

2004

Mostafa (Jim) Tarkeshian v. Utah Labor Commission : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 20040996

MOSTAFA (JIM) TARKESHIAN :

Petitioner, :

vs. :

Appeal No. 20040996

Agency Decision No. 8-00-0085

UTAH LABOR COMMISSION, :

Respondent. :

APPELLANT'S REPLY BRIEF ON APPEAL

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS

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Petitioner,

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UTAH LABOR COMMISSION,

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Appeal No. 20040996

Agency Decision No. 8-00-0083

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
RESPONSE TO APPELLEE’S STATEMENT OF FACTS	4
A. Introduction	4
B. Salt Lake County’s Actions Were Inconsistent With The CPMA And Its Own Policies.	4
C. Salt Lake County’s Misdirection of Facts.	10
D. Some of Salt Lake County’s Factual Assertions Are Not Supported By The Record.	13
ARGUMENT	15
I. AS FOUND BOTH BY THE ALJ AND THE APPEALS BOARD, THE PLAINTIFF DID ESTABLISH A PRIMA FACIE CASE.	15
II. THE PETITIONER MET HIS BURDEN OF MARSHALLING THE EVIDENCE.	16
III. THE LABOR COMMISSION APPEALS BOARD ERRED IN ITS LEGAL CONCLUSION THAT SALT LAKE COUNTY ADVANCED A LEGITIMATE NON-DISCRIMINATORY REASON FOR NOT PROMOTING THE PETITIONER.	18
CONCLUSION AND RELIEF SOUGHT	20
CERTIFICATE OF SEREVICE	25

TABLE OF AUTHORITIES

Cases

<u>Woodward v. Fazzio</u> , 823 P.2d 474 (Ut. App. 1991)	16
<u>Mohammed v. Callaway</u> , 698 F.2d 395 (10 th Cir. 1983).....	18
<u>435 Main Street v. Easy Heat, Inc.</u> , 99 P.3d 908 (Utah 2004).....	11
<u>DoDoo v. Seagate Technology, Inc.</u> , 235 F.3d 522 (10 th Cir. 2000).....	18
<u>Doebele v. Sprint/United Management Co.</u> , 342 F.3d 1117 (10 th Cir. 2003).....	18
<u>Eggett v. Wasatch Energy Corp.</u> , 94 P.3d 193 (Utah 2004).....	16
<u>Muller v. United States Steel Corporation</u> , 509 F.2d 923 (10 th Cir. 1975)	18
<u>Muller v. United States Steel Corporation</u> , 509 F.2d 923,927,10 Fair Empl.Prac.Cas. (BNA) 323, 9 Empl.Prac.Dec. p. 9901 (10 th Cir. 1975).....	13
<u>Pierce v. Pierce</u> , 994 P.2d 193 (Utah 2000).....	16
<u>Pitre v. Western Elec. Co., Inc.</u> , 843 F.2d 1262 (10 th Cir. 1988)	17
<u>Sheikh v. Department of Public Safety</u> , 904 P.2d 1103 (Ut. App. 1995	17
<u>Vitron/Lika v. Labor Commission</u> , 38 P.3d 993, 995 (Ut. App. 2001)	17

Statutes

Section 17-33-1 et. seq. U.C.A. (1953)	4
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APPELLANT'S REPLY BRIEF ON APPEAL

The Appellant/Petitioner Mostafa (Jim) Tarkeshian, by and through his undersigned counsel, respectfully submits the following Reply Brief for the convenience and guidance of the Court:

RESPONSE TO APPELLEE'S STATEMENT OF FACTS

A. Introduction

Three observations may be made regarding the Respondent's Statement of facts. First, while Salt Lake County admits that it is bound by Utah's County Personnel Management Act, Section 17-33-1 et. seq. U.C.A. (1953), as amended ("CPMA") and its own merit system policies, Policy 5100, 5200 and 5400,¹ Salt Lake County wrongfully asserts that its actions were consistent with the CPMA and its own policies.

Second, while Salt Lake County does not contest any of the facts set forth in Appellant's Statement Of The Facts in Appellant's Brief on Appeal, Salt Lake County attempts to misdirect the Court to facts that are not relevant for analysis.

Third, some of the facts asserted by Salt Lake County are not supported by the record.

These points are addressed below.

B. Salt Lake County's Actions Were Inconsistent With The CPMA And Its Own Policies.

The core of Petitioner's case is that "disturbing procedural irregularities (e.g. falsifying or manipulating...criteria", Garrett v. Hewlett-Packard Company, 305 F.3d

¹ Brief of Appellee, pages 5, 7 and 13. "The County does not dispute that it is required to set minimum job requirements." Brief of Appellee, p. 13.

1210, 1218, 89 Fair Empl. Prac. Case (BNA) 1675, 83 Empl. Prac. Dec. ¶ 41, 291 (10th Cir. 2002), in Salt Lake County's promotional processes created a subtle mask of discrimination that left the Petitioner in an entry level position throughout his employment as an engineer in Salt Lake County's Public Works Department. Instead of comparing himself to just one, two or three fellow employees, he cited seven specific examples of fellow engineers within his department. Nearly all of these seven examples have certain common irregularities that must be classified as "disturbing"²:

A. Wrongful Substitution of Land Surveyor's License. While Salt Lake County attempts to justify the substitution of a land surveyor's license for that of the minimum requirement of the EQE and EIT Examinations, or that of the FE Examination,³ the fact remains that the CPMA, Section 17-33-5(3)(b)(ii), requires that the minimum requirements be set forth in writing in Salt Lake County's own merit system rules and be formally approved by the County itself. Salt Lake County's own merit system rules, its 4/1/80 and 3/16/00 Career Ladder Policies (Addendums G and H to Appellant's opening Brief on Appeal) do not allow substitutions.

Salt Lake County attempts to explain this discrepancy by citing selective testimony of its own Classification and Compensation Manager Roy Arrigo during direct examination before the ALJ below. (Brief of Appellee, p. 20). However, Salt Lake

² This does not suggest that other irregularities as identified in Appellant's Opening Brief on Appeal should be ignored. This section simply identifies irregularities that were commonly used by Salt Lake County to automatically promote/advance white non-minorities while leaving the Plaintiff in an entry level position.

³ The Fundamentals of Engineering Examination described in the March 16, 2000, policy was a new examination that replaced the EQE and EIT Examination required under the April 1, 1980, policy. (Transcript, p. 286 and 297).

County's Brief left out Mr. Arrigo's cross-examination testimony where he admitted that Salt Lake County was required to establish written minimum qualifications for positions (Transcript, p. 125), admitted that Salt Lake County had not established any written policy that allowed for substitutions (Transcript, p. 146), and admitted that Salt Lake County should have established a different set of career ladder criteria to allow for the substitution of a land surveyor's license, but failed to do so (Transcript, p. 153).

In each of the cited examples, Salt Lake County either automatically advanced the employee to a higher engineering grade level, or accepted an application to a different position that required the EQE, EIT, or FE of an engineer, while keeping the Petitioner in his entry level position. Brent Tidwell, Reid Demman, Steven Dale, Rick Olsen, and Martin Knaphus.

B. Wrongful Substitution of Supervisory Status Again, as set in Subpart A, above, neither the CPMA nor Salt Lake County's own policies allow substitutions and they specifically do not exempt a supervisory engineer from possessing the minimum requirements of an engineer. Salt Lake County's Classification and Compensation Manager Roy J. Arrigo admitted on cross-examination that no policy, rule or regulation provided an exemption for supervisors. "There's no such rule." (Transcript, p. 166).

Instead, Salt Lake County attempted to argue below, as it does before this Court, that the *actual duties* of a supervisor do not need to have the minimum qualifications of the EQE, EIT or FE and, therefore, the CPMA and its own policies should be ignored (Transcript, p. 165-167 and Brief of Appellee, p. 13, 15). Despite this testimony, however, it is undisputed that the supervisor's job descriptions do indeed require such

certifications. For example, see Mr. Mecham's job description, Record, p. 608-611 where he was responsible, among other things, for "project design and organization of all field data," "engineer estimate and awarding contract[s]", "development of engineer estimates for highway and maintenance needs", "train engineering interns and technicians to conduct field surveys", and others.

Salt Lake County cannot say, with a straight face, that its supervisors are not required to be trained in, and have the same certifications, as the employees they supervise. That argument simply makes no sense.

In each of the following examples, Salt Lake County either automatically advanced the employee to a higher engineering supervisory grade level, or accepted an application to a different supervisory position requiring the EQE, EIT or FE of an engineer, while keeping the Petitioner in his entry level position: Brent Tidwell, Reid Demman, Denton Mecham, and Rick Olsen.

C. Wrongful Assertion of Exemptions. Salt Lake County attempted to justify below, and does so on appeal, that Salt Lake County had a right to exempt Mr. Brent Tidwell from the CPMA and its own policies by "grandfathering" him. It also argued below, as it does on appeal, that Larry Taggart was exempt from the CPMA and its own policies because he was a "temporary" employee, even though he has been employed as a temporary employee since 1999. Neither proposition is true.

Neither the CPMA nor Salt Lake County authorizes an exemption of merit system positions based upon "grandfathering". In fact, Section 17-33-8 specifically limits exemptions to the CPMA and Section 17-33-5(3)(a)(b)(ix) prohibits "temporary,

provisional, or other non-career service appointments...as a way of defeating the purpose of the career service....” Salt Lake County’s own Policies, Policy 5400, Part 4.0 only allows a limited grandfathering where an incumbent’s position has been reclassified and new qualifications are required. There has been no reclassification of the engineering positions involving new qualifications here.

Instead, Salt Lake County first issued its policy requiring its grade 24 engineers to possess the EQE or EIT certifications on April 1, 1980. (Appellant’s Brief, Addendum G). In fact, the Plaintiff filed his first grievance on the basis of unfairness when his application for a grade 26 engineer was rejected *before the effective date* of the above policy, when he admittedly possessed the then existing qualifications⁴, but then promoted Mr. Tidwell *immediately after the effective date* of the above policy when he admittedly lacked the new qualifications required for the engineering position. (Transcript, p. 32). In response, Salt Lake County then argued it had a right to “grandfather” Mr. Tidwell. Salt Lake County’s Merit Council upheld the County’s action but concluded that, “[i]f and when said employee leaves the position, it must be filled by an engineer who is qualified....” (Record, p. 349-351).

However, when Mr. Tidwell retired in early 1998, Salt Lake County automatically promoted Reid Demman⁵ who admittedly lacked either the EIT, EQE, FE, or PE credentials! Salt Lake County now attempts to justify this blatant irregularity, and

⁴ The only requirement then was that the applicants have a bachelor's in science degree in civil engineering. The Petitioner was interviewed and accepted and then his appointment was withdrawn to facilitate the promotion of Mr. Tidwell.

⁵ Salt Lake County admits that Mr. Demman was not even required to complete an application for his promotion to Mr. Tidwell's position. (Record, p. 374).

mislead the Court on appeal, by suggesting Mr Demmon “met the minimum qualifications to be an Engineer, Grade 24 ” (Brief of Appellee, p 12) A grade 24 is not the issue! Being advanced or promoted to a grade 26 or beyond is the issue! Salt Lake County ignores the undisputed testimony of Mr Arrigo

“Q Regarding the engineer position Is it correct to look at this first page and say that he has never been an engineer 26?

A That’s correct ” (Transcript, p 219)

Salt Lake County also attempts to justify its automatic promotion of Mr Demmon on the basis he became a supervisor, Brief of Appellee, p 13, which is discussed *supra* Despite Salt Lake County’s efforts to “hide the ball”, the fact remains that Mr Demmon was automatically advanced, and filled Mr Tidwell’s position, in violation of the CPMA and Salt Lake County’s own policies, as well as a specific merit system arbitration ruling that required the position to be filled by a qualified individual

Salt Lake County also argued below, as it does on appeal, that it could exempt employees, such as Larry Taggart, from the minimum qualifications because he was a “temporary” employee As this Court may recall, Mr Taggart worked alongside the Petitioner in a grade 24 engineering position until he retired on December 31, 1998 (Record, 640) Shortly after his retirement, Salt Lake County re-hired Mr Taggart as a grade 26 engineer doing exactly what he was doing before he retired even though he admittedly lacked the minimum qualifications (Record, p 641) Salt Lake County argued below, as it does here, that it had a right to hire him as a grade 26 engineer because Salt Lake County considered him a “temporary” employee Under the CPMA, Section 17-33-5(d)(b)(ix), “temporary, provisional, or other non-career appointments may not

be used as a way of defeating the purpose of the career service and may not exceed 90 days....” Yet, Mr. Taggart remains employed to this very day! Further, Mr. Arrigo admitted on cross-examination that Salt Lake County had no express written policy that permitted temporary employees from meeting the minimum qualifications for that job.⁶ (Transcript, p. 186).

Again, through either a blatant violation of the CPMA, and/or its own policies, Salt Lake County either automatically advanced white, non-Arabic, employees to a higher engineering grade level (with multiple promotions and advancements thereafter), or accepted an application to a different position requiring the EQE, EIT or FE of an engineer, while keeping the Petitioner in his entry level position for over 27 years.

C. Salt Lake County’s Misdirection of Facts.

First, Salt Lake County makes the assertion that the “racial or ethnic make-up” of the employees in question is unknown. (Appellee’s Brief, p. 26). The fact that the Petitioner was within a protective minority status was not challenged below.⁷ Indeed, the fact that the other employees in question were white, non-minorities, likewise was not contested below. “No dispute existed that all of the employees discussed in relation to this action except Mr. Tarkeshian were white, non-Arabic, and not of Persian/Iranian National origins.” (Decision of ALJ La Jeunesse, Record, p. 420). The Appellee may

⁶ Salt Lake County's Policy 5100, Part 5.0, has provisions for seven specific categories of exempt employees. Section 5.2.4, regarding "provisional" employees, i.e., situations where an urgent need exists to fill a position before it may be filled from the register, mandates that such employees meet the minimum qualifications for the position. Section 5.3.1, regarding "temporary" employees, prohibits their hiring "[i]f a current position description already exists...." Here, the position of engineer already existed and Salt Lake County could not explain below why Mr. Taggart qualified to be a temporary employee.

⁷ Nor does Salt Lake County dispute this fact on appeal. Brief of Appellee, p. 8.

not raise an issue on appeal that was not raised before the lower court---yet alone where the facts were uncontested below as ALJ La Jeunesse noted. 435 Main Street v. Easy Heat, Inc., 99 P.3d 908 (Utah 2004).

Second, Salt Lake County wrongfully attempts to justify the irregularities surrounding the land-surveyor's license by alleging facts that are not in the record. Salt Lake County's Brief on Appeal asserts that, when the Development Services Division was created in 1983, they "substituted the required FE license for a Land Surveyor's license." (Brief of Appellee, p. 9-10). This is simply not true! On April 1, 1980, Salt Lake County's Personnel Division & Merit System Council mandated that, "All county Engineers assigned to the grade 24, 26 and 28 career ladder must pass the EQE or the EIT to be eligible for promotion to grade 26." (Brief of Appellant, Addendum G). That requirement never changed and, in fact, was reinforced on March 16, 2000, when Salt Lake County adopted its new policy requiring the FE for advancement to grade 26 and a PE for advancement to grades 28 and 30. (Brief of Appellant, Addendum H). All of Salt Lake County's Public Works Department heads, including Cal Schneller from the Development Services Division, signed off on that policy. Id.

Contrary to the naked assertion of Salt Lake County in its Brief on Appeal, p. 8, there is *no* evidence in the record that Development Services "opted" to create a different career path for its engineers. Salt Lake County's citation to the record on page 9 does not support Salt Lake County's naked assertion. Instead, the evidence before ALJ La Jeunesse was that engineers in Development Services sometimes reviewed the acts of surveyors and, as Mr. Arrigo testified, "it was felt that the professional engineer's license

would be equivalent to the EIT or FE.” (Testimony of Arrigo, p. 145). There was no evidence that this practice by subordinates in the Development Services Department of Salt Lake County’s Public Works Department was ever approved by Salt Lake County as required under the CPMA. There is no evidence in the record that any written policy embraced this practice. In fact, Mr. Arrigo testified that the County’s only official policies were those contained in its April 1, 1980, Policy (Addendum G) and its March 16, 2000, Policy (Addendum H) that did not allow any substitutions. (Transcript, p. 146).

Third, Salt Lake County suggests that the promotional histories set forth in Appellant’s Opening Brief on Appeal were “incomplete and inaccurate.” (Appellee’s Brief, p. 9). In particular, Salt Lake County claims that the Petitioner failed to “delineate the qualifications of the seven other employees.” (Id., p. 10). At page 26 of Appellee’s Brief, Salt Lake County even suggests that the “full qualifications of Tarkeshian’s co-workers are unknown.” Not only are Salt Lake County’s assertions inaccurate, they miss the mark.

The Petitioner painstakingly went through each employee’s promotional history and identified each employee’s full qualifications at the hearing before ALJ La Jeuness. Indeed, Salt Lake County’s Brief on Appeal does not identify any qualification that was allegedly omitted in Appellant’s opening Brief on Appeal. Each of the employee’s qualifications were fully and completely identified in Appellant’s brief than can be verified by reviewing the references cited in Appellant’s opening Brief on Appeal.

Salt Lake County’s suggestion that one must compare the “full qualifications” of each employee to decide this case, misses the mark. Here, the issue is whether Salt Lake

County manipulated the *minimum* qualifications for advancement of its white, non-minority engineers, to the detriment of the Petitioner. When it comes to pretext in the promotional process, “It is sufficient that the employer’s conduct produced discriminatory results.” Muller v. United States Steel Corporation, 509 F.2d 923,927,10 Fair Empl.Prac.Cas. (BNA) 323, 9 Empl.Prac.Dec. p. 9901 (10th Cir. 1975). In this case, Salt Lake County always seemed to find an exception to the rules in order to advance white, non-minority, engineers while leaving the Plaintiff at the bottom of the rung for over 27 years.

Fourth, Salt Lake County attempts to misdirect the court factually by suggesting the Petitioner never made any efforts to obtain the EQE, EIT, or FE and therefore cannot complain. (Appellee’s Brief, p. 19). In response, it is significant to note that advancement within Salt Lake County’s own policies is done *automatically* by management when management *deems* the minimum qualifications have been satisfied. (Brief of Appellee, p. 7). Indeed, Mr. Arrigo testified that it was “the supervisor’s responsibility” to advance employees within a career path once they met the minimum qualifications. (Transcript, p. 161). In some cases, such as Mr. Demman, no formal applications for new or vacated positions were even required. Furthermore, Salt Lake County fails to note that all seven examples cited by the Plaintiff also never made any effort to obtain the EQE, EIT or FE. Salt Lake County should not be allowed to single out the Petitioner in making such a legal argument.

D. Some of Salt Lake County’s Factual Assertions Are Not Supported By The Record.

While perhaps minor, some of Salt Lake County's factual assertions are not true and not supported by the record:

1. Appellee's Brief, p. 7. The Petitioner has never claimed that Salt Lake County established the minimum job requirements for engineering positions "in order to deny him promotion/advancement because of his national origin." The Petitioner argued below, as he does on appeal, that Salt Lake County used disturbing irregularities in its promotional processes for the advancement of white, non-minorities, while, at the same time, leaving him in an entry level position for over 27 years.

2. Appellee's Brief, p. 8. The Petitioner did not file a grievance in 1980 *because* Salt Lake County established minimum qualifications. As stated *supra*, he filed a grievance when Mr. Tidwell was promoted where he admittedly lacked the minimum qualifications for the position on the heels of Mr. Tarkeshian's earlier rejection for advancement (without explanation)(when he was fully qualified) immediately prior to the enactment of Salt Lake County's April 1, 1980, Career Ladder Policy.

3. Appellee's Brief, p. 10. Contrary to Salt Lake County's assertion, the Petitioner did testify as to qualifications of the other seven employees, or lack thereof, during the hearing before the ALJ. First, he noticed that his fellow engineers were being promoted without having to take the EQE, EIT or FE tests. (Transcript, p. 39). Second, he noticed after 27 years that he was the only person in engineering department that had not been promoted. (Transcript, p. 95). The Petitioner then testified at length concerning the qualifications, or lack thereof, of the seven employees in question: Tidwell, p. 32-38; Demman, 77-79; Dale, 89-90; Mecham, 90-92; Olsen, p. 92-93; Taggart, 85-86; and,

Knaphus, p. 86-88. In addition, the Petitioner called Mr. Arrigo, Salt Lake County's Classification and Compensation Manager and the employment records of all employees were admitted into evidence as Exhibits P-12 through P-22.

4. Appellee's Brief, p. 10. Contrary to the assertion of Salt Lake County, the Petitioner did "delineate the qualifications of the seven other employees", as noted under No. 3 above.

5. Appellee's Brief, p. 13. Salt Lake County asserts that it's Public Works Department had a right to make ad hoc substitutions for the minimum job requirements for career merit system positions, such as the land surveyor's certificate, supervisory experience, etc. The CPMA, Section 17-33-5(3)(b)(ii) requires that the minimum job requirements to be in writing and approved by each county and for good reason. Otherwise, the merit system would be emasculated. Likewise, Salt Lake County's own personnel policies, Policy 5400, Part 4.0 requires the same.

ARGUMENT

I. AS FOUND BOTH BY THE ALJ AND THE APPEALS BOARD, THE PLAINTIFF DID ESTABLISH A PRIMA FACIE CASE.

Putting its head in the sand, Salt Lake County clings to the notion the Petitioner was not qualified because he never made the effort to obtain the EQE, EIT or FE certificate to be advanced. That is not the point. The point is none of the seven other engineers did either and they were automatically advanced under very suspect conditions. And, as both the ALJ and the Appeals Board noted, the Petitioner had superior overall qualifications as an engineer when compared to the others despite lacking the EQE, EIT

or FE certificate. In each of the seven examples cited by the Plaintiff in the record below, none of them even held an engineering degree!

II. THE PETITIONER MET HIS BURDEN OF MARSHALLING THE EVIDENCE.

The Petitioner does not dispute Salt Lake County's argument that he must marshal the evidence to overcome a factual finding that is not supported by the evidence. Indeed, the Petitioner identified his obligation in his opening Brief. (Appellant's Brief on Appeal, p. 13). Marshalling is not, however, a blanket defense for all appellees to recklessly throw at the Court in order to defeat a valid concern on appeal. For example, the marshalling requirement does not apply where the lower court made inadequate findings. Woodward v. Fazzio, 823 P.2d 474 (Ut. App. 1991). Nor does it apply to conclusions of law. Eggett v. Wasatch Energy Corp., 94 P.3d 193 (Utah 2004) and Pierce v. Pierce, 994 P.2d 193 (Utah 2000).

Salt Lake County does not identify the factual finding it claims that was defectively marshaled by the Petitioner. Presumably, it is the mixed factual and legal conclusion reached by the Appeals Board, that Salt Lake County's proffered explanation for not promoting the Petitioner, was not pretextual, whereas ALJ La Jeunesse found it was pretextual. [See Appeals Board's Order Granting Motion For Review, p. 5, Addendum B, Appellant's Brief on Appeal]("The Appeals Board concludes that the so-called disparities in treatment are attributable to the other engineers meeting the County's requirement for advancement and other legitimate reasons that are not related to Mr. Tarkeshian's national origin.")]. [Compare ALJ La Jenusse's Findings of Fact,

Conclusions of Law, And Order, p. 12, Addendum A, Appellant's Brief on Appeal) ("The exceptions articulated by Salt Lake County in promoting white, non-Arabic, non-Persian engineers merely served as pretexts to mask a subtle discrimination against Mr. Tarkeshian in violation of Utah Code § 34A-5-106."").

Contrary to Salt Lake County's assertion, Brief of Appellee, p. 22, the establishment, or not, of the prima facie case is a question of law. Sheikh v. Department of Public Safety, 904 P.2d 1103 (Ut. App. 1995). Appellee's cite to Vitron/Lika v. Labor Commission, 38 P.3d 993, 995 (Ut. App. 2001) for its assertion is inapposite and such cite, in fact, supports the legal principle cited above by the Petitioner. And, the legal conclusion given to facts surrounding pretext likewise is a question of law and an appellate court affords the lower court's conclusions of law no deference as to the legal conclusion. Pitre v. Western Elec. Co., Inc., 843 F.2d 1262 (10th Cir. 1988).

In this case, the Petitioner has marshaled all of the facts regarding Salt Lake County's disturbing irregularities in its promotional processes. Indeed, Salt Lake County does not argue on appeal that evidence bearing on these promotional irregularities have been omitted or overlooked. Therefore, to the extent the issue of pretext is factual question, the Petitioner has fully complied with his obligation.

Instead, Salt Lake County's argument (as well as Petitioner's) is over the legal conclusion regarding pretext and all of the "disturbing procedural irregularities" that were afforded non-minorities by Salt Lake County but not afforded the Petitioner, Garrett, supra, p. 1218.

III. THE LABOR COMMISSION APPEALS BOARD ERRED IN ITS LEGAL CONCLUSION THAT SALT LAKE COUNTY ADVANCED A LEGITIMATE NON-DISCRIMINATORY REASON FOR NOT PROMOTING THE PETITIONER.

The Labor Commission Appeals Board admittedly “substituted” its own judgment for that of its own ALJ on the issue of pretext. (Brief of Appellant, p. 26). In doing so, the Appeals Board did not apply any legal standard regarding pretext to the serious irregularities and merely concluded that the “County could have done a better job of conforming its written policies to its actual practices....” (Record, p. 498).

On Appeal, Salt Lake County does not dispute that the Appeals Board should have applied the legal standards as set forth in Point One, Subpart B, of Petitioner’s opening Brief on Appeal. (Brief of Appellee, p. 27). Salt Lake County agrees that disturbing serious procedural irregularities may demonstrate pretext as explained in Garrett v. Hewlett-Packard Company, *supra*; Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983); Muller v. United States Steel Corporation, 509 F.2d 923 (10th Cir. 1975); DoDoo v. Seagate Technology, Inc., 235 F.3d 522 (10th Cir. 2000); and Doebele v. Sprint/United Management Co., 342 F.3d 1117 (10th Cir. 2003). (Brief of Appellee, p. 27).

Instead, Salt Lake County denies the undisputed evidence and asserts without any rational foundation that there were “no irregularities in [the seven employee’s] promotions.” (Brief of Appellee, p. 27). This argument ignores the findings of ALJ La Jeuness as well as the Appeals Board. Even the Appeals Board found that Salt Lake County allowed the *practice* of substituting a surveyor’s license for that of the EQE, EIT

or FE,⁸ allowed the *practice* of advancing admittedly non-qualified engineers on the basis they had supervisory experience, and allowed the *practice* of finding exceptions for grandfathering and temporary employees. One may review the CPMA and the County's own written career ladder policies, and determine these *practices* violated the law and should be characterized as "serious disturbing procedural irregularities." Garrett, *supra*.

Salt Lake County attempts to assail the Petitioner's point that he was the only person in his department that was *not* promoted during his 27 years by asserting there is no evidence in the record to support this point.⁹ (Appellee's Brief, p. 26). Salt Lake County is incorrect. Not only did the Petitioner testify as to this fact, Transcript, p. 95, this fact was undisputed at the hearing before ALJ La Jeunesse. Indeed, ALJ La Jeunesse referenced this fact when he found, "Salt Lake County always seemed able to find an exception to the rules that bound Mr. Tarkeshian to any entry level position in order to promote everyone but Mr. Tarkeshian. (Findings of Fact, Conclusions of Law, and Order, p. 10; Brief of Appellant, Addendum A).

The Appeals Board did not follow the correct legal standard regarding pretext and, in fact, used no legal standard regarding pretext. It's flawed conclusion regarding pretext should be rejected on appeal. The Petitioner was left in his entry level position

⁸ Salt Lake County attempts to attack the fact that Petitioner remained in an entry level position for over 27 years by suggesting he never took the EQE, EIT or FE exams. As pointed out under Facts, above, this is a misdirection by Salt Lake County as the undisputed evidence was that it was required to automatically advance its own employees once the minimum qualifications were met and it was Salt Lake County who decided if the minimum qualifications were met. Moreover, Salt Lake County may not insist that the Petitioner take the exams that it exempted from the other engineers based upon a variety of excuses and exceptions.

⁹ Salt Lake County attempts to marginalize this evidence by only admitting that the Petitioner was left in an entry level position for over 27 years while advancing the other seven employees identified in the record. (Brief of Appellees, p. 27).

for over 27 years while Salt Lake County always found some excuse to advance its white, non-Arabic, engineers. *None* of the seven white, non-Arabic, engineers who were advanced, even held an engineering degree whereas the Petitioner held a B.S. Degree in Civil Engineering, a Bachelor's Degree in mathematics, and a Diploma in Industrial Drafting. When it comes to pretext in the promotional process, "It is sufficient that the employer's conduct produced discriminatory results." Muller v. United States Steel Corporation, 509 F.2d 923, 927 (10th Cir. 1975).


ERRATA NOTICE

Appellant's Brief on Appeal, Addendum D (Policy 5100), Addendum E (Policy 5200), and Addendum F (Policy 5400) were copied from the Record, R. 518-533, and apparently those documents were one-sided copies in the Record. This error was not discovered until the Appellant was preparing his Reply Brief. These polices are now attached with all pages as Addenda D, E, and F to this Reply Brief. Appellant's counsel discussed this error with Appellee's counsel and Appellee has no objection to this procedure.

CONCLUSION AND RELIEF SOUGHT.

The decision of the Appeals Board should be reversed and the decision of ALJ La Jeunesse reinstated. The Petitioner also respectfully urges the Court to award the Petitioner a reasonable attorney's fee and costs to be determined appropriately on remand.

Dated this 15 day of April, 2005.



STEPHEN W. COOK
Attorney For Appellant/Petitioner.

ADDENDUM D: POLICY 5100

SALT LAKE COUNTY PERSONNEL POLICY & PROCEDURE

EMPLOYMENT STATUS

REFERENCE

County Personnel Management Act, Utah Code Annotated 17-33-8
County Personnel Management Act, Utah Code Annotated 17-33-5,
 (3) (h)
Personnel Policy & Procedure:
 Pay Practices
 Overtime & Compensatory Practices
Revised Ordinance Salt Lake County 1-5-12
Revised Ordinance Salt Lake County January 17, 1980

PURPOSE

To define and provide uniform and consistent employment practices used in Salt Lake County Government.

SUBJECTS COVERED IN THIS POLICY

- Exempt Employment
- Full-Time Merit
- Hiring Status
- Part-Time Merit Employment with County Benefits
- Part-Time Merit Employment without County Benefits
- Probationary

DEFINITIONS

CLERICAL OPEN RECRUITMENT REGISTER: An open recruitment register (definition below) which is used to fill specific clerical merit positions such as Office Specialist or Secretary.

COUNTY BENEFITS: All benefits in addition to FICA, Unemployment Insurance, Workers Compensation and retirement.

EMPLOYMENT STATUS: The assignment of an employee to one of eleven employment categories, i.e. regular, merit probation, provisional, temporary, part-time merit employment with County benefits, part-time merit employment without County benefits, intern, reserve deputies, appointed, federal man-power, and elected.

EXEMPT EMPLOYEE: Elected members of the governing body, other elected officials, major department heads appointed by the governing body or by a board established by the governing body or

any other employee not covered under the merit system provisions of the County Personnel Management Act. Exempt employees include provisionals, temporaries, interns, reserve deputies, appointed positions, federal program employees, and elected officials.

MERIT EMPLOYEE: An employee who has satisfactorily completed a merit probation period with Salt Lake County and is therefore entitled to all merit system benefits appropriate to hours worked.

NEW HIRE MERIT EMPLOYEE: One who has been selected from a merit register.

PAYROLL UNIT: An organization (Division, Department or Elected Office) or sub-unit of an organization identified by a four-digit organizational code.

PROBATIONARY PERIOD: A six (6) month probationary period that must be satisfactorily completed by a new merit system employee, i.e. one who has been selected from a merit register or a rehired merit employee, prior to obtaining regular status. The probationary period may be extended for up to an additional six (6) months for good cause.

PROMOTION: Change in the classification level of a merit employee to one having a higher entrance/starting grade level.

REHIRE: The re-employment of a former County merit employee without competition.

REINSTATEMENT: Refers to the mandatory rehire of a former County merit employee who (a) has been reduced-in-force within the last six months; or (b) is a veteran eligible under the Vietnam Era Veteran's Readjustment Assistance Act of 1974; or (c) has been reinstated as a result of Career Service Council or subsequent court action.

PROCEDURE

1.0 Probationary (Status 03)

- 1.1 Status as a merit employee shall be conditional upon the satisfactory completion of a merit probationary period. Merit probationary employees may be terminated at any time for unsatisfactory performance including inappropriate or unprofessional behavior.
- 1.2 The merit probationary period is the first six months of employment following the hire date of an employee who has been certified from a merit employment register.
 - 1.2.1 Merit probation is required of:
 - 1.2.1.1 all new hire merit employees;
 - 1.2.1.2 rehired merit employees;
 - 1.2.1.3 employees transferring from merit exempt positions to merit covered positions who

- are eligible for rehire due to previous merit status but who have a break in County service between the merit and exempt appointments;
- 1.2.1.4 employees transferring from other merit systems who have not completed an original merit probation with Salt Lake County unless being transferred with an entire program or service;
- 1.2.1.5 employees reinstated from the RIF retention register who do not return to the same classification in the same payroll unit from which they were terminated.
- 1.3 The merit probationary period may be extended for up to an additional six months for good cause.
 - 1.3.1 Any extension to the merit probationary period shall be communicated in writing to the employee prior to the completion of the original probation period, with a copy forwarded to the Personnel Division.
 - 1.3.2 Individuals who have been placed on extended merit probation over three months shall be given performance evaluations at least every three months. Individuals on extended merit probations of three months or less, shall be given at least one performance evaluation near the end of the extended period.
 - 1.3.2.1 In all cases, evaluations should be given prior to the end of the extended merit probationary period.
 - 1.3.3 Employees who have been placed on an approved extended merit probationary period shall not be entitled to benefits which are contingent upon merit employment status except:
 - 1.3.3.1 The right to appeal to the Career Service Council in cases of discrimination or concerning undue prolongation of the probation period .
- 1.4 Probationary employees shall be evaluated prior to completion of their six month merit probationary period.
- 1.5 Prior to completion of the probationary period, the hiring authority shall initiate a Personnel Action Form (CP4), as soon as practical following the performance evaluation that will either terminate the employee or extend their merit probationary period.
- 1.6 A CP4 is not required for employees who successfully complete the merit probation or approved extended merit probation period. Such employees shall be considered to have acquired merit status.
- 1.7 **Promotions** - The serving of a merit probationary period shall not prevent a probationary employee from being promoted to a position of a higher classification,

provided the employee is certified from a merit employment register or is eligible for rehire into the position. The Administrator may allow the newly hired employee to serve the original probation period or begin a new one with the effective the date of the promotion.

1.7.1 Probationary employees may be reclassified to a higher grade or salary as a result of market analysis.

1.8 **Termination** - An employee may be terminated at any time during the probationary period without right of appeal, hearing or progressive discipline except in cases of alleged discrimination. Notice of dismissal and date of termination shall be submitted by letter to the employee. A copy of the letter and the CP4 must be submitted to the Personnel Division.

1.8.1 A person terminated during their merit probation period shall not be reinstated on a merit employment register without competition and certification, unless waived by the Personnel Division Director.

1.8.2 Employees in good standing who terminate or are terminated while on probation or extended probation shall be eligible for rehire into the same classification without competition and certification through the Personnel Division.

1.8.3 Individuals who have satisfactorily completed merit probation or an extended merit probation and who terminate employment with Salt Lake County in good standing, are eligible for rehire into any County position for which they qualify without competition.

2.0 Full-Time Merit Employment (Status 02)

2.1 Full-time merit employees work an average of 40 hours per week.

2.2 Full-time merit employees receive all County benefits.

2.3 The number of hours worked per week may not be permanently changed without position reallocation from the Personnel Division and a Personnel Action Form (CP4) changing the status.

2.4 Full-time merit status employees are eligible for reclassification, promotion and transfer.

2.5 Full-time merit employees shall be paid on a salaried basis.

2.6 Full-time merit employment follows the completion of the original or extended probationary period. No employee can be placed in a full-time merit employment status until they have completed an original probationary period.

2.7 Individuals who have satisfactorily completed merit probation or an extended merit probation and who terminate employment with Salt Lake County in good standing, are eligible for rehire into any County position for which they qualify without competition.

- 3.0 Part-Time Merit Employment With County Benefits (Status 08)
 - 3.1 For record keeping purposes, the status of part-time merit with County benefits employees will always remain 08 - even during the original merit probationary period.
 - 3.2 Part-time merit employees with County benefits shall work at least an average of twenty hours per week but less than forty.
 - 3.3 Part-time merit employees with County benefits receive most benefits pro-rated to the number of hours worked except that they may be required to pay a different percentage of costs for fixed benefits such as insurance.
 - 3.4 After completion of the original probationary period, part-time merit employees with County benefits may be reclassified, promoted or transferred.
 - 3.4.1 Part-time merit employees with County benefits serving a probationary period may be reclassified to higher grade or salary as a result of a market analysis.
 - 3.5 The number of hours worked per week may be changed at any time. If adjusted to less than an average of twenty hours per week, more than thirty hours per week, or to forty hours per week, during a calendar year, a status change shall be submitted on a Personnel Action Form (CP4).
 - 3.6 Part-time merit employees with County benefits shall be paid on an hourly basis.
 - 3.7 Individuals who have satisfactorily completed merit probation or an extended merit probation and who terminate employment with Salt Lake County in good standing, are eligible for rehire into any County position for which they qualify without competition.
- 4.0 Part-Time Merit Employment Without County Benefits (Status 09)
 - 4.1 For record keeping purposes, the status of part-time merit employees without County benefits will always remain 09 - even during the original merit probationary period.
 - 4.2 Part-time merit employees without County benefits shall work less than an average of twenty hours per week.
 - 4.3 Part-time merit employees without benefits do not receive any County benefits.
 - 4.4 After completion of the original probationary period, part-time merit employees without County benefits may be reclassified, promoted or transferred.
 - 4.5 The number of hours worked per week may be changed at any time. If permanently adjusted to more than an average of twenty hours per week, more than thirty hours per week, or to forty hours per week, during a calendar year, a status change shall be submitted on a Personnel Action Form (CP4).
 - 4.6 Part-time merit employees without benefits shall be paid on an hourly basis.
- 5.0 Exempt Employment Status
 - 5.1 For payroll purposes there are seven specific categories of exempt employees - **04**, Provisional; **05**, Temporary; **93**,

Interns; 94 Reserve Deputy; 95, Appointed; 96 Federal Program (or related); 97 Elected Officials.

5.2 **Status 04 - Provisional Appointments**

5.2.1 The Personnel Division shall review and approve all requests for provisional appointments.

5.2.2 A provisional appointment cannot be made until a position has been allocated, classified, had minimum qualifications established and a Request For Eligible Form (CP2) has been submitted to the Personnel Division.

5.2.3 Administrators may request that an individual be considered for provisional employment if:

5.2.3.1 there are urgent reasons for filling the position and the Personnel Division is unable to make satisfactory certification from a register; or

5.2.3.2 individuals who are eligible for reassignment, rehire, reinstatement, reclassification or promotion are deemed inappropriate for the position.

* { 5.2.4 After the Personnel Division certifies that an individual meets the minimum qualifications of a position, the person may be provisionally appointed to fill the existing vacancy until an employment register is established.

5.2.5 Provisional appointments shall not be continued beyond 30 calendar days after the establishment of an employment register or beyond the length of a probationary period, whichever comes first.

5.2.6 The recruitment process shall proceed as quickly as possible.

5.2.7 A position shall not be filled by repeated provisional appointments.

5.2.8 Time spent in the position as a provisional employee shall be credited towards the merit probationary period.

5.2.9 Provisional employees accumulate vacation and sick leave, receive holiday pay and are eligible for retirement and insurance benefits commensurate with the number of hours worked.

5.3 Temporary Appointments (Status 05)

5.3.1 A temporary appointment may not be made until a description of duties has been submitted to the Personnel Division who will assign an appropriate grade and pay range. If a current position description already exists, the grade and pay range previously established will be used.

5.3.2 The hiring authority may directly hire a temporary employee with the exception of a position which is covered by the CLERICAL open recruitment registers. These employees shall be hired in the manner described in Personnel Policy and Procedure - Filling County Job Vacancies and may be transitioned to probationary status in the **same** position for which they were hired as a temporary.

- 5.3.3 Under no circumstances shall a temporary employee work more than 1,040 hours per calendar year.
- 5.3.4 Temporary employees shall be paid on an hourly basis and within the pay range of the grade established by the Personnel Division for the position and approved by the Board of County Commissioners.
 - 5.3.4.1 In order to pay a temporary above the established grade range, the Administrator must prepare a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division.
- 5.3.5 The time spent in a temporary appointment shall not be considered part of the merit probationary period.
- 5.3.6 Temporary employees are not eligible for County benefits.
- 5.3.7 Temporary employees are not considered merit employees, they are "at will" employees who may be terminated for any reason, without notice and without a pre-termination hearing.
- 5.3.8 Temporary appointments are subject to the overtime provisions of the Fair Labor Standards Act. Overtime hours for all temporary employees are accrued at one and a half time the hours worked and shall be paid in cash.
- 5.3.9 Overtime hours shall be counted towards the 1,040 hours permitted in any calendar year.
- 5.4 Interns (Status 93)
 - 5.4.1 Student interns are hired in this status.
 - 5.4.2 When the hiring authority wishes to hire an intern, they shall provide the Personnel Division with a letter from the college, university or other training institution verifying the individual's enrollment and the relevancy of the work experience to the student's education. The hiring authority will ensure that the intern will receive competent supervision from County employees for the period of the internship.
 - 5.4.3 The internship shall not be used as a means to replace or eliminate full-time merit employees.
 - 5.4.4 The appropriate stipend for each appointment shall be determined in consultation with the Personnel Division, with final approval from the Board of County Commissioners.
 - 5.4.5 Interns are not eligible for any County benefits.
- 5.5 Reserve Deputy (Status 94)
 - 5.5.1 Reserve Deputies are hired in this status.
 - 5.5.2 Reserve Deputies are not eligible for any County benefits.
- 5.6 Appointed (Status 95)
 - 5.6.1 Appointments made by Elected Officials to fill exempt Chief Deputy, Administrative Assistant to the County Commissioners, Confidential Secretary

positions, and exempt Administrators, are hired in this status if one is assigned by the Board of County Commissioners.

- 5.6.2 Appointments made by Elected Officials to fill confidential and/or key policy-determining positions are also hired in this status. All positions designated as being exempt under this subparagraph shall be listed by job title and department, office or agency. Any change in exempt status shall constitute an amendment to this policy and procedure.

5.6.2.1 The following positions are exempt under the provisions of sub paragraph 5.6.2:

- *Community Information Director - County Commission.
- *Commission Office Assistant - County Commission
- *Deputy Fire Chief - Fire Division.
- *Fire Chief - Fire Division.
- *Intergovernmental Relations Manager - Commission Staff.
- *Law Clerk Bailiff-Sheriff's Office
- *Personnel Division Director - Department of Community & Support Services

- 5.6.3 Appointed positions receive comparable benefits as merit employees except as listed below.

5.6.3.1 They do not accrue vacation and sick leave.

5.6.3.2 They cannot be promoted or transferred to a merit position unless certified from a merit system register.

5.6.3.3 They cannot be promoted or transferred to a merit position unless they previously encumbered a merit position.

5.6.3.4 They do not receive a County preference adjustment when competing in merit registers.

5.6.3.5 They do not have the right of appeal or hearing, except in cases of alleged discrimination.

- 5.6.4 Salary ranges for exempt appointments are set by the Personnel Division subject to the approval of the Board of County Commissioners.

- 5.6.5 If certified and hired for a merit position, individuals shall carry all benefits accrued and retain their original service date (adjusted for interrupted County service) and at the option of the hiring authority, may be transferred at the same salary - not to exceed the pay range maximum.

- 5.6.6 All appointed employees who are hired into merit positions shall be required to serve an original probationary period.

- 5.6.7 Merit employees who have accepted an appointment to an appointed position and are not retained by the appointing officer shall:

- 5.6.7.1 be appointed to any Career Service position for which they qualify in a pay grade comparable to their last position in Career Service provided an opening exists; or
 - 5.6.7.2 be appointed to a lesser Career Service position for which they qualify pending the opening of a position described in 5.6.6.1.
- 5.6.8 Full-time merit employees who transfer to an appointed position and transfer back to a merit position, with no break in service, are not required to serve another merit probationary period.
- 5.6.9 When creating an appointed position, the following procedure shall be followed:
 - 5.6.9.1 the Administrator shall make a written request to the Personnel Division Director for the change of status of a specific position, and shall provide the Personnel Division Director with a written job description and proposed justification of the change.
 - 5.6.9.1.1 The Personnel Division Director may also initiate a request concerning a change in the exempt or non-exempt status of any position within Salt Lake County Government.
- 5.6.10 The Personnel Division Director shall review the request to determine if the change of status requirements of the County Personnel Management Act are met. The Personnel Division Director shall prepare written findings of fact and a recommendation which shall be forwarded to the Career Service Council and the requesting party.
- 5.6.11 The Career Service Council shall review the Personnel Division Director's findings of fact and decision and will conduct a public hearing to rule on the change of status request. The Council shall schedule a public hearing within 10 days of receipt of the request to solicit input regarding the proposed change. Notice of the public hearing shall be circulated in the same manner as County job announcements. Such notice shall include the source and proposed justification of the request.
- 5.6.12 The Career Service Council shall prepare written findings of fact and a final decision regarding the request for change in status which shall be forwarded to the governing body, the Personnel Division Director and the requesting Administrator.
- 5.7 Federal Manpower Program or Related (Status 96)
 - 5.7.1 Applies to individuals hired through the Federal Manpower Training or similar programs.
 - 5.7.2 Employees may be salaried or hourly.
 - 5.7.3 Employees in this status are eligible for all County benefits except 1) the Tuition Assistance Program; and 2) they cannot be transferred or

promoted to a merit position unless they were certified on a merit system register by the Personnel Division. In lieu of the County's preference adjustment on merit registers, employees in this status, who meet the minimum qualifications, shall receive double credit for their related county experience in the program (6 months = 12 months experience) when applying and competing on a merit register.

- 5.7.4 If certified and hired for a merit position, individuals shall carry all benefits accrued and retain their original service date (adjusted for interrupted County service) and at the option of the hiring authority, may be transferred at the same salary - not to exceed the pay range maximum.
- 5.8 Elected Officials (Status 97)
 - 5.8.1 Includes County Commissioners, Assessor, County Attorney, District Attorney, Auditor, Clerk, Recorder, Sheriff, Surveyor, and Treasurer.
 - 5.8.2 Salaries are set by the governing body.
 - 5.8.3 Elected officials receive comparable County benefits.
 - 5.8.4 Elected officials may move to a merit position only after successfully competing and being certified by the Personnel Division.
 - 5.8.5 If certified and hired for a merit position, individuals shall carry all benefits accrued and retain their original service date (adjusted for interrupted County service) and at the option of the hiring authority, may be transferred at the same salary - not to exceed the pay range maximum.
 - 5.8.6 Elected officials who are hired into merit positions shall be required to serve an original probationary period.
 - 5.8.7 Full-time merit employees who transfer to an Elected Office and transfer back to a merit position, with no break in service, are not required to serve another merit probationary period.
 - 5.8.8 Merit employees who are elected to office and are not re-elected shall:
 - 5.8.8.1 be appointed to any merit position for which they qualify in a pay grade comparable to their last merit position provided an opening exists; or
 - 5.8.8.2 be appointed to a lesser merit position for which they qualify pending the opening of a position described above.

5100

APPROVED AND PASSED THIS 21 OF August, 1996

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

By: Mary A. Callaghan
~~Brent Overton~~, Chairman *pro tem*

ATTEST:

Sherri Swensen
Sherri Swensen
Salt Lake County Clerk

APPROVED AS TO FORM:
Salt Lake County Attorney's Office

By: Gavin Anderson
Date: 8 Aug 96

ADDENDUM E: POLICY 5200

SALT LAKE COUNTY PERSONNEL POLICY & PROCEDURE ALLOCATION AND CLASSIFICATION OF MERIT POSITIONS

REFERENCE

County Personnel Management Act, Utah Code Annotated, 17-33

Personnel Policy & Procedure:

General Definitions

Pay Practices

Reduction-in-Force Separations

PURPOSE

To establish procedures by which Salt Lake County shall monitor and control the classification and allocation of County merit positions.

POLICY

Upon approval from the Board of County Commissioners, the Personnel Division shall allocate new or additional merit positions to requesting agencies. No person shall be hired or appointed, and no merit employee shall be promoted or transferred to any position, until it has been approved, classified and allocated.

PROCEDURE

- 1.0 Administrators shall submit, in writing, to the Board of County Commissioners through Personnel, requests for reclassifications, new or additional allocations, to transfer an allocation from one payroll unit to another or to abolish an allocation. Upon approval, the Board of County Commissioners shall authorize the Personnel Division to allocate, transfer or abolish the allocation(s) as appropriate.
 - 1.1 The effective date for new, additional, reclassified or transferred allocations shall be the beginning of the first pay period following receipt of the agency request and/or the new position description in the Personnel Office.
- 2.0 An allocation shall not be classified or reclassified unless the Personnel Division has received a new position description or has an existing position description or class specification

on file.

- 2.1 The position description, at a minimum, shall include the critical or essential objectives and tasks of the position. The class specification should reflect the general types of duties and responsibilities performed by employees in the occupational group.
 - 2.2 Supervisors shall be held accountable for the accuracy of position descriptions and for notifying the Personnel Division of significant and substantive changes in duties and responsibilities consistent with the procedures described in this policy.
 - 2.3 Supervisors shall prepare position descriptions in the approved standard format and submit them to the Personnel Division after ensuring they are signed and approved by the parties identified on the position description form.
 - 2.4 The Personnel Division shall maintain a file of position descriptions or class specifications for each Agency.
- 3.0 The Personnel Division shall prepare a letter to notify the Administrators and incumbents of the allocation change to include the effective date, the job code, FLSA status, title, grade, and full time equivalency (FTE).
- 4.0 Minimum qualifications for County positions shall be set by the Personnel Division.
- 4.1 If the incumbent in a reclassified position does not meet the new minimum qualifications as established by personnel, and is not required to do so by law, he or she shall be grandfathered into the reclassified position.
 - 4.2 If the incumbent in a reclassified position does not meet the new minimum qualifications and is required to do so by law, grandfathering shall be prohibited and the following procedures shall apply:
 - 4.2.1 Probationary employees will be terminated in good standing.
 - 4.2.2 Merit employees may be transferred, reassigned, or promoted to another position in accordance with Personnel Policy and Procedure: Pay Practices; OR
 - 4.2.3 The employee may be terminated in accordance with Personnel Policy and Procedure: Reduction-in-Force Separations.
- 5.0 An official record of Salt Lake County allocations shall be maintained by the Personnel Division.

5200

SALT LAKE COUNTY PERSONNEL POLICY & PROCEDURE
ALLOCATION AND CLASSIFICATION OF MERIT POSITIONS

APPROVED AND ADOPTED this _____ day of DEC 15 1997, 1997.

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

By: Mary Callaghan
MARY CALLAGHAN, Chair

ATTEST:

Sherrie Swensen
SHERRIE SWENSEN,
Salt Lake County Clerk

Commissioner Callaghan voted aye
Commissioner Horiuchi voted aye
Commissioner Overson voted aye

APPROVED AS TO FORM
Salt Lake County Attorney's Office
Burtin-Hee
Dep. Atty. Gen.
7/14/97

ADDENDUM F: POLICY 5400

SALT LAKE COUNTY PERSONNEL POLICY AND PROCEDURE
PAY PRACTICES

REFERENCE

* [Personnel Policy & Procedure Filling County Job Vacancies
 General Definitions

Utah Code Annotated, County Personnel Management Act, 17-33-5
Uniformed Services Employment & Reemployment Rights Act, 1994,
38 U.S.C , 4301-4333

PURPOSE

To identify and provide for the consistent application of pay adjustments resulting from the execution of a personnel policy, procedure, practice or action.

THE PERSONNEL DIVISION DIRECTOR AND THE BOARD OF COUNTY COMMISSIONERS WILL NOT BE BOUND BY PROMISES OR COMMITMENTS MADE TO EMPLOYEES OR PROSPECTIVE EMPLOYEES REGARDING PAY, UNLESS THE PROVISIONS OF THIS POLICY ARE FOLLOWED.

PROCEDURE

- 1.0 All salary increase requests, in excess of 10%, will be reviewed for approval by the Personnel Division Director and must be justified in writing. For those requests that exceed the mid-point of the salary range more extensive justification and prior written approval of the Personnel Division Director will be required. In all instances, the administrator shall pay particular attention to the impact the proposed salary will have on existing employees. Additional areas that must be addressed in any letter of justification are listed below.
 - 1.1 Relatedness of education and experience, including licenses, certifications, etc.;
 - 1.2 An overall evaluation of the applicants qualifications compared to other applicants OR to existing County employees within the agency or Division payroll unit;
 - 1.3 Market conditions - supply and demand of the labor market;
 - 1.4 Impact of not hiring, promoting or transferring this employee or applicant at the requested salary.

2.0 ACTING-IN-POSITION

- 2.1 A merit employee may be temporarily assigned to perform the critical or essential objectives and tasks of an unoccupied, allocated, higher grade position. An individual may be placed in an acting capacity without regard to minimum qualifications.
- 2.2 Acting-in-Position assignments are generally made for any period up to six (6) months in length. However, special or unusual circumstances may require that the Acting-in-Position assignment be extended upon approval of a written request to the Board of County Commissioners through the Personnel Division Director.
 - 2.2.1 A Personnel Action Form (CP4) must be prepared to place a merit employee in an Acting-in-Position capacity. The Personnel Action Form (CP4) must include the effective date of the action and the title of the position that is being filled. The employee's job code and grade should not be changed.
 - 2.2.2 Acting-in-Position assignments may be made retroactively for a period not to exceed thirty (30) days.
- 2.3 A merit employee who has been assigned to temporarily perform the essential or critical objectives and tasks of an unoccupied, allocated, higher grade position may be granted a salary increase of 0% through 10% or the minimum of the acting-in grade.
 - 2.3.1 If the Acting-in-Position assignment is for less than thirty (30) days, no salary adjustment is required.
 - 2.3.2 If the Acting-in-Position assignment will last for more than thirty (30) days:
 - 2.3.2.1 The employee may be granted a salary adjustment upon the effective date of the original Personnel Action Form (CP4).
 - 2.3.2.2 An employee who is Acting-in-Position shall have the base salary adjusted to reflect any salary plan adjustments and pay for performance increases that are made during the Acting-in-Position assignment.
 - 2.3.2.3 Upon the completion of the Acting-in-Position assignment the employee's salary shall be adjusted to his/her base rate plus any increases received during the Acting-in-Position

assignment.

- 2.4 While Acting-in-Position the employee may be permanently promoted following applicable Salt Lake County Personnel Policies and Procedures

3.0 CAREER LADDER

- 3.1 Salt Lake County establishes career ladders to provide career development opportunities for employees

- 3.1.1 A career ladder will typically consist of two or more grades constituting the entry and working level or the entry, working and senior level. All levels are identified by the same title and job code. However, each level has distinguishing duties, responsibilities and characteristics. Advancement through the levels is dependent upon meeting the established career ladder advancement criteria. The position is classified at the highest level and the career development\training levels are established below.

- 3.2 Career ladders are subject to the approval of the Personnel Division Director. Administrators wishing to develop career ladders should follow the regular position description review process as outlined in Salt Lake County Personnel Policy and Procedure, Allocation and Classification of Merit Positions. The Administrator must request that the position submitted for classification or reclassification be assigned to a career ladder. Administrators must clearly define the differences between each level of the career ladder before the structure is implemented. In addition, they must develop and submit written criteria for advancement to the next level in the career ladder.

- 3.2.1 Advancement through the career ladder is primarily dependent upon satisfactorily performing the duties of and meeting the advancement criteria of the next higher level. Advancement criteria shall be applied uniformly to all employees in the particular career ladder.

- 3.3 A merit employee who has met or exceeded the established advancement criteria for the career ladder plus demonstrated the ability to perform the duties of the next highest level of the career ladder must be advanced.

- 3.4 A merit employee who has received a career ladder advancement must have his/her pay adjusted to at least the new pay range minimum.

- 3.4.1 Pay adjustments above the pay range minimum may

be made as follows:

3.4.1.1 A career ladder advancement with a pay adjustment of 0% through 10% may be initiated by completing a Notice of Personnel Action Form (CP-4).

3.4.1.2 A career ladder advancement with a pay adjustment of more than 10% may be initiated by completing a Notice of Personnel Action Form (CP-4). In addition to the Notice of Personnel Action Form (CP4), the elected office or division must prepare and attach a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division Director.

3.5 Employees eligible for career ladder advancement while in an "Acting in Position" shall be adjusted without regard to their current "Acting in Position" assignment.

4.0 DEMOTION

4.1 The salary of a merit employee who has been demoted may be reduced. The salary of the demoted employee shall not exceed the new pay range maximum.

5.0 PAY ADJUSTMENTS

5.1 An Administrator may request a Pay Adjustment for an employee to correct a situation of unfairness.

5.2 All pay adjustment requests shall be submitted in writing to the Personnel Division through the agency in which the employee works. Administrators shall forward all requests to the Personnel Division, irrespective of the nature of the request.

5.3 Upon approval of the pay adjustment request, the Administrator shall submit the Notice of Personnel Action (CP-4). The Personnel Division shall forward to the Board of County Commissioners the letter of justification initially submitted by the agency.

5.4 All pay adjustments are at the sole discretion of the Board of County Commissioners and must be approved through the Personnel Division Director.

5.5 Pay adjustments do not affect an employee's eligibility for promotion, reclassification, pay for performance or other personnel actions.

6.0 NEW HIRE MERIT EMPLOYEE

- 6.1 A new hire merit employee may be hired 0% through 10%, above the pay range minimum by completing a Notice of Personnel Action Form (CP-4).
- 6.2 A new hire merit employee may be hired more than 10% above the pay range minimum by completing a Notice of Personnel Action Form (CP-4). In addition, the Administrator must prepare a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division Director.

7.0 PROMOTION

- 7.1 All merit employees may be promoted into higher grade positions for which they meet the minimum education and experience requirements and are certified as eligible by the Personnel Division.
 - 7.1.1 Probationary employees may not be promoted unless they have been certified from a merit register developed for the higher grade position. These employees will be required to serve a new merit probationary period.
- 7.2 A merit employee who has been promoted must have the pay adjusted to at least the new pay range minimum.
 - 7.2.1 Pay adjustments above the pay range minimum may be made as follows:
 - 7.2.1.1 A promotion with a pay adjustment of 0% through 10% may be initiated by completing a Notice of Personnel Action Form (CP-4).
 - 7.2.1.2 A promotion with a pay adjustment of more than 10% may be initiated by completing a Notice of Personnel Action Form (CP-4). In addition, the Administrator must prepare a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division Director.

8.0 REASSIGNMENT

- 8.1 An employee may be reassigned on a temporary or permanent basis for the purposes of improved administrative practices, reorganization or for any other non-disciplinary reason. A reassignment may require a Personnel Action Form (CP4) if there is a change in grade or job code.
- 8.2 An employee may be eligible for a pay adjustment due to

reassignment.

- 8.3 A new position description, reflecting the reassigned duties and responsibilities shall be prepared and submitted to the Personnel Division.

9.0 RECLASSIFICATION

- 9.1 The Personnel Division shall review position descriptions upon the request from an administrator.

9.1.1 The effective date of the reclassification action shall be the beginning of the first pay period following receipt of the position description in the Personnel Office.

- 9.2 A reclassification may involve a salary increase at the Administrator's discretion.

10.0 REDLINED

- 10.1 An employee may not be paid at a rate that exceeds the pay range maximum of their classification unless the redlined rate is approved by the Commission.

10.2 Temporary redlining of a salary may be authorized for acting-in conditions or shift differential pay when approved by the Administrator through Personnel and the Commission.

11.0 REHIRE *

- 11.1 Terminated employees who have successfully completed a probationary period are eligible for rehire, without competition, into any vacant position for which they meet the minimum qualifications. All rehired employees must serve a new probationary period. The decision to rehire a previous merit employee shall always be at the option of the Administrator, subject to the approval of the Board of County Commissioners through the Personnel Division.

11.1.1 A County employee who terminated, after completing a probationary period, may directly approach any Administrator for consideration for job openings; or conversely, an Administrator may approach any former merit employee to determine their interest in a job opening they are expecting to fill.

11.1.2 If an Administrator is considering rehiring a former merit employee, he/she must notify the Personnel Division of their intention and request certification of the individual's eligibility.

11.1.3 A representative of the Personnel Division shall

review the request for certification and determine the individuals eligibility for rehire by verifying that the individual

11.1.3.1 completed a County probationary period,

11.1.3.2 left the County in good standing (was not terminated for cause);

11.1.3.3 meets the current minimum job qualifications required for entry to the available position

11.1.4 The Personnel Division shall notify the requesting Administrator of the individuals eligibility for rehire.

11.1.5 If not certified as eligible for rehire by the Personnel Division, the Administrator shall inform the individual, in writing, of the decision.

11.2 A former merit employee may be rehired 0% through 10%, above the pay range minimum by completing a Notice of Personnel Action Form (CP-4).

11.3 A former merit employee may be rehired more than 10% above the pay range minimum by completing a Notice of Personnel Action Form (CP-4). In addition, the Administrator must prepare a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division Director.

11.4 A rehired employee shall have his/her service date adjusted to reflect all previous merit employment with Salt Lake County. The adjusted service date will be used for the purpose of determining vacation accrual, awarding employee service awards, employee service certificates and reduction-in-force retention points.

12.0 REINSTATEMENT

12.1 Reinstatement applies to a merit employee who (a) has been reduced-in-force within the last six (6) months, or (b) is a veteran eligible under the Uniformed Services Employment and Reemployment Act, or (c) has been reinstated as a result of Career Service Council or subsequent court action

12.1.1 A merit employee who has been reinstated within six (6) months of being reduced-in-force must have his/her pay and/or benefits restored as follows:

12.1.1.1 The employee will be required to serve a merit probation period unless the employee is being hired in the same

- classification in the same payroll unit from which they were reduced-in-force.
- 12.1.1.2 A reduced-in-force employee may be hired 0% through 10%, above the pay range minimum by completing a Notice of Personnel Action Form (CP-4). This Notice of Personnel Action Form (CP4) must be signed by the Administrator.
 - 12.1.1.3 A reduced-in-force employee may be hired more than 10% above the pay range minimum by completing a Notice of Personnel Action Form (CP-4). In addition, the Administrator must prepare a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division Director.
 - 12.1.1.4 The employee shall have his/her service date adjusted to reflect all previous merit employment with Salt Lake County. The adjusted service date will be used for the purpose of determining vacation accrual, awarding employee service awards and employee service certificates and for the calculation of Reduction-in-Force retention points.
 - 12.1.1.5 Upon application, the employee's health, dental, life, retirement, etc. benefits will be restored without the required waiting period.
 - 12.1.1.6 The employee shall have his/her sick leave hours restored.
- 12.1.2 A merit employee who has left Salt Lake County employment for the purpose of entering the Armed Forces must be reemployed, as soon as possible after making application, in the position they would have occupied if they had remained on the job. This could be the same position, a superior position, an inferior position, one of like seniority, status, pay, layoff status and benefits. If the employee is reinstated they must have their pay and/or benefits restored as follows:
- 12.1.2.1 The veteran must be paid at the level they would have attained had they not

left for military service. This includes all general, cost-of-living and length of service increases.

12.1.2.2 The employee shall have his/her service date adjusted to reflect their previous merit employment plus a reasonable period between leaving county employment and entering military service, the entire period of military service and the period between release from the service and their return to work. The adjusted service date will be used for the purpose of determining vacation accrual, awarding employee service awards and employee service certificates and for the calculation of Reduction-in-Force retention points.

12.1.2.3 Upon application, the employee's health, dental, life, etc. benefits will be restored without the required waiting period.

12.1.2.4 The employee shall have his/her sick leave hours restored.

12.1.3 A merit employee who has been reinstated as a result of Career Service Council or subsequent court action must have his/her pay and/or benefits restored as directed by the Career Service Council or court.

12.1.3.1 When the county has been directed to rehire an employee who has been reinstated by Career Service Council or court action and a vacancy no longer exists, the Reduction-in-Force Policy #5720 shall be applied.

13.0 TRANSFER (County)

13.1 A merit employee may transfer from one payroll unit to another within the County subject to the approval of the Board of County Commissioners through the Personnel Division Director. When transferring between payroll units the following procedures apply:

13.1.1 The new payroll unit must request that the Personnel Division verify that the employee meets the minimum qualifications of the position.

13.1.2 The new payroll unit must contact the old payroll unit to arrange for a mutually agreeable transfer

date.

- 13.1.3 The new payroll unit must accept all of the transferring employee's accrued annual and sick leave, except that compensatory time accrued by non-exempt FLSA employees only must be cashed out by the prior payroll unit.
- 13.1.4 The new payroll unit must prepare the Personnel Action Form (CP4) to effect the transfer.
- 13.1.5 A probationary employee may transfer to another position if that position is the same classification, i.e title and grade, that they currently encumber.
- 13.1.6 A probationary employee may not transfer to positions other than those identified in 13.1.5 above unless they have competed and been certified on a merit register developed for that position.
- 13.2 A transfer may be made with a pay adjustment of 0% through 10% by completing a Notice of Personnel Action Form (CP-4).
- 13.3 A merit employee who transfers to an exempt position, with no break in service, may transfer back to a vacant, allocated, merit position, with regular status, if they meet the current minimum qualifications.

14.0 TRANSFER (Inter-Jurisdiction)

- 14.1 The Personnel Division Director may authorize the transfer of an individual, with merit system status, from another public jurisdiction.
 - 14.1.1 If the Administrator is considering the transfer of a current merit employee of another public jurisdiction he/she must notify the Personnel Division of their intention and request certification of the individual's eligibility.
 - 14.1.2 A representative of the Personnel Division shall review the request and determine the individual's eligibility for transfer by verifying that the individual:
 - 14.1.2.1 is a current merit employee of the other jurisdiction.
 - 14.1.2.2 meets the current Salt Lake County minimum qualifications required for entry to the available position.
 - 14.1.3 The Personnel Division shall notify the requesting Administrator of the individual's eligibility for transfer.

- 14.2 The transferring employee may be hired 0% through 10%, above the pay range minimum by completing a Notice of Personnel Action Form (CP-4).
 - 14.3 The transferring employee may be hired more than 10% above the pay range minimum by completing a Notice of Personnel Action Form (CP-4). In addition, the Administrator must prepare and attach a letter of justification that must be approved by the Board of County Commissioners through the Personnel Division Director
 - 14.4 When an individual transfers to the Salt Lake County merit system from another equivalent public merit system jurisdiction, as provided for under U.C.A. 17-33-3 and 17-33-5(3)(b)(xii), they will be treated as a new hire merit employee and as such will be required to serve a probationary period.
 - 14.5 The transferring employee shall have his/her service date adjusted to reflect all previous merit employment with the other equivalent public merit system jurisdiction if there has been no break in service and a formal request is made to the Personnel Office within the first six (6) months of employment.
 - 14.6 A transferring employee may take up to thirty calendar days off before reporting to work with Salt Lake County without it being considered a break in service if the transfer was arranged for before the individual left his previous job assignment or as part of the hire negotiations with Salt Lake County.
 - 14.7 The adjusted service date will be used for the purpose of determining vacation accrual and awarding employee service awards retention points and employee service certificates.
- 15.0 TRANSFER (Assimilation)
- When a program or service is transferred through assimilation to Salt Lake County government, from another public jurisdiction, the merit employee(s) of the original provider automatically become employees of the Salt Lake County merit system. As such, all their benefits are transferred to or comparable benefits are provided by Salt Lake County. All employees who transfer with the program or service shall have their service date adjusted to reflect all previous merit employment with the other public jurisdiction. The adjusted service date will be used for the purpose of determining vacation accrual, reduction-in-force, awarding employee service awards and employee service certificate.

APPROVED AND PASSED THIS 28th DAY OF April, 1999

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

By: Mary Callaghan
Mary Callaghan, Chairwoman

ATTEST:

[Signature]
Chief Deputy
Salt Lake County Clerk

APPROVED AS TO FORM:
Salt Lake County Attorney's Office

By: Kenneth F. Smith


Date: 21 April 1999

STATE OF UTAH)
)
) :SS
COUNTY OF SALT LAKE)

That he is the attorney for Petitioner/Appellant herein; and that he served the attached **APPELLANT'S BRIEF ON APPEAL** upon:

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STEPHEN W. COOK

 **KATY HOGGE**
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My Comm. Exp. 11/11/2007


NOTARY PUBLIC