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IN THE UTAH COURT OF APPEALS

KEVIN YARDLEY, Petitioner, v. UTAH DEPARTMENT OF CORRECTIONS, Respondent.	Case No. 20050055-CA

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THE COURT'S JURISDICTION WAS INVOKED UPON THE FILING OF THE PETITION FOR JUDICIAL REVIEW.

The Department contends that Mr. Yardley failed to invoke the jurisdiction of this Court by failing to name the Career Service Review Board (CSRB) in his petition for judicial review and his subsequent brief. Mr. Yardley has previously argued in his response to the Department's motion for summary disposition that he properly named the agency in his petition for judicial review as required by Utah Administrative Procedures Act (UAPA). UAPA contains statutory definitions for the material terms that it uses. Pursuant to and consistent with those definitions, Mr. Yardley named the proper agency in his timely filed petition for judicial review. *See,* Utah Code Ann. §§ 63-46b-2 and 63-46b-14. Furthermore, since Mr. Yardley's previous response, the Utah Supreme Court has directly addressed the issue raised by the Department and ruled in a manner that resolves the issue in favor of Mr. Yardley.

In *Harley Davidson v. Workforce Services,* 116 P.3d 349 (Utah 2005), the Supreme Court, in a decision filed June 21, 2005, addressed the issue of appellate court jurisdiction over administrative rulings. The Court's ruling was simple and clear: "[w]e hold that regardless of whether a party seeks to invoke the jurisdiction of an appellate court under rule 3 or rule 14, *the only* jurisdictional requirement is the timely filing of the pleading initiating appellate review." *Id.* at 352. (Emphasis added). In so ruling, the

Court rejected the respondent's arguments that a wrongly titled petition, a petition not filed with the required filing fee, not served on the opposing party and a petition that had the incorrect court designation were jurisdictional defects.

In an effort to distinguish *Harley Davidson* from applying to this case, the Department contends that factual distinctions between this case and *Harley Davidson* make it inapplicable to this case. The Department, citing to paragraph 5 of the opinion, asserts that in *Harley Davidson* all the deficiencies in the petition were corrected well before the briefing stage, unlike the facts in the present case. Resp. Brf. at 14. There were a number of defects with the petition in *Harley Davidson* spanning from failing to pay the filing fee to failing to serve the opposing party. *Id.* Contrary to the Department's statement, paragraph 5 of the opinion reflects only that the filing fee was paid and the name of the pleading was corrected. *Id.* at 351. Moreover, the Court's ruling in *Harley Davidson* was not fact sensitive or narrowly tailored to the facts of the case. Indeed, the Court specifically stated that it declined to adopt a "narrow application" of the ruling. *Id.* at 352. Thus, the Department's efforts to persuade this Court that *Harley Davidson* does not apply to this case because of factual distinctions are without merit.

Mr. Yardley timely filed his petition for review. In doing so, Mr. Yardley properly invoked the jurisdiction of this court pursuant to Utah Rule of Appellate Procedure 14 and Utah Code Ann. § 63-46b-16. *Harley Davidson v. Workforce Services,* 116 P.3d 349 (Utah 2005). The remaining arguments advanced by the Department regarding the need

to name the Career Service Review Board (CSRB) in the petition for this Court to exercise jurisdiction over the CSRB decision that is the subject of this appeal were explicitly and implicitly rejected by the *Harley Davidson* Court when they stated "we, like the court of appeal, can find no principled reason to treat agency petitions differently that other appeals." *Id.* at 352. Thus, contrary to the Department's argument, there was no need to for the Court in *Harley Davidson* to discuss the differences between an agency appeal and an appeal from a lower court because the Court found no "principled reason" to do so.

MR. YARDLEY'S DUE PROCESS RIGHTS GO BEYOND RECEIVING NOTICE OF THE ALLEGATIONS AND AN OPPORTUNITY TO BE HEARD.

The Department responds to Mr. Yardley's argument that he was denied due process when the Department failed to utilize committee reviews and conduct a meaningful investigation by contending that all that was required was notice of the allegations and an opportunity to be heard and that Mr. Yardley's argument creates an additional due process requirement not supported by authority. The Department's contention is in error.

When a public employee has an expectation to continued employment, they enjoy a property right in that employment that cannot be adversely affected by the public employer without first affording the employee due process. *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 541 (1985), *Worrall v. Ogden City Fire Dep't*, 616 P.2d 598,

601 (Utah 1980). As previously described by the Utah Supreme Court, "[d]ue process is not a technical conception with a fixed content unrelated to time, place and circumstance; it is flexible and requires such procedural protections as the particular situation demand." *Worrall v. Ogden City Fire Dep't,* 616 P.2d 598, 602 (Utah 1980). Ultimately, "[t]he purpose of due process is to prevent fundamental unfairness." *Kent v. Department of Employment,* 860 P.2d 984, 987, nt. 4 (Utah App. 1993)(Citing *State v. Maestas,* 815 P.2d 1319, 1325 (Utah App. 1991). Thus, contrary to the Department's implied contention, due process protections in the discipline or discharge of a public employee are not limited to notice of the allegations and opportunity to be heard.

As Mr. Yardley recited in his opening brief, the Utah Supreme Court has specifically addressed the issues raised by Mr. Yardley regarding the Department's failure to use committee reviews and conduct an investigation. Adopting a holding from a Washington Supreme Court decision, the Court held that when a public employer announces a particular policy or practice, the employer must follow the particular policy or practice. *Thurston v. Box Elder County,* 835 P.2d 165, 169 (Utah 1992). The Court's holding is nothing more than requiring the employer to act with fundamental fairness by following the policies and practices it announces to its employees consistent with due process principles. The essence of the ruling in *Thurston* is also grounded in statute. Utah Code Ann. § 63-46b-16(4)(h)(iii) provides that upon judicial review of a final agency action following an adjudicative proceeding, the appellate court may only grant

relief where the party seeking review has been substantially prejudiced by an agency's failure to act consistent with a prior practice. Accordingly, authority exists specifically supporting Mr. Yardley's position that the Department is required to act consistent with prior practices utilized in the discharge of an employee.

In Mr. Yardley's case, the evidence developed at the evidentiary hearing demonstrated without dispute that the Department had a practice of using committee reviews in the process of disciplining employees and that it failed to use committee reviews in discharging Mr. Yardley. Likewise, the evidence also demonstrated that the Department, as a matter of established policy and practice, conducts an investigation as part of their disciplinary process which also was not followed in Mr. Yardley's case. (Addendum A). By failing to follow its own policy and practices in discharging Mr. Yardley, the Department acted fundamentally unfair and thereby violated Mr. Yardley's due process rights.

THE WARNING APPLIES TO MR. YARDLEY'S DISCHARGE BY ITS PLAIN TERMS AND CONSTRUCTION.

The Department responds to Mr. Yardley's argument that his discharge was in violation of the warning it previously issued him by contending that the warning was not applicable to the discharge for two reasons. First, the conduct for which Mr. Yardley was discharged was not of the "type" for which he was previously disciplined. Secondly, the warning only applied to future misconduct. The Department's response is without merit.

The Department's argument that the warning's use of the word "type" limited its application to a degree that it did not apply to Mr. Yardley's discharge because the conduct for which he was discharged was more egregious than the conduct for which he was previously disciplined, is simply an effort to rewrite the warning after its already been given effect. Considering that the Department previously disciplined Mr. Yardley for sexual acts committed alone and with his wife recorded on video tape and then issued a warning that he would be terminated should he engage in that "type" of behavior in the future, the reasonable and plain interpretation of the warning would make it applicable to sexual conduct committed alone or with his wife. The fact that the masturbation may have been committed in a different manner does not change the "type" of the conduct. The application of the warning, however, is not without limitation. The application of the warning is limited to the type of conduct for which Mr. Yardley was disciplined. Certainly inappropriate acts unrelated to the conduct would not be covered just as other sexual acts unrelated to acts of masturbation would not be covered. To contend that the warning would amount to "*carte blanche*" as the Department argues is an unreasonable embellishment of the warning.

Perhaps the best illustration of the weakness of the Department's argument is the answer to the following question: would the Department rely on the warning to justify Mr. Yardley's discharge if Mr. Yardley committed the acts for which he was discharged *after* warning? Absolutely. The similarity of the conduct, how it was recorded would all

support that Mr. Yardley was previously warned thereby meriting his discharge. If the Department is entitled to rely upon the warning certainly Mr. Yardley is equally entitled as a matter of fundamental fairness. The enforcement of the warning is not and should not be dependent upon the discretion and preference of the Department, but rather upon its own terms and pursuant to law.

The Department's further contention that Mr. Yardley's argument is unreasonable because it fails to realize that the warning only applies to future conduct not only overlooks the overall construction and language of the warning, but ironically is an argument in support of Mr. Yardley's position.

The warning is constructed with the following language: "should this type of misconduct *reoccur* in the future..." In using the word *reoccur*, the interpretation of the warning that is communicated is that the matter is now closed, but if the conduct should *reoccur,* termination would be likely. To contend that by its reference to *future*, the warning has no contemplation to conduct that has already occurred is contrary to the wording of the warning.

The essence of the Department's argument is that because the conduct for which Mr. Yardley was discharged occurred before the warning and not after the warning, the warning does not apply. In short, if Mr. Yardley committed the conduct after the warning and not before, then the warning applies - and would serve as a basis to terminate. As a

matter of fundamental fairness, the opposite must also be true - if Mr. Yardley did not commit the conduct after the warning, then he should not have been terminated.

Furthermore, the warning was in an administrative complaint that Mr. Yardley did not appeal thereby resulting in its inclusion into the final order by reference. As a final order, Mr. Yardley would reasonably believe the matter was closed with the only remaining concern that he take the warning seriously and not repeat the misconduct lest his employment would be terminated. That belief is also consistent with Mr. Yardley's required participation in the "performance plan" as a result of his prior discipline where the intent of the plan was to bring closure to the matter. (RT.302:34-35).

CONCLUSION

The issue as to whether Mr. Yardley properly invoked this Court's jurisdiction has been resolved. Mr. Yardley invoked this Court's jurisdiction when he timely filed his petition for judicial review.

By failing to follow its practice and policy of utilizing committee reviews and conducting an investigation in Mr. Yardley's case, the Department violated his due process rights in their discharge of his employment. Furthermore, the Department's discharge of Mr. Yardley's employment violated the terms of the warning they previously issued him. Because the warning was an enforceable component of the Department's employment relationship with Mr. Yardley his discharge was improper. Accordingly, the

CSRB's decision upholding the Department's discharge of Mr. Yardley's employment was not rational nor reasonable.

Because Mr. Yardley was improperly discharged, the decision of the CSRB upholding his discharge should be set aside and reversed and Mr. Yardley should be reinstated to his employment with the Department and awarded all appropriate back pay and other wages or compensation as provided by law from the date of his discharge.

RESPECTFULLY submitted this 22nd day of September 2005.

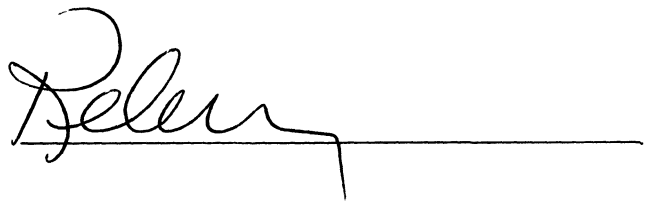
Blake A. Nakamura
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, REBECCA L. WHETZEL, hereby certify that I have caused to be hand-delivered 8 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114, and 2 copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 26th day of September 2005.

REBECCA L. WHETZEL

Delivered to the Utah Court of Appeals and the Utah Attorney General's Office as set forth above, this 27 day of September 2005.



Addendum A

imposition of discipline as other career service members.

1. If a mediation or due process hearing is granted by the Department, there shall be no right of appeal beyond the Executive Director.

2. The decision to grant a mediation or hearing to a probationary or exempt member lies within the discretion of the Executive Director/designee.

C. Probationary or exempt status members may be terminated only with the prior approval of the Executive Director.

D. The Executive Director/designee shall provide written notification to the employee specifying the reasons for the dismissal or demotion and the effective date.

AE 03/02.08 Procedure: Supervisory and Administrative Staff

A. Supervisory and administrative staff are held to higher standards than non-managerial members.

B. Greater sanctions may be imposed on supervisory and administrative staff than on non-managerial members.

AE 03/02.09 Procedure: Certified Peace Officers and Correctional Officers

A. Certified officers hold a high level of public trust and shall be held to higher standards of conduct than civilian members.

B. Greater sanctions may be imposed on certified officers.

C. Conduct affecting officer certification shall be referred to POST.

D. Decertification or suspension of any Peace Officer or Correctional Officer by POST may result in termination of the member's employment with the Department.

AE 03/03.00 RESPONSIBILITY AND AUTHORITY IN MEMBER DISCIPLINE

AE 03/03.01 Policy

It is the policy of the Department that:

A. each division shall perform the investigative functions in all suspected and/or reported infractions except:

1. sexual harassment;

2. discrimination;

3. conduct in violation of federal or State law, or municipal ordinance, excluding minor traffic violations;

4. firearms violations;

5. inappropriate use of alcohol and substance abuse;

6. use of excessive force; or

7. other violations which, on a case-by- case basis, the Deputy Director may assign to OPSE.

B. in cases where one or more of the above is alleged, the division director shall promptly refer the matter to the Deputy Director or the Department Representative;

C. in allegations of sexual harassment and discrimination, the Human Resource Director shall be promptly informed so that appropriate advice can be expediently provided in dealing with the situation pending the outcome of any investigation;

D. failure to promptly report any of the above violations shall be grounds for disciplinary action;

E. in cases that involve the Executive Director's office, the Deputy Director shall function as a division director;

F. in cases where a certified officer's conduct appears to have violated the provisions detailed in Utah Administrative Code R728- 409-3, "Cause to Evaluate Certification for the Refusal, Suspension or Revocation of Peace Officer Certification or Authority" the case shall also be referred to POST; and

G. the Executive Director/designee may place the member on leave in accordance with 67-19- 18(4).

AE 03/03.02 Rationale

It is necessary for the Department to provide for those infractions which may be investigated by each division and those that must be reported to a Deputy Director of the Department for investigation.

AE 03/03.03 Procedure: Letters of Warning and Reprimand

A. Letters of Warning and Reprimand should be used by managers and supervisors to formally censure a member and shall specify the reasons for the discipline, previous oral warnings and/or discussions and an admonition that behavioral change by the member is necessary to avoid more serious disciplinary action in the future. The written warning and reprimand are the only forms of disciplinary actions that do not go through the Executive Director/designee.

1. A written warning is a written formal communication from a member's supervisor to the member warning the member about a problem or violation.

2. It is not grievable beyond Step 4.