

2005

# Kevin Yardley v. Utah Department of Corrections : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KEVIN YARDLEY,

Petitioner,

v.

UTAH DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 20050055-CA

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**BRIEF OF PETITIONER**

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THIS IS A PETITION FOR JUDICIAL REVIEW OF A DECISION  
AND FINAL AGENCY ACTION FROM THE UTAH  
CAREER SERVICE REVIEW BOARD

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## **JURISDICTION**

This is a petition for judicial review of a final order resulting from a formal adjudicative proceeding before the Utah Career Service Review Board. This Court has jurisdiction over the petition pursuant to Utah Code Ann. § 78-2a-3(2).

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

The issues for judicial review in this petition are:

- A. Whether the Career Service Review Board (CSRB) erred in upholding the Department's termination of Mr. Yardley's employment after finding that the written warning, the Department previously issued Mr. Yardley pursuant to its own policy was not enforceable and that the warning did not apply to the conduct for which Mr. Yardley was terminated.
- B. Whether the CSRB erred in upholding the Department's termination of Mr. Yardley's employment by finding that although the Department did not follow its practice of utilizing committee reviews in terminating Mr. Yardley, the Department nevertheless fulfilled the fundamental requirements of due process.
- C. Whether the CSRB erred in upholding the Department's termination of Mr. Yardley's employment after finding that the Department's investigation of the allegations against Mr. Yardley was in accordance with their practice of conducting an investigation as part of the disciplinary process.
- D. Whether the CSRB erred in upholding the Department's termination of Mr. Yardley's employment in finding that the Department, pursuant to its own policy,

acted consistent with similar disciplinary actions it has previously taken in terminating Mr. Yardley's employment.

Standard of Review: This Court reviews an agency's application of its own policies for reasonableness and rationality, according some, but not total deference to the agency. *Lunnen v. Utah Department of Transportation*, 886 P.2d 70 (Utah App. 1994).

Preservation of Issue on Appeal: The Utah Career Service Review Board issued its Decision and Final Agency Action on December 23, 2004. Mr. Yardley filed his Petition for Review of Final Agency Action with this Court on January 19, 2005.

### STATEMENT OF THE CASE

Mr. Yardley was a state career service employee employed by the Utah Department of Corrections (Department) as a correctional officer. Approximately three months after he was disciplined for sexual misconduct that he recorded on a video tape, he was notified by the Department of their intent to terminate his employment for sexual misconduct that he recorded on a video tape that predated his prior discipline. Mr. Yardley challenged the Department's action and was afforded a pre-termination proceeding. Following the proceedings, Mr. Yardley was served a Final Order from the Department notifying him that his employment was terminated. Mr. Yardley challenged the termination through the Utah Career Service Review Board. Following an evidentiary hearing before a hearing officer, his termination was upheld. Mr. Yardley appealed the hearing officer's decision to the Career Service Review Board which upheld the hearing

officer's decision. Mr. Yardley now seeks judicial review of the Career Service Review Board's decision.

### **STATEMENT OF FACTS**

For a number of years, rumors were being discussed at the Department's Central Utah Correctional Facility (CUCF) that video tapes were being circulated that contained images of Mr. Yardley and his wife engaged in sexual conduct. (RT.299:68). In October 2000, the Department received information that the video tapes that were the subject of the rumors had surfaced and they contained not only images of Mr. Yardley and his wife engaged in sexual conduct, but also Mr. Yardley masturbating in a guard tower at CUCF, and images of CUCF staff members walking about CUCF property. (RT.299:68). Gary Ogilvie, a Department investigator, was assigned to investigate the information concerning the video tapes. (RT. 299:70). As part of the investigation, Mr. Ogilvie interviewed Mr. Yardley and Travis Clark, another employee at CUCF who supposedly had information about the video tapes. (R.370; RT.322:62, 68). During the interview, Mr. Yardley acknowledged that the video tapes included images of him masturbating, engaging in sexual conduct with his wife and masturbating in the guard tower. (R. 374-377). Prior to being interviewed by Mr. Ogilvie, Mr. Clark informed CUCF administration that the video tapes contained images of Mr. Yardley masturbating with various objects, masturbating in the guard tower on CUCF property, engaging in sexual conduct with his wife and of third parties in a non-sexual context. (RT. 322:12-15). Mr. Clark informed CUCF administration that he had a copy of a video tape. (RT. 322:26).



Mr. Clark provided the same information to Mr. Ogilvie during his interview that he provided to CUCF administration. (RT. 322:24-25). Mr. Ogilvie completed a written report of his interviews that discussed Mr. Yardley's conduct that both parties disclosed. (R. 372).

During his investigation, however, Mr. Ogilvie never obtained the video tapes because he was under the belief that they were destroyed. (RT. 299:101). He acknowledged that he nevertheless should have asked for the video tapes. (RT. 299:102). Furthermore, Mr. Ogilvie learned through his involvement with the current matter that resulted in Mr. Yardley's termination that other video tapes did exist, but he acknowledged that he simply did not ask for the video tapes. (RT. 299:102). According to Travis Clark, when Mr. Ogilvie interviewed him, he had a video tape and he was prepared to produce the video tape, but was surprised that Mr. Ogilvie did not ask for it since he told administration that he had a video tape. (RT. 322:25-26). Further, Mr. Clark believed that other video tapes existed and if asked he would have informed Mr. Ogilvie of his belief. (RT. 322:26).

As a result of Mr. Ogilvie's investigation, on January 12, 2001, the Department issued Mr. Yardley an Administrative Complaint that notified him of their intent to suspend him for 15 days without pay. (R. 344-346). The Administrative Complaint contained the following language: "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). On March 5, 2001, a Final Order was

executed implementing the 15 day suspension without pay sanction and noted: “Mr. Yardley’s failure to contest the allegations and sanctions is considered agreement with the allegations and acceptance of the sanction.” (R. 347). According to Scott Carver, then the Department’s Director of Institutional Operations, the warning issued to Mr. Yardley is used pursuant to Department policy and relied upon by the Department to determine subsequent levels of discipline. (RT.304:12-14, Addendum A). The Department’s intent in issuing the warning is to correct employee misconduct, but if not corrected, the warning is relied upon to determine subsequent levels of discipline for the employee. (RT. 304:15-16). The Department uses the warning to set a standard of conduct that the Department expects from the employee and, in turn, what the employee can expect from the Department. (RT. 304:16).

As part of correcting Mr. Yardley’s misconduct identified in the January 12, 2001, Administrative Complaint, he was required to participate in a “performance plan” to monitor and correct his behavior. (RT. 302:33-37). Mr. Yardley was performing well in the performance plan. (RT. 302:39). The performance plan is used by the Department to bring closure to the matter. (RT.302:34-35).

Despite Mr. Yardley’s performing well in the performance plan, and the Department’s intent to bring closure to the matter by implementing the performance plan, Mr. Yardley was served on June 14, 2001, with another Administrative Complaint. It was executed by Mr. Carver and notified Mr. Yardley of the Department’s intent to terminate his employment that is the subject of this Petition. (R. 353). The Administrative

Complaint was subsequently amended by Mr. Carver on July 9, 2001. (R. 350-352). The Administrative Complaint was not based upon alleged misconduct that occurred after his 15 day suspension wherein Mr. Yardley was warned by the Department that they would consider termination if he committed the same misconduct in the future. Rather, it was based upon alleged misconduct that predated not only the January 12, 2001, Administrative Complaint, but predated even the October 2000 commencement of the investigation on that Complaint. According to the Amended Administrative Complaint, the last date of alleged misconduct is September 11, 2000. (R. 350-352).

Upon learning of the Administrative Complaint notifying Mr. Yardley that the Department intended to terminate his employment, Beverly Thomas, the Deputy Warden who was administering Mr. Yardley's performance plan, reacted with "shock." (RT.302:41). Ms. Thomas was shocked because the administration supervising Mr. Yardley had not been consulted prior to Mr. Yardley being served with the Administrative Complaint leading to her belief that the Department was not aware that the matter had already been addressed. (RT. 302:41). Ms. Thomas testified that based upon her knowledge of Mr. Yardley's prior discipline and her review of the current matter that resulted in Mr. Yardley's termination that is the subject of this petition, Mr. Yardley was terminated for the same type of conduct and information that served as the basis for his prior discipline. (RT. 302:47). Ms. Thomas testified: "Right. I based that on the Amended Complaint that was filed in June and July, because they referred all the incidents that we were addressing back in October." (RT. 302:47). Mr. Ogilvie, also

testified that the conduct on the video tapes for both Administrative Complaints were of the same type. (RT.299:107-108). Indeed, even the referral from a Warden Smith to investigate the complaint that resulted in Mr. Yardley's termination commented that the matter was related to the prior investigation. (RT.299:78).

According to Mr. Carver, the Department maintains a policy and practice of conducting an investigation of alleged acts of misconduct prior to creating the administrative complaint that initiates the disciplinary process. (RT. 304:6-11). The same was also testified to by the Department's then Executive Director, Mike Chabries. (RT. 301:24-25). Pursuant to the Department's policy and practice, on June 1, 2001, a referral was sent to Gary Ogilvie to investigate the allegations that led to the June 14, 2001, Administrative Complaint that resulted in Mr. Yardley's termination. (RT.299:110). On June 11, 2001, Mr. Ogilvie obtained a video tape that was provided by Brian Barker who made the complaint, but did not speak with him. (RT.299:111). On June 12, 2001, Mr. Ogilvie contacted and spoke with Brian Barker. However, it was not an interview that was done as part of an investigation, but rather to simply get to know Mr. Barker. (RT. 299:111). On the same day Mr. Ogilvie spoke with Mr. Barker, he reviewed the video tape acquired from Mr. Barker with Mr. Gallegos. (RT. 299:112-113). After viewing the video tape with Mr. Gallegos, Mr. Ogilvie was instructed by Mr. Gallegos to suspend his investigation and to not proceed further, and that the investigation would be handled by the Attorney General's Office. (RT. 299:82). Mr. Ogilvie acknowledged that up to June 12th he had not really conducted any investigation, but only picked up the video tape

from Mr. Barker and spoke with him. (RT. 299:131). Mr. Ogilvie testified that he did not really start the investigation until July 2, 2001, two weeks after the Amended Administrative Complaint was already served upon Mr. Yardley. (RT.299:130). The Attorney General's Office did conduct an investigation, but their investigation was only assigned to an investigator on June 14, 2001, the same day the Department served Mr. Yardley with the Administrative Complaint notifying him of their intent to terminate his employment. (RT. 299:25).

The Department maintains established procedures for processing disciplinary actions against employees. (RT 304:7-9). The Department first conducts an investigation into the allegations the reports of which are then forwarded through committee reviews. (RT. 304:8-10). The first review is at the "division level" that includes the Director or Institutional Operations, the wardens in the subject employee's chain of command and bureau chiefs. (RT:304:10). At the division level, the committee discusses the facts of the case, related issues and aggravating and mitigating circumstances that include a discussion of prior disciplines and warnings issued to the employee. (RT. 304:10-14). After discussing the various issues, the committee makes a recommendation for discipline. (RT. 304:11). The case then goes through another review at the Department level. (RT. 304:11). The Department committee includes a representative from each division within the Department, including a representative from human resources. (RT. 304:11). The Department committee reviews the consistency of the discipline recommended by the committee at the division level. (RT. 304:11).

According to Mr. Carver, Mr. Yardley's case should have followed the Department's procedures and should have been subject to the committee reviews. (RT. 304:18-19). That process would have allowed the Department to scrutinize the propriety of the decision to terminate his employment. (RT. 304:18). However, the Department did not follow its procedures and, consequently, Mr. Yardley's case did not go through any committee reviews. (RT.302:41-43). According to Beverly Thomas, the warden over Mr. Yardley, the entire administration that she is apart of was completely unaware of the Department's decision to terminate Mr. Yardley and they were not consulted consistent with Department procedures. (RT. 302:41). According to Ms. Thomas, such an event has never occurred in her 20 years with the Department. (RT. 302:42).

### **SUMMARY OF THE ARGUMENT**

What occurred in this case became fairly clear once all the evidence regarding the Department's termination of Mr. Yardley's employment was heard. The Department terminated Mr. Yardley's employment after they viewed images of Mr. Yardley engaged in sexual conduct recorded on a video tape. However, apparently because of the offensive nature of the images, the Department acted hastily and disregarded their own procedures that would have ensured proper consideration and handling of the termination. As a consequence, the Department denied Mr. Yardley due process resulting in a fundamentally unfair termination.

Several months prior to being terminated, the Department disciplined Mr. Yardley for sexual conduct that he recorded on video tape that involved images of himself

masturbating, some of which occurred in a guard tower, and engaging in sexual conduct with his wife. The investigation was less than thorough and it was evident. No video tapes were requested or recovered, although they existed, and the extent of the images and the circulation of the video tapes were not pursued. Nevertheless, the Department preserved Mr. Yardley's employment, imposed a 15 day suspension of his employment and issued him a broad warning. Contained in the Administrative Complaint, the Department warned Mr. Yardley that if he engaged in the "type of misconduct" in the future, the Department would consider terminating his employment. The discipline was finalized in a final order dated March 5, 2001, and the terms of the discipline thereafter became an enforceable term of the employment relationship between the Department and Mr. Yardley. After being disciplined, Mr. Yardley committed no further acts of misconduct and was participating and doing well in a performance plan the Department implemented to correct his misconduct and bring closure to the incident.

On June 14, 2001, the Department served another administrative complaint on Mr. Yardley that was amended on July 9, 2001. It informed Mr. Yardley of the Department's intent to terminate his employment. The basis that was identified were images of Mr. Yardley engaged in masturbation with various objects and in a guard tower that were recorded on video tape. The complaint noted that it was for acts that occurred after 1995 and 1998, the dates noted on the first complaint, but made no mention of any distinction in the "type of misconduct" from the conduct relied upon by the first complaint. Furthermore, the dates of the acts relied upon, while subsequent to 1995 and 1998, did not

occur after the first complaint that warned Mr. Yardley of a termination if he committed the same type of misconduct in the future. In fact, the last date relied upon is September 11, 2000, which not only predates the first complaint, but even the investigation on the first complaint. By terminating Mr. Yardley's employment for the same type of conduct for which he was previously disciplined, and for conduct that did not occur after his prior discipline, the Department fundamentally violated the warning resulting in an unlawful termination of Mr. Yardley's employment.

Mr. Yardley challenged his termination through the Career Service Review Board. During the evidentiary hearing, Mr. Yardley learned that the Department failed to follow its procedures in handling his case in two principle regards. Specifically, the Department failed to conduct an investigation prior to initiating the disciplinary procedures against him and failed to utilize committee reviews to review his case. As a result, the Department failed to investigate whether the conduct for which he was terminated was conduct that he was already disciplined for, and Mr. Yardley's case was denied the benefit of committee reviews where his supervising warden would have stated that the conduct was already addressed in his prior discipline.

Finally, the evidence presented at the hearing persuasively demonstrated that the Department has not acted consistently in its disciplines when compared to Mr. Yardley's case.



## ARGUMENTS

Pursuant to Utah Code Ann. § 63-46b-16, an appellate court shall grant relief only if the employee has been substantially prejudiced by, inter alia, an employer' erroneous interpretation or application of the law or if the employer acted inconsistent to its own rules or prior practice, unless the employer can justify the inconsistency by presenting facts or reasons that provide a fair and rational basis for the inconsistency. Utah Code Ann. § 63-46b-16(d) and (h). In this case, Mr. Yardley has been substantially prejudiced by the Department when, in terminating his employment, they violated a legally enforceable prior warning they issued to Mr. Yardley and by violating their own procedures and practices without justification.

### **THE WARNING IS AN ENFORCEABLE TERM OF MR. YARDLEY'S EMPLOYMENT RELATIONSHIP WITH THE DEPARTMENT THAT THEY VIOLATED IN TERMINATING HIS EMPLOYMENT.**

In *Kent v. Department of Employment*, 860 P.2d 984 (Utah App. 1993), this Court noted that "[t]he purpose of due process is to prevent fundamental unfairness." *Id.* at 987. The Utah Supreme Court addressed that notion as it specifically refers to the obligations that a public employer must honor and act in accordance with in managing its employees. Relying and adopting the holding from a Washington Supreme Court case, the Court held:

Therefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe

that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises.

*Thurston v. Box Elder County*, 835 P.2d 165, 169 (Utah 1992).

When the Department first disciplined Mr. Yardley on March 5, 2001, prior to terminating his employment they included a warning in the Administrative Complaint that led to the March 5, 2001, discipline that 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. 344). After receiving the Administrative Complaint, Mr. Yardley did not contest the allegations contained therein resulting in an acceptance of the discipline. (R. 347). Thereafter, Mr. Yardley was required to participate in a performance plan that was intended to correct his misconduct and close the incident. (RT. 302:34-39). The warning was included as part of the discipline process pursuant to Department policy and relied upon by the Department to determine the level of subsequent discipline, if necessary. (RT. 302:13-15). The Department uses the warning to set a standard of conduct that it expects from the employee and what the employee can expect from the Department. (RT. 302:13-15). Accordingly, by disciplining, but preserving Mr. Yardley’s employment and warning him what the Department would do should he commit the type of misconduct in the future, the Department created an “atmosphere of job security and fair treatment with promises of specific treatment in specific situations”. As a consequence, pursuant to *Thurston*, the Department assumed “an obligation of treatment in accord with those written promises”

with the warning becoming an “enforceable component” of Mr. Yardley’s employment relationship with the Department.

The CSRB’s ruling that the warning was “simply an attempt by the Department to express its expectation concerning [Mr. Yardley’s] future behavior” is directly contrary to the holding in *Thurston*. As the *Thurston* Court stated: if the “employer, for whatever reason” creates an “enforceable component” of the employment relationship, the employer is obligated to act in accordance with and honor that component. Accordingly, the CSRB’s ruling that the warning was only an expression of expectation of future behavior is contrary to law and, therefore, is not reasonable nor rational.

Furthermore, the reasoning the CSRB used to conclude that the warning is only an expression of expectation of future behavior substantively undermines its ruling. The CSRB reasoned that the warning was only an expression of expectation because Mr. Yardley never fully disclosed what was on the video tapes during his interview and investigation that led to his first discipline. Beyond the fact that the record reflects that Mr. Yardley was cooperative in the interview and answered every question put to him. (R. 373-377). The CSRB’s reasoning not only shifts the burden of the investigation from the Department and the investigator to the subject being investigated<sup>1</sup>, but also conditions the enforcement of any terms of the employment relationship not upon the law, but upon what the employee being investigated discloses. The *Thurston* decision did not provide

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<sup>1</sup> During an interview, the subject is only required to answer all questions honestly. *See, In Re Grand Jury Subpoenas v. United States of America*, 40 F.3d 1096 (10<sup>th</sup> Cir. 1994).

for such an exception to its holding. The opposite is true. Once the employer creates the atmosphere of fair treatment, any promises therefrom become binding thereby obligating the employer to act in accordance with those promises.

With the warning being an enforceable component of Mr. Yardley's relationship with the Department, the Department was required to act in accordance with its terms. It is undisputed that Mr. Yardley did not commit any of the conduct for which he was terminated after he was issued the warning. If that were the case, the warning would have clear application justifying his termination. After all, he was warned. The opposite is true, however. Mr. Yardley committed no further similar acts or any acts of misconduct and was performing well in the performance plan that he was required to participate in following the first discipline. (RT. 302:38-39). Indeed, according to the Amended Administrative Complaint, Mr. Yardley was being terminated for conduct that predated the first Administrative Complaint. The date of the last conduct identified was September 9, 2000, four months prior to first discipline. (R. 350, 351, 352). Thus, in determining whether the Department acted in accordance with the warning, the issue is whether the type of conduct for which Mr. Yardley was terminated is of the type for which he was previously disciplined. If it is of the same type, then the Department acted contrary to the warning because they promised to only consider terminating his employment if he committed the same type of conduct in the future.

During the evidentiary hearing, the Department contended that the conduct for which Mr. Yardley was terminated was different from the type of conduct for which he

was previously disciplined and the CSRB agreed.<sup>2</sup> However, the Department's position and the CSRB's ruling do not comport with the common meaning of the language used in the warning and ultimately are not supported by evidence. Based upon the language used in the warning, the issue is not whether the conduct was the same or identical to the conduct for which Mr. Yardley was previously disciplined. Rather, the issue is whether the conduct was of the same "type." Thus, the conduct could very well be different or dissimilar. However, if the conduct for which Mr. Yardley was terminated was the same "general character" or has a "common trait or characteristic" to the conduct for which he was previously disciplined, then the conduct for which he was terminated is the same type that he was previously disciplined for. *American Heritage Dictionary*, 3<sup>rd</sup> Ed., Houghton Mifflin Co., 1992.

A review of the evidence demonstrates that the conduct for which Mr. Yardley was terminated was indeed the same type of conduct for which he was previously disciplined. During the hearing, the Department called Gary Ogilvie as a witness. Mr. Ogilvie is a Department investigator who was involved in the first investigation of Mr. Yardley and the current matter. (RT. 299:67-70, 76-77). During that investigation, Mr. Ogilvie was made aware of rumors that were circulating around the Department that a video tape existed containing images of Mr. Yardley masturbating in a guard tower, engaging in sexual conduct with his wife and also images of Department employees in non-sexual

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<sup>2</sup> On page 7 of the CSRB Decision and Final Agency Action, the CSRB erroneously quotes the warning using the word "kind" instead of "type".

contexts. (RT. 299:68). Mr. Ogilvie further learned that the images were on two video tapes, one dated in 1995 and the other in 1998. (RT.299:71-72). Neither video tape was recovered or reviewed by Mr. Ogilvie. (RT. 299:72). The 1995 video tape was accidentally distributed by Mr. Yardley's to another employee of the Department and was never recovered, but is believed to have been copied and distributed to others by that employee. (R. 374). The 1998 video tape was distributed to Travis Clark, another Department employee, who returned it to Mr. Yardley who then destroyed it. (RT. 299:72-73). During his interview with Mr. Yardley, Mr. Ogilvie was informed that the video tapes contained images of himself masturbating, engaging in intercourse with his wife and masturbating in a guard tower. (RT. 373-377). Evidently, Mr. Ogilvie was satisfied with Mr. Yardley's general verification of the sexual acts. Mr. Ogilvie did not ask Mr. Yardley for any details of how he committed the sexual acts, the number of times the acts were committed or even whether video tapes were copied and continued to be circulated. (R. 373-377).

In the current case, Mr. Ogilvie testified that after viewing the video tape he believed that it contained images that were different from those that he was aware of from his first investigation. (RT. 299:81). Mr. Ogilvie created a written outline that describes the images contained on the video tape that he recovered from Brian Barker, who originated the complaint. (RT.299:79-80,84-85). The descriptions describe a series of images of Mr. Yardley masturbating with various objects, some of which occurs in the guard tower, and images of third parties in a non-sexual context. (R. 333-335). The

descriptions created by Mr. Ogilvie are consistent with the testimony of Jesse Gallegos, then the Department's Deputy Director, who also testified that the video tapes contained images of Mr. Yardley masturbating with various objects. (RT. 299:82).

In comparison, the images of Mr. Yardley on the video tape are the same type of image that he was previously disciplined over. They are acts of masturbation recorded on video tape. The images are of the same "general character" and certainly share a "common trait or characteristic" through Mr. Yardley's behavior. The fact that the images on the video tape showed Mr. Yardley masturbating with different names on his penis or with various objects does not change the "type" of conduct. The act of masturbation is the general character of the images that is also the common trait in the conduct for which he was first disciplined and subsequently terminated. Indeed, Mr. Clark testified that the images on the video tapes that he was questioned about by Mr. Ogilvie during the first investigation contained images of Mr. Yardley's masturbating with various objects. (RT.322:13-15). Ultimately, the evidence support that not only was the conduct in Mr. Yardley's first discipline the same type of conduct for which he was terminated, the video tapes are all part of the same conduct and basis for his first discipline.

Furthermore, beyond actual comparisons of the conduct, the two witnesses who were aware of the conduct in the first discipline against Mr. Yardley and his termination testified that the conduct in both instances were the same type. Beverly Thomas, Mr. Yardley's supervising warden, and Mr. Ogilvie each testified that the conduct in both

cases were the same type, but different dates. (RT. 299, 108-109; 302:45-47). The CSRB ruling was critical of the testimony from both witnesses saying that the testimony was taken out of context and any reliance on their testimony was misplaced. (CSRB Final Order p. 14). However, the testimony from Ms. Thomas and Mr. Ogilvie was in response to the very issue at hand: was the conduct for which Mr. Yardley was terminated the same type of conduct for which he was previously disciplined. Thus, the context of their testimony is precisely what is at issue and was not taken out of context.

Finally, the CSRB concludes their ruling by noting that if they were to rule to the contrary it would encourage employees to withhold information to be protected from subsequent discipline. The CSRB's reasoning is myopic and misguided. The warning was drafted by the Department, not Mr. Yardley. If the Department wanted to preserve the option to further discipline Mr. Yardley, or any employee, they need only be more circumspect in drafting the warning to make clear that the employee would be subject to further discipline if the Department learns of other conduct not disclosed. Evidently, in Mr. Yardley's case, the Department chose not to do so and instead, "for whatever reason," chose to draft a broad warning that they must now act in accordance with.

It is undisputed that the conduct for which Mr. Yardley was terminated predated his first discipline that resulted in the written warning at issue. The only dispute is whether the conduct was of the same type for which Mr. Yardley was previously disciplined. The CSRB ruling that the conduct was not the same type is not reasonable nor rational. The conduct was of the same kind and class and shared common traits and



general character. Consequently, the evidence strongly supports that the conduct for which Mr. Yardley was previously disciplined and the conduct for which he was terminated was a pattern of conduct that shared common traits all of which were copied on video tape. As an enforceable component of Mr. Yardley's relationship with the Department, the Department was obligated to act in accordance with the warning. By terminating his employment in a manner contrary to the warning, the Department violated an enforceable term that is part of the conditions of Mr. Yardley's employment. The Department's termination of Mr. Yardley's employment was therefore fundamentally unfair and consequently a violation of his due process rights.

**THE DEPARTMENT FAILED TO FOLLOW ITS OWN  
POLICIES AND PROCEDURES THEREBY VIOLATING  
MR. YARDLEY'S RIGHT TO DUE PROCESS.**

In processing Mr. Yardley's termination, the Department violated his due process rights in two fundamental respects. First, the Department failed to follow its established procedure of using committee reviews in the disciplinary process. Second, the Department failed to follow its procedure of conducting an investigation of the allegations prior to initiating the disciplinary process. In reviewing the Department's actions, the CSRB ruled that although the Department failed to follow its practice of using committee reviews in terminating Mr. Yardley's employment, the Department nevertheless met the "fundamental requirements" of due process. Therefore, the CSRB concluded the Department's failure to use committee reviews did not violate Mr. Yardley's due process rights. However, the findings that the CSRB's ruling relies upon

and the reasoning that it uses to conclude that the fundamental requirements of due process were met are not reasonable nor rational. Furthermore, the CSRB's ruling fails to consider the harm Mr. Yardley suffered as a consequence of the Department failing to use committee reviews. Similarly, the CSRB's finding that the Department conducted an investigation is not supported by the evidence.

**A. FAILURE TO USE COMMITTEE REVIEWS:**

In making its ruling, the CSRB did not take issue with whether the Department was required to use committee reviews in terminating Mr. Yardley's employment. For good reason. The law is well established that a public employer must adhere to its policies, procedures and practices in disciplinary proceedings against an employee. *Thurston*, 835 P.2d 165 (Utah 1992). As the *Thurston* Court recited: "Once an employer announces a specific policy or practice, especially in light of the fact that he expects the employees to abide by the same, the employer may not treat its promises as illusory." *Id.* at 169. (Citing *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984).

Rather, the CSRB found that because Mr. Yardley was afforded a pretermination proceeding where he was able to raise the issues that would be taken up in committee reviews, his due process rights were protected. The CSRB relied upon *Lucas v. Murray City*, 949 P.2d 746 (Utah App. 1997) where this Court held that an employer's strict compliance with its policies and procedures are not necessary where the employer otherwise fulfills the "fundamental requirements" of due process. The CSRB's reliance upon *Lucas* is misplaced.

In *Lucas*, this Court found that although the Department did not provide Lucas with written notice of the charges, he did receive actual notice of the charges and was afforded a pretermination hearing where he addressed those charges. Thus, the principled purpose in providing written notification of the charges was met through the employee receiving actual notice of the charges. In Mr. Yardley's case, no committee reviews ever occurred and no proceedings that functionally served their purpose ever occurred. Moreover, Mr. Yardley suffered significant harm as a consequence of the committee reviews not occurring.

According to Scott Carver, the Department's then Director of Institutional Operations and the administrator who executed the Administrative and Amended Administrative Complaint served upon Mr. Yardley, the use of committee reviews is an established procedure used by the Department. (RT. 304:8-10). There are two levels of reviews. The initial review is at the "division level" that includes Mr. Carver, the warden in the employees chain of command, and bureau chiefs. (RT: 304:10). The second review is at the Department level and is comprised of division administrators and a Department human resources representative. (RT. 304:10). There are several purposes for the committee reviews that include an analysis of the factual support for the allegations, consideration of employment history, consideration of mitigating and aggravating circumstances and prior disciplines and warnings. (RT. 304:12-14). They allow the Department administrators to consider issues of consistency, standardization and

propriety of sanction. (RT. 304:8). The committee reviews occur after an investigation and lead to the notification of the charges to be issued. (RT. 304:10-16).

In finding that the pretermination proceedings satisfied the purpose of committee reviews, the CSRB relied upon a part of the disciplinary proceedings that fulfill a part of the process distinct from that part served by the committee reviews. The pretermination proceedings not only follow the committee review process, but are proceedings that will occur or not conditioned upon the committee review process. The fact that the committees consider the factual support for the allegations makes that clear, let alone their consideration of other aspects that are particularly relevant to this case concerning prior disciplines and warnings. Thus, unlike *Lucas* where the employee had actual knowledge of what the written charges would have informed him of, the pretermination proceedings do not fulfill the purpose of the committee review process. The later is wholly dependent upon the former and, therefore, one cannot reasonably nor rationally satisfy the other.

Furthermore, the committee reviews are performed by Department administrators who deliberate over several important issues related to the discipline in arriving at the decision to discipline. That is substantively and fundamentally different from the pretermination hearing. The committee reviews are a deliberative process by administrators who engage one another leading to a decision, while the pretermination hearing is an adversarial process designed to challenge and defend the decision made by the committee reviews. Indeed, even Mr. Carver testified that Mr. Yardley's case should

have gone through committee reviews and he believed it did. (RT. 304:16-18). In that regard, the Department not only failed to act in accordance with its procedure of using committee reviews in violation of Utah Code Ann. § 63-46b-16(40(h)(iii), but Mr. Carver's testimony precludes any finding that the Department justified its inconsistency upon facts or reasons that provide a fair and rational basis for the inconsistency.

Mr. Yardley was substantially prejudiced and harmed by the Department's failure to utilize committee reviews. Unlike *Lucas* who suffered no harm because he had actual notice of what the written charges would have informed him, Mr. Yardley's case was denied the exchange of information between administrators that the committee reviews were specifically designed to cause. As Mr. Carver testified, among the issues considered are the prior disciplines and warnings the employee has been issued. (RT. 304:12-13). That is particularly germane in this case considering the warning the Department served upon Mr. Yardley in the first discipline. Ms. Thomas, Mr. Yardley's warden who would have participated in committee reviews if they had occurred, would have been able to provide the committee with her information that she believed that the basis for his termination was the same conduct for which he was already disciplined. (RT. 302:45-47). That would have impacted the discussion on the warning. Furthermore, Ms. Thomas would have been able to discuss the Mr. Yardley's successful participation in the performance plan and the fact that it was designed to bring closure to the matter. (RT. 302:34-39). Thus, by denying Mr. Yardley's case the benefit of committee reviews, the Department denied his case the exchange of information among administrators who

would have discussed the material issue in this Petition with the administrator providing information favorable to Mr. Yardley. The remarkable nature of the Department's failure to use committee reviews in Mr. Yardley's case is best summed up by Ms. Thomas who testified that she has never experienced such a process in her twenty years with the Department and that the administrator's in charge of Mr. Yardley were entirely denied involvement in the process. (RT. 302:41-43).

The CSRB's ruling that because the Petitioner enjoyed pretermination proceedings, the Department's failure to utilize committee review did not violate his due process rights is not reasonable nor rational because the pretermination proceedings do not fulfill the purpose of the committee reviews. While the Department may not be obligated to strictly follow its procedure and practice of using committee reviews, neither can it treat those obligations as "illusory." The pretermination proceedings fundamentally are different from the committee review and cannot replace their role. Furthermore, Mr. Yardley was materially harmed by the Department's failure to utilize committee reviews. Thus, it was not simply a technical violation that was otherwise satisfied, but rather a constitutional violation that cause material harm. Finally, the CSRB's reliance on *Piacitelli v. Southern Utah State College*, 636 P.2d 1063 (Utah 1981) to conclude that as long as Mr. Yardley's substantial interests are protected a technical violation of the disciplinary procedure is not actionable is without merit. The Court in *Piacitelli* made very clearly that they were "construing a contract, not declaring statutory or constitutional rights." *Id.* at 1066. Therefore, *Piacitelli* has no application to this case.

B. NO INVESTIGATION WAS PERFORMED.

Conducting an investigation is also an established procedure that is part of the Department's process in disciplining employees. Mr. Carver testified that after an incident is reported, it is referred for investigation. (RT. 304:7-8). Following the investigation, the investigative reports are forwarded to and used in committee reviews. (RT. 304:9-11). Mr. Ogilvie, a Department investigator testified similarly. Mr. Ogilvie testified that the Department has an established procedure in disciplinary matters that start with a referral of misconduct leading to an investigation that results in an investigative report being generated and forwarded to Department Administration. (RT. 299:119-120). Accordingly, as an established procedure in the disciplinary process, the Department is required to conduct an investigation. *Thurston*, 835 P.2d at 169.

The CSRB ruled that the Department completed an investigation. The CSRB found that when Mr. Ogilvie and Mr. Gallegos, the Department's then Deputy Director, reviewed a video tape that Mr. Ogilvie obtained from a Brian Barker on June 12, 2001, the investigation "began and ended." The evidence, however, does not rationally support the CSRB's conclusion. When Mr. Ogilvie and Mr. Gallegos viewed the video tape, they were considering the *referral* of the matter for investigation and did not substantively or procedurally conduct any investigation. Indeed, the information Mr. Ogilvie learned in receiving the referral even identified the areas of investigation that were needed.

Mr. Ogilvie testified that when he met with Mr. Gallegos to view the video tape on June 12, 2001, he was ordered to discontinue and terminate his investigation and that the investigation would be handled by the Attorney General's Office. (RT. 299:82, 124). Mr. Ogilvie acknowledged that prior to that point all he had done was to pick up the video tape and speak with Mr. Barker who provided the tape. (RT. 299:131). Mr. Ogilvie further acknowledged, however, that what he had done prior to June 12 was not an investigation and that he did not really start any investigation until July 2, 2001. (RT. 299:130). In fact, according to Mr. Ogilvie's testimony, when he viewed the video tape on June 11th or 12th, he initially thought it was related to his prior investigation of Mr. Yardley, but by the end of viewing the video tape, he believed he had new matter that needed investigation. (RT. 299:126-129). However, because of the order to discontinue his investigation he did not resume any investigation until July 2<sup>nd</sup>, a date after Mr. Yardley was already notified by the Department of their intent to terminate his employment. (RT. 299:129). The totality of Mr. Ogilvie's testimony establishes that all he and Mr. Gallegos did was to consider the referral and not a completion of any investigation. (RT. 299:76, 126-127).

The information Mr. Ogilvie acquired in receiving the referral further underscores the CSRB's find that an investigation was completed by the Department. Mr. Ogilvie was informed by administration in his prior investigation of Mr. Yardley and from interviewing Travis Clark, a witness, that the video tapes for which Mr. Yardley was ultimately disciplined contained several images of Mr. Yardley and his wife engaging



sexual conduct, Mr. Yardley engaging in masturbation in the guard tower, images of Department staff members in a non-sexual context and Mr. Yardley masturbating. (RT. 299:68-74). In testifying at the termination hearing in the present case, Mr. Ogilvie acknowledged that the conduct for which Mr. Yardley was terminated was the same type of conduct for which Mr. Yardley was already disciplined. Furthermore, Warden Smith, who initiated the referral in the present case, also wrote Mr. Ogilvie a memorandum wherein he discussed his concern that the matter may be related to Mr. Yardley's prior discipline and asked Mr. Ogilvie to investigate that issue. (RT. 299:78). Additionally, after Mr. Ogilvie viewed the video tape provided by Mr. Barker, he became aware that copies of the video tapes had been made and that dates contained on the video images were not in chronological order. (RT. 299:80-81). That information reasonably raises issues regarding the integrity and authenticity of the video tapes that Mr. Barker provided for which Mr. Yardley was terminated as a consequence thereof. Thus, Mr. Ogilvie provided testimony that identified issues and areas, at a minimum, that needed to be investigated that were never done in his viewing of the video tape with Mr. Gallegos.

The Attorney General's Office did do an investigation. However, Diana Hollis, the investigator from the Attorney General's Office, testified that she was only assigned to and started her investigation on June 14, 2001, the same day the Department notified Mr. Yardley of their intent to terminate his employment. (RT. 299:25). Mr. Ogilvie did note that the Department uses a slightly different procedure when the referral suggests criminal conduct on the part of an employee. (RT. 299:121-122). In those cases, the

Department would suspend their investigation and allow the criminal investigation to be completed first before conducting their own investigation. (RT. 299:121-122). However, Mr. Ogilvie ultimately acknowledged that the fact that no investigation was completed by the Department prior to notifying Mr. Yardley of their intent to terminate his employment was remarkable and unique in his experience. (RT. 299:125). As Mr. Ogilvie testified: “I don’t know how that could have been done.” (RT. 299:125).

The CSRB’s decision that the Department “began and ended” its investigation when Mr. Ogilvie and Mr. Gallegos viewed the video tape is not rational. Mr. Ogilvie testified that he did not conduct any investigation at that point and that he was ordered to discontinue his investigation. Furthermore, the fact that Mr. Ogilvie received information from the referral that identified areas that needed investigation, but were not investigated, substantively undermines the CSRB’s decision. Indeed, if the investigation was completed, this case may not even exist since one of the principal issue raised in this case was an area that merited investigation - whether the referral was based upon the same conduct for which Mr. Yardley was previously disciplined. Ultimately, the Department was required by law to conduct an investigation. It implicitly requires a meaningful investigation. Otherwise, any fundamental requirement of due process would be satisfied with the employer simply concluding it was done, as occurred in this case, rendering the requirement meaningless.

**THE DEPARTMENT FAILED TO ACT CONSISTENTLY IN  
TERMINATING MR. YARDLEYS EMPLOYMENT.**

In raising the issue of consistency of discipline, Mr. Yardley does not challenge whether the Department satisfied its initial burden of providing a factual basis for the allegations and whether the discipline was proportionate. Rather, Mr. Yardley contends that he presented sufficient evidence that the Department acted inconsistently in terminating his employment and therefore violated his due process rights. Mr. Yardley relies upon the case of *Lunnen v. Utah Department of Transportation*, 886 P.2d 70 (Utah App. 1994), where this Court held that once the employer satisfies its burden of providing factual support and establishing proportionality of the discipline, the employee must raise due process concerns, including consistency of discipline.

Similar to the issue *Lunnen*, the Department maintains a policy that requires it to consider the consistency of the discipline it imposes. Under Department policy AE 03/02.06, the Department, among other issues, is supposed to consider the “consistent application of rules and standard.” (R. 66, Addendum A). Thus, like the employer in *Lunnen*, the Department was obligated to follow that policy. Following the presentation of the Department’s case at the hearing, Mr. Yardley called several witnesses who offered evidence demonstrating that the Department has not acted consistently when it was aware of misconduct involving other employees where the same concerns raised over his conduct were present.

According to the Final Order terminating Mr. Yardley's employment, it maintained that the alleged misconduct he engaged in not only raised concerns for the Department about public perception, but also "negatively affected the workplace." (R. 367). The Department based the concern upon the allegation that Mr. Yardley engaged in inappropriate sexual acts using the name of a co-worker where the Department contended that it caused "rumors" of a workplace affair and "strained her marriage." (R. 367). Those concerns served as the basis for Mr. Yardley's termination. (RT. 322:118-119). Yet the evidence that Mr. Yardley presented clearly showed that many rumors circulated among Department employees that others, specifically two witnesses in this case, Lauren Barker and Annabelle Brough, were also rumored to have affairs with co-workers. In fact, Early Hobby, a former warden, testified that Ms. Brough's husband, Steve Brough, complained to him that he believes that his wife was having an affair with a co-worker. (RT. 303:44-45). The alleged co-worker, Randy Gerrard, also testified and acknowledged that he was aware of the many rumors that he was having an affair with Ms. Brough and that administration was aware of the rumors. (RT. 303:32-33, 35-36; 45-46). However, to even Mr. Gerrard's surprise, no investigation was ever conducted regarding the rumors despite the fact that the substance of the rumors violated Department policy. (RT. 303:34).

Beverly Thomas, a Deputy Warden, acknowledged that the Department initiates investigations from rumors of improprieties, and acknowledged, as did other administrators, that they were aware of Mr. Brough's complaint that his wife, Annabelle

Brough, was having an affair with a co-worker. (RT.303:17-20). Ms. Thomas had reported her concerns regarding Annabelle Brough to her supervisor, Bob Tanzy. (RT. 302:20-26; 303:46). Department Administrators testified, as did Mr. Ogilvie, that the information regarding the affair warranted an investigation. (RT. 303:36-37; 299:146; 322:120). According to the testimony, the Department's concern, as in Mr. Yardley's case, was not limited to the affair, but the effect on Mr. Brough's health and the employment environment. (RT. 302:20). The fact that Mr. Gerrard was Ms. Brough's subordinate was also of concern. (RT. 302: 22-25). Despite the Department's policy of investigating such "rumors," the Department failed to conduct any investigation into the rumored affair between Ms. Brough and Mr. Gerrard. The contrary seems to be the case. While no investigation was ever initiated, both parties, particularly Ms. Brough, have enjoyed significant employment advancement with the Department. (RT. 302:26-28). Thus, the evidence Mr. Yardley presented established that the concerns the Department identified with his conduct were similar to the concerns the Department raised with the conduct of other employees. Yet, the Department failed to even investigate the conduct of the other employees while they terminated his employment.

Ultimately to prevail in this argument, Mr. Yardley must present evidence of "meaningful disparate" treatment based upon comparison of his case to "similar factual circumstances." *Kelly v. Salt Lake City Civil Service Commission*, 8 P.3d 1048, 1056 (Utah App. 2000). Mr. Yardley concedes that the evidence presented concerning the conduct of other parties was dissimilar to the conduct for which he was terminated.

However, conduct that is the subject of discipline is ultimately subject to discipline due to the concerns the conduct raises. Similarities in the concerns reasonably comport with the requirement that comparisons be made between “similar factual circumstances.” In that regard, the concerns raised in Mr. Yardley’s case over his conduct for which the Department terminated his employment were the same as those concerns raised and would be raised from the conduct of other Department employees Mr. Yardley introduced at the hearing. The similarities cover violations of Department policy to criminal violations to undermining Department integrity to causing rumors of workplace affairs to straining marriages to the negative impact upon the workplace. Thus, although in the conduct of other employees may be dissimilar to Mr. Yardley’s conduct, the factual similarities in the concerns raised by the Department are not only similar, but the same.

The evidence presented at the hearing by Mr. Yardley clearly established that the Department seemingly does not even so much as investigate the conduct of other employees who engaged in behavior that caused the Department the same concerns as it had with Mr. Yardley. By terminating Mr. Yardley’s employment while allowing the other employees to continue employment, the Department has acted impermissibly inconsistent in violation of the Mr. Yardley’s due process rights.

## CONCLUSION

The conduct for which Mr. Yardley was terminated is offensive and disturbing. However, regardless of how offensive Mr. Yardley’s conduct may be, the rule of law must be preserved and must prevail. As a matter of law, the Department must act in

accordance with the terms of the warning that they previously issued to Mr. Yardley that warned him that they would consider terminating his employment if he committed the same type of conduct in the future. Mr. Yardley took the warning to heart, did not commit any further acts of misconduct and he was successfully completing his performance plan. The Department's subsequent termination of his employment for the same type of conduct for which he was previously disciplined that without dispute occurred not after the warning was issued, but well before it, violates the terms of the warning. Furthermore, the Department violated Mr. Yardley's right to due process and caused him material harm by disregarding its procedures without justification in terminating his employment. Finally, the evidence demonstrates that the Department does not act consistently in disciplining employees when Mr. Yardley's case is compared against similar cases. Consequently, the CSRB's decision affirming the Department's termination of Mr. Yardley was not reasonable nor rational. Accordingly, the CSRB's decision should be reversed, Mr. Yardley's employment should be reinstated and he should be awarded back pay.

RESPECTFULLY submitted this 22<sup>nd</sup> day of June, 2005.

A handwritten signature in black ink, appearing to be 'BN' or similar initials, written over a horizontal line.

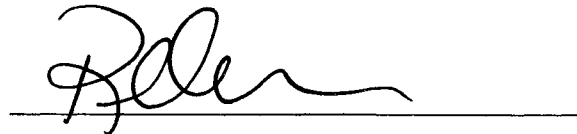
Blake Nakamura  
Counsel for Petitioner

**CERTIFICATE OF SERVICE**

I, BLAKE A. NAKAMURA, 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, 5<sup>th</sup> 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 22<sup>nd</sup> day of June 2005.

  
\_\_\_\_\_  
BLAKE A. NAKAMURA

Delivered to the Utah Court of Appeals and the Utah Attorney General's Office as set forth above, this 22 day of June 2005.

  
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## Addendum A

1. transfers;
2. additional training;
3. reassignments; and
4. corrective action.

C. Nothing in this section shall preclude the division director from taking corrective action, transferring, reassigning and providing additional training as managerial tools.

**AE 03/02.06 Procedures: Factors to be Considered in Determining Discipline**

A. When deciding the specific type and severity of the discipline to administer to any employee, the following may be considered:

1. consistent application of rules and standards;
2. prior knowledge of rules and standards;
3. the severity of the infraction;
4. the repeated nature of violations;
5. prior disciplinary/corrective actions;
6. previous oral warnings, written warnings and discussions;
7. the employee's past work record;
8. the potential effect on agency operations, the Department's ability to carry out its duties, or public confidence in the member and/or Department; and
9. the potential of the violations for causing damage to persons or property.

B. At the time the disciplinary action is imposed, the employee shall be notified in writing of the discipline, the reasons for the discipline, the effective date and length of the discipline.

C. Final decisions in disciplinary actions are subject to the grievance and appeals procedure as provided by law for career service employees only.

**AE 03/02.07 Procedure: Probationary, Exempt and Career Status Members**

A. All members, regardless of employment status, are subject to AE 02, "Code of Conduct".

B. Members who are on probationary or exempt status do not have a property interest in their jobs and, therefore, do not have a right to due process before the

Revised 12/1/93      AA 01/01.00

## Addendum B

**BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD**

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<b>KEVIN YARDLEY,</b>	:	
	:	
<b>Grievant and Appellant,</b>	:	<b>DECISION</b>
	:	<b>AND</b>
<b>v.</b>	:	<b>FINAL AGENCY ACTION</b>
	:	
	:	
<b>UTAH DEPARTMENT OF CORRECTIONS,</b>	:	
	:	
	:	
<b>Agency and Respondent.</b>	:	<b>Case No. 8 CSRB 77 (Step 6)</b>

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On Tuesday, April 20, 2004, the Career Service Review Board (Board and CSRB) held an appellate review hearing in the above-entitled case involving all the parties and an executive session. The following Board Members were present and heard oral argument at the hearing and deliberated in an executive session: Felix J. McGowan, Acting Chair; Joan M. Gallegos and Kevin C. Timken, Board Members. At the hearing, Kevin Yardley (Appellant) was present and represented by Blake Nakamura, Attorney at Law, who presented oral argument on Appellant's behalf. Assistant Attorney General Robert E. Steed represented the Utah Department of Corrections (Department and UDC) and presented oral argument on the Department's behalf.<sup>1</sup> Accompanying Mr. Steed as the Department Representative was Lori Worthington, Correctional Program Coordinator.

**AUTHORITY**

The Board's statutory authority is set forth in the *Utah Code* at §§67-19a-101 through -408 of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act at §§67-19-1 *et seq.* The CSRB's administrative rules are published in the *Utah Admin. Code* at R137-1-1 through -23. This Board-level or Step 6 appeal hearing is the final administrative review in the State Employees' Grievance and Appeal Procedures for Mr. Yardley's appeal from termination of his employment. Both the Board's evidentiary/Step 5 and these

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<sup>1</sup>Assistant Attorney General Patrick B. Nolan represented the Department at the Step 5/evidentiary hearing in this matter. However, after Appellant appealed the hearing officer's decision and order, Assistant Attorney General Robert E. Steed appeared and represented the Department before the Board. This representation included filing a Reply Brief to Grievant's Step 6 appeal and oral argument at the administrative hearing held before the Board.

appellate/Step 6 proceedings are designated as “formal adjudications” pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB’s Step 5 and Step 6 hearings. (§§63-46b-0.5 *et seq.*)

### PROCEDURAL BACKGROUND

On June 14, 2001, Appellant was given initial notice of the Department’s intent to terminate (Initial Notice of Intent) Appellant’s employment as a Correctional Security Officer for the Department. (Ex. A-10; Appellant’s Memorandum of Points and Authorities in Support of Summary Judgment dated March 27, 2002; Attachment C)<sup>2</sup> This Initial Notice of Intent was issued by Scott Carver who at the time was the Division Director of the Department’s Division of Institutional Operations (DIO).<sup>3</sup> The Department’s Initial Notice of Intent appropriately informed Appellant of his right to appeal the Agency’s Intent to then Executive Director Mike Chabries (Exec. Dir. Chabries). (*Id.*) At the time the Initial Notice of Intent was issued, Appellant had been employed as with the Department for more than ten and one-half years. (*Id.*)

This June 14, 2001 Initial Notice of Intent recommended that Appellant’s employment be terminated for multiple violations of State and Department policies and procedures. Specifically, the Department alleged that Appellant violated UDC Policies AE 02\11.03 Professionalism, AE02\05.00 Dereliction of Duty and Utah Department of Human Resource Management (DHRM) rule R477-9 Employee Conduct by videotaping himself “performing various sexual acts while on duty.” (*Id.*) As mandated by DHRM rule R477-11-1(2)<sup>4</sup>, Appellant appropriately filed a reply (Initial Reply) to the Department’s Initial Notice of Intent on June 21, 2001.<sup>5</sup> (*Id.*)

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<sup>2</sup>Appellant’s Motion for Summary Judgment and accompanying Memorandum of Points and Authorities in Support thereof are part of the file maintained and controlled by the CSRB office.

<sup>3</sup>Scott Carver is currently serving as the “Acting Executive Director” for the Department.

<sup>4</sup>DHRM rule R477-11-2(2) provides in pertinent part as follows:

- (2) No employee shall be dismissed or demoted from a career service position unless . . .
  - (a) The agency head or designee shall notify the employee in writing of the specific reasons for the proposed dismissal or demotion.
  - (b) The employee shall have up to five working days to reply....

<sup>5</sup>Mr. Blake Nakamura filed an appearance of counsel as well as the Initial Reply with the Department on June 21, 2001. (Ex. A-10)

In his Initial Reply, Appellant argued that the Department's Initial Notice of Intent was deficient because it lacked sufficient specificity and referenced conduct for which Appellant had previously been disciplined. (Ex. A-10).<sup>6</sup> After reviewing Appellant's Initial Reply, the Department's administrative law judge (ALJ) issued an order dated June 29, 2001, specifically finding that:

[T]he notice provided to Mr. Yardley (Appellant) does not provide adequate notice as to what conduct serves as the basis for discipline. It does not allow Mr. Yardley (Appellant) to determine if the videotape serving as the basis for the current case is the same as the one serving as the basis for 2001 MC 17-D.<sup>7</sup>

(Appellant's Memorandum in Support of Summary Judgment, Attachment D)

As a result of these findings, the Department's ALJ ordered that the disciplinary proceedings against Appellant be stayed and that the Department provide Appellant an amended notice of intent with sufficient information to allow him to respond and specifically determine whether the Department's Intent to Terminate Appellant was based on conduct for which he previously had been disciplined. The Department's ALJ ordered that this amended intent provide, insofar as possible, specific dates, times and places regarding when and where Appellant's misconduct occurred. (*Id.*)

On July 9, 2001, Appellant received an Amended Notice of Intent to Terminate his employment with the Department (Amended Notice of Intent). (Exs. A-9, A-10) This Amended Notice of Intent was also issued by Scott Carver and, in accordance with the ALJ's Order dated June 29, 2001, listed in specific and graphic detail the dates, times and places Appellant was alleged to have engaged in conduct violating Department and State policy. (*Id.*)

Specifically, the Department's Amended Notice of Intent alleged that on virtually countless occasions between the years 1999-2000, Appellant videotaped himself masturbating not only while on duty in the guard tower at CUCF, but in open public areas and at home. (*Id.*) The masturbation in the guard tower allegedly occurred while Appellant was out of uniform because he had removed

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<sup>6</sup>On March 5, 2001, a few months prior to the Department's Initial Notice of Intent at issue in this case, Appellant was suspended from work for 15 working days. The basis for this suspension was that in 1995 and 1998, Appellant videotaped himself and his wife engaged in sexual intercourse and was involved in disseminating these tapes to coworkers. The Department further found that on at least one occasion, Appellant masturbated while on duty in the Central Utah Correctional Facility (CUCF) guard tower. (Ex. A-8, A-10)

<sup>7</sup>2001 MC 17-D is the disciplinary case number corresponding with the Department's 15-day suspension of Appellant for videotaping himself engaged in sexual intercourse with his wife and for masturbating while on duty in the guard tower on at least one occasion. (Ex. A-8)

most of his clothing. (*Id.*) The Department further alleged the video depicted Appellant masturbating with the names of various women displayed on his penis including at least one instance where the name displayed on his penis was that of a coworker. (*Id.*)

In addition, the Department alleged that on at least six separate occasions while videotaping himself masturbating, Appellant displayed a sign inviting calls from women. This sign, sometimes displayed around his neck, provided the phone numbers of both his home and the guard tower and invited calls to either location. (*Id.*)

The Department's allegations also included that Appellant videotaped a woman walking through the CUCF parking area and on at least three occasions videotaped his neighbor working in her yard. (*Id.*) Finally, the Department's Amended Notice of Intent alleged conduct wherein Appellant videotaped himself masturbating either at home, work or other public places using various objects. The objects alleged to have been used by Appellant to masturbate with included, but were not limited to, a watermelon, a squash, a trash bag filled with grass clippings, a truck tailpipe and gas tank, donuts, a flashlight, a green bottle, a public chainlink fence, a stuffed animal, a gas can, and a cherry pie. (*Id.*)

In its Amended Notice of Intent, the Department alleged that Appellant's conduct as outlined above violated numerous Department and State workplace policies. Specifically, The Department alleged Appellant's conduct violated DHRM rule R477-9 Employee Conduct, UDC Policies AE 02\11.03(L), (M), (P) Professionalism, AE 02\05.00 Dereliction of Duty, AE 02\13.05 Bringing Unauthorized Items Into A Correctional Facility, ACr 30/04.05 Acceptable Use of Electronic Communication Technology, and FBr 13\09, 15, 16 governing dress and uniform standards. (*Id.*) In its Amended Notice of Intent, the Department further clarified that: "This intent to impose disciplinary action is based on events which occurred separate and apart from those events for which you were previously disciplined on March 5, 2001." (Ex. A-9)

After receiving the Department's Amended Notice of Intent, Appellant filed a written response requesting a hearing before the Department imposed any disciplinary action. (Ex. A-10) On August 9, 2001, a hearing was held before the Department's ALJ regarding the Department's intent to terminate Appellant's employment. (*Id.*) This hearing was held as part of the Department's internal grievance procedure and in consonance with the rules established by the CSRB and under the authority of *Utah Code Ann.* § 64-13-28.

At this evidentiary hearing, Appellant did not challenge the factual allegations set forth in the Department's Amended Notice of Intent, nor that he videotaped himself engaging in such conduct.

(Ex. A-10 at 9) Instead, Appellant primarily argued that the entire case against him should be dismissed because he had previously been disciplined for the conduct depicted on the videotape that was now being relied upon by the Department to terminate his employment. (*Id.*)

On September 12, 2001, the Department's ALJ entered his Report and Recommendation (R&R) wherein he recommended that Appellant's employment with the Department be terminated. (Exs. A-10 at 12, A-11, G-2)<sup>8</sup> In reaching this decision, however, the Department's ALJ specifically agreed with Appellant that the evidence presented at the departmental hearing failed to establish that the conduct occurring in the guard tower and depicted in the video tape in the current case was distinguishable from the conduct occurring in the guard tower for which Appellant had previously been disciplined.<sup>9</sup> (Ex. A-10)

After addressing the evidence regarding Appellant's videotaped conduct in the tower while on duty, the Department's ALJ then shifted his focus to Appellant's conduct outside the CUCF tower. After reviewing this evidence, the Department's ALJ concluded: "There is sufficient, egregious misconduct occurring outside of the tower to warrant terminating Mr. Yardley's employment . . . . Additional overwhelming evidence exists that Mr. Yardley is manifestly unfit to remain an employee of the Department." (*Id.* at 11) In reaching this decision, the Department's ALJ focused on the very disturbing nature of Appellant's conduct outside the CUCF tower and his finding that some of Appellant's conduct violated criminal law. (*Id.*)

After reviewing the Department ALJ's R&R, Exec. Dir. Chabries entered his Final Order terminating Appellant's employment with the Department. (Ex. A-11) This Order was entered on November 5, 2001. (*Id.*) In reaching his decision to terminate Appellant's employment, Exec. Dir. Chabries adopted many of the findings and conclusions of the Department's ALJ. (*Id.*) However, contrary to the Department ALJ's findings, Exec. Dir. Chabries found that Appellant's conduct in the guard tower was also a basis for terminating him. (*Id.*)

In reaching this decision, Exec. Dir. Chabries concluded that the videotaped conduct giving rise to the Department's Amended Notice of Intent to Terminate went beyond the simple masturbation for which Appellant had previously been disciplined. (*Id.*) In reaching this decision,

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<sup>8</sup>It appears from Ex. A-11 that Appellant received a copy of this R&R on September 18, 2001. However, the ALJ signed and dated the R&R on September 12, 2001. (Exs. A-10, A-11)

<sup>9</sup>See n.6 discussing Appellant's prior discipline for masturbating while on duty in the guard tower "on at least one other occasion."



Exec. Dir. Chabries focused on facts present in this case that were never established in Appellant's prior disciplinary action. Some of the factors relied upon by Exec. Dir. Chabries to distinguish this case from Appellant's prior disciplinary action included Appellant's conduct of displaying women's names on his penis while masturbating in the guard tower and wearing a sign around his neck inviting women to call him while on duty in the CUCF guard tower. (*Id.*)

In reaching his final decision, Exec. Dir. Chabries also found that Appellant's conduct outside the tower was sufficient in and of itself to warrant termination of Appellant's employment. In reaching this decision, Exec. Dir. Chabries emphasized that Appellant engaged in sexual conduct in public places in violation of criminal law and departmental policy. Exec. Dir. Chabries found Appellant's conduct discredited the Department and had an adverse impact on the efficiency of the Department. (*Id.*)

Based upon his findings, Exec. Dir. Chabries ordered Appellant's employment with the Department to be terminated. (*Id.*) Thereafter, on November 20, 2001, Appellant timely filed an appeal of Exec. Dir. Chabries' Final Order with the CSRB.

#### **PROCEEDINGS BEFORE THE CAREER SERVICE REVIEW BOARD**

In addressing the proceedings before the CSRB, the Board notes that before the evidentiary hearing was held in this matter, both parties filed motions for and memorandums in support of summary judgment. Appellant filed his Motion for Summary Judgment on March 28, 2002. On May 15, 2002, the Department filed its own Motion for Summary Judgment and a memorandum simultaneously in support of its motion and in opposition to Appellant's Motion for Summary Judgment. Both parties then filed appropriate responses and replies to the cross-motions for summary judgment.<sup>10</sup>

In moving for summary judgment, Appellant conceded that there was no dispute as to the material facts at issue in this case, but that the Department's termination of his employment was "unlawful and wrongful" because it violated a prior contractual agreement. (Appellant's Motion for Summary Judgment) In arguing that his termination was "unlawful and wrongful," Appellant relied on the language set forth in the Administrative Complaint that ultimately resulted in Appellant's prior 15 working day suspension for videotaping himself and his wife engaged in sexual intercourse and for

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<sup>10</sup>As stated in n.2 above, these motions for summary judgement and the accompanying memoranda in support, responses and replies are part of the file maintained and controlled by the CSRB Office.

masturbating while on duty in the guard tower on at least one occasion. (Appellant's Memorandum in Support of Summary Judgment)<sup>11</sup>

The specific wording in the Administrative Complaint relied upon by Appellant in making this argument provides as follows: "You are hereby warned that should *this kind* of misconduct reoccur in the future we will be forced to consider severe disciplinary sanctions, including termination." (*Id.* at 7-8, Ex. A-7) (Emphasis added.)

Appellant argued on summary judgment that because the "conduct" for which the Department now seeks to terminate his employment occurred prior to the date of this warning and involved the same type of misconduct, that conduct cannot now be used in further disciplinary proceedings. (*Id.*) Essentially, Appellant argued that because he did not engage "in any misconduct after his initial discipline, the Agency's Final Order terminating Mr. Yardley's [Appellant's] employment on November 5, 2001, violates the contractual agreement that it [Department] had with Mr. Yardley [Appellant] from his prior discipline." (Appellant's Memorandum in Support of Summary Judgment at 5)

In its cross-motion for summary judgment and opposition, the Department essentially argued that Appellant's reliance on a "single sentence" is misplaced and taken largely out of context. The Department further argued that because Appellant is a career service employee, he is subject only to the terms and granted only the protections specifically set forth in the Utah State Personnel Management Act at *Utah Code Ann.* § 67-19-1 *et seq.* These protections, the Department argued, control and govern dismissals of career service employees.

After considering the parties' motions and the memoranda both in support and opposition, the Hearing Officer entered his order dated June 28, 2002. In his written decision, the Hearing Officer specifically denied Appellant's Motion for Summary Judgment and granted the Department's motion that Appellant's rights were governed by statute rather than contract. (Hearing Officer Order dated June 28, 2002)<sup>12</sup> The Hearing Officer specifically found that "Grievant [Appellant] is a career service

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<sup>11</sup>Appellant was served this Administrative Complaint on January 12, 2001. The specific allegation was: "[I]n 1995 and again in 1998 you videotaped yourself and your wife engaged in sexual intercourse. These tapes were somehow circulated to some CUCF staff members. It is further alleged that you, on at least one occasion, masturbated while on duty in the tower. Both of these allegations you admitted to participating in. ..." Appellant never contested these allegations. As stated previously, the Department entered its Final Order regarding these allegations on March 5, 2001.

<sup>12</sup>This Order is part of the file maintained and controlled by the CSRB Office.

employee. Accordingly, he is a statutory employee rather than a contract employee. His rights in matters of discipline are set forth in statute, specifically in Utah Personnel Management Act, *Utah Code Ann.* § 67-19-1 *et seq.* His rights in matters of discipline are not set forth in contract . . . the language in the Administrative Complaint does not rise to the level of a legally binding contract between Grievant and the Agency.” (*Id.* at 2)

Thereafter, on July 11, 2002, Appellant filed a Motion for Reconsideration of the Hearing Officer’s Order date June 28, 2002.<sup>13</sup> The Agency filed a Memorandum in Opposition to Appellant’s Motion to Reconsider on July 29, 2002. On August 7, 2002, the Hearing Officer entered his decision denying Appellant’s Motion for Reconsideration.

On April 2, 3, 4, and 23, 2003, an evidentiary hearing was held before CSRB Hearing Officer J. Francis Valerga. At this hearing, Appellant was represented by Blake Nakamura, Attorney at Law. The Department was represented by Assistant Attorney General Patrick B. Nolan, who was assisted by Department Management Representative David Salazar, Human Resource Director for the Department.

The statute authorizing the CSRB to hold an evidentiary hearing can be found at *Utah Code Ann.* § 67-19a-406. Moreover, because Appellant’s employment was terminated, the Department had the burden of proving its case by substantial evidence and the burden of going forward. (*Utah Code Ann.* § 67-19a-406(2)(a) and (c))

The specific issues adjudicated at the Step 5 hearing were twofold. First, did the Department terminate Appellant’s employment for just cause or for the good of the public service as required by *Utah Code Ann.* § 67-19-18(1)? Second, if the Department did not terminate Appellant’s employment for these reasons, what is the appropriate remedy? (Prehearing Conference Summary and Order ¶¶ 3 at 1; Findings of Fact, Conclusions of Law, and Decision at 1)

At the evidentiary hearing on this matter, the Hearing Officer received evidence relating to the several allegations against Appellant. This evidence included testimony given and documents received concerning Appellant’s alleged conduct of videotaping himself masturbating, not only while on duty in the guard tower at CUCF, but in open public areas and at home. The evidentiary hearing also included extensive evidence regarding the internal procedures followed by the Department in

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<sup>13</sup>Though not specifically cited, the Board assumes this Motion for Reconsideration was filed pursuant to *Utah Admin. Code* R157-1-21(12).

reaching its decision to terminate Appellant's employment and whether those procedures afforded Appellant appropriate due process protections.

Specifically, testimony was given and documentary evidence received at the evidentiary hearing relating to the Department's allegations that Appellant masturbated on numerous occasions and sometimes using objects, while on duty in the guard tower at CUCF, in open public areas and at home. There was also evidence received concerning the Department's allegations that this conduct occurred while Appellant was out of uniform and with the names of various women displayed on his penis, including at least one instance where the name displayed on his penis was that of a coworker. Evidence was also received relating to other alleged violations by Appellant of Department policy including allegations that Appellant videotaped himself masturbating in the guard tower with a sign displayed around his neck inviting calls from women. This sign provided phone numbers of both his home and the guard tower and invited calls to either location.

In addition, extensive testimony was given and documentary evidence received concerning Appellant's due process concerns. Specifically, evidence was received examining whether the alleged conduct at issue in the instant case involved conduct for which Appellant had previously been disciplined and whether the Department acted consistently in terminating Appellant's employment. Finally, evidence was received regarding the administrative and investigative process initiated by the Department in reaching its final decision to dismiss Appellant.

At the conclusion of the evidentiary hearing, the Hearing Officer entered his Findings of Fact, Conclusions of Law and Decision (Step 5 Decision) dated August 21, 2003. In this Step 5 Decision, the Hearing Officer examined the evidence presented at the hearing and concluded there was substantial evidence to support the Department's decision to terminate Appellant's employment and that such discipline was consistent, for just cause and advanced the good of the public service. (Step 5 Decision at 4)

Moreover, the Hearing Officer specifically found that the conduct for which Appellant was dismissed was separate and apart from the conduct for which he was previously disciplined and that the internal procedures followed by the Department during the termination process complied with all relevant policies, rules and statutes. (*Id.* at 4-5)

Finally, the Hearing Officer concluded that the warning language contained in the January 12, 2001 Administrative Complaint did not create a binding agreement or promise upon which Grievant [Appellant] could rely to prevent termination of his employment. (*Id.* at 9) Based upon this

conclusion, the Hearing Officer held that the Department did not violate any prior agreement by terminating Appellant's employment. (*Id.* at 9-10)

## STANDARDS OF REVIEW AND ISSUES ON APPEAL

### I. ISSUES ON APPEAL

In Appellant's appeal before this Board, he challenges numerous aspects of the Hearing Officer's Step 5 Decision. Specifically, Appellant challenges the Hearing Officer's conclusion that the warning language contained in the January 12, 2001 Administrative Complaint did not create a promise or binding agreement upon which Appellant could rely to prevent termination of his employment. Addressing this issue in his Step 6 appeal before the Board, Appellant summarized as follows:

[I]n terminating Mr. Yardley for conduct that pre dated [sic] his prior discipline, the Agency violated a prior warning issued to Mr. Yardley pursuant to its own policy and that the Step 5 Decision reasoning that such deviation is lawful is not supported by the law.

(Grievant's Step 6 Brief on Appeal)

Appellant also argues that the Hearing Officer erred in concluding that the discipline Appellant received was consistent with how the Department has treated other employees who have engaged in similar conduct. Citing to *Lunnen v. Utah Dep't of Transportation*, 886 P.2d. 70 (Ut. App. Ct. 1994), Appellant argues that this alleged inconsistency violates due process thereby requiring that the Department's disciplinary sanction of dismissal be overturned. (*Id.* at 24-25)

Finally, Appellant challenges the Hearing Officer's conclusion that the internal procedures followed by the Department during the termination process afforded Appellant appropriate due process protections and substantively complied with all relevant policies, procedures and statutes. (*Id.* at 10-16) Appellant argues that the Department violated his due process rights during the termination process by not conducting an investigation prior to terminating his employment and for disregarding its own internal practice of utilizing committee reviews prior to imposing discipline. (*Id.* at 2-3, 11)

In essence, Appellant challenges the Hearing Officer's Step 5 Decision on two primary grounds. First, Appellant asserts that the Department's termination of his employment violated alleged contractual language set forth in a prior Administrative Complaint stating that "should this type of misconduct reoccur in the future we will be forced to consider severe disciplinary sanctions,

including termination.” Second, Appellant raises due process concerns related to consistency and failure by the Department to follow internal procedures during the termination process. These issues will be now addressed in the remainder of this Decision and Final Agency Action.

## II. THE BOARD’S APPELLATE STANDARDS OF REVIEW

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

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

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

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

Based upon the foregoing, the Board must first determine whether the Hearing Officer’s factual findings are reasonable and rational based upon the evidentiary record as a whole and whether those findings are supported by substantial evidence. Next, our task is to review the fact finder’s decision to determine whether the Hearing Officer correctly applied “the relevant policies, rules, and statutes according to the correctness standard,” giving no deference to the Hearing Officer on this legal issue. Finally, the Board’s appellate role is to consider whether the totality of the Department’s disciplinary penalty of termination of Appellant’s employment is reasonable and rational based upon our determination of the ultimate facts together with the correct application of relevant State policies, rules and statutes which were considered by our Hearing Officer.



BOARD'S REVIEW AND ANALYSIS  
OF FACTS AND ISSUES ON APPEAL

I. REVIEW OF THE DEPARTMENT'S PRIOR DISCIPLINE OF APPELLANT  
AND IT'S WARNING REGARDING FUTURE MISCONDUCT

As set forth above, on March 5, 2001, Appellant was suspended from his employment for 15 working days. (Ex. A-8)<sup>14</sup> The Department imposed this suspension after Appellant failed to contest the Department's allegations that "[I]n 1995 and again in 1998 you videotaped yourself and your wife engaged in sexual intercourse. These tapes were somehow circulated to some CUCF staff members. It is further alleged that you, on at least one occasion, masturbated while on duty in the tower. ..." (Ex. A-7)

The Administrative Complaint setting forth these allegations was dated January 12, 2001. (*Id.*) This Administrative Complaint also specifically provided that, "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." (*Id.*)

On appeal, Appellant argues that the Department's termination of his employment violates the warning language set forth in this January 12, 2001 Administrative Complaint. In making this argument, both at the evidentiary hearing and on appeal before this Board, Appellant relies primarily on two factors. First, Appellant correctly asserts that the conduct relied upon by the Department in making its decision to terminate his employment occurred before this January 12, 2001 Administrative Complaint. (Grievant's Step 6 Brief on Appeal at 17-18)<sup>15</sup> Second, Appellant asserts the conduct for which he was terminated was of the same *type* for which he was previously disciplined. (*Id.*) (Emphasis added) Based upon these two factors, Appellant argues that the Department's termination of his employment violated due process by breaching the terms of his prior Administrative Complaint and that the Hearing Officer's Decision is "not supported by the law." (*Id.* at 3, 17)

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<sup>14</sup>The Board briefly addressed these facts on page 3 and footnotes 6 & 7 of this Decision and Final Agency Action.

<sup>15</sup>The Hearing Officer specifically found, and this Board agrees, that "the conduct on the second videotape occurred before January 12, 2001." (Step 5 Decision at 10)

Specifically addressing this issue in his brief before this Board, Appellant asserts that “whether the agency acted properly in terminating Mr. Yardley’s employment in light of the warning depends on whether the conduct for which they terminated him was of the same ‘type’ of conduct for which Mr. Yardley was previously disciplined and if so, whether Mr. Yardley can assert and enforce the terms of the warning against the agency.” (*Id.*) In light of this argument, the Board will first address whether the evidence establishes that the conduct the Department relied upon to terminate Appellant’s employment is of the same “type” for which they had previously suspended him.

In arguing that the conduct for which Appellant was dismissed was the same “type” of conduct for which he had previously been suspended, Appellant relies primarily upon the testimony of two witnesses – Beverly Thomas and Gary Ogilvie. (*Id.* at 18)<sup>16</sup> In his written appeal, Appellant argues that both Ms. Thomas and Mr. Ogilvie knew of the underlying conduct leading to Appellant’s suspension and the underlying conduct relied upon by the Department to terminate Appellant’s employment and that “both agreed that the conduct in the two instances were of the same type.” (*Id.*)

In support of this argument, Appellant specifically cites to the evidentiary transcript wherein Mr. Ogilvie testified on cross-examination as follows:

MR. NAKAMURA: Q. That’s – you understand the current stuff has videotapes of masturbation, sexual intercourse on it?

A. I understand that. Yes.

Q. And that’s exactly what the concern was in the videotapes in the prior discipline, masturbation and sexual intercourse?

A. That’s correct.

Q. Same type, different dates, though, right?

A. Different dates.

(April 2, 2003 Tr. at 108-109)

Ms. Thomas testified that:

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<sup>16</sup>Gary Ogilvie was the Department’s Internal Affairs Investigator who investigated the allegations that resulted in Appellant’s suspension from work for 15 days. Beverly Thomas was the Deputy Warden at CUCF both at the time Appellant was suspended 15 working days and when he was dismissed.

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Q. [B]ased upon what you know of the prior investigation and now what you know of the current matter, do you believe the current matter is based upon the same [sic] kind of conduct and information that was involved in the first discipline?

A. I do.

(April 3, 2003 Tr. at 47)

In response to this argument, the Department asserts that Appellant has taken this testimony largely out of context and mischaracterized it as an admission by the Department that the conduct involved in both the suspension and termination were of the "same type." (Agency's Reply Brief at 15) After review of the evidentiary record as a whole, including careful review of Ms. Thomas' and Mr. Ogilvie's sworn testimony, the Board agrees with the Department that Appellant's substantial reliance on this testimony is misplaced. While this Board agrees that in a very general sense the evidentiary record shows that the conduct investigated, established and relied upon by the Department in both disciplinary proceedings involved videotapes of masturbation and sexual intercourse, it also finds that is where the similarities end.

The evidentiary record in the instant case clearly establishes that at no time during the investigation that resulted in Appellant's 15-day suspension did the Department become aware of or rely on the fact that Appellant had videotaped himself masturbating with the names of various women displayed on his penis, including in at least one instance where the name displayed on his penis was that of a coworker. (April 2, 2003 Tr. at 77)

In addition, the record establishes that at the time the Department suspended Appellant for 15 working days, it was not aware that Appellant removed his clothing to masturbate while on duty nor that on at least six separate occasions while videotaping himself masturbating, Appellant had displayed a sign around his neck inviting women to call him either at home or while on duty at the CUCF tower. (*Id.* at 104-105; April 3, 2003 Tr. at 145; April 23, 2003 Tr. at 75-76; Ex. A-9)

Finally, it is also clear that at the time the Department imposed its 15 working day suspension on Appellant, it was unaware that Appellant had videotaped himself masturbating in public areas in possible violation of Utah law. (April 2, 2003 Tr. at 105; April 23, 2003 Tr. at 92; Exs. A-9, A-10) It is also evident from the evidentiary record that at the time of Appellant's suspension, the Department was unaware that in videotaping himself masturbating either at home, work or other

public places, Appellant used a large array of inanimate objects with which to masturbate. (April 2, 2003 Tr. at 104-105; April 3, 2003 Tr. at 146; April 23, 2003 Tr. 105, 109)

Careful review of the evidentiary record, including those portions cited above, overwhelmingly supports the Department's position that this information was not known by the Department until after Appellant's suspension. Moreover, the record establishes that the conduct relied upon to terminate Appellant's employment was different from and more serious from a public safety standpoint, than the simple videotaped masturbation that was the subject of Appellant's 15-day suspension. (*Id.*)

Specifically comparing the conduct relied upon by the Department to terminate Appellant's employment with the conduct that was the basis of Appellant's previous 15-day suspension, Mr. Ogilvie testified as follows:

A. The content of what was depicted was different. The only thing I knew about from the earlier investigation was that there was intercourse between himself and his wife.

Q. Uh-huh.

A. And there was none of that in this new tape.

Q. Uh-huh.

A. I knew he had masturbation on the tower.

Q. Uh-Huh.

A. But I didn't know anything about the other things he was doing in the tower. I didn't know anything about all of the things that he was doing at home and elsewhere.

Q. Okay. And so when you say doing all the things in the tower and elsewhere, what we're talking about is masturbating, masturbation in the home?

A. Not just masturbating.

Q. What else?

A. Masturbation was included. Oh, there was signs around his neck and there was things written on his penis, there were objects involved, viewing pornography on the television, it looked like, or computer, perhaps.

Q. Uh-huh.

A. And there was also magazines that he was looking at.

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Q. Okay.

A. None of those things were part of the first investigation.

(April 3 Tr. at 104-105)

In addition, careful examination of the transcript establishes that the internal investigation that ultimately resulted in Appellant's 15-day suspension was initiated after the Department's Investigative Bureau received a request for an investigation from the CUCF Warden. (April 2, 2003 Tr. 67-69) Testifying about this referral, Mr. Ogilvie stated that the request for investigation was based upon the fact:

[T]here were rumor and talk of that involving Officer Kevin Yardley and his wife. That that rumor was that the video had now surfaced and that it included additional clips that included not only Mr. Yardley and his wife, but included Mr. Yardley masturbating in the tower, and some video shots of staff members walking in the – in the CUCF area there.

(April 2, 2003 Tr. 68)

The evidentiary record also establishes that the Department's internal investigation that resulted in Appellant's 15 working day suspension was initiated because CUCF administrators heard that videotapes depicting Appellant were being circulated to some CUCF staff members. (Ex. A-7) One staff member who spoke with CUCF administrators regarding the videotapes was Officer Travis Clark.

At the evidentiary hearing, Mr. Clark testified that in explaining to CUCF staff what he had seen on the tapes, he told them: "[H]e [Appellant] was masturbating on them and some – you know, I didn't like go into detail about how, but I told them about some of the images that were on there."

(April 23, 2003 Tr. at 12)

Specifically testifying as to whether he informed CUCF staff during the initial investigation that the videotapes he had viewed depicted Appellant masturbating with various objects while at home, work or other public places, Mr. Clark testified as follows:

A. I don't know. I can't say for sure if these were before or after that point because, if I remember right, I received some of them even after that point. I can't remember.

Q. Okay.

A. Maybe I did. I'm not sure at that point how many I had received.

(April 23, 2003 Tr. at 13)

Based upon our thorough review of the evidentiary record and careful consideration of the parties' briefs on appeal, this Board believes there is more than substantial evidence to support the Hearing Officer's finding that the troubling conduct relied upon by the Department in making its decision to terminate Appellant's employment was not only substantively unknown to the Department at the time it suspended Appellant, but was categorically different from the conduct relied upon to suspend him.

Though it is true that videotaped masturbation was a concern in both disciplinary actions, it is an unfair characterization of the facts of this case to argue Appellant was dismissed for the "same type" of conduct for which he had previously been suspended. The facts distinguishing this case from Appellant's prior suspension are simultaneously glaring and disturbing. The distinguishing facts of this case include masturbation by Appellant in open public areas, names of women depicted on his penis as he masturbates, being out of uniform while masturbating in the tower and using signs to invite calls from women requesting him to masturbate for them while on duty.

The troubling nature of the conduct relied upon by the Department to terminate Appellant's employment was not only unknown to the Department at the time Appellant was suspended, but was categorically different and more concerning from a public safety standpoint than the simple videotaped masturbation and sexual intercourse that were the cause for Appellant's prior 15-day suspension. Based upon these factors, this Board upholds the Hearing Officer's decision regarding this issue.

Because this Board finds that the misconduct for which Appellant was terminated from his employment with the Department is not the "same type" of misconduct for which Appellant was suspended, this Board finds that the warning language set forth in the January 12, 2001 Administrative Complaint provides Appellant no protection. However, because of the facts of this case, the Board will briefly address Appellant's argument that the warning language provided him protection from further discipline.

The undisputed facts of the instant case establish that on March 5, 2001, Appellant was suspended from his employment for videotaping himself and his wife engaged in sexual intercourse

and for masturbating while on duty in the tower on at least one occasion. (Exs. A-7, A-8)<sup>17</sup> Prior to this suspension, an investigation was conducted by Department Internal Investigator Gary Ogilvie.

Mr. Ogilvie interviewed Appellant as part of this initial investigation. At no time during this interview or indeed, during the initial investigative process, did Appellant ever give Mr. Ogilvie a clear picture of the conduct in which Appellant was involved nor did Appellant ever fully disclose what was depicted on the videotapes. (April 3, 2003 Tr. at 151-152, 157, April 23, 2003 Tr. at 56; Ex. G-1)

Based upon these facts, this Board finds that the warning in the instant case was simply an attempt by the Department to express its expectation concerning Appellant's future behavior and was given based upon the limited information provided by Appellant. This language in no way excuses Appellant's conduct nor does it provide immunity for actions and violations substantively unknown and categorically different from the conduct relied upon to impose the suspension.

Indeed, this Board agrees with the Department's argument that to rule otherwise would "encourage employees to withhold information from their employer during their investigations with the expectation that the agency would be barred from bringing a subsequent action based on the discovery of new acts and violations." (Appellant's Brief at 19) Based on the foregoing, this Board upholds the Hearing Officer's findings regarding the warning language set forth in the January 12, 2001 Administrative Complaint.

## II. DUE PROCESS CONSISTENCY ISSUES

On appeal before this Board, Appellant argues that the Hearing Officer erred in finding that the Department's termination of his employment did not violate due process consistency standards. (Appellant's Brief on Appeal at 23-24) Before addressing Appellant's arguments on this issue, this Board notes that Appellant timely and appropriately raised due process consistency concerns during the evidentiary proceedings in this matter. (*Lunnen v. Utah Dep't of Transportation*, 886 P.2d 70 (Ut. App. Ct. 1994)) These issues were raised not only during the evidentiary hearing, but were also briefed by Appellant in his Post Hearing Brief. (April 4, 2003 Tr. at 33-36, 44-45)<sup>18</sup>

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<sup>17</sup>As set forth above, Mr. Ogilvie testified that during his initial investigation, there were also concerns expressed of "some video shots of staff members walking in the CUCF area." (April 3, 2003 Tr. at 68)

<sup>18</sup>Appellant's Post Hearing Brief is part of the file maintained and controlled by the CSRB office.

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Addressing this issue in his Step 5 Decision, the Hearing Officer concluded: "In terminating Grievant's employment for his misconduct, UDC acted consistently with other cases involving UDC employees who engaged in similar misconduct." (Step 5 Decision ¶7 at 4) Specifically reviewing the evidence presented at the evidentiary hearing, regarding consistency, the Hearing Officer found that:

Grievant cites instances where other UDC employees were rumored to have engaged in workplace affairs and yet UDC failed to investigate or discipline them ... I am not persuaded that the facts of those cases are sufficiently similar to this case to warrant comparison. Indeed, the only case factually similar to this case is one involving another prison guard who admitted to videotaping himself masturbating in the tower. The discipline imposed in that case by Executive Director Michael Chabries was a twenty-day suspension. ... I do not find Grievant's argument regarding inconsistency of discipline to be persuasive.

(Step 5 Decision at 6)

On appeal before this Board, Appellant challenges the Hearing Officer's findings regarding consistency on two primary grounds. First, Appellant argues that the Hearing Officer "disregarded the significant evidence that showed the similarities between the concerns the agency identified with Mr. Yardley's conduct and the conduct in the cases Mr. Yardley presented to show that the Agency did not act consistently." (Appellant's Brief on Appeal at 22) Appellant also asserts that the Hearing Officer erred by relying upon evidence not admitted into the record in reaching his decision. (*Id.* at 24)

In addressing Appellant's concerns, the Board first notes that it previously has held that "once the agency meets its required burdens, it is then incumbent upon the disciplined employee to show by evidence, that the penalty was inconsistent with other prior penalties imposed on similarly situated employees under *the same or substantially similar circumstances*." (*Michael D. Hummel v. Dep't of Corrections*, 5 CSRB 50 at 30 (1994); *M. Dale King v. Utah Dep't of Human Services*, 7 CSRB 70 at 24 (2003) (Emphasis added)

Thorough review of the testimony relied upon by Appellant to establish the Department acted inconsistently fails to convince this Board that Appellant's dismissal was inconsistent with the Department's actions under substantially similar circumstances. In making this determination, this Board notes that none of Appellant's witnesses testified of conduct even remotely similar to Appellant's. Moreover, Appellant's argument that the Department acted inconsistently is based



entirely on witness testimony regarding rumors and innuendos of workplace affairs that allegedly “negatively affected the workplace.” (Appellant’s Step 6 Brief on Appeal at 22)

As stated by the Utah Court of Appeals in *Kelly v. Salt Lake City Civil Service Comm.*, 8 P.3d 1048, 1056 (Utah App. 2000): “Meaningful disparate treatment can only be found when similar factual circumstances lead to a different result without explanation.” In the instant case, Appellant’s reliance on rumors and workplace affairs are insufficient to implicate *Lunnen* due process protections.

The facts of this case establish that Appellant engaged in troubling and egregious conduct, not only at home, but also while on duty at CUCF and other public areas. His conduct went well beyond “negatively affecting the workplace” as the rumors and innuendos allegedly did. His conduct actually prevented him from applying himself to and from fulfilling his assigned duties while on duty in the guard tower. It brought discredit on the Department while simultaneously affecting the efficiency of the Department’s operations all in violation of departmental policy. Based upon these factors, this Board does not believe the Hearing Officer “disregarded” significant evidence in determining that Appellant failed to show the Department acted inconsistently.

Finally, the Board will address Appellant’s argument that the Hearing Officer erred in relying upon evidence not admitted into the record in making his decision. In addressing this issue, the Board first notes that substantial testimony was received into the evidentiary record regarding the Department’s treatment of another employee who was disciplined for videotaping himself masturbating on one occasion while on duty in the CUCF tower. (April 2, 2003 Tr. at 139, 145, 154-156; April 3, 2003 Tr. at 7) The evidentiary record established that this employee was suspended for 20 working days. Moreover, no evidence was presented at the evidentiary hearing bringing these facts into dispute.

Based upon the testimony given regarding this employee, the Board finds no error in the Hearing Officer’s reliance on this evidence to determine whether the Department acted consistently in disciplining Appellant. Though it is true that the Department’s Final Order regarding its treatment of this other employee was not received into the record, there remains substantial testimony that, with the limited exception of this other employee, the Department is unaware of any cases involving conduct even remotely similar to the conduct relied upon by the Department to terminate Appellant’s

employment.<sup>19</sup> For these reasons, this Board finds no error in the Hearing Officer's decision that the Department "acted consistently with other cases" in deciding to dismiss Appellant. (Step 5 Decision ¶7 at 4)

### III. REVIEW OF THE INTERNAL PROCEDURES FOLLOWED BY THE DEPARTMENT DURING THE TERMINATION PROCESS

On appeal before this Board, Appellant argues that the Department violated his due process rights during the termination process by not conducting an investigation prior to terminating his employment and for disregarding its own internal practice of utilizing committee reviews prior to imposing discipline. He further argues that the Hearing Officer erred in concluding that the internal procedures followed by the Department during the termination process afforded Appellant appropriate due process protections and substantively complied with all relevant policies, procedures and statutes. Essentially, Appellant argues that by not following these internal procedures he was "denied the benefit of the exchange of information that would have occurred at those reviews." (Appellant's Step 6 Brief on Appeal at 12)

Regarding the Department's internal investigation, the Hearing Officer specifically found that:

The departmental investigation essentially began and ended to the satisfaction of UDC management when Mr. Ogilvie and Mr. Gallegos viewed the second video tape on June 11 and 12, 2001. Their investigation did not require more.

(Step 5 Decision at 8)

After carefully reviewing the evidentiary record as a whole, including the sworn testimony of the numerous witnesses and the documents submitted into evidence, this Board concludes that the Hearing Officer's finding regarding the Department's internal investigation is reasonable and rational and supported by substantial evidence. In so finding, the Board notes that at no time during the proceedings before the CSRB has Appellant challenged the factual basis relied upon by the Department to terminate his employment. (Appellant's Step 6 Reply Brief at 1)

Moreover the Board does not believe an extensive investigation was necessary for the Department to determine that Appellant's conduct violated departmental policy. Deputy Director Gallegos testified: "I couldn't believe what I was seeing because it was much more than just a single

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<sup>19</sup>The Board finds the evidence presented regarding this employee to be of limited relevance because it does not believe his conduct to be "substantially similar" to the admitted conduct of Appellant.



act of masturbation. The film begins with Mr. Yardley in the tower when he's supposed to be working performing various sex acts with himself, a computer screen, a water bottle, over a toilet, things up on the computer screen, standing there with a homemade sandwich board type of apparatus with his phone number. . . . I couldn't believe what I was seeing." (April 23, 2003 Tr. at 105-109)

Nothing in rule or statute required the Department to conduct a more full investigation. Based upon these facts, the Board finds the investigative process followed by the Department prior to Appellant's termination comported with due process protections and substantively complied with all relevant rules and statutes.

Finally, Appellant argues that by not following its practice of using "committee reviews" before imposing discipline, the Department violated his due process rights. Appellant argues that had the Department utilized committee reviews before recommending his termination, it would have discovered that the "basis for his termination" was for the same conduct for which he had previously been suspended. (Appellant's Step 6 Brief at 12)

The facts of the instant case establish that the Department's normal practice in processing disciplinary actions is to have committees review investigative findings of misconduct to make disciplinary recommendations to the Executive Director. (Carver April 4, 2003 Tr. at 8-14) There are two committees involved in this process. The first is at the "division level" and the second is at the "department level." (*Id.*) In making their recommendations, these committees review such things as the facts supporting the allegations, the employee's employment history and mitigating and aggravating circumstances such as prior disciplinary actions. (*Id.*)

In the instant case, there is no factual dispute that the Department did not follow its normal practice of utilizing committee reviews before issuing its Notice of Intent to terminate Appellant's employment. The facts of the instant case also establish however, that prior to his dismissal, Appellant received a specific and detailed notice of the charges against him and participated in a pretermination hearing before an administrative law judge. (Exs. A-9, A-10, G-2)

After carefully reviewing the process afforded Appellant prior to the issuance of the Department's Final Order, the Board finds that the Department's failure to utilize committee reviews prior to terminating Appellant's employment did not violate due process. In reaching this decision, the Board notes that Appellant's rights to due process regarding the termination of his employment are found at *Utah Code Ann.* § 67-19-18(5). This statute specifically provides as follows:

(5) (a) A career service employee may not be . . . dismissed unless . . .

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(b) The department head or designated representative notifies the employee in writing of the reasons for the dismissal or demotion.

\* \* \*

(d) The employee has an opportunity to be heard by the department head or designated representative.

(e) Following the hearing, the employee may be dismissed ... if the department had finds adequate cause or reason.

(*Utah Code Ann.* § 67-19-18(5))

In the instant case, Appellant was in fact notified in writing of the reasons the Department was relying upon to terminate his employment. In addition, he participated in a pretermination hearing where he was represented by counsel and evidence was received by the Department's ALJ. Importantly, at this pretermination hearing, Appellant was able to argue that the conduct for which the Department was seeking termination was the same conduct for which he had previously been suspended.

These factors persuade the Board that while the Department may have failed to "strictly comply" with its practice of using committee reviews, fundamental requirements of due process were nonetheless met. In reaching this decision, the Board relies on the Utah Court of Appeals decision in *Lucas v. Murray City Civil Service Comm'n*, 949 P.2d 746, 754 (Utah App. 1997) wherein the Court stated: "Although the record shows the Department failed to strictly comply with its procedure, the fundamental requirements of due process were met."

Moreover, the Board agrees with the Department that any perceived violation of due process in the instant case was cured when the Department provided Appellant a pretermination evidentiary hearing. At this hearing, Appellant was able to present evidence regarding his prior suspension and argue before the Department's ALJ that the conduct for which the Department proposed termination of Appellant's employment was the same conduct for which he had previously been suspended. Indeed, the facts establish that in his R&R to the Executive Director, the Department's ALJ based his recommendation that Appellant's employment be terminated solely for the conduct occurring off duty, while not in the guard tower. (Ex. A-10)

In the instant case, the Board finds that Appellant's due process interests were substantially satisfied in that he was afforded every procedural right to which he was entitled under law. As the Utah Supreme Court stated in *Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1066: "While exact conformance with the precise terms of termination procedures is doubtless the least

controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail of the termination procedure is not actionable.”

In the instant case, Appellant was given notice of the charges against him and participated in a full post termination hearing. Therefore, the Board finds no due process violation in the Department’s decision to not utilize committee reviews during the process leading up to Appellant’s dismissal.

### CONCLUSION

The Board has addressed each of the issues raised by Appellant in his appeal. After thoroughly reviewing the evidentiary record, and carefully studying the issues raised by Appellant before this Board, the Board sustains the Hearing Officer’s decision for the reasons set forth herein and hereby dismisses Appellant’s appeal to this Board. The Board finds the Hearing Officer’s decision to be reasonable and rational and supported by substantial evidence. Based upon the evidence presented at the evidentiary hearing in this matter, the Board finds the Department had adequate cause and reason to terminate Appellant’s employment.

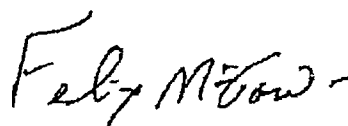
DATED this 23rd day of December 2004.

### DECISION UNANIMOUS

Felix J. McGowan, Acting Chair

Joan M. Gallegos, Member

Kevin C. Timken, Member



Felix J. McGowan  
Acting Chair

### RECONSIDERATION

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

### JUDICIAL REVIEW

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

**CERTIFICATE OF SERVICE**

I certify that on this 23rd day of December 2004, (1) I caused to be mailed, postage prepaid, the foregoing *Decision and Final agency Action* in the matter of *Kevin Yardley v. Utah Department of Corrections* to the following:

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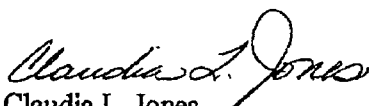
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