

1993

James M. Lunnen v. Utah Department of Transportation, and the Career Service Review Board of the State of Utah : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen G. Schwendiman; Assistant Attorney General; Jan Graham; Attorney General; Attorney for Respondents.

Phillip W. Dyer; Attorney for Petitioner.

Recommended Citation

Brief of Respondent, *Lunnen v. Transportation*, No. 930737 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5643

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DO
KFU
53
.A10
LOC

BRIEF

IN THE UTAH COURT OF APPEALS

930737 CA

JAMES M. LUNNEN,

Petitioner,

v.

UTAH DEPARTMENT OF
TRANSPORTATION, and the CAREER
SERVICE REVIEW BOARD OF THE
STATE OF UTAH,

Respondents.

Case No. 93-0737 CA

Priority 14

APPEAL OF THE FINAL DECISION OF THE UTAH
CAREER SERVICE REVIEW BOARD, AN ADMINISTRATIVE
AGENCY OF THE STATE OF UTAH

BRIEF OF RESPONDENTS

Phillip W. Dyer (#4315)
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone (801) 363-5000

Attorney for Petitioner

STEPHEN G. SCHWENDIMAN (#2891)
Assistant Attorney General
JAN GRAHAM (#1321)
Attorney General
4120 State Office building
Salt Lake City, Utah 84114
Telephone (801) 538-9500

Attorneys for Respondents

JUN 01 1994

IN THE UTAH COURT OF APPEALS

JAMES M. LUNNEN,)	
)	
Petitioner,)	
)	
v.)	Case No. 93-0737 CA
)	
UTAH DEPARTMENT OF)	
TRANSPORTATION, and the CAREER)	
SERVICE REVIEW BOARD OF THE)	Priority 14
STATE OF UTAH,)	
)	
Respondents.)	

APPEAL OF THE FINAL DECISION OF THE UTAH
CAREER SERVICE REVIEW BOARD, AN ADMINISTRATIVE
AGENCY OF THE STATE OF UTAH

BRIEF OF RESPONDENTS

Phillip W. Dyer (#4315)
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone (801) 363-5000

Attorney for Petitioner

STEPHEN G. SCHWENDIMAN (#2891)
Assistant Attorney General
JAN GRAHAM (#1321)
Attorney General
4120 State Office building
Salt Lake City, Utah 84114
Telephone (801) 538-9500

Attorneys for Respondents

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
NATURE OF THE PROCEEDINGS	1
ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW	2
DETERMINATIVE STATUTES AND RULES	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	
POINT I THE CSRB CORRECTLY DETERMINED THAT PETITIONER HAS THE OBLIGATION TO ESTABLISH INCONSISTENCY WITH PRIOR DISCIPLINARY MATTERS AND TO ESTABLISH THAT THE INCONSISTENCY CONSTITUTES AN ABUSE OF DISCRETION.	6
POINT II THE REOPENING OF HEARING PROCESS WAS NOT HARMFUL ERROR. PETITIONER HAS FAILED TO ESTABLISH THAT THE DISCIPLINE IMPOSED WOULD HAVE BEEN DIFFERENT.	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Anti-Fascist Comm. v. McGrath</u> , 341 U.S. 123 (1951)	10
<u>Farrell v. City of Seattle</u> , 452 P.2d 965 (Wash. 1969)	16
<u>Fedder v. McCurdy</u> , 768 P.2d 711 (Colo. App. 1988)	13
<u>Hotel Utah Co. v. Industrial Comm'n</u> , 211 P.2d 200 (Utah 1949)	16
<u>Kent v. Dep't of Employment Security</u> , 860 P.2d 984 (Utah App. 1993)	6, 7
<u>Morton Int'l, Inc. v. Auditing Div.</u> , 814 P.2d 581 (Utah 1991)	2, 18
<u>Neal v. Department of Health and Human Serv.</u> , 46 M.S.P.R. 26 (1990)	12
<u>People v. Gallegos</u> , 692 P.2d 1074 (Colo. 1984)	13
<u>Pickett v. Utah Dep't of Commerce</u> , 858 P.2d 187 (Utah App. 1993)	15
<u>Rupp v. Grantsville City</u> , 610 P.2d 338 (Utah 1980)	10
<u>Savage Industries, Inc. v. State Tax Comm'n</u> , 811 P.2d 664 (Utah 1991)	2
<u>Thornton v. Comm'r of Dep't of Labor & Industry</u> , 621 P.2d 1062 (Mont. 1980)	14
<u>Utah Dep't of Corrections v. Despain</u> , 824 P.2d 439 (Utah App. 1991)	6, 9

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

	Page
Utah Admin. Code R137-1-20.C.2 (1993)	3, 7, 9, 10, 11, 13, 17
Utah Admin. Code R137-1-21.D (1993)	3
Utah Admin. Code R477-11.1(1) (1993)	12
Utah Admin. Code R477-11-2 (1993)	3
Utah Code Ann. § 63-46b-1 et. seq. (1993)	1
Utah Code Ann. § 63-46b-14 (1994)	1
Utah Code Ann. § 63-46b-16(4)(h)(iii) (1993)	2, 15, 17
Utah Code Ann. § 67-19-18(1) (1993)	2, 7, 8, 13
Utah Code Ann. §§ 67-19a-101	9
Utah Code Ann. § 67-19a-406(2)(a)	9

IN THE UTAH COURT OF APPEALS

JAMES M. LUNNEN,)	
)	
Petitioner,)	
)	BRIEF OF RESPONDENTS
v.)	
)	
UTAH DEPARTMENT OF)	
TRANSPORTATION, and the CAREER)	Case No. 93-0737 CA
SERVICE REVIEW BOARD OF THE)	
STATE OF UTAH,)	Priority 14
)	
Respondents.)	

STATEMENT OF JURISDICTION

This appeal is from a final judgment of the Career Service Review Board of the State of Utah. Jurisdiction in this matter is conferred upon this court under Utah Code Ann. § 63-46b-14 (1994).

NATURE OF THE PROCEEDINGS

This appeal is from the final decision of the Utah Career Service Review Board (CSRB), an administrative agency of the State of Utah. A formal evidentiary hearing was held under the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1 et. seq. (1993) and the decision rendered was appealed to the CSRB. The CSRB sustained the hearing officer's decision after clarifying certain issues raised in that appeal. Petitioner Lunnen appeals from the CSRB decision denying his grievance and sustaining the discipline imposed by the Department of Transportation.

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

Respondents assert the relevant issues to be:

1. Whether the CSRB properly placed the burden of establishing inconsistency of treatment and abuse of discretion on the party claiming it.

STANDARD OF REVIEW: The conclusion of the CSRB is a conclusion of law and is reviewed for correctness with no deference being given to the agency's conclusion. Savage Industries, Inc. v. State Tax Comm'n, 811 P.2d 664 (Utah 1991); Morton Int'l, Inc. v. Auditing Div., 814 P.2d 581 (Utah 1991).

2. Whether the reopening of the record by the hearing officer constituted reversible or harmless error.

STANDARD OF REVIEW: The determination of whether actions taken constitute prejudicial or harmless error are conclusions of law. The CSRB's conclusions are given no deference and are reviewed on a correctness standard. Savage, supra, and Morton, supra.

DETERMINATIVE STATUTES AND RULES

The following statutes and rules are applicable in this matter. The text of the provisions either appears in the text of the argument or in the Addendum to this brief:

STATUTES:

1. Utah Code Ann. § 63-46b-16(4)(h)(iii) (1993)
2. Utah Code Ann. § 67-19-18(1) (1993)
3. Utah Code Ann. § 67-19-18(5) (1993)

ADMINISTRATIVE RULES:

1. Utah Admin. Code R137-1-20.C.2 (1993)
2. Utah Admin. Code R137-1-21.D (1993)
3. Utah Admin. Code R477-11-1 (1993)
4. Utah Admin. Code R477-11-2 (1993)

STATEMENT OF THE CASE

Petitioner Lunnen, who had a history of poor response to call-outs for emergencies, was demoted for his failure to report after having been contacted by dispatch and ordered to report. Petitioner appealed that decision to the Executive Director of the Department of Transportation, who sustained the demotion.

Petitioner appealed the director's decision to the CSRB, which assigned a hearing officer to hear the appeal. The hearing officer issued an Interim Order requesting that further information be supplied by the Department. Upon receipt of the additional information, the hearing officer issued a final ruling denying the Petitioner's grievance and allowing the discipline to stand.

Petitioner appealed the hearing officer's decision to the CSRB which, after reviewing the briefs, transcript and evidence, modified several of the findings and issued its final order denying the appeal and sustaining the Department's discipline of Petitioner. From that decision, Petitioner appeals to this Court.

STATEMENT OF FACTS

The following consists of an abbreviated statement of pertinent facts for this appeal. The Petitioner is not challenging

the finding of insubordination. The following facts, however, are set forth to present an understanding of the basis of the demotion.

1. Petitioner was a Highway Operations Specialist. (Hearing officer Findings of Fact 3, hereinafter cited as FF 3, R.4).

2. As part of Petitioner's responsibilities, he was subject to 24 hour call-out. (FF 4, R.4)

3. Petitioner had the poorest response rate of anyone of his crew. He responded only 3 of 14 times. This constitutes a 20% call-out rate. (FF 22, R.6).

4. Petitioner was rated between successful and unsuccessful in his 1991 appraisal for 24 hour call-out (FF 17, R.5) and fully unsuccessful for the 24 hour call-out for the 1992 appraisal (FF 18, R.5).

5. In April 1992, Petitioner was summoned to a meeting with his supervisor and informed that disciplinary action would be taken if he did not improve his response to call-outs. (FF 23, R.6).

6. Department policy was clear that if an employee was home and received a phone call to report, the employee reported (R.279, 283). Petitioner testified "[i]f you are home you respond" (R.321).

7. Petitioner knew he was subject to 24 hour call-out, with the obligation to respond if he was at home (R.321, 339, 344-5).

8. Petitioner had problems with call-outs (R.228) and crew members complained about his failure to respond (R.235-6).

9. On the evening of June 12, 1992, Petitioner received a call from Dispatch telling him it was headquarters and that he was

to report immediately to 7th West and I-215 in Salt Lake County. Petitioner told Dispatch that he would be right there (R.312-3, FF 26, R.7).

10. Petitioner did not report (R.167, 215, 339-40). After 1 3/4 hours of waiting for Petitioner, Dispatch called Petitioner a second time but could not get through (R.196, 215, FF 27, R.7).

11. While Petitioner and his wife testified that they thought it was a prank (R.303, 313), Petitioner could locate no one who verified it was a prank and did not call dispatch to verify its authenticity (R.287, 339). He simply did not report and went to bed (R.287-89, FF 27, R.7).

12. When Petitioner went to bed, he turned off his telephone answering machine and did not activate his pager (R.287-89).

13. Based on Petitioner's history of non-response to call-outs and his insubordination in not responding on the evening of June 12, 1992, Petitioner's supervisors and district director recommended a demotion (FF 28, R.7).

SUMMARY OF ARGUMENT

Employees may be demoted or dismissed from service for insubordination. There is a two prong-test that must be applied to determine whether an agency's decision is appropriate. First, the agency must establish that what is alleged to have happened took place. Second, the discipline will be sustained unless the discipline is an abuse of discretion. Parties challenging the discipline as being abusive or excessive have the burden of proving

the inappropriateness of discipline. It is not an agency's obligation to establish consistency of application.

Any error committed by the hearing officer in reopening the record was harmless error in that the record is replete with evidence that the punishment was not an abuse of discretion. Petitioner has the obligation to marshall the evidence and show a substantial likelihood that, but for the error the result would have been different. In this matter, Petitioner has presented nothing to show the outcome would have been different if the record had not been reopened.

ARGUMENT

POINT I

THE CSRB CORRECTLY DETERMINED THAT PETITIONER HAS THE OBLIGATION TO ESTABLISH INCONSISTENCY WITH PRIOR DISCIPLINARY MATTERS AND TO ESTABLISH THAT THE INCONSISTENCY CONSTITUTES AN ABUSE OF DISCRETION.

In Utah Dep't of Corrections v. Despain, 824 P.2d 439 (Utah App. 1991), this Court stated:

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

824 P.2d at 443.

In a subsequent appeal of a disciplinary matter before this court, Kent v. Dep't of Employment Security, 860 P.2d 984 (Utah App. 1993), the position taken in Despain was affirmed. This Court

emphasized that, if the department head finds "adequate cause or reason," Utah Code Ann. § 67-19-18(5)(e) (1993), the disciplinary decision would be sustained: "Accordingly, the CSRB must affirm the Department's decision if it is within the bounds of reasonableness and rationality." 860 P.2d at 987.

In Kent, the court held that section 67-19-18(5) and Utah Admin. Code R477-11 established "boundaries that limit the Department's use of discretion." 860 P.2d at 987. Unless the employee being disciplined shows that the Department's exercise of discretion in demoting him was abusive or beyond the scope of reasonableness and rationality as outlined in the rule and law, the discipline must be sustained. The court continued:

The Department fully complied with the administrative rules governing the dismissal of a career service employee. As we have already noted, the Department's action took into account the principles of due process, in accordance with administrative rule. Accordingly, the department's decision to dismiss Kent was within the bounds of reasonableness and rationality.

860 P.2d at 987.

In his appeal to the CSRB, Petitioner, conceded that the Department had presented substantial evidence of misconduct (R.44). Thus, the issue of whether Petitioner was insubordinate was never challenged at the CSRB level and is not being challenged before this Court. In his Interim Order, the hearing officer declared:

There is no doubt Grievant disobeyed the orders of a superior. Disobedience to the orders of a superior is insubordination. The act is also malfeasance and misfeasance in that Lunnan did not do something he should have done and/or did it wrongfully. No matter

how we characterize the act, it meets the requirement for discipline.

Hearing Officer Interim Order (emphasis added R.9-10).

For purposes of this appeal, the grounds upon which discipline was taken were substantiated. Petitioner never presented any evidence or testimony regarding inconsistent treatment between himself and others at the hearing. As such, the focal point of this appeal must center on whether the agency satisfies the second prong of the Kent test: Did it act reasonably and rationally in imposing a demotion on Lunnen as discipline for insubordination?

Utah Code Ann. § 67-19-18(1) states as follows:

Career service employees may be dismissed or demoted only to advance the good of the public interest, and for just causes as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

Thereafter, under section 67-19-18(5), department directors are obligated to follow procedural requirements before demoting employees. There is no allegation that these procedures were not followed. Subsection (5)(e) states that "[f]ollowing the hearing, the employee may be dismissed or demoted if the department head finds adequate cause or reason."

The department director therefore exercises his discretion in determining what discipline to impose after the hearing, based on the cause or reason found. It is that decision which thereafter becomes the focus of appeals. If an employee appeals the action, a formal de novo hearing is held before an independent CSRB hearing

officer. See Utah Code Ann. §§ 67-19a-101 to 408 (1993). The CSRB has promulgated rules in relation to those hearings that establish the responsibility of hearing officers relative to these matters. Utah Admin. Code R137-1-20.C.2. states, with emphasis added:

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

This rule places no burden on the agency to establish a negative (that its action was not an abuse of discretion), but directs the hearing officer to determine whether the discipline, in light of the evidence presented, was "excessive, disproportionate or . . . an abuse of discretion." That is a legal determination made by the hearing officer based on what he hears and believes from the evidence presented.

It is an agency's burden to prove its case through substantial evidence. In Other words, prove the facts upon which the action is taken and a reasonable relationship to the discipline imposed. See Utah Code Ann. § 67-19a-406(2)(a) and Despain, 824 P.2d at 443. It is not the agency's responsibility to disprove its own case or prove an employee's challenge to the discipline. Pursuant to

section 67-19-18(5)(e), the executive director may demote an employee if he finds adequate cause or reason. That is what the agency is required to present in the hearing to establish the grounds for discipline. Whether the demotion is an abuse of discretion will depend on how that information "stands on its own" and whether the hearing officer, in light of evidence presented by an employee, deems it abusive.

In this case, the hearing officer found that the discipline was appropriate and, as required by CSRB rule, gave deference to the agency decision.

Petitioner misunderstands the relationship between an agency's "burden of proof" and general "principles of due process." In an attempt to support his position, Petitioner cites Utah Admin. Code R477-11-1.(1), which states that principles of due process shall include various factors including consistent application. The factors noted in the rule do not create separate specific burdens in presenting a case and are certainly not technical concepts with fixed elements.

The Utah Supreme Court has clearly expressed this admonition, which originated with the United States Supreme Court:

"[D]ue process" is not a technical concept with a fixed content unrelated to time, place and circumstances which can be imprisoned within the treacherous limits of any formula. Rather the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved.

Rupp v. Grantsville City, 610 P.2d 338, 341 (Utah 1980); see also Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951).

In addition to "consistency of treatment," other factors are listed in R477-11-1.(4) that agency management may use in determining discipline. An employee may likewise use these factors to establish that the discipline was too severe.

In determining the specific type and severity of the discipline to be taken, consideration may be given to such factors as the severity of the infraction, the repeated nature of violations, prior disciplinary/corrective actions, previous oral warnings, written warnings and discussions, the employee's past work record, the effect on agency operations, and the potential of the violations for causing damage to persons or property.

Each of these factors can be used to determine whether the discretion of agency management was abused. No burden is placed on the agency. Due process principles, as Rupp points out, are based on the principle of "fairness and justice" for the parties involved.

The clear interpretation of Utah Admin. Code R477-11-1(1), which refers to "principles of due process" and states that these principles "include" those five listed, is that other factors of due process may be applicable. The factors listed are suggestions that enable the agency to protect the procedural (due process) fairness of a merit employee.

Petitioner's misinterpretation of mandated burdens placed on the agency leads to potentially ridiculous results. For example, if an agency has never faced a situation like the one for which action was taken, an agency could never prove consistent application of sanctions and would be stymied in its actions. "Fairness" mandates an independent look at what has taken place to

determine whether there has been an "abuse of discretion." Due process principles establish guidelines as to what fairness may include but does not create separate burdens on management to prove that the disciplinary action taken was fair.

The Federal Merit System Protection Board, the federal equivalent of the CSRB, has addressed the issue of whether "principles" of the merit system independently create a cause of action. In Neal v. Department of Health and Human Serv., 46 M.S.P.R. 26 (1990), the Board stated:

The merit systems principles are intended to furnish guidance to Federal agencies and do not constitute an independent basis for legal action

46 M.S.P.R. at 28.

Just as in the federal system, principles established by the Department of Human Resource Management under Utah Admin. Code R477-11.1(1) do not create separate causes of action or burdens to be placed on the agency in establishing its case. Instead, they provide guidance in determinations of fairness if raised by the appropriate party. When there are allegations that due process has not been provided, the burden of establishing such a denial does not fall on the agency alleged to have violated the doctrine, but the person claiming the violation. Counsel has found no jurisdiction that requires an affirmative showing that due process was followed in every particular as part of a case proper.

As stated previously, agencies have no obligation to prove a negative in a hearing setting. Agency management is to follow principles of fairness in its determinations, but there is no

statute, rule or procedure that elevates these principles to separate elements on which the disciplining agency bears the burden of proof. Challenges to the rules, procedures or fairness of discipline imposed fall squarely on the one making the challenge.

Utah Code Ann. § 67-19-18(5) and Utah Admin. Code R477-11-2 require that an employee be notified in writing of the grounds for contemplated disciplinary action, be given an opportunity to be heard and respond, and then, if the "agency head finds adequate cause or reason," the employee may be demoted or dismissed as the circumstances warrant. Thus, the issue boils down to whether, given the circumstances, the department head has found "adequate cause" or "reason" for the demotion. If so, then the action shall be sustained absent a showing that the action was an abuse of discretion. It cannot seriously be argued that management must establish what it did, then turn around and prove that it did not act in an abusive manner.

Statutes, rules and court decisions acknowledge a presumption of correctness of agency action, including imposition of discipline. To shift the burden of proof to the party who is presumptively correct is procedurally incorrect and error.

The Colorado Court of Appeals in Fedder v. McCurdy, 768 P.2d 711 (Colo. App. 1988), so held when it stated "[t]he burden is on the individual challenging the action to overcome the presumption that the agency's acts were proper." Id. at 713 (citation omitted). Previously, the Colorado Supreme Court held in People v. Gallegos, 692 P.2d 1074, 1078 (Colo. 1984), that:

Traditionally, a presumption of regularity attaches to administrative acts. . . . In civil cases, a presumption operates to place upon the adverse party the burden of producing evidence sufficient to rebut the presumption, while retaining the burden of persuasion where it originally lay.

Accord Thornton v. Comm'r of Dep't of Labor & Industry, 621 P.2d 1062, 1064-65 (Mont. 1980) ("[t]here exists a rebuttable presumption in favor of the decision of the agency, and the burden of proof is on the party attacking it to show that it is erroneous").

If, as Despain states, the discipline shall be sustained absent a showing of abuse of discretion or lack of reasonableness or rationality, the agency simply needs to establish that there is a connection between the discipline and the willful misconduct. The burden then shifts to the one challenging that claim to establish that the actions were not reasonable. If evidence is brought forward by the person claiming an abuse of discretion, as noted in Gallegos, the burden shifts back to the agency to counter, through rebuttal evidence, that the evidence presented by the employee was not credible or does not overcome the presumption of correctness.

As noted, Petitioner offered no evidence as to inconsistency of application of discipline, an issue he claims is grounds to vacate the disciplinary action. With no evidence of inconsistent application or violation of due process, it would be error for this court to reverse an otherwise appropriate disciplinary action.

This Court has addressed a similar issue in Pickett v. Utah Dep't of Commerce, 858 P.2d 187 (Utah App. 1993). The Utah Administrative Procedures Act permits judicial review for possible reversal of an agency action is if the action is

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

Utah Code Ann. § 63-46b-16(4)(h)(iii).

This provision, the Pickett court declared, did not place an affirmative obligation on the agency to establish consistency as part of its case proper. 858 P.2d at 191. The person claiming that inconsistency with prior practice justified reversal of agency action has the burden of establishing that inconsistency, as well as its prejudicial impact. This Court said:

We agree with Justice Durham's analysis that this section requires a petitioner to establish as a prima facie case that the administrative agency's action in his or her case was "contrary to the agency's prior practice." If a petitioner meets this burden, section 16(4)(h)(iii) unambiguously requires that "the agency justif[y] the inconsistency" with prior decisions. Therefore . . . establishing this prima facie case by a preponderance of the evidence shifts the burden to the agency to "demonstrate a fair and rational" basis for the departure from precedent in the instant case. If the agency sets forth its rationale for deviation from its own precedent or an explanation to demonstrate consistency, our review of the explanation will be on the basis of "reasonableness and rationality." Appellate review of the penalty itself, other than as affected by prior agency actions, is limited to determining if the agency has abused the discretion granted it to impose sanctions.

858 P.2d at 191.

The reasoning of the Utah Supreme court in Hotel Utah Co. v. Industrial Comm'n, 211 P.2d 200 (Utah 1949), clearly supports the Pickett holding. In Hotel Utah, the Industrial Commission had exercised its discretion in determining which party would be the appropriate collective bargaining unit in a labor dispute. The Court stated:

If the discretion so granted is reasonably exercised, the finding cannot be set aside. It is only in those cases wherein we can find the Board has abused its discretion that we may interfere. And if appellant seeks to reverse the finding of the Board because of an abuse of discretion in selecting the appropriate unit the burden is on it to establish the abuse.

211 P.2d at 203. Accord Farrell v. City of Seattle, 452 P.2d 965, 967 (Wash. 1969) ("[O]ne who asserts that a public authority has abused its discretion and is guilty of arbitrary, capricious, and unreasoning conduct has the burden of proof.").

Here, the hearing officer determined insubordination had been proven and that the discipline selected was reasonable. The CSRB found the hearing officer was in error to require the agency to produce evidence it did not have the burden to produce. That was and is consistent with what this court and other courts have held: the burden falls on the one claiming abuse of discretion to produce evidence of the abuse. That was not done by Petitioner in this case. The CSRB's decision is therefore correct and must be sustained.

Because the hearing officer was in error to order evidence of consistency and because the CSRB corrected that error and held that

Petitioner had presented nothing to establish inconsistency, it is not necessary to address Petitioner's third argument. While Respondents believe that testimony given by Gene Sturzenegger, District Director involved with Petitioner's case (R.18-19), was sufficient to show consistency within Petitioner's district as to how insubordination cases were handled, there was no requirement on the agency to present such information and, therefore, it will not be discussed further.

POINT II

THE REOPENING OF THE HEARING PROCESS WAS NOT HARMFUL ERROR. PETITIONER HAS FAILED TO ESTABLISH THAT THE DISCIPLINE IMPOSED WOULD HAVE BEEN DIFFERENT.

Petitioner argues that the hearing officer erred in reopening the proceedings and requiring further evidence to be submitted for use in his deliberations. Respondents are unaware of any rule specifically addressing the hearing officer's authority to reopen matters. Petitioner cites Utah Admin. Code R137-1-20.E as support for his argument. A close reading of the rule does not address the hearing officer's right to exercise his discretion for the fairness of the proceedings.

Respondents therefore assert that, for Petitioner to prevail, he must establish that the hearing officer not only abused his discretion by reopening the proceedings but also that the reopening resulted in "substantial prejudice" within Utah Code Ann. § 63-46b-16(4) (1993).

Petitioner has failed in both respects. In particular, he has failed to establish that there is a reasonable likelihood that the

reopening materially affected the outcome of the CSRB proceeding. See Morton Int'l Inc. v. Utah State Tax Comm'n, 814 P.2d 581, 584 (Utah 1991). If error was committed by the hearing officer, it is Petitioner's obligation to convince this Court that the error affected the discipline imposed to the extent that there is a reasonable likelihood the discipline would have been different absent any abuse of discretion by the hearing officer.

Petitioner does not challenge the fact that he engaged in insubordinate conduct, which the hearing officer held justified discipline. Petitioner produced no evidence to show that the punishment was inherently unfair or an abuse of discretion. Petitioner's sole argument is that no discipline at all should be imposed regardless of the determination by the hearing officer that discipline is appropriate. Such an assertion, absent a showing that the discipline rendered was an abuse of discretion, is not supported by anything Petitioner is presenting to this Court.

The Utah Supreme Court adopted the harmless error standard for review of administrative decisions. The Court stated in Morton:

Indeed, the language of section 63-46b-16(4) is similar to language in rules of procedure and evidence dealing with harmless error. Given this similarity in language, we conclude that the legislature in enacting section 63-46b-16(4) intended that the same standard used for determining the harmfulness of error in appeals from judicial proceedings should apply to reviews of agency actions. Under this standard, an error will be harmless if it is "sufficiently inconsequential that . . . there is no reasonable likelihood that the error affected the outcome of the proceedings."

814 P.2d at 584.

This purported "error," if error it was, does not automatically justify the removal of all discipline - only that which can be interpreted to be arbitrary or unreasonable would be subject to judicial modification.

The hearing officer nowhere held that the demotion was either an abuse of discretion or excessive. To hold that the hearing officer made such a finding manufactures something that never happened and strains logic.

In his Final Decision, the hearing officer stated: "Therefore, it was for Lunnen's benefit that further proof of consistency was required" (R.26-7) (emphasis added). Further proof assumes the existence of some proof to begin with. Nonetheless, to simply argue, as Petitioner does, that a rule violation of reopening the matter somehow changed the outcome does not establish harm. The hearing officer himself stated, as cited above, that the only reason he requested additional information was "for Lunnen's benefit." The only way it could have been for Petitioner's benefit was if it had shown that prior circumstances justified a modification. Since the information supplied didn't benefit him, it made no difference to the outcome of the discipline imposed.

Independently, the discipline was proper and sustainable without the reopening of the matter to accept additional information. The Petitioner has failed to show that there was any reasonable likelihood that the outcome would have been different. Demotion was proper. The error, if error it was, had no effect on the outcome of the CSRB proceeding.

CONCLUSION


Agency management has the right to discipline employees if it is determined there is cause. The hearing officer established through an independent hearing process that there was cause insubordination - in Petitioner's willful refusal to respond to an order to report for duty. Petitioner does not challenge that conclusion.

Once "cause" is established, the discipline chosen by the agency must be upheld unless the agency abused its discretion or the discipline was so unreasonable or irrational as to require a modification. The burden of establishing abuse of discretion falls on the party claiming the abuse.

In conclusion, a party claiming that error necessitates the reversal or modification of a decision has the burden on appeal to show that the error, if error there was, was harmful in the sense that, but for the error, there is a substantial likelihood that the outcome of the administrative proceeding would have been different. This Petitioner has failed to do.

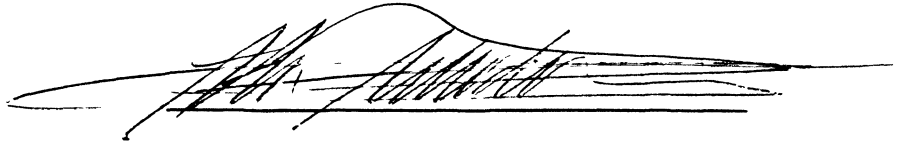
Respondents urge the Court to affirm the decision of the CSRB upholding the demotion imposed by the Department of Transportation.

DATED this 1st day of June, 1994.


STEPHEN G. SCHWENDIMAN
Assistant Attorney General
Counsel for Respondents

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Respondents to counsel for Petitioner, Phillip W. Dyer, 318 Kearns Building, 136 South Main Street, Salt Lake City, Utah 84101, this 21 day of ~~May~~^{June}, 1994.

A handwritten signature in black ink, appearing to be "J. W. Dyer", written over a horizontal line.

INDEX OF ADDENDA TO RESPONDENTS' BRIEF

- A. HEARING OFFICER'S INTERIM ORDER, LUNNEN v. UTAH DEPARTMENT OF TRANSPORTATION, 11 CSRB/H.O. 154, January 5, 1993
- B. HEARING OFFICER'S FINAL ORDER AND DECISION, LUNNEN v. UTAH DEPARTMENT OF TRANSPORTATION, 11 CSRB/H.O. 154, March 15, 1993
- C. CAREER SERVICE REVIEW BOARD'S DECISION AND FINAL AGENCY ACTION, LUNNEN v. UTAH DEPARTMENT OF TRANSPORTATION, 5 CSRB 46, October 28, 1993
- D. UTAH CODE ANN. § 63-46B-16 (1993)
- E. UTAH CODE ANN. § 67-19-18 (1993)
- F. UTAH ADMIN. CODE R137-1-20 (1993)
- G. UTAH ADMIN. CODE R137-1-21 (1993)
- H. UTAH ADMIN. CODE R477-11-1 (1993)
- I. UTAH ADMIN. CODE R477-11-2 (1993)
- J. NEAL v. DEPARTMENT OF HEALTH AND HUMAN SERV., 46 M.S.P R. 26 (1990)

ADDENDUM A

Hearing Officer's Interim Order, Lunnen v. Utah Department
of Transportation, 11 CSRB/H.O. 154, January 5, 1993

BEFORE THE CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH

In The Matter Of:

JAMES M. LUNNEN,

Grievant,

v.

**UTAH DEPARTMENT OF
TRANSPORTATION**

Agency.

• • • • •

FINDINGS OF FACT,

CONCLUSIONS OF LAW

AND INTERIM ORDER

WITH CONTINUING

JURISDICTION

Case No. CSRB/H.O. 154

AUTHORITY

In compliance with *Utah Code Annotated* §67-19a-406, an administrative hearing at Step 5 was held on Tuesday, November 10, 1992. James M. Lunnen (Grievant) was present and represented by Thomas R. Bielen, Utah Public Employees' Association; the Utah Department of Transportation (Department) was represented by Grant S. Fairbanks, Human Resource Manager. A court reporter made a verbatim record of the proceedings; testimony and documentary evidence were received into the record. Witnesses were placed under oath. This Hearing Officer (Presiding Officer, *Utah Code Annotated*, §63-46b-2(1)(h)) now makes and enters the following:

STIPULATED FACTS

The parties, by and through their representatives, stipulated and agreed that the

following facts shall be deemed conclusively admitted as to all parties:

1. Mr. Lunnen was hired by the Utah Department of Transportation as a probationary employee, Schedule "B," on March 6, 1978.

2. On September 21, 1985, Grievant was promoted to a Highway Operations Specialist, Grade 17.

3. On April 1, 1989, Grievant was promoted to a Highway Operations Specialist, Grade 19.

4. The Job Specification for a Highway Operations Specialist, Grade 19, indicates that the incumbent may be subject to 24 hour call-out.

5. Because of Grievant's assignment, he received a pager approximately the same time that he was promoted to a Highway Operations Specialist, Grade 19.

6. On April 2, 1992, Grievant was called to a meeting. Present at the meeting were: Mr. Lunnen; Ron Smith, Area Supervisor; Paul Crossland, Supervisor; and Gloria Hunt, District Administrative Coordinator.

7. On June 22, 1992, Grievant was given a warning notice dated June 16, 1992, which indicated a problem with not responding to a call-out.

8. On July 7, 1992, a memo was sent to Eugene Findlay, Executive Director of the Utah Department of Transportation, by Gene Sturzenegger, District 2 Director, requesting that Grievant be demoted to a Highway Operations Specialist, Grade 17, and be given an 11% reduction in salary.

9. On July 13, 1992, Mr. Findlay sent a memo to Grievant that informed him that he would be demoted.

10. The Grievant appealed this proposed demotion.

11. Mr. Findlay appointed Howard Richardson, Deputy Director, to hear the appeal. Mr. Richardson was assisted by Lester Jester, Engineer for Maintenance; Heber Vlam, Engineer for Standards and Special Studies; and Grant Fairbanks, Human Resource Director.

12. A hearing was held on August 3, 1992, regarding the proposed demotion.

13. As a result of the aforementioned hearing, the Department board recommended that a demotion from Grade 19 to Grade 17 with a 2.75% reduction in pay be assessed.

14. On August 10, 1992, Mr. Findlay sent a memo to Grievant which indicated that Lunnan would be demoted to a Highway Operations Specialist, Grade 17, effective August 15, 1992.

15. Mr. Lunnan was demoted to Grade 17 and given a salary reduction to \$11.62 effective August 15, 1992.

16. Mr. Lunnan appealed this aforementioned demotion to the fifth step of the grievance process.

17. Joint Exhibit 1, a UDOT Performance Review of Lunnan, for the period 7/1/90 - 6/30/91 evidences an "S/U" rating, which is a cross between "successful" and "unsuccessful" in the "24-Hour Call" objective. Paul Crossland wrote of Lunnan: "Sometime [sic] hard to get a hold of for snow removal at night."

18. Joint Exhibit 2, a UDOT Performance Review of Lunnan, for the period 7/1/91 - 6/30/92, evidences an unsatisfactory rating on the "24-Hour Call" objective. Crossland wrote of Lunnan that Lunnan "may be" subject to 24 hour call-out. Crossland thanked

Lunnen for installing a phone in his residence. Testimony relevant to this exhibit stated that Crossland was reinforcing the 24 hour call-out provision in Lunnen's job duties. Crossland also wanted to reinforce the fact that a phone was a requirement of the job.

19. Joint Exhibit 3, a UDOT Warning Notice to Lunnen, dated June 16, 1992, and signed by both Lunnen and Crossland, states that Lunnen did not respond to an emergency call-out and upon a subsequent attempt to telephonically contact Lunnen, an answering machine informed the dispatcher that the Lunnens were not at home. The exhibit further states that a demotion for Lunnen will be recommended to the Executive Director.

20. Joint Exhibit 5, a memorandum from Gene Sturzenegger to Gene Findlay, UDOT Executive Director, details Lunnen's history regarding 24 hour call-outs and recommends a demotion.

21. Joint Exhibit 4 is a class specification of the Utah Department of Human Resource Management (DHRM) for Lunnen's position. The class specification states that the employee's working conditions:

may be subject to 24 hour call; may be required to have access to an operating telephone or equivalent method of contact in case of emergency.

22. Agency Exhibit 1, as testified to by Crossland, is a record of the after hours call-outs made to Lunnen and others on his crew between January 1, 1992, and June 21, 1992. The exhibit shows that Lunnen responded to after hour calls 3 of 14 times. This is a 20% response rate. The next lowest response was 40%, according to Crossland.

23. Based upon the low response to call-outs by Lunnen, Crossland called Lunnen into a meeting on April 2, 1992. Lunnen was informed that disciplinary action would follow if he did not improve his response to call-outs. The basis for the needed improvement, according to Crossland, was that a "no show" placed crew members at risk because they had to work longer hours to remove snow. That, coupled with bad weather and fatigue

which they experienced while working longer hours, placed them in danger.

24. Crossland stated that there was no criteria nor policy determinative of what percentage of call-outs each crew member was required to adhere to.

25. During the eight months Lunnan was without a phone, a pager had been provided to him. Lunnan and Crossland had a code devised which informed Lunnan if he should merely call in or whether he should show up at the station in response to the page. Lunnan stated that several times he checked the pager and it appeared not to be in working order. Each report of an inoperable pager was responded to by repairing the pager by the end of the shift.

26. On June 12, 1992, a tape was made of the call by dispatch to the Lunnan residence. The tape was played for this hearing officer and is a part of the record, although not a part of the transcript due to the multiple voices on the tape. The dispatcher called while Lunnan and a friend were watching a televised basketball game at approximately 10:00 p.m. The dispatcher informed Lunnan that there had been a concrete buckle on I-215. Lunnan responded "ok". Approximately one-half hour later, a dispatcher again called the Lunnan residence and a machine answered the phone. Lunnan did not respond to the emergency.

27. Lunnan and his wife testified that it is common among the crew members to call each other during televised sporting events and pretend there has been a call-out. Lunnan and his wife have both participated in these pranks. Lunnan believed the call of June 12, 1992, to be such a prank, but he could not verify it because other pranksters were not answering their phone when Lunnan tried to call them.

28. It was this failure to respond to the June 12, 1992 call-out that led to Lunnan's demotion.

29. But for the call-out situation at issue, Lunnan was a satisfactory employee who had been recommended for a promotion from Grade 17 to Grade 19, by Crossland, due to his ability and hard work. Lunnan has worked at UDOT since 1978 and has no other disciplinary record.

CONCLUSIONS OF LAW

1. State of Utah, DHRM R477-11-2 states that an employee may be demoted for

cause as listed in R477-10-2 and R477-11-1 of the rules.

2. R477-10-2 governs corrective actions. Pursuant to this rule, which governs conduct other than "willful misconduct," corrective action shall consist of one or more of a number of actions, pursuant to a written plan.

3. R477-11-1 governs disciplinary actions. Disciplinary action may be instituted for, among other reasons, insubordination or disloyalty to the orders of a superior. The type and severity of the discipline shall be governed by due process as defined in R477-11-1.(1) through R477-11-1.(1)(e).

DISCUSSION

The first issue in dispute is whether or not the Agency can demote Lunnen without first implementing corrective action pursuant to R477-10-2.

In this case there is a history of satisfactory job performance, except in the goal, "objective", of 24-hour call-outs. As to that objective, Lunnen has received notice through two annual evaluations and a meeting on April 12, 1992, that he needed improvement in that objective. That is, Lunnen needed to show up when he was called out for after-hour emergency situations.

To assist Lunnen's meeting the objective, the Agency provided him with a pager when he could not afford to pay for a phone in his home — a period of eight months. Lunnen's supervisor went to Lunnen's house to pick him up on more than one occasion when there was a heavy snowfall that needed emergency clearing and Lunnen had no phone. This Hearing Officer believes these pick ups were to assist Lunnen, not to punish or embarrass him.

The unsatisfactory performance of the 24-hour call-out objective did not impede Lunnen's promotion based upon an overall satisfactory performance. The person who recommended that Lunnen be promoted was the same person who had issued him a pager, picked him up, gave him time to install a phone, and evaluated Lunnen annually, Paul Crossland.

Can a corrective action plan merely consist of only verbal notice to respond to an objective, or an annual evaluation comment which may or may not be clear to the employee, or a meeting which informs the employee that there is a problem? In this case, the

employee was given notice by each of the above means that there was a problem. The solution was to pick him up when he was needed; then a pager was used to contact him; then, finally a phone was required to be installed. Each of the above was a means to remedy a problem. The problem — not being as responsive as management wanted — was communicated in writing at least twice.

I have discussed the Corrective Action Plan rule because Lunnen made it a key part of his defense that he was not given a written Corrective Action Plan as called for in the rule. However, the rule regarding corrective actions is not an exclusive remedy when "willful misconduct" exists. In this case, demotion resulted due to one incident which occurred on June 12, 1992. The appropriate rule to apply is R477-11-1, Disciplinary Action. (See Grievant Exhibit 2.) This rule applies in cases of ". . . insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance,"

In this case, Lunnen received a phone call from the dispatcher informing him of an emergency situation and that he was requested to respond. Lunnen was at home and personally received the call. He gave absolutely no indication that he could not or would not respond to the call. He was watching a basketball game with a friend. Lunnen's failure to respond is based upon his claim that he thought it was a prank call. Grievant and his wife both testified that they and Grievant's co-workers call each other during televised sporting events and, as a prank, act as if they are calling from work and request that the called party report to work. Lunnen believes this is an intervening event that does exculpate him. Lunnen did not verify with anyone at work that the call was not legitimate. Lunnen cannot validate his failure to respond by putting up a defense that is of his own creation. His non-response is not based upon legitimate grounds, but upon a reason that should not exist because it has the ability to harm someone or cause someone injury if the result is as in this case.

Is Lunnen subject to discipline for not responding to a direct order? The appropriate answer is only if he was insubordinate or disobeyed orders of a superior or was misfeasant or malfeasant is he then subject to demotion as a discipline, as stated in R477-11-2, which is based upon and recites *Utah Code Annotated* (UCA), §67-19-18(1). There is no doubt Grievant disobeyed the orders of a superior. Disobedience to the orders of a superior is

insubordination. The act is also malfeasance and misfeasance in that Lunnen did not do something he should have done and/or did it wrongfully. No matter how we characterize the act, it meets the requirement for discipline.

The severity of the discipline is governed by R477-11-1.(1). Discipline must take into consideration: consistency of application, prior knowledge of the standards, notice of noncompliance, determination of facts and opportunity to respond. Lunnen had prior knowledge that there was a problem with his not responding to the call-outs. Grievant received notice by way of annual evaluations, verbal notification and by meetings. Lunnen has been given the opportunity to respond to the allegation of insubordination. The remaining issue is whether or not the demotion is consistent with other employees' disciplinary penalties for insubordination.

The Agency offered one instance of insubordination and a commensurate demotion as proof of consistency of application. Taking into account the long and valued work performance of Lunnen, it does not appear that a demotion for this act is consistent with prior discipline imposed by the Agency. There is no dispute that Lunnen knew about the call-out policy of 24-hours and that he knew he was subject to it; but, there is no proof that it is a mandatory policy nor that anyone else has been disciplined for not responding to the call-out, except the one incident mentioned above. There is substantial evidence from both sides that any excuse for not responding was accepted as being valid. In this case, Lunnen had no excuse.

Pursuant to UCA, §67-19a-406, the Agency has the burden of proof in cases of demotion. The Agency has not provided any proof that the demotion of Lunnen is consistent with prior discipline for one act of insubordination. It would be difficult and probably inequitable to both parties for this Hearing Officer to ratify some random discipline. Therefore, Lunnen will continue in his present status for twenty working days from receipt of this decision. During this time, the Agency shall submit the best evidence they have regarding the discipline they imposed on others for a similar first insubordination finding. If there is no consistency in application of discipline, this Hearing Officer will select the most common or equitable discipline. The Agency should be aware that if demotion is not a consistent discipline, then Lunnen will be reinstated to his prior grade with back

pay.

ORDER

This Hearing Officer finds that the Agency had the authority to discipline Lunnen and that Lunnen was insubordinate by his failure to obey the order of a superior pursuant to Lunnen's prior knowledge that he was subject to a 24-hour call-out. The discipline imposed shall be held in abeyance pending proof by the Agency that it is consistent with other similarly situated employees. The Agency shall submit to this Hearing Officer, through the Administrator of the Career Service Review Board, its best proof of what discipline is consistently given to employees of the Agency for a first time insubordination, i.e., failure to obey the order of a supervisor. This Hearing Officer shall then ratify the Grievant's appropriate discipline. If there is no consistent discipline, this Hearing Officer shall select the most appropriate one from those disciplines most regularly imposed. Any adjustment to Lunnen's grade and pay shall be adjusted when the discipline is imposed.

Pending modification or validation of the discipline, the record shall remain open. This hearing and its record shall remain open for purposes of appeal by Grievant until the discipline is imposed and the time for appeal shall commence subsequent to a modification of this Order which imposes the discipline. Copies of all submittals to this Hearing Officer shall be provided to Grievant.

DATED this 5th day of January 1993.

Michael N. Martinez
Hearing Officer/Presiding Officer
Career Service Review Board

ADDENDUM B

Hearing Officer's Final Order and Decision, Lunnen v. Utah
Department of Transportation, 11 CSRB/H.O. 154, March 15, 1993

MAR 17 1993

Office of ATTORNEY GENERAL
236 STATE CAPITOL



COURTESY COPY.

BEFORE THE CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH

In The Matter Of:

JAMES M. LUNNEN,

Grievant,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Agency.

• • • • •

FINAL ORDER

AND DECISION TO

STEP 5 PROCEEDINGS

Case No. CSRB/H.O. 154

AUTHORITY

Pursuant to the Findings of Fact, Conclusions of Law, and Interim Order With Continuing Jurisdiction issued by this Hearing Officer on January 5, 1993, and to R137-1-20 A., which states that a Hearing Officer may require evidence be produced, separate and apart from that received in a hearing, as governed by R137-1-20 B., this Final Order issues.

Also, pursuant to R137-1-20 J., the CSRB Hearing Officer may, after finding sufficient cause for sustaining disciplinary action by an agency, provide for a remedy or relief "as deemed appropriate and in the best interest of the respective parties."

In this case the Hearing Officer found, and so held in his Interim Order, that the Agency had just cause to discipline Grievant for insubordination. The remaining issue to be decided then was the degree of severity of the disciplinary penalty, since neither party had argued the issues of severity, consistency or latitude of discipline. Therefore, pursuant

to R137-1-20 J., this Hearing Officer issued his Interim Order, which included both Findings of Fact and Conclusions of Law, but which delayed any finding on severity of Agency's action pending further submission by the parties and in the best interests of the respective parties.

Since the issuance of the Interim Order, Mr. Lunnen, Grievant, has objected to the submission of further evidence to this Hearing Officer. See Lunnen Memorandums dated January 13, 1993, and February 3, 1993. The Agency submitted its requested documentation on January 25, 1993. Grievant's main objection is that this Hearing Officer was prohibited from accepting or requiring further evidence in this case once the hearing day was over. Pursuant to the above citations, Hearing Officers are given wide latitude in seeking to do justice to the respective parties. In this specific case, Mr. Lunnen filed a Request For Reconsideration, which basically stated that the Agency did not meet its burden of proof; therefore, the supplemental information could not be introduced. What Mr. Lunnen did not address in his Motion is that the Interim Order issued states emphatically that Mr. Lunnen was insubordinate, on that issue the Agency fully met its burden. Therefore, the supplemental evidence sought, which as noted in the Interim Order that the record would remain open, was not further testimony or argument but rather proof of consistent discipline. The only information sought by the Hearing Officer was, "What is the appropriate punishment for insubordination at UDOT?"

Mr. Lunnen argues in his Motion For Reconsideration that the Agency did not prove a demotion was consistent discipline for one act of insubordination. That is true. However, this does not invalidate the finding that Lunnen was, without doubt and by substantial proof, insubordinate and the only evidence received was that the reduction in grade was what the Agency thought was just and consistent with prior discipline. Therefore, it was for Lunnen's

benefit that further proof of consistency was required. Lunnan further argues, in his second Memorandum, that this Hearing Officer is barred by the "residuum rule" as stated in the case of *Tolman v. Salt Lake County*, which bars "all hearsay and other legally inadmissible evidence." What Mr. Lunnan is saying is that the Agency's subsequent submissions are hearsay and/or legally inadmissible. What the court in *Tolman* was referring to was due process. Do the parties have the ability to confront and examine the witnesses against them? In this case there has been no objection to the evidence introduced and accepted at the hearing. The subsequent submissions were provided to both parties. No objection to the materials provided has been made by Mr. Lunnan; he has argued against their being received, but receipt of these documents has only been to assist in the provision of an appropriate remedy, not to assist in the determination of guilt or innocence. This specific bifurcation is allowed by R137-1-20 J.

Does the above rule allow for subsequent information to be received? The Hearing Officer may provide for "other relief as deemed appropriate and in the best interest of the respective parties," through the receipt of information pursuant to R137-1-20 A. so long as each party's due process is protected. In this case the parties each had full opportunity to provide subsequent information dealing with consistent discipline for the behavior found to be insubordinate and to further contest the information provided.

As an exhibit to his final Memorandum, Mr. Lunnan attached a copy of the *Parker v. Utah Department of Corrections*, 5 CSRB 42, (Step 6) issued 28 January 1993. Although issued after the hearing of the above parties, it does have some clarification useful to this case. The *Parker* Order cites R137-1-20 J. at page 5. In its discussion of the rule the Career Service Review Board states that the determination of whether "discipline as excessive, disproportionate or otherwise constitutes an abuse of discretion" is inherent in the process

of rendering a decision. The Hearing Officer must give latitude and consideration to an agency's decision when supported factually.

Parker does not state that a case cannot be bifurcated nor evidence received on the narrow issue of consistency of discipline nor as a basis to give latitude and consideration to an agency's discipline. What *Parker* does say is that whatever method of evidence gathering is used, when permissible, it must be fair to both parties. In this case, the latitude given to the Agency, as well as the consistency of imposing demotion, were not adequately addressed at the hearing by either party; therefore, fairness to both sides dictated further documentation to the issue. This in no way impinges on the finding that Mr. Lunnen was insubordinate. The supplemental issue only pertained to his demotion.

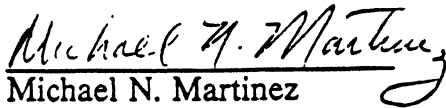
The reason for the supplemental information was to be fair and not have the Hearing Officer ratify a discipline inconsistent with prior Agency imposition with the possibility of being overly harsh on the Grievant.

DECISION AND ORDER

Based upon the information submitted by the Agency pursuant to the Interim Order and Grievant's failure to contest either the sufficiency or veracity of that information as well as both the consistency and severity of the Agency's use of demotion as a discipline when employees have been insubordinate, it is hereby held that the Agency's discipline was neither excessive, disproportionate nor an abuse of discretion. Therefore, Mr. Lunnen's grievance remedy seeking a lesser discipline is denied and the Agency's discipline is upheld.

Additionally, Grievant's Motion For Reconsideration, although untimely, has been considered and discussed above, and is also denied.

DATED this 15th day of March 1993.


Michael N. Martinez
CSRB Hearing Officer

RECONSIDERATION

Any request for reconsideration must be filed in writing with the Career Service Review Board within ten working days upon receipt of this decision. (*Utah Administrative Code*, R137-1-20 M.)

APPEAL

Any appeal of this decision must be filed in writing with the Career Service Review Board within ten working days upon receipt of this decision. (*Utah Code Unannotated* (1993 Supp.), §67-19a-407(1)(a)(i).)

ADDENDUM C

Career Service Review Board's Decision and Final Agency Action
Lunnen v. Utah Department of Transportation, 5 CSRB 46
October 28, 1993

BEFORE THE CAREER SERVICE REVIEW BOARD OF THE STATE OF UTAH

This case proceeded properly through the State's grievance procedures, and the Board has assumed jurisdiction over Mr. Lunnan's appeal to Step 6. The Step 6 or Board-level review constitutes the final step in the administrative review under the codified *Grievance and Appeal Procedures*, according to §§67-19a-202(1)(a), -407 and -408, as well as constituting a final agency action under §63-46b-14 of the *Utah Administrative Procedures Act* (UAPA). All UAPA formal adjudicatory provisions are applicable to the CSRB's proceedings at both Steps 5 and 6. After closing the record following oral argument, the Board Members entered into an executive session for deliberation and decision-making.

After considering the record as a whole and the arguments presented at the Board-level hearing, the Board sustains the Step 5 Decision and denies Mr. Lunnan's appeal.

ISSUES

A. Issues Adjudicated at Step 5 Hearing

The following twofold issues were noticed for the evidentiary/Step 5 proceedings as the issues to be adjudicated:

1. Was Grievant demoted for just cause?
2. If not, what is the appropriate remedy?

On these issues, the CSRB hearing officer ruled that just cause supported Mr. Lunnan's demotion, and that his penalty was neither excessive, disproportionate nor an abuse of discretion.

B. Issues Presented on Appeal to Step 6

Mr. Lunnan comes before this Board arguing three issues upon appeal to Step 6. First, Appellant argues that the Department failed to carry its burden of proof; therefore, his disciplinary penalty should be vacated, and that Mr. Lunnan should be reinstated to his former Grade 19 position and his lost pay restored. Second, Mr. Lunnan urges the Board to rule that its hearing officers do not have authority to reopen the record at Step 5 proceedings once the record has been closed. Third, Appellant Lunnan avers that the CSRB hearing officer violated the following: (a) provision §63-46b-10(3) of the UAPA, (b) the residuum rule, and (c) the Utah Court of Appeals' holding in *Tolman v. Salt Lake County Attorney*, 818 P.2d 23 (Ut. App. 1991). (Hereinafter, the *Tolman* case.)

C. The Board's Appellate Standards of Review

Effective November 2, 1992, the Board amended its standards of review provision at R137-1-21 D. Thus, the recently amended version of R137-1-21 D. is applicable to Mr. Lunnen's appeal to the Board at Step 6. The just-mentioned provision states:

D. The Board's Standards of Review. The board's standards of review shall be based upon the following criteria:

1. The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational in accordance with the substantial evidence standard. If 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.

2. 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.

3. 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 in accordance with the above provisions.

The above-quoted provisions constitute the Board's standards by which this case will be reviewed.

FACTUAL BACKGROUND

A. Event Giving Rise to the Appeal

Mr. Lunnen is a long term State career service employee. He has been employed with the Department continuously since being hired permanently on March 6, 1978, at a Grade 15. The Department promoted Appellant to Highway Operations Specialist, Grade 17, effective September 21, 1985. Four and one-half years later (April 1, 1989), Appellant Lunnen was promoted to a Highway Operations Specialist, Grade 19, a lead worker position. The State's classification specification for an employee in Mr. Lunnen's job title stipulates under the category of working conditions that an incumbent: "... may be subject to 24 hour call; may

be required to have access to an operating telephone or equivalent method of contact in case of emergency." (Jt. Exht. 4.)

Paul Crosland, Mr. Lunnan's immediate supervisor, rated Lunnan on his FY90-91 performance appraisal under the 24-hour call-out performance objective as borderline acceptable ("satisfactory/unsatisfactory"). Thus, Supervisor Crosland noted that Appellant Lunnan is "Sometime[s] hard to get a hold of for snow removal at night," (Jt. Exht. 1). By rating Mr. Lunnan as borderline or "S/U" for his poor call-out response record, Mr. Crosland had served warning on him regarding this problem. On the following year's FY91-92 performance appraisal, Supervisor Crosland again cautioned Mr. Lunnan about his completely inadequate ("unsatisfactory") emergency call-out response record under the same 24-hour call-out objective: "I need [your] help on call out[s] (may be subject to 24 hour call). Thank you for getting a phone again," (Jt. Exht. 2). Supervisor Crosland had now warned Mr. Lunnan for two consecutive years about the latter's inadequate emergency call-out response rate.

During early 1992, Appellant further failed in responding to emergency call-outs. Additionally, for more than eight months he lacked a required residential telephone (Crosland, T. 62; Mrs. Lunnan, 142). Mr. Lunnan blamed personal bankruptcy problems for his lack of a residential telephone (T. 30), even though UDOT officials had offered him assistance in getting his telephone re-installed (T. 30-31). As Appellant lacked a residential telephone during this eight month period, Department officials provided him with a pager (T. 93), so that when paged, Mr. Lunnan either returned calls to Supervisor Crosland or showed up at the coded UDOT station appearing on his pager. When Mr. Lunnan twice complained that his pager didn't work properly, Mr. Crosland took it to be repaired and returned it to him on the same day (T. 73, 173). Each time the repair operator returned the pager in working condition.

On April 2, 1992, Mr. Lunnan had been directed to meet with District 2 Maintenance Area Supervisor Ron Smith and Station Supervisor Paul Crosland concerning his continuing failure in not responding to several recent after-hours call-outs (T. 57-58). Mr. Lunnan was informed that a disciplinary penalty would be imposed if he did not improve his call-out responses (T. 78). Supervisor Crosland expressed his extreme concern that Mr. Lunnan still lacked a telephone after more than eight months, and that Appellant was not yet responding to emergency call-outs as instructed. Appellant Lunnan was ordered to get a home telephone installed within two weeks (Jt. Exht. 5). Mr. Crosland informed Mr. Lunnan that he absolutely had to have a telephone as a continuing condition of his employment with UDOT. Appellant complied.

Other employees on Mr. Crosland's crew had long harbored ill feelings due to Mr. Lunnan's many absences on call-outs (T. 86-87). Appellant Lunnan's failure to respond in emergency situations placed a greater burden on his fellow crew members, who had to work additional hours (T. 21, 87). Mr. Lunnan's continued absences caused morale problems within Crosland's crew. Area Maintenance Supervisor Smith observed that Lunnan's history of not responding to call-outs dated back to 1983 (T. 54, 63). Supervisor Crosland also testified that Lunnan had a long history of not responding (T. 71, 79, 87), even though he had been twice promoted.

UDOT District 2 Director Gene Sturzenegger later summarized this April 2 meeting in his subsequent July 7, 1992 report:

Mr. Lunnan was also told that if he didn't show a willingness to cooperate, make arrangements for a telephone and also be available for emergency call-outs, it would be necessary to recommend disciplinary action. Mr. Lunnan did arrange for a telephone one day after the deadline given him (Jt. Exht. 5). (Emphasis supplied.)

The above paragraph's content was originally conveyed to Mr. Lunnan in verbal context through his supervisors (Smith and Crosland) during their April 2 meeting with him. Importantly, Appellant Lunnan was placed on notice through a direct, specific verbal warning that he faced disciplinary action if he did not respond to call-outs, and if he did not obtain a telephone in his home.

Next, Mr. Lunnan received a formal Warning Notice, dated June 16, 1992, from both Supervisor Crosland and UDOT's District 2 engineer that clearly stated Lunnan was still not properly responding to emergency call-outs upon being notified by telephone. The Warning Notice explained that Mr. Lunnan had again failed to report as directed during the evening of June 12, 1992, regarding the following incident:

On June 12th, Mr. Lunnan was contacted by the dispatcher and asked to come to work as there was an emergency blowup of the concrete at I-215 and approximately 700 West. Virgil Bair was waiting for Mr. Lunnan to help him on the road. After a considerable amount of time, Mr. Bair contacted the dispatcher [again] and asked that Mr. Lunnan be contacted again for an estimated time of arrival. At that time, Mr. Bair was informed that their [UHP Dispatch] call to Mr. Lunnan was answered by a machine and that Mr. Lunnan was not available. Personnel Bulletins state, "employee must be willing and able to work night shifts" and "may be subject to 24-hour call." (Jt. Exht. 3.)

The written Warning Notice by both the District 2 engineer and Station Supervisor Crosland carried a recommendation that Appellant be immediately demoted for his failure to report as directed during the emergency call-out on June 12.

B. Departmental Proceedings

District 2 Director Sturzenegger supported both supervisors' June 16 written Warning Notice's recommended demotion of Appellant based upon his failure in responding to the June 12 I-215 emergency call-out. In his July 7, 1992 recommendation for Mr. Lunnan's demotion, Director Sturzenegger considered Appellant's explanation for not responding to the June 12 emergency call-out, and found his explanation lacking credibility and his conduct inexcusable:

. . . Mr. Lunnan was contacted by Highway Patrol Dispatch because of an emergency situation on I-215. Mr. Lunnan answered the initial call and agreed to come to work. When he did not arrive, Dispatch was asked to contact him again and their call was answered by a machine saying he was not available. He was also paged and did not answer his pager.

When Mr. Lunnan was asked why he did not respond, he said he thought someone was playing a joke on him because there was laughing and giggling on the telephone.

In an effort to verify his statement, arrangements were made to listen to the tapes from Dispatch. There was no evidence of laughing and giggling, only a call requesting that he respond to an emergency on I-215. He agreed to respond. The second call [s]hows that it was answered by an answering machine. A copy of this tape has been retained by the District for future use.

The just-mentioned UHP Dispatch tape was submitted to and heard by the CSRB hearing officer (Finding of Fact No. 26). The Dispatch tape conveys Mr. Lunnan answering the telephone, receiving the call-out message, and agreeing to report to work, as instructed. But he did not report. Mr. Lunnan fully disregarded this call-out notification. The Dispatch operator called again about 30-45 minutes later but no one answered Mr. Lunnan's telephone. The Lunnens' telephone answering machine had been turned on and a message was left. Mr. Lunnan and his wife testified that it was not uncommon for those on Supervisor Crosland's crew to call each other during off-duty time, especially during televised sporting events, and pretend to report an emergency call-out. Mrs. Lunnan stated that the prank calls were more common during winter months, than during other seasons (T. 141). According to Appellant Lunnan, he, his wife, and his co-workers all participated in such pranks as a means of attempting to hoodwink each other into going out on a false report. At the Step 5 hearing,

Mr. Lunnan acknowledged that he did not properly respond to the June 12 emergency call-out, but defended his failure by laying blame on the prankster practice prevalent among Supervisor Crosland's crew. Mr. Lunnan's demotion was directly precipitated by his failure to report as directed during the June 12 evening emergency call-out on I-215.

On July 2, 1992, UDOT's District 2 director requested via memo to the Department's executive director that Mr. Lunnan be demoted from Highway Operations Specialist, Grade 19 to Grade 17, with an accompanying 11 percent salary reduction. On July 13, 1992, the Department's executive director notified Appellant Lunnan of his intent to demote him. Mr. Lunnan appealed the Department's proposed demotion. A three-member departmental grievance panel heard Mr. Lunnan's story and considered his appeal in an informal administrative hearing. Afterwards, the three-person departmental grievance panel recommended to UDOT's executive director that Mr. Lunnan be demoted from Grade 19 to 17 but with an accompanying 2.75 percent salary reduction (a one-step reduction on the State's pay plan) rather than the previously proposed 11 percent. Effective August 15, 1992, Appellant was demoted and his pay rate decreased according to the grievance panel's recommendation. Mr. Lunnan properly and timely appealed this disciplinary penalty through the CSRB's grievance procedures at Steps 5 and 6.

C. Interim Order

The CSRB hearing officer issued his Step 5 Decision in two separate rulings. The first Step 5 ruling, issued on January 5, 1993, was entitled "Findings of Fact, Conclusions of Law and Interim Order with Continuing Jurisdiction" (Interim Order). In that document, the trier of fact accepted the parties' joint stipulation of facts as the material factual basis of this case. The CSRB examiner supplemented the evidentiary record with his additional factual findings, and then made legal conclusions. Therein, the Interim Order assessed Mr. Lunnan's duty to comply with the call-out order given him by UHP Dispatch by telephone on June 12, against Mr. Lunnan's excuses for not complying: believing the call might be a purported telephone prank from one or more crew members, a family member mistakenly turning on his answering machine, and his pager not being activated that evening. The CSRB hearing officer considered the witnesses' demeanor, observed their degree of eye contact, their vocal responses along with tonal qualities, and weighed all testimonial and documentary evidence along with each witnesses' credibility. The transcript contains numerous inconsistencies when comparing Mr. and Mrs. Lunnens' testimony with that of the other witnesses. The trier of fact rejected

Mr. Lunnan's so-called prank alibi as an attempt to efface the latter's complete failure to comply with a valid, twice-made emergency call-out:

Lunnan believes this is an intervening event [prank alibi] that does exculpate him. Lunnan did not verify with anyone at work that the call was not legitimate. Lunnan cannot validate his failure to respond by putting up a defense that is of his own creation. His non-response is not based upon legitimate grounds, but upon a reason that should not exist because it has the ability to harm someone or cause someone injury if the result is as in this case. (Interim Order, p. 7.)

Having determined that Appellant Lunnan lacked a valid reason when he chose not to respond to the June 12 emergency call-out, the evidentiary examiner next essayed whether Mr. Lunnan's behavior warranted demotion as a proper disciplinary penalty for his failure to respond to a directly-requested emergency call-out. "There is no doubt [Lunnan] disobeyed the orders of a superior," concluded the CSRB hearing officer (Interim Order, p. 7).

Disobedience to the orders of a superior is insubordination. The act is also malfeasance and misfeasance in that Lunnan did not do something he should have done and/or did it wrongfully. No matter how we characterize the act, it meets the requirement for discipline. (*Ibid.*, pp. 7-8.)

The evidentiary examiner further concluded that the Department had proper authority to discipline Mr. Lunnan, and that Appellant, in turn, had been insubordinate by his failure to obey the lawful order of a superior by taking into account Mr. Lunnan's prior knowledge that he was subject to 24-hour emergency call-out duty (*Ibid.* p. 9).

After having concluded that some form of discipline was appropriate, the Interim Order considered the Department's particular sanction of a demotion. Specifically, the CSRB examiner contemplated whether a demotion from Grade 19 to 17 with an accompanying 2.75 percent pay loss was consistent with other UDOT employees' disciplinary penalties for a first-time insubordination incident. Opined the CSRB examiner in his Interim Order at page 8:

The Agency [UDOT] offered one instance of insubordination and a commensurate demotion as proof of consistency of application. Taking into account the long and valued work performance of Lunnan, it does not appear that a demotion for this act is consistent with prior discipline imposed by [UDOT]. There is no dispute that Lunnan knew about the call-out policy of 24-hours and that he knew he was subject to it; but, there is no proof that it is a mandatory policy nor that anyone else has been disciplined for not responding to the call-out, except the one incident mentioned above. There is substantial evidence from both sides that any excuse for not responding was accepted as being valid. In this case, Lunnan had no excuse.

Noting that §67-19a-406 places the burden of proof on the Department in appeals stemming from demotion, the CSRB hearing officer observed that UDOT “has not provided any proof that the demotion of Lunnen is consistent with prior discipline for one act of insubordination.” (*Ibid.* p. 8.) Consequently, the CSRB hearing officer ordered that Lunnen’s demotion and pay rate decrease be held in abeyance “pending proof by the [Department] that it is consistent with other similarly situated employees.” UDOT was directed to submit “its best proof of what discipline is consistently given to employees of the [Department] for a first time insubordination, i.e., failure to obey the order of a supervisor,” (*Ibid.*, p. 9). According to the Step 5 Interim Order, should the Department be able to provide proof of consistent treatment for first time acts of insubordination, the examiner stated that he would “then ratify [Lunnen’s] appropriate discipline.” Otherwise, if UDOT failed to show consistency of discipline for similarly situated employees, the trier of fact would then “select the most appropriate one from those disciplines most regularly imposed,” with any subsequent adjustment to Lunnen’s grade and pay being adjusted later (*Ibid.*, p. 9). The Interim Order concluded that “the record shall remain open” during the period UDOT submits its supporting evidence of previous demotion actions.

D. Final Order

On March 15, 1993, the CSRB examiner issued his “Final Order and Decision to Step 5 Proceedings” (Step 5 Decision). Having previously established that UDOT had just cause to discipline Lunnen, the CSRB hearing officer now assessed “the degree of severity of the disciplinary penalty, since neither party had argued the issues of severity, consistency or latitude of discipline,” (Step 5 Decision, p. 1). After considering a selection of UDOT case histories submitted pursuant to the Interim Order, regarding other previously disciplined UDOT employees charged with insubordination, the Step 5 Decision ultimately concluded that Mr. Lunnen’s discipline was appropriately warranted, and was neither inconsistent nor excessive.

THE DEPARTMENT AND THE BURDEN OF PROOF

Appellant claims that the Department failed to carry its burden of proof with respect to the propriety of its disciplinary sanction. However, while Mr. Lunnen concedes that “UDOT presented substantial evidence of [his] misconduct,” (Brief, p. 9), he asserts that UDOT “wholly failed to prove” the propriety of its demotion and salary reduction. Because our amended

evidentiary standard is a two-tier standard, we review R137-1-20 C. 1. and 2., and apply these provisions to Mr. Lunnen's factual situation.

A. Burden of Proof - Misconduct Proved

R137-1-20 C. 1. states:

The CSRB hearing officer shall first make factual findings based solely on the evidence presented at the hearing without deference to any prior factual findings of the agency. The CSRB hearing officer shall then determine whether: (a) the factual findings made from the evidentiary/Step 5 hearing support with substantial evidence the allegations made by the agency or the appointing authority, and (b) the agency had correctly applied relevant policies, rules, and statutes.

In his Interim Order, the examiner explicitly found that: "There is no doubt Grievant disobeyed the orders of a superior. Disobedience to the orders of a superior is insubordination." (*Ibid.*, pp. 7-8.) Mr. Lunnen had received written notice on two consecutive annual performance appraisals of his unsatisfactory call-out record. He and Supervisor Crosland had engaged in many conversations over the years regarding this problem (T. 78, 86). Appellant had met with his supervisors on April 2, and was told specifically that his ongoing failure to adequately respond would result in discipline unless he improved his call-out response record. Supervisor Crosland's records show that Mr. Lunnen responded to only three call-outs during the period of January 1 through June 21, 1992, while he failed to respond to 11 other call-outs (T. 75). Appellant's response rate was only 20 percent for 3 out of 14 call-out requests in his crew. The next lowest response rate was 40 percent (Agency Exht. 1). Yet even after his supervisors' verbal warning on April 2, Lunnen did not respond on June 12, when he personally received a telephone call, acknowledged the UHP dispatcher's message to report, stated he would be responding, but for inexplicable reasons deliberately chose not to report.

That evening Mr. Lunnen had been watching a basketball game on television when the call came about 10:00 p.m. The UHP Dispatch caller directed Appellant to report promptly to a section of ruptured concrete slab (a "blow up") emergency at I-215 and 700 West. Appellant stated to the dispatcher that he would respond ("O. K."), but he did not. A half-hour or more later, the dispatcher called again but found Mr. Lunnen's answering machine turned on, and no one picked up the incoming call. Dispatch also tried alerting Mr. Lunnen with the pager but he had not activated it. Appellants' witnesses testified that it was District 2 policy to report if you were at home and got called out (T. 130, 134), as did Lunnen himself (T. 172). Moreover, Mr. Lunnen had known since his meeting with supervisors on April 2 that

he would be under penalty of discipline should he not improve his call-out response record (T. 86).

Mr. Lunnen defended himself for the June 12 incident by claiming that he thought the Dispatch call had been made by fellow crew members, although none had called back to claim it was a prank. Both Appellant and his wife stated that with prank calls, someone always called shortly afterwards and identified the call as a prank (T. 171). No one really wanted a crew member to go out on a false report (T. 171). Appellant acknowledged that he had no reasonable basis upon which to believe that this call was anything but legitimate, and not bogus. Importantly, Mr. Lunnen had given no indication that he would not be responding nor did he verify with anyone at UDOT or UHP Dispatch that the call was not valid. Quite the opposite, Appellant stated that he would be responding that evening. Substantial evidence shows that Mr. Lunnen committed insubordination through his misconduct when he refused his supervisors' standing orders to respond to emergency call-outs when contacted, unless not in a condition or circumstance to respond.

UDOT effectively marshalled the evidence against Mr. Lunnen's wrongdoing at the evidentiary proceeding below. Even Appellant acknowledges such in his Brief at page 9: "Admittedly, UDOT presented substantial evidence of [Appellant's] misconduct" After hearing the evidence, the CSRB examiner then determined that under R137-1-20 C. 1., substantial evidence supported the Department's allegations of insubordination and misconduct as described in the executive director's July 13 and August 10 disciplinary action letters. We conclude that the evidentiary examiner made accurate factual findings, which were reasonable and rational based upon the record as a whole, as required by R137-1-20 C. 1.

Next, the hearing officer complied with R137-1-20 C. 2., when he determined that Appellant's disciplinary sanction of a demotion and a one-step pay rate decrease was not excessive, disproportionate or abusive.

B. Burden of Proof - Penalty

Appellant Lunnan argues that UDOT failed to meet its burden of proof on showing the propriety of a two-grade demotion coupled with a pay rate reduction.¹ First, the codified grievance and appeal procedures place upon an agency the burden of proof in all disciplinary grievances, including demotions (§67-19a-406(2)(a)). Then the evidentiary examiner properly applied the Board's provision at R137-1-20 C. 2., which states:

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

Mr. Lunnan has misread or misunderstood the examiner's Step 5 Decision with respect to the following portion that is quoted in Appellant's Brief at page 2:

Mr. Lunnan argues in his Motion For Reconsideration that the Agency did not prove a demotion was consistent discipline for one act of insubordination. That is true.

But, importantly, continued the hearing officer, in the immediately following sentences:

However, this does not invalidate the finding that Lunnan was, without doubt and by substantial proof, insubordinate and the only evidence received was that the reduction in grade was what the Agency thought was just and consistent with prior discipline. Therefore, it was for Lunnan's benefit that further proof of consistency was required. (*Ibid.*, pp. 2-3.)

The CSRB hearing officer did not state that Mr. Lunnan's discipline was not appropriate, as argued in the latter's Brief. Having found just cause to discipline Mr. Lunnan, the examiner stated that the remaining issue to be decided was that of "the degree of severity of the disciplinary penalty, since neither party had argued the issues of severity, consistency or latitude of discipline," (Step 5 Decision, p. 1). Contrary to Mr. Lunnan's argument that the hearing officer did not find his penalty "appropriate" (Brief, p. 9), the evidentiary examiner specifically determined that Lunnan's demotion was consistent with UDOT's other imposed sanctions "for one act of insubordination." Mr. Lunnan misreads the Step 5 Decision when he contends that the evidentiary record lacks substantial evidence for sustaining his

demotion—even on the basis of alleging a lack of consistent disciplinary application by the Department.

The Interim Order states that, “The Agency offered one instance of insubordination and a commensurate demotion as proof of consistency of application” (*Ibid.*, p. 8). Next, the hearing officer concluded: “The Agency has not provided any proof that the demotion of Lunnen is consistent with prior discipline for one act of insubordination” (*Ibid.*) On that basis, the trier of fact left the record open long enough for the Department to submit prior examples of other employees’ demotions based upon a single act of insubordination. In contrast, the Board finds that the record of the Step 5 proceedings contains sufficient credible substantial evidence of UDOT’s consistency of discipline upon which to satisfy the standard of R137-1-20 C. 2. The record evidence, based upon the facts and circumstances of Mr. Lunnen’s case, establishes just cause for his demotion and absent an excessive, disproportionate or abusive penalty. Consequently, the Board concludes that it was not necessary to have the Department further validate its decision by requiring an additional showing on the issue of consistency of discipline. (See below.)

REOPENING THE EVIDENTIARY RECORD

A. Resolution of Issues at Step 5 Proceedings

In his Interim Order, the hearing officer sought to resolve three pertinent issues. The first issue concerned Mr. Lunnen’s argument that UDOT had failed to implement a corrective action plan under R477-10-2. The trier of fact resolved this issue when he concluded that a corrective action plan would have been appropriate for a job performance problem, but not for Appellant’s deliberate failure to report during an emergency call-out. Acts of willful misconduct fall under R477-11-1, which concerns insubordination, misfeasance, malfeasance and nonfeasance or disobeying the orders of a superior (*Ibid.*, pp. 6-7). As to the second or misconduct issue, the examiner concluded that Mr. Lunnen had disobeyed the orders of a superior, and that his disobedience constituted insubordination (*Ibid.*, pp. 7-8). According to the hearing officer, that left one last issue to be resolved: “. . . whether or not the demotion [of Mr. Lunnen] is consistent with other employees’ disciplinary penalties for insubordination,” (*Ibid.*, p. 8). Continued the Interim Order: “The Agency offered one instance of insubordination and a commensurate demotion as proof of consistency for insubordination.” Yet in the following paragraph the Interim Order offers this contradictory statement: “The Agency has not provided any proof that the demotion of Lunnen is consistent with prior discipline for one

act of insubordination.” Hence the CSRB hearing officer held the record open² in order for the Department to submit supplemental proof of consistent discipline in first-act insubordination incidents.

B. Adequate Credible Substantial Evidence in the Record

The Step 5 proceedings’ evidentiary record contains sufficiently credible substantial evidence anent UDOT’s prior discipline for a one-act offense of insubordination. District 2 Director Sturzenegger related an incident two years previously when another District 2 employee, a Highway Operations Specialist, Grade 17, assigned to UDOT Station 223 in Tooele, had repeatedly disregarded instructions to respond to emergency 24-hour call-outs, when notified (T. 18). According to Mr. Sturzenegger, that employee had been called “quite a few times” previously without responding (T. 19). On this occasion, the employee was at home; he was called, answered the Dispatch call, but deliberately failed to respond. The Tooele employee’s insubordination resulted in a two-grade demotion coupled with a ten or eleven percent pay decrease³ (T. 19). Hence, there is sufficient credible substantial evidence in Director Sturzenegger’s un rebutted testimony regarding the Tooele employee’s insubordinate actions to support UDOT’s demotion of Mr. Lunnen. This evidence meets the Department’s burden of showing that it did not impose an excessive, disproportionate or abusive penalty upon Mr. Lunnen. Therefore, the Department was not required to show supplemental proof regarding consistent treatment vis-a-vis Mr. Lunnen’s penalty.

As the Department presented substantial evidence of a prior case in which a similarly situated UDOT employee was demoted two grades with an accompanying greater pay loss for not responding to call-outs after many efforts by his supervisors, we hold that the Step 5 Interim Order’s conclusionary finding (“The Agency has not provided any proof that the demotion of Lunnen is consistent with prior discipline for one act of insubordination.”) is incorrect. However, it is clear from both the Interim Order and the final Step 5 Decision that the hearing officer committed a misstatement rather than harmful error. The evidentiary examiner’s request for UDOT to produce more information regarding penalties for insubordinate employees only benefitted Mr. Lunnen. This error, which favored Mr. Lunnen, was *de minimis*, and neither harmful nor consequential to his interests. In sum, we conclude that it was a moot issue for our hearing officer to have requested supplemental disciplinary examples from UDOT regarding first-offense insubordination.

Another aspect of the Step 5 proceedings compels clarification. The hearing examiner concentrated on Mr. Lunnen’s failure in not reporting for an emergency call-out on June 12,

after replying by telephone that he would. The hearing officer characterized this incident as "one act of insubordination," and as "a first time insubordination," (Interim Order, pp. 8, 9; also, Step 5 Decision, p. 2). We find that Mr. Lunnen's demotion and pay reduction was not limited to the single event of not responding on June 12. Rather, Appellant had been notified at his meeting with supervisors on April 2 that he needed to improve his call-out response. Also, his response rate from January through June 21 was an unacceptable twenty percent. Moreover, Appellant's performance appraisals for FY90-91 and 91-92 directed his attention to his continuing problem of not satisfactorily responding to emergency call-outs. Mr. Lunnen had a substantial work history of not properly responding to emergency call-outs. That unsatisfactory work history was pointed out in all three disciplinary documents: Sturzenegger's July 7 letter, and the executive director's July 13 and August 13 letters (Jt. Exhs. 5, 6, 7). Each of these letters emphasized that Mr. Lunnen's insubordinate pattern and inadequate response record were the cause of his pending demotion, not just "one act of insubordination." The Department's penalty was based upon the totality of Mr. Lunnen's insubordinate behavior over a lengthy period of time, not just for his failure on June 12.

C. Meeting Burden - Discipline

The Department had the burden of proof when the Step 5 proceedings commenced (§67-19a-406(2)(a)). UDOT had the initial burden to show that its discipline was supported by just cause. Once the agency has shown that its disciplinary sanction was reasonable and correct in relation to the facts and circumstances, then the burden is on the employee to show that the penalty imposed was disproportionate or otherwise constituted an abuse of discretion (R137-1-20 C. 2.). Certainly inconsistency of treatment between similarly situated employees could be a showing of disproportion, which could constitute an abuse of discretion. An abuse of discretion results when a sanction is so unreasonable that it offends reasonable minds.

In Mr. Lunnen's situation, we conclude that there was a sufficiency of due process provided at the Step 5 proceedings to support just cause for the discipline (please refer to R477-11-1, Disciplinary Action).

D. Reopening Step 5 Proceedings

At the conclusion of Mr. Lunnen's Step 5 proceeding on November 13, 1992, the CSRB hearing officer remarked in his closing comment:

HEARING OFFICER: Thank you very much. That will close argument in this case. An opinion will be rendered in writing in twenty days beginning tomorrow to be provided to both parties and counsel. I appreciate your professionalism, and it's been a pleasure to have you before me (T. 217).

Concededly, the hearing examiner had indeed "closed argument," although his exact words did not state that he had actually closed the record. However, the evidentiary examiner's wording implies a closing of the evidentiary record at that time. Hence, we assume that the record was intended to be closed and was, in fact, closed at that time.

In his Interim Order, under the section labeled "Order," the Step 5 hearing officer stated:

Pending modification or validation of the discipline, the record shall remain open. This hearing and its record shall remain open for purposes of appeal by Grievant until the discipline is imposed and the time for appeal shall commence subsequent to a modification of this Order which imposes the discipline (Page 9).

However, Mr. Lunnen argues in his Brief (pp. 9-10) that, "Step 5 hearing officers do not have authority to reopen the record." In support, Appellant cites our rule at R137-1-20 E.⁴ Appellant Lunnen further avers that the CSRB's rules only provide for the record remaining open where, under R137-1-20 F., the parties agree to submit posthearing briefs. According to Mr. Lunnen, "Absent such an agreement, R137-1-20 E. prohibits the presentation of further evidence and the hearing officer is thereafter required to prepare Findings of Fact and Conclusions of Law pursuant to R137-1-20 G." To further support his position, Appellant has included another CSRB hearing officer's ruling which denied an agency's request to re-open a Step 5 proceeding several days after the record was closed and the proceeding had adjourned. The agency in *Charles D. Kent v. Utah Department of Employment Security*, 10 CSRB/H.O. 138, had requested to re-open the evidentiary proceedings to offer rebuttal testimony from a witness not previously called but referred to in the grievant's testimony. Basing her denial on R137-1-20 E., the Board's hearing officer concluded that it would constitute an abuse of discretion for her to re-open a hearing for the taking of additional evidence, once it had been formally closed. The basis for that hearing officer's denial was "because no specific provisions are set forth to do so." In the given circumstances, that hearing officer's decision was reasonable and legally supportable. The Board determined that it was not necessary to re-open the hearing because there was ample substantial evidence in the record to otherwise reach a proper decision (*Kent*, p. 12).

There are provisions that enable our factfinders to obtain additional information within their discretionary ambit. For example, R137-1-17 A. states:

Conduct. The purpose of a hearing is to provide a fair and impartial opportunity to be heard so that the hearing officer may be completely informed in the matter and enabled to render a

proper determination based on all the facts and applicable laws and rules.

Thus, to "be completely informed in the matter" a hearing officer may require additional information from time to time. Also, R137-1-20 F. provides for the admission of posthearing briefs and memoranda of law to be submitted along with "posthearing documents." That provision may be read in concert with R137-1-20 A., which charges the hearing examiner to "insure the development of a clear and complete record." Of particular import is R137-1-20 J.:

Scope of Remedy/Relief. If the hearing officer finds that the action complained of which was taken by the appointing authority was too severe, even though for good cause, the hearing officer may provide for such other remedy or relief as deemed appropriate and in the best interest of the respective parties.

A hearing officer may well have a complete and correct understanding of all case facts, all applicable rules and laws, and have all relevant pieces of information sorted out at the conclusion of the hearing. But not always. Hearing officers may need further time and opportunity after the evidentiary hearing to analyze and weigh evidence, and sort out the relevant information from the non-relevant. We hold that the hearing officer's *sua sponte* request for additional information in *Lunnen*, where he issued a subsequent Interim Order delineating the information he should receive from the agency, is not contrary to the CSRB hearing officer's ruling in *Kent*, above. In the *Kent* decision, an agency sought on its own motion to rebut testimony by later supplementing the Step 5 record after the record had been closed and the proceedings adjourned. The facts and circumstances of both cases are substantially different, and the exigencies of each case resulted in proper but different discretionary decisions by our hearing officers.

Essentially, we hold that where our hearing officer reasonably justifies re-opening a Step 5 proceeding, that our hearing officer has sufficient discretion and authority to do so to satisfy the ends of justice, to conduct a full and fair hearing, and to make a complete record. The UAPA does not prohibit the CSRB hearing officer/presiding officer from re-opening an evidentiary proceeding.

THE UAPA, THE RESIDUUM RULE, AND THE *TOLMAN* CASE

According to Mr. Lunnen, the Step 5 Decision violated the UAPA, the residuum rule, and Utah Court of Appeals' holding in the *Tolman* case. These claimed violations challenge the Interim Order's request for and the Step 5 Decision's acceptance of what the hearing

officer called the Department's "best proof of what discipline is consistently given to employees of the Agency for a first time insubordination, i.e., failure to obey the order of a supervisor," (page 9). Specifically, Appellant objects to UDOT's posthearing submission of hearsay evidence because he was not allowed to cross-examine any witnesses on the materials' foundation, factual basis or trustworthiness. Mr. Lunnan feels strongly that his due process rights have been violated by the process used to bring these documents into the record below.

This tribunal has given serious consideration to Appellant's argument. We understand Mr. Lunnan's concerns regarding UDOT's evidence that was received after the evidentiary proceeding went off the record. Furthermore, the Board comprehends the hearing officer's purpose in requesting additional proof from the Department on the issue of consistency and proportionate discipline between Mr. Lunnan and other UDOT employees previously disciplined for similar acts of insubordination.

Grievance hearings are neither criminal nor civil proceedings, and different legal standards and procedures apply. With sufficient due process granted to both parties, the hearing officer may need to gather additional facts and information on matters specific to a case. Whether to "re-open" the entire proceeding or just the record falls within the hearing officer's discretion. In the *Lunnan* case, the hearing officer was charged to adjudicate two general issues/queries: (1) Did the Department have just cause to demote Mr. Lunnan?, and (2) If not, what is the appropriate remedy? Conceivably, answering these two issues may require additional factfinding after the evidentiary proceeding has been closed. In writing a factually accurate and a well reasoned decision, the hearing officer may require that further factual information be adduced, so that all issues raised are adequately addressed and purposefully resolved. This is to be accomplished temperately and with a mind to each party's proper burdens. Burdens can and do shift on occasion during administrative proceedings. To re-open or request additional information is not exclusively advantageous to one party or another.

The CSRB's rules permit the Board to remand a case to the original hearing officer for additional evidence-taking (R137-1-21 G.). Another provision, R137-1-21 H. 3., permits the Board to re-open a case and supplement or amend the record. Also, the Board has authority to compel new or additional evidence on its own motion (§67-19a-202(3)(c) and R137-1-21 B.). The Board, then, has several means of gaining additional information even though the evidentiary record below has long been closed. However, our appointed hearing officers retain

jurisdiction until giving up that jurisdiction to the Board at Step 6. If circumstances compel, our hearing officers may circumspectly re-open the record for further evidence-gathering.

Moreover, either party to a grievance hearing may request a reconsideration at Step 5 (R137-1-20 M.) or Step 6 (R137-1-21 J.), which is a re-examination of a decision permitted by law (§63-46b-13).

We conclude that it is not necessary to rule upon Mr. Lunnen's third issue, because the record contains District Director Sturzenegger's clear testimony that constitutes sufficient credible substantial evidence—which was unrefuted by Mr. Lunnen. The hearing officer did not need to request additional "best proof" from UDOT because Director Sturzenegger's testimony of the District 2 Tooele employee's misconduct and disciplinary penalty satisfies the element of consistency and shows just cause for Mr. Lunnen's penalty under the CSRB's standard at R137-1-20 C. 2. Consequently, because the case record, through the transcript, contains sufficient evidence to satisfactorily determine the issue of consistency/abusive discipline, we do not need to address the particular hearsay elements associated with the UAPA, the residuum rule or with the *Tolman* case. Thus, having considered these three points and finding them moot, it is not necessary to further address them.

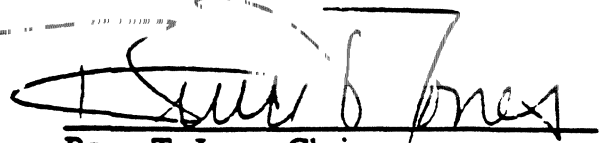
DECISION

The hearing officer's Step 5 Decision is affirmed. Mr. Lunnen's appeal to Step 6 is denied, and therefore his remedy or relief cannot be granted. We hope that through improved conduct he may be promoted again to a Grade 19 at an appropriate time. The record shows that Mr. Lunnen has many good qualities, enjoys the support of his family, and has provided many years of service to the state of Utah and the Department.

DECISION UNANIMOUS.

Bruce T. Jones, Chairman
Jean M. Bishop, Member
David M. Hilbig, Member
Jose L. Trujillo, Member

DATED this 27th day of October 1993.

A handwritten signature in black ink, appearing to read "Bruce T. Jones", written over a horizontal line.

Bruce T. Jones, Chairman
Career Service Review Board

ENDNOTES

1. Mr. Lunnen's Brief at pages 2 and 9 mentions an eleven percent pay rate reduction. However, that percentage is incorrect as the penalty rate imposed was actually 2.75 percent (Jt. Exht. 7), which constituted the percentage amount between steps on the Legislature's newly authorized "step pay plan." In July 1992, the State adopted the new "step pay plan" enacted during the Legislature's 1992 general session. See also, Interim Order, Finding No. 13. Thus, Mr. Lunnen's actual pay rate decrease was much less severe than he presented in his Step 6 Brief.

2. As stated on the Interim Order's last page:

... [T]he Agency had the authority to discipline Lunnen and that Lunnen was insubordinate ... The discipline imposed shall be held in abeyance pending proof by the Agency that it is consistent with other similarly situated employees. The Agency shall submit to this Hearing Officer ... its best proof of what discipline is consistently given to employees of the Agency for a first time insubordination, i. e., failure to obey the order of a superior

Pending modification or validation of the discipline, the record shall remain open

3. There is ambiguity in the record as to whether the Tooele employee received a ten or an eleven percent pay reduction. Both figures were cited side by side.

4. R137-1-20 E. reads:

Closing of the Record. After all testimony, documentary evidence, and arguments have been presented, the hearing officer shall close the record and terminate the proceeding, unless one or both parties agree to submit a posthearing brief within a specified time.

RECONSIDERATION

A party may apply for reconsideration of a Step 6 decision through R137-1-21 J and *Utah Code Unannotated*, §63-46b-13.

JUDICIAL REVIEW

A party may petition for judicial review of a final agency action pursuant to *Utah Code Unannotated*, §63-46b-14 and -16.

CERTIFICATE OF MAILING

STATE OF UTAH)
COUNTY OF SALT LAKE)

§

I certify that the preceding document is a true, exact, complete and unaltered photocopy of the DECISION, ORDER AND FINAL AGENCY ACTION in the matter of *James M. Lunnan v. Utah Department of Transportation* and has been served upon the following parties by placing such copies in an envelope addressed to:

James M. Lunnan
101 South 400 East
Copperton, Utah 84006

W. Craig Zwick
Executive Director
Department of Transportation
STATE MAIL

Phillip W. Dyer
Attorney at Law
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Grant S. Fairbanks
Human Resource Manager
Utah Department of Transportation
STATE MAIL

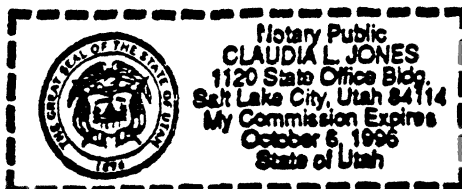
Thomas R. Bielen
Utah Public Employees' Association
1000 West Bellwood Lane
Murray, Utah 84123-4494

Stephen G. Schwendiman
Attorney General's Office
Governmental Affairs
4120 State Office Building
STATE MAIL

and delivered to an employee of State Mailing, State of Utah on the 28th day of October 1993.

Robert N. White
Robert N. White

SUBSCRIBED AND SWORN to before me this 28th day of October 1993.



Claudia L. Jones
Claudia L. Jones
Notary Public

ADDENDUM D

Utah Code Ann. § 63-46b-16 (1993)

Utah Code Ann. § 63-46b-16. Judicial review - Formal adjudicative proceedings.

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

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

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

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

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

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

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

(ii) according to any other provision of law.

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

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

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

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

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

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

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

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

(h) the agency action is:

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

(ii) contrary to a rule of the agency;

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

(iv) otherwise arbitrary or capricious.

ADDENDUM E

Utah Code Ann. § 67-19-18 (1993)

Utah Code Ann. § 67-19-18. Dismissals and demotions - Grounds - Disciplinary action - Procedure - Reductions in force.

(1) Career service employees may be dismissed or demoted only to advance the good of the public interest, and for just causes such as inefficiency, incompetency, failure to maintain skills or adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, or nonfeasance in office.

(2) Employees may not be dismissed because of race, sex, age, physical handicap, national origin, religion, political affiliation, or other nonmerit factor including the exercise of rights under this chapter.

(3) The director shall establish rules governing the procedural and documentary requirements of disciplinary dismissals and demotions.

(4) If an agency head finds that a career service employee is charged with aggravated misconduct or that retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the employee may be suspended pending the administrative appeal to the department head as provided in Subsection (5).

(5) (a) No career service employee may be demoted or dismissed unless the department head or designated representative has complied with this subsection.

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

(c) The employee has no less than five working days to reply and have the reply considered by the department head.

(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 or demoted if the department head finds adequate cause or reason.

(6) (a) Reductions in force required by inadequate funds, change of workload, or lack of work are governed by retention rosters established by the director.

(b) Under those circumstances:

(i) The agency head shall designate the category of work to be eliminated, subject to review by the director.

(ii) Temporary and probationary employees shall be separated before any career service employee.

(iii) (A) Career service employees shall be separated in the order of their retention points, the employee with the lowest points to be discharged first.

(B) Retention points for each career service employee shall be computed according to rules established by the director allowing appropriate consideration for proficiency and for seniority in state government, including any active duty military service fulfilled subsequent to original state appointment.

(iv) A career service employee who is separated in a reduction in force shall be:

(A) placed on the reappointment roster provided for in Subsection 67-19-17(2); and

(B) reappointed without examination to any vacancy for which the employee is qualified which occurs within one year of the date of the separation.

(c) (i) An employee separated due to a reduction in force may appeal to the department head for an administrative review.

(ii) The notice of appeal must be submitted within 20 working days after the employee's receipt of written notification of separation.

(iii) The employee may appeal the decision of the department head according to the grievance and appeals procedure of this act.

ADDENDUM F

Utah Admin Code. R137-1-20 (1993)

R137-1-20. Evidentiary/Step 5 Hearings.

A. Authority of Hearing Officers. The hearing officer is empowered to:

1. maintain order, insure the development of a clear and complete record, rule upon offers of proof, and receive relevant evidence;

2. set reasonable limits on repetitive and cumulative testimony and exclude any witness whose later testimony might be colored by the testimony of another witness or any person whose presence might have a chilling effect on another testifying witness;

3. rule on motions, exhibit lists, and proposed findings;

4. require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

5. compel testimony and order the production of evidence and the appearance of witnesses; and

6. admit evidence that has reasonable and probative value.

B. Conduct of Hearings. A hearing shall be confined to those issues related to the subject matter presented in the original grievance statement.

1. An evidentiary proceeding shall not be allowed to develop into a general inquiry into the policies and operations of an agency.

2. An evidentiary proceeding is intended solely to receive evidence that either refutes or substantiates specific claims or charges. It shall not be made an occasion for irresponsible accusations, general attacks upon the character or conduct of the employing agency or the employee or others, or for making derogatory assertions having no bearing on the claims or specific matters under review.

C. Evidentiary/Step 5 Hearing. An evidentiary/step 5 hearing shall be a new hearing for the record, held de novo, with both parties being granted full administrative process as follows:

1. The CSRB hearing officer shall first make factual findings based solely on the evidence presented at the hearing without deference to any prior factual findings of the agency. The CSRB hearing officer shall then determine whether: (a) the factual findings made from the evidentiary/step 5 hearing support with substantial evidence the allegations made by the agency or the appointing authority, and (b) the agency has correctly applied relevant policies, rules, and statutes.

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

D. Discretion. Upon commencement, the hearing officer shall announce that the hearing is convened and is henceforth on the record. The hearing officer shall note appearances for the record and shall determine which party has the burden of moving forward.

E. Closing of the Record. After all testimony, documentary evidence, and arguments have been presented, the hearing officer shall close the record and terminate the proceeding, unless one or both parties agree to submit a posthearing brief within a specified time.

ADDENDUM G

Utah Admin. Code R137-1-21 (1993)

R137-1-21. The Board and the Appellate Procedure.

A. Transcript Production. The party appealing the hearing officer's decision to the board at the appellate/step 6 level shall order production of the evidentiary/step 5 proceeding's transcript from the court reporter. The appellant shall share an equal payment with the CSRB Office to the court reporting firm.

1. Transcript production cost-sharing applies only to the appellant and to the CSRB Office. The former receives the transcript original; the latter receives a transcript copy.

2. The respondent may inquire of the CSRB Office about obtaining a transcript copy, or may directly purchase a copy from the court reporting firm.

B. Briefs. An appeal hearing before the board is based upon the evidentiary record previously established by the hearing officer. No additional or new evidence is permitted unless compelled by the board.

1. The appellant in a step 6 proceeding must obtain the transcript of the step 5 hearing. After receipt of the transcript, the appellant has 30 calendar days to file an original and six copies of a brief with the administrator. Additionally, the respondent must be provided with a copy of the appellant's brief.

2. Upon receipt of a copy of the appellant's brief, the respondent then has 30 calendar days to file an original and six copies of a reply brief with the administrator.

3. Briefs are distributed to board members upon receipt from both parties.

4. All briefs shall be hand delivered, sent by the U.S. Postal Service postage prepaid, or sent through the state's Central Mailing.

5. Briefs shall be date-stamped upon receipt in the CSRB Office.

6. The time frame for receiving briefs shall be modified or waived only for good cause as determined by the administrator.

C. Rules of Procedure. The following rules are applicable to appeal hearings before the board:

1. Dismissal of Appeal. Upon a motion by either party or upon its own motion, the board may dismiss any appeal prior to holding a formal appeal hearing if the appeal is clearly moot, without merit, not properly filed, or not within the scope of the board's authority.

2. Notice. Written notice of the date, time, place, and issues for hearing by the board shall be given to the aggrieved employee, to the employee's counsel or representative, to the agency, and to the agency's counsel or representative, at least five days before the date set for the hearing.

3. Compelling Evidence. The board may compel evidence in the conduct of its appeals.

4. Oral Argument/Time Limitation. As a general rule, the board restricts the oral argument to 30 minutes, or less, per party. The board may grant additional time as it deems appropriate.

5. Oral Argument Set Aside. If the board determines that oral argument is unnecessary, the parties shall be so notified, but they may be expected to appear before the board at the date, time, and place set to answer any questions raised by the board members.

6. Argument or Memoranda. Oral argument or written memoranda may be required of the parties at the board's discretion.

D. The Board's Standards of Review. The board's standards of review shall be based upon the following criteria:

1. 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. If 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.

2. 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 according to the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.

3. 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.

ADDENDUM H

Utah Admin Code R477-11-1 (1993)

R477-11-1. Disciplinary Action.

Noncompliance with these rules, departmental or other applicable policies and safety policies, professional standards adopted by a department, work place policies, and such matters as inefficiency, incompetency, failure to maintain skills, adequate performance levels, insubordination, disloyalty to the orders of a superior, misfeasance, malfeasance, nonfeasance or failure to advance the good of the career service shall be cause for disciplinary action. For purposes of R477-11, employee shall mean career service employee unless indicated otherwise.

11-1.(1) The type and severity of any disciplinary action taken shall be governed by principles of due process which include:

- (1)(a) Consistent application
- (1)(b) Prior knowledge of rules and standards
- (1)(c) Determination of fact
- (1)(d) Timely notice of noncompliance
- (1)(e) Opportunity to respond and rebut as defined herein

11-1.(2) If the agency determines that a career service employee is charged with aggravated or repetitive misconduct or that the retention of a career service employee would endanger the peace and safety of others or pose a grave threat to the public interest, the agency, pending an investigation to determine fact upon which disciplinary action may be taken, shall utilize one or more of the following options:

(2)(a) The employee may be placed on paid administrative leave (suspension with pay).

(2)(b) The employee may be temporarily reassigned to another position or different work location at the same rate of pay pending the completion of the investigation.

11-1.(3) In all cases, except as provided under Section 67-19-18(4) the disciplinary process includes the following:

(3)(a) The agency representative notifies the employee in writing of the proposed discipline and the reasons therefor;

(3)(b) The employee has five working days within which to reply and have the reply considered by the agency representative before discipline is imposed;

(3)(c) If an employee waives the right to respond or does not reply within the time frames stated in these rules or as established by the agency representative, whichever is longer, discipline may still be imposed in accordance with these rules.

(3)(d) The employee and the agency representative may agree in writing to waive or extend any grievance step, or the time limits specified for any grievance step.

11-1.(4) After an employee has been informed of the reasons for the proposed discipline and has been given an opportunity to respond and be responded to, discipline may be imposed by the agency representative as appropriate. In determining the specific type and severity of the discipline to be taken, consideration may be given to such factors as the severity of the infraction, the repeated nature of violations, prior disciplinary/corrective actions, previous oral warnings, written warnings and discussions, the employee's past work record, the

effect on agency operations, and the potential of the violations for causing damage to persons or property. Disciplinary action may include one or more of the following options:

(4)(a) Written reprimand.

(4)(b) Suspension of the employee without pay up to 30 calendar days per occurrence requiring discipline.

(4)(c) Demotion of the employee utilizing one of the following methods as provided by law:

1) An employee may be moved from a position in one class to a position in another class having a lower entrance salary if the duties of the position have been reduced for disciplinary reasons.

2) A demotion within the employee's current pay range may be accomplished by lowering the employee's salary rate back on the range, as determined by the department head or designee.

(4)(d) A department head shall dismiss or demote an employee only in accordance with the provision of Section 67-19-18 (5). See R477-11-2 of these rules.

(4)(e) Disciplinary actions are subject to the grievance and appeals procedure as provided by law.

11-1.(5) At the time 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 and the standard of conduct necessary to avoid further discipline.

ADDENDUM I

Utah Admin Code R477-11-2 (1993)

R477-11-2. Dismissal or Demotion.

An employee may be dismissed or demoted for cause as explained under R477-10-2 and 11-1 of these rules as follows:

11-2.(1) A department head or appointing officer may dismiss an employee having other than career service status, without right of appeal, upon providing written notification to the employee specifying the reasons for the dismissal and the effective date.

11-2.(2) No employee shall be dismissed or demoted from a career service position unless the department head or designee has observed the following procedures and the Grievance Procedure Rules:

(2)(a) The department head or designee shall notify the employee in writing of the specific reasons for the dismissal or demotion.

(2)(b) The employee shall have no less than five working days to reply and to have the reply considered by the department head or designee.

(2)(c) The employee shall have an opportunity to be heard by the department head or designee.

(2)(d) Following such a hearing an employee may be dismissed or demoted if the department head finds adequate cause or reason.

11-2.(3) Agency management may suspend an employee with pay pending the administrative appeal to the department head as provided by law under Section 67-19-18 (14).

ADDENDUM J

Neal v. Department of health and Human Serv.

46 M.S.P.R. 26 (1990)

Sharon NEAL, Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.

HQ71218910035.

Merit Systems Protection Board.

Aug. 17, 1990.

Employee requested review of arbitration decision that sustained agency's action removing her from position of claims development clerk for unacceptable performance. The Merit Systems Protection Board held that: (1) appellant's bare allegations of disparate treatment and discrimination before both arbitrator and the Board, without specific reference to protected categories under statute defining prohibited personnel practices, failed to establish Board's jurisdiction to review arbitration award, and (2) appellant's reference to merit systems principles did not establish basis for Board to take jurisdiction over appeal from arbitration decision.

Request dismissed.

1. Merit Protection ⇐103

Merit Systems Protection Board may review an arbitration award only if employee has been affected by prohibited personnel practice, and action is otherwise appealable. 5 U.S.C.A. §§ 2302(b)(1), 7121(d), 7702.

2. Merit Protection ⇐24

Appellant has burden of proving by preponderance of the evidence that the Merit Systems Protection Board has jurisdiction to hear case. 5 C.F.R. § 1201.56(a)(2)(i).

3. Merit Protection ⇐103

Appellant's bare allegations of disparate treatment and discrimination before both arbitrator and the Merit Systems Protection Board, without specific reference to protected categories under statute defining prohibited personnel practices, failed to establish Board's jurisdiction to review arbitration award. 5 U.S.C.A. §§ 2302(b)(1), 7121(d).

4. Merit Protection ⇐103

Appellant's reference to merit systems principles did not establish basis for Board to take jurisdiction over appeal from arbitration decision. 5 U.S.C.A. § 2301(b).



5. Merit Protection ⇐2

Merit systems principles are intended to furnish guidelines to federal agencies and do not constitute an independent basis for legal action.

William P. McKillen, American Federation of Government Employees, Greendale, Wis., for appellant.

Hoyt C. Griffin, Jr., Chicago, Ill., for agency.

Before LEVINSON, Chairman, JOHNSON, Vice-Chairman and PARKS, Member.

OPINION AND ORDER

The appellant has requested review of a May 30, 1989 arbitration decision that sustained the agency's action removing her from the position of Claims Development Clerk based on unacceptable performance. In its response to the appellant's request, the agency asserts that the Board lacks jurisdiction to review the arbitration award because the appellant has not raised a claim of discrimination under 5 U.S.C. § 2302(b)(1). Because it appeared that the Board lacks jurisdiction over the matter appealed, the Clerk of the Board issued an order on June 6, 1990, providing the appellant with an opportunity to clarify her claims of disparate treatment and discrimination.

The appellant has responded to the Board's order, and the agency has replied to the appellant's response. For the reasons set forth below, we DISMISS the appellant's request for review of the arbitration award for lack of jurisdiction.

ANALYSIS

(1, 2) As explained in the order, the Board may review an arbitration award under 5 U.S.C. § 7121(d) only if the employee has been affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) and the action is otherwise appealable under 5 U.S.C. § 7702. See *Salinas v. Immigration and Naturalization Service*, 34 M.S.P.R. 553, 554 (1987), *aff'd*, 846 F.2d 77 (Fed.Cir.1988) (Table). As further stated, the appellant has the burden of proving by preponderant evidence that the Board has jurisdiction to hear the case. See 5 C.F.R. § 1201.56(a)(2)(i).

(3) In her request for Board review of the arbitration award, the appellant does not raise a claim of prohibited discrimination, nor does she raise the arbitrator's failure to make a specific finding on her claim of disparate treatment. Appeal File, Tab 3, Appellant's Brief. Similarly, in her response to the Board's order, the appellant

has failed to identify any discrimination of the type prohibited by 5 U.S.C. § 2302(b)(1). Rather, she simply asserts that "the record as a whole" shows "disparate treatment/discrimination" and that the agency "discriminated" against her in creating the performance standards for her position.

Based upon our review of the record, we find that the appellant's bare allegations of disparate treatment and discrimination before both the arbitrator and the Board, without specific reference to any of the protected categories under 5 U.S.C. § 2302(b)(1), fail to establish the Board's jurisdiction to review the arbitration award under 5 U.S.C. § 7121(d). Compare, e.g., *Ogden Air Logistics Center v. American Federation of Government Employees*, 6 MSPB 531, 6 M.S.P.R. 630, 635-36 (1981) (mere assertion that the agency's action violated 5 U.S.C. § 2302(b) is insufficient to establish the Board's jurisdiction under 5 U.S.C. § 7121(d)), with *McClain v. Department of the Air Force*, 37 M.S.P.R. 653, 655 (1988) (the Board has jurisdiction to review an arbitration award under 5 U.S.C. § 7121(d) where the appellant asserted the prohibited personnel practice of handicap discrimination based on alcohol abuse and the removal action could have been appealed to, the Board under 5 U.S.C. Chapter 75).

[4, 5] We also find that the appellant's reference to provisions in 5 U.S.C. § 2301(b) does not establish a basis for the Board to take jurisdiction over this appeal. The merit systems principles are intended to furnish guidance to Federal agencies and do not constitute an independent basis for legal action. See *Middleton v. Department of Justice*, 23 M.S.P.R. 223, 227 n. 6 (1984), *aff'd*, 776 F.2d 1060 (Fed.Cir.1985) (Table); *Wells v. Harris*, 1 MSPB 199, 1 M.S.P.R. 208, 214-15 (1979). Accordingly, the appellant's citation to the merit systems principles does not establish a cause of action.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if

you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board:
ROBERT E. TAYLOR
WASHINGTON, D.C.



Sofronio C. RINT, Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency (CSA 3 097 740).

SE06318910688.

Merit Systems Protection Board.

Aug. 20, 1990.

Appellant petitioned for review of initial decision which sustained reconsideration decision of the Office of Personnel Management (OPM) denying his application for a civil service retirement annuity. The Merit Systems Protection Board held that case would be remanded for further adjudication, in light of appellant's allegation that he did not receive refund of retirement deductions, and OPM's failure to submit evidence that refund check was indeed sent, or received.

Petition granted; initial decision vacated and remanded.

Merit Protection #311

In light of applicant's allegation that he did not receive a refund of retirement deductions, and failure of Office of Personnel Management (OPM) to submit evidence that refund check was sent, or received, appeal from denial of application for civil service retirement annuity would be remanded for further adjudication.

Sofronio C. Rint, Dau, Mabalacat, Pampanga, Philippines, pro se.
Kenneth Brown, Washington, D.C., for agency.

Before LEVINSON, Chairman, JOHNSON, Vice Chairman, and PARKS, Member.