

2004

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

Utah Court of Appeals

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Appeal No. 20040996
Agency Decision No. 8-00-0083

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UTAH APPELLATE COURTS
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IN THE UTAH COURT OF APPEALS

MOSTAFA (JIM) TARKESHIAN :

Petitioner, :

vs. :

UTAH LABOR COMMISSION, :

Respondent. :

Appeal No. 20040996

Agency Decision No. 8-00-0083

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STATEMENT SHOWING JURISDICTION

This Court has jurisdiction pursuant to Section 78-2a-3(2)(a) U.C.A. (1953), as amended, in that this Court has jurisdiction to review final orders and decrees resulting from formal adjudicative proceedings of state agencies. The Utah Labor Commission issued its final order in this case on October 21, 2004. (Record, p. 494).¹ The Petitioner filed his Petition For Review on November 18, 2004.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether substantial evidence existed for the Utah Labor Commission Appeals Board to conclude that Salt Lake County's proffered legitimate non-discriminatory justification for not advancing the Petitioner was non-pretextual and did not discriminate against the Petitioner based upon his national origin.

A. Standard of review. The appellate court employs an intermediate standard of review to the agency's determination and to its application of law to the facts. Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 242 (Ut. App. 1997). In doing so, it looks for an abuse of discretion in applying the law to the facts. Id., p. 243. In applying that standard, the appellate court determines whether the agency decision exceeded the bounds of reasonableness and rationality. Id.

¹ All references to the record on appeal will be "Record, p. ____". All references to the transcript included in the appeal will be "Transcript, ____".

B. Preservation of issue. The Respondent raised this issue in its Motion For Review. (Record, p. 454-467). The Petitioner also raised this issue in his Response to Respondent's Motion For Review. (Record, p. 469-481).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

Section 17-33-1 U.C.A. (1953), as amended,² requires certain counties, including Salt Lake County, to adopt merit systems under the County Personnel Management Act ("CPMA"). (Addendum C). "Merit system' means a system of personnel administration based on the principles set forth in Section 17-33-3." § 17-33-2(7). Section 17-33-3 provides:

"It is the policy of this state that each county may establish a personnel system administered in a manner that will provide for the effective implementation of the following merit principles:

- (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;
- (2) provision of equitable and adequate compensation;
- (3) training of employees as needed to assure high-quality performance;
- (4) retention of employees on the basis of the adequacy of their performance, and separation of employees whose inadequate performance cannot be corrected;
- (5) fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, or disability, and with proper regard for their privacy and constitutional rights as citizens;
- (6) provision of information to employees regarding their political rights and prohibited practices under the Hatch Act; and

² Unless otherwise indicated, all statutory references shall be to U.C.A. (1953), as amended.

- (7) provision of a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.”

The CPMA requires each county to appoint a three-member bipartisan career service council. §17-33-4. In addition, each county is required to create an office of personnel management administered by a director. §17-33-5. The director is required to recommend personnel rules for the county to adopt. The CPMA identifies the rules to be adopted in Section 17-33-5(3)(b):

“(b) The rules shall provide for:

- (i) recruiting efforts to be planned and carried out in a manner that assures open competition, with special emphasis to be placed on recruiting efforts to attract minorities, women, persons with a disability as defined by and covered under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102, or other groups that are substantially underrepresented in the county work force to help assure they will be among the candidates from whom appointments are made;
- (ii) the establishment of job related minimum requirements wherever practical, that all successful candidates shall be required to meet in order to be eligible for consideration for appointment or promotion;
- (iii) selection procedures that include consideration of the relative merit of each applicant for employment, a job related method of determining the eligibility or ineligibility of each applicant, and a valid, reliable, and objective system of ranking eligible applicants according to their qualifications and merit;

- (ix) temporary, provisional, or other noncareer service appointments, which may not be used as a way of defeating the purpose of the career service and may not exceed 90 days, with the period extendable for a period not to exceed an additional 90 days for good cause;

promotion and career ladder advancement of employees to higher level positions and assurance that all persons promoted are qualified for the position;

- (xiii) preparation, maintenance, and revision of a position classification plan for all positions in the career service, based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for, and the same schedule of pay be equitably applied to, all positions in the same class, the compensation plan, in order to maintain a high quality public work force, to take into account the responsibility and difficulty of the work, the comparative pay and benefits needed to compete in the labor market and to stay in proper alignment with other similar governmental units, and other factors; ...”

Pursuant to the CPMA, Salt Lake County adopted a merit system and corresponding career ladder positions. Pertinent to this action are three policies found in the appellate record, Policy 5100 relating to “Employment Status” (Record, p. 523)(Addendum D), Policy 5200 relating to “Allocation And Classification of Merit Positions” (Record, p. 535)(Addendum E), and Policy 5400 relating to “Pay Practices” (Record, p. 518)(Addendum F).

Under Salt Lake County’s merit system, employees do not necessarily “apply” for career ladder advancements. (Transcript, p. 161). Instead, it is the supervisor’s responsibility to recognize that an inferior employee possesses the minimum qualifications for a career ladder advancement and automatically advance the employee accordingly. (*Id.*). However, an employee may also advance by applying for a new or vacated position, if a recruitment notice is

posted by Salt Lake County's Personnel Office and the employee qualifies and is selected for the position. (Id., p. 158).

Policy 5400, Part 4.0 provides that the minimum qualifications for county positions shall be set by the county's personnel division:

- "4.0 Minimum qualifications for County positions shall be set by the Personnel Division.
- 4.01 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.
- 4.02 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."

As more described below, under Background Facts, Salt Lake County's Personnel Division established minimum career ladder qualifications for all county engineers on April 1, 1980. (Record, p. 334, Petitioner's Exhibit 3)(Addendum G). Significant to this action is the following provision:

"The purpose of this memo is to outline procedures for applying with the State of Utah Department of Transportation to take the Engineer Qualifying Examination given every December. All County Engineers assigned to the grade 24, 26, 28 career ladder must pass the EQE or the EIT to be eligible for promotion to grade 26."

On March 16, 2000, the career ladder plan was changed in three Public Works divisions: Flood Control, Engineering and Planning/Development Services. (Record, p. 364, Petitioner's Exhibit 11)(Addendum H). The minimum qualifications for moving from an Engineer 26 to 28 within the career ladder were:

- “1. The employee has worked for one year as a grade 26.
2. The employee has performed satisfactorily in the duties the year as shown by receiving a performance evaluation with a satisfactory rating.
3. The employee has received their Fundamentals of Engineering (FE) certification by the National Council of Examiners for Engineering.”³

The minimum qualifications for moving from an Engineer 28 to 30 within the career ladder were:

1. The employee has worked for one year as a grade 28.
2. The employee has performed satisfactorily in the duties during the year as shown by receiving a performance evaluation with a satisfactory rating.
3. The employee has received their Professional Engineering (PE) License in the State of Utah.”

STATEMENT OF THE CASE

Nature of the case. This action arises under Utah's Anti-Discrimination Act, §34A-5-101 et. seq. U.C.A. (1953), as amended. The Petitioner, an engineer, alleged that Respondent, Salt Lake County, failed to advance him from an entry level position in its career ladder system for over twenty-seven (27) years. Acknowledging that he did not have an EIT, EQE, FE, or PE, he claimed that other less qualified white, non-Arabic, non-Iranian/Persian engineers were advanced by the Respondent without having the same credentials he lacked. He

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

claimed discrimination on the basis of national origin. He also claimed retaliation after he received a lesser evaluation following the filing of his charge.⁴

Course of proceedings. The Petitioner filed a Charge Of Discrimination with the Utah Labor Commission on November 16, 1999. (Petitioner's Exhibit 8, Record, p. 356). An evidentiary hearing occurred on April 14, 2003, before Richard M. LaJeunesse, Administrative Law Judge, Utah Labor Commission. On October 9, 2003, ALJ LaJenunesse found in favor of the Petitioner and issued his Findings of Fact, Conclusions of Law and Order. (Record, p. 411)(Addendum A). ALJ LaJenunesse found:

"None of the six white males promoted from entry level engineers to higher grades over Mr. Tarkeshian obtained a PE license and/or qualifying results from either the EIT, EQE or FE tests as required by Salt Lake County's written policies. Salt Lake County argued exceptions applied for each promotion of the six white males who lacked a PE license and/or qualifying results from either the EIT, EQE or FE tests. The preponderance of the evidence in this case revealed that the exceptions articulated by Salt Lake County in promoting white, non-Arabic, non-Persian engineers served as pretexts to mask a subtle discrimination against Mr. Tarkeshian in violation of § 34A-5-106. It is incomprehensible that Mr. Tarkeshian who in many cases had more experience and education than those promoted over him sat in an entry level engineering position for 26 years while Salt Lake County found various and sundry exceptions to the written rules in order to promote white, non-arabic, non-Iranian/Persian males. Salt Lake County always seemed able to find an exception to the rules that bound Mr. Tarkeshian to an entry level position in order to promote everyone but Mr. Tarkeshian." (Id., p. 420).

ALJ La Jeunesse ordered Respondent Salt Lake County to immediately advance Mr. Tarkeshian to a grade 26 engineer for a specified time period and to a grade

⁴ The Petitioner abandon's this claim on appeal in order to focus entirely on his main claim of discrimination.

28 engineer effective April 16, 2000. (*Id.*, p. 422). He also ordered Respondent County to reimburse him in the form of backpay for the difference in pay he actually received from what he should have received. On October 30, 2003, ALJ La Jeunesse issued a Supplement Order awarding Mr. Tarkeshian attorney's fees and costs. (Record, p. 449).

Disposition below. Salt Lake County filed a Motion For Review on November 6, 2003. (Record, p. 452). Nearly a year later, on October 21, 2004, the Utah Labor Commission Appeals Board "substitute[d] its judgment" for that of ALJ La Jeunesse, and dismissed the Plaintiff's action. (Record, p. 494)(Addendum B). The Appeals Board found that the Petitioner had established his prima facie case of discrimination using the burden-shifting analysis imposed by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (*Id.*, p. 498). Likewise, the Appeals Board found that the Respondent County fulfilled its burden of identifying an alleged non-discriminatory explanation of its treatment of the Petitioner. (*Id.*). The Appeals Board then substituted its judgment for that of its own ALJ on the issue of pretext by concluding, "...the so-called disparities in treatment are attributable to the other engineers meeting the County's requirements for advancement and other legitimate reasons that are not related to Mr. Tarkeshian's national origin." (*Id.*).

The Petitioner filed his Petition For Review with this Court on November 18, 2004.

STATEMENT OF THE FACTS

A. DESCRIPTION OF SALT LAKE COUNTY'S DEPARTMENT OF PUBLIC WORKS DEPARTMENT.

Salt Lake County's Public Works Department is made up of eleven separate payroll units, or divisions, who report to the Public Works Director. (Petitioner's Exhibit 12, Record, p. 365).⁵ Three of the eleven divisions employ engineers. They are Development Services, Public Works Engineering and Flood Control Engineering. (*Id.*). Salt Lake County historically employs a total of approximately 14-15 FTE engineers in its Flood Control Division and approximately 8-12 FTE engineers in its other public works sectors. (Record, p. 367).

The organizational chart for Development Services is found at Record, p. 554. This Subdivision is responsible for subdivision permits and urban hydrology.⁶ (Record, p. 554). During a significant portion of the past, the head of the Subdivision was Brent Tidwell. (*Id.*). Some engineers in Development Services review plat plans, and subdivision plans in their review process and

⁵ The Petitioner has attempted to "marshal" all of the facts in fulfillment of his duty to marshal the facts on appeal. *Hales Sand & Gravel, Inc. v. Audit Div. of State*, 842 P.2d 887 (1992). Accordingly, the Petitioner will bring out the Respondent's positions on factual issues, and relevant facts in support thereof, while reviewing all of the evidence submitted at the trial on the factual issues presented.

⁶ Development Services was developed by Salt Lake County in September, 1983. It was for the purpose of bringing together personnel who were involved in permits for development. Among others, licensed engineers in Flood Control who were reviewing private development projects were transferred to Development Services. This was done to better coordinate their responsibilities with others involved in development review and inspections for Salt Lake County. (R. 569, ¶ 2).

therefore review some surveying work, but are not surveyors. (Transcript, p. 128).

The organizational chart for the Public Works Engineering and Flood Control Engineering is found at Record, p. 663. Engineers in the Public Works Engineering Division and the Flood Control Engineering Division are identified as being in the Engineering Division. (Record, p. 366). The Petitioner was employed in the Flood Control Engineering Division in design during the entire period of his employment.

B. BACKGROUND FACTS.

The Petitioner received a Bachelor Of Science in Civil Engineering from the University of Idaho in 1975. He previously received an Associates Degree in Engineering from Idaho State University in 1968 along with a Bachelor's degree in mathematics in the same year. (Transcript, p. 23-24, Petitioner's Exhibit 1, Record, p. 337). He had also received a diploma in Industrial Drafting from the National Technical School of Los Angeles. From 1975 to 1976, he worked for Bush & Gudgell as an engineer's aid, and in 1976, worked for Call Engineering as a design draftsman. (Id.). In January, 1977, the Petitioner went to work for Salt Lake County's Surveyor's Office as a designer.

In May, 1977, the Petitioner applied for and received an entry level grade 24 engineer's position with Salt Lake County in its Public Works Department,

Flood Control Division.⁷ (Id.). He had nearly eight years of engineering related work prior to his employment with Salt Lake County. (Transcript, p. 26).

In 1979, a grade 26 engineer position became open in Salt Lake County's Public Works, Flood Control Division. (Id., p. 27). The only requirement was that the applicant have a Bachelors of Science Degree in Engineering. (Id.). After interviewing for the position, he was advised by Salt Lake County's Personnel Manager on November 23, 1979, that the County decided not to fill the position. (Id., p. 28, Petitioner's Exhibit 2, Record, p. 343). Nevertheless, Salt Lake County filled the position "internally" with another person. (Petitioner's Exhibit 4, ¶ 1, Record, p. 346).

Four months later, on April 1, 1980, Salt Lake County's Personnel Division decided to issue a new policy regarding career ladder progression for its engineers. (Addendum G). The new policy required grade 24 engineers to take an Engineer Qualifying Examination ("EQE") or an Engineer In Training Examination ("EIT") in order to possess the minimum qualifications for advancement to grade 26. (Id.).

Notwithstanding the new policy, Salt Lake County promoted Brent Tidwell from a grade 24 to a grade 27 who lacked the minimum qualifications of EQE or EIT. Mr. Tidwell also lacked an engineering degree and a PE (Professional Engineer) license. (Transcript, p. 32). In response, the Petitioner filed a

⁷ At that time, and until a reclassification in May, 2000, the classification career ladder for engineers was grades 24/26/28. In May, 2000, the engineering position was reclassified to grades 26/28/30.

grievance alleging unfairness. (Id.). The Director of the Public Work's Department answered the Petitioner's grievance on December 17, 1980, by stating that Mr. Tidwell "...was given 'Grandfather' status by the Personnel Department with full knowledge of career ladder requirements...." (Petitioner's Exhibit 4, Record, p. 346-347). The Petitioner appealed the Director's decision to the Salt Lake County Merit Council. A full hearing was held on February 5, 1981. On February 10, 1981, the Merit Council issued a decision that allowed the "Grandfathering" of Mr. Tidwell but concluded:

"13. If and when said employee leaves the position, it must be filled by an engineer who is qualified according to the career ladder to possess not only the EIT certificate, or pass the EQE, but must also hold a Professional Engineer (PE) license." (Record, p. 349-351).

C. SALT LAKE COUNTY'S 2000 RECLASSIFICATION SYSTEM.

On March 16, 2000, Salt Lake County's Public Works Department "reclassified" its career ladder for engineers from a 24/26/28 grade ladder to a 26/28/30 career ladder.⁸ (Record, p. 364, Transcript, 70, Addendum H). This classification was for all engineers employed by Public Works: Flood Control, Engineering and Development Services. (Id.).

Progression from grade 26 to grade 28 required being employed as a grade 26 engineer for one year, a satisfactory performance evaluation and the receipt of a FE Certificate (Fundamentals of Engineering Certificate by the

⁸ Engineers employed in the grade 24 entry level were automatically advanced to the grade 26 entry level.

National Council of Examiners for Engineering).⁹ Progression for a grade 28 to a grade 30 required being employed as a grade 28 for one year, a satisfactory performance evaluation and the receipt of their PE (Professional Engineering) License. (Id.). Roy J. Arrigo, Classification and Compensation Manager for Salt Lake County testified at trial that the entry level for an engineer also required a bachelor's degree in civil engineering or four years of equivalent experience. (Transcript, p. 230).

Mr. Arrigo testified as to the relationship between the 26, 28, and 30 ladders. He testified there "really isn't" any difference in job duties between a grade 26 and grade 28 engineer. "[T]hey're all doing the same kind of work." (Transcript, p. 231). However, by having demonstrated proficiency by obtaining the FE, the employee's supervisor would probably spend less time supervising. (Id.). On the other hand, an engineer grade 30 is required to "sign off" on engineering documents and the PE is required. (Transcript, p. 232).

D. CAREER LADDER PROMOTIONS FROM 1980-2000.

After 1980, the Petitioner noticed that engineers, other than Mr. Tidwell who was grandfathered, were being promoted but lacked the minimum qualifications. As noted earlier, under Salt Lake County's merit system, an employee does not necessarily "apply" for advancement; instead, it is incumbent upon the employee's supervisor to recognize that an employee has the minimal

⁹ As noted in footnote 3 above, the FE replaced the EIT and EQE requirements.

qualifications for advancement and do it automatically by preparing an appropriate personnel action form. (Transcript, p. 161).

In this case, the Petitioner was the only person in the Public Works Department that was *never promoted for over 27 years and he remains to this day in his entry level position.* (Transcript, p. 95). At the hearing before ALJ La Jeuness, the Petitioner identified seven specific white engineers who did not possess the minimum qualifications, and were less qualified than the Petitioner, yet, were advanced or promoted by Salt Lake County over the years. They are identified as follows:

1. Brent Tidwell. Brent Tidwell did not hold an engineering degree. As mentioned above, the Merit Council issued a decision in 1981 that allowed the “grandfathering” of Mr. Tidwell but cautioned that his position would have to be filled by a qualified individual. He was the section manager of the Development Services Engineering Subsection.¹⁰ In March, 1985, Brent Tidwell was being promoted from grade 27 to grade 30 and Salt Lake County's Senior Personnel Analyst, Sharon Hoglund, questioned whether he should be the section manager as he lacked a surveyor's license and Section 58-22-1 required a registered surveyor to perform land surveying functions. Apparently, he was instructed to obtain a surveyor's license in 1979. (R. 568). He was allowed three more years to obtain a surveyor's license (R. 569) but was promoted to grade 28

¹⁰ See footnote 6.

nevertheless on July 31, 1985, (R. 578).¹¹ Therefore, at the time of his promotion, Mr. Tidwell lacked any of the required minimum qualifications of EQE, EIT, PE, or even a surveyor's license. On November 6, 1985, Mr. Tidwell obtained his land surveyor's license and was promoted to grade 30. (R. 575). Mr. Tidwell retired in early 1998.

2. Reid Demman. Reid Demman did not hold an engineering degree. (Transcript, p. 77). He did hold, however, a four-year H.E.T. Certificate (Highway Engineering Technology) from the University of Utah/BYU. (R. 540). He did not have an EIT, EQE, FE, or PE. (R. 374, Transcript, p. 150). He had been employed in the Public Works Engineering as a survey technician 18, and worked below the Petitioner, until 1984 when he transferred to Development Services to be an engineering technician 19. (Transcript, p. 78 and Record, p. 540). In 1991, he was awarded a grade 24 engineer position. (R. 540).

Mr. Demman obtained a Land Surveyor's License on January 30, 1998. (R. 577). On February 1, 1998, he was "promoted" to the position of Engineering Subdivision Section Manager, Development Services, at a grade 30. He did not complete an application. (R. 374). He did not have any prior managerial or supervisory experience. (Transcript, p. 222). He replaced Brent Tidwell who, as described above, retired in early 1998. (Transcript, p. 150).

¹¹ It is interesting that, when Mr. Tidwell was approved for a grade 28 promotion, the Director of Development Services and the Associate Director of Public Works advised the Classification Selection Manager for the Administrative Services Department that "neither the surveyor's or engineer's license was required to perform the duties of this position." (R. 578).

Salt Lake County admitted that Mr. Demman lacked the necessary qualifications to fill Brent Tidwell's position as directed by the Salt Lake County Merit Council when it grandfathered Mr. Tidwell. (R. 150). In response, Salt Lake County asserted the minimum qualifications were met by Mr. Demmen's Land Surveyor's License. (R. 151).

According to the testimony of Roy J. Arrigo, Salt Lake County's Classification and Compensation Manager, some engineers in Development Services review land surveying functions in addition to their engineering functions. The reason is that Development Services often involves the review of plats and subdivision designs where right-of-ways and other surveying functions occur. (Transcript, p. 278). Therefore, according to Salt Lake County, having a land surveyor's license is more valuable to the Development Services Subdivision than an engineer's qualifications in some cases.¹² (Id.).

Roy J. Arrigo admitted in his testimony before ALJ La Jeunesse that the CPMA, Section 17-33-5(3)(b)(ii), as well as Salt Lake County's Policy 5400, Part 4.0, required that Salt Lake County establish written minimum qualifications for positions. (Transcript, p. 125). He also admitted that Salt Lake County had not established any written policy to allow the substitution of the minimum requirements for EIT, EQE, FE, or PE, or an engineering degree, for that of a Land Supervisor's License. (Transcript, p. 146). Mr. Arrigo was forced

¹² Notwithstanding this testimony, it should be noted that Salt Lake County has an official surveyor, as permitted by statute, who employs licensed surveyors who perform surveying functions.

to admit that Salt Lake County's Personnel Director 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).

3. Steven Dale. Steven Dale did not hold an engineering degree. Salt Lake County recruited, through a recruitment notice, the position of Engineer 24/26 position in Development Services on or about February 13, 1998. (R. 633). The announcement for a grade 26 required a bachelor's degree in engineering, EIT, EQE, or a Professional Land Surveyor's license. Steven Dale was hired 4/27/98 at grade 26.¹³ (R. p. 632). At the time of his appointment, he lacked any of these qualifications except a Land Surveyor's License.¹⁴ (Transcript, p. 198-198).

4. Denton Mecham. Mr. Mecham did not hold an engineering degree. (Transcript, p. 167). He did not have an EIT, EQE, FE, or PE. (Record, p. 374, Transcript, p. 162). He was initially employed in the Operations Division of Public Works as a grade 24/26 engineer. (Record, p. 612, 612a, and p. 393). He was promoted from an engineer 24 to engineer 26 on January 1, 1999. (Record, p. 394). On January 1, 1999, he was "promoted" to a pavement

¹³ Interestingly, the Public Works Department submitted a "Position Description Form" on 1/23/98 that identified Steven Dale as the employee of this position even though the job had not been posted. (Record, p. 408, Exhibit 22).

¹⁴ Roy J. Arrigo, Classification and Compensation Manager for Salt Lake County, testified that he did not know the difference between a professional land surveyor or a professional engineer but a land surveyor is generally paid less in the marketplace. (R. 199).

manager supervisor as a grade 26. (Record, 394). (Transcript, p. 90, 162). He was not required to apply for the position. (Record, p. 374).¹⁵

Salt Lake County attempted to justify Mr. Mecham's position and grade on the basis that he was in a supervisory position. (Transcript, p. 165). According to Mr. Arrigo, the *actual* duties of a supervisor do not require the minimum qualifications.¹⁶ (Transcript, p. 165-167). However, when asked if there was any policy, rule or regulation that stated supervisors did not have to meet the minimum qualifications for the position, Roy J. Arrigo, Classification and Compensation Manager for Salt Lake County testified, "There's no such rule." (Transcript, p. 166).

5. Rick Olson. Mr. Olson held no engineering degree. He did hold a Bachelor's Degree in Business Administration from the University of Phoenix and an Associates Degree in Drafting from the Utah Technical College. (Record, p. 614). He did not hold an EIT, EQE, FE, or PE. (Transcript, p. 168 and Record, p. 374). He started with the Public Works Department in 1979 as a designer. On March 16, 1980, he became an Engineer 24 in Flood Control of Public Works. (Record, p. 614). On December 1, 1987, Salt Lake County

¹⁵ On December 16, 1999, he applied for and was promoted to the position of Sanitation Director of the Public Works Department, grade 33. (Record, p. 599).

¹⁶ Notwithstanding his testimony, Mr. Mecham's duties as pavement manager supervisor clearly required engineering functions. See his job description, Record, p. 608-611. He was responsible for, among other things, "project design and organization of all field data", "engineer estimate and awarding of contract[s]", development of engineer estimates for highway and maintenance needs, "train engineering interns and technicians to conduct field surveys", and others. His job description specifically required, under the "Knowledge" Section, "Engineering principles and applications for highway design."

promoted Mr. Olsen from a grade 24 engineer to a grade 26 Permit Supervisor in the Highway Department. On January 1, 1999, he was promoted as part of a "reclassification" to Flood Control Supervisor, Grade 28. (Record, p. 616). He was not required to apply for the position. (Record, p. 374).

6. Larry Taggart. Larry Taggart did not hold an engineering degree. Mr. Taggart worked with the Petitioner in the position of a grade 24 engineer in the Flood Control Engineering Division in design. (Record, p. 642). On December 31, 1998, Mr. Taggart retired after 27 years as an engineer 24. (Record, p. 640). On August 4, 1999, Salt Lake County rehired Mr. Taggart in the same position as a "temporary" employee but rehired him as a grade 26. (Record, p. 641). Neil Stack, Salt Lake County's Engineering Director, frankly testified that they made him a grade 26 "to come back." (Transcript, p. 291). Although Mr. Taggart is classified as a "temporary" employee, he remains employed to this day. (Transcript, p. 133-134, 178).

Salt Lake County admitted that Mr. Taggart did not have the qualifications to be in an engineer grade 26. (Transcript, p. 188). Roy J. Arrigo, Classification and Compensation Manager for Salt Lake County, testified that Salt Lake County considered Mr. Taggart's qualifications as "immaterial" (Record, p. 188) because, according to Salt Lake County, there are no minimum qualifications for temporary employees. (Record, p. 185). He claimed that this was an "interpretation" of the County Personnel Management Act. (Record, p. 186). Yet, the CPMA, Section 17-33-5(3)(b)(ix) provides, "temporary, provisional,

or other non-career service appointments, ... may not be used as a way of defeating the purpose of the career service and may not exceed 90 days...." On cross-examination, Mr. Arrigo admitted that Salt Lake County had no express written policy that exempted temporary employment from meeting the minimum qualifications for the job.¹⁷ (Transcript, p. 186).

7. Martin Knaphus. Martin Knaphus did not hold an engineering degree. Mr. Knaphus was employed in the Public Works Flood Control Division along with the Petitioner in a grade 21 position. In the fall of 1991, Development Services Engineering Subdivision reclassified the position of Highway Engineering Technician 23 to an Engineer 24-26. (Record, p. 591). Mr. Knaphus successfully applied for the position and was transferred from Public Works Flood Control to Development Services effective May 1, 1992, and became an Engineer 24. (Record, p. 586). Mr. Kanaphus did not have the EIT, EQE, FE, or PE. (Transcript, p. 155). Like Steven Dale, however, he acquired a Land Surveyor's License on January 25, 2000. (Record, p. 584). Like Steven Dale, Salt Lake County then promoted Mr. Kanaphus to a Grade 26 Engineer effective February 1, 2000, (Record, p. 583, Transcript, p. 156). Salt Lake County again "reclassified" his position to an Engineer Review Specialist

¹⁷ Salt Lake County, however, requires all "provisional" appointments to meet the minimum qualifications for the position. (Policy 5100, § 5.2.4). Mr. Arrigo could not explain why provisional employees would have to meet minimum requirements but temporary employees would not. (Transcript, p. 267).

effective April 16, 2000, and promoted him to a grade 28. (Record, p. 581, Transcript, p. 156).

SUMMARY OF ARGUMENT

The Petitioner argues that he was the victim of discrimination on the basis of national origin, or race, when Salt Lake County Public Work's Department failed to advance him from an entry level engineer position for over 27 years while, at the same time, advancing less qualified white non-Iranian/Persian employees. He submits that Salt Lake County's Public Works Department found ways to manipulate and evade Salt Lake County's career ladder program to avoid the mandatory minimum qualifications for advancement.

No dispute exists relative to the Petitioner's prima facie case of discrimination. Instead, the only issue in this case is whether there was substantial evidence in the record for the Labor Commission Appeal Board to overrule its own Administrative Law Judge and conclude that Salt Lake County's articulated reason for not promoting the Petitioner past an entry-level position for over 27 years, while at the same time advancing white non-Iranian/Persian males, was not pretextual and was based upon legitimate and lawful non-discriminatory reasons unrelated to the Petitioner's origin.

The Petitioner respectfully submits that the Appeals Board erred in its analysis by ignoring the legal standard regarding pretext and ignoring or marginalizing undisputed evidence of "disturbing" irregularities conducted by Salt Lake County's Public Works Department in its promotional processes. These

disturbing irregularities were not technical in nature and were abundant within the Public Works Department. The discriminatory effect was to leave Mr. Tarkeshian in his entry level position for his entire career.

The Petitioner seeks a reversal of the Labor Commission Appeals Board and the reinstatement of the decision of its own Administrative Law Judge that originally found in Petitioner's favor. He also seeks an award of a reasonable attorney's fee and costs for this Appeal if he is successful.

ARGUMENT

Point One

THE LABOR COMMISSION APPEALS BOARD ERRED WHEN IT CONCLUDED THAT SALT LAKE COUNTY'S PROFFERED LEGITIMATE NON-DISCRIMINATORY REASON FOR NOT ADVANCING THE PETITIONER WAS NON-PRETEXTUAL AND DID NOT DISCRIMINATE AGAINST THE PETITIONER BASED UPON HIS NATIONAL ORIGIN.

A. INTRODUCTION AND ADDITIONAL AUTHORITIES ON STANDARD OF REVIEW.

By its own words, the Utah Labor Commission "substitute[d] its own judgment" for that of its own administrative law judge. (Record, p. 494, 495). The only difference between the Appeals Board and its ALJ is that the former disagreed with the ultimate legal conclusion regarding pretext, i.e., whether Salt Lake County 's failure to promote the Petitioner for over 27 years, while, at the same time, promoting seven other less qualified white male employees was non-pretextual and non-discriminatory. (Id., p. 498). In other words, the Appeals Board completely condoned or discounted the "so-called disparities in treatment..." proved by the Petitioner at trial. (Id.).

The Petitioner admits that an agency may "substitute its own judgment" for that of its ALJ, United States Steel Corp. v. Industrial Commission, 607 P.2d 807, 811 (Utah 1980), and may affirm, modify, or reverse its decision, or remand for further proceedings. §34A-1-303(4). However, an agency's ability to substitute its own ALJ's judgment is not without limits. For example, an agency's ultimate findings must be supported by substantial evidence. Id., p. 811. "Substantial evidence" is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." Harken v. Board of Oil, Gas & Mining, 920 P.2d 1176, 1180 (Utah 1996)(citations omitted). In supplying the substantial evidence test, the appellate court reviews both evidence that supports the Board's findings and evidence that fairly detracts from them. Albertson's v. Department of Employment Sec., 854 P.2d 570, 574 (Ut. App. 1993). Further, the ultimate findings must be viewed in light of the whole record before the court. Albertson's, supra, p. 574-575. Lastly, because the Utah Legislature has not given the Labor Commission authority to interpret Utah's Anti-Discrimination Act, this Court reviews the Labor Commissions rulings of law for correctness. Viktron/Lika v. Labor Commission, 38 P.3d 993, 995 (Ut. App. 2001).

This case is one of alleged discrimination arising under Utah's Anti-Discrimination Act, §34A-5-106 that prohibits discrimination on the basis of, among other things, race and national origin. Both the ALJ and the Appeals Board attempted to follow the precedents established by federal courts in

interpreting and applying federal anti-discrimination laws. (Order Granting Motion For Review, Record, p. 497). Generally, so do Utah's appellate courts. For example, see Viktron/Lika v. Labor Commission, supra, p. 995.

The application of the burden-shifting analysis set forth by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is a question of law. Sheikh v. Department of Public Safety, 904 P.2d 1103 (Ut. App. 1995); and, Handy v. Union Pac. R.R., 841 P.2d 1210, 1215 (Utah App.1992). When reviewing an agency's conclusion regarding a question of law, appellate courts accord the agency decision no deference, but review it for correctness. Sheikh v. Department of Public Safety, supra; Savage Indus. v. State Tax Comm'n, 811 P.2d 664, 668 (Utah 1991); Hilton Hotel v. Industrial Comm'n, 897 P.2d 352, 354 (Utah App.1995).

Here, both the ALJ and the Appeals Board followed the "burden-shifting" analysis of McDonnell Douglas Corp. v. Green. Under the burden-shifting analysis, a party claiming discrimination first has the burden of demonstrating a prima-facie case. Sheikh v. Department of Public Safety, supra, p. 1106. Second, once completed, the burden shifts to the employer to demonstrate a non-discriminatory reason for its suspect actions. (Id.). Third, if the employer does so, then the burden re-shifts to the complainant to demonstrate that the employer's alleged non-discriminatory reason was pretextual. (Id.). The ultimate burden of persuasion that the employer discriminated against the employee " 'remains at all times with the plaintiff.' " University of Utah v. Industrial

Commission, 736 P.2d 630, 635 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

Here, again, both the ALJ and the Appeals Court concluded that the Petitioner presented a prima facie case. (Order Granting Motion For Review, Record, p. 498). They both agreed that Salt Lake County offered an explanation for its suspect actions. (Id.). However, the ALJ and the Appeals Court differed on the third analysis of McDonnell Douglas Corp. v. Green: whether the Respondent's explanation for its actions were pretextual.

For the reason's set forth below, the Petitioner alleges the Labor Commission Appeal Board's ultimate factual and legal conclusion, that Salt Lake County's explanation for not promoting the Petitioner was not pretextual, is not supported by substantial evidence taking the record as a whole and applying the correct standard of law regarding pretext. Albertson's v. Department of Employment Sec., supra. It wrongfully substituted its judgment for that of its own ALJ.

The Petitioner respectfully submits that, under the law governing pre-text in the federal system, to be applied in the instant case, there is only one conclusion: that Salt Lake County's alleged exceptions to the law and irregularities regarding promotions allowed a subtle form of discrimination to occur that left the Petitioner in an entry level position for his entire employment with Salt Lake County.

B. LEGAL STANDARD TO BE APPLIED REGARDING PRETEXT.

The Petitioner respectfully maintains that the Labor Commission Appeals Board employed the wrong legal standard in determining pretext. This Court has not addressed *how* an employee may demonstrate pretext, or what evidence may be considered. However, other courts have done so while addressing federal anti-discrimination laws and this Court often follows such decisions. Victron/Lika, *supra*.

The law in the Tenth Circuit is well settled that an employee may show pretext by “prior treatment of plaintiff; the employer’s policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g. falsifying or manipulating...criteria; and the use of subjective criteria.” Garrett v. Hewlett-Packard Company, 305 F.3d 1210, 1218, 89 Fair Empl.Prac.Case (BNA) 1675, 83 Empl. Prac.Dec. P41,291 (10th Cir. 2002)(citations omitted).¹⁸ Pretext need not be shown by direct evidence (racist comments, ageist drawings or the like) and may be demonstrated by circumstantial evidence alone. (*Id.*, ft. 5, p. 1218). As the Court noted in Garrett, *supra*, p. 1218, ft. 5, “Indeed, the burden-shifting structure, involving prong three, pretext, is precisely the means by which a plaintiff may prove discrimination with circumstantial rather than direct evidence.”

¹⁸ Citing specific cases, the Garrett court explained at p. 1218 that, “Courts view with skepticism subjective evaluation methods....” (Citation omitted). “[S]ubjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse.” (Citation omitted).

In Mohammed v. Callaway, 698 F.2d 395, 401, 30 Fair Empl.Prac.Cas. (BNA) 13115 (10th Cir. 1983), a case arising from Utah involving the promotion of a engineer, the Tenth Circuit reversed a district court decision following a bench trial and held that an inference of pretext existed sufficient to rebut the employer's alleged non-discriminatory explanation for its suspect action where the employer had "serious procedural irregularities" in its promotional processes. In Mohammed, the procedural irregularity was the employer's failure to convene an ad hoc committee to interview applicants and the decision to promote was based upon the mere review of personnel files.

In Muller v. United States Steel Corporation, 509 F.2d 923, 10 Fair Empl.Prac.Cas. (BNA) 323, 9 Empl.Prac.Dec. p. 9901 (10th Cir. 1975), involving another Utah promotion case, the Tenth Circuit upheld a district court's decision following a bench trial and ruled that statistics could be used to demonstrate pretext. In Muller, the plaintiff showed that, though employed for fourteen years, he had not been chosen to be a spell foreman, a criterion used to become a turn foreman. The Muller Court also ruled that the application of "vague and inconclusive criteria" and the lack of "meaningful standards" in promotion decisions supported pretext. Muller, supra, p. 927. The Muller Court specifically rejected the employer's argument that a specific intent to discriminate had to exist:

"The law is clear that a plaintiff in a job discrimination case need not prove that the employer had a specific intent to discriminate. It is sufficient that the employer's conduct produced discriminatory results." (Id.).

In DoDoo v. Seagate Technology, Inc., 235 F.3d 522, 84 Fair Empl.Prac.Cas. (BNA) 933, 79 Empl. Prac. Dec. P 40,357, 2001 CJ C.A.R. 184 (10th Cir. 2000), the Tenth Circuit upheld a jury trial and jury instructions involving a failure to promote. In DoDoo, the plaintiff showed pretext by a “highly irregular” procedure where the employer promoted a non-minority ahead of the plaintiff in violation of the company’s rule that one must be employed for at least a year before being considered for promotion.

The Tenth Circuit has likewise reversed district court decisions following summary judgment in favor of the employer where the employee demonstrated pretext by irregular procedures in the promotion process. In Doebele v. Sprint/United Management Co., 342 F.3d 1117 (10th Cir. 2003), the Tenth Circuit reversed a Kansas District Court’s ruling on pretext where the employee showed the employer’s decision not to promote, and ultimately terminate the plaintiff, was shown to be documented by the employer “after the fact” to justify decisions already made by the employer. Likewise, in Beaird v. Seagate Technology, Inc., 145 F.3d 1159 (10th Cir. 1998), the Tenth Circuit reversed an Oklahoma district court’s ruling on pretext where the employee demonstrated the employer used “potential” as a criteria for promotion in violation of its own policies.

In the present case, the Appeals Board did not employ the legal standards as expressed by the above decisions in deciding the issue of pretext. In fact, the Appeals Board did not discuss it at all. Instead, the Appeals Board wanted what

is not required to prove pretext, i.e., evidence of direct discrimination.¹⁹ Garrett, supra, p. 1218. Moreover, it condoned and marginalized the Plaintiff's undisputed evidence of these serious promotional irregularities by simply stating that the "County could have done a better job of conforming its written policies to its actual practices...." (Record, p. 498). And contrary to the Appeals Board's strange conclusion regarding the nationality of his co-workers²⁰, it was *undisputed* at the hearing before ALJ La Jeunesse that all of the employees discussed in relation to this case were all white, non-minorities, except the Petitioner who was of Persian/Iranian origin, as Judge La Jeunesse noted. (Record, p. 420).

C. APPLICATION OF THE LEGAL STANDARD REGARDING PRETEXT TO THE FACTS OF THIS CASE.

The Petitioner's evidence on pretext is amply supported by the record. In summary this evidence consisted of the following:

- A. The Petitioner, of Persian/Iranian national origin, has remained in an entry level position for over twenty-seven years without promotion.
- B. He is the only person in his department who has not been promoted.

¹⁹ The Appeals Board stated in its ruling, "He has identified no instances during that time [twenty-five years of employment] any conflict or comment from co-worker, supervisor or manager related to his national origin." (Record, p. 498)(Explanation added).

²⁰ The Appeals Board stated in its ruling, "Furthermore, Mr. Tarkeshian has presented no evidence regarding the national origin of his co-workers and supervisors." (Record, p. 498).

C. During the same period of time, seven less qualified white, non-minority, employees were promoted in the Public Works Department through admitted irregularities, if not outright violations of the law.

The first two facts were not disputed below and are unlikely to be disputed on appeal. Therefore, the Petitioner will focus the balance of his argument on the irregularities or the “exceptions to the rule” claimed by Salt Lake County in justifying the promotion of these seven employees to the exclusion of the Petitioner. This is important because ALJ La Jeunesse viewed “the exceptions articulated by Salt Lake County in promoting white, non-Arabic, non-Persian engineers “...as pretexts to mask a subtle discrimination against Mr. Tarkeshian...” (Record, p. 420), whereas the Appeals Board condoned or marginalized Salt Lake County’s violations of its own career ladder rules as being both reasonable and non-discriminatory. (Record, p. 498-499).

First, the irregularities that permeated Salt Lake County’s career-ladder promotional processes must be classified as “disturbing” or “highly” irregular and not mere technicalities. Garrett, supra. The undisputed facts in this case rise to that level. Here, Utah State Law mandates that counties, including Salt Lake County, establish the minimum qualifications “for appointment or promotion.” CPMA, § 17-33-5(3)(b)(ii). In addition, Salt Lake County’s own policy, Policy 5400, Part 4.0, requires that the minimum qualifications be set forth in writing. In conformity with the above statute and policy, Salt Lake County established minimum qualifications for career-ladder appointments and promotions of all

engineers by the publication of its April 1, 1980, Policy (Addendum G) and its March 16, 2000, Policy (Addendum H) that required either the EIT, or EQE, or FE, to advance from an entry level position. These policies *did not allow* Salt Lake County's Public Works Department to substitute any of these minimum qualifications for a Land Surveyor's License.

Yet, the Public Works Department allowed all seven white employees to be advanced, at one time or another, on the basis they held a surveyor's license, even though they had never held an engineering degree and had never taken the EQE, EIT, or FE. All seven appointments violated the County's own written policies as well as Utah State Law.

Salt Lake County also attempted to defend the promotions of the seven white employees on the basis that some became supervisors. Salt Lake County alleged that its supervisors *really* did not need to meet the minimum qualifications. It takes "Chutzpa" for Salt Lake County to advocate that its supervisory engineers did not need to meet the minimum qualifications in order to supervise those who perform the actual engineering services! How in the world can they possibly be effective supervisors if they do not have the basic engineering knowledge required of their subordinates? Moreover, as admitted by Mr. Arrigo, there is *no* provision in Salt Lake County's written policies and procedures that suggest an engineer may be promoted or advanced to a supervisory position without the minimum qualifications.

Salt Lake County also attempted to justify its failure to follow its own written policies regarding promotion, regarding one of the seven white employees, Mr. Taggart, on the basis his was only a "temporary" appointment and that temporary appointments did not need to meet the minimum qualifications required for that position. As the court may recall, Mr. Taggart worked side-by-side with the Petitioner as an engineer 24 until December 31, 1998, when Mr. Taggart retired. (Record, p. 640). Shortly thereafter, Salt Lake County rehired Mr. Taggart in the same position as a "temporary" employee but rehired him in a grade 26. (Record, p. 641). Although Mr. Taggart is classified as a "temporary" employee, he remains employed to this day. (Transcript, p. 133-134, 178).

In response, the Petitioner demonstrated below that under State law, CPMA, § 17-33-5(3)(ix), "temporary, provisional, or other non-career service appointments"..."may not be used as a way of defeating the purpose of career service and may not exceed 90 days...." At trial before ALJ La Jeunesse, Mr. Arrigo was forced to admit that Salt Lake County had no express written policy that exempted temporary employment from meeting the minimum qualifications for the job. (Transcript, p. 186).

Second, Salt Lake County's "so-called" exceptions to Utah State Law and its own written policies only benefited less qualified, white, non-Iranian/Persian, employees. As found by ALJ La Jeunesse,

"It is incomprehensible that Mr. Tarkeshian who in many cases had more

experience and education than those promoted over him sat in an entry level engineering position for 26 years while Salt Lake County found ‘ various and sundry exceptions to written rules in order to promote white, non-Iranian/Persian males. Salt Lake County always seemed able to find an exception to the rules that bound Mr. Tarkeshian to an entry level position in order to promote everyone but Mr. Tarkeshian.” (Record, p. 420).

The Petitioner respectfully maintains that the undisputed evidence in this case demonstrates that Salt Lake County’s articulated alleged non-discriminatory reason for not advancing the Petitioner, while advancing the other white employees, was pure pretext. Garrett, supra. There is no substantial evidence to sustain the Labor Commission Appeal Board’s conclusion that the promotion of these seven employees, leaving the Petitioner in an entry level position for over 27 years, was based upon legitimate non-discriminatory reasons. Frankly, it is inconceivable that the Appeals Board could condone violations of the County Personnel Management Act, as well as Salt Lake County’s own merit system, that were passed to advance merit principles and prohibit the very thing that occurred in this case. Salt Lake County’s Public Works Department used, or abused, Salt Lake County’s career-ladder system to exclude the Petitioner from promotions. When it comes to pretext in the promotional process, “It is sufficient that the employer’s conduct produced discriminatory results.” Muller, supra, p. 927.

CONCLUSION AND RELIEF SOUGHT

The Petitioner respectfully urges the Court to reverse the decision of the Labor Commission Appeals Board and to reinstate the decision of its ALJ La

Jeunesse. 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 25 day of January, 2005.



STEPHEN W. COOK
Attorney for Appellant/Petitioner

STATE OF UTAH)
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COUNTY OF SALT LAKE)

Tarkeshian Brief ***page 47

ADDENDUM A: ALJ La JEUNESSE DECISION

UTAH LABOR COMMISSION
P.O. BOX 146615
Salt Lake City, Utah 84114-6615

Case No. 8000083

MOSTAFA (JIM) TARKESHIAN,

Petitioner,

vs.

**SALT LAKE COUNTY PUBLIC
WORKS,**

Respondent,

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FINDINGS OF FACT,

CONCLUSIONS OF LAW,

AND ORDER

Judge: Richard M. La Jeunesse

HEARING: Room 334, Labor Commission, 160 East 300 South, Salt Lake City, Utah,
on April 14, 2003 at 8:30 a.m. Said Hearing was pursuant to Order and
Notice of the Commission.

BEFORE: Richard M. La Jeunesse, Administrative Law Judge.

APPEARANCES: The petitioner, Mostafa (Jim) Tarkeshian, was present and represented by
his attorney Ashley Jolly.

The respondent was represented by attorney Valerie Wilde.

I. STATEMENT OF THE CASE

The petitioner, Jim Tarkeshian, filed an "Charge of Discrimination" with the Utah Antidiscrimination and Labor Division (UALD) on November 16, 1999 and claimed that Salt Lake County Public Works (Salt Lake County) discriminated against him in Violation of Utah Code § 34A-5-106. Mr. Tarkeshian asserted that Salt Lake County failed to promote him in his employment as a civil engineer because of his race, Arabic, his national origin, Iranian/Persian, his color, brown, and his age, over forty. At the hearing, Mr. Tarkeshian also claimed that Salt Lake County retaliated against him because he filed the "Charge of Discrimination." Salt Lake County generally denied the allegations of discriminatory conduct.

II. ISSUES.

1. Did Salt Lake County fail to promote Jim Tarkeshian in his position as a civil engineer because of his national origin, Iranian/Persian?
2. Did Salt Lake County fail to promote Jim Tarkeshian in his position as a civil engineer because of his race, Arabic?
3. Did Salt Lake County fail to promote Jim Tarkeshian in his position as a civil engineer because of his color, brown?
4. Did Salt Lake County fail to promote Jim Tarkeshian in his position as a civil engineer because of his age over forty?
5. Did Salt Lake County fail to promote Jim Tarkeshian in his position as a civil engineer in retaliation for his filing of a Charge of Discrimination?

III. COURSE OF PROCEEDINGS.

The petitioner, Jim Tarkeshian, filed an "Charge of Discrimination" with the Utah Antidiscrimination and Labor Division on November 16, 1999. On November 14, 2001 UALD issued a Determination and Order and found no cause to support Mr. Tarkeshian's claim. On December 14, 2001 Mr. Tarkeshian filed a Notice of Appeal and Request for Formal Evidentiary Hearing with respect to UALD's Determination and Order.

On August 22, 2002 Salt Lake County filed a Motion for Summary Judgment which claimed a right to judgment as a matter of law based on the undisputed facts in this case. Mr. Tarkeshian filed a Memorandum in Opposition of Motion for Summary Judgment. On October 2, 2002 I issued a Ruling on Motion for Summary Judgment wherein I denied the motion. I held a de novo evidentiary hearing in this matter on April 14, 2003.

IV. FINDINGS OF FACT

Mr. Tarkeshian began his employment with Salt Lake County as a grade 24 engineer on January 18, 1977. Mr. Tarkeshian born on September 23, 1940, was 36 years old when hired by Salt Lake County. Mr. Tarkeshian worked for Salt Lake County as a civil engineer for over twenty-six years from 1977, through the date of the hearing. In the twenty-six plus years he worked as an engineer, Salt Lake County never promoted Mr. Tarkeshian beyond the entrance level for engineers.

Salt Lake County asserted that engineers operated under a "career ladder" system of promotion where after one year service Salt Lake County promoted engineers to the next grade based on the engineer's passing the EIT¹, EQE², FE³, or proof of a PE⁴ license. Salt Lake County refused to promote Mr. Tarkeshian because he failed to pass either the EIT, EQE, or FE, and never obtained a PE license.

Mr. Tarkeshian obtained Bachelor of Science degrees in both Civil Engineering and Mathematics from the University of Idaho. [Exhibit "P-1"]. Mr. Tarkeshian also obtained a diploma in Industrial Drafting from National Technical Schools of Los Angeles, California. [id.].

In 1979 Mr. Tarkeshian applied for a position as an engineer grade 26 in the Salt Lake County Flood Control Division. [Exhibit "P-2"]. Mr. Tarkeshian did not obtain the grade 26 position with Flood Control. [id.]. In a letter to Mr. Tarkeshian dated November 23, 1979, Salt Lake County told him that the county elected not to fill the position. [id.]. Salt Lake County did actually fill the grade 26 position with an internal promotion. [see: Exhibit "P-4"].

On October 31, 1980 Mr. Tarkeshian filed a grievance based on Salt Lake County's failure to promote him to the grade 26 position. [Exhibit "P-4" and Exhibit "P-5"]. On December 16, 1980 Donald Spencer, the Director of Salt Lake County Public Works, held a hearing on Mr. Tarkeshian's grievance. [Exhibit "P-4"]. On December 17, 1980 Mr. Spencer issued his decision resultant from the hearing. [id.]. Mr. Spencer stated that:

Selection on the register was canceled at my direction, as well as additional consideration for promotion in the Engineering Division pending the establishment of career paths and identifying formal criteria for the measurement of competency and justification for promotion. Subsequently, the Personnel Department approved a career path program for Civil Engineers Grade 24-28. Since the establishment of the career ladder program for promotion, several promotions have been accomplished in accordance with career ladder requirements. At the present time, you have not passed the Engineering in

¹Engineer in Training.

²Engineering Qualification Examination.

³Fundamentals of Engineering.

⁴Professional Engineer.

Training Examination or the Utah State Engineering Qualification Examination and are therefore, not eligible for promotion under the career ladder. [id. at pages 1-2 ¶ 2][emphasis added].

In short, Mr. Spencer maintained that Salt Lake County canceled the 1979 job announcement for a grade 26 engineer in Flood Control in order to implement the EIT and EQE requirements contained in the career ladder. In a confusing about face Mr. Spencer then disclosed that Salt Lake County actually promoted an engineer by grandfathering Brent Tidwell into a grade 27 “[w]ith full knowledge of career ladder requirements and position responsibilities.” [id. page 2 ¶ 4]. Yet no dispute existed that Brent Tidwell never passed the EIT and/or EQE so important to Mr. Spencer when he allegedly canceled the job announcement for the grade 26 engineer position in anticipation of the career ladder standards.

On April 1, 1980 Salt Lake County first implemented the policy that required engineers to “[p]ass the EIT or EQE to be eligible for promotion to grade 26.” [Exhibit “P-3”]. In other words, Salt Lake County set the career ladder policies at issue some four months after denying Mr. Tarkeshian promotion, yet grandfathered Brent Tidwell into a grade 27 outside the career ladder requirements. The April 1, 1980 policy specifically stated:

All county Engineers assigned to the grade 24, 26, 28 career ladder must pass the EQE or the EIT to be eligible for promotion to grade 26. [id.][emphasis added].

Roy Arrigo, the Salt Lake County Classification and Compensation Manager testified that Salt Lake County had no written policy that established exceptions to the minimum requirements of successful passage of either EIT or EQE for promotion of engineers from grade 24 to grade 26. In particular, Salt Lake County had no written policy that allowed substitution of another certification such as a Professional Land Surveyor’s License in lieu of successful completion of either the EIT, EQE, or eventually the F.E. and/or P.E.

Mr. Tarkeshian appealed Mr. Spencer’s December 17, 1980 decision. On February 10, 1981 the Merit Council for Salt Lake City issued “Findings and Conclusions and Order” (1981 Order). The 1981 Order concluded:

Progression within the ladder to an Engineer 26 position required the applicant to possess the EIT certificate or pass the EQE. [1981 Order page 2 ¶ 3].

Like Mr. Spencer, the Merit Counsel excepted Brent Tidwell and found:

- 9 There does exist in the Engineering Division of Salt Lake County one example of an employee who holds an Engineer 27 position, but who does not possess the EIT certificate nor has passed the EQE.

10. Said Engineer 27 position consists mostly of supervisory and administrative responsibility, and does not hold engineering responsibility beyond the expertise required for an Engineer 24 position.
11. Said employee held that position prior to the time the EIT and EQE requirements were made part of the engineer career ladder, and thus said employee was left in that position in a 'grandfather' status.
12. Said employee continues in that position as an Engineer 27, while the position is actually available for an Engineer 30; thus, due to his lack of the EIT or EQE, said employee is underfilling the position.
13. If and when said employee leaves the position, it must be filled by an engineer who is qualified according to the career ladder to possess not only the EIT certificate, or pass the EQE, but must also hold a Professional Engineer (PE) license. [id. at page 3].

On one hand the 1981 Order found that progression of engineers beyond a grade 24 required either passage of the EIT or EQE. Yet, the 1981 Order then seemed to excuse failure to pass the EIT or EQE by Mr. Tidwell because of his supervisory status. Then in another about face, the 1981 Order mandated that anyone replacing Mr. Tidwell in his grandfathered status must not only pass either the EIT, or the EQE, but must also have the PE license. No where in Salt Lake County written policy did the career ladder except supervisors from the EIT and/or EQE requirements. In deed, the 1981 Order mandated possession of the EIT, or EQE, in addition to the PE license for future supervisors who replaced Brent Tidwell. [id. at page 3 ¶ 13].

Despite the edict contained in the 1981 Order, on February 1, 1998⁵ Salt Lake County promoted Reid Demman from an engineer grade 24 into Mr. Tidwell's position as an Engineer Section Manager grade 30. [Exhibit "R-3"]. Mr. Demman had a Professional Land Surveyor License, but lacked a PE license⁶ license and/or qualifying results from either the EIT or EQE tests. [id.]. Before his promotion to a grade 30 engineering manager, Mr. Demman had no managerial or supervisory experience. [id.].

⁵ Noted here is the fact that all of the employee actions hereafter complained of by Mr. Tarkeshian took place after he turned 40 years of age. None of the evidence provided by the parties indicated Mr. Demman's age at the time of his promotion.

⁶ Neal Stack, Director of the Salt Lake County Engineering Division, testified that a grade 30 required a PE license because the grade 30 engineer signed off on design plans.

On December 1, 1987 Salt Lake County promoted Ricky Olsen from a grade 24 engineer to a grade 26 Permit Supervisor in the Highway Department. [Exhibit "R-3"]. Ricky Olsen not only lacked any of the EIT, EQE, FE, and/or PE certifications, he also lacked a B.S. in Engineering. [id.]. Mr. Arrigo claimed that supervisors do not function as engineers. Ergo, Mr. Arrigo maintained that Mr. Olsen required none of the EIT, EQE, FE, PE certifications, nor a B.S. in Engineering. On January 1, 1990 Mr. Olsen became the Permit Supervisor in Public Works Engineering still at a grade 26. [id.].

In the meantime, Salt Lake County issued several announcements for engineers with varying and inconsistent minimum qualifications listed. In 1992 Salt Lake County issued a job announcement for an "ENGINEER 26" in the Development Services Division with a closing date of September 18, 1992 (the 1992 bulletin). [Exhibit "R-4"]. The 1992 bulletin set forth minimum qualifications as:

Education and Experience

- a. Graduation from an accredited college of (sic) university with a bachelor's degree in Civil Engineering plus two (2) years of experience in a field closely related to these duties and an Engineer-in-Training Certificate or passage of the Utah State Engineer Qualifying Examination; OR

Eight (8) years of experience in a field closely related to these duties for the required college study plus Engineer-in-Training Certificate or passage of the Utah State Engineer Qualifying Examination; OR

- b. An equivalent combination of education and experience

College study in a closely related field may be substituted for up to two (2) years of the eight (8) years of required related experience. [id.].

The 1992 bulletin created an ambiguity that could be read in two conflicting ways. At first blush the 1992 bulletin seemed to conform to the April 1, 1980 policy announcement set forth in Exhibit "P-3" that an engineer grade 26 required passage of the EIT, or EQE, in addition to a Bachelor's Degree in Civil Engineering and two years related experience. [id.]. The 1992 bulletin allowed certain substitutions of experience for education. [id.]. However, subparagraph "b" prefaced by "OR" could be read to mean that education and experience served as an acceptable substitute for all the requirements in subparagraph "a." [id.]. No where does the 1992 bulletin state that a Professional Land Surveyor's License could be substituted for passage of the EIT, or EQE.

Acceptance of the later interpretation of the 1992 bulletin meant that Mr. Tarkeshian who at that time had 15 years experience in the Salt Lake County Engineering Division, together with a B.S. in Civil Engineering, should not have been denied advancement to a grade 26 engineer. Acceptance of the first interpretation of the 1992 bulletin left Salt Lake County without an acceptable excuse for the promotions of Mr. Tidwell and particularly Mr. Demman.

Salt Lake County issued a job announcement for an "ENGINEER 24/26" in the Development Services Division with a closing date of December 29, 1997 (The 1997 bulletin). [Exhibit "P-6"] The 1997 bulletin set forth minimum qualifications identical to those in the 1992 bulletin.

In 1998 Salt Lake County issued a job announcement for an "ENGINEER 24/26" in the Development Services Division with a closing date of February 13, 1998 (The February 1998 bulletin). [Exhibit "R-4"]. The February 1998 bulletin set forth minimum qualifications identical to those in the 1992 and 1997 bulletins except, the February 1998 bulletin allowed for the first time a substitution of the Professional land Surveyor's license in lieu of the EIT, or EQE requirements.

The "Notice of Personnel Action" contained in the records of Salt Lake County showed that it hired Steven Dale as a grade 26 engineer effective April 27, 1998. [Exhibit "R-3"]. Mr. Arrigo acknowledged and Salt Lake County's own records showed that it hired Steven Dale off of the February 1998 bulletin. [id.]. Yet, a Salt Lake County Position Description Form demonstrated that effective February 1, 1998 Mr. Dale accepted the grade 26 position some 12 days before the closing date set forth in the job announcement bulletin. [id.]. Mr. Dale had a Professional land Surveyor's License but never passed the EIT, or EQE. As with Mr. Tidwell, Mr. Demman, and Mr. Olsen, irregularities and exceptions to normal written requirements abounded in Salt Lake County's hiring of Mr. Dale as a grade 26 engineer.

On December 31, 1998 Larry Taggart retired from Salt Lake County as a grade 24 engineer. [Exhibit "P-18"]. On August 4, 1999 Salt Lake County re-hired Larry Taggart as a grade 26 engineer instead of at the grade 24 entry level then in effect. [Exhibit "P-20"]. Mr. Taggart never met the requirements of the EIT, EQE, FE or PE. [Exhibit "R-3"]. Mr. Arrigo maintained that because Salt Lake County re-hired Mr. Taggart as a temporary employee at a grade 26, no requirement existed for him to meet the requirements of the EIT, EQE, FE or PE. However, Mr. Arrigo admitted that nothing existed in written Salt Lake County policies that excused grade 26 engineers from passage of either the EIT, EQE, FE, or PE because of a temporary employment classification. Neal Stack frankly acknowledged that Salt Lake County offered Mr. Taggart a grade 26 so that he would accept an offer to come back to work for Salt Lake County. Mr. Taggart remained a temporary employee from August 24, 1999, through the date of the hearing, some two and a half years later.

On January 1, 1999 Salt Lake County promoted Ricky Olsen from a grade 24⁷ engineer to a Flood Control Supervisor Grade 28 in the Flood Control Engineering Division. [Exhibit "R-3"]. Mr. Olsen still had nothing by way of certification in the EIT, EQE, FE, PE, nor a B.S. Degree in Engineering.

Also on January 1, 1999 Salt Lake County reclassified Denton Mecham from a grade 24 engineer to a grade 26 Pavement Manager. [Exhibit "P-17"]. Then, on December 16, 1999 Salt Lake County promoted Mr. Mecham outside the Engineering Division to Sanitation Division Director at a grade 33. [Exhibit "R-3"]. Mr. Mecham lacked a PE license and/or qualifying results from either the EIT, EQE or FE tests. [id.]. Mr. Arrigo again claimed that neither the Pavement Management Supervisor, nor the Sanitation Division Director, required a PE license and/or qualifying results from either the EIT, EQE or FE tests.

On February 1, 2000 Salt Lake County utilized the "career ladder" to move Martin Knapus from a grade 24 engineer to a grade 26 engineer. [Exhibit "R-3"]. Mr. Arrigo argued that because Mr. Knapus obtained a Professional Land Surveyor's License he met the "Career Ladder" criteria for automatic promotion to a grade 26 engineer. Yet, Mr. Knapus lacked a PE license and/or qualifying results from either the EIT, EQE or FE tests.

On March 16, 2000 Salt Lake Public Works Department requested approval from the Personnel Department to restructure the career ladder in that the entry level position moved from a grade 24 to a grade 26, the grade 26 became a grade 28, and the grade 28 became a grade 30. [Exhibit P-11"]. The request specifically stated:

⁷ Mr. Olsen caught in a Reduction in Force action at Salt Lake County went back to an engineer grade 24 on May 1, 1991.

We respectfully request approval of the Career Ladder Plan as written for the Engineer 26/28/30 position. As you know, we have this classification in three Public Works divisions, Flood Control, Engineering, and Planning/Development Services.

The minimum qualifications for moving an Engineer 26 to the 28 level are as follows:

1. The employee has worked for one year as a grade 26.
2. The employee has performed satisfactorily in the duties during the year as shown by receiving a performance evaluation with satisfactory rating.
3. The employee has received their Fundamentals of Engineering (FE)⁸ certification by the National Council of Examiners for Engineering.

The minimum qualifications for moving an Engineer 28 to the 30 level are as follows:

1. The employee has worked for one year as a grade 28.
2. The employee has performed satisfactorily in the duties during the year as shown by receiving a performance evaluation with satisfactory rating.
3. The employee has received their Professional Engineer (PE) License in the State of Utah. [id.].

Of note the reclassification Memo of March 16, 2000 applied to three Divisions that employed engineers i.e. Public Works divisions, Flood Control, Engineering, and Planning/Development Services. Importantly, the reclassification memo mentioned nothing about substituting the Professional Land Surveyor's License for the FE. Further, the reclassification memo made no exception for supervisors in the respective divisions affected by the reclassifications.

Mr. Arrigo stated that Salt Lake County approved the reclassification proposal set forth in Exhibit "P-11" on May 1, 2000. [see: Exhibit "R-7"]. A Recruitment Announcement issued after approval of the reclassification of the Career ladder set forth the minimum qualifications for a grade 28 (the new grade 26):

⁸The parties agreed that successful completion of the EIT or EQE satisfied the FE requirement.

Graduation from an accredited college or university with a bachelor's degree in Civil Engineering plus one (1) year of experience in a field closely related to these duties and the Fundamentals of Engineering (FE) Certification or equivalent.
[Exhibit "R-4"].

The Recruitment Announcement after the reclassification said nothing about substituting the Professional Land Surveyor's License for the FE. [id.]. Also, the Recruitment Announcement made no exception for supervisors in the respective divisions affected by the reclassifications.

On April 16, 2000 Salt Lake County reclassified Martin Knapus from a grade 26 to a grade 28 pursuant to the reclassification of the Career Ladder. [Exhibit "R-3"]. Mr. Knapus' promotion to a grade 28 engineer took place two weeks before the actual effective date of the general reclassification on May 1, 2000. [Exhibit "R-7"]. Again, Mr. Knapus lacked a PE license and/or qualifying results from either the EIT, EQE or FE tests.

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. No dispute existed that at least six white males including Mr. Demman, Mr. Knapus, Mr. Mecham, Mr. Olsen, Mr. Dale, and Mr. Taggart received promotions from entry level engineers to grades higher than Mr. Tarkeshian who himself remained at the entry level for an engineer during his 26 plus year career with Salt Lake County.

None of the six white males promoted from entry level engineers to higher grades over Mr. Tarkeshian obtained a PE license and/or qualifying results from either the EIT, EQE, or FE tests as required by Salt Lake County's written policies. Salt Lake County argued exceptions applied for each promotion of the six white males who lacked a PE license and/or qualifying results from either the EIT, EQE or FE tests. The preponderance of the evidence in this case revealed that 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-5-106.⁹ It is incomprehensible that Mr. Tarkeshian who in many cases had more experience and education than those promoted over him sat in an entry level engineering position for 26 years while Salt Lake County found various and sundry exceptions to the written rules in order to promote white, non-arabic, non-Iranian/Persian males. Salt Lake County always seemed able to find an exception to the rules that bound Mr. Tarkeshian to an entry level position in order to promote everyone but Mr. Tarkeshian.

⁹ Because I found direct discrimination by Salt Lake County against Mr. Tarkeshian based on race, national origin, and color, I do not reach the issues of retaliation. Mr. Tarkeshian presented no evidence to support his claim of age discrimination.

After reclassification of the "career ladder" levels from 24-26, to 26-28, on May 1, 2000, all entry level engineers including Mr. Tarkeshian moved from a 24 to a 26 grade. However Mr. Tarkeshian lost the benefit of earlier promotion.

Salt Lake County should be compelled to promote Mr. Tarkeshian to a grade 26 engineer effective November 13, 1979¹⁰, until April 16, 2000¹¹ at which date Salt Lake County should reclassify Mr. Tarkeshian to a grade 28 engineer. Salt Lake County should reimburse Mr. Tarkeshian for the difference in the pay he actually received for the time period November 13, 1979, until the date of this Order, and the pay he would have received pursuant to the promotions ordered herein.

V. CONCLUSIONS OF LAW.

Utah Code § 34A-5-106(1) states in relevant part that:

It is a discriminatory or prohibited employment practice:

(a)(i) For an employer to refuse to... promote...or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any persons otherwise qualified, because of:

(A) race;

(B) color;

(G) national origin.....

Mr. Tarkeshian belonged to a protected class as an Arabic man of Iranian/Persian national origin and brown skin color. During the times relevant to this action, Mr. Tarkeshian had Bachelor of Science degrees in both Civil Engineering and Mathematics. Mr. Tarkeshian also had a diploma in Industrial Drafting from National Technical Schools of Los Angeles, California. When denied his first promotion in November 1979 Mr. Tarkeshian had two years experience in Salt Lake County's Engineering Division together with other experience in the engineering field. Absent the exceptions made by Salt Lake County for white, non-Arabic, non Iranian/Persian, engineers, Mr. Tarkeshian qualified for promotion from the entry level engineer grade to the next grade level in the Career Ladder for engineers the same as others promoted over him.

¹⁰The date Salt Lake County first denied Mr. Tarkeshian promotion to the grade 26.

¹¹ The first date evidenced in this case that an engineer received reclassification promotion from grade 26 to 28. (i.e. Martin Knapus).

In summary, Salt Lake County discriminated against Mr. Tarkeshian based on his race, Arabic, National Origin, Iranian/Persian, and color, brown. 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.

Salt Lake County must promote Mr. Tarkeshian to a grade 26 engineer effective November 13, 1979, until April 16, 2000, at which date Salt Lake County must reclassify Mr. Tarkeshian to a grade 28 engineer. Salt Lake County must reimburse Mr. Tarkeshian for the difference in the pay he actually received for the time period November 13, 1979, until the date of this Order, and the pay he would have received pursuant to the promotions ordered herein.

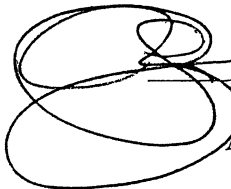
VI. ORDER

IT IS THEREFORE ORDERED that Salt Lake County shall promote Mr. Tarkeshian to a grade 26 engineer effective November 13, 1979, until April 16, 2000, at which date Salt Lake County shall reclassify Mr. Tarkeshian to a grade 28 engineer. Salt Lake County shall reimburse Mr. Tarkeshian for the difference in the pay he actually received for the time period November 13, 1979, until the date of this Order, and the pay he would have received pursuant to the promotions ordered herein together with interest at eight percent (8%).

IT IS FURTHER ORDERED that Salt Lake County shall cease all discriminatory practices toward Mostafa Tarkeshian.

IT IS FURTHER ORDERED that no later than October 22, 2003, Mostafa Tarkeshian's attorney, Ashley Jolly, shall file an affidavit setting forth in detail his attorneys' fees relevant to this matter. The respondents shall no later than November 3, 2003, file objections, if any, with respect to Ashley Jolly's attorneys' fees affidavit. Thereafter, I will issue a supplemental Order with respect to attorneys' fees in this matter.

Dated this 9th day of October 2003,


Richard M. La Jeunesse
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

CERTIFICATE OF MAILING


I, Karla Rush, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Findings of Fact, Conclusions of Law, and Order in the case of Tarkeshian v. Salt Lake County, Case No. 8000083 on the 4th day of October 2003, to the following:

MOSTAFA TARKESHIAN
3019 E 3215 S
SALT LAKE CITY UT 84109

ASHLEY JOLLY ESQ
STEPHEN COOK ESQ
323 S 600 E STE 200
SALT LAKE CITY UT 84102

DAVID YOCUM ESQ
VALERIE WILDE ESQ
2001 S STATE STE S3400
SALT LAKE CITY UT 84190

SHERRIE HAYASHI ESQ
DIRECTOR UALD
160 E 300 S THIRD FLOOR
SALT LAKE CITY UT 84111



Karla Rush

ADDENDUM B: APPEALS BOARD DECISION

**APPEALS BOARD
UTAH LABOR COMMISSION**

MOSTAFA (JIM) TARKESHIAN,

Applicant,

v.

SALT LAKE COUNTY PUBLIC WORKS,

Defendant.

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**ORDER GRANTING
MOTION FOR REVIEW**

Case No. 8-00-0083

Salt Lake County asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's determination that the County violated the Utah Antidiscrimination Act (Title 34A, Chapter 5, Utah Code Annotated; ("the Act" hereafter) by engaging in unlawful employment discrimination against Mostafa Tarkeshian.

The Appeals Board exercises jurisdiction in this matter pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-5-107(11).

BACKGROUND AND ISSUES PRESENTED

On November 16, 1999, Mr. Tarkeshian filed a complaint with the Utah Antidiscrimination and Labor Division ("UALD") alleging the County had refused to promote him because of his national origin, race, color and age, thereby violating the Utah Antidiscrimination Act. UALD investigated the complaint but found no violation of the Act. Mr. Tarkeshian then requested a formal *de novo* evidentiary hearing on his complaint as allowed by §34A-5-107(4)(c) of the Act.

Judge La Jeunesse conducted the evidentiary hearing on April 14, 2003. During the course of the hearing, Mr. Tarkeshian limited his charges against the County to discrimination based on national origin and retaliation. On October 9, 2003, Judge La Jeunesse ruled that the County had unlawfully discriminated against Mr. Tarkeshian.

In seeking Appeals Board review of this matter, the County challenges Judge La Jeunesse's findings of fact and his ultimate conclusion of unlawful discrimination. In reviewing Judge La

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MOSTAFA (JIM) TARKESHIAN
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Jeunesse's decision, the Appeals Board may substitute its judgment for that of Judge La Jeunesse, United States Steel Corp. v. Industrial Commission, 607 P.2d 807, 811 (Utah 1980), and may affirm, modify or reverse his decision, or remand for further proceedings. See §34A-1-303(4) Utah Code Annotated.

FINDINGS OF FACT

Having carefully considered the testimony and documentary evidence presented at the hearing in this matter, the Appeals Board enters the following findings of fact and sets aside Judge La Jeunesse's findings to the extent they are inconsistent with these findings.

Mr. Tarkeshian is of Iranian national origin. He holds Bachelor of Science degrees in both mathematics and engineering. He has been employed as an engineer by the Salt Lake County Public Works Department since 1977. The Public Works Department is comprised of several divisions, including the Engineering Division, where Mr. Tarkeshian works on flood control projects, and the Development Services Division, which includes engineers who review subdivision surveys and designs.

Mr. Tarkeshian began his career with the County at a "grade 24," what was then the entry level for engineers. In 1980, the County established standards by which engineers could advance to higher grades within the County's personnel classification system. Under this "career ladder," the entry level for engineers remained at grade 24. However, engineers who obtained one of several specified professional engineering certifications were entitled to automatic advancement to grade 26. Additional qualifications were established for further advancement to grade 28.¹

The County assisted its entry level engineers in obtaining certification by authorizing use of work time for study, providing study materials and also establishing study groups. For personal reasons, Mr. Tarkeshian did not avail himself of these opportunities and has never obtained certification.

Some years after instituting its career ladder for engineers, the County recognized that engineers working in its Development Services Division had substantial responsibilities related to land surveys. For that reason, the County permitted engineers in that division to substitute a surveyor's license for the engineering certification that was otherwise required under the career ladder standard. In other words, engineers in the Development Services Division were advanced from grade 24 to grade 26 without engineering certification if, instead, they obtained a surveyor's license. In implementing this policy, the County did not adequately update its written career path

¹ A few years ago, the entire career ladder was upgraded, with the grades increasing from 24/26/28 to 26/28/30.

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policy. However, the new policy was incorporated in recruitment bulletins during 1998 and thereafter and was consistently applied within the Development Services Division. For engineers working in other divisions the engineering certification requirement continued to be applied.

The foregoing requirements applied only to those County employees classified as engineers and not to other classifications. The County Personnel Director, rather than the County's individual departments or division, establishes minimum job qualifications.

Mr. Tarkeshian has identified a number of individuals he believes were promoted to higher grade levels despite their lack of engineering certification. The circumstances of each of these individuals are discussed below.

- Brent Tidwell. At the time the County instituted its engineering career ladder, Mr. Tidwell was already employed as engineering section manager within the Development Services Division at a grade 27. He did not have engineering certifications, but his position was primarily supervisory and administrative. The County allowed him to remain where he was. At some point, he obtained a surveyor's license and his grade was increased.
- Reid Denman. Mr. Denman began work for the County in 1976 and, over 25 years, worked his way through various survey and engineering technician jobs until he was selected for an opening as an entry level, grade 24 engineer in the Development Services Division. After six years in that position, he was selected to manage the Division, thereby replacing Mr. Tidwell. Mr. Denman had a surveyor's license.
- Martin Knaphus. Mr. Knaphus was employed as an engineer, grade 28, in the Development Services Division. He has a surveyor's license.
- Denton Mecham. Mr. Mecham is currently Director of the Sanitation Division, at a grade 33. In that capacity, he performs no engineering functions and no certification is required. Prior to his current position, he was Pavement Management Supervisor at a grade 26 in the Public Works Operations Division. That position did not require any certification.
- Ricky Olsen. Mr. Olsen is Flood Control Supervisor, Grade 28. His position does not require professional certification.
- Larry Taggart. Mr. Taggart retired from County service in December 1998, as an engineer 24 in the same Division as Mr. Tarkeshian. He does not have a professional engineer certification. He was rehired as a temporary part-time employee during August, 1999 at grade 26. As a temporary employee his hourly wage is 25% less than the wage he received before retirement. He receives no fringe benefits and has no merit protection.

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MOSTAFA (JIM) TARKESHIAN
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County policy exempts temporary individuals from meeting minimum job qualifications that would be applicable to full time merit employees.

- Stephen Dale. Mr. Dale was hired in 1998 as an engineer, grade 26, in the Development Services Division. He has a surveyor's license.

Mr. Tarkeshian receives a performance evaluation from his supervisor each year. At the end of 1998, he was rated as meeting or exceeding expectations in all categories of his evaluation. During November 1999, Mr. Tarkeshian filed his discrimination complaint against the County. A few months later, he received his performance evaluation for 1999. The evaluation was somewhat lower than the year before. Mr. Tarkeshian received an unsatisfactory evaluation in one of the seven categories, but was rated as meeting expectations in 5 other categories. He received an "exceeding expectations" rating in one category. Overall, he was rated as successful for 1999.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-5-106 of the Utah Antidiscrimination Act prohibits employers from discriminating in the terms or conditions of employment because of, among other factors, national origin. Section 106 also prohibits retaliation against employees who have filed discrimination complaints. These provisions of the Act are equivalent to federal statutes prohibiting employment discrimination. Therefore, in interpreting and applying the Utah Act, the Commission and Utah's appellate courts have generally followed the precedent established by the federal courts in interpreting and applying federal antidiscrimination law. Viktron/Lika v. Labor Commission, 38 P.3d 993, 995 (Utah App.); Sheikh v. Department of Public Safety, 904 P.2d 1103 (Utah App. 1995); University of Utah v. Industrial Commission, 736 P.2d 630 (Utah 1987). The Appeals Board will likewise consider federal precedent in evaluating Mr. Tarkeshian's claims of discrimination based on his national origin and retaliation.

Mr. Tarkeshian's claim of discrimination based on national origin. Mr. Tarkeshian contends that, because of his Iranian national origin, the County applied more stringent "career ladder" requirements to him than it applied to other County engineers. Mr. Tarkeshian further contends that this discrimination prevented him from receiving the increases in grade and pay that other similarly situated employees received.

In McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973), the United States Supreme Court defined the burden of production and order for presentation of proof for claims of intentional discrimination based on circumstantial evidence. In such cases, the individual alleging discrimination must first establish a "*prima facie*" case. The employer is then required to come forward with a non-discriminatory explanation for its actions. If the employer produces such an explanation, it falls to the trier of fact to decide the ultimate question: Did the employer intentionally

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discriminate against the employee for an unlawful reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502; also Reeves v. Sanderson Plumbing Products, 530 U.S. 133, (2000); also Victron/Lika, 38 P.3d at 995.

Here, Mr. Tarkeshian has discharged his initial obligation of establishing a *prima facie* claim of employment discrimination based on national origin. Likewise, the County has fulfilled its obligation of providing a non-discriminatory explanation of its treatment of Mr. Tarkeshian. With the case in this posture and considering all relevant evidence and permissible inferences, the Appeals Board must address the ultimate question: Did the County in fact, discriminate against Mr. Tarkeshian because of his national origin? In considering this ultimate question, the Appeals Board finds the following facts to be persuasive.

Mr. Tarkeshian has been employed by the County for more than 25 years. He has identified no instances during that time of any conflict or comment from co-worker, supervisor or manager related to his national origin. Furthermore, Mr. Tarkeshian has presented no evidence regarding the national origin of his co-workers and supervisors. The Appeals Board finds that Mr. Tarkeshian's national origin was not a factor in his work environment.

Mr. Tarkeshian acknowledges that, for many years, the County has had a "career ladder" for engineers that allowed for professional development and concomitant advancement in grade and pay. Mr. Tarkeshian also acknowledges that he has not obtained any of the professional certifications that would allow him to automatically move up the career ladder from an entry level grade 24 to a grade 26. Consequently, the County's career ladder system appears to be a legitimate, non-discriminatory explanation for Mr. Tarkeshian's failure to advance.

However, Mr. Tarkeshian argues the County's career ladder should not be taken at face value because it has been inconsistently applied to favor other individuals who are similarly situated to Mr. Tarkeshian, but are not of Iranian national origin. It is Mr. Tarkeshian's theory that because of his national origin, he has remained at the bottom rung of the career ladder.

The Appeals Board has carefully considered the evidence presented by Mr. Tarkeshian and the County regarding the advancement of other engineers in County service and the failure to advance Mr. Tarkeshian. The Appeals Board concludes that the so-called disparities in treatment are attributable to the other engineers meeting the County's requirements for advancement and other legitimate reasons that are not related to Mr. Tarkeshian's national origin.

Most of the individuals identified by Mr. Tarkeshian as having received favorable treatment were in the Development Division. As such, their duties focused on evaluation and approval of subdivision surveys. It was reasonable for the County to allow engineers in that division to substitute a surveyor's license for the engineering certification that was otherwise required by the career ladder system.

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Mr. Tarkeshian has also identified individuals who have been promoted to manage various divisions who lack engineering certification. However, it is undisputed that the County's personnel classification system does not require engineering certifications for the individuals in those positions. Furthermore, Mr. Tarkeshian has not applied for these or any other management positions with the County.

Finally, Mr. Tarkeshian points to Mr. Taggart, who also lacks any engineering certification and who retired from County service as an engineer 24 in the same division as Mr. Tarkeshian. Mr. Taggart was later rehired as a temporary part-time employee at a grade 26. However, as a temporary employee, Mr. Taggart is paid 25% less than the wage he received before retirement, with no fringe benefits or merit protection. Thus, the grade designation for temporary part-time employees is not directly comparable to the grade designation for regular employees. Under these circumstances, the Appeals Board is unable to conclude that Mr. Taggart has been treated more favorably than Mr. Tarkeshian.

In light of the foregoing facts surrounding the relative treatment of Mr. Tarkeshian and his co-workers at the County, the Appeals Board concludes that any differences are attributable to legitimate, non-discriminatory reasons and are not related to Mr. Tarkeshian's national origin. While the County could have done a better job of conforming its written policies to its actual practices that inadequacy, when viewed in the context of all the evidence, does not persuade the Appeals Board that the County was engaged in unlawful employment discrimination against Mr. Tarkeshian.

Mr. Tarkeshian's allegation of retaliation. Although Mr. Tarkeshian contends the County retaliated against him for filing a discrimination complaint with UALD, the only alleged retaliation was a reduction in the subjective evaluation of his work performance from the 1998 to the 1999 evaluation. But in both years Mr. Tarkeshian received at least a "successful" evaluation. He has presented no evidence that his marginally lower evaluation in 1999 had any consequence with respect to the terms or conditions of his employment or any likely effect on future job opportunities. Without such evidence that he suffered an "adverse action," Mr. Tarkeshian's retaliation claim must fail. Tran v. Trustees of the State Colleges, 355 F.3d 1263 (10th Cir. 2004), citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998); Hillig v. Rumsfeld, 2004 W.L. 190946 (10th Circuit August 27, 2004). The Appeals Board therefore finds it unnecessary to consider the other elements of that claim.

Conclusion. In summary, the Appeals Board concludes that the County did not discriminate against Mr. Tarkeshian because of his national origin, nor did the County retaliate against Mr. Tarkeshian for having filed a discrimination complaint against the County.

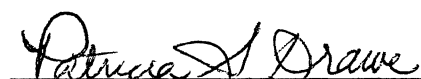
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ORDER

The Appeals Board grants Salt Lake County's motion for review, sets aside Judge La Jeunesse's decision in this matter, and dismisses Mr. Tarkeshian's claims of employment discrimination against the County. It is so ordered.

Dated this 21st day of October, 2004.


Colleen S. Colton, Chair


Patricia S. Drawe


Thomas Carlson²

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

² Appeals Board member Joseph Hatch having recused himself from participating as a member of the Appeals Board in this matter, the remaining members of the Appeals Board have temporarily designated Thomas Carlson to serve in place of Mr. Hatch, pursuant to §34A-1-303(5)(c) of the Utah Labor Commission Act.

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CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Granting Motion For Review in the matter of Mostafa (Jim) Tarkeshian, Case No. 8-00-0083, was mailed first class postage prepaid this 28th day of October, 200~~7~~, to the following:


MOSTAFA (JIM) TARKESHIAN
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2001 SOUTH STATE #S3400
SALT LAKE CITY UT 84190

and by Interdepartmental Mail to:

SHERRIE HAYASHI, DIRECTOR
UTAH ANTIDISCRIMINATION AND LABOR DIVISION


Sara Danielson
Utah Labor Commission

orders/8-00-0083ab

00501

ADDENDUM C: CPMA

History: L. 1965, ch. 29, § 3; 1990, ch. 283, § 6.

Cross-References. — County treasurer, Chapter 24 of this title

17-32-4. Oaths and bonds to be filed.

The oath and bond of the office of a bail commissioner shall be filed with the county clerks of their respective counties.

History: L. 1965, ch. 29, § 4; 1990, ch. 283, § 7.

Cross-References. — County clerk, Chapter 20 of this title

CHAPTER 33

COUNTY PERSONNEL MANAGEMENT ACT

Section		Section	
17-33-1	Title — Establishment of merit system — Separate systems for peace officers and firemen recognized — Options of small counties		sonnel management — Personnel functions of county agencies, departments, or offices
17-33-2	Definitions	17-33-8	Career service — Exempt positions
17-33-3	Merit principles	17-33-9	Acceptance of exempt position by career service employee — Reappointment register
17-33-4	Career service council — Members and alternate members — Powers and duties — Appeals — Time limit — Qualifications, appointment, terms, and compensation of council members	17-33-10	Grievance and appeals procedure — Employees' complaints of discriminatory or unfair employment practice.
17-33-4.5	Council may refer an appeal to an administrative law judge for a recommendation — Council action on recommendation	17-33-11	Political activities of employees
17-33-5	Office of personnel management — Director — Appointment and responsibilities — Personnel rules	17-33-12	Reciprocal agreements for benefit of system — Cooperation by director with other governmental agencies
17-33-6	Certification of eligibility by director — Power of director to examine payrolls	17-33-13	Prohibited actions
17-33-7	Functions of county office of per-	17-33-14	Violations — Misdemeanor — Ineligibility for employment and forfeiture of position
		17-33-15	Duty of county legislative body to provide rules or regulations — Conflicts with state or federal law

17-33-1. Title — Establishment of merit system — Separate systems for peace officers and firemen recognized — Options of small counties.

(1) This chapter shall be known and may be cited as the "County Personnel Management Act "

(2) A merit system of personnel administration for the counties of the state of Utah, their departments, offices, and agencies, except as otherwise specifically provided, is established

(3) This chapter recognizes the existence of the merit systems for peace officers of the several counties as provided for in Chapter 30, Deputy Sheriffs

— Merit System, and for firemen of the several counties as provided for in Chapter 28, Firemen's Civil Service Commission, and is intended to give county commissions the option of using the provisions of this chapter as a single merit system for all county employees or in combination with these existing systems for firemen and peace officers.

(4) This chapter is optional with counties having fewer than 130 full-time, part-time, and seasonal employees and elected officials not covered by other merit systems.

History. C. 1953, 17-33-1, enacted by L. 1981, ch. 81, § 2; 2001, ch. 241, § 46.

Repeals and Reenactments. — Laws 1981, ch. 81, § 1 repeals former §§ 17-33-1 to 17-33-20 as enacted by Laws 1969, ch. 45, §§ 1 to 20, and as amended by Laws 1977, ch. 61, § 1, 1978, ch. 5, § 1 and 1979, ch. 61, § 1 relating to the county merit system. Laws 1981, ch. 81, § 2 enacts present §§ 17-33-1 to 17-33-14. Laws 1981, ch. 81, § 3 enacts present § 17-33-15.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, in Subsection (3) updated code citations, in Subsection (4) substituted 'full-time, part-time, and seasonal employees and elected officials' for 'employees' and made stylistic changes.

Cross-References. — State personnel management Title 67, Chapter 19.

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Civil Service § 1 et seq.

A.L.R. — Validity, under Federal Constitution of regulations, rules, or statutes requiring

random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government. 86 A.L.R. Fed. 420.

17-33-2. Definitions.

As used in this chapter

(1) "Career service position" means any position in the county service except those exempted under Section 17-33-8.

(2) "Council" means the career service council, a three-member appeals and personnel advisory board.

(3) "Director" means the director of personnel management.

(4) "Eligible applicant" means any applicant that meets the job related minimum requirements established for a position in the career service.

(5) "Eligible list" means a list of eligible applicants ranked in order of relative knowledge, skill, ability and merit.

(6) "Exempt positions" means those positions which are not in the career service as specified in Section 17-33-8.

(7) "Merit system" means a system of personnel administration based on the principles set forth in Section 17-33-3.

(8) "Position classification" means a grouping of positions under the same title which are sufficiently similar to be compensated at the same salary range and to which the same tests of ability can be applied.

(9) "Provisional appointment" means an appointment to fill a position pending the establishment of a register for such position.

History: C. 1953, 17-33-2, enacted by L. 1981, ch. 81, § 2; 1993, ch. 227, § 160, 1994, ch. 12, § 13; 1994, ch. 146, § 15, 1999, ch. 182, § 1.

Amendment Notes. — The 1999 amend-

ment, effective May 3, 1999, deleted former Subsection (2) which defined 'certification,' redesignating the following subsections accordingly.

17-33-3. Merit principles.

It is the policy of this state that each county may establish a personnel system administered in a manner that will provide for the effective implementation of the following merit principles:

- (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;
- (2) provision of equitable and adequate compensation;
- (3) training of employees as needed to assure high-quality performance;
- (4) retention of employees on the basis of the adequacy of their performance, and separation of employees whose inadequate performance cannot be corrected;
- (5) fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, or disability, and with proper regard for their privacy and constitutional rights as citizens;
- (6) provision of information to employees regarding their political rights and prohibited practices under the Hatch Act; and
- (7) provision of a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

History: C. 1953, 17-33-3, enacted by L. 1981, ch. 81, § 2; 2001, ch. 73, § 11.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, in Subsection (5) substituted “disability” for “handicap” and

made a stylistic change.

Federal Law. — The federal Hatch Act, cited in Subsection (6), is 5 U.S.C. § 1501 et seq.

17-33-4. Career service council — Members and alternate members — Powers and duties — Appeals — Time limit — Qualifications, appointment, terms, and compensation of council members.

- (1) (a) (i) There shall be in each county establishing a system a three-member bipartisan career service council appointed by the county executive. The members of the council shall be persons in sympathy with the application of merit principles to public employment.
 - (ii) (A) The county executive may appoint alternate members of the career service council to hear appeals that one or more regular career service council members are unable to hear.
 - (B) The term of an alternate member of the career service council may not exceed one year.
- (b) The council shall hear appeals not resolved at lower levels in the cases of career service employees suspended, transferred, demoted, or dismissed as well in the cases of other grievances not resolved by the grievance procedure at the division or departmental level.
- (c) The career service council:
 - (i) may make an initial determination in each appeal whether the appeal is one of the types of matters under Subsection (1)(b) over which the council has jurisdiction;

- (ii) shall review written appeals in cases of applicants rejected for examination and report final binding appeals decisions, in writing, to the county legislative body,
 - (iii) may not hear any other personnel matter; and
 - (iv) may affirm, modify, vacate, or set aside an order for disciplinary action
- (d) (i) A person adversely affected by a decision of the career service council may appeal the decision to the district court.
- (ii) An appeal to the district court under this Subsection (1)(d) is barred unless it is filed within 30 days after the career service council issues its decision.
 - (iii) If there is a record of the career service council proceedings, the district court review shall be limited to the record provided by the career service council.
 - (iv) In reviewing a decision of the career service council, the district court shall presume that the decision is valid and may determine only whether the decision is arbitrary or capricious.
- (2) Each council member shall serve a term of three years to expire on June 30, three years after the date of his or her appointment, except that original appointees shall be chosen as follows: one member for a term expiring June 30, 1982; one member for a term expiring June 30, 1983; and one member for a term expiring June 30, 1984. Successors of original council members shall be chosen for three-year terms. An appointment to fill a vacancy on the council shall be for only the unexpired term of the appointee's successor. Each member of the board shall hold office until his successor is appointed and confirmed. A member of the council may be removed by the county executive for cause, after having been given a copy of the charges against him or her and an opportunity to be heard publicly on the charges before the county legislative body. Adequate annual appropriations shall be made available to enable the council effectively to carry out its duties under this law.
- (3) Members and alternates of the council shall be United States citizens and be actual and bona fide residents of the state of Utah and the county from which appointed for a period of not less than one year preceding the date of appointment and a member may not hold another government office or be employed by the county.
- (4) The council shall elect one of its members as chairperson, and two or more members of the council shall constitute a quorum necessary for carrying on the business and activity of the council.
- (5) The council shall have subpoena power to compel attendance of witnesses, and to authorize witness fees where it deems appropriate, to be paid at the same rate as in justice courts.
- (6) (a) (i) Council members shall receive compensation for each day or partial day they are in session at a per diem rate determined by the county legislative body.
- (ii) An alternate member shall receive compensation for each day or partial day that the alternate member is required to replace a regular council member, at a per diem rate determined by the county legislative body
- (b) The county legislative body may periodically adjust the compensation rate for inflation.

History: C. 1953, 17-33-4, enacted by L. 1961, ch. 81, § 2; 1994, ch. 146, § 16; 1999, ch. 182, § 2; 2001, ch. 241, § 47.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, subdivided Subsection (1) inserted “career service” in Subsection (1)(b) added the introductory phrase in Subsection (1)(c), added Subsections (1)(c)(i) and (1)(c)(ii), added “Notwithstanding the other provisions of this Subsection (1)” in Subsection (1)(d) substituted “a per diem rate determined by the county legislative body” for “the rate of \$50 per diem” in Subsection (C), and made related and stylistic changes throughout the section

The 2001 amendment, effective April 30, 2001, in Subsection (1)(a)(i) substituted “executive” for “legislative body,” added Subsections (1)(a)(ii) and (1)(c)(iv), substituted the present Subsection (1)(d) for former provisions which stated that the right of appeal shall not be abridged and referred to the Utah Rules of Civil Procedure, in Subsection (2) substituted “county executive” for “governing body,” in Subsection (3) added “and alternates” near the beginning, added Subsection (6)(a)(ii), and made related changes

Cross-References. — Fees of jurors and witnesses, § 78-46-24 et seq

NOTES TO DECISIONS

Immunity.

In a civil rights action brought by a prison psychiatrist who had been reassigned and subsequently discharged for criticizing a local jail’s conditions, individual members of the career

service were protected by quasi-judicial immunity because their functions and duties were comparable to state judges’ *Atiya v. Salt Lake County*, 988 F.2d 1013 (10th Cir. 1993)

17-33-4.5. Council may refer an appeal to an administrative law judge for a recommendation — Council action on recommendation.

(1) (a) A county legislative body may appoint one or more administrative law judges to hear appeals referred by a career service council under this section.

(b) Each administrative law judge shall be trained and experienced in personnel matters

(2) (a) If a career service council determines that it is in the county’s best interest, it may initially refer an appeal to an administrative law judge who has been appointed under Subsection (1).

(b) After holding a hearing, the administrative law judge shall make findings of fact and a recommendation to the career service council.

(c) After receiving the administrative law judge’s recommendation, a career service council may request the administrative law judge to hold a further factual hearing before the career service council’s decision.

(d) A career service council may adopt or reject an administrative law judge’s recommendation, whether before or after a further hearing under Subsection (2)(c)

History: C. 1953, 17-33-4.5, enacted by L. 2001, ch. 241, § 48.

Effective Dates. — Laws 2001 ch. 241

became effective on April 30, 2001, pursuant to Utah Const., Art. VI, Sec. 25

17-33-5. Office of personnel management — Director — Appointment and responsibilities — Personnel rules.

(1) (a) Each county executive shall:

- (i) create an office of personnel management, administered by a director of personnel management; and
 - (ii) ensure that the director is a person with proven experience in personnel management.
 - (b) The position of director of personnel management shall be:
 - (i) a merit position; and
 - (ii) filled as provided in Subsection (1)(c).
 - (c) The career service council shall:
 - (i) advertise and recruit for the director position in the same manner as for merit positions,
 - (ii) select three names from a register, and
 - (iii) submit those names as recommendations to the county legislative body.
 - (d) The county legislative body shall select a person to serve as director of the office of personnel management from the names submitted to it by the career service council.
- (2) The director of personnel management shall:
- (a) encourage and exercise leadership in the development of expertise in personnel administration within the several departments, offices, and agencies in the county service and make available the facilities of the office of personnel management to this end.
 - (b) advise the county legislative and executive bodies on the use of human resources;
 - (c) develop and implement programs for the improvement of employee effectiveness, such as training, safety, health, counseling, and welfare;
 - (d) investigate periodically the operation and effect of this law and of the policies made under it and report findings and recommendations to the county legislative body;
 - (e) establish and maintain records of all employees in the county service, setting forth as to each employee class, title, pay or status, and other relevant data;
 - (f) make an annual report to the county legislative body and county executive regarding the work of the department; and
 - (g) apply and carry out this law and the policies under it and perform any other lawful acts that are necessary to carry out the provisions of this law.
- (3) (a) (i) The director shall recommend personnel rules for the county.
- (ii) The county legislative body may approve, amend, or reject those rules before they are adopted.
- (b) The rules shall provide for:
- (i) recruiting efforts to be planned and carried out in a manner that assures open competition, with special emphasis to be placed on recruiting efforts to attract minorities, women, persons with a disability as defined by and covered under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102, or other groups that are substantially underrepresented in the county work force to help assure they will be among the candidates from whom appointments are made;
 - (ii) the establishment of job related minimum requirements wherever practical, that all successful candidates shall be required to meet in order to be eligible for consideration for appointment or promotion,
 - (iii) selection procedures that include consideration of the relative merit of each applicant for employment, a job related method of

determining the eligibility or ineligibility of each applicant, and a valid, reliable, and objective system of ranking eligible applicants according to their qualifications and merit;

(iv) certification procedures that insure equitable consideration of an appropriate number of the most qualified eligible applicants based on the ranking system;

(v) appointments to positions in the career service by selection from the most qualified eligible applicants certified on eligible lists established in accordance with Subsections (3)(b)(iii) and (iv);

(vi) noncompetitive appointments in the occasional instance where there is evidence that open or limited competition is not practical, such as for unskilled positions that have no minimum job requirements;

(vii) limitation of competitions at the discretion of the director for appropriate positions to facilitate employment of qualified applicants with a substantial physical or mental impairment, or other groups protected by Title VII of the Civil Rights Act;

(viii) permanent appointment for entry to the career service that shall be contingent upon satisfactory performance by the employee during a period of six months, with the probationary period extendable for a period not to exceed six months for good cause, but with the condition that the probationary employee may appeal directly to the council any undue prolongation of the period designed to thwart merit principles;

(ix) temporary, provisional, or other noncareer service appointments, which may not be used as a way of defeating the purpose of the career service and may not exceed 90 days, with the period extendable for a period not to exceed an additional 90 days for good cause;

(x) lists of eligible applicants normally to be used, if available, for filling temporary positions, and short term emergency appointments to be made without regard to the other provisions of law to provide for maintenance of essential services in an emergency situation where normal procedures are not practical, these emergency appointments not to exceed 90 days, with that period extendable for a period not to exceed an additional 90 days for good cause;

(xi) promotion and career ladder advancement of employees to higher level positions and assurance that all persons promoted are qualified for the position;

(xii) recognition of the equivalency of other merit processes by waiving, at the discretion of the director, the open competitive examination for placement in the career service positions of those who were originally selected through a competitive examination process in another governmental entity, the individual in those cases, to serve a probationary period;

(xiii) preparation, maintenance, and revision of a position classification plan for all positions in the career service, based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for, and the same schedule of pay may be equitably applied to, all positions in the same class, the compensation plan, in order to maintain a high quality public work force, to take into account the responsibility and difficulty of the work,

the comparative pay and benefits needed to compete in the labor market and to stay in proper alignment with other similar governmental units, and other factors;

(xiv) keeping records of performance on all employees in the career service and requiring consideration of performance records in determining salary increases, any benefits for meritorious service, promotions, the order of layoffs and reinstatements, demotions, discharges, and transfers;

(xv) establishment of a plan governing layoffs resulting from lack of funds or work, abolition of positions, or material changes in duties or organization, and governing reemployment of persons so laid off, taking into account with regard to layoffs and reemployment the relative ability, seniority, and merit of each employee;

(xvi) establishment of a plan for resolving employee grievances and complaints with final and binding decisions;

(xvii) establishment of disciplinary measures such as suspension, demotion in rank or grade, or discharge, measures to provide for presentation of charges, hearing rights, and appeals for all permanent employees in the career service to the career service council;

(xviii) establishment of a procedure for employee development and improvement of poor performance;

(xix) establishment of hours of work, holidays, and attendance requirements in various classes of positions in the career service;

(xx) establishment and publicizing of fringe benefits such as insurance, retirement, and leave programs, and

(xxi) any other requirements not inconsistent with this law that are proper for its enforcement.

History: C. 1953, 17-33-5, enacted by L. 1981, ch. 81, § 2; 1989, ch. 132, § 1; 1992, ch. 275, § 1; 1993, ch. 227, § 161; 1994, ch. 146, § 17; 1999, ch. 182, § 3; 2001, ch. 73, § 12; 2001, ch. 241, § 49.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, inserted “for employment” in Subsection (3)(b)(iii), substituted “and career ladder advancement” for “in such a manner that eligible permanent career service employees are considered” in Subsection (3)(b)(xi), deleted “in the state” after “governmental units” in Subsection (3)(b)(xiii), and made stylistic changes in the section.

The 2001 amendment by ch. 73, effective April 30, 2001, in Subsection (3)(b)(i) substituted “persons with a disability as defined by and covered under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102” for “handicapped” and made stylistic changes.

The 2001 amendment by ch. 241, effective April 30, 2001, in Subsection (1)(a) substituted “executive” for “legislative body,” substituted the present Subsection (1)(b) for the former which described the length of term and appointment of another personnel manager, in Subsection (2)(f) added “and county executive,” in Subsection (3)(a) substituted “recommend” for “issue” and “adopted” for “implemented,” and made stylistic changes.

This section has been reconciled by the Office of Legislative Research and General Counsel.

Meaning of “this law.” — The term “this law,” as used in this section, apparently means Laws 1981, ch. 81, codified as §§ 17-33-1 to 17-33-15.

Federal Law. — Title VII of the federal Civil Rights Act, cited in Subsection (3)(b)(vii) is 42 U.S.C. § 2000e et seq.

NOTES TO DECISIONS

Layoff plan.

A county was not authorized to adopt standards for laying off employees different from those required under Subsection (3)(b)(xv), thus, an employer was required to consider all

three statutory criteria in making reduction in force determinations. *Thurston v. Box Elder County*, 835 P.2d 165 (Utah 1992).

A county may not consider factors in addition to relative ability, seniority, and merit, allowing

consideration of factors beyond those stated in Subsection (3)(b)(xv) would result in no layoff plan at all, leaving employees subject to arbitrary treatment by their superiors *Thurston v Box Elder County*, 835 P2d 165 (Utah 1992)

County's use of language from the County Personnel Management Act in writing the employee reduction in force provision of its policies and procedures manual manifested an intent to be subject to a court's interpretation of the Act

when interpreting an ambiguous provision of the manual, thus, even though the prior decision finding that a county wrongfully terminated an employee overstated the applicability of the Act to the county's personnel policies and procedure, the earlier holding would remain the law of the case for the purposes of resolving the ambiguity of the manual's provision *Thurston v Box Elder County*, 892 P2d 1034 (Utah 1995)

17-33-6. Certification of eligibility by director — Power of director to examine payrolls.

No new employee shall be hired in a position covered by this chapter, and no employee shall be changed in pay, title, or status, nor shall any employee be paid, unless certified by the director as eligible under the provisions of, or regulations promulgated under, this chapter. The director of personnel management may examine payrolls at any time to determine conformity with this chapter and the county rules.

History: C. 1953, 17-33-6, enacted by L. 1981, ch. 81, § 2.

17-33-7. Functions of county office of personnel management — Personnel functions of county agencies, departments, or offices.

- (1) (a) The county office of personnel management shall perform the functions required by this Subsection (1).
- (b) The county executive, county legislative body, and county office of personnel management may not delegate those functions to a separate county agency, office, or department.
- (c) The county office of personnel management shall:
 - (i) design and administer a county pay plan that includes salaries, wages, incentives, bonuses, leave, insurance, retirement, and other benefits;
 - (ii) design and administer the county classification plan and grade allocation system, including final decisions on position classification and grade allocation;
 - (iii) conduct position classification studies, including periodic desk audits, except that an agency, department, or office may submit classification recommendations to the county office of personnel management;
 - (iv) maintain registers of publicly recruited applicants and certification of top-ranking eligible applicants;
 - (v) monitor county agency, department, or office personnel practices to determine compliance with equal opportunity and affirmative action guidelines, and
 - (vi) maintain central personnel records.
- (d) The county legislative body may approve, amend, or reject the pay plan.

- (2) County agencies, departments, or offices shall
- (a) establish initial job descriptions,
 - (b) recommend position classifications and grade allocations,
 - (c) make final selections for appointments and promotions to vacant positions,
 - (d) conduct performance evaluations,
 - (e) discipline employees, and
 - (f) perform other functions approved by the county executive, and agreed to by the county agency, office, or department

History: C. 1953, 17-33-7, enacted by L. 1981, ch. 81, § 2; 1991, ch. 134, § 1; 1992, ch. 275, § 2; 1999, ch. 182, § 4; 2001, ch. 241, § 50.

Amendment Notes. — The 1999 amendment, effective May 3 1999, in Subsection (1)(c)(iv) inserted “of publicly recruited appli-

cants” and “top-ranking” deleted “from lists of certified eligibles” in Subsection (2)(c), and made one minor stylistic change

The 2001 amendment, effective April 30, 2001 substituted “county executive” for “legislative body” in Subsection (2)(f)

17-33-8. Career service — Exempt positions.

The career service shall be a permanent service to which this law shall apply and shall comprise all tenured positions in the public service now existing or hereafter established, except the following

(1) The county executive members of the county legislative body, other elected officials, and major department heads charged directly by the county legislative body, or by a board appointed by the county legislative body, with the responsibility of assisting in the formulation and carrying out of matters of policy, and if it is sought that any position which differs from its present status be exempted or tenured after the effective date of this act, a public hearing on the proposed exemption or tenure shall be held upon due notice and the concurrence of the council

(2) One confidential secretary for each elected county officer and major department head if one is assigned

(3) An administrative assistant to the county executive, each member of the county legislative body, and to each elected official, if one is assigned

(4) The duly appointed chief deputy of any elected county officer who would take over and discharge the duties of the elected county officer in the absence or disability of the originally responsible officer

(5) Persons employed to make or conduct a temporary and special inquiry, investigation, or examination on behalf of the county legislative body or one of its committees

(6) Noncareer employees compensated for their services on a seasonal or contractual basis who are hired on emergency or seasonal appointment basis, as approved by the council, and provisional or part-time employees as defined by the county's policies and procedures or its rules and regulations

(7) Positions which by their nature — confidential or key policy-determining or both — cannot or should not be appropriately included in the career service All positions designated as being exempt under this subsection shall be listed in the rules and regulations promulgated under this act by job title and department, office or agency, and any change in exempt status shall constitute an amendment to the rules and regulations

History: C. 1953, 17-33-8, enacted by L. 1981, ch. 81, § 2; 1994, ch. 146, § 18; 2001, ch. 241, § 51.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, added “county executive” in Subsections (1) and (3) and made stylistic changes

Meaning of “this act.” — The phrase “this act,” and presumably also “this law,” as used in this section, mean Laws 1981, ch. 81, which enacted this chapter. The term “effective date of this act,” in Subsection (1), means the effective date of Laws 1981, ch. 81, i.e., July 1, 1981.

NOTES TO DECISIONS

ANALYSIS

Granting of exempt status
Relation to county policy

Granting of exempt status.

Only the merit council can confer exempt status and then only to major department heads charged directly by the governing body with assisting in policy formulation and implementation; county commissioners have no authority to grant exemptions from merit status by passing ordinances. *Layton v Swapp*, 484 F Supp 958 (D Utah 1979) (decided under prior law).

Relation to county policy.

Where, under a county's personnel manual, the plaintiff was a permanent employee who could not have been discharged except for cause, curtailment of work, or lack of funds, this section did not supersede the county manual to make her position “exempt” rather than permanent; the county opted to have its own merit system, as delineated in its manual, and its restrictive discharge policy gave the plaintiff a property interest in continued employment that could not be curtailed without constitutional protections. *West v Grand County*, 967 F2d 362 (10th Cir 1992).

17-33-9. Acceptance of exempt position by career service employee — Reappointment register.

(1) Any career service employee accepting an appointment to an exempt position who is not retained by the appointing officer, unless discharged for cause as provided by this act or by regulation, shall:

(a) be appointed to any career service position for which the employee qualifies in a pay grade comparable to the employee's last position in the career service provided an opening exists; or

(b) be appointed to any lesser career service position for which the employee qualifies pending the opening of a position described in Subsection (1) of this section.

(2) The director shall maintain a reappointment register to facilitate the operation of this section, which shall have precedence over other registers.

History: C. 1953, 17-33-9, enacted by L. 1981, ch. 81, § 2.

Meaning of “this act.” — See note under

catchline “Meaning of ‘this law’” following § 17-33-5

17-33-10. Grievance and appeals procedure — Employees' complaints of discriminatory or unfair employment practice.

(1) Any county to which the provisions of this act apply shall establish in its personnel rules and regulations a grievance and appeals procedure. The procedure shall be used to resolve disputes arising from grievances as defined in the rules and regulations, including but not limited to acts of discrimination. The procedure may also be used by employees in the event of dismissal, demotion, suspension, or transfer.

(2) Any charge by a county career service employee of discriminatory or unfair employment practice as prohibited by Section 34A-5-106, can be filed with the Division of Antidiscrimination and Labor within the Labor Commission. Complaints shall be filed within 30 days of the issuance of a written decision of the county career service council.

History: C. 1953, 17-33-10, enacted by L. 1981, ch. 81, § 2; 1996, ch. 240, § 3; 1997, ch. 375, § 4.

Amendment Notes. — The 1997 amendment, effective July 1, 1997, substituted “34A-5-106” for “35A-5-106” and “Division of Antidis-

crimination and Labor within the Labor Commission” for “Division of Labor, Safety, and Program Regulation” in Subsection (2).

Meaning of “this act.” — See note under catchline “Meaning of ‘this law’” following § 17-33-5

COLLATERAL REFERENCES

A.L.R. — Rights of state and municipal public employees in grievance proceedings, 46 A.L.R.4th 913

17-33-11. Political activities of employees.

Except as otherwise provided by law or by rules and regulations promulgated under this chapter for federally aided programs, county employees may voluntarily participate in political activity subject to the following provisions:

(1) No person shall be denied the opportunity to become an applicant for a position under the merit system in any covered department by virtue of political opinion or affiliation.

(2) No person employed by the county under the merit system may be dismissed from service as a result of political opinion or affiliation.

(3) A county career service employee may voluntarily contribute funds to political groups and become a candidate for public office.

(4) No county officer or employee, whether elected or appointed, may directly or indirectly coerce, command, or advise any officer or employee covered under the merit system to pay, lend, or contribute part of his or her salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No county officer or employee, whether elected or appointed, may attempt to make any officer's or employee's personnel status dependent upon the employee's support or lack of support for any political party, committee, organization, agency, or person engaged in a political activity.

(5) No officer or employee may engage in any political activity during the hours of employment nor shall any person solicit political contributions from county employees during hours of employment for political purposes, but nothing in this section shall preclude voluntary contribution by a county employee to the party or candidate of the employee's choice.

(6) Nothing contained in this chapter shall be construed to permit partisan political activity of any county employee who is prevented or restricted from engaging in such political activity by the provision of the federal Hatch Act.

History: C. 1953, 17-33-11, enacted by L. 1981, ch. 81, § 2; 1983, ch. 65, § 1.

Federal Law. — See note under same catchline following § 17-33-3

COLLATERAL REFERENCES

Utah Law Review. — Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics, and Constitutional Policy, 1988 Utah L. Rev. 295 (1988)

A.L.R. — Validity construction, and effect of state statutes restricting political activities of public officers or employees, 51 A.L.R.4th 702.

17-33-12. Reciprocal agreements for benefit of system — Cooperation by director with other governmental agencies.

(1) The county may enter into reciprocal agreements, upon such terms as may be agreed upon, for the use of equipment, materials, facilities, and services with any public agency or body for purposes deemed of benefit to the public personnel system.

(2) The director may cooperate with other governmental agencies charged with public personnel administration in conducting personnel tests, recruiting personnel, training personnel, establishing lists from which eligibles shall be certified for appointment and for the interchange of personnel and their benefits.

History: C. 1953, 17-33-12, enacted by L. 1981, ch. 81, § 2.

17-33-13. Prohibited actions.

(1) It is an offense for a person to make any false statement, certificate, mark, rating, or report with regard to any test, certification, or appointment made under any provision of this law or in any manner commit or attempt to commit any fraud preventing the impartial execution of this chapter.

(2) It is an offense for a person, under circumstances not amounting to a violation of Section 76-8-103 or 76-8-105, to directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for any appointment, proposed appointment, promotion, or proposed promotion to, or for any advantage in, a position in the career service.

(3) It is an offense for any employee of the personnel department, examiner, or other person to:

(a) defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this chapter; or

(b) furnish to any person any special or secret information for the purpose of affecting the rights or prospects of any person with respect to employment in the career service.

History: C. 1953, 17-33-13, enacted by L. 1981, ch. 81, § 2; 1998, ch. 92, § 4.

Amendment Notes. — The 1998 amendment, effective May 4, 1998, made stylistic changes to Subsections (1) to (3) to begin each subsection with the "It is an offense for" language, inserted "under circumstances not

amounting to a violation of Section 76-8-103 or 76-8-105, to" in Subsection (2), and subdivided Subsection (3), adding the (a) and (b) designations

Meaning of "this law." — See note under same catchline following § 17-33-5

17-33-14. Violations — Misdemeanor — Ineligibility for employment and forfeiture of position.

(1) Any person who willfully violates any provision of this chapter or the rules and regulations promulgated under it is guilty of a class A misdemeanor.

(2) Any person who has been adjudged guilty of violating any of the provisions of this chapter or the rules and regulations promulgated under it shall, for a period of five years, in addition to the sanctions of Subsection (1), be ineligible for appointment to or employment in a position in the county service, and if an officer or employee of the county, shall forfeit that office or position.

History: C. 1953, 17-33-14, enacted by L. 1981, ch. 81, § 2; 1991, ch. 241, § 12.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301

17-33-15. Duty of county legislative body to provide rules or regulations — Conflicts with state or federal law.

(1) It shall be the duty of the county legislative body to provide by rule or regulation for the operation and functioning of any activity within the purpose and spirit of the act which is necessary and expedient.

(2) If any provision of this act or the application thereof is found to be in conflict with any state or federal law, conflict with which would impair funding otherwise receivable from the state or federal government, the conflicting part is hereby declared to be inoperative solely to the extent of the conflict and with respect to the department, agency, or institution of the county directly affected, but such finding shall not affect the operation of the remainder of this act in any of its applications.

(3) Notwithstanding any provision to the contrary, no rule or regulation shall be adopted by the county legislative body which would deprive the county or any of its departments, agencies, or institutions of state or federal grants or other forms of financial assistance.

History: C. 1953, 17-33-15, enacted by L. 1981, ch. 81, § 3; 1993, ch. 227, § 162.

act" and "this act," see note under catchline "Meaning of 'this law'" following § 17-33-5.

Compiler's Notes. — For meaning of "the

CHAPTER 34

MUNICIPAL-TYPE SERVICES TO UNINCORPORATED AREAS

Section		Section	
17-34-1	Counties may provide municipal services — Limitation — First class counties required to provide paramedic and detective investigative services	17-34-4	Contracts under Interlocal Cooperation Act
		17-34-5	Budgeting, accounting for, and disbursing of funds — Annual audit
17-34-2	Repealed	17-34-6	State to indemnify county regarding refusal to site nuclear waste
17-34-3	Taxes or service charges		— Terms and conditions

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:

Kevin J. Anderson

Date:

8 Aug 96

SALT LAKE COUNTY
PROBATIONARY PERIOD NOTICE

Salt Lake County has a six-month probationary period for new employees. This is a time for both you and your supervisor to evaluate whether there is a match between the job and your skills and interests. The probationary period is used for the effective adjustment of the new employee to meet acceptable work standards. You should discuss these standards with your supervisor.

*You should receive regular performance feedback from your supervisor during the first few months of your probationary period. You **must** receive a formal performance evaluation from your supervisor prior to completion of the six month probationary period. You may, however, be separated from service at any time for unsatisfactory performance including inappropriate or unprofessional behavior during the six-month probationary period for any non-discriminatory reason or no reason. Employees who are terminated will be notified in writing of the proposed termination and the effective date.*

During this probationary period, as in all other aspects of employment with Salt Lake County, you are protected against discrimination on the basis of race, color, disability, national origin, age, sex, sexual orientation, marital status or religion. If you believe such discrimination has occurred, the County grievance and appeal procedure is available to you.

I understand that my employment with Salt Lake County is probationary for six months from my hire date. I further understand that my performance will be monitored during the probationary period by my supervisor and that I will receive a formal evaluation prior to completion of the six month probationary period. Retention is at my supervisor's discretion, and I understand that I am not entitled to progressive discipline. This decision may not be appealed except on the grounds of discrimination. I understand that my probationary period may be extended up to an additional six (6) months.

Please sign below to indicate you have read and understand the procedure specified above.

PRINT NAME

SIGNATURE

DATE

REFERENCE: Salt Lake County Personnel Policies & Procedures

REV 06/96

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
By: Burt M. Lee
Deputy County Attorney
Date: 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

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

- 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 (CP-4) if there is a change in grade or job code.
- 8.2 An employee may be eligible for a pay adjustment due to

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

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

- 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.

ADDENDUM G: 4/1/80 CAREER LADDER POLICY



PERSONNEL DIVISION & MERIT SYSTEM COUNCIL

DOUGLAS E. THOMSEN
DIRECTOR

SANDRA S. McINTOSH
Deputy Director

COMMISSIONER
WILLIAM E. DUNN

DEPARTMENT OF ADMIN. SERVICES
JAMES C. GOINS, DIRECTOR

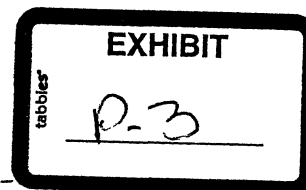
MERIT SYSTEM COUNCIL
VIRGINIA P. KELSON, CHAIRPERSON
DANIEL L. BERMAN
WILLIAM M. TIMMINS

M E M O R A N D U M

TO: ALL COUNTY ENGINEERS

FROM: PERSONNEL

DATE: April 1, 1980



The purpose of this memo is to outline procedures for applying with the State of Utah Department of Transportation, to take the Engineer Qualifying Examination given every December. All County Engineers assigned to the grade 24, 26, 28 career ladder must pass the EQE or the EIT to be eligible for promotion to grade 26.

- A. Applicants should request the examination through their immediate supervisor.
- B. Blank applications and instructions may be obtained by contacting Mr. Ed Klarich at the Utah State Department of Transportation (533-5016).
- C. Completed applications must have a letter of recommendation attached, written by the immediate supervisor.
- D. Applications must be received by the state D.O.T., prior to sixty (60) days before the date of the examination.
- E. All applications requesting state certification will be reviewed by the State Development and Testing Unit to determine if the minimum qualifications have been met. (Place "State Certification Requested" in upper right hand corner of the application).
- F. All applications requesting only county certification will be reviewed by the respective division director of the applicant before submittal to the state.



(2)

- G. Applicants will be notified of eligibility, testing days, times and locations by the D.O.T.
- H. Time off with pay will be given to examinees during the two (2) days of testing.
- I. Notification of examination results will be given to each candidate in writing, either from the state or county depending upon certification requested.
- J. Notification of an examination review conducted by the state grading committee will be forwarded to each examinee.

This office strongly recommends that applicants attempt to meet all requirements for state certification.

County minimum requirements for purposes of qualifying for grade 26 will be determined by an Engineering Committee (County Engineer, Engineering and Flood Control Directors), in advance of the examination date and based upon their review of the examination content and point values for each section. These minimums may not vary from the State or may vary only slightly.

Please contact this office if you have any questions.

ADDENDUM H: 3/16/00 CAREER LADDER POLICY

Salt Lake County Public Works Department
Administration Division

Mary Callaghan, *Commissioner*
J D Johnson, *Department Director*
Larry Moller, *Division Director*



RECEIVED

MAR 20 2000

SALT L
PERSON.

SALT LAKE COUNTY
GOVERNMENT CENTER
2001 S State Street
Suite N3100
Salt Lake City
Utah 84190-4000
Tel (801) 468-3771
Fax (801) 468-3712

March 16, 2000

Felix McGowan
Personnel Division Director
2001 South State Street, N4600
Salt Lake City Utah 84190

Dear Felix

SUBJECT Career Ladder Plan - Engineer 26/28/30

We respectfully request approval of the Career Ladder Plan as written for the Engineer 26/28/30 position. As you know, we have this classification in three Public Works divisions, Flood Control, Engineering and Planning/Development Services.

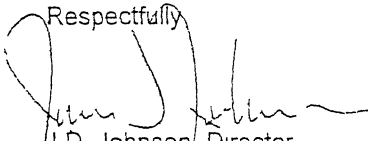
The minimum qualifications for moving an Engineer 26 to the 28 level are as follows:


1. The employee has worked for one year as a grade 26.
2. The employee has performed satisfactorily in the duties during the year as shown by receiving a performance evaluation with a satisfactory rating.
3. The employee has received their Fundamentals of Engineering (FE) certification by the National Council of Examiners for Engineering.

The minimum qualifications for moving an Engineer 28 to the 30 level are as follows:

1. The employee has worked for one year as a grade 28.
2. The employee has performed satisfactorily in the duties during the year as shown by receiving a performance evaluation with a satisfactory rating.
3. The employee has received their Professional Engineer (PE) License in the State of Utah.

Respectfully,

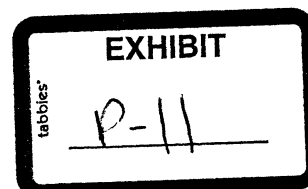

J D Johnson, Director
Public Works Department


Neil D. Stack, P.E. Director
Engineering Flood Control


Cal Schneller, Director
Planning/Development Services

cc Sharon Hoglund

JDJ33



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