

2005

Kevin Yardley v. Utah Department of Corrections : Brief of Respondent

Utah Court of Appeals

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No. 20050055-CA

IN THE UTAH COURT OF APPEALS

KEVIN YARDLEY,

Grievant-Petitioner,

vs.

UTAH DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF OF RESPONDENT

Petition for Judicial Review of Decision and Final Agency
Action of the Utah Career Service Review Board

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

FILED
UTAH APPELLATE COURTS

AUG 25 2005

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



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Protecting Utah • Protecting You

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December 21, 2005

Via Hand Delivery

Paulette Stagg, Clerk of Court
Utah Court of Appeals
450 South State Street, 5th Floor
Salt Lake City, Utah 84111

Re: Kevin Yardley v. Utah Department of Corrections
Utah Court of Appeals Case No. 20050055-CA

Dear Clerk:

Pursuant to Utah R. App. P. 24(i), Respondent hereby informs the Court of the following pertinent and significant authority which has come to Respondent's attention after completion of briefing in this matter: Blauer v. Department of Workforce Services, 2005 UT App 488, 538 Utah Adv. Rep. 60. This decision was issued on November 10, 2005, and appears to govern the jurisdictional argument raised in Respondent's brief at pages 10-15.

In light of this new authority, Respondent withdraws the jurisdictional argument raised at pages 10-15 of its brief.

Sincerely yours,

J. CLIFFORD PETERSEN
Assistant Attorney General
Litigation Division
Attorney for Respondent Utah Department of
Corrections

cc: Blake Nakamura, Attorney for Petitioner Kevin Yardley

No. 20050055-CA

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BRIEF OF RESPONDENT

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List of All Parties

The petition for judicial review named only two parties, who are both listed on the caption of this brief.

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IN THE UTAH COURT OF APPEALS

KEVIN YARDLEY,

Petitioner,

vs.

UTAH DEPARTMENT OF CORRECTIONS,

Respondent.

Brief of Respondent

Utah Department of Corrections (“Department”) submits this brief in answer to the Brief of Petitioner Kevin Yardley.

Statement of Jurisdiction

The Decision and Final Agency Action of the Career Service Review Board (CSRB) was entered on December 23, 2004. R. 554-583. Kevin Yardley’s Petition for Judicial Review was filed on January 19, 2005. 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 Yardley’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.

Issues Presented

1. Jurisdiction over final agency action resulting from formal adjudicative proceedings

Although Yardley seeks judicial review of the CSRB's decision, he has never made the CSRB a party to this proceeding. The plain language of the Utah Administrative Procedures Act requires the agency whose final action is to be reviewed to be named as a party. Does this Court lack jurisdiction to review the CSRB's decision?

A. *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).

B. *Preservation of issue*

Questions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims. State v. Sun Surety Ins. Co., 2004 UT 74, ¶ 7, 99 P.3d 818, 820. This issue is unique to the appeal and does not call for a review of the CSRB's decision.

2. Reasonableness and rationality of CSRB's decision

CSRB made three separate conclusions challenged on appeal by Yardley. First, CSRB determined that the Department did not act inconsistently with its prior practice in terminating Yardley when he failed to make a prima facie showing of inconsistency. Second, CSRB concluded that Yardley was afforded due process before his termination because he was given notice of the allegations against him and an opportunity to be heard at a pretermination hearing. Third, CSRB concluded that a prior warning given to Yardley did not prevent the Department from terminating Yardley because the warning did not address the prior, previously undiscovered misconduct for which Yardley was terminated. Were CSRB's three conclusions nevertheless reasonable and rational?

A. Standard of review

This Court reviews an agency's application of its own rules for reasonableness and rationality, employing some, but not total, deference to the agency. Kent v. Dep't of Employment Sec., 860 P.2d 984, 986 (Ut. Ct. App. 1993). Yardley stipulates to this standard of review. Aplt. Brf. at 2.

B. Preservation of issue

The CSRB made the above conclusions in its Decision and Final Agency Action issued December 23, 2004. R. 563-77. Yardley filed his petition for review on January 19, 2005. Yardley has challenged all three of the CSRB's conclusions in his opening brief.

Determinative Constitutional Provisions, Statutes and Rules

The following provisions are attached as an Addendum to this Brief:

Utah Code Ann. § 63-46b-14(3)

Utah Code Ann. § 63-46b-16(4)(d)

Utah Code Ann. § 63-46b-16(4)(h)(iii)

Statement of the Case

1. Nature of the Case

This is a petition for judicial review of final agency action of the CSRB that upheld the Department's decision terminating Yardley's employment for sexual misconduct.

2. Course of the Proceedings Below

On November 5, 2001, Kevin Yardley was dismissed from his career service position as a correctional officer with the Utah Department of Corrections (Department). R. 367-69. The termination was based on Yardley's numerous acts of videotaped sexual misconduct occurring both on and off duty. R. 367-69.

Yardley appealed his termination to the CSRB on November 20, 2001. R. 6-7. An evidentiary hearing on Yardley's grievance was conducted by a CSRB hearing officer on April 2, 3, 4 and 23, 2003. R. 298-304, 322-23. In his August 21, 2003, Findings of Fact, Conclusions of Law, Decision, and Order, the hearing officer upheld the Department's decision to terminate Yardley's employment. The Hearing Officer also found that the termination of Yardley's employment was not excessive, disproportionate or otherwise an abuse of discretion. R.429-41.

On August 29, 2003, Yardley filed his notice of appeal to the CSRB from the hearing officer's decision. R. 445-46. After hearing Yardley's appeal,¹ the CSRB issued its Decision and Final Agency Action on December 23, 2004. R. 554-83. The CSRB

¹The CSRB appeal hearing held April 20, 2004, is contained in the record in a separately bound volume entitled "Administrative Appeal Hearing Before the Board." This volume is not Bates-stamped, apparently because the transcript had not yet been received by CSRB when the record was transmitted to this Court.

sustained the hearing officer's findings and conclusions and affirmed the termination of Yardley's employment.

Yardley filed his Petition for Review of Final Agency Action on January 19, 2005.

3. Disposition Below

By its decision dated December 23, 2004, CSRB affirmed the termination of Yardley's employment, concluding that the hearing officer's decision was reasonable and rational and supported by substantial evidence. R. 577. CSRB agreed with the hearing officer that the Department's decision to terminate Yardley's employment was supported by substantial evidence, did not violate Yardley's due process rights, and was neither disproportionate nor inconsistent with the Department's prior practice.

Statement of Facts

Before the termination of his employment, Yardley had been employed with the Department for eleven years as a prison guard, a career service position. R. 354. Yardley was assigned to a guard tower at the Central Utah Correctional Facility at the time his employment was terminated.

On January 12, 2001, the Department issued an administrative complaint against Yardley, alleging that: (1) Yardley videotaped himself and his wife in 1995 and 1998 having sexual intercourse, and that these videotapes were circulated to other Department employees; and (2) that Yardley masturbated on at least one occasion while on duty in the guard tower. R. 344-46. This complaint contained a warning: "You are hereby warned that should this type of misconduct reoccur in the future, we will be forced to consider

severe disciplinary sanctions, including termination.” R. 345. Yardley did not contest these allegations and on March 5, 2001, the Department ordered that Yardley be suspended for fifteen days without pay. R. 347-49.

Three months later, in June of 2001, a husband of a Department employee informed the Department that he had four sexually explicit videotapes of Yardley. The four videos were copied onto one tape and given to the Department management. When Department management viewed the videotape, it was immediately determined that the misconduct depicted thereon was different from the conduct in the administrative complaint of January 12, 2001. R. 299, at 81-82, 103-05.² Prior to viewing the video compilation, the Department was unaware of the degree of Yardley’s sexual misconduct portrayed on the video. R. 322, at 107-09. Jesse Gallegos, the Department’s deputy director, testified that he was “dumbfounded” when he viewed the videotape: “I couldn’t believe what I was seeing[,] it was much more than just a single act of masturbation.” R. 322, at 82. The video compilation showed numerous incidents of Yardley masturbating on and off duty before the video camera using a variety of inanimate objects, including Yardley masturbating in public places. R. 350-352. A more detailed listing of these incidents appears below, in the summary of the amended administrative complaint filed upon Yardley on July 9, 2001.

On June 14, 2001, the Department served Yardley with a second administrative complaint. R. 353. This complaint stated an intent to terminate Yardley’s employment with the Department. The complaint was amended and served upon Yardley again on July 9, 2001. R. 350-52. The amended administrative complaint again stated an intent to

²Because the individual volumes of the step 5 hearing are not Bates-stamped except for the first page of each volume, this brief cites to the Bates-stamped number on page one of the volume, followed by the page number of each volumes own pagination.

terminate Yardley's employment, and included a detailed list of allegations of sexual misconduct. R. 350-52. The amended complaint stated that the intent to impose disciplinary action was based on different events from those for which Yardley had been previously disciplined on March 5, 2001.

The amended administrative complaint alleged that Yardley had engaged in multiple videotaped incidents of masturbating while on duty in the guard tower and multiple incidents of masturbating in public places while off duty. R. 350-52. In at least six of the incidents portrayed on the video, Yardley displayed a sign around his neck with his home and work phone numbers, inviting women to call him at home or work so he could masturbate for them. R. 350-52. Yardley was naked in several incidents of videotaped masturbation in the guard tower. R. 350-52. In three of the incidents, Yardley masturbated with the names of women written on his penis, including the name of a Department employee. R. 351. Several incidents showed Yardley viewing pornography in the guard tower while on duty. R. 351. The amended complaint also alleged that Yardley had disseminated at least one copy of a videotape portraying similar events to those listed above to the spouse of a Department employee. R. 352.

Yardley received a pretermination hearing on August 9, 2001, before a Department Administrative Law Judge (ALJ). R. 384. At this hearing, Yardley called witnesses, introduced documentary evidence, and made closing arguments. R. 384. Yardley was also represented by counsel at the hearing. R. 384. Among other things, the Department ALJ reviewed the following: Yardley's personnel file (R. 354); the prior discipline imposed in March 2001 (R.354, ¶2); the mitigating effect of Yardley's positive performance evaluations (R. 364); the aggravating factor of Yardley's status as a certified officer (R. 364).

At this pretermination hearing, Yardley did not contest the numerous allegations of videotaped misconduct itemized in the amended administrative complaint of July 9, 2001. R. 362. Yardley instead argued that the videotape portrayed misconduct for which he had already been punished in the first administrative complaint. R. 362. The Department ALJ accordingly found that all of the factual allegations in the amended complaint were true. R. 362. The Department ALJ recommended that the Department terminate Yardley's employment. R. 354-66, 384-85.

After reviewing the ALJ's recommendation, the Department's Executive Director, Mike Chabries, terminated Yardley's employment in a Final Order entered November 5, 2001. R. 367-369.

Summary of Argument

This Court should dismiss Yardley's petition with prejudice because, under UAPA, Yardley's failure to make CSRB a party to this action deprives this Court of jurisdiction over this controversy. Although Yardley served his petition for review on CSRB, he did not name CSRB as a party in this proceeding, did not list CSRB as an additional non-captioned party in his brief as required by Utah R. App. P. 24(a)(1), and did not serve CSRB with a copy of his opening brief.

Even if this Court has jurisdiction over this controversy, the CSRB's decision should be affirmed because it was reasonable and rational. The CSRB correctly upheld Yardley's termination in all three aspects challenged by Yardley. *First*, CSRB correctly determined that the Department did not act inconsistently with its prior practice in terminating Yardley because he failed to make a prima facie showing of any inconsistency. *Second*, CSRB correctly concluded that Yardley was not deprived of due

process prior to his termination because he was given notice of the allegations against him and an opportunity to be heard at a pretermination hearing. *Third*, CSRB correctly concluded that a prior warning given to Yardley did not prevent the Department from terminating Yardley because the prior warning did not address the prior, undiscovered misconduct for which Yardley was terminated.

Argument

1. This Court lacks jurisdiction over Yardley's petition seeking judicial review of the CSRB's decision

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 Env'tl. 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").³

UAPA governs judicial review of the CSRB's administrative proceedings. UAPA requires that the CSRB be named as a respondent in the present action. Although Yardley served his petition for review on the CSRB, Yardley has not named the CSRB as a respondent. Yardley has not identified CSRB as an additional non-captioned party, as

³Utah Code Ann. §§ 63-46b-0.5 to -21 (West 2004).

required by Utah R. App. P. 24(a)(1). Yardley did not serve his opening brief upon CSRB. The jurisdictional time limit to bring a petition for judicial review against the CSRB has now passed. This Court therefore lacks jurisdiction to review the CSRB decision and should summarily dismiss Yardley'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). See 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, Yardley should have named both the Department and the CSRB as respondents.⁴

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).

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.⁵ In such cases, the requirement

⁴See, 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).

⁵See, 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).

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.⁶ 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).

By not naming the CSRB as a respondent, Yardley has thus failed to meet the requirements of UAPA. More precisely, Yardley 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). Yardley has thereby deprived this Court of jurisdiction.

Dicta from the Utah Supreme Court's recent decision in Harley Davidson v. Department of Workforce Services, 2005 UT 38, 116 P.3d 349, may at first blush appear contrary to this jurisdictional argument. In Harley Davidson, the Court stated that “regardless of whether a party seeks to invoke the jurisdiction of an appellate court under

⁶See, 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).

rule 3 or rule 14, the *only* jurisdictional requirement is the timely filing of the pleading initiating appellate review.” Id. at ¶14.

Despite this sweeping statement in dicta, the holding in Harley Davidson did not address jurisdictional errors perpetuated into the briefing stage of a case such as those perpetuated by Yardley. In Harley Davidson, all of the petition’s deficiencies were corrected well before the case reached the briefing stage. Id. at ¶5 (stating that the deficiencies were corrected within three days of the initial filing of the petition). Here, Yardley has not committed a mere pleading error at the outset of this case, but has perpetuated into the briefing stage a basic misinterpretation of UAPA’s jurisdictional requirement to name the decision-making agency as a party. In addition to initially failing to name CSRB as a party to his petition, Yardley has now failed to list CSRB as an additional non-captioned party, as required by Utah R. App. P. 24(a)(1), and failed to serve his opening brief upon CSRB.⁷ Accordingly, the limited holding in Harley Davidson does not apply in this case and the plain language requirement in UAPA does.

Harley Davidson is further inapplicable because the Court did not address two important considerations present here when it stated that it could find “no principled reason to treat agency petitions differently than other appeals.” 2005 UT 38 at ¶13. *First*, unlike a lower court which is bound by an order of reversal, modification, or remand because it is located within the hierarchy of the judicial branch of government, a state agency such as CSRB is part of the executive branch of government and only comes under a court’s jurisdiction when properly joined as a party to a particular controversy.

⁷Moreover, it appears that this Court does not consider CSRB to be a party, as demonstrated by this Court’s order of April 12, 2005, which was served upon Yardley and the Department but not to CSRB.

The Court in Harley Davidson did not discuss this inherent difference between an agency appeal and an appeal from a lower court.

Second, the right to judicial review of an agency decision is not a constitutional right, but a limited right created by statute. See Dep't of Env'tl. Quality v. Golden Gardens Water Co., 2001 UT App 173, ¶13, 27 P.3d 579. Absent statutory authority to review the actions of an administrative agency, this Court has no jurisdiction to review the agency action. Id. Where the legislature has evinced its intent to impose filing requirements, such as those in UAPA, upon a petition for judicial review, an appellate court's review of those requirements should be made in the context of this limited right to judicial review and not compared with the right to judicial review of a district court decision.

Because neither of these principled reasons was before the Harley Davidson Court, its pronouncements in that case are inapplicable here.

2. The CSRB's decision was reasonable and rational

Even if this Court has jurisdiction here, the CSRB's decision should be affirmed on the merits because it was reasonable and rational. The CSRB correctly upheld Yardley's termination in all three aspects challenged by Yardley. *First*, CSRB correctly determined that the Department did not act inconsistently with its prior practice in terminating Yardley because he failed to make a prima facie showing of any inconsistency. *Second*, CSRB correctly concluded that Yardley was not deprived of due process before his termination because he was given notice of the allegations against him

and an opportunity to be heard at a pretermination hearing. *Third*, CSRB correctly concluded that a prior warning given to Yardley did not prevent the Department from terminating Yardley because the prior warning did not refer to the prior, undiscovered misconduct for which Yardley was terminated.

Discipline for employee misconduct is within the sound discretion of the employing agency. Lucas v. Murray City Civ. Serv. Comm'n, 949 P.2d 746, 761 (Ut. Ct. App. 1997). CSRB review of an employing agency's personnel actions is a limited one. Utah Dep't of Corr. v. Despain, 824 P.2d 439, 443 (Utah Ct. App. 1991). By its own rules, CSRB must first determine whether the factual findings of the step 5 CSRB hearing officer are reasonable and rational under the substantial evidence standard. Utah Admin. Code R. 137-1-22(4)(a) (2003). CSRB must next determine whether the step 5 hearing officer correctly applied the relevant policies, rules, and statutes under the correctness standard. Utah Admin. Code R. 137-1-22(4)(b) (2003). Finally, CSRB must determine whether the step 5 decision is reasonable and rational based on the ultimate factual findings and correct application of relevant policies, rules, and statutes. Utah Admin. Code R. 137-1-22(4)(c).

Yardley concedes that the Department satisfied its initial burden of proving a factual basis for the allegations. Aplt. Brf. at 30. Yardley further concedes that the discipline was proportionate to his misconduct. Aplt. Brf. at 30. Yardley takes exception only with the three conclusions summarized above, basing his argument on Utah Code Ann. § 63-46b-16(4)(d) and -16(4)(h)(iii). These subsections provide that this Court shall grant relief only if it determines that Yardley has been substantially prejudiced by final agency action where the agency "has erroneously interpreted or applied the law" (subsection 63-46b-16(4)(d)) or if the agency action is "contrary to the agency's prior

practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency” (subsection 63-46b-16(4)(h)(iii)).

A. CSRB correctly determined that the Department did not act inconsistently with its prior practice because Yardley failed to make a prima facie showing of inconsistency

Yardley first contends that the Department acted inconsistently with its prior practice in terminating his employment because the Department did not similarly discipline employees about whom rumors of workplace affairs had circulated. Yardley’s argument fails because he applies an incorrect test for showing inconsistency.

This Court has held that a party asserting inconsistent agency action has the burden of making a prima facie showing of inconsistency. Kelly v. Salt Lake City Civil Serv. Comm., 2000 UT App 235, ¶13, 8 P.3d 1048. Inconsistent treatment “can only be found when *similar factual circumstances* led to a different result without explanation.” Id at ¶14 (emphasis added). If a party makes a showing of inconsistent treatment by a preponderance of the evidence, the burden of persuasion then shifts to the agency to explain its rationale for the inconsistency. Id. This Court’s review of that explanation will be for reasonableness and rationality. Id. Here, the burden of persuasion never shifted to the Department to offer an explanation, because Yardley never demonstrated a prima facie inconsistency in similar factual circumstances.

Rather, Yardley put on evidence in the step 5 hearing that rumors of off-duty co-worker affairs were treated differently than Yardley’s on-duty and off-duty sexual misconduct. Yardley now concedes that a rumor of a workplace affair is dissimilar to his

own videotaped misconduct, yet nevertheless should be considered a similar factual circumstance merely because it raises the *same concerns* as his own misconduct. Aplt. Brf. at 32-33. However, this argument improperly expands the test in Kelly for determining inconsistency. Only similar factual circumstances are relevant, not dissimilar factual circumstances which may raise the same concerns. The holding in Kelly does not intimate that dissimilar conduct raising the same concerns can support a showing of inconsistency nor does Yardley cite any authority for his expanded reading of Kelly. Thus, Yardley's argument fails by his own concession that the conduct is dissimilar.

Moreover, Yardley fails to demonstrate that a rumor of an off-duty workplace affair raises all of the same concerns as Yardley's on-duty misconduct. CSRB correctly noted that Yardley's on-duty masturbation actually prevented him from fulfilling his guard duties, a different and additional concern from the general negative impact upon the workplace potentially caused by a rumor of an affair.

Because Yardley's argument is based on an incorrect standard unsupported by case law, it should be rejected. Because rumors of workplace affairs constituted conduct factually dissimilar to Yardley's videotaped misconduct, CSRB correctly determined that Yardley never established a prima facie showing of inconsistency and thus the burden of persuasion never shifted to the Department to explain any inconsistency. Kelly, 2000 UT App at ¶13. Accordingly, CSRB's conclusion is reasonable and rational and should be affirmed.

B. CSRB correctly found no due process deprivation where Yardley was given notice of the allegations against him and an opportunity to be heard prior to his termination

Yardley next argues that he was deprived of due process because a complete investigation was not conducted nor were committee reviews used prior to the filing of the second administrative complaint. However, Yardley's argument fails because it would create additional due process requirements that are not supported by authority.

The Department's statutory due process requirements were met in this case before Yardley's termination. Utah Code Ann. § 67-19-18(5) sets forth those requirements: "A career employee may not be . . . dismissed unless . . . the department head or designated representative notifies the employee in writing of the reasons for the dismissal . . . [and] the employee has an opportunity to be heard by the department head or designated representative." Following this hearing, the employee may be dismissed "if the department head finds adequate cause or reason." Utah Code Ann. § 67-19-18(5)(e). These statutory requirements are consistent with Lucas v. Murray City Civil Serv. Comm., 949 P.2d 746, 755 (Utah Ct. App. 1997), where this Court held that a terminated employee was afforded due process where he (1) received written notice of the charges against him and (2) had a pretermination opportunity to respond to the charges.

Both requirements were met in this case. Prior to the step 4 hearing, Yardley received written notice of the allegations against him in the form of the amended administrative complaint. R. 350-52. At the hearing, Yardley called witnesses, introduced documentary evidence, and made closing arguments. R. 384. Yardley was also represented by counsel. R. 384. Because the statutory requirements of due process were met by this pretermination hearing, Yardley cannot claim that any other error

predating the hearing deprived him of due process. Because Yardley does not challenge that he was notified in writing of the allegations against him or that he was able to respond to the allegations at a pretermination hearing, he has in effect conceded that the statutory due process requirements were met.

Instead of addressing these statutory requirements, Yardley argues without supporting authority that the pretermination hearing did not satisfy due process because it did not functionally serve the purpose of the committee review process. This argument misstates the due process requirements and creates an additional requirement unsupported by authority. In any event, the pretermination hearing did serve the purpose of a committee review, because the Department's ALJ reviewed the very issues Yardley claims would have been assessed in the committee review: Yardley's personnel file (R. 354); the prior discipline imposed in March 2001 (R.354, ¶2); and mitigating and aggravating factors (R. 364). Yardley asserts he was materially harmed by the Department's failure to use committee reviews. Yet he fails to explain how he was harmed. Accordingly, Yardley suffered no due process violation.

Yardley's assertion that the lack of committee reviews was a constitutional violation that caused harm and his assertion that the Department was required by law to conduct a meaningful investigation are conclusory arguments made without authority and should be summarily rejected. See Marchant v. Park City, 771 P.2d 677, 682 (Utah Ct. App. 1989) (stating that this Court will not consider conclusory arguments without citation to authority); Utah R. App. P. 24(a)(9) (requiring arguments to be supported with citation to authority relied upon). Likewise, Yardley's argument that the investigation should have implicitly been meaningful and that a non-meaningful investigation violates due process are also made without supporting authority and should be rejected. In

addition, Yardley's argument regarding perceived inadequacies in the second investigation is really a challenge to the CSRB's factual finding that the investigation began and ended with the viewing of the videotape. Because Yardley has failed to marshal the evidence, he cannot challenge this factual finding. See Road Runner Oil, Inc. v. Bd. of Oil, Gas and Mining, 2003 UT App 275, ¶10, 76 P.3d 692 (requiring party challenging sufficiency of the evidence to marshal the evidence). In any event, any perceived irregularities with the investigation or the committee review process were cured when Yardley was given notice of the allegations against him and a meaningful opportunity to be heard *before his termination*.

CSRB correctly concluded that Yardley was not deprived of due process because he was given notice of the allegations against him and an opportunity to be heard at a pretermination hearing. Because Yardley has not demonstrated a due process violation CSRB's conclusion is reasonable and rational and should be affirmed.

C. CSRB correctly determined that the prior warning did not prevent the Department from terminating Yardley because it only referred to future conduct and not the prior, previously undiscovered misconduct for which Yardley was terminated

Finally, Yardley argues that the prior warning precluded his termination because it was in effect a promise that the Department would not take disciplinary action for previously occurring misconduct similar to that for which he was given the suspension. This argument fails because CSRB's contrary interpretation that the Department was not bound by the language of the warning is reasonable and rational. It is Yardley's interpretation, not the CSRB's, which is unreasonable and irrational.

CSRB concluded that the misconduct supporting termination was so much more egregious and “troubling” than the misconduct supporting the 15-day suspension that it could not be considered the “same type” of conduct. R. 567-71. Yardley’s 15-day suspension came for masturbating at least once in the guard tower and for videotaping himself and his wife having intercourse, after which the videos were somehow circulated to Department employees. Yardley was terminated, however, for multiple incidents of videotaped masturbation, both on and off duty, including masturbating in public places, which CSRB correctly noted could constitute violations of Utah law. R. 567. Yardley was also terminated for displaying his work phone number to solicit sexually oriented phone calls, displaying the names of women on his penis while he masturbated, and removing his clothing to masturbate naked in the guard tower. Because the conduct supporting termination is significantly more egregious than the conduct supporting the 15-day suspension, both in nature and number, and because this more serious misconduct was unknown to the Department at the time of the suspension, CSRB reasonably and rationally concluded that it was conduct of a different type. Particularly given the criminal implications of Yardley’s public masturbation, the misconduct supporting termination is sufficiently more serious from a public safety standpoint. Accordingly, CSRB acted reasonably and rationally when it labeled the more serious misconduct as categorically different from the conduct supporting the 15-day suspension. Yardley’s interpretation of the warning and the nature of the misconduct, on the other hand, is *unreasonable* because it would give him *carte blanche* immunity for substantial misconduct committed prior to the first administrative complaint.

Yardley’s interpretation of the warning language is further unreasonable in that it overlooks the warning’s application to future conduct only. Because the warning only

referred to *future* misconduct, it did not bind the Department with respect to any of Yardley's previous misconduct. The first administrative complaint stated: "You are hereby warned that should this type of misconduct reoccur in the future, we will be forced to consider severe disciplinary sanctions, including termination." R. 345. Two qualifiers are used for misconduct – "type" and "future." The warning on its face only addresses misconduct which is both of the same type *and* occurring in the future. By its grammatical construction, it says nothing of dissimilar misconduct, past or future. And it says nothing of past conduct, similar or dissimilar. The substance of the first administrative complaint itself did deal with past conduct, but the precise warning language relied upon by Yardley says nothing of undiscovered past conduct, similar or dissimilar to the misconduct in the first complaint.

Yardley's interpretation of the warning is unreasonable because it unduly focuses on the modifier "type," while ignoring "future." Yardley's analysis additionally overlooks the word "warned." Warn means "[to] make aware *in advance* of actual or potential harm, danger, or evil"; "to admonish as to action or manners"; "[t]o notify (a person) to go or stay away"; or "[t]o notify or apprise *in advance*." AMERICAN HERITAGE DICTIONARY (4th Ed. 2000, online at <http://www.bartleby.com/61/27/W0032700.html>) (emphasis added). When viewed in its entirety, the warning language objectively limits itself to future conduct only. Because the misconduct relied upon to terminate Yardley predated the first administrative complaint, the warning language did not preclude the Department from terminating Yardley for that misconduct. Because the warning language thus makes no promise regarding past misconduct which at the time was undiscovered, the CSRB was not unreasonable or irrational in concluding that the prior

warning had no binding effect on the Department in relation to the previously occurring misconduct.

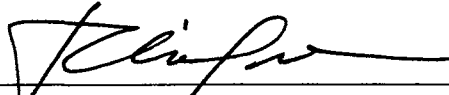
Conclusion

This Court should dismiss Yardley's petition with prejudice because Yardley's failure to make CSRB a party to this action deprives this Court of jurisdiction under UAPA. Yardley has never named CSRB as a party in this proceeding, he has not listed CSRB as an additional non-captioned party in his brief as required by Utah R. App. P. 24(a)(1), nor has he served CSRB with a copy of his opening brief. His failure to perfect his appeal at this stage of the proceedings warrants dismissal.

Even if this Court has jurisdiction over this controversy, the CSRB's decision should be affirmed because it was reasonable and rational. The CSRB correctly upheld Yardley's termination in all three aspects challenged by Yardley. First, CSRB correctly determined that the Department did not act inconsistently with its prior practice in terminating Yardley because he failed to make a prima facie showing of any inconsistency. Second, Yardley was not deprived of due process because, prior to his termination, he was given notice of the allegations against him and an opportunity to be heard. And, third, CSRB correctly concluded that a prior warning given to Yardley did not prevent the Department from terminating Yardley because the prior warning only

referred to future conduct and not to the prior, previously undiscovered misconduct for which Yardley was terminated.

Dated this 25th day of August, 2005



J. CLIFFORD PETERSEN

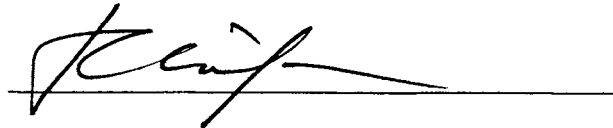
Assistant Attorney General

Attorney for Department of Corrections

CERTIFICATE OF SERVICE

This is to certify that I mailed TWO copies of the foregoing BRIEF OF RESPONDENT to the following this 25th day of August, 2005:

Blake Nakamura
Attorney for Kevin Yardley
142 East 200 South, Suite 312
Salt Lake City, Utah 84111



Addendum

the agency action, in whole or in part, is arbitrary, procedural, or in violation of subsequent agency action. U.C.A.1953, § 63-46b-14(3)(a). *Union State Tax Com'n*, 2000, 31 UT Adv. Rep. 31, 2000 UT Adv. Procedure ¶ 704.

Tax Commission in taxpayer's assets for last "final agency action" 30-day period for filing, where order indicated reached end of its denying reconsideration, and by precluding reconsideration, order denying affirming Commission's case regarding order left no issues for action was taken by 53, 63-46b-14(3)(a). *Utah State Tax Com'n*, 1999, 974 P.2d 284, 1999 UT 11. *Taxation* ¶ 1085.

Commission's attorney fee order that was appealed through Commission order in the same matter understood fee order did not change any instead acknowledged Commission denied request by inaction rather than order was not final, end of its decision issue when it failed to order. U.C.A.1953, § 63-46b-14(3)(a). *Barker v. Utah Pub. Serv. Co.*, 1970 P.2d 702, 338 UT 2d 1042. *Telecommunications* denied. *Telecommunications* denied.

sent nine days after that officer reconsidered officer had read email it had not persuaded officer, was not "written" of Utah Administrative Code, it was not sufficiently specific request for reconsideration as matter of law 20 and his petition for review within 30 days of deemed final. U.C.A.1953, § 63-46b-14(3)(a). *Lopez v. State*, 1992, 834 P.2d 568, 2d 1042. *Administrative Law and Procedure* ¶ 723; *Officers And* 45(3).

7. Jurisdiction

Agency has jurisdiction to act on motion for reconsideration after statutory 20-day presumptive denial period has passed. U.C.A.1953, § 63-46b-13(3)(b). *McCoy v. Utah Disaster Kleenup*, 2003, 65 P.3d 643, 467 Utah Adv. Rep. 23, 2003 UT App 49. *Administrative Law And Procedure* ¶ 483.

Statute deeming the State Tax Commission to have denied a motion not ruled upon within 20 days of submission did not apply to motion for reconsideration, and thus, Commission had jurisdiction to grant, four months after the motion was submitted, Collection Division's petition for reconsideration of Commission's final decision dismissing taxpayer from assessment action. U.C.A.1953, § 63-46b-13(3)(b). *Prince v. Collection Div. of State Tax Com'n*, 1999, 974 P.2d 284, 1999 UT 11. *Taxation* ¶ 1085.

8. Appeal

Where State Tax Commission issued order on taxpayer's reconsideration request on January 15, taxpayer's appeal filed on February 12 was timely, despite Commission's claim that motion for reconsideration had been deemed denied more than 30 days earlier. U.C.A.1953, § 63-46b-13(3)(b), 63-46b-14(3)(a). *Knowledge Data Systems v. Utah State Tax Com'n Auditing Div.*, 1993, 865 P.2d 1387. *Taxation* ¶ 1319.

Appeal from order of Tax Commission filed within 30 days of Tax Commission's denial of petition for reconsideration was timely, even though it was more than 30 days after the petition was deemed denied by virtue of Commission's failure to make a timely ruling. U.C.A.1953, § 63-46b-13(3)(b). *Orton v. Utah State Tax Com'n, Collection Div.*, 1993, 864 P.2d 904. *Taxation* ¶ 493.3.

§ 63-46b-14. Judicial review—Exhaustion of administrative remedies

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3)(a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Laws 1987, c. 161, § 270; Laws 1988, c. 72, § 24.

Cross References

Division of Facilities Construction and Management, dispute resolution process, see § 63A-5-208.

Library References

Administrative Law and Procedure ¶ 662, 722.

Westlaw Key Number Searches: 15Ak662; 15Ak722

C.J.S. Public Administrative Law and Procedure §§ 185, 204, 209.

Court of Appeals examines appeal from lower court's review of administrative decision as if appeal had come directly from agency; Court of Appeals need not defer to lower court's findings and conclusions. *Matter of License of Topik*, 1988, 761 P.2d 32, certiorari denied 773 P.2d 45. *Administrative Law And Procedure* ¶ 683

In reviewing administrative agency's interpretation of general law, Court of Appeals applies correction of error standard of review, giving no deference to agency's interpretation. *Matter of License of Topik*, 1988, 761 P.2d 32, certiorari denied 773 P.2d 45. *Administrative Law And Procedure* ¶ 796

§ 63-46b-16. Judicial review—Formal adjudicative proceedings

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2)(a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Laws 1987, c. 161, § 272; Laws 1988, c. 72, § 26.

Cross References

Taxation, additional district court jurisdiction, see § 59-1-601.

Library References

Administrative Law and Procedure ¶676, 725, 754 to 765.	C.J.S. Public Administrative Law and Procedure §§ 197, 206, 212, 218 to 219, 223 to 225, 244.
Westlaw Key Number Searches: 15Ak676; 15Ak725; 15Ak754 to 15Ak765.	

Research References

Treatises and Practice Aids

Accountant's Liability § 10:2.6, Appeals.

United States Supreme Court

Review of agency decisions,

In general,

Administrative agencies, level of deference required for tariff classification ruling, see *United States v. Mead Corporation*, U.S.2001, 121 S.Ct. 2164, 533 U.S. 218.

Final agency action, environmental protection, revisions to national ambient air quality standards, delegation of legislative power, see *Whitman v. American Trucking Associations, Inc.*, U.S.Dist.Col.2001, 121 S.Ct. 903, 531 U.S. 457.

Federal-question jurisdiction, supplemental jurisdiction over state claims, deferential review of state administrative findings, see *City of Chicago v. Intern. College of Surgeons*, U.S.Ill.1997, 118 S.Ct. 523, 522 U.S. 156.

Judicial review, agency discretion, allocation of funds from lump sum appropriations, notice and comment procedures, judicial deference, see *Lincoln v. Vigil*, U.S.N.M.1993, 113 S.Ct. 2024, 508 U.S. 182, 124 L.Ed.2d 101, on remand 2 F.3d 1161.

Ripeness doctrine, judicial review of administrative actions, evaluation of fitness of issues and hardship to parties, exceptions, see *National Park Hospitality Association v. Department of the Interior*, U.S.D.C.2003, 123 S.Ct. 2026, 538 U.S. 803.

Agency interpretation,

Judicial deference to agency construction of regulations, applicability of federal regulations to railroad warning devices installed with federal funds, administrative law, see *Norfolk Southern Railway Company v. Shanklin*, U.S.Tenn. 2000, 120 S.Ct. 1467, 529 U.S. 156.

Exhaustion,

Administrative review, exhaustion of remedies, mandate of reviewing court, silence of statute or agency rules, see *Darby v. Cisneros*, U.S.S.C.1993, 113 S.Ct. 2539, 509 U.S. 137, 125 L.Ed.2d 113.

Exhaustion of administrative remedies, agency rejection of claim after commencement of suit but before substantial progress, see *McNeil v. U.S.*, U.S.Ill.1993, 113 S.Ct. 1980, 508 U.S. 106, 124 L.Ed.2d 21.

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