

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

| | | |
|-----------------------------|---|--------------------------------|
| John M. Duran, |) | MEMORANDUM DECISION |
| |) | (Not For Official Publication) |
| Petitioner, |) | |
| |) | Case No. 20090252-CA |
| v. |) | |
| |) | |
| Department of Technology |) | F I L E D |
| Services and Career Service |) | (May 27, 2010) |
| Review Board, |) | |
| |) | 2010 UT App 144 |
| Respondents. |) | |

Original Proceeding in this Court

Attorneys: Charles R. Stewart, Salt Lake City, for Petitioner
Mark L. Shurtleff and Peggy E. Stone, Salt Lake City,
for Respondents

Before Judges Davis, Thorne, and Roth.

DAVIS, Presiding Judge:

Petitioner John M. Duran appeals the order of the Career Service Review Board (the Board) upholding the termination of his employment by the Utah Department of Technology Services (DTS). We affirm.

Duran first contests the Board's use of a 2003 Corrective Action Plan (the CAP), arguing that this use should be prohibited under the res judicata doctrine of issue preclusion. "[The] application of res judicata presents a question of law, which we review for correctness." Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 21, 70 P.3d 1.

The doctrine of issue preclusion applies where the party seeking preclusion establishes the following four elements: (i) [T]he party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the

one presented in the instant action;
(iii) the issue in the first action must have been completely, fully, and fairly litigated;
and (iv) the first suit must have resulted in a final judgment on the merits.

Snyder v. Murray City Corp., 2003 UT 13, ¶ 35, 73 P.3d 325 (alteration in original) (internal quotation marks omitted). Not all of these required elements are met in this case. Most obviously, the case neither was completely litigated nor resulted in a final judgment on the merits. "'On the merits' is a term of art that means that a judgment is rendered only after a court has evaluated the relevant evidence and the parties' substantive arguments." Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 42 n.6, 44 P.3d 663 (citing Black's Law Dictionary 1117 (7th ed. 1999)). Duran incorrectly characterizes the issues raised in the prior grievance procedure as "determined to be unfounded and therefore dismissed with prejudice." However, in that prior action, the employer decided to vacate its written reprimand in the matter and the Board therefore dismissed the grievance.¹ There was no determination that the underlying complaints were unfounded. Thus, without a final judgment on the merits or the complete litigation of the issue, *res judicata* does not apply here.

Although the Board had stated that the employer was required to "'remove the record of the disciplinary action from the employee's agency personnel file and central personnel file,'" see generally Utah Code Ann. § 67-19a-303(4)(c) (2008) (requiring such steps when a disciplinary action is rescinded through grievance procedures), we do not see that this also mandated removal of the CAP. The hearing officer correctly noted, "Not every employment action an agency takes is disciplinary in nature. The purpose of a CAP is not punitive; rather, it is to improve an employee's performance" Indeed, the CAP specifically states its nonpunitive nature.

Further, although the CAP and the rescinded discipline were based on substantially the same conduct, there is virtually no mention within the CAP of the specific circumstances that led to its creation. Instead, the CAP simply states that corrective action in several broad areas was necessary "[a]fter considering [Duran's] behavior and work performance" and once mentions that

¹Prior to the legislative creation of DTS in 2005, Duran's position was within the Utah Department of Workforce Services. Thus, it was this department that initiated the disciplinary action in 2003.

Duran had reportedly "exercised questionable judgment as [he] addressed customer service issues." Indeed, DTS agreed that the actual documents showing that prior disciplinary action had been commenced against Duran for the underlying events should not be admitted. The CAP, on the other hand, was simply evidence that there had been some prior concerns with Duran's work behavior that warranted corrective action. An employer is entitled to consider evidence of prior corrective action when addressing whether the severity of later discipline is appropriate and is not bound to consider only disciplinary action that has been taken. See Utah Admin. Code R477-11-3(1) ("When deciding the specific type and severity of discipline, the agency head or representative may consider . . . prior disciplinary/corrective actions" (emphasis added)); see also id. R137-1-21(9) ("In those proceedings where a disciplinary penalty is at issue, the past employment record of the employee is relevant for purposes of either mitigating or sustaining the penalty when substantial evidence supports an agency's allegations."). Thus, the CAP was appropriately used in this case to show that there had previously been concerns with Duran's work performance that merited corrective action and that as a result of such corrective action, Duran had received further training regarding certain company policies. Moreover, as the Board noted, because "[n]umerous documents were admitted establishing that Mr. Duran knew of [DTS's] policies in general and its code of conduct in particular and was given training on all relevant policies," the CAP ultimately "had little or no bearing on the decision in this matter."

Duran next argues that the Board's action, which ultimately relied on the hearing officer's findings, is not supported by substantial evidence when viewed in light of the whole record before the court. See generally Utah Code Ann. § 63G-4-403(4)(g) (2008) (providing for an appellate grant of relief in cases where "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court"). "[U]nder the 'whole record test,' a court must consider not only the evidence supporting the Board's factual findings, but also the evidence that fairly detracts from the weight of the [Board's] evidence." Grace Drilling Co. v. Board of Review of Indus. Comm'n, 776 P.2d 63, 68 (Utah Ct. App. 1989) (second alteration in original) (additional internal quotation marks omitted). But correct application of such a test "necessarily requires that a party challenging the Board's findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not

supported by substantial evidence." Id.; see also First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990). Duran does not meet this burden. When challenging a factual finding, he simply states the finding and then, under the heading "Substantial Evidence Contrary to This Finding," lists the evidence that he views as conflicting with the finding. At no point does he set forth a complete recitation of evidence supporting any challenged finding.

Notwithstanding Duran's clear failure to fulfill his marshaling burden, we note that the record plainly shows that the challenged findings were supported by substantial evidence. See generally Grace Drilling Co., 776 P.2d at 68 ("Substantial evidence is more than a mere scintilla of evidence . . . though something less than the weight of the evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (omission in original) (citation and internal quotation marks omitted)). Duran mainly argues that the hearing officer's determination "misstates" or mischaracterizes witness testimony. But even if we were to characterize the witness testimony as Duran suggests, there is ample evidence to support the findings relied upon for the ultimate determination here. There is clear evidence that several of Duran's female coworkers were uncomfortable with repeated interactions with Duran--which interactions included personal questioning or revelations, comments on the coworkers' appealing physical attributes, looking the coworkers "up and down," and repeatedly and persistently inviting coworkers to lunch or coffee--and that such interactions made them hesitant to ask for Duran's assistance with computer problems. Further, when one of those coworkers told Duran she intended to put her concerns in writing, Duran tried to deter her from doing so, stating that the letter could have a negative impact on her future job prospects, that he would file a retaliatory complaint against her, and that everyone would think they had slept together. And there was evidence that Duran was aware of company policies prohibiting his inappropriate behaviors. Thus, we cannot say that the contested findings were not supported by substantial evidence.

Duran also argues that the Board's action was arbitrary or capricious. See generally Utah Code Ann. § 63G-4-403(4)(h) (providing for an appellate grant of relief where the agency action is "arbitrary or capricious"). This argument is largely based on the Board's adoption of the hearing officer's findings, which we have already determined were supported by substantial evidence. Duran additionally argues that the Board, too, mischaracterized the facts of the case. But this argument is

wholly without merit. The assertions made in the Board's decision are supported by the record evidence, and we see nothing arbitrary or capricious with regard to the Board's determination.

Affirmed.

James Z. Davis,
Presiding Judge

WE CONCUR:

William A. Thorne Jr., Judge

Stephen L. Roth, Judge