

2004

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Blauer v. Utah Department of Workforce Services*, No. 20040848 (Utah Court of Appeals, 2004).
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IN THE UTAH COURT OF APPEALS

LORIN BLAUER,

Plaintiff/Appellant/Cross-Appellee,

vs.

DEPARTMENT OF WORKFORCE SERVICES,

Defendant/Appellee/Cross-Appellant.

BRIEF OF APPELLEE AND CROSS-APPELLANT

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

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REQUESTING ORAL ARGUMENT AND PUBLISHED OPINION

No. 20040848-CA

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REQUESTING ORAL ARGUMENT AND PUBLISHED OPINION

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IN THE UTAH COURT OF APPEALS

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DEPARTMENT OF WORKFORCE SERVICES,

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Brief of Appellee and Cross-Appellant

Department of Workforce Services (“Department”) submits this brief in answer to the Brief of Appellant Lorin Blauer and in support of its cross-appeal.¹

Statement of Jurisdiction

In his opening brief, Blauer asserts jurisdiction based only upon Utah Code Ann. § 78-2a-3(2)(b) (West 2004), which confers jurisdiction on this Court over appeals from the district court review of challenges to agency rules under section 63-46a-12.1 of the

¹Because the cross-appeal raised threshold issues of subject matter jurisdiction, the Department submits only a single brief addressing both the issues raised in Blauer’s opening brief and the issues raised by the cross-appeal. To the extent that the Court determines that the cross-appeal is unnecessary to preserve the issues of subject matter jurisdiction, the Department has no objection to a dismissal of the cross-appeal.

Utah Administrative Rulemaking Act (“UARA”).² See section 78-2a-3(2)(b)(ii). As discussed in Point 2 below, however, jurisdiction fails under UARA because Blauer never exhausted his administrative remedies in the relevant rulemaking agency, the Utah Department of Human Resource Management.

Under section 78-2a-2(a), this Court has jurisdiction over appeals from the district court review of final agency action resulting from informal adjudicative proceedings. As discussed in Point 1 below, however, Blauer has failed to name the CSRB as a party to his complaint and therefore failed to comply with a jurisdictional prerequisite for review by the district court. Accordingly, this Court also lacks subject matter jurisdiction over Blauer’s claim for review of the CSRB decision that he was not demoted.

Issues Presented

1. Jurisdiction over final agency action resulting from informal adjudicative proceedings

To obtain judicial review of a “final agency action” resulting from informal adjudicative proceedings, a party must file a complaint in district court naming “the agency” as a respondent. Blauer filed a complaint seeking review of a final action of the Career Service Review Board resulting from such proceedings, but failed to make the Board a party. Did the district court lack jurisdiction over Blauer’s claim for judicial review of the Board’s action?

²UARA is found at Utah Code Ann. §§ 63-46a-1 to -16 (West 2004). Because no significant amendments to the relevant provisions of any of the statutes or rules at issue in this appeal have been adopted since the date of Blauer’s grievance, this Brief cites to the current versions.

A. Standard of review

Whether a trial court has subject matter jurisdiction presents a question of law which this Court reviews under a correction of error standard without deference to the trial court. See, e.g., Case v. Case, 2004 UT App 423, ¶ 5, 103 P.3d 171.

B. Preservation of issue

Questions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims. State v. Sun Surety Ins. Co., 2004 UT 74, 99 P.3d 818. However, the Department did raise this issue below in its Memorandum in Support of Defendants' Motion to Dismiss filed February 6, 2004. R. 29-30. This issue was also raised in the Department's cross-appeal. R. 1201-03.

2. Jurisdiction over challenge to administrative rule

A person must petition the rulemaking agency to amend or repeal an administrative rule before seeking judicial review of the rule in district court. Blauer never filed a petition with the rulemaking agency before challenging the validity of administrative rules defining a demotion and reassignment. Did the district court lack jurisdiction over Blauer's challenge to the rules?

A. Standard of review

Whether a trial court has subject matter jurisdiction presents a question of law which this Court reviews under a correction of error standard without deference to the trial court. See, e.g., Case v. Case, 2004 UT App 423, ¶ 5, 103 P.3d 171.

B. Preservation of issue

Questions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims. State v. Sun Surety Ins. Co., 2004 UT 74, ¶ 7, 99 P.3d 818, 820.

3. Alleged Demotion

Blauer was an attorney employed by a state agency. He was assigned various duties, including conducting adjudications. To address concerns about Blauer's performance and to accommodate his request for objective performance criteria, his supervisor temporarily removed some of his duties and assigned him to conduct adjudications full-time. Blauer lost no pay, benefits, or prospective benefits and kept his position, title, pay range, and supervisor. Did the trial court correctly hold that Blauer failed to establish that he was demoted?

A. Standard of Review

On appeal from a district court's grant of summary judgment on review of an agency's informal adjudicative proceeding, this Court should "examine, without deference, the district court's legal conclusions and determine whether, on de novo review, the district court properly granted summary judgment." Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1145 (Utah 1995). Thus, this Court should accord the district court's conclusions no deference but review them for correctness. Id. at 1144. The facts supporting the order should be viewed in the light most favorable to the party opposing the motion. Id.

B. Preservation of Issue

The Department preserved this issue below in its Cross-Motion for Summary Judgment, R. 527-29, and supporting memorandum. R. 510-15.

**Determinative Constitutional
Provisions, Statutes and Rules**

The following provisions are attached as Addendum B to this Brief:

Utah Code Ann. § 63-46a-12, -12.1 (West 2004)

Utah Code Ann. § 63-46b-14, -15 (West 2004)

Utah Code Ann. § 67-19-12 (West 2004)

Utah Code Ann. § 67-19-18(1) (West 2004)

Utah Code Ann. § 67-19a-202(1) (West 2004)

Utah Code Ann. § 78-3-4 (West 2004)

Utah Administrative Code, Rule 477-1(32)

Utah Administrative Code, Rule 477-3-3

Statement of the Case

1. Nature of the Case

This is an appeal from an order of the district court granting partial summary judgment to the Department on Blauer's claim for judicial review of a final action of the Career Service Review Board resulting from informal adjudicative proceedings. The Board had declined jurisdiction over Blauer's employment grievance because Blauer had failed to establish that he was demoted when his supervisor temporarily changed his duties without changing his pay, pay range, benefits, prospective benefits, title, or position as Legal Counsel for the Department.

2. Course of the Proceedings Below

In October, 2003, Raylene Ireland, then the Executive Director of the Department, denied Blauer's grievance from the change in his assignment. R. 204-06. Blauer appealed the denial to the Board, which declined jurisdiction because Blauer had failed to establish that he had been demoted. R. 35-40. Upon Blauer's motion for reconsideration, the Board reaffirmed its previous decision on December 22, 2003. R. 214-17.

Blauer then commenced this action by filing a complaint in the district court in January 2004. R. 1-13. Among other claims, the complaint sought review of the Board's decision that Blauer had not been demoted. R. 7-8. The Department filed a motion to dismiss Blauer's claim for judicial review on the ground that the district court lacked jurisdiction to review the Board's decision because Blauer had failed to name the Board as a party to his complaint. R. 20 & 29-30. While the motion to dismiss was pending, Blauer filed a motion for summary judgment, seeking a declaration that his assignment to conduct adjudications full-time was a demotion. R. 367-70. The Department filed a

cross-motion for summary judgment seeking to affirm the Board's decision that Blauer had failed to establish that he was demoted and therefore the Board lacked jurisdiction over his grievance. R. 527-28. The cross-motions were fully briefed and argued to the district court. R. 1196.

On August 16, 2004, the district court entered a memorandum decision denying the Department's motion to dismiss and asserting jurisdiction over Blauer's claim for judicial review of the CSRB's decision. R. 1086-91. The court also partially granted Blauer's motion for summary judgment by remanding issues concerning written reprimands and violation of personnel rules to the Board for consideration. R. 1088-89. The court denied the balance of Blauer's motion for summary judgment and granted the Department's cross-motion on the ground that the undisputed material facts demonstrated that Blauer had not been demoted and therefore the Board had correctly declined jurisdiction over Blauer's grievance. R. 1087-88.

Counsel for the Department prepared a proposed order, to which Blauer objected. R. 1096-1100. While his objections were pending, Blauer filed his notice of appeal on September 30, 2004. R. 1176-77. On November 18, 2004, the district court denied Blauer's objections and directed counsel for the Department to resubmit the proposed order. R. 1193-95. On December 8, 2004, the court entered a final order in conformance with its memorandum decision. R. 1197-99. The Department filed a notice of cross-appeal on January 6, 2005. R. 1201-03.

3. Disposition Below

By its order dated December 8, 2004, the district court (1) denied the Department's motion to dismiss; (2) denied Blauer's motion for summary judgment, except for

remanding to the Board Blauer's claims regarding written reprimands and violations of personnel rules; and (3) granted the Department's cross-motion for summary judgment on Blauer's claim for judicial review of the Board's decision dismissing for lack of jurisdiction Blauer's appeal from the denial of his grievance. R. 1197-98. This order dismissed with prejudice Blauer's first cause of action to the extent it was based on his alleged demotion and remanded the first cause of action to the Board only as it related to the Board's consideration of written reprimands and violations of personnel rules. R. 1197-98.³ The order also dismissed with prejudice Blauer's second, third, and fourth causes of action in their entirety. R. 1193-94 & 1198.

Statement of Facts

In September 2003, Tani Downing, then the Director of the Division of Adjudication (the "Division") of the Utah Department of Workforce Services (the "Department"), notified Lorin Blauer, a career service employee with the Division, that Downing had decided to temporarily change Blauer's assignment. R. 200-02, 743, 846. Downing assigned Blauer to adjudicate unemployment insurance ("UI") appeals on a full-time basis, temporarily removing other duties from his assignment. Id.

³Specifically, the order remanded Blauer's claims (1) that negative letters in his personnel file constituted written reprimands which were independently reviewable by the Board, regardless of whether a demotion occurred; and (2) that the Department had violated administrative personnel rules which were also independently reviewable by the Board. R. 1198, ¶2. The alleged rules violations included: failing to define his job performance parameters; assigning tasks outside his job description; retaliating against him for his request for disability accommodation; failing to maintain proper personnel records; refusing him access to documentation in his personnel file; and denying him administrative leave. Id. See also R. 7-8.

Blauer had been employed with the Department since 1981 and held a position as Legal Counsel.⁴ R. 1-13 & 406-87. Since at least 1999, one of the “core duties” of Blauer, and other Legal Counsel, had been to adjudicate UI appeals. R. 578 & 728.⁵ At times, Blauer had been assigned to conduct ten to twenty UI appeal hearings per week. R. 728. Besides those duties, Blauer had been one of two or three attorneys assigned to the Workforce Appeals Board, and he had handled requests for the release of public assistance information, and unemployment insurance collection matters. R. 729; 732; 734-35 & 944.

From the beginning of her tenure as Director of the Division in January 2002, Downing had received complaints from Blauer’s co-workers and clients about Blauer’s performance. R. 730. In June 2002, Downing began to hold weekly meetings with Blauer in order to review his workload and discuss performance issues. R. 731. In March 2003, because of long-standing concerns about Blauer’s handling of public assistance information release, Downing removed Blauer from that assignment and increased his duties with the Workforce Appeals Board. R. 735. Not long after that, however, Downing was informed that Becky Thomas, Chair of the Workforce Appeals Board, had reduced Blauer’s workload with the Board because of frustration with Blauer’s performance. R. 735-36.

In June 2003, Downing gave Blauer a formal performance evaluation for the prior year that described many of her concerns. R. 185-87. She gave him an overall rating that placed him just inside the “unsuccessful” category by two points. R. 185. Blauer grieved

⁴Five to six other employees also held the Legal Counsel position. R. 728. The formal title of Blauer’s position was Legal Enforcement Counsel III. R. 578.

⁵UI adjudications were also performed by other Legal Counsel including Craig Bunker. R. 728.

the evaluation to Ireland, claiming that he had been evaluated based on unclear and subjective criteria. R. 798-802. At the same time, Blauer filed a request for a reasonable accommodation of certain medical conditions, including a sciatic nerve condition that he claimed prevented him from sitting for more than an hour. R. 538-42 & 575.⁶

While Blauer's grievance and ADA request were pending, Downing began to search for an appropriate assignment that would address both her concerns about his performance and his expressed desire for more objective performance criteria. R. 738-41. During this time, she discovered serious professional lapses by Blauer in his handling of unemployment compensation collections. R. 738 (Affidavit of Downing, noting that Blauer had permitted staff to use his signature stamp to file legal documents that he had not reviewed, and that he had not performed the statutorily required risk analysis before releasing public assistance information). She also learned that the UI staff was much happier with the work being performed by the attorney who had replaced Blauer. R. 739. In addition, Thomas told Downing that if Blauer were assigned more Workforce Appeals cases, Thomas would exercise the statutory right of the Workforce Appeals Board to hire its own legal counsel at the Department's expense. *Id.* Accordingly, Downing's options for assigning Blauer were limited.

Also while Blauer's grievance and ADA request were pending, Downing met with Tom Cantrell, Blauer's representative on his grievance. At a meeting among Downing, Cantrell, and Joanne Campbell, the Department's Human Resources Director, Campbell suggested that the assignment that would best meet Blauer's desire for objective and

⁶Downing was informed that the request, which was submitted to Chuck Butler, the Department's ADA Coordinator, was pending, but did not see the request and was not provided any other information about it. R. 539 & 738.

measurable criteria would be UI appeals. R.738-39.⁷ Downing decided to await the recommendations of the ADA Coordinator before making any decision about Blauer's assignment. R. 739.

On September 5, 2003, Butler denied Blauer's accommodation request. R. 540. However, he advised Downing of the physicians' recommendations so that she could take them into account in making Blauer's assignments. Specifically, Blauer's doctors recommended that he not sit for longer than an hour at a time without being able to move around, and that he be given an assignment where he would have a clear understanding of her expectations of what comprised a full forty-hour workload, allowing him to adequately organize and plan his work. Additionally, Butler contacted an ergonomic specialist to do a workstation evaluation and make recommendations on any special equipment or changes that could benefit Blauer's sciatic nerve condition at work. R. 540 & 740.

That same day, Ireland issued her decision on Blauer's grievance, in which she increased Blauer's overall rating by two points to the lowest possible "successful" rating. R. 568-69. The increase was based on an error that Blauer had identified in his favor in the statistics on his compliance with timeliness requirements for the UI hearings. Ireland explained her decision as follows:

[Downing] indicates that this area [the UI timeliness statistics] is only one part of the job expectations for the year. She further indicates that the two-point spread [in the overall rating] was her attempt to be generous with you because she likes you and had no desire to demoralize you. In reviewing

⁷The U.S. Department of Labor has developed objective standards for quality and timeliness in unemployment insurance appellate processes. States are required to maintain records of appeals decisions and to do quarterly self-evaluations based on the federal standards. The federal government also does annual reviews to ensure that fair hearings are being provided. R. 846; 854-915 (Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality, U.S. Department of Labor).

the record, it appears to me that both [Downing], and her predecessor, while being very clear about issues they believed were performance problems, were taking the “gentle approach” to managing your performance. This may have contributed to your confusion about expectations. Nevertheless, I do think there were some very clear messages. However, because of this dispute regarding perceptions of performance standards and the fact that there was only a two point spread in the final evaluation, I will give you the benefit of the doubt and we will change the review to the lowest score for “successful.”

In conclusion, Ireland stated that “it is [Downing’s] responsibility to determine the best utilization of your skills for your own good as well as for the good of the department.” R. 569.

Based on the ADA Coordinator’s recommendations and Downing’s previous review of possible assignments for Blauer, Downing decided that the best available option was to assign Blauer full-time to the UI appeals. Blauer would be able to perform most of those duties, such as dictating decisions and conducting telephone hearings, while standing, sitting for brief periods, or even walking around the building. R. 740-41; 821-23. Most of the remaining hearings lasted less than an hour, and Blauer would be free to take breaks or stand up during any longer hearings. R. 741. On September 9, Downing advised Blauer of her decision. R. 821-23.

In changing Blauer’s duties, Downing did not remove him from his position, change his title, his pay, his pay range, or his benefits or prospective benefits. R. 577. She did not assign him to another supervisor, or in any other way alter the conditions of his employment. R. 742. Several employees in the position of Administrative Law Judge - Non-Legal (“ALJ”), a position with a lower pay range than Legal Counsel, also conducted UI adjudications on a full-time basis. R. 537. About half of the ALJs were licensed attorneys, although a Bar license was not required. R. 728. Unlike Blauer, the ALJs were directly supervised by Tom Patterson, the Chief Administrative Law Judge.

R. 733. Downing did not move Blauer to the ALJ position because she regarded his full-time assignment to UI adjudications as temporary. R. 743 & 846. Because the workload of the Division had increased enormously while Downing had been Director, she could not spare any of the Legal Counsel positions. R. 732-33.

Nevertheless, Blauer again grieved to Ireland, this time contending that the change in his assignment was a demotion. R. 331; 742; 827-28. On October 14, Ireland denied his grievance, stating:

[T]he assignment to hold hearings is not new for you. This duty has been a part of your performance plan from at least 1999 to the present. Moreover, you and others with the title legal counsel have been holding hearings for a number of years.

In assigning these duties, [Downing] considered the original recommendations of your physicians even though your medical problems were determined not to meet the guidelines for an ADA accommodation Since the majority of these hearings are conducted over the telephone, there should be no problem with you standing up and moving around your office while the hearings are in progress. In addition, the duties meet the recommendations of your medical providers regarding organizing and planning your work, and receiving clear expectations of what comprises a forty-hour workload.

You have claimed that this assignment is a demotion. However, I disagree. You retain your title as legal counsel and you maintain the same pay and pay range. It is not a demotion. Rather [Downing] has assigned you duties that are very specific, allow for regular feedback, and help ensure that you maintain a full workload. At some point, she may change these duties as it is within her authority.

I sincerely hope that you take this opportunity to use the knowledge you have of the Unemployment Insurance program to be an asset to this important function of the department. R. 333-35.

Blauer filed a petition with the CSRB, which through its Administrator, agreed with Ireland and determined that it lacked jurisdiction over the Department's action because it

was not a demotion. R. 340-45. Blauer requested reconsideration of the decision, which the Administrator denied, stating:

I find it significant that an administrative review of the documents . . . shows that the duties of the Administrative Law Judge were a part of Grievant's core responsibilities as Legal/Enforcement Counsel III even before the events giving rise to this grievance. These facts establish that his "job and position" have *not* been changed to an entirely different combination of duties as Grievant asserts. While there have been substantial modifications to his core responsibilities, both Grievant and at least one other individual held hearings as part of their Legal Counsel III responsibilities prior to this grievance. Indeed, when notifying Grievant of his change of assignment, Ms. Downing state[d]: "In the Legal Counsel performance plans, objective hearing criteria are contained in the Core Duties Section."

* * *

Therefore, based upon Grievant's own analysis, I do not believe the Department's requirement, that he take on full-time duties and responsibilities already expected within his current "position," translates to a loss of status and therefore, a demotion . . . Grievant has been assigned to perform, on a full time basis, responsibilities and duties that the Department has always considered generic to his position. R. 214-18.

Blauer then filed this action in district court seeking to challenge the CSRB's decision, but failed to make the CSRB a party. R. 1-13.⁸

⁸As Addendum 3 to his opening brief, Blauer attached a letter to Blauer from Ireland dated November 3, 2004, terminating Blauer's employment because he failed to return to work after taking a medical leave of over a year. The letter is not part of the record below and Blauer has not filed a motion to supplement the record or otherwise demonstrated why this Court should consider the letter in this appeal. Therefore, the letter should be stricken.

The Department notes that, at first blush, Blauer's termination from the Department may appear to moot the issues on appeal in this case. However, Blauer has appealed his termination to the CSRB, seeking reinstatement, and that matter remains pending. Blauer v. Utah Department of Workforce Services, Case No. 25 CSRB/H.O. 361. Accordingly, this appeal may continue to present a live controversy until the proceedings relating to Blauer's termination are finally resolved.

Summary of Argument

This Court should vacate the entire judgment below and dismiss Blauer's complaint with prejudice because, under UAPA, the district court lacked jurisdiction over Blauer's claim for judicial review of the CSRB's decision on his grievance, and under UARA, the district court also lacked jurisdiction over Blauer's challenge to the administrative rule defining a demotion. Jurisdiction failed over the CSRB because Blauer failed to make the CSRB a party to his petition for judicial review. Jurisdiction failed over Blauer's challenge to the administrative rule because Blauer failed to first file a petition for a rule change with the Department of Human Resource Management, the rulemaking agency.

Even if the district court had properly exercised jurisdiction over Blauer's claim that he was demoted, that claim fails on its merits. In challenging the district court's application of the administrative rule defining demotion, Blauer ignores the undisputed material facts on the record below. Those facts demonstrate that Blauer's supervisor made a temporary change in Blauer's duties by assigning him to unemployment insurance adjudications on a full-time basis because of valid concerns about Blauer's performance, and in response to Blauer's own request for an assignment that would provide him clear expectations of what comprised a full forty-hour workload. The undisputed material facts also demonstrate that the adjudications were already within the core duties of Blauer's position as one of several Legal Counsel for the Department, and that the assignment change did not affect Blauer's pay, pay range, benefits, prospective benefits, position, title, supervision, or any other condition of his employment. Accordingly, the district court correctly held that Blauer was not demoted within the meaning of the administrative

rule defining demotion as a movement from one job or position to another job or position having a lower salary range.

Similarly, even if the district court had properly exercised jurisdiction over Blauer's challenge to the rule under this Court's decision in Draughon, that challenge also fails on its merits. The Department of Human Resource amended the rule defining demotion in response to the Draughon decision. The new rule eliminates the loss of pay as the defining element of a demotion and requires instead only a movement to a position with a lower salary range. Because the new rule is anchored to the statutory classification system, it is entirely consistent with both the holding of this Court in Draughon and with the legislative intent behind the statutory scheme of the Utah Personnel Management Act and the Utah Grievance and Appeal Procedures Act. Thus, this Court should in the alternative affirm the judgment dismissing Blauer's claim that he was demoted.

Argument

1. The district court lacked jurisdiction over Blauer's claim seeking judicial review of the CSRB's decision

A. UAPA required Blauer to make the CSRB a party to his complaint for judicial review

The district court lacked subject matter jurisdiction over Blauer's challenge to the CSRB's decision because Blauer failed to name the CSRB as a party to his complaint as required by the Utah Administrative Procedures Act ("UAPA").⁹ Blauer contended that he was demoted in violation of the Utah Personnel Management Act ("Personnel Management Act").¹⁰ The Personnel Management Act is enforceable only in

⁹Utah Code Ann. §§ 63-46b-0.5 to -21 (West 2004).

¹⁰Utah Code Ann. §§ 67-19-1 to -42 (West 2004)

administrative proceedings before the CSRB under the Grievance and Appeal Procedures Act and judicial review of those administrative proceedings under UAPA.¹¹ See Hom v. Dep't of Pub. Safety, 962 P.2d 95, 99-101 (Utah Ct. App. 1998) (dismissing for lack of jurisdiction state employee's claim for breach of contract based on Personnel Management Act when employee failed to exhaust administrative remedies before CSRB). Blauer exhausted his remedies for his alleged demotion in the CSRB, but then deprived the district court of subject matter jurisdiction over the administrative proceedings by failing to make the CSRB a defendant in his complaint as required by UAPA. Without CSRB as a party, the district court lacked jurisdiction to consider Blauer's challenge to the CSRB's decision.

Under UAPA, the district courts have jurisdiction to review "final agency actions" resulting from informal adjudicative proceedings. Section 63-46b-15(1)(a). To vest the district court with jurisdiction over a particular proceeding, however, a party must meet the requirements of section 63-46b-14. Accordingly, the party must exhaust all available administrative remedies under subsection 14(2). Hom, 962 P.2d at 101. In addition, the party must file a petition for judicial review under subsection 14(3).¹²

Subsection 14(3) sets forth two basic requirements. First, the petition must be filed "within 30 days after the date that the order constituting final agency action is issued." Section 63-46b-14(3)(a); Bonded Bicycle Couriers v. Dep't of Employment Sec., 844 P.2d 358, 359 (Utah Ct. App. 1992) (dismissing untimely filed petition for review for lack of jurisdiction). Second, the petition must "*name the agency* and all other

¹¹See Grievance and Appeals Procedures Act, Utah Code Ann. §§ 67-19a-101 to -408 (West 2004)

¹²A petition for review of informal adjudicative proceedings is filed in the form of a complaint. Section 63-46b-15(2)(a).

appropriate parties as respondents and shall meet the form requirements specified in this chapter.” Section 63-46b-14(3)(b) (emphasis added).

In a petition seeking judicial review of CSRB proceedings, the “agency” that must be made a respondent is the CSRB.¹³ The purpose of the requirement of naming the agency is to obtain jurisdiction over the agency that conducted the adjudicative proceedings to be reviewed. Without such jurisdiction, the reviewing court would be powerless to affirm, reverse, remand, modify, or even vacate the agency action. See Ostler v. Buhler, 1999 UT 99, ¶7, 989 P.2d 1073 (noting that the court lacked jurisdiction to make ruling in favor of nonparty); see also Openshaw v. Openshaw, 12 P.2d 364, 365 (Utah 1932) (holding that “decree in favor of a person who is not a party to the action or proceeding is void because the court has no jurisdiction to make it”).

This Court should interpret the term “agency” in subsection 14(3)(b) in a manner consistent with its purpose. See In re Kunz, 2004 UT 71, ¶ 8, 99 P.3d 793 (holding court should interpret language of statute in light of its purpose). To interpret the requirement otherwise would render it meaningless or absurd in many cases. Although one of the parties in this case happens to be an agency, many administrative proceedings involve only private parties.¹⁴ In such cases, the requirement of naming the agency as a

¹³See, e.g., State v. CSRB, 2004 UT App 171, 92 P.3d 776 (CSRB named as respondent in case seeking “review of a final decision of the [CSRB]”); Lunnen v. UDOT, 886 P.2d 70, 71 (Utah Ct. App 1994) (same); Kent v. CSRB, 860 P.2d 984 (Utah Ct. App. 1993) (same); Holland v. CSRB, 856 P.2d 678 (Utah Ct. App. 1993) (same); Lopez v. CSRB, 834 P.2d 568 (Utah Ct. App. 1992) (same).

¹⁴See, e.g., Thomas v. Color Country Mgmt., 2004 UT 12, 84 P.3d 1201 (judicial review of administrative action of Labor Commission, which was named as respondent); Gilley v. Blackstock, 2002 UT App. 414, 61 P.3d 305 (judicial review of administrative action of Department of Public Safety, which was named as respondent); Longley v. Leucadia Fin. Co., 2000 UT 69, 9 P.3d 762 (judicial review of administrative action of state engineer, who was named as respondent).

respondent would be meaningless unless it means the agency whose final action is being challenged in the petition. See Hall v. Dep't of Corr., 2001 UT 34, ¶ 15, 24 P.3d 958 (holding court should avoid interpretations that will render portions of a statute superfluous or meaningless).

Blauer was required to make the CSRB a defendant in his complaint and his failure to do so deprived the district court of jurisdiction over his claims. Therefore, this Court should vacate the judgment below and summarily dismiss Blauer's complaint. Because the thirty-day period for Blauer to file a complaint naming the CSRB has elapsed, this Court should enter the dismissal with prejudice.

B. The district court lacked jurisdiction over CSRB to remand the case to CSRB

The district court lacked jurisdiction over CSRB because CSRB was never personally served with notice of this proceeding or with the petition, nor did CSRB ever appear as a party in these proceedings. UAPA provides that a petition for judicial review is "governed by the Utah Rules of Civil Procedure." Section 63-46b-15(2)(a). UAPA further requires that "[a]ll additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure." Section 63-46b-15(2)(b). Yet the record is devoid of any personal or substitute service upon CSRB, as required by Rule 4 of the Utah Rules of Civil Procedure. Moreover, Blauer acknowledged below that only the Department was made a respondent. R. 61.

If CSRB had been properly made a party, and served, the district court would have had jurisdiction over CSRB to remand pursuant to Utah Code Ann. § 63-46b-17(1)(b). But an order purporting to command a non-party to perform an act is void for lack of personal jurisdiction. See Ostler v. Buhler, 1999 UT 99, ¶7, 989 P.2d 1073) (noting that

the court lacked jurisdiction to make ruling in favor of nonparty); see also Openshaw v. Openshaw, 12 P.2d 364, 365 (Utah 1932) (holding that “decree in favor of a person who is not a party to the action or proceeding is void because the court has no jurisdiction to make it”). Because CSRB was never made a party and served with notice of this proceeding, the district court’s order remanding the case to CSRB is void for lack of jurisdiction and should be vacated.

2. The district court lacked jurisdiction over Blauer’s challenge to the rule defining demotion because he failed to exhaust his administrative remedies in the rulemaking agency

Because Blauer never exhausted his administrative remedies in the Department of Human Resource Management (“Human Resource Department”), the district court lacked jurisdiction over Blauer’s claim that the administrative rule defining demotion is inconsistent with the governing statutes. Blauer contends that the reasoning of Draughon v. Utah Department of Financial Institutions, 1999 UT App 42, 975 P.2d 935, requires this Court to invalidate Rule 477-1(32) of the Utah Administrative Code, which defines a demotion. Rule 477-1(32) was promulgated by the Human Resource Department, and is a successor to the administrative rule considered in Draughon. In Draughon, this Court held that the prior rule was inconsistent with the statutory scheme of the Personnel Management Act and the Grievance and Appeals Procedures Act. 1999 UT App 42, ¶ 11.

The rule considered in Draughon distinguish[ed] between a demotion and an ‘involuntary assignment’ solely on the basis of an immediate loss of pay. 1999 UT App 42, ¶ 11. In response to the Draughon decision, however, the Human Resource Department amended its rule defining demotion. Unlike the prior rule, the current definition does not require any loss of pay. Rather, it only requires a movement “from

one job or position to another job or position having a lower salary range.” Rule 477-1(32). Thus, in seeking to apply the reasoning of Draughon to Rule 477-1(32), Blauer challenges the rule itself, rather than simply the interpretation and application of the rule.

The procedural posture of this case, however, is far different from that in Draughon. In Draughon, the demotion issue was before this Court on appeal from the district court’s review of the denial of a petition for a rule change filed with the Human Resource Department. 1999 UT App 42, ¶ 3. Thus, the employee in Draughon had exhausted his administrative remedies in the rulemaking agency before seeking judicial review of his challenge to the demotion rule.

Unlike Draughon, Blauer has never exhausted his administrative remedies in the Human Resource Department. Under the Utah Administrative Rulemaking Act (“UARA”),¹⁵ a person aggrieved by an administrative rule may obtain judicial review of the rule only after exhausting administrative remedies. Utah Code Ann. § 63-46a-12.1(2) (West 2004). Specifically, the aggrieved party must exhaust that party’s administrative remedies under section 63-46a-12 – that is, by petitioning the rulemaking agency for amendment or repeal of the rule. Alternatively, jurisdiction will still lie if the party seeking judicial review can demonstrate that exhaustion of administrative remedies is not required under any of the exceptions in Utah Code Ann. § 63-46a-12.1(b).

Here, Blauer has not alleged that he filed a petition to change or repeal Rule 477-1(32) with the Human Resource Department. Nor has he alleged that he meets any of the statutory exceptions to the exhaustion requirement. See Utah Code Ann. § 63-46a-12.1(3)(a)(v) (West 2004) (requiring allegation that person filing complaint has either

¹⁵Utah Code Ann. §§ 63-46a-1 to -16 (West 2004).

exhausted the administrative remedies or met the requirements for waiver of exhaustion requirement). Accordingly, the district court was deprived of jurisdiction over Blauer's challenge to Rule 477-1(32). See Bluth v. Utah State Tax Comm'n, 2002 UT 91, ¶¶ 14-16, 54 P.3d 1147 (holding that the district court lacked jurisdiction to hear a facial challenge to an administrative rule where grievant neither exhausted administrative remedies nor qualified for exception to exhaustion rule). Therefore, this Court also lacks subject matter jurisdiction over Blauer's challenge to Rule 477-1(32) based on this Court's decision in Draughon. This Court should therefore vacate the decision below to the extent that it purported to apply the Draughon decision to Rule 477-1(32).¹⁶

3. Blauer failed to establish that he was demoted

Even if Blauer had properly conferred subject matter jurisdiction on both the district court and this Court over his claims for judicial review of the CSRB's decision and of his challenge to Rule 477-1(32), his appeal would still fail on its merits. The district court correctly held that Blauer failed to demonstrate that he was "demoted" and therefore that the CSRB lacked jurisdiction over his grievance. The CSRB has only the limited jurisdiction conferred on it by the Legislature. Therefore, an employee who appeals the denial of a grievance has the initial burden of establishing the CSRB's jurisdiction over the grievance. See Lopez v. CSRB, 834 P.2d 568, 573 (Utah Ct. App. 1992) (stating the CSRB does not have jurisdiction over all personnel matters and "[i]t is axiomatic that a party wishing to bring a matter before a tribunal with limited subject

¹⁶In addition, as discussed in Point 3.B below, the Draughon decision does not support Blauer's contention that he was demoted.

matter jurisdiction must present sufficient facts to invoke the limited jurisdiction of that tribunal”).

The CSRB’s jurisdiction is statutorily defined by Utah Code section 67-19a-202(1), which states:

(a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, *demotions*, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.

(b) The board has no jurisdiction to review or decide any other personnel matters.

Utah Code Ann. § 67-19a-202(1) (West 2004)(emphasis added). All other matters may be grieved only to the level of the department head, whose decision is final and unappealable. See Section 67-19a-302. Under section 67-19a-202(1), unless Blauer can demonstrate that the change in his assignment was a “demotion,” his assignment is a personnel matter outside the CSRB’s jurisdiction. He cannot.

Neither the Career Services Review Act nor the Utah Personnel Management Act defines a demotion. Utah Administrative Rule 477-1(32), however, 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 Id.

Utah Admin. R. 477-1(32) (emphasis added). As discussed in Point 2 above, this Court invalidated a prior administrative rule that defined demotion in Draughon v. Utah Department of Financial Institutions, 1999 UT App 42, 975 P.2d 935. In response to the Draughon decision, the Human Resource Department replaced the previous rules with Rule 477-1(32). Unlike the former rule addressed in Draughon, the new definition does

not require any loss of pay. Rather, it requires only a movement “from one . . . job or position to another job or position having a lower salary range.” Id.

Draughon asserts two basic challenges to the district court’s decision that he was not demoted under Rule 477-1(32). First, he contends that the district court misapplied the rule. Second, he asserts that the rule is invalid under the reasoning of this Court in Draughon. Neither argument is persuasive.

A. The district court correctly applied the administrative rule defining demotion

Blauer’s challenge to the district court’s application of Rule 477-1(32) ignores the undisputed material facts before the court below. In essence, Blauer relies on just two facts to support his contention that he was moved to another “job or position” within the meaning of Rule 477-1(32). First, the range or variety of his duties was reduced, at least temporarily. Second, other employees who were in the ALJ position at a lower salary range and some of whom were not attorneys, also conducted UI adjudications on a full-time basis. These facts fail to establish a “movement . . . from one job or position to another” when it remains undisputed that the assignment to UI adjudications was not intended to be permanent, and when Blauer’s pay, pay range, benefits, prospective benefits, title, position, supervisor, and every other condition of his employment remained the same.

Unlike the ALJs, Blauer remained both available and presumptively qualified to step back into any of his prior duties at any time. In fact, the undisputed evidence below established that the Division had recently experienced an extraordinary increase in its workload and that Blauer’s position as Legal Counsel was therefore critical to the Division’s operations. R. 732-33. The evidence also established that Downing frequently

changed the particular assignments of the various Legal Counsel in response to the frequently changing needs of the Department. R. 729. Given the problems with Blauer's performance of some of his prior duties, his request for a predictable schedule with clear performance criteria, and his physical limitations, see SOF at 9-11, Downing's decision to temporarily assign him to a limited area of responsibility was completely within her managerial discretion. See Rule 477-3-3 of the Utah Administrative Code ("Management may assign, modify, or remove any employee task or responsibility in order to accomplish reorganization, improve business practices or process, or for any reason deemed appropriate by the department administration.")

Given the extensive record evidence of valid managerial reasons for the assignment change, Blauer's speculation that the change was retaliatory and constituted corrective action remains purely speculative. Blauer's grievance of his performance evaluation produced equivocal results at best, R. 739-40; 812-13, and his contention that the assignment change was motivated by his grievance is untenable in light of the undisputed record evidence that the Chair of the Workforce Appeals Board was frustrated with Blauer's performance to the point of threatening to hire outside counsel. R. 735-36; 785-86. Blauer's apparent contention that his assignment should have remained unchanged is also untenable in light of his own demand for objective criteria of what he was expected to produce in a forty hour week. R. 802. Although the assignment change may have placed Blauer in a position where corrective action could have been taken in the future if his performance problems continued, the change itself was not disciplinary in nature, notwithstanding Blauer's displeasure with the change. Thus, the district court correctly determined as a matter of law that Blauer was not demoted within the meaning of Rule 477-1(32).

B. The district court correctly determined that the administrative rule defining demotion was consistent with the statutory scheme

As discussed in Point 2 above, under UARA, Blauer's challenge to the definition of demotion in Rule 477-1(32) is beyond the subject matter jurisdiction of both the district court and this Court, absent a prior petition to change or repeal the rule. Even if Blauer's rule challenge were properly before the Court, however, it would fail on its merits. Unlike its predecessor rule addressed in Draughon, Rule 477-1(32) is consistent with the statutory scheme of the Personnel Management Act and the Grievance and Appeals Procedures Act. Contrary to Blauer's suggestion, this Court's holding in Draughon was narrow: "We hold that Human Resource's 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." 1999 UT App 42, ¶ 11 (emphasis added). By eliminating the loss of pay as the distinguishing element of a demotion, and requiring only a movement from one job or position to another having a lower salary range, Rule 477-1(32), unlike its predecessor, creates broad access to the grievance process without undue interference in managerial discretion.

This Court in Draughon did not hold that a demotion is any change in assignment from a variety of tasks to a single task within the core duties of the same position. To do so, would eliminate managerial discretion to respond to the changing needs of the agency and embroil the CSRB in highly subjective decisions about which tasks within a position are more important or complex than others. In addition to the grievance process, the statutory scheme provides for a comprehensive classification system for positions and pay ranges administered by the Human Resource Department. See Utah Code Ann. § 67-19-

12 (West 2004).¹⁷ Therefore, the requirement of a formal change in position to a lower salary range before the grievance process may be invoked is not only reasonable, but entirely consistent with legislative intent.¹⁸

Moreover, to extend the narrow holding in Draughon to invalidate Rule 477-1(32) would lead to the grievance of every conceivable diminution in status or prestige. Thus, the loss of the coveted parking space closest to the elevator, a move from a private office to a cubicle because of space restrictions, and the like, would all be subject to a showing that the action advanced the good of the public service or was for just causes. Nothing in the statutory scheme suggests that the legislature intended such an absurd result. Reasonable limits must be placed the definition of a demotion in order for government to effectively function. Rule 477-1(32) is a reasonable approach, consistent with the statutory scheme, and should be upheld.

Therefore, this Court should reject Blauer's contention that the new administrative rule defining demotion is contrary to the Draughon decision and affirm the judgment below that Draughon was not demoted and that, therefore, the CSRB lacked jurisdiction over his grievance.


¹⁷This aspect of the statutory scheme was not directly at issue in Draughon and was not included in the Court's analysis of the demotion issue in that case.

¹⁸Blauer speculates that the change in his assignment could at some point in the future subject his position to possible reclassification. Blauer has not even begun to make the showing necessary to demonstrate that his new assignment met the standards for a downward reclassification. Most obviously, such a reclassification could occur only if Blauer never resumed any of the other duties of Legal Counsel -- an unlikely scenario given the extraordinary increase in the Division workload. R. 732-33. That the assignment change was intended to be temporary was undisputed. R. 743 & 846.

Conclusion

This Court should vacate the entire judgment below and dismiss Blauer's complaint with prejudice because under UAPA and UARA, the district court lacked jurisdiction to review the CSRB decision, to remand any claims to the CSRB, or to consider Blauer's challenge to the administrative rule defining demotion. In the alternative, this Court should affirm the summary judgment in favor of the Department below on the issue of whether Blauer was demoted. Blauer's contention that the district court misapplied Human Resource's new rule defining demotion fails to acknowledge the undisputed material facts on the record below. Furthermore, the new rule satisfies the Draughon holding and is consistent with the legislative intent behind the governing statutes. Accordingly, this Court should decline Blauer's invitation to invalidate the rule and either dismiss Blauer's rule challenge for lack of jurisdiction or affirm the judgment below that Blauer was not demoted.

Dated this 18th day of May, 2005



DEBRA J. MOORE
J. CLIFFORD PETERSEN
Assistant Attorneys General
Attorneys for Department of Workforce Services

CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the foregoing BRIEF OF APPELLEE
AND CROSS-APPELLANT to the following this 18th day of May, 2005:

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Salt Lake City, Utah 84145-0444

Debra J Moore

ADDENDUM A

FILED DISTRICT COURT
Third Judicial District

AUG 16 2004

SALT LAKE COUNTY
By
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.

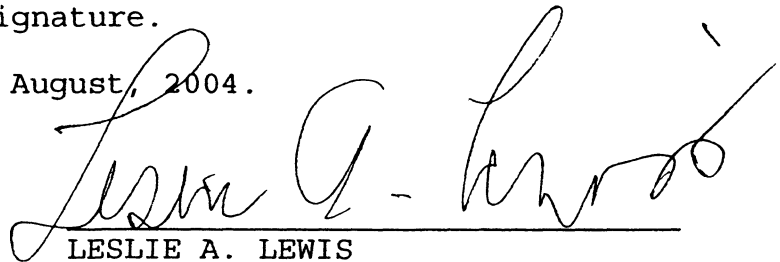
Given the Court's decisions above, it appears that the only remaining issue is the CSRB's refusal to consider the plaintiff's remaining grievances based upon alleged violations of the personnel rules. The Court concludes that the plaintiff, in his Request for Reconsideration before the CSRB, preserved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

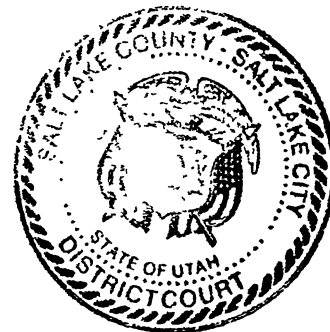
It appears that the foregoing addresses all of the issues raised in the pending Motions. However, if the parties need clarification as to any of the foregoing or if an issue remains unaddressed, the Court requests that counsel direct a letter to the Court's law clerk, Alexandra C. Doctorman, indicating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

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 16th day of August, 2004.

A handwritten signature in cursive script, appearing to read "Leslie A. Lewis", written over a horizontal line.

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:

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FILED EIGHTH JUDGE
Third Judicial District

DEC 8 2004

By 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).

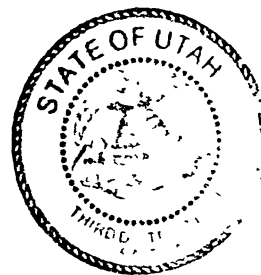
3. The Plaintiff's Second, Third, and Fourth Claims for Relief are based upon an alleged unlawful demotion and are therefore dismissed with prejudice.

240900221

DATED this 30th day of November, 2004.

BY THE COURT:

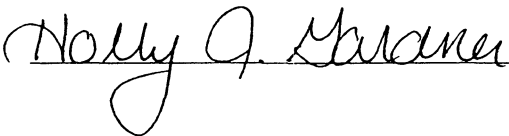
Leslie A. Lewis
THE HONORABLE LESLIE LEWIS



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:

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ADDENDUM B

U.C.A. § 63-46a-12 Interested parties

- (1) An interested person may petition an agency requesting the making, amendment, or repeal of a rule.
- (2) The division shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition.
- (3) A statement shall accompany the proposed rule, or amendment or repeal of a rule, demonstrating that the proposed action is within the jurisdiction of the agency and appropriate to the powers of the agency.
- (4) Within 30 days after submission of a petition, the agency shall either deny the petition in a writing stating its reasons for the denial, or initiate rulemaking proceedings in accordance with Section 63-46a-4.

U.C.A. § 63-46a-12.1 Judicial challenge to administrative rules

(1)(a) Any person aggrieved by a rule may obtain judicial review of the rule by filing a complaint with the county clerk in the district court where the person resides or in the district court in Salt Lake County.

(b) Any person aggrieved by an agency's failure to comply with Section 63- 46a-3 may obtain judicial review of the agency's failure to comply by filing a complaint with the clerk of the district court where the person resides or in the district court in Salt Lake County.

(2)(a) Except as provided in Subsection (2)(b), a person seeking judicial review under this section shall exhaust that person's administrative remedies by complying with the requirements of Section 63-46a-12 before filing the complaint.

(b) When seeking judicial review of a rule, the person need not exhaust that person's administrative remedies if:

- (i) less than six months has passed since the date that the rule became effective and the person had submitted verbal or written comments on the rule to the agency during the public comment period;
- (ii) a statute granting rulemaking authority expressly exempts rules made under authority of that statute from compliance with Section 63-46a-12; or
- (iii) compliance with Section 63-46a-12 would cause the person irreparable harm.

(3)(a) In addition to the information required by the Utah Rules of Civil Procedure, a complaint filed under this section shall contain:

- (i) the name and mailing address of the plaintiff;
- (ii) the name and mailing address of the defendant agency;
- (iii) the name and mailing address of any other party joined in the action as a defendant;
- (iv) the text of the rule or proposed rule, if any;
- (v) an allegation that the person filing the complaint has either exhausted the administrative remedies by complying with Section 63-46a-12 or met the requirements for waiver of exhaustion of administrative remedies established by Subsection (2)(b);
- (vi) the relief sought; and
- (vii) factual and legal allegations supporting the relief sought.

(b)(i) The plaintiff shall serve a summons and a copy of the complaint as required by the Utah Rules of Civil Procedure.

(ii) The defendants shall file a responsive pleading as required by the Utah Rules of Civil Procedures.

(iii) The agency shall file the administrative record of the rule, if any, with its responsive pleading.

- (4) The district court may grant relief to the petitioner by:
- (a) declaring the rule invalid, if the court finds that:
 - (i) the rule violates constitutional or statutory law or the agency does not have legal authority to make the rule;
 - (ii) the rule is not supported by substantial evidence when viewed in light of the whole administrative record; or
 - (iii) the agency did not follow proper rulemaking procedure;
 - (b) declaring the rule nonapplicable to the petitioner;
 - (c) remanding the matter to the agency for compliance with proper rulemaking procedures or further fact-finding;
 - (d) ordering the agency to comply with Section 63-46a-3;
 - (e) issuing a judicial stay or injunction to enjoin the agency from illegal action or action that would cause irreparable harm to the petitioner; or
 - (f) any combination of Subsections (4)(a) through (e).

(5) If the plaintiff meets the requirements of Subsection (2)(b), the district court may review and act on a complaint under this section whether or not the plaintiff has requested the agency review under Section 63-46a-12.

U.C.A. 1953 § 63-46b-14 Judicial review—Exhaustion of administrative remedies

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3)(a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13 (3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

U.C.A. 1953 § 63-46b-15 Judicial review—Informal adjudicative proceedings

(1)(a) The district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile courts have jurisdiction over all state agency actions relating to:

- (i) the removal or placement of children in state custody;
- (ii) the support of children under Subsection (1)(a)(i) as determined administratively under Section 78-3a-906; and
- (iii) substantiated findings of abuse or neglect made by the Division of Child and Family Services, after an evidentiary hearing.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains the petitioner's principal place of business.

(2)(a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

- (i) the name and mailing address of the party seeking judicial review;
- (ii) the name and mailing address of the respondent agency;
- (iii) the title and date of the final agency action to be reviewed, together with a copy, summary, or brief description of the agency action;
- (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
- (v) a copy of the written agency order from the informal proceeding;
- (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
- (vii) a request for relief, specifying the type and extent of relief requested; and
- (viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3)(a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

U.C.A. 1953 § 67-19-12 State pay plans--Applicability of section--Exemptions--Duties of director

(1)(a) This section, and the rules adopted by the department to implement this section, apply to each career and noncareer state employee not specifically exempted under Subsection (2).

(b) If not exempted under Subsection (2), a state employee is considered to be in classified service.

(2) The following state employees are exempt from this section:

(a) members of the Legislature and legislative employees;

(b) members of the judiciary and judicial employees;

(c) elected members of the executive branch and their direct staff who meet career service exempt criteria as defined in Subsection 67-19-15(1)(k);

(d) certificated employees of the State Board of Education;

(e) officers, faculty, and other employees of state institutions of higher education;

(f) employees in any position that is determined by statute to be exempt from this Subsection (2);

(g) attorneys in the Office of the Attorney General;

(h) department heads and other persons appointed by the governor pursuant to statute;

(i) employees of the Department of Community and Economic Development whose positions are designated as executive/professional positions by the executive director of the Department of Community and Economic Development with the concurrence of the director; and

(j) employees of the Medical Education Council.

(3)(a) The director shall prepare, maintain, and revise a position classification plan for each employee position not exempted under Subsection (2) to provide equal pay for equal work.

(b) 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.

(c) The director shall allocate or reallocate the position of each employee in classified service to one of the classes in the classification plan.

(d)(i) The department shall conduct periodic studies and desk audits to provide that the classification plan remains reasonably current and reflects the duties and responsibilities assigned to and performed by employees.

(ii) The director shall determine the schedule for studies and desk audits after considering factors such as changes in duties and responsibilities of positions or agency reorganizations.

(4)(a) With the approval of the governor, the director shall develop and adopt pay plans for each position in classified service.

(b) The director shall design each pay plan to achieve, to the degree that funds permit, comparability of state salary ranges to salary ranges used by private enterprise and other public employment for similar work.

(c) The director shall adhere to the following in developing each pay plan:

(i) Each pay plan shall consist of sufficient salary ranges to permit adequate salary differential among the various classes of positions in the classification plan.

(ii) The director shall assign each class of positions in the classification plan to a salary range and shall set the width of the salary range to reflect the normal growth and productivity potential of employees in that class. The width of the ranges need not be uniform for all classes of positions in the plan, but each range shall contain merit steps in increments of 2.75% salary increases.

(iii) The director shall issue rules for the administration of pay plans. The rules may provide for exceptional performance increases and for a program of incentive awards for cost-saving suggestions and other commendable acts of employees. The director shall issue rules providing for salary adjustments.

(iv) Merit step increases shall be granted, if funds are available, to employees who receive a rating of "successful" or higher in an annual evaluation of their productivity and performance.

(v) By October 15 of each year, the director shall submit market comparability adjustments to the director of the Governor's Office of Planning and Budget for consideration to be included as part of the affected agency's base budgets.

(vi) By October 31 of each year, the director shall recommend a compensation package to the governor.

(vii) Adjustments shall incorporate the results of a total compensation market survey of salary ranges and benefits of a reasonable cross section of comparable benchmark positions in private and public employment in the state. The survey may also study comparable unusual positions requiring recruitment outside Utah in the surrounding western states. The director may cooperate with other public and private employers in conducting the survey.

(viii) The director shall establish criteria to assure the adequacy and accuracy of the survey and shall use methods and techniques similar to and consistent with those used in private sector surveys. Except as provided under Section 67-19-12.3, the survey shall include a reasonable cross section of employers. The director may cooperate with or participate in any survey conducted by other public and private employers.

(ix) The establishing of a salary range is a nondelegable activity subject to Subsection 67-19-8(1) and is not appealable under the grievance procedures of Sections 67-19-30 through 67-19-32, Title 67, Chapter 19a, Grievance and Appeal Procedures, or otherwise.

(x) The governor shall:

- (A) consider salary adjustments recommended under Subsection (4)(c)(vi) in preparing the executive budget and shall recommend the method of distributing the adjustments;
 - (B) submit compensation recommendations to the Legislature; and
 - (C) support the recommendation with schedules indicating the cost to individual departments and the source of funds.
- (xi) If funding is approved by the Legislature in a general appropriations act, the adjustments take effect on the July 1 following the enactment.

(5)(a) The director shall regularly evaluate the total compensation program of state employees in the classified service.

(b) The department shall determine if employee benefits are comparable to those offered by other private and public employers using information from:

- (i) the most recent edition of the Employee Benefits Survey Data conducted by the U.S. Chamber of Commerce Research Center; or
- (ii) the most recent edition of a nationally recognized benefits survey.

(6)(a) The director shall submit proposals for a state employee compensation plan to the governor by October 31 of each year, setting forth findings and recommendations affecting state employee compensation.

(b) The governor shall consider the director's proposals in preparing budget recommendations for the Legislature.

(c) The governor's budget proposals to the Legislature shall include a specific recommendation on state employee compensation.

**U.C.A. 1953 § 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.

U.C.A. 1953 § 67-19a-202 Powers—Jurisdiction

(1)(a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.

(b) The board has no jurisdiction to review or decide any other personnel matters.

U.C.A. 1953 § 78-3-4 Jurisdiction—Appeals

- (1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.
- (2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.
- (3) The district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.
- (4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.
- (5) The district court has appellate jurisdiction to adjudicate trials de novo of the judgments of the justice court and of the small claims department of the district court.
- (6) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.
- (7) The district court has jurisdiction to review:
 - (a) agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings; and
 - (b) municipal administrative proceedings in accordance with Section 10-3- 703.7.
- (8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:
 - (a) there is no justice court with territorial jurisdiction;
 - (b) the matter was properly filed in the circuit court prior to July 1, 1996;
 - (c) the offense occurred within the boundaries of the municipality in which the district courthouse is located and that municipality has not formed a justice court; or
 - (d) they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.
- (9) The district court has jurisdiction of actions under Title 78, Chapter 3h, Child Protective Orders, if the juvenile court transfers the case to the district court.

Utah Admin. R. 477-1 (Current through March 1, 2005)

R477-1. 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.

Utah Admin. R. 477-3 (Current through March 1, 2005)

R477-3. Classification.

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.