

2004

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

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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LORIN BLAUER,

Plaintiff/Appellant/Cross-Appellee,

vs.

DEPARTMENT OF WORKFORCE SERVICES,

Defendant/Appellee/Cross-Appellant.

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**REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT**

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Appeal from an Order of the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Leslie A. Lewis presiding, denying a motion to dismiss, partially granting a motion for summary judgment, and remanding claims to the Utah State Career Service Review Board

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REQUESTING ORAL ARGUMENT AND PUBLISHED OPINION

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**Reply Brief of Appellee and Cross-Appellant**

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**Argument**

**1. The district court lacked jurisdiction over CSRB**

In arguing that the district court had jurisdiction over CSRB, Blauer mistakenly equates a state agency with a lower court. Ans. Brf. at 15.<sup>1</sup> This argument is made without supporting authority. Furthermore, the argument would place all state agencies which are administrative tribunals under the perpetual jurisdiction of the district courts,

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<sup>1</sup>“Ans. Brf.” refers to Blauer’s second brief, designated “Reply Brief,” which is also an answer brief on the cross-appeal.

without service or notice of any given controversy. But a state agency is not equivalent to a lower court. A state agency comes under the jurisdiction of the district court by being named as a party and served in compliance with Rule 4 of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 4(d)(1)(K). Regardless of CSRB's status as an administrative tribunal, CSRB was never brought within the jurisdiction of the district court pursuant to the Rules of Civil Procedure, thus leaving the district court powerless to remand any aspect of the case to the CSRB.<sup>2</sup>

Blauer alternatively argues that he can cure any deficiency by simply adding CSRB now. But adding CSRB would not relate back to the time of original filing since no identity of interest exists between CSRB and the department, which are separate state agencies with different legal interests in this matter. See Penrose v. Ross, 2003 UT App 157, ¶¶19-20, 71 P3d 631 (holding that addition of new party with different legal interests than original party did not relate back to time of original filing to avoid statute of limitations). Because the addition of CSRB would not relate back, any petition filed now against CSRB would be outside UAPA's thirty-day filing limit. Blauer could not satisfy the "when justice so requires" standard of Utah R. Civ. P. 15(a) for amendment of pleadings where he deliberately chose not to correct his failure to name CSRB in the ten months which elapsed between when he was informed of the deficiency and when the district court granted summary judgment. R. 29-30, 61, 1197-2000.

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<sup>2</sup>Nor has CSRB been brought within the jurisdiction of this Court because Blauer did not serve his notice of appeal on CSRB. R. 1176-77. See Gill v. Tracy, 13 P.2d 329 (Utah 1932) (stating that, in order to confer jurisdiction on an appellate court, appellant must serve notice of appeal on all non-appellant parties who may be adversely affected by modification or reversal of the judgment). Furthermore, Blauer's opening brief lists no other interested parties which are not included in the caption of the brief. See Utah R. App. P. 24(a)(1).

2. Because the Department's decision was not *final* agency action, Blauer has no statutory right to judicial review of the Department's decision, standing alone

Blauer's assertion that he properly named only the Department as the respondent<sup>3</sup> agency overlooks the limits on judicial review imposed by UAPA and the Grievance and Appeal Procedures Act. *First*, UAPA provides that judicial review can only be had of final agency action. The Department's decision is not final agency action because it was preliminary to CSRB's subsequent agency action. Because the Department's decision is not final agency action, Blauer has no statutory right under UAPA to judicial review of that decision, standing alone. *Second*, the Grievance and Appeal Procedures Act only authorizes judicial review of CSRB as the final administrative decision maker, not direct judicial review of the agencies subject to CSRB review.

Given these statutory limits, the district court lacked jurisdiction to review the Department's decision, standing alone. See Dep't of Env'tl. Quality v. Golden Gardens Water Co., 2001 UT App 173, ¶13, 27 P.3d 579 (neither trial court nor appellate court has jurisdiction to review administrative decision where a party cannot demonstrate a statutory right to judicial review).<sup>4</sup>

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<sup>3</sup>Blauer's reliance on a joint reading of the definitions of "respondent" and "agency" is flawed because it is based on a definition of "respondent" that applies only to agency proceedings, not to a petition for judicial review. See Utah Code Ann. § 63-46b-2(1)(i) (West 2004). Respondent is defined only in the context of an *adjudicative* proceeding, which is, in turn, defined only as an agency action or proceeding. Utah Code Ann. § 63-46b-2(1)(a) (West 2004). The definition of respondent relied upon by Blauer, then, does not purport to apply to petition for judicial review.

<sup>4</sup>The Utah Supreme Court's recent decision in Harley Davidson v. Dep't of Workforce Services, 2005 UT 38, 528 Utah Adv. Rep. 24, --- P.3d ---, is inapplicable to this case because it dealt with appellate court jurisdiction to review a *formal* agency proceeding under Utah R. App. 14. The Supreme Court did not examine a district court's jurisdiction to review *informal* agency proceedings, nor did it address personal



**A. Only final agency action is reviewable under UAPA and the Department's decision was not final agency action**

UAPA restricts judicial review to final agency action only. Utah Code Ann. § 63-46b-14(1) (West 2004) (stating that a “party aggrieved may obtain judicial review of *final* agency action”) (emphasis added); see also Utah Code Ann. § 63-46b-15 (West 2004) (limiting district court jurisdiction to judicial review of “*final* agency actions resulting from informal adjudicative proceedings) (emphasis added). Moreover, UAPA does not apply to “internal personnel action within an agency concerning its own employees, *or judicial review* of the action.” Utah Code Ann. § 63-46b-1(1)(e) (West 2004) (emphasis added).

Blauer concedes that both CSRB and the Department meet UAPA’s definition of “agency.” Ans. Brf. at 13. But between these two agencies, only CSRB is the *final* agency actor here. The Utah Supreme Court defined “final agency action” in Barker v. Utah Public Serv. Comm’n, 970 P.2d 702 (Utah 1998), as the “whole or a part” of any action which is “not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.” Id. at 706 (emphasis added, citation and internal quotation marks omitted). The Court further explained that the “relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.” Barker at 706 (citation and internal quotation marks omitted).

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jurisdiction or the statutory limitations to judicial review in UAPA and the Grievance and Appeal Procedures Act.

Under this test from Barker, the internal decision by the Department here, though final within the Department, was not “final agency action” for purposes of UAPA. The Department’s decision was not final agency action because the decision was merely “preliminary, preparatory, procedural, or intermediate” to Blauer’s exhaustion of administrative remedies, given Blauer’s statutory right to appeal the Department’s decision to the CSRB, a superior agency. Barker, 970 P.2d at 706. Furthermore, the Department’s decision was not final agency action because direct judicial review of the Department’s decision, without review of the CSRB decision, would “disrupt the orderly process of adjudication” set forth in the Grievance and Appeal Procedures Act, which mandates that CSRB is the ultimate administrative decision maker. Id.; see also Utah Code Ann. §§ 67-19a-202(1)(a) and -302(1)(a) (West 2004).

Only the CSRB decision meets the definition of “final” agency action in Barker. Indeed, Blauer’s assertion that CSRB acted as a “superior agency” in denying Blauer’s grievance is tantamount to an admission that the CSRB is the final agency actor here, not the Department.<sup>5</sup> Ans. Brf. at 14. The *final* agency action denying Blauer’s grievance was the CSRB’s decision, not the Department’s, and certainly not both. Because the Department’s decision is not “final” agency action, the district court lacked jurisdiction to review it under UAPA. Because UAPA was Blauer’s only basis of jurisdiction, the district court erred as a matter of law in not dismissing Blauer’s complaint.<sup>6</sup>

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<sup>5</sup>Blauer exhausted his administrative remedies by appealing to the CSRB, yet argues that somehow the outcome of this exhaustion, the CSRB decision, was not the ultimate agency action declining his grievance.

<sup>6</sup>Blauer’s complaint cited sections 63-46b-15 and 78-3-4 as the only jurisdictional provisions supporting his complaint. R. 2, ¶4. Section 78-3-4(7)(a) states that the district court has jurisdiction to review “agency adjudicative proceedings” as set forth in UAPA. Section 63-46b-15 of UAPA limits district court jurisdiction to judicial review of “*final* agency actions resulting from informal adjudicative proceedings.” (Emphasis added).

Furthermore, Blauer's petition for judicial review of the Department's internal personnel decision was untimely as to that decision. The Department made its final internal decision on October 14, 2003. R. 6, ¶26; 204-06. Blauer did not file his petition for judicial review until January 7, 2004, well over thirty days later. See Utah Code Ann. § 63-46b-14(3)(a) (West 2004) (requiring a party to "file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued"). Therefore, Blauer's petition for review of the Department's decision was untimely.

**B. The administrative procedures available to a career service employee only do not authorize direct judicial review of the employing agency**

In addition, judicial review of the Department's decision, standing alone, is not contemplated in the statutory scheme setting forth the administrative procedures available to a career service employee. The Grievance and Appeal Procedures Act sets forth the administrative procedures available to a career service employee, such as Blauer, to pursue a grievance against the state agency which is his employer. These procedures provide for CSRB review of certain employment disputes and judicial review of CSRB decisions. Blauer's underlying dispute with the Department meets the Act's definition of "grievance" because it is a "a complaint by a career service employee concerning *any matter* touching upon the relationship between the employee and his employer; *and any dispute* between a career service employee and his employer." Utah Code Ann. § 67-19a-101(5)(a) (West 2004) (emphasis added). Here, Blauer, grieved his alleged demotion and constructive discharge, which are appealable to all levels of grievance procedure,

including appeal to the CSRB as the “final administrative body” to review the grievance. Utah Code Ann. §§ 67-19a-202(1)(a) and -302(1)(a) (West 2004).

As the final administrative body, CSRB is an agency separate and distinct from the agency whose employment decisions it reviews. See Lopez v. Career Serv. Review Bd., 834 P.2d 568, 572 (Utah App. 1992) (stating that CSRB “was established to provide state civil service employees with a forum for appealing personnel decisions *outside* the agency for which they work”) (emphasis added); Kent v. Career Serv. Review Bd., 860 P.2d 984, 985 (Utah App. 1993) (holding that the CSRB is an administrative agency whose sole purpose is reviewing *other* agency decisions). Once the CSRB renders its ultimate administrative decision, the aggrieved party – be it the employee or the employing agency – may seek judicial review of the CSRB’s decision in accordance with UAPA. But neither the Grievance and Appeal Procedures Act nor UAPA provides for direct judicial review to a career service employee of the employing agency’s decision alone. For this Court to now conclude otherwise would be contrary to the structure of the grievance procedure outlined in statute.

3. Having failed to petition DRHM to change the rule defining a demotion, Blauer is precluded from challenging the rule under the rationale of Draughon

Despite his acknowledged failure to petition DHRM to modify its new rule defining demotion, Blauer improperly continues to argue that the rule should be invalidated under the rationale of this Court’s decision in Draughon. In so doing, Blauer ignores both the Utah Administrative Rulemaking Act (“UARA”), which precludes the judicial invalidation of an agency rule except on review of a petition for a rule change,

and the procedural posture of Draughon, which was properly before the Court on appeal from a district court's review of the denial by the employee's petition for a rule change. This Court should reject Blauer's invitation to excise the Draughon decision from its foundation, and to gloss over so basic a matter as subject matter jurisdiction. Under UARA, this Court should limit its review of the decision below to whether the trial court properly applied the DRHM rule to the facts of this case.<sup>7</sup> The question of the validity of the rule itself under the Personnel Management Act was not properly before either the trial court or this Court.

Blauer insinuates that the Department has raised the question of subject matter jurisdiction as a subterfuge to dodge the issue of whether DHRM's new rule conforms to the Utah Personnel Management Act. Unlike Blauer, however, who has ignored the jurisdictional consequences of his failure to petition DHRM for a rule change, the Department has addressed the question of the validity of the rule in the Brief of Appellee. Under Blauer's rationale, it is not the Department, but Blauer who seeks to dodge an issue. Moreover, this Court has the duty to determine its subject matter jurisdiction whether or not a party to the appeal has raised a jurisdictional challenge.

## **Conclusion**

The CSRB is not perpetually subject to district court jurisdiction merely because it is an administrative tribunal. Rather, the CSRB must be brought under the jurisdiction of the district court in accordance with the service requirements of the Utah Rules of Civil

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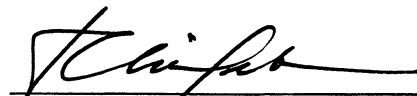
<sup>7</sup>Of course, such a review assumes the existence of jurisdiction over Blauer's challenge to the CSRB decision. However, Blauer's actions have also deprived this Court of such jurisdiction.

Procedure. Because CSRB was not brought under the jurisdiction of the district court, the court lacked jurisdiction to remand the case to CSRB.

In addition, the district court lacked subject matter jurisdiction over this dispute because Blauer has no statutory right to judicial review of the Department's decision, standing alone. Blauer has no right to judicial review under UAPA because the Department's decision was not final agency action. Likewise, the Grievance and Appeal Procedures Act does not authorize direct review of the Department's decision, but only contemplates judicial review of CSRB as the final administrative decision maker.

Under the Utah Administrative Rulemaking Act, this Court also lacks jurisdiction over Blauer's appeal to the extent that he contends the new DHRM rule defining demotion is invalid under the rationale of this Court's decision in Draughon. Unlike the employee in Draughon, Blauer has provided no basis on which either the court below or this Court may exercise jurisdiction to determine whether the new rule conforms to the governing statutory scheme. Assuming for the sake of argument that this Court may exercise jurisdiction over Blauer's grievance, this Court should limit its review to Blauer's contention that the trial court incorrectly applied the new DHRM rule.

DATED this 20<sup>th</sup> day of July, 2005



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## CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the foregoing REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT to the following this 20<sup>th</sup> day of July, 2005:

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A handwritten signature in dark ink, appearing to read "V. Rampton", is written over a horizontal line.