2006

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

Utah Court of Appeals

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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.	No. 20060702-CA Agency Decision No. 9CSRB83 Priority No. 14

REPLY 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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Petitioner Lorin Blauer submits the following closing brief in connection with his petition for review of the decision of the Career Service Review Board on June 28, 2006 herein, and its denial of Petitioner's Request for Reconsideration thereof dated July 27, 2006.

ARGUMENT

POINT I

PETITIONER DID NOT FAIL TO MARSHAL EVIDENCE SUPPORTING CSRB'S FACTUAL FINDINGS

Respondents first take issue with whether Petitioner has adequately "marshaled the evidence" in support of CSRB's June 28, 2006 decision.

Petitioner recognizes that, under Rule 24(a)(9), Utah Rules of Appellate Procedure, the party challenging factual findings of an administrative body is required to marshal evidence in support of those findings. *See* also *Chen v. Stewart*, 2004 Utah 82 at ¶ 26, 100 P.3d 1177. The Court is referred, in this regard, to pages 14-15 of his Opening Brief, and the citations to the record contained therein, as well as the citations to the record and explanation set out in CSRB's own decision and final agency action, appended as Attachment 1 to Petitioner's Opening Brief. Respondents take issue that Petitioner failed to account for "every scrap of competent evidence supporting CSRB's decision," and accuse him of actually omitting "considerable evidence supporting that decision." Yet Respondents themselves identify only a handful of supposed bases for the CSRB decision. These will be dealt with in turn.

Respondents claim that "Blauer omits significant evidence of the nature of his job duties that support CSRB's findings that the same position was held open for him" (Opposing Brief at p. 18). *There is no evidence supporting this proposition.* It is undisputed in the record that, before "reassignment," the conducting of administrative hearings full-time was *never* part of his "job description" – see Petitioner's Statement of Facts at ¶ 7-15 (Petitioner's Opening Brief at pp. 5-8). At best, he was assigned to conduct two hearings per week, 10% of his total workload. *See* Petitioner's Statement of Facts at ¶ 15 (Petitioner's Opening Brief at pp. 7-8). Respondents cite no evidence in the record to refute this, nor was any such competent evidence adduced before CSRB.

Respondents fault Petitioner for failing to note to this Court that "90% or more of the hearings Blauer conducted were done telephonically with a speaker phone, 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." The problem with this assertion is that it was not articulated by any of DWS's witnesses as direct basis for Petitioner's termination, or as a basis for his termination (Agency Exhibit 7, R. 895); rather, he was terminated for attempting to impose conditions of any sort upon his return from long-term disability leave (R. 893 at 9:18 - 56:9 and Agency Exhibits 1-7 (R. 895)); (R. 893 at 114:24 - 115:6). Indeed, Petitioner presented unrefuted evidence that the conducting of administrative hearings full-time – whether sitting, standing or any

combination of the two – would have had a crippling effect on Petitioner. *See* Petitioner's Statement of Facts at ¶¶ 18-20 (Petitioner's Opening Brief at pp. 8-9).

Respondents fault Petitioner for failing to bring to this Court's attention the fact of a prior ruling, in separate litigation, that his "reassignment" to do administrative hearings full-time was not a "demotion" under governing law. The Court is invited to search the record from beginning to end for any evidence that CSRB's decision and final agency action of June 28, 2006 was, or could in any way have been, based in whole or in part on this determination. Petitioner was terminated for the reasons set out in DWS' letter of November 3, 2004 (Agency Exhibit 7, R. 895); Petitioner need not buy into DWS' post-termination inventions of alternative grounds in order to "marshal the evidence".

With respect to the assertion that Petitioner failed to bring this Court's attention to the fact that his termination was based, in part, on his failure to furnish a medical release, the Court is referred to ¶ 37B of Petitioner's Statement of Facts (Petitioner's Opening Brief at p. 15), and in particular to his November 3, 2004 termination letter (Agency Exhibit 7, R 895). DWS has invented the medical release argument out of whole cloth to justify its actions retrospectively. Petitioner certainly acknowledges the content of a letter submitted as Agency Exhibit 5 (included in ¶ 37B of Petitioner's Statement of Facts); the issue, however, was that in her letter of October 1, 2004, HR Director Joanne Campbell was demanding that Petitioner provide a "medical release" certifying him as fit to conduct administrative law hearings full-time, something which he had repeatedly told

Respondents that he could not do. Rather than making this demand, it was incumbent upon DWS to afford Petitioner rights guaranteed under R. 477-7-17(3)(b), and offer to reassign him 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." Throughout this proceeding, DWS has carefully sidestepped the obligation which it disregarded in this respect.

Finally, in a footnote on page 23 of their Opposing Brief, Respondents fault Petitioner for failing to include "evidence of accommodations made by the department for Blauer's physical condition," relying on recommendations by the state ergonomic specialist. It is noteworthy that the state ergonomic specialist was never called to testify in this matter, nor was his report properly considered under the "residuum" rule discussed at Point II below. Testimony from Dr. Dennis Peterson was the only competent medical evidence placed before CSRB.

POINT II

PETITIONER'S TERMINATION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In claiming that Petitioner's termination was supported by "substantial evidence in the record," Respondents continue to harp on the proposition that, because the holding of administrative law hearings was one of the "core functions" of his position, DWS's demand that he perform that "core function" full-time was fully justified, and that his

inability to do so due to medical disability was irrelevant. The argument ignores two critical factors.

First, the term "core function" is nowhere defined in state law or the administrative code. It is a term of convenience, fabricated by Respondents in conjunction with legal proceedings surrounding Petitioner's "reassignment" and firing, apparently to justify DWS's actions. The relevant inquiry under R. 477-7-17(3), Utah Administrative Code, has nothing to do with "core functions". It is, instead, whether or not Petitioner could, with or without reasonable accommodation, perform the *essential* functions of his job. For those reasons addressed in Petitioner's Opening Brief, the defining of full-time administrative hearings as an "essential function" of his position as Legal/Enforcement Counsel III is belied by 23 years of personal history.

Second, testimony before CSRB was *uncontroverted* that Petitioner suffered from both psychopathological and physiological disabilities, precluding him from conducting administrative law hearings full-time. The fact that Petitioner was approved for long-term disability, by a separate state agency, for psychological reasons only does not alter this fact. At the conclusion of his disability period, Petitioner was entitled to rights guaranteed under the Utah Administrative Code – rights completely sidestepped by DWS in deciding to terminate him.

Indeed, both DWS and CSRB base their contention that Petitioner was only psychologically disabled upon one source: a written report from Dr. Darrell H. Hart,

Ph.D. Dr. Hart's report, without his testimony at the hearing, constituted hearsay. While hearsay is admissible in administrative hearing, it cannot form the sole basis of CSRB's findings. This is so due to the "residuum" rule applicable in administrative hearing. That rule was recently stated in the case of *Taft v. Draper City*, 2006 Utah App. 315, 2006 WL2089967, in which the court stated the following:

> Hearsay evidence is admissible in proceedings before administrative agencies. However, findings of fact cannot be based *exclusively* on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law.

2006 Utah App. 315 at ¶ 2. *See also*, *Beehive Telephone Co. v. Public Service Comm. of Utah*, 2004 Utah 18, 89 P.3d 131; *Hoskings v. Ind. Comm. of Utah*, 918 P.2d 150 (Ct. of Appeals 1996). The only "residuum" of competent evidence before the Court was the testimony of Dr. Dennis Peterson, who clearly stated that Petitioner was disabled – for both physiological and psychological reasons – from performing administrative law hearings full time, but could perfectly well resume his activities as Legal/Enforcement Counsel III – a position which, even if considered, Dr. Hart's report sustains completely (Agency Exh. 2, R. 895, p. 13, ¶ 2).[1]

Concerning DWS's ongoing claim that Petitioner was obliged to furnish, and failed to furnish, a "medical release," the Court is referred to p. 3, above: As stated by his counsel, Petitioner was still unable to return to the job duties demanded of him at the time

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[1] The "residuum rule" also disqualifies Respondents' attempted reliance on recommendations of the state ergonomic specialist – *see* Opposing Brief at p. 23, fn.5.

of his departure (the holding of administrative law hearings full-time). From both psychological and physiological aspects, Petitioner could not obtain a "medical release" under these circumstances, as his physician explained at length on the stand. He was, however, able to return to the work which he had done for 23 years, as his counsel explained on October 4, 2004. At this point, state law mandated that DWS afford Petitioner the rights guaranteed under R. 477-7-17(3). No evidence in the record even hints that DWS undertook any of the required steps thereunder. And again, the Court is referred to Petitioner's letter of termination (Agency Exhibit 7, R. 895), which nowhere cites Petitioner for failing to produce a medical release.

POINT III

CSRB INCORRECTLY APPLIED THE LAW GOVERNING PETITIONER'S RIGHTS UPON EXHAUSTION OF LEAVE

In response to Petitioner's argument that CSRB incorrectly applied the law in determining that Petitioner's termination was proper (Petitioner's Opening Brief at pp. 18-23), Respondents can offer nothing but the excuse that, because he went on disability for "psychological reasons", and because he did not produce a "medical release" to return to the exact duties which he had been unable to perform in the first place, DWS acted properly. The argument is a mystery, and completely ignores the plain wording of R. 477-7-17(3)(b). DWS had been amply supplied, for an extended period, with medical evidence documenting the fact that Petitioner could not – for physiological and psychological reasons – conduct administrative hearings full-time. Upon his return,

the law required DWS to treat this situation as a disability, and to make available to Petitioner any vacancies which his disability would permit him to fill with reasonable accommodation. DWS made no effort to fulfill this requirement, and CSRB made no effort to hold DWS to it.

POINT IV

PETITIONER DID NOT "WAIVE" A CHALLENGE TO CSRB'S DECISION DENYING RECONSIDERATION

At pages 27-28 of their Opposing Brief, Respondents claim that, by failing to argue the substance of CSRB's denial of Petitioner's request for reconsideration, Petitioner has "waived" any challenge thereto.

The Court is invited to review CSRB's ruling on Petitioner's request for reconsideration (Opening Brief at Attachment 2). It has no substance beyond the claim that the request was untimely, which Petitioner challenged at Point III of his Opening Brief (*see* Petitioner's Opening Brief at pp. 30-35).

POINT V

THIS COURT DOES NOT LACK SUBJECT MATTER JURISDICTION

Finally, Respondents have failed to dislodge the fact that this Court's subject matter jurisdiction over this petition is established by Utah Code Ann. § 78-2a-3(a), relating to "the final orders and decrees resulting from formal adjudicative proceedings of state agencies". This is confirmed by Utah Code Ann. § 63-46b-16. Petitioner pursued this petition within thirty days of CSRB's "final agency action" – the temporal

prerequisite to this Court's jurisdiction. Respondents have cited this Court to no case in which a delay in seeking reconsideration of an agency order has barred a Utah Appellate Court from exercising its jurisdiction, nor would such holding promote the interest of justice or resolution of claims on their merits, the ultimate goal and policy of the law. *Sulzen v. Williams*, 1999 Utah App. 76, 977 P.2d 497; *Meyers v. Interwest Corp.*, 632 P.2d 879 (Utah 1981). For those reasons more fully set out in his opening brief, Petitioner submits that the jurisdiction of this Court is proper, and that the conduct of Respondents should be dealt with on the merits.

CONCLUSION

For those reasons set out above, as well as those in his Opening Brief, Petitioner submits that he was improperly terminated as a DWS employee, and is entitled to reinstatement with an order of back-pay.

DATED this 18th day of April, 2007.

JONES WALDO HOLBROOK & McDONOUGH PC

By_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **REPLY BRIEF** was mailed via first class mail, postage prepaid, to the following this 18th day of April, 2007:

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