

1997

Ronald J. Scarpa v. The Real Estate Appraiser
Registration and Certification Board of the
Department of Commerce of the State of Utah :
Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SECRET NO. 11191

RONALD J. SCARPA,)	
)	
Petitioner,)	
)	Case No. 970196-CA
vs.)	
)	
THE REAL ESTATE APPRAISER)	
REGISTRATION AND CERTIFICATION)	
BOARD OF THE DEPARTMENT OF)	Priority No. 14
COMMERCE OF THE STATE OF UTAH,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

PETITION FOR REVIEW OF A FINAL ORDER OF THE
REAL ESTATE APPRAISER REGISTRATION AND CERTIFICATION BOARD
OF THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED AND STANDARD OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	4
STATEMENT OF THE CASE	5
Events preceding the hearing	5
The Board's original Order	6
The Board's Order on Reconsideration	8
STATEMENT OF THE FACTS	11
SUMMARY OF ARGUMENT	22
ARGUMENT	24
I Substantial evidence supports the Board's finding that Scarpa fraudulently claimed experience credit for appraisals on which he did not provide any significant professional assistance	24
II Scarpa has failed to adequately brief his challenge to the Department of Commerce Rule requiring the preponderance of the evidence standard in this case	31
III Even if the Board erred in applying the preponderance of the evidence standard, the error was harmless because the Board determined that the proof of Scarpa's fraudulent conduct was sufficient to satisfy a clear and convincing evidence standard.	33
IV Scarpa waived any argument that the Division did not comply with discovery requirements	34
V Scarpa was not prejudiced by the fact that the Division did not provide him with Teresa Larsen's working papers	36

CONCLUSION	38
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ADDENDA

ADDENDUM A	Findings of Fact, Conclusions of Law and Order of the Appraiser Board
ADDENDUM B	Order on Request for Agency Reconsideration
ADDENDUM C	Notice of Posthearing Conference and Entry of Nunc Pro Tunc Order
ADDENDUM D	Utah Administrative Code Rule R162-104-17 (1994)
ADDENDUM E	Utah Administrative Code Rule R162-104-9 (1994)
ADDENDUM F	Utah Administrative Code Rule R162-109-1 (1994)

TABLE OF AUTHORITIES

STATE CASES

<u>Albertson's, Inc. v. Department of Emp. Security</u> , 854 P.2d 570 (Utah App. 1993) . . .	25
<u>Alta Pacific v. Utah State Tax Com'n</u> , 931 P.2d 103 (Utah 1997)	3, 4
<u>Ashcroft v. Industrial Commission</u> , 855 P.2d 267 (Utah App. 1993)	3
<u>Barney v. Utah Department of Commerce</u> , 885 P.2d 809 (Utah App 1993)	3, 35
<u>Brinkerhoff v. Schwendiman</u> , 790 P.2d 587 (Utah App. 1990)	35
<u>Crookston v. Fire Insurance Exch.</u> , 817 P.2d 789 (Utah 1991)	3, 4
<u>First National Bank v. County Board of Equalization</u> , 799 P.2d 1163 (Utah 1990) . . .	24
<u>Grace Drilling Company v. Board of Review</u> , 776 P.2d 63 (Utah App. 1989)	30
<u>Gregory v. Fourthwest Investments, Ltd.</u> , 754 P.2d 89 (Utah App. 1988)	30
<u>Harken Southwest Corporation v. Board of Oil, Gas and Mining</u> , 920 P.2d 1176 (Utah 1996)	33
<u>Horton v. Utah State Retirement Board</u> , 842 P.2d 928 (Utah App. 1992)	32
<u>Jensen v. Brown</u> , 639 P.2d 150 (Utah 1981)	25
<u>Johnson v. Board of Review</u> , 842 P.2d 910 (Utah App. 1992)	24
<u>King v. Industrial Commission</u> , 850 P.2d 1281 (Utah App. 1993)	2
<u>In re Knickerbocker</u> , 912 P.2d 969 (Utah 1996)	30
<u>Morton Intern., Inc. v. Auditing Division</u> , 814 P.2d 581 (Utah 1991)	3, 34
<u>Semeco Industries v. State Tax Comn</u> , 849 P.2d 1167 (Utah 1993)	36
<u>State v. Yates</u> , 834 P.2d 599 (Utah App. 1992)	2, 4, 32
<u>Stokes v. Board of Review</u> , 832 P.2d 56 (Utah App. 1992)	25

<u>Union Pacific R. v. Auditing Division</u> , 842 P.2d 876 (Utah 1992)	2, 32
<u>Vance v. Fordham</u> , 671 P.2d 124 (Utah 1983)	28, 29

STATE STATUTES AND RULES

Utah Code Ann. § 61-2b-10 (Supp. 1990)	11
Utah Code Ann. § 61-2b-10 (Supp. 1991)	12
Utah Code Ann. §§ 61-2b-13 thru 16 (Supp. 1990)	11
Utah Code Ann. § 61-2b-16 (1993)	4
Utah Code Ann. § 61-2b-27 (Supp. 1990)	31
Utah Code Ann. § 61-2b-29 (1993)	4, 28
Utah Code Ann. § 61-2b-31 (1993)	4
Utah Code Ann. § 63-46a-2 (Supp. 1996)	32
Utah Code Ann. § 63-46b-13 (1993)	36
Utah Code Ann. § 63-46b-14 (1993)	11
Utah Code Ann. § 63-46b-16 (1993)	1, 2, 3, 24, 37
Utah Code Ann. § 68-3-11 (1993)	33
Utah Code Ann. § 68-3-12 (1993)	33
Utah Code Ann. § 76-2-103 (1993)	33
Utah Code Ann. §§ 78-2a-3 (1996)	1
Utah Administrative Code Rule R151-46b-3 (October 1, 1996) (Effective March 4, 1996)	32
Utah Administrative Code Rule R151-46b-10 (October 1, 1996) (Effective March 4, 1996)	5, 31

Utah Administrative Code Rule R162-104-9 (1994)	27
Utah Administrative Code Rule R162-104-17 (1994)	27
Utah Administrative Code Rule R162-109-1.1, 1.3 (1994)	28

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JURISDICTIONAL STATEMENT

Petitioner seeks judicial review of an order of the Real Estate Appraiser Registration and Certification Board (the "Board") of the Department of Commerce of the State of Utah. This court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2a-3(2)(a) (1996) and 63-46b-16(1) (1993).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Is the Board's finding that Scarpa fraudulently claimed experience credit for appraisals on which he did not provide any significant professional assistance

supported by substantial evidence?

Standard of Review: This is a factual issue. The Board's finding should be affirmed if the Court determines it is "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1993); accord King v. Industrial Comm'n, 850 P.2d 1281, 1285 (Utah App. 1993).

2. Has Scarpa adequately briefed his argument challenging the Department of Commerce rule requiring the preponderance of the evidence standard of proof in this case?

Standard of Review: A party must adequately brief an issue with argument and citations to authority. Appellate courts routinely decline to consider arguments which are not adequately briefed. Rule 24(a)(9), Utah R. App. P.; State v. Yates, 834 P.2d 599, 602 (Utah App. 1992). "[C]ourts should uphold agency rules if they are reasonable and rational," and will employ an intermediate standard (one of some, but not total, deference) in reviewing claims that an agency erred in applying its rules. Union Pacific R. v. Auditing Div., 842 P.2d 876, 879 (Utah 1992).

3. Even if the Board erred in applying the preponderance of the evidence standard, was the error rendered harmless by its determination that the proof of Scarpa's fraudulent conduct also was sufficient to satisfy a clear and convincing evidence standard?

Standard of Review: Even if an agency has erred, the appellate court may grant relief only if the person seeking judicial review was "substantially prejudiced" by that error. Utah Code Ann. § 63-46b-16(4) (1993). Under this standard, an error will be

harmless if it is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceeding. Morton Intern., Inc. v. Auditing Division, 814 P.2d 581, 584 (Utah 1991). An error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine the Court's confidence in the outcome. Alta Pacific v. Utah State Tax Com'n, 931 P.2d 103, 116 (Utah 1997), citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 796 (Utah 1991).

4. Did Scarpa waive the argument that the Division did not comply with discovery requirements?

Standard of Review: In order to preserve an issue for appeal, a party must make specific and timely objections to the administrative agency. Barney v. Utah Dept. of Commerce, 885 P.2d 809, preserve an issue for appeal, he has waived that issue. Barney, 885 P.2d 809; Ashcroft v. Industrial Comm'n, 855 P.2d 267, 268-69 (Utah App. 1993).

5. Was Scarpa substantially prejudiced because the Division did not provide him with Teresa Larsen's working papers?

Standard of Review: An appellate court may not grant relief from an order of a state agency unless the person seeking judicial review was "substantially prejudiced" by any of several specified types of error. Utah Code Ann. § 63-46b-16(4) (1993). Under this standard, an error will be harmless if it is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceeding. Morton Intern., Inc. v. Auditing Div., 814 P.2d 581, 584 (Utah 1991). An error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine the Court's

confidence in the outcome. Alta Pacific v. Utah State Tax Com'n, 931 P.2d 103, 116 (Utah 1997), citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 796 (Utah 1991).¹

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following are of central importance to this appeal.

1. . . . [A]n original certification may only be issued to a person who is of good moral character. . . . Utah Code Ann. § 61-2b-16(1) (1993)
2. The board shall require and pass upon proof necessary to determine the honesty, competency, integrity, and truthfulness of each applicant. Utah Code Ann. § 61-2b-16(2) (1993)
3. The following acts and omissions shall be considered grounds for disciplinary action: (1) procuring or attempting to procure registration or certification under this chapter by fraud or by making a false statement, submitting false information, making a material misrepresentation in an application filed with the division. . . . Utah Code Ann. § 61-2b-29(1) (1993)
4. If, after the hearing, the board determines that the registrant or certificate holder has violated this chapter, his registration or certificate may be suspended, revoked, or denied reissuance by written order of the board. Utah Code Ann. § 61-2b-31(2) (1993)
5. Standard of Proof. The standard of proof in all proceedings under these rules, whether initiated by a notice of agency action or request for agency action, shall be a

¹In his Summary of the Argument, Scarpa states that "additional witnesses for the defense were not allowed to testify" regarding various matters. (Scarpa's Brief at 28). He makes no citation to the record, cites no authority, and does not discuss this anywhere else in his brief. Scarpa has thus failed to properly raise this as an issue and the Court should disregard it. State v. Yates, 834 P.2d 599 (Utah App. 1992).

preponderance of the evidence. Utah Administrative Code Rule R151-46b-10(8) (October 1, 1996) (Effective March 4, 1996).

STATEMENT OF THE CASE

Events preceding the hearing

On April 10, 1992, Scarpa obtained a license to act as a registered real estate appraiser from the State of Utah, Department of Commerce, Division of Real Estate (the "Division")(R. 1182 at 17-19; R. 1222 at 17-21). On November 9, 1994, he submitted an application to the Division to become a certified residential appraiser (R. 2 at ¶ 5; R. 10 at ¶ 1; Exhibit 2).

On February 14, 1995, the Division commenced a formal adjudicative proceeding against Scarpa by filing before the Board a petition seeking denial of his application to become a certified residential appraiser and revocation of his license to act as a registered appraiser (R. 1-6). The Division alleged that in submitting that application, Scarpa claimed experience credit for appraisals performed by other appraisers and on which he had minimal or no active participation (R. 1-6). It also alleged that he caused records to be falsified to create the impression that he had performed such appraisals, rather than the appraiser who had actually performed them (R. 1-6). The Division served Scarpa with the petition and a notice of agency action (R. 6-9).

Scarpa filed a reply, opposing the relief requested (R. 10-12). On July 28, 1995 and August 11, 1995, he filed a motion and supplemental motion to dismiss the

proceeding on various procedural grounds (R. 16-17, 32-34). The Board denied those motions on January 26, 1996 (R. 91-97).

The Board's original Order

On September 9-10, 1996, a formal hearing was held before the Board. The Board was assisted by J. Steven Eklund, Administrative Law Judge for the Department of Commerce. (R167-174.) On October 29, 1996, the Board issued Findings of Fact, Conclusions of Law and an Order (the "original order"), ordering that Scarpa's application for licensure as a certified residential appraiser be denied and that his license as a registered appraiser be revoked (R167-174). This original order is attached as Addendum "A."

The Board found that in applying to become a certified residential appraiser, Scarpa claimed experience credit for five appraisals performed by Teresa Larsen, with the help of Gerald Higgs (R.167-74). Larsen and Higgs were appraisers affiliated with Appraisal Professionals, a company owned by Scarpa (R. 167-68). The Board found that although Scarpa provided some assistance and supervision to Larsen, he did not provide significant professional assistance such as would entitle him to claim such experience credit (R.167-74). The Board found that the appraisal reports sent to the lenders accurately reflected Larsen as the appraiser who had conducted those appraisals, but that Scarpa instructed Larsen to prepare an additional copy of each appraisal report (R.167-74). It found that Scarpa instructed Larsen to delete her own name and signature from that extra copy, and to reflect Scarpa's name and signature as the appraiser who performed those appraisals (R.167-74). The Board found that

Scarpa required the preparation of this extra copy, and signed it, to subsequently claim credit for having performed those appraisals (R. 167-174).

The Board also found that Scarpa claimed experience credit for three appraisals performed by Bruce Warburton and Gerald Higgs (R.169-74). Warburton was a registered appraiser affiliated with Scarpa's company (R.169). The Board found that although Scarpa provided some assistance and supervision to Warburton, he did not provide significant professional assistance such as would entitle him to claim such experience credit (R. 169-74). The Board found that Scarpa directed Warburton to prepare those three appraisal reports so as to reflect that he had joined Warburton and Higgs in conducting those appraisals (R. 169-174).

The Board also found that Scarpa engaged in this type of practice so frequently that there was a lack of evidence that he had performed and could properly claim credit for any of the appraisals for which he sought credit on his application for certification (R. 170).

The Board concluded, based on a preponderance of the evidence, that Scarpa devised a fraudulent scheme in an attempt to obtain licensure as a certified residential appraiser, and had thus not established that he possessed the necessary honesty, integrity and truthfulness to qualify for such licensure (R. 170-171).

The Board concluded that Scarpa submitted false information to the Division by improperly seeking credit for experience on at least eight appraisals when he had not provided significant professional assistance in those appraisals (R. 171). The Board concluded that Scarpa engaged in a course of fraudulently devious conduct by creating

false copies of appraisals performed by registered appraisers in his employ to subsequently claim experience credit for those appraisals (R. 171). It found that Scarpa prompted the submission of appraisal reports to lenders which did not reflect his participation, but later claimed that he was involved in those appraisals for purposes of obtaining experience credit (R.172). It found that Scarpa created false copies of appraisals and submitted information to the Division which did not reflect the appraisers who had provided significant professional assistance on those appraisals (R.172). The Board concluded that Scarpa engaged in unprofessional conduct in the practice of real estate appraising which constituted dishonesty and fraud, and that his license to act as a registered appraiser should be revoked (R. 170-73).

The Board's Order on Reconsideration

Scarpa submitted a request for reconsideration of the Board's order (R175-220). Following the submission of memoranda by the parties (R175-220, 224-253, 256-294), the Board issued an Order on Request for Agency Reconsideration (the "order on reconsideration"), bearing an effective date of February 27, 1997 (R. 295-304). This order is attached as Addendum "B." As part of its order on reconsideration, the Board entered supplemental findings of fact, modified findings of fact, and additional conclusions of law, which are summarized below (R. 295-304). The Board reaffirmed the findings of fact and conclusions of law contained in its first order to the extent they were not modified by the order on reconsideration (R. 295-96). The Board did not modify the sanction contained in its original order (R. 295-304).

The Board determined that it erred in finding in its original order that Scarpa failed to conduct or provide significant professional assistance on any of the appraisals listed on his experience documentation form (R. 296-97; R.302-303). It concluded that it should not have made such a finding regarding any appraisals other than the Teresa Larsen and Bruce Warburton appraisals (R. 296-97). It thus limited its order to those eight appraisals (R. 295-304). It rejected Scarpa's implicit assertion that there was any evidence the Board was biased against him in this proceeding (R. 303).

The Board concluded that the evidentiary standard it should use was the "preponderance of the evidence" standard as prescribed by Department rule, but found that the Division also met the "clear and convincing evidence" standard in prevailing in the case (R. 295-304). It found that this latter standard was satisfied by Scarpa's own testimony at the hearing, which established that he submitted false statements to both lending institutions and the Division for varying purposes. (R. 299).

The Board found that "significant professional assistance," while not defined by statute or rule, is a well recognized and commonly understood standard in the appraisal industry, that members of the appraisal profession can be properly held to understand the various standards of performance which govern all appraisals, and that the Board is entitled to apply and interpret that standard of performance in the process of administrative adjudication (R. 299-300). It found that Scarpa did not provide significant professional assistance so as to claim credit for having performed any of the eight appraisals in question (R. 296).

The Board found that Scarpa knowingly and intentionally misrepresented that he had conducted a complete inspection of the properties appraised by Larsen (R. 296).

The Board concluded that Scarpa had ample opportunity to obtain access to Larsen's working papers both prior to and during the hearing, and that the fact that the Division did not provide him with those papers caused him no prejudice (R. 300). The Board said this conclusion was further supported by the fact that Scarpa's own admissions formed the lynchpin on which its original order was based (R. 300).

The Board concluded that Scarpa devised a fraudulent scheme, creating false copies of appraisals in an attempt to obtain licensure as a certified residential appraiser (R. 301). This led the Board to further conclude that whether Scarpa knew how to document his experience was not an issue (R. 301).

Finally, the Board concluded that Scarpa was afforded a fair opportunity to present evidence which was neither repetitive nor cumulative, and was not improperly limited in his ability to present evidence (R. 303).

On March 12, 1997, following a motion made by the Division, the Administrative Law Judge entered a nunc pro tunc order correcting a clerical error regarding the date the October 29, 1996 order would become effective, the date of the order on reconsideration, and the deadline for filing a petition for judicial review (R305-309). That nunc pro tunc order is attached as Addendum "C."

On March 27, 1997, Scarpa filed the petition for review now pending before this Court.²

STATEMENT OF THE FACTS

The Utah Real Estate Appraiser Registration and Certification Act (the "Act"), which became effective July 1, 1990, provided for an entry-level license designated as "state-registered appraiser." Utah Code Ann. § 61-2b-10 (Supp. 1990). Higher levels of licensure designated as "state-certified residential appraiser" and "state-certified general appraiser" were made available to state-registered appraisers who attained certain levels of experience and fulfilled other requirements. Utah Code Ann. §§ 61-2b-13 through 16 (Supp. 1990). These license classifications have continued to the present date.

A 1991 amendment to the Act placed some limitations on the kinds of appraisals a registered appraiser could perform. For example, a registered appraiser could not

²Under Department rules, the final agency action in this case was the Board's order on reconsideration, which modified the original order in some ways and otherwise reaffirmed it and incorporated it by reference. Utah Administrative Code Rule R.151-46b-13 (3) (October 1, 1996) (Effective March 4, 1996). On pages 4 and 5 of his brief, however, Scarpa states that he is seeking review of the Board's original order, its order on reconsideration, his own request for agency reconsideration, and the Division's response. This court should disregard Scarpa's effort to seek review of anything other than the final agency action. His request for reconsideration, the Division's response, and those parts of the Board's original order which were changed on reconsideration are not a proper subject of the pending petition for review, because they are not part of the final agency action. Only the final agency action is subject to judicial review. Utah Code Ann. §§ 63-46b-14(1); 63-46b-16(1) (1993). The Court should ignore statements in Scarpa's brief (such as on pages 11-12) criticizing parts of the Board's original order which it later changed after reconsideration.

perform appraisals exceeding a certain dollar amount, and could not issue a certified appraisal report. Utah Code Ann. § 61-2b-10 (Supp. 1991). These limitations continue to the present date.

Scarpa became a state-registered real estate appraiser on April 10, 1992 (R. 1182 at 17-19; R. 1222 at 17-21). He became the original owner, as well as the president, of Appraisal Professionals, a company providing appraisal services (R. 1222 at 22 through R. 1223 at 5; R. 1333 at 20 through R. 1334 at 6.) He contracted with a certified general appraiser, Gerald Higgs, to act as a certified appraiser for Appraisal Professionals (R. 1445 at 17 through R. 1447 at 7).

In late December 1992, the Division was contacted by Teresa Larsen, a registered appraiser who had recently been working for Appraisal Professionals. Larsen told the Division she was concerned that Scarpa would try to claim her appraisals for credit on a future application to become a certified appraiser (R. 1178 at 13-23). Larsen identified five specific appraisals on which she thought this might happen (R. 1178 at 24 through R. 1179 at 8).

The Division then monitored the certification applications it received, watching for an application from Scarpa (R. 1179 at 9-14). On November 9, 1994, the Division received from Scarpa an application for certification as a certified residential appraiser. As part of his application, Scarpa included an experience documentation form claiming to have performed appraisals on the five properties Larsen had identified as properties she had appraised while working for Scarpa (Exhibit 2; R. 1179 at 14-21). The experience documentation form, signed by Scarpa and acknowledged before a notary,

contains the following statement:

Under penalty of perjury, I attest that the information contained on this form is true. I understand that I may be required to substantiate the experience claimed by submitting written reports or file memoranda, and that willfully submitting false information can result in license revocation and/or criminal prosecution.

(Exhibit 2).

Following an investigation, the Division filed a petition against Scarpa, alleging that in submitting that application, Scarpa claimed experience credit for appraisals actually done by other appraisers, and on which he had minimal or no active participation (R. 1-9). The Division alleged that Scarpa failed to meet the criteria of honesty, integrity and truthfulness which are required for certification (R. 3-4). It alleged that Scarpa was also subject to disciplinary action for attempting to procure certification by fraud or by making a false statement, submitting false information, or making a material misrepresentation in his application (R. 4). The petition asked the Board to deny Scarpa's application to become a certified residential appraiser, and to revoke his license to act as a registered appraiser (R. 4-5).

At the hearing on the petition, the Division showed that Larsen had worked for Appraisal Professionals in November and December of 1992 (R. 1086 at 2-15). She performed appraisals on five properties while working there:

2086 E. Kramer Drive, Sandy, Utah. Larsen performed the work on this appraisal, with the assistance of Gerald Higgs (R.1087 at 23 through R. 1088 at 1). She did not recall Scarpa doing any work on the appraisal (R. 1089 at 2-3). Before she finished the appraisal report, Scarpa instructed her to prepare an extra copy of the

appraisal report, to delete her name, and to add Scarpa's name and a place for him to sign (R. 1088 at 2 through R. 1089 at 1). The appraisal report on this property which was submitted to the lender is Exhibit 14. It is signed by Larsen and Higgs. The extra copy Larsen prepared for Scarpa is Exhibit 16. It is signed by Scarpa and Higgs.

1995 East Rua Branco Circle, Sandy, Utah. Larsen performed the work on this appraisal, with the assistance of Higgs (R. 1093 at 9-18). To her knowledge, Scarpa did not do any work on that appraisal (R. 1093 at 19-21). She prepared an extra copy of this appraisal for Scarpa's signature, as she had been previously instructed (R. 1093 at 22 through R. 1094 at 4). Larsen's copy of the appraisal report on this property, bearing the signatures of Larsen and Higgs, is Exhibit 3. The extra copy Larsen prepared for Scarpa, signed by Scarpa and Higgs, is Exhibit 4.

462 West 1250 North, Centerville, Utah. Larsen performed the work on this appraisal, with the assistance of Higgs (R. 1094 at 9-18.) To Larsen's knowledge, Scarpa may have suggested changing the word "remodeled" in describing the kitchen to the word "modified" (R. 1561 at 16 through R. 1564 at 3). Other than that, Larsen had no evidence or recollection of Scarpa doing any work on that appraisal (R. 1094 at 23-25; R. 1564 at 15-20). She prepared an extra copy of this appraisal for Scarpa's signature, as Scarpa had previously instructed her (R. 1095 at 1-7). The copy of the appraisal report on this property which was sent to the lender is Exhibit 5. It bears only Higgs signature. Larsen did not know why her signature did not appear on that copy (R. 1095 at 15 through R. 1096 at 13). Larsen's personal copy of that report is Exhibit 6. It is signed by Larsen and Higgs. The extra copy Larsen prepared for Scarpa is

Exhibit 7. It is signed by Scarpa and Higgs.

2275 West 10546 South, South Jordan, Utah. Larsen performed the work on this appraisal, with the assistance of Higgs (R. 1096 at 14-24). Scarpa provided Larsen with some information from the builder (R. 1096 at 25 through 1097 at 5). He also may have suggested rephrasing three words in a sentence in the comments section, and changed two separate words in that same section (R. 1561 at 16 through R. 1563 at 13; R. 1564 at 4-14). Other than that, Larsen had no evidence or specific recollection of Scarpa performing any work on this appraisal (R. 1097 at 6-8; R. 1564 at 15-20). She prepared an extra copy of this appraisal for Scarpa's signature, as Scarpa had previously instructed her (R. 1097 at 9-15). The copy of the appraisal report on this property which was sent to the lender is Exhibit 8. It is signed by Larsen and Higgs. The extra copy Larsen prepared for Scarpa is Exhibit 10. It is signed by Scarpa and Higgs.

876 South 2200 East, Salt Lake City, Utah. Larsen performed the work on this appraisal, with the assistance of Higgs (R. 1097 at 22 through R. 1098 at 6). Larsen could not recall specifically Scarpa performing any work on this appraisal (R. 1098 at 7-10). She prepared an extra copy of this appraisal for Scarpa's signature, as Scarpa had previously instructed her (R. 1098 at 11-17). The copy of the appraisal report on this property which was sent to the lender is Exhibit 11. It is signed by Larsen and Higgs. The extra copy Larsen prepared for Scarpa is Exhibit 13. It is signed by Scarpa and Higgs.

To Larsen's knowledge, Scarpa did not see any of the properties involved in her

five appraisals. She recalled that he probably contributed information to her or answered general questions she may have had in performing her appraisal work (R. 1099 at 4-8). Scarpa claimed that he inspected the exterior of all five properties (R. 1273 at 4-5). He admitted, however, that he did not inspect the interior of three of the properties, even though the copies he kept for himself and later submitted to the Division of those three appraisals contained his signed certification that he had inspected both the interior and exterior those properties (R. 1273 at 6-9; R. 1273 at 10-21; R. 1231 at 25 through R. 1232 at 2; Exhibit 7; R. 1281 at 25 through R. 1282 at 14; R. 1239 at 1-2; Exhibit 13; R. 1283 at 16-22; Exhibit 16; R. 1258 at 24 through R. 1259 at 9).

Larsen left Appraisal Professionals because she was uncomfortable about the procedure involved in making the extra copy for Scarpa's signature (R. 1103 at 14-25). She was concerned because she was being asked to delete her name from that copy (R. 1104 at 23-25; R. 1119 at 11 through R. 1120 at 11).

Richard Bybee was a registered appraiser who worked for Appraisal Professionals from about June 1992 to January 1993 (R. 1036 at 17 through 1038 at 5). At the hearing, Bybee bolstered Larsen's testimony by confirming that while he worked for Appraisal Professionals, Scarpa took credit for doing work on Bybee's appraisals, even though he performed little or no work on those appraisals (R. 1038 at 13-19). Bybee testified that "[Scarpa] signed all of mine. Every appraisal I did that was done for Appraisal Professionals there was a copy made with his signature on it." (R. 1043 at 19-21). On between 20 and 50 of these appraisals, Scarpa did not see the properties

(R. 1043 at 22 through R. 1044 at 5). Bybee was concerned about the procedure of making an extra copy for Scarpa's signature because there came a point where in Bybee's opinion Scarpa "wasn't even looking at the appraisals." (R. 1038 at 23 through R. 1040 at 2, especially R. 1040 at 1-2).

Bruce Warburton was a registered appraiser who worked for Appraisal Professionals from about September 1993 to September 1994. At the hearing, the Division showed that while working for Appraisal Professionals, Warburton performed three narrative appraisals:

1359 West 5930 North, Oakley, Utah. Warburton performed the work on this appraisal, with the assistance of Higgs (R. 1134 at 20 through R. 1137 at 2; R. 1144 at 13 through R. 1145 at 4; R. 1171 at 16-18; Exhibit 19). After Warburton had compiled all of his notes and was ready to have the appraisal sent out to be typed, Scarpa instructed him to put Scarpa's name on the appraisal. Scarpa told him he was going to proof the appraisal, and that would give him the involvement needed to put his name on it. Scarpa told Warburton to do this because Scarpa was "the boss." Prior to that point, Scarpa had nothing to do with that appraisal. Warburton followed Scarpa's instructions, and when the appraisal was finished, he gave it Scarpa. Scarpa returned the appraisal to Warburton later that day. Scarpa signed that appraisal. (R. 1136 at 18 through R. 1139 at 12).

98 West Center Street, Midvale, Utah. Warburton performed the work on this appraisal, with the assistance of Higgs (R. 1139 at 13 through R. 1140 at 2; Exhibit 20). Scarpa did not do any work on this appraisal (R. 1140 at 3-4). Pursuant to instructions

from Scarpa, Warburton put Scarpa's name on this appraisal and gave it to Scarpa to sign. Scarpa signed it in Warburton's presence. (R. 1140 at 5-23; Exhibit 20).

548 East 12th Street, Ogden, Utah. Warburton performed the work on this appraisal, with the assistance of Higgs (R. 1140 at 24 through R. 1141 at 17; Exhibit 21). Based on Scarpa's instructions on the previous two appraisals, Warburton added Scarpa's name to this appraisal (R. 1141 at 21 through R. 1142 at 124). To Warburton's knowledge, Scarpa did no work on this appraisal (R. 1142 at 4-7). Scarpa signed this appraisal in Warburton's presence (R. 1142 at 2-3).

Scarpa presented evidence of his own, claiming he had been actively involved in all the appraisals performed by Larsen and Warburton. He attempted to contradict or discount the testimony of Larsen, Bybee and Warburton and to challenge their credibility.³ Ultimately, however, the Board resolved the dispute in the testimony in favor of the Division. It found that the Division proved by clear and convincing evidence that Scarpa did not provide significant professional assistance on the Higgs and Warburton appraisals as to allow him to claim credit for having performed any of them (R. 296; R. 301).

³Scarpa attempted during the hearing to challenge Warburton's credibility by seeking to introduce extrinsic evidence of specific instances of alleged misconduct on his part. Counsel for the Division objected, and the administrative law judge sustained the objections. Scarpa then attached letters and affidavits to his request for reconsideration containing the kind of statements to which the Division successfully objected at the hearing. The Division objected to those letters and affidavits on reconsideration and asked the Board to ignore them (R. 242). None of the statements made in those letters or affidavits are mentioned in the order on reconsideration. Scarpa has made reference to those statements in his brief. The Division has filed a motion to strike all such references from Scarpa's brief.

Scarpa offered a number of reasons which he claimed justified his practice of having multiple copies of appraisals prepared, some with the signatures of one of his registered appraisers and Higgs, and one with the signature of himself and Higgs. For example, he said that certain lenders would only allow the certified appraiser to sign appraisals for them (R. 1228 at 23 through R. 1229 at 6). Even when doing an appraisal for a company that had no such requirement, however, Scarpa still had his appraisers prepare a separate copy for his signature in addition to the copies they signed themselves. Scarpa said there were so many lenders that it was "easier to have one procedure in the office." (R. 1278 at 22 through R. 1279 at 10).

Scarpa also claimed that in establishing the procedure of preparing an extra copy of appraisals which would include his signature, he was only following the advice of Joe Dunlop, a certified general appraiser who was working for him as a consultant, and was just trying to create a record which showed his participation in the appraisals (R. 1276 at 10 through 1277 at 4; R. 1353 at 5-9; R. 1354 at 6-10). Dunlop testified, however, that he never advised Scarpa to delete from the appraisal the name of any registered appraiser from his office who had performed the appraisal (R. 1368 at 14-18). Scarpa admitted that the idea of deleting the name of the other appraiser from his copy of the appraisal was his own interpretation of Dunlop's directions (R. 1277 at 5-11).

The Board was not persuaded that any of Scarpa's reasons justified him in submitting false statements to both lending institutions and the Division for varying purposes (R. 295-304, especially R. 299). In both its initial order, and its order on

reconsideration, the Board stated:

Significantly, the appraisal report form submitted to lenders on those properties appraised by Ms. Larsen provides for the entry of the name(s) of each appraiser who may have conducted any given appraisal. *If Respondent had actually joined Ms. Larsen or any other state-registered appraiser employed by Appraisal Professionals in conducting one of the appraisals in question, the appraisal report submitted to any given lending institution was necessarily inaccurate if it did not reflect the fact of Respondent's significant professional assistance.* Moreover, copies of appraisal reports which Respondent submitted to the Division to thus document his claim for experience toward certification as a state-certified residential appraiser *were also inaccurate because he did not acknowledge the significant professional assistance provided by Ms. Larsen or any other appraiser in each instance.*

(R. 301) (Emphasis added by Board in its order on reconsideration).

At the hearing, Teresa Larsen made reference to her working files which she had taken with her when she left Appraisal Professionals. These were files which belonged to her (R. 1562 at 15-22) She testified on rebuttal that on reviewing her working files on the five appraisals she performed, she found no indication that Scarpa had done any work on three of the appraisals (R. 1561 at 22 through R. 1563 at 12). She found some handwriting she did not recognize and said it could have been Scarpa's. Someone having that handwriting had asked that about six words be changed on the appraisals of the property located at 462 West 1250 North, Centerville, Utah, and 2275 West 10546 South (R. 1563 at 5 through R. 1564). She testified that she had provided these working files to counsel for the Division several weeks before the hearing (R. 1567 at 5 through R. 1568 at 12.) She also testified that from the time she left Appraisal Professionals in 1992 to the day she gave those files to counsel for the Division, neither the Division nor Scarpa, or anyone on their behalf, had contacted her to produce those

files (R. 1571 at 3-16). Scarpa testified that he had known Larsen had those working files since receiving correspondence from the Division requesting copies of those appraisals, which would have been November 1994, almost two years before the hearing (R. 276 at 4-15; Exhibit 17). Larsen had her working files with her during the hearing and reviewed them to respond to a question from counsel for the Division (R. 300). The working papers themselves were neither offered nor received in evidence.

Scarpa made no objection to Larsen's testimony about what she observed on reviewing her working files (R. 1561 at 22 through 1564 at 20). He did not request an opportunity to review those files. Throughout the entire hearing, he never raised any issue that the Division had allegedly violated discovery requirements by not giving him copies of the working files it obtained several weeks before the hearing.

After the Board issued its original order and Scarpa requested reconsideration, he claimed for the first time that the Division was obligated under discovery requirements to provide him with the Larsen working papers, and that he was substantially prejudiced and denied due process because the Division did not provide him with those documents (R. 177-179; R. 272-274). On reconsideration, the Board did not address Scarpa's allegation that the Division was obligated under discovery requirements to provide him with those papers. Instead, it considered whether or not Scarpa had established he was prejudiced in his ability to present testimony in the case by not having those papers prior to the hearing (R. 300). It concluded that Scarpa had various opportunities—up to and including during the hearing itself—to obtain access to those documents (R.300). Scarpa failed, however, to avail himself of those

opportunities. The Board determined that since Scarpa's own admissions formed the lynchpin on which its original order was based, Scarpa had failed to establish that he was prejudiced by not having those documents prior to the hearing (R. 300).⁴

SUMMARY OF ARGUMENT

This case involved a credibility contest. The Division presented evidence showing that Scarpa submitted an application for certification in which he tried to claim experience credit for work he did not perform. Scarpa presented evidence disputing the Division's position. The Board believed the Division's evidence and found that the Division had proved its case, not just by a preponderance of the evidence, but by a showing of clear and convincing evidence. It found that Scarpa's conduct was fraudulent, that he did not meet the criteria of honesty needed to become a certified appraiser, and that his license as a registered appraiser should be revoked. The Board's findings on these factual issues are supported by substantial evidence and this Court should not disturb them.

The Board concluded that in order to receive experience credit for having

⁴Scarpa asserts in his brief (on pages 13, 17, 18 and 43, for example) that Larsen's working files contained verification that he participated in her appraisals and would have refuted her testimony. There is nothing in the record to support this assertion. Weeks after the hearing had been concluded and the Board had issued its order, Scarpa attached letters and affidavits to his request for reconsideration in an attempt to make this assertion. The Division objected to those letters and affidavits on reconsideration and asked the Board to ignore them (R. 242). None of the statements made in those letters or affidavits are mentioned in the order on reconsideration. Those letters and affidavits are the subject of a motion to strike which the Division has filed with this Court.

performed an appraisal, an appraiser must have provided some significant professional assistance on the appraisal. It found that Scarpa did not provide that level of assistance on eight appraisals for which he claimed credit. Scarpa claims the Board should have adopted a formal rule before holding him to such a standard. He is wrong. It is not necessary to have an express rule for everything that might come before an agency. Existing rules already contain an implicit significant professional assistance requirement. In any event, the Board is authorized to interpret and apply standards of performance that should be understood by members of the profession.

Scarpa's attempts to characterize the case as a mere difference of opinion about how he should have kept records of his participation on appraisals are misguided and irrelevant. This is not a case about the proper way to keep records of participation in appraisals. Rather, this case is about whether Scarpa participated sufficiently in certain appraisals to get credit in the first place. The Board found that he did not.

The Board applied a preponderance of the evidence standard of proof, as required by Department rule. Scarpa, while acknowledging that no statutory provision calls for a higher standard of proof, asserts that the Board should have applied a clear and convincing evidence standard. He fails to adequately brief the point, however, and cites no controlling authority that would support overturning the rule. In any event, even if the Board should have applied a clear and convincing evidence standard, there was no prejudice to Scarpa because the Board found that the proof satisfied both standards.

Scarpa claims the Division violated discovery requirements by not providing him

with a copy of some documents it obtained from a witness several weeks before the hearing. By failing to timely raise that issue before the Board, however, he waived the right to have it considered on judicial review. Furthermore, because he had ample opportunity to timely discover that information himself from the witness early in the course of the proceeding, and could even have reviewed that information at the hearing, but did not, he was not prejudiced by not receiving a copy of that information from the Division.

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SCARPA FRAUDULENTLY CLAIMED EXPERIENCE CREDIT FOR APPRAISALS ON WHICH HE DID NOT PROVIDE ANY SIGNIFICANT PROFESSIONAL ASSISTANCE

The Board's finding that Scarpa fraudulently claimed experience credit for appraisals on which he did not provide any significant professional assistance should be sustained by this Court as long as it is "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1993). Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990). It is more than a mere "scintilla" of evidence and something less than the weight of the evidence. Johnson v. Board of Review, 842 P.2d 910, 911 (Utah App. 1992).

Appellate courts give great deference to the factual determinations of trial-level decision makers. As long as there is sufficient evidence to support the findings of the lower court, the appellate court will be mindful of the advantaged position of the trial judge who sees and hears the witnesses and will therefore give due deference to his decision. Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981). This principle applies to the decisions of trial courts and administrative agencies alike. An agency's findings of fact are accorded substantial deference and "will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible." Stokes v. Board of Review, 832 P.2d 56, 60 (Utah App. 1992)(quoting Hurley v. Board of Review, 767 P.2d 524, 526-27 (Utah 1988). "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." Albertson's, Inc. v. Department of Emp. Sec., 854 P.2d 570, 575 (Utah App. 1993)(quoting Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989)).

This case presented a credibility contest to the Board. Witnesses for the Division testified that Scarpa took credit for performing appraisals on which he had little or no involvement. They demonstrated that in a number of cases, Scarpa caused a dual set of appraisal records to be established. One appraisal went to the lender, showing the names of the appraisers who actually performed the appraisal. A second version of the appraisal deleted the name of the registered appraiser who had done the work (Teresa Larsen) and substituted Scarpa's name. The application submitted by Scarpa to

become a certified residential appraiser claimed experience credit for some of the appraisals on which he had little or no involvement. The evidence offered by the Division, if accepted by the Board as truthful, was compelling and substantial.

Scarpa, on the other hand, claimed that he had participated significantly in every appraisal he signed.⁵ He tried to attack the credibility of some of the Division's witnesses. He admitted maintaining the dual set of appraisal records, but tried to justify his actions with various explanations. He admitted signing a certification that he had inspected the interior of three of the properties appraised by Larsen, even though he had admittedly not really conducted such an inspection.

After observing the witnesses and hearing their testimony, the Board believed the Division's witnesses, and not Scarpa's. Even though it would have been sufficient for the Board to find that the evidence preponderated against Scarpa, the Board found that the evidence against him was "clear and convincing."⁶

Scarpa asserts that the Board should not have found his level of participation in

⁵Some of the references in Scarpa's brief which purport to be references to evidence in the record are actually citations to the memoranda he submitted in support of his request for reconsideration. (See, for example, Scarpa's brief at page 20, where he cites to R. 178, pages 22-23, where he cites to R. 179, and page 42, where he cites to R. 266). The Division has made a motion to strike such references.

⁶Since each appraisal for which Scarpa sought credit without having provided sufficient participation raised a serious concern respecting his honesty, integrity, truthfulness and moral character, the Board's finding that there were eight such appraisals was more than enough to support its finding that Scarpa should lose his license and be denied certification, even though his application listed hundreds of properties. The duplicate record scheme developed by Scarpa to facilitate this process further supported the Board's finding.

the subject appraisals was insufficient to receive experience credit because there was no statute or rule specifically defining the level of participation required to legitimately claim such credit. Actually, a review of the Division's rules in effect at the time of Scarpa's application for certification shows that even though the words "significant professional assistance" are not expressly stated, such a standard is implicit. The Appraisal Experience Points Schedule begins with the words "Appraisal Experience Points Schedule. Points shall be awarded as follows. . . ." The schedule then lists various kinds of properties, each having a corresponding point value. Utah Administrative Code Rule R162-104-17 (1994), attached as Addendum D. Other rules point out that if the appraiser has done a desk review of the appraisal of the property, he earns 20% of the points for the appraisal. If he does a field review, he earns 50% of the points. If he supervises the appraiser, he earns 20% of the points for the appraisal. Utah Administrative Code Rule R162-104-9 (1994), attached as Addendum E.

A reading of these rules strongly supports the Board's conclusion that in order to earn experience credit, an appraiser must provide significant professional assistance on an appraisal. The only cited rule which does not refer to some specific type of significant professional assistance by the appraiser (desk review, field review, or supervision) is the opening portion of the point schedule itself. However, since that schedule lists the maximum points available for an appraisal, and since the rules clearly provide that certain defined forms of participation in the appraisal will allow the appraiser to earn fewer points, it follows that to qualify for those maximum points, an

appraiser must provide some significant professional assistance.⁷

Even if the rules did not already have an implicit requirement of significant professional assistance, it is not necessary for an agency to have a rule governing every issue that might come before it. Case law allows the Board to make appropriate interpretations of the rules. In Vance v. Fordham, 671 P.2d 124 (Utah 1983), the license of an osteopathic physician had been revoked for “unprofessional conduct.” Among other things, the physician argued on appeal that it was illegal for the Department to revoke his license for unprofessional conduct when the Department had not published regulations defining what professional conduct was forbidden under that standard. The Supreme Court held that the Department’s decision on the meaning of “unprofessional conduct” was within the limits of reasonableness, and upheld the revocation of the license. The Court reasoned that as applied to the treatment of patients, or services to clients,

[A] general statutory standard like “unprofessional conduct” is acceptable for three reasons: (1) The subject of professional performance is too comprehensive to be codified in detail. (2) Members of a profession can properly be held to understand its standards of performance. (3) Standards of performance will be interpreted by members of the same profession in the process of administrative adjudication.

Vance, 671 P.2d at 129.

⁷On page 37 of his brief, Scarpa appears to argue that the Division should have questioned his claimed experience points in some informal manner instead of filing this formal proceeding. He is mistaken. Since the Division was seeking to deny Scarpa’s initial certification application for a reason listed in Utah Code Ann. § 61-2b-29, and to revoke his license to act as a registered appraiser, its rules required it to proceed by way of a formal administrative proceeding. Utah Administrative Code Rules R162-109-1.1, 1.3 (1994) attached as Addendum F.

The principles followed by the Supreme Court in Vance also apply to this case. The Board concluded in its order on reconsideration that the term "significant professional assistance," while not defined by statute or rule, is a well recognized and commonly understood standard in the appraisal industry,⁸ members of the appraisal profession can be properly held to understand the various standards of performance which govern all appraisals, and the Board is entitled to apply and interpret that standard of performance in the process of administrative adjudication (R. 299-300).⁹

The Board did not adopt a new rule in deciding this case, nor did it need to.¹⁰ Instead, by applying commonly understood standards already recognized in the appraisal industry, it found that Scarpa did not provide significant professional assistance so as to claim credit for having performed any of the eight appraisals in question (R. 296).¹¹

⁸The Board found that "significant professional assistance is commonly accepted to mean that an appraiser has provided input into the final value estimate of the property in question." (R. 300).

⁹Accordingly, it was unnecessary for the Board to adopt the views of Scarpa's expert witness and former consultant Joe Dunlop regarding the level of participation he felt was necessary in order to qualify for experience credit on an appraisal. In addition, Dunlop's credibility was damaged by his admission on cross-examination that he had given incorrect advice to Scarpa about making an extra copy of appraisals for his signature (R. 1364 at 19 through R. 1368 at 13, especially R. 1368 at 11-13).

¹⁰On page 36 of his brief, Scarpa says the Board did consider the issue of minimum criteria for participation "post decision," and refers to Addendum #3 of his brief. Addendum #3 consists of materials which are not part of the record, are irrelevant to this case and are a subject of the Division's motion to strike.

¹¹Scarpa's contention that the Board needed to formally enact on a rule on the subject before it could decide this case is incorrect. Vance, 671 P.2d at 128-30.

In Part IV of his argument, Scarpa claims, without any citation of relevant supporting authority, that the Board committed error by failing to make detailed findings of the evidence it relied on to support its conclusions.¹² He is incorrect. The Board's findings of fact provide ample detail for this Court to carry out its review. It was not necessary for the Board to itemize the specific points of evidence on which it relied. In re Knickerbocker, 912 P.2d 969, 979 (Utah 1996). Most of Scarpa's argument on this point consists of self-serving assertions about the comparative strength of the evidence presented by the Division and by Scarpa. He fails to recognize that the Board saw and heard all of the witnesses and was able to assess their credibility and consider their testimony. He fails to recognize that it was the province of the Board determine which witnesses to believe. Grace Drilling Company v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989). The Board performed its function of weighing the evidence and adequately explained the factual bases for its decision. This Court should ignore Scarpa's attempts to get this Court to substitute its judgment for that of the Board in the determination of these factual issues.

The Board's finding that Scarpa fraudulently claimed experience credit for appraisals on which he did not provide any significant professional assistance is based

¹²One case Scarpa cites is Gregory v. Fourtwest Investments, Ltd., 754 P.2d 89 (Utah App. 1988). This was a negligence case based on injuries suffered when a snow-covered roof collapsed. The court granted a directed verdict in favor of the defendant, and the plaintiff appealed. Scarpa cites this case for the proposition that "speculation and conjecture do not constitute the more 'credible evidence presented' based on an assumed, undefined, unpublished standard or test of 'significant participation' or 'significant professional assistance.'" The case does not support Scarpa's assertion and has nothing to do with participation on an appraisal.

on substantial evidence and should be sustained by this Court.¹³

POINT II

SCARPA HAS FAILED TO ADEQUATELY BRIEF HIS CHALLENGE TO THE DEPARTMENT OF COMMERCE RULE REQUIRING THE PREPONDERANCE OF THE EVIDENCE STANDARD IN THIS CASE

In deciding this case, the Board necessarily applied the standard of proof required by the rules of the Department of Commerce: "The standard of proof in all proceedings under these rules, whether initiated by a notice of agency action or request for agency action, shall be a preponderance of the evidence." Utah Administrative Code Rule R151-46b-10(8) (October 1, 1996)(Effective March 4, 1996). (Emphasis added.) This rule was adopted by the Department "under the authority of Subsection 63-46b-1(6) and Section 13-1-6 to define, clarify, or establish the procedures which

¹³ Scarpa argues in Point I of his brief that his procedure of making double copies of appraisals with differing signatures was simply an attempt to document his participation in appraisals while still satisfying lenders who would supposedly allow only the certified appraiser to sign an appraisal. He claims that at the time, the Uniform Standards of Professional Appraisal Practice ("USPAP"), had some potentially inconsistent requirements, and that he is being sanctioned over nothing more than an honest disagreement over how to document his experience while still complying with USPAP. (Since 1990, licensed appraisers have been required by Utah law to comply with USPAP. Utah Code Ann. § 61-2b-27 (Supp. 1990)) His argument lacks credibility because he admittedly used this procedure for lenders who imposed no such restriction, and because by causing the deletion of the name of the registered appraiser who performed the appraisal from his own copy, Scarpa went beyond the advice of his own consultant, Joe Dunlop. Most importantly, his argument fails because it is based on a false premise--that he provided significant professional assistance in the Larsen and Warburton appraisals. As the Board concluded, this case is not about whether Scarpa knew how to document his experience. It is about whether he earned the experience in the first place. The Board concluded he did not.

govern adjudicative proceedings before the department.” Utah Administrative Code Rule R151-46b-3 (October 1, 1996)(Effective March 4, 1996).

Utah law recognizes that “courts should uphold agency rules if they are reasonable and rational.” Union Pacific R. v. Auditing Div., 842 P.2d 876, 879 (Utah 1992). A properly adopted rule has the effect of law. Utah Code Ann. § 63-46a-2(16)(a)(ii) (Supp. 1996). It is presumed valid. See Horton v. Utah State Retirement Board, 842 P. 2d 928, 932, n. 2 (Utah App. 1992), and the cases cited therein.

While conceding that no statutory provision calls for a higher standard of proof than that provided in the rule, Scarpa asserts that the Board erred in applying the “preponderance of the evidence” standard of proof in this case. He claims that the Board should have required the Division to prove its case by “clear and convincing evidence.” Scarpa, in effect, is asking this Court to overturn Commerce Department Rule R151-46b-10(8).

Rule 24(a) of the Rules of Appellate Procedure imposes the following burden on the parties as they brief issues on appeal: “The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on.” A party who fails to meet this burden risks having the appellate court disregard issues which have not been sufficiently briefed. “This court has routinely declined to consider arguments which are not adequately briefed on appeal.” State v. Yates, 834 P.2d 599, 602 (Utah App. 1992).

The Board respectfully submits that Scarpa has failed to adequately brief his

challenge to its application of the preponderance of the evidence standard required by the rule. He has failed to meet his burden of challenging the constitutionality and validity of the rule. He cites no controlling case authority. His only Utah case reference in purported support of his claim is to dictum in the case of Harken Southwest Corporation v. Board of Oil, Gas and Mining, 920 P.2d 1176 (Utah 1996). He makes reference to statutes which are not relevant and do not support the generalized assertions for which he cites them (for example, Utah Code Ann. § 76-2-103 (1993), which is part of the criminal code, and Utah Code Ann. §§ 68-3-11 and 68-3-12 (1993), which are part of the general rules of statutory construction). He offers no constitutional analysis.

Scarpa has failed to adequately brief the burden of proof issue. The Court should decline to consider his challenge to the application of the Department's rule.

POINT III

EVEN IF THE BOARD ERRED IN APPLYING THE PREPONDERANCE OF THE EVIDENCE STANDARD, THE ERROR WAS HARMLESS BECAUSE THE BOARD DETERMINED THAT THE PROOF OF SCARPA'S FRAUDULENT CONDUCT WAS SUFFICIENT TO SATISFY A CLEAR AND CONVINCING EVIDENCE STANDARD

Although the Board concluded that the standard of proof which governed this proceeding is a preponderance of the evidence, it also concluded "that the quantum of evidence in this proceeding is sufficient to satisfy a 'clear and convincing' evidentiary standard." (R. 301). Accordingly, even if the Board erred in applying the preponderance of the evidence standard, the error was harmless because the Board

determined that it would have reached the same decision under either standard. Thus, Scarpa could not demonstrate substantial prejudice. Morton Intern., Inc. v. Auditing Div., 814 P.2d 581, 584 (Utah 1991).

POINT IV

SCARPA WAIVED ANY ARGUMENT THAT THE DIVISION DID NOT COMPLY WITH DISCOVERY REQUIREMENTS

In Point V of his argument, Scarpa argues that the Division somehow violated discovery requirements by not providing him a copy of Larsen's working papers when it received them several weeks before the hearing.¹⁴ Scarpa failed to properly preserve this issue and has waived this argument on appeal.

When Larsen testified at the hearing that she had given her working papers to the Division several weeks earlier, Scarpa was put on notice that this had happened. If

¹⁴ Although Scarpa waived the discovery issue on appeal by not raising it at the hearing, it is important to note that in his brief, Scarpa misrepresents the content of the record. He states on page 42 that "The Division filed an Amended Witness and Exhibit List dated May 24, 1997, representing that it was in the process of obtaining Ms. Larsen's file with the appraisal reports on the five subject appraisals, including all the work papers and field notes. (R.00266)." (Emphasis added.) This cite is to the reply memorandum Scarpa filed in support of his request for reconsideration, not to the Division's witness and exhibit list. The Division's Amended Witness and Exhibit List actually reads as follows: "The Division is in the process of obtaining from Teresa Larsen copies of her file copies of the appraisal reports on the following properties [the addresses of the five Larsen appraisals are here set forth]." (R. 110). There is no mention of work papers and field notes, just the appraisal reports themselves. Scarpa's misquotation from the record gives the false impression that the Division was in the process at that time of obtaining copies of Larsen's working papers for use as a possible exhibit, but such was not the case. Furthermore, the working papers were never received as an exhibit and are not part of the record on review.

he had felt the Division had violated any discovery requirements by not providing him a copy of those papers, he needed to make a specific objection at that time. That would have given the Board an opportunity to deal with his objection at the hearing, while the Board, the parties, their counsel, and Teresa Larsen were present. If Scarpa had felt he had somehow been unfairly surprised and that he needed time to review the working papers, it was his burden to make a specific objection at that time and request appropriate relief, such as a recess, or even a continuance of the hearing, to give him an opportunity to review the papers, to cross examine Larsen about them and to present testimony of his own. He could have even asked the Board to keep the record open for a period of time and to permit him to present supplemental evidence. He did none of these things. At no time during the hearing did Scarpa raise the issue that the Division had violated discovery requirements by not providing him with those papers. Accordingly, he waived the right to have that issue considered on judicial review. As this Court held in Barney v. Utah Dept. of Commerce,

Counsel did not timely object to the specific defects Barney now raises on appeal. Moreover, counsel failed to make a motion for relief, denying the administrative law judge any opportunity to remedy the defects.

Therefore, we are unable to consider Barney's due process claims.

Barney, 885 P.2d at 809. Further, in Brinkerhoff v. Schwendiman, this Court held that "It is axiomatic in our adversary system that a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings." 790 P.2d 587, 589 (Utah App. 1990).

When Scarpa submitted his request for reconsideration to the Board, he made a

belated attempt to raise the issue of the alleged violation of discovery requirements. It was within the sound discretion of the Board to decide whether to allow him to raise this issue on reconsideration,¹⁵ and it chose not to address that issue in its order on reconsideration.

Since Scarpa failed to preserve the discovery issue, he has waived that argument on review and this Court should disregard it.¹⁶

POINT V

SCARPA WAS NOT PREJUDICED BY THE FACT THAT THE DIVISION DID NOT PROVIDE HIM WITH TERESA LARSEN'S WORKING PAPERS

Even if Scarpa had preserved the issue below, he was not prejudiced by the fact that the Division did not provide him with Larsen's working papers before the hearing. In its order on reconsideration the Board, without discussing the merits of Scarpa's claim that the Division violated discovery rules, considered whether Scarpa had in any event been prejudiced by the fact that the Division did not provide him with Larsen's working files. It concluded as follows:

¹⁵Since it is within the discretion of an administrative agency to grant or deny a request for reconsideration in the first place, it is certainly within its discretion to decide whether to reconsider one of several issues a party attempts to raise on reconsideration. Utah Code Ann. § 63-46b-13(3) (1993)

¹⁶Even though Scarpa's waiver of this issue makes it unnecessary to discuss the merits of his argument, it is important to note that on page 3 of his brief, where he addresses the standard of review he believes applies, he cites the case of Semeco Industries v. State Tax Com'n, 849 P.2d 1167, 1172 (Utah 1993) without indicating that page 1172 of this case is part of the dissenting opinion.

Nevertheless, Respondent had an opportunity to inquire of Ms. Larsen as to the availability of those materials prior to the hearing and, if necessary, obtain a subpoena to compel production of those documents. More significantly, Ms. Larsen had the field notes and original work papers in her possession during the hearing in question and she reviewed those documents to respond to a question from Mr. Ferguson. Respondent--through his counsel--thus had the opportunity to review those materials at that time, cross examine Ms. Larsen in that regard and also elicit testimony from Respondent as might have possibly been aided by his review of those documents.

The Board thus concludes that no proper basis exists to now provide the field notes and original work papers to Respondent with a view toward any further supplemental proceedings in this case. Since Respondent's own admissions form the lynchpin on which the October 29, 1996 Order is based, the Board concludes that Respondent has not established he was prejudiced in any ability to present testimony in this case by reason of the fact that Ms. Larsen's field notes and original work papers were not available prior to the hearing.

(R. 300).

The Board was obviously convinced that since Scarpa had ample opportunity to obtain access to Larsen's working papers from November 1994 up through and including time of the hearing itself, and since it found that in any event his own admissions formed the crux of its findings against him, Scarpa was not prejudiced by the fact that the Division did not provide him with a copy of those papers after it received them some weeks before the hearing.

For the same reasons, this Court should also conclude that Scarpa was not substantially prejudiced by the fact that the Division did not give him a copy of Larsen's working papers, and is thus not entitled to relief in this judicial review proceeding. Utah Code Ann. § 63-46b-16(4) (1993).


CONCLUSION

Scarpa has failed to meet his burden on appeal. He is not entitled to any relief.

The Board respectfully asks the Court to affirm its order on reconsideration.

RESPECTFULLY SUBMITTED this 3rd day of November, 1997.

JAN GRAHAM
Attorney General


BLAINE R. FERGUSON
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on this 3rd day of November, 1997, I mailed two copies of the foregoing Brief of Respondent to each of the following persons at the following addresses by first-class mail, postage prepaid:

E. H. Fankhauser
Attorney for Ronald Scarpa
243 E 400 S, Suite 200
Salt Lake City, UT 84111

Candice Ragsdale-Pollock
Attorney for Ronald Scarpa
254 W 400 S, Suite 320
Salt Lake City, UT 84101


BLAINE R. FERGUSON

Addenda

Addendum A

**BEFORE THE REAL ESTATE APPRAISER REGISTRATION
AND CERTIFICATION BOARD
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the Matter of the License of
Donald J. Scarpa to Act as a
Registered Real Estate Appraiser
and to Become a Certified Real
Estate Appraiser

**FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER**
Case No. AP94-11-18

Appointed:

Blaine K. Ferguson for the Division of Real Estate

E. H. Fankhauser for Respondent

By the Board:

A September 9-10, 1996 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Real Estate Appraiser Registration and Certification Board (hereinafter the Board). Board members present were Brad M. Lindley, James W. Fauver, Dorothy M. Burnham and Jerry R. Webber. The remaining Board members, LeRoy Pia, Kevin Anderson and G. Edward Leary, were absent. The hearing was offered and received.

The Board, being fully advised in the premises, now enters its **Findings of Fact,**
Conclusions of Law and Order.

FINDINGS OF FACT

1. Respondent, and at all time relevant to this proceeding, has been, licensed as a state-registered real estate appraiser. Respondent became so licensed on July 10, 1992. During the time under review, Respondent was the president and owner of Appraisal Tech, Inc., a company which provided appraisal services. Appraisal Tech, Inc. was an independent contractor affiliated with Appraisal Professionals to provide services as an independent contractor during the

time under review. Appraisal Professionals employed various state-registered appraisers between June 1992 and September 1994.

2. Respondent submitted a November 9, 1994 application to the Division, seeking approval to take the examination for licensure as a state-certified residential appraiser. Respondent submitted an appraiser certification documentation form, which listed the various appraisals he purportedly conducted to satisfy the two-year experience requirement as a prerequisite to any certification as a state-certified residential appraiser. When Respondent submitted that form, he thus attested the information on the form was true. Respondent further attested that he understood he could be required to substantiate the claimed experience in question by submitting written reports or file memoranda and that willfully submitting false information could result in license revocation and/or criminal prosecution.

3. Teresa Larsen was employed by Appraisal Professionals as a state-registered appraiser during November and December 1992. Based on the substantial and more credible evidence presented, Ms. Larsen conducted five appraisals between November 5, 1992 and December 1, 1992 on properties at 1995 East Rua Branco Circle in Sandy, Utah; a Chase Lane condominium at 462 West 1250 North in Centerville, Utah; a home under construction at 2275 West 10546 South in South Jordan, Utah; a residence at 876 South 2200 East in Salt Lake City, Utah; and a residence at 2086 E. Kramer Drive in Sandy, Utah. Mr. Higgs accompanied Ms. Larsen in her on-site inspection of those five properties and he conducted a review of her appraisal on each property.

4. Respondent listed each of the just-referenced five appraisals on the experience documentation form which he submitted to the Division to obtain credit for possible certification as a state-certified residential appraiser. Based on the substantial and more credible evidence presented, Respondent did not personally inspect any of the properties in question incident to the appraisal of those properties by Ms. Larsen. Respondent provided some guidance to Ms. Larsen as to the appraisal procedure on one of the properties. He inserted some language on the appraisal report for one of the properties. Respondent also provided building plans to Ms. Larsen on one of the properties and he rephrased comments initially prepared by Ms. Larsen as to one of the appraisal reports in question.

The appraisal reports on the above-referenced five properties which were appraised by Ms. Larsen were submitted to lenders and those reports accurately reflect Ms. Larsen as the appraiser who conducted those appraisals. However, Respondent instructed Ms. Larsen to prepare an additional copy of each appraisal which she had conducted. He also instructed Ms. Larsen to delete her name and signature on those appraisals and then generate a document on each appraisal to reflect his name and signature as the appraiser who conducted those appraisals. Respondent required those additional documents be prepared and he signed them to subsequently claim credit for having performed those appraisals.

6. Bruce L. Warburton was employed by Appraisal Professionals as a state-registered appraiser from September 1993 to September 1994. Based on the substantial and more credible evidence presented, Mr. Warburton and Mr. Higgs conducted three appraisals between January 15, 1994 and May 20, 1994 on properties at 1359 West 5930 North in Oakley, Utah; an auto body shop and wrecker lot at 98 West Center Street in Midvale, Utah; and a chiropractic center at 548 East 12th Street in Ogden, Utah. Mr. Higgs accompanied Mr. Warburton in a joint, on-site inspection of those three properties, Mr. Warburton initially prepared appraisal reports for the properties and he obtained guidance from Mr. Higgs in that regard.

Respondent listed each of the just-referenced three appraisals on the experience documentation form which he submitted to the Division to obtain credit for possible certification as a state-certified residential appraiser. Respondent conducted a separate inspection of the lots on which those three properties were located. However, Respondent did not conduct an interior inspection of each building on the property in question. Respondent prepared a valuation of each property, which was used by Mr. Higgs--for comparison purposes--as to the appraisals prepared by Mr. Warburton. Respondent suggested certain language changes on the appraisal reports prepared by Mr. Warburton for two of the properties and he provided a sample narrative to Mr. Warburton to assist the latter in his preparation of the appraisal reports on two of those properties.

7. The appraisal reports on the above-referenced three properties involving Mr. Warburton and those appraisals were conducted by Mr. Warburton, Mr. Higgs and Respondent. Based on the substantial and more credible evidence presented, Respondent had instructed Mr.

Warburton to prepare those reports to reflect Respondent had joined Mr. Warburton and Mr. Higgs in conducting those appraisals.

9. Based on the substantial and more credible evidence presented, Respondent frequently provided training and clerical assistance to Ms. Larsen, Mr. Warburton and the other state-registered appraisers in the office. He also periodically supervised the work performed by those appraisers. However, Respondent did not provide significant professional assistance on any of the above-described five appraisals conducted by Ms. Larsen as to thus claim credit toward the experience required to possibly qualify for certification as a state-certified residential appraiser. Respondent also did not provide significant professional assistance in any of the three appraisals conducted by Mr. Warburton and Mr. Higgs as to thus claim credit toward the experience required to possibly qualify for certification as a state-certified residential appraiser.

10. During the time under review, Respondent instructed both Ms. Larsen, Mr. Warburton and other state-registered appraisers in the office to prepare an additional copy of all appraisals which they had conducted. Respondent instructed each state-registered appraiser to then generate a document by routinely deleting the appraiser's name and signature on the copy of an appraisal report and then inserting his name and signature as the appraiser who conducted that appraisal. Based on the substantial and more credible evidence presented, Respondent frequently engaged in that practice to thus document his appraisal experience for purposes of his subsequent application for certification as a state-certified residential appraiser. Given the just-described office procedure, there is a lack of substantial and credible evidence Respondent conducted any other appraisal listed on the experience documentation form or otherwise provided significant professional assistance on each appraisal as to properly claim credit for certification as a state-certified residential appraiser.

CONCLUSIONS OF LAW

Utah Code Ann. §61-2b--16(1) provides an original certification may only be issued to a person "who is of good moral character". §61-2b-16(2) specifically provides:

The board shall require and pass upon proof necessary to determine the honesty, competency, integrity, and truthfulness of each applicant.

Based on a preponderance of the evidence, the Board finds and concludes Respondent has claimed experience credit for appraisals which were actually performed by other appraisers and

Respondent provided **no significant professional assistance** in the **performance** of those appraisals as to qualify for any experience credit. The Board further finds and concludes Respondent altered file copies of certain appraisals to reflect his participation as the appraiser whereas those appraisals were actually performed by other state-registered appraisers employed by Respondent through Appraisal Professionals.

When Respondent submitted **the documentation form as a predicate** to possible certification as a state-certified residential appraiser, he attested under penalty of perjury and potential license revocation that the appraisal experience claimed on the documentation form was accurate. **On a preponderance of the evidence**, the Board finds and concludes Respondent devised a fraudulent scheme in an attempt to obtain licensure as a state-certified residential appraiser. The Board thus finds and concludes Respondent has not established his honesty, integrity and truthfulness and he thus lacks the necessary qualifications for such licensure.

§61-2b-29 further provides certain acts and omissions constitute unprofessional conduct which shall be considered grounds for disciplinary action:

- (1) procuring or attempting to procure registration or certification under this chapter by fraud or by making a false statement, submitting false information, making a material misrepresentation in an application filed with the division

The Board finds and concludes Respondent submitted false information to the Division on his application for certification as a state-certified residential appraiser. Specifically, Respondent improperly sought credit for experience on at least eight appraisals when he had not provided significant professional assistance in the performance of those appraisals. Moreover, Respondent engaged in a course of fraudulently devious conduct when he created false copies of appraisals performed by state-registered appraisers in his employ to subsequently claim credit for experience on those appraisals in his application for certification as a state-certified residential appraiser. The Board thus finds and concludes a proper factual and legal basis exists to enter a disciplinary sanction as to Respondent's license.

The Board does acknowledge Respondent's testimony that certain lending institutions would not accept an appraisal report signed by two appraisers if the appraisal was--in fact--conducted by more than one appraiser. Nevertheless, the Board necessarily disregards Respondent's rather self-serving assertion that such lending institutions ever required, requested or

suggested that an appraisal report be submitted which did not accurately reflect when more than one appraiser had conducted that appraisal.

Significantly, the appraisal report form submitted to lenders on those properties appraised by Ms. Larsen provides for the entry of the name(s) of each appraiser who may have conducted any given appraisal. If Respondent had actually joined Ms. Larsen or any other state-registered appraiser employed by Appraisal Professionals in conducting one of the appraisals in question, the appraisal report submitted to any given lending institution was necessarily inaccurate if it did not reflect the fact of Respondent's significant professional assistance. Moreover, copies of appraisal reports which Respondent submitted to the Division to thus document his claim for experience toward certification as a state-certified residential appraiser were also inaccurate because he did not acknowledge the significant professional assistance provided by Ms. Larsen or any other appraiser in each instance.

Simply put, Respondent prompted the submission of appraisal reports to a lender which do not reflect that he provided any significant professional assistance in conducting those appraisals, yet Respondent now claims that he was so involved for purposes of obtaining credit toward certification as a state-certified residential appraiser. The gist of Respondent's testimony is that appraisals were submitted to certain lending institutions in violation of the uniform standards of professional appraisal practice when those appraisal reports did not accurately reflect all appraisers who provided significant professional assistance in conducting those appraisals. Respondent created false copies of appraisals and then submitted that information to the Division. The information thus submitted also fails to accurately reflect the appraisers who provided significant professional assistance on those appraisals. Essentially, Respondent engaged in unprofessional conduct in the practice of real estate appraising which constitutes dishonesty and fraud. See §61-2b-29(3).


The Board necessarily concludes Respondent's entirely unwarranted and devious course of misconduct reveals that he lacks the qualifications for certification as a state-certified residential appraiser and also establishes a pattern of dishonest and fraudulent misconduct in the practice of real estate appraising. Given the serious and repeated nature of Respondent's misconduct, the Board necessarily concludes the Order set forth below is warranted to adequately protect the public.

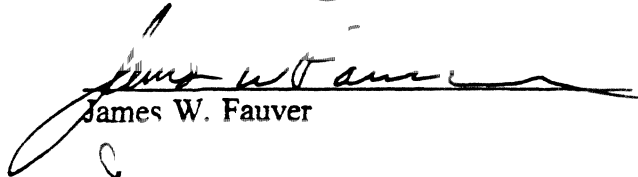
ORDER

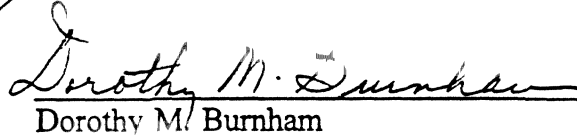
WHEREFORE IT IS ORDERED that Respondent's application for licensure as a state-certified residential appraiser shall be denied

It is further ordered that Respondent's license as a state-registered real estate appraiser shall be revoked. Said revocation shall be effective thirty (30) days from the date of this Order.

Dated this 29th day of October, 1996.


Brad M. Lindley


James W. Fauver

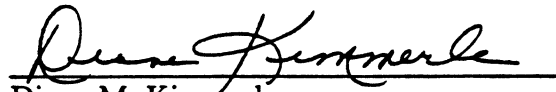

Dorothy M. Burnham


Jerry R. Webber

Agency reconsideration of this Order may be obtained by filing a request for such review with the Board within twenty (20) days after the issuance of this Order. Any such request must comply with the requirements of Utah Code Ann §63-46b-13 and R151-46b-13.

Certificate of Mailing

I hereby certify that on the 29th day of October, 1996, a copy of the foregoing Findings of Fact, Conclusions of Law and Order was sent, by regular mail, postage prepaid, to Blaine R. Ferguson, Assistant Attorney General, 160 East 300 South, P. O. Box 140872, Salt Lake City, Utah 84114-0872 and E. H. Fankhauser, Attorney for Respondent, 243 East 400 South, Suite 200, Salt Lake City, UT 84111. A copy of the Findings of Fact, Conclusions of Law and Order was also hand delivered to Shelley K. Wismer, Staff Legal Counsel, Division of Real Estate.

A handwritten signature in cursive script, reading "Diane Kimmerle", written over a horizontal line.

Diane M. Kimmerle
Administrative Assistant

Addendum B

**OFFICE OF THE REAL ESTATE APPRAISER
REGISTRATION AND CERTIFICATION BOARD
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the Matter of the License of
Ronald J. Scarpa to Act as a
Registered Real Estate Appraiser
and to Become a Certified Real
Estate Appraiser

**ORDER ON REQUEST FOR
AGENCY RECONSIDERATION**
Case No. AP94-11-18

By **11 11 11**

By **11 11 11** to an **October 29, 1996** Order, Respondent's application for licensure as a state-certified residential appraiser was denied. Moreover, Respondent's license as a state-registered real estate appraiser was revoked. The revocation was to become effective thirty (30) days from the date of the October 29, 1996 Order.

Respondent filed a November 15, 1996 request for agency reconsideration of the October 29, 1996 Order. The Division filed a December 13, 1996 response and a final reply was filed January 8, 1997.

The Board reviewed the just-stated submissions and determined no oral argument would be necessary or beneficial to address the issues raised in Respondent's request for agency reconsideration. Accordingly, the Court conducted a January 16, 1997 telephonic conference with Blain R. Ferguson, counsel for the Division of Occupational and Professional Licensing, and E. H. Fankhauser, counsel for Respondent. The Court thus informed respective counsel no oral argument would be presented and the Board would conduct deliberations as to the pending request for agency reconsideration on January 21, 1997.

However, one of the four Board members who are participating in this case was not available on the just-stated date. The Court thus contacted respective counsel on January 22, 1997 and informed counsel that the Board would meet in late January 1997 to address the pending request. The Court subsequently informed respective counsel that Board deliberations would be conducted on January 30, 1997 and a decision on Respondent's request for agency reconsideration would issue within twenty (20) days thereafter.

The Board, being fully advised in the premises, now enters the following **Supplemental**

and Modified Findings of Fact, Accompanying Conclusions of Law and Order. The Findings of Fact and Conclusions of Law--initially set forth in the October 29, 1997 Order--are otherwise reaffirmed and incorporated herein by reference.

SUPPLEMENTAL FINDINGS OF FACT

1. Respondent's own testimony clearly and convincingly establishes that he knowingly submitted false appraisal reports to lending institutions. Specifically, those reports did not reflect all appraisers who had purportedly conducted those appraisals.

2. Respondent's own testimony clearly and convincingly establishes he submitted altered copies of five appraisal reports to the Division as to obtain credit toward possible certification as a certified real estate appraiser. Specifically, those copies did not accurately reflect that the appraisals had been performed by Ms. Larsen. Moreover, those appraisal reports contain a certification that Respondent had conducted an interior and exterior inspection of the subject property when--in fact--he never performed such an inspection. Respondent thus knowingly and intentionally misrepresented that he had conducted a complete inspection of the five subject properties.

3. Respondent did not conduct a complete personal inspection of the three buildings which were the subject of the appraisals performed by Mr. Warburton and Mr. Higgs. Moreover, the valuation Respondent prepared for one of those properties was not used to prepare the appraisal report for that property. Rather, Respondent made that valuation after Mr. Warburton had appraised the property and did so solely for comparative purposes to enable Mr. Higgs to review the appraisal which had been completed by Mr. Warburton.

4. There is no substantial evidence Respondent provided significant professional assistance to either Ms. Larsen or Mr. Warburton as to appraisals performed on the eight properties in question. Respondent periodically provided guidance on appraisal procedures to other appraisers employed by Appraisal Professionals. He also periodically provided clerical assistance and background information on properties or made grammatical changes on appraisal reports. However, the just-described work does not constitute significant professional assistance as to claim credit for having performed any of the eight appraisals in question.

MODIFIED FINDINGS OF FACT

1. Based on the Board's recollection of the evidence presented during the September

9 10 1996 hearing and a review of the **arguments submitted by** respective counsel on Respondent's request for agency reconsideration, the Board finds and concludes there is no substantial evidence to sustain the finding--initially entered by the Board in Paragraph 10 of the October 29, 1996 Order--that Respondent failed to conduct any other appraisal listed on the experience documentation form which was submitted to the Division. The Board similarly finds and concludes there is no substantial evidence to sustain the related finding that Respondent otherwise failed to provide significant professional assistance on the remaining appraisals as to properly claim credit for certification as a state-certified residential appraiser.

11 The Board erred when it made the just-described unsupported findings. Specifically, the Board improperly speculated whether Respondent should receive credit for other appraisals beyond the eight appraisals directly in question relative to this proceeding. Accordingly, the Board's findings regarding any other appraisals are hereby vacated. Simply put, any issue as to credit for other appraisals was not properly before the Board in this proceeding.

CONCLUSIONS OF LAW

Respondent contends specific grounds exist to warrant the reversal of the October 29, 1996 Order. Respondent thus asserts a new hearing should be granted on numerous material

Specifically, he urges: (1) there is no sufficient and credible evidence he did not substantially participate in the eight appraisals under review, (2) no statute or rule establishes a "significant professional assistance test" and, hence, the Board improperly applied that finding in this proceeding and (3) the Division failed to disclose to Respondent that Mr. Larsen had the field notes and original work papers as to the five appraisals in question and Respondent was thus prejudiced in his ability to establish the nature of his participation on those appraisals.

Respondent further asserts that no statute or rule prescribes the method whereby an appraiser is to document participation on an appraisal and, absent any guidance, Respondent has properly documented the work he performed as to receive credit toward possible

certification as a residential appraiser; (2) the Board applied an erroneous standard of proof to find he had engaged in fraudulent misconduct, the proper standard being that of clear and convincing evidence; (3) the Board has abused its discretion and--without any sufficient evidence--has speculated as to whether Respondent performed other appraisals listed on the

experience documentation form, thus giving rise to the appearance of bias against Respondent; and (4) Respondent was improperly limited in his ability to call witnesses sufficient to refute the credibility of adverse witnesses and he was thus denied due process.

Two procedural issues should be initially addressed. Utah Code Ann. §63-46b-13(1)(a) provides any party may file a written request for reconsideration with the agency and is thus required to state "the specific grounds upon which relief is requested". The Division correctly asserts no Utah statute or rule sets forth the grounds which must be invoked as to prompt agency reconsideration. However, Rule 59(a) of the Utah Rules of Civil Procedure sets forth those grounds which may justify granting a new trial, taking additional testimony, amending findings of fact and conclusions of law, making new findings or conclusions and directing the entry of a new judgment. The Board duly acknowledges R151-46b-5(3), which provides:

The Utah Rules of Civil Procedure and case law thereunder may be looked to as persuasive authority upon these rules, but shall not, except as otherwise provided by Title 63, Chapter 46b, Administrative Procedures Act, or by these rules, be considered controlling authority.

The Division accurately asserts that the "specific grounds"--alluded to in §63-46b-13(1)(a)--should be those expressly set forth in Rule 59(a) of the Utah Rules of Civil Procedure. Respondent has invoked various provisions of that rule in his request for agency reconsideration. Accordingly, the Board readily acknowledges Respondent has adequately identified the grounds upon which relief is now requested.

The Division asserts Respondent has not provided a transcript of the September 9-10, 1996 hearing. The Division thus contends the Board should necessarily disregard any challenges to findings based on an alleged insufficiency of evidence to support those findings. R151-46b-13 sets forth the rules which govern agency reconsideration. Significantly, those rules do not require that the record of the hearing be submitted with any citations to that record regarding any challenged findings of fact. R151-46b-12, which governs agency review, expressly requires the preparation and submission of a transcript if the grounds for agency review include any challenge to a determination of fact or conclusion of law as unsupported by or contrary to the evidence. See R151-46b-12(3)(c) and (d).

Since R151-46b-13 does not require a transcript be filed, the Board necessarily rejects the Division's contention that Respondent's challenge to any finding based on an alleged

Efficiency of the evidence should be either **ignored or summarily rejected** simply because Respondent has not provided a transcript of the hearing. Accordingly, the Board has addressed the issues thus raised by Respondent based on the Board's review of the testimony presented during the September 9-10, 1996 hearing. Concededly, Respondent's assertions and the Board's review of those issues would have been necessarily aided by the production of a transcript. Beyond the modified findings of fact set forth above, the Board concludes Respondent has failed to sustain his burden of establishing the evidence is not sufficient to support any other findings entered by the Board.

Notwithstanding Respondent's belabored arguments as to whether he substantially participated in the eight appraisals for which he has sought credit, the crux of this case lies in Respondent's own testimony that he submitted appraisal reports to lending institutions which did not reflect his purported participation as an appraiser with respect to those properties and he submitted altered copies of appraisal reports to the Division to obtain credit toward state certification as a residential appraiser when those reports did not reflect that Ms. Larsen or Mr. Warburton had performed those respective appraisals. Beyond the substantial and credible testimony offered by any other witness, Respondent's own admissions clearly establish that he submitted false statements to both lending institutions and the Division for licensing purposes.

The Board reiterates there is ample evidence to find and conclude Respondent did not substantially participate in the five Larsen appraisals or the three Warburton appraisals. The Board acknowledges no statute or rule establishes a "significant professional assistance test" as to govern when an appraiser can properly obtain credit on work allegedly performed during the course of an appraisal. Nevertheless, USPAP Standard Rule 2-3 specifically requires that all significant professional assistance be acknowledged on an appraisal report. It is undisputed that Respondent failed to comply with that standard when he submitted the appraisal report in question to certain lending institutions and then submitted altered file copies of those same reports to the Division as to obtain credit toward possible certification as a residential appraiser.

The Board notes Respondent's testimony that he merely complied with purported directives from various lending institutions and that he acted on the advice of Mr. Dunlop as to how he would subsequently document whatever he may have done during the course of a given appraisal. Nevertheless, USPAP Standard Rule 2-3 governs every appraisal report.

submitted to a lending institution. Moreover, the Board concludes there is no justification to excuse the fact that Respondent fraudulently submitted altered copies of appraisal reports to the Division which did not reflect that another appraiser had performed those appraisals.

Significant professional assistance, while not defined by statute or rule, is a well recognized and commonly understood standard in the appraisal industry. Simply put, significant professional assistance is commonly accepted to mean that an appraiser has provided input into the final value estimate of the property in question. The Board reiterates that instructing a fellow appraiser as to appraisal procedures, providing clerical assistance or background information and making grammatical corrections in appraisal reports does not constitute significant professional assistance within the meaning of the above-described standard. Clearly, members of the appraisal profession can be properly held to understand the various standards of performance which govern all appraisals. Moreover, such standards of performance can be properly applied and interpreted by members of this Board in the process of administrative adjudication. See *Vance v. Fordham*, 671 P.2d 124, 129 (Utah 1983).

The Board acknowledges the Division did not provide Ms. Larsen's field notes and original work papers to Respondent prior to the hearing as to the five appraisals in question. Nevertheless, Respondent had an opportunity to inquire of Ms. Larsen as to the availability of those materials prior to the hearing and, if necessary, obtain a subpoena to compel production of those documents. More significantly, Ms. Larsen had the field notes and original work papers in her possession during the hearing in question and she reviewed those documents to respond to a question from Mr. Ferguson. Respondent--through his counsel--thus had the opportunity to review those materials at that time, cross examine Ms. Larsen in that regard and also elicit testimony from Respondent as might have possibly been aided by his review of those documents.

The Board thus concludes no proper basis exists to now provide the field notes and original work papers to Respondent with a view toward any further supplemental proceedings in this case. Since Respondent's own admissions form the lynchpin on which the October 29, 1996 Order is based, the Board concludes that Respondent has not established he was prejudiced in any ability to present testimony in this case by reason of the fact that Ms. Larsen's field notes and original work papers were not available prior to the hearing.

Respondent accurately asserts no statute or rule prescribes the method by which an

appraiser is to document participation in an appraisal as to potentially receive credit toward possible certification. However, Respondent clearly misrepresented the manner in which the eight appraisals had been performed when he failed to provide documentation to the Division which reflected the fact that both Ms. Larsen and Mr. Warburton had participated in the appraisals in question. The Board reiterates the following conclusions of law, previously set forth in its October 29, 1996 Order:

Significantly, the appraisal report form submitted to lenders on those properties appraised by Ms. Larsen provides for the entry of the name(s) of each appraiser who may have conducted any given appraisal. *If Respondent had actually joined Ms. Larsen or any other state-registered appraiser employed by Appraisal Professionals in conducting one of the appraisals in question, the appraisal report submitted to any given lending institution was necessarily inaccurate if it did not reflect the fact of Respondent's significant professional assistance.* Moreover, copies of appraisal reports which Respondent submitted to the Division to thus document his claim for experience toward certification as a state-certified residential appraiser *were also inaccurate because he did not acknowledge the significant professional assistance provided by Ms. Larsen or any other appraiser in each instance.* (All emphasis herein added).

The issue is not whether Respondent knew how to document his experience. Rather, Respondent elected to do so by fraudulent means with the intended purposes of insuring that appraisals would be approved by lending institutions and he would also subsequently receive credit for those appraisals as to obtain certification as a residential appraiser.

The Board reiterates that the undisputed testimony, rationally offered by Respondent himself--provides clear and convincing evidence that he devised a fraudulent scheme in an attempt to obtain licensure as a state-certified residential appraiser. Moreover, there is also clear and convincing evidence Respondent engaged in a course of fraudulently devious conduct when he created false copies of appraisals performed by state-registered appraisers in his employ, to subsequently claim credit for experience on those appraisals in his application for certification as a state-certified residential appraiser.

Notwithstanding this Board's conclusion that the quantum of evidence in this proceeding is sufficient to satisfy a "clear and convincing" preponderant standard, the Board further concludes that the standard of proof which governs the proceeding in all respects is a preponderance of the evidence. R151-46b-10 governs all hearings held in departmental adjudicative proceedings. PRS 151-46b-10(8) provides:

The standard of proof in all proceedings under these rules, whether initiated by a notice of agency action or a request for agency action, shall be a preponderance of the evidence.

The Utah Supreme Court has acknowledged that the standard of proof generally applicable to proceedings before administrative agencies is one of a "preponderance of the evidence". *Harken Southwest Corporation v. Board of Oil Gas and Mining*, 920 P.2d 1176, 1182 (Utah 1996). The *Harken* Court thus concluded that the correct standard of proof (i.e., preponderance of the evidence) had been properly applied in that case. Concededly, the *Harken* decision includes the following passage:

Absent an allegation of fraud or a statute or a court rule requiring the higher standard, the standard of proof in administrative proceedings is a preponderance of the evidence. *In re D'Angelo*, 105 N.M. 391, 393, 733 P.2d 360, 362 (1986).

Significantly, the just-quoted language is dictum, given the Court's analysis of the applicable quantum of evidence and the nature of the allegations in the *Harken* case.

Accordingly, this Board concludes the *Harken* decision does not establish that the standard of proof for allegations of fraud in an administrative adjudicatory proceeding is clear and convincing evidence. This Board acknowledges the just-stated standard generally applies when fraud claims are asserted in a civil action. See *Utah State Department of Social Services v. Pierren*, 619 P.2d 1380, 1381-82 (Utah 1980); *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046-47 (Utah App. 1994). However, the Board further notes the usual standard of proof in both attorney and judicial discipline proceedings is a preponderance of the evidence. See *In re Worthen*, 302 Utah Adv. Rep. 4, 11 (1996).

Respondent has provided no legal authority from the courts of this state to support his assertion that allegations of fraud in an adjudicative proceeding conducted pursuant to the Utah Administrative Procedures Act must be proven by clear and convincing evidence. The governing department rule has no such provision. Moreover, the courts of this state have not engrafted any such requirement on the standard of proof applicable in attorney or judicial discipline proceedings. Absent unequivocal direction from the courts of this state, this Board necessarily concludes any allegations of fraudulent misconduct in this proceeding may be properly established by a preponderance of the evidence.

The Board concurs with both the Division and Respondent that the Board erred when it entered any findings as to other appraisals which were not within the scope of the

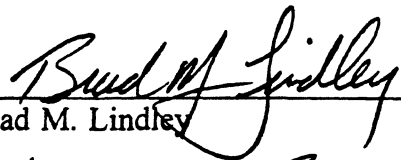
allegations of this proceeding. Based on the modified Findings of Fact previously set forth herein, the Board necessarily disregards Respondent's implicit assertion there is any evidence the Board was biased or prejudiced against Respondent in this proceeding.

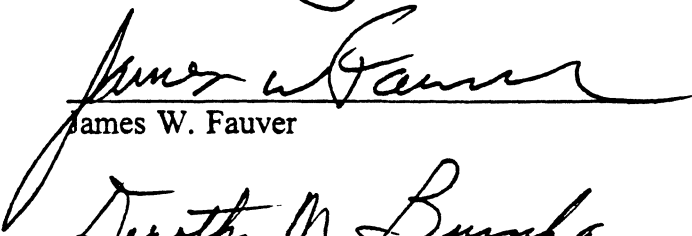
The Board further concludes that Respondent had a fair opportunity to present evidence in this proceeding which was neither repetitive nor cumulative. Significantly, Respondent presented testimony from eleven witnesses over the course of the two-day hearing. *The Board concludes Respondent was not improperly limited in his ability to both present the relevant and material evidence in support of his various defenses in this proceeding and also challenge the credibility of any adverse witness.*

ORDER

WHEREFORE, IT IS ORDERED no proper factual or legal basis exists to conduct a new hearing or any further proceedings in this case. The Board has reconsidered its October 29, 1996 Order in light of the issues presented by Respondent. Beyond entry of the matters set forth herein, the Board concludes no further relief is warranted. The October 29, 1996 Order shall thus become effective thirty (30) days from the date of this Order.

Dated this 20th day of February, 1996.


Brad M. Lindley


James W. Fauver


Dorothy M. Burnham


Jerry R. Webber

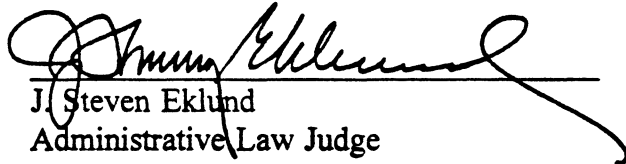
Judicial review of this Order may be obtained pursuant to §63-46b-14 and §63-46b-16, consistent with the provisions of those statutes.

By the Administrative Law Judge:

The Court conducted a February 20, 1997 telephonic conference with Blaine R. Ferguson, counsel for the Division of Real Estate, and E. H. Fankhauser, counsel for Respondent. The Court thus informed respective counsel that three Board members (Brad M. Lindley, Dorothy M. Burnham, and Jerry R. Webber) signed the foregoing Order on February 20, 1997. The Court further informed respective counsel that the remaining Board member participating in this case (James W. Fauver) was initially expected to sign the Order on that date, but he would not be available to do so for one week.

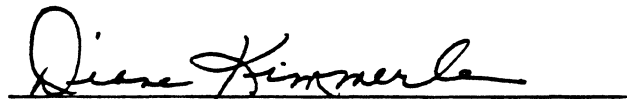
Accordingly, the Court and respective counsel agreed the Order would be issued--with Mr. Fauver's signature--on February 27, 1997. Moreover, it was further agreed and the Court so ordered that the time to file any petition for judicial review would not commence until thirty (30) days from the issuance of the Order, as opposed to the February 20, 1997 date initially entered on the Order.

Dated this 27th day of February, 1997.


J. Steven Eklund
Administrative Law Judge

Certificate of Mailing

I hereby certify that on the 27th day of February, 1997, a copy of the foregoing Order on Request for Agency Reconsideration was sent, by regular mail, postage prepaid, to Blaine R. Ferguson, Assistant Attorney General, 160 East 300 South, P. O. Box 140872, Salt Lake City, Utah 84114-0872 and E. H. Fankhauser, Attorney for Respondent, 243 East 400 South, Suite 200, Salt Lake City, Utah 84111. A copy of the Order on Request for Agency Reconsideration was also hand delivered to Shelley K. Wismer, Staff Legal Counsel, Division of Real Estate.


Diane M. Kimmerle
Administrative Assistant

Addendum C

**BEFORE THE REAL ESTATE APPRAISER
REGISTRATION AND CERTIFICATION BOARD
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the Matter of the License of	:	
Ronald J. Scarpa to Act as a	:	NOTICE OF POSTHEARING CONFERENCE
Registered Real Estate Appraiser	:	AND ENTRY OF NUNC PRO TUNC ORDER
and to Become a Certified Real	:	Case No. AP94-11-18
Estate Appraiser	:	

By the Administrative Law Judge:

The Order on Respondent's Request for Agency Reconsideration in the above-entitled proceeding was issued February 27, 1997. This Court issued a February 27, 1997 addendum to that Order, which recites the time to file any petition for agency review would not commence until thirty (30) days from the issuance of the Order.

The Division of Real Estate filed a March 7, 1997 motion, requesting entry of an order to clarify that: (1) the October 29, 1996 Order initially entered by the Board would become effective thirty (30) days after the issuance of the February 27, 1997 Order on Request for Agency Reconsideration; and (2) any petition for judicial review must be filed within thirty (30) days after February 27, 1997. The Court thus conducted a March 11, 1997 telephonic post-hearing conference with Blaine R. Ferguson, counsel for the Division of Real Estate and E. H. Fankhauser, counsel for Respondent.

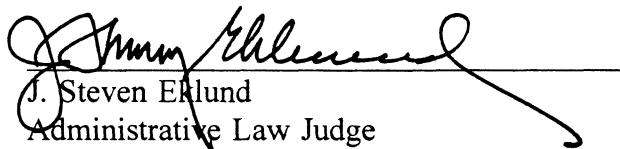
There is a significant omission in this Court's February 27, 1997 addendum to the Board's Order on Request for Agency Reconsideration. Further, that addendum contains a clerical error. Specifically, the addendum should have included a provision that the October 29, 1996 Order would become effective thirty (30) days after the issuance of the February 27, 1997 Order on Request for Agency Reconsideration. Moreover, the addendum should have provided that any petition for judicial review must be filed within the same time. Accordingly, the Court informed respective counsel that the Court would enter a nunc pro tunc order to correct the February 27, 1997 addendum and clarify the just-described issues.

ORDER

WHEREFORE, IT IS ORDERED the October 29, 1996 Order shall become effective on March 31, 1997. Any petition for judicial review of that Order or the February 27, 1997 Order on Request for Agency Reconsideration shall be filed no later than March 31, 1997.

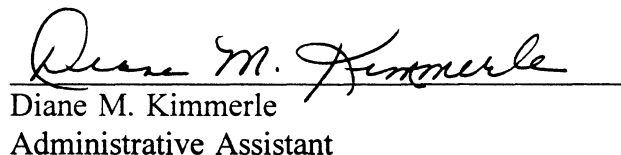
The Order on Request for Agency Reconsideration also contains a clerical error. Specifically, that Order recites its date as February 20, 1996. However, the correct date is February 27, 1997 as reflected in this Court's February 27, 1997 addendum.

Dated this 12th day of March, 1997.


J. Steven Eklund
Administrative Law Judge

Certificate of Mailing

I hereby certify that on the 12th day of March, 1997, a copy of the foregoing Notice of Posthearing Conference and Entry of Nunc Pro Tunc Order was sent, by regular mail, postage prepaid, to Blaine R. Ferguson, Assistant Attorney General, 160 East 300 South, P. O. Box 140872, Salt Lake City, Utah 84114-0872 and E. H. Fankhauser, Attorney for Respondent, 243 East 400 South, Suite 200, Salt Lake City, Utah 84111. A copy of the Notice of Posthearing Conference and Entry of Nunc Pro Tunc Order was also hand delivered to Shelley K. Wismer, Staff Legal Counsel, Division of Real Estate.


Diane M. Kimmerle
Administrative Assistant

Addendum D

dards Rule 6 of the Uniform Standards of Professional Appraisal Practice.

R162-104-13. Unacceptable Experience.

104.13. Unacceptable experience. An applicant will not receive points toward satisfying the experience requirement for registration or certification for performing the following:

- (a) Appraisals of the value of a business as distinguished from the appraisal of commercial real estate; or
- (b) Personal property appraisals.

R162-104-14. Verification of Experience.

104.14. Verification of experience. The Board, at its discretion, may verify the claimed experience by any of the following methods: Verification with the clients; Submission of selected reports to the Board; and Field inspection of reports identified by the applicant at the applicant's office during normal business hours.

R162-104-15. Experience Review Committee.

104.15. Experience Review Committee. There may be a committee appointed by the Board to review the experience claimed by applicants for certification.

104.15.1. The Committee shall:

104.15.1.1. Review all applications for adherence to the experience required for certification;

104.15.1.2. *Correspond with applicants concerning submissions, if necessary; and*

104.15.1.3. Make recommendations to the Division and the Board for certification approval or disapproval.

104.15.2. Committee composition. The Committee shall be composed of appraisers from the following categories: Residential appraisers; commercial appraisers; farm and ranch appraisers; right-of-way appraisers; and ad valorem appraisers.

104.15.2.1. The chairperson of the committee shall be appointed by the Board.

104.15.2.2. Meetings may be called upon the request of the chairperson or upon the written request of a quorum of committee members.

104.15.3. Reconsideration. If the review of an application has been performed by the Experience Review Committee, and the Board has denied the application based on insufficient experience, the applicant may request that the Board reconsider the application by making a written request within ten days after the denial stating specific grounds upon which relief is requested. The Board shall thereafter consider the request and issue a written decision.

R162-104-16. Special Circumstances.

104.16. Special Circumstances. Applicants having experience in categories other than those shown on the Appraisal Experience Points Schedule, or applicants who believe the Experience Points Schedule does not adequately reflect their experience, or applicants who believe the Experience Points Schedule does not adequately reflect the complexity or time spent on an appraisal, may petition the Board on an individual basis for evaluation and approval of their experience as being substantially equivalent to that required for certification. Upon a finding that an applicant's experience is substantially equivalent to that required for certification, the Board may waive experience points, give an applicant credit for months of experience, or both.

R162-104-17. Appraisal Experience Points Schedule.

104.17. Appraisal Experience Points Schedule. Points shall be awarded as follows:

104.17.1. Residential Experience Points Schedule. The following points shall be awarded to form appraisals. Three points may be added to the points shown if the appraisal was a narrative appraisal instead of a form appraisal.

TABLE 1

(a) One unit dwelling (including a site)	1 point
(b) Two to four unit dwellings	4 points
(c) Employee Relocation Counsel reports completed on currently accepted Employee Relocation Counsel form	2 points
(d) Residential lot, (1-4 family)	1 point
(e) Small parcel up to 5 acres	1 point
(f) Vacant land, 20-500 acres maximum 50 points	4 points
(g) Recreational, farm, or timber acreage suitable for a house site up to 10 acres	2 points
Over 10 acres	3 points
(h) All other unusual structures or acreages, which are much larger or more complex than typical properties	1-5 points as determined by the Board
(i) Residential appraisal textbook authorship not to exceed 20 points per year	As determined by the Board
(j) Residential appraisal articles in journals of approved national appraisal organizations, not to exceed 20 points per year	10 points
(k) Instructing an approved residential course of 20 classroom hours or more	10 points

104.17.2. General Experience Points Schedule. All appraisal reports claimed must be narrative appraisal reports.

TABLE 2

(a) Apartments, 5-100 units over 100 units	8 points
(b) Hotel or motels, 50 units or less	10 points
51-150 units	6 points
Over 150 units	8 points
(c) Nursing home, rest home, care facilities, Less than 80 beds	10 points
Over 80 beds	8 points
(d) Industrial or warehouse building, Less than 20,000 square feet	6 points
Over 20,000 square feet, single tenant	8 points
Over 20,000 square feet, multiple tenants	10 points
(e) Office buildings	6 points
Less than 10,000 square feet	8 points
Over 10,000 square feet, single tenant	10 points
Over 10,000 square feet, multiple tenants	6 points
(f) Condominiums, using income approach to value	6 points
5 to 30 units	10 points
31 or more units	6 points
(g) Retail buildings	8 points
Less than 10,000 square feet	10 points
More than 10,000 square feet, single tenant	6 points
More than 10,000 square feet, multiple tenants	8 points
(h) Commercial or multiple family use acreage which is nonresidential	10 points
Less than 10 acres	4 points
100 acres or more	6 points
100 acres or more, income approach to value	10 points
(i) All other unusual structures or acreages which are much larger or more complex than the properties described in (a) to (h) herein.	1 to 20 points as determined by Board
(j) Instructing an approved general appraisal course of 20 classroom hours or more, not to exceed 20 points per year	10 points
(k) Textbook authorship in general appraisal topics, not to exceed 20 points per year	As determined by Board
(l) General field journal articles in journals of approved national appraisal organizations, not to exceed 20 points per year	10 points
(m) Subdivisions or Planned Unit Developments	6 points
1 to 25 units	10 points
Over 25 units	1 to 20
(n) Feasibility or market analysis	

maximum 100 points	points as determined by Board	
Ad Valorem appraisals		
(o) Development and implementation of multiple regression model — land valuation guide (up to 5000 parcels)	20 points	
For each additional 5000 parcels, add 1 point		
(p) Depreciation study and analysis	20 points	
(q) Sales ratio study and implementation — physical inspection and review, maximum 50 points	10 points	
(r) Development of standards of practice for assessment administration and writing of those guidelines, maximum 40 points	10-20 points as determined by Board	
(s) State assessed property — gravel pits, mines, utilities	1-20 points as determined by Board	
Farm and Ranch appraisals	Form	Narrative
(t) Irrigated cropland, pasture other than rangeland,		
1 to 10 acres	2 pts.	3 pts.
11-50 acres	2.5 pts.	4 pts.
51-200 acres	3 pts.	5 pts.
201-1000 acres	5 pts.	8 pts.
More than 1000 acres	8 pts.	10 pts.
(u) Dry farm, 1 to 1000 acres	3 pts.	5 pts.
More than 1000 acres	4 pts.	8 pts.
(v) Improvements on properties other than a rural residence (maximum 2 points):		
Dwelling	1 pt.	1 pt.
Sheds	0.5 pt.	0.5 pt.
(w) Cattle ranches		
0-200 head	3 pts.	4 pts.
201-500 head	5 pts.	6 pts.
501-1000 head	6 pts.	8 pts.
More than 1000 head	8 pts.	10 pts.
(x) Sheep ranches		
0-2000 head	5 pts.	6 pts.
More than 2000 head	7 pts.	9 pts.
(y) Dairies (includes all improvements except a dwelling)		
1-100 head	4 pts.	5 pts.
101-300 head	5 pts.	6 pts.
More than 300 head	6 pts.	7 pts.
(z) Orchards		
5-50 acres	6 pts.	8 pts.
More than 50 acres	8 pts.	10 pts.
(aa) Rangeland/timber		
0-640 acres	4 pts.	5 pts.
More than 640 acres	6 pts.	7 pts.
(bb) Poultry		
0-100,000 birds	6 pts.	8 pts.
More than 100,000 birds	8 pts.	10 pts.
(cc) Mink		
0-5000 cages	6 pts.	7 pts.
More than 5000 cages	8 pts.	10 pts.
(dd) Fish farms	8 pts.	10 pts.
(ee) Hog farms	8 pts.	10 pts.
(ff) Separate grazing privileges or permits	4 pts.	5 pts.

104.17.2.1. Appraisals on commercial or multifamily form reports shall be worth 75% of the points normally awarded for the appraisal.

104.17.2.2. An additional 2.5 points may be added for appraisal of any proposed project which is performed from plans and specifications.

1993

61-2b-1 through 61-2b-40

R162-105. Education Requirement.

R162-105-1. Course Credit.

R162-105-2. Submission for Course Approval.

R162-105-3. Education Review Committee.

R162-105-4. Continuing Education.

R162-105-5. Education Approved by Another State.

R162-105-1. Course Credit.

105.1. Education credit will be granted towards registration/certification for an appraisal education course which meets the following criteria:

105.1.1. The provider of an approved appraisal education course must be one of the following:

105.1.1.1. An accredited college, university, junior college or community college.

105.1.1.2. A nationally recognized real estate appraisal or real estate related organization, society, institute, or association.

105.1.1.3. A state or federal agency or commission.

105.1.1.4. Such other school or organization as approved by the Board.

105.1.2. The course content shall meet the minimum standards set forth in the State Approved Course Outline.

105.1.2.1. A course must be at least fifteen (15) hours in duration (including examination). An hour is defined as 50 minutes of supervised contact by a certified instructor within a 60 minute time period.

105.1.2.2. A final examination will be administered at the end of each course pertinent to that education offering.

105.1.3. Credit will be granted for a course taken prior to July 1, 1990 where the applicant obtained credit from the course provider by challenge examination without attending the course. Provision 105.1.4 will also apply.

105.1.3.1. The Board reserves the right to review and approve the challenge examination.

105.1.4. Credit will not be given for duplicate or highly comparable classes taken from different course providers.

105.1.5. Credit will be given for appraisal classes regardless of when the class was taken until July 1, 1992, at which time credit will be given for classes taken only within ten years immediately preceding registration/certification application.

105.1.5.1. Hourly credit for a course taken from a professional appraisal organization will be granted based upon the Division approved list which verifies hours for such courses.

105.1.6. Credit will only be granted for a course that has been successfully completed. Successful completion of a course means that the applicant has attended a minimum of 90% of the scheduled class hours, has completed all required exercises and assignments, and has achieved a passing score on a course final examination.

105.1.7. All education requirements must be met prior to applying for the pre-registration/certification examination.

R162-105-2. Submission for Course Approval.

105.2. It is the responsibility of the applicant to establish that a particular education offering will qualify to meet the education requirement for registration/certification.

105.2.1. For courses other than those originally certified by the Division for pre-registration/certification purposes, the applicant shall submit on a form provided by the Division a list of the courses that documents the name of the course title, the name of the sponsoring organization, the number of classroom hours, and the date the course was completed.

105.2.1.1. The applicant will attest on a notarized affidavit that the courses have been completed as documented.

105.2.1.2. The applicant will support the claim for education credit if requested by the Division by providing proof of completion of the courses in the form

Addendum E

A maximum of 300 points will be credited for any one twelve month period.

R162-104-3. Time Allowed for Meeting Experience Requirement.

104.3. Time Allowed for Meeting Experience Requirement. Credit will be given for appraisal experience earned only within five years immediately preceding the certification application.

R162-104-4. Proof of Experience.

104.4. Proof of Experience. The Division shall require the applicant to furnish the following information for each appraisal for which points are claimed: Property address or legal description, date of the appraisal, type of property, and any other information deemed appropriate by the Division.

R162-104-5. Compliance with USPAP and Licensing Requirements.

104.5. No experience credit will be given for appraisals which were performed in violation of Utah Law or the law of another jurisdiction.

104.5.1. No experience credit will be given for appraisals performed after July 1, 1990 by Utah licensed appraisers unless the appraisals were done in compliance with USPAP.

104.5.2. No experience credit will be given for appraisals performed after July 1, 1990 if the applicant was not licensed as an appraiser in Utah, or in another state if licensure was required in that state, at the time the appraisal was performed.

R162-104-6. State-Certified Residential Applicants.

104.6. State-Certified Residential Applicants. Applicants applying for certification as State-Certified Residential Appraisers must document at least 75% of the points submitted from the Residential Experience Points Schedule. No more than 25% of the total points submitted may be from the General Experience Points Schedule.

R162-104-7. State-Certified General Applicants.

104.7. State-Certified General Applicants. Applicants applying for certification as State-Certified General Appraisers may claim points for experience from either the Residential Experience Points Schedule or the General Experience Points Schedule, so long as at least 200 points have been earned from the General Experience Points Schedule.

R162-104-8. Cumulative Points.

104.8. The cumulative points from instruction of appraisal classes and appraisal textbook and article authorship shall not exceed 50% of the cumulative points submitted.

R162-104-9. Review or Supervision of Appraisals.

104.9. Review or supervision of appraisals. Review appraisals will be awarded experience credit when the appraiser has performed technical review(s) of appraisals prepared by either employees, associates or others, provided the appraiser complied with Uniform Standards of Professional Appraisal Practice Standards Rule 3 when the appraiser was required to comply with the rule. The following points shall be awarded for review or supervision of appraisals:

104.9.1. Review of appraisals which does not include a physical inspection of the property and verification of the data, commonly known as a desk review, shall be worth 20% of the points awarded to the appraisal if a separate written review appraisal report

is prepared. A maximum of 100 points may be earned by desk review of appraisals.

104.9.2. Review of appraisals which includes a physical inspection of the property and verification of the data, commonly known as a field review, shall be worth 50% of the points awarded to the appraisal if a separate written review appraisal report is prepared. A maximum of 100 points may be earned by field review of appraisals.

104.9.3. Supervision of appraisers. Supervision of appraisers shall be worth 20% of the points awarded to the appraisal. A maximum of 100 points may be earned by supervision of appraisers.

104.9.4. Not more than 50% of the total experience required for certification may be granted under Subsections R162-104-9(1) through R162-104-9(3) and Sections R162-104-11(1) and R162-104-11(3) combined.

R162-104-10. Condemnation Appraisals.

104.10. Condemnation appraisals shall be worth an additional 50% of the points normally awarded for the appraisal if the condemnation appraisal included a before and after appraisal because of a partial taking of the property.

R162-104-11. Preliminary Valuation Estimates, Comparative Market Analysis, Real Estate Consulting Services, and Other Real Estate Experience.

104.11.1. Preliminary valuation estimates, range of value estimates or similar studies, and other real estate related experience gained by bankers, builders, city planners and managers, or other individuals may be granted credit for up to 50% of the experience required for certification in accordance with Section R162-104-16 of this rule, so long as the experience demonstrates to the Board that the applicant has the ability to arrive at a fair market value of property and to properly document value conclusions.

104.11.2. Comparative market analysis by real estate licensees may be granted up to 100% experience credit toward certification in accordance with Section R162-104-16 of this rule, when the analysis is prepared in conformity with USPAP Standards Rules 1 and 2 and the individual can demonstrate to the Board that he is using similar techniques as appraisers to value properties and effectively utilize the appraisal process.

104.11.3. Appraisal analysis, real estate counseling or consulting services, and feasibility analysis/study will be awarded experience credit in accordance with Section R162-104-16 of this rule for up to 50% of the experience required toward certification so long as the services were performed in accordance with USPAP Standards Rules 4 and 5.

104.11.4. Not more than 50% of the total experience required for certification may be granted under Subsections R162-104-11(1) and R162-104-11(3) and Sections R162-104-9(1) through R162-104-9(3) combined.

R162-104-12. Ad Valorem Appraisal and Benchmark Appraisal.

104.12. Ad valorem appraisal and benchmark appraisal by property type will earn the same number of points as fee appraisal where the individual can demonstrate that he performed highest and best use analysis, developed the model in model specification, or developed adjustments to the model in model calibration, and where the individual can demonstrate the appraisal was performed in accordance with Stan-

Addendum F

105.4.4.1. Credit may be granted on a case by case basis for teaching, program development, authorship of textbooks, or similar activities which are determined by the Board to be equivalent to obtaining continuing education.

105.4.4.2. The Education Review Committee will review claims of equivalent education and also alternative continuing education proposed to be used for continuing education purposes.

R162-105-5. Education Approved by Another State.

105.5. Credit will be granted toward the education requirement for registration/certification or for the renewal of certification for any education courses which have been taken out of state and have been approved by the appraiser licensing agency of another state as meeting the appraiser qualification criteria for registration/certification education or for continuing education as defined by the Appraiser Qualifications Board of the Appraisal Foundation. 1993 61-2b-8 through 61-2b-8(3)

R162-106. Professional Conduct.

R162-106-1. Uniform Standards.
R162-106-2. Use of Term "State Certified".
R162-106-3. Size and Use of Seal.
R162-106-4. Testimony by an Appraiser.

R162-106-1. Uniform Standards.

106.1. Uniform Standards. All appraisers registered or certified by the division must observe the 1993 edition of the Uniform Standards of Professional Appraisal Practice (USPAP), which is hereby incorporated by reference. Copies of the USPAP may be obtained from the Appraisal Foundation, 1029 Vermont Avenue N.W., Suite 900, Washington, D.C. 20005. Registered or certified appraisers, or candidates for registration or certification, may obtain copies from the division.

R162-106-2. Use of Term "State Certified".

106.2. Use of Term "State Certified". The terms "State-Certified Residential Appraiser", "State-Certified General Appraiser", and "Senior Certified Appraiser" shall not be abbreviated or reduced to a letter or group of letters. If these terms are used on letterhead or in advertising, the appraiser's certificate number must follow his name.

R162-106-3. Size and Use of Seal.

106.3. Size and Use of Seal.
106.3.1. When signing a certified appraisal report, a state-certified appraiser shall place on at least the certification page of his report, immediately below his signature, the seal required by Utah Code Section 61-2b-17(3)(e).

106.3.2. The seal to be affixed on reports prepared by state-certified appraisers shall contain the words "Utah State-Certified Residential Appraiser" or "Utah State-Certified General Appraiser" along with the appraiser's certificate number and expiration date. The zeros preceding the certificate number may be deleted. The size of the seal, rectangular in shape, shall be no larger than two and seven-eighths inches long and five-eighths of an inch high including the border. An example of the seal shall be made available on request at the Division offices.

106.3.3. The seal may be reproduced as a stamp with ink that can be copied, or may be inserted by

computer in an appraisal report at the appropriate place.

R162-106-4. Testimony by an Appraiser.

106.4. Testimony. An appraiser who testifies as to an appraisal opinion in a deposition or affidavit, or before any court, public body, or hearing officer, shall prepare a written appraisal report or a file memorandum prior to giving such testimony.

106.4.1. File memoranda. For the purpose of this rule, a file memorandum shall include work sheets, data sheets, the reasoning and conclusions upon which the testimony is based, and other sufficient information to demonstrate substantial compliance with USPAP Standards Rule 2-2, or in the case of mass appraisal, Standards Rule 6-7.

1993

61-2b-27

R162-109. Administrative Proceedings.

R162-109-1. Formal Adjudicative Proceedings.
R162-109-2. Informal Adjudicative Proceedings.
R162-109-3. Hearings Not Required.
R162-109-4. Hearings Permitted.
R162-109-5. Procedures for Hearings in Informal Adjudicative Proceedings.

R162-109-1. Formal Adjudicative Proceedings.

109.1. Any adjudicative proceeding as to the following matters shall be conducted on a formal basis:

109.1.1. the denial of an application for an initial appraiser registration or certification for the reasons listed in Utah Code Section 61-2b-29;

109.1.2. the denial of an application for reissuance of an appraiser registration or certification for the reasons listed in Utah Code Section 61-2b-29;

109.1.3. the revocation or suspension of an appraiser registration or certification;

109.1.4. the revocation or suspension of certification of appraisal courses, schools, or instructors;

109.1.5. the imposition of a fine against a registrant or certificate holder; or

109.1.6. any proceedings conducted subsequent to the issuance of a cease and desist order or other emergency order.

R162-109-2. Informal Adjudicative Proceedings.

109.2.1. All adjudicative proceedings as to any other matters not specifically designated as formal adjudicative proceedings shall be conducted as informal adjudicative proceedings.

109.2.2. A hearing will be held in an informal adjudicative proceeding only if required or permitted by the Appraiser Registration and Certification Act or these rules.

109.2.3. A party is not required to file a written answer to a notice of agency action from the Division in an informal adjudicative proceeding.

109.2.4. All proceedings on applications for registration or certification as an appraiser, or for certification of appraisal courses, schools, or instructors, will be conducted as informal adjudicative proceedings, except as provided in Section 9.1 of this rule.

109.2.5. All application forms which shall be filed out and submitted to the Division for registration or certification as an appraiser, or for certification of courses, schools, or instructors, shall be deemed a request for agency action pursuant to the Utah Admin-