Appellant’s Docketing Statement herein. In its supporting brief, however, DWS raises only two issues on cross-appeal, both jurisdictional in nature: Whether the trial court lacked jurisdiction over this matter because the Career Services Review Board was not named as a party to the lower court’s proceeding, and whether the trial court lacked jurisdiction because Appellant had filed no petition to amend or repeal administrative rules before filing suit. It is therefore to be understood, apparently, that if the trial court had jurisdiction of this case to begin with, DWS assigns no error to its ruling remanding its rule violations toward Appellant Lorin Blauer (hereafter “Mr. Blauer”) for further proceedings before the Career Services Review Board.

DWS’s first issue on cross-appeal has already been fully briefed to, and disposed of by, this Court incident to DWS’s motion for summary disposition herein. As already determined there, CSRB’s absence as a party litigant in this action is not a fatal jurisdictional flaw. At worst, CSRB can still be added as a party under Rule 21, Utah R. Civ. P.

The suggestion that, prior to filing his petition for district court review of his demotion, Plaintiff/Appellant was required to petition for an amendment or appeal to administrative rules was never raised before the trial court. DWS submits as much in its brief, but suggests that this issue defeats the trial court's subject matter jurisdiction, and may therefore be raised at any time. What DWS does not understand, though, is that Mr. Blauer makes no challenge to R477-1-1(32), but in fact relies on it to establish DWS' actions against him as a "demotion", as defined therein, as well as violative of the standards from prior decisions of this Court which went into the rule's formulation.

DWS raises no substantial challenge to the impropriety of its actions in demoting Appellant – to the contrary, DWS admits that it was taking action against Appellant based on perceived performance deficiencies, clearly implying that he was moved from a job that he could not perform competently into a job which he could perform competently (even though, in fact, the reverse was the case due to Mr. Blauer's physical impairments, as DWS well knew). Yet because DWS held his pay and benefits level, DWS would have this court accept the proposition embraced by the lower court: that there was no demotion as a matter of law. The conclusion flies in the face of established case precedent before this Court, and the decision must be reversed.

STATEMENT OF JURISDICTION

Mr. Blauer disagrees with DWS's statement of jurisdiction, and asserts that jurisdiction in this matter arises under Utah Code Ann. § 78-2a-3(2)(a).

ISSUES FOR REVIEW AND STANDARD OF REVIEW

In addition to the issues and standards identified in his opening brief, Mr. Blauer identifies the following additional issues raised by DWS on cross-appeal:

1. Whether the lower court (and this Court, incident to DWS's Motion for Summary Disposition) erred in failing to find, as a matter of law, that by failing to join the Utah State Career Services Review Board as a party litigant in this action, Mr. Blauer deprived the trial court and this Court of subject matter jurisdiction.
2. Whether Mr. Blauer's appeal mounts an explicit or implicit challenge to an administrative rule; if so, whether Mr. Blauer's failure to petition the rulemaking agency before filing this action deprived the trial court and this Court of subject matter jurisdiction.

DWS's issues on cross-appeal are both jurisdictional in nature, and review is *de novo*. *Case v. Case*, 2004 UT App 423, ¶ 5, 103 P.3d 171.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Mr. Blauer relies upon the Statement of Determinative Case Law, and Statutory and Regulatory Provisions set out at p. 5 of in his opening brief.

STATEMENT OF CASE

Mr. Blauer relies upon his Statement of the Case set out at pp. 6-8 of his opening brief.

STATEMENT OF FACTS

Mr. Blauer relies on the Statement of Facts set out at pp. 8-21 of his opening brief. In addition, Mr. Blauer responds as follows to the Statement of Facts set out at pages 8-14 of DWS's brief:

1. Concerning DWS's claim that Mr. Blauer's "reassignment" to a full-time administrative law judge was "temporary," the Court is invited to review Division Director Tani Downing's memorandum of September 9, 2003 (R. 454-456). There is nothing temporary about it – it is a move to a position with less responsibility, a lower pay range, and lesser qualifications, based on a series of claimed performance deficiencies as to which, *to this day*, Mr. Blauer has yet to be afforded a hearing. The letter itself is clear that "from now on" Mr. Blauer would be assigned to the duties of ALJ. Moreover, the fact that Mr. Blauer's "reassignment" to ALJ duties was accompanied by the hiring of Tiffany Vincent to fill his position (Blauer Affidavit, R. 406-487, at ¶ 24 and Exhibit 11) further belies its "temporary" nature.

2. DWS continues to maintain that administrative law adjudication was one of the "core duties" of Mr. Blauer's position as Legal/Enforcement Counsel III. The Court is referred to Mr. Blauer's last position description questionnaire (R. 428), and paragraph 14 of Mr. Blauer's Affidavit (R. 406-487). *Nowhere* is such duty specified as a core function of his position. Temporary assignment to Administrative Law Judge duties (which can only be categorized as part of the "special assignments" described therein) accounted for less than 10% of Mr. Blauer's official workload as defined by the

Department of Human Resource Management; all duties to the Workforce Appeals Board accounted for only 50% of his duties.

3. According to DWS, Tani Downing had to reduce Mr. Blauer's workload and give it to others. The truth is another attorney was hired, and workload was shuffled and reassigned from everyone (not just Mr. Blauer), to the new attorney (Blauer Affidavit. R. 406-487, at ¶ 24 and Exhibit 11). At the same time, the Board workload was increasing. This resulted in Mr. Blauer's Board cases increasing from 222 for fiscal year ending June 30, 2002, to 443 cases for fiscal year ending June 30, 2003 (Blauer Affidavit. R. 406-487, at ¶ 16 and Exhibits 4 and 5). As noted above, Mr. Blauer's last PDQ dated April 2, 1998 (R. 406-487) shows the Board as 50% of his work assignments. But even with a doubling of the caseload Mr. Blauer was handing in that part of his assignments, Ms. Downing maintained he was not carrying his proportionate share of the workload – yet provided no substantive evidence to support her opinion (Blauer Affidavit. R. 406-487, at ¶ 21 and Exhibit 9). In other words, not only was Mr. Blauer handling a Board workload that had doubled in the past year, Ms. Downing also assigned him to handle 40% of an ALJ caseload in addition to his duties including U.I. Information release, prosecution board and sub plans. Yet he faced an unsuccessful rating with no objective criteria against which his performance could be judged.¹

¹Mr. Blauer had not been furnished a performance plan for 2002 or 2003, as required by R477-10-1, Utah Admin. Code.

4. Concerning Ms. Downing's "unsuccessful" performance appraisal and Mr. Blauer's successful challenge thereto, DWS fails to address the shortcomings of the appraisal report. In fact, the appraisal contained gross errors regarding Mr. Blauer's supposed failure to meet "red letter dates" on the cases he heard beginning March 26, 2003. Mr. Blauer noted those errors in his Response/Grievance (R. 432-435).² Ms. Downing acknowledged the errors in her response (R. 452),³ but refused to reconsider her unsuccessful review.

5. Concerning DWS's allegations of poor performance on his part, Mr. Blauer reminds the Court that he has never had the opportunity to face or refute these charges – the very purpose of an administrative grievance proceeding culminating in a hearing before the Career Services Review Board. Instead, CSRB (and then the lower court)

²On page 2 of his Response/Grievance, Mr. Blauer noted that his "...appeal rate to the Workforce Appeals Board on cases I handled as an ALJ has been nearly half the rate of the Appeals unit as a whole. If the Appeals unit as a whole had my appeal rate, the Board's workload would have been cut nearly in half during the period that it had, instead, doubled." He further noted that "...the quality of decisions written for the Board remains high with an appeal rate of less than 5% to the Court of Appeals, and no reversals by the Court of Appeals. I am now handling nearly triple the Board caseload over the 1998 figures when the Board was 50% of my workload." R. 432-435.

³In her July 25, 2003 Response to Grievance R. 452), Ms. Downing stated: "I acknowledge that you have a low appeal rate, not only to the Workforce Appeals Board, but to the Court of Appeals. Your 20 plus years' experience in your job would have enabled you to achieve this." She did not, however, respond to Mr. Blauer's factual data showing that his Board workload had doubled, in addition to his other assignments including a 40% ALJ workload. She simply continued to contend he was not handling his fair share of the workload; however without providing a shred of factual data to support her contention.

determined that, even though DWS acknowledged having “reassigned” Mr. Blauer to the responsibility of Administrative Law Judge-Non-Juris Doctorate, as a “corrective action” for performance deficiencies (R. 454-456; 727-840), it was not a “demotion” over which the CSRB could exercise jurisdiction. The whole purpose of this appeal is to compel a forum to address DWS’s performance charges, and to permit Mr. Blauer to confront them.⁴

⁴ Particularly egregious are Ms. Downing’s groundless charges that, as Legal/Enforcement Counsel III, Mr. Blauer engaged in conduct violative of his professional obligations as a member of the Utah State Bar. Mr. Blauer has proceeded through all administrative grievance levels, through a proceeding before the lower court, and now stands before the Court of Appeals, having *never* had the opportunity to belie these outrageous charges. To cite three examples:

1. Ms. Downing actually accused Mr. Blauer of “plagiarism” in quoting from briefs of counsel in the opinions which he authored – a charge fully addressed in his appraisal response (R. 432-435), yet never withdrawn;
2. Ms. Downing groundlessly accused Mr. Blauer of permitting use of a stamp to sign his name to submittals which he had not read, in violation of Rule 11, Utah R. Civ. P. – yet no proof of such conduct has ever been adduced.
3. Ms. Downing’s allegation that Mr. Blauer did not strictly comply with Subsection 35A-4-312(6), because she had not found anyone who could remember the risk analysis required by that subsection is, particularly outrageous. Mr. Blauer represented the Department on the state committee that drafted GRAMA. He was primarily responsible for the drafting of the Department rule that was subsequently codified into Section 35A-4-312. Subsection 35A-4-312(6) is also set forth below. Mr. Blauer was assigned by Ms. Downing’s predecessor, Allen Zabel, to make the risk analysis that Ms. Downing accuses Mr. Blauer of not making. Mr. Blauer made that analysis himself, and only raised the issue with others if he saw a problem. In most instances when he did raise it, it was with John Levanger, Internal Audit Manager with responsibility over the release of Department records. Mr. Blauer was his legal counsel on these issues.

6. With respect to DWS's claim, at p. 10 of its brief, that Ms. Downing ". . . discovered serious professional lapses by Blauer in his handling of Unemployment compensation collections," it is noted that Ms. Downing's September 9, 2003 memorandum (R. 454-456) supposedly itemizing these professional lapses and using them as justification to move Mr. Blauer from the duties of Legal/Enforcement Counsel III (steps 63-78) to Administrative Law Judge-Non Juris Doctorate (steps 51-66) failed outright to comply with the requirements of R477-10-2.(1) and (2). The record is devoid of any evidence that Ms. Downing ever discussed with Mr. Blauer his alleged substandard performance as set forth in that memorandum, as required by law. Had she done so, she would have learned that her accusations were much worse than simply inaccurate.

7. DWS clearly attempts to characterize its demotion of Mr. Blauer as an attempt at "reasonable accommodation" under the Americans With Disabilities Act of 1993. The suggestion is preposterous, for several reasons:

a. Mr. Blauer's "reassignment" was, by the express terms of Ms. Downing's September 2003 memorandum, a "corrective action" – not a "reasonable accommodation" (R. 454-456);

b. Prior to the demotion, Mr. Blauer had expressly notified DWS that, due to health problems, he had difficulty performing the responsibilities of an Administrative Law Judge (Affidavit of Lorin Blauer, R.406-487, at ¶ 25 and Exhibits 12-15);

c. Mr. Blauer's administrative representative, Tom Cantrell, attempted to intercede on Mr. Blauer's behalf with DWS's ADA coordinator, Chuck Butler, who was openly scornful of Mr. Blauer's disability claim, actually accusing Mr. Blauer of falsifying medical information in support of his claim. (Affidavit of Tom Cantrell, R. 398-405, at ¶ 4-10; 12-18.) Mr. Butler expressly characterized Mr. Blauer as nothing but a "slacker." *Id.*

8. At p. 11 of its brief, DWS mischaracterizes the recommendations of his doctors regarding how long he could sit. In his July 26, 2003 letter to DWS's ADA Coordinator Chuck Butler (R. 464-466), Dr. Dennis R. Peterson stated with respect to his functional limitations:

Sciatica – Sitting for any period at all (when sciatica is active) or for more than an hour (when it is at its best) induces lancinating pain which is very distracting and degrades attention, concentration, and creativity.

Any misunderstanding which DWS might claim regarding the recommendations of Mr. Blauer's doctors should have been cleared up by their subsequent letters. In a letter dated September 23, 2003 (R. 469), Dr. Perry J. Lofthouse (who treated Mr. Blauer's sciatica) stated:

He informed me of his new job assignment effective September 9th—reporting a caseload increase involving lengthy sessions of sitting... I examined Blauer today for treatment of backache and inflamed sciatic.

I thought I was clear that Mr. Blauer needs to have physical mobility – no sitting or standing in place for longer than 20 minutes at a time without moving about for at least 5 to 10 minutes.

In a letter dated November 6, 2003 (R. 352), Dr. Peterson stated the following:

In order to accommodate his sciatica, Lorin should do no more than two hearings a week (or similar limitation of duties that require him to sit or stand for extended periods of time); but he must take an ambulatory break every 40 minutes at minimum...In order to accommodate his coronary condition and other medical issues that can be exacerbated by undue stress, Lorin should be insulated from the current management style of Tani Downing...I have repeatedly stated that Lorin can perform his traditional—or similar—duties with these accommodations...I recommend that he be placed on FMLA sick leave, not because he couldn't work, but to protect his health because of the letters from the Department revealing that they were forcing him to perform a combination of duties that I specifically advised against under conditions that were unnecessarily stressful.

(Emphasis in original.)

Given the clear directives from Mr. Blauer's attending healthcare providers, DWS's inference that it was somehow a "positive" that Ms. Downing "...did not assign him to another supervisor" (opposing brief at p. 12) can only be seen as perverse.

SUMMARY OF ARGUMENT

Mr. Blauer's non-joinder of the Utah State Career Services Review Board as a party litigant in this action is not fatal to the trial court's jurisdiction, or to this Court's jurisdiction on appeal. A proper reading of Utah Code Ann. § 63-46d-14, which requires joinder of "the agency" as a "respondent" in a petition for review of an adjudicative proceeding, contemplates joinder of the agency taking action against the petitioner – not the Utah State Career Services Review Board, which is properly defined by statute as a "superior agency" (Utah Code Ann. § 63-46b-2(1)(j)). In addition, if the CSRB's absence from this action is deemed problematic, it can still be joined as a party defendant under Rule 21, Utah R. Civ. P.

DWS's second claim, that Mr. Blauer should have petitioned for repeal of R477-1-1(32), Utah Admin. Code, before filing this action, ignores the fact that Mr. Blauer has *never* sought repeal of that provision, either expressly or by implication. To the contrary, Mr. Blauer recognizes the amendments to the rule as reflective of governing case law, and contends that DWS violated both the rule and supporting case law in his demotion.

DWS has failed to dislodge the fact that its actions against Mr. Blauer constituted a "demotion" within the meaning of both the applicable regulatory provision and governing case law in the form of *Draughon v. Utah Dept. of Financial Institutions*, 1999 UT App. 42, 975 P.2d 935.

ARGUMENT

POINT I

MR. BLAUER'S NON-JOINDER OF UTAH STATE CAREER SERVICES REVIEW BOARD AS A PARTY DEFENDANT BEFORE THE TRIAL COURT DID NOT DEPRIVE THAT COURT, OR THIS COURT, OF SUBJECT MATTER JURISDICTION.

At Point I of its Argument, DWS again visits the question of whether Mr. Blauer's failure to include the Utah State Career Services Review Board as a named party defendant deprived the trial court of subject matter jurisdiction. This issue was the substance of DWS's Motion for Summary Disposition in this matter; Mr. Blauer addressed the argument at that time, and the Court denied the motion.

The Utah legislature has set out the scope of this Court's jurisdiction at Utah Code Ann. § 78-2a-3. Pursuant to subsection 2(a) thereof, this court is expressly granted

exclusive appellate jurisdiction over “the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies . . .” Appellant in this matter takes his appeal from a review, by the Third Judicial District Court, of an informal adjudicative proceeding before the Career Services Review Board (“CSRB”), involving DWS’s constructive termination of his employment. Procedurally, the matter falls squarely within this Court’s appellate jurisdiction.

DWS, however, claims that none of this matters. According to DWS, the fact that CSRB was not joined in this action (even though Appellant joined DWS as the “agency” which the statute expressly defines as the proper “respondent”), this entire proceeding is jurisdictionally deficient and must be dismissed on summary disposition. In support of this proposition, DWS cites to a handful of reported decisions involving appeals from CSRB decisions, and invokes the language of Utah Code Ann. § 63-46d-14. These will be dealt with in turn.

1. With respect, first, to DWS’s cited case authority, *not a single cited case has held that failure to join CSRB constitutes a jurisdictional defect*. The cited cases, in fact, have nothing whatsoever to do with the substance of this appeal in general, or of DWS’s motion in particular, save that, in each case, CSRB *was* joined as a respondent. The fact that CSRB is a proper or permissible party, however, does not equate to the proposition that its joinder is a jurisdictional prerequisite. Such a condition would of necessity have to arise from the enabling statute – which it simply does not.

2. Plaintiff acknowledges that, under Utah Code Ann. § 63-46d-14, a petition for judicial review of informal agency proceedings provides that a petition for judicial review “shall join the *agency* and all other appropriate parties as *respondents*” (emphasis added). DWS fails to note, however, that (1) both the term “agency” and the term “respondent” are defined terms in the statute, and (2) a reasonable joint reading of those definitions points to joinder of DWS as the proper “respondent” in the action.

Under Utah Code Ann. § 63-46b-2(1)(b), the term “agency” is broadly defined:

“Agency” means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head, but does not mean the Legislature, the courts, the governor, any political subdivision of the state, or any administrative unit of a political subdivision of the state.

“Agency,” then, is broadly defined by the statute, and would include DWS as well as CSRB.

“Respondent,” however, is far more narrowly defined:

“Respondent” means a person *against whom an adjudicative proceeding is initiated, whether by an agency or any other person.*

Utah Code Ann. § 63-46b-2(1)(i) (emphasis added).⁵ Any reasonable joint reading of these definitional provisions leads to the conclusion that the appropriate “agency” to join as the “respondent” is the “person” against whom Appellant initiated the adjudicative proceeding *before the CSRB*, not CSRB itself. In electing to bring his action against

⁵The term “person” includes, if applicable, an “agency” – Utah Code Ann. § 63-46b-2(g).

DWS, then, Appellant sued the entity which it is identified, under the statute, as the “respondent,” as well as the “agency,” involved in the proceeding, for purposes of § 63-46b-14(3)(a). DWS’s argument, without benefit of further clarifying language in the statute or interpretive case law, that Appellant’s approach in this regard created a fatal jurisdictional flaw, is simply untenable.

DWS’s argument that CSRB – the administrative tribunal from which Appellant’s petition against DWS was taken – was the *only* correct, indispensable “agency” under the Act, also overlooks the fact that CSRB’s role in the administrative proceedings in this matter brings it within another defined term under the Act – that of a “superior agency”:

“Superior agency” means an agency required or authorized by law to review the orders of another agency.

Utah Code Ann. § 63-46b-2(1)(j). The Act, in other words, makes a distinction between the agency or other person taking action against the petitioner – the “respondent” – and another agency authorized by law to review the orders of that person if it is an agency – a “superior agency.” CSRB acted as a “superior agency” in its review of DWS’s actions, pursuant to Mr. Blauer’s grievance. Had the legislature intended to make joinder of the “superior agency” a jurisdictional prerequisite to seeking judicial review of informal adjudicative proceedings, it could have said so. It did not. DWS’s interpretation of the Act under these circumstances is unduly restrictive, and in derogation of the Legislature’s broad grant of jurisdiction to this Court to hear appeals from judicial review of informal adjudicative proceedings.

In short, DWS invites this Court to create a limitation on the Legislature's broad grant of jurisdiction to review lower courts' rulings on informal adjudicative proceedings, supported neither by clear statutory mandate or any applicable decisions.

Given the foregoing, DWS's final leap of logic – that the trial court was powerless to reverse CSRB's determination that it lacked jurisdiction over Mr. Blauer's grievance is void because he did not have "personal jurisdiction" over CSRB – fails outright. Mr. Blauer's petition to the trial court was for review of CSRB's decision – precisely as Mr. Blauer's petition to this Court was for review of the trial court's decision. The CSRB, as a "superior agency" under the statute, is an administrative tribunal, the ruling of which was under consideration by the trial court pursuant to statute – not a private party litigant whose actions can not be compelled without the service of Summons and Complaint. The trial court determined that CSRB's administrator had made legal error in declining jurisdiction over Mr. Blauer's grievance. The lower court no more lacked jurisdictional competence to fashion an appropriate remedy under the circumstances than does this Court to reverse the trial court's determination that Mr. Blauer was not demoted without joining the trial court as a party defendant in this appeal.

As a final note, if DWS continues to be agitated by CSRB's absence from these proceedings, CSRB can still be added. Rule 21, Utah R. Civ. P. is emphatic that "[m]isjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party of its own initiative *at any stage of*

the action and on such terms as are just.” Joinder could be accomplished on remand, if this Court deems it necessary to full and proper relief.

POINT II

MR. BLAUER’S PETITION TO THE TRIAL COURT, LIKE HIS APPEAL TO THIS COURT, MAKES NO ATTEMPT TO OVERTURN RULE 477-1(32) OF THE UTAH ADMINISTRATIVE CODE; AS SUCH, HIS FAILURE TO PETITION FOR REVOCATION OF THAT RULE DOES NOT DEPRIVE THIS COURT OF JURISDICTION.

DWS’s second argument is a complete mystery. It seems to suggest that, by citing this Court to the case of *Draughon v. Utah Dept. of Financial Institutions*, 1999 UT App. 42, 975 P.2d 935, Mr. Blauer has somehow mounted a challenge to the validity of Rule 477-1(32), Utah Admin. Code; further, that since that challenge was not preceded by a petition to the Department of Human Resources to Repeal R477-1(32), this entire proceeding is jurisdictionally deficient.

The Court need do no more than review Mr. Blauer’s opening brief, which nowhere challenges the validity of the cited rule, or argues its repeal. To the contrary, the cited provision *defines* DWS’s conduct toward Mr. Blauer as a “demotion,” in full conformity to the *Draughon* decision. See R378-387; opening brief at pp. 4, 23, 31, 32, 38.

As more fully set out in his opening brief, and at Point II below, Mr. Blauer argues that, under the standard established by R477-1-1(32), Utah Admin. Code, DWS’s actions against him constituted a “demotion” in that it was a change of an incumbent from one

position to another having a lower salary range (whether or not it entailed a change in job title, or a reduction in salary). Like the *Draughon* decision giving rise to it, the cited rule can sustain no other conclusion. Mr. Blauer does not challenge its validity, or seek its repeal, and is under no mandate to petition the Department of Human Resource Management before filing suit.

POINT III

MR. BLAUER WAS DEMOTED, AND ENTITLED TO A HEARING BEFORE THE CSRB.

DWS's opposing brief does nothing to dislodge the fact that, as corrective action against him (and in the wake of a superior overruling her "unsuccessful" performance evaluation), Tani Downing demoted Mr. Blauer for perceived performance deficiencies (albeit groundless and as yet unchallenged) by moving him from a position which he had performed for many years to one in which he could not effectively function due to physical limitations; a position defined, by DHRM regulations, as one having a salary step and pay range as significantly lower than that which he had previously occupied. Both the CSRB and the lower court completely ignored the language of *Draughon* and R477-1-1(32), concluding that since Mr. Blauer had lost no salary or benefits, he had not been "demoted." For those reasons set out in Mr. Blauer's opening brief, the position is simply untenable.

In an attempt to sidestep the inevitable consequences of its action, DWS takes completely inconsistent positions. Its opposing brief attempts to characterize the

demotion as nothing but a “temporary” “reassignment” – a position nowhere supported by the record. It attempts to argue that the “reassignment” was for Mr. Blauer’s own good – again ignoring the facts that (1) Ms. Downing was motivated by claims of performance deficiencies on Mr. Blauer’s part, which she now seeks to avoid having to address in an adjudicative proceeding; (2) the “reassignment” was to a position which, as DWS well knew, Mr. Blauer was physically incapable of performing; and (3) DWS’s ADA representative was openly scornful of Mr. Blauer’s claims of disability. Why, if Mr. Blauer was the hopeless maladroit characterized in Ms. Downing’s affidavit, would the “reassignment” to function of an ALJ be “temporary”? How, in light of medical documentation in DWS’s possession at the time of “reassignment” could Ms. Downing’s actions possibly increase Mr. Blauer’s well-being or utility to his employer? How, given the internal inconsistencies in DWS’s own story behind the “reassignment” (to say nothing of the challenges thereto contained in Mr. Blauer’s submittals) could CSRB and the lower court validly determine that, as a matter of law, there had been no “demotion,” and therefore no jurisdiction?

At p. 27 of its Brief, DWS mischaracterizes the requirements of Rule 477-1(32) when it states “. . . the requirement of a formal change in position to a lower salary range before the grievance process may be invoked is not only reasonable, but entirely consistent with legislative intent.” The rule (set forth on pages 4, 23, and 38 of Appellant’s Brief) does not require a “formal change” “to a lower salary range.” The rule

requires only “An *action* resulting in . . . the movement of an incumbent from one job or position to another job or position having a lower salary range. . . .”

If DWS truly accepts that “Rule 477-1(32), unlike its predecessor, creates broad access to the grievance process without undue interference in managerial discretion” (opposing brief at p. 26) why is it so desperate to deny Mr. Blauer a hearing on his adverse action, clearly intended to be a demotion or corrective action? Tani Downing demoted Mr. Blauer without giving him the basic due process right of an opportunity to rebut the charges she cited in her demotion memorandum as grounds for the demotion. That denial has continued on now for nearly two years. During this time DWS has refused to allow him to perform the duties his doctors have certified he can perform, and has insisted it will only allow him to perform the duties his doctors have certified he cannot safely perform.

Somewhere, DWS needs to be held accountable for its action toward Mr. Blauer. It is possible that upon hearing the merits, CSRB will determine that DWS’s action was justified. To find, however, that jurisdiction was lacking as a matter of law, and that no facts existed raising a reasonable question whether a demotion had in fact occurred under applicable regulatory and case law, was clearly reversible error.

CONCLUSION

For those reasons set out above, as well as those in his opening brief, Mr. Blauer submits that the trial court’s dismissal of his claims based on demotion should be

reversed, while its remand of all remaining issues for further consideration by the Utah State Career Services Review Board should be affirmed.

DATED this 17th day of June, 2005.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

Vincent C. Rampton

Attorneys for Plaintiff/Appellant Lorin Blauer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE was mailed via first class
mail, postage prepaid, to the following this 17th day of June, 2005:

Debra J. Moore
J. Clifford Petersen, Assistant Utah
Attorney General
Mark L. Shurtleff, Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, UT 84114-0856
Attorneys for Defendant/Appellee Department of Workforce Services


A handwritten signature, appearing to be "J. Petersen", is written over a horizontal line.