

2006

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

Utah Court of Appeals

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## Recommended Citation

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No. 20060702-CA

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**IN THE UTAH COURT OF APPEALS**

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LORIN BLAUER,

Petitioner,

v.

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

Respondents.

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**Brief of Department of Workforce Services**

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

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REQUESTING ORAL ARGUMENT AND PUBLISHED OPINION

FILED  
UTAH APPELLATE COURTS  
MAR 07 2007

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REQUESTING ORAL ARGUMENT AND PUBLISHED OPINION

## List of All Parties

All parties to the proceeding appear in the caption of this Brief.

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**Brief of Department of Workforce Services**

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**Statement of Jurisdiction**

Blauer's petition seeks review of the Career Service Review Board's (CSRB) June 28, 2006 decision on the merits and its July 27, 2006 order denying reconsideration. In his opening brief, Blauer asserts jurisdiction based only upon Utah Code Ann. § 78-2a-3(2)(b) (West 2004), which confers jurisdiction on this Court over appeals from "the final orders and decrees resulting from formal adjudicative proceedings of state agencies." As discussed in Point 1 below, however, this Court lacks jurisdiction to consider

CSRB's June 28, 2006 decision because Blauer failed to timely file a petition for review of that decision and his untimely request for reconsideration did not toll his time to file a petition for review. Although this Court does not have jurisdiction to review CSRB's decision on the merits, it does have jurisdiction over CSRB's subsequent order denying reconsideration because the petition for review was filed within 30 days of that order.

## **Issues Presented**

### **1. Jurisdiction**

Because Blauer's petition for review was filed thirty-four days after CSRB's decision denying Blauer's employment grievance, the petition is untimely unless the time to file was tolled. Blauer had filed a request for reconsideration, but it too was untimely. Did Blauer's untimely request for reconsideration toll the time to file his petition?

### **A. Standard of Review**

"[T]he initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction. When a matter is outside the court's jurisdiction it retains only the authority to dismiss the

action.” *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989).

## B. Preservation of the Issue

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

## 2. Substantial evidence supports CSRB’s decision

Blauer fails to mention significant evidence presented to the CSRB that supports its factual findings. Should the findings of fact be affirmed due to Blauer’s failure to marshal?

Blauer challenges CSRB’s choice of competing inferences which could have been drawn from conflicting evidence and attempts to reargue the weight of the evidence. Should the factual findings be affirmed?

## A. Standard of Review

This Court reviews the findings of an administrative agency under a clearly erroneous standard. *Drake v. Indus. Comm’n*, 939 P.2d 177, 181 (Utah 1997). This Court will “generally reverse only if the findings are not supported by substantial evidence.” *Id.*

## B. Preservation of the Issue

This issue was considered by CSRB in its Decision and Final Agency Action. R. 864-71.

## 3. CSRB correctly applied the law

While on medical leave from his position with the Department of Workforce Services (Department), Blauer was approved for long-term disability benefits due to a psychological illness. After one year of medical leave, Blauer did not demonstrate that he had recovered from his psychological illness but instead asked to be returned to work with accommodation for a physical condition. The Department terminated Blauer’s employment pursuant to a state personnel rule that requires termination if an employee cannot return to work after one year of medical leave. Did CSRB

correctly apply this rule in affirming the termination?

#### A. Standard of Review

Since this issue raises a question of general law, this Court reviews the “CSRB’s conclusion for correctness, granting no deference to that agency’s decision.” *Holland v. CSRB*, 856 P.2d 678, 682 (Utah App. 1993).

#### B. Preservation of the Issue

This issue was considered by CSRB in its Decision and Final Agency Action. R. 871-74.

### **Determinative Constitutional Provisions, Statutes and Rules**

The following provisions are attached in Addendum D:

Utah Code Ann. § 63-46b-13 (West 2004)  
Utah Admin. Code R. 477-7-17 (2004)

## Statement of the Case

### 1. Nature of the Case

This is a petition for judicial review of final agency action of the CSRB that affirmed the Department's decision terminating Blauer's employment.

### 2. Course of the Proceedings Below

On November 3, 2004, Blauer was dismissed from his position as Legal Enforcement Counsel III with the Department. R. 895, Agency Ex. 7.<sup>1</sup> The termination of Blauer's employment was based on his inability to return to work after taking one year of medical leave. *Id.*

Blauer appealed the termination to the CSRB. R. 1. After holding a step 5 evidentiary hearing, a CSRB hearing officer affirmed the termination. R. 677-91. Blauer then appealed the hearing officer's decision and CSRB conducted a formal appellate review of that decision. R. 856-75. CSRB issued its Decision and Final Agency Action on June 28, 2006, affirming the hearing officer. *Id.*

Twenty-two days later, on July 20, 2006, Blauer filed a request for

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<sup>1</sup>Because the exhibits received into evidence at the CSRB evidentiary hearing are not individually Bates-stamped, this brief will cite to them by referring to Bates number of the first page of the exhibit volume, R. 895, followed by the exhibit number.

reconsideration of the CSRB's decision. R. 882-87. On July 27, 2006, CSRB issued an order denying the request for reconsideration as untimely because it was filed more than twenty days after CSRB's Decision and Final Agency Action. R. 888-90. Blauer then filed the present petition for review on August 1, 2006, thirty-four days after CSRB's Decision and Final Agency Action.

### 3. Disposition Below

By its decision dated June 28, 2006, CSRB affirmed the hearing officer's decision that Blauer's employment was properly terminated. R. 856-75. By its order dated July 27, 2006, CSRB denied Blauer's request for reconsideration. R. 888-90.

## **Statement of Facts**

On October 8, 2003, Blauer went on medical leave. R. 893 at 10. Blauer then applied for long-term disability benefits and received a psychological evaluation as part of the application process. R. 895, Agency Exs. 1 & 2. In July of 2004, while still on medical leave, Blauer was approved for long-term disability benefits based upon a psychological illness. R. 894 at 292; R. 895,

Agency Ex. 4.

While Blauer was on medical leave, the Department kept open his position of Legal Enforcement Counsel III. R. 893 at 79. Immediately before taking medical leave, Blauer's assigned responsibilities consisted entirely of conducting unemployment insurance hearings. R. 893 at 111-12. Ninety percent or more of these hearings were conducted telephonically with a speakerphone. R. 893 at 76. During any telephonic hearing, Blauer was not required to remain in a stationary, seated position but could walk back and forth or alternate between sitting and standing as he wished. *Id.*

This assignment to conduct hearings full time was given only a few weeks before Blauer went on medical leave, and Blauer previously litigated a grievance where he argued that this assignment was a demotion. That litigation culminated in a decision by this Court that the reallocation of Blauer's job responsibilities to conduct hearings full time did not constitute a demotion to a lesser position, but was merely an extension of a core job function of the position he held. *See Blauer v. Dep't of Workforce Servs.*, 2005 UT App 488, ¶¶ 32-36, 128 P.3d 1204. Blauer's position was considered a sedentary position, both before and after his reassignment. R. 893 at 75.

On October 1, 2004, the Department notified Blauer that his one year of medical leave would be ending soon and that, if he were able to return to



work, he needed to contact the Department and provide a medical release:

Last year, you were placed on medical leave for a medical reason, and subsequently you 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 these conditions. Our records show that your last day worked was October 8, 2003.

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. . . .

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.*

R. 895, Agency Ex. 5 (emphasis added).

On October 4, 2004, Blauer responded, through his attorney, by stating that his medical condition had not changed and that he remained disabled from conducting unemployment hearings full time. R. 895, Grievant Ex. 24. Blauer referred to his assignment conducting hearings as a demotion. *Id.*

On October 8, 2004, the Department reiterated to Blauer that the same position he had occupied before going on medical leave was still in fact open and available for him to return to; the Department also advised Blauer of a pre-termination hearing that had been set since he had not yet returned to work. R. 895, Agency Ex. 6. At the pre-termination hearing, Blauer presented

no information that he had recovered from the psychological illness on which his long-term disability status was based. R. 893 at 61-62; R. 894 at 293. He presented no medical release stating that he had recovered from the psychological illness. *Id.* He did not even mention his psychological illness at all, but instead addressed only physical health issues. *Id.* Blauer wanted to be able to select his supervisor and wanted to unilaterally reallocate his job responsibilities to avoid holding hearings full time. R. 893 at 62.

Because Blauer was unable to return to work, the Department terminated his employment on November 3, 2004. R. 895, Agency Ex. 7. Nine months later, at the CSRB step 5 hearing, Blauer testified that he was still receiving long-term disability benefits, that he still had not received a medical release stating that he had recovered from his psychological illness, and that he had not notified the provider of his disability benefits that he was no longer disabled. R. 894 at 294-95; 298.

## Summary of the Argument

This Court lacks jurisdiction to review CSRB's decision on the merits because Blauer's untimely request for reconsideration did not toll his time to file a petition for review. Because CSRB had no authority to hear the untimely request for reconsideration, that request did not suspend the finality of CSRB's decision and Blauer should have filed his petition for review within thirty days of that decision instead of within thirty days of the order denying reconsideration.

CSRB's factual findings should be affirmed because Blauer has failed to marshal the evidence. In any event, the findings should be affirmed because they are supported by substantial evidence. Blauer's attack on the CSRB's findings lacks merit because it is merely an attempt to reargue the weight of the evidence considered by CSRB. Because Blauer had not recovered from the psychological illness for which he went on medical leave, CSRB correctly concluded that Blauer could not return to work and a state personnel rule required the Department to terminate his employment.

## Argument

1. Because Blauer's untimely request for reconsideration did not toll the time to file a petition for review, this Court lacks jurisdiction to review CSRB's decision

A lack of subject matter jurisdiction can be raised at any time by either party or by the court. *Weiser v. Union Pac. R.R. Co.*, 932 P.2d 596, 597 (Utah 1997). Without statutory authority to review the action of an administrative agency, this Court has no jurisdiction to review the agency action. *Dep't of Envtl. Quality v. Golden Gardens Water Co.*, 2001 UT App 173, ¶13, 27 P.3d 579.

Absent an event that tolled the time to file a petition for review, Blauer's petition is untimely because it was filed more than thirty days after CSRB's Decision and Final Agency Action. *See* Utah Code Ann. § 63-46b-14(3)(a) (West 2004) (requiring petition for judicial review be filed "within 30 days after the date that the order constituting final agency action is issued"); *Viktron / Lika Utah v. Labor Comm'n*, 2001 UT App 8, ¶7, 18 P.3d 519 (holding that failure to timely file a petition for judicial review is a jurisdictional defect). The thirty days to file began to run from June 28, 2006, the date on the face of CSRB's decision. *See Dusty's Inc. v. Auditing Div.*, 842 P.2d 868, 870 (Utah 1992). Instead of filing his petition within thirty days, by

July 28, 2006, he filed his petition on August 1, 2006, four days late. Thus, barring any event which tolled Blauer's time to file the petition, his petition was untimely and this Court lacks jurisdiction to review CSRB's June 28, 2006 decision.

Although Blauer filed a request for reconsideration, this did not toll the period to seek judicial review because the request was filed two days late. Blauer had twenty days from June 28, 2006, to file his request for reconsideration – until Tuesday, July 18, 2006 – but did not file Thursday, July 20, 2006. R. 882-87. *See* Utah Code Ann. § 63-46b-13(1)(a) (limiting request for reconsideration to “[w]ithin 20 days” of final agency action). Utah's appellate courts have held that a request for reconsideration tolls the time to seek review, but only in cases where the request for reconsideration is timely. *See Bourgeois v. Dep't of Commerce, Div. of Occupational & Prof'l Licensing*, 1999 UT App 146, ¶¶ 11-12, 981 P.2d 414 (request for reconsideration was filed “within the twenty-day period permitted by statute”); *49th St. Galleria v. Tax Comm'n*, 860 P.2d 996, 998 (Utah Ct. App. 1993) (agency decision issued November 20 and request for reconsideration timely filed twenty days later on December 10); *Orton v. Utah State Tax Comm'n*, 864 P.2d 904, 906 (Utah Ct. App. 1993) (final decision entered September 4 and request for reconsideration timely filed twenty days

later on September 24).

The Utah Administrative Procedures Act (UAPA)<sup>2</sup> expressly requires a request for reconsideration to be filed within twenty days of the agency's final decision. *See* Utah Code Ann. § 63-46b-13(1)(a) (West 2004). Regardless of whether a request for reconsideration is affirmatively denied on jurisdictional grounds, as it was here, or whether it is deemed denied by CSRB's failure to issue a ruling, an untimely request does not toll the time to appeal because it asks CSRB to do something it cannot do. Other than a good cause extension,<sup>3</sup> which was neither sought nor granted in this case, there is no basis in the language of UAPA or in case law for the notion that CSRB could hear or grant Blauer's untimely request for reconsideration. In fact, the plain language of UAPA – limiting a request for reconsideration to a strict twenty-day limit – expressly foreclosed CSRB from considering the untimely request on its merits.

Although Blauer's reconsideration request was only two days late, it was nevertheless outside UAPA's plain twenty-day limitation. Allowing an

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<sup>2</sup>UAPA consists of Utah Code Ann. §§ 63-46b-0.5 to -23, inclusive.

<sup>3</sup>The Utah Supreme Court has held that an agency's granting of a "good cause" extension to seek reconsideration will toll the thirty-day period to seek review. *See Harper Invs., Inc. v. Auditing Div., Utah State Tax Comm'n*, 868 P.2d 813, 815 (Utah 1994). However, Blauer did not request an extension and did not make a showing of good cause.

untimely request for reconsideration to toll the time to seek review would eviscerate finality in agency decisions. It would allow a party to indefinitely extend the time to seek judicial review, simply by filing an untimely request for reconsideration well outside UAPA's strict twenty-day limit. Blauer's approach interprets UAPA's deadline as meaningless. *See Hall v. Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958 (holding court should avoid interpretations that will render portions of statute meaningless).

The Utah Supreme Court recently observed that “we, like the court of appeals, can find no principled reason to treat agency petitions differently than other appeals.” *Harley Davidson v. Workforce Appeals Bd.*, 2005 UT 38, ¶ 14, 116 P.3d 349. In keeping with that holding, the tolling implications of Blauer's untimely request for reconsideration should be the same as those raised by an untimely post-judgment motion under Utah R. App. P. 4. The situation here is equivalent to an appeal from a district court judgment where the notice of appeal is filed within thirty days of the disposition of an untimely post-judgment motion, but not within thirty days of the final judgment. In that situation, this Court would lack jurisdiction to review the underlying judgment because Utah R. App. P. 4(b)(1) tolls the appeal time only as to certain *timely* post-judgment motions. *See Albretson v. Judd*, 709 P.2d 347, 347 (Utah 1985) (holding that because no tolling post-judgment

motion was filed *within requisite time period* after judgment was entered, time to appeal was not extended). Just as an untimely Rule 59 motion for a new trial, for example, does not suspend the finality of a district court's final judgment, an untimely request for reconsideration of an agency decision does not suspend the finality of the agency's decision because the agency is powerless under UAPA to hear that request. Accordingly, this Court lacks jurisdiction to review CSRB's decision on the merits.

2. CSRB's factual findings should be upheld because Blauer failed to marshal the evidence and because those findings are supported by substantial evidence

A. Failure to marshal

CSRB's factual findings should be affirmed because Blauer has failed to marshal the evidence supporting CSRB's decision. Before this Court "will subject an agency's findings to the substantial evidence test, the party challenging the findings 'must marshal all the evidence supporting the findings and show that despite the supporting facts, the [agency's] findings are not supported by substantial evidence.'" *VanLeeuwen v. Indus. Comm'n of Utah*, 901 P.2d 281, 284 (Utah Ct. App. 1995) (quoting *First Nat'l Bank v.*



*County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990)) (bracketed material in original).

This Court has compared the marshaling process to becoming the devil's advocate, where the challenging party must present every scrap of competent evidence *supporting* the challenged finding:

The marshaling process is not unlike becoming the devil's advocate. Counsel must remove himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

*Neely v. Bennett*, 51 P.3d 724, 727-28 (Utah Ct. App. 2002) (quotation marks and citation omitted, emphasis in original).

Blauer has not only failed to present every scrap of competent evidence supporting CSRB's decision, but he has omitted considerable evidence supporting that decision. He omits significant evidence regarding the nature of his job duties, the nature of the position held open for him, and the requirement that he provide a medical release before returning to work. Moreover, much of his factual statement is argumentative, even the three-

paragraph section ironically designated as the marshaling section.

First, Blauer omits significant evidence of the nature of his job duties that supports CSRB's finding that the same position was held open for him. Blauer fails to discuss his previously litigated grievance and this Court's conclusion that the reallocation of Blauer's job responsibilities to conduct hearings full time did not constitute a demotion to a lesser position, but was merely an extension of a core job function of the position he held. *See Blauer* 2005 UT App 488 at ¶ 32.

Second, Blauer omits evidence of the nature of his job duties that refutes his claim that he had physical disabilities in addition to his psychological illness. For example, Blauer fails to mention that ninety percent or more of the hearings Blauer conducted were done telephonically with a speakerphone, so Blauer would not have been confined to a stationary position during the hearings but could have walked around or alternated between sitting and standing. R. 893 at 76. This omission is particularly egregious because the bulk of Blauer's argument that he physically could not "conduct hearings full time is based on his assertion that he could not sit or stand very long in a stationary position.

Third, Blauer omits evidence regarding his failure to submit a medical release. Blauer erroneously asserts that the requirement to furnish a medical

release was “not required of him as part of any pre-termination communication.” Aplt. Brf. at 23. Yet the letter sent to Blauer on October 1, 2004, stated: “If you are able to return to work, you will need to provide a medical release.” R. 895, Agency Ex. 5 (attached as Addendum A). Blauer not only failed to produce a medical release, but he made no representations at his pre-termination hearing that he had recovered from his psychological condition or that he could obtain a release. R. 893 at 61-62.

Because Blauer has failed to marshal the evidence that supports the CSRB’s factual findings, those findings should be affirmed.

#### B. Substantial evidence

Even if Blauer has adequately marshaled the evidence, he has failed to show that the findings are not supported by substantial evidence. Much of Blauer’s argument asks this Court to improperly substitute its judgment as between two reasonably conflicting views. *EAGALA v. Dep’t of Workforce Servs.*, 2007 UT App 43, ¶ 16, --- P.3d --- (stating that this Court does not “substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review”) (citation and quotation marks omitted). But it is the provision of the agency, “not appellate courts, to resolve conflicting evidence,

and where inconsistent inferences can be drawn from the same evidence, it is for the [agency] to draw the inferences.” *Id.*

This Court will “generally reverse only if the findings are not supported by substantial evidence.” *Drake*, 939 P.2d at 181. Substantial evidence is “that which a reasonable person might accept as adequate to support a conclusion.” *Stewart v. Bd. of Review of the Indus. Comm’n of Utah*, 831 P.2d 134, 137 (Utah Ct. App. 1992). Substantial evidence is “more than a scintilla of evidence, though less than the weight of the evidence.” *Commercial Carriers v. Indus. Comm’n of Utah*, 888 P.2d 707, 711 (Utah Ct. App. 1994) (quotation marks and citation omitted). Furthermore, “[t]he marshaled facts should ‘correlate particular items of evidence with the challenged findings.’” *Neely*, 51 P.3d at 728 (quoting *West Valley City v. Majestic Inv., Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). This Court has stated that “we do not want an exhaustive review of all of the evidence presented at trial. Rather, we want a precisely focused summary of all the evidence that supports any finding that is challenged on the ground that it is clearly erroneous.” *Neely*, 51 P.3d at 728 n.1.

As set forth below, CSRB’s findings are supported by substantial evidence.

The position Blauer left was held open for him while he was on medical leave

Substantial evidence supports CSRB's finding that the same position Blauer left was held open for him while he was on medical leave. This Court concluded in *Blauer* that the reallocation of Blauer's job responsibilities to conduct hearings full time did not constitute a demotion to a lesser position, but was merely an extension of a core job function of the position he held. See *Blauer*, 2005 UT App 488 at ¶ 32. While it is true that his assigned duties on the day he went on medical leave were not the same duties he had before the reallocation, this Court's decision in *Blauer* renders that inquiry irrelevant. Yet, despite that decision, much of Blauer's brief is devoted to revisiting the irrelevant distinction between what his duties were on the day he went on medical leave and what they had been historically, before the reassignment addressed in *Blauer*. To the extent that Blauer's arguments rely on the erroneous factual assertion that he was not offered the same position, they are not grounded in fact and should be rejected by this Court.

Because conducting hearings full time was a valid extension of a core job function and was not a demotion to a lesser position, that specific assignment was properly considered by the CSRB as the position to which Blauer would have returned, had he demonstrated recovery from his psychological illness. The Department presented unequivocal testimony that

his exact position was in fact held open for him during his medical leave and that he would have resumed the identical duties to which he was assigned on the day he went on medical leave. R. 893 at 79, 111. Because this evidence supports CSRB's finding that the assignment to conduct hearings full time was the same position he had left, that finding should be affirmed.

Blauer went on medical leave for psychological reasons

Substantial evidence supports CSRB's finding that Blauer went on medical leave for psychological illness. This finding is supported by evidence that Blauer was approved for long-term disability benefits for psychological, but not physical, illness while on medical leave. R. 894 at 292; R. 895, Agency Ex. 4. And although Blauer presented evidence regarding physical difficulties he had with sitting or standing for long periods of time,<sup>4</sup> the Department presented conflicting evidence that Blauer's assignment to conduct hearings full time would not require him to sit or stand for long periods of time. R. 893 at 76. Blauer could walk around or alternate between sitting and standing, at his option, during most of the hearings he conducted since at least ninety

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<sup>4</sup>Blauer claims at pages 9-10 of his brief that he went on medical leave because of a physical disability only, not psychological. In support of this, he cites only to R. 893 at 10, which contains the date he went on leave but not the reason.

percent of the hearings were conducted telephonically with a speakerphone.

*Id.* Because the inference CSRB ultimately drew – that Blauer went on medical leave for psychological reasons – is supported by this evidence, it should be affirmed.<sup>5</sup> See *EAGALA, 2007 UT App 43 at ¶ 16* (stating that this Court does not “substitute its judgment as between two reasonably conflicting views”).

Blauer was notified of his obligation to demonstrate recovery from psychological illness

Substantial evidence supports CSRB’s finding that Blauer was notified of his obligation to demonstrate recovery from his psychological illness. As noted previously, the Department sent Blauer a letter before his termination, stating: “If you are able to return to work, you will need to provide a medical release.” R. 895, Agency Ex. 5 (attached as Addendum A). Blauer implies that his failure to produce a medical release was merely a technicality that the Department should have given him a chance to remedy. But the medical release never became an issue in and of itself because Blauer never asserted

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<sup>5</sup>Blauer fails to include evidence of accommodations made by the Department for Blauer’s physical condition before he went on medical leave. Based on the recommendations of the State ergonomic specialist, Blauer’s desk was raised so he could stand at his desk; he was provided dictation equipment and an audio player so he could listen to recordings of hearings and dictate documents as he walked around his office. R. 893 at 77-78.

in the first place that he had recovered from his psychological illness. R. 893 at 61. Furthermore, in implying that he could have obtained a release if he had just been given the opportunity, Blauer fails to mention that, nine months after his termination, he was *still* receiving long term disability benefits and *still* had not received a release – verbal or written – to return to work based on recovery from psychological illness. R. 894 at 294-95, 298.

Blauer did not demonstrate recovery from psychological illness

Substantial evidence supports CSRB's finding that Blauer did not demonstrate recovery from his psychological illness. Blauer erroneously relies on the October 4, 2004 letter from his counsel to assert that he in fact demonstrated recovery from his psychological illness. Because the letter was devoted to perpetuating Blauer's sophistic insistence that holding hearings full time was a demotion, the letter communicated little of anything. *See* R. 895, Grievant Ex. 24 (attached as Addendum B). Nevertheless, the letter stated that Blauer's condition had "not changed" and he remained disabled from conducting hearings full time. *Id.* Even if an inference could reasonably be drawn from this letter that Blauer had recovered from his psychological illness, CSRB drew the opposite inference. CSRB's finding that Blauer failed to demonstrate a recovery from his psychological illness is further supported



by Blauer's failure at the pre-termination hearing to even discuss his psychological illness. R. 894 at 293. The finding is likewise supported by Blauer's own admission that nine months after his termination he still had not received a release – verbal or written – to return to work based on recovery from psychological illness. R. 894 at 298.

### 3. CSRB correctly applied the law

#### A. Application of Utah Admin. Code R. 477-7-17

CSRB correctly applied Utah Admin. Code R. 477-7-17 (2004), which required a state agency to terminate an employee who was unable to return to work after one year of medical leave:

(1) An employee who is determined eligible for the Long Term Disability Program (LTD) shall be granted up to one year of medical leave, if warranted by a medical condition.

(a) The medical leave begins on the last day the employee worked.

....

(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 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 place the employee in the best available, vacant position for which the employee qualifies and is able to perform the essential functions of the position with or without 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 set forth above, CSRB correctly found that Blauer failed to demonstrate that he had recovered from his psychological illness. Because Blauer did not demonstrate that he was able to work, the plain language of the rule mandated the termination of his employment. Only if Blauer had demonstrated that his recovery from the psychological illness made him able to work would any accommodation due to Blauer's physical health have become an issue. Moreover, Blauer has failed to demonstrate that the two accommodations requested – that he be given a new supervisor and not be required to hold hearings full time – were reasonable accommodations under the Americans with Disability Act (ADA). *See Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997) (holding that no ADA disability exists where plaintiff “merely cannot work under certain supervisor because of the stress and anxiety it causes” (citing *Weiler v. Household Finance Corp.*, 101 F.3d 519, 524-25 (7th Cir. 1996)); *see also Frazier v. Simmons*, 254 F.3d 1247, 1261 (10th Cir. 2001) (stating that job restructuring accommodation that

eliminates the essential function of the job is not reasonable).

#### B. CSRB's decision denying reconsideration

By failing to brief the issue of whether CSRB correctly denied his request for reconsideration, Blauer has waived this issue. *See Brown v. Glover*, 2000 UT 89, ¶23, 16 P.3d 540 (stating that, generally, any issues “that were not presented in the opening brief are considered waived and will not be considered by the appellate court”). Blauer notes in his opening brief that whether CSRB correctly concluded the reconsideration request was untimely is an issue for this court to review, yet he fails to present any argument or analysis why the CSRB erred. Moreover, Blauer fails to specifically address whether his request for reconsideration was in fact filed twenty-two days after CSRB's final decision.

In any event, CSRB correctly determined that the request for reconsideration was filed outside UAPA's twenty-day limit. As noted above, CSRB's decision on the merits was considered issued on June 28, 2006, the date it bore on its face. *See Dusty's*, 842 P.2d at 870. Blauer filed his request for reconsideration twenty-two days later, on Thursday, July 20, 2006.

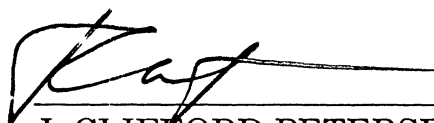
R. 882-87 (attached as Addendum C). But his request should have been filed within twenty days – by Tuesday, July 18, 2006. *See Utah Code Ann. § 63-*

46b-13(1)(a). Since the request for reconsideration was brought two days outside the statutorily allowed time, CSRB correctly concluded that the request was untimely.

## Conclusion

This Court lacks jurisdiction to hear Blauer's challenge to CSRB's decision on the merits because Blauer's untimely request for reconsideration did not toll his time to appeal. CSRB's factual findings should be affirmed because Blauer has failed to marshal the evidence and because those findings are supported by substantial evidence. CSRB correctly applied the law in concluding that, because Blauer could not return to work after one year of medical leave, the Department was required to terminate his employment.

Dated this 7<sup>th</sup> day of March, 2007.



J. CLIFFORD PETERSEN  
Assistant Attorney General  
Attorney for Department of Workforce Services

## Certificate of Service

This is to certify that I mailed TWO copies of the foregoing Brief of Department of Workforce Services to the following this 7<sup>th</sup> day of March, 2007:

Vincent C. Rampton  
JONES WALDO HOLBROOK & MCDONOUGH, PC  
170 South Main Street, Suite 1500  
Salt Lake City, Utah 84101

Robert Thompson, Administrator  
Career Service Review Board  
State Office Building, Room 1120  
Salt Lake City, Utah 84114

A handwritten signature in black ink, appearing to read "R. Thompson", is written over a horizontal line.

# ADDENDUM A



State of Utah

Department of  
Workforce Services

OLENE S. WALKER  
*Governor*

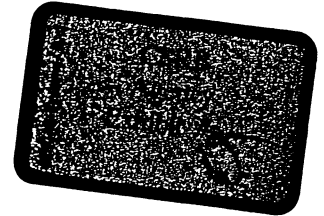
GAYLE F. MCLEACHNIE  
*Lieutenant Governor*

RAYLENE IRELAND  
*Executive Director*

DARIN BRUSH  
*Deputy Director*

JAMES C. WHITAKER  
*Deputy Director*

October 1, 2004



Lorin Blauer  
460 North 900 East  
Bountiful, Utah 84010

Dear Lorin:

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, 2003.

If your condition has improved and you are able to return to work, please contact Wendy Peterson at (801) 526-4334 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. In the event your condition improves later, you may reapply for any vacant positions available within our Department. This action does not affect your eligibility to remain on LTD, which provides you with benefits that include monthly payments, medical insurance coverage, and service credit towards retirement.

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.

If we do not hear from you, we will take you off they payroll in accordance with the DHRM rule cited above. We thank you for the work you have performed for the department in the past and wish you well in the future.

Sincerely,

  
Anne Campbell  
Human Resource Director

# ADDENDUM B



**JONES  
WALDO**  
HOLBROOK &  
MCDONOUGH PC

(24)

ATTORNEYS & COUNSELORS  
EST. 1875

TEL: 801-521-3200  
FAX: 801-328-0537

170 SOUTH MAIN ST, SUITE 1500  
SALT LAKE CITY, UTAH 84101

WWW.JONESWALDO.COM

October 4, 2004

**VIA HAND DELIVERY**

JoAnne Campbell  
Human Resource Director  
Department of Workforce Services  
140 East 300 South  
Salt Lake City, UT 84111

**Re:** *Lorin Blauer*  
Our File 15632.0001

Dear Ms. Campbell:

This letter is to respond to your letter of October 1, 2004, concerning your attempt to terminate the employment of Lorin Blauer.

Mr. Blauer's medical condition (as you are by now well aware) precludes him from performing the essential functions of the position to which he was demoted: Administrative Law Judge/Non-Juris Doctorate. His condition has not changed, and he remains disabled from the ALJ position.

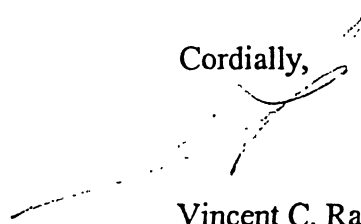
Mr. Blauer is and remains able to perform the essential functions of Legal/Enforcement Counsel III, the position he occupied prior to demotion. It is his understanding, however, that this position is not available to him, and has in fact been filled by another employee. If this is incorrect, please let me know without delay.

October 4, 2004

Page 2

Please be advised that the termination of Mr. Blauer's employment under the circumstances outlined in your letter of October 1, 2004, and given the foregoing, constitutes constructive termination by reason of a disability, and will be pursued accordingly.

Cordially,



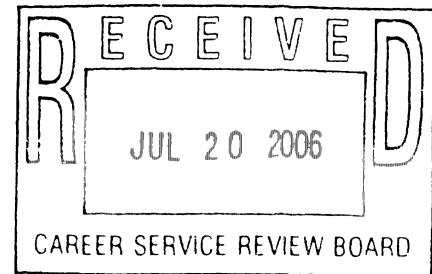
Vincent C. Rampton

VCR:jm

cc: Susannah Kesler  
Stewart Hanson  
Lorin Blauer  
Tom Cantrell

# ADDENDUM C

Advocates @Tomcantrell.com  
Telephone: 355-2005



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

LORIN BLAUER,

**Grievant and Appellant,**

**V.**

**UTAH DEPARTMENT OF  
WORKFORCE SERVICES,**

### Agency and Respondent.

# REQUEST FOR RECONSIDERATION OF DECISION AND FINAL AGENCY ACTION

**Case No. 9 CSRB 83**

Administrative Representative, Tom Cantrell, for and on behalf of Grievant, Lorin Blauer, hereby submits to the Career Service Review Board (CSRB), this Request for Reconsideration of Decision and Final Agency Action in accordance with *Utah Administrative Code, R137-1-22(10)*, and *Utah Code, §63-46b-13*, Utah Administrative Procedures Act.

The Grievant appealed the termination of his employment in accordance with *Utah Code*, §67-19a-302 (1) which states:

*A career service employee may grieve promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position to all levels of [the] grievance procedure.*

The Grievant originally appealed various issues and on various grounds, which issues and grounds were limited by the Hearing Officer to the issues as set forth in the Agency's Motion in Limine which stated:

*The sole issue to be decided in this matter is whether Grievant was properly separated from state employment for failure to return to work within one (1) year after the last day worked. Utah Administrative Code R477-7-17 provides in relevant part:*

*R477-7-17. Long Term Disability Leave.*

*(1) An employee who is determined eligible for the Long Term Disability Program (LTD) shall be granted up to one year of medical leave, if warranted by a medical condition.*

*(a) The medical leave begins on the last day the employee worked. ...*

*(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 his 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 place the employee the agency shall place the employee in the best available, vacant position for which the employee qualifies and is able to perform the essential functions of the position with or without 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.*

*Wherefore Agency prays that it's Motion in Limine be granted.*

Though the issues were limited then to the above; the Hearing Officer allowed the addressing of the Agency's allegation, together with the Agency's evidence and argument, that the Grievant had failed under that rule, but refused to accept the Grievant's arguments or evidence that the Agency had failed under that rule (this is particularly odd because the Grievant had brought the complaint).

The Hearing Officer did not make a finding of whether or not Grievant would have been "...able to return to work within one year of the last day worked..." if the agency had offered to place him in the position or even in the "similar Position" of Legal Enforcement Counsel III but not limited solely to the function of holding administrative hearings and whether Grievant was "...able to perform the essential functions of the job

[of Legal Enforcement Counsel III] if not limited solely to the function of holding administrative hearings] with or without a reasonable accommodation.”

The termination of Grievant’s employment has apparently been upheld by the CSRB on the grounds that the Grievant “failed to return to work” because the Grievant failed to submit a medical release that the Agency thought he should have submitted.

The Grievant’s position that the state failed by not allowing the reasonable accommodation requested by the Grievant was not addressed by the CSRB despite the fact that almost the entirety of the hour-long discussion before the CSRB in this representative’s argument in support of the appeal was focused on that issue as well as the Grievant’s defense that if the Agency thought the Grievant remiss in the manner or lack of submission of medical release, they were obligated to warn him and give him opportunity to respond or remedy.

The CSRB and Hearing Officer wholly failed to address the question as to why, if the medical release was insufficient or absent, did that justify a termination of Grievant’s employment without warning and opportunity to respond or remedy.

Despite repeated attempts by the Grievant’s representative to address these issues in the hearing before the Hearing Officer and in oral argument before the CSRB, the CSRB and the Hearing Officer fail or refuse, without explanation, to address them. They appear to simply take the position that the Grievant’s alleged failure to submit a medical release in a particular format was just cause for termination of his employment, even though the Grievant and his attorney and administrative representative did not realize that the offer to return to work as submitted by the attorney was not sufficient – and the Grievant was not notified otherwise or warned of the consequences if he did not comply.

This failure of the CSRB and the Hearing Officer to address such a fundamental claim or defense, is wholly mystifying except for one possible explanation: Based on what this representative has heard, apparently the Hearing Officer and the CSRB do not believe they have the jurisdiction to make a ruling relative to whether or not the state fulfilled its obligation to offer reasonable accommodation. If that is the case or if there is some other reason the CSRB is not addressing the issues as stated herein – that

reasonable accommodation was not offered or granted when requested, or why the Grievant did not merit a warning and opportunity to remedy the problem regarding a medical release, the CSRB should make that clear.

## **CONCLUSION AND REQUEST**

The Hearing Officer limited the issues to the question of whether or not R477-7-17 was violated by the agency or whether the Grievant had failed to fulfill his obligations under that rule. However the Hearing Officer did not address the Grievant's claim under R477-7-17 that the state, not the Grievant, failed by (1) not allowing the accommodation requested and (2) not notifying the Grievant that they believed he was remiss in not providing the form and style of medical release the Agency desired; and (3) not warning the Grievant that his alleged failure to submit such a medical release in the form desired was a terminable offence or would be construed as job abandonment.

On appeal to the CSRB, the Grievant's representative argued that the Hearing Officer had not made a finding relative to the Grievant's charge that the Agency was in violation of R477-7-17 by not allowing him the reasonable accommodation that would have allowed him to return to the position of Legal Enforcement Counsel III that they claimed they were offering him; which reasonable accommodation was simply to restructure his job (or rather de-restructure his job) so he could continue to do his work in the way he had done it for decades – and for which he was NOT medically disqualified and for which he required little or no accommodation.


We request that the CSRB (1) make now such a finding or ruling; or (2) remand back to the Hearing Officer for a finding or ruling or (3) allow this matter to be recombined with the original grievance which is now before the CSRB at step 5.


Or, in the alternative, reverse their ruling and the decision of the Hearing Officer and grant Grievant's complaint; order Grievant returned to his position as Legal Enforcement Counsel III and order the Agency to offer the reasonable accommodation asked for, that is, the allowance of the Grievant to perform his historical duties as Legal

Enforcement Council III from which no medical evidence has ever supported his disqualification.

It is the Grievant's belief and understanding that the purpose of the Career Service Review Board is to hear grievances of the career service employees and protect their rights accordingly. It appears in this case, however, that the claims of the State against the Grievant, a career service employee, have been upheld while the claims of the Grievant against the State have been ignored. This can be remedied by granting the employee's grievance or remanding it back to step 5 and ordering that it be joined with the first half of this grievance which was delayed in the courts but is now before a hearing officer. It makes sense to do that because this is, as this representative clearly demonstrated, and the record proves, the second half of the same case (the one now at step 5) which genesis arises from essentially the same set of facts and circumstances.

Respectfully submitted on behalf of the Grievant by:

/s/   
Tom Cantrell


  
Date



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Objection to and Request for Reconsideration of Prehearing Scheduling Conference Summary and Order** was mailed via first class mail, postage prepaid, to the following this \_\_\_\_\_ day of July, 2006 (copies also sent via email)

Philip S. Lott, Assistant Utah Attorney General  
MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL  
160 East 300 South, Sixth Floor  
P.O. Box 140856  
Salt Lake City, UT 84114-0856

/s/   
\_\_\_\_\_  
Tom Cantrell

7/20/06  
Date

# ADDENDUM D

## § 63-46b-12

### Note 3

63-46b-14(3)(a), 63-46b-15(2)(a). *Bourgeois v. Department of Commerce, Div. of Occupational & Professional Licensing*, 1999, 981 P.2d 414, 368 Utah Adv. Rep. 42, 1999 UT App 146. Licenses ⌘ 22

Civil rule giving three-day extension of time to take action if notice of required action has been served by mail does not apply to Administrative Procedure Act's (APA) deadlines for seeking administrative review. U.C.A.1953, 63-46b-12(1)(a), (1)(b)(iv); Rules Civ.Proc., Rule 6(e). *Maverik Country Stores, Inc. v. Industrial Com'n of Utah*, 1993, 860 P.2d 944. Administrative Law And Procedure ⌘ 722.1

The 15-day time limit for filing motion for Industrial Commission's review of administrative law judge's decision was mandatory and jurisdictional; Commission's jurisdiction terminated upon expiration of time limit. U.C.A. 1953, 35-1-82.55 (Repealed). *Varian-Eimac, Inc. v. Lamoreaux*, 1989, 767 P.2d 569. Administrative Law And Procedure ⌘ 513; Workers' Compensation ⌘ 798

#### 4. Finality of order

Where at hearing before Public Service Commission it was concluded that quantity of water then developed was not sufficient to permit water company, a public utility to make any more extensions findings were binding on water company, and when order contained restriction that no further connections could be made order controlled company's obligation to furnish water to additional connections and if other affected property owners claimed an impairment of their rights by rulings made, their relief was by requesting a further hearing before Commission or by appeal and not having taken steps to have the order modified or changed same had effect of a judgment and its legality could not be attacked in proceedings brought by city to condemn property of water company. U.C.A.1943, 76-3-23, 76-4-18, 76-6-14. *North Salt Lake v. St. Joseph Water & Irr. Co.*, 1950, 118 Utah 600, 223 P.2d 577. Administrative Law And

Procedure ⌘ 496; Administrative Law And Procedure ⌘ 500; Administrative Law And Procedure ⌘ 513; Administrative Law And Procedure ⌘ 658; Waters And Water Courses ⌘ 202

#### 5. Supreme court jurisdiction

The Supreme Court lacked subject matter jurisdiction over challenge to legality of standby fees imposed by water company, in that there was no initial determination of standby issue by Public Service Commission followed by additional application for review or rehearing. U.C.A.1953, 54-7-15, 63-46b-12, 63-46b-14. *Hi-Country Homeowners Ass'n v. Public Service Com'n of Utah*, 1989, 779 P.2d 682. Waters And Water Courses ⌘ 203(12)

#### 6. Preservation of claim

Failure of workers' compensation claimant to raise claim that he was entitled to compensation for an additional 50% permanent partial disability at original hearing precluded any review of such claim on appeal. *Zupon v. Industrial Com'n of Utah*, 1993, 860 P.2d 960. Workers' Compensation ⌘ 1856

#### 7. Standard of review

Issues whether event giving rise to appeal by employees at state training school was decision to discontinue hazard pay or effective date of discontinuance and whether employees filed timely appeal were questions of law to be decided under "correction of error" standard for reviewing decision by Personnel Review Board, hearing officer had no substantial expertise in area of personnel management; and determination of what constituted "event giving rise to an appeal" did not require application of basic facts from case. U.C.A.1953, 67-19-24, 67-19-24(1)(a) (Repealed). *Taylor v. Utah State Training School*, 1989, 775 P.2d 432. Administrative Law And Procedure ⌘ 513; Officers And Public Employees ⌘ 72.55(1)

## § 63-46b-13. Agency review—Reconsideration

(1)(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be mailed to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Laws 1987, c. 161, § 269; Laws 1988, c. 72, § 23; Laws 2001, c. 138, § 18, eff. April 30, 2001.

### Library References

Administrative Law and Procedure Ⓒ513.  
Westlaw Key Number Search: 15Ak513.

C.J.S. Public Administrative Law and Procedure §§ 166 to 171.

### Research References

#### Treatises and Practice Aids

Emp. Discrim. Coord. Analysis of State Law  
§ 49:87, Declaratory Orders.  
HRS Fair Employment Practices § 68:44, Declaratory Orders.

HRS Fair Employment Practices 325,900,  
Utah.

### Notes of Decisions

In general 1  
Appeal 8  
Filing 2  
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#### 1. In general

Administrative Procedure Act (APA) did not authorize employer to file more than one request for reconsideration of decision of Industrial Commission to deny extension of time for employer to petition for review of ALJ's decision in antidiscrimination hearing. U.C.A.1953, 63-46b-1(9), 63-46b-16(4), (4)(h)(iv). *Maverik Country Stores, Inc. v. Industrial Com'n of Utah*, 1993, 860 P.2d 944. Administrative Law And Procedure Ⓒ 481; Civil Rights Ⓒ 1711

#### 2. Filing

"Filing," as used in Administrative Procedure Act's (APA) deadlines for seeking administrative review, requires actual delivery of necessary documents to agency within 30-day time limit; mailing within that time limit is insufficient. U.C.A.1953, 63-46b-12(1)(b)(iv); Rules Civ. Proc., Rule 6(e). *Maverik Country Stores, Inc. v. Industrial Com'n of Utah*, 1993, 860 P.2d 944. Administrative Law And Procedure Ⓒ 722-1

#### 3. Timeliness

Complaint seeking judicial review of decision by Department of Commerce denying application for professional engineer's license was timely, though it was filed over 30 days after agency review ruling affirming the original license denial, where applicant requested agency

reconsideration within 20 days of that ruling, department issued order memorializing its denial of that request, and applicant sought judicial review within 30 days of that order. U.C.A. 1953, 63-46b-12, 63-46b-13(1)(a), 63-46b-14(3)(a), 63-46b-15(2)(a). *Bourgeois v. Department of Commerce, Div. of Occupational & Professional Licensing*, 1999, 981 P.2d 414, 368 Utah Adv. Rep. 42, 1999 UT App 146. Licenses Ⓒ 22

For purposes of determining timeliness of complaint seeking judicial review of agency decision denying application for professional license, applicant's request for reconsideration would have been considered denied 20 days after he filed his request if agency had failed to issue an order in response. U.C.A.1953, 63-46b-13(3)(b), 63-46b-14(3)(a). *Bourgeois v. Department of Commerce, Div. of Occupational & Professional Licensing*, 1999, 981 P.2d 414, 368 Utah Adv. Rep. 42, 1999 UT App 146. Licenses Ⓒ 22

Fact that State Tax Commission took no action for over 20 days on taxpayers' petition for reconsideration of decision assessing sales taxes did not compel finding, under statute providing that such petition is deemed denied if no action is taken by Commission within 20 days, that 30-day period for seeking judicial review of decision assessing sales taxes began 20 days after petition was filed, where Commission ultimately issued order denying petition for reconsideration; actual date of issuance of order marked beginning of 30-day period. U.C.A. 1953, 63-46b-13(3)(b), 63-46b-14(3)(a). *Harper Investments, Inc. v. Auditing Div., Utah State Tax Com'n*, 1994, 868 P.2d 813. Taxation Ⓒ 1318

Fact that taxpayers filed request for judicial review of State Tax Commission decision as-

### **R477-7 Leave**

- (5) If the employee is unable to return to work within 12 months, the employee shall be separated from state employment.
- (6) An employee who files a fraudulent workers compensation claim shall be disciplined according to the provisions of R477-11.

#### **7-17. Long Term Disability Leave.**

- (1) An employee who is determined eligible for the Long Term Disability Program (LTD) shall be granted up to one year of medical leave, if warranted by a medical condition.
  - (a) The medical leave begins on the last day the employee worked. LTD requires a three month waiting period before benefit payments begin. During this period, an employee may use available sick and converted sick leave. When those balances are exhausted, an employee may use other leave balances available.
  - (b) An employee determined eligible for Long Term Disability benefits, after the three month waiting period, shall be eligible for health insurance benefits beginning two months after the last day worked. The employee is responsible for the employee share of the premium during the two months following the last day worked. The health insurance benefit shall continue without premium payment for up to 22 months or until eligibility for Medicare or Medicaid, whichever occurs first. After 22 months, the health insurance may be continued with premiums being paid in accordance with LTD policy and practice.

Upon approval of the LTD claim:

- (i) Biweekly salary payments that the employee may be receiving shall cease. If the employee received any salary payments after the three month waiting period, the LTD benefit shall be offset by the amount received.
- (ii) The employee shall be paid for remaining balances of annual leave, compensatory hours and excess hours in a lump sum payment. This payment shall be made at the time LTD is approved unless the employee requests in writing to receive it upon separation from state employment. No reduction of the LTD payment shall be made to offset this payment. If the employee returns to work prior to one year after the last day worked, the employee has the option of buying back annual leave at the current hourly rate.
- (iii) An employee with a converted sick leave balance at the time of LTD eligibility shall have the option to receive a lump sum payout of all or part of the balance or to keep the balance intact to pay for health and life insurance upon retirement. The payout shall be at the rate at the time of LTD eligibility.
- (iv) An employee who retires from state government directly from LTD may be eligible for up to five years health and life insurance as provided in Subsection 67-19-14(2)(b)(ii).
- (v) Unused sick leave balance shall remain intact until the employee retires. At retirement, the employee shall be eligible for the cash payout and the

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purchase of health and life insurance as provided in Subsection 67-19  
14(2)(c)(i)

- (2) An employee shall continue to accrue service credit for retirement purposes while receiving long term disability benefits
- (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 place the employee in the best available, vacant position for which the employee qualifies and is able to perform the essential functions of the position with or without 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
- (4) An employee who files a fraudulent long term disability claim shall be disciplined according to the provisions of R477-11

#### **7-18. Leave Bank.**

With the approval of the agency head, agencies may establish a leave bank program as follows

- (1) Only annual leave, excess hours, compensatory time earned by an FLSA nonexempt employee, and converted sick leave hours may be donated to a leave bank
- (2) Only employees of agencies with approved leave bank programs may donate leave hours to another agency with a leave bank program, if mutually agreed on by both agencies
- (3) An employee may not receive donated leave until all individually accrued leave is used
- (4) Leave shall be accrued if an employee is on sick leave donated from an approved leave bank program

#### **7-19. Policy Exceptions.**

The Executive Director, DHRM, may authorize exceptions to the provisions of this rule consistent with R477-2-3(1)

**KEY: holidays, leave benefits, vacations**

**July 1, 2003**

**49-9-203**

**63-13-2**

**67-19-6**

**67-19-12.9**

**67-19-14.5**