

2006

Lorin Blauer v. Department of Workforce Services, an agency of the State of Utah, and Utah Career Service Review Board : Brief of Petitioner

Utah Court of Appeals

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LORIN BLAUER.

VS.

Respondents.

Priority No. 14

FILED
UTAH APPELLATE COURTS
JAN - 5 2007

IN THE UTAH COURT OF APPEALS

LORIN BLAUER,

Petitioner,

vs.

UTAH DEPARTMENT OF
WORKFORCE SERVICES, an agency of
the State of Utah, and UTAH CAREER
SERVICE REVIEW BOARD,

Respondents.

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: Court of Appeals Case No. 20060702
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: Agency Decision No. 9CSRB83
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: Priority No. 14
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PETITIONER'S BRIEF

Petition for review of final agency decisions by the
Career Service Review Board dated June 28, 2006
and July 27, 2006 in Agency Proceeding No. 9CSRB83

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INTRODUCTION

Petitioner Lorin Blauer seeks review of a decision by the Utah Career Service Review Board entered June 28, 2006 (Addendum at Attachment 1), and its denial of Petitioner's Request for Reconsideration dated July 27, 2006 (Addendum at Attachment 2 hereto).

JURISDICTION

By this Petition, Petitioner seeks review of orders issued by the Utah Career Service Review Board ("CSRB"), an administrative body created under Utah Code Ann. § 67-19(a)-201. The CSRB ruling followed a formal adjudicative proceeding, upholding Mr. Blauer's termination from his employment as Legal/Enforcement Counsel III for the Utah State Department of Workforce Services, despite his physical and psychological inability to perform the duties which he had been reassigned in retaliation for challenging a performance evaluation. Jurisdiction obtains pursuant to Utah Code Ann. § 78-2(a)-3(2)(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether CSRB erroneously interpreted or applied the law in determining that DWS properly terminated Petitioner's employment with the state for failure to return to work within one year after the last day worked, even though it made no effort to place him in the best available, vacant position which he qualifies, and for which he was able to perform the essential functions notwithstanding physical or psychological disability.

2. Whether CSRB erred in finding that the propriety of DWS' termination decision concerning Petitioner was supported by substantial evidence when viewed in light of the whole record before it; specifically:

(a) whether Petitioner was properly determined to be disabled, within the meaning of the Americans With Disabilities Act, solely for "psychopathological illness";

(b) whether DWS presented any evidence whatever establishing that, at the time of his termination, Petitioner was unable to perform the "essential functions" of his prior position as Legal/Enforcement Counsel III (as such functions had been established by custom and practice over 23 years), or that such position was not available for him at that time;

(c) whether DWS presented any evidence whatever to suggest that, at any time, DWS made any effort to place Petitioner in the best available, vacant position for which he qualified, and of which he was able to perform the essential functions without reasonable accommodation, despite his disability;

(d) whether DWS presented any evidence in the record that Petitioner was obliged, prior to his termination, to establish his ability to return to work with a medical release.

3. Whether this Petition was untimely.

The standard of review for Issues 1 and 3 is *de novo* review for correct application and interpretation of the law – Utah Code Ann. § 63-46b-16(4)(d); *Tasters Limited, Inc. v. Department of Employment Security*, 863 P.2d 12 (Utah App. 1993); *cert. denied* 878 P.2d 1154.

Issue 2 is reviewed for support by substantial evidence viewed in light of the whole record before the Court, pursuant to Utah Code Ann. § 63-46b-16(4)(g); the decision is sustainable only if reasonable minds would accept as adequate the quantum of evidence necessary to support the conclusion. *Acosta v. Labor Commission*, 2002 Utah App. 67, 44 P.3d 819, *cert. denied* 48 P.3d 797.

DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS

1. Federal Statutory Provisions

42 U.S.C., § 12101, *et seq.*

2. State Statutory and Administrative Provisions

Utah Code Ann. § 67-19a-202(1)(a) and (3)

Utah Code Ann. § 67-19a-407

Utah Code Ann. § 67-19a-408

Utah Administrative Code, R477-7-17(3)(a)

STATEMENT OF THE CASE

The appellant, Lorin Blauer, filed an appeal on November 16, 2005, from the decision of the DWS Executive Director dated November 3, 2004 which terminated his employment. A Step 5 evidentiary hearing was conducted by a hearing officer for the

Career Service Review Board, on August 18 and 19, 2005. The hearing officer issued his decision denying appellant's appeal on September 19, 2005. The appellant filed his appeal to the Career Service Review Board on September 28, 2005. CSRB issued its decision on June 28, 2006, denying Mr. Blauer's appeal (Addendum at Attachment 1) and holding that his termination had been proper notwithstanding DWS' failure to afford him proper reinstatement to his prior job responsibilities as required by rule. CSRB denied Mr. Blauer's Request to Reconsider by order dated July 27, 2006 (Addendum at Attachment 2). Mr. Blauer filed his Petition for Review with this Court on August 1, 2006.

STATEMENT OF FACTS

1. The Petitioner began working for the Department of Employment Security (now Department of Workforce Services; hereinafter referred to as DWS) on a temporary basis in 1980. R. 894 at 161:21-25, 162:1-5.
2. In September, 1981, Mr. Blauer achieved merit status as Legal Counsel. *Id.*
3. Mr. Blauer worked for the department for 23 years as Legal Counsel (now Legal/Enforcement Counsel III). R. 894 at 218:24-25.
4. Membership in the Utah State Bar was a required qualification of the job. R. 894 at 221:3-6, Appellant's Exhibit 16 (R. 790-791; 895).
5. Mr. Blauer's initial responsibilities as Legal/Enforcement Counsel III included researching legal issues and writing legal opinions for the department; advising

Appeals Referees (now Administrative Law Judge-DWS or Administrative Law Judge - Non Juris Doctorate); when they had legal issues arise in the course of a hearing and requested a legal opinion; advising the Board of Review (now Workforce Appeals Board) regarding factual and legal issues raised in appeals from decisions of Department Administrative Law Judges; writing decisions for the Board and defending those decisions with legal briefs to and oral arguments in the Utah Supreme Court and Court of Appeals. R. 894 at 219:5 through 221:2, Appellant's Exhibit 16 (R. 790-791; 895).

6. In 1986, Mr. Blauer was temporarily assigned to hold hearings as a Department Appeals Referee as a voluntary reassignment mutually agreed upon according to rules (later changed to Administrative Law Judge – Non Juris Doctorate and referred to hereinafter as ALJ) so that he would have a better feel for what that job entailed. This would help him in his job as Legal Counsel since his job was to review decisions of the ALJs and advise the Board as to whether the ALJs had made errors in their decisions or in their fact finding processes. R 894 at 218:25 through 219:14, 221:10-24, Appellant's Exhibit 1 (R. 786, 895). Though the name of the ALJ position has changed, the responsibilities have not changed in any significant way. The job does not now require, nor has it ever required, a law degree. R. 894 at 223:1-23, 239:9-12, 336:18 through 341:20, 343:21 through 344:5, Appellant's Exhibit 12 (R. 788-789, 895)

7. Over the last five years of the Petitioner's performance of his duties, and indeed for essentially most of Mr. Blauer's career, the duties of acting as Legal Counsel

to the Workforce Appeals Board comprised 50 percent of his job responsibilities as defined by his Position Description Questionnaire. R. 894 at 225:16 through 226:22.

8. Mr. Blauer was also legal counsel to the Contributions Unit of the Department, representing them in court garnishment and collection matters, in bankruptcy matters and in needed legal opinions. He reviewed sub plans and contracts for the department. *Id.*

9. Further, Mr. Blauer served on a prosecution board to decide with the other members whether certain cases met the requirements for referring to the County Attorney's office for prosecution, and then referred those cases to the County Attorney. He served under the title "Special Assistant Attorney General" as authorized by the Attorney General's Office. *Id.*

10. Mr. Blauer was also the Information Disclosure Attorney whose responsibility it was to advise the internal auditor, John Levanger. Together, Mr. Levanger and Mr. Blauer would make the determination, upon receipt of requests for disclosure on issues of disclosure agreements relative to department records, whether providing the information would or would not have a chilling effect on employers in filing their reports or claimants filing their claims. *Id.*

11. Mr. Blauer also was responsible for responding to subpoenas. On numerous occasions he appeared and opposed subpoenas for the department's information, in both State and Federal Court. R. 894 at 226:23 through 227:2.

12. All of the above responsibilities are listed on Mr. Blauer's job description (i.e., Position Description Questionnaire, hereinafter PDQ) because they were essential to the purpose of his position. *Holding unemployment insurance hearings, though, is not a task listed on the DHRM Job Description for Legal/Enforcement Counsel III; neither was the holding of unemployment insurance hearings a task ever listed on any PDQ issued in connection with Mr. Blauer's position.* Appellant's Exhibit 16 (R. 790-791; 895); Appellant's Exhibit 2 (R. 787, 895).

13. However, holding hearings *is* a task listed on the DHRM Job Description for Administrative Law Judge-DWS (same as Administrative Law Judge-non juris Doctorate so also hereinafter referred to as ALJ). Petitioner's Exhibit 12 (R. 788-789, 895).

14. Holding hearings was never a part of Mr. Blauer's regular assignments as Legal/Enforcement Counsel III; nor was he asked to do it as a temporary or special assignment ("other duties as assigned") for 18 of the 23 years Mr. Blauer served as Legal Counsel. It has *never* appeared on his PDQ or his official DHRM job description. Appellant's Exhibit 16 (R. 790-791; 895); Appellant's Exhibit 2 (R. 787, 895); Petitioner's Exhibit 12 (R. 788-789, 895).

15. Sometime during her tenure as Mr. Blauer's supervisor, Virginia (Ginger) Smith, (who preceded Tani Downing as Mr. Blauer's supervisor) temporarily assigned Mr. Blauer to conduct two hearings a week as a "special assignment." According to his

PDQ, special assignments may comprise 10% of his workload. Two hearings a week would be just that – 10%. R. 894 at 242:11-22, 243:20-24, 246:3-13, Appellant's Exhibit 2 (R. 787, 895). Occasionally Mr. Blauer conducted more hearings if an ALJ was ill or had scheduling conflicts. During this time, Mr. Blauer in order to be a helpful team player had no problems or objections to holding such hearings. R. 894 at 242:23 through 243:10.

16. About a year after becoming Mr. Blauer's supervisor, Tani Downing incrementally increased the number of hearings assigned to Mr. Blauer from two cases to eight cases per week. R. 894 at 251:8-15. Mr. Blauer experienced physical difficulty conducting eight hearings a week because the long periods of sitting exacerbated his sciatic nerve problem (see below), causing, as stated by his physician, severe "distracting pain". R. 894 at 252:13-23.

17. Mr. Blauer consulted Doctors Perry Lofthouse and Dennis Peterson about his sciatic nerve problem. He was advised he should not be sitting or standing still for more than 20-30 minutes at a time. Mr. Blauer conveyed this information to Ms. Downing. Rather than accommodating Mr. Blauer's physical limitations, she actually increased his hearing assignments to 20 cases a week (a full time work load for an ALJ) which would have effectively crippled the Claimant. R. 893 at 111:13-22; R. 894 at 252:24 through 253:18.

18. According to Mr. Blauer's personal physician, Dr. Dennis R. Peterson (R

894 at 163:11-13, 164:11-12), in June of 2003, Mr. Blauer “had fairly severe sciatica or pain radiating from the low back and sacral region through the buttocks down the left lateral leg to the knee, then down to the--the lateral foreleg, into the foot. There was some numbness in the dorsum of the left foot”. R 894 at 166:1-16. The pain was caused by generalized degeneration of the lower spine resulting in an impingement on the nerves coming from the lower spine and down that region. He had been dealing with this for some time fairly successfully but now it was in extreme exacerbation. R 894 at 167:21 through 167:25.

19. The cause of the exacerbation was “an increase in seated work” which is “something that intensified the pain, that tends to stretch the nerve around the corner of the hip or the buttock and pulls ...the nerve into contact.” Standing stationary, especially in cases of spinal stenosis such as Petitioner’s, “will make that worse”. R 894 at 168:1 through 169:3.

20. Dr. Peterson was aware of Mr. Blauer’s duties as Legal/Enforcement Counsel III and that those duties were changed to holding administrative hearings in midyear of 2003. He knew that “sitting and running hearings...had disabled” Petitioner. Mr. Blauer has since undergone major surgery in an attempt to correct this problem – a problem exacerbated by the assignment of Ms. Downing during which surgery he nearly lost the use of his legs. R. 894 at 192:21 through 193:24.

21. Mr. Blauer was constrained by the foregoing physical disability to go on

medical leave on October 8, 2003. R. 893 at 10:23-25. He applied for long term disability on January 26, 2004 (Agency's Exhibit 1, R. 798, 895), and was approved for long term disability on July 14, 2004 (Agency's Exhibits 4 and 5, R. 808, 895).

22. Prior to being approved for long term disability, Mr. Blauer's Administrative Representative, Tom Cantrell, hand-delivered to Ms. Downing a letter from Mr. Blauer dated June 4, 2004, wherein he requested that he "be allowed to return to work to perform my historical duties as Legal Counsel within the medical parameters that has been certified by Dr. Peterson who has cleared me for work as Legal Counsel but not for Administrative Law Judge". Petitioner's Exhibit 21, R. 792, 895.

23. In order to determine whether Mr. Blauer should be granted long term disability, the Long-Term Disability Program arranged for an Independent Psychological Evaluation of Petitioner by Darrell H. Hart, Ph.D. As a part of his evaluation, Dr. Hart reviewed Mr. Blauer's medical information. He details the recommendations given to DWS by Doctors Dennis R. Peterson and Perry Lofthouse in behalf of Mr. Blauer to enable him to work effectively. Agency Exhibit 2 (R. 799-805, 895), pages 2 and 3. Dr. Hart noted on page 13 of his evaluation that: "[Petitioner] is indeed suffering from psychopathology..." and "The condition *does* cause a total inability to perform his normal work *as assigned in mid year 2003*. If there were significant accommodations made which would include modification of the workload and if [Petitioner] had a different supervisor, I would predict his level of depression and anxiety drop from moderate/severe

to mild. If that were the case, *he could perform the functions and tasks associated with modified accommodations at the level of adequacy which he had performed in the past*” (italics added). *Id.*

24. Dr. Peterson advised Mr. Blauer’s attorney, Vince Rampton, in 2004 that Mr. Blauer could perform the essential functions of Legal/Enforcement Counsel III.

25. Attorney Rampton then advised the department in a letter dated October 4, 2004 that Mr. Blauer was able and available to return to his position as Legal Counsel III if such position was available. R. 894 at 172:3 through 174:5.

26. The department responded in a letter dated October 8, 2004 stating that the position was available but only with duties assigned at the discretion of management. Agency Exhibit 6 (R. 895). This clearly meant, in the context of Mr. Rampton’s letter and the department’s response, and their position regularly communicated both verbally and in writing that Mr. Blauer would be expected to hold unemployment hearings full time – a prospect fully admitted by Tani Downing on the stand (R. 111:2-23).

27. Scott Steele, who conducted the Petitioner’s informal Step 4 hearing on behalf of the Executive Director, testified that Mr. Blauer had notified DWS that “he was able to return to work if he could identify what he could do and the extent of what his job would be.” R. 893 at 63:22-25. Mr. Steele testified that, to his understanding, Mr. Blauer was offered the job of “...Legal Counsel III ... That was a job that had multiple parts to that job of duties that could be assigned in accordance with the performance plan of that

job. One of those duties was to conduct hearings. And – he was being offered that position to come back and conduct hearings...I believe that they said his primary job duties would be to be (sic) conduct hearings”. R. 893 at 66:23 through 68:3.

28. Mr. Blauer’s employment was terminated by letter dated November 3, 2004 (Agency Exhibit 7, R. 895). In its letter, DWS made no mention whatever of Mr. Blauer’s offer to return to work with reasonable accommodation, as set out in his counsel’s letter (which was not mentioned in the November 3 letter at all), and no mention of failure to furnish a medical release. *Id.*

29. DWS offered no reason for termination of Mr. Blauer’s employment, other than Utah Administrative Code R477-7-17(1)(3)(a), (b) and (c). R. 893 at 38:16 through 39:1; Agency Exhibit 6 (R. 895). In deciding to terminate Mr. Blauer’s employment DWS Human Resources Director Jo Anne Campbell acknowledged that she was not qualified to speak to the question of what constituted the “essential functions” of positions within DWS – “I do not do the ADA work. We have a separate ADA coordinator that handles that and determines essential functions.” R. 893 at 46:13-17.

30. Human Resources Director Jo Anne Campbell acknowledged that termination of Mr. Blauer’s employment after one year of absence was not mandated – that circumstances existed where the time period was flexible. R. 893 at 51:4-21.

31. In imposing the requirement that Petitioner come back to work solely to conduct hearings (which his physical disabilities prohibited him from doing), Tani

Downing (General Counsel and Director of the Division of Adjudication for DWS, and Mr. Blauer's superior) was aware that, over the course of his career, Mr. Blauer had acted as legal counsel concerned with collections, information disclosure and contract review. R. 893 at 83:2-9.

32. DWS (Tani Downing in collaboration with Jo Anne Campbell) determined to terminate Mr. Blauer's employment based on his representation that, while he could and would return as Legal/Enforcement Counsel III, he could not conduct hearings full time – a restriction which DWS unilaterally determined that Mr. Blauer would not be allowed to make:

“Well, sir, the question was whether he was offered the same job. My understanding was that the department communicated that his legal counsel III position job was still available but that he would have to perform whatever duties within that job he was assigned, and that he could not select his supervisor.”

R. 893 at 96:5-11.

33. Tani Downing communicated to Jo Anne Campbell (and Jo Anne Campbell communicated to Mr. Blauer) that, while he could return to work as Legal/Enforcement Counsel III, “he would have to be willing to come back and take any of those assignments”. R. 893 at 110:7-9; Agency Exhibit 5 (R. 895). *See also* R. 893 at 113:21 through 114:5.

34. In hearing, DWS acknowledged that Mr. Blauer had attempted, through a letter from his counsel, to explain that while he was willing to come back as

Legal/Enforcement Counsel III, there were physical limitations on what aspects of that job he could perform with or without reasonable accommodation. In her testimony, however, Tani Downing openly admitted to rejecting the imposition of any such condition or limitation:

“There was a letter back from Mr. Blauer’s attorney, I believe, saying he’ll do it but only under these conditions. She came to me and asked me if that—you know, what I—what I thought of that. And I said, ‘no. He needs to be coming back without being able to specify duties or supervisor at all.’”

R. 893 at 114:24 through 115:6.

35. In extending the offer to Petitioner to return to work, therefore, DWS contemplated that he would come back in order to do the same job he had done on the last day of his employment (the full-time holding of administrative hearings). R. 893 at 117:15-22.

36. Since this matter has been pending, DWS has claimed that it relied, in part, on Mr. Blauer’s failure to furnish a “medical release” incident to his agreement to return to work. However, (1) Human Resources Director Jo Anne Campbell acknowledged that, where job functions upon return did not entail the disability for which disability relief had been offered, no such medical release would necessarily be required (R. 893 at 55:1-21); and (2) failure to produce a medical release was not given as a reason for termination (Agency Exhibit 6, R. 895).

37. With respect to marshaling evidence supporting the ruling of the Career Services Review Board herein, DWS offered the following:

A. Testimony of DWS' Human Resources Director Jo Anne Campbell that she terminated Mr. Blauer's employment effective November 8, 2004, pursuant to Utah Administrative Code R477-7-17(1) and (3)(a), (b) and (c), when he attempted to impose conditions upon his return, due to personal disability (R. 893 at 9:18 through 56:9 and Agency Exhibits 1-7 (R. 895));

B. Ms. Campbell further testified that Mr. Blauer had been granted long-term disability benefits by reason of "psychological illness" (Agency Exhibit 4, R. 895), and that he did not furnish a medical release. Mr. Blauer's counsel's letter was apparently inadequate for DWS, even though (1) no correspondence notified Mr. Blauer that any particular release was required, or that the letter from counsel was insufficient, and (2) failure to provide a medical release is not listed in his termination letter as a factor in termination—Agency Exhibits 3-7 (R. 895));

C. While Mr. Blauer agreed to come back to work, he attempted to impose conditions on his return by reason of personal disability – something which is superior, Tani Downing, flatly refused to let him do (R. 893 at 114:24 through 115:6).

SUMMARY OF ARGUMENT

Petitioner Lorin Blauer was entitled, at the conclusion of his leave period, to rights set out at R477-7-17(3), Utah Admin. Code:

Conditions for return from leave without pay shall include:

(a) If an employee is able to return to work within one year of the last day worked, the agency shall place the employee in the previously held position

or similar position in a comparable salary range provided the employee is able to perform the essential functions of the job with or without a reasonable accommodation.

(b) If an employee is unable to perform the essential functions of the position because of a permanent disability that qualifies as a disability under the ADA, the agency shall offer the employee a reassignment to one or more immediately available vacant positions, for which the employee qualifies, and whose essential functions the employee is able to perform without a reasonable accommodation.

(c) If an employee is unable to return to work within one year after the last day worked, the employee shall be separated from state employment.

As Mr. Blauer, his administrative representative, his legal representative and his health care providers had notified DWS on numerous occasions, he was fully capable of resuming, at the conclusion of his leave period or at any other time, his traditional, historic duties as Legal/Enforcement Counsel III, but *could not*, for both physiological and psychological reasons, do administrative hearings to the extent required by DWS and to the exclusion of all else. His legal counsel reiterated these facts in response to DWS' October, 2004 communications concerning his return following the leave period. But DWS – for reasons which it did not even attempt to explain to the Hearing Officer – determined that, alone among all Legal/ Enforcement Counsel employed by DWS, Mr. Blauer must do 100% administrative hearings or nothing. The only offered explanation of its position was that supervisor Tani Downing was not about to have Mr. Blauer dictate the terms of his employment.

In upholding the Hearing Officer's findings, conclusions and order, CSRB disregarded completely the requirements of subdivision (b) of R477-7-17(3), concluding that because Mr. Blauer had failed to demonstrate re-employability under the standards of subdivision (a) thereof, his termination was justified under subdivision (c).

Evidence submitted failed to offer even marginal, much less substantial, support for CSRB's ruling. CSRB's analysis rested in significant part on the assertion that Mr. Blauer's long-term disability was for "psychopathological reasons" – ignoring completely uncontroverted testimony that he was also suffering from physiological disability which prevented his acceptance of an assignment confining him to full-time administrative hearings. CSRB similarly ignored the facts that – again by uncontroverted testimony – Mr. Blauer was fully capable, both physically and psychologically, of re-assuming his prior duties as Legal/Enforcement Counsel III, so long as hearings were not the sum and substance of his job; that DWS made no effort to determine whether his request in this regard could be accommodated; that DWS made no showing that the holding of hearings full-time was an "essential function" of the position under governing ADA regulations as adopted under DHRM rule; or that DWS made no attempt to find other, immediately-vacant positions the essential functions of which Mr. Blauer *could* perform without reasonable accommodation. His termination was therefore unjustified.

This petition, finally, is not untimely. It was pursued within 30 days of CSRB's final action on Mr. Blauer's request for reconsideration, and the timeliness of that request places no limitations on the jurisdiction of this Court.

ARGUMENT

POINT I

CSRB ERRONEOUSLY INTERPRETED AND APPLIED GOVERNING LAW IN CONCLUDING THAT DWS PROPERLY TERMINATED PETITIONER'S EMPLOYMENT FOR FAILURE TO RETURN TO WORK WITHIN ONE YEAR AFTER THE LAST DAY WORKED.

As noted in the Statement of Facts, the evidence was clear – and in fact uncontroverted – that Mr. Blauer was terminated from his employment based on DWS' *discretionary* application of a policy terminating employees after one year of long-term disability, where the employees are unable to return to work at that time.

But where an employee is disabled, yet able to return to work under certain conditions, DWS' authority to terminate the employee was, in October of 2004, restricted by operation of R477-7-17(3):

Conditions for return from leave without pay shall include:

- (a) If an employee is able to return to work within one year of the last day worked, the agency shall place the employee in the previously held position or similar position in a comparable salary range provided the employee is able to perform the essential functions of the job with or without a reasonable accommodation.
- (b) If an employee is unable to perform the essential functions of the position because of a permanent disability that qualifies as a disability under

the ADA, the agency shall offer the employee a reassignment to one or more immediately available vacant positions, for which the employee qualifies, and whose essential functions the employee is able to perform without a reasonable accommodation.

(c) If an employee is unable to return to work within one year after the last day worked, the employee shall be separated from state employment.¹

In upholding Petitioner's termination, the CSRB reviewed the hearing examiner's findings (and the evidence underlying those findings) against the legal standard articulated by subsection (a) of the foregoing provision—*but completely omitted from its decision the language or impact of subsection (b)*. At pages 16-19 of its June 28, 2006, Decision and Final Agency Action (R871-874), entitled "Legal Issues Regarding the Department's Termination of Appellant's Employment for Failure to Return to Work Within One Year as Required by DHRM Rule R477-7-17", CSRB quoted subsection (a) of R477-7-17(3), concluded that because Petitioner had not established (and documented – see Point II(C.), below) that he was "able to return to work" (i.e., able to go back and perform administrative law hearings full-time, the job change which had resulted in his disability to begin with), and since DWS was entitled, in its discretion, to structure his job responsibilities any way it chose, regardless of disability, it was justified in firing him under subsection (c). *Id.*

¹R477-7-17(3) has since been amended to eliminate express reference to the ADA, although a state employee's right to be placed in a position the essential functions of which he/she can perform with or without reasonable accommodation has been preserved.

CSRB's evaluation of the evidence, like that of the hearing officer's, was fundamentally flawed – *see* Point II, below. As a threshold issue, however, it must be observed that it occurred in the context of an erroneous legal standard. Subsection (b) of R477-7-17(3) imposed an alternate reinstatement standard – one which, by its express terms, invokes the language and standards adopted pursuant to the Americans with Disabilities Act, 42 U.S.C., § 12101, *et seq.* As more fully discussed at Point II(B.), below, ADA standards invoke a factual analysis very different from that relied on by the Hearing Officer, and CSRB on review.

Simply put, Petitioner notified DWS, immediately prior to his termination, that he could not, *by reason of disability*, return to the responsibilities to which he had been assigned immediately prior to his departure: the holding of administrative law hearings full-time. He notified them, however, that he *could* return to the position of Legal/Enforcement Counsel III as he had performed it for over 20 years, conducting *some* hearings, but performing other job duties as well. This, however, Ms. Downing flatly rejected – “He needs to be coming back without being able to specify duties or supervisors at all.” (R893 at 114:24 through 115:6). This “my way or the highway” attitude was, in the mind of DWS and its personnel, the sum and substance of what “reasonable accommodation” was due Petitioner, on pain of termination.

The language of the law plainly demonstrates that DWS was required to do more than this. It was required to offer Petitioner a reassignment to one or more immediately

available vacant positions – positions for which he qualified, and the essential functions of which he could perform without a reasonable accommodation. *The record is utterly devoid of any sign that either the Hearing Officer or CSRB imposed such a legal standard on DWS.* Nowhere was DWS (which bore the burden of proof in this matter) put to the task of coming forward with evidence that it took any effort to analyze Petitioner’s disability status, compared against available vacant positions for which he was otherwise qualified, and make any determination of where he could be reassigned. Worse still, DWS completely disregarded – without any justification appearing anywhere in the record – Petitioner’s own suggestion that he simply be permitted to return as Legal/Enforcement Counsel III with the same or similar mix of duties and responsibilities which had been entrusted to him over the course of more than two decades. DWS’ personnel freely admitted that they dismissed this suggestion out of hand, hiding behind definitions and descriptions contained in DHRM regulations to conclude that, in order to be “able to return to work” (a standard under subsection (a), not subsection (b)), Petitioner had to demonstrate himself able to perform *all* functions (and especially all “core functions” in whatever proportions DWS dictated, apparently) falling within the job description of the position in question. This, concluded CSRB, was all that was

incumbent upon DWS when faced with Petitioner's offer to return to work under conditions that would accommodate his disability.²

The language of R477-7-17(3)(b), and the ADA-mandated legal standards which it incorporates by reference, required far more of DWS than it afforded to Petitioner. In its stretch to uphold DWS' decision, though, CSRB shifted its focus to a separate legal standard – one which, under the undisputed facts of this matter, did not apply in Petitioner's case. On this basis alone, CSRB's decision, and that of its hearing examiner, constituted an erroneous interpretation of governing law, and mandates reversal.

²It is illuminating that, having rubber-stamped DWS' position in this regard, CSRB dismissed Petitioner's observation that his "reassignment" to perform administrative law hearings full-time was the functional equivalent of being made an administrative law judge out of hand, labeling it "sophistic" (R871). To the contrary, it was DWS' line of reasoning which was "sophistic" – (1) to qualify for reinstatement, Petitioner needed to be able to perform *all* functions falling under the heading of Legal/Enforcement Counsel III (or whatever mix of those functions DWS, in its sole and unfettered discretion, saw fit to impose upon him, with full knowledge of his disability); (2) the holding of administrative law hearings constituted a "core function" under the job description of Legal/Enforcement Counsel III (even though, in practice, Petitioner had never been required to devote more than a small fraction of his time to the conducting of such hearings before being abruptly reassigned to hold hearings full-time by his supervisor, a decision which created his disability to begin with); and (3) because he could not do what he was told and hold administrative law hearings full-time, his termination was justified without any further effort at reasonable accommodation.

POINT II

THE CSRB ERRED IN FINDING THAT DWS' TERMINATION OF PETITIONER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE VIEWED IN LIGHT OF THE ENTIRE RECORD BEFORE IT.

In holding Mr. Blauer to the standard imposed by R477-7-17(a) (*not* (b), as discussed under Point I), the CSRB affirmed the Findings of Fact entered by the Hearing Officer to the effect that (1) Mr. Blauer suffered solely from a “psychopathological illness”, which, because it had been relied upon in extending long-term disability to him, was the sole basis of his “disability,” and (2) his offer to return to work was not supported by medical documentation that his “psychopathological illness” had ameliorated to any degree. See R. 871.

In fact, the CSRB’s opinion (like the Findings of Fact entered by the Hearing Officer) completely skirts the issue. First, Mr. Blauer suffered from both physical and psychological disabilities. Second, neither of these prevented him from doing the “essential functions” of the position which he had held for 23 years – with or without reasonable accommodation (maintenance of his historic duties), he could perform – and *had been performing* – the “essential functions” of Legal/Enforcement Counsel III, as those functions had been established by long practice. Third, Mr. Blauer’s failure to furnish a medical release concerning the foregoing was an afterthought – it was not required of him as part of any pre-termination communication, and was not listed as a reason for his termination.

A. The Petitioner was not properly determined to be disabled, within the meaning of the Americans With Disabilities Act, solely for “psychopathological illness”.

Mr. Blauer does indeed suffer a disability as defined under the American's with Disabilities Act (ADA), but not limited to that addressed by the Hearing Officer or CSRB. In the second sentence of paragraph 6 of his Findings of Fact, the Hearing Officer states: "Dr. Hart concluded that Grievant suffered from psychopathological illness, and that Grievant's condition was sufficiently severe to cause a total inability to perform his normal work as assigned." This statement is accurate, but incomplete. The balance of Dr. Hart's statement is: "... as assigned in mid year 2003." Agency's Exhibit 2, R. 895, page 13, paragraph 2. As assigned prior to that time, Mr. Blauer was fully capable of performing the essential functions of his job as set by longstanding practice.

Dr. Hart's conclusion in his Independent Psychological Evaluation that Grievant is unable to hold unemployment insurance hearings full time but could perform his regular duties as Legal/Enforcement Counsel III was fully supported by the testimony of Grievant's personal physician, Dr. Dennis R. Peterson that physiologically Grievant is unable to hold hearings full time but could perform his regular historical duties as Legal/Enforcement Counsel III. Dr. Peterson testified at length concerning Grievant's sciatica, mini-traumatic stress disorder, numbness in the lower extremities and feet, arising generally from degeneration of the lower spine and impingement on the spinal column - all in a state of severe exacerbation during mid-2003 (R. 894 at 163:11 through

168:5). Dr. Peterson concluded that the exacerbation of Grievant's condition derived from increased sitting and stationary standing. (R. 894 at 168:1-22) Dr. Peterson testified that Appellant was physically disabled as a result of holding hearings (R. 894 at 192:21-25). His testimony stood uncontroverted and, in fact was supported by Dr. Hart's report.

Mr. Blauer in fact was never disabled from any part of his regular, historic duties. He could even conduct the occasional hearing as he had done without complaint until he reached the number of eight hearings a week. He simply could not perform the increasing and finally extreme number of hearings that Tani Downing attempted to force him to do when she knew it was causing him pain and injury.

Dr. Hart's report states that the Grievant could continue to perform his regular (historic) duties in the same manner and at the same (successful) level that he had performed them for the previous 23 years (see report, Agency Exhibit 2, R. 895, page 13 "response to question #2" - "yes, the condition does cause a total inability to perform his normal work as assigned in midyear 2003 [that is the assignment to conduct hearings full time]... [however] he could perform the functions and tasks associated with modified accommodations at the level of adequacy which he had performed in the past").

Even though Hart's report wholly supported Mr. Blauer's position, though, DWS attempted to use it to support their claim that he could not perform his duties with or without accommodation, and therefore justify their dismissal. This is a most telling point.

It demonstrates that the Department is willing to twist and shift the facts and evidence in order to justify their predisposition to get rid of a competent successful 23 year veteran for untried reasons in violation of R477-7-17(3) (b), Utah Admin. Code.

B. Mr. Blauer was shown to be capable of performing the “essential functions” of his prior position with or without reasonable accommodation.

Mr. Blauer testified, without contradiction, that he could perform the “essential functions” of his historic position of Legal/Enforcement Counsel III, as defined both by the Position Description Questionnaire related to that position, and by long-standing practice. R894 at 240:14-18. The holding of administrative hearings was never a described function of Mr. Blauer’s position under the Position Description Questionnaire; however, he had held some hearings thereunder during his time in the position. R894 at 235:15-25; R895, Grievance Exhibit 16. Only when he was “reassigned” to do *nothing but* conduct administrative law hearings to the extent assigned did Mr. Blauer’s disabilities impede his capacity to perform in his job – and this for physiological, as well as psychological, reasons. R894 at 252:13-23. When Mr. Blauer conveyed information concerning this difficulty to his supervisor, Tani Downing (and supported it with information from his physician), he was assigned to do *more* hearings. R894 at 253:1 through 255:10. When this insistence forced him to apply for and receive long-term disability, Mr. Blauer remained willing to return to work with a mix of duties which would accommodate his disability. R895, Grievance Exhibit 7. Tani Downing, though,

saw such conditions as Mr. Blauer’s attempt to dictate the terms of his employment – something for which she would not stand (R893 at 114:24 through 115:6). CSRB upheld the Hearing Officer’s finding that DWS had not abused its discretion in this regard, noting only that the holding of unemployment hearings “had always been a ‘core function of a Legal/Enforcement Counsel II position’” R873.

Regulations enacted to implement the Americans With Disabilities Act (the standards of which are incorporated by reference into R477-7-17(3)(b)) call for a far more thoughtful probe of “essential functions” than that offered by the hearing officer or CSRB:

(1) The term essential functions means the fundamental job duties of the employment position the individual with the disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. Part 1630.2(n).

As noted above, Mr. Blauer equipped DWS with sufficient information and medical documentation to permit "a reassignment to one or more immediately available vacant positions, for which the employee qualifies, and whose essential functions the employee is able to perform without a reasonable accommodation" (R477-7-17(3)(b), Utah Admin. Code) under the foregoing standard. Mr. Blauer himself (as well as his legal and administrative representatives) made abundantly clear to DWS that he could do what he had always done as Legal/Enforcement Counsel III without any reasonable accommodation. CSRB and its hearing officer, however, joined with DWS in the unexplained decision that 23 years of history did not establish the "essential functions" of

Mr. Blauer's position of Legal/ Enforcement Counsel III; that, rather, the "essential functions" for that position (where he alone was concerned, apparently) had suddenly metamorphosed into the conducting of administrative law hearings full-time. This, according to the DWS (and CSRB) could be turned into the sole "essential function" of Mr. Blauer's position as Legal/Enforcement Counsel III by administrative fiat alone. It is submitted that what does and does not constitute an "essential function", as opposed to a "marginal function", under the governing regulatory standard is simply not met by this determination. While the employer's judgment as to which functions are "essential" and which are not *is* evidence under the Regulation, so also are written job descriptions (which, in this case, nowhere mentioned the conducting of administrative hearings); the amount of time spent on performing the function (historically, less than 10 percent of Mr. Blauer's duties); the consequences of not requiring the incumbent to perform the function (nowhere addressed in DWS' case in chief); the work experience of past incumbents in the job (similar if not identical to Mr. Blauer's historic experience – R894 at 244:6 through 250:23); and the current work experience of incumbents in similar jobs (DWS failed to identify a single individual holding the position of Legal/Enforcement Counsel III assigned to do nothing but administrative law hearings).

In short, there exists no substantial evidence in the record to establish DWS' compliance with the requirements of R477-7-17(3)(b), Utah Admin. Code.

C. DWS presented no evidence that it had attempted to place Mr. Blauer in an immediately-vacant position the essential functions of which he could perform without reasonable accommodation.

R477-7-17(3)(b) called upon DWS to take affirmative action if it did not want to accept Mr. Blauer's suggestion concerning reinstatement in his prior duties. Upon expiration of the year leave period, and with awareness of Mr. Blauer's disability, DWS needed to "offer the employee a reassignment to one or more immediately available vacant positions, for which the employee qualifies, and whose essential functions the employee is able to perform without a reasonable accommodation". *DWS offered not one shred of evidence that it had even attempted to locate, much less offer to Mr. Blauer, such an alternate position.* It did, in fact, precisely the opposite, demanding that Mr. Blauer accept assignment to the precise set of duties which, to their own express knowledge, he could *not* perform due to disability, for no articulated reason other than the rules were theirs – not his – to make. On this basis alone, CSRB's ruling must be reversed.

D. DWS was not excused from compliance with R477-7-17(3)(B) by Mr. Blauer's failure to provide medical documentation of his ability to perform the essential functions of the position he had historically held.

As noted above, the record proves that Mr. Blauer was always able to perform the essential functions of Legal/Enforcement Counsel III. Furthermore, there is no evidence of record that he was ever informed, until long after his employment was terminated, that he was deficient by not presenting a medical release in order to return to work. It is reasonable for him to believe it was not necessary for him to provide such a release to

perform the essential functions of Legal/Enforcement Counsel III, as established by longstanding practice, that he had never been medically disabled from. It was also reasonable for him to believe that the Department would have been satisfied in that regard by the letter written by Vince Rampton (R. 895, Grievant's Exhibit 24) and previous letters from his medical provider already in record especially since there is no particular required format for such a release. Therefore there did not appear to be a need for him to present a more formal medical release in order to return to work to perform those functions he had never been disqualified from.

Mr. Blauer was simply never told otherwise – not in the hearing before the department representative representing Director Ireland, nor in Director Ireland's letter of dismissal. It is important to note that neither in the letter of termination nor in the testimony offered by the hiring authority, Raylene Ireland, was the matter of the alleged failure to produce such a release ever made an issue or indicated as cause in Mr. Blauer's termination. It was never brought up, in fact, until the hearing before CSRB Hearing Officer Wallentine! It can only be assumed that it wasn't a factor in the dismissal and was a moot point before the CSRB.

If it had been important to the Department for Mr. Blauer to produce something more in the way of a medical release, the Department should have notified him of the deficiency in time for him to produce such. To make a belated claim that the failure to

produce such a release had any part of the decision is entirely pretext. It is clear that such an alleged deficiency was not a proximate cause of the termination.

In the worst case scenario, assuming *arguendo* that Mr. Blauer's alleged failure to present a medical release to return to work could be considered a terminable offense, it would be incumbent upon the agency to advise Blauer, a 23-year employee of the agency, that he needed to present such medical release and give him an opportunity to provide such (or otherwise respond to the issue). If he refused to do so, then the agency may have an argument for disciplining him, but he has a right to be noticed of any work-related deficiency before discipline could be imposed.

In short, Mr. Blauer's failure to produce an un-demanded medical release as the price of rehiring cannot be urged as "substantial evidence" of DWS' compliance with regulatory standards incumbent on it prior to terminating his employment.

POINT III

PETITIONER'S PETITION FOR REVIEW BY THIS COURT IS NOT UNTIMELY.

In its Order of July 27, 2006, CSRB refused to consider Mr. Blauer's Request for Reconsideration of its June 28 decision upholding the Hearing Officer's ruling herein, stating only that its filing was untimely, and that it lacked jurisdiction on that basis. DWS has taken the position that, by reason thereof, this appeal was likewise untimely. Both positions were presented on Motion for Summary Disposition herein, and both were rejected pending briefing.

Under Utah Code Ann. § 63-46b-13, a party is entitled to petition an “agency” to reconsider its ruling. Under Utah Code Ann. § 63-46b-14(3), filing and disposition of such a request tolls the period for seeking judicial review.

A. The filing of a request for reconsideration tolls the appeal period.

DWS argued in its motion that Petitioner first petitioned this Court 34 days after CSRB issued its June 28, 2006 ruling, and that the Petition is therefore time-barred under Utah Code Ann. § 63-46b-14(3)(a). DWS acknowledged, however, that during that interim, Petitioner filed a request for reconsideration with CSRB.

Utah Code Ann. § 63-46b-13 permits any party to an administrative proceeding to request reconsideration of any “order [that] would otherwise constitute final agency action” within 20 days of issuance of such order. If a request for reconsideration is submitted, the head of the agency issuing the order is required to issue a written order granting the request or denying the request. If no order issues within 20 days of the request being filed, it is deemed denied by operation of law.

This Court has expressly held that an appeal filed within 30 days after an agency’s disposition of a request for reconsideration is timely, even if filed more than 30 days after the final agency decision as to which the request was made. In *Orton v. Utah State Tax Collection Division*, 864 P.2d 904 (Utah App. 1993), therein, this Court (relying on the decision of *49th Street Galleria v. Utah State Tax Commission*, 860 P.2d 996 (Utah App. 1993), held that “A party may file a petition for judicial review within 30 days after the

order constituting the final agency action . . . ‘or’ within 30 days after the ‘deemed denied’ date established by § 63-46b-13(3)(b).” 864 P.2d at 907 (emphasis in original).

In this case, Lorin Blauer has petitioned this Court to review CSRB’s June 28, 2006 decision, which it declined to reconsider on July 27, 2006 – less than 30 days before this petition was filed. As such, this petition is not untimely by reason of having been filed 34 days after issuance of the June 27 decision.

B. DWS may not bootstrap CSRB’s decision to decline jurisdiction over Petitioner’s Request for Reconsideration into a jurisdictional issue for this Court.

DWS attempted to circumvent the foregoing by saying that, since the CSRB held that Petitioner’s request for reconsideration was untimely, this Court somehow lacks jurisdiction to hear a petition for review of that decision. DWS’ argument in this regard, though, confuses the jurisdiction of CSRB with the jurisdiction of this Court.

Petitioner herein challenges CSRB’s ruling that his request for reconsideration was untimely. As noted above, that challenge was timely filed before this Court. Whether CSRB properly or improperly limited its own jurisdiction in this regard is one of the issues to be reviewed by this Court incident to the petition. It does *not*, however, go to the jurisdiction of this Court. The Utah Legislature has conferred jurisdiction upon this Court to hear appeals from all “final agency actions” wherever a petition is filed within 30 days of the “final agency action”, or within 30 days following disposition of a request to review a “final agency action”. Petitioner has met the time limits specified by statute,

and is properly before this Court. Whether CSRB was correct in holding the request for reconsideration untimely is a substantive issue to be reviewed by this Court – not a threshold jurisdictional issue limiting this Court’s ability to address the Petition.

CONCLUSION

Lorin Blauer was forced to go on long-term disability leave when his supervisors at DWS insisted on reassigning him to job responsibilities which known disabilities precluded him from performing. When the resulting leave ended, he was entitled to ADA-defined accommodation, either by simple reinstatement to his longstanding job duties (as he had suggested), or to another vacant position the essential functions of which his disabilities did not prevent him from performing. Instead, DWS laid down an arbitrary demand: come back and do precisely the work that gave rise to your disability, or be fired. DWS thus failed to follow regulations incumbent on it, and CSRB failed to reverse its decision despite the mandate of then-governing law.

Based on the foregoing, the decision of CSRB should be reversed, and Lorin Blauer ordered reinstated with back pay.

DATED this 5th day of January, 2007.

JONES WALDO HOLBROOK & McDONOUGH PC

By

Vincent C. Rampton

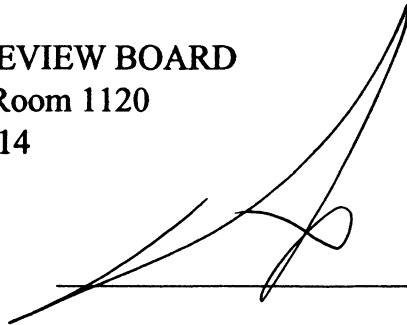
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed via first class mail, postage prepaid, to the following this 5th day of January, 2007:

J. Clifford Petersen
Philip S. Lott
Assistant Utah Attorney General
MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
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Salt Lake City, UT 84114-0856

Kevin C. Timpkin
Acting Chairman
CAREER SERVICE REVIEW BOARD
State Office Building, Room 1120
Salt Lake City, UT 84114

A handwritten signature in black ink, appearing to read 'Kevin C. Timpkin', is written over a horizontal line. The signature is stylized with a large, sweeping loop.

Tab 1

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

| | | |
|-------------------------|---|---------------------|
| LORIN BLAUER, | : | |
| | : | |
| Grievant and Appellant, | : | DECISION |
| | : | AND |
| v. | : | FINAL AGENCY ACTION |
| | : | |
| UTAH DEPARTMENT OF | : | |
| WORKFORCE SERVICES, | : | |
| | : | |
| Agency and Respondent. | : | Case No. 9 CSRB 83 |

On Tuesday, May 2, 2006, the Career Service Review Board (Board and CSRB) completed its final review of the above-entitled case with a hearing involving the parties and an executive session. The following Board members were present and heard oral argument at the hearing and deliberated in the executive session: Kevin C. Timken, Acting Chair; Joan M. Gallegos, Teresa N. Aramaki, and Richard R. McDonald, Board Members. At the hearing, Lorin Blauer (Appellant) was present and represented by an employee advocate, Tom Cantrell, who presented oral argument on Appellant's behalf. Assistant Utah Attorney General Philip S. Lott represented the Utah Department of Workforce Services (Department and DWS) and presented oral argument on the Department's behalf. Wendy Peterson and Geoffrey T. Landward were present with Mr. Lott as the Department Representatives.

AUTHORITY

The Board's statutory authority is set forth in the *Utah Code* at §§67-19a-101 through -408 of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act at §§67-19-1 *et seq.* The CSRB's administrative rules are published in the *Utah Admin. Code* at R137-1-1 through -23. This Board-level or Step 6 appeal hearing is the final administrative review in the State Employees' Grievance and Appeal Procedures for Mr. Blauer's appeal from termination of his employment. Both the Board's evidentiary/Step 5 and these appellate/Step 6 proceedings are designated as "formal adjudications" pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB's Step 5 and Step 6 hearings. (§§63-46b-0.5 *et seq.*)

PROCEDURAL BACKGROUND

I. PROCEEDINGS BEFORE THE DEPARTMENT

Review of the Step 5 evidentiary record and the appeal briefs filed by the parties establishes that on October 8, 2003, Appellant began taking authorized leave from work for medical reasons. (Tr.1 at 10; Ex. A-5; Hearing Officer's Findings of Fact, Conclusions of Law, Decision and Order (Step 5 Decision) ¶ 4 at 2; Grievant's Appeal Brief to CSRB (Appellant's Brief on Appeal) at 9; Respondent Agency's Step 6 Appellate Brief (Department's Brief on Appeal) at 5) Thereafter, on January 26, 2004, Appellant applied for Long Term Disability (LTD) Benefits with the Utah Retirement Systems.¹ (Ex. A-1; Appellant's Brief on Appeal at 9; Department's Brief on Appeal at 5)

As part of the LTD application process, Appellant underwent an independent psychological evaluation. (Ex. A-2; Step 5 Decision ¶ 6 at 3; Appellant Brief on Appeal at 10; Department Brief on Appeal at 6) This independent psychological evaluation was performed on June 14, 2004, by Darrell M. Hart, Ph.D. (Dr. Hart). (*Id.*) Dr. Hart's evaluation conclusions were forwarded to Ms. Jeri Richards, LTD Specialist, Long Term Disability Program, Public Employees' Health Program (PEHP).² (Ex. A-2) In his evaluation conclusions, Dr. Hart specifically represents that Appellant suffered from psychopathology and that this psychopathology in fact rendered Appellant totally unable "to perform his normal work as assigned in midyear 2003." (*Id.*)

On July 14, 2004, PEHP notified Appellant and the Department that Appellant had been approved for LTD benefits based upon "psychological illness." (Exs. A-3, A-4; Step 5 Decision ¶ 6 at 3; Appellant's Brief on Appeal at 9; Department Brief on Appeal at 6) In granting its approval of Appellant's request for LTD benefits, PEHP specifically informed Appellant that "your long term disability benefits were approved for a maximum of two years, based on psychological illness. Our

¹Though there was no testimony or documentary evidence regarding the Utah Retirement Systems, it is evident from the evidentiary record that the Utah Retirement Systems administers and oversees Long Term Disability Benefits for State employees. This fact, however, is of little relevance in that neither party disputes that Appellant applied for LTD benefits to cover his leave which began on October 8, 2003.

²Like the Utah Retirement Systems, there is no testimony or documentary evidence regarding PEHP. However, it is evident from the evidentiary record that PEHP administers LTD benefits for the Utah Retirement Systems and that Ms. Richards is a LTD Specialist with PEHP. Again, these facts are of little relevance in this dispute and are added for clarity only.

program allows benefits to a disabled worker for a maximum of two years if psychopathology primarily causes the disability.” (Ex. A-4; Step 5 Decision ¶ 8 at 3)

On October 1, 2004, the Department notified Appellant that the one-year period of allowable medical leave under the State’s LTD leave rules was coming to a conclusion.³ (Tr. I at 24-26; Ex. A-5; Step 5 Decision ¶ 10 at 3) In this October 1, 2004 notification, the Department reminded Appellant of his right to contact Department personnel and arrange to return to work at the conclusion of his LTD leave. This notification also informed Appellant of his need to provide a medical release before his employment could be restored and that if he failed to return to work at the end of the one-year period, his employment would be terminated. (*Id.*)

On October 4, 2004, Vincent C. Rampton, Attorney at Law, responded on behalf of Appellant to the Department’s October 1, 2004 letter. (Ex. G-24)⁴ Appellant’s October 4, 2004 response letter unambiguously asserted that Appellant’s medical condition had not changed and that he remained disabled but also asserted that Appellant remained “able to perform the essential functions of . . . the position he occupied prior to demotion.” (*Id.*)⁵

As of October 8, 2004, Appellant had not returned to work. Based upon these facts, the

³DHRM rule R477 specifically provides that “medical leave begins on the last day the employee worked.” (*Utah Admin. Code* R477-7-17(1)(a)) There is no factual dispute that Appellant’s last day of work was October 8, 2003.

⁴Throughout the proceedings before the CSRB relating to Appellant’s dismissal, he has been represented by Tom Cantrell, an advocate. However, Vincent C. Rampton filed with the CSRB the appeal of Appellant’s dismissal from employment with the Department and continues to represent Appellant in matters collateral to these proceedings.

⁵The issue of demotion is one of the collateral proceedings Appellant is pursuing. In a grievance originally filed with the CSRB on October 15, 2003, Appellant argued that in September 2003 when the Department began requiring Appellant to conduct unemployment hearings full time with no change in job title or pay rate, he was in fact demoted. In an Administrative Review of the File dated November 12, 2003, the CSRB dismissed Appellant’s grievance finding it had no jurisdiction to adjudicate his claims because there was no demotion. On November 30, 2004, in a review of the CSRB’s administrative ruling, the Third District Court ruled that the Department “did not demote the [Grievant]” when it assigned him to perform duties of an administrative law judge and that “the CSRB was correct in reaching the same conclusion.” *Blauer v. Department of Workforce Services* Civil No. 040900221. Appellant then appealed the Third District Court’s decision to the Utah Court of Appeals. On November 10, 2005, the Utah Court of Appeals concluded that “DWS did not demote Blauer, and thus, the CSRB did not err in declining jurisdiction over *Blauer’s* grievance. *Blauer v. Department of Workforce Services*, 128 P.3d 1204 (Utah Ct. App. 2005)

Department again notified Appellant in a letter dated October 8, 2004, that his position of Legal Enforcement Counsel III continued to be open and available for him to return to. In addition, this letter further informed Appellant of his right to have a hearing prior to any termination of his employment for failure to return to work. (Tr. I at 27; Ex. A-6; Step 5 Decision ¶ 12 at 3-4; Department Brief on Appeal at 8-9) Appellant never returned to work.

On October 27, 2004, a hearing on Appellant's failure to return to work was held before Department Representative Scott Steele (Mr. Steele), who was designated by then Executive Director Raylene Ireland (Exec. Dir. Ireland)⁶ to conduct Appellant's predismissal hearing. (Ex. A-7)⁷ Following this hearing, Mr. Steele reported his recommendations to Exec. Dir. Ireland.

After meeting with Mr. Steele, Exec. Dir. Ireland determined that the "department really had no other position it could take except to move forward with termination." (Tr. I at 122) Exec. Dir. Ireland then issued her letter terminating Appellant's employment. (Ex. A-7) The effective date of Appellant's dismissal was November 3, 2004. (*Id.*)

In Exec. Dir. Ireland's written decision, she specifically indicated that Appellant's termination from employment was based on the fact that he was unable or unwilling to return to work after being on LTD for one year as required by DHRM rule.⁸ Specifically addressing Appellant's failure to return to work, Exec. Dir. Ireland stated:

On October 1, 2004, you were sent a letter regarding your return to work. You indicated during the hearing that you are unable to return to your previous work assignment. You were offered a position at the Department of Workforce Services with the same title and pay range. However, you have declined to accept the duties that have been assigned to this position.

Based upon these factors, Exec. Dir. Ireland concluded that "I have no choice but to terminate your employment. This decision is based upon your medical leave of longer than one year, and the fact

⁶At the time of Appellant's dismissal, Raylene Ireland was the Executive Director of the Department. Since that time, Tani Pack-Downing has been appointed as Executive Director of the Department. The Board notes that on October 8, 2003, when Appellant first went on LTD leave, Executive Director Downing was in fact Appellant's supervisor.

⁷*Utah Code Ann.* § 67-19-18 allows predismissal hearings to be held by the "department head or *designated representative*." (emphasis added)

⁸DHRM personnel rules are found at *Utah Admin. Code* R477 *et seq.*

that we offered you a job, which you declined.” (*Id.*)

Thereafter, on November 16, 2004, Appellant timely filed an appeal of his dismissal from employment with the CSRB. As set forth above, this appeal was filed by Mr. Rampton who specifically indicated that “while I [Mr. Rampton] will be advising Mr. Blauer in connection with this appeal, he will be represented before the Career Service Review Board by Mr. Tom Cantrell.”

II. PROCEEDINGS BEFORE THE CSRB

On August 17-18, 2005, a Step 5 evidentiary hearing was held in this matter before CSRB Hearing Officer Kenneth R. Wallentine. At this hearing, Appellant was represented by advocate Tom Cantrell. The Department was represented by Assistant Utah Attorney General Philip S. Lott. Assisting Mr. Lott as the Management Representative was JoAnne Campbell (Ms. Campbell), Human Resources Director, DWS.

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

The specific issues adjudicated at the Step 5 evidentiary hearing were twofold. First, did the Department terminate Appellant’s employment to advance the good of the public service or for just cause as required by *Utah Code Ann.* § 67-19-18? Second, if substantial evidence does not support the Department’s decision to terminate Appellant’s employment, what is the appropriate remedy? (Prehearing Conference Summary and Order ¶ 3 at 2; Step 5 Decision at 2)

At the evidentiary hearing on this matter, the Hearing Officer received evidence relating to the specific reasons supporting the Department’s decision to terminate Appellant’s employment. This evidence included testimony given and documents received concerning the factual basis supporting the Department’s decision and whether its actions were in compliance with State statutes and personnel rules.

Specifically, testimony was given and documentary evidence received establishing that in October 2003, Appellant began taking authorized leave for medical reasons. (Tr. I at 10; Ex. A-5) In addition, evidence was received concerning Appellant’s authorized request for, and the eventual approval by PEHP of, LTD benefits. (Exs. A-1, A-3, A-4) There was also evidence received concerning the Department’s notification to Appellant of State personnel rules that limited Appellant’s right to return to work to one year from his last day worked. (Ex. A-5) Evidence was

also received showing the Department's efforts notifying Appellant of the conditions he must meet in order for him to be reinstated by the Department. (Tr. I at 24-26, 52; Exs. A-5, A-6)

The evidentiary hearing also included extensive evidence concerning the Department's actions after determining that Appellant was unable or unwilling to return to the Department as Legal Counsel III performing the duties he performed immediately preceding his medical leave of absence. (Tr. I at 29-30, 61-62; Tr. II at 293; Exs. A-6, G-24).⁹ This evidence included specific efforts by the Department to ensure Appellant that his position would be open and available to him and that prior to any final determinations being made as to his employment with the Department, he would have an opportunity to meet with the Executive Director's designee in a predissmissal hearing. (Tr. I at 27; Ex. A-6) Finally, extensive evidence was received regarding Appellant's concerns that the Department's actions of terminating his employment violated State personnel rules and statutes regarding LTD leave and dismissals. (Exs. G-9, G-30-16; Appellant's Brief on Appeal at 20-21; Amended Prehearing/Scheduling Conference Summary and Order at 2)

At the conclusion of the evidentiary hearing, the Hearing Officer entered his Step 5 Decision dated September 19, 2005. In his Step 5 Decision, the Hearing Officer examined the evidence presented at the hearing and found that the Department had met its burden to show that Appellant failed to return to work as required by State personnel rules. The Hearing Officer also concluded that the Department had complied with all relevant statutory and administrative requirements in reaching its decision to terminate Appellant's employment. (Step 5 Decision ¶¶ 6 and 10 at 6)

Based upon these findings, the Hearing Officer concluded that the Department's termination of Appellant's employment was not excessive, disproportionate nor did it constitute an abuse of discretion. (Step 5 Decision ¶ 11) The Hearing Officer further concluded that the Department's termination of Appellant's employment was for the good of the public service and otherwise for just cause based on Appellant's failure to return to work following expiration of the maximum period of disability leave. (*Id.*)

⁹As set forth above, in September 2003, the Department began requiring Appellant to conduct unemployment hearings full time. Prior to September 2003, conducting unemployment hearings was a minor component of Appellant's daily work duties, but as held by the Utah Court of appeals, holding unemployment hearings has always been a "core job function" of the Legal Enforcement Counsel III position. (*Blauer v. Department of Workforce Services*, 128 P.3d 1204, 1211 (Utah Ct. App. 2005))

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I. ISSUES ON APPEAL

In his appeal before this Board, Appellant challenges numerous aspects of the Hearing Officer's Step 5 Decision. Specifically, Appellant contests many of the Hearing Officer's factual findings, asserting that these findings were not based on substantial evidence and that the Hearing Officer failed to "address the case as it was brought before him." (Appellant's Brief on Appeal at 22) Addressing the Hearing Officer's findings in Appellant's Brief on Appeal, Appellant states: "His findings of fact appear to be rational and accurate, but most are skewed a little off point with the cumulative effect of misstating the case." (*Id.*) Indeed, Appellant concludes that the Hearing Officer's findings are skewed sufficiently that "it doesn't even seem to be the same case." (*Id.*)

Appellant also argues that the Hearing Officer erred in concluding that the Department had complied with all relevant statutory and administrative requirements in reaching its decision to terminate Appellant's employment. Specifically addressing this issue, Appellant argues that the Hearing Officer erred in concluding that the Department offered Appellant the opportunity to return to the same position he held prior to going on LTD. (Step 5 Decision ¶ 7 at 6) In support of his position, Appellant argues that because the Department expected Appellant to perform unemployment hearings full time upon his return, he was in fact not being returned to the position he "previously held." (Appellant's Brief on Appeal at 20-22) Based upon these factors, Appellant asserts that the Hearing Officer erred in concluding that the Department complied with DHRM rule R477-7-17(3)(a). (*Id.*)

In essence, Appellant challenges the Hearing Officer's findings that substantial evidence supported the essential facts relied upon by the Department in reaching its decision to terminate Appellant's employment. He further argues that the Hearing Officer erred by legally concluding that in reaching its decision to terminate Appellant's employment, the Department correctly applied all pertinent statutes, rules and policies as mandated by *Utah Admin. Code* R137-1-21(3)(a)(ii). Indeed, the substance of Appellant's argument before this Board appears to be that the Department did not offer to place Appellant in his "previously held position" of Legal Counsel III, but rather offered to place him in the different or lesser position of "Administrative Law Judge" thereby requiring him to perform functions for which he was disabled from performing. Based upon these factors, Appellant argues the Hearing Officer erred in concluding that the Department complied with State rules and statutes in reaching its decision to terminate his employment.

II. THE BOARD'S APPELLATE STANDARDS OF REVIEW

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

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

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

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

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

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

I. FACTUAL EVENTS PRECEDING THE DEPARTMENT'S TERMINATION OF APPELLANT'S EMPLOYMENT

As stated above, the Board's first obligation on review is to make a determination of whether the factual findings of the Hearing Officer are reasonable and rational according to the substantial evidence standard. (*Utah Admin. Code* R137-1-22(4)(a)) In the instant case, the Hearing Officer received testimony from numerous witnesses, including Appellant himself, regarding Appellant's failure to return from LTD leave within one year as required by DHRM rule R477-7-17. Exhibits were also introduced by the parties establishing a sequence of events occurring up to the time Appellant's employment with the Department was terminated. This documentary evidence included, but was not limited to, his application and eventual approval for LTD benefits; the Department's letter outlining requirements for Appellant to return to work, and; the Department's actions after determining that Appellant was unable or unwilling to return to the Department as a Legal Counsel III performing the duties he performed immediately preceding his medical leave of absence. (Exs. A-1, A-3, A-4, A-5, A-6, G-24)

After carefully considering the testimony given at the evidentiary hearing and reviewing the documents received into evidence, the Hearing Officer issued his decision. This decision set forth several dispositive facts crucial to his final decision. Among other facts, the Hearing Office specifically found that the last day Appellant worked for the Department was October 8, 2003, when Appellant began taking authorized leave from work for medical reasons. (Step 5 Decision ¶ 4at 2) He also found that Appellant was approved for LTD benefits based on psychopathological illness. (*Id.* ¶¶ 6-7at 3) The Hearing Officer further found that on October 1, 2004, the Department notified Appellant that the one-year period of allowable medical leave under the State's LTD leave rules was coming to a conclusion and that Appellant's position of Legal Counsel III continued to be open and available for him to return. (*Id.* ¶¶ 10, 14-16, 22 at 3-5) In addition, the Hearing Officer also found that Appellant never provided the Department with any notice or indication that he was no longer fully disabled due to his psychopathological illness. (*Id.* ¶ 19 at 4) Finally, the Hearing Officer found that Appellant failed to return to work within one year as required by DHRM rule. (*Id.* ¶ 24 at 5)

After carefully reviewing the evidentiary record as a whole, including the sworn testimony of the witnesses and the documents admitted into evidence, this Board finds the Hearing Officer's

factual findings as set forth in his Step 5 Decision both reasonable and rational and supported by substantial evidence.¹⁰ In reaching this decision, the Board stresses that it has consistently held that the findings made by a fact finder are entitled to a presumption of correctness. (*Chournos v. Utah Dep't of Workforce Services*, 8 CSRB 74 (Step 6 2004), *Jones v. Utah Dep't of Public Safety*, 4 CSRB 38 (Step 6 1992); See also *Parks and Recreation v. Anderson*, 3 PRB 22 at 7-8 (1986))¹¹ In granting such deference to the hearing officer's factual findings, the Board notes that it is the hearing officer who is in the best and most unique position to hear the testimony, weigh the evidence and judge the veracity of the witnesses' various statements.

During the evidentiary hearing held in this matter, substantial and persuasive testimony and documentary evidence was provided supporting the Hearing Officer's factual findings. Specifically, the evidence establishes that on October 8, 2003, Appellant began taking authorized leave from work for medical reasons. (Tr. I at 2; Ex. A-5) The evidence further establishes that on January 26, 2004, Appellant applied for LTD benefits with the Utah Retirement Systems. (Ex. A-1) As part of the LTD application process, Appellant underwent an independent psychological evaluation. (Ex. A-2) This independent psychological evaluation was performed on June 14, 2004, by Dr. Hart. (*Id.*)

Dr. Hart's evaluation findings were forwarded to PEHP for determination of Appellant's eligibility for LTD benefits. (Ex. A-2) In his evaluation conclusions, Dr. Hart specifically provides:

My task is to determine if Mr. Blauer suffers from psychopathology.

* * *

1. Is the examinee suffering from psychopathology?

¹⁰CSRB rule R137-1-2 defines substantial evidence to be "evidence possessing something of substance and relevant consequence, and which furnishes substantial basis of fact from which issues tendered can be reasonably resolved. It is evidence that a reasonable mind might accept as adequate to support a conclusion, but is less than a preponderance." Addressing substantial evidence courts have found that substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v State*, 903 P.2d 429, 430 (Utah 1995), quoting *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *see also Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah Ct. App. 1989) Substantial evidence "is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Board of Review of Industrial Comm'n*, 842 P.2d 910, 911 (Utah Ct. App. 1992)

¹¹The PRB was the Personal Review Board, the predecessor for the Career Service Review Board.

Response: Mr. Blauer is indeed suffering from psychopathology.

* * *

2. If yes, does the condition cause a total inability to perform his normal work?

Response: Yes. The condition does cause a total inability to perform his normal work as assigned in mid year 2003.

(Ex. A-2 at 1 and 13)

This evaluation further provided that:

Psychologically, this man does not want to return to the workplace, irrespective of whatever accommodations might be made for him. And, if he is forced to do so his anxiety and depression will be debilitating. He won't function well because of those psychological conditions. And, he doesn't want to be there. Unfortunately, there are two victims here. The system is victimized by a man who is unwilling and psychologically limited to accommodate to job performance expectations in a changing workplace. Mr. Blauer is a victim because of unwanted physical challenges and psychophysiological vulnerabilities . . . insufficient psychological resilience to work within the changing work setting as well as to fight off a tendency to allow his psychology to cause or exacerbate the physical problems.

(*Id.* at 12)

In addition, the record further establishes that on July 14, 2004, PEHP notified Appellant and the Department that Appellant had been approved for LTD benefits based upon "psychological illness." (Exs. A-3, A-4) In granting its approval of Appellant's request for LTD benefits, PEHP informed Appellant that "your [Appellant's] long term benefits were approved for a maximum of two years, based on *psychological illness*. Our program allows benefits to disabled workers for a maximum of two years if psychopathology primarily causes the disability." (Ex. A-4) (emphasis added)

By letter dated October 1, 2004, the Department notified Appellant that the one-year period of allowable medical leave under the State's LTD leave rules was coming to a conclusion. (Tr. I at 24-26; Ex. A-5) This October 1, 2004 notification letter specifically provided that:

Last year, you were placed on leave for a medical reason, and subsequently were found eligible for the Long Term Disability Program (LTD). The Department of Human Resource Management rule R477-7-17(1) states that employees shall be granted up to one year of medical leave under those conditions. Our records show that

your last day worked was October 8, 2004.

If your condition has improved and you are able to return to work, please contact Wendy Peterson . . . so that we can arrange for your return. If you are still unable to return to work, your employment with the Department will be terminated. Termination of your employment under these circumstances does not affect your eligibility for rehire.

* * *

You have until October 5, 2004 to contact Wendy and arrange for your return to work, or submit written documentation as to why your employment with the department should not be terminated at this time. If you are able to return to work, you will need to provide a medical release.

(Ex. A-5)

Regarding the Department's requirement that Appellant provide a medical release, Ms. Campbell testified as follows:

A. When people are on long-term disability there's a requirement that we keep them on abeyance on our payroll one year from the time they left the department for a medical reason. Once that year is up it's routine for us to send them a letter that says, "Are you able to come back to work?" If they are able to come back to work with a release they are placed back in the department. If they are not then we do take them off of the state payroll system.

* * *

Q. When a letter such as Exhibit 5 is sent to an employee that's been on medical leave does the employee have any obligation to do anything?

A. They do. They have the obligation to contact whichever HR specialist is listed in the letter to arrange for their return . . .

A. The letter also indicates that – that there's a – a request for a medical release?

A. That's right.

Q. And what's the purpose of that?

A. Well, to determine if, in fact, they are now no longer disabled and able to return to work.

Q. . . . Would Workforce Services uniformly require a medical release for – for work after one year of medical leave?

A. That would be the practice, yes.

(Tr. I at 24-26, 52)

Substantial evidence also supports the Hearing Officer's finding that on October 4, 2004, Appellant, through Mr. Rampton, responded to the Department's October 1, 2004 letter by

indicating that his medical condition had not changed and that Appellant remained disabled from performing the duties he performed immediately preceding his medical leave of absence. (Ex. G-24)¹² Regarding his ability to return to work in October 2004, Appellant himself testified at the evidentiary hearing in this matter as follows:

- Q. You admit that you provided no information from any health care providers to Mr. Steele verifying that you recovered from your psychological illness that was the basis for your long-term disabilities?
- A. Provided no psychological information, no.
- * * *
- Q. You admit that you provided no written documentation from any health care provider stating that you have recovered from the basis of your long-term disability which was psychological illness?
- A. Yes.

(Tr. II at 293-294)

Indeed, the evidentiary record establishes that at the time the evidentiary hearing was held in this matter, more than two years after going on medical leave, Appellant was still receiving LTD benefits and had not yet received a written release to return to work based upon recovery from psychological illness. Specifically addressing this issue in the hearing, Appellant testified as follows:

- Q. Are you still receiving long-term disability benefits?
- A. Yes.
- Q. You have not notified the provider of long-term disability benefits that you were no longer disabled?
- A. No.
- * * *
- Q. Have you received a written release to return to work based upon recovery of psychological illness?
- A. No.
- Q. Have you received any other type of release from a health care provider based upon recovery of psychological illness?

¹²Importantly, the Board notes that this letter also states that Appellant remained “able to perform the essential functions of . . . the position he occupied prior to demotion.” The apparent contradiction highlighted in this letter constitutes the issue that lies at the core of this appeal. In essence, Appellant argues that the Department never really offered to place him in his “previously held position” because holding unemployment hearings is not an essential function of the Legal Enforcement Counsel III position, but a function assigned to the Administrative Law Judge position. The Board is not persuaded by Appellant’s arguments on this issue for the reasons set forth at pages 16-19 below.

A. No.

(Tr. II at 294-298)

Moreover, both Ms. Campbell and Mr. Steele testified that at no time prior to his dismissal did Appellant ever provide notification that the condition upon which Appellant's LTD was based had been resolved. When Mr. Steele was questioned about the pre-dismissal hearing he conducted, Mr. Steele testified as follows:

Q. Who appeared at the hearing?

A. Lorin was there and Mr. Cantrell was with him, myself and Wendy Peterson, who was our HR representative for the hearing.

Q. Were you the person who conducted the hearing?

A. I did.

* * *

Q. Was Mr. Blauer given the opportunity to present information at the hearing?

A. He was.

* * *

Q. Was any information presented to you regarding Mr. Blauer's psychological condition?

A. No.

* * *

Q. Were there any – any medical records presented at the hearing?

A. Not that I recall, no.

Q. Were there any releases from any health care providers indicating that Mr. Blauer was able to return to work?

A. No.

(Tr. I at 60-62)

Similarly, Ms. Campbell testified that Appellant never provided a medical release indicating he is able to return to work. Specifically addressing this issue, Ms. Campbell testified:

Q. Are you aware of Mr. Blauer ever providing the agency with a release from a health care provider indicating that he was able to return to work?

A. . . . No.

(Tr. I at 28-29)

In the instant case, substantial evidence also supports the Hearing Officer's findings that by October 8, 2004, Appellant had not returned to work. Based upon this fact, and Appellant's October 4, 2004 letter, the Department again notified Appellant in a letter dated October 8, 2004,

that his position of Legal Enforcement Counsel III continued to be open and available for him to return to. However, because of the language set forth in Appellant's October 4, 2004 letter and his failure to report to work on October 8, 2004, this letter also informed Appellant of his right to have a hearing prior to any termination of his employment for failure to return to work as required by DHRM rule. (Tr. I at 27; Ex. A-6) After receiving this correspondence, Appellant did not return to work.

Finally, the evidentiary record further establishes that on October 27, 2004, a hearing on Appellant's failure to return to work within one year was held before Department Representative Mr. Steele. (Ex. A-7) Mr. Steele was designated by Exec. Dir. Ireland to conduct Appellant's predissmissal hearing. (Ex. A-6) As set forth above, the record establishes that at this hearing, Appellant did not provide a medical release or any other information that he had recovered from the medical condition upon which his LTD leave had been granted. (Tr. I at 60-62; Tr. II at 93-94) Based upon these and other representations made to him at this hearing, Mr. Steele recommended to Exec. Dir. Ireland that Appellant's employment with the Department be terminated for failure to return to work within one year as required by DHRM rule. (Tr. I at 122)

By letter dated November 3, 2004, Exec. Dir. Ireland informed Appellant of her decision to terminate Appellant's employment. Exec. Dir. Ireland's decision was based upon Appellant's representations made to Mr. Steele that he was "unable to return to your [Appellant's] previous work assignment." (Ex. A-7) Specifically, Exec. Dir. Ireland stated:

On October 1, 2004, you were sent a letter regarding your return to work. You indicated during the hearing that you are unable to return to your previous work assignment. You were offered a position at the Department of Workforce Services with the same title and pay range. However, you have declined to accept the duties that have been assigned to this position.

* * *

I have no choice but to terminate your employment. This decision is based upon your medical leave of longer than one year, and the fact that we offered you a job, which you declined.

(Id.)

After carefully reviewing the evidentiary record, the Board finds that there is more than substantial evidence to support the Hearing Officer's factual findings in this case. The record establishes that in October 2003, Appellant became disabled from performing his Legal Enforcement Counsel III position with the Department due to psychological illness. The

record further supports the Hearing Officer's findings that on more than one occasion in October 2004, the Department informed Appellant that his "previously held position" remained open and available for him to return to. Finally, the record supports the Hearing Officer's findings that at the end of the one-year period of allowable LTD leave, Appellant failed to provide the Department with any direct statement or substantive information that he was not longer disabled due to severe psychopathological illness or that he was even able to return to work within the time frame required by statute. (Step 5 Decision at ¶¶ 19-10 at 4)

After careful review of the evidentiary record, the Board upholds the Hearing Officer's detailed factual findings. The Hearing Officer's findings are clearly supported by substantial evidence and support the Department's position that its termination of Appellant's employment was for just cause and to advance the good of the public service.

II. LEGAL ISSUES REGARDING THE DEPARTMENT'S TERMINATION OF APPELLANT'S EMPLOYMENT FOR FAILURE TO RETURN TO WORK WITHIN ONE YEAR AS REQUIRED BY DHRM RULE R-477-7-17

On appeal, Appellant argues that the Hearing Officer erred by legally concluding that in reaching its decision to terminate Appellant's employment, the Department had complied with State personnel rules governing LTD leave. Indeed, on appeal, Appellant essentially argues that the Department never offered to place Appellant in his "previously held position" of Legal Enforcement Counsel III. Rather, Appellant argues that in reality the Department offered to place Appellant in the very different or lesser position of "Administrative Law Judge," a position with functions Appellant was disabled from performing. Based upon these factors, Appellant argues that the Department violated State personnel rules regarding LTD and that the Hearing Officer erred in upholding the Department's decision.

After carefully reviewing the evidentiary record as a whole, including the State's personnel rules regarding LTD leave, the Board finds Appellant's arguments on this issue sophistic. In so holding, the Board relies heavily on the evidentiary record which establishes not only that prior to his dismissal from employment, Appellant never provided the Department with any information that his psychopathological illness had ameliorated to any degree, but also that holding unemployment hearings has always been a core function of the Department's Legal Enforcement Counsel III position.

In reaching this conclusion, the Board first notes that the conditions upon which an employee

may return to work for the State after being on LTD leave can be found at DHRM rule R477-7-17, which provides that:

- (3) Conditions for return from leave without pay shall include:
 - (a) If an employee is able to return to work within one year of the last day worked, the agency shall place the employee in the previously held position or similar position in a comparable salary range provided the employee is able to perform the essential functions of the job with or without a reasonable accommodation.
* * *
 - (c) If an employee is unable to return to work within one year after the last day worked, the employee shall be separated from state employment.

A plain reading of this rule establishes that as a condition precedent, before an employee can be placed in a previously held position, or any other position for that matter, the formally disabled employee must be “able to return to work.” (*Id.*) In the instant case, the evidentiary record establishes that at no time prior to his dismissal from employment did Appellant provide the Department with any information or give the Department any reason to believe he had recovered from the medical condition upon which his LTD leave had been granted. (Tr. I at 60-62; Tr. II at 90-94) To the contrary, Appellant’s counsel, in a letter dated October 4, 2004, actually and unambiguously informed the Department that Appellant’s illness was unchanged and that he in fact remained “disabled. . . .” (Ex. G-24)

The Board is also not persuaded that Appellant’s assertion in this October 4, 2004 letter that he deemed himself “able to perform the essential functions of . . . the position he occupied prior to demotion” was sufficient to inform the Department that he was “able to return to work.” (*Id.*) This is especially true in light of Appellant’s repeated assertions that he “remained disabled” and had been diagnosed as totally disabled due to a psychopathological illness and in light of the fact the Department had specifically required that before placing Appellant back to work he would need to provide a medical release. (Ex. A-5)

Regarding the Department’s requirement that Appellant provide a medical release indicating that he was able to return to work, the Board agrees with the Hearing Officer that the Department would have been derelict had it “failed to require a medical release clearing Grievant [Appellant] to work following his diagnosis of pathological illness and the consequent total disability.” (Step 5

Decision at 9) Indeed, to suggest that the Department not need obtain such a release would require the Agency to have “amnesia” with respect to Appellant’s disability, a requirement this Board is unwilling to impose on the Department. (*Id.*) (*See Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000))

Moreover, the Board finds Appellant’s assertion that he was able to perform the essential functions of the position he held “prior to his demotion” to have been intended to advance his then-pending litigation rather than as a factual statement of his ability to return to work. As discussed in note 5, *supra*, this issue has been resolved, and the Board notes that Appellant was in fact never demoted and that holding unemployment hearings had always been a “core function of a Legal Enforcement Counsel III position.” (Step 5 Decision at 6-7; *Blauer v. Utah Department of Workforce Services*, 128 P.3d 1204, 1210-1211 (Utah Ct. App. 2004))¹³ Indeed, the record establishes that the only position Appellant was ever determined to be disabled from and for which he was on LTD leave for was the Legal Enforcement Counsel III position and none other.

Even if the Court of Appeals decision regarding core functions of the Legal Enforcement Counsel III position were ignored, the evidentiary record clearly establishes in and of itself that holding unemployment hearings is a core function of a Legal Enforcement Counsel III position. The evidence establishes that in addition to Appellant, other individuals employed by the Department in the Legal Enforcement Counsel III position have consistently been required to hold unemployment hearings as part of their regularly assigned duties. (Tr. I at 84, 86-87) In addition, because performing such hearings is a core function of the Legal Enforcement Counsel III position, the Department has always been free to increase the percentage of time that Appellant or any other individual in this position is assigned to conduct unemployment hearings in accordance with DHRM rule R477-3-3. This rule allows management to assign or modify tasks or responsibilities within a position for any reason deemed appropriate by the Department.

Based upon careful review of the Hearing Officer’s Step 5 Decision, as well as the evidentiary record and the parties’ briefs on appeal, the Board finds the Hearing Officer correctly applied the relevant personnel policies and rules in deciding to uphold the Department’s termination of Appellant’s employment. The evidentiary record clearly establishes that the Department offered

¹³This decision by the Utah Court of Appeals is entitled to res judicata consideration in this action. *Youren v. Tintic School Dist.*, 86 P.3d 771 (Utah Ct. App.), *cert. denied*, 94 P.3d 929 (Utah 2004)

to place Appellant his “previously held position” in conformance with DHRM rule R477-7-17. Moreover, the evidentiary record supports the Hearing Officer’s findings that prior to his dismissal from employment, Appellant never provided the Department with any information that his pathological illness had ameliorated to any degree and thus was “able to return to work.” Indeed, the record establishes that in August 2005, when the evidentiary hearing was held in this matter, Appellant was still receiving LTD benefits and had not yet received a written release to work based upon recovery from his psychological illness. (Tr. II at 294-298)

Finally, substantial evidence produced at the evidentiary hearing in this matter establishes that performing unemployment insurance hearings was and continues to be a core and necessary function of the Department’s Legal Enforcement Counsel III position and a requirement regularly assigned to individuals employed in this position. Because holding such hearings is a core function of this position, the Department was well within its rights to assign Appellant, or any other employee in that position, to perform such hearings on a substantially full time basis. (DRHM rule R477-3-3)

Based upon these factors, the Board upholds the Hearing Officer’s decision sustaining the Department’s termination of Appellant’s employment. In upholding the Hearing Officer’s Step 5 Decision, the Board finds that in accordance with DHRM rule R477-7-17, the Department offered Appellant his previously held position to which Appellant was either unwilling or unable to return. Therefore, this Board finds that the Department properly terminated Appellant’s employment in accordance with DHRM rule R477-7-17(3)(c) which directs, in mandatory terms, that an employee who is “unable to return to work within one year of the last day worked . . . *shall* be separated from state employment.” (emphasis added)

DECISION

The Board has addressed the issues raised by Appellant in his appeal. After thoroughly reviewing the evidentiary record and carefully studying the legal issues raised by the parties before this Board, the Board sustains the Hearing Officer’s decision for the reasons set forth herein and denies Appellant’s appeal to this Board. The Board finds the Hearing Officer’s decision to be reasonable and rational and supported by substantial evidence. The Board further finds that the Hearing Officer correctly applied all pertinent rules and policies in rendering his decision. Based upon the evidence presented at the evidentiary hearing in this matter, the Board finds the

Department's decision to be based on just cause and to advance the good of the public service and thus upholds the Hearing Officer's decision sustaining Appellant's dismissal.

It is so **ORDERED** this 28th day of June 2006.

DECISION UNANIMOUS

Kevin C. Timken, Acting Chair
Joan M. Gallegos, Member
Teresa N. Aramaki, Member
Richard R. McDonald, Member

A handwritten signature in black ink, appearing to read 'K. Timken', enclosed within a large, loopy oval stroke.

Kevin C. Timken, Acting Chair

RECONSIDERATION

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

JUDICIAL REVIEW

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


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The Decision and Final Order was issued on June 28, 2006. Appellant's Request for Reconsideration was filed on July 20, 2006 – 22 days after the Decision and Final Agency Action was issued. Thus, the CSRB has no alternative but to deny Appellant's Request for Reconsideration as it was untimely filed.

It is so **ORDERED** this 27th day of July 2006.



Kevin C. Timken, Acting Chairman
Career Service Review Board

JUDICIAL REVIEW

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

CERTIFICATE OF SERVICE

I certify that on this 27th day of July 2006, I caused to be mailed, postage prepaid, the foregoing *Denial of Appellant's Request for Reconsideration of the Board's Decision and Final Agency Action* in the matter of *Lorin Blauer v. Utah Department of Workforce Services* to the following:

✓ Lorin Blauer
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(2) I sent an E-mail of the original document to the following:

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Legal Secretary