

2004

John D. Sorge v. Utah Office of the Attorney General : Brief of Respondent

Utah Court of Appeals

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John D. Sorge; Petitioner.

Brent A. Burnett; Assistant Attorney General; Attorney for Respondent.

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IN THE UTAH COURT OF APPEALS

JOHN D. SORGE,	:	
Petitioner,	:	
v.	:	Case No. 20041046-CA
UTAH OFFICE OF THE ATTORNEY	:	
GENERAL,	:	
Respondent.	:	

BRIEF OF RESPONDENT

Appeal of the Final Decision of the Utah Career Service
Review Board, an Administrative Agency of the State of Utah

BRENT A. BURNETT (4003)
Assistant Attorney General
160 East 300 South, Sixth Floor
P. O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Attorney for Respondent

JOHN D. SORGE
Wells Fargo Building
299 South Main Street, 13th Floor
Salt Lake City, Utah 84111
Petitioner

**ORAL ARGUMENT AND PUBLISHED OPINION NOT
REQUESTED BY RESPONDENT**

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P. O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Attorney for Respondent

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Wells Fargo Building
299 South Main Street, 13th Floor
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LIST OF ALL PARTIES

To the best of Respondent's knowledge, the Career Service Review Board, the administrative body whose final agency action the petitioner asks be reviewed is not listed in the caption of this Brief. Otherwise, all interested parties appear in the caption of this Brief.

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BRIEF OF RESPONDENT

STATEMENT OF JURISDICTION

The Decision and Final Agency Action of the Career Service Review Board (CSRB) was entered on November 4, 2004. R. 831-55. John Sorge's Petition for Judicial Review was filed on December 6, 2004. This Court, generally, has jurisdiction over such petitions pursuant to Utah Code Ann. § 78-2a-3(2)(a) (West 2004) and Utah Code Ann. § 63-46b-14 (West 2004). This Court is without jurisdiction over Sorge's petition, as explained below, because the petitioner has failed to make the agency whose decision he seeks to challenge a party to this proceeding.

STATEMENT OF THE ISSUES

1. This Court is without jurisdiction to review the CSRB's final agency action where the CSRB has not been made a party to this proceeding.

This issue is unique to the appeal and does not call for a review of the CSRB's decision.

STANDARD OF REVIEW: "[T]he initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction. When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah App. 1989).

2. The CSRB did not err in finding that there was factual support for the Department's decision to terminate the petitioner. Sorge has failed to meet his burden to marshal the facts in support of the CSRB's decision.

This issue was considered by the CSRB in its Decision and Final Agency Action. R. 834-840, 847-50.

STANDARD OF REVIEW: Since this issue raises a question of general law, this Court reviews the "CSRB's conclusion for correctness, granting no deference to that agency's decision." Holland v. CSRB, 856 P.2d 678, 682 (Utah App. 1993).

3. The CSRB correctly determined that the Department's decision to terminate the petitioner was not an abuse of discretion.

This issue was considered by the CSRB in its Decision and Final Agency Action.

R. 847-50.

STANDARD OF REVIEW: Since this issue raises a question of general law, this Court reviews the “CSRB's conclusion for correctness, granting no deference to that agency's decision.” Holland v. CSRB, 856 P.2d 678, 682 (Utah App. 1993).

4. Sorge was properly precluded from relitigating prior employment decisions.

Sorge was barred by res judicata from seeking to reopen such issues.

This issue was considered by the CSRB in its Decision and Final Agency Action.

R. 842-44.

STANDARD OF REVIEW: Since this issue raises a question of general law, this Court reviews the “CSRB's conclusion for correctness, granting no deference to that agency's decision.” Holland v. CSRB, 856 P.2d 678, 682 (Utah App. 1993).

5. Sorge's rights were not violated by the Department's counsel assisting in the preparation of the termination letter and, subsequently, representing the Department before the CSRB for the first time before this Court.

This issue was raised by the petitioner in a single paragraph in his Step 6 Brief. R. 583. The CSRB did not specifically address it.

STANDARD OF REVIEW: Since this issue raises a question of general law, this Court reviews the “CSRB's conclusion for correctness, granting no deference to that agency's decision.” Holland v. CSRB, 856 P.2d 678, 682 (Utah App. 1993).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES & RULES

There are no such provisions.

STATEMENT OF THE CASE

On October 17, 2002, John Sorge was dismissed from his position as an Assistant Attorney General with the State of Utah's Office of the Attorney General (Department). R. 1-3. The termination was based on three incidents that occurred after Sorge had been transferred to the Department's Clearfield office, and the fact that he had been previously put on notice that such further incidents would not be tolerated. R. 1-8. Sorge appealed this decision to the CSRB on October 28, 2002. R. 0.

A Step 5 Hearing on Sorge's grievance was conducted by a CSRB hearing officer on March 31, 2003, April 1-4, 2003, and April 9, 2003. R. 858-64. In his April 23, 2003, Findings of Fact, Conclusions of Law, and Decision, the hearing officer found that the facts supported the Department's position as to two of the three incidents that led to Sorge's termination.¹ The Hearing Officer also found that the facts showed Sorge's termination was not excessive, disproportionate or otherwise an abuse of discretion. R. 531-34.

¹ The Hearing Officer found that the facts related to an incident of alleged threatening comments concerning concealed weapons did not support the termination of the petitioner. R. 527-29. Neither the Hearing Officer nor the CSRB considered this incident in upholding the Department's termination decision, so it is not discussed further in this brief.

On May 8, 2003, Sorge filed his notice of appeal to the CSRB from the hearing officer's decision. R. 538-60. After hearing Sorge's appeal (R. 904) the CSRB issued its Decision and Final Agency Action on November 4, 2004. R. 831-55. The board sustained the hearing officer's findings and conclusions and affirmed Sorge's termination.

Sorge's Petition for Judicial Review was filed on December 6, 2004.

STATEMENT OF RELEVANT FACTS

Appellant John D. Sorgé was hired in April 1999 as an assistant attorney general in the Ogden office of the Utah Attorney General's Office's Child Protection Division. His direct supervisor was Mark May, Section Chief of the Child Protection Division's Northern Region. Appellant's Brief at 8. On March 10, 2000, Sorge received sexual harassment training and affirmed that he understood the sexual harassment policy of the Utah Attorney General's office. R. 895-896.

During the first two and a half years of his employment in the Ogden office, there arose concerns of Sorge's inappropriate sexual comments and conduct with female Division of Child and Family Services ("DCFS") employees and staff members of the Attorney General's office. In December 2000, May received a telephone call from a child protection services supervisor about concerns she had regarding Sorge and three of her workers. R. 858 at 265. During the first week of January 2001, May and Division Chief Dave Carlson spoke with Sorge about his behavior towards the DCFS employees and

notified him that this was not appropriate and should not happen again. R. 861 at 767, 769-71.

However, in October 2001, a female paralegal who was assigned to work with Sorge complained of his inappropriate and unwelcome sexual comments and behavior towards her. R. 861 at 778; R. 879. Again, Sorge's supervisor and Division Chief spoke with him about the complaint and ultimately put him on corrective action in an attempt to change his behavior. R. 861 at 778-79, 787-90; R. 879-81. In the spring of 2002, Division Chief Mary Noonan, May and Chief Deputy Kirk Torgensen met with Sorge to discuss his performance appraisal which was to be "unsuccessful" for that year, partially as a result of the complaints of his misconduct. R. 860 at 587-90; R. 861 at 800-3. During this meeting, Sorge was again told that the office would not tolerate inappropriate and disrespectful behavior towards other employees. R. 860 at 591-95; R. 862 at 957. When May prepared Sorge's performance evaluation, he attached a copy of the corrective action plan as notice to him of what was expected. R. 861 at 816. At the time of the performance evaluation in mid-June 2002, Sorge was again put on notice that he must not engage in any sexually explicit comments or other such inappropriate behavior. R. 862 at 976. Shortly thereafter, Sorge was transferred to the Clearfield office in an attempt to give him a "fresh start." R. 862 at 959; R. 864 at 1424.

Within three weeks of his arrival at the Clearfield office, Sorge had a discussion with paralegal, Jennifer Howell that she found to be offensive and sexually inappropriate.

On July 23, 2002, Sorge found a new file on his desk that included a DCFS case worker's log containing sexually graphic language relating to the abuse of the child victim. R. 858 at 145-47, 152-56. He took the file to Howell's office where he initially spoke to her about the proper venue and jurisdiction of the case. R. 858 at 227. Sorge then began to read portions of the log out loud to Howell and commented on some of the sexually graphic details. R. 858 at 161-64, 227; R. 860 at 561. Howell had no involvement with the case, was not familiar with the case and was not assigned to do anything on the case. R. 858 at 144; R. 860 at 597; R. 861 at 696.

Howell attempted to call the case worker to answer any questions Sorge had but was unable to contact her during the 45 minutes to an hour that Sorge remained in her office. R. 858 at 145, 166. Howell was offended and upset by this event and felt violated and sick to her stomach. R. 858 at 158, 165, 174, 208, 240, 247. During her employment with the Attorney General's office, Howell had never had an attorney read sexually explicit logs to her. She felt harassed because there was no reason for Sorge to read such material to her. R. 858 at 167.

This meeting affected Howell so much that after Sorge left her office, she shut her door and cried. R. 858 at 169. When Janice Ventura returned from court that afternoon, Howell reported the incident to her. R. 858 at 172, 294-96. Ventura and the office secretary, Lori Trivino, testified that Howell was visibly upset following this incident. R. 858 at 297; R. 860 at 418. Although the Child Protection Division often deals with

sexual abuse cases containing sexually graphic language, it is inappropriate and unnecessary for an attorney to read sexually graphic language to a paralegal or other staff member. R. 858 at 296; R. 860 at 416; R. 862 at 968-69. This incident was so upsetting to Howell that she was given permission to leave the office whenever she and Sorge were alone there together. R. 858 at 175-76; R. 862 at 967.

Ventura reported the incident to May who reported it to his supervisors. R. 862 at 961-62. The administration determined that an investigation into the matter was required and assigned Ross Larsen and Jade Pusey, investigators with the Attorney General's office, to conduct an investigation. R. 860 at 559, 599; R. 862 at 970-71. Sorge denied or stated he did not remember reading the sexually explicit details of the file to Howell. R. 860 at 565-66; R. 861 at 684-85.

The day before the investigators arrived in the Clearfield office to begin their interviews, Sorge made additional comments to Howell that she found to be offensive and sexually and culturally inappropriate. On August 28, 2002, in reference to a case involving a minor Hispanic female who was sexually abused by her stepfather, Sorge stated to Howell that in the Hispanic culture, it was acceptable for younger Hispanic females to have sex with older Hispanic males. R. 858 at 181-84; R. 860 at 563-64; R. 861 at 689-90, 725. Howell took offense to this statement and told Sorge it was untrue. R. 858 at 245. Trivino witnessed Howell's statement. R. 860 at 422-23. Sorge then attributed the statement to Darryl Armstrong, a DCFS caseworker in Bountiful. R. 858 at

184-85; R. 863 at 1353-54, 1369. However, Armstrong testified that Sorge was the one who had commented to him on an earlier occasion at the courthouse in Farmington, that it was acceptable in the Hispanic culture for older Hispanic males to have relationships with younger Hispanic females. R. 860 at 510-11. Armstrong also testified that his wife was Hispanic and that he had told Sorge that although that may be a perception of the Hispanic community, it was not accepted. He never told Sorge that it was common for 25-year-old men to have sex with 14- and 15 year-old girls in the Hispanic community. R. 860 at 512-14, 523, 525.

Howell immediately reported this incident to Ventura. Howell was so upset, that Ventura and Trivino took her for a walk to help calm her down. R. 858 at 186, 312; R. 860 at 426. Later that same afternoon, Howell sent May an email regarding the latest incident with Sorge. R. 858 at 188; R. 861 at 833-34; R. 889. When Noonan was notified of the incident, she requested the investigators to include this incident in their investigation. R. 862 at 971-72.

After the investigators issued their report, May, Noonan and Torgensen met to discuss a course of action. They reviewed the entire history with Sorge and their attempts to put a stop to his inappropriate behavior. They concluded that there was no other alternative but termination. R. 860 at 611-13. Noonan issued Sorge a Notice of Intent to Terminate Employment on September 27, 2002 which outlined the incidents in the Clearfield office as well as Sorge's history of inappropriate behavior with the office as

the reasons for his termination. R. 866-70. Sorge appealed this decision to Attorney General Mark Shurtleff who assigned Chief Deputy Ray Hintze to investigate and handle the appeal. Following Hintze's personal investigation into the matter, he recommended to Shurtleff that Sorge be terminated for the reasons outlined in the Notice of Intent. Shurtleff issued his Decision to Terminate Sorge's employment on October 17, 2002. R. 871-73.

SUMMARY OF ARGUMENT

The petitioner failed to name the CSRB as a party to this action. Sorge asks this Court to review the final agency action of the CSRB, but has failed to make the CSRB a party to this judicial proceeding. This Court is without jurisdiction to review the decision of an agency that is not before the Court.

The CSRB, and its Hearing Officer, found that the evidence of record supported the Department's decision to terminate the petitioner. Sorge seeks to challenge the CSRB's findings of fact, but has failed to marshal the evidence that supports the same. For this reason, the CSRB's factual findings should be affirmed.

The Department did not abuse its discretion in terminating the petitioner. The two incidents at the Department's Clearfield office that the CSRB found were sustained by the evidence were sufficient to justify Sorge's termination. This is especially so when the notice given to the petitioner concerning the Department's expectations is considered.

The CSRB correctly refused to permit the petitioner to reopen prior employment matters and seek to relitigate issues that had been previously resolved. Such efforts are barred by res judicata effect.

Petitioner's due process rights were not violated by permitting the Department's counsel to advise his client concerning Sorge's termination and to also represent his client on the same issue before the CSRB.

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS PETITION FOR LACK OF JURISDICTION UNDER THE UTAH ADMINISTRATIVE PROCEDURES ACT

A lack of subject matter jurisdiction can be raised at any time by either party or by the court. Weiser v. Union Pac. R.R. Co., 932 P.2d 596, 597 (Utah 1997). Absent statutory authority to review the actions of an administrative agency, this Court has no jurisdiction to review the agency action. Dep't of Ertvl. Quality v. Golden Gardens Water Co., 2001 UT App 173, ¶13, 27 P.3d 579. This Court lacks subject matter jurisdiction to hear this petition under the Utah Administrative Procedures Act ("UAPA").²

UAPA governs judicial review of the CSRB's administrative proceedings. UAPA requires that the CSRB be named as a respondent in the present action. Sorge has not named the CSRB as a respondent. The jurisdictional time limit to bring a petition for

²Utah Code Ann. §§ 63-46b-0.5 to -21 (West 2004).

judicial review against the CSRB has now passed. This Court therefore lacks jurisdiction to review the CSRB decision and should summarily dismiss Sorge's petition with prejudice.

This Court has jurisdiction to review "all final agency action resulting from formal adjudicative proceedings." Utah Code Ann. § 63-46b-16(1); see also Utah Code Ann. § 78-2a-3(2)(a); Lopez v. Career Serv. Review Bd., 834 P.2d 568, 572 (Utah App. 1992). To vest this Court with jurisdiction over a particular proceeding, however, a petitioner must meet the requirements of section 63-46b-14. Subsection 14(3) contains two requirements. First, the petition must be filed "within 30 days after the date that the order constituting final agency action is issued." Section 63-46b-14(3)(a); Viktron/Lika Utah v. Labor Comm'n, 2001 UT App 8, ¶7, 18 P.3d 519 (holding that failure to timely file a petition for judicial review is a jurisdictional defect). Second, the petition "shall name the agency and all other appropriate parties as respondents." Section 63-46b-14(3)(b), (emphasis added).

In the context of this section, "agency" means the agency which entered the order constituting final agency action. The only other use of agency mentioned in the section is "final agency action" and "order constituting final agency action." No mention is made of an agency which might have appeared as a party in the administrative proceeding. Moreover, the reference in subsection 14(3)(b) to parties indicates that they shall be named as respondents in addition to the agency whose decision is being appealed: "the

petition shall name the agency and all other appropriate parties as respondents.”

(Emphasis added.) The conjunctive “and” indicates that the requirement to name parties is separate from the requirement to name the agency. See State v. Maestas, 2002 UT 123, 63 P.3d 621 (concluding that a statute was “written in the conjunctive, thus making clear that it has two separate requirements”). Accordingly, Sorge should have named both the Department and the CSRB as respondents.³

One purpose of the requirement to name the agency as respondent is to obtain jurisdiction over the agency that conducted the adjudicative proceedings to be reviewed. Without such jurisdiction, the reviewing court would be powerless to affirm, reverse, remand, modify, or even vacate the agency action. See Ostler v. Buhler, 1999 UT 99, ¶7, 989 P.2d 1073 (noting that the court lacked jurisdiction to make ruling in favor of nonparty); see also Openshaw v. Openshaw, 12 P.2d 364, 365 (Utah 1932) (holding that “decree in favor of a person who is not a party to the action or proceeding is void because the court has no jurisdiction to make it”). This Court should interpret the term “agency” in subsection 14(3)(b) in a manner that is consistent with its purpose. See In re Kunz, 2004 UT 71, ¶ 8, 99 P.3d 793 (holding court should interpret plain language of statute in light of its purpose).

³See, e.g., Lunnen v. UDOT, 886 P.2d 70, 71 (Utah Ct. App. 1994) (identifying as respondents in a petition for judicial review both the CSRB and the agency which appeared before the CSRB as a party); Kent v. CSRB, 860 P.2d 984 (Utah Ct. App. 1993) (same); Holland v. CSRB, 856 P.2d 678 (Utah Ct. App. 1993) (same); Lopez v. CSRB, 834 P.2d 568 (Utah Ct. App. 1992) (same).

To interpret the requirement otherwise would render it meaningless or absurd in many cases. Although one of the parties in this case happens to be an agency, many administrative proceedings involve only private parties.⁴ In such cases, the requirement of naming the agency as a respondent would be meaningless unless it means the agency whose final action is being challenged in the petition. See Hall v. Dep't of Corr., 2001 UT 34, ¶ 15, 24 P.3d 958 (holding court should avoid interpretations that will render portions of a statute superfluous).

Similarly, although the petitioner here happens to be a private party, in other cases the petitioner is an agency.⁵ In such cases, unless the term “agency” refers to the agency whose final action is to be reviewed, subsection 14(3)(b) would require the petitioner to name itself as a respondent. This Court should avoid an interpretation of section 63-46b-14(3) that would lead to such an absurd result. See Sullivan v. Sullivan, 2004 UT App 485, ¶ 9, 515 Utah Adv. Rep. 28 (declining to follow rigid interpretation of statute where doing so would lead to absurd result).

⁴See, e.g., Thomas v. Color Country Mgmt., 2004 UT 12, 84 P.3d 1201 (judicial review of administrative action of Labor Commission, which was named as respondent); Gilley v. Blackstock, 2002 UT App. 414, 61 P.3d 305 (judicial review of administrative action of Department of Public Safety, which was named as respondent); Longley v. Leucadia Fin. Co., 2000 UT 69, 9 P.3d 762 (judicial review of administrative action of state engineer, who was named as respondent).

⁵See, e.g., State v. CSRB, 2004 UT App 171, 92 P.3d 776 (petition for judicial review of CSRB decision filed by Department of Public Safety); Utah Dep't of Corr. v. Despain, 824 P.2d 439 (Utah Ct. App. 1991) (same filed by Utah Department of Corrections).

By not naming the CSRB as a respondent, Sorge has thus failed to meet the requirements of UAPA. More precisely, Sorge has failed to bring a petition against the CSRB within thirty days from the date of the CSRB's final decision, as required by section 63-46b-14(3). Sorge has thereby deprived this Court of jurisdiction.

II. THE CSRB DID NOT ERR IN FINDING THAT THERE WAS FACTUAL SUPPORT FOR THE DEPARTMENT'S DECISION TO TERMINATE THE PETITIONER

The CSRB is required to give deference to the decisions of those agencies who come before it. Utah Dep't of Corr. v. Despain, 824 P.2d 439, 442 (Utah App. 1991) (CSRB required to give deference to the personnel decisions of agencies).

The CSRB's role in examining the Department's personnel actions is a limited one. The CSRB is restricted to determining whether there is factual support for the Department's charges against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion.

Career Serv. Review Bd. v. Utah Dep't of Corr., 942 P.2d 933, 942 (Utah 1997).

Petitioner was terminated for three specific incidents that occurred while he was employed at the Attorney General's Clearfield office. Sorge has challenged both the proportionality of his termination and whether there was factual and legal support for the CSRB's decision that two of the three incidents supporting that termination were supported by the evidence in the record.

Sorge has failed to marshal the evidence in support of the factual findings of the CSRB and cannot challenge those findings. A party challenging the factual findings of the CSRB has a duty to marshal the evidence.

Furthermore, when challenging an agency action as not based upon substantial evidence, appellants have a duty to "marshal all of the evidence supporting the findings and show that despite the supporting facts, the [Board's] findings are not supported by substantial evidence."

Road Runner Oil, Inc. v. Bd. of Oil, Gas and Mining, 2003 UT App 275, ¶10, 76 P.3d 692 (alteration in original); see also Covey v. Covey, 2003 UT App 380, ¶27, 80 P.3d 553 ("In order to successfully challenge the trial court's findings of fact, Almon 'must first marshal all the evidence in support of the finding[s] and then demonstrate that the evidence is legally insufficient to support the finding[s] even when viewing it in a light most favorable to the court below.'") .

Instead of marshaling the evidence supporting the Hearing Officer's findings of fact, and demonstrating that they were not supported by substantial evidence, Sorge relies instead on certain statements of the Hearing Officer taken out of context and the testimony that he believes supports his position. Without marshaling the evidence in support of Hearing Officer's factual findings, the petitioner simply argues that the facts support him and that the CSRB and Hearing Officer should be reversed.

Because Sorge has failed to marshal the evidence that supports the factual findings of the Hearing Officer and the CSRB, those findings should be affirmed.

A. Incident of July 23, 2002.

The Hearing Officer made express findings of fact as to what took place during this incident.

22. On or about July 23, 2002, Grievant entered Ms. Howell's office and first asked her what she felt about the venue of a case involving sexual molestation of a minor. The sexual acts occurred in the area of Hurricane, Utah, but the victim was now staying with a relative in the Clearfield area. Grievant then proceeded to read sexually graphic material to Ms. Howell. Ms. Howell made repeated attempts to contact the caseworker by telephone during the conversation, which lasted about 45 minutes, but was unsuccessful. Ms. Howell felt she could not tell Grievant to discontinue reading the material because "he was her boss," and because "she was afraid of him."

23. Ms. Howell felt offended and violated by the words that Grievant had read to her. She became sick to her stomach while he was reading the material. After Grievant left her office, she cried. Upon Ms. Ventura's return to the office, Ms. Howell told Ms. Ventura what had happened. The next day was Friday, July 24, a State holiday.

R 523-24.

Rather than meet his burden of marshaling the evidence that supports these findings of fact, Sorge instead cites to some of the evidence and claims that the findings are unsupported. Brief of Appellant John D. Sorge at 26-34. Petitioner also relies upon the Hearing Officer's statement that Ms. Howell was not a credible witness. Id. at 35-36; R. 528-29. This statement has been taken out of context. Sorge has failed to include the conclusion that the Hearing Officer reached.

These factors, all taken together, lead to the conclusion that Ms. Howell's testimony of the event and Ms. Ventura's testimony as to Ms.

Howell's state of emotions that day are more likely to be accurate than Grievant's testimony, which has an appearance of being self-serving.

R. 530.

Even the evidence that Sorge does present is misleading. Petitioner quotes two witnesses (Janell Pugh and Dianne Balmain) for the proposition that they did not believe that reading the sexually graphic material to a paralegal, when the only issue was venue, would be inappropriate. Brief of Appellant John D. Sorge at 31-34. But Ms. Pugh testified that it would probably be inappropriate, and could be offensive, to read this material when the only issue was jurisdiction. R. 862 at 1179, 1181-82. Ms. Balmain also testified that it would be inappropriate to use the information in this manner and that the details were not relevant to the venue issue. R. 863 at 1228, 1237. Sorge's use of part of a witness's testimony, but not all relevant portions, is the very problem that the marshaling requirement is meant to avoid.

B. Incident of August 28, 2002.

The Hearing Officer, again, made an express finding of fact as to what took place during this incident.

27. In the morning of August 28, 2002, Ms. Howell overheard part of a conversation between Grievant and another person in Grievant's office. After the other person left Grievant's office, Ms. Howell went to Grievant's office and asked Grievant what had been said. Grievant said, referring to a case, "In the Hispanic culture 25-year-old men often have sex with 14-year-old girls." Ms. Howell immediately stood up and responded loudly, "That

is so wrong. It is not at all true and I am very offended.” Grievant replied that it was not his statement; Darryl Armstrong made the statement.

R. 524.

Sorge’s claim that Armstrong made the inappropriate comment was rejected by both the Hearing Officer and the CSRB. Having reviewed the testimony of the witnesses, the Hearing Officer expressly stated that: “[t]herefore, the Hearing Officer concludes that the Agency’s allegations about the incidents which occurred on July 23 and August 28, 2002, are supported by the evidence produced in the hearing, and that they violated office policy and specific instructions given to Grievant.” R. 531.

In addressing this incident, the CSRB also rejected the petitioner’s claims that someone else made the complained of comment.

The Agency’s version of the August 28 incident is supported by the nearly uncontroverted testimony of Ms. Howell, Ms. Trivino and Mr. Armstrong. Indeed, other than Grievant’s testimony, which the Hearing Officer characterized as “self-serving” (Step 5 Decision at 1–11), the Agency’s version is uncontroverted.

R. 839.

The CSRB expressly made a factual finding that Mr. Armstrong’s testimony that he did not make the offensive comment, but that Sorge had made a similar comment to Armstrong previously, more credible than the testimony of the petitioner.

The testimony of Grievant and Mr. Armstrong on the August 28 incident are at odds. Grievant claims Mr. Armstrong made the racially offensive remark and he, the Grievant, simply repeated it to Ms. Howell. Mr.

Armstrong denies making the remark. He says Grievant made it. The Agency argues that Mr. Armstrong should be believed over the Grievant for three reasons. First, as previously discussed, the Hearing Officer found Grievant not to be credible. (Step 5 Decision, Finding of Fact No. 31, and at 10-11). On the other hand, the Hearing Officer made no adverse credibility finding against Mr. Armstrong. Second, Grievant's testimony on the issue is not very convincing. The Hearing Officer described it as "self-serving." On the other hand, Mr. Armstrong's testimony on this issue is very detailed, clear, and specific. A careful reading of his testimony in the transcript shows it to be reasoned, balanced, and logical. (Tr. II at 512). Third, it is unreasonable to believe Mr. Armstrong would make the racially inflammatory remark about Hispanics attributed to him by Grievant. Mr. Armstrong is married to a Hispanic woman who is a member of the Governor's Hispanic Affairs Committee. (Tr. II at 511-12, 692, 908). He is sympathetic to and knowledgeable about Hispanic issues and not inclined to slander Hispanics. (Tr. II at 512, 908).

The Board finds that while there is some confusion regarding the specifics of the events surrounding the August 28 incident, the conclusions drawn by the Hearing Officer are sustained; that the actions of the Appellant resulted in good cause for terminating his employment after having been put on notice that offensive behavior will not be tolerated. Appellant's attempt to claim he was only repeating the offensive remarks of others is insufficient to establish the Hearing Officer's finding was not supported by substantial evidence.

R. 840.

C. Appropriateness of the Discipline Imposed.

While Sorge challenges the factual findings underlying the CSRB's affirmance of the propriety of the discipline that was imposed, he has made no effort to marshal the facts that support these findings. The Hearing Officer found that termination was appropriate given the two incidents that occurred and the prior notice that Sorge had been given.

In the instant case, Grievant had been employed at the Agency about three and one-half years. Grievant acknowledged that the corrective action plan he was placed on at the end of 2001, and his unsuccessful performance evaluation in June 2002, gave him notice of what conduct was expected of him. The corrective action in particular was explicit in directing Grievant to make no sexual comments to co-workers and to treat support staff with respect. Mr. Torgensen was verbally explicit in advising Grievant to avoid even the perception of offending his co-workers or clients. While there was not a series of progressive disciplinary actions taken by management during Grievant's employment, the main purpose of progressive discipline is to give an employee clear and unequivocal warning that his or her job may be in jeopardy from inappropriate or improper conduct.

Grievant was given ample notice of what was expected of him. He knew or should have known that his conduct was under close scrutiny by management. He knew or should have known that even the perception of impropriety could place his job in jeopardy. Grievant's conduct on July 23, and August 28, 2002, evidence a failure on Grievant's part to understand the seriousness of management's concerns with his conduct. . . .

Grievant's history with the Agency demonstrated a continuing lack of understanding of the importance of Grievant's relationship with his co-workers and with the clients he served. This lack of understanding was evidenced in the interchange between Grievant and Darryl Armstrong during Mr. Armstrong's testimony. . . .

The Corrective Action Plan in December 2001 and January 2002, and Mr. Torgensen's discussions with Grievant during the spring of 2002, all emphasized the need for Grievant to maintain good relations with co-workers and with DCFS workers. They emphasized specifically the need to avoid comments which could be perceived as offensive. Despite these warnings and admonishments, Grievant failed to recognize their importance to the Agency.

This lack of understanding gives strong credence to Mr. Hintze's conclusions, in both his testimony and in the Notice of Termination, that management could no longer control Grievant's conduct, that Grievant had not altered his conduct despite the warnings, and that his conduct left the Agency at risk for possible adverse actions against the Agency by reason of Grievant's continuing conduct.

Indeed, the CSRB found that Sorge had presented no evidence to support his claims that the discipline imposed was disproportionate or excessive. R. 848. Before this Court the petitioner has failed to marshal the facts that support the CSRB's finding that Sorge's termination was not an abuse of the agency's discretion. For this reason these factual findings should be affirmed on appeal.

**III. GIVEN THE CSRB'S FINDINGS OF FACT, IT DID NOT ERR
IN UPHOLDING THE DEPARTMENT'S DECISION TO
TERMINATE THE PETITIONER**

In considering whether to uphold the Department's decision to terminate the petitioner, the CSRB correctly followed this Court's decision in Utah Dep't of Corrections v. Despain, 824 P. 2d 439 (Utah App. 1991).

In matters of employee terminations, the Court of Appeals has consistently held that the CSRB's review role is limited. The CSRB should not disturb an agency's decision to dismiss an employee unless there is no factual support for the agency's action, and only upon showing that the agency's sanction is so disproportionate to the charges that it amounts to an abuse of discretion.

R. 842 (citation and internal quotations omitted).

The CSRB's factual findings have not been properly challenged before this Court. The only issue then is whether the Department abused its discretion by terminating Sorge for the July 23 and August 28, 2002, incidents. As shown in the prior argument, the Hearing Officer expressly found that, given the notice Sorge had received, it was not an abuse of discretion for the Department to terminate him.

It is unfortunate that Grievant did not recognize the importance of his relations with others and how his own conduct affected those relationships. As noted in the Corrective Action Plan, Grievant was a hard worker who handled a large caseload in a timely manner, performed his work very quickly, and did a good job of representing the Agency in court. However, considering the totality of the evidence in this case, the Hearing Officer can find no abuse of discretion in the Agency's decision to terminate Grievant's employment.

R. 534.

The CSRB also found the Department's decision to be both reasonable and rational. R. 848-49.

Recently, this Court has repeated that commissions and boards, such as the CSRB, must give deference to the employment decisions of the agencies that they review. Ogden City Corp. v Harmon, 2005 UT App 274 at ¶17 (discipline imposed for employee misconduct is within the sound discretion of the agency and should be overturned on review only if it exceeds the bounds of reasonableness and rationality) (copy attached hereto as Addendum C).

Utah law has provided little guidance on the precise factors used to balance the proportionality of the punishment to the offense. We have noted that an exemplary service record and tenuous evidence of misconduct may tip the balance against termination. On the other hand, dishonesty, or a series of violations accompanied by apparently ineffective progressive discipline may support termination. Other courts have given weight to considerations of (a) whether the violation is directly related to the employee's official duties and significantly impedes his or her ability to carry out those duties; (b) whether the offense was of a type that adversely affects the public confidence in the department; (c) whether the offense undermines the morale and effectiveness of the department; or (d) whether the offense was committed willfully or knowingly, rather than negligently

or inadvertently. Courts have further considered whether the misconduct is likely to reoccur.

Id. at ¶18 (citations omitted).

The CSRB did not err in finding that the Department's decision to terminate Sorge was not an abuse of discretion. The evidence of prior events was used only for the purpose of showing that Sorge had adequate notice that inappropriate conduct would not be tolerated. When such actions occurred in the Clearfield office, the Department properly determined that Sorge's employment should be terminated. His offending actions met all four of the considerations listed by this Court in Harmon. That the actions occurred after the notice he had already received shows that there was a real concern that this kind of conduct would be repeated. The Hearing Officer correctly concluded that the ineffectiveness in changing Sorge's actions of the actual notice provided served the same purpose as would a record of progressive discipline.

Nor was the punishment given the petitioner disproportionate to that inflicted on others. In his brief, Sorge admits that there have not been any prior analogous disciplinary actions by the Department. Appellant's Brief at 61. But the petitioner, without any supporting authority, claims that this prevents the Department from disciplining him. Such an argument is illogical. In essence Sorge claims that because no one else in the Department has been guilty of similar conduct in the past, he cannot be punished for his actions. The CSRB correctly rejected this claim.

The CSRB correctly found that the Department's termination of the petitioner was not an abuse of discretion. That decision should be affirmed.

IV. PETITIONER WAS CORRECTLY PREVENTED FROM RELITIGATING HIS PAST WORK RECORD

Sorge claims that his rights were violated because he was not permitted to reopen his employment record and present evidence as to the validity of prior discipline and the accuracy of the facts presented in his employment record. Petitioner's termination was not upheld on the basis of these prior incidents. The only conduct that was considered by the Hearing Officer and the CSRB were the incidents that occurred after Sorge's transfer to the Department's Clearfield office. R. 527-31, 835-40 (finding that Sorge was terminated for the three incidents occurring at the Clearfield office, and upholding that termination on the basis of two of the three incidents). Before the CSRB, the prior incidents were only used to demonstrate that the petitioner had been provided notice that incidents such as those that happened in Clearfield would not be tolerated. R. 532.

The CSRB correctly rejected the petitioner's efforts to broaden the scope of the administrative proceeding so as to relitigate these prior matters.

While Utah has no case law on point, the CSRB has consistently followed the reasonable and practical rule of not allowing persons to relitigate matters which have come to rest. The reason for this rule is to allow employees and agencies to achieve finality in their affairs. Parties to Step 5 hearings routinely introduce evidence, both positive and negative of an employee's work record. The authority for so doing is found in Utah Admin. Code, R137-1-21(9) which reads as follows:

Past Work Record. In those proceedings where a disciplinary penalty is at issue, the past employee record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations.

The rule is silent regarding whether the parties can challenge the past work record by calling witnesses to support or rebut it. However, to allow such challenges would be administratively burdensome. To do so would be considered "relitigating" which is exactly what the court in Reece denounced.

If parties were allowed to relitigate past work record, finality would never be achieved. Moreover, instead of taking one or two days to litigate a typical termination case at Step 5, it would take one or two months. It is not uncommon for parties to introduce 15 to 20 years' worth of performance appraisals, and numerous letters of commendation in a Step 5 hearing. When that happens, neither side objects, presumably because of R137-121(9) [sic] and several years of long-standing CSRB precedent. If parties were able to call witnesses to challenge the substantive nature of those records, hearings would go on ad infinitum and finality would never be achieved.

In the instant case, the items in his work record that Grievant wishes to relitigate, i.e., the sexual harassment complaints from the three DCFS workers and Lynette Martinez, the 2001 corrective action, and the 2001-2002 performance appraisal have all become final. They have come to rest. It should also be noted that they did not come to rest because the Grievant was unaware of his rights. Grievant is an experienced attorney who is aware of his rights and not shy about exercising them. Grievant either challenged the items in his work record and lost, or the statute of limitations on his right to challenge them ran well before the Step 5 hearing commenced.

The ruling of the Hearing Officer not allowing Grievant to relitigate his prior work record was not error. It was a correct ruling, supported by law, long-standing CSRB precedent, and common sense. It did not violate any due process rights of the Grievant. We sustain the Hearing Officer on this point.

R. 843-44 (footnotes omitted).

Efforts to challenge the factual findings made in administrative procedures are barred by res judicata. Utah law has long recognized that the doctrine of res judicata applies to administrative proceedings as well as judicial ones.

Res judicata, which "subsumes the doctrine of collateral estoppel," applies to administrative adjudications in Utah. We noted recently in Salt Lake Citizens v. Mountain States, 846 P.2d 1245 (Utah 1992), that "the doctrine of res judicata has been applied to administrative agency decisions in Utah since at least 1950." In Mountain States, we reiterated the rule that "the principles of res judicata apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy."

CSRB v. Utah Dep't of Corr., 942 P.2d 933, 938 (Utah 1997) (citations and footnote omitted). See also Univ. of Tennessee v. Elliott, 478 U.S. 788, 797 (1986) ("We have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity.").

The CSRB correctly refused to permit the petitioner to relitigate prior employment actions. These earlier matters either were, or should have been, challenged and decided against Sorge. The petitioner was properly precluded from reopening these issues.

**V. PETITIONER'S RIGHTS WERE NOT VIOLATED BY THE
DEPARTMENT'S COUNSEL BOTH ASSISTING HIS CLIENT IN
DRAFTING THE TERMINATION DOCUMENTS AND
DEFENDING HIS CLIENT'S ACTIONS BEFORE THE CSRB**

Sorge claims that his rights were violated because he was not permitted to call the attorney that represented the Department before the CSRB as a witness. Appellant's

Brief at 56. Petitioner wanted to examine the Department's counsel concerning his assistance to his client with the preparation of the documents that terminated Sorge's employment with the Department. Calling a client's attorney as a witness to testify concerning the work he performed for that client is prohibited by Rule 504 of the Utah Rules of Evidence. None of the exceptions contained in subsection (d) of the rule applies. Sorge was permitted to examine under oath the officers of the Department who made the decisions concerning his employment. He did not have the right to examine their counsel as to what legal advice he provided them.

CONCLUSION

For the reasons presented above, this appeal should be dismissed for lack of jurisdiction. In the alternative, the CSRB's final agency action should be affirmed.

RESPONDENT DOES NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Respondent does not request oral argument and a published opinion in this matter. The questions raised by this petition are not such that oral argument or a published opinion is necessary, though the respondent desires to participate in oral argument if it is held by the Court.

DATED this 24th day of June, 2005.

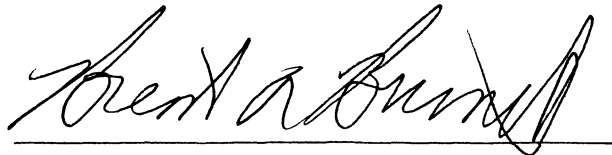


BRENT A. BURNETT
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF
RESPONDENT, postage prepaid, to the following this 24th day of June, 2005:

JOHN D. SORGE
Wells Fargo Building
299 South Main Street, 13th Floor
Salt Lake City, Utah 84111



ADDENDUM “A”

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

JOHN D. SORGE,

Grievant,

v.

UTAH OFFICE OF THE
ATTORNEY GENERAL,

Agency.

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:FINDINGS OF FACT,
CONCLUSIONS OF LAW
and DECISION

Case No. 20 CSRB/H.O. 298

A Step 5 hearing was held in the above-entitled matter on March 31, April 1-4 and 9, 2003, at the State Office Building in Salt Lake City, Utah. The hearing was conducted by K. Allan Zabel, Hearing Officer for the Career Service Review Board (CSRB). John D. Sorge (Grievant) was present and represented himself, *pro se*. The Utah Office of the Attorney General (Agency) was represented by Stephen Schwendiman, Assistant Attorney General. The management representative in attendance for the Agency was Mary Noonan. A verbatim record of the proceedings was made by certified court reporters. Witnesses were placed under oath and testimony and documentary evidence were received into the record.

AUTHORITY

The authority of the CSRB to hold this Step 5 hearing is found at *Utah Code*, §67-19a-406 (2002), and *Utah Administrative Code*, R137-1-1 *et seq.* (2002).

Having heard and reviewed the evidence of record and being otherwise fully advised in the premises, this Hearing Officer [Presiding Officer, *Utah Code* Subsection 63-46b-2(1)(h) (2002)], now makes and enters the following Findings of Fact, Conclusions of Law, and Decision.

ISSUES

The issues presented by this case are: 1) Was Grievant dismissed for just cause or for the good of the public service, as provided for in *Utah Code Annotated*, §67-19-18; and 2) If not, what is the appropriate remedy?

FINDINGS OF FACT

1. Grievant has been employed by the state of Utah as an Assistant Attorney General since approximately April 1999. Prior to that, he worked as an attorney in the Box Elder County Attorney's Office.

2. Grievant's duty station was in the Ogden Office of the Agency until he was involuntarily transferred to the Agency's Clearfield Office on July 3, 2002.

3. On or about December 20, 2001, while in the Ogden office, Grievant was placed on a Corrective Action Plan. At all times prior to and since its implementation, Grievant has disputed the allegations on which the Corrective Action Plan was based.

4. Part of the Corrective Action Plan required Grievant to review a video tape concerning sexual harassment in the office, to not make any comments to the support staff of a sexual nature, and to treat the support staff with respect at all times.

5. The Corrective Action Plan was terminated early by management during February 2002.

6. Kirk Torgensen, Chief Deputy Attorney General and, at the time Grievant was placed on the Corrective Action Plan, Acting Chief of the Child Protective Services Division of the Agency, met with Grievant after the Corrective Action Plan was implemented to discuss the Plan and what was expected of Grievant.

7. In the time following the conclusion of the Corrective Action Plan, Mr. Torgensen met with other staff members of the Ogden office. During these visits, Mr. Torgensen became concerned about the negative feelings in the Ogden office which seemed to focus on Grievant.

8. During the same period, Mr. Torgensen met with Grievant and asked him to apologize to the Ogden staff. In other meetings during this period, Mr. Torgensen and Grievant had many discussions about the issues, particularly concerning Grievant's relations with co-workers and Division of Child and Family Services (DCFS) workers.

9. While at a training conference held at the Homestead in Heber Valley during the latter part of May 2002, Mr. Torgensen met with Mark May, Grievant's immediate supervisor, and Mary Noonan, who had become the new Chief of the Child Protection Services Division. They discussed Grievant's relations with his co-workers in the Ogden office, his job performance, and an EEOC complaint filed by one of the Ogden office workers, Lynnette Martinez, against Grievant for sexual harassment.

10. In their discussion, Mr. Torgensen, Mr. May and Ms. Noonan decided to transfer Grievant to the Clearfield office. This decision was motivated in part because they felt it would be satisfactory to Lynette Martinez as part of a settlement with her on her EEOC complaint. They also felt the transfer would be a way of providing Grievant with an opportunity for a “new start.”

11. When Grievant arrived at the Homestead for that day’s session of the conference, Mr. May invited Grievant to join their discussion. Grievant was informed of the decision to transfer him to the Clearfield office. Grievant was very vocal in his opposition to the transfer. Mr. Torgensen told Grievant that the atmosphere was such that Grievant had to be *very* careful to avoid *any* perception of offensive conduct.

12. Grievant was given an “unsuccessful” performance evaluation in June 2002. Grievant disputed the justification for the performance evaluation just as strongly as he did the earlier Corrective Action Plan and the notice of his involuntary transfer to the Clearfield office. However, Grievant stipulated in the Step 5 hearing that the performance evaluation did place him on notice that he was to avoid any comments of an offensive nature to co-workers.

13. On June 27, 2002, a paralegal from the Clearfield office, Jennifer Howell, traveled to Ogden and delivered keys for entrance into the Clearfield office building to Grievant. She also explained about the parking situation at the Clearfield office and answered Grievant’s questions about the commute between Ogden and Clearfield.

14. Upon her return to her office in Clearfield, Ms. Howell sent an email to Grievant’s supervisor, Mr. May, notifying him that she delivered the keys and of Grievant’s response.

15. The lead attorney for the Clearfield office at the time of Grievant’s transfer was Janice Ventura. Ms. Ventura testified that she had no animosity or negative feelings about Grievant at the time of his transfer, and that she had always been able to work well with him when she worked as an attorney for the Office of Guardian ad Litem in the Logan area prior to her joining the AG’s staff, other than one incident in Logan in which Ms. Ventura felt that Grievant had assaulted her by pointing and shaking his finger near her face during a verbal altercation between the two.

16. Another witness, Dianne Balmain, also an attorney for the Office of Guardian ad Litem, had a conversation with Ms. Ventura during a conference at Midway, Utah in May 2002. In this conversation, Ms. Ventura repeated to Ms. Balmain several times, “I can’t stand John,” referring to Grievant.

17. On or about July 18, 2002, Ms. Ventura held a staff meeting in the Clearfield office. The staff consisted of herself, Grievant, Ms. Howell, and a secretary, Lori Trivino. During the course of the meeting, Ms. Ventura mentioned a security incident which had recently occurred at the Bountiful DCFS office. Ms. Ventura noted that two male investigators in the Bountiful office carry concealed hand guns. At this time, Grievant told the others that he, too, had a Concealed Firearms Permit and a “sweet gun,” and that he used hollow-point bullets. Grievant also described the nature of the damage caused by hollow-point bullets.

18. Both Ms. Ventura and Ms. Howell became very alarmed by Grievant’s statements about his gun and bullets, and felt threatened by him by reason of the statements. Ms. Howell became so frightened from that time on that she always went to or from the parking lot in fear of whether Grievant was present or might show up while she was there.

19. The other staff member present at the July 18 meeting, Lori Trivino, felt that while Grievant’s gun comments put her on alert that there might be days when Grievant could bring a loaded gun to the office, she was not apprehensive about it and did not feel it was a threat or a danger.

20. Grievant and counsel for the Agency, Mr. Schwendiman, stipulated that although Grievant had once owned a 9mm pistol, he had in fact sold the handgun prior to becoming employed with the Agency. However, he maintained his Concealed Firearms Permit after he sold the handgun.

21. The Attorney General has filed a lawsuit against the University of Utah challenging its policy prohibiting handgun on campus pursuant to possession of a Concealed Firearms Permit. He also notified the Utah Department of Human Resource Management (DHRM) that he considers its rule prohibiting concealed weapons possession by state employees while on the job to be a violation of State law. Some time after receipt of the Attorney General’s notice, DHRM rescinded the rule.

22. On or about July 23, 2002, Grievant entered Ms. Howell’s office and first asked her what she felt about the venue of a case involving sexual molestation of a minor. The sexual acts occurred in the area of Hurricane, Utah, but the victim was now staying with a relative in the Clearfield area. Grievant then proceeded to read sexually graphic material to Ms. Howell. Ms. Howell made repeated attempts to contact the caseworker by telephone during the conversation, which lasted about 45 minutes, but was unsuccessful. Ms. Howell felt she could not tell Grievant to discontinue reading the material because “he was her boss,” and because “she was afraid of him.”

23. Ms. Howell felt offended and violated by the words that Grievant had read to her. She became sick to her stomach while he was reading the material. After Grievant left her office, she cried. Upon Ms. Ventura's return to the office, Ms. Howell told Ms. Ventura what had happened. The next day was Friday, July 24, a State holiday.

24. After Ms. Howell's return to the office the next week, she made a complaint to Mr. May about the July 23 incident. She later met with Mr. May and Mr. Torgensen to discuss her complaint.

25. Mr. Torgensen, in consultation with Mr. May, decided to have the Division of Investigations conduct an internal investigation into Ms. Howell's complaint about the July 23 incident. Between July 27 and September 9, 2002, the investigators, Jade Pusey and Ross Larsen, interviewed Ms. Howell, Ms. Ventura, Ms. Trivino, Darrel Armstrong and Grievant. At the conclusion of their interviews, Mr. Larsen prepared a written report which was submitted to Mr. Torgensen.

26. During Mr. Larsen's interview with Ms. Howell on August 29, 2002, Ms. Howell reported that on the previous day, August 28, Grievant had made a comment to Ms. Howell which she felt was racist.

27. In the morning of August 28, 2002, Ms. Howell overheard part of a conversation between Grievant and another person in Grievant's office. After the other person left Grievant's office, Ms. Howell went to Grievant's office and asked Grievant what had been said. Grievant said, referring to a case, "In the Hispanic culture 25-year-old men often have sex with 14-year-old girls." Ms. Howell immediately stood up and responded loudly, "That is so wrong. It is not at all true and I am very offended." Grievant replied that it was not his statement; Darryl Armstrong made the statement.

28. After the discussion in Grievant's office on August 28, Ms. Howell returned to her office. Ms. Trivino, who had overheard Ms. Howell's response to Grievant, was concerned and went to Ms. Howell's office. Ms. Howell was visibly very upset by the incident. Ms. Trivino reported Ms. Howell's getting upset to Ms. Ventura as soon as Ms. Ventura returned to the office. Ms. Ventura, Ms. Trivino and Ms. Howell then took a walk to a nearby Conoco station. During the walk, Ms. Howell explained what had happened between her and Grievant that morning. A little while later, Ms. Howell took the rest of the day off.

29. Ms. Ventura reported the incident on that same day to Mr. May, saying, “The situation is getting out of hand with Mr. Sorge, and you need to do something about it right away.” Ms. Howell also reported the incident, via email that same day, to Mr. May.

30. Upon receipt of Ms. Howell’s email, Mr. May decided to have the August 28 incident rolled into the investigation of the July 23 incident.

31. Mr. Larsen interviewed Grievant on September 4, 2002, as part of the investigation. At the beginning of the interview, Mr. Larsen gave Grievant the Garrity warning. In his interview with Mr. Larsen, Grievant’s responses to questions began to develop inconsistencies, and during the course of the interview, Grievant changed his statements of the facts several times. For example, Grievant at first acknowledged that he may have talked with Ms. Howell on July 23 about the venue issue in the case in question that day; later in the interview Grievant could not remember talking to Ms. Howell about the case. At the beginning of the interview, Grievant seemed confused, which is very common in such interviews, but as the interview progressed, Grievant became evasive and demonstrated selective memory.

32. From July 18, 2002, until his interview with Mr. Larsen on September 4, Grievant was never told by Ms. Howell, Ms. Ventura, Mr. May, or anyone else in management that Ms. Howell had made complaints about his conduct.

33. After receiving the investigative report of the July 23 and August 28 incidents, Mr. Torgensen, Ms. Noonan and Mr. May met to discuss it and decide what should be done next.

34. During the discussion, Mr. Torgensen reached the conclusions that Grievant had displayed a pattern of unacceptable conduct; that management felt they could no longer control that conduct; and that any discipline short of termination was not a viable alternative. Therefore, the decision was to recommend to the Attorney General that Grievant’s employment with the Agency be terminated. The Notice of Intent to Terminate was thereafter issued on September 27, 2002.

35. Grievant timely appealed the Notice of Intent to Step 4 of the grievance process. The Attorney General assigned another Chief Deputy, Raymond Hintze, to conduct the Step 4 informal hearing. Before holding the hearing, Mr. Hintze conducted his own investigation into the allegations made against Grievant. Grievant was then given an opportunity to be heard on October 10, 2002. Mr. Hintze felt Grievant was unable to recognize the impact his words and actions had on others; that Grievant failed to demonstrate that he was trying sufficiently to alter his conduct; and that the

Agency was too much at risk by reason of Grievant's continuing conduct. Therefore, Mr. Hintze drafted the letter terminating Grievant's employment, which the Attorney General signed on October 17, 2002.

CONCLUSIONS OF LAW

1. Grievant's appeal from the termination was timely.
2. Grievant received multiple notices as to the conduct which was of concern to Agency management, and knew or should have known that continued conduct causing offense to co-workers and clients could lead to his termination from employment.
3. Grievant's comments regarding his Concealed Firearms Permit, gun possession, and the bullets he preferred to use did not violate a universal standard of conduct such as to justify or support termination.
4. Grievant's comments and actions on July 23, 2002, constituted a violation of Agency office policy 2.11, Sexual Harassment.
5. Grievant's comments and actions on August 28, 2002, caused offense to both a co-worker and, ultimately, to a DCFS worker, in violation of directions and instructions given to Grievant by management.
6. Grievant's comments and actions on July 23, and August 28, 2002, his responses during the investigative interview with him, and his subsequent responses to management caused management to lose confidence and trust in Grievant's ability to comply with Agency policies.

STANDARDS

The standards for considering the discharge of State employees are: The agency dismissing an employee bears the burden of proof that the dismissal was for just cause. *Utah Code*, §67-19a-406(2)(a), (2002). The evidentiary standard by which the agency must meet its burden of proof is "substantial evidence." *Utah Code*, §67-19a-406(2)(c), (2002). Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v. State*, 903 P.2d 429,430 (Utah 1995) quoting *First National Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); see also *Zissi v. State Tax Commission*, 842 P.2d 848,853 (Utah 1992). "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Board of Review of Indus. Commission.* , 842 P.2d 910,911 (Utah Ct. App. 1992).

At the Step 5 hearing, the Hearing Officer has the responsibility to determine whether the factual findings, as determined by substantial evidence, support the allegations made by the agency, and whether the agency has correctly applied relevant policies, rules, and statutes. *Utah Administrative Code*, R137-1-21(3)(a), (2002). If the Hearing Officer determines that the factual findings support the allegations of the agency, then the Hearing Officer must determine, giving deference to the agency's decision, whether the agency's disciplinary action is excessive, disproportionate or otherwise constitutes an abuse of discretion. *Utah Administrative Code*, R17-1-21(3)(b), (2002); *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933 (Utah Ct. App. 1997).

DISCUSSION

The Agency's decision to terminate Grievant rests on three factual allegations: first, that Grievant threatened co-workers by comments he made respecting ownership of a Concealed Firearms Permit, a handgun, and hollow-point bullets; second, the reading of sexually graphic material to a paralegal without any business necessity; and third, the making of a culturally and racially insensitive remark.

Concealed Firearms

The factual findings in this case do not support the Agency's allegations that Grievant threatened co-workers by making comments about his Concealed Firearms Permit, handgun and bullets. Grievant denied making any gun comments in the staff meeting. However, three witnesses testified they heard he comments. While two of those witnesses may have held a bias against Grievant, which will be discussed in greater depth at later points in this decision, the third witness, Lori Trivino, testified also that the comments were made by Grievant. Ms. Trivino's testimony was not shown to be biased in any way, and is therefore considered fully credible. Therefore, the Hearing Officer concludes that Grievant did make the gun comments attributed to him in the July 18 staff meeting.

While two of Grievant's coworkers, Janice Ventura and Jennifer Howell, claimed to feel threatened by Grievant's gun comments, the Hearing Officer concludes for several reasons that Grievant did not intend the comments to be threatening, and the two co-workers were grossly oversensitive to the comments.

First, Grievant's comments were not made under circumstances that would lend support to the theory that Grievant had any reason to openly or impliedly threaten his co-workers. The comments were made in a staff meeting only after the lead attorney in the office brought up the subject of security and mentioned that two DCFS investigators in the Bountiful DCFS office carried handguns.

Second, the staff meeting was held within three weeks after Grievant began working in the Clearfield office, and there is no evidence that Grievant was aware of any difficulties with his co-workers at that point in time, or that Grievant had any reason to be angry with his co-workers.

Third, the reaction of the lead attorney, Janice Ventura, and the paralegal, Jennifer Howell, and their subsequent fear of Grievant do not appear to have any justification or basis in fact. Ms. Ventura testified "It was the way he said it," in telling about Grievant's gun comments. There is no evidence whatsoever that Grievant has ever displayed physical anger (as contrasted with emotional anger) or violence in the work place. Ms. Howell wrote an email to Mark May on July 22, 2002, in which she said:

It seriously bothers me to know that he has a gun and knowing the situation in the office and **his past**, it causes me a great deal of anxiety stress. I AM FREAKED OUT. If for some reason he should get angry because the "lawsuit" [sic] I wish we could be informed so as to protect ourselves from **his rage**. [Capitals in the original; bolding added.]

Ms. Howell testified that she had no knowledge of Grievant's past, except for a statement from Lynette Martinez that Ms. Martinez had filed an action against Grievant over an issue of sexual harassment. She further testified that she saw a "pattern." The pattern consisted of Ms. Martinez's action against Grievant, a news article about a claim of sexual harassment made against Grievant while Grievant was running for county attorney, the gun comments by Grievant on July 18, Grievant's alleged rudeness when Ms. Howell delivered office keys to Grievant just prior to his transfer, and the transfer itself. However, none of these matters rise to the level of evidence that Grievant was a violent person or that he harbored a "rage."

Ms. Ventura testified that when she talked to Mr. May about the issue of the gun, Mr. May, who Ms. Ventura knew had worked with Grievant for several years, told Ms. Ventura that he (Mr. May) did not believe Grievant would ever do anything to harm any of the staff. Mr. May's

statement could be interpreted as a “hope,” but again, there is no evidence of Grievant ever displaying physical violence in the workplace.

Fourth, Lori Trivino was also in the July 18 staff meeting, heard Grievant’s gun comments, and felt the comments were not threatening and did not give her any reason to feel alarmed or frightened. These four matters, taken together, strongly evidence an overreaction by Ms. Howell and Ms. Ventura, and refute management’s conclusion that Grievant violated a universal standard of conduct by threatening his co-workers.

It is also clear by reason of the Attorney General’s public stance regarding guns at the University of Utah and in State offices, that Grievant did not violate any known policy by his possession of a Concealed Firearms Permit.

Offensive Comments

The factual findings in this case do support the Agency’s allegations that Grievant read sexually graphic material to his paralegal on July 23, 2002, without a business purpose, and that he made a racially derogatory remark on August 28, 2002. Grievant strongly disputes both allegations. However, there is reliable evidence to support the allegations, while Grievant’s own testimony appears to be self-serving.

The July 23, 2002 allegation appears to be a “he said, she said” type of incident. Ms. Howell is a less than credible witness. The Hearing Officer is very troubled by her obvious animosity toward Grievant, which was evidenced from the day she first met him after the announcement of his transfer. On June 27, 2002, Ms. Howell took office keys to Grievant at his Ogden office preparatc ry to his transfer to Clearfield. When she gave Grievant the key and key card, Grievant responded in a manner that Ms. Howell felt was rude. She returned to her office in Clearfield and sent an email to Mr. May informing him of the encounter because she thought he “would like to know.” Ms. Howell testified that she meant nothing in particular by the statement, yet for some unexplained reason she felt it necessary to inform Mr. May of what happened.

Ms. Howell later also wrote about Grievant’s “past” and his “rage” without, according to her testimony, any negative feelings about Grievant or his transfer into the Clearfield office. She testified that she experienced fear every time she entered the office parking lot. Janice Ventura, the lead attorney in Clearfield, wrote an email referring to Ms. Howell’s fear of what Grievant might do because of his “anger.” All of the written evidence of Ms. Howell’s feelings about Grievant is

diametrically opposed to her testimony that she knew of no instances of violence or physically abusive conduct by Grievant. This conflict between Ms. Howell's written documents referencing Grievant and her testimony about not having feelings of animosity toward Grievant lead the Hearing Officer to conclude that Ms. Howell was not a credible witness.

Does this conclusion mean that the alleged incident on July 23 did not occur? Grievant testified that he absolutely did not read sexually graphic material to Ms. Howell. Yet he admitted that he went into Ms. Howell's office on July 23, and "may" have talked to her about the venue in the case. The file for the case contained the sexually graphic material complained of by Ms. Howell. It is unlikely that these two facts would be just coincidental. Grievant argued that a delay of more than six months in bringing the file to his attention is suspicious.

The Hearing Officer does not completely rule out the possibility of some kind of conspiracy against Grievant. Both the delay in bringing the case to his attention, and Ms. Howell's and Ms. Ventura's apparent animosity toward Grievant are indeed highly suspicious. However, in the end, the fact remains that no actual evidence was presented which could be considered to prove that Ms. Howell selected the file and placed it on Grievant's desk as a way to "create" a situation she could use against Grievant.

These factors, all taken together, lead to the conclusion that Ms. Howell's testimony of the event and Ms. Ventura's testimony as to Ms. Howell's state of emotions that day are more likely to be accurate than Grievant's testimony, which has an appearance of being self-serving.

With respect to the August 28, 2002 incident, Grievant also denies making the racially derogatory comments of which he is accused. This incident has several perplexing aspects. Ms. Howell did not say in her testimony where the comments were made; whether they were in her office, Grievant's office, or somewhere else. Grievant attributed the comments to Darryl Armstrong, a DCFS investigator. However, Mr. Armstrong categorically and repeatedly denied making the comments. This in itself is not so surprising, nor is it very illuminating, because the Hearing Officer considers it unlikely that Mr. Armstrong or anyone else possessing a normal amount of common sense would voluntarily admit to making such comments.

Another perplexing aspect of the case is that Grievant insists the discussion with Ms. Howell in which the derogatory comments were allegedly made occurred in his office. Mr. Armstrong

insists equally strongly that the comments were made by Grievant in the Farmington courthouse. This conflict can be resolved by considering the testimony of Lori Trivino.

Ms. Trivino stated that the conversation between Ms. Howell and Grievant on August 28, took place in Grievant's office. However, she did not identify the third party who had been in Grievant's office prior to Ms. Howell's entering it. Mr. Armstrong was unequivocal that his only conversation with Grievant in which the derogatory comment was made occurred at the Farmington courthouse. From the evidence given at the Step 5 hearing there appears to be no way to resolve the discrepancy between Grievant's testimony and Mr. Armstrong's about whether the conversation between them took place in Grievant's office or at the courthouse. However, the fact remains that Grievant had a conversation with someone in his office on August 28. When that person left Grievant's office, Ms. Howell stepped in and asked Grievant what was said. Grievant's response clearly upset Ms. Howell so noticeably that Ms. Trivino became concerned and tried to talk to Ms. Howell about it.

Therefore, the Hearing Officer concludes that the Agency's allegations about the incidents which occurred on July 23 and August 28, 2002, are supported by the evidence produced in the hearing, and that they violated office policy and specific instructions given to Grievant. Having so concluded, the Hearing Officer must determine, giving deference to the Agency's decision, whether the Agency's disciplinary action is excessive, disproportionate or otherwise constitutes an abuse of discretion.

The Agency has had very few personnel cases similar in nature to the instant case. Based on the limited information that is therefore available, there is no evidence that the Agency's decision to terminate Grievant's employment was excessive or disproportionate.

In considering whether the Agency's decision constituted an abuse of discretion, this Hearing Officer generally refers to *Utah Administrative Code*, R477-11-1(3)(e), (2002). This rule provides:

- (e) When deciding the specific type and severity of the discipline to administer to any employee, the agency representative may consider the following factors:
 - (i) Consistent application of rules and standards
 - (ii) Prior knowledge of rules and standards
 - (iii) The severity of the infraction
 - (iv) The repeated nature of the violations
 - (v) Prior disciplinary/corrective actions

- (vi) Previous oral warnings, written warnings and discussions
- (vii) The employee's past work record
- (viii) The effect on agency operations
- (ix) The potential of the violations for causing damage to persons or property.

Although State agencies are not required to apply this rule, it provides a platform from which a determination may be made as to whether the Agency abused its discretion in deciding to terminate Grievant.

In the instant case, Grievant had been employed at the Agency about three and one-half years. Grievant acknowledged that the corrective action plan he was placed on at the end of 2001, and his unsuccessful performance evaluation in June 2002, gave him notice of what conduct was expected of him. The corrective action in particular was explicit in directing Grievant to make no sexual comments to co-workers and to treat support staff with respect. Mr. Torgensen was verbally explicit in advising Grievant to avoid even the perception of offending his co-workers or clients. While there was not a series of progressive disciplinary actions taken by management during Grievant's employment, the main purpose of progressive discipline is to give an employee clear and unequivocal warning that his or her job may be in jeopardy from inappropriate or improper conduct.

Grievant was given ample notice of what was expected of him. He knew or should have known that his conduct was under close scrutiny by management. He knew or should have known that even the perception of impropriety could place his job in jeopardy. Grievant's conduct on July 23, and August 28, 2002, evidence a failure on Grievant's part to understand the seriousness of management's concerns with his conduct. As with any governmental agency or private business, relationship of workers with each other and of workers with customers or clients is a matter of primary importance to the successful operation of that agency or business, particularly when the budget or income of that agency or business is dependent on its relations with clients or customers. When management fails to understand that basic principle, its agency or business often fails.

Grievant's history with the Agency demonstrated a continuing lack of understanding of the importance of Grievant's relationship with his co-workers and with the clients he served. This lack of understanding was evidenced in the interchange between Grievant and Darryl Armstrong during Mr. Armstrong's testimony. At one point, Grievant asked Mr. Armstrong, "Now you have indicated earlier that there was one instance where you might have had a disagreement with me on a case; is

that correct?" After considerable dialogue between Grievant and Mr. Armstrong pertaining to identification of the case in question, the questioning and testimony was:

A. . . . I think I was upset about something that was said in the court at that time - -

Q. Oh.

A. - - regarding my sloppiness of my work. And it had nothing to do with you, it had nothing to do with Mark May, it had to do with sloppiness of my work, and my work was not sloppy.

Q. Uh-huh.

A. And you did not - - I continually tried to prompt you and tell you what had actually happened to promote me to do the actions that I did. You didn't get up and say what I was trying to get you to say, and that's - - that's what my problem was. It has nothing with Mark May, it has nothing to do with - - and - - and if you think that incident has anything to do with what I'm saying now, it's ridiculous.

Q. No, that's not what I'm saying. Who said your work was sloppy?

A. The judge.

Q. Oh.

A. She said that my work was sloppy.

Q. Judge Wilkins can be very frank at times?

Transcript of Excerpt from April 1, 2003, Testimony of Darryl Armstrong, pp. 52, 57-58.

Even in the Step 5 hearing, it did not appear that Grievant understood the true nature of Mr. Armstrong's complaint, and the reason Mr. Armstrong "had a problem" with Grievant's representation of Mr. Armstrong in court. Rather, Grievant devoted considerable time and energy to defending his actions and his own professionalism instead of dealing with the problem as Mr. Armstrong perceived it. The Corrective Action Plan in December 2001 and January 2002, and Mr. Torgensen's discussions with Grievant during the spring of 2002, all emphasized the need for Grievant to maintain good relations with co-workers and with DCFS workers. They emphasized

specifically the need to avoid comments which could be perceived as offensive. Despite these warnings and admonishments, Grievant failed to recognize their importance to the Agency.

This lack of understanding gives strong credence to Mr. Hintze's conclusions, in both his testimony and in the Notice of Termination, that management could no longer control Grievant's conduct, that Grievant had not altered his conduct despite the warnings, and that his conduct left the Agency at risk for possible adverse actions against the Agency by reason of Grievant's continuing conduct.

It is unfortunate that Grievant did not recognize the importance of his relations with others and how his own conduct affected those relationships. As noted in the Corrective Action Plan, Grievant was a hard worker who handled a large caseload in a timely manner, performed his work very quickly, and did a good job of representing the Agency in court. However, considering the totality of the evidence in this case, the Hearing Officer can find no abuse of discretion in the Agency's decision to terminate Grievant's employment.

DECISION

The decision of the Agency to terminate Grievant's employment effective October 17, 2002, for just cause and for the good of the public service is affirmed.

It is so **ORDERED** this *23rd* day of April 2003.



K. Allan Zabel
Hearing/Presiding Officer
Career Service Review Board

RECONSIDERATION

Any request for reconsideration must be filed with the Career Service Review Board within ten working days upon receipt of this decision. *Utah Administrative Code R137-1-21(12)(b)*.

APPEAL

Any appeal of this formal adjudicative decision must be filed with the Career Service Review Board within ten working days upon receipt of this decision according to *Utah Code §67-19a-407(1)(a)(i)*.

ADDENDUM “B”

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

JOHN D. SORGE,

Grievant and Appellant

v.

UTAH OFFICE OF THE
ATTORNEY GENERAL,

Agency and Respondent.

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:DECISION
AND
FINAL AGENCY ACTION

Case No. 8 CSRB 72

On Tuesday, September 7, 2004, the Career Service Review Board (Board and CSRB) completed its appellate review of the above-entitled case with a hearing involving the parties and an executive session. The following Board members were present and heard oral argument at the hearing and deliberated in executive session: Teresa N. Aramaki, Joan M. Gallegos, Felix J. McGowan, Acting Chairman, and Kevin C. Timken. At the hearing, John D. Sorge (Appellant) was present and represented by Erik Strindberg, Attorney at Law, who presented oral argument on Appellant's behalf. Assistant Attorney General J. Francis Valerga represented the Utah Office of the Attorney General (Agency and AG) and presented oral argument on the Agency's behalf. Finally, Assistant Attorney General Geoffrey Landward was present at the hearing but did not participate in the hearing and was there for observational purposes only.

AUTHORITY

The Board's statutory authority is set forth in the *Utah Code Annotated* at §§ 67-19a-101 through -408 (hereinafter *Utah Code*) of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act at §§ 67-19 -1 to -42. The CSRB's administrative rules are published in the *Utah Administrative Code* at R137-1-1 to -23. This Board-level or Step 6 appeal hearing is the final administrative review in the State Employees' Grievance and Appeal Procedures for Mr. Sorge's appeal from termination of his employment. Both the Board's evidentiary/Step 5 and these appellate/Step 6 proceedings are designated as "formal adjudications" pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB's Step 5 and Step 6 hearings. (*Utah Code*, §§ 63-46b-0.5 to -23)

PROCEDURAL BACKGROUND

On or about September 27, 2002, Appellant was given a notice of intent to terminate him from his position as an Assistant Attorney General with the Child Protection Division. (Gvt. Ex. 1) This Notice of Intent was signed by Mary T. Noonan who was then the Division Chief over the Child Protection Division of the Agency. At the time the Notice of Intent was issued, Appellant had been employed as an attorney with the Child Protection Division for approximately three and one-half years.

This September 27, 2002 Notice of Intent recommended that Appellant's employment be terminated for violation of Office Policy 2.11, Sexual Harassment. (Gvt. Ex. 1) Specifically, the Agency alleged in this notice that Appellant had engaged in two incidents of inappropriate conduct: one occurring on July 23, 2002, and the other on August 28, 2002. Both of these incidents occurred after the Agency transferred Appellant from the Ogden office to the Clearfield office and after the Appellant had been placed on a Corrective Action Plan. (Gvt. Ex. 6)¹

After receiving the September 27, 2002 Notice of Intent, Appellant requested a hearing with Mark L. Shurtleff, the Attorney General for the State of Utah. Attorney General Shurtleff delegated this responsibility to Raymond Hintze (Mr. Hintze), Chief Deputy Attorney General, who met with Appellant and Appellant's attorney, Mr. Erik Strindberg, in a Step 4 hearing on October 10, 2002. After this hearing, Mr. Hintze conducted additional interviews, reviewed documents and read a transcript of a September 4, 2002, interview between Appellant and Agency investigators Ross Larsen and Jade Pusey. Mr. Hintze then made a recommendation to the Attorney General to terminate Appellant's employment. After review of Mr. Hintze's recommendation, Attorney General Shurtleff made the final decision to terminate Appellant's employment with the Agency. Appellant received notice of the Agency's final decision on October 17, 2002. (Gvt. Ex. 2)

In Attorney General Shurtleff's written decision, he concluded that the intent to terminate Appellant's employment was justified, and denied Appellant's appeal. (*Id.*) His conclusions were based generally on the reasons stated in the Notice of Intent to Terminate and specifically on three incidents which occurred in the Clearfield Attorney General's Office after an unsatisfactory 2002 performance review and transfer from Ogden to Clearfield. The three incidents included the July 23

¹ While the Corrective Action Plan (CAP) was entered into the exhibits as to notice only, the Agency appears to have terminated the CAP early. The CAP began on or about December 20, 2001 (Findings of Fact, #3) and was ended early by management in February 2002 (Findings of Fact, #5).

and August 28 incidents previously mentioned in the Notice of Intent to Terminate, as well as a third incident the Notice only mentioned in passing² – that of comments made in July 2002 regarding Appellants Concealed Firearm Permit and comments made at a staff meeting in Clearfield where Appellant discussed the impact delivered by hollow-point ammunition.

In reaching his final decision, Attorney General Shurtleff concluded that Appellant's dismissal was for:

“[N]ew incidents ... which cannot and will not be tolerated and which, when coupled with the incidents described in the Notice of Intent, justify my ultimate conclusion.”

(*Id.*)

On October 28, 2002, Appellant timely filed his appeal of Attorney General Shurtleff's Final Decision with the CSRB.³

² On page 2 of the Notice of Intent to Terminate, Ms. Noonan writes: “Jennifer [Howell]...was afraid for her safety because of comments you [Appellant] had earlier made regarding a concealed weapon and the use of hollow-point bullets.” Mark Shurtleff's letter amplifies his concerns regarding this incident. The Hearing Officer, however, concluded that this incident does not justify termination.

³ The procedural record is extensive in the case. A Prehearing/Scheduling Conference was held on November 19, 2002, and a Summary and Order was issued November 25, 2002. Discovery was requested on January 9, 2003. The CSRB received a Motion to Set Aside Grievant's Termination of Employment on January 27, 2003. On January 29, 2003, the CSRB Administrator wrote to Appellant in response to Appellant's Motion to Set Aside Grievant's Termination of Employment or in the Alternative Demand for Immediate Assignment of Officer and Discovery. In this letter, it was agreed that a formal written response to this motion would not be necessary. It was followed the same day with a Decision and Order assigning K. Allan Zabel as Hearing Officer in this matter. A Prehearing/Scheduling Conference was held on February 4, 2003. At this prehearing, Appellant received Agency's Answers to Grievant's Request for Discovery. A Motion to Quash Agency's February 4 2003 Motion in Limine and Order was received on February 13, 2003, along with the Grievant's Response to Agency's February 4, 2003 Answers to Grievant's Request for Discovery. Arguments on Agency's Motion in Limine and Agency's Objections to Discovery were heard on February 18, 2003, and an order issued on February 20, 2003. An Amended Request for Discovery was received February 25, 2003. On March 3, 2003 the Agency supplied CSRB with its Answers to Grievant's Request for Discovery Pursuant to Order on Objections and on March 6, provided Agency's Final Witness List. On March 10, the Agency provided an Answer to Grievant's Amended Request for Discovery and Appellant provided his Final List of Witnesses. On March 12, Agency's Objection to Excessive Number of Grievant Witnesses was received, and on March 13, the CSRB received Grievant's Response to Agency's Objection to Excessive Number of Grievant's Witnesses. A Motion to Compel Discovery was received from Appellant on March 18, 2003. The CSRB issued an Order on Agency's Objection to Grievant's Witness List on March 20. On March 24, the CSRB received Appellant's Motion to Reconsider Some Witnesses on Grievant's Final Witness List. The Agency replied to Grievant's Motion for Reconsideration on March 25. The CSRB issued an Order on Grievant's Motion to Reconsider Some Witnesses on March 25. The Agency made a Motion for Protective Order and Return of Document which was received by the CSRB on March 25. Appellant filed a Request for Stipulation of Grievant, Agency, and Hearing Officer and Order allowing telephonic subpoenas for First and Second District Juvenile judges which was received by the CSRB on March 26, 2003. The CSRB Hearing Officer issued an Order on Grievant's

STANDARDS OF REVIEW AND ISSUES ON APPEAL

I. STEP 5 EVIDENTIARY ISSUES AND RULING

On March 31, April 1-4 and 9, 2003, a Step 5 evidentiary hearing was held before CSRB Hearing Officer K. Allan Zabel (Hearing Officer). At the hearing, Appellant was present and represented himself, *pro se*. The Agency was represented by Assistant Attorney General Stephen G. Schwendiman, who was assisted by Agency Management Representative Mary Noonan, then Division Chief, Child Protection Division, Office of the Attorney General, for the Agency.

The statute authorizing the CSRB to hold an evidentiary hearing can be found at *Utah Code*, §67-19a-406. Moreover, because Appellant's employment was terminated, the Agency had the burden of proving its case by substantial evidence and the burden of going forward. (*Utah Code*, §67-19a-406(2)(a) and (c)) The specific issues adjudicated at the Step 5 hearing were twofold. First, did the Agency terminate Appellant's employment to either (a) advance the good of the public service, or (b) for just cause? If not, what would be the appropriate remedy?

Approximately two weeks before the Step 5 hearing, on March 10, 2003, Appellant provided the Hearing Officer with a Final Witness List consisting of sixty-nine witnesses. On March 12,

Motion to Reconsider some Witnesses, Agency Motion for Protective Order, Agency's Motion to Reconsider Order to Compel, Grievant's Request for Stipulation, and Cutoff of Discovery and Motions on March 26. On March 28, a Supplement to the aforementioned Order was issued. The Step 5 Hearing was held on March 31, April 1-4 and 9, 2003. The Findings of Fact, Conclusions of Law and Decision (Step 5 Decision) was entered on May 23, 2003. The CSRB received Appellant's Notice of Appeal and Request for Expedited Hearing on May 8, 2003. On May 9, 2003, the CSRB issued a letter to Appellant explaining the procedures involved in ordering a transcript of the Step 5 proceedings. Appellant received this letter on May 13, 2003. On August 5, 2003, a Scheduling Order was issued by the CSRB fixing September 2, 2003 as the day Grievant's brief was due, and October 2, 2003 as the date the Agency's brief was due. This order was remailed to Appellant on August 12, 2003, after it was determined the first order was mailed to an address from which the Appellant had moved. The CSRB did not receive Appellant's brief by the September 2, 2003 deadline. On January 5, 2004, the CSRB issued an Order to Show Cause asking Appellant to show why his appeal should not be dismissed for failure to prosecute. On January 20, 2004, the CSRB received Appellant's response to the Order to Show cause. On January 20, 2004, Appellant filed his Brief. The Agency filed a motion on January 28 to Extend the Time to File its Response Brief, and the CSRB granted the Agency until August 9, 2004, to file its brief. On June 4, 2004, Appellant filed a Motion to Clarify the extension of time the CSRB granted the Agency for filing their brief. On June 7, the Agency filed a memo in opposition to Appellant's Motion to Clarify. The CSRB denied Appellant's motion in an order dated June 16, 2004. The Agency filed its brief August 9, 2004. Also on August 9, the Agency submitted its application for an exception to the page limitation set forth in *Utah Admin. Code*, R137-1-18(13). Appellant responded to the Agency's Brief on August 16, with an Objection to Agency's Request to Change Findings of Fact. Appellant also requested an Expedited Step 6 Hearing and the CSRB received the request on August 17, 2004. The Agency responded to Appellant's objection to requesting a change in the findings of fact on August 24, 2004. Finally, on August 25, 2004, the CSRB issued a Notice of Administrative Appeal Hearing Before the Board fixing the date and time for the Step 6 Hearing at 11 a.m. on September 7, 2004.

2003, counsel for the Agency, Stephen G. Schwendiman, filed the Agency's Objection to Excessive Number of Grievant's Witnesses. The CSRB issued subpoenas for Appellant's witnesses, but on March 25, 2003, two days prior to the date the Step 5 hearing was to begin, the Hearing Officer issued an Order on Grievant's Motion to Reconsider Some Witnesses, Agency's Motion for a Protective Order, Agency's Motion to Reconsider Order to Compel, Grievant's Request for Stipulation, and Cutoff of Discovery and Motions. Appellant did not receive this order until March 26, the day before the hearing was to begin on March 27. At the conclusion of the hearing, the Hearing Officer entered his Findings of Fact, Conclusions of Law and Decision (Step 5 Decision) dated April 23, 2003. In this decision, the Hearing Officer examined the evidence presented at the hearing, including the legal arguments raised by Appellant, and concluded that there was substantial evidence to support the Agency's decision to terminate Mr. Sorge's employment and that such discipline was not excessive, disproportionate, nor was it an abuse of discretion. (Step 5 Decision at 2)

Grievant's employment was terminated by the Agency for three incidents: (1) comments made in a staff meeting on July 18, 2002, regarding a gun; (2) sexually explicit comments made to a co-worker on July 23, 2002; and (3) offensive comments made to a co-worker on August 28, 2002. The Hearing Officer found that the gun comments were indeed made, but also ruled that they could not be used to terminate Grievant's employment because they were not sufficiently offensive. (Step 5 Decision at 7) He found that the incidents on July 23, and August 28, did occur, and that they were sufficient to terminate Grievant's employment.

A. The July 23 Incident

Grievant worked in a four-person office in Clearfield. The three other employees who worked with him were a senior attorney and office supervisor named Janice Ventura, a paralegal named Jennifer Howell, and a secretary named Lori Trivino.

In the afternoon of July 23, 2002, Grievant and Ms. Howell were alone in the office. Grievant entered Ms. Howell's office with a case file in his hand. The door shut behind him. (Tr.I at 139) Ms. Howell got up and opened the door because she did not want to be alone with Grievant in the office. (Tr.I at 140, 143) The case file Grievant was holding dealt with the sexual molestation of a minor female. His reason for entering Ms. Howell's office, according to his testimony, was to discuss the venue of the case. (Tr.I at 145-146) However, Ms. Howell knew nothing about the case and told him so. She told him he would have to talk to the DCFS case worker and offered to get the

case worker on the phone. (Tr.I at 145) Grievant told Ms. Howell not to call the case worker. He then proceeded to read aloud to Ms. Howell from the file. The material he read was sexually graphic and explicit. (Agency Ex. 8) (Tr.I at 147) He stayed in her office reading aloud from the case file and attempting to engage her in conversation about the case for approximately 45 minutes. Ms. Howell tried on numerous occasions during the meeting to call the case worker but was unsuccessful. She did not stop him from reading because “he was her boss” and “she was afraid of him.” (Step 5 Decision at 4) (Tr.I at 166) Ms. Howell felt “offended,” “upset,” “violated,” and “sick to [her] stomach.” (Tr.I at 165-172) After Grievant finally left her office, she cried. (Tr.I at 169)

Later that afternoon, Janice Ventura returned to the office. Ms. Howell entered Ms. Ventura’s office and explained what happened. Ms. Ventura testified that Ms. Howell was “upset,” “shaking,” and “crying.” (Tr.I at 297) Ms. Ventura’s testimony was consistent with the testimony of Ms. Howell. In Grievant’s testimony regarding the July 23 incident, he admitted that he entered Ms. Howell’s office, but testified they discussed issues solely related to venue. He completely denied reading the sexually graphic material in the file. (Tr.V at 1352-53) (Step 5 Decision at 10-11)

Notwithstanding Grievant’s denials, the Hearing Officer found the July 23 incident took place as alleged and testified to by Ms. Howell. (Step 5 Decision at 4, 7, 10-11) While he questioned Ms. Howell’s credibility, he questioned Grievant’s credibility even more. Moreover, while other witnesses (Ms. Ventura and Ms. Trivino) gave testimony that at least indirectly supported the testimony of Ms. Howell, no one gave testimony that supported Grievant’s version of the events.

We agree with the Agency that the record in the instant case is replete with evidence to support the finding of the Hearing Officer that the July 23 incident took place. No credible evidence supports the argument that it did not take place. As further found by the Hearing Officer, “Ms. Howell’s testimony of the event and Ms. Ventura’s testimony as to Ms. Howell’s state of emotions that day are more likely to be accurate than Grievant’s testimony, which has an appearance of being self-serving.” (Step 5 Decision at 11) We sustain the findings of the Hearing Officer on the July 23 incident.

B. The August 28 Incident

The August 28 incident consisted of Grievant making an offensive remark to Ms. Howell

about young Hispanic women. Even though Grievant denied the incident occurred in the manner alleged by the Agency, the Hearing Officer found that it did occur and used it along with the July 23 incident to uphold Grievant's termination.

On Appeal, the Agency asks this Board to change one of the Hearing Officer's Finding of Fact. While we agree there may have been some confusion on this finding, we are not ready to change it, nor do we feel it materially affects the conclusion reached by the Hearing Officer. We further find that no abuse of discretion attaches to the finding nor the Hearing Officer's conclusion as a result of the finding.

In arguing that the Board should exercise its discretion by correcting one of the Hearing Officer's findings of fact, the Agency asserts the Hearing Officer apparently misunderstood some of the testimony regarding the August 28 incident, and because of that misunderstanding made an erroneous finding of fact. (Finding of Fact No. 27) This erroneous finding of fact, the Agency argues, unfairly marginalizes the seriousness of the August 28 incident and weakens the Agency's overall case. The Agency asked the Board to sustain the Hearing Officer's ultimate conclusion on the August 28 incident, while correcting Finding of Fact No. 27 in the Hearing Officer's Step 5 Decision to reflect the true context in which the August 28 incident took place.

In asking to have its cake and eat it too, the Agency goes too far. Finding of Fact No. 27 in the Step 5 Decision reads as follows:

In the morning of August 28, 2002, Ms. Howell overheard part of a conversation between Grievant and another person in Grievant's office. After the other person left Grievant's office, Ms. Howell went to Grievant's office and asked Grievant what had been said. Grievant said, referring to a case, "In Hispanic culture 25-year-old men often have sex with 14-year-old girls." Ms. Howell immediately stood up and responded loudly, "That is so wrong. It is not at all true and I am very offended." Grievant replied that it was not his statement; Darryl Armstrong made the statement.

(Step 5 Decision at 6)

The Agency claims Finding of Fact No. 27 is wrong because Ms. Howell did not "overhear part of a conversation between Grievant and another person," and after the other person left, she did not go to Grievant's office to ask Grievant "what had been said." The Agency claims Grievant was not simply repeating what he heard Darryl Armstrong say, but that Grievant was repeating to Ms. Howell a statement he himself had previously made to Mr. Armstrong.

Grievant's version of the August 28 incident is as follows: (a) that a DCFS case worker named Darryl Armstrong was in Grievant's office on August 28, and while there, Mr. Armstrong

made the statement that, “in the Hispanic culture young Hispanic women frequently have sexual relations with older Hispanic men and such relationships are perfectly acceptable in the Hispanic culture”; (b) that Ms. Howell overheard part of that conversation; (c) that after Mr. Armstrong left Grievant’s office, Ms. Howell stepped into Grievant’s office and asked Grievant what he and Mr. Armstrong had been talking about; (d) that Grievant repeated Mr. Armstrong’s statement to Ms. Howell; (e) that if Ms. Howell was offended by what Grievant said it was not Grievant’s fault since he was just repeating what Mr. Armstrong said and Ms. Howell asked him to repeat it. (Tr. V at 1353-55, 1369-75)

The Agency points out that the only witness in the Step 5 hearing who supported Grievant’s version of the August 28 incident was Grievant himself. No other witness supported his version. All the other witnesses who addressed the August 28 incident, Jennifer Howell, Lori Trivino, and Darryl Armstrong, supported the Agency’s version. It is clear that the Hearing Officer believed the three Agency witnesses over the Grievant; otherwise, he would not have sustained the August 28 charge against Grievant.

The Agency’s main problem with the finding is the way Finding of Fact No. 27 is written, particularly the first two sentences, because in the Agency’s words it sounds as though Grievant was sitting in his office minding his own business when Ms. Howell walked in and asked him to explain something she had overheard him talking about with someone else. When Grievant responded to her inquiry by telling him what he had been talking about with the other person (Darryl Armstrong), Ms. Howell was offended by it. If that version is allowed to stand, Agency claims it hurts its case because it makes it appear that Ms. Howell was the person who initiated the discussion, that Grievant simply responded to her request for information, and that Grievant should not be faulted for providing that information to her.

The Agency submits the August 28 incident did not happen as set forth in Finding of Fact No. 27. Rather, the Agency’s version of the August 28 incident is as follows: (a) sometime prior to August 28, Grievant and Darryl Armstrong were in the hallway of the Farmington courthouse, having just finished handling a case involving a 14-year-old Hispanic female who was molested by her Hispanic stepfather (Tr.II at 509-10); (b) Grievant told Mr. Armstrong that Grievant believed the female “had the hots” for her stepfather and must have enjoyed being molested because she voluntarily went on a road trip with him (Tr.I at 182, 510-15); (c) Mr. Armstrong tried to correct Grievant’s racially offensive remark by telling him that is not the way it is in the Hispanic culture

(Tr.III at 812-13); (d) that on August 28, without any prior inquiry or urging from Ms. Howell, Grievant invited Ms. Howell into his office and gratuitously repeated his racially offensive remarks to her (Tr.I at 181-82); and (e) after the termination letter was issued against Grievant by the Attorney General's Office, and one of the charges against him was the August 28 incident, Grievant made up the story that Mr. Armstrong, not Grievant, made the offensive remark, that he made it in Grievant's office rather than in the Farmington courthouse, and that Ms. Howell overheard it and asked Grievant about it.

The Agency's version of the August 28 incident is supported by the nearly uncontroverted testimony of Ms. Howell, Ms. Trivino, and Mr. Armstrong. Indeed, other than Grievant's testimony, which the Hearing Officer characterized as "self-serving" (Step 5 Decision at 10-11), the Agency's version is uncontroverted.

The Agency believes the Hearing Officer made the following two fundamental errors in analyzing the August 28 incident: (1) He misunderstood part of Ms. Howell's testimony, and (2) He misunderstood part of Ms. Trivino's testimony. The part of Ms. Howell's testimony the Agency claims he misunderstood was the part about *where* the offensive comments were made. In his Step 5 Decision, the Hearing Officer states: "Ms. Howell did not say in her testimony where the comments were made; whether they were made in her office, Grievant's office, or somewhere else." (Step 5 Decision at 11) The Agency believes the Hearing Officer is simply wrong in this assessment of Ms. Howell's testimony. Ms. Howell did indeed say where the offensive comments were made. She said they were made in Grievant's office. (Tr.I at 181-82)

Thus, the Hearing Officer's statement that Ms. Howell did not say *where* the offensive comments were made appears to be inaccurate. It is not clear exactly what part of Ms. Trivino's testimony the Hearing Officer misunderstood, but it had something to do with whether Mr. Armstrong had been in Grievant's office just before Ms. Howell entered it. In his Step 5 Decision, the Hearing Officer appears to struggle with the question of whether the conversation between Grievant and Mr. Armstrong took place in the Farmington Courthouse or in Grievant's office. (Step 5 Decision at 11-12) For some unknown reason, the Hearing Officer says the question "can be resolved by considering the testimony of Lori Trivino." (Step 5 Decision at 12) However, a reading of Ms. Trivino's testimony (set forth above and found in Tr.II at 421-24) clearly shows she said absolutely nothing about Mr. Armstrong or any other third party being in Grievant's office before Ms. Howell went into his office. Indeed, neither Ms. Howell, Ms. Trivino, nor

Mr. Armstrong said anything about someone being in Grievant's office just before Ms. Howell went into his office. The only one who said anything about that was the Grievant himself, and since the Hearing Officer discounts Grievant's credibility throughout the Step 5 Decision, it makes no sense for him to believe Grievant on that narrow issue, particularly since none of the other witnesses supports it.

The testimony of Grievant and Mr. Armstrong on the August 28 incident are at odds. Grievant claims Mr. Armstrong made the racially offensive remark and he, the Grievant, simply repeated it to Ms. Howell. Mr. Armstrong denies making the remark. He says Grievant made it. The Agency argues that Mr. Armstrong should be believed over the Grievant for three reasons. First, as previously discussed, the Hearing Officer found Grievant not to be credible. (Step 5 Decision, Finding of Fact No. 31, and at 10-11) On the other hand, the Hearing Officer made no adverse credibility finding against Mr. Armstrong. Second, Grievant's testimony on the issue is not very convincing. The Hearing Officer described it as "self-serving." On the other hand, Mr. Armstrong's testimony on this issue is very detailed, clear, and specific. A careful reading of his testimony in the transcript shows it to be reasoned, balanced, and logical. (Tr.II at 512) Third, it is unreasonable to believe Mr. Armstrong would make the racially inflammatory remark about Hispanics attributed to him by Grievant. Mr. Armstrong is married to a Hispanic woman who is a member of the Governor's Hispanic Affairs Committee. (Tr.II at 511-12, 692, 908) He is sympathetic to and knowledgeable about Hispanic issues and not inclined to slander Hispanics. (Tr.II at 512, 908)

The Board finds that while there is some confusion regarding the specifics of the events surrounding the August 28 incident, the conclusions drawn by the Hearing Officer are sustained; that the actions of the Appellant resulted in good cause for terminating his employment after having been put on notice that offensive behavior will not be tolerated. Appellant's attempt to claim he was only repeating the offensive remarks of others is insufficient to establish the Hearing Officer's finding was not supported by substantial evidence. However, based upon our review of the extensive record, the Board finds it unnecessary to correct or amend this finding in reaching our decision.

II. ISSUES ON APPEAL

In Appellant's appeal before this Board, he challenges several aspects of the Hearing Officer's Step 5 decision. Specifically, Appellant argues that the Hearing Officer's ruling to limit witnesses rises to the level of a due process violation, and further argues that the proportionality of

the penalty under the circumstances [dismissal] was grossly excessive and an abuse of discretion. Finally, Appellant argues that the finding by the Hearing Officer that witness Jennifer Howell was less than credible should put into doubt whether any of the acts cited as reasons for termination even occurred. Further, since the Hearing Officer indicated that he could not rule out the possibility of a conspiracy against the Appellant, Appellant argues that the credibility of witnesses against him is nonexistent and that termination under such circumstances is too severe a penalty.

Each of these issues will be addressed in the remainder of this Decision and Final Agency Action.

III. THE BOARD'S APPELLATE STANDARDS OF REVIEW

We review Appellant's appeal under *Utah Admin. Code*, R137-1-22(4)(a) – (c), (*Supp. 2003*), which reads as follows:

(a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.

(b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes in accordance with the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.

(c) Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

Based upon the foregoing, the Board must first determine whether the Hearing Officer's factual findings are reasonable and rational based upon the evidentiary record as a whole and whether those findings are supported by substantial evidence. Next, our task is to review the fact finder's decision to determine whether the Hearing Officer correctly applied "the relevant policies, rules, and statutes according to the correctness standard," giving no deference to the Hearing Officer on this legal issue. Finally, the Board's appellate role is to consider whether the totality of the Agency's disciplinary penalty of termination of Appellant's employment is reasonable and

rational based upon our determination of the ultimate facts together with the correct application of relevant State policies, rules and statutes which were considered by our Hearing Officer.

In matters of employee terminations, the Court of Appeals has consistently held that the CSRB's review role is limited. The CSRB should not disturb an agency's decision to dismiss an employee unless there is no factual support for the agency's action, and only upon showing that the agency's sanction is "so disproportionate to the charges that it amounts to an abuse of discretion." (*Utah Dep't of Corrections v. Despain*, 824 P.2d 439, 443 (Utah Ct. App. 1991)). The Court went on to say punishment is within the agency head's discretion as long as "reasonable minds might differ as to [its] propriety." (*Id.* at 448) See also, *Kent v. Dept. of Employment Security*, 860 P.2d 984, 987 (Utah App. 1993) where the court held "the CSRB must affirm the Department's decision if it is within the bounds of reasonableness and rationality." In reversing a decision of the Tooele County Deputy Sheriffs' Merit Commission, which had overturned the dismissal of a deputy sheriff in *In re Discharge of Jones*, 720 P.2d 1356 (Utah 1986), the Utah Supreme Court set forth the reason why a department head must have broad latitude in disciplining employees. The Court said:

The sheriff must manage and direct his deputies, and is in the best position to know whether their actions merit discipline. If the Merit commission finds upon review that the facts support the charges against the deputy, then it must affirm the sheriff's disciplinary action unless it finds the sanction so clearly disproportionate to the charges as to amount to an abuse of the sheriff's discretion.

(Emphasis added.) (*Id.* at 1363)

BOARD REVIEW AND ANALYSIS OF FACTS AND ISSUES ON APPEAL

I. THE ORDER LIMITING WITNESSES

As stated above, the Board's first obligation on review is to make a determination of whether the factual findings of the Hearing Officer are reasonable and rational according to the substantial evidence standard (R137-1-22(4)(a)). In the instant case, the Hearing Officer heard testimony from numerous witnesses including Appellant himself concerning the events precipitating the Agency's Notice of Intent to Terminate. As the Hearing Officer, Mr. Zabel was in the unique position to hear this testimony, weigh all the evidence presented at the hearing and deliberate on the testimony of the witnesses. The Board has previously outlined the tremendous amount of procedural motions and orders that preceded both the Step 5 hearing and Decision. (See n.3)

Grievant argues that the Hearing Officer erred by not allowing him to call witnesses to rebut

the evidence regarding his prior work record. (Grievant's Brief at 1-3) Grievant argues that due process requires him to have the opportunity to confront his accusers, no matter how old and final the accusations are, and to put on evidence to rebut their allegations against him. Grievant is in error on this point.

While Utah has no case law on point, the CSRB has consistently followed the reasonable and practical rule of not allowing persons to relitigate matters which have come to rest.⁴ The reason for this rule is to allow employees and agencies to achieve finality in their affairs. Parties in Step 5 hearings routinely introduce evidence, both positive and negative of an employee's work record. The authority for so doing is found in *Utah Admin. Code*, R137-1-21(9) which reads as follows:

Past Work Record. In those proceedings where a disciplinary penalty is at issue, the past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations.

The rule is silent regarding whether the parties can challenge the past work record by calling witnesses to support or rebut it. However, to allow such challenges would be administratively burdensome. To do so would be considered "relitigating" which is exactly what the court in *Reece* denounced.

If parties were allowed to relitigate past work record, finality would never be achieved. Moreover, instead of taking one or two days to litigate a typical termination case at Step 5, it would take one or two months. It is not uncommon for parties to introduce 15 to 20 years' worth of performance appraisals, and numerous letters of commendation in a Step 5 hearing. When that happens, neither side objects, presumably because of R137-121(9) and several years of long-standing CSRB precedent. If parties were able to call witnesses to challenge the substantive nature of those records, hearings would go on *ad infinitum* and finality would never be achieved.

In the instant case, the items in his work record that Grievant wishes to relitigate, i.e., the sexual harassment complaints from the three DCFS workers and Lynette Martinez, the 2001

⁴Agency in its brief cited, and we concur, with the holding in *Reece v. City of Columbus Board of Public Works and Safety*, 498 N.E.2d 1276 (Ind. App. I Dist. 1986.) *Reece* involved a police officer who appealed a demotion and claimed the administrative body that heard his case erred by not allowing him to put on evidence regarding a prior disciplinary action that was used against him in the hearing. In upholding the lower court which had prevented the officer from calling witnesses and putting on evidence against the prior discipline, the court of appeals said:

[The officer] is not entitled to collaterally re-try prior, unappealed from, impositions of discipline. *It takes no citation of authority to show that a thread exists throughout the law that a person may not relitigate matters which have come to rest.* (*Id.* at 1278)

corrective action, and the 2001-2002 performance appraisal, have all become final. They have come to rest. It should also be noted that they did not come to rest because the Grievant was unaware of his rights. Grievant is an experienced attorney who is aware of his rights and not shy about exercising them. Grievant either challenged the items in his work record and lost, or the statute of limitations on his right to challenge them ran well before the Step 5 hearing commenced.⁵

The ruling of the Hearing Officer not allowing Grievant to relitigate his prior work record was not error. It was a correct ruling, supported by law, long-standing CSRB precedent, and common sense. It did not violate any due process rights of the Grievant. We sustain the Hearing Officer on this point.

II. DUE PROCESS ISSUES

In Appellant's appeal before this Board, he also argues that in terminating his employment, the Agency violated due process, thereby requiring that his dismissal be overturned. Appellant's due process issues are based on several claimed errors. Each of these due process issues will be addressed herein.

In Appellant's brief, he claims the Hearing Officer made multiple errors. Appellant claims the Hearing Officer erred when he denied Appellant's discovery motion to include witnesses ready to testify on issues involving Appellant's performance evaluation, Corrective Action Plan, and previous allegations mentioned in the Notice of Intent to Terminate and the Decision to Terminate letters of Mary Noonan and Mark L. Shurtleff. Appellant summarizes the argument as "even a criminal defendant has a right to confront and cross-examine his accusers."⁶

Appellant argues further that the scope of the Step 5 hearing was limited to three allegations allegedly occurring in the Clearfield office, and since the Hearing Officer found that the comments about a Concealed Firearms Permit and bullets did not violate a standard of conduct such as to justify or support termination (Conclusions No. 3, Step 5 Decision at 7) the termination rested on

⁵Grievant considered filing a formal complaint or defamation lawsuit against Lynette Martinez. (Tr.III at 877-879, 1313-14) He told Ms. Howell he had a pending lawsuit against the Ogden office. (Tr.IV at 1107, 1122) He appealed his corrective action to Attorney General Mark Shurtleff. (Tr.III 871) He wrote several emails to Mr. Shurtleff complaining about Lynette Martinez's complaint and about being put on corrective action. (Tr.V at 1317-18) He personally requested and received an audience with Mr. Shurtleff to complain about his immediate supervisor. (Tr.I at 13, 15-16) He appealed his 2001-2002 performance appraisal to Chief Deputy Attorney General Ray Hintze. (Tr.V at 1345)

⁶Grievant's Brief in Support of Grievant's Appeal to the Full Five Member Career Service Board at 2.

just two issues: the July 23 and August 28 incidents. He characterizes these incidents as a “he said, she said” factual situation between Appellant and Jennifer Howell. (Brief at 4) Appellant finds fault with and error on the part of the Hearing Officer for nevertheless concluding that the allegations of July 23, 2002, and August 28, 2002, occurred even though Ms. Howell was not a credible witness. (Brief at 5) The Hearing Officer did, however, find witnesses with differing levels of credibility, and did not abuse his discretion in so ruling.

Appellant claims the Hearing Officer automatically deferred to the State on the issue of whether or not the termination of his employment was excessive or disproportionate by giving no reason why the decision was not excessive nor disproportionate. While the Hearing Officer’s decision indicated that the “Agency has had few personnel cases similar in nature to the instant case” and concluded that “[b]ased on the limited information that is therefore available, there is no evidence that the Agency’s decision to terminate Grievant’s employment was excessive or disproportionate” there is nothing inexplicable nor confusing about his decision. Without evidence of excessiveness or disproportionateness, the Hearing Officer is bound by law and rule to defer to the State. We do so likewise.

Appellant claims the Hearing Officer erred when he went beyond the scope of allowable evidence to discuss Appellant’s lack of understanding of the importance of Grievant’s relationship with his co-workers and chides the Hearing Officer’s inclusion of a dialogue between Darryl Armstrong and the Appellant when the Appellant never claimed to have told Mr. Armstrong that his work was sloppy.

Appellant also claims error occurred when the Hearing Officer ruled that a Cliff Swenson could not be called to testify on Appellant’s behalf because he was not present during an alleged outside-of-courtroom exchange between Darryl Armstrong and John Sorge prior to August 28, 2002, yet during the Step 5 hearing, Ross Larsen testified Darryl Armstrong said that Cliff Swenson was present during that conversation. (Brief at 7) Appellant further claims error for not including Janell Pugh’s testimony in the Findings of Fact, Conclusion of Law and Order because of Ms. Pugh’s opinion that she would not have taken issue with those things Ms. Howell testified occurred during the July 23 incident.

Each of the three foregoing arguments falls within the Hearing Officer’s realm of discretion in analyzing evidence and determining facts and rendering his decision. While reasonable minds might have included other testimony or excluded something in rendering a decision, we find no

abuse of discretion in the decision at hand.

Finally, Appellant believes the Hearing Officer erred when he mentioned a newspaper article in his Findings of Fact, Conclusion of Law and Order in which Appellant was the subject of the article, but was refused by the Hearing Officer an opportunity to put on witnesses regarding the issues raised by the article. In his Brief, Appellant stated the Hearing Officer, after ruling to exclude the witnesses, “did mention the article at the end of his decision upholding the termination.” (Brief at 12) Again, we find no abuse of discretion here.

The Hearing Officer’s exact words referring to the newspaper article were in the context of analyzing Ms. Howell’s credibility in the July 2002 incident involving talk of a gun and bullets. The Hearing Officer summarizes Ms. Howell’s testimony that she, not the Hearing Officer, testified that she saw a “pattern” within the Appellant sufficient that she needed to be protected against Appellant’s rage. (Step 5 Decision at 9) Further, the Hearing Officer mentions that Ms. Howell believed the pattern to comprise several items, including “a news article about a claim of sexual harassment made against Grievant while Grievant was running for county attorney.” (Step 5 Decision at 9)

It should be noted however, that while citing this article, the Hearing Officer specifically discounted this purported pattern by concluding that “none of these matters rise to the level of evidence that Grievant was a violent person or that he harbored a ‘rage.’” Therefore, while Appellant may feel the Hearing Officer opened the door by mentioning this in his decision, the context clearly shows that the article failed to convince the Hearing Officer of the contention the witness hoped its mention would prove. We find no abuse of discretion nor due process violation in the mention of Ms. Howell’s testimony in this manner.

The Board concludes that Appellant clearly had an opportunity to be heard by the Agency head and present his side of the story. The Agency’s final decision was not rendered until after such a hearing occurred. In light of the State’s elaborate post termination procedures, these factors satisfy due process.⁷

Ultimately, the Agency is responsible for insuring that appropriate behavior is exhibited in the workplace. When conduct exists in the workplace that implicates reasonably required behavioral standards, management must have the ability to address these concerns.

⁷See *Utah Code*, §67-19a-101 to -408.

III. PROPORTIONALITY ISSUES

As stated previously, *Utah Administrative Code*, R137-1-22(4)(c) requires the Board to:

[D]etermine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes.

In the instant case, Appellant argues before this Board that the disciplinary sanction of dismissal was excessive, disproportionate and otherwise constituted an abuse of discretion. In ruling on this issue, the Board notes that it is constrained by Utah Court rulings specifically addressing this issue. In *Utah Department of Corrections v. Despain*, 824 P.2d 439 (Utah Ct. App. 1991) the Utah Court of Appeals examined the parameters under which the Board may review disciplinary sanctions imposed by departments. At the time of *Despain*, the Board had a rule which stated:

“[I]f the hearing officer finds that the action complained of which was taken by the appointing authority was too severe, even though for good cause, the hearing officer may provide for such other remedy or relief as deemed appropriate and in the best interest of the respective parties.”⁸

In its decision, the Court of Appeals concluded that this language gave the CSRB the “authority to modify the Department’s sanction only if the Department has abused its discretion in imposing that sanction.” (*Id.*) In reaching this conclusion, the Court adopted the reasoning set forth in *Szmaczarz v. California State Personnel Board*, 79 Cal. App. 3d 904, 145 Cal. Rptr. 396 (1978) wherein that Court held:

“[I]f the penalty imposed was under all the facts and circumstances clearly excessive, this will be deemed an abuse of discretion . . . In determining whether there has been an abuse of discretion the Supreme Court of this state has stated that “If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the [administrative body] acted within the area of its discretion.”⁹

⁸This rule was set forth in *Utah Admin. Code*, R140-1-20(J) (1990). The Board notes that this rule has since been modified and is essentially cabined within the current CSRB R137-1-21(3)(b).

⁹The Board notes with interest that shortly after the Court’s decision in *Despain*, this Board amended its rules and essentially adopted the specific language set forth in the *Despain* decision. Specifically, at CSRB R137-1-21(3)(b), the Board adopted the following rule:

In the instant case, the Board has already found that there was substantial evidence to support the Hearing Officer's factual findings in this case. Those facts are detailed elsewhere in this decision. Applying the facts gleaned at the Step 5 hearing, the Hearing Officer concluded that: "[T]here is no evidence that the Agency's decision to terminate Grievant's employment was excessive or disproportionate." (Step 5 Decision at 12)

Exercising his allowable discretion as set forth in CSRB R137-1-21(3)(b), the Hearing Officer concluded that the dismissal was not "excessive or disproportionate." (Step 5 Decision at 12) The Hearing Officer next addressed the abuse of discretion standard, and concluded that "[C]onsidering the totality of the evidence in this case, [I] can find no abuse of discretion in the Agency's decision to terminate Grievant's employment."

Pursuant to CSRB R137-1-22(4), the Board's requirement is to determine whether the Hearing Officer's decision, including the totality of the sanction imposed by the agency, is reasonable and rational. Based on these rules and the Court of Appeals' decision in *Despain*, the Board finds the Agency's decision to be both reasonable and rational. In the instant case, the Board believes that reasonable minds could differ regarding the propriety of the sanction imposed. The Board further believes that the Agency could have done much more than it had in documenting and disciplining Appellant before terminating him.

In the final analysis, however, no evidence was submitted by the Appellant regarding the disproportionateness or excessiveness of the Agency's decision. Argument was presented to suggest that the weight of witness credibility was misplaced, or that this whole case boils down to the word of Ms. Howell against the word of the Appellant. Appellant suggests that it is unfair to terminate

When the CSRB hearing officer determines in accordance with the procedures set forth above that the evidentiary/step 5 factual findings support the allegations of the agency or the appointing authority, then the CSRB hearing officer must determine whether the agency's decision, including any disciplinary sanctions imposed, is excessive, disproportionate or otherwise constitutes an abuse of discretion. In making this latter determination, the CSRB hearing officer shall give deference to the decision of the agency or the appointing authority unless the agency's penalty is determined to be excessive, disproportionate or constitutes an abuse of discretion in which instance the CSRB hearing officer shall determine the appropriate remedy.

based on the two incidents on which the hearing focused. However, the Agency did put Appellant on notice that his actions were inappropriately impacting the workplace. He was given an opportunity to succeed in a new post of duty assignment. He was asked by his superiors to be careful about how he conducted himself in the future, after receiving an unsuccessful performance evaluation and after having been placed on a Corrective Action Plan for a brief period. Reviewing this case in light of the *Despain* decision, we conclude that the Agency acted within its discretion in deciding to terminate Appellant's employment.

Based on the facts as reported in the Step 5 hearing, the Board cannot, and indeed does not, find as a matter of law that the Agency's termination of Appellant's employment was excessive, disproportionate or otherwise an abuse of discretion.

IV. CREDIBILITY OF WITNESSES

In his Step 6 Brief at page 5, Grievant asks rhetorically how the Hearing Officer could have ruled against him in a "he said, she said" case where the Agency's primary witness was found to be less than credible. While the Hearing Officer may have found the Agency's primary witness to be less than credible, he found other Agency witnesses to be sufficiently credible to support her testimony. A total of fourteen witnesses were called in the hearing. Ten of the witnesses testified for the Agency and four of the witnesses testified for the Grievant. Of the Agency's ten witnesses, four testified either directly or indirectly about the two charges that were sustained by the Hearing Officer, i.e., the July 23 incident and the August 28 incident. Of the Grievant's four witnesses, only one, i.e., the Grievant himself, testified about the two incidents. The four Agency witnesses who testified either directly or indirectly about the two charges sustained by the Hearing Officer were Jennifer Howell, Janice Ventura, Darryl Armstrong, and Lori Trivino. Against the Agency, the Hearing Officer found Ms. Howell to be "a less than credible witness" (Step 5 Decision at 10) and Ms. Ventura's testimony suspect because of possible "bias" (Step 5 Decision at 8) and "apparent animosity" (Step 5 Decision at 11). For the Agency, the Hearing Officer made no negative credibility finding against Mr. Armstrong, and most important, made a positive credibility finding for Ms. Trivino. Specifically regarding Ms. Trivino, the Hearing Officer said: "While two of the witnesses may have held a bias against Grievant . . . the third witness, Lori Trivino, [did not]. Ms. Trivino's testimony was not shown to be biased in any way, and is therefore considered fully credible." (Step 5 Decision at 8)

The only witness for the Grievant who was able to testify either directly or indirectly about the two charges was the Grievant himself. As to the Grievant's credibility, the Hearing Officer stated: "Grievant strongly disputes both allegations. However, there is reliable evidence to support the allegations, *while Grievant's own testimony appears to be self serving.*" (Emphasis added) (Step 5 Decision at 10)

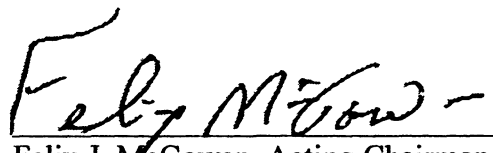
Rather than being a "he said, she said" case, the Hearing Officer used discretion in weighing various witnesses and their testimony. A review of the more than 1,500 pages of transcript in this case is a lengthy process, and one the Board took seriously. The Hearing Officer found the testimony of the four Agency witnesses, taken as a whole, to be believable, and the testimony of Grievant was not. We conclude that the Hearing Officer did not abuse his discretion in doing so.

DECISION

The Board has addressed each of the issues raised by Appellant in his appeal. After thoroughly reviewing the evidentiary record, and carefully studying the due process issues raised by Appellant before this Board, the Board sustains the Hearing Officer's decision for the reasons set forth herein and hereby denies Appellant's appeal to this Board. The decision sets forth in detail that Attorney General Mark L. Shurtleff had adequate cause or reason to terminate Appellant's employment.

DATED this 4th day of November 2004.

DECISION UNANIMOUS
Teresa N. Aramaki, Member
Joan M. Gallegos, Member
Felix J. McGowan, Acting Chairman
Kevin C. Timken, Member


Felix J. McGowan, Acting Chairman
Career Service Review Board

CONCURRING OPINION Kevin C. Timken, Member

I concur in the Board's decision. I write separately to address two matters of concern.

First, I believe the Board has done Appellant a remarkable courtesy in addressing his due process arguments. While those arguments were presented capably and professionally by

Appellant's counsel during oral argument, they were mentioned only inferentially, at best, in Appellant's *pro se* brief. Appellant's brief never uses the words "due process," and Appellant, an attorney, presented a 14-page brief that failed to cite any case law or prior decisions of this Board. It is difficult to understand how Appellant expected this Board to overturn the Hearing Officer's decision on the basis of the brief he presented. It is not this Board's role to develop legal arguments for the parties that appear before it.

I also want to identify what we have not done in this case. The Hearing Officer determined that the incidents of July 23 and August 28, 2002, were sufficient to form the basis for the Agency's decision to terminate Appellant's employment, and this Board has determined that the Hearing Officer did not abuse his discretion in doing so. If, however, as Appellant's counsel suggested at oral argument, those two incidents, considered alone, had been *insufficient* to justify termination, and the Agency had also relied upon earlier matters in which the Agency had imposed discipline that our rules do not permit to be appealed to Steps 5 and 6, due process may well require that Appellant be permitted to call witnesses and contest those matters, regardless of whether they had previously "come to rest." In the end, that was not this case.

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with *Utah Administrative Code*, R137-1-22(10), and *Utah Code* §63-46b-13, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to *Utah Administrative Code*, R137-1-11, and *Utah Code*, §63-46b-14 and -16, Utah Administrative Procedures Act.

ADDENDUM “C”

*This opinion is subject to revision before
publication in the Pacific Reporter.*

IN THE UTAH COURT OF APPEALS

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Ogden City Corporation,

Petitioner,

v.

Daniel Harmon and Ogden Civil Service Commission,

Respondents.

OPINION
(For Official Publication)

Case No. 20031030-CA

F I L E D
(June 16, 2005)

2005 UT App 274

Original Proceeding in this Court

Attorneys: Camille N. Johnson, Stanley J. Preston, and Judith D.
Wolferts, Salt Lake City, for Petitioner

D. Bruce Oliver, Salt Lake City, and Douglas Holmes, Ogden, for
Respondents

Before Judges Jackson, Orme, and Thorne.

JACKSON, Judge:

¶1 Ogden City (the City) appeals the Ogden Civil Service Commission's (the Commission) order reversing the City's decision to terminate Daniel Harmon's employment. We reverse and remand the Commission's order.

BACKGROUND

¶2 This case involves the conduct of Daniel Harmon, a captain in the Ogden City Fire Department (the Fire Department). On September 8, 2000, the Fire Department received a complaint regarding an alleged incident of sexual harassment occurring two years prior, involving Harmon and a subordinate female employee. In response, the Fire Department conducted an investigation in which it discovered several incidents of misconduct involving Harmon. The Fire Department held hearings on December 11, 2000, and afterwards, on December 15, 2000, Chief Mike L. Mathieu issued a letter notifying Harmon that his employment with the Fire Department would be terminated the next day due to violations of city and department regulations. Harmon appealed his dismissal to the Commission pursuant to Utah Code section 10-3-1012. See Utah Code Ann. § 10-3-1012(2) (2003).⁽¹⁾

¶3 The Commission held hearings and, in its November 20, 2003 Finding of Fact, Conclusions of Law and Order, the commissioners agreed that several of the incidents tended to support the Fire Department's decision to discipline. First, the Commission found that during the fall of 1996, Harmon had, as an official of the Firefighter's Union, coordinated a fund-raising event for the Muscular Dystrophy Association (MDA) in which he permitted female entertainers to pose topless with firefighters. Second, the Commission found that Harmon had missed three mandatory training meetings between 1999 and 2000. Third, the Commission found that during the summer of 1999 Harmon, who also operated a lawn fertilizing business, agreed to provide a retired battalion chief and former supervisor with a bottle of Round-Up weed-killer for the chief's personal use. Harmon and two other firefighters filled an empty bottle with their urine, which the chief later picked up understanding it to be the promised weed-killer. Finally, the Commission also found that during a summer 2000 training exercise Harmon urinated into a drafting pit, or water reservoir, being used by his and another fire crew. Although the Commission concluded that the incident would not have supported a criminal charge for public urination, it did support the present employment charges against him.

¶4 Two of the three commissioners agreed that the remaining incidents did not support the charges against Harmon and should not be considered in determining whether his employment should be terminated. The Commission found that approximately eight to ten

years before the investigation, Harmon had urinated into a shower stall occupied by another firefighter. The majority concluded that this should not be considered because it was understood by the other firefighters as a joke and never resulted in complaints by those present. Moreover, the evidence did not indicate precisely when the event occurred or whether Harmon had yet been made a captain.

¶15 Further, the Commission found that in November 1998 Harmon engaged in a sexual dialogue with a female firefighter who was a probationary employee. The female firefighter had apparently held up a cucumber or zucchini and stated to Harmon, "Do you know what they call these where I'm from? Home-wreckers." When, as a captain, Harmon should have corrected the employee and warned her about making improper comments, he instead furthered the exchange by later presenting the female firefighter with a greased cucumber or zucchini while she was on the telephone with her husband and asking, "Is this big enough?" The majority determined that this event did not support the charges against Harmon because the female firefighter laughed and because "it was a consensual exchange, was isolated, and was not offensive to either party, [and] it could not be considered sexual harassment or considered to otherwise violate Department policy."

¶16 Finally, the Commission found that throughout his tenure as captain, Harmon had tolerated a specific form of sexually-oriented horseplay among the male firefighters in his station, in which they would, while clothed, imitate sexual intercourse with each other. The majority determined that Harmon's failure to stop the bizarre practice of grown men "humping" each other did not support the charges against him because the "activity was common in the Department, did not involve females, was consensual, and had continued for many years without any[one] ever being told that it violated Department policy."

¶17 The majority of the commissioners reversed the Fire Department's decision to discharge Harmon. It concluded that only the MDA incident, the Round-Up incident, the drafting pit incident, and Harmon's absenteeism should be considered in its determination. Based on these charges, the majority determined that discharge was an excessive remedy because the events occurred over an extended period of time, Harmon was not given progressive punishment, and similar violations by others were not punished as severely. The third commissioner dissented, concluding that the shower incident, the "zucchini" incident, and the "humping" horseplay should all be considered to support the charges against Harmon; and even if they were not, dismissal would be an appropriate sanction because Harmon's conduct indicated a pattern of unacceptable behavior.⁽²⁾

¶8 On appeal, the City claims the Commission's reversal of the chief's decision to dismiss Harmon is in error because the majority of Commissioners failed to properly consider (a) the shower incident, (b) the "zucchini" incident, (c) the ongoing "humping" horseplay, and (d) Harmon's failure to properly answer questions during the December 11, 2000 Fire Department hearing. The City claims, moreover, that the Commission exceeded its authority and abused its discretion in reversing the Fire Department's decision to discharge Harmon.

¶9 Our review of the Commission's order is limited to "the record of the [C]ommission." Utah Code Ann. § 10-3-1012.5 (2003). We review the Commission's decision "for the purpose of determining if the [C]ommission has abused its discretion or exceeded its authority." Id. The statute itself does not further define when the Commission may have abused its discretion, but we take guidance from the general principle of administrative law that when "[t]he Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it . . . we must uphold the Commission's determination . . . unless the determination exceeds the bounds of reasonableness and rationality." McKesson Corp. v. Labor Comm'n, 2002 UT App 10, ¶11, 41 P.3d 468 (third alteration in original) (citation omitted) (interpreting Labor Commission Act, Utah Code section 34A-1-301 (1997)); see also AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶6, 996 P.2d 1072 ("When the Legislature has granted an agency discretion to determine an issue, we review the agency's action for reasonableness." (citation omitted)) (interpreting Utah Administrative Procedures Act, Utah Code section 63-46b-16 (1997)).

ANALYSIS

¶10 Pursuant to Utah Code section 10-3-1012, a discharged civil service employee may appeal the discharge to the Commission, "which shall fully hear and determine the matter." Utah Code Ann. § 10-3-1012(2). In doing so, the Commission is to make two inquiries: "(1) do the facts support the charges made by the department head, and, if so, (2) do the charges warrant the sanction imposed?" Kelly v. Salt Lake City Civil Serv. Comm'n, 2000 UT App 235, ¶16, 8 P.3d 1048 (quoting In re Discharge of Jones, 720 P.2d 1356, 1361 (Utah 1986)).

¶11 Under the first prong, the majority of the Commission determined that the shower incident, the "zucchini" incident, and the "humping" did not support the charges against Harmon. The City takes issue with this conclusion, arguing that these incidents should be included in the analysis because, as the Commission itself found, the incidents did in fact occur.

¶12 We agree with the City. The majority of the Commission disregarded the shower incident primarily because it occurred several years prior to the investigation. Although an incident's remoteness

in time may be relevant in mitigating the degree of discipline imposed, it does not erase the fact that Harmon committed a violation of department rules which merited discipline. Similarly, the majority commissioners disregarded the "zucchini" incident on grounds that the female firefighter was a willing and active participant. Here too, the fact that no offense was expressed may mitigate the degree of discipline imposed, but the fact remains that such behavior was contrary to applicable policies and regulations and, as Harmon acknowledges, inappropriate for the workplace.⁽³⁾ Finally, the majority concedes that the ongoing sexual horseplay among the firefighters "might support the charge" against Harmon, but concluded that it was permissible given that such horseplay occurred frequently for several years without complaint. We cannot agree that a violation of department regulations is justifiable merely because it is common and consensual among the participants; such considerations are relevant only in that they may affect the degree of discipline imposed.

¶13 The City next argues that the Commission failed to consider evidence that Harmon had been untruthful or evasive in responding to questions in the December 11, 2000 Fire Department predetermination hearing. During the hearing, which was headed by Chief Mathieu, Harmon was asked regarding the incident in which he allegedly substituted urine for weed-killer. Harmon's attorney was not present, and he responded only by referencing a prior letter in which he had denied the accusation. Because several witnesses had confirmed that the incident had occurred, Mathieu concluded that Harmon was being untruthful. This was later confirmed when Harmon testified before the Commission that he had participated in the incident.

¶14 We reach no conclusion in regard to whether this incident does or does not support the charges against Harmon, but we agree with the City that the Commission is under an obligation to address each of the grounds for termination stated by the department head. Chief Mathieu has twice referenced the incident, first in his memorandum summarizing Harmon's violations and later in his testimony before the Commission; however, the Commission does not address it in its findings of fact or conclusions of law. An allegation of dishonesty, if proven, would violate Fire Department regulations⁽⁴⁾ and could possibly add further support to the charges against Harmon. As such, it must be considered.

¶15 Having determined that the shower incident, the "zucchini" incident, and the "humping" horseplay were relevant, support the charges against Harmon, and should have been considered by the Commission, we reverse the Commission's order and remand to allow it to determine whether these incidents, taken together with the other incidents, warrant the sanction of dismissal.⁽⁵⁾ On remand the Commission should also determine whether Chief Mathieu's allegations

of dishonesty additionally support the charges against Harmon and, if so, whether they further justify the Fire Department's decision to dismiss him.

¶16 In determining whether the sanction of dismissal is warranted in this case, the Commission must affirm the sanction if it is (1) appropriate to the offense and (2) consistent with previous sanctions imposed by the department. See Kelly v. Salt Lake City Civil Serv. Comm'n, 2000 UT App 235, ¶21, 8 P.3d 1048. The Commission has already determined that Harmon offered no evidence of inconsistency, and therefore, the question of severity is of primary importance in this case.

¶17 In weighing the punishment against the offense, the Commission must give deference to the chief's choice of punishment because, as the head of the Fire Department, he is in a position to balance the competing concerns in pursuing a particular disciplinary action. See id. at ¶22 ("'[D]iscipline imposed for employee misconduct is within the sound discretion of the [c]hief.'" (quoting Lucas v. Murray City Civil Serv. Comm'n, 949 P.2d 746, 761 (Utah Ct. App. 1997))); cf. In re Discharge of Jones, 720 P.2d 1356, 1363 (Utah 1986) ("The sheriff must manage and direct his deputies, and is in the best position to know whether their actions merit discipline."). Likewise, the Commission must give deference to the chief's determination of whether progressive discipline is appropriate. See Lucas, 949 P.2d at 762 ("[T]he use of progressive discipline is committed to the [c]hief's discretion, based on the [c]hief's determination of the severity of the offense."). Given the degree of deference afforded to the fire chief's determination, the Commission may reverse the chief's choice of discipline as unduly excessive only when the punishment is "clearly disproportionate" to the offense, In re Discharge of Jones, 720 P.2d at 1363, and "'exceeds the bounds of reasonableness and rationality,'" McKesson Corp. v. Labor Comm'n, 2002 UT App 10, ¶11, 41 P.3d 468 (citation omitted).

¶18 Utah law has provided little guidance on the precise factors used to balance the proportionality of the punishment to the offense. We have noted that an exemplary service record and tenuous evidence of misconduct may tip the balance against termination. See Lucas, 949 P.2d at 762. On the other hand, dishonesty, id., or a series of violations accompanied by apparently ineffective progressive discipline may support termination, see Kelly, 2000 UT App 235 at ¶25. Other courts have given weight to considerations of (a) whether the violation is directly related to the employee's official duties and significantly impedes his or her ability to carry out those duties; (b) whether the offense was of a type that adversely affects the public confidence in the department; (c) whether the offense undermines the morale and effectiveness of the department; or (d) whether the offense was committed willfully or knowingly, rather than negligently or inadvertently. See 5 Antieau on Local Gov't Law, §

79.11[4], [5] (2002); Eugene McQuillin, The Law of Municipal Corporations § 12.237 (3d ed. 1999); 15A Am. Jur. 2d Civil Service §§ 50, 65 (2000). Courts have further considered whether the misconduct is likely to reoccur. See Skelly v. State Pers. Bd., 539 P.2d 774, 791 (Cal. 1975).

¶19 We reverse the Commission's order and remand the case to the Commission for further proceedings consistent with this opinion.

Norman H. Jackson, Judge

¶20 WE CONCUR:

Gregory K. Orme, Judge

William A. Thorne Jr., Judge

1. For convenience we refer to the 2003 version of the statute which is, for all practical purposes, identical to that in effect in 2000.
2. Commissioner Lemke, who was in the majority, wrote a separate opinion bemoaning the Commission's inability to substitute a lesser form of discipline for the termination that had been ordered by Chief Mathieu, given his reading of our opinion in Salt Lake City Corp. v. Salt Lake City Civil Service Commission, 908 P.2d 871 (Utah Ct. App. 1995).
3. The Commission found that "Harmon initially did not think the incident was a problem" but "later acknowledged that the type of joke with a sexual connotation was not appropriate in the work place."
4. Fire Department regulations prohibit "the making of misleading . . . statements with the intent to deceive." Ogden City Fire Department Regulations, R-0497, ch. 3, § 32 (effective June 18, 1997).
5. We acknowledge a passing reference in the Commission majority's opinion to the possibility termination would be improper even if all the charged incidents were considered. We are not convinced, given the entirety of the opinion, that this alternative rationale was meaningfully considered.