

2006

Lorin Blauer v. Department of Workforce of Services, utah Career Service Reivew Board : Brief of Appellant

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. 20061177

Agency Decision No. 28 CSRB/
H.O. 408

Priority No. 14

PETITIONER'S BRIEF

Petition for Review of a Final Agency Decision by the
Career Service Review Board Dated December 6, 2006
in Agency Proceeding No. 28 CSRB/H.O. 408

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INTRODUCTION

Petitioner Lorin Blauer seeks review of a decision by the Utah Career Service Review Board entered December 6, 2006 (Addendum at Attachment 1).

JURISDICTION

By this Petition, Petitioner seeks review of an order issued by the Utah Career Service Review Board (“CSRB”), an administrative body created under Utah Code Ann. § 67-19a-201. CSRB’s ruling (Attachment 1) was entered despite an order issued by the Third Judicial District Court for Salt Lake County, State of Utah (Addendum at Attachment 2), directing that CSRB consider Petitioner’s claims as raised therein; notwithstanding that order; CSRB dismissed Petitioner’s remanded claims on jurisdictional grounds. Notwithstanding the nature of the dismissal, however, CSRB designated the ruling as the result of a “formal adjudicative proceeding,” appealable only to this Court under Utah Code Ann. § 63-46b-16. Jurisdiction therefore obtains pursuant to Utah Code Ann. § 78-2(a)-3(2)(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether CSRB’s December 6, 2006 ruling constituted a “formal adjudicative proceeding” under Utah Code Ann. § 63-46b-1, *et seq.*, depriving Petitioner of *de novo* review thereof by the Third Judicial District Court for Salt Lake County, State of Utah under Utah Code Ann. § 63-46b-15.

2. Whether, despite prior orders of the Third District Court in related litigation, CSRB erroneously declined subject matter jurisdiction over Petitioner's claims that

a. The DWS violated Utah Administrative Code R. 477-10-1, *et seq.*, by failing to define job performance parameters;

b. The DWS violated personnel rules by assigning job tasks to Petitioner falling outside of his job description, in violation of Utah Administrative Code R. 477-3-2 and 3;

c. The DWS engaged in unlawful harassment of, and retaliation against, Petitioner in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R. 477-15-2 and 3;

d. The DWS representatives violated Utah Administrative Code R. 477-2-5 by failing to maintain proper personnel records concerning Petitioner's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file;

e. The DWS violated Utah Administrative Code R. 477-7-7 by denying Petitioner administrative leave; and

f. The critical letters from DWS representatives, remaining in Petitioner's personnel file, constituted "written reprimands," grievable to CSRB pursuant to Utah Code Ann. § 67-19a-302(1).

CSRB's decision declines jurisdiction over the Remanded Claims, and is reviewable for correctness – by this Court under Utah Code Ann. § 63-46b-16(4)(d), or by the Third Judicial District Court for Salt Lake County, State of Utah under Utah Code Ann. § 63-46b-15. *Lopez v. Career Service Review Board*, 834 P. 2d 568 (Utah App. 1992).

**DETERMINATIVE CASE LAW AND
STATUTORY PROVISIONS**

Utah Code Ann. § 63-46b-8, 10, 14-16

Utah Code Ann.. § 67-19a-202, 302, 402 (2003)

Utah Admin. R. 477-1(31), (33), (35), (40), (56), (67), (68), (70), (71), (77), (78), (79),
(82), (85), (86), (92), and (96)

Utah Admin. R. 477-1(3), (31), (33), (34), (36), (40), (58), (69), Utah Code Ann.
§ 67-19a-403 (2003)

Utah Admin. R. 477-2-6-3

Utah Admin. R. 477-2-6-7(9) and (12)

Utah Admin. R. 477-3-3-1, 2, and 3

Utah Admin. R. 477-7-4(6)

Utah Admin. R. 477-7-5(1) and (2)

Utah Admin. R. 477-7-6(3) and (5)

Utah Admin. R. 477-7-7(1)

Utah Admin. R. 477-10-1-1 and 2

Utah Admin. R. 477-11-1

Utah Admin. R. 477-15-2 and 3

STATEMENT OF THE CASE

This petition relates to an action still pending before the Third Judicial District Court for Salt Lake County, State of Utah, styled: *Lorin Blauer, Plaintiff, v. Utah Dept. of Workforce Services, et al., Defendants*, Civil No. 040900221 (hereafter the “2004 Action”). In the 2004 Action, Petitioner (a veteran attorney and employee of the State of Utah) challenged, *inter alia*, violations of personnel rules incumbent on his employer, Respondent Utah Department of Workforce Services (“DWS”). In administrative proceedings before Respondent Utah Career Service Review Board (“CSRB”), Petitioner’s claims in this regard had been dismissed without hearing for lack of subject matter jurisdiction. DWS moved to dismiss the 2004 Action on the same basis, but the Third Judicial District Court for Salt Lake County disagreed, and remanded Petitioner’s claims to CSRB for adjudication.

On December 6, 2006, though, CSRB again declined jurisdiction of Petitioner’s claims of workplace rules violation, again without evidentiary hearing. Unlike the first jurisdictional dismissal, though, CSRB labeled its December 6, 2006 ruling the product of a “formal adjudicative proceeding”.

Petitioner responded not only with this petition, but with a supplemental filing before the Third Judicial District Court for Salt Lake County styled: *Lorin Blauer,*

plaintiff, v. Utah Department of Workforce Services and the Career Service Review Board of Utah, defendants (Civil No. 070900108) (“2007 Action”)¹. By order dated April 9, 2007, however, Judge Joseph C. Fratto of the Third District Court dismissed the 2007 Action, concluding that CSRB’s December 6, 2006 Order had been the result of a “formal adjudicative proceeding”.

The Third District Court has yet to take up the question whether, in dismissing the claims remanded to it by Judge Lewis’ order in the 2004 Action, CSRB disregarded that order.

STATEMENT OF FACTS

CSRB’s order dismissed remanded claims from the 2004 Action without hearing, stating that as a matter of law, Petitioner had asserted no cognizable claim. As such, this Court should assume the truth of all factual allegations before CSRB – *Russell Packard Development, Inc. v. Carson*, 2005 Utah 14, 108 P.3d 741; *Peterson v. Delta Airlines, Inc.*, 2002 Ut. App. 56, 42 P.3d 1253; *Snowflower Homeowner’s Association v. Snowflower, Limited*, 2001 Ut. App. 207, 31 P.3d 576. The Court must accept as true the following allegations, taken from Petitioner’s submittals before CSRB:

1. Grievant began employment with the Department of Employment Security (now DWS) in December of 1980 as a temporary, part time, employee. Effective

¹Petitioner filed the 2007 Action, rather than simply seeking relief in the 2004 Action, in order to meet the 30-day filing deadline imposed on challenges to final orders of administrative agencies under Utah Code Ann. § 63-46b-14(3)(a).

September 14, 1981 he achieved full time merit status as a Career Service Employee with the working title of Legal Counsel. He achieved such status specifically because of the quality of his work and because he was willing to “go the extra mile”. As Legal Counsel, Grievant’s tasks have included defending Board decisions in the Utah Court of Appeals and the Utah Supreme Court. In addition to hundreds of cases that have resulted in dismissals of appeals or unpublished decisions, Grievant has represented the Board in 20 cases that resulted in published decisions by the Court of Appeals and Supreme Court, with a 75% win rate. Grievant has the highest win rate of the current DWS Legal Counsel and more than twice the number of published decisions as other current Legal Counsel. Petition for Reconsideration, R. 27-149.

2. When Grievant first began work for the Department, those who held unemployment insurance hearings had the statutory title of Appeal Referee. In a bid to gain a higher level of respect from the parties to hearings, the Appeal Referees thereafter requested a change of title to Administrative Law Judge, which was later enacted. Letter R. 13-16; Petition for Reconsideration, R. 27-149.

3. From June 2, 1986 to December 1, 1986, by special written agreement between the Department and Grievant, Grievant served a temporary assignment, as an Appeal Referee, now titled Administrative Law Judge-DWS, in order to gain better understanding and insight into the role of Appeal Referee thus to be better able to fulfill his role as counsel to the Board of Review (now Workforce Appeals Board - hereinafter

“Board”). His return to his regular duties was guaranteed to take place at a specific time and at his regular pay plus any appropriate increases attached to his original job and pay range. Letter R. 13-16; Petition for Reconsideration, R. 27-149, at Attachment 2.

4. Historically, Grievant’s job description detailed his overall responsibilities and examples of probable duties. His position description questionnaire (PDQ) detailed his specific legal duties to DWS along with the percentage of his work time that was to be devoted to each duty. As his duties changed, so did his PDQ. For example, Grievant’s 1986 PDQ listed his duties with the Board to be 40% of his legal duties. In 1989 his PDQ shows his Board work to be 35% of his legal duties. His 1990 PDQ lists his Board related duties as 50% of his legal duties. His last PDQ, signed by Grievant and his then supervisor, Virginia Smith, on April 2 & 3, 1998 (Attachment 3), also lists his duties with the Board as 50% of his legal duties. Other than for the specific period of his temporary assignment as an Appeal Referee, none of Grievant’s PDQ’s included serving as, or performing the duties of, an Administrative Law Judge-DWS as part of his duties. Letter R. 13-16; Petition for Reconsideration, R. 27-149.

5. Historically, Grievant shared the responsibility of being counsel to the Board with one or two other attorneys. The case load for was fairly consistent for many years.

6. Beginning in 1998, though, there was a significant increase in caseload -- from 342 in 1998 to 445 in 1999; to 485 in 2000; to 585 in 2001; to 819 in 2002. Petition

for Reconsideration, R. 27-149, at Attachment 10. There were 971 Board cases during the fiscal year ended June 30, 2003. Petition for Reconsideration, R. 27-149, at Attachment 11 - page 3.

7. In Grievant's 2002 Performance Appraisal (Petition for Reconsideration, R. 27-149, at Attachment 12) his current immediate supervisor, Ms. Downing, gave Grievant a score of 60 points; just one (1) point less than the points needed for a "highly successful" rating. Grievant disagreed with that appraisal. He made two pages of typewritten comments wherein he noted specific errors in Ms. Downing's appraisal. He noted the additional duties to which he had been assigned since 1998; but without a change in his PDQ or a reduction of the other duties he was already performing. He also noted the health problems that he had been experiencing. Petition for Reconsideration, R. 27-149, at Attachment 13.

8. Grievant's physicians have also explained Grievant's health issues and need for accommodation to DWS in several letters. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149, at Attachments 14-19.

9. Grievant's objections were ignored; however, Grievant elected not to file a grievance in the interest of maintaining good relations with his supervisor. Petition for Reconsideration, R. 27-149.

10. At some point during the ramping up of responsibilities incident to Grievant's job responsibilities as set out above, Ms. Downing, Director of Adjudications,

determined to further alter Grievant's traditional duties as Legal\Enforcement Counsel III and reassign him to a combination of Legal Counsel and Administrative Law Judge-DWS duties. Petition for Reconsideration, R. 27-149.

11. In her performance appraisal signed June 26, 2003, Ms. Downing attempted to establish cause for an adverse employment action in order to accomplish her plan. She tried to establish this "cause" through an "unsuccessful" performance rating. Petition for Reconsideration, R. 27-149, at Attachment 20.

12. In her 2003 Performance Appraisal, Ms. Downing dropped Grievant's 2002 score 21 points from 60 to 39 points, from just one point below "highly successful" down to just two (2) points less than the points needed for a "successful" rating; she offered no objective, measurable evidence to support that precipitous drop, though. Instead, she claimed reliance on unsubstantiated information and allegations kept from Grievant. Petition for Reconsideration, R. 27-149.

13. On July 16, 2003 Grievant filed a five page response/grievance, wherein he noted numerous errors Ms. Downing made in her performance appraisal. Petition for Reconsideration, R. 27-149, at Attachment 11.

14. In an e-mail dated July 25, 2003, Ms. Downing acknowledged some of the errors she had made in her performance evaluation - particularly in regards to ratings on factors and criteria supportable by objective evidence - but refused to give Grievant the two additional points needed for a "successful" performance evaluation. Her reason was

her undocumented allegation that he was “not carrying his fair share of the workload.”

Petition for Reconsideration, R. 27-149, at Attachment 21.

15. Ms. Downing did not deny, or even respond to, most of the information Grievant provided in his response, including his information in the last paragraph of page two of his response that his case load for the Board had increased from 222 to 443 cases during that year. Petition for Reconsideration, R. 27-149, at Attachment 21.

16. Grievant had also noted that his Board work was 50% of his workload on his most recent PDQ (April 2, 1998) at which time his Board case load was 171 cases and now it was over 2½ that number. Ms. Downing refused to supply any evidence that Grievant was not carrying his fair share of the work load. Petition for Reconsideration, R. 27-149, at Attachments 11 and 21.

17. On July 28, 2003 Grievant appealed Ms. Downing’s unsuccessful performance rating to Executive Director Ms. Ireland. The primary basis for his appeal was that the rating was invalid because it was not based on a proper job or position description, proper and adequate performance plan(s), adequate, accurate, objective, or otherwise appropriate performance standards and criteria, or a proper or accurate interpretation of relevant facts and history. Grievant also argued that just correcting the errors Ms. Downing acknowledged in her July 25, 2003 response to his grievance should have been sufficient to give him the additional two points he needed to move from an unsuccessful to a successful rating. Petition for Reconsideration, R. 27-149.

18. In August 20, 2003, Grievant and his representative met with Ms. Downing and Joanne Campbell to discuss his performance management. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149.

19. Grievant pointed out that there was no performance plan in place upon which Ms. Downing could base an objective evaluation. He referred to the PDQ from which the performance plan should be derived and asked what criteria she used to evaluate Grievant's performance. Letter R. 5-12; Petition for Reconsideration, R. 27-149.

20. Except for identifying alleged negative comments of unidentified employees never shared with Grievant, Ms. Downing would not reveal any specific elements, criteria, or evidence of failure. She simply reiterated that Grievant's work was not timely nor was he carrying his fair share of the load. Letter R. 13-16; Petition for Reconsideration, R. 27-149.

21. Ms. Downing again implied that Grievant did not do "quality work," and made other vague observations as to others not wanting to work with him; however, when challenged, she did not produce any objective evidence to back up her statements. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149.

22. In response to the question what a "fair share of the workload" was, Ms. Downing said it was "difficult to quantify," and then actually asked Grievant what he thought others were doing. Grievant told her that he was not privy to that information. Petition for Reconsideration, R. 27-149.

23. Immediately after the meeting, Ms. Downing (through Joanne Campbell) suggested that Grievant should be an Administrative Law Judge-DWS because that position was easier to quantify and qualify but that they would leave his salary range and title unchanged. Grievant responded that this was not an appropriate solution. Letter R. 5-12; Petition for Reconsideration, R. 27-149.

24. In the past, Ms. Downing had frequently mentioned to Grievant that she did not fully understand Grievant's job, so Grievant offered to analyze the position and come up with some recommendations for not only some alternative combinations of duties, but also a performance plan with specific elements and criteria for rating the successful performance of those elements. Petition for Reconsideration, R. 27-149.

25. Ms. Downing voiced no objection to this plan; accordingly, Grievant offered in writing suggestions for two possible combinations of assignments that would accommodate his disabilities and meet the needs of the Department. Petition for Reconsideration, R. 27-149.

26. Grievant offered to further negotiate until he and they could come up with a solution that would fulfill the needs and interests of all concerned. Ms. Downing, though, rejected the offer and closed negotiations. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149, at Attachments 22 and 23.

27. In a letter dated September 5, 2003, Ms. Ireland, granted Grievant's appeal and awarded him a successful performance rating, thereby invalidating the cause for

Ms. Downing's intended adverse action. Petition for Reconsideration, R. 27-149, at Attachment 24.

28. Prior to the overturn of the unsuccessful performance rating, and during a Performance appraisal interview, Grievant again gave Ms. Downing notice of his health problems that should be accommodated. She refused to look at his information and said it was too late to be considered in his performance appraisal. Letter R. 5-12; Petition for Reconsideration, R. 27-149.

29. Ms. Downing did instruct Grievant that he had to ask for a determination of his ADA qualification; then she requested of Chuck Butler, DWS ADA Coordinator, a review of Grievant's need, and qualification, for ADA accommodation. Petition for Reconsideration, R. 27-149.

30. Mr. Butler made disbelieving and sarcastic remarks relative to Grievant's disabilities - particularly his sciatic nerve disorder. He questioned the authenticity of the Doctor's recommendations. He called Grievant's Doctor and made offensive remarks implying that the Doctor's recommendations were not genuine or valid. He declared that Grievant was not qualified for accommodation under ADA. Petition for Reconsideration, R. 27-149.

31. Nevertheless, Mr. Butler finally recommended that Ms. Downing consider his disabilities in making assignments. Petition for Reconsideration, R. 27-149.

32. Ms. Downing had been told by Grievant that he could perform his duties as Legal\Enforcement Counsel III to the Workforce Appeals Board with minimal, inexpensive accommodation to his physical health issues, but could not do the duties of Administrative Law Judge-DWS to the extent assigned without damage to his health - not even with the more extensive and expensive physical accommodations discussed. Letter R. 5-12; Petition for Reconsideration, R. 27-149.

33. During the years of his employment, Grievant carefully managed his sick leave account accruing 857 hours of Sick leave as of September 26, 2003, with the intent of buying paid up health insurance upon retirement. Petition for Reconsideration, R. 27-149.

34. Even though Ms. Downing could not impose the previously planned action as a “corrective action,” and even though she was fully informed of the physical impossibility of Grievant performing the functions of an Administrative Law Judge-DWS, she nevertheless carried out her “corrective action” demotion by referring to it as a “change of assignment”. In a letter dated September 9, she removed from Grievant all of his historical duties as Legal\Enforcement Counsel III and assigned him full time and exclusively to the lesser duties of Administrative Law Judge- DWS, a position distinctly different from his current position of Legal\Enforcement Counsel III. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149, at Attachment 25.

35. Given the information then at her disposal, Ms. Downing acted with full knowledge that Grievant could not physically perform the duties as assigned without injury. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149.

36. This was not a temporary assignment. Ms. Downing clearly stated that Grievant would no longer perform his duties as Legal\Enforcement Counsel III, including being Legal Counsel to the Workforce Appeals Board, and would henceforth only perform the duties of Administrative Law Judge-DWS. Petition for Reconsideration, R. 27-149, at Attachment 25, page 1, paragraph 1.

37. Ms. Downing listed numerous alleged events and representations as giving specific “cause” for her action. None of them, though, has been documented in any way in Grievant’s personnel file, nor have they been presented to Grievant for rebuttal; neither has he been granted a meaningful hearing on any of them. Petition for Reconsideration, R. 27-149.

38. Ms. Downing’s action was instituted without warning to Grievant or opportunity for him to be heard by the Department Head. Petition for Reconsideration, R. 27-149.

39. Grievant appealed Ms. Downing’s action to demote to Ms. Ireland. Petition for Reconsideration, R. 27-149.

40. In a letter dated October 14, 2003, Ms. Ireland upheld Ms. Downing’s action. Letter R. 5-12; Petition for Reconsideration, R. 27-149, at Attachment 26.

41. Grievant again notified DWS that he could not perform the functions of an Administrative Law Judge-DWS but could do the work of Legal Counsel, especially counsel to the Board. He notified that he could do much of that work from his home as he had done in the past. Ms. Ireland essentially ignored his offer to work and made disparaging and sarcastic remarks about Grievant's need for sick leave. Letter R. 5-12; Letter R. 13-16; Petition for Reconsideration, R. 27-149, at Attachment 27.

42. Because Grievant could not safely perform the new combination of duties, he requested administrative leave until the problems could be resolved. Letter R. 1; Letter R. 18-19; Petition for Reconsideration, R. 27-149.

43. Ms. Ireland suggested that she did not believe that she could allow Administrative leave, but would check into it. Later she refused his request, insisting that he go on extended FMLA sick leave despite his offer to do Board work. Letters R. 1, 18-19; Petition for Reconsideration, R. 27-149, at Attachment 27.

44. In his October 15, 2003 letter, placing Grievant on FMLA leave, DWS Human Resources Director, Kevin Beutler requested that additional medical information be submitted to him by November 14, 2003, to justify Grievant's continuing on FMLA medical leave. Grievant's Doctor supplied a letter stating that Grievant did not need to be on medical leave; that he was fit - and always had been fit - to continue his regular duties as Legal Enforcement Counsel III. He stated he had recommended that Grievant "be placed on FMLA sick leave, not because he couldn't work, but to protect his health

because the letters from the Department revealed that they were forcing him to perform a combination of duties that [the doctor] specifically advised against under conditions that were unnecessarily stressful.” He concluded that “Grievant should return to work only when these issues are appropriately addressed . . . [and] [t]hat seems to be in the control of the Department, not Grievant.” Petition for Reconsideration, R. 27-149, at Attachment 28.

45. On or about November 13, 2003, Grievant’s representative delivered the Doctor’s letter to Mr. Beutler. Mr. Beutler then stated to the representative that Grievant was a “slacker”; that there were “affidavits in his file” including “signed statements and notarized statements” to the effect that Grievant was “lazy”; that he “did the minimum he could get away with”; that he had been caught “asleep in his office with his head on his desk”; that “no one wanted to work with him”; and that “everyone wanted to work around him but not through him”. Petition for Reconsideration, R. 27-149.

46. Upon hearing the request that those statements and affidavits be produced for review and rebuttal, Mr. Beutler said that they would not let Grievant examine evidence and would continue to refuse to allow it. Petition for Reconsideration, R. 27-149.

47. On November 21, 2003, Grievant and his Representative went to the DWS personnel office to view Grievant’s personnel file. They were told by staff that there was no paper file; only a computer file of microfilmed documents. There were no affidavits

or notarized statements in Grievant's computerized personnel file of the kind Mr. Beutler had identified. Ms. Downing's unsuccessful 2003 performance appraisal was still in the computerized file. Ms. Ireland's September 5, 2003 letter overturning Ms. Downing and granting Grievant a successful performance appraisal was not in the file. Other significant documents were missing. Petition for Reconsideration, R. 27-149.

48. Plaintiff filed the 2004 Action on January 7, 2004. In his Complaint, Plaintiff claimed that DWS improperly took corrective action against him. R. 565-575.

49. Before filing the 2004 Action, Plaintiff sought relief before CSRB; CSRB, however, conducted a preliminary jurisdictional review pursuant to Utah Code Ann. § 67-19a-403(2)(a), and determined that it had jurisdiction over none of Plaintiff's claims herein. R.

50. By his First Claim for Relief in the 2004 Action, therefore, Plaintiff sought *trial de novo* of all issues raised before CSRB, as to which it had declined jurisdiction. R. 565-575.

51. The parties to the 2004 Action thereafter filed cross dispositive motions. By Memorandum Decision dated August 16, 2004 in the 2004 Action, the trial Court dismissed certain of Plaintiff's claims therein. All other issues asserted in the 2004 Action, however, were preserved by the Third District Court as follows:

Given the Court's decisions above, it appears that the only remaining issue is the CSRB's refusal to consider the Plaintiff's remaining grievances based upon alleged violations of the personnel rules. The Court concludes that Plaintiff, in his Request for Reconsideration before the CSRB, preserve all

of his remaining allegations concerning the Defendant's violations of the Personnel Management Act However, rather than determining whether the violations actually occurred, it appears from the dialogue with Plaintiff's counsel during oral argument, that he would prefer to have these matters transferred back to the CSRB for consideration. Accordingly, to the extent that the Plaintiff's Motion for Summary Judgment seeks a renewed opportunity to have the CSRB consider his grievance related to the alleged violations of the personnel management act, the Court grants the same and remands the matter back to the CSRB.

Memorandum Decision in the 2004 Action, R. 576-581, at pp. 3-4.

52. The Court's ruling in its Memorandum Decision in the 2004 Action (R. 576-581) was reflected in its Order of December 8, 2004 (R. 582-590, Addendum at Attachment 2), in which the Court remanded the following issues back to CSRB for further determination ("Remanded Claims"):

- a. The DWS violated Utah Administrative Code R. 477-10-1, *et seq.*, by failing to define job performance parameters;
- b. The DWS violated personnel rules by assigning job tasks to Plaintiff falling outside of his job description, in violation of Utah Administrative Code R. 477-3-2 and 3;
- c. The DWS engaged in unlawful harassment of, and retaliation against, Plaintiff in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R. 477-15-2 and 3;
- d. The DWS representatives violated Utah Administrative Code R. 477-2-5 by failing to maintain proper personnel records concerning Plaintiff's

performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file;

e. The DWS violated Utah Administrative Code R. 477-7-7 by denying Plaintiff administrative leave; and

f. The critical letters from DWS representatives, remaining in Plaintiff's personnel file, constituted "written reprimands," grievable to CSRB pursuant to Utah Code Ann. § 67-19a-302(1).

53. Following affirmation of the Court's Order in the 2004 Action by this Court, Plaintiff requested a hearing on the Remanded Claims before the CSRB. DWS then filed a Motion to Dismiss the Remanded Claims, placed before CSRB by Order of this Court in the 2004 Action, again on jurisdictional grounds. R. 465-632.

54. When DWS' Motion to CSRB to dismiss the Remanded Claims was placed before the trial Court in the 2004 Action, in further support of Plaintiff's Motion to Reconsider Remand therein, the Court deferred ruling on the Motion, and indicated an intent to await CSRB's disposition of the Motion to Dismiss the Remanded Claims. In her ruling, Judge Lewis stated the following:

. . . [T]he defendant's recent filing of a Motion to Dismiss before the CSRB puts an entirely new complexion on the plaintiff's pending Motion to Reconsider. Specifically, the defendant's Motion essentially argues that the CSRB does not have jurisdiction and ought not to consider the claims previously remanded to it by this Court. Given this Court's prior rulings, the purpose of this Motion remains unclear.

The Court will await a decision by the CSRB on the defendant's Motion to Dismiss before reaching a definitive decision on the plaintiff's Motion to Reconsider The Court will defer ruling on the Motion to Reconsider until it hears from counsel.

See Addendum at Attachment 3.

55. By Decision dated December 6, 2006 (Addendum at Attachment 1), CSRB dismissed the Remanded Claims, holding – despite the Third District Court's Order in the 2004 Action – that it lacked jurisdiction to hear the Remanded Claims. R. 659-673.

56. Despite basing its decision on jurisdictional grounds (precisely as it had done prior to Plaintiff's filing of the 2004 Action), CSRB claimed to have afforded Plaintiff a “formal adjudicative proceeding” within the meaning of Utah Code Ann. § 63-46b-8, and notified him that his sole remedy was a petition for review of the record by the Utah Court of Appeals under Utah Code Ann. § 63-46b-16. R. 659-670.

57. Upon receipt of CSRB's Decision (R. 659-670), Plaintiff renewed his Motion to Reconsider Order of Remand in the 2004 Action (as contemplated in Judge Lewis' October 30, 2006 ruling (R. 674-676); as of this filing, however, no ruling has issued thereon in the 2004 Action.

SUMMARY OF ARGUMENT

Neither DWS nor CSRB should have been permitted to place this matter in such a posture that it appears before this Court at all. The claims remanded by the Third Judicial District Court for Salt Lake County, State of Utah in the 2004 action were to have been heard by CSRB; its determination that it lacked jurisdiction to hear those claims had

already been overturned. By simply repeating its disagreement with the Third District Court in the 2004 action, and labeling its decision as a result of a “formal adjudicative proceeding”, however, CSRB has managed to avoid enforcement, by the Third District Court, of its own order in the 2004 action. Courts of general jurisdiction in the State of Utah retain inherent jurisdiction to enforce their own orders. On this basis alone, this matter should be remanded to the Third District Court for consolidation into the 2004 action.

In addition, Petitioner was afforded no more a “formal adjudicative proceeding” in the second jurisdictional hearing before CSRB than it received in the first such hearing. Without considering any additional evidence, without reviewing any additional documentation, without hearing a single word of testimony from Petitioner or any other witness, CSRB again dismissed the remanded claims on subject matter jurisdiction grounds. This procedure was a “jurisdictional review” under Utah Admin. R. 477-1(3), (31), (33), (34), (36), (40), (58), (69), Utah Code Ann. § 67-19a-403, not a “formal adjudicative proceeding” affording Petitioner due process and warranting an appeal directly to this Court. A full *de novo* review was warranted by the Third District Court.

Setting aside procedural improprieties, CSRB improperly declined jurisdiction over each of the remanded claims. On the face of the record before, CSRB had clear evidence that DWS had violated Utah Administrative Code R. 477-10-1, *et seq.*, by failing to define his job parameters. Similarly, evidence on the face of CSRB’s record

demonstrated that DWS had violated personal rules by assigning Petitioner responsibilities falling outside of his job description in violation of Utah Administrative Code R. 477-3-2 and 3. Ample evidence before CSRB established that DWS had engaged in unlawful harassment of, and retaliation against, Petitioner in connection with his requests for disability accommodations in violation of Utah Administrative Code R. 477-15-2 and 3; CSRB's observation that such claims would also support the claim for discrimination under state or federal anti-discrimination law does not render them any less a violation of "personnel rules", falling squarely within its jurisdiction and mandating adjudication. Evidence before CSRB warranted hearing on Petitioner's claim that DWS representatives had violated Utah Administrative Code R. 477-2-5 by failing to maintain proper personnel records concerning his performance, and by refusing him access to such documentation. CSRB should have considered whether DWS abused its discretion in denying Petitioner administrative leave under Utah Administrative Code R. 477-7-7. Finally, Petitioner was entitled to hearing concerning DWS's failure to remove "written reprimands" from his personnel file.

ARGUMENT

POINT I. THIS MATTER SHOULD BE TRIED *DE NOVO* BEFORE THE THIRD JUDICIAL DISTRICT COURT

As a threshold issue, this matter should have been retained by the Third Judicial District Court, and not placed before this Court at all. CSRB disregarded entirely a standing order of the Third Judicial District Court remanding the Remanded Claims for

disposition, dismissing Petitioner's claims again on jurisdictional grounds, again without hearing on their merits. CSRB's ruling was erroneous on two grounds.

A. The Third District Court Should Retain Jurisdiction Over Plaintiff's Claims by Virtue of its Rulings and Orders in the 2004 Action

Both DWS and CSRB make the assumption that, by creatively labeling CSRB's disregard of this Court's Order in the 2004 action as a "formal adjudicative proceeding," CSRB could sidestep the Third District Court's orders in the 2004 Action, taking that Court "out of the loop" and forcing Petitioner before a new Court for limited review. Their argument in this regard, though, ignores a fundamental tenet of statutory and common law.

Utah Code Ann. § 78-3-4(2) confers upon the district courts of the State of Utah power to issue orders and writs "necessary to carry into effect their orders, judgments, and decrees". This provision is a recognition of a long-standing tenet of common law: That all courts retain inherent jurisdiction to enforce their own orders. This principle was recognized in the case of *JJW v. State of Utah*, 2001 Ut. App. 271, 33 P.3d 59; *see also*, *Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996); *Phone Directories Company, Inc. v. Clark*, 2006 WL 3735500 (10th Cir. 2006); *Demorizi v. Demorizi*, 28 Fla. Law Weekly D1747, 851 So. 2d 243 (Dist. Fla., 3rd Dist. 2003); *In Re Marriage of Hartman*, 305 Ill. App. 3d, 338, 712 N.E.2d 367 (Ct. App. Ill. 2nd Dist. 1999).

The Third District Court remanded to CSRB issues presented to it on cross-motions for summary judgment, with the express directive that they be heard on their merits. In so ruling, the lower Court expressly rejected the notion that CSRB lacked jurisdiction to hear those claims – as CSRB had decided prior to the filing of the 2004 action. Upon remand, CSRB flatly disregarded the Court’s order, finding once again that it lacked jurisdiction over the very claims which it had been directed to hear and resolve on their merits.

It was for this reason that Petitioner (in addition to filing this Petition) renewed his motion to the Court in the 2004 action, seeking that the Court reconsider its Order of Remand, and grant trial *de novo* on the remanded claims; the sole reason for this Petition being filed is the fact that the Court in the 2004 action has yet to rule on that motion. If this Court buys into the argument that this Petition is properly before it because CSRB afforded Petitioner a “formal adjudicative proceeding”, it perpetuates the very conundrum for which Defendants in this action are hoping, and which they have successfully created in this case all along: multiple proceedings at cross purposes, none of them reaching the merits of Plaintiff’s claims. It is submitted that this case should be consolidated with the 2004 case, the Motion to Reconsider and Consolidate the remanded claims in that case granted, and this matter heard on its merits before the Third District Court.

B. The Second Motion to Dismiss Before CSRB Was No More a “Formal Adjudicative Proceeding” Than Was the First

CSRB and DWS invoked administrative regulations for the proposition that, while CSRB’s first rejection of jurisdiction over Plaintiff’s claims was an “informal adjudicative proceeding,” the second rejection was a “formal adjudicative proceeding” because a hearing officer heard oral argument. The distinction, however, ignores the definition set up by the Utah Legislature.

Under Utah Code Ann. § 63-46B-8, a “formal adjudicative proceeding” must afford a petitioner certain rights and opportunities:

Except as provided in subsection 63-46B-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions . . .

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

By its express terms, CSRB’s Order of Dismissal was based purely on documentation already before it incident to its prior dismissal of Plaintiff’s grievances, which was overturned by Judge Lewis in the 2004 action.

In related proceedings, DWS has cited the case of *Lopez v. Career Service Review Bd*, 834 P.2d 568 (Utah App. 1992) for the proposition that a jurisdictional hearing is always a “formal adjudicative proceeding” if CSRB so designates it. *Lopez*, however,

holds just the opposite. In that action, the Respondent agency submitted a full “chronology” of events and documents, which the Petitioner in that case agreed to accept as its case. For his part, the Petitioner presented evidence from the stand for approximately three hours. The Court of Appeals concluded that, under these circumstances, the Petitioner had received all procedural rights indicated under § 63-46(b)-8 as prerequisite to a “formal adjudicative proceeding”. Plaintiff in this action, by contrast, received no such consideration – he has now been thrown out from the CSRB twice (despite Judge Lewis’ order in the 2004 action) without ever being able to present evidence, question witnesses, present rebuttal, etc. No less than the CSRB ruling giving rise to the 2004 action, the order forming the basis of this action was not a “formal adjudicative proceeding”, under any possible reading of the governing statute. As such, Plaintiff is entitled to his “day in court” before the Third District Court.

Concerning CSRB’s own label for its order, it is meaningless. In the case of *Alumbaugh v. White*, 800 P.2d 825 (Utah App. 1990), the Court concluded that: “the administrative review of petitioner’s grievance file, without a hearing, is properly characterized as an informal adjudicative proceeding under the Utah Administrative Procedure Act, Utah Code Ann. § 63-46(b)-5 . . . and . . . that Rule 140-1-17(B) of the Career Services Review Board designating all adjudicative proceedings before the Career Services Review Board as formal adjudicative proceedings does not apply, and could not properly apply, to the summary dismissal of the grievance by the administrator upon a

review of Petitioner's file and in the absence of the hearing." 800 P.2d at 825.

Alumbaugh stands for the proposition that, however labeled, a proceeding before CSRB which does not afford the Petitioner an evidentiary hearing is not a "formal adjudicative proceeding", and neither the hearing officer's statement to the contrary, nor the wording of an administrative rule, can change that. A "formal adjudicative proceeding", in short, was precisely what this Court, in the 2004 action, remanded this matter to the CSRB to conduct. Instead, CSRB conducted a non-evidentiary hearing "the sole purpose [of which] . . . was to more fully consider the Agency's Motion to Dismiss". In the wake of that proceeding, and with no further proceedings, CSRB took precisely the same position which it had taken in response to Plaintiff's first petition, before the 2004 action was filed: It had no jurisdiction over the Remanded Claims. This decision was reached without any evidence, without any cross-examination, without any right of confrontation of witnesses – without any rights or opportunities granted to Plaintiff that had not been granted the first time, other than the opportunity to argue his position verbally as well as in writing.

It was clearly concern over the prospect of CSRB acting in precisely this fashion which caused Judge Leslie Lewis, in her ruling of October 30, 2006 in the 2004 action (Exhibit 5 hereto), to reserve judgment on Plaintiff's Motion to Reconsider her order of remand until she saw what CSRB would do with DWS's Motion to Dismiss. CSRB has clearly acted precisely as Judge Lewis feared. For this Court to condone CSRB's

unilateral classification of its conduct as a “formal adjudicative proceeding”, unaccompanied by any of the statutorily-mandated attributes of such a proceeding, is clearly not warranted by law.

POINT II. CSRB IMPROPERLY DECLINED JURISDICTION OVER THE REMANDED CLAIMS

Even setting aside its disregard of Judge Lewis’ rulings in the 2004 action, CSRB’s refusal to afford a hearing on the remanded claims was no more proper than the first jurisdictional refusal reversed by Judge Lewis. Each of the six remanded claims will be addressed in turn.

A. DWS Violated Utah Administrative Code R. 477-10-1, *et seq.*, by Failing to Define Petitioner’s Job Parameters

CSRB declined jurisdiction to consider whether DWS had failed to define Petitioner’s performance standards and expectations in compliance with DHRM 477-10-1, observing that Petitioner had previously raised the inadequacy of his job description incident to his July 16, 2003 Response to Performance Appraisal/Grievance, filed in response to the unsuccessful performance rating received from Supervisor Tani Downing (R. 528-533). Since that grievance was ultimately resolved in Petitioner’s favor, and since he therefore did not pursue it further, CSRB reasoned, it lacked jurisdiction to consider the matter as part of Petitioner’s later grievance when – clearly in retaliation against him for having successfully grieved her unsuccessful performance rating – Tani Downing took “corrective action” against him. In proceedings before CSRB, DWS held

up the July 18, 2003 “Performance Plan/Evaluation” (R. 534-546), arguing that the matter was therefore moot.

Utah Administrative Code R. 477-10-1, *et seq.*, governs career service employee evaluation procedures incumbent upon state agencies including DWS. Thereunder, performance standards and expectations for each employee must be specifically written in a performance plan by August 30 of each fiscal year. Supervisors are to provide employees with regular verbal and written feedback based upon the standards of performance and conduct outlined in the performance plan. Management must adopt a rating system by August 30 of each fiscal year, to be effective for the entire year.

Contrast the standard imposed by R. 477-10-1 against the vague guidelines imposed upon Petitioner by Ms. Downing in conjunction with his 2003 job performance review (and again following the “reassignment” which followed, reversal of the performance review notwithstanding) – R. 505-522; 534-546. By CSRB’s own admission, these are the “performance plans” upon which it relied in dismissing Petitioner’s claims. The Court will search in vain for any qualifying elements of a “performance plan” under R. 477-10-1 against which Petitioner could objectively measure his job performance during the time period in question. Agency expectations concerning Petitioner’s job performance had long since parted company with any written job description applicable to his position. Workload had increased dramatically.

Additional responsibilities were being woven in by DWS without input or authority from DHRM.

Then, in the face of these unwarranted and undefined changes in job responsibilities, Petitioner was notified that he was not doing his fair share of the work - even though his own supervisor was unable to articulate the nature of the work, or the amount thereof constituting Petitioner's fair share, and even though the resulting unfavorable performance review was overturned (yet mysteriously left largely unaltered in the personnel file).

It is the nature of career service employment that the employee is given an objective, measurable standard against which to compare his job performance. DWS, to be blunt, has thrown the requirements of R. 477-10-1 to the winds, and CSRB has sanctioned its actions. Any employment action concerning Petitioner's position taken by DWS in such an administrative vacuum, constitutes a *per se* violation of the rule.

The 2003 "Performance Plan/Evaluation" (R. 534-546) was no more adequate to satisfy the requirements of R. 477-10-1 than was the December 29, 2000 "Performance Plan/Evaluation" (R. 505-522). Petitioner is entitled to a determination whether, on its face, the Performance Plan/Evaluation offered by DWS is adequate to satisfy the regulatory requirement. CSRB's claim that it lacks jurisdiction to make this determination was manifest error.

B. DWS Violated Personnel Rules by Assigning Job Tasks to Petitioner Falling Outside of His Job Description, in Violation of Utah Administrative Code R. 477-3-2 and 3

From Petitioner's last genuine "performance plan" to the time of his 2003 performance evaluation, there were numerous intervening changes in his job assignments and responsibilities - all without supporting authority from DHRM. It was on these job modifications, together with the drastic increase in workload, that Ms. Downing apparently relied in her personnel decisions concerning Petitioner. Ms. Downing's modification of Petitioner's job responsibilities in this manner must fall outside the broadest interpretation of Utah Administrative Code R. 477-3-3 concerning discretion to modify job responsibilities - it made no sense to saddle Petitioner with additional responsibilities when the workload for DWS's legal counsel was so overwhelming. Considering that Ms. Downing's main complaint against Petitioner was that he was not carrying his "fair share," the imposition of additional responsibility seems particularly egregious.

CSRB counters all the foregoing by observing that, in its decision in *Blauer v. Department of Workforce Services*, 128 P.3d 1204 (Utah App. 905), this Court held that Petitioner's "reassignment" to the holding of administrative hearings full-time did not constitute a "demotion." From this, CSRB reasoned that it also did not constitute an assignment to task falling outside of Petitioner's job description. In this, CSRB engaged herein an unwarranted leap of logic – the issue of whether Petitioner was improperly

“demoted” is separate and apart from whether he had been “reassigned” in violation of his job description.

Simply put, Petitioner’s reassignment to do unemployment hearings *full-time* fell afoul of his only standing job description, which contemplated “special assignments” on a *limited basis*. To permit “special assignments” to consume the entirety of his time (particularly when he was physically and psychologically unable to assume such responsibilities – see below) constitutes far more than a mere “modification” of his duties.

In this regard, Petitioner certainly acknowledges the content of R. 477-3-3, providing that “management may assign, modify or remove any employee task or responsibility in order to accomplish reorganization, improve business practices or process, or for any other reason deemed appropriate by the department administration.” To permit application of this rule to transform a Legal/Enforcement Counsel III to a full-time Administrative Law Judge – a separate and distinct job classification under the DHRM system – would be to permit the exception to swallow the rule. It is submitted that the holding of administrative law hearings was not a “core function” of Petitioner’s job description at all, but a distinctly peripheral one. To turn it into Petitioner’s *sole* function (particularly when physical and psychological limitations prevented Petitioner from performing that function – see below) goes far beyond what the rule intended, and constitutes a violation thereof.

C. CSRB Should Have Heard Petitioner’s Claim That DWS Representatives Engaged in Unlawful Harassment Of, and Retaliation Against, Petitioner in Connection With the Request for Accommodation of Disabilities, in Violation of Utah Administrative Code R. 477-15-2 and 3

Citing Utah Administrative Code R. 137-1-5, CSRB dismissed out of hand Petitioner’s claim that DWS’s conduct toward him, with respect to his disability claims, fell within CSRB jurisdiction, concluding that all such claims “are not admissible under . . . grievance procedures.” In this regard, CSRB disregarded three fundamental facts.

First, Utah Administrative Code R. 477-15-2 and 3 specifically prohibit discriminatory treatment based upon race, religion, national origin, color, sex, age, protected activity or disability. This, no less than any other rule incumbent upon DWS, constitutes a “personnel rule.” The Utah Legislature has conferred upon CSRB jurisdiction “to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, *violations of personnel rules . . .*” Utah Code Ann. § 67-19a-202(1)(a) (emphasis added). CSRB’s rule-making authority (on which CSRB expressly relied in enacting R. 137-1-5 – *see* R. 137-1-1) is found in Utah Code Ann. § 67-19a-203. *Nowhere* in that Section is CSRB authorized to enact rules limiting its jurisdiction. In other words, the Legislature conferred upon CSRB jurisdiction to hear grievances, by career service employees, of personnel rule violations, but did not confer upon CSRB the power to

invoke its rule-making authority in limiting that jurisdiction. As such, CSRB may not decline jurisdiction of Petitioner's claims under R. 477-15-2.

Second, R. 137-1-5(1) is limited to "claims alleged to be based upon a legally prohibited practice as set forth in Section 34A-5-106." By its express terms, the rule has no application to claims based upon R. 477-15-2 and 3. The fact that that provision incorporates standards from both the Americans with Disabilities Act and the Utah Anti-Discrimination Act does not automatically move it beyond CSRB's jurisdiction. Because discrimination standards have been incorporated as a personnel rule incumbent upon DWS, and because DWS has violated that rule in its treatment of Petitioner, CSRB is clothed with jurisdiction to hear the claim.

Third, Petitioner has *attempted* to seek redress against DWS for unlawful discrimination by challenge before proper administrative bodies. His efforts were met by the Court's Memorandum Decision of August 8, 2006 in the 2004 action (R. 628-632). Therein, the Third District Court came to the startling conclusion that public employees *have* no rights under the Americans with Disabilities Act:

During oral argument, counsel for the plaintiff raised the interesting issue of whether the defendants' argument concerning immunity would effectively create a "Catch 22" for state employees seeking redress under the ADA. Defense counsel sought to rebut this conclusion as inaccurate and pointed to administrative procedures and remedies which are available to employees claiming discrimination. *Because these procedures may not provide the full scope of redress available under the ADA, there remains a valid concern that under the state's theory of sovereign immunity from ADA claims, the ADA is rendered meaningless for an entire class of employees. While this*

Court is mindful of these concerns, its role is construe the law and properly apply it.

Memorandum Decision of August 8, 2006 in the 2004 action (R. 628-632) at p. 2 (emphasis added). The Third District Court, then, concluded that Petitioner's claims of unlawful discrimination could not be brought against the State of Utah through the same channels available to private employees, the State enjoying sovereign immunity from those claims. CSRB now asserts that, even though anti-discrimination provisions have been included in personnel rules incumbent upon DWS, CSRB has no jurisdiction to hear grievances based thereon. In short, the State of Utah has put Petitioner through a half-decade shell game, seeking vindication of DWS' discrimination against him, only to be told at every turn that, meritorious or not, his claims may not be redressed. At some point, before some forum, DWS needs to be held accountable for its conduct.

D. CSRB Should Have Exercised Jurisdiction Over Petitioner's Claim That DWS Representatives Violated Utah Administrative Code R. 477-2-5 by Failing to Maintain Proper Personnel Records Concerning Petitioner's Performance, and by Refusing Access to Alleged Documentation Supposedly Reflecting Negatively on His Job Performance, and Claimed to Be in His Personnel File

Utah Administrative Code R. 477-2-5 governs the maintenance of personnel records by DHRM. The file is to be computerized, and must contain, among other things, all performance records, "any documents affecting the employee's conduct, status or salary" (Utah Administrative Code R. 477-2-5(1)(e)). Under subsection 3 of the rule, employees have the right to review their personnel file upon request, and challenge any

information contained therein through specified process. Under subsection 4, when a disciplinary action is rescinded or disapproved upon appeal, any forms, documents and records pertaining thereto must be removed from the file.

Supposedly, Petitioner successfully challenged his unsuccessful performance rating in 2003. Yet his examination of the computerized personnel file showed that it had not been removed. Reportedly, Petitioner's personnel file was littered with affidavits, statements, memoranda, etc. making his out to be lazy and unproductive, and amply justifying adverse job actions taken against him - yet upon Grievant's examination of his file, none of this documentation was present.

Petitioner was entitled, at the very least, to an order of compliance by DWS with the mandates of R. 477-2-5, and to an airing of DWS' violation thereof.

E. DWS Abused Its Discretion in Denying Petitioner Administrative Leave, in Violation of Utah Administrative Code R. 477-7-7

Utah Administrative Code R. 477-7-7(1)(a)(iv) provides for the granting of administrative leave for reasons "consistent with agency policy." There could be no more emphatic statement of agency policy than that contained at Utah Administrative Code R. 477-15-1, *et seq.*, concerning prohibited acts of harassment against individuals due to disability, or retaliation against them for engaging in protected activity. Petitioner's basis for seeking administrative leave was DWS's flagrant violation of these provisions, as addressed above - yet Ms. Ireland waived them aside, saying that Petitioner must exhaust

sick leave. Whether that decision was right or wrong, a grievance taken therefrom is clearly within CSRB jurisdiction.

CSRB waives all of this aside by observing that there is no “specific and designated basis for mandatory approval of administrative leave in the applicable DHRM rules”. (R. 688) In R. 477-7-7(1)(b)(iii) suggests (if it does not mandate) administrative leave for “removal from adverse or hostile work environment situations”. As is manifest throughout the record, circumstances arising from the petitioner’s work environment were creating an intolerable situation for Petitioner. *See*, most notably, Letter of July 31, 2003 from Dr. Dennis R. Peterson, M.D. (R. 122).² CSRB’s suggestion that this issue rests upon nothing but “bare bones allegations” (R. 688) is simply untrue. Certainly, Petitioner should have been afforded an evidentiary hearing on the point.³

F. Petitioner Was Entitled to a Hearing Concerning Removal of “Written Reprimands” From His Personnel File

Utah Code Ann. § 67-19a-302(1) confers jurisdiction upon CSRB to hear grievances from “written reprimands”. The term “written reprimand” is not a defined

² “It is important that Lorin minimize stressful circumstances which increase adrenalin-induced cardiac output and create a potential catastrophe. In light of recent precipitation of chest pain by stresses related to his grievance/appeal, I strongly recommend that Lorin be placed on administrative leave until the grievance and related issues are satisfactorily resolved.” (R. 122)

³Petitioner acknowledges that DWS enjoyed a measure of discretion on this issue. No administrative agency of the State of Utah, however, should enjoy absolute and unfettered discretion, and CSRB’s mandate includes a review of whether agencies abuse their discretion – *Holland v. Career Service Review Board*, 856 P.2d 678 (Utah App. 1993); *Utah Dept. of Corrections v. Despain*, 824 P.2d 439 (Utah App.1991).

term under Utah Code Ann. § 67-19a-302(1). Utah Administrative Code

R. 477-11-1(3)(a), however, refers to a “written reprimand” as a means of discipline to be imposed on a career service employee after the employee has been notified of reasons for proposed discipline, given an opportunity to respond, and furnished procedural rights (none of which happened in Petitioner’s case - see above).

The Court is referred to letters of July 25, 2003 (R. 135), September 5, 2003 (R. 138-139), and October 14, 2003 (R. 143-145). They can hardly be viewed as other than “written reprimands” under the above-referenced regulatory standard. These remain in Petitioner’s personnel file and his right to challenge their correctness, and seek their removal, is clearly within CSRB’s jurisdiction.

CSRB, however, dismisses all of the foregoing by claiming that it is “moot”— that Petitioner was dismissed for “job abandonment”, rather than for performance reasons.

First, nothing in the law cited by DWS or CSRB limits Petitioner’s right to challenge written reprimands by reason of termination of his employment on unrelated grounds. At the time the challenge was made, Petitioner was a “career service employee”, and his challenge was within CSRB’s jurisdiction.

Second, CSRB’s observation completely misses the entire point of this case: Tani Downing, Petitioner’s superior, has openly admitted that his “reassignment” to conduct unemployment hearings full time were driven by performance concerns—concerns which have yet to be tested in any evidentiary hearing before any tribunal, administrative or

judicial. *See, e.g.*, September 9, 2003 “Change of Assignment” (R. 140). It was Petitioner’s inability to function as a full-time Administrative Law Judge, for physical and psychological reasons, well known to DWS, that he was unable to return to work after a year of long-term disability leave, and was therefore terminated for “job abandonment”. CSRB’s suggestion that that termination moots the reprimands which resulted in the very reassignment which compelled his separation from DWS creates yet another “Catch-22” scenario for Petitioner to deal with in this matter.

CONCLUSION

Since September of 2003, Petitioner Lorin Blauer has been attempting to get a simple hearing to challenge the charges leveled at him by Tani Downing, his supervisor, incident to his “reassignment” to a job which he could not physically or psychologically perform, resulting in his termination. The simple proposition, though, has vanished into a labyrinth of procedural maneuvering, checks and tripwires imposed by DWS (and now CSRB) designed to shield DWS from ever having to answer for its conduct toward Petitioner.

It is time for this to end. Petitioner should be entitled to his day in court before the Third District Court, preferably in the context of final resolution of the 2004 action (including retrial of the remanded claims which are the subject of this proceeding), and this matter brought to a conclusion.

Based on the foregoing, it is submitted that CSRB's December 6, 2006 order of dismissal be reversed, and the matter be remanded for further proceedings.

DATED this 6th day of June, 2007.

JONES WALDO HOLBROOK & McDONOUGH PC

By 

Vincent C. Rampton

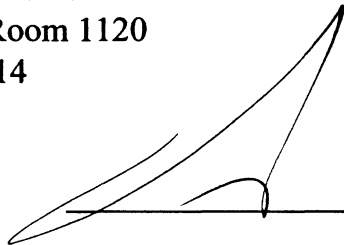
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed via first class mail, postage prepaid, to the following this 6th day of June, 2007:

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ADDENDUM

Tab 1

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

LORIN BLAUER,	:	
	:	
Grievant,	:	DECISION ON
	:	AGENCY'S MOTION TO DISMISS
	:	
v.	:	
	:	
UTAH DEPARTMENT OF WORKFORCE SERVICES,	:	
	:	
	:	
Agency.	:	Case No. 28 CSRB/H.O. 408

Pursuant to a telephonic Status/Scheduling Conference held on Friday, October 13, 2006, conducted by the Hearing Officer assigned to adjudicate this issue, oral argument on the Utah Department of Workforce Services' Motion to Dismiss was held on October 24, 2006, at the State Office Building. Present during the hearing were the Grievant, Lorin Blauer and his administrative law representative, Tom Cantrell.¹ Assistant Utah Attorney General Philip S. Lott appeared on behalf of the Agency. Also in attendance were JoAnne Campbell, HR Director of the Utah Department of Human Resources, as the Agency's management representative, and Brian Blake, a paralegal in the Utah Office of the Attorney General. A certified court reporter made a record of the proceedings. No witnesses appeared and no other evidence was received into the record other than that which is already on file.

The sole purpose of this proceeding was to more fully consider the Agency's Motion to Dismiss filed on September 29, 2006, and the Grievant's Response filed October 10, 2006, both of which subsequently followed a Third District Court Memorandum Decision dated August 16, 2004. (Ex. T) As noted by Judge Leslie Lewis in an August 2, 2006 Memorandum Decision, this case presents a "convoluted procedural history." (Ex. Y) While it is unnecessary to reiterate the entire history preceding the issues at hand, some limited recitation is necessary to provide a meaningful context for this decision. All exhibits referred to herein, unless otherwise noted, are appended to the Agency's Motion to Dismiss.

¹Attorney Vincent C. Rampton, who has represented the Grievant in various permutations of this ongoing case, did not attend although notice was duly provided to him.

BACKGROUND

Grievant began working for the Agency as legal counsel in approximately 1980. Over the past three and one-half years, Grievant has filed three grievances with the Career Service Review Board (CSRB), two State court lawsuits, one federal court lawsuit (which he voluntarily withdrew), and two different appeals to the Utah Court of Appeals in connection with his job at the Agency.

THE FIRST GRIEVANCE - PERFORMANCE EVALUATIONS (STEP 4)

In June of 2003, Grievant received a poor performance evaluation from his supervisor Tani Downing (Ms. Downing). He filed a grievance to change the evaluation to "successful" and this grievance was initially denied by Ms. Downing. Part of this grievance included Grievant's claims that he either did not have a Performance Plan in place or that the one in existence was outdated. He also complained that he was being held to unfair performance standards. This latter claim may have been connected with Grievant's ongoing preparation of a request for ADA accommodations but it is unclear.² He subsequently appealed Ms. Downing's initial denial of his grievance to the Agency's Executive Director Raylene Ireland (Exec. Dir. Ireland). (Ex. G) Sometime thereafter, Exec. Dir. Ireland agreed with Grievant's request to upgrade his evaluation and the poor evaluation was changed to "successful."?, the grievance was resolved in Grievant's favor. (Ex. J) Grievant was also given a new Performance Plan at that time. Finally, he was advised to follow through on any ADA accommodation request with the proper department.³

THE SECOND GRIEVANCE - DEMOTION (STEP 4)

In September 2003, after his first grievance had been resolved to his satisfaction, Grievant filed a second grievance, claiming that he had been demoted when he had been recently reassigned to conduct unemployment hearings full-time. First Ms. Downing and then Exec. Dir. Ireland denied this grievance after determining that Grievant had not been demoted.

STEP 5 APPEAL OF THE SECOND GRIEVANCE (DEMOTION)

In October 2003, Grievant appealed his denied grievance, the alleged demotion, to the CSRB. Grievant also appended to this appeal, new claims of "constructive suspension and dismissal,"

²It is unclear, in part, because Grievant expressly wrote at the time, "my concern is not about reasonable accommodations as I can - and have been - performing the essential functions of my position at a highly successful level." (Ex. G).

³Grievant did so and the request was denied (Ex. K).

characterizing the Agency's actions as "discriminatory and retaliatory." No Step 5 formal adjudicative hearing was held. Instead, in November 2003, the CSRB Administrator, under applicable rules, issued an Administrative Review of the File Jurisdictional Decision (Jurisdictional Decision). The Administrator concluded that Grievant's job reassignment did not constitute a demotion as that term is defined under applicable rules and regulations. The Administrator determined that Grievant's reassignment of duties was an "internal personnel action" over which the CSRB had no jurisdiction. The Administrator addressed the newly appended claims of "constructive suspension and dismissal" in the same decision by noting that because these claims were not "ripe" (i.e., Grievant had not been terminated, suspended, or left employment), the CSRB had no jurisdiction.

SEPARATE REQUEST TO AGENCY FOR ADMINISTRATIVE LEAVE

On or about the same time Grievant filed his Second Grievance in September 2003, he also asked the Agency for "administrative leave based on medical considerations." Exec. Dir. Ireland informed him that although he was not entitled to take administrative leave on the requested medical basis, he could apply for leave under the Family Medical Leave Act (FMLA).

PURPORTED STEP 5 APPEAL OF DENIAL OF REQUEST FOR ADMINISTRATIVE LEAVE

In October 2003, Grievant filed an "appeal" to the CSRB of the Agency's denial of his request for administrative leave. A day or two later, he filed an amended version of this "appeal" to the CSRB.

REQUEST FOR RECONSIDERATION OF CSRB'S ADMINISTRATIVE REVIEW OF THE FILE DECISION

In December of 2003, Grievant filed a request for reconsideration of the jurisdictional decision addressing his demotion claims. Grievant asked the CSRB Administrator to reconsider his decision that Grievant's job reassignment did not constitute a demotion, and therefore, the CSRB had no jurisdiction. He also reiterated his claim – raised in the separate purported "appeal" to the CSRB in October 2003 – that he was improperly denied administrative leave. Then, he included the addressed claims of "constructive discharge/dismissal⁴ and discrimination and retaliation" raised in

⁴While Grievant in his motion for reconsideration characterized his claim as constructive discharge/dismissal, it is clear from a review of the file that he intended to include the claim of constructive suspension.

the CSRB demotion appeal. Finally, he asserted four other brand new claims which he had not previously raised: the Agency's failure to define his job performance parameters, the Agency's violation of personnel rules, the Agency's failure to maintain proper personnel records/refusal to access personnel records and critical letter constituting "written reprimands."

MOTION TO DISMISS

This matter came to the CSRB pursuant to Judge Leslie Lewis' (Judge Lewis) Memorandum Decision dated August 16, 2004. (Ex. T) While the court concluded that Grievant was not demoted as a matter of law, it left open the issue of the various alleged personnel rules violations related to the Utah Personnel Management Act such as harassment/retaliation and an improper denial of a request for administrative leave. Judge Lewis determined: (1) these allegations were raised and preserved by Grievant in his previous Request for Reconsideration before the CSRB; and (2) they were not addressed by the CSRB.⁵ The exact language in Judge Lewis' Memorandum Decision is as follows:

[I]t appears that the only remaining issue is the CSRB's refusal to *consider* the plaintiff's remaining grievances based upon alleged violations of the personnel rules (Memorandum Decision, page 3; *emphasis added*). . . . Accordingly, to the extent that the plaintiff's Motion for Summary Judgment seeks a renewed opportunity to have the CSRB *consider* his grievance related to the alleged violations of the Personnel Management Act, the Court grants the same and remands the matter back to the CSRB. (Memorandum Decision, page 4; *emphasis added*.)

The only claims as determined by the district court pursuant to Grievant's Request for Reconsideration of Administrative Review and Final Agency Action with which the CSRB is charged to consider are: '

- (1) the Agency violated *Utah Admin. Code* R477-10-1, et seq. by failing to define [Grievant's] job performance parameters;
- (2) the Agency violated personnel rules by assigning job tasks to Grievant falling outside his job description, in violation of *Utah Admin. Code* R477-3-2 and 3;

⁵The Administrator did not address the "extraneous" personnel violation claims in his Decision on Grievant's Motion for Reconsideration for the following reason: "Because I do not find that a demotion in fact occurred, I have limited my discussion . . . I recognize that Grievant's Request for Reconsideration addressed other issues primarily, but not entirely, stemming from the argument that a demotion had occurred. Based upon my decision herein however, it is unnecessary to address these arguments. . . ." (Decision on Grievant's Request for Reconsideration at 3)

- (3) Agency representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of *Utah Admin. Code* R477-15-2 and 3;
- (4) Agency representatives violated *Utah Admin. Code* R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file;
- (5) the Agency violated *Utah Admin. Code* R477-7-7 by denying Grievant administrative leave; and
- (6) critical letters from Ms. Tani Downing and Ms. Raylene Ireland remaining in Grievant's personnel file constituted written reprimands, grievable to the CSRB pursuant to *Utah Code Ann.* § 67-19a-302(1).

At the outset of this proceeding, Grievant moved to continue oral argument based primarily in the "interests of judicial economy." When questioned, Grievant explained that a motion to consolidate various proceedings had been filed with the Third Judicial District Court but no decision had yet been issued. Mr. Cantrell opined that the motion to consolidate likely would be granted, and that oral argument on Grievant's personnel violation claims should be heard after that time. Although Grievant did not know when the motion to consolidate had been filed, Mr. Lott opined that it had been "a few months ago" and objected to Grievant's request for a continuance. The Agency's attorney argued that Grievant's motion to consolidate was a "separate issue before the judge relating to § 1983 ADA/Utah anti-discrimination claims" and disagreed that the motion would be granted "because the CSRB lacks jurisdiction over such claims." Because this case has been winding its way through various forums for approximately three and one-half years, and because Grievant's argument grounded in the "interests of judicial economy" was speculative, his motion was denied.

Grievant's arguments essentially are twofold. First, Judge Lewis' remand order of August 16, 2004, stating that specified matters relating to alleged violations of personnel rules should be *considered* by the CSRB, means that, according to the "law of the case," the CSRB must conduct a *full hearing* on the merits of these allegations to determine their validity, regardless of when and how they were raised in the previous proceedings. Second, Grievant argues that because Judge Lewis ordered the CSRB to *consider* certain claims, it follows that the CSRB must have jurisdiction over the subject matter of those claims.

I do not agree with Grievant's interpretation of Judge Lewis' choice of language. One need not hold a full evidentiary hearing in order to properly assess the merits of Grievant's remaining claims. Indeed, in some instances, that process would border on the ridiculous or violate existing rules as discussed below. Had Judge Lewis' determined that it was mandatory to hold a full-blown Step 5 hearing (a formal adjudicative proceeding) to *consider* Grievant's remaining claims, she easily could have delineated that process. The word "consider" is not identical to the word "hearing." The term "consider" means to "think about carefully" to "study" or "contemplate" or "give thought in order to reach a suitable conclusion." (*Webster's Ninth New Collegiate Dictionary* (1988)) As I read the court's instructions, what must occur in this matter is that the CSRB address, in some fashion, Grievant's remaining claims.

JURISDICTION

I agree with the Agency's arguments that the CSRB is without jurisdiction to hear these issues in a formal adjudicative proceeding. An analogous situation would be where a trial court had granted summary judgment in favor of one party, an appeal was filed and a decision rendered, but then, the losing party goes back to the trial court to file a motion to reconsider the summary judgment decision, and includes claims not previously presented. Moreover, merely recasting former claims - which were already adjudicated - in new window dressing such as "personnel rule violations" does not give them new life.

Like the Agency, I also believe that lack of jurisdiction can be raised at any time. (*Bradbury v. Valencia*, 5 P.3d 649, 650-1 (Utah 2000)) Grievant raised his claims relating to job performance parameters (issue #1 above) in his First Grievance and naturally, did not appeal the Step 4 decision in his favor. The CSRB lacks jurisdiction to hear a grievance that was previously resolved in the Grievant's favor. In essence, this claim does not exist anymore.

Grievant raised his claims relating to assigned tasks outside his job description (issue # 2 above) in his Second Grievance. The CSRB addressed this claim inherently as part of the same demotion grievance when it concluded that the tasks Grievant had been given were properly within his job. The Utah Court of Appeals in *Blauer v. Department of Workforce Services*, 128 P.3d 1204, 1211 (Utah App. 2005), ultimately determined that the assigned tasks were properly within Grievant's job description. The Utah Court of Appeals in *Blauer* succinctly held "[the] CSRB did not

err in declining jurisdiction over Blauer's grievance." (*Id.* at 1204) The CSRB is without jurisdiction to hear this claim based on res judicata (issue preclusion).

Grievant failed to raise his claims of unlawful harassment and retaliation with or without any connection with his request for accommodation of disabilities at any time prior to his Request for Reconsideration (issue #3 above). The CSRB simply has no jurisdiction over these claims pursuant to *Utah Admin. Code* R137-1-5. Such claims by law must be filed with the Utah Anti-Discrimination Division. (*Id.* (See also *Buckner v. Kennard*, 99 P.3d 842, 852 (Utah 2004).) Moreover, these issues simply cannot be raised for the first time at the Step 5 level.

Grievant also failed to raise his claims (issue #4 above) that the Agency failed to [properly] maintain his personnel record and refused him access [to certain documentation] prior to filing his Request for Reconsideration. It is impossible under existing CSRB rules to "reconsider" an issue of this type that was never raised at the Department level. Moreover, Grievant was, in fact, granted access to his personnel files. The only "problem" is that the documents he "supposed" were there, were not. The CSRB is not obligated to hear claims based on mere supposition *after* an employee has been terminated for unrelated reasons.

Grievant's additional claim is that he was improperly denied administrative leave (issue #5 above). He failed to file a Step 4 grievance in connection with this claim and only in his amended purported Step 5 appeal did this claim first appear. As stated above, it is impossible under existing CSRB rules to "reconsider" an issue of this type that was never raised at the Department level. Thus, the CSRB is without jurisdiction to hear this matter.

Finally, Grievant's remaining claim (issue #6 above) had no antecedent grievance and appeared for the first time in his Request for Reconsideration. Grievant asserts that certain of his supervisors' documentation and correspondence constituted "written reprimands." Again, it is impossible under existing CSRB rules to "reconsider" an issue of this type that was never raised at the Agency level. The CSRB has no jurisdiction to go back and somehow hear claims not raised with the proper entity more than three and one-half years ago - the time they were required to be filed.

To the extent the court may require a more detailed analysis, this decision will provide the same below.

ANALYSIS

Issue #1: The Agency violated *Utah Admin. Code* R477-10-1, *et seq.*, by failing to define [Grievant's] job performance parameters.

DHRM R477-10-1 (a) states: "Performance standards and expectations for each employee shall be specifically written in a performance plan by August 30 of each fiscal year." As noted under "Background" above, the Agency fulfilled any duty it had under R477-10-1 to define Grievant's "job performance parameters/standards" by issuing a new Performance Plan dated July 18, 2003 (Ex. H) pursuant to the First Grievance. Grievant acknowledges this undisputed fact in his Response to Motion to Dismiss wherein he states, beginning on page 10, "It is true that the Grievant's allegation of failure to define job performance standards and failure to have a current performance plan were raised in what the Agency defines as 'the first grievance' and that a Step 4 decision was issued in Grievant's favor." He continues, "It is true that Grievant prevailed on his first grievance and did not appeal beyond the Step 4 Decision because there was no apparent reason to." (Grievant's Response at 11.)⁶ There still is no legitimate basis to revisit this issue and I conclude that the evidence in the record reflects that the Agency did not violate R477-10-1.

Issue #2: The Agency violated personnel rules by assigning job tasks to Grievant falling outside his job description, in violation of Utah Administrative Code R477-3-2 and 3.

DHRM R477-3-2 governs employee job descriptions. Job descriptions are to contain a "job title; distinguishing characteristics; a description of tasks commonly associated with most positions in the job; a statement of required knowledge, skills and other requirements; FLSA status' and other administrative information." R477-3-3 (Assignment of Duties) states that, "Management may assign, modify or remove any employee task or responsibility in order to accomplish reorganization, improve business practices or process, or for any other reason deemed appropriate by the department administration." Although R477-3-2 and 3 were not specifically cited at the time, this issue constitutes the subject matter of Grievant's Second Grievance, i.e., he was reassigned to conduct unemployment hearings full-time. The CSRB Administrator analyzed this issue, albeit in the form of a claim that Grievant was demoted, in his Jurisdictional Decision. He determined that Grievant's

⁶Despite his overt recognition that the Agency did issue job performance standards in accordance with *Utah Admin. Code* R477-10-1, Grievant presents the argument that further consideration of this issue is somehow required because "[T]o the extent that the Step 4 Decision later contributed to Grievant's injury, though, the CSRB does have jurisdiction to further consider these allegations in the context of the current grievance, because the District Court and the Court of Appeals have so determined." (Grievant's Response at 11)

job reassignment was valid and permissible under applicable rules and regulations in that Grievant's job had always included conducting unemployment hearings. Moreover, R477-3-3 expressly allows modifications to an employee's job duties. This is exactly what occurred in Grievant's case.

After the CSRB Administrator had rendered his Jurisdictional Decision, upon Grievant's appeal, the Utah Court of Appeals in *Blauer v. Department of Workforce Services*, 128 P.3d 1204 (Utah App. 2005) further considered this issue. Again, although R477-3-2 and 3 were not specifically cited, the Court concluded however, that the adjudication of unemployment claims were properly within Grievant's core duties that he had previously performed part-time but was now required to perform full-time. The Court observed, "Because of Blauer's previous, and not uncommon, assignments to adjudications, DWS claims that in reapportioning Blauer's job responsibilities from part-time to full-time adjudicator, DWS did nothing more than extend one of Blauer's core job functions, in response to varying department needs. We agree and conclude that DWS's assignments of Blauer to full-time adjudications, a job function DWS had delegated to Blauer, and other Legal Enforcement Counsel III, in the past, "did not constitute a demotion. . . ." *Blauer v. DWS* at 1210. And, "Here, as discussed above, there was no change in job or position, but rather a reallocation by DWS of Blauer's then existing job responsibilities." (*Id.* at 1210) Moreover, a review of Grievant's Performance Plan/Evaluations for the periods July 1, 1999 to June 30, 2000 (Ex. D), July 1, 2000 to June 30, 2001 (Ex. E) and July 1, 2003 to June 30, 2004, reflects that unemployment hearings were a part of Grievant's workload and did not fall outside the DWS Legal Counsel/Administrative Law Judge Performance Plan. (*Id.*)

To this day, Grievant has never mentioned any other "job task" to which he was assigned and which he found objectionable or allegedly violated personnel rules other than conducting unemployment hearings. Even then, it was the increased number of unemployment hearings that he found objectionable.⁷ Because Grievant has not designated any other "job task" which presumably violated personnel rules other than conducting unemployment hearings, and because that very issue

⁷Based on the record submitted to it, the Court of Appeals found that presiding over unemployment hearings in a four-year period from 1999-2003 was a job function DWS consistently assigned to Blauer." (*Id.* at 1210) For instance, in 2000, DWS assigned Blauer to six to twenty hearings a week for 36 weeks and prior to 2003, DWS assigned Blauer to an average of eight hearings a week over the course of nineteen weeks." (*Id.*)

has been decided by both the CSRB and the Utah Court of Appeals, this claim has been repeatedly and conclusively determined.

Issue #3: Agency representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R477-15-2 and 3.

DHRM R477-15-2 governs unlawful harassment. By definition under subsection (1), unlawful harassment means, "discriminatory treatment based on race, religion, national origin, color, sex, age, protected activity or disability." Harassment can result in a hostile, offensive or intimidating work environment under this policy under subsection (2)(a). Such behavior can also result in a tangible employment action being taken against the harassed employee under subsection (2)(b). R477-15-3 prohibits retaliation against an employee, "who has opposed a practice forbidden under [this] policy, or has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under [this] policy or is otherwise engaged in protected activity." Grievant never raised a harassment claim until he filed his Request for Reconsideration with the CSRB.

R477-15 (Unlawful Harassment Policy and Procedure) sets forth the proper complaint and investigative procedure for employees who believe they have been aggrieved. Grievant failed to avail himself of these proper avenues with his employer at the time he was required to do so. Only now, after Grievant has been terminated for job abandonment and has lost his demotion claim, does he pursue these issues with the CSRB. The CSRB, however, is expressly prohibited from hearing these claims regardless of when they were raised or whether they are raised in conjunction with a disability accommodations' request. (See *Utah Admin. Code* R137-1-5: "Claims alleged to be based upon a legally prohibited practice ... including employment discrimination on the basis of race, color, sex, pregnancy, childbirth ... age ... religion, national origin, or disability, are not admissible under these grievance procedures. The CSRB and the CSRB hearing officers have no jurisdiction over the preceding claims.")

Issue #4: Agency representatives violated Utah Administrative Code R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file.

R477-2-5 governs personnel records. The provision mandates what types of records must be maintained, as appropriate, and how they should be maintained. Subsection (e) specifically permits "copies of any documents affecting the employee's conduct, status or salary. . . ." R477-2-5 also provides a mechanism for employees who feel aggrieved by how their personnel files are being maintained - subsection (4). Grievant, however, never pursued these procedures during the time he worked for the Agency when he was required to do so. Grievant never raised these claims until he filed his Request for Reconsideration with the CSRB.

Moreover, these claims are moot. Grievant was not terminated based on any performance assessments or criteria contained in the Agency's records. He was terminated because he abandoned his job. Grievant was not "demoted" based on performance assessments or criteria contained in the Agency's records. In fact, he was not demoted at all, but merely reassigned to perform duties that were already in his job description. Grievant was not disciplined in any fashion based on performance assessments contained in the Agency records. Indeed, he was never disciplined. The record in this matter reveals that Grievant was allowed access to his personnel file. There were no documents "supposedly reflecting negatively on his job performance" which were relied upon, used or required by the Agency in any actions that it undertook.

Issue #5: The Agency violated *Utah Admin. Code* R477-7-7 by denying Grievant administrative leave.

Absent a specific and designated basis for mandatory approval of administrative leave in the applicable DHRM rules, the granting of administrative leave under R477-7-7 is discretionary and then, only if it is consistent with Agency policy ("Administrative leave may be granted consistent with agency policy.") There is nothing in the record that indicates why Grievant believes that the Agency allegedly violated R477-7-7 when it denied his request for "administrative leave related to medical reasons." Instead, Grievant appears to believe that because he characterized his request as necessary for "medical reasons," that the Agency was obligated to give it to him.⁸

⁸Grievant's written submission on this issue is less than enlightening: "It is true that Grievant was informed by Director Ireland that his request for administrative leave based on medical considerations was denied. The Agency's argument that the rule upon which Grievant relies, R477-7-7, is discretionary and is dependent upon 'agency policy' can be heard by the CSRB because the Courts have so ruled." (Grievant's Response to Motion to Dismiss at 13.) Actually, Grievant misquotes this

There is, however, evidence in the record that the Agency researched Grievant's request and could find no provision that mandated approval of Grievant's request. (Ex. Q) The Agency's response to Grievant indicated that while annual leave, sick leave or FMLA could be used to support an extended absence, Grievant's situation did not require the Agency to grant his request. Bare bone's allegations are insufficient to sustain a claim that the Agency violated R477-7-7, particularly in light of the fact that whether to grant or deny Grievant administrative leave was within the Agency's discretion.

Issue #6: Critical letters from Ms. Tani Downing and Ms. Raylene Ireland remaining in Grievant's personnel file constituted written reprimands, grievable to the CSRB pursuant to Utah Code Ann. § 67-19a-302(1)

Utah Code Ann. § 67-19a-302(1) states that certain State employees may grieve written reprimands. The "critical letters"⁹ to which Grievant alludes allegedly constituting written reprimands are simply a moot issue in this case regardless of whether they were "grievable" under §67-19a-302(1). Grievant was terminated on a basis other than his performance, i.e., job abandonment, where any written reprimand, if issued, played no role. In addition, the issue of whether Grievant was demoted (where written reprimands conceivably may have been relevant) has already been conclusively determined by the Utah Court of Appeals. Thus, whether or not these various letters could be considered "written reprimands" – and could have been grieved on that basis – is irrelevant.

provision. The granting of leave under this rule is not dependent on policy but rather, must only be consistent with policy. At any rate, it still remains discretionary. The CSRB simply does not have jurisdiction over discretionary matters. As stated by the Utah Court of Appeals in *Lopez v. Career Service Review Board*:

“[D]iscretionary personnel powers granted to agencies do not constitute mandates. Absent the statutory mandate that an employee receive a certain benefit, the employee may not demand it as a right . . . Lopez has failed to identify any personnel rule that was violated by the Commission's refusal to allow him to job share. Jurisdiction therefore was properly denied.”

(*Lopez v. Career Service Review Board*, 834 P.2d 658 (Utah Ct. App.) (1992))

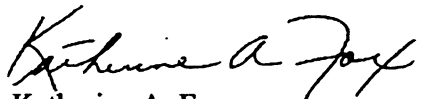
⁹The letters to which Grievant refers are attached to the Agency's Motion to Dismiss as Ex. I, Ex. J and other communications from the Agency are all contained in the record.

Moreover, a review in the record of the communications between the Agency and Grievant reflects that they were not designated as "written reprimands" as required by DHRM rules and thus, they could not be used or construed as such in any Agency action. No rule or policy violations were noted in these letters and no adverse action thereafter was based on their content. In fact, Exec. Dir. Ireland's letter (Ex. J) indicates that she reversed Grievant's Performance Evaluation from "unsuccessful" to "successful." The letter from Tani Downing (Ex. I) merely outlines her reasons underlying her "unsuccessful" performance evaluation in responding to Grievant's objection, an evaluation that was later changed to "successful."

DECISION

Based on the foregoing, the Agency's Motion to Dismiss is granted.

It is so ORDERED this 6th day of December 2006.


Katherine A. Fox
CSRB Hearing/Presiding Officer

JUDICIAL REVIEW

Judicial review by the Utah Court of Appeals of this final agency action and decision may be obtained pursuant to *Utah Code* §§63-46b-14 and -16, Utah Administrative Procedures Act. To obtain judicial review, a party must file a petition for judicial review with the Court within 30 days of the date that this order or decision is issued (i.e., signature date).

Tab 2

GABRIELLE LEE CARUSO (7368)
Assistant Utah Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Dept. of Workforce Services
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Ph: (801) 366-0100

FILED DISTRICT COURT
Third Judicial District

DEC 8 2004

By CRYSTAL
SALT LAKE COUNTY
Deputy Clerk

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

LORIN BLAUER,

Plaintiff,

vs.

UTAH DEPARTMENT OF
WORKFORCE SERVICES,

Defendant.

**PROPOSED ORDER IN
CONFORMANCE WITH THE
MEMORANDUM DECISION DATED
AUGUST 16, 2003**

Civil No. 040900221
Judge Leslie A. Lewis

For the reasons set forth in the Court's Memorandum Decision dated August 16, 2004,
the Court hereby orders and adjudges:

1. The Defendant's Motion to Dismiss is denied. The Court has Jurisdiction to consider the matter.
2. There is no genuine issue of material fact, and as a matter of law, the Defendant did not demote the Plaintiff when it assigned him to perform the duties of an administrative law judge. The CSRB was correct in reaching this same conclusion. . Accordingly, the Plaintiff's

000582

First Claim for Relief is dismissed with prejudice, with the exception that the allegations in Paragraph 34 subsections ©) through (j) of the complaint which do 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. Those allegations are: A) DWS violated Utah Administrative Code R477-10-1, et seq by failing to define job performance parameters; B) DWS violated personnel rules by assigning job tasks to Grievant falling outside of his job description, in violation of Utah Administrative Code R477-3-2 and 3; C) DWS representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R477-15-2 and 3; D) DWS representatives violated Utah Administrative Code R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file; E). DWS violated Utah Administrative Code R477-7-7 by denying Grievant administrative leave; and F) Critical letters from Ms. Downing and Ms. Ireland, remaining in Grievant's personnel file constitute "written reprimands, grievable to CSRB pursuant to Utah Code Ann. Sec. 67-19a-302(1).

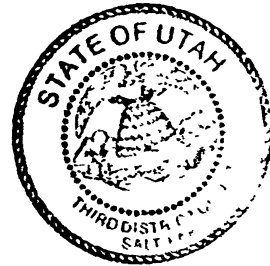
3. The Plaintiff's Second, Third, and Fourth Claims for Relief are based upon an alleged unlawful demotion and are therefore dismissed with prejudice.

140900221

DATED this 30th day of November, 2004.

BY THE COURT:

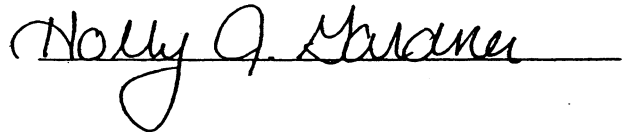
Leslie A. Lewis
THE HONORABLE LESLIE LEWIS



CERTIFICATE OF DELIVERY

I hereby certify that on this 23rd day of November, 2004, I caused a true and correct copy of the foregoing **PROPOSED ORDER IN CONFORMANCE WITH THE MEMORANDUM DECISION DATED AUGUST 16, 2003** to be mailed by United States mail, postage pre-paid, to the following:

Vincent C. Rampton
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444
Attorney for Plaintiff

A handwritten signature in cursive script, reading "Holly J. Gardner", is written over a horizontal line.

GABRIELLE LEE CARUSO (7368)
Assistant Utah Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Dept. of Workforce Services
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Ph: (801) 366-0100

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

LORIN BLAUER, Plaintiff, vs. UTAH DEPARTMENT OF WORKFORCE SERVICES, Defendant.	PROPOSED ORDER IN CONFORMANCE WITH THE MEMORANDUM DECISION DATED AUGUST 16, 2003 Civil No. 040900221 Judge Leslie A. Lewis
---	---

For the reasons set forth in the Court's Memorandum Decision dated August 16, 2004,
the Court hereby orders and adjudges:

1. The Defendant's Motion to Dismiss is denied. The Court has Jurisdiction to consider the matter.
2. There is no genuine issue of material fact, and as a matter of law, the Defendant did not demote the Plaintiff when it assigned him to perform the duties of an administrative law judge. The CSRB was correct in reaching this same conclusion. . Accordingly, the Plaintiff's

First Claim for Relief is dismissed with prejudice, with the exception that the allegations in Paragraph 34 subsections ©) through (j) of the complaint which do 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. Those allegations are: A) DWS violated Utah Administrative Code R477-10-1, et seq by failing to define job performance parameters; B)DWS violated personnel rules by assigning job tasks to Grievant falling outside of his job description, in violation of Utah Administrative Code R477-3-2 and 3; C) DWS representatives engaged in unlawful harassment of, and retaliation against Grievant in connection with his request for accommodation of disabilities, in violation of Utah Administrative Code R477-15-2 and 3; D) DWS representatives violated Utah Administrative Code R477-2-5 by failing to maintain proper personnel records concerning Grievant's performance, and by refusing access to alleged documentation supposedly reflecting negatively on his job performance, and claimed to be in his personnel file; E). DWS violated Utah Administrative Code R477-7-7 by denying Grievant administrative leave; and F) Critical letters from Ms. Downing and Ms. Ireland, remaining in Grievant's personnel file constitute "written reprimands, grievable to CSRB pursuant to Utah Code Ann. Sec. 67-19a-302(1).

3. The Plaintiff's Second, Third, and Fourth Claims for Relief are based upon an alleged unlawful demotion and are therefore dismissed with prejudice.

DATED this 30 day of November, 2004.

BY THE COURT:

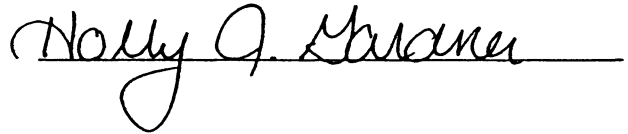
LS

THE HONORABLE LESLIE LEWIS

CERTIFICATE OF DELIVERY

I hereby certify that on this 23rd day of November, 2004, I caused a true and correct copy of the foregoing **PROPOSED ORDER IN CONFORMANCE WITH THE MEMORANDUM DECISION DATED AUGUST 16, 2003** to be mailed by United States mail, postage pre-paid, to the following:

Vincent C. Rampton
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444
Attorney for Plaintiff

A handwritten signature in cursive script, reading "Holly J. Gardner", is written over a horizontal line.



Attorney General Courier Request Form

Requestor Name: Holly Gardner (for Lee Caruso)

Div: Litigation

Requestor Tel: 60146

Regular Run Schedule

For Urgent Request, check box: ☐

Explanation for Urgency: _____

Request Date: 11/23/04

Request Time: _____ AM

Request Time: 4:05 PM

11:00AM Run:	<input type="checkbox"/>
1:30 PM Run (NR/Tax Com.):	<input type="checkbox"/>
3:00 PM Run:	<input type="checkbox"/>
Sandy Run (MWF only):	<input type="checkbox"/>
Special Runs (require approval)	<input checked="" type="checkbox"/>

Case No.: 040900221 CaseName: Blauer v Ut Dept. Workforce Svs

Document Name:	1) Final Judgment (sealed letter to Judge Lewis)
	2)
	3)
Other reference:	

Delivery Instructions:

Name: Judge Lewis' CHAMBERS Tel: _____

Court/Firm: 3rd District Court

Address: _____

<input type="checkbox"/>	File Original:	
<input type="checkbox"/>	Courtesy Copy:	
<input type="checkbox"/>	Ret. Court Stamped Copy To:	
<input type="checkbox"/>	Wait For Signature From:	
Instructions:		
Recipient's Signature: <u>C. E. Johnson</u>		Date

Pick -up Instructions:

Name: _____ Tel: _____

Court/Firm: _____

Address: _____

<input type="checkbox"/>	Certified Copy:	
<input type="checkbox"/>	Return Receipt:	
<input type="checkbox"/>	Return to:	
Instructions:		
Courier's Signature: <u>[Signature]</u>		Date: <u>11-23</u>
If request was not completed, please explain why:		

Tab 3

NCY . 1 2006

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LORIN BLAUER,	:	COURT'S RULING
Plaintiff,	:	CASE NO. 040900221
vs.	:	
UTAH DEPARTMENT OF WORKFORCE	:	
SERVICES, an agency of the	:	
State of Utah,	:	
Defendant.	:	

The Court has before it a request for decision filed by the plaintiff seeking a ruling on his Motion to Reconsider Order of Remand to Career Services Review Board ("CSRB"), and to Consolidate.


At the outset, the Court notes that it has reviewed the moving and responding memoranda concerning the plaintiff's Motion, as well as the various supplemental briefs and information which were recently submitted to the Court. The Court's initial inclination was to deny the plaintiff's Motion so that the CSRB could fully assess and decide his claims of personnel rule violations, in accordance with the Court's prior ruling. In fact, as the plaintiff acknowledges, the Court remanded these claims to the CSRB in the first place because of the plaintiff's counsel's representations and request for remand during a prior oral argument. The fact that the plaintiff has now had a change of heart and would instead prefer to have this Court consider all of his remaining

claims is not a sufficient basis for the Court to reconsider its prior ruling.

However, the defendant's recent filing of a Motion to Dismiss before the CSRB puts an entirely new complexion on the plaintiff's pending Motion to Reconsider. Specifically, the defendant's Motion essentially argues that the CSRB does not have jurisdiction and ought not to consider the claims previously remanded to it by this Court. Given this Court's prior rulings, the purpose of this Motion remains unclear.

The Court will await a decision by the CSRB on the defendant's Motion to Dismiss before reaching a definitive decision on the plaintiff's Motion to Reconsider. Counsel for either side should contact the Court's law clerk, Alexandra Doctorman, to inform the Court of the CSRB's decision on the Motion to Dismiss. The Court will defer ruling on the Motion to Reconsider until it hears from counsel.

Dated this 30 day of October, 2006.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

BLAUER V. UTAH DEPT.
OF WORKFORCE SVCS.

PAGE 3

COURT'S RULING

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the
foregoing Court's Ruling, to the following, this 1 day of ^{Nov}~~October~~,
2006:

Vincent C. Rampton
Attorney for Plaintiff
170 S. Main Street, Suite 1500
Salt Lake City, Utah 84101

Philip S. Lott
Assistant Attorney General
Attorney for Defendant
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856

