

2004

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LORIN BLAUER,	:	
	:	
Plaintiff and	:	
Appellant,	:	Court of Appeals Case No. 20040848-CA
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
Appellee.	:	

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On appeal from an Order by the Third Judicial District Court for Salt Lake County, State of Utah, The Honorable Leslie J. Lewis presiding, styled “Proposed Order in Conformance with the Memoranda Decision Dated August 16, 2003 [sic]”, entered December 8, 2004 (Attachment 1), which Order dismissed with prejudice the second, third, and fourth claims for relief of Plaintiff’s Complaint herein.¹

INTRODUCTION

Plaintiff and Appellant Lorin Blauer, a licensed attorney and Utah State career service employee since 1981, was the subject of a “corrective action” on September 9, 2003, in the form of a *de facto* demotion from his prior position, Legal/Enforcement Counsel III, for Defendant Department of Workforce Services, to Administrative Law Judge–Non-Juris Doctorate. He was afforded no pre-demotion hearing. When Plaintiff challenged the demotion through the career service employee grievance procedure provided by law, he was met with the declaration, first by Defendant/Appellee Department of Workforce Services (“DWS”) and then by the Career Service Review Board (“CSRB”), that he had no valid complaint as he had not been “demoted” at all as a result of the “corrective action”, but merely “reassigned.” CSRB refused jurisdiction to

¹ The December 8, 2004, Order remanded Plaintiff’s remaining claims (dealing with personnel rule violations) to the Career Service Review Board for further proceedings, finding that the Career Service Review Board had improperly declined jurisdiction thereof. No appeal is taken from this portion of the Court’s ruling.

hear the matter, declaring that no rule had been violated and plaintiff/appellate had not been demoted or suffered any other harm.

In considering Plaintiff's Motion for Summary Judgment (together with a blizzard of motions filed by Defendant/Appellee Department of Workforce Services), the lower court – ignoring completely established case precedent – concluded that, because Plaintiff did not receive a pay cut or lose benefits, his “reassignment”, even where taken as “corrective action” was, as a matter of law, not a “demotion” at all:

. . . [T]he court carefully considered the Plaintiff's argument that the court look to such factors as the change in his status and that his new responsibilities essentially fit the job description for the lower paying and apparently less esteemed position of Administrative Law Judge–Non-Juris Doctorate. While the Plaintiff argues this position admirably, the fact remains that *without a commensurate decrease in salary or a lower salary range (or the loss of retirement benefits), the Plaintiff cannot be considered demoted.*²

This Court's decision in *Draughon v. Dep't. of Financial Institutions*, 975 P.2d 935 (Utah App. 1999), as well as other case law and the current wording of administrative rules promulgated by the Department of Human Resource Management and DWS itself, simply preclude the trial court's categorical presumption that, absent loss of pay or benefits, no demotion occurred. Mr. Blauer is entitled to a hearing before the Career Service Review Board establishing that he was, in fact, “demoted” – and demoted without

² Trial Court's Memorandum Decision of August 16, 2004 (Attachment 2), at p. 3 (emphasis added).

cause – in violation of due process rights secured by both state and federal constitutional guarantees.

JURISDICTION

This is an appeal from a final order and judgment of the Third Judicial District Court for Salt Lake County, State of Utah, the Honorable Leslie J. Lewis presiding. By her order (Attachment 1), the trial court granted in part, and denied in part, Plaintiff/Appellant's Motion for Summary Judgment, remanding all grievances unrelated to his claims of demotion for further hearing before the Career Services Review Board, but holding that, as a matter of law, Plaintiff could claim no deprivation of any due process rights in his employment as Legal/Enforcement Counsel III to DWS, as his property rights in that employment had not been impacted by a "demotion."

Jurisdiction obtains pursuant to Utah Code Ann. § 78-2a-3(2)(b).

STATEMENT OF ISSUES PRESENTED FULL REVIEW AND STANDARD OF REVIEW

1. Whether the trial court erred in determining that Plaintiff was not "demoted" within the meaning of Utah Code Ann. § 67-19a-302(1), when the Department of Workforce Services removed his responsibilities as Legal/Enforcement Counsel III (with the required qualifications of Juris Doctorate degree and membership in the Utah Bar, and the pay range of step 63-78), and assigned him to perform, full-time, the duties of an Administrative Law Judge–Non-Juris Doctorate (which does not require a Juris Doctorate degree or membership in the Utah State Bar, has less opportunity for

advancement, and is a pay range of step 51-66), even if no immediate change in pay was entailed. (Preserved at R. 367-487; 1005-1048.)

2. Whether the lower court erred in finding that Plaintiff's transfer, as described above, was not a "demotion" despite Utah Admin. Code R477-1-1(32), which defines demotion as:

An action resulting in a salary reduction on the current salary range or the movement of an incumbent from one job or position to another job or position having a lower salary range, which may include a reduction in salary . . .

(Preserved at R. 367-487; 1005-1048.)

3. Whether the trial court erred in granting Defendants' Motion for Summary Judgment on the demotion issue as described above, and finding that, as a matter of law, Mr. Blauer's transfer was not a demotion. (Preserved at R. 367-487; 1005-1048.)

The lower court's ruling was on motion for summary judgment, and is reviewable by this Court for correctness, giving no deference to the lower court's actions. *See Schurtz v. BMW of North America, Inc.*, 814 P.2d 1108 (Utah 1991); *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, 979 P.2d 332. All factual inferences are construed in favor of the appellant, and against the appellee. *See BlueCross & BlueShield v. State of Utah*, 779 P.2d 634 (Utah 1989).

DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS

FEDERAL STATUTES

U.S. Const. amend. XIV

FEDERAL CASES

Board of Regents v. Roth, 408 U.S. 564, 577 (1972)

Gilbert v. Homar, 520 U.S. 924 (1997)

Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793

STATE CASES

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Lucas v. Murray City Civil Service Comm'n, 949 P.2d 746

STATE STATUTES

Utah Const. Art. 1, § 7

Utah Code Ann. § 67-19-8

Utah Code Ann. § 67-19-12

Utah Code Ann. § 67-19-18

Utah Code Ann. § 67-19a-302(1)

Utah Code Ann. §§ 67-19a-402 through 408

Utah Admin. Code R477-1-1

Utah Admin. Code R477-3-3

STATEMENT OF THE CASE

Plaintiff/Appellant Lorin Blauer's claims in this action center around his September 9, 2003, demotion from Legal/Enforcement Counsel III to the equivalent of an Administrative Law Judge–Non-Juris Doctorate, without cause (and, in fact, as a corrective or disciplinary action, and in apparent retaliation for having successfully challenged an unfavorable performance review).

Plaintiff filed a grievance concerning his demotion with DWS' Executive Director pursuant to Utah Code Ann. § 17-19a-302. By letter dated October 14, 2003, and without hearing on the issue of whether DWS had cause to demote Plaintiff, DWS upheld Plaintiff's demotion by his supervisor, contending that the action was simply a reassignment because, "You retain your title as legal counsel and you maintain the same pay and pay range. It is not a demotion."

Plaintiff thereafter appealed DWS' decision to the CSRB, whose administrator declined jurisdiction on November 12, 2003, claiming that Plaintiff raised no grievance reviewable by CSRB under existing law.

On December 2, 2003, Plaintiff requested reconsideration of CSRB's declination of jurisdiction. By order dated December 22, 2003, CSRB's administrator denied Plaintiff's motion for reconsideration, and again refused to permit CSRB to hear Plaintiff's grievance.

Plaintiff filed this action before the lower court on January 6, 2004, and moved for summary judgment on March 22, 2004. On April 19, 2004, Defendant/Appellee (which had already filed a Motion to Dismiss on February 6, 2004, and received no ruling thereon) filed a Cross-motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment; a Response in Opposition to Plaintiff's Motion for Summary Judgment and Cross-motion for Summary Judgment; an Affidavit of Chuck Butler in Support of Cross-motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment; an Affidavit of Patricia Barrett in Support of Cross-motion for Summary Judgment; an Affidavit of Kevin Beutler in Support of Cross-motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment; an Affidavit of JoAnne Campbell in support of Defendant's Cross-motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment; an Affidavit of Tani Downing in Support of Defendant's Cross-motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment; an Affidavit of Thomas E. Patterson in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment; a Rule 56(f) Motion for Continuance; a Memorandum and Affidavit in Support of Rule 56(f) Motion for Continuance; a Rule 16(b) Motion for Schedule and Management Conference; and a Memorandum in Support of Rule 16(b) Motion for Scheduling and Management Conference.

Pending motions were argued to the court on June 24, 2004. By Memorandum Decision dated August 16, 2004, the lower court denied DWS' Motion to Dismiss; granted in part and denied in part DWS' Cross Motion for Summary Judgment, denied in part and granted in part Plaintiff's Motion for Summary Judgment, and implicitly denied DWS' remaining motions. Specifically, the lower court held that, as a matter of law, Plaintiff was not "demoted" under applicable law, as he suffered no loss of pay or benefits. It is from the lower court's determination, in granting DWS' Cross Motion for Summary Judgment as it relates to Plaintiff's having been demoted, that Plaintiff appeals.

STATEMENT OF FACTS

1. Plaintiff began employment with DWS in December of 1980, as a temporary, part-time employee. (Affidavit of Lorin Blauer, hereafter "Blauer Affidavit," R. 406-487, at ¶ 6).

2. Effective September 14, 1981, Plaintiff achieved full-time merit status as a "Career Service Employee," with a working title of "Legal Counsel." (Blauer Affidavit, R. 406-487, ¶ 7.)

3. As Legal Counsel for DWS, Plaintiff's tasks included advising the Workforce Appeals Board (formerly Board of Review), writing its decisions and defending those decisions in the Utah Court of Appeals and the Utah Supreme Court. (Blauer Affidavit, R. 406-487, ¶ 8.)

4. Plaintiff has at all times been effective and productive in his role as Legal Counsel for DWS, achieving a seventy-five percent (75%) success rate in reported decisions from all matters handled before the Utah Supreme Court or this Court – the highest success rate of any DWS Legal Counsel. (Blauer Affidavit, R. 406-487, ¶ 9.)

5. Utah’s Division of Human Resource Management, or DHRM, which has the responsibility to “prepare, maintain, and revise a position classification plan for each employee position” pursuant to Utah Code Ann. § 67-19-12, a responsibility which it “may not contract or otherwise delegate . . . to another agency (Utah Code Ann. § 67-19-8), issued “job descriptions” for a “job series” with titles of Legal/Enforcement Counsel I, II, III, and IV, which are benchmarked to Legal/Enforcement Counsel II. These positions require a Juris Doctorate degree and active membership in the Utah State Bar Association. The salary range for this series is 55-70 for Legal/Enforcement Counsel I; 59-74 for Legal/Enforcement Counsel II; 63-78 for Legal/Enforcement Counsel III; and 65-82 for Legal/Enforcement Counsel IV. (Blauer Affidavit, R. 406-487, ¶ 11 and Exhibit 1.)

6. As holder of the title of “Legal/Enforcement Counsel III”, and as an employee performing the functions of that position, Plaintiff was called upon to “provide legal advice to agency management, personnel, the Work Force Appeals Board, agency executive directors, the Commissioner on Decisions of Administrative Law Judges, and/or the entire agency,” and to act “as Chief Liaison between their agencies and the

Attorney General's Office"; further, Plaintiff was to "functionally or directly supervise legal counsel, legal support staff, investigators, and/or auditors" (State of Utah Department of Human Resource Management job description, Legal/Enforcement Counsel III, Blauer Affidavit, R. 406-487, at Exhibit 1, pp.5-6, R. 420-421).

7. As Legal/Enforcement Counsel III, Plaintiff was to have knowledge concerning "applicable laws, rules, regulations and/or policies and procedures . . . agency and/or organizational program(s) . . . rules of evidence . . . research methods, techniques, and/or sources of information . . . [and] civil and criminal justice laws." (*Id.*)

8. DHRM has also issued a job description with a title of "Administrative Law Judge–Non-Juris Doctorate," which is benchmarked to Rehabilitation Counselor II. The job description does not require a Juris Doctorate degree, or membership in the Utah State Bar, and has a salary step range of only 51-66, and a pay range of \$18.09 - \$27.18 per hour (State of Utah Department of Human Resource Management job description, Administrative Law Judge–Non-Juris Doctorate, Blauer Affidavit, R. 406-487, at Exhibit 2, R. 425-426).

9. The job description for "Administrative Law Judge – Non-Juris Doctorate" requires the holders of such position to "preside at hearings consistent with provisions of the Utah Administrative Procedures Act (UAPA) governing adjudicative proceedings," to "conduct hearings and render decisions based on federal and state laws"; to "utilize independent judgment to rule on all issues by evaluating evidence and testimony"; to

“issue written decisions consistent with all applicable laws and rules, conduct pre-hearing conferences to negotiate issues and rule on stipulations and motions regarding discovery and requests for continuances,” to “rule on requests for and issue subpoenas,” and to “provide training to department employees and external customers as requested.” (*Id.*)

10. The knowledge and training required of an Administrative Law Judge – Non Juris Doctorate are limited to “applicable laws, rules, regulations and/or policies and procedures . . . legal processes and procedures . . . formats for a wide variety of legal documents . . . [and] grammar, spelling and punctuation.” (*Id.*)

11. Prior to September 9, 2003, Plaintiff’s title was Legal/Enforcement Counsel III; his salary was at step 76 - ten steps above the highest step for Administrative Law Judge - DWS. (Blauer Affidavit, R. 406-487, ¶ 13.)

12. In addition to his responsibilities as Legal/Enforcement Counsel to DWS, Plaintiff performed, as part of his duties specified under his Position Description Questionnaire (or “PDQ”), additional work in connection with “special assignments.” These additional temporary responsibilities included, on occasion, filling in temporarily as Administrative Law Judge-Non Juris Doctorate. These kinds of undefined temporary additional responsibilities, though, accounted for less than ten percent (10%) of Plaintiff’s overall workload, according to his official job description. His last PDQ, signed by Plaintiff and his then supervisor, Virginia Smith, on April 2 & 3, 1998, lists his duties with the Workforce Appeals Board as fifty percent (50%) of his legal duties. Other than

for the specific period of his temporary assignment as an Appeal Referee (now Administrative Law Judge-Non Juris Doctorate) in 1987, none of Plaintiff's PDQ's included serving as, or performing the duties of, an Administrative Law Judge-Non Juris Doctorate as part of his duties. (Blauer Affidavit, R. 406-487, ¶ 14 and Exhibit 3.)

13. Historically, Plaintiff shared the responsibility of being Legal Counsel to the Workforce Appeals Board of DWS with one or two other attorneys, and the caseload remained fairly consistent for many years. (Blauer Affidavit, R. 406-487, ¶ 15.)

14. Beginning in 1998, however, there was a significant increase in caseload - from 342 in 1998 to 445 in 1999, 485 in 2000, 585 in 2001, and 819 in 2002. There were 971 Board cases during fiscal year ending June 30, 2003. Plaintiff's share of that caseload was 222 for the fiscal year ending June 30, 2002, and 443 for the fiscal year ending June 30, 2003. (Blauer Affidavit, R. 406-487, ¶ 16 and Exhibits 4 and 5.)

15. According to the Affidavit of Tani Downing, DWS' Director of Legal Services/Appeals (R. 727-840, hereafter "Downing Affidavit"), between the years 2000-2002, terminations increased by 1,100%; unemployment insurance collection work increased by 800%; human resources grievances increased by 300%; unemployment compensation information releases increased by 195%; Workforce Appeals Board cases increased by 69%; Lower Appeals Cases increased by 65.5%; unemployment insurance bankruptcy work increased by 58%; unemployment compensation and public assistance

rules work increased by 50%, and contract work increased by 34%. (Downing Affidavit, R. 727-840, at ¶ 9.)

16. In addition, according to Ms. Downing, the Utah Legislature transferred responsibility for the collection of public assistance overpayments from State Office of Recovery Services to DWS, thus shifting all responsibility for that work to DWS' legal staff from the office of the State Attorney General. (Downing Affidavit, R. 727-840, at ¶ 9.)

17. By Ms. Downing's own testimony, the increase in workload imposed by the foregoing was to be absorbed "by the Department's existing Legal Counsel". (Downing Affidavit, R. 727-840, at ¶ 9.)

18. In this position, Plaintiff received annual performance appraisals; prior to 2003, all such appraisals had been extremely favorable. (Blauer Affidavit, R. 406-487, ¶ 17 and Exhibit 6.)

19. In his 2003 performance appraisal, however, Plaintiff's performance score was dropped 21 points from his 2002 performance rating, resulting in an "unsuccessful" rating. (Blauer Affidavit, R. 406-487, ¶ 18 and Exhibits 7 and 8.)

20. Plaintiff's supervisor, Tani Downing, gave no objective, measurable evidence to support the reduction in rating, but claimed reliance on unsubstantiated information which she refused to share with Plaintiff. (Blauer Affidavit, R. 406-487, ¶ 19 and Exhibit 8.)

21. Plaintiff challenged his 2003 performance rating through public employee grievance process before DWS' Executive Director, Raylene Ireland, noting that his performance had been exemplary despite increased workload, and that his job description failed to offer objective performance standards or criteria. (Blauer Affidavit, R. 406-487, ¶ 20 and Exhibit 5).

22. In answer to Plaintiff's grievance before the Executive Director, his supervisor acknowledged errors in her conducting of Plaintiff's performance appraisal and could not offer any specific elements, criteria, or evidence of Plaintiff's job failure. She did not respond to Plaintiff's statement in his Response that his share of the Workforce Appeals Board caseload doubled from 222 for the fiscal year ending June 30, 2002, to 443 for the fiscal year ending June 30, 2003. Instead she insisted that "the other attorneys' assignments either had more workload than yours to begin with, or their workload has increased more significantly than yours has, leading to an inequity between what the other attorneys individually carry and what you carry." She has never produced any evidence to support this untrue contention. (Blauer Affidavit, R. 406-487, ¶ 21 and Exhibit 9.)

23. By letter dated September 5, 2003, DWS' Executive Director granted Plaintiff's appeal and awarded him a successful performance rating for 2003. (Blauer Affidavit, R. 406-487, ¶ 22.)

24. Thereafter, though, by letter dated September 9, 2003, DWS, through Ms. Downing, took “corrective action” against Plaintiff (even though his “unsuccessful” performance rating had been overturned on appeal) by reassigning him to conduct administrative law hearings full-time. (Blauer Affidavit, R. 406-487, ¶ 23 and Exhibit 10; Downing Affidavit, R. 727-840, ¶ 39.)

25. As such, Plaintiff was stripped of all duties, functions and responsibilities as legal counsel and could only conduct administrative hearings as an Administrative Law Judge in a forum for which a Juris Doctorate Degree is not required. *Id.*

26. Plaintiff’s responsibilities after his “reassignment” are, in fact, the mirror image of the Utah State Department of Human Resource Management’s job description for “Administrative Law Judge – Non-Juris Doctorate.” Blauer Affidavit, R. 406-487, at Exhibit 2.)

27. Simultaneously, Ms. Downing advertised for a new Legal/Enforcement Counsel and promoted Tiffany Vincent, then an Administrative Law Judge–Non-Juris Doctorate into the position of Legal/Enforcement Counsel III with its accompanying raise in status, classification, pay range, opportunity, and level of duties and responsibilities. Ms. Vincent’s reassignment was treated as a promotion. (Blauer Affidavit, R. 406-487, ¶ 24 and Exhibit 11.)

28. Ms. Downing’s reasons for Plaintiff’s “reassignment” were somewhat vague in her September 9 memo (Blauer Affidavit, R. 406-487, at Exhibit 10). In DWS’

submittals to the trial court in support of its motions, though, Ms. Downing was far more voluble concerning Plaintiff's supposed job failings, alleging (without opportunity for cross-examination):

- That Plaintiff was “often out of his office and unable to be found” (Downing Affidavit, R. 727-840, at ¶¶ 10, 12, and 21);
- That he was “not always in court when scheduled on our internal calendar” (Downing Affidavit, R. 727-840, at ¶ 10);
- That he was “doing non-DWS work during work hours” (Downing Affidavit, R. 727-840, at ¶¶ 10, 14, and 35);
- That he was “falling asleep in meetings” (Downing Affidavit, R. 727-840, at ¶¶ 10, 11 and 14);
- That he was “spending too much time during business hours visiting with one of the claimant representatives” (Downing Affidavit, R. 727-840, at ¶¶ 10, 13 and 14);
- That he was “putting his workload off on others to do” (Downing Affidavit, R. 727-840, at ¶ 10);
- That some of his unemployment insurance cases “missed the appropriate time lapse” (Downing Affidavit, R. 727-840, at ¶ 14);

- That he did not “meet the minimum federally mandated requirement in two areas associated with his handling of UI cases” (Downing Affidavit, R. 727-840, at ¶ 14);
- That he had “too many proofreading errors in his decisions” (Downing Affidavit, R. 727-840, at ¶ 14);
- That he was “not a hard worker” (Downing Affidavit, R. 727-840, at ¶ 14);
- That he “did not carry the workload that his co-workers were carrying” (Downing Affidavit, R. 727-840, at ¶¶ 14 and 26);
- That he was “not answering public assistance information release questions from our internal clients in a timely manner” (Downing Affidavit, R. 727-840, at ¶ 20);
- That he supposedly “plagiarized” submittals by counsel in the preparation of decisions through “cutting and pasting” language from the parties’ arguments (Downing Affidavit, R. 727-840, at ¶ 23);
- That he “permitted Collections staff to file thousands of legal documents using his signature stamp and without his review of the documents” in violation of Rule 11 (Downing Affidavit, R. 727-840, at ¶ 30);
- That he had not “provided sufficient legal counsel to the department that a risk analysis was required by Section 35A-4-312 to be performed before the department could release certain information even though he had been legal

counsel assigned to that area for a number of years” (Downing Affidavit, R. 727-840, at ¶ 30); and

- That Defendant’s Board Chair, Becky Thomas, so objected to Plaintiff’s job performance that, if he were assigned to any more Board cases “she would not use him and would exercise her statutory authority to hire her own legal counsel at the Department’s expense” (Downing Affidavit, R. 727-840, at ¶ 34);

29. DWS openly admitted that it “reassigned” Plaintiff to a full-time ALJ as a direct and proximate result of its assessment of his perceived job deficiencies:

The plaintiff’s assignments also changed based upon things such as (a) a request from the Chair of the Board due to Plaintiff’s poor performance on board cases as set forth and summarized in her e-mail to me attached hereto as Exhibit 5;³ (b) complaints regarding his handling of public assistance information released that caused that assignment to be transferred to other counsel, and (c) reassignment of the prosecution board and subplans responsibilities.

(Downing Affidavit, R. 727-840, at ¶ 25.)

30. *Yet DWS maintained that Plaintiff was not demoted based on job performance issues.* (Downing Affidavit, R. 727-840, at ¶ 52.)

31. Prior to his demotion, Plaintiff had notified DWS that, due to health problems, he had difficulty performing the responsibilities of an Administrative Law

³ The referenced e-mail was from Board Chair, Becky Thomas. No copy of that e-mail was ever shown to Plaintiff until well after this case had been filed—and shortly after Ms. Thomas’ death.

Judge–Non-Juris Doctorate (although he could, and still can, perform the duties of Legal/Enforcement Counsel III to DWS with reasonable accommodation). DWS’ demotion of Plaintiff to Administrative Law Judge–Non-Juris Doctorate was thus made with full knowledge that, due to physical constraints, he was unable to perform the functions of that position full time. (Blauer Affidavit, R. 406-487, ¶ 25 and Exhibits 12-15.)

32. For her part, Ms. Downing actually maintained before the lower court that Plaintiff’s demotion was undertaken to *accommodate* his disabilities – despite his attending physician’s characterization of the demotion as a “blueprint to destroy the man”. (Downing Affidavit, R. 727-840, ¶ 39; Affidavit of Tom Cantrell, hereafter “Cantrell Affidavit”, R. 398-405, ¶ 12.)

33. DWS persisted in claiming that Plaintiff’s demotion was the product of poor performance, even though (1) no documentation of such poor performance was ever produced in response to Plaintiff’s requests; (2) neither DWS nor DHRM had articulated measurable, objective performance criteria against which to measure Plaintiff’s performance as Legal/Enforcement Counsel III; and (3) measurement of Plaintiff’s job performance in 2003 failed to take into account a nearly three-fold increase in workload from 1998 to 2003. (Blauer Affidavit, R. 406-487, ¶ 26.)

34. Plaintiff's demotion was accomplished without prior warning to Plaintiff, or opportunity for him to be heard by the department head on the reasons for the demotion. (See Blauer Affidavit, R. 406-487, ¶ 27.)

35. Plaintiff thereafter filed a grievance concerning his demotion with DWS' Executive Director pursuant to Utah Code Ann. § 17-19a-302. By letter dated October 14, 2003, and without hearing on the issue of whether DWS had cause to demote Plaintiff, DWS upheld Plaintiff's demotion by his supervisor, contending the action was simply a reassignment because, "you retain your title as legal counsel and you maintain the same pay and pay range. It is not a demotion." (Blauer Affidavit, R. 406-487, ¶ 28 and Exhibit 16.) This, even though Plaintiff's "reassignment" was taken as a "corrective action," deriving from allegations of poor job performance. (Blauer Affidavit, R. 406-487, ¶¶ 23 and 26 and Exhibit 10.)

36. Incident to its denial of Plaintiff's grievance, DWS, through its agents and representatives, made disparaging remarks concerning his health condition. (Cantrell Affidavit, R.398-405, at ¶¶ 5-18.)

37. Plaintiff thereafter appealed DWS' decision to the CSRB, whose administrator declined jurisdiction on November 12, 2003, claiming that Plaintiff raised no grievance reviewable by CSRB under existing law, as DWS' "corrective action" was not a "demotion." (Blauer Affidavit, R. 406-487, ¶ 29 and Exhibit 17.)

38. On December 2, 2003, Plaintiff requested reconsideration of CSRB's declination of jurisdiction; by order dated December 22, 2003, CSRB's administrator denied Plaintiff's motion for reconsideration, and again refused to permit CSRB to hear Plaintiff's grievance. (Blauer Affidavit, R. 406-487, ¶ 30 and Exhibits 1 and 2 to Plaintiff's Memorandum in Opposition to Motion to Dismiss, R. 47-352.)

39. Due to his inability to perform as Administrative Law Judge-Non Juris Doctorate for health reasons, Plaintiff has been constrained by DWS' actions to exhaust leave furnished under the Family Medical Leave Act of 1992, and to expend accrued sick leave (as DWS has refused to grant Plaintiff administrative leave). (Blauer Affidavit, R. 406-487, ¶ 31.)

40. In spite of its actions, DWS has refused to furnish Plaintiff with any documentation (or other competent evidence to which he could articulate a response) concerning his allegedly substandard performance justifying his demotion. (Blauer Affidavit, R. 406-487, ¶ 32.)

41. Effective November 3, 2004 (after the date of the trial court's ruling herein), Mr. Blauer was finally and permanently terminated as a state employee. (See letter of termination, Attachment 3 hereto.)

SUMMARY OF ARGUMENT

Plaintiff's "reassignment" to the duties of an Administrative Law Judge-Non-Juris Doctorate, from those of Legal/Enforcement Counsel III, was clearly a demotion, whether

or not it cost him an immediate cut in pay or benefits. Under governing case law, whether a change in public employment is or is not a demotion turns on many factors, of which loss of pay and benefits is only one. Under applicable precedent, Plaintiff was clearly demoted: he lost position, responsibility, and (due to his inability to perform the duties to which he was transferred) his career.

Neither may DWS avoid the fact of its demotion of Plaintiff by claiming that it did not alter his job title. It is position, not title, which classifies a career service employee under the statutory job classification system established by the Utah Legislature. If Plaintiff has been “reassigned” to function as an Administrative Law Judge–Non-Juris Doctorate, the law mandates that he become one; DWS may not arrogate to itself the right to simply define away the fact of Plaintiff’s demotion under regulatory language which (if interpreted as DWS urged before the trial court) would subvert the classification system entirely.

Plaintiff’s demotion was accomplished without any of the statutorily-mandated procedural safeguards intended for career service employees by the legislature. He received no CSRB hearing or prehearing, no opportunity to tell his side of the story on which DWS unilaterally relied in its decision to demote him, and no directive from the Career Service Review Board that DWS step forward and prove, by substantial evidence, that his demotion was for just cause. Neither did Plaintiff receive even the semblance of

constitutional due process incident to deprivation of his property rights in continued employment.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT, UNDER GOVERNING CASE LAW, PLAINTIFF WAS NOT “DEMOTED” WITHIN THE MEANING OF UTAH CODE ANN. § 67-19a-302(1).

Put simply, the trial court opted for an ultra-simplistic approach to the question of whether or not Plaintiff was demoted when, as a matter of “corrective action,” he was “reassigned” from Legal/Enforcement Counsel III to the responsibilities of Administrative Law Judge–Non-Juris Doctorate in September 2003 (even when the action was taken with full knowledge that physical limitations precluded his performance of the lower position). Without immediate loss of money or benefits, the court concluded, no demotion has occurred as a matter of law. The trial court’s position in this regard, however, ignores both the plain language of DHRM Rule 477-1-1(32) and governing case law in this area, including this Court’s prior declarations on the subject.

A. Regulatory Definition.

Utah Admin. Code R477-1-1(32) offers a broad definition of the term “demotion”:

An action resulting in a salary reduction on the current salary range *or* the movement of an incumbent from one job *or position* to another job *or position* having a lower salary range, which *may include* a reduction in salary . . .

(Emphasis added.) The language of DHRM’s definition is not quoted or referenced in the trial court’s memorandum decision, and the offered rationale ignores its terms completely. By law, a demotion may, but need not, include a loss of salary; it may, but need not, involve loss of a job, etc. The trial court’s reasoning simply cannot be squared with the governing regulatory language, and must fail on that basis alone.

B. The *Draughon* Decision.

The lower court’s rationale moreover, was challenged and expressly rejected by this Court in the case of *Draughon v. Dep’t of Financial Institutions*, 1999 UT App. 042, 975 P.2d 935.⁴ A copy of the *Draughon* decision is attached as Attachment 4. In *Draughon*, a state career service employee challenged his “reassignment” from the position of Financial Institution’s Manager to Financial Institution’s Specialist, claiming that he had been “demoted” without cause, since the latter position entailed less responsibility, lower status, and a lower pay range. The state countered that Mr. Draughon had not been “demoted” in that his salary had remained the same, and that his reassignment was simply made “to better utilize his skills.” As in this case, the lower court found for the state on the basis that Mr. Draughon had not been “demoted,” having not lost pay or benefits.

⁴ DHRM, in fact, amended the rule quoted at subpoint A., above, in order to conform to the Court of Appeal’s decision in *Draughon* (which interpreted a prior version of the same rule that in fact limited “demotions” to situations involving loss of pay or benefits); however CSRB and DWS have failed to conform to the rule as amended .

This court reversed. In rejecting the rule requiring a salary reduction for a movement to a lower position to be considered a demotion, this Court relied on “what is commonly understood as a ‘demotion.’ Webster’s Ninth New Collegiate Dictionary 338 (1986) defines “demote” as “1: to reduce to a lower grade or rank 2: to relegate to a less important position.” This Court then stated (*supra* at 938):

Here, appellant’s involuntary reassignment was in fact a demotion. Though he suffered no immediate loss of pay, appellant’s new position as a Financial Institutions Specialist has less status, fewer responsibilities, a lower pay range, and will ultimately result in commensurately lower retirement benefits.

The net effect of Plaintiff’s demotion places him squarely within the *Draughon* decision’s underlying rationale. Like Draughon, Plaintiff suffered a job change entailing less status, fewer responsibilities; lessened prospects for advancement, loss of opportunity to apply current skills and credentials, a significant a lower pay range, and lower retirement benefits.

1. Reason Given for Demotion. This Court should begin its analysis with the logical inquiry which both CSRB and the trial court failed to raise: what was the stated reason for the “reassignment”? By her own admission, Ms. Downing, as Director of Legal Services/Appeals for DWS, was taking “corrective action” against Plaintiff, based upon a litany of accusations concerning “poor performance” (Statement of Facts, above, at ¶¶ 28-29). It was no simple shuffling of responsibilities, given the dramatic increase in departmental workload, as described in the record both by Plaintiff and Ms. Downing

(Statement of Facts, above, at ¶¶ 14-17). DWS clearly needed all the Legal/Enforcement Counsel at its disposal, if not more. Plaintiff was being punished for allegations that he was not doing his job properly – allegations that he never had an opportunity to rebut.

2. Pay Range and Retirement Benefits. Plaintiff has been moved from the job responsibilities of Legal/Enforcement Counsel III, which has a step range of 63-78 and pay range of \$25.05-\$37.63, to the job responsibilities of Administrative Law Judge–Non-Juris Doctorate which has a much lower step range of only 51-66 and a salary range of \$18.09-\$27.18. Plaintiff is currently at step 76, 10 steps above the highest step for an Administrative Law Judge–Non-Juris Doctorate. Assuming that the position itself follows upon “reassignment” or “demotion” to the duties of the position (which it must – *see* Point II, below), with or without an immediate cut in pay or benefits, Plaintiff has been placed against a glass ceiling – as Administrative Law Judge–Non-Juris Doctorate, he cannot hope for any advance in salary or an increase in benefits, no matter how long he works or how well he performs.

Plaintiff’s demotion, though, imposes a far more fundamental impact upon his earning, benefit and retirement prospects than questions of step or salary ranges. Plaintiff cannot conduct administrative hearings full-time, due to physical restraints – a fact well-known to DWS representatives at the time of his “reassignment”. As such, DWS’s actions have cost Plaintiff his job. He was forced, first, to rely upon the Family Medical Leave Act, and accrued sick leave, to maintain his income and standing as a career

service employee in the face of his physical inability to perform the tasks to which he was “reassigned”. As these leave benefits were exhausted, he was compelled to seek long-term disability. In November 2004, DWS terminated his employment because he had been on long term disability for a year. Taken together, these facts clearly establish a situation which “will ultimately result in commensurately lower retirement benefits,” and a “lower pay range.” CSRB’s refusal to exercise its jurisdiction over Plaintiff’s grievance in this regard, on the grounds that there was no “demotion,” and the lower Court’s affirmation of that decision, simply ignore the realities of DWS’ actions.

3. Job Status and Responsibilities. DHRM’s job description for the title of Legal/Enforcement Counsel III is found in the record at R. 419-421 (Blauer Affidavit, R. 406-487, at Exhibit 1, pp. 5-6). Required education is that of Juris Doctorate, and active membership in the Utah State Bar Association. The description states the following concerning the purpose and distinguishing characteristics of the position:

Incumbents in this job provide legal advice to agency management, personnel, the Work Force Appeals Board, Agency Executive Directors, the commissioner on decisions of Administrative Law Judges, and/or the entire agency. Incumbent acts as chief liaison between their agencies and the Attorney General’s office. Incumbent may functionally or directly supervise legal counsel, legal support staff, investigators, and/or auditors.

Examples of tasks (to the extent not included in the foregoing) are given as “facilitates resolution of civil and administrative actions; represents agency at hearings. . . takes administrative action against violators of statutes and rules. . . represents the State or the employing agency in lawsuits, grievances, and complaints. . . prepares cases by

conducting legal research and gathering evidence” The position requires knowledge of applicable laws, rules, regulations, policies and procedures, rules of evidence, research methods, civil and criminal justice laws, etc. Required skills include the ability to “provide consultation and/or expert advice or testimony . . . coordinate the activities or tasks of people, groups and/or organizations . . . make a decision or solve a problem by using logic to identify key facts, explore alternatives, and propose quality solutions . . . interpret and apply legal decisions and identify current and emerging trends in interpretation . . . perform legal research using case law and appropriate techniques.”

Contrast these requirements and functions with those implicated in the job title of Administrative Law Judge–Non-Juris Doctorate (R. 425-426, Blauer Affidavit, R. 406-487, at Exhibit 2). No Juris Doctorate degree or Bar membership is required. The organizational and analytical skills required of Legal/Enforcement Counsel III are absent. In its every aspect, the position is of a lower status, requiring lesser skills, calling upon fewer abilities, offering less variety, etc.

DWS’s “reassignment” of Plaintiff to the conducting of administrative law hearings full-time (regardless of what “title” or “position” it is argued that he retained – see Point 2, below), Plaintiff has been confined, on the basis of untried accusations of job performance deficiencies, to the duties and responsibilities of a lesser position. To suggest that such a “reassignment” is not a “demotion” under *Draughon* is simply

untenable; to hold (as to the Trial Court) that no facts could establish it as a demotion is even more untenable.

C. The *Hooks* Decision.

The *Draughon* decision is in full accord with case law from the Tenth Circuit, interpreting the nature of “demotion” in a different context.

In *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 797 (10th Cir. 1993) the court held that a reassignment is a demotion if the employee “. . . can show that he receives less pay, has less responsibility, or is required to utilize a lesser degree of skill than his previous assignment”. Demotion is determined by a loss of *any one* of these three elements: (1) status, opportunity, responsibility, and function; *or* (2) opportunity to exercise one’s best skills and credentials, or (3) pay. The presence of any one of those three elements makes it a demotion.

Under *Hooks v. Diamond* as well as *Draughon*, then, CSRB should have treated loss of pay or pay range as only one of three factors the presence of any one of which determines that an employee action is an appealable demotion. It should also have taken into consideration the impact of the transfer on Plaintiff’s status, opportunity, responsibility and function, and loss of opportunity to exercise his skills and credentials. In his new position (had he been able to fill it given his disability), Plaintiff did not even need to be a lawyer. Plaintiff was stripped of a career as a legal professional which he

had built up through years of education and practice; that he did not end up with a smaller paycheck is a meaningless palliative.

POINT II

THE TRIAL COURT’S RULING CANNOT BE JUSTIFIED BY ADOPTION OF CSRB’S CLAIM THAT, BECAUSE HIS TITLE WAS NOT CHANGED, PLAINTIFF WAS NOT “DEMOTED”

In its ruling declining jurisdiction of Plaintiff’s grievance, CSRB attempted to distinguish *Draughon* by observing that in Plaintiff’s case the title supposedly remains the same. According to its Administrator, Plaintiff had not been demoted at all, due to two decisive factors: Plaintiff had maintained his “position” and maintained his pay. The Administrator states at pages 3-4 of his initial decision:

An administrative review of the file in the instant case establishes that throughout the events giving rise to this grievance, [Plaintiff] has maintained his position as a legal counselor with the Department. Moreover, there has been no reduction in his salary nor his salary range . . .

In the instant case, a thorough review of the file establishes that [Plaintiff] has not been reduced to a lower grade or rank, nor has he been assigned a different, let alone, less important position. [Plaintiff] continues to hold his position or title as “Legal Counsel” and maintains his same pay and pay range . . .

(The trial court, as noted above, took an even simpler approach: without an immediate loss of current salary level or other employment benefit, demotion did not, as a matter of law, occur. As a summary judgment ruling is sustainable on alternate legal theories, however, Plaintiff addresses CSRB’s rationale as well – *see Higgins v. Salt Lake County*, 855 P. 2d 231 (Utah 1989).)

To begin with, the CSRB rationale, no less than that of the trial court, ignores the fundamental attribute of Plaintiff's "reassignment" which renders it a demotion regardless of labels or perquisites: physical impairments, known to DWS at the time of the change, precluded Plaintiff from performing the duties assigned. A "reassignment" which deliberately positions the employee to fail cannot be other than a demotion.

Yet even if the Administrator's position is viewed in the absence of this fact, CSRB erred in finding that Plaintiff was not demoted under law. Plaintiff was, literally and absolutely, turned from a Legal/Enforcement Counsel III to an Administrative Law Judge–Non-Juris Doctorate by virtue of his "reassignment" to the duties described for that position. An examination of the regulatory structure surrounding job descriptions for Utah state career employees permits no other conclusion.

It is the loss of *position*, not *title*, that alters status and effects a demotion by definition under R477-1-1(32). Title does not give one status if the functions obviously deny the title, as they do in Plaintiff's case. Relegation of an Appeals Court Justice to the job title of "Justice of the Peace" would still amount to a demotion, retention of the term "Justice" notwithstanding.

The Administrator's conclusion that Plaintiff was not demoted because his title did not change fails on several grounds.

A. Plaintiff was Stripped of His Job and Position.

The Administrator erred in his conclusion that Plaintiff has in fact “maintained his position or title as Legal Counsel”. Plaintiff’s *position* is not “legal counselor” or “Legal Counsel.” The *working title* of his historic position may be “Legal Counsel,” but *title* is not *position*. The distinction arises from DHRM’s own rules.

Utah Admin. Code R477-1-1(32) does not address title changes - it addresses job or position changes. According to Utah Admin. Code R477-1-1(87) “position” is “*a unique set of duties and responsibilities identified by DHRM authorized job and position management numbers (emphasis added).*” If Plaintiff does not maintain that unique set of duties defined by DHRM authorized job and position management numbers, he has not “maintained his position,” no matter by what title his supervisor may choose to call him. Utah Admin. Code R477-1-1(69) defines “job” as “[*a group of positions similar in duties performed, in degree of supervision exercised or required, in requirements of training, experience, or skill and other characteristics. The same salary range and test standards are applied to each position in the group.*]” (Emphasis added.)

“Job,” then, is not a set of duties put together at the discretion of Plaintiff’s supervisor. “Job” is a specific DHRM term denoting a DHRM classification, clarified by a “job description,” the general class or group of positions with similar sets of responsibilities, duties, certification, and education/experience requirements identified by a main “job title.” A “job description” is a general description of a group or class of

similar “positions” and contains “the duties, distinguishing characteristics, knowledge, skills, and other requirements for a job.” *See* R477-1-1(69) and (70). DHRM is the only agency or entity authorized to classify positions. *See* § 67-19-8 and 12(3). If Plaintiff has the title of Legal/Enforcement Counsel III, then his “job” is Legal/ Enforcement Counsel III, and he is to fulfill the responsibilities and perform the duties of Legal/Enforcement Counsel III as set forth in DHRM’s official job description. DWS Administration may then create a position description for Plaintiff specifically detailing the tasks he is to perform *as long as they fall within the general DHRM job description for the job title Legal/Enforcement Counsel III.*

Furthermore, a “position” may not be defined at DWS’ discretion. “Position” also has a specific meaning under DHRM rule. A “position” is any of several possible combinations of the general duties and responsibilities *within* a specified “job.” There are many “positions” within a “job” but those combinations arranged as a job assignment must be within that job description or the assignment is logically and legally “a move to another ‘job.’” *See* R477-1-1(69), (70), and (87).

A “position” is customarily identified by a working title. Plaintiff’s “job” title is Legal/Enforcement Counsel III. The official DHRM job description for that title defines the type of duties and responsibilities Plaintiff can be assigned as long as he is in that “job.” His “position” is the set of responsibilities set forth in his position description or position description questionnaire (PDQ). The working title of his “position” may be

Legal Counsel or Attorney or something similar. His title is not “Intake Specialist,” “Adjudicator,” or “Administrative Law Judge.” Those are specific “positions” that fall under unique and specific “job description” set forth by DHRM, listing different job requirements and qualifications as required by rule.

The official DHRM “job title” for Administrative Law Judge for DWS is “Administrative Law Judge–Non-Juris Doctorate.” The “Administrative Law Judge” position under Administrative Law Judge–Non-Juris Doctorate is normally called “Administrative Law Judge,” “Judge,” or “ALJ.” There is also another Administrative Law Judge “job.” DHRM job description titles it “Administrative Law Judge II.” Even though this Administrative Law Judge job is several rungs higher on the pay scale than Administrative Law Judge–Non-Juris Doctorate, they are both called by the same working titles “Administrative Law Judge,” “Judge,” or “ALJ;” but they are entirely different jobs or *positions* with significantly different levels of responsibility and pay. This misunderstanding of the legal meaning of the terms used in DHRM rule is the only plausible explanation for the CSRB Administrator’s erroneous assumption that the shift in level and type of duties and responsibilities in Plaintiff’s move is slight; and that it was not therefore a demotion. Under governing law, though, the error cannot stand.

B. DWS Could Not Avoid the Fact of Plaintiff’s Demotion by Relabeling His Job or Position.

In *Draughon, supra*, the Court said, “. . . the agency’s definition of an ‘involuntary reassignment’ seems entirely consistent with what is commonly understood as a

‘demotion.’” The Court was quite clear that an improper action cannot be sanitized by simple relabeling:

We agree with appellant’s counsel that Human Resources’ rules distinguishing between a demotion and an involuntary reassignment are comparable to a memorable exchange between Alice and Humpty Dumpty: “‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean - nothing more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master - that’s all.’” Lewis Carroll, Through the Looking Glass and What Alice Found There (1941).”

(*Draughon, supra*, at p. 938.)

A supervisor cannot legally defeat statutorily authorized DHRM rules by simply renaming an appealable employment action something else that is not appealable. The supervisor is not master. The statute is master - and the Court, not DWS, interprets the statute. An appealable demotion does not become a non-appealable “reassignment” just because DWS wants to call it that.

In his initial decision, the Administrator interpreted Utah Admin. Code R477-3-3 to defeat all of the foregoing, stating that the Rule “contemplates *the very actions the Department took in this case.*” Rule R477-3-3 states as follows:

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

The rule, though, must be interpreted in the context of the governing Personnel Management Act wherein DHRM is to perform the functions of “design and

administration of the state classification system and procedures for determining schedule assignments.” Pursuant to Utah Code Ann. § 67-19-8, DHRM “may not contract or otherwise delegate these functions to another state agency.”

Section 67-19-12(3) provides:

1. The director [of DHRM] shall prepare, maintain, and revise a position classification plan for each employee position . . . to provide equal pay for equal work.
2. Classification of positions shall be based upon similarity of duties performed and responsibilities assumed, so that the same job requirements and the same salary range may be applied equitably to each position in the same class.
3. The director shall allocate or reallocate the position of each employee in classified service to one of the classes in the classification plan.

Rule R477-3-3 must therefore be interpreted to limit management’s authority to “assign, modify, or remove any employee task or responsibility” to remain within the confines of the employee’s DHRM job description in order to “provide equal pay for equal work” and otherwise fulfill the requirements of similarity of duties performed and responsibilities assumed” so that duties, responsibilities and requirements - and salary range - will be “applied equitably to each position in the same class.”

If it were literally true that “[m]anagement may assign, modify, or remove any employee task or responsibility . . . for any . . . reason deemed appropriate by the department administration” without the Career Service employee having any right to protest or appeal - DHRM classification would be irrelevant, no employee would ever

have any just cause for review and redress by the CSRB, and the CSRB Administrator would not have a job.

C. DWS Cannot Shelter Behind the Administrator’s “Equivalent Duties” Argument.

The Administrator also assumed, in error, that Plaintiff’s change in assignment was an exchange of one set of duties for another set of duties of equal grade or rank.⁵ This assumption, simply put, completely ignores the reality of Plaintiff’s demotion.

Compare the description of Plaintiff’s job of Legal/Enforcement Counselor III, as specifically detailed by DHRM, with the description of the Administrative Law Judge–Non-Juris Doctorate job. (Blauer Affidavit, R. 406-487, at Exhibits 1 and 2, R. 4419-426.) The responsibilities and duties of the job titled Legal/ Enforcement Counselor III include providing “legal advice to the Workforce Appeals Board . . . on decisions of Administrative Law Judges, and/or the entire agency.” Examples of Tasks include representing “the state or employing agency in lawsuits . . .”

Plaintiff’s tasks have included writing Board decisions which affirm, modify, or reverse Administrative Law Judge–Non-Juris Doctorate decisions and explaining where they erred, if in fact they erred. His tasks also have included defending Board decisions in the Utah Court of Appeals and the Utah Supreme Court. In addition to hundreds of cases that have resulted in dismissals of appeals or unpublished decisions, Plaintiff has

⁵ The Administrator said, “[Plaintiff] has not been reduced to a lower grade or rank, nor has he been assigned a different, let alone, less important position.”

represented the Board in 20 cases that resulted in published decisions by the Court of Appeals and Supreme Court, with a seventy-five percent (75%) win rate. Plaintiff has the highest win rate of the current DWS Legal Counsel and more than twice the number of published decisions than all of the other current Legal Counsel combined.

Pursuant to R477-1-1(69) Plaintiff's new assignment is actually a move to a new "job" as an Administrative Law Judge-Non Juris Doctorate which is the title of "[a] group of positions similar in duties performed, in degree of supervision exercised or required, in requirements of training, experience, or skill and other characteristics." "[T]he movement of an incumbent from one job or position to another job or position having a lower salary range . . ." (Utah Admin. Code R477-1-1(32)) could not describe more precisely what was done in Plaintiff's case. Plaintiff has been "moved from one job [and] position to another job [and] position with a lesser pay range." It is a demotion regardless of what the job and position is called and regardless of what he might be paid.

D. The Administrator Should Have Considered Other Relevant Factors in Determining the Fact of Plaintiff's Demotion.

Utah Admin. Code R477-1-1(32) defines demotion as:

An action resulting in a salary reduction on the current salary range or the movement of an incumbent from one job or position to another job or position having a lower salary range, which may include a reduction in salary . . .

He is thus moved "from one job or position to another job or position having a lower salary range," precisely the definition of a "demotion" under the rule.

E. Public Policy Considerations Mandate Confining DWS to the Terms of the Governing Regulatory Structure

There is a final concern raised by DWS' claim that it could avoid the statutory/regulatory impact of demoting Plaintiff by either terming the action a "reassignment", or claiming discretionary authority under R477-3-3 – one that goes beyond Plaintiff's injury alone. State agencies must be held, in their personnel policies generally, to restrictions imposed by state law and DHRM regulations, in the interest of preserving efficient, responsive government operations. To permit DWS to disregard the structure of the Personnel Management Act, and DHRM regulatory structure created thereunder, whenever it deems such conduct warranted under its managerial discretion would ultimately defeat bureaucratic accountability, and foster patronage in government employment practices. Long-term employees (such as Plaintiff) could be shunted to one side in favor of personal friends and family members, with attendant loss of continuity and expertise – all at the expense of the taxpayer.

POINT III

**PLAINTIFF'S DEMOTION WAS ACCOMPLISHED WITHOUT
DETERMINATION OF CAUSE, AND WAS THEREFORE
IN VIOLATION OF BOTH UTAH CODE ANN.
§ 67-19-18(1)(b) AND PLAINTIFF'S DUE
PROCESS RIGHTS.**

Once DWS' demotion of Plaintiff is recognized for what it was, CSRB's failure to afford notice and an opportunity to be heard by CSRB (or anyone else) falls afoul of both statutory and constitutional mandate.

A. Utah Code Ann. §§ 67-19-18 and 67-19a-202, 302 and 402-408 Mandated a CSRB Hearing.

Career service employees in the state of Utah are not employees at will. The Utah Legislature has conferred specific rights, both substantive and procedural, upon public employees; they may not be either terminated or demoted in derogation of those rights.

Utah Code Ann. § 67-19-18(1) specifically states the following:

Career service employees may be dismissed or demoted:

- (a) to advance the good of the public service; or
- (b) for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or non-feasance in office.

DWS' submittals to the trial court made abundantly clear that its actions against Plaintiff were driven by accusations of "poor performance", as detailed at length in Tani Downing's Affidavit (*see* Statement of Facts, above, at ¶¶ 28-30). He was demoted based on charges falling squarely within subparagraph (b), by "reassignment" from a position which he had capably performed for many years to one which his attending physician had certified him unable to perform.

Yet DWS, CSRB, and then the trial court failed to afford Plaintiff a meaningful forum in which to challenge Ms. Downing's charges, or the propriety of DWS' actions in light thereof. State statute flatly prohibits such denial.

Utah Code Ann. § 67-19a-302(1) states the following:

A career service employee may grieve promotions, dismissals, *demotions*, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of [the] grievance procedure.

(Emphasis added.) The career service employee grievance procedure, set out at § 67-19a-402, culminates in an evidentiary proceeding before CSRB – *see* Utah Code Ann. § 67-19a-402(5). Jurisdiction to hear such grievances, arising from demotions or other disputes arising incident to changes in employment status, is expressly conferred on CSRB by Utah Code Ann. § 67-19a-202, which constitutes that body “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.” Utah Code Ann. §§ 67-19a-403 through 408 sets out the procedure to be followed by CSRB in reviewing the employee’s grievance and issuing its decision thereon, including (1) an initial determination of jurisdiction (as far as CSRB got in this instance); appointment of a hearing officer to review the grievance; the conducting of a prehearing conference; the convening and conducting of an evidentiary hearing before a certified shorthand reporter; the taking of evidence from the employing agency *which has the burden of proof in issues involving demotion* (Utah Code Ann. § 67-19a-406(2)); a right of appeal to the entire

Career Service Review Board if the employee is dissatisfied with the hearing officer's determination; and Board review of the transcript incident to its own determination on the merits.

Yet DWS persuaded CSRB to sidestep the clear import of Utah Code Ann. § 67-19-18(1)(b), and the procedural guarantees of Utah Code Ann. § 67-19a-201, *et seq.*, by imposing a demotion with the deceptive "reassignment" moniker attached, even admitting after the fact that it was in response to undocumented, unchallenged claims of "poor performance". Plaintiff received no hearing; DWS was put to no proof of its charges; and Plaintiff was left either to accept a job which he was physically incapable of performing, or risk a charge of job abandonment (which charge has now matured into actual termination).

B. Plaintiff was Not Afforded Even the Rudiments of Fundamental Due Process.

Plaintiff has not only been denied his statutory procedural due, but has not been afforded even the basic notice and hearing mandated by constitutional considerations of due process.

It is by now too well-established to require comment that a public employee has a constitutionally-protected property interest in continued employment, arising out of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Calhoun v. Gaines*, 982 F.2d 1470 (10th Cir. 1992); *West v. Grand County*, 967 F.2d 362, 366 (10th Cir. 1992); *Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985); *Lucas v. Murray City Civil Service Comm'n*, 949

P.2d 746 (UT App. 1997). Under both the Fourteenth Amendment to the Constitution of the United States and article I, § 7 of the Constitution of the State of Utah, such rights may not be revoked, damaged or impacted by state action until the employee has been afforded due process.

Plaintiff has to date seen nothing even resembling due process in connection with his demotion. While case law has made clear that the process constitutionally due in aid of state-created property rights is for the courts – not the state legislature – to determine (*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), citing *Vitek v. Jones*, 445 U.S. 480 (1980), and distinguishing *Arnett v. Kennedy*, 416 U.S. 134 (1974))⁶, it has mandated a careful examination of what process is afforded prior to deprivation of property rights according to specified criteria.

In the case of *Gilbert v. Homar*, 520 U.S. 924 (1997) the Supreme Court offered an extensive explanation of due process requirements implicated in the loss of public employment rights. Therein, the Court, in reviewing process which attended the suspension of a police officer, observed the following:

To determine what process is constitutionally due, we have generally balanced three distinct factors:

First, the private interest that would be affected by the official action; second, the risk of an erroneous deprivation of such interest through

⁶In other words, the process constitutionally required in aid of public employment is not necessarily dictated by Utah Code Ann. § 67-19a-101, *et seq.*, although those requirements remain statutorily incumbent on DWS, and (had they been followed) would certainly have satisfied the requirements of due process.

the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest. [Citations omitted.]

520 U.S. at 931.

Plaintiff was entitled to test his demotion in a proceeding meeting the foregoing standard. Yet DWS, then CSRB, and finally the trial court, refused him any forum for challenging his "corrective action," because it bore the wrong label and cost him no salary or benefits at the moment imposed – even though his physical inability to perform the "reassigned" duties has now rendered him jobless. The "private interest" impacted by DWS' official action, Plaintiff's ability to pursue continued employment, received knowing and callous disregard; DWS' clear error in depriving Plaintiff thereof received no hearing; additional and/or substitute safeguards received no consideration; and the government was never put to the task of demonstrating that its interest was impacted in any meaningful way. There is, in fact, no need to address deficiencies or shortcomings in Plaintiff's pre-demotion process, as there was no process.

CONCLUSION

The fundamental failing of both the state agencies and the trial court are simple. Plaintiff never had the opportunity to confront and refute DWS' litany of supposed performance shortcomings. As such, DWS (by characterizing its "corrective action" as a "reassignment" instead of a demotion) has not been compelled to demonstrate proper grounds for demotion. DWS has never done more than make unfounded and


unchallenged accusations to establish “just cause” for his demotion – the only basis recognized by Utah law for its actions.

In fact, Plaintiff’s performance has been exemplary. He has continued to perform well even in the face of an exponential increase in workload. Ms. Downing’s after-the-fact charges in her affidavit were not only unchallenged by any meaningful hearing (see below), but are without any empirical basis whatever in the record. Ms. Downing’s attempt to saddle Plaintiff with an unfavorable performance review was specifically overturned by her superior. Yet (apparently in retaliation) Plaintiff was subjected to “corrective action” in the form of *de facto* demotion to a job classification which, with or without pay cuts, is a clear demotion.

Plaintiff is entitled to put DWS to its burden of proof in justification of its conduct toward him. This matter should therefore be remanded to the trial court with instructions to refer Plaintiff’s grievance to the Utah State Career Service Review Board for proper hearing.

DATED this 24th day of January, 2005.

JONES WALDO HOLBROOK & McDONOUGH PC

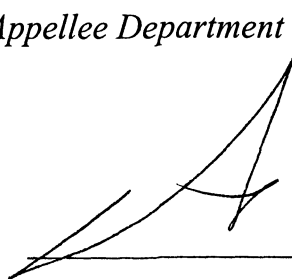
By: 

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 Brief of Appellant was hand delivered to the following this 24th day of January, 2005:

Debra J. Moore
J. Clifford Petersen
Gabrielle Lee Caruso
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



ADDENDUM

1. *Proposed Order in Conformance with the Memorandum Decision dated August 16, 2004*, dated December 8, 2004
2. *Memorandum Decision* dated August 16, 2004
3. Termination letter of November 3, 2004
4. *Draughon v. Dep't of Financial Institutions*, 975 P.2d 935 (Utah App. 1999)
5. Cited statutory and administrative provisions

Tab 1

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Assistant Utah Attorney General
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FILED **DEC 8 2004**
Third Judicial District

DEC 8 2004

By **SALT LAKE COUNTY**
Deputy Clerk

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

LORIN BLAUER,

Plaintiff,

vs.

UTAH DEPARTMENT OF
WORKFORCE SERVICES,

Defendant.

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

Civil No. 040900221
Judge Leslie A. Lewis

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

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

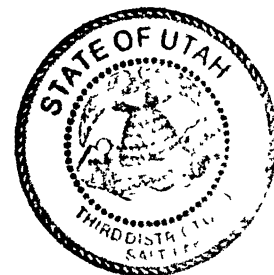
First Claim for Relief is dismissed with prejudice, with the exception that the allegations in Paragraph 34 subsections ©) through (j) of the complaint which do are not based upon unlawful demotion, and which were also set forth by the Plaintiff in his Motion for Reconsideration (previously filed with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

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

DATED this 20th day of November, 2004.

BY THE COURT:

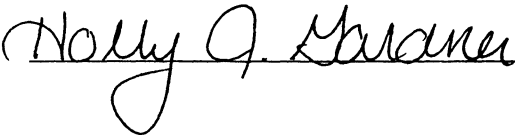
Leslie A. Lewis
THE HONORABLE LESLIE LEWIS



CERTIFICATE OF DELIVERY

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

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



Tab 2

9-15

Third Judicial District

AUG 16 2004

SALT LAKE COUNTY

By (S) Deputy Clerk

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

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

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

LEGAL ANALYSIS

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

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

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

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

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

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

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

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


BLAUER V. UTAH DEPT.
OF WORKFORCE SVCS.

PAGE 5

MEMORANDUM DECISION

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

Dated this 16 day of August, 2004.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 16 day of August, 2004:

Vincent C. Rampton
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170 S. Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444

Gabrielle Lee Caruso
Assistant Attorney General
Attorney for Defendant
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P.O. Box 140856
Salt Lake City, Utah 84114-0856

H

Tab 3



State of Utah

Department of
Workforce Services

OLENE S. WALKER
Governor

GAYLE F. MCKEACHNIE
Lieutenant Governor

RAYLENE IRELAND
Executive Director

DARIN BRUSH
Deputy Director

JAMES C. WHITAKER
Deputy Director

November 3, 2004

Lorin Blauer
460 North 900 East
Bountiful, Utah 84010

Dear Lorin:

On October 27, 2004, Scott Steele conducted a hearing with you regarding termination of your employment. The termination hearing was due to the fact that you have been on medical leave since October 8, 2003.

On October 1, 2004, you were sent a letter regarding your return to work. You indicated during the hearing that you are unable to return to your previous work assignment. You were offered a position at the Department of Workforce Services with the same title and pay range. However, you have declined to accept the duties that have been assigned to this position.

You indicated that you cannot return to the duties offered due to a sciatic nerve condition. We have made every attempt to make your workstation comfortable. Ergonomic equipment and resources have been offered to allow you to complete your duties while standing, sitting, or moving about your office. There are also breaks between hearings that allow you to move about the building.

In addition, you have been approved for Long Term Disability for a different condition, and not for sciatic nerve problems.

I have no choice but to terminate your employment. This decision is based upon your medical leave of longer than one year, and the fact that we offered you a job, which you declined. The termination will be effective November 3, 2004. If you wish to appeal this decision, you have twenty working days from the date of this decision to appeal to the Career Service Review Board, 1120 State Office Building, Capitol Hill, Salt Lake City, Utah 84114.

You inquired as to whether it would be considered a conflict of interest if you advise UI claimants if you are no longer employed at the Department of Workforce Services. I see no conflict of interest once you are removed from DWS payroll.

Sincerely,

Raylene G. Ireland
Executive Director

Utah!

Tab 4

Source: [Utah](#) > [Cases](#) > **UT State Cases, Combined** [i](#)

Terms: **draughon** ([Edit Search](#))

☑ Select for FOCUS™ or Delivery



*1999 UT App 42, *; 975 P.2d 935, **;
363 Utah Adv. Rep. 3; 1999 Utah App. LEXIS 14, ****

Ronald R. **Draughon**, Plaintiff and Appellant, v. Department of Financial Institutions, State of Utah; Department of Human Resource Management, State of Utah; Career Service Review Board, State of Utah; G. Edward Leary, in his individual and official capacities; Karen Suzuki-Okabe, in her individual and official capacities; and Robert N. White, in his individual and official capacities, Defendants and Appellees.

Case No. 970554-CA

COURT OF APPEALS OF UTAH

1999 UT App 42; 975 P.2d 935; 363 Utah Adv. Rep. 3; 1999 Utah App. LEXIS 14

February 19, 1999, Filed

PRIOR HISTORY: [***1] Third District, Salt Lake Department. The Honorable Glenn K. Iwasaki.


CASE SUMMARY


PROCEDURAL POSTURE: Appellant employee sought review of decision of the Third District, Salt Lake Department (Utah), which granted summary judgment in favor of appellee agencies in appellant's grievance over his involuntary assignment.

OVERVIEW: Appellant employee worked for appellee agencies. He was "involuntarily reassigned," which was distinguished in the agency rules from a "demotion." Appellant's grievance was dismissed. The reviewing court found that the dismissal of his grievance was improper. The relevant agency rules, Utah Admin. Code R477-1-1(27), (57) (1996), distinguished between the two actions. However, there were less procedural protections for a worker who was involuntarily reassigned. The reviewing court found that appellees' definition of an "involuntary reassignment" was entirely consistent with what is commonly understood as a "demotion." Therefore, the rules impermissibly altered the statute they were enacted under, [Utah Code § 67-19a-302](#), which provided protections for demotions, and contravened the legislative intent of the statute.


OUTCOME: A decision that granted summary judgment in favor of appellee agencies in appellant employee's grievance over his involuntary assignment was reversed and remanded because appellees' regulations contravened the legislative intent of the statute under which they were enacted.

CORE TERMS: reassignment, involuntary, demotion, demoted, regulation, reduction, career, salary range, salary, loss of pay, grievance, involuntarily, skills, department head, amicus brief, grieve, corrective action, summary judgment, promulgated, utilize, Personnel Management Act, governing statute, statutory scheme, dispositive, deference, illusory, harmony, enlarge, invalid, agency head


[Civil Procedure](#) > [Summary Judgment](#) > [Summary Judgment Standard](#) 

HN1  Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Because a challenge to summary judgment presents for review only questions of law, appellate courts accord no deference to the trial court's conclusions but review them for correctness. Additionally, questions of statutory construction are matters of law, and appellate courts give no deference to an administrative agency's interpretation of a statute absent certain circumstances. [More Like This Headnote](#)


[Administrative Law](#) > [Separation & Delegation of Power](#) > [Legislative Controls](#) 

HN2  It is a longstanding principle of administrative law that an agency's rules must be consistent with its governing statute. Courts adhere to this principle because an administrative rule out of harmony or in conflict with the express provisions of a statute would in effect amend that statute. [More Like This Headnote](#)


[Administrative Law](#) > [Separation & Delegation of Power](#) > [Legislative Controls](#) 

HN3  An administrative agency's authority to promulgate regulations is limited to those regulations which are consonant with the statutory framework, and neither contrary to the statute nor beyond its scope. Administrative regulations may not conflict with the design of an act, and when they do the court has a duty to invalidate them. Furthermore, when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted. Agency regulations may not abridge, enlarge, extend, or modify a statute. [More Like This Headnote](#)


[Governments](#) > [State & Territorial Governments](#) > [Employees & Officials](#) 

HN4  See [Utah Code Ann. § 67-19-18\(1\)](#) (1996).

[Governments](#) > [State & Territorial Governments](#) > [Employees & Officials](#) 

HN5  Career service employees who are either dismissed or demoted have procedural protections under [Utah Code Ann. § 67-19a-302](#) (1996). These protections include appealing grievances to the administrator, who may appoint a hearing officer to adjudicate the complaint. If still dissatisfied, and if the appeal meets specific statutory criteria, the employee may appeal to the Career Services Review Board. [Utah Code Ann. §§ 67-19a-402 to -408](#). However, a career service employee may grieve all other matters only to the level of his department head, and the decision of the department head is final and unappealable to the Career Services Board. [Utah Code Ann. § 67-19a-302](#). The statutory scheme does not address the procedural protections for an involuntary reassignment. [More Like This Headnote](#)

[Governments](#) > [State & Territorial Governments](#) > [Employees & Officials](#) 

HN6  See [Utah Admin. Code R477-1-1\(27\), \(57\)](#) (1996).

[Governments](#) > [State & Territorial Governments](#) > [Employees & Officials](#) 

HN7  See [Utah Admin. Code R477-7-4](#) (9), (11)

COUNSEL: Elizabeth T. Dunning and Brett J. DelPorto, Salt Lake City, for Appellant.

Jan Graham, Debra J. Moore, and Brent Burnett, Salt Lake City, for Appellees.

Phillip W. Dyer and Kevin C. Timken, Salt Lake City, for Amicus Curiae Utah Public Employees' Association.

JUDGES: Before Judith M. Billings, Judge. I CONCUR: James Z. Davis, Judge. I CONCUR IN THE RESULT: Gregory K. Orme, Judge.

OPINIONBY: JUDITH M. BILLINGS

OPINION: **[**936]** OPINION
BILLINGS, Judge:

[*P1] Appellant Ronald **Draughon** (Appellant) appeals from a grant of summary judgment to the Department of Financial Institutions (the Department) and the Department of Human Resource Management

(Human Resources) upholding rules promulgated by Human Resources allowing his involuntary reassignment without the procedural protections required for a demotion. We reverse and remand.

FACTS

[*P2] Appellant is a career civil service employee of the Department. From 1988 to 1996 he held the position of Financial Institutions Manager with the working title of Supervisor of Savings and Loans. **[**2]** This position placed appellant in a pay range with steps from 53 to 68, and as of 1996 he was being paid at step 61. In January 1996, appellant was "involuntarily reassigned" to the position of Financial Institutions Specialist with a working title of Senior Examiner and a pay range with steps from 51 to 65. Appellant's current pay was unchanged. The Department's decision was made pursuant to Utah Admin. Code R477-7-4(9) (1996), which defines Involuntary Reassignment:

Positions may be filled by involuntarily reassigning staff without a reduction in pay within the agency . . . with approval of the respective agency heads for administrative reasons such as budget constraints, corrective action pursuant to R477-10-2, or the need to move persons to positions that better utilize their skills.

Appellant was told the involuntary reassignment was made "to better utilize his skills."

[*P3] Appellant grieved his involuntary reassignment, but was denied a hearing before the Career Services Review Board. He also filed a Petition for Rules Change with Human Resources, contending that Human Resources' rules, distinguishing between a demotion and an involuntary reassignment, made an **[**3]** illusory distinction and denied him his grievance rights. Appellant argued that his involuntary reassignment was in fact a demotion, though he suffered no immediate loss of pay. Human Resources did not act on appellant's petition. Appellant later filed a complaint in district court alleging, among other things, that the Human Resources rules were invalid as they were contrary to the Personnel Management Act. See Utah Code Ann. § 67-19-18(1) (1996). The trial court dismissed appellant's complaint. Appellant now brings this appeal.

ANALYSIS n1

- - - - - Footnotes - - - - -

n1 The Department has filed a Motion to Strike an amicus brief offered by the Utah Public Employees' Association (UPEA), arguing that UPEA has only raised issues not raised below. We disagree. Though UPEA raises some novel issues, at least one part of its brief touches on the primary focus of this appeal. Thus, "consistent with the well-settled rule that an amicus brief cannot extend or enlarge the issues on appeal, we . . . only consider[] those portions of

the amicus brief that bear on the issues pursued by the parties to this appeal." Madsen v. Borthick, 658 P.2d 627, 629 n.3 (Utah 1983) (internal citations omitted). We therefore deny the motion in part and grant the motion in part.

- - - - - End Footnotes- - - - - **[***4]**

[*P4] ^{HN1} Summary judgment is appropriate only when there are no genuine issues **[**937]** of material fact and the moving party is entitled to judgment as a matter of law. 'Because a challenge to summary judgment presents for review only questions of law, we accord no deference to the trial court's conclusions but review them for correctness.'" Crossroads Plaza Ass'n v. Pratt, 912 P.2d 961, 964 (Utah 1996) (citations omitted). Additionally, "questions of statutory construction are matters of law, and we give no deference to an administrative agency's interpretation of a statute absent certain circumstances, none of which exist here." Sanders Brine Shrimp v. Audit Div., 846 P.2d 1304, 1305 (Utah 1993) (citation omitted).

[*P5] Human Resources argues that we should uphold its rules distinguishing between a demotion and an involuntary reassignment if the definitions are reasonable. See R.O.A. Gen., Inc. v. Department of Transp., 966 P.2d 840, 843 (Utah 1998). While we agree with this principle in the abstract, the dispositive issue here is whether the rules promulgated by Human Resources that distinguish between a demotion and an involuntary reassignment, without an immediate loss **[***5]** of pay, are in harmony with section 67-19-18(1) (1996). n2 ^{HN2} 'It is a longstanding principle of administrative law that an agency's rules must be consistent with its governing statute.'" Crossroads Plaza, 912 P.2d at 965 (quoting Sanders Brine Shrimp, 846 P.2d at 1306). We adhere to this principle because "'an administrative rule out of harmony or in conflict with the express provisions of a statute "would in effect amend that statute.'" Id. (quoting Consolidation Coal Co. v. Division of State Lands & Forestry, 886 P.2d 514, 532 (Utah 1994) (Bench, J., concurring and dissenting)) (additional citations omitted).

- - - - - Footnotes - - - - -

n2 Because we conclude this issue is dispositive, we do not reach appellant's constitutional arguments. See R.O.A. Gen., Inc. v. Department of Transp., 966 P.2d 840, 842 (Utah 1998) ("We do not reach [appellant's] constitutional arguments because we can resolve this case on statutory grounds.") (citing Hoyle v. Monson, 606 P.2d 240, 242 (Utah 1980) (holding constitutional questions are not to be addressed where courts can determine the merits on other grounds)).

- - - - - End Footnotes- - - - - **[***6]** ^{HN3}

An administrative agency's authority to promulgate regulations is limited to those regulations which are consonant with the statutory framework, and neither contrary to the statute nor beyond its scope. Administrative regulations "may not conflict with the design of an Act, and when they do the court has a duty to invalidate them. . . . Furthermore, when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted." . . . Agency regulations may not "abridge, enlarge, extend or modify [a] statute"

Crowther v. Nationwide Mut. Ins. Co., 762 P.2d 1119, 1122 (Utah Ct. App. 1988) (citations omitted).

[*P6] We review the governing statute and the rules at issue in this appeal against this governing legal principle. ^{HN4} Section 67-19-18(1) states:

Career service employees may be dismissed or demoted:

(a) to advance the good of the public service; or

(b) for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

Utah **[***7]** Code Ann. § 67-19-18(1) (1996). ^{HN5} Career service employees who are either dismissed or demoted have procedural protections under Utah Code Ann. § 67-19a-302 (1996). These protections include appealing grievances to the administrator, who may appoint a hearing officer to adjudicate the complaint. If still dissatisfied, and if the appeal meets specific statutory criteria, the employee may appeal to the Career Services Review Board. See Utah Code Ann. §§ 67-19a-402 to -408. However, "[a] career service employee may grieve all other matters only to the level of his department head[, and t]he decision of the department head is final and unappealable to the [Career Services Board.]" Id. § 67-19a-302. The statutory scheme does **[**938]** not address the procedural protections for an "involuntary reassignment."

[*P7] Pursuant to his authority under section 67-19-6(1)(d), ⁿ³ the Human Resources director adopted rules to further the agency's statutory guidelines. These rules, unlike the statute, distinguish between a demotion and an involuntary reassignment.

----- Footnotes -----

ⁿ³ Utah Code Ann. § 67-19-6(1)(d) (1996) states that "the director shall adopt rules for personnel management according to the procedures of Title 63, Chapter 46a, Utah Administrative Rulemaking Act."

----- End Footnotes----- **[***8]** ^{HN6}

(27) Demotion: A disciplinary action resulting in a salary reduction on the current salary range or the movement of an incumbent from one position to another position having a lower salary range, including a reduction in salary. If this action is taken for a limited time period, it shall only be within the current salary range.

....

(57) Involuntary Reassignment: Management initiated movement of an employee from his current position to a position of an equal or lower salary range, or to a different work location or organization unit for administrative, corrective action or other reasons not included in the definition of demotion or reclassification.

Utah Admin. R477-1-1(27), (57) (1996). This distinction is further clarified in Rules 477-7-4 (9) and (11):

^{HN7}(9) Involuntary Reassignment

Positions may be filled by involuntarily reassigning staff without a reduction in pay within the agency or across agencies with approval of the respective agency heads for administrative

reasons such as budget constraints, corrective action pursuant to R477-10-2, or the need to move persons to positions that better utilize their skills.

. . . .

(11) Demotions

Employees demoted *****9** consistent with R477-11-2 shall receive a salary reduction of one or more salary steps as determined by the agency head or designee. The agency head or designee may move an employee to a position with a lower salary range concurrent with the salary reduction.

Utah Amin. Code R477-7-4 (9), (11) (emphasis added). Furthermore, the rules adopted by Human Resources place an "involuntary reassignment" in the category where an employee may appeal his change in status only to his department head. See Utah Code Ann. § 67-19a-302(2) (1996).

***P8** The simple question raised is whether the distinction made in the regulations between "involuntary reassignment" and "demotion" is consistent with the statutory scheme. The Legislature has plainly set forth the two situations in which a career service employee can be demoted or dismissed. Additionally, under section 67-19a-302, those employees that are "demoted" have the right to grieve such a decision "to all levels of grievance procedure."

P9** However, under the rules promulgated by Human Resources, if an employee is "involuntarily reassigned" he does not have the same grievance opportunities as a "demoted" employee. Yet, the agency's **10** definition of an "involuntary reassignment" seems entirely consistent with what is commonly understood as a "demotion." Webster's Ninth New Collegiate Dictionary 338 (1986) defines "demote" as "1: to reduce to a lower grade or rank 2: to relegate to a less important position."

***P10** Here, appellant's involuntary reassignment was in fact a demotion. Though he suffered no immediate loss of pay, appellant's new position as a Financial Institutions Specialist has less status, fewer responsibilities, a lower pay range, and will ultimately result in commensurately lower retirement benefits.

P11** Thus, we hold that Human Resources' rules distinguishing between a "demotion" and an "involuntary reassignment," solely on the basis of an immediate loss of pay, are invalid because this illusory distinction contravenes the Legislature's intent to afford a career service employee the opportunity to fully grieve a demotion. n4 Thus, we *939** reverse the trial court's grant of summary judgment and remand for proceedings that allow appellant all grievance procedures owed to a demoted employee, consistent with the Personnel Management Act.

- - - - - Footnotes - - - - -

n4 We agree with appellant's counsel that Human Resources' rules distinguishing between a demotion and an involuntary reassignment are comparable to a memorable exchange between Alice and Humpty Dumpty: "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean--nothing more nor less.' 'The question is,' said Alice, 'whether you can make words mean different things.' 'The question is,' said Humpty Dumpty, 'which is to be master--that's all.'" Lewis Carroll, *Through the Looking Glass and What Alice Found There* 123 (1941).

- - - - - End Footnotes- - - - - *****11**

Judith M. Billings, Judge

[*P12] I CONCUR:

James Z. Davis, Judge

[*P13] I CONCUR IN THE RESULT:

Gregory K. Orme, Judge

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Tab 5

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19. UTAH STATE PERSONNEL MANAGEMENT ACT
§ 67-19-8. Functions of department not to be delegated

The department shall perform the following functions and may not contract or otherwise delegate those functions to another state agency:

- (1) design and administration of the state pay plan;
- (2) design and administration of the state classification system and procedures for determining schedule assignments;
- (3) position classification studies, including periodic desk audits, except that an agency may conduct classification studies and desk audits as necessary under Subsection 67-19-9(2) consistent with a delegation agreement approved by the department;
- (4) monitoring of state agency personnel practices to determine compliance with state personnel guidelines, including equal employment opportunity; and
- (5) maintenance of central personnel records.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19. UTAH STATE PERSONNEL MANAGEMENT ACT
§ 67-19-18. Dismissals and demotions--Grounds--Disciplinary action-- Procedure--Reductions in force

- (1) Career service employees may be dismissed or demoted:
 - (a) to advance the good of the public service; or
 - (b) for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.
- (2) Employees may not be dismissed because of race, sex, age, disability, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.
- (3) The director shall establish rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(4) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (5).

(5)(a) A career service employee may not be demoted or dismissed unless the department head or designated representative has complied with this subsection.

(b) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion.

(c) The employee has no less than five working days to reply and have the reply considered by the department head.

(d) The employee has an opportunity to be heard by the department head or designated representative.

(e) Following the hearing, the employee may be dismissed or demoted if the department head finds adequate cause or reason.

(6)(a) Reductions in force required by inadequate funds, change of workload, or lack of work are governed by retention rosters established by the director.

(b) Under those circumstances:

(i) The agency head shall designate the category of work to be eliminated, subject to review by the director.

(ii) Temporary and probationary employees shall be separated before any career service employee.

(iii)(A) Career service employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first.

(B) Retention points for each career service employee shall be computed according to rules established by the director, allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment.

(iv) A career service employee who is separated in a reduction in force shall be:

(A) placed on the reappointment roster provided for in Subsection 67-19-17(2); and

(B) reappointed without examination to any vacancy for which the employee is qualified which occurs within one year of the date of the separation.

(c)(i) An employee separated due to a reduction in force may appeal to the department head for an administrative review.

(ii) The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation.

(iii) The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act. [FN1]

[FN1] Laws 1983, c. 332.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES
PART 3. GRIEVANCE AND APPEAL PROCEDURES

§ 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES
PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE

§ 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES
PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE
§ 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES
PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE
§ 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES
PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE
§ 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 (s); 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES
CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES
PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE
§ 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES

CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES

PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE

§ 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.

TITLE 67. STATE OFFICERS AND EMPLOYEES

CHAPTER 19A. GRIEVANCE AND APPEAL PROCEDURES

PART 4. PROCEDURAL STEPS TO BE FOLLOWED BY AGGRIEVED EMPLOYEE

§ 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.

HUMAN RESOURCE MANAGEMENT
R477. ADMINISTRATION.

R477-1-1. Definitions.

The following definitions apply throughout these rules unless otherwise indicated within the text of each rule.

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

(69) Job Identification Number: A unique number assigned to a job by DHRM.

(70) Job Proficiency Rating: An average of the last three annual performance evaluation ratings used in reduction in force proceedings.

(87) Position Description: A document that describes the detailed tasks performed, as well as the knowledge, skills, abilities, and other requirements of a specific position.

UTAH ADMINISTRATIVE CODE
HUMAN RESOURCE MANAGEMENT
R477. ADMINISTRATION.

R477-3-3. Assignment of Duties.

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