

2004

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

Utah Court of Appeals

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

J. Kevin Murphy; Kipp & Christian; Attorney for Petitioner/Appellant.

Recommended Citation

Reply Brief, *John D. Sorge v. Utah Office of the Attorney General*, No. 20041046 (Utah Court of Appeals, 2004).
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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.	:	

REPLY BRIEF OF PETITIONER/APPELLANT JOHN D. SORGE

Appeal from Step 6 Order of Utah Career
Service Review Board

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FILED
UTAH APPELLATE COURTS
AUG 25 2005

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UTAH OFFICE OF THE ATTORNEY	:	Case No. 20041046-CA
GENERAL,	:	
Respondent.	:	

REPLY BRIEF OF PETITIONER/APPELLANT JOHN D. SORGE

Appellant/petitioner John D. Sorge ("Mr. Sorge") submits this reply brief pursuant to Rule 24(c), Utah Rules of Appellate Procedure.

NEW MATTERS RAISED BY RESPONDENT
and
STANDARDS OF APPELLATE REVIEW

I. Does this Court have jurisdiction over this appeal, despite omission of the Utah Career Service Review Board ("CSRB") in the caption of Mr. Sorge's opening brief? (Br. of Respondent, Point I, p. 11-15.) This is a question of statutory interpretation, as well as a question of appellate procedure that, by its nature, can only be raised for the first time on appeal. Therefore, this issue raises a question of law, to be reviewed *de novo* by this Court.

II. Is mere "factual support" for the Attorney General's termination decision a sufficient ground for the CSRB or this Court to affirm that termination? (Br. of Respondent, Points II and III, p. 15-25.) This is also a question of appellate procedure and

statutory interpretation, presenting a question of law reviewable by this Court without deference to the CSRB panel decision under appeal.

III. Did it violate due process principles to revisit allegations related to Mr. Sorge's past work record, when Mr. Sorge was barred from rebutting those allegations during the Step 5 grievance hearing? (Br. of Respondent, Point IV, p. 25-28.) This is a question of law, reviewed on appeal without deference to the CSRB. *Tolman v. Salt Lake County*, 818 P.2d 23, 27-28 (Utah Ct. App. 1991).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Fourteenth Amendment, Section I, to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" Article I, Section 7, of the Utah Constitution similarly states: "No person shall be deprived of life, liberty, or property without due process of law."

The Utah Administrative Procedures Act is located at Utah Code Ann. § 63-46b-0.5 through -23 (2004). Statutes governing proceedings before the Career Service Review Board (CSRB) are found at Utah Code Ann. § 67-19a-301 through -408 (2004). Applicable grievance rules are found in Utah Admin. Code R137-1-1 through -23 (2005).

ARGUMENT

REPLY POINT ONE

THIS APPEAL SHOULD BE DECIDED ON THE MERITS EVEN THOUGH THE CSRB WAS NOT NAMED AS A PARTY IN THE OPENING BRIEF

A. Content, Not Caption

Mr. Sorge's opening Brief of Appellant identifies the Attorney General, but not the CSRB, as a party to this appeal. However, his opening brief was served upon the CSRB,

as reflected in its certificate of service. Furthermore, the cover page of his brief plainly states that it was filed on appeal “from an order issued by the Step 6 Career Service Review Board”

The Attorney General argues that Mr. Sorge was required to name the CSRB as a party to the appeal under Utah Code Ann. § 63-46b-14(3)(b) (2004), which requires a petition for judicial review of administrative action to “name the agency and all other appropriate parties as respondents” This requirement is echoed in Utah R. App. P. 14(a). The failure to name the CSRB as a party, continues the Attorney General, constitutes a jurisdictional defect that compels summary dismissal of this appeal. (Br. of Respondent p. 12.)

Because accepting such argument would exalt form over substance, this Court should reject it. The text of Section 63-46b-14(3) nowhere states that failure to name the CSRB as a party divests a reviewing court of jurisdiction. Nor does the case law cited by the Attorney General compel such a holding. Instead, that case law cites the familiar and well-understood rule that failure to perfect an appeal within prescribed *time limits* will defeat jurisdiction. *E.g., Viktron/Lika Utah v. Labor Comm’n*, 2001 UT App 8 ¶ 5-7, 18 P.3d 519, 520-21. No case cited by the Attorney General holds that failure to name a particular party will defeat jurisdiction.

Indeed, in *Viktron/Lika*, *supra*, this Court stated: “We may construe a filing with this court according to its content, regardless of its caption.” 2001 UT App 8 ¶ 8, 18 P.3d at 521 (citing authority). Mr. Sorge’s opening brief, served upon the CSRB and plainly stating that it supports an appeal from a CSRB order, should not be held jurisdictionally deficient merely because it does not name the CSRB in its caption. The content of the brief and its

certificate of service demonstrate that the CSRB has been put on notice of Mr. Sorge's appeal. The Attorney General, both named and served, has filed its brief in support of the CSRB order. Thus it plainly appears that the CSRB has suffered no prejudice by not being named in the brief's caption. Construing Mr. Sorge's brief based upon its content, this Court should hold that it has jurisdiction to decide this appeal on its merits.

B. Due Process

Furthermore, based upon the particular circumstances of this case, finding a jurisdictional defect would likely violate Mr. Sorge's due process right to notice. Subsection 63-46b-14(3)(b) and Utah R. App. P. 14(a), require that the "agency" be named as party to an appeal from an administrative order. Utah's Administrative Procedures Act defines "agency" to include "a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head" Utah Code Ann. § 63-46b-2(1)(b) (2004). Utah R. App. P. 14(a) similarly states that "the term 'agency' shall include agency, board, commission, committee, or officer[.]" The Utah Attorney General's Office, as the appellee/respondent named in the caption of Mr. Sorge's opening brief, readily falls within those definitions of "agency."

By naming the Attorney General as a party on appeal, Mr. Sorge was naming the key "agency" that was *party* to the CSRB proceedings. Therefore, he was at least arguably in compliance with Section 63-46b-14(3)(b) and Utah R. App. P. 14(a), which require that the pertinent "agency" be named as party to an appeal from an administrative order. Without case law plainly holding that the CSRB must be a named party as a *jurisdictional*

requirement, Mr. Sorge could not be on adequate notice of such requirement when he filed his opening brief. Absent such notice, it would violate Mr. Sorge's due process rights to dismiss his appeal for lack of jurisdiction. Therefore, if this Court holds that the CSRB must be a named party for purposes of appellate jurisdiction, such rule should be announced prospectively, for future appeals. It should not be applied retroactively to this appeal. For this further reason, this Court should decide this appeal on the merits, and not apply a jurisdictional bar.

REPLY POINT TWO

BASED UPON THE RECORD AS A WHOLE, THE CSRB ERRONEOUSLY UPHELD THE ATTORNEY GENERAL'S TERMINATION OF MR. SORGE

A. Marshaling the Evidence

The Attorney General takes Mr. Sorge to task for failing to marshal certain evidence supporting the CSRB's affirmance of Mr. Sorge's termination. (Br. of Respondent p. 16.) The Attorney General has, naturally, cured that omission by marshaling the evidence that supports the CSRB decision on appeal. (Id. p. 17-20.)

But more than the supporting evidence must be reviewed. Under the Administrative Procedures Act, the CSRB's findings must be reviewed to determine whether they are "supported by substantial evidence when viewed in light of *the whole record* before the court[.]" Utah Code Ann. § 63-46b-16(4)(g) (2004) (emphasis added). In *Grace Drilling v. Bd. of Rev. of Indus. Comm'n*, 776 P.2d 63 (Utah Ct. App. 1989), this Court acknowledged the "whole record" test. Under this test, a reviewing court considers not only evidence supporting an agency's findings, but also the evidence that "fairly detracts from the weight of the [Board's] evidence." 776 P.2d at 68 (quoting authority; brackets in

original). The Court did state that a party challenging an administrative finding must still marshal the supporting evidence. *Id.* But rigid application of Utah's appellate "marshaling" requirement, by reviewing only the supporting evidence, would contravene the statutorily-mandated "whole record" test. Instead, under the "whole record" test, evidence that "fairly detracts" from the CSRB decision must also be marshaled.

In this appeal, the parties have, between them, marshaled both the supporting evidence and the evidence that fairly detracts from the CSRB's decision. Accordingly, this Court has been properly briefed to determine whether that decision should be affirmed. As follows, under the "whole record" test, the decision cannot stand.

B. Insubstantial Evidence

Review of the whole record reveals that Mr. Sorge's termination was not supported by substantial evidence, mandating relief under Section 63-46b-16(4)(g). The CSRB hearing officer's findings, and the decision to uphold the termination, were based upon insubstantial evidence.

1. Incidents of July 23 and August 28, 2002

Based upon testimony at the Step 5 hearing, the CSRB hearing officer found that Mr. Sorge's termination was justified because he offended a paralegal, Ms. Howell, on July 23 and August 28, 2002. The hearing officer found that on July 23, Mr. Sorge read sexually graphic material to Ms. Howell from a DCFS case file. (R. 523-24; the Findings, Conclusions, and Decision, R. 520-34, are copied in Addendum "A" to Br. of Respondent.) The hearing officer also found that on August 28, Mr. Sorge made a racially offensive comment to Ms. Howell. (R. 524.) While making those findings, the hearing officer noted

significant problems with the credibility of the key witnesses against Mr. Sorge: Ms. Howell, and Assistant Attorney General Janice Ventura.

Ms. Howell's credibility problem consisted of contradictions between her Step 5 testimony, wherein she denied negative feelings toward Mr. Sorge, and a record of her emails, written well prior to his termination, expressing concern about Mr. Sorge's "past" and his "rage." (R. 528.) At the Step 5 hearing, Ms. Ventura similarly denied ill will toward Mr. Sorge. However, another witness testified that Ms. Ventura, prior to Mr. Sorge's termination, had repeatedly stated, "I can't stand John [Sorge]." (D. Balmain testimony at R. 863 pp. 1209-13, 1260.) The hearing officer was properly concerned about the credibility issues raised by these contradictions to the Step 5 testimony of Ms. Howell and Ms. Ventura. (R. 530, finding Ms. Howell "less than credible.") Indeed, the hearing officer noted "Ms. Howell's and Ms. Ventura's apparent animosity toward" Mr. Sorge, and could "not rule out completely the possibility of some kind of conspiracy" against him. (R. 530.)

These serious credibility issues, plus the *possibility* of conspiracy, "fairly detract" from the hearing officer's ultimate decision to uphold Mr. Sorge's termination. Additionally, at the Step 5 hearing, Assistant Attorney General Mary Noonan testified that she knew of no complaints of "sexual harassment" in the office where the July 23 and August 28 incidents allegedly occurred:

Q: (Mr. Sorge): Did anyone from the Clearfield office feel that I had sexually harassed them in any manner whatsoever, seeing that it's in [sic: an] office with all females and I was the only male?

A: (Ms. Noonan): Not to my knowledge.

(R. 862 p. 1002.) That testimony contradicted the Notice of Intent to Terminate, wherein

Ms. Noonan cited Mr. Sorge for “violation of Office policy 2.11, Sexual Harassment . . .” (Notice of Intent, R. 866, copied in Exhibit 1 to this brief.)

Also fairly detracting from that decision is the fact that Mr. Sorge had worked for over three years as an Assistant Attorney General at the time he was terminated. (R. 532.) Besides thus being a career service employee (R. 20), Mr. Sorge was also an experienced former prosecutor, with four years experience as a deputy county attorney in Box Elder County. (R. 863 p. 1296-97.) Fairly detracting from that decision is the hearing officer’s acknowledgment, not contested by the Attorney General, that Mr. Sorge “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.” (R. 534.)

2. Inappropriateness of Termination as Sanction

In light of the foregoing whole record, the Step 5 hearing officer erred in finding no abuse of discretion in the Attorney General’s decision to terminate Mr. Sorge. The Step 6 CSRB panel erred in upholding the Step 5 decision.

The hearing officer acknowledged that Mr. Sorge was not afforded the benefit of progressive discipline to address his alleged errors on June 23 and August 28, 2002. The hearing officer sought to excuse this omission by holding that “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.” (R. 532.) Because Mr. Sorge had been otherwise placed on notice by the corrective action plan of late 2001 and early 2002, the hearing officer concluded, the lack of a progressive discipline plan did not bar the decision to terminate Mr. Sorge. (Id.)

There are two problems with that conclusion. First, the purpose of progressive discipline is not solely to provide notice; it is also to increase job security. In *Nat'l Labor Relations Bd. v. General Warehouse Corp.*, 643 F.2d 965 (3rd Cir. 1981), the appellate court, reviewing a wrongful discharge claim, approved an arbitrator's finding that the employer had applied:

a series of increasingly severe disciplinary sanctions in keeping with the well-accepted tenets of progressive discipline which endeavor to make employees more secure in their jobs by alerting them to their employer's dissatisfaction in time to correct their behavior and avoid being discharged.

643 F.2d at 970 n. 18. See also *McClaskey v. United States Dep't of Energy*, 720 F.2d 583, 592 (9th Cir. 1983) (Reinhardt, J., dissenting) ("Progressive discipline has long been a hallmark of enlightened employee relations."). Mr. Sorge's termination was upheld based upon two alleged improper interactions with Ms. Howell, who was "not a credible witness." (R. 530.) Under those circumstances, Mr. Sorge should not have been terminated. Instead, as an able attorney with several years of service, he should have been placed on progressive discipline.

The second problem is the hearing officer's over-reliance on the "notice" provided to Mr. Sorge by the corrective action plan. The corrective action plan (R. 879-81, copied as Exhibit 2 to this brief) was implemented and presented to Mr. Sorge on December 20, 2001. (R. 861 p. 790.) It was not signed by Mr. Sorge. The corrective action plan was intended to last three months—through March 20, 2002. (Exh. 2 ¶ 3.) However, Assistant Attorney General Kirk Torgensen, acting division chief, withdrew the corrective action plan early, in mid-January, 2002, after Mr. Sorge complained directly to Attorney General Shurtleff. (R. 861 pp. 794-96, 867-69; R. 863 p. 1317-18.) The plan was withdrawn even

though Mr. Sorge was believed to be non-compliant with it, and Assistant Attorney General Torgensen has subsequently asserted that it was “a mistake” to withdraw the plan prematurely under those circumstances. (R. 860 p. 620-21.)¹

Mistake or not, by withdrawing the corrective action plan early, the Attorney General gutted the plan’s effectiveness as notice regarding prohibited conduct. Mr. Sorge had denied the allegations of wrongdoing that led to the plan’s implementation. He objected to the plan, did not sign it, and did not carry out several of its directives. By withdrawing the plan prematurely under those circumstances, neither the CSRB nor the Attorney General can plausibly assert that the plan gave Mr. Sorge “clear and unequivocal warning” about what was expected. Quite the contrary, such withdrawal of the plan could reasonably and naturally be perceived as withdrawal of the allegations of misconduct that supported the plan, and as acknowledgment that the plan had been inappropriately implemented in the first place.

Because of these problems, Mr. Sorge’s termination from employment was an abuse of the Attorney General’s discretion, and the CSRB erred in affirming it. The Attorney General originally listed a multitude of reasons for terminating Mr. Sorge, and expressed concerns about a “pattern” of misbehavior. (R. 866-73, termination notices by M. Noonan and M. Shurtleff, copied in Exhibit 1 to this brief.) But when Mr. Sorge

¹There was actually a divergence of opinion between Attorney General witnesses regarding Mr. Sorge’s compliance with the corrective action plan. Assistant Attorney General Torgensen opined that Mr. Sorge had not complied. (R. 860 p. 620-21.) Assistant Attorney General May testified that the plan was withdrawn early because Mr. Sorge had agreed to modify his behavior. (R. 861 p. 794-97.) In the Notice of Intent to Terminate, Assistant Attorney General Noonan stated that the corrective action plan was withdrawn because Mr. Sorge had complied with it. (R. 867, copied in Exhibit 1.)

appealed to the CSRB, the Attorney General abandoned its stance about a “pattern” of wrongdoing, and relied only upon three discrete incidents, arising well after the corrective action plan was withdrawn. The CSRB hearing officer then determined that one of those incidents (discussing concealed weapons during staff meeting addressing security issues) did not constitute a violation of policy or of expected standards of conduct. (R. 527-29.) That left the incidents of July 23 and August 28, 2002 as the only grounds for termination. Under a “whole record” analysis of those incidents, they form an insubstantial basis for the dire remedy of termination.

The Attorney General, in response to those two incidents, should have placed Mr. Sorge on a corrective action plan, and provided the guidance, rehabilitation, *and* notice that such plan is designed to achieve. He was, as the CSRB hearing officer found, an effective attorney in his service to the Attorney General and its client agency, DCFS. Given the uniquely difficult realm in which he worked, Mr. Sorge was a uniquely valuable asset to the Attorney General. To uphold his termination based upon two incidents, supported by witnesses of questionable credibility, is tantamount to permitting a summary termination. That termination should be reversed on appeal, with a directive to reinstate Mr. Sorge to his former position, with appropriate back pay.

REPLY POINT THREE

THE ATTORNEY GENERAL AND THE CSRB VIOLATED MR. SORGE’S DUE PROCESS RIGHTS BY ADMITTING EVIDENCE RELATED TO THE PRIOR CORRECTIVE ACTION PLAN

On appeal, the Attorney General chastises Mr. Sorge for attempting to “relitigate his past work record.” (Br. of Respondent p. 25-27.) The past work record in question

consisted of the December 2001 corrective action plan, and the allegations of misconduct that led to implementation of that plan. That plan was the only corrective action plan ever applied to Mr. Sorge. Although the plan was withdrawn early, it was used as a basis for Mr. Sorge's termination. (Termination notices, copied in Exhibit 1 to this brief.)

Before the CSRB Step 5 hearing, Mr. Sorge gave notice that he intended to call witnesses to rebut the allegations in the corrective action plan, as well as to rebut the allegations related to the July and August 2002 complaint by Ms. Howell. However, the hearing officer ruled that the corrective action plan would be addressed *only* for purposes of showing that by July and August 2002, Mr. Sorge was on notice of prohibited conduct. Therefore, the hearing officer denied Mr. Sorge's request to subpoena witnesses to rebut the allegations in the corrective action plan. (R. 858 pp. 5-6, 59-62.)

As explained in Reply Point Two, the December 2001 corrective action plan was withdrawn long before its three-month term, after Mr. Sorge objected to it, and before Mr. Sorge had performed many of its requirements. Therefore, its effectiveness as "notice" was non-existent, or ambiguous at best.

Worse, however, was the fact that despite the agreement to admit the corrective action plan "for notice only," the Attorney General was allowed, by the CSRB, to introduce extensive evidence of the allegations underlying that plan. At the outset of the Step 5 hearing, the Attorney General was permitted to introduce testimony that three DCFS or Child Protective Services workers had accused Mr. Sorge of sexual harassment in late 2000. (R. 858 p. 36-40.) Extensive testimony was permitted about accusations made against Mr. Sorge in early 2001, his response to those accusations, and how those accusations led to implementation of the December 2001 corrective action plan. (E.g., R.

861 p. 764-79.) Those accusations were listed in the corrective action plan which was utilized as an exhibit before the CSRB. (Exh. 2 to this brief.)

Such allegations of prior misconduct, placed into the CSRB record, could only have been prejudicial against Mr. Sorge. See Utah R. Evid. 403 (evidence that is substantially more prejudicial than probative should be excluded); *State v. Bartley*, 784 P.2d 1231, 1237 (Utah Ct. App. 1989) (evidence is unfairly prejudicial if it may cause fact finder “to base its decision on something other than the established propositions in the case” (quoting authority)). Barred from calling witnesses who might rebut those allegations, Mr. Sorge had no way to offset that prejudice. Nor was he able to confront the people who had actually made those allegations; he was only allowed to cross-examine selected members of the Attorney General staff. Mr. Sorge’s termination, in short, was upheld based upon prejudicial hearsay.

The Step 6 grievance panel admitted that “Utah has no case law on point” regarding Mr. Sorge’s effort to rebut the allegations of prior misconduct (R. 843-44, quoted in Br. of Respondent p. 25.) The panel observed, however, that pursuant to Utah law, Mr. Sorge’s past work record was “relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports and agency’s allegations.” (Id., citing Utah Admin. Code R137-1-21(9).) Because Mr. Sorge’s past work record was relevant to the decision whether to uphold or reverse the Attorney General’s termination action, Mr. Sorge should have been permitted to introduce evidence relevant to his past work record.

The panel therefore erred in casting Mr. Sorge’s effort to introduce such evidence as an effort to “relitigate” the negative allegations in his past work record. Because the corrective action plan was withdrawn before its three-month term ended, the allegations

underpinning that plan never were actually “litigated.” It was patently unfair, and a complete denial of due process, to permit the Attorney General to (1) assert that past allegations, related to the corrective action plan, were admissible only for notice; but (2) then introduce those allegations in support of termination; and then (3) bar Mr. Sorge from presenting evidence to rebut those allegations. Mr. Sorge was thereby deprived of the most basic element of a fair hearing: the opportunity to introduce evidence in his own defense, either through cross-examination or through his own witnesses.² See *Tolman v. Salt Lake County*, 818 P.2d 23, 28-33 (Utah Ct. App. 1991) (termination based upon hearsay, without opportunity to cross examine, violated due process). Thus Mr. Sorge should be granted relief under at least the following provisions of the Utah Administrative Procedures Act: § 63-46b-16(4)(a) (unconstitutional action by agency), -(c) (not deciding all issues requiring resolution), -(d) (erroneous interpretation or application of law, -(e) (unlawful decision-making process).

“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972) (quoting and citing authority). Mr. Sorge’s good name, reputation, honor, and integrity were at stake from the moment the Attorney General accused him of wrongdoing. When those accusations escalated into the decision to terminate his employment, Mr. Sorge should

²Even on appeal, the Attorney General cites allegations, never subjected to adversarial testing, that Mr. Sorge behaved inappropriately toward female co-workers prior to the allegations of July 23 and August 28, 2002. (Br. of Respondent p. 5-6.)

have been afforded an opportunity to refute them. See *id.* Because that opportunity was denied, the decisions of the CSRB upholding that termination should be reversed.

CONCLUSION

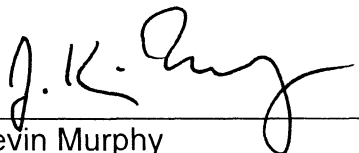
For the foregoing reasons, this Court should accept jurisdiction over this appeal, and reverse the decision of the CSRB.

ORAL ARGUMENT REQUESTED

Appellant-petitioner John Sorge believes that oral argument would significantly aid the decision of this appeal, Utah R. App. P. 29(a)(3), and hereby requests same.

RESPECTFULLY SUBMITTED this 25 day of August, 2005.

KIPP AND CHRISTIAN, P.C.



J. Kevin Murphy
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 25 day of August, 2005, two true and correct copies of the foregoing REPLY BRIEF OF PETITIONER/APPELLANT JOHN D. SORGE, to the following:

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Salt Lake City, Utah 84114-1561



EXHIBIT 1

Termination Notices

Mary Noonan R. 863-70
Mark Shurtleff R. 871-73

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
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RAY HINTZE
Chief Deputy - Civil

RYAN MECHAM
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KIRK TORGENSEN
Chief Deputy - Criminal

September 27, 2002

John Sorge
Assistant Attorney General
221 Penny Lane
Logan, Utah 84341

Re: Notice of Intent to Terminate Employment

Dear John:

Mark Shurtleff, the Utah Attorney General, has authorized me pursuant to Utah Code Annotated 67-5-12(2)(a) to give you this notice. This constitutes notice to you that I am recommending your termination of employment with the Office of the Attorney General for Malfeasance, Misfeasance, and to advance the good of public service.

This action is being taken based on your violation of Office policy 2.11, Sexual Harassment, the pattern of such conduct which has led to various investigations, complaints and warnings to you that such behavior is inappropriate in the workplace, and is behavior unbecoming and violative of what this office expects of professionals. It is not in the public's or the office's interest to maintain you in employment when you continue to engage in activities that are offensive, inappropriate and constitute violations of office policy and which you have been told are inappropriate in the workplace.

On March 10, 2000, you participated in a course "The Prevention of Sexual Harassment" and affirmed that you understood the concepts contained in the course. Contrary to that training and in violation of office policy you thereafter engaged in activities that were inappropriate, unprofessional and also created a hostile work environment.

In April, 2001, your former Division Chief David Carlson and your Section Chief, Mark May, met with you to discuss allegations made against you by three DCFS workers that you engaged in sexually harassing comments and activities. You confronted one worker by asking questions about her sexual life and another by asking questions of a very personal nature which she considered offensive and sexually motivated. You were informed that such activity and

discussion was inappropriate in the work place and that you were to cease doing so. As a result of these conversations you ultimately apologized to one case worker after you were directed and admonished to do so by your supervisors.

In October, 2001, you engaged in sexually harassing conduct when you said to one of the office's paralegals, Lynette Martinez: "I hope it does not sour your milk" while cupping your hands to your chest to indicate breasts. You denied making the comment, but it was overheard by a third party who confirmed that it was said. While the cupping of the chest was only witnessed by Lynette, she became so distraught at your conduct and comments that she was required to take sick leave because of her inability to function in the workplace with you. When confronted with this information you threatened to retaliate against Lynette by filing a grievance against her. Such retaliation is contrary to law.

Following that incident with Lynette Martinez, and with additional concerns raised about difficulties you were having with the support staff in the office, you were placed on Corrective Action for a period of three months. As part of that Correction Action Plan you were admonished and directed as follows: "You will not make any comments to the support staff of a sexual nature." You were warned that if you demonstrated any unwillingness to cooperate "in any area of this Corrective Action Plan, you will be subject to disciplinary action."

While you were eventually taken off of Corrective Action based on your compliance with the terms of the plan, you were clearly on notice that conduct and comments of a sexual nature in the work place were not acceptable and that if you engaged in them you would be subject to disciplinary action. Office Policy 2.11 specifically states: "Any employee that engages in sexual harassment or illegal discrimination will be subject to disciplinary action up to and including discharge." (Emphasis added). Though the office chose to take a lesser course of action against you in Lynette's situation, you were placed on notice of the seriousness of such conduct.

Lynette ultimately filed a discrimination charge against the office based on your actions toward her with the Utah Labor Commission which necessitated review, response and ultimate settlement with her. A part of that resolution, though it was coupled with other difficulties that you were experiencing in the Ogden office, was to move you to the Clearfield Office as of July 1, 2002. The intent was noted in your performance appraisal: "It is hoped and believed that the transfer to Clearfield is an opportunity for John to succeed."

Within a matter of three weeks after beginning your work in Clearfield, particularly on July 23, 2002, you again violated Office Policy 2.11 when you went to Jennifer Howell's office and read to her parts of documents that involved salacious, graphic and explicit sexual language. You made additional comments that were directed to the sexual language in the report when such communication had no legitimate business or professional purpose. This conduct created "an intimidating, hostile or offensive work environment" thereby necessitating the office granting administrative leave to Jennifer who was distraught at your actions. Jennifer indicated that your actions were "extremely offensive" and that she was "embarrassed," "uncomfortable," "felt violated and taken advantage of," was sick to her stomach and was afraid for her safety because of comments you had earlier made regarding a concealed weapon and the use of hollow-point

bullets.

Based on your actions toward Jennifer and her concerns regarding such actions, the office determined to assign Jade Pusey and Ross Larsen to investigate the allegations pursuant to the Office's sexual harassment policy, 2.11. This investigation included interviewing you, Jennifer Howell and other individuals.

When interviewed regarding this incident you initially denied reading the caseworkers notes which contained the graphic comments alluded to, but later modified your answer to indicate you couldn't remember doing so. You did state, however, that the only thing you remember discussing was the jurisdiction of the case. Following your meeting with Jennifer, Jennifer went to another attorney who was in the office to relate what happened. It is reported by this attorney that Jennifer "was upset, crying and very distraught," that your conduct lasted approximately 45 minutes and that Jennifer felt she couldn't leave her office or get away from the situation because you were her boss.

You have provided no satisfactory explanation sufficient to overcome my conclusion that you violated Office policy and engaged in such unprofessional behavior that action is necessary. It is your section chief's and my determination that there was no professional or justifiable reason to engage in such communication other than to create a sexually charged and intimidating atmosphere which is contrary to policy and a violation of conduct that you had been warned about by your superiors and through the corrective action.

Further, on August 28, 2002, you again approached Jennifer Howell with an unsolicited, inappropriate sexual and ethnic comment that was offensive and demeaning. Again this involved a case where the facts of the case were not relevant to any discussion with Jennifer but led to a sexually motivated and charged comment. You indicated to her that in the Hispanic culture it is acceptable for 25 year old men to have sex with 14 or 15 year old girls and that you wondered if this girl was "hot after her step-father." This comment offended and upset Jennifer. When she took offense at that assertion, telling you that it was inappropriate to stereo-type Hispanics and fourteen year olds in that manner, you quickly declared that Darryl Armstrong, a DCFS worker in the Bountiful Office had told you that information and that you were just repeating what he told you.

When Darryl Armstrong was contacted by the investigator to verify your claim, he firmly denied making such a statement. He declared that it was you who made the comment and that he disputed it and told you that such was not true. He stated that he is married to a Hispanic and told you that that perception is false. Yet, in what I perceive as an attempt to generate some "sexual" discussion with Jennifer, you ignored Darryl's clarification and made that comment to Jennifer in a situation that was neither professional nor appropriate. I further find no justifiable reason why you would engage a woman subordinate in this office in a conversation of this nature.

Because of your actions, Jennifer has indicated that she is fearful of working alone with you in the office with you. The office has made arrangements that she would not be required to be alone with you in the office and could work from another location if that situation occurred. I

determined to place you on administrative leave while her allegations of the July 23rd incident were investigated. During that investigation the August 28th incident came to light which I consider serious when all of your actions are taken as a whole and are not isolated.

While one unfamiliar with your history with the office might view the July 23rd and the August 28th incidents as isolated incidents, I view your comments and actions as a continuation of conduct that you were informed was inappropriate in the workplace. Your continuing actions, are independently inappropriate and unprofessional for one in your position, and have also created a hostile environment in violation of Office policy to such a degree that I find it necessary to recommend this action. Your actions further constituted a knowing refusal to comply with the directives given you when you were told: "you will not make any comments to the support staff of a sexual nature."

In deciding what action to recommend, I have reviewed your history with the Office, your prior conduct, and the information that led to your unsuccessful 2002 appraisal. In assessing whether this would mitigate against a recommendation for termination, I have concluded that not only have you repeatedly violated the sexual harassment policy, but you have treated support staff and DCFS workers with contempt. Pursuant to numerous DCFS workers, as noted in your 2002 performance review, you have fallen short of providing the type of representation for the Division and treatment of employees that this office expects of an attorney in your position.

Your June 2002 appraisal indicated that you did not meet standards overall and were particularly unsuccessful in your interpersonal relationships, your compliance with professionalism and adherence to policies, and providing leadership. Thus, it appears that your record with this office does little to mitigate the seriousness of what you have done regarding your conduct and the creation of a hostile environment. I therefore have concluded that your past performance with this office speaks against retaining you as an employee.

Additionally, several months after Lynette's incident Kirk Torgensen, Chief Deputy Attorney General, met with you to discuss the ongoing difficulties between you and staff of the office regarding your actions that led, in part, to the Corrective Action. You committed to Kirk that you would resolve the problems and make amends, but have failed to follow through and do as you indicated you would.

Your attitude, actions, and lack of commitment to comply with office policy and your inappropriate behavior in the work setting constitutes Malfeasance and Misfeasance and leads me to recommend termination of your employment with the Attorney General's office to advance the good of public service.

Therefore, you are continued on administrative leave with pay through the close of business, Friday, October 4, 2002. You have the right to appeal this recommendation to Chief Deputy Attorney General, Raymond Hintze, the Attorney General's designee in this matter. If you choose to do so, you must notify Helen Peterson at 538-1191 by 5 o'clock p.m. on October 4, 2002. If you appeal, you may appear with or without representation on Thursday, October 10, 2002, where you may respond to this recommendation and present any information you believe

is relevant in the Attorney General making a final decision. Pursuant to Utah Code Ann. 67-5-12(2)(b) you also have the opportunity to reply in writing by October 10th and have that response considered by the Attorney General.

The hearing before the Raymond Hintze is informal where you will have the opportunity of responding to the allegations contained in this letter. If an appeal is filed, you will remain on administrative leave pending the final determination by the Attorney General. You will be notified in writing of his final decision.

You are directed to turn in your card keys, office identification and return any state property that you currently have. You may remove your personal items from your office only under the direction of your Section Chief Mark May. You are not authorized to enter the Attorney General's Office in Clearfield or Ogden without permission from Mark. All communications with this office, other than with Raymond Hintze or Helen Peterson, are to be with Mark May or myself.

If you choose not to appeal this Recommendation, your last day of work will be October 4, 2002. The termination will be effective that date.

Pursuant to Utah Code Annotated 67-5-12(3)(a), all final decisions regarding the termination of attorneys with the Attorney General's office may be appealed to the Career Service Review Board, 1120 State Office Building within twenty working days from the decision of termination.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary T. Noonan", with a long, sweeping horizontal stroke extending to the right.

MARY T. NOONAN

Assistant Attorney General

Division Chief, Child Protection Division

cc: Raymond Hintze
Personnel file

000870

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

KIRK TORGENSEN
Chief Deputy

October 17, 2002

John Sorge
221 Penny Lane
Logan, Utah 84341

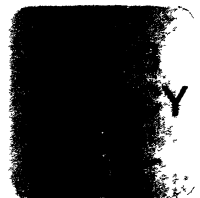
RE: DECISION TO TERMINATE YOUR EMPLOYMENT
WITH THE ATTORNEY GENERAL'S OFFICE

Dear John:

As you are aware, I appointed Raymond Hintze, Chief Deputy Attorney General, to act as my designee on your appeal from the Notice of Intent to Terminate your employment with the Attorney General's Office. He met with you and your attorney Erik Strindberg in an informal hearing on October 10, 2002. Following that hearing, he conducted additional interviews of parties involved, reviewed all of the documents which you submitted at the hearing, and read the transcript of your September 4, 2002 interview conducted by Ross Larsen and Jade Pusey. Based on his review of this information he has recommended to me that you be terminated from your employment with this office.

The Notice of Intent was based upon numerous items as set forth in the September 27th Notice of Intent to Terminate signed by Division Chief Mary Noonan. This included your unsatisfactory 2002 performance review. Mr. Hintze has concluded that the allegations contained in the Notice of Intent to Terminate are substantiated and constitute grounds for your termination from employment. As such, each and every allegation, designation of violation of policy and professionalism are incorporated into this determination and constitute adequate and good cause to sustain Ms. Noonan's recommendation.

Mr. Hintze clearly finds that subsequent to your performance review, new incidents occurred in the Clearfield Attorney General's Office which cannot and will not be tolerated and which, when coupled with the incidents described in the Notice of Intent, justify my ultimate conclusion.



John Sorge
October 17, 2002
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In particular, the first incident involved a meeting in Jennifer Howell's office on July 23rd, wherein you read specific portions of a caseworker's report on the [REDACTED] case, including additional comments you made regarding graphic portions of the report. In your statements to Mr. Hintze in the appeal hearing, you stated that you did not recall discussing or reading any parts of the caseworker's notes regarding specific sexual acts complained of. Jennifer Howell, however, reported that you not only read each of the specific incidents reported to the caseworker, but discussed the terminology and tried to engage Jennifer in a discussion of graphic sexual terms used in the report.

Ray specifically found Jennifer's testimony on the events of this conversation are the most credible. Your testimony on this incident has varied from an outright denial that it occurred, to a statement that you did not recall that it occurred; and in one interview you admitted that it's possible that it occurred. Jennifer's actions following the incident lend credibility to her version of the facts. Shortly after you left her office on July 23rd, she went to Janice Ventura's office, reported the incident, and Janice created an email the following morning reporting the incident to your supervisor. Janice verifies that Jennifer was extremely upset immediately after the incident

In finding against you on this matter, Ray analyzed the purpose of the meeting with Jennifer. Jennifer had no prior knowledge of this case, and the jurisdictional decision is typically one made by an attorney. I agree with Ray who found it totally without justification that you recited specific sexual acts and additional discussion on terminology used in discussion of specific acts with Jennifer. Clearly, attorneys and paralegals must sometimes read descriptions of specific sexual acts in a file, but discussing them with Jennifer was totally unnecessary, particularly in this context where it was doubtful that this case would even be filed in Clearfield. Such behavior on your part is a continuation of conduct that is inappropriate and contrary to the directions given you previously.

According to Mr. Hintze, the second issue discussed involved comments made which added to Jennifer's concern for her safety and ability to continue working with you. Your responses reflect on your credibility. This issue involves comments you made that you have a Concealed Firearm Permit and a handgun equipped with hollow point ammunition. Your statements at the appeal hearing were that you had never discussed the Concealed Firearm Permit, the gun, or the ammunition directly with any of the attorneys or staff in the Clearfield office. Your explanation was that the conversation must have been overheard by them as you discussed it with Cliff Swenson, a caseworker from Bountiful. You specifically denied ever discussing having the gun with Jennifer or any of the other employees in the office.

Contrary to your statements, testimony from other staff members given to Ray directly clearly establishes that at a staff meeting in July of 2002, at which the Clearfield employees were all present, you reported that you had a Concealed Firearm Permit and a pistol which was loaded

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John Sorge
October 17, 2002
Page Three

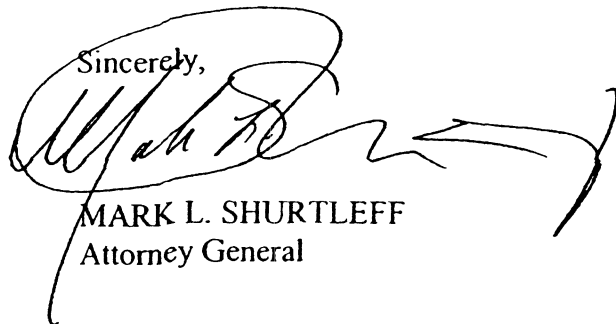
with hollow point ammunition which made a small entry hole but enlarged as it passed through the victim, causing great injury. You further stated that you had stopped carrying your gun everyday because you did not like to wear a coat to keep it covered. Everyone at the July meeting had the impression that you were still carrying your concealed weapon when you chose to.

The final allegation involves a conversation on August 28, 2002, where your, again, engaged Jennifer in a conversation reporting a case where a stepfather took a girl on a road trip to have sex. Your conclusion was the girl must have enjoyed the sex because she went on a trip with her stepfather. Following that report, you stated that 25 to 30-year-old men in the Hispanic culture frequently have sex with 14 to 15-year-old girls. You deny saying that directly to Jennifer, but allege that it was a conversation you had with Darrell Armstrong in your office, which was simply overheard by others in the office. Again, Ray found Jennifer's testimony more persuasive because immediately following this conversation Jennifer, again, met with Lori Trivino and Janice Ventura, who both reported that Jennifer was visibly upset and reported the contents of the conversation shortly after it occurred. Jennifer was so upset that Lori and Janice took her for a walk outside the office.

Based upon the foregoing and other reasons stated in the Notice of Intent to Terminate, which I incorporate into this decision, it is my decision that the intent to terminate your employment is justified, and the appeal thereof is hereby denied.

Effective the close of business, October 17, 2002, this date your employment is hereby terminated with the Utah Attorney General's Office. If there are any personal items that remain in the workplace which you desire to retrieve, you are directed to contact Mark May to make arrangements to obtain them. Pursuant to Utah Code Annotated 67-5-12(3)(a), you have the right to appeal this decision to the Utah Career Service Review Board within twenty working days from the date of this decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark L. Shurtleff", with a large, sweeping flourish extending to the right.

MARK L. SHURTLEFF
Attorney General

cc: Erik Strindberg
Raymond Hintze
Mary Noonan
Personnel file

000873

EXHIBIT 2

Corrective Action Plan

R. 879-81

CORRECTIVE ACTION PLAN

TO: John Sorge

SUBJECT: Corrective Action Plan

ISSUE: Negative impact on office due to comments and treatment of support staff.

BACKGROUND: The support staff in the Ogden office has expressed several, repeated concerns about your conduct and comments. Although not an exhaustive list, the following are specific examples:

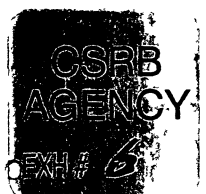
(1) On October 16, 2001, Lynette Martinez was making copies at the copy machine and she commented to you that the spray cleaner you were using made her stomach ache. You then stated: "I hope you does not sour your milk" as you cupped your hands to your chest to indicate breast. When I approached you about the conversation you denied that you made any gestures with your hands, could not recall if you made the sour milk comment and threatened to file a grievance against Lynette. Corina Archuletta later confirmed that she heard you made the sour milk statement.

(2) For over year you have refused to speak with Sharon Goodrich. Indeed, you go to great lengths to avoid speaking with Sharon. On approximately December 14, 2000, you, me, Sharon and Corina met in attempt to work out the difficulties between you and Corina and Sharon. It is apparent that the meeting did not achieve its purpose.

On approximately August 7, 2001, I was on vacation and Janice Frost was in charge. You did not arrive at your usual time. A discussion took place between you and Janice about the proper way to notify the office when you would be late. You stated you left a message on Mary Torres-Berry's phone, but Mary had not retrieved the message before going to court. You said you did not leave a message with Janice because she does not get to work until after 8:30 a.m. An argument ensued between you and Janice. Janice stated: "You know John, the real problem here is your refusal to talk to Sharon. You need to call Sharon, she is always here by 7:00 a.m. She is the only one you can count on to be here by 7 a.m. and to be here everyday." You stated the reason you called Mary was because that was the only telephone number you knew. At that point Sharon stated: "Excuse me for interrupting but all you have to do is dial 0 on anybody's line in this office and you will eventually get me." As soon as Sharon started to speak, you said, in an indignant manner: "Oh no, do not talk to me. I'm not talking to Sharon" at which time you turned and went back to your office.

Even now, you still refuse to speak to Sharon. Recently to told me that you would not even check out the State car because you have to go in Sharon's cubicle to get the keys.

(3) On October 17, 2001, you sent an email to everyone in the office except Sharon Goodrich, sending it instead to Sharon Bertagnole in the Logan office. Corina asked you why you excluded Sharon Goodrich. You explained it was an accident and that it should have gone to



Sharon Goodrich. Corina felt you had done it on purpose based on your past history with Sharon. Indeed, Corina stated "I just want you to admit you did it on purpose. . . ." Corina's statement was inappropriate. Your response, however, was outrageous. You said, in part: "Plus as far as I'm concerned you have absolutely no right to be telling me what to do under any circumstances. I'm the attorney and you're the secretary. I've never understood where you've gotten off telling me what to do, giving me your opinion, etc."

(4) Your discourteous conduct to staff has caused a serious morale problem in the Ogden office. Your treatment of staff falls below the standard of professionalism this office demands.

(5) Your behavior toward staff must improve. Regardless of your personal feelings it is essential that you communicate with staff, treat them with courtesy, respect and professionalism. At this point, you are being placed on corrective action in an effort to allow you to build a proper relationship with the support staff. I hope you take advantage of this opportunity.

(6) I have listed many negative aspects about your conduct. In fairness, I should also list what I believe to be your strengths. You are a hard worker. You are able to handle a large case load without getting behind. You get your petitions out very quickly. You do a good job representing the Division in Court. You contribute much to this office and your efforts are valued and appreciated.

CORRECTIVE ACTION STEPS:

1. This corrective action plan places you on a period of constant review and under closer supervision. It will also give you an opportunity for remediation.
2. The following is a list of what you will be required to do:
 - a. You will be required to review the video tape concerning sexual harassment in the office and complete the assignment.
 - b. You will not make any comments to the support staff of a sexual nature .
 - c. You will treat the support staff with respect at all times.
 - d. You will not let any personal animosities effect the office.
 - e. You will interact with staff in a cordial, professional manner. You will not give staff the silent treatment or otherwise make them feel uncomfortable because of personal grudges you may hold.
 - f. You will not retaliate against staff who have complained of your conduct.

3. This Corrective Action Plan will start today and will last for a period of three months. I will be meeting with you at least every two weeks. I will provide you with a mid-point written evaluation summary regarding your progress. I expect you to be receptive to the plan.

4. Be aware that if you demonstrate any unwillingness to cooperate in any area of this Corrective Action Plan, you will be subject to disciplinary action. This Plan is not designed to be a punishment, rather, its purpose is to help you become a productive employee. Please recognize this Plan as such.

Supervisor Mark May [Signature] Date: 12-20-01

Employee _____ Date: _____