

IN THE UTAH COURT OF APPEALS

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Dan Leatham, Robert E. Steele,	)	MEMORANDUM DECISION
Tim Slocum, Harold W. Johnson,	)	(Not For Official Publication)
and W. Fred Hurst,	)	
	)	Case No. 20040376-CA
Petitioners,	)	
	)	
v.	)	F I L E D
	)	(July 29, 2005)
	)	
Department of Corrections and	)	2005 UT App 329
Career Service Review Board,	)	
	)	
Respondents.	)	

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Original Proceeding in this Court

Attorneys: Phillip W. Dyer and Carey A. Seager, Salt Lake City,  
for Petitioners  
Mark L. Shurtleff and Brent A. Burnett, Salt Lake  
City, for Respondents

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Before Judges Billings, Davis, and Thorne.

THORNE, Judge:

Dan Leatham, Robert Steele, Tim Slocum, Harold Johnson, and W. Fred Hurst (collectively Petitioners) appeal from an order of the Career Service Review Board (CSRB) limiting the amount of back-pay compensation available to them through the grievance process. We affirm.

"The [CSRB] is an agency within the meaning of UAPA [the Utah Administrative Procedures Act]." Career Serv. Rev. Bd. v. Department of Corr., 942 P.2d 933, 937-38 (Utah 1997); see also Utah Code Ann. § 67-19-30 (2004). Pursuant to UAPA, "we may grant [Petitioners] relief [only] if "the agency has erroneously interpreted or applied the law."" Luckau v. Board of Rev., 840 P.2d 811, 813 (Utah Ct. App. 1992) (citations omitted). Moreover, "where the legislature either expressly or implicitly grants the agency discretion to interpret or apply a statutory term, we review the agency's interpretation or application under a reasonableness standard." Id.; see also Morton Int'l, Inc. v.

Auditing Div., 814 P.2d 581, 588 (Utah 1991) (stating that "absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term"); Lunnen v. Department of Transp., 886 P.2d 70, 72 (Utah Ct. App. 1994) (stating "we review an agency's application of its own rules for reasonableness and rationality, according the agency some, but not total deference"). By statute, the CSRБ has been granted the authority to define all "terms, phrases, and words used in the grievance process," including "what matters constitute excusable neglect for purposes of the waiver of time limits." Utah Code Ann. § 67-19a-203(1), -(2) (2004).

In the instant case, Petitioners filed their grievance petition on January 30, 1998, claiming that the Department of Corrections had failed to pay them for on-call work performed over several years. However, by statute Petitioners had only twenty working days from either the date of the event "giving rise to the grievance," or the date that they became aware of the event, to file their petition. Id. § 67-19a-401(4), -(5) (2004). Failure to comply with this requirement would result in the waiver of the claim unless Petitioners were able to show that the untimely filing was the result of excusable neglect. See id. The CSRБ defines "Excusable neglect" as

the exercise of due diligence by a reasonably prudent person and constitutes a failure to take proper steps at the proper time, not in consequence of the person's own carelessness, inattention, or willful disregard in the processing of grievance, but in consequence of some unexpected or unavoidable hindrance or accident.

Utah Admin. Code R137-1-2.

Applying this definition to the facts of this case, the CSRБ determined that Petitioners

lacked "excusable neglect" for filing their grievance more than six months after Mr. Haun became the Executive Director of the Department . . . . Even assuming, however, [Petitioners'] fear of retaliation under the previous administration would bring them within the definition of "excusable neglect," the [CSRБ] finds those fears reasonably

should have dissipated after Mr. Haun became Executive Director.

In support of its conclusion, the CSRB drafted a multitude of factual findings.<sup>1</sup> The CSRB found that the Department of Corrections's failure to pay Petitioners for their on-call time was not a single event, but was instead a series of discrete events, each of which Petitioners should have grieved separately. It further found that Petitioners were entitled to have been paid for the on-call time that they worked and that Petitioners were aware that they were on-call and not being paid, even if they did not necessarily know that their on-call time was compensable. Moreover, the CSRB found that Petitioners began receiving on-call pay for certain activities in July 1997 and that such compensation was "readily available, not only to [Petitioners], but to all public employees at all times relevant to this matter." Finally, and central to this case, the CSRB found that although the previous administration was indeed responsible for the creation of a reasonable fear of retaliation in Petitioners, that fear rapidly became unreasonable with the introduction of Pete Haun as the Director of the Department of Corrections. Upon taking the position, Director Haun swiftly took steps to inform all personnel that retaliation would not be tolerated. He made numerous visits to Department facilities and spoke directly with employees, attempting to assure them that he was accessible and that he desired to change the working conditions within the Department for the better. He even encouraged the employees to use the grievance process when they had problems or concerns.

Having reviewed the record, we conclude that the CSRB's decision does not fall outside the bounds of reasonableness and rationality. Petitioners began receiving on-call pay in July 1997 and the on-call policy was widely available and easily obtained at that point. Moreover, Director Haun had changed the culture sufficiently to eliminate any concerns that Petitioners could have had concerning retaliation. Assuming that the behavior of the directors that proceeded Director Haun was sufficient to toll the twenty-day requirement before his arrival --or in other words that their behavior created a condition which supported a finding of excusable neglect--the arrival and

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<sup>1</sup>Petitioners do not dispute the CSRB's factual findings.

behavior of Director Haun eliminated this condition well before January 30, 1998.

Accordingly, we affirm the CSRB's decision.<sup>2</sup>

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William A. Thorne Jr., Judge

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WE CONCUR:

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Judith M. Billings,  
Presiding Judge

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James Z. Davis, Judge

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<sup>2</sup>We find no merit in Petitioners' remaining claims. The statute contains its own tolling provision. See Utah Code Ann. § 67-19a-401(5) (2004). Moreover, because we affirm the CSRB's conclusion that, assuming the fear of retaliation once existed, Petitioners could not rely on it after Director Haun took over, we need not address its opinion of the legal effect of a fear of retaliation on the determination. Consequently, we do not address these claims. See State v. Carter, 776 P.2d 886, 888 (Utah 1989) (holding that an appellate court "need not analyze and address in writing each and every argument").