

1998

# Keith W. Bourgeois v. Utah Department of Commerce : Reply Brief

Utah Court of Appeals

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Cass C. Butler; Callister Nebeker & McCullough; Attorneys for Plaintiff/Appellant.

Jeffrey C. Hunt; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Defendant/Appellee.

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## IN THE UTAH COURT OF APPEALS

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KEITH W. BOURGEOUS,

Case No. 981518-CA

Plaintiff/Appellant,

District Court No. 98-0900810

vs.

Priority No. 15

UTAH DEPARTMENT OF  
COMMERCE,

Defendant/Appellee.

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### APPELLANT'S REPLY BRIEF

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On Appeal from the Order of Dismissal of  
the Third District Court  
Honorable Ronald Nehring

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 981518-CA

Cass C. Butler (4202)  
Callister Nebeker & McCullough  
Gateway Tower East, Suite 900  
10 East South Temple  
Salt Lake City, Utah 84133

Attorneys for Plaintiff/Appellant Keith  
W. Bourgeois

Jeffrey C. Hunt  
Assistant Attorney General  
Jan Graham  
Utah Attorney General  
160 East 300 South  
Box 140872  
Salt Lake City, Utah 84114-0872  
Attorneys for Defendant/Appellee.

**FILED**

Utah Court of Appeals

JAN 19 1999

Julia D'Alessandro  
Clerk of the Court

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Cass C. Butler (4202)  
Callister Nebeker & McCullough  
Gateway Tower East, Suite 900  
10 East South Temple  
Salt Lake City, Utah 84133

Attorneys for Plaintiff/Appellant Keith  
W. Bourgeois

Jeffrey C. Hunt  
Assistant Attorney General  
Jan Graham  
Utah Attorney General  
160 East 300 South  
Box 140872  
Salt Lake City, Utah 84114-0872  
Attorneys for Defendant/Appellee.

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Appellant Keith W. Bourgeois, through his counsel of record, submits this Reply Brief in Support of his Appeal.

### **PRELIMINARY STATEMENT**

The most troubling aspect of this appeal is that Appellee, the Department of Commerce ("UDC"), has refused to address on the merits the denial of Appellant Bourgeois' application for an engineering license since October 24, 1997, over 14 months. Normally it is the state agency which seeks to insure that a matter within its jurisdiction does not advance prematurely to the courts until all of the agency's remedies have been explored and exhausted. Hi-Country Homeowners Ass'n v. Public Serv. Commission, 779 P.2d 68 (Utah 1989).

In spite of Appellant Bourgeois' efforts to present to UDC all of the evidence and arguments relevant to his license denial before filing suit, UDC refused to address any of those merits. First, UDC claimed that Bourgeois had not included a copy of UDC's denial letter with his request for agency review. Then, when Bourgeois sent a second copy of the denial letter, UDC summarily rejected his request for review. Second, Bourgeois retain counsel who timely filed a Request for Reconsideration. The request consisted of meritorious and relevant information to Bourgeois application for license. That information included: (1) proof that Bourgeois had been awarded in 1990 an "Engineer-in-

Training Certificate" by the Department of Occupational and Professional Licensing ("DOPL") which provided that he had 10 years in which to complete all the requirements for licensure, which he did within the 10 years; (2) proof that Bourgeois obtained an electrical engineering degree in 1989 and passed all of the National examinations required by DOPL; and (3) proof that DOPL had treated similarly situated persons differently than Bourgeois by awarding such persons a professional engineering license. Mountain Fuel Supply Co. v. Public Serv. Commission, 861 P.2d 414 (Utah 1993) (before an error is considered on appeal to the Court, the agency should have a chance to correct it).

Had Bourgeois filed suit after the UDC's initial denial and before his request for reconsideration, (as UDC argues that he should have), UDC would have taken the position that Bourgeois had failed to exhaust his administrative remedies and that UDC had not been presented with all of the facts and circumstances relevant to Bourgeois' license application. Now, 14 months later, Bourgeois is still trying to have the merits of his appeal addressed by UDC.

### **ARGUMENT**

#### **I. UTAH'S ADMINISTRATIVE PROCEDURE ACT DOES NOT PROHIBIT RECONSIDERATION OF AN AGENCY REVIEW.**

Appellee UDC argues that U.C.A. § 63-46b-13 bars Agency Reconsideration when there has been an Agency Review or in "other words, Agency Reconsideration is not available where Agency Review is." (UDC Brief



at p. 10). In presenting this interpretation of Section 13, UDC misquotes Bourgeois by stating that he argued that the heading to Section 13 is inconsistent with the language in the body of Section 13. (UDC Brief, at pgs. 14-15). This is not correct. Bourgeois has argued that the heading is both consistent with the body as well as gives clarification to Section 13. UDC concedes that the heading of Section 13 provides for reconsideration. Yet, UDC incorrectly reasons that the language in the body of Section 13 prohibits reconsideration. Accordingly, UDC implies that because the language within the statute is inconsistent with the headings, this Court must follow the language of the statute and not the heading. UDC is mistaken -- the heading and the language in the body of Section 13 are consistent with each other. To reach this incorrect conclusion, UDC argues: (a) that Agency Review is the exclusive remedy of a license denial; (2) that the prior statute would be redundant unless this Court uses UDC's interpretation of Section 13 of the current statute; (3) the cases cited by Bourgeois are not on point and therefore cannot be relied upon by this Court in interpreting the meaning of Sections 12 and 13; and (4) those situations where a state agency has provided for reconsideration of an Agency Review by regulation are exceptions to the statute and have no significance to UDC's position.

A. The Headings and Language of Sections 12 and 13 Establish That Reconsideration May Occur of an Agency Review. The heading which would be required to be consistent with UDC's interpretation of the body of Section 13 would be something like "Reconsideration in Lieu of Agency Review" or "Reconsideration Before Agency Review". This Court in Maverick Country Stores v. Industrial Commission, 860 P.2d 944 (Utah App. 1993), stated that under the Utah Administrative Procedures Act ("UAPA") a Request for Review "asks a higher level decision maker to evaluate the claim." Whereas, "a Request for Reconsideration asks the highest level of administrative decision maker to reassess a claim they have previously examined." (Id. at 951).

In this case, Bourgeois' original application for professional license was denied in a letter on September 24, 1997 by Karen McCall, secretary for the Bureau manager. Bourgeois does not disagree with UDC's argument that the only appeal from that letter was to seek Agency Review. The Agency Review was directed to Douglas C. Borda, the Executive Director of UDC. However, in his Order on Review dated October 24, 1997, Director Borda did not even get to the merits of the review. Rather, he dismissed the Request for Review on procedural basis claiming that Mr. Bourgeois had not provided a copy of the McCall denial letter. Director Borda was in fact the highest decision maker in the Agency process. Consequently, his decision could have been reconsidered

under Section 13 in accordance with the dicta of Maverick Country Stores.

Under UDC's interpretation, Bourgeois could not seek reconsideration once he requested and received the highest official's (Director Borda) review of DOPL's denial. This interpretation makes reconsideration an impossibility because Agency Review is always available under Section 12 of the UAPA. Section 13 allows reconsideration only of the highest official's decision. It makes no sense for the Legislature to provide for reconsideration and then make the mechanism for seeking reconsideration an impossibility. Rather, the Legislature merely provided that an aggrieved party could go to Court after an Agency Review or could first seek reconsideration of such Agency Review.

B. The Prior Statute Supports Bourgeois' Interpretation of Section 13. UDC argues that the predecessor statute to Section 13 would be redundant if this Court were not to adopt UDC's interpretation that no reconsideration is allowed of an agency review. (Appellee's Brief, at p. 15). The prior statute stated:

Within ten days after the date that an order on review is issued, or within ten days after the date that a final order is issued for which agency review is unavailable, any party may file a request for reconsideration... 1987 Laws of Utah, Chapter 161, Section 269. (See, Addendum 10 to UDC's Brief).

UDC argues that if "unavailable" means "utilized and exhausted", the first clause would be redundant of the second. UDC sets up this straw man

argument by assuming that "order on review" and "final order" must always be something different. However, an order on review under the UAPA was always a final order for purposes of seeking judicial review. Thus, under the old statute, an aggrieved party could seek reconsideration of any agency review, as well as reconsideration of a final agency order where no higher agency authority could be petitioned. There was no limitation. This has since changed. Under the new statute, reconsideration can only occur from the highest agency official's decision, which in this case was Director Borda's November 4, 1998 order. Maverick Country Stores v. Industrial Commission. Therefore, Section 13, as amended, permitted Bourgeois to seek reconsideration of Director Borda's Order.

C. Case Law Supports the Right to Reconsideration of an Agency Review Under Section 13. UDC argues that this Court should ignore the 12 cases cited by Bourgeois where Utah Courts have reviewed under a de novo standard, petitions from Agency denials of Requests for Reconsideration of an earlier final agency action or "Agency Review." The 12 cases are: Evans & Sutherland Computer Corp. v. Utah State Tax Comm., 327 Utah Adv. Rep. 38 (Utah 1997); Harrington v. Industrial Comm., 942 P.2d 961 (Utah App. 1997) Harper Investments v. Auditing Div., 868 P.2d 813 (Utah 1994); Knowledge Data Systems v. Tax Commission, 865 P.2d 1387 (Utah App. 1993); 49th Street

Galleria v. Tax Com'n., 860 P.2d 996 (Utah App. 1993); Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992); Nelson v. Board of Equalization of Salt Lake County., 943 P.2d 1354 (Utah 1997); Newspaper Agency Corp. v. Auditing Div. of Utah State Tax Com'n., 938 P.2d 266 (Utah 1997); Visitor Information Center Authority of Grand County v. Customer Service Div., Utah State Tax Com'n., 930 P.2d 1196 (Utah 1997); Utah Ass'n of Counties v. Tax Com'n of State of Utah ex rel. MCI Telecommunications Corp., 895 P.2d 825 (Utah 1995); and Lunnen v. Utah Dept. of Transp., 886 P.2d 70 (Utah App. 1994); cf., Career Service Review Board v. Department of Corrections, 942 P.2d 933, 945 (Utah 1997).

UDC ignores the fact that all 12 cases involved state agencies which were governed by the UAPA. See, U.C.A. § 63-46b-2(1)(b) ("Agency" broadly defined to include all agencies of the State). UDC is correct that none of the 12 cases involved the specific issue of whether or not Section 13 permits reconsideration of an "Agency Review". Nonetheless, it is incomprehensible that such an important issue going to the very jurisdiction of the Court's review of these various agency actions would have been overlooked so many times. Even more compelling is the fact that many Utah State Agencies have enacted regulations themselves which provide for reconsideration of Agency Review. (See regulations quoted in Bourgeois' Opening Brief, at pgs. 15 and 16).

UDC's opposition brief is conspicuously silent on this point. Nor can UDC offer any protection for the regulations of the previously listed agencies from being held inconsistent with the UAPA Administrative Procedures Act and therefore invalid if this Court accepts UDC's position that Section 13 of the Act prohibits reconsideration of Agency Review.

D. The Regulations of the State Tax Commission are Consistent With Bourgeois' Interpretation of Section 13. UDC argues that the regulations of the Utah Tax Commission are an exception to the prohibition of Section 13 against reconsideration of an agency review. In a complete breakdown of logic, UDC argues that because the "Tax Commission has chosen to establish unique procedures through its rule making authority" which provides for "automatic review before orders are entered in elective agency reconsideration within 20 days after an order is entered," that this Court should ignore the Tax Commission's procedures. (See, UDC Brief, at pgs. 18-20). However, the Tax Commission, as is every other state agency, (including UDC and DOPL), is governed by and must insure that any regulation promulgated is consistent with the UAPA. U.C.A. § 63-46b-1 and 22.

Consequently, this Court should reverse the District Court's dismissal of Bourgeois' Complaint and remand this matter to UDC for reconsideration of the denial of Bourgeois' application for a professional engineering license.

**II. THE DOCTRINE OF EQUITABLE ESTOPPEL IS LEGALLY AND FACTUALLY APPLICABLE TO UDC'S ACTIONS.**

In essence, UDC argues that equitable estoppel cannot apply to UDC's actions because Bourgeois "could not have relied to his detriment upon the Department's October 24, 1997 Order". However, that Order was defective. It did not meet all the requirements of the statute. (See, Bourgeois' Opening Brief, at pgs. 23-27). In an effort to cure this problem, UDC wishes to ignore the fact the Bourgeois did not receive 2 of the 4 pages to the October 24, 1997 Order. (See, R86-87 and R144-145). The missing pages that Bourgeois should have received include the "notice" that he had 30 days to file suit.

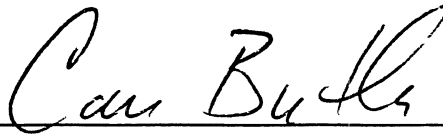
Furthermore, the detrimental reliance was not upon the October 24, 1997 Order. Rather, it was on the November 4, 1997 Order wherein Bourgeois filed his Request for Reconsideration on November 20, 1997, by hand delivery to UDC. As was argued at pg. 26 of Bourgeois' Opening Brief, UDC failed to notify Bourgeois between November 20, 1997 and December 4, 1997 (the expiration of the 30 days in which to seek judicial relief), that he was not permitted to seek reconsideration. Had UDC so notified Bourgeois, the 30 days would not have expired. This is the basis of Bourgeois' detrimental reliance.

**CONCLUSION**

In accordance with this Court's authority under U.C.A. § 78-21-3(2), Bourgeois requests that this Court remand this case to UDC for reconsideration

of Bourgeois' license application in accordance with Section 13 of the Utah Administrative Procedure Act. In the alternative, Bourgeois requests that this Court reverse the District Court's dismissal of his Complaint and remand this case to the District Court for the Third District of Utah.

Respectfully submitted this 19<sup>th</sup> day of January, 1999.

A handwritten signature in cursive script, appearing to read "Cass C. Butler", is written over a horizontal line.

CASS C. BUTLER  
CALLISTER NEBEKER & McCULLOUGH  
Gateway Tower East, Suite 900  
10 East South Temple  
Salt Lake City, Utah 84133  
*Attorneys for Appellant Bourgeois*



CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, 900 Gateway Tower East, 10 East South Temple, Salt Lake City, Utah 84133, and that in said capacity two (2) true and correct copies of the attached **APPELLANT'S REPLY BRIEF** was caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 19<sup>th</sup> day of January, 1999.

Jeffrey C. Hunt  
Assistant Attorney General  
Jan Graham  
Utah Attorney General  
160 East 300 South  
Box 140872  
Salt Lake City, Utah 84114-0872

  
\_\_\_\_\_