

2006

Lorin Blauer v. Utah Department of Workforce of Services, Uta Career Service Review Board : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LORIN BLAUER,

Petitioner,

v.

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

Respondents.

Brief of Department of Workforce Services

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

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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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

Statement of Jurisdiction

The Career Service Review Board's (CSRB's) Decision and Final Agency Action was entered on December 6, 2006. R. 659-71. Lorin Blauer filed a petition for judicial review on December 29, 2006. This Court has jurisdiction over that petition pursuant to Utah Code Ann. § 78-2a-3(2)(a) (West 2004), which confers jurisdiction on this Court over appeals from "the final orders and decrees resulting from formal adjudicative proceedings of state agencies." *See also* Utah Code Ann. § 63-46b-16 (West 2004).

Blauer filed a motion with this Court on April 9, 2007, seeking to have this appeal transferred to the district court. Without reserving the issue for plenary consideration, this Court denied that motion on May 7, 2007. *See* Addendum B.

Issues Presented

1. Formal CSRB adjudication

This Court has exclusive jurisdiction to hear appeals from CSRB's formal decisions. Pursuant to clear administrative rule, CSRB's decision here was designated as a formal proceeding. This Court has already denied Blauer's previous motion to transfer this appeal to the district court for a trial de novo. Likewise, in a separate district court proceeding, to which Blauer was a party and from which he did not appeal, the district court concluded that it lacked jurisdiction to hear the appeal because CSRB's decision was a formal adjudication. Given all this, and that no factual disputes need to be resolved for this Court to review CSRB's jurisdictional decision, should this Court deny Blauer's renewed request to transfer this case to the district court for a trial de novo?

A. Standard of Review

“[T]he initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction.” *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989). 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

This issue is unique to this appeal.

2. CSRB’s dismissal for lack of jurisdiction

The legislature granted CSRB limited authority to hear certain employment grievances that have been raised before the employing agency and then timely appealed to CSRB. After Blauer lost his demotion grievance before CSRB, he filed a request for reconsideration, raising six new issues that had not been timely appealed through the statutory grievance process. Did CSRB correctly determine that it lacked jurisdiction to hear the merits of those new issues?

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 raised by the Department in its motion to dismiss. R. 465-632. The issue was considered by CSRB in its December 6, 2006 Decision and Final Agency Action. R. 659-71.

Determinative Constitutional Provisions, Statutes and Rules

The following provisions are attached in the Addendum:

Utah Code Ann. § 63-46b-4(1) (West 2004)
Utah Code Ann. § 63-46b-4(2) (West 2004)
Utah Code Ann. § 63-46b-4(3) (West 2004)
Utah Code Ann. § 67-19a-202 (West 2004)
Utah Code Ann. § 67-19a-401 (West 2004)
Utah Code Ann. § 67-19a-402 (West 2004)
Utah Admin. Code R. 137-1-17

Statement of the Case

1. Nature of the Case

This is a petition for judicial review of final agency action of the CSRB. CSRB concluded that it lacked jurisdiction over new issues in Blauer's employment grievance that were raised for the first time in a request for reconsideration.

2. Course of the Proceedings Below

Blauer, an attorney for the Department of Workforce Services (Department), filed a grievance in July 2003 over an unsuccessful performance evaluation. R. 528-33. He also complained of the Department's failure to define job performance standards and that he did not have a current performance plan in place. R. 532; 642-43. That grievance was appealed to the Department's director, who ruled in Blauer's favor and changed the performance evaluation to "successful." R. 548-49. Blauer did not appeal that grievance to the CSRB. R. 636.

In September 2003, the Department of Workforce Services reapportioned Blauer's job duties and assigned him to conduct administrative hearings full time. R. 551-53. Blauer grieved his new assignment to the Career Service Review Board (CSRB), claiming the assignment was a

demotion. R. 554-55. The Department denied his grievance, concluding that no demotion had occurred. R. 559-61. After conducting an administrative review of the file, CSRB concluded that it lacked jurisdiction over the grievance because no demotion had occurred. R. 20-26.

Blauer then filed a request for reconsideration, asking CSRB to review six new issues not previously raised in the CSRB proceeding. R. 27-149. Five of those claims alleged that the Department violated personnel rules.¹

R. 57-62. The other claim requested that CSRB review some purported written reprimands in Blauer's file. R. 62. Specifically, Blauer alleged that:

- a. the Department failed to define Blauer's job performance parameters (R. 57-58);
- b. the Department assigned job tasks to Blauer outside his job description (R. 29-30);
- c. Department representatives harassed and retaliated against Blauer for his request for accommodation for disabilities (R. 59-60);

¹Blauer's request for reconsideration also included claims of constructive suspension and constructive termination, R. 61-62, but Blauer makes no mention of those claims in his opening brief and has therefore waived appellate review of that issue. *See Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (stating that failure to raise issue in opening brief generally constitutes waiver). Moreover, the district court did not list those claims in its order of remand, R. 583, and Blauer did not discuss the claims in his response to the Department's motion to dismiss. R. 633-46.

d. the Department failed to properly maintain Blauer's personnel records and refused him access to documentation in his personnel file (R. 60-61);

e. the Department improperly denied Blauer administrative leave (R. 61); and

f. the Department placed negative letters in Blauer's personnel file, thereby effectively issuing written reprimands against him. R. 62.

CSRB denied the motion for reconsideration, declining to consider the new claims because it deemed those claims to be ancillary to the demotion grievance. R. 276-82.

Blauer filed a petition for review in the district court, and the district court ultimately agreed with CSRB that no demotion occurred.² R. 582-83. The court, however, remanded the new claims of alleged violations of personnel rules to CSRB for consideration. R. 583. The remand order did not

²And this Court, in turn, agreed with the district court, holding that, because Blauer's assignment to conduct hearings full time was not a demotion, "CSRB did not err in declining jurisdiction over Blauer's grievance." *Blauer v. Dep't of Workforce Servs.*, 2005 UT App 488, ¶ 36, 128 P.3d 1204. While that appeal was pending, Blauer's employment was terminated On November 3, 2004, based on his inability to return to work after taking one year of medical leave. That termination is the subject another appeal pending before this Court, *Blauer v. Department of Workforce Services*, Utah Court of Appeals, No. 20060702. That appeal has been briefed and submitted for decision.

specify whether a formal or informal adjudication was required and did not direct CSRB to determine that it had jurisdiction:

Accordingly, the Plaintiff's First Claim for Relief is dismissed with prejudice, with the exception that the allegations in Paragraph 34 subsections (c) through (j) of the complaint which . . . are not based upon unlawful demotion, and which were also set forth by the Plaintiff in his Motion for Reconsideration (previously filed with the CSRB), are *remanded to the CSRB for consideration*.

R. 583 (emphasis added).

On remand to CSRB, the Department moved to dismiss the remanded issues for lack of jurisdiction. R. 465-632. CSRB conducted a jurisdictional hearing, where the parties presented memoranda and oral argument to a hearing officer. R. 652-58; 659. The Department attached documentary evidence to its memorandum. R. 483-632. Blauer referred to that evidence in his response but did not submit documentary evidence of his own, although nothing in the record indicates he was precluded from doing so. R. 645. CSRB concluded, in a decision issued December 6, 2006, that it lacked jurisdiction to hear the six remanded issues. R. 659-71.

To overturn CSRB's December 6, 2006 decision, Blauer then commenced two separate legal actions. First, on December 29, 2006, Blauer filed a petition for review with this Court, initiating the present action. Then, on January 3, 2007, Blauer filed a new district court action seeking judicial

review, in the form of a trial de novo, of the CSRB's decision. The complaint also contained a second claim for a declaratory judgment against CSRB and the Department. *See* Docket, *Blauer v. Utah Dep't of Workforce Servs.*, Third Judicial District Court, Case No. 070900108.³

On April 9, 2007, the district court dismissed the new district court action in its entirety for lack of jurisdiction. The district court's order stated that: a "CSRB jurisdictional hearing is a formal adjudication"; "Utah district courts are not granted jurisdiction over such appeals"; and the district court did "not have jurisdiction to review the CSRB decision [of December 6, 2006]." *See* Addendum A (Order of April 9, 2007, *Blauer v. Dep't of Workforce Servs.*, Third Judicial District Court, No. 070900108).

Blauer then filed a motion with this Court, seeking to have this appeal transferred to the district court for a trial de novo, arguing that the CSRB decision was an informal adjudication. This Court denied the motion outright on May 7, 2007. *See* Addendum B.

³This new 2007 action should not be confused with another district court action Blauer brought against the Department, *Blauer v. Department of Workforce Services*, Third Judicial District Court, Case No. 040927275, that was consolidated with the first district court petition for judicial review, *Blauer v. Department of Workforce Services*, Third Judicial District Court, Case No. 040900221.

3. Disposition Below

By its decision dated December 6, 2006, CSRB concluded that it lacked jurisdiction to hear the remanded claims. R. 659-71.

Statement of Facts

In his opening brief, Blauer includes a lengthy statement of facts relating the underlying allegations supporting the six new claims he raised in his request for CSRB reconsideration. But those facts are unnecessary to this Court's resolution of this appeal. CSRB did not address the merits of the new claims because it concluded that the undisputed procedural history of the case showed that Blauer had not properly preserved the claims for CSRB review. Accordingly, this brief does not include a counter-recitation of the underlying facts.

Summary of the Argument

Because CSRB's decision was designated by clear administrative rule as a formal adjudication, jurisdiction over this appeal is properly before this Court. Further, Blauer should be estopped from arguing that the CSRB decision was an informal adjudication because the third district court ruled

against Blauer on this identical argument, and Blauer has acquiesced in the ruling by not appealing it. In any event, transfer of this case to the district court for a trial de novo is manifestly inappropriate because CSRB's jurisdictional conclusion was based on undisputed procedural facts.

CSRB correctly dismissed the six remanded claims because Blauer had not timely appealed those claims through the statutory grievance process. One claim had been grieved to the Department director, but was not timely appealed to CSRB. Another claim was subsumed by Blauer's demotion grievance and had never been pursued as a grievance in its own right. The remaining claims were never grieved within the Department but were raised for the first time in a request for CSRB reconsideration. Because Blauer did not preserve his claims as required by statute, CSRB correctly determined that it lacked jurisdiction to hear the claims.

Accordingly, the Department asks this Court to affirm CSRB's decision.

Argument

1. CSRB's decision was a formal adjudicative proceeding and jurisdiction is properly here.

In its May 7, 2007 order this Court declined to transfer this case to the district court for a trial de novo. *See* Order of May 7, 2007, included as

Addendum B. In that order, this Court rejected Blauer’s argument that this Court lacks jurisdiction over CSRB’s adjudication. Further, this Court denied the motion outright, without reserving the issue for plenary consideration. Yet Blauer repeats arguments now in his opening brief, again asking this Court to transfer this case to the district court. To the extent that Blauer’s argument is a repeat motion for transfer, it should be rejected again.

Moreover, under principles of issue preclusion, Blauer should be estopped from continuing to argue that he is entitled to a trial de novo in district court. In a separate proceeding – commenced by Blauer for judicial review of the same CSRB decision Blauer seeks to have reviewed here – the third district court conclusively decided that it lacked jurisdiction to review CSRB’s decision. *See* Addendum A (Order of April 9, 2007, *Blauer v. Utah Dep’t of Workforce Servs.*, Third Judicial District Court, Case No. 070900108). The district court concluded that: (1) a “CSRB jurisdictional hearing is a formal adjudication”; (2) “Utah district courts are not granted jurisdiction over such appeals”; and (3) the district court did “not have jurisdiction to review the CSRB decision [of December 6, 2006].” *Id.* Blauer has acquiesced to this final determination by not appealing it. *See* Docket, *Blauer v. Utah Dep’t of Workforce Servs.*, Third Judicial District Court, Case No. 070900108 (showing that no notice of appeal was filed from the order of dismissal).

Issue preclusion⁴ prevents parties “from relitigating issues which were once adjudicated on the merits and have resulted in a final judgment.”

Brigham Young Univ. v. Tremco Consultants, Inc., 2005 UT 19, ¶ 27, 110 P.3d

678. Issue preclusion has four elements:

[1] [t]he party against whom claim preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits.

Id. (quoting *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 15, 982 P.2d

65 (bracketed material in original)).

Although the district court’s April 6th decision was a dismissal on jurisdictional grounds, and therefore cannot be used as a dismissal on the merits of the underlying dispute, it nevertheless addressed the identical jurisdictional argument made by Blauer here, and should therefore have preclusive effect, at least over that jurisdictional issue. Although the Department could not find Utah authority on this point, other jurisdictions have concluded that a dismissal for lack of jurisdiction does preclude

⁴The Department did not make this claim preclusion argument in its April 26, 2007 response to Blauer’s motion to transfer appeal because that response was filed before Blauer’s time to appeal the April 9, 2007 decision expired.

relitigation “of the issues determined in ruling on the jurisdictional question.” *Matosantos Commercial Corp. v. Applebee’s Int’l, Inc.*, 245 F.3d 1203, 1211 (10th Cir. 2001) (quoting 18 Charles Alan Wright *et al.*, Federal Practice and Procedure § 4436 (1981)). *See also Okoro v. Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999) (“[A] jurisdictional dismissal precludes only the relitigation of the ground of that dismissal, and thus has collateral estoppel (issue preclusion) effect rather than the broader res judicata effect.”) (citations omitted); *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987) (stating that judgment dismissing action for lack of jurisdiction will “have preclusive effect as to matters actually adjudicated” and will “preclude relitigation of the precise issue of jurisdiction that led to the initial dismissal”). Because this Court and the district court have already decided the very issue Blauer now renews, the Department respectfully asks this Court to reject the argument again.

In any event, because CSRB’s December 6, 2006 decision was designated by clear administrative rule as a formal adjudication, jurisdiction exclusively lies with this Court. This Court has appellate jurisdiction over “the final orders and decrees resulting from *formal* adjudicative proceedings of state agencies.” Utah Code Ann. § 78-2a-3(2)(a) (West 2004) (emphasis added); *see also* Utah Code Ann. § 63-46b-16(1) (West 2004). *Cf.* Utah Code

Ann. § 63-46b-15(1)(a) (West 2004) (stating that the district court has “jurisdiction to review by trial de novo all final agency actions resulting from *informal* adjudicative proceedings”).

Pursuant to the Utah Administrative Procedures Act (UAPA),⁵ CSRB has designated by administrative rule⁶ that a “jurisdictional hearing is a formal adjudication” and an “administrative review of the file is an informal adjudication.” Utah Admin. Code R. 137-1-17. To determine whether CSRB has jurisdiction over an employment grievance, its administrator has discretion to *either* “hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both” *or* “conduct an administrative review of the file.” Utah Code Ann. § 67-19a-403(2)(b) (stating that the administrator “may” hold one or the other).⁷ Because CSRB can

⁵UAPA consists of Utah Code Ann. §§ 63-46b-0.5 through -23 (West 2004), inclusive.

⁶CSRB “may, by rule, designate categories of adjudicative proceedings to be conducted informally,” providing certain conditions are met. Utah Code Ann. § 63-46b-4(1) (West 2004). But “all agency adjudicative proceedings not specifically designated as informal proceedings by the agency’s rules shall be conducted formally in accordance with the requirements of this chapter.” Utah Code Ann. § 63-46b-4(2) (West 2004). Further, CSRB may only convert a formal proceeding into an informal one, or vice versa, provided the conversion is “in the public interest” and “does not unfairly prejudice the rights of any party.” Utah Code Ann. § 63-46b-4(3) (West 2004).

⁷A grievant is entitled to a hearing on the merits of his claim only if he demonstrates CSRB has jurisdiction over his grievance. *See Lopez v. CSRB*,

choose between a jurisdictional hearing – a formal proceeding – and an administrative review of the file – an informal proceeding – it can, with that decision, also choose whether judicial review lies with this Court or the district court. And because CSRB chose to conduct a jurisdictional hearing, that decision necessarily dictated that any appeal would be before this Court.

The remand order did not limit CSRB’s statutory discretion to select a formal or informal proceeding to assess its jurisdiction. That order simply “remanded to the CSRB for *consideration*,” without specifying the type of proceeding required. R. 583 (emphasis added). Only if CSRB had considered the remanded issues in another informal proceeding – another administrative review of the file – would the district court have had jurisdiction to review the decision in a subsequent petition for judicial review. But since CSRB opted to hold a formal proceeding, jurisdiction over Blauer’s petition for review falls squarely with this Court.

Furthermore, Blauer grossly misrepresents the recent CSRB proceedings when he asserts that he received no more of a formal adjudication on remand than he did initially when he raised the new issues in

834 P.2d 568, 573 n.4 (Utah Ct. App. 1992) (stating that “[i]f an employee’s grievance meets the statutory requirements in subsection 403(2)(a), the employee is entitled to a hearing on the merits of his claim”).

his request for reconsideration. The most significant difference is that CSRB actually considered the new claims on remand, but did not even consider them in 2003 because it deemed the claims as ancillary to the demotion grievance. CSRB stated in its December 22, 2003 decision denying Blauer's request for reconsideration: "I recognize that Grievant's Request for Reconsideration addressed other issues primarily, but not entirely, stemming from the argument that a demotion occurred. Based upon my decision herein, however, it is unnecessary to address these arguments as I view them as essentially ancillary to the issue demotion." R. 278. On remand, however, CSRB analyzed each of the new issues individually. R. 666-71. CSRB's decision was based on a review of its own record, as well as the briefs and documentary evidence submitted to it, and made after both parties presented oral argument. R. 659. Accordingly, this Court should disregard Blauer's misrepresentations that the jurisdictional hearing on remand was no different than the previous administrative review of the file.

Section 8 of UAPA provides that, in a formal proceeding, CSRB "shall afford all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence." Utah Code Ann. § 63-46b-8 (West 2004). Despite this language, it does not follow that a full-blown evidentiary hearing is a necessary component of every formal proceeding,

especially when CSRB resolves a case based on legal conclusions drawn entirely from the pleadings, procedural history of the case, and documentary evidence submitted to it. CSRB did not need to resolve any factual disputes to assess jurisdiction and none need to be resolved before this Court can review CSRB's legal conclusions. Blauer did not submit, nor was he precluded from submitting, any documentary evidence that conflicted with the documentation CSRB relied on to assess its jurisdiction.

As set forth in CSRB's detailed December 6 decision, the jurisdictional inquiry did not require the resolution of any factual disputes. The Department's jurisdictional motion to dismiss raised no factual issues requiring an evidentiary hearing. Based on the pleadings in the record and the documentary evidence submitted to it, CSRB analyzed each of the arguments Blauer made in his 2003 request for reconsideration. As set forth below, CSRB correctly determined that it lacked jurisdiction to hear those arguments. CSRB made legal conclusions, not findings of fact based on conflicting evidence. This Court does not need a trial de novo to examine the same record and documentary evidence CSRB reviewed to decide whether the lack of an evidentiary hearing warrants a remand to CSRB.

As this Court has previously stated, "[n]o purpose would be served by a trial de novo in the district court where the relevant facts are not in dispute

and the issue is solely one of law.” *Hales v. Indus. Comm’n*, 854 P.2d 537, 539 n.2 (Utah Ct. App. 1993). Blauer fails to identify what evidence he could have presented that would have had any bearing on CSRB’s review of the procedural history of the case. He fails to show that he was precluded from submitting documentary evidence to rebut the Department’s evidence or to rebut anything already in the CSRB record. He does not explain why his failure to submit any conflicting documentary evidence to CSRB is not a waiver of his right to do so. And he fails to show what evidence at an evidentiary hearing would have altered CSRB’s legal conclusions. Instead, he mistakenly implies that all of the events listed in Utah Code Ann. § 63-46b-8, including an evidentiary hearing, must occur in every formal proceeding, even when unnecessary to the resolution of the case. Any purported factual disputes regarding the merits of his claims were not material to the jurisdictional analysis because an employee is only entitled to a hearing on the merits of a grievance once he establishes that CSRB has jurisdiction. *See Lopez*, 834 P.2d at 573 n.4.

Even assuming that CSRB erred in not holding an evidentiary hearing, it does not follow that a missing evidentiary component in a CSRB proceeding transforms what was designated by rule as a formal proceeding into an informal proceeding. Any procedural deficiency in a formal proceeding is

simply that – a procedural deficiency. Blauer’s authority does not suggest that a formal proceeding becomes informal whenever an agency commits an error in how it conducts that proceeding. This Court has never held that a violation of UAPA’s Section 8 – containing the requirements for a formal proceeding – necessarily renders a proceeding informal. *See Lopez*, 834 P.2d at 571. Instead, this Court has stated only that “[s]ince there was a hearing, and there is no showing of any violations of Section 8, we conclude this was a formal adjudicative proceeding that we may properly review.” *Id.* Likewise, UAPA’s provisions for designating formal and informal proceedings do not suggest that a deficiency in a formal proceeding changes the status of the proceeding. Rather, UAPA provides that a proceeding changes from formal to informal status by CSRB’s designation only, either by rule or by express conversion. *See Utah Code Ann. § 63-46b-4* (West 2004).

Moreover, transferring this case to the district court would impose a collateral, summary reversal of the district court’s April 6th dismissal order. It would force the district court to review a CSRB decision it has already determined it lacks jurisdiction to review. This would further complicate the procedural dilemma Blauer has created with his duplicative filings. If, as Blauer argues, judicial review of the CSRB’s decision is properly in the

district court, then he should have appealed the district court's April 6th dismissal order and sought to have that order reversed.

At best, an error in how CSRB conducted a formal proceeding may justify a remand to CSRB with instructions to correct the deficiency, not require transfer of the appeal to the district court for a trial de novo. But Blauer does not argue that the matter should be remanded to CSRB for an evidentiary hearing. Nor does he point to any evidence excluded by CSRB material to its jurisdictional conclusion. Instead, he plunges into the merits of the newly raised issues, even though CSRB did not reach the merits of those issues. This appeal, however, is not about the merits of Blauer's belated claims. It concerns CSRB's ruling that it lacked jurisdiction to decide the merits of those claims, based on Blauer's failure to properly appeal them within the statutory grievance procedures.

2. CSRB correctly concluded that it lacked jurisdiction to hear Blauer's belated claims.

CSRB correctly concluded that it lacked jurisdiction over Blauer's new claims because those claims had not been timely appealed through the statutory grievance process. In his opening brief, Blauer extensively discusses

the merits of his claims but does not address his failure to preserve them for CSRB review. This constitutes a waiver of the issues, and this Court should affirm the CSRB on that basis alone. *See Brown*, 2000 UT 89 at ¶ 23 (stating that failure to raise issue in opening brief generally constitutes waiver).

In any event, CSRB correctly concluded that it lacked jurisdiction over the six new claims in Blauer's request for reconsideration. CSRB's authority is set forth in the Grievance and Appeal Procedures Act (GAPA). *See Utah Code Ann. §§ 67-19a-101 to -408* (West 2004). GAPA limits CSRB's jurisdiction to certain types of employment decisions. *Utah Code Ann. § 67-19a-202(1)* (West 2004). CSRB's jurisdiction is limited to resolve only those disputes "that have not been resolved at an earlier stage in the grievance procedure." *Utah Code Ann. § 67-19a-202* (West Supp. 2006). Other than as authorized by GAPA, CSRB "has no jurisdiction to review or decide *any other* personnel matters. *Utah Code Ann. § 67-19a-202(1)(b)* (emphasis added).

An aggrieved employee must initiate a grievance within 20 days of the event being grieved or, with a showing excusable neglect,⁸ within one year:

(5)(a) Unless the employee meets the requirements for

⁸CSRB "shall determine the applicability of the excusable neglect standard on the basis of good cause." *Utah Admin. Code R. 137-1-13(3)*. Blauer made no showing or mention of excusable neglect before the CSRB and likewise makes not mention of it in his opening brief.

excusable neglect established by rule, an employee may submit a grievance for review under this chapter *only if* the employee submits the grievance:

(i) within 20 working days after the event giving rise to the grievance; or

(ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.

(b) Notwithstanding Subsection 5(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

Utah Code Ann. § 67-19a-401(5) (West 2004) (emphasis added). Once a grievance is initiated, an employee must process the grievance up to his department head within certain time limits before appealing to the CSRB. *See* Utah Code Ann. § 67-19a-402 (West Supp. 2004). Failure to meet the statutory time limits for processing a grievance results in both a waiver of the employee's right to grieve *and* of the right to judicial review. Utah Code Ann. § 67-19a-401(4)(a)⁹ ("Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, he has waived his right to process the grievance or obtain judicial review of the

⁹*See also* Utah Code Ann. § 67-19a-401(4)(b) (West 2004) ("Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, the grievance is considered to be settled based on the decision made at the last step.")

grievance.”)

As set forth below, CSRB correctly concluded that it lacked jurisdiction over the Blauer’s six new claims.

First, Blauer’s claim regarding job performance parameters and performance plan was correctly dismissed because he did not timely appeal that claim to CSRB. That claim was made as part of Blauer’s first grievance in July 2003. R. 643-44. Blauer received a favorable ruling on the 2003 grievance from his department head (Level 4) and did not timely appeal the grievance further. An appeal from a Level 4 decision must be made to CSRB within ten days: “If the written grievance submitted to the employee’s department head meets the subject matter requirements of Section 67-19a-302 and if . . . the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to the administrator within ten working days.” Utah Code Ann. § 67-19a-202(5) (West 2004). As CSRB correctly noted, Blauer admitted that he never appealed the Step 4 decision on this first grievance. R. 643. Accordingly, CSRB lacked jurisdiction over the claim and properly dismissed it.

Second, Blauer’s claim that he was being assigned tasks outside his job description was correctly dismissed by CSRB because the claim was part of his demotion grievance. The demotion issue has now been considered by

CSRB, the district court, and this Court. All three tribunals determined that the reassignment was not a demotion. Specifically, this Court agreed that, “in reapportioning Blauer’s job responsibilities from part-time to full-time adjudicator, [the Department] did nothing more than extend one of Blauer’s core job functions, in response to varying department needs.” *Blauer v. Dep’t of Workforce Servs.*, 2005 UT App 488, ¶ 32, 128 P.3d 1204. Accordingly, the CSRB correctly concluded that it lacked jurisdiction to consider further the issue. Even if this new claim were severable from the demotion claim, CSRB lacked jurisdiction to hear it because Blauer filed no antecedent grievance with the Department identifying the issue in its own right.

Third, Blauer’s claim of unlawful harassment and retaliation was properly dismissed by CSRB because Blauer filed no timely antecedent grievance with the Department. The claim was not brought in either of Blauer’s prior grievances, but was made for the first time in the request for reconsideration. Moreover, because Blauer asserted that the claim arose out of his request for accommodation for a disability, he should have made the claim before the Division of Antidiscrimination and Labor, which has exclusive jurisdiction to decide discrimination claims. *See Buckner v. Kennard*, 99 P.3d 842, 852 (Utah 2004) (stating that “the exclusive remedy for an employee claiming a violation of the UADA [Utah Antidiscrimination Act]

is an appeal to the Division of Antidiscrimination and Labor”); *see also* Utah Code Ann. § 34A-5-107(15) (West 2004) (stating that UADA is the “exclusive remedy under State law for employment discrimination”); *Gottling v. P.R., Inc.*, 2002 UT 95, ¶ 10, 61 P.3d 989 (same).

Fourth, Blauer’s claim regarding personnel records was correctly dismissed because Blauer never filed a timely antecedent grievance with the Department.

Fifth, Blauer’s claim regarding administrative leave was correctly dismissed by CSRB because it was neither timely grieved to the Department’s director nor timely appealed to CSRB.

And, sixth, Blauer’s claim regarding written reprimands was also correctly dismissed by CSRB because Blauer never filed a timely antecedent grievance within the Department.

Because Blauer failed to meet the statutory time limits for processing his antecedent grievance claims, he waived both his right to grieve *and* his right to judicial review, and CSRB correctly concluded that it lacked jurisdiction to hear Blauer’s new claims. *See* Utah Code Ann. § 67-19a-401(4)(a) (“Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next

step within the time limits established in this part, he has waived his right to process the grievance or obtain judicial review of the grievance.”)

Conclusion

Jurisdiction over this appeal is properly with this Court because the CSRB’s decision was designated by clear administrative rule as a formal adjudication. Moreover, this Court has already denied Blauer’s motion to transfer this case to the district court for a trial de novo. In addition, Blauer should be estopped from arguing that a trial de novo is a proper remedy because the third district court ruled against Blauer on this identical argument, and Blauer has acquiesced in the ruling by not appealing it.

CSRB correctly dismissed the six remanded claims because Blauer did not timely appeal those claims through the statutory grievance process. Accordingly, the Department asks this Court to affirm CSRB’s decision.

Dated this 8th day of August, 2007.

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

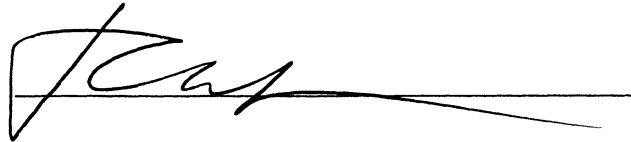
J. CLIFFORD PETERSEN
Assistant Attorney General
Attorney for Department of Workforce Services

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 8th day of August,
2007:

Vincent C. Rampton
JONES WALDO HOLBROOK & MCDONOUGH, PC
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Salt Lake City, Utah 84101

Robert Thompson, Administrator
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State Office Building, Room 1120
Salt Lake City, Utah 84114

A handwritten signature in black ink, appearing to read 'R. Thompson', with a long horizontal line extending to the right.

ADDENDUM A

April 9, 2007 Order Granting Defendants' Motions to Dismiss, *Blauer v. Dep't of Workforce Servs.*, Third Judicial District Court, No. 070900108.

FILED DISTRICT COURT
Third Judicial District

APR 09 2007

SALT LAKE COUNTY

Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH

LORIN BLAUER,

Plaintiff,

vs.

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

Defendants.

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

Civil No. 070900108

Judge Joseph C. Fratto

THIS MATTER having come before the Court for hearing on March 26, 2007, of Defendants' separate Motions to Dismiss; Plaintiff appearing by and through his counsel, Vincent C. Rampton; Defendant Utah Department of Workforce Services (DWS) appearing by and through its counsel, Philip S. Lott; and Defendant Career Service Review Board (CSRB) appearing by and through its counsel, Steven K. Walkenhorst; the Court having reviewed the pleadings, received oral arguments from counsel, and being otherwise fully advised, FINDS:

1. The Complaint herein alleges that this Court has appellate jurisdiction over a CSRB Decision which dismissed Plaintiff Blauer's employment grievance against Defendant DWS related to alleged

violations of personnel rules. *Complaint* at ¶¶ 4, 5.

2. The Complaint seeks trial *de novo* by this Court of Plaintiff Blauer's employment grievance and declaratory judgment regarding the nature of the CSRB Decision. *Complaint* at 14-15.

3. The CSRB is the final administrative body to review grievances from Utah career service employees of, among others, alleged violations of personnel rules. U.C.A. § 67-19a-202.

4. When an employee files a grievance with the CSRB, the CSRB is required to determine, among others, whether or not it has jurisdiction over the grievance and whether or not the employee has been directly harmed. U.C.A. § 67-19a-403(2)(a).

5. On October 24, 2006, the CSRB held a hearing to consider whether it had jurisdiction over Plaintiff Blauer's employment grievance.

6. The October 24, 2006 CSRB hearing was a jurisdictional hearing at which the parties, Plaintiff Blauer and Defendant DWS, appeared and presented written and oral arguments.

7. A CSRB jurisdictional hearing is a formal adjudication. Utah Administrative Code R137-1-17.

8. Following the October 24, 2006 jurisdictional hearing the CSRB issued its Decision on Agency's Motion to Dismiss, dismissing Plaintiff Blauer's employment grievance.

9. An aggrieved employee or the responding agency may appeal the CSRB's formal adjudicative jurisdictional hearing decision and final agency action to the Utah Court of Appeals. U.C.A. § 63-46b-16; Utah Administrative Code R137-1-17.

10. Utah district courts are not granted jurisdiction over such appeals.

11. On December 29, 2006, before filing this lawsuit, Plaintiff Blauer filed with the Utah Court

of Appeals a Petition for Review of Administrative Agency Decision, seeking judicial review of the CSRB Decision. *Blauer v. Utah Department of Workforce Services and Utah Career Service Review Board*, Utah Court of Appeals Case No. 20061177 (2006).

12. This Court (the Third Judicial District Court) does not have jurisdiction to review the CSRB Decision on Agency's Motion to Dismiss and Plaintiff's Complaint must be dismissed in its entirety.

13. The CSRB is not a proper party to an appeal of its own decision. *Blauer v. Department of Workforce Services*, 128 P.3d 1204, 1210 (Utah App. 2005).

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED:

1. Defendants' Motions to Dismiss are granted and Plaintiff's Complaint is dismissed in its entirety.

DATED this 9th day of April, 2007.

BY THE COURT

Joseph C. Fratto
District Court Judge

Approved as to form:

Vincent C. Rampton

Philip S. Lott

Steven K. Walkenhorst

ADDENDUM B

May 7, 2007 Order of the Utah Court of Appeals

FILED
UTAH APPELLATE COURTS
MAY 07 2007

IN THE UTAH COURT OF APPEALS

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Lorin Blauer,)	ORDER
)	
Petitioner,)	Case No. 20061177-CA
)	
v.)	
)	
Utah Department of Workforce)	
Services, an agency of the)	
State of Utah, and Utah Career)	
Service Review Board,)	
)	
Respondents.)	

Before Judges Greenwood, Billings, and Davis.

This matter is before the court on petitioner Lorin Blauer's motion to transfer his appeal.

IT IS HEREBY ORDERED that the motion is denied.

Dated this 7 day of May, 2007.

FOR THE COURT:


Judith M. Billings, Judge

ADDENDUM C

Determinative Statutes and Rules

§ 63-46b-3

Note 4

mal contract with his agency yet never notified the Department of his absence as required by the licensure statute; in short, the default resulted from the agent's failure to exercise due diligence, not from excusable neglect. U.C.A.1953, 31A-23-312(1), 63-46b-3(2)(b)(i), 63-46b-11(3)(a); Rules Civ.Proc., Rule 60(b)(1). *Black's Title, Inc. v. Utah State Ins. Dept.*, 1999, 991 P.2d 607, 382 Utah Adv. Rep. 8, 1999 UT App 330. Insurance ⇨ 1620

5. Decertification proceedings

Victim of wildlife conservation officer's acts was not entitled to initiate decertification proceedings before division of police officer standards and training (POST). - U.C.A.1953, 63-46b-3(3)(a). *Nielson v. Division of Peace Officer Standards and Training, (POST), Dept. of Public Safety*, 1993, 851 P.2d 1201. Administrative Law And Procedure ⇨ 450.1; Game ⇨ 6

6. Applicable law

Reference to "applicable law" found in statute permitting persons other than agency to initiate adjudicative proceedings if law applicable to agency so permits is to agency's enabling statute, not rules. U.C.A.1953, 63-46b-3(3)(a). *Nielson v. Division of Peace Officer Standards and Training, (POST), Dept. of Public Safety*,

1993, 851 P.2d 1201. Administrative Law And Procedure ⇨ 450.1

7. Dismissal

Provision of Administrative Procedures, Act pursuant to which presiding officer may notify party requesting agency action that further proceedings are required to determine agency's response to request authorized Industrial Commission to dismiss workers' compensation claims without prejudice, particularly where basis for dismissals was failure to diligently prosecute claims. U.C.A.1953, 63-46b-3(3)(d)(iii). *Doubletree, Inc. v. Industrial Com'n of Utah*, 1990, 797 P.2d 464. Administrative Law And Procedure ⇨ 467; Workers' Compensation ⇨ 1174

8. Appeal

Driver's failure to object at beginning of hearing on suspension of his license to the failure of the Division of Drivers License Services to include in its notice of hearing advice as to whether the license revocation hearing was formal or informal, after he was clearly informed that the proceeding would be conducted informally, precluded driver from claiming error on this ground on appeal. U.C.A.1953, 63-46b-3(2)(a)(v). *Brinkerhoff v. Schwendiman*, 1990, 790 P.2d 587. Administrative Law And Procedure ⇨ 669.1; Automobiles ⇨ 144.2(2.1)

§ 63-46b-4. Designation of adjudicative proceedings as informal—Standards—Undesignated proceedings formal

(1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted informally according to the procedures set forth in rules enacted under the authority of this chapter if:

(a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter;

(b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures;

(c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations; and

(d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding.

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

(3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if:

- (a) conversion of the proceeding is in the public interest; and
- (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

Laws 1987, c. 161, § 260.

Administrative Code References

Administrative rules, adjudicative proceedings, see Utah Admin. Code 15-5.
 Administrative services, debt collection, Office of State Debt Collection administrative procedures, see Utah Admin. Code 21-2.
 Information technology services, Division of Informational Technology Services, adjudicative proceedings, see Utah Admin. Code 29-1.

Library References

Administrative Law and Procedure ⇨ 446. C.J.S. Public Administrative Law and Procedure § 116.
 Westlaw Key Number Search: 15Ak446.

Research References

Treatises and Practice Aids

60 Federal Register 37002, Utah Regulatory Program and Utah Abandoned Mine Land Reclamation (AMLR) Plan

Notes of Decisions

In general 1

Conversion to formal proceedings 2

Judicial review 3

1 In general

Under Utah Administrative Procedures Act (UAPA), each applicant has opportunity to have formal hearing before agency, or de novo review by district court. U.C.A.1953, 63-46b-0.5 to 63-46b-22, 63-46b-4(1). Cordova v. Blackstock, 1993, 861 P.2d 449. Administrative Law And Procedure ⇨ 469.1, Administrative Law And Procedure ⇨ 744.1

2 Conversion to formal proceedings

Broker dealer's challenge to state Division of Securities' converting proceedings against broker dealer from informal to formal failed to comply with rule requiring citations to authority where only authority cited by broker dealer in support of argument that Division acted improperly was statute that supported Division's action; thus, appeal of issue was disregarded. U.C.A.1953, 63-46b-4(3), 63-46b-6 to 63-46b-10; Rules App.Proc., Rule 24(a)(9). Johnson-Bowles Co., Inc. v. Division of Securities of Dept. of Commerce of State of Utah, 1992, 829 P.2d 101, certiorari denied 843 P.2d 516. Securities Regulation ⇨ 275

3 Judicial review

District court was required to hold trial de novo to review Department of Public Safety's decision to suspend driver's license based on

driver's arrest for driving under influence of intoxicating beverage (DUI), where Department's decision was based on informal hearing presided over by hearing officer. U.C.A.1953, 63-46b-0.5 to 63-46b-22, 63-46b-4(1). Cordova v. Blackstock, 1993, 861 P.2d 449. Administrative Law And Procedure ⇨ 744.1, Automobiles ⇨ 144.2(4)

Administrative law judge's decision that workers' compensation claims were barred, and Industrial Commission's review thereof, constituted formal adjudicative proceedings which were properly reviewed by Court of Appeals. U.C.A.1953, 63-46b-4, 63-46b-16 Hales v. Industrial Com'n of Utah, 1993, 854 P.2d 537. Administrative Law And Procedure ⇨ 663; Workers' Compensation ⇨ 1828

Sale of parcel of public land by division of state lands and forestry was not a final order or decree from a formal adjudicative proceeding but, rather arose from informal adjudicative proceedings; therefore, Supreme Court lacked jurisdiction over petition challenging sale. U.C.A.1953, 78-2-2(3)(e)(iii). Southern Utah Wilderness Alliance v. Board of State Lands and Forestry of State, 1992, 830 P.2d 233. States ⇨ 89

Supreme Court has jurisdiction only over final orders and decrees of agencies that originate in formal adjudicative proceedings U.C.A. 1953, 78-2-2(3)(e)(iii). Southern Utah Wilderness Alliance v. Board of State Lands and Forestry of State, 1992, 830 P.2d 233. Administrative Law And Procedure ⇨ 704

(6) Each year, the board shall choose a chair and vice chair from its own members.

(7)(a) Three members of the board are a quorum for the transaction of business.

(b) Action by a majority of members when a quorum is present is action of the board.

(8)(a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(b) Members may decline to receive per diem and expenses for their service.

Laws 1989, c 191, § 7, Laws 1996, c 194, § 24, eff April 29, 1996, Laws 1996, c 243, § 183, eff April 29, 1996

Historical and Statutory Notes

Section 27 of Laws 1996, c 194, provides
 "If this bill, H B 403 [Laws 1996, c 242], State Boards, Commissions, Committees, and Councils Amendments, and H B 406 [Laws 1996, c 243], State Boards and Commissions—Benefits and Terms, all pass, it is the intent of the Legislature that all of the amendments to sections in this bill supersede the amendments

to sections in H B 403 and H B 406 that conflict with them. If, however, any sections in H B 403, State Boards, Commissions, Committees, and Councils Amendments, or H B 406, State Boards and Commissions—Benefits and Terms, repeal sections amended by this bill, it is the intent of the Legislature that the repealers in H B 403 and H B 406 supersede any amendments made by this bill "

Library References

Officers and Public Employees ⇐69 3
 Westlaw Key Number Search 283k69 3

C J S Officers and Public Employees §§ 71 to 72, 121, 130, 160

Research References

Treatises and Practice Aids

Emp Discrim Coord Analysis of State Law
 § 49 88, State Personnel Management Act
 HRS Fair Employment Practices § 68 45,
 State Personnel Management Act

HRS Fair Employment Practices 325,900,
 Utah

§ 67-19a-202. Powers—Jurisdiction

(1)(a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about 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 that have not been resolved at an earlier stage in the grievance procedure.

(b) The board has no jurisdiction to review or decide any other personnel matters.

(2) The time limits established in this chapter supersede the procedural time limits established in Title 63, Chapter 46b, Administrative Procedures Act

(3) In conjunction with any inquiry, investigation, hearing, or other proceeding, any member of the board may:

- (a) administer oaths;
- (b) certify official acts;
- (c) subpoena witnesses, documents, and other evidence; and
- (d) grant continuances pursuant to board rule.

Laws 1989, c 191, § 8, Laws 1991, c 101, § 3, Laws 1991, c 204, § 8

Library References

Officers and Public Employees § 69 3
Westlaw Key Number Search 283k69 3

C J S Officers and Public Employees §§ 71 to 72, 121, 130, 160

Research References

Treatises and Practice Aids

Emp Discrim Coord Analysis of State Law
§ 49 88, State Personnel Management Act
HRS Fair Employment Practices § 68 45,
State Personnel Management Act

HRS Fair Employment Practices 325,900,
Utah

Notes of Decisions

In general 1
Job sharing 3
Presumptions and burden of proof 4
Suspensions 2

67-19a-202(1) Lopez v Career Service Review Bd , 1992, 834 P 2d 568, certiorari denied 843 P 2d 1042 Officers And Public Employees § 72 22

3. Job sharing

For purposes of determining whether Career Service Review Board had jurisdiction to hear state employee's grievance, Utah State Industrial Commission's decision not to allow senior investigator to job share did not violate personnel rule, insofar as rule gave Commission full discretion as to whether job sharing would be allowed U C A 1953, 67-19a-202(1) Lopez v Career Service Review Bd , 1992, 834 P 2d 568, certiorari denied 843 P 2d 1042 Officers And Public Employees § 72 22

4. Presumptions and burden of proof

State employee had burden of showing that his grievance fit into statutorily designated category in order to bring that grievance before Career Service Review Board U C A 1953, 67-19a-202(1) Lopez v Career Service Review Bd , 1992, 834 P 2d 568, certiorari denied 843 P 2d 1042 Officers And Public Employees § 72 61

1. In general

Career Service Review Board had subject matter jurisdiction to issue order to Department of Corrections, requiring that career service employee be restored to former rank and salary U C A 1953, 67-19a-202 Career Service Review Bd v Utah Dept of Corrections, 1997, 942 P 2d 933, 322 Utah Adv Rep 8 Officers And Public Employees § 72 33(1)

2. Suspensions

For purposes of determining whether Career Service Review Board had jurisdiction of its grievance, senior investigator with Utah State Industrial Commission was not given 'de facto suspension' when Commission required him to take unpaid leave of absence in order to attend law school, employee made conscious decision to attend law school after being formally notified that he would be required to take a leave of absence if he did so U C A 1953,

§ 67-19a-203. Rulemaking authority

The board may make rules governing.

(1) definitions of terms, phrases, and words used in the grievance process established by this chapter,

(2) what matters constitute excusable neglect for purposes of the waiver of time limits established by this chapter,

**PART 4. PROCEDURAL STEPS TO BE FOLLOWED
BY AGGRIEVED EMPLOYEE**

§ 67-19a-401. Time limits for submission of appeal by aggrieved employee—Voluntary termination of employment—Group grievances

(1) Subject to the standing requirements contained in Part 3 and the restrictions contained in this part, a career service employee may have a grievance addressed by following the procedures specified in this part.

(2) The employee and the person to whom the grievance is directed may agree in writing to waive or extend grievance steps 2, 3, or 4 or the time limits specified for those grievance steps, as outlined in Section 67-19a-402.

(3) Any writing made pursuant to Subsection (2) must be submitted to the administrator.

(4)(a) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, he has waived his right to process the grievance or to obtain judicial review of the grievance.

(b) Unless the employee meets the requirements for excusable neglect established by rule, if the employee fails to process the grievance to the next step within the time limits established in this part, the grievance is considered to be settled based on the decision made at the last step.

(5)(a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:

- (i) within 20 working days after the event giving rise to the grievance; or
- (ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.

(b) Notwithstanding Subsection (5)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

(6) A person who has voluntarily terminated his employment with the state may not submit a grievance after he has terminated his employment.

(7)(a) When several employees allege the same grievance, they may submit a group grievance by following the procedures and requirements of this chapter.

(b) In submitting a group grievance, each aggrieved employee shall sign the complaint.

(c) The administrator and board may not treat a group grievance as a class action, but may select one aggrieved employee's grievance and address that grievance as a test case.

Laws 1989, c. 191, § 14, Laws 1991, c. 101, § 6; Laws 1991, c. 204, § 11; Laws 1999, c. 21, § 86, eff. May 3, 1999.

Cross References

Rules Civ Proc, Rule 23

Library References

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Westlaw Key Number Search: 283k72.27.

C.J.S. Officers and Public Employees §§ 143,
196 to 197.

Research References**Treatises and Practice Aids**

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§ 49:88, State Personnel Management Act.
HRS Fair Employment Practices § 68:45,
State Personnel Management Act.

HRS Fair Employment Practices 325,900,
Utah.

United States Supreme Court**Class actions,**

Natural gas leases, class actions, opportunity to "opt out", see Phillips Petroleum Co. v. Shutts, U.S.Kan.1985, 105 S.Ct. 2965, 472 U.S. 797, 86 L.Ed.2d 628, on remand 240 Kan. 764, 732 P.2d 1286.

Standing as a class of one, equal protection, see Village of Willowbrook v. Olech, U.S.Ill.2000, 120 S.Ct. 1073, 528 U.S. 562.

Notes of Decisions**Judicial review 1****1. Judicial review**

Former employee of Department of Public Safety, who brought action seeking vindication of Personnel Management Act rights, failed to exhaust his administrative remedies, and thus,

Court of Appeals lacked jurisdiction over Act claim, where employee allowed his Career Service Review Board appeal to be dismissed for failure to prosecute. U.C.A. 1953, 67-19a-401(4)(a). Hom v. Utah Dept. of Public Safety, 1998, 962 P.2d 95, 347 Utah Adv. Rep. 50. Officers And Public Employees Ⓒ 72.41(2)

§ 67-19a-402. Procedural steps to be followed by aggrieved employee

(1)(a) A career service employee who believes he has a grievance shall attempt to resolve the grievance through discussion with his supervisor.

(b) Within five days after the employee discusses the grievance with him, the employee's supervisor may issue a verbal decision on the grievance.

(2)(a) If the grievance remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the supervisor's verbal decision, the employee may resubmit the grievance in writing to his immediate supervisor within five working days after the expiration of the period for response or receipt of the decision, whichever is first.

(b) Within five working days after the employee's written grievance is submitted, the employee's supervisor shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) Immediately after submitting the written grievance to his supervisor, the employee shall notify the administrator of the board that he has submitted the written grievance.

(3)(a) If the written grievance submitted to the employee's supervisor remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his agency or division director within ten

working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within five working days after the employee's written grievance is submitted, the employee's agency or division director shall issue a written response to the grievance stating his decision and the reasons for the decision.

(4)(a) If the written grievance submitted to the employee's agency or division director remains unanswered for five working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to his department head within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

(b) Within ten working days after the employee's written grievance is submitted, the department head shall issue a written response to the grievance stating his decision and the reasons for the decision.

(c) The decision of the department head is final in all matters except those matters that the board may review under the authority of Part 3.

(5) If the written grievance submitted to the employee's department head meets the subject matter requirements of Section 67-19a-302 and if the grievance remains unanswered for ten working days after its submission, or if the aggrieved employee is dissatisfied with the decision issued, the employee may submit the grievance in writing to the administrator within ten working days after the expiration of the period for decision or receipt of the decision, whichever is first.

Laws 1989, c. 191, § 15; Laws 1989, 2nd Sp Sess., c. 3, § 2; Laws 1991, c. 204, § 12.

Library References

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Notes of Decisions

Notice 1

1. Notice

Agency, as well as employee, is entitled to notice of issues to be raised before Career Ser-

vice Review Board (CSRB) in connection with review of disciplinary action Lunnan v Utah Dept of Transp , 1994, 886 P 2d 70, certiorari denied 892 P 2d 13 Administrative Law And Procedure ¶ 513, Officers And Public Employees ¶ 72 28

§ 67-19a-403. Appeal to administrator—Jurisdictional hearing

(1) At any time after a career service employee submits a grievance to the administrator under the authority of Section 67-19a-402, the administrator

R137-1-17. Jurisdictional Hearing.

A jurisdictional hearing is a formal adjudication conducted according to Subsection 67-19a-403(2)(b)(i) with Section 63-46b-8 of the UAPA incorporated by reference. An administrative review of the file is an informal adjudication according to Subsection 67-19a-403(2)(b)(ii) with Section 63-46b-4 of the UAPA incorporated by reference.

(1) Procedural Issues. The administrator shall determine the following: timeliness, standing, direct harm, jurisdiction, and eligibility of the issues to be advanced, and any other procedural matters or jurisdictional controversies according to Sections 67-19a-403 and 67-19a-404.

(2) Determination. The administrator shall determine which types of grievances may be heard at the evidentiary/step 5 level. Those types of grievances found to have been resolved at a lower level or those that do not qualify for advancement to the evidentiary/step 5 level are precluded from further consideration in any grievance submitted for CSRB consideration.

(3) Preclusion. Those types of actions not listed in Subsections 67-19a-202(1)(a) and 67-19a-302(1) are precluded from advancement to the evidentiary/step 5 level. When the grievance is precluded from the evidentiary/step 5 level, the matter under dispute shall be deemed as final at the level of the department head/step 4 written reply according to Subsection 67-19a-302(2).

(4) Reconsideration. A written request for reconsideration may be filed with the administrator. It must be filed within 20 days from the date that a jurisdictional hearing decision or an administrative review of the file decision is issued with Section 63-46b-13 of the UAPA incorporated by reference. The written reconsideration request must contain specific reasons why a reconsideration is warranted with respect to the factual findings and legal conclusions of the jurisdictional hearing decision or administrative review of the file decision. New or additional evidence may not be considered.

(5) Judicial Review.

(a) The aggrieved employee or the responding agency may appeal the administrator's formal adjudicative jurisdictional hearing decision and final agency action to the Utah Court of Appeals within 30 calendar days from the date of issuance according to Subsection 63-46b-14(3)(a) and Section 63-46b-16 of the UAPA which are incorporated by reference.

(b) The aggrieved employee or the responding agency may appeal the administrator's informal adjudicative decision and final agency action of an administrative review of the file to the district court according to Sections 63-46b-15 and 63-46b-17 of the UAPA which are incorporated by reference.

(6) Summary Judgment. The administrator may, pursuant to an administrative review of the procedural facts and circumstances of a grievance case, summarily dispose of a case on the ground that:

- (a) the matter is untimely;
- (b) the grievant has failed to appear at the properly scheduled date, time, and place pursuant to written notice;
- (c) the grievant lacks standing;
- (d) the grievant has withdrawn or otherwise abandoned the grievance;
- (e) the grievant has not been directly harmed;
- (f) the issue grieved does not qualify to be advanced beyond step 4; or
- (g) the requested remedy or relief exceeds the scope of these grievance procedures.

(7) Transcription and Transcript Fees. If a party appeals a jurisdictional hearing decision to the Utah Court of Appeals or to the district court, the appealing party is responsible for paying all transcription costs and any transcript fees. The CSRB does not participate in the payment of these fees when appeals are taken to the appellate or trial court. See Utah Rules of Appellate Procedure, Rule 11, and Section 63-46b-16(3), regarding transcript costs from formal adjudications under the UAPA.