

1998

Keith W. Bourgeois v. Utah Department of Commerce : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

KEITH W. BOURGEOUS,

Case No. 981518-CA

Plaintiff/Appellant,

District Court No. 98-0900810

vs.

Priority No. 15

UTAH DEPARTMENT OF
COMMERCE,

Defendant/Appellee.

Appellant Bourgeois' Brief

**UTAH COURT OF APPEALS
BRIEF**

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

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED 

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STANDARD OF REVIEW

Under the applicable Standard of Review this Appellate Court is "Obligated to construe the Complaint in the light most favorable [to the Appellant Bourgeois] and to indulge in all reasonable inferences" in his favor. Errol Industries v. Zions First National Bank, 767 P.2d 935, 936 (Utah, 1988). This Appellate Court should "accord conclusions of law no particular deference, but review them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Further, this Court is free to reappraise the Third District Court's legal conclusions. Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989). Madsen v. Borthick, 769 P.2d 245, 252-53 (Utah 1988); Mendez v. State, 813 P.2d 1234, 1236 (Utah App. 1991).

STATEMENT REGARDING JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to U.C.A. § 78-2a-(2)(a).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does Section 63-46(b)-13 of the Utah Administrative Procedure Act prohibit Agency reconsideration after an Agency has conducted a review?

2. Did Appellant Bourgeois timely file his Complaint with the Third District Court 30 days from the date Appellee Utah Department of Commerce ("UDC") denied his request for reconsideration where such denial:

a. Refused to grant Bourgeois his right to reconsideration as provided under U.C.A. § 63-46b-13, thereby allowing Bourgeois to exhaust his administrative remedies;

b. Where UDC's December 29, 1997 Order on Review stated that Bourgeois had 30 days in which to petition the District Court for review of the Order; and

c. Where case law supports agency reconsideration and other state agencies have promulgated regulations which interpret the statute as allowing for reconsideration after review, when requested.

3. Did the District Court err in dismissing Appellant Bourgeois' Complaint by failing to recognize that Appellee UDC was estopped from denying that the December 29, 1997 Order was a final agency action from which Bourgeois had 30 days in which to file his Petition for Review before the Third District Court.

STATUTES AND REGULATIONS DETERMINATIVE OF APPEAL

U.C.A. § 63-46b-12 and 13.

A. Nature of Case. This is an appeal from the Third District Court's Order dated July 22, 1998, dismissing Bourgeois' Complaint.

B. Course of Proceedings. On January 23, 1998, Bourgeois sought Judicial Review in Third District Court of UDC's denial of his Request for Reconsideration. On July 22, 1998, the District Court dismissed Bourgeois' Complaint as untimely filed, and Bourgeois appealed on August 19, 1998.

C. Facts Relevant to Issues on Appeal.

1. In 1989, after earning a degree in Electrical Engineering from Weber State University, Appellant Bourgeois applied with the Division of Occupational and Professional Licensing ("DOPL") to take the Fundamentals and Engineering examination, which examination he passed on October 29, 1989. This initiated the application process for a professional engineer's license. Bourgeois also applied with the Utah Department of Commerce ("UDC") and was certified as an Engineer-in-Training, Certificate No. 9451-0999-0. (R. 6 to R.7, ¶¶ 15-17).

2. The Engineer-in-Training Certificate was issued to Bourgeois pursuant to the then applicable Department Regulation R153-22-2(c) which stated that the Certificate was valid for 10 years without renewal. (R.7, ¶ 17); Exhibit H, Addendum).

3. After receiving the Engineer-in-Training Certificate, Bourgeois commenced working on meeting the other requirements for professional licensure including qualifying experience of 6 years under the supervision of a licensed engineer. (R.6, ¶ 18).

4. Bourgeois completed the necessary years of experience in 1997 (2 years before his Engineer-in-Training Certificate would expire), whereupon he applied to take the NCEES Principles and Practices Engineering ("PE") examination. On April 18, 1997, Bourgeois passed the PE examination. Bourgeois then applied for a Professional Engineer license with DOPL on September 2, 1997. (R.6 to R.7, ¶¶ 19-20).

5. On September 24, 1997, DOPL denied Bourgeois's application for "failure to document graduation from the required EAC/ABET accredited program in engineering." Bourgeois' 1987 engineering degree from Weber State University was not considered adequate by DOPL. (R.83).

6. On October 21, 1997, Bourgeois sought Agency Review of the denial of his application. (R.84 to R.85).

7. On October 24, 1997, the Utah Department of Commerce dismissed Bourgeois's request for review on the grounds for "failure to comply with the rules governing agency review." The "Order on Review" advised

Bourgeois that he should have included a copy of the September 24, 1997 denial. (R.86 to R.87).

8. The "Order on Review" failed to comply with requirements of U.C.A. § 63-46b-12(6)(c)(vi)-(viii), inasmuch as it failed to state whether Bourgeois's license denial was to be affirmed, reversed or modified, nor did the "Order on Review" provide Bourgeois with any notice of further administrative reconsideration or judicial review which was available to him. Finally, the "Order on Review" failed to provide Bourgeois with the applicable time limits to any appeal or review as required by U.C.A. § 63-46b-12(6)(c)(viii). (R.86 to R.87).

9. On October 28, 1997, Bourgeois sent UDC a second copy of his Request for Agency Review as well as a copy of the September 24, 1997 denial stating that "If these items were not included in the original request it was an oversight on my part during the mailing or copying procedure." (R.88).

10. On November 4, 1997, UDC issued an Order treating Bourgeois's filing as a Request as for further consideration of his request for agency review. The Order stated that the request to reopen the Order and Review was denied, and that Bourgeois had thirty days in which to petition for review with the District Court. However, the Order did not comply with U.C.A. § 63-46b-12(6)(c)(vi) by advising Bourgeois whether or not the denial

of his application for professional licensure should be affirmed, reversed or modified. (R.89 to R.90).

11. Thereafter, Bourgeois retain counsel to assist him. On November 21, 1997, through his attorney, Bourgeois filed a Request for Agency Reconsideration of the November 4, 1997 Order. (R.91 to R.154). The Request for Agency Reconsideration included additional materials and arguments not previously presented but contained in DOPL's file, including Bourgeois' engineer-in-training certificate (Id.)

12. On December 29, 1997, UDC issued a second "Order on Review" which made findings of fact and conclusions of law and denied Bourgeois's Request for Reconsideration. (R.155 to R.160). The "Order on Review" also stated in part:

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review.

(R.159).

13. The December 29, 1997 "Order on Review" issued by UDC further stated:

"Agency reconsideration does not exist from the orders issued by the executive director and petitioner's . . . recourse, as he was informed on two

occasions, was to appeal the Department's Order to the District Court."

(R.158, ¶ 7).

14. The December 29, 1997 "Order on Review also failed to advise Bourgeois whether or not the denial of his application for professional licensure would be affirmed, reversed, or modified as required under U.C.A. § 63-46b-12(6)(c)(vi). (R.155 to R.160).

15. On January 23, 1998, Bourgeois filed his Complaint with the Third District Court seeking judicial review of the December 29, 1997 Order on Review and Final Agency Action. (R1 to R.23).

16. On February 17, 1998, UDC moved that the complaint be dismissed because the complaint was not filed within 30 days of the "Order on Review" constituting final agency action. (R.29).

17. After being briefed on the motion, the District Court granted UDC's motion by minute entry dated June 12, 1998 (R.191), which was later reduced to an Order of Dismissal on July 22, 1998 (R.192 to R.196). Bourgeois filed his notice of appeal to this Court on August 19, 1998 (R.199).

SUMMARY OF THE ARGUMENT

The District's Order dismissing Bourgeois' complaint is based upon an assertion that Bourgeois failed to file his Petition for Judicial review of an agency order within the thirty days provided under U.C.A. § 63-46b-14(3)(a).

However, the District Court looked to the wrong order as the final agency action from which Bourgeois petitioned. The correct order, (constituting final agency action and advising Bourgeois that he had 30 days to seek judicial review), was issued on December 29, 1997. The District Court's failure to consider the December 29, 1997 Order was reversible error because: (1) the December Order denied Bourgeois's Request for Reconsideration which reconsideration was available to Bourgeois under U.C.A. § 63-46b-13; (2) the December Order was the last order in time issued in this matter; and (3) the Order gave Bourgeois specific notice that he had thirty days in which to file his Petition for Review of the December 29, 1997 Order.

ARGUMENT

I.

THE UTAH ADMINISTRATIVE PROCEDURES ACT PROVIDES FOR RECONSIDERATION OF FINAL AGENCY REVIEW.

The District Court ruled that the November 21, 1997 Order on Review was the Agency's final action and a subsequent request for reconsideration was not permitted by the statute or regulation. However, the District Court has: (1) ignored the clear section headings and the language of the Utah Administrative Procedure Act which unequivocally provide for reconsideration, (2) skipped over the unavailability of Superior Agency review

of Bourgeois' petition as a basis for reconsideration, (3) misapplied UDC's own regulations, (4) issued an order which is inconsistent with the regulations of other State Agencies, (5) stepped over well established case law, and (6) prevented Bourgeois from presenting all of the evidence showing agency error and thereby exhausting his administrative remedies.

A. Section 63-46b-13 of the Utah Administrative Procedure Act provides for reconsideration. Section 63-46b-13 of the Utah Administrative Procedure Act states in part:

Agency review - reconsideration.

(1)(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the Order would otherwise constitute final agency action, any private party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

The District Court ruled that this section limited Bourgeois's administrative remedies to agency review only and not to reconsideration. The District Court looked to the phrase "for which review by the agency... under Section 63-46b-12 is unavailable" for support of its position. The District Court erred by reading the language in Section 13 to mean that reconsideration can only occur if the applicant cannot first obtain agency review. In other words, the District Court incorrectly read Section 13 to limit reconsideration to

instances where agency review under Section 12 is prohibited, as opposed to completed or exhausted. To reach this result, the District Court eliminated the Section headings.

However, the District Court erred in ignoring the headings of Sections 12 and 13 of the Act to ascertain the clear meaning of the Administrative Procedure Act and the intent of the Legislature. Section 12 entitled, "**Agency Review - Procedure**" precedes Section 13 entitled, "**Agency Review - Reconsideration**". The Legislature provided that pursuant to Section 13 an aggrieved party may seek reconsideration of an *Agency Review*. If the Legislature intended reconsideration to be available only when agency review was not, then the Legislature would not have entitled Section 63-46b-12 as "**Agency Review - Reconsideration**." It makes no sense to reconsider "Agency Review" if there is not first an "Agency Review" to reconsider. Brinkerhoff v. Forsyth, 779 P.2d 685 (Utah 1989) (statutes are construed according to their plain language).

The District Court reasoned that the heading of the Section 13 "**Agency Review - Reconsideration**," should not be read into the text of the statute. (R.195). In so doing, the District Court relied upon Great Salt Lake Authority v. Island Ranching Co., 414 P.2d 963, 964-65 (Utah 1966) (the title of an act cannot be used "to create an ambiguity or uncertainty when the language in the

body is clear"). Yet, the word "unavailable" in the body of Section 13 is not clear on its face without the heading. It is not clear whether "for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable" means (1) unavailable because the Section 12 review has already occurred and been completed, or (2) reconsideration is permitted only if Agency Review was unavailable in the first place. The heading clarifies the meaning to be unavailable because the "agency review" of Section 12 is concluded; hence, reconsideration of the Agency Review can then occur. While this interpretation has not been directly ruled upon by this Court, it has been implicitly followed in numerous prior decisions. Furthermore, this Court has articulated *in dicta* this interpretation. In the case of Maverick Country Stores v. Industrial Commission, 860 P.2d 944, 951 (Utah App. 1993), this Court stated in reference to Section 13 the following:

UAPA provides:

Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order *would otherwise constitute final agency action*, any party may file a written request for reconsideration with the agency.... Utah Code Ann. § 63-46b-13(1)(a) (1989) (emphasis added).

This section provides a petitioner with the option of applying to the agency for reconsideration of appealing to the courts. It does not provide a petitioner the opportunity to pursue both routes

concurrently. The emphasized language indicates a petitioner who decides to file a request for reconsideration no longer has a "final agency action" from which to appeal. The petitioner must wait until the request is either responded to in writing or denied by operation of law. Section 63-46b-13(1)(a) provides a request for reconsideration is not a mandatory step in exhausting administrative remedies or reaching "finality" to give the courts jurisdiction over an appeal. Under UAPA, a request for reconsideration asks the highest level of administrative decision maker to reassess a claim they have previously examined. A request for review, on the other hand, asks a higher level decision maker to evaluate the claim. Compare Utah Code Ann. § 63-46b-12 (1989) (agency review procedures) with Id. § 63-46b-13 (requests for reconsideration). Petitioners who choose to take advantage of the statutory provision that allows them to request reconsideration must thereafter accept the consequences, one of which is that an appeal to the judicial system cannot be made until the agency acts on the request.

850 P.2d at 951, fn. 11.

B. Superior Agency Review was unavailable to Bourgeois. Even if this Court agrees with the District Court's ruling that Agency Review under Section 12 was available (and therefore was not unavailable), to Bourgeois, the second part of Section 13, Superior Agency Review, was unavailable.

The language of the Section 13 provides for reconsideration if review "by a superior agency" is unavailable. The Administrative Procedures Act defines "superior agency" to mean "an agency required or authorized by law to review

the orders of another agency." U.C.A. § 63-46b-2(j). Thus, because a superior agency review was unavailable, i.e., there was no other agency which could have reviewed UDC's Order on Review, Bourgeois was free to seek reconsideration under Section 13.

Accordingly, Section 63-46b-12 of the Utah Administrative Procedure Act afforded Bourgeois the right to seek reconsideration of UDC's Agency Review, denying Bourgeois his license. Therefore, UDC's order denying Bourgeois' Request for Reconsideration on December 29, 1997, was the final agency action from which the 30 day period ran for filing a Petition with the District Court.

C. UDC's Own Regulation Did Not Prevent Bourgeois From Seeking Reconsideration of UDC's "Agency Review." UDC's own regulation, R151-46b-13(1)(a), states:

Before seeking judicial review of any order or decision entered by the real estate appraiser registration and certification board, an aggrieved party may file a petition for reconsideration by the board pursuant to § 63-46b-13.

Nothing in this regulation prohibited Bourgeois from seeking reconsideration of UDC's "Agency Review." While the regulation states that orders from the Real Estate Appraiser Board cannot be reviewed under the "Agency Review" of U.C.A. § 63-46b-12, this fact alone does not prevent orders from other agencies

(such as DOPL), from being reconsidered once an "Agency Review" as been rendered. UDC's regulation is simply silent on this point. Even if UDC's regulation did address petitions for reconsideration of an agency review, the regulation could not deny Bourgeois the reconsideration right he had under the Administrative Procedures Act.

D. Other Utah Agencies Have Promulgated Regulations which permit Reconsideration Consistent with § 63-46b-13.

If this Court affirms the District Court's ruling that Agency Review under Section 12 and Reconsideration of Agency Review under Section 13 are mutually exclusive, then this Court will effectively strike down the regulations of other State Agencies. Thus, by affirming the District Court's ruling, this Court will have held other state agency regulations to be inconsistent with the Administrative Procedures Act. Those regulations include:

Utah Department of Agriculture and Food R51-2-14 which provides for a request for reconsideration of an "order on review . . . by following the procedures of Section 63-46b-13."

Utah State Tax Commission R861-1A-29 which provides for Agency Review and Reconsideration of the Agency Review within 20 days thereafter;

Utah Administrative Services R13-1-7 which provides for both review and reconsideration under Sections 63-46b-12 and 63-46b-13.

Utah Housing Finance Agency R460-7-6 providing for administrative review under the procedures of both Sections 12 and 13.

See also, R123-4-7; Auditor; R698-1-7, Public Safety; and R907-1-12,

Transportation agencies.

Therefore, this Court should follow the interpretation and application of Sections 12 and 13 by other State Agencies which provide for Agency Review and then Reconsideration of the Agency Review, if the Petitioner so elects.

E. Well Established Case Law Support's Bourgeois's Right to Seek Reconsideration Under § 63-46b-13. Utah courts have repeatedly reviewed, under a de novo standard, petitions from agency denials of requests for reconsideration of an earlier final agency action or "Agency Review." The requests for reconsideration were sought under U.C.A. § 63-46b-13. See e.g., Evans & Sutherland Computer Corp. v. Utah State Tax Comm., 327 Utah Adv. Rep. 38 (Utah 1997) (reaffirmed earlier decision that date of denial of petition for reconsideration starts 30 day time period); Harrington v. Industrial Comm., 942 P.2d 961 (Utah App. 1997)(de novo review of Utah Industrial Commission's denial of request for reconsideration); Harper Investments v. Auditing Div., 868 P.2d 813 (Utah 1994); Knowledge Data Systems v. Tax Commission, 865 P.2d 1387 (Utah App. 1993) (de novo review of Tax Commission's denial of reconsideration request of final decision; Orton v. Utah

State Tax Comm., 864 P.2d 904 (Utah App. 1993) (judicial review of the Utah Tax Commission's denial of petition for reconsideration of earlier "final decision"); 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) (Industrial Commission advised petitioner reconsideration right under 63-46b-13 after final decision in an informal adjudicative proceeding). See also, 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) ("Utah is among the majority of western states to have held that administrative agencies have the power to reconsider their decisions in the absence of statutory provisions to the contrary.")

Inherent in every decision by this Court or any of the district courts of this State, is the initial inquiry to determine whether the requested action is within the court's subject matter jurisdiction, which jurisdiction is "the power

and authority of the court to determine a controversy without which it cannot proceed." Varian - EIMAC, Inc. v. Lamoreaux, 769 P.2d 569, 570 (Utah App. 1989), quoting Thompson v. Jackson, 743 P.2d 1230, 1232 (Utah App. 1987). It is axiomatic that when a request for review is outside of the court's jurisdiction, the court retains only the authority to dismiss the action. (Id.). The District Court's decision in this case that Section 13 prohibits petitions for reconsideration when there has been an agency review would necessarily mean that all of the above identified cases were issued by courts acting beyond their authority and "those acts are null and void" (Id.). Each of the above identified cases involve review of a petition for reconsideration of an earlier Agency Review under Section 12. Because the Courts in each of the above listed cases reviewed the cases on the merits, those courts implicitly held that they had jurisdiction over review of reconsideration denials of Agency Reviews.

In an effort to avoid the sheer volume of the above listed cases, UDC argued to the District Court that Ring v. Industrial Comm., Second Injury Fund, 744 P.2d 602 (Utah App. 1987), supported its position that Bourgeois's request for reconsideration was impermissible (R.7). However, the Ring decision is distinguishable because it was issued before the enactment of section 63-46b-12 ("Agency Review - Reconsideration") of the Utah Administrative Procedures Act. Furthermore, in Ring, the petitioner filed a motion for review with the

Industrial Commission, claiming that he was improperly denied attorney's fees. The day after the Industrial Commission denied petitioner's request for review, but before he received the denial, petitioner filed a "Motion for Review Supplement" which the Industrial Commission treated as a further motion for review. 744 P.2d at 602. Unlike Section 63-46b-12, the then applicable statutory provisions governing workers' compensation jurisdiction did not allow for subsequent motions, including a motion for reconsideration. 744 P.2d at 603. In dismissing Petitioner Ring's complaint, this Court reasoned that Petitioner Ring was entitled to "one bite of the apple" and had failed to file his complaint in a timely manner from the date of the original denial, and not from the date of the denial of his "Motion for Review Supplement." (Id. at 604).

Unlike the petitioner in the Ring case, Bourgeois did not file multiple supplements to his request for review. Bourgeois's submission of October 28, 1997, was nothing more than a refile of his earlier request for review with an exhibit (the October 24, 1997 Order), DOPL claimed was not included originally. (See R.87 and R.88). In other words, this was merely sending DOPL a second copy of Bourgeois's Request for Review because DOPL apparently lost the first copy. Additionally, Bourgeois's case is distinguishable from the Ring case because UDC's denial of Bourgeois's request for

reconsideration advised Bourgeois that he had 30 days to file his challenge to the denial in the Third District Court.

Since enactment of the Utah Administrative Procedures Act, other state agencies, in similar fashion to UDC, have sought dismissal of complaints filed in District Court seeking review of their denials. Those attempts have been rejected by the courts. For example, in the case of 49th Street Galleria v. The Tax Commission, 860 P.2d 996 (Utah App. 1993), the petitioner sought reconsideration of a Tax Commission final order. However, the Tax Commission did not issue its order denying reconsideration within 20 days of the Petition for Reconsideration and the request was deemed denied under U.C.A. § 63-46b-13(3)(b). Instead, the Tax Commission waited for 3 months and then issued its order denying the motion for reconsideration, after which the petitioner filed his complaint in District Court. In holding that the petitioner's complaint was timely filed, this Court stated,

A plain reading of the statute [63-46b-13(3)(b)] indicates that a party may file a petition for judicial review within 30 days after the order constituting a final agency action, in this case the order denying reconsideration . . .

The 49th Street Galleria decision was reaffirmed in Orton v. Utah State Tax Commission, 864 P.2d 904 (Utah App. 1993) and again in Harper Investments

v. Auditing Div., 868 P.2d 813 (Utah 1994). In Harper, the Utah Supreme Court stated,

If an agency chooses to issue an order denying the petition for reconsideration after the 20 day presumptive denial, the actual date of issuance would mark the beginning of the 30 day time period.

868 P.2d at 816.

In his dissent, Justice Howe further elaborated on the effect of the Supreme Court's holding explaining that in cases of a request for reconsideration:

The agency may act on the request, thereby breathing life into the case, and start running again the 30 days to seek judicial review.

868 P.2d at 817.

Because UDC acted upon Bourgeois's Request for Reconsideration, the 30 days to seek judicial review started running on December 29, 1997. Therefore, Bourgeois's complaint filed on January 23, 1998, was timely and the District Court's dismissal should be reversed.

F. Bourgeois's Request for Reconsideration Presented UDC with Facts and Law DOPL had Previously Ignored in Denying Bourgeois's Application for a License. Bourgeois's Request for Reconsideration was necessary under the Utah Administrative Procedure Act to "marshall all of the evidence" showing the error in DOPL's denial. Mountain Fuel Supply v. Public

Service Comm., 861 P.2d 414, 424 (Utah 1993). Prior to Bourgeois's Request for Reconsideration, DOPL had ignored Bourgeois's 10 year Certificate of Engineer-in-Training, which Certificate is valid until 1999. DOPL had also ignored facts showing its inconsistent treatment of Bourgeois and other similarly situated applicants. This information, as well as other important arguments, were included in Bourgeois' Request for Reconsideration (R.91 to R.154). Without the Request for Reconsideration and the evidence presented by Bourgeois, UDC could have argued that it did not have a full and complete opportunity to evaluate Bourgeois's application. With the Request for Reconsideration, Bourgeois exhausted his administrative remedies, making this matter ripe judicial review once UDC denied the Request for Reconsideration on December 29, 1997.

For these reasons, this Court should reverse the District Court's dismissal of Bourgeois' Complaint and remand this case.

II.

UDC IS ESTOPPED FROM TREATING THE NOVEMBER 4, 1997 ORDER AS ITS FINAL ORDER.

The District Court ruled that the December 29, 1997 Order was not the final order from which Bourgeois should have appealed. Rather, the District Court ruled that Bourgeois had 30 days from the November 4, 1997 Order on

Review to petition the Court even though UDC asserted that the October 24, 1997 Order started the 30 day time period for Bourgeois to seek judicial review (R.37 to R.38). However, both the October 24, 1997 and November 4, 1997 Orders were defective, failing to meet the requirements of the Statute. Furthermore, UDC is equitably estopped from denying that the December 29, 1997 Order was its final order from which Bourgeois could seek judicial review.

A. The Earlier Orders Were Defective And Not Final Agency

Actions. Section 63-46b-12(6)(c) of the Utah Administration Procedures Act sets forth 8 requirements for an Order on Review as follows:

(c) The order on review *shall* contain:

- (i) a designation of the statute or rule permitting or requiring review;
- (ii) a statement of the issues reviewed;
- (iii) findings of fact as to each of the issues reviewed;
- (iv) conclusions of law as to each of the issues reviewed;
- (v) the reasons for the disposition;
- (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
- (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and
- (viii) the time limits applicable to any appeal or review.

U.C.A. § 63-46b-12(6)(c)(i) - (viii)(emphasis added).

UDC's October 24, 1997 Order failed to comply with 4 of the 8 mandatory requirements. The October 24, 1997 Order contained no conclusions

of law; no statement as to whether the earlier decision was affirmed or reversed, etc.; no notice of Bourgeois's right of further administrative reconsideration or judicial review; and no statement of the applicable time limits. (See R.86 to R.87). Consequently, UDC's October 24, 1998 Order was defective and not a valid "Agency Review" of UDC's final agency action.

The November 4, 1997 Order was also defective and not a valid Final Agency Action. The November 4, 1997 Order failed to meet subsections i, ii, iii, iv, v of the eight requirements set forth in § 63-46b-12(6)(c) of the Utah Administrative Procedures Act. By so failing, the November 4, 1997 Order was not a valid final agency action.

B. UDC is Estopped From Denying that The December 29, 1997 Order Was A Final Agency Action. UDC's November 4, 1997 Order advised Bourgeois that he had thirty days in which to seek judicial review. Before the thirty days had expired, and before the twenty days to seek reconsideration pursuant to § 63-46b-13 had expired, Bourgeois filed his Request for Reconsideration on November 20, 1997. Had UDC notified Bourgeois that he did not have the right to seek reconsideration, Bourgeois could have filed his complaint with Third District Court before the expiration of the thirty days on December 3, 1997. Instead of advising Bourgeois that his Request would not be considered by UDC, UDC accepted Bourgeois' Request and subsequently

responded to the Request on December 29, 1997. Bourgeois' Request for Reconsideration was hand-delivered to UDC on November 21, 1997. A simple letter from UDC to Bourgeois before December 4, 1997, advising him that his request would not be considered would have sufficed. (See, Lopez v. Career Services Review Board, 834 P.2d 568 (Utah App. 1992) (request for reconsideration was denied by a simple letter from the Board officer). Once Bourgeois filed his Request for Reconsideration, he no longer had a Final Agency Action from which he could appeal. He had to "wait until the request is either responded to in writing or denied by operation of law." Maverick Country Stores v. Industrial Commission, 860 P.2d 944, 951 fn. 11.

Moreover, in its December 29, 1997 Order denying Bourgeois's Request for Reconsideration, UDC advised Bourgeois that,

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

(December 29, 1997 Order, R.155 to R.160).

The elements necessary to invoke equitable estoppel are:

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or

failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Eldredge v. Utah State Retirement Board, 795 P.2d 671, 675 (Utah App. 1990).

Generally equitable estoppel against a state agency is assertable in unusual situations "in which it is plainly apparent that failing to apply the rule would result in manifest injustice". Holland v. Career Services Review Board, 856 P.2d 678, 682 (Utah App. 1993), citing Anderson v. Public Serv. Comm'n, 839 P.2d 822, 827 (Utah 1992); Utah State Univ. v. Sutro & Co., 646 P.2d 715, 718 (Utah 1982). Sufficient certainty of a grave injustice by the government can be established by written representations made by an authorized government entity. Anderson v. Public Serv. Comm'n, 839 P.2d 822, 827 (Utah 1992).

In this case, UDC's failure to notify Bourgeois between November 20, 1997 and December 4, 1997, that he was not permitted to seek reconsideration, as well as UDC's written representation to Bourgeois that he had 30 days to challenge the December 29, 1997 Order, meet all three of the elements of equitable estoppel. By failing to apply the rule, the District Court's Order resulted in manifest injustice to Bourgeois. Bourgeois reasonably relied upon UDC's silence and representation as well as UDC's failure to advise Bourgeois in the October 24, 1997 Order of "the time limits applicable to any appeal or review." (U.C.A. § 63-46b-12(6)(c)(viii)). Moreover, all three of UDC's

"Orders" failed to comply with the mandatory terms of § 63-46b-12(b)(c), albeit, the December 29, 1997 Order came the closest. Finally, Bourgeois has suffered substantial injury because of UDC's improper refusal to consider fully his Request for Reconsideration and the District Court's dismissal of his Complaint. The District Court's ruling now allows UDC to contradict and repudiate its representations inasmuch as Bourgeois will be unable to challenge UDC's improper denial of his application to be a licensed engineer after being advised by UDC that he had 30 days to file his complaint with the District Court.

For these reasons, UDC is equitably estopped from its failure to act between November 20, 1997 to December 4, 1997 and is estopped from contradicting the language in its December 29, 1997 Order which established that the Order was a final agency action, reviewable by the District Court within 30 days under U.C.A. § 63-46b-14. Therefore, this Court should reverse the District Court's dismissal of Bourgeois' Complaint and remand this matter.

CONCLUSION

This Court should reverse the District Court's ruling that Bourgeois had no right to reconsideration by UDC and the subsequent dismissal of his Complaint which was timely filed within 30 days of UDC's final Order dated December 29, 1997. Pursuant to this Court's authority under U.C.A. § 78-21-

3(2), this Court should remand this case to UDC for Reconsideration of Bourgeois' license application as requested in accordance with U.C.A. § 63-46b-13.

Respectfully submitted this 16th day of November, 1998.

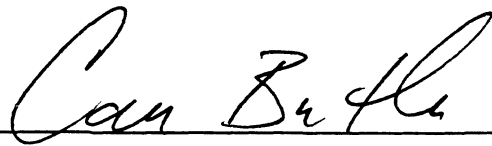
A handwritten signature in cursive script, reading "Cass C. Butler".

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 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 16th day of November, 1998.

Martin B. Bushman
Assistant Attorney General
Jan Graham
Utah Attorney General
160 East 300 South
Box 140872
Salt Lake City, Utah 84114-0872



ADDENDUM

- A. July 22, 1998 Order of Dismissal
- B. September 24, 1997 Denial of License
- C. October 21, 1997 Request for Agency Review
- D. October 24, 1997 Order of Review
- E. October 28, 1997 letter from Bourgeois
- F. November 4, 1997 Order
- G. December 29, 1997 Order on Review
- H. R153-22-2 Engineer-in-Training (1989)
- I. R151-46b-13, Department of Commerce
- J. R51-2-14, Utah Department of Agriculture and Food
R861-1A-29, Tax Commission
R13-1-7, Utah Administrative Services
F460-7-6, Utah Housing Finance Agency

EXHIBIT "A"

MARTIN B. BUSHMAN (#5594)
Assistant Attorney General
JAN GRAHAM (#1231)
UTAH ATTORNEY GENERAL
Counsel for the Defendant
160 East 300 South
Box 140872
Salt Lake City, UT 84114-0872
Telephone: (801) 366-0310

FILED DISTRICT COURT
Third Judicial District

JUL 22 1998

By SALT LAKE COUNTY
Deputy Clerk

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

KEITH W. BOURGEOUS,

Plaintiff,

vs.

UTAH DEPARTMENT OF COMMERCE,

Defendant.

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ORDER OF DISMISSAL

Civil No. 980900810
Judge Ronald E. Nehring

The above entitled matter comes before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint requesting judicial review pursuant to Utah Code Ann. § 63-46b-15(1)(a). The Court having reviewed Defendant's Motion to Dismiss and all responsive memoranda thereto, and having heard oral argument by both parties at hearing on June 5, 1998, hereby finds and orders as follows:

FACTUAL BACKGROUND

On September 2, 1997, Plaintiff applied with the Division of Occupational and Professional Licensing (Division) of the Department of Commerce (Department) for licensure as a professional engineer. The license application was denied by the Division on September 24, 1997 for “failure to document graduation from the required EAC/ABET accredited program in engineering.” On October 21, 1997, Plaintiff requested “agency review” with the Department under Utah Code Ann. § 63-46b-12.

On October 24, 1997, the Department issued its Order on Review denying Plaintiff’s request for relief. The Department’s order advised Plaintiff he could seek judicial review of the order through filing a petition for judicial review in the district court within 30 days of its issuance. Plaintiff nevertheless elected to file a supplemental request with the Department on October 30, 1997 requesting that agency review be reopened for consideration of additional information not included in the original request. The Department issued an other order on November 4, 1997, denying Plaintiff’s request to reopen agency review. Although the Order advised Plaintiff of his right to seek judicial review under Utah Code Ann. § 63-46b-15, it did not offer “agency reconsideration” under Utah Code Ann. § 63-46b-13 as an appeal option.

Plaintiff petitioned the Department on or about November 21, 1997 for agency reconsideration challenging the November 4, 1997 Order on Review. The Department dismissed the request for agency reconsideration on December 29, 1997 for lack of jurisdiction. On January

23, 1998, Plaintiff filed for judicial review in this Court challenging the merits of the Division's September 24, 1997 decision to deny Plaintiff's license application.

DISCUSSION

The Utah Administrative Procedures Act requires that written orders on agency review include, among other things, "a notice of any right of further administrative *reconsideration* or *judicial review* available to aggrieved parties." (Emphasis added). Utah Code Ann. § 63-46b-12(6)(c)(vii). The Order on Review entered by the Department on November 4, 1997 notified Plaintiff of his right to seek judicial review by filing a petition for review in the District Court within 30 days of the order as set forth in Utah Code Ann. § 63-46b-14 and § 63-46b-15. The order did not impose any requirement or inform him of any right to seek agency reconsideration under Utah Code Ann. 63-46b-13. From the November 4, 1998 Order on Review, Plaintiff enjoyed a 30 day window within which to seek judicial review. Rather than pursue judicial review within this time period, Plaintiff elected to file with the Department a petition for agency reconsideration under Utah Code Ann. § 63-46b-13(1). However, agency reconsideration, as defined in § 63-46b-13, was not available to Plaintiff as a means of administrative relief on account he had previously sought and received agency review under § 63-46b-12. The language in § 63-46b-13(1)(a) explicitly states that agency reconsideration is available as an administrative appellate option only in cases where agency review under § 63-46b-12 is unavailable.

Plaintiff's election to seek agency reconsideration does not act to toll the 30 day period in which he was required to file for judicial review in the district court since he had no right to seek

reconsideration. Plaintiff's contention that the heading to § 63-46b-13 reading, "Agency review-Reconsideration," reflects the Legislature's intent to authorize reconsideration where agency review is available is unpersuasive. The title of an act cannot be used "to create an ambiguity or uncertainty when the language of the body of the act is clear." Great Salt Lake Auth. v. Island Ranching Co., 414 P.2d 963, 964-65 (Utah 1966). Because there existed no right to seek agency reconsideration, Plaintiff's filing of his request for reconsideration does not toll the running of the 30 day filing period for judicial review, nor does the Department's order denying Plaintiff's improper request for reconsideration revive a right to seek judicial review or create a new right of review.

Lastly, Plaintiff's claim that the Department is estopped from challenging the untimeliness of his request for judicial review on account of its December 29, 1997 order which informed him he could appeal the order through judicial review is unpersuasive. Plaintiff fails set out the facts which satisfy the elements of an estoppel claim against a state agency. Specifically, Plaintiff fails to establish he relied on the Department's Order to his detriment, Holland v. Career Service Review Board, 856 P.2d 678 (Utah App. 1993); and he fails to establish that the requested relief will not substantially effect public policy in a adverse manner, and that injustice will result in the absence of relief. Utah State University v. Sutro & Co., 646 P.2d 715, 718 (Utah 1982).


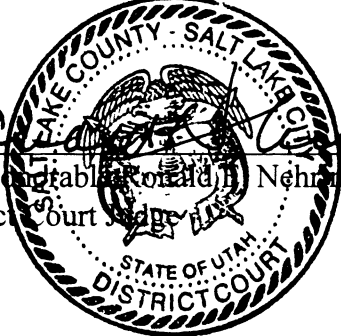
Plaintiff's Complaint requesting judicial review was filed on January 23, 1998, more than 30 days beyond the Department's Order on Review. Accordingly, the Complaint was filed untimely and the Court is without jurisdiction to consider the matter.

For the reasons and upon the grounds set forth above and in Defendant's Motion to Dismiss,
it is hereby:

ORDERED that Defendant's Motion to Dismiss is granted and Plaintiff's request for judicial
review is hereby dismissed with prejudice.

DATED this 22 day of July, 1998.

BY THE COURT:


The Honorable Ronald J. Nehring
District Court Judge


Approved as to form:

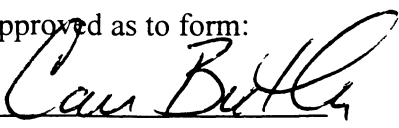

Cass C. Butler
Attorney for Plaintiff

EXHIBIT "B"

179465



DEPARTMENT OF COMMERCE
DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

Michael O. Leavitt
Governor
Douglas C. Borba
Executive Director
J. Craig Jackson, R. Ph.
Division Director

Heber M. Wells Building
160 East 300 South, P.O. Box 146741
Salt Lake City, Utah 84114-6741
(801) 530-6628 Fax (801) 530-6511
Investigations Fax (801) 530-6301
<http://www.commerce.state.ut.us/web/commerce/dopl/dopl1.htm>

September 24, 1997

KEITH W BOURGEOUS
2761 S 3000 W
SYRACUSE UT 84075

Dear Mr. Bourgeois:

DENIAL OF LICENSE:

Your application for licensure as a Professional Engineer was reviewed and denied for the following.

1. Failure to document graduation from the required EAC/ABET accredited program in engineering.

QUESTIONS OR ASSISTANCE:

If you have questions or need assistance, call:

Karen McCall, (801) 530-6632

CHALLENGE AFTER DENIAL OF LICENSURE:

You may challenge the denial by requesting agency review. If you choose to file a request for agency review, you must adhere to the attached procedures.

Sincerely,

Karen McCall, Board Secretary
FOR THE BUREAU MANAGER

enclosure



EXHIBIT "C"

October 21, 1997

Keith Wyatt Bourgeois
2761 So. 3000 W.
Syracuse, Utah 84075

Douglas C. Borba, Executive Director
Utah Department of Commerce
160 East 300 South
Salt Lake City, Utah 84114-6701

Dear Sir:

I would like to request an agency review of my recent denial for licensure as a Professional Engineer.

In 1974 I graduated from Weber State College with an Associates Degree of Applied Science in Electronics. At that time I had also completed an equivalent to a departmental minor in chemistry. It became necessary at this time for me to seek full time employment at Phillips Petroleum continue my education part time.

In 1980 I submitted a degree plan to the Electronics Department at Weber State College for a Bachelors of Science Degree in Electronics. During my studies it came to my attention that I could gain a Professional Engineering License by completing the proper classes and passing the required examinations. Throughout the remainder of my education I was careful to select the required classes to meet the State Engineering requirements.

Upon graduation in 1989 I passed the FE Exam, and registered with the State Department of Commerce as an engineer in training. Requirements for Professional Licensing were completion of 6 years of supervised engineering work and passing the PE exam.

In June of 1991 I was able to transfer to a job that provided at least 50% qualifying time.

In 1994 during a conversation with the Division of Professional Licensing I was informed they had reduced the qualifying time to four years and had eliminated the licensure by experience only. And no longer fully accepted the TAC /ABET engineering program. My understanding at this time was that my registration as an engineer in training was acceptance of my educational requirements. I have received no notification contrary to this and would refer to definition 58-22-102 10 as a reason for this understanding.

It states; "Professional engineering intern" means a person who has completed the education requirements to become a professional engineer, has passed the fundamentals of engineering

examination, and is engaged in obtaining the four years of qualifying experience for licensure under the direct supervision of a licensed professional engineer.

I also feel that a review of my college transcripts would indicate that I have credits that would meet or exceed those covered by definition R156-22-102-a-i; a bachelors or post graduate degree in engineering or equivalent education as determined by the NCEES Foreign Engineering Education Evaluation Program and four years of full time engineering experience under supervision of one or more licensed engineers; or eight years of experience under supervision of one or more licensed engineers; or eight years of full time engineering experience under supervision of one or more licensed professional engineers;

During the summer of 1995 I was able to increase my qualifying time to 100% of time worked.

The fall of 1996 I called the State Dept. of Commerce and asked if I could take the PE Exam. After confirming my status as an EIT [now called a Professional Engineering Intern] the necessary forms were sent to me. I passed the PE exam in spring of 1997 and submitted my application for Licensure then received notice of denial of licensure due to the dropping of TAC/ABET accredited programs in 1992. Although the TAC/ABET curriculum is accepted as criteria to take the Fundamentals of Engineering Examination.

have completed the requirements originally outlined to me by the Dept. of Commerce and in principal meet the current requirements of a professional engineer.

I would appreciate an earnest review of this request.

Sincerely,

Keith Wyatt Bourgeois

EXHIBIT "D"

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF
KEITH WYATT BOURGEOUS

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ORDER ON REVIEW
DOPL: Misc

INTRODUCTION

This matter comes before the Executive Director on the request for agency review filed by Keith Wyatt Bourgeois (hereafter "Petitioner") from an order of the Division of Occupational and Professional Licensing (hereafter "Division").

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

ISSUES REVIEWED

1. Whether the Petitioner has filed a request for agency review upon which relief may be granted.

FINDINGS OF FACT

1. Petitioner filed a request for agency review, apparently from the denial by the

qualified to be licensed to act as an Engineer in the State of Utah, the Executive Director is unable to conduct a proper review of the agency's action in denying licensure.

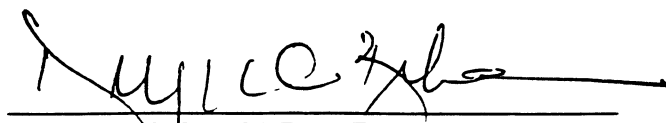
3. The letter of instruction accompanying Petitioner's denial instructed him that "You **MUST** include with your request a copy of the letter or order you wish reviewed". Petitioner chose not to furnish the Executive Director with the information necessary to conduct a review of the appeal so it is therefore necessary that the appeal be dismissed.

ORDER

The Executive Director of the Department of Commerce having made the above Findings of Fact and Conclusions of law, it is, therefore

ORDERED that the Request for Agency Review heretofore filed by Keith Wyatt Bourgeois is not well taken and the request should be and is hereby dismissed for failure to comply with the rules governing agency review.

SO ORDERED this the 24th day of October, 1997.



DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

EXHIBIT "E"

October 28, 1997

Dear Mr. Borba,

Please find enclosed a copy of my request of agency review. If these items were not included in the original request it was an oversight on my part during the mailing or copying procedure. I did not knowingly choose to withhold this information. I would ask that you would please consider this request its merits. I have included a copy of your original review and have included a travel agenda to show that I did not receive notification of the original denial of license until Friday, October 3, 1997.

I appreciate your assistance to this point. Thank your for your time and effort.

Sincerely,

Keith W. Bourgeois

EXHIBIT "F"

October 24th.

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE AGENCY
REVIEW OF
KEITH WYATT BOURGEOIS

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ORDER
DOPL: Misc

THIS MATTER COMES ON upon the request heretofore filed by Petitioner for further consideration of his request for agency review upon which an order was heretofore entered on October 24, 1997 rejecting the appeal for failure to comply with the rules. In support of his request Petitioner states that omission of a copy of the order appealed from had been an oversight in the copying and mailing process.

The order denying Petitioner licensure, issued by the Division of Occupational and Professional Licensing, stated as the reason that Petitioner had not documented graduation from an EAC/ABET accredited engineering program as required by the licensing statute.

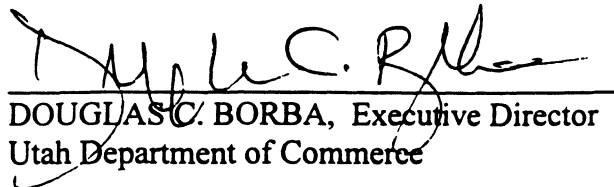
Petitioner does not attempt to establish in his request for review that he possesses the statutorily required education, but instead documents a TAC/ABET accredited education which ceased being acceptable for licensure on July 1, 1996. The amendment establishing the increased educational requirements was put into law in 1992, four years prior to its effective date, to provide time for persons such as Petitioner possessing a lesser requirement to become licensed prior to the effective date of the change. Petitioner's recourse, if any, lies with the legislature rather than the administrative division which can only implement the legislative mandates under which Petitioner does not qualify for licensure.

The Executive Director is of the opinion and finds that Petitioner's has stated no grounds

sufficient to support his request to reopen consideration of his appeal and the same should be denied. It is, therefore

ORDERED that the request to reopen the Order on Review heretofore entered herein should be and is hereby denied.

SO ORDERED this the 7th day of November, 1997.


DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

CERTIFICATE OF MAILING

I certify that on the 7th day of November, 1997, I caused to be mailed a true and correct copy of the foregoing Order on Review, properly addressed, postage prepaid, by certified mail to:

Keith Wyatt Bourgeois
2761 S. 3000 West
Syracuse UT 84075

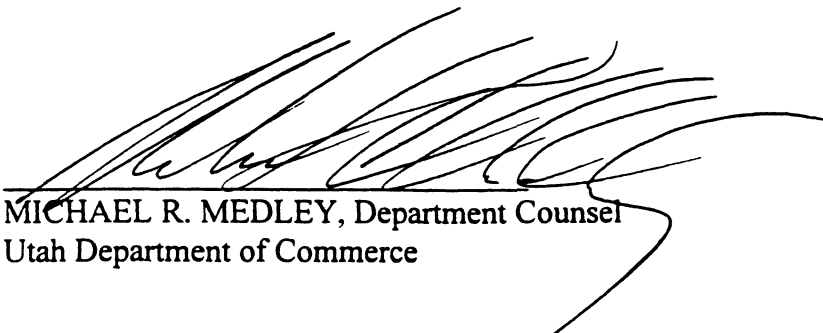

MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

EXHIBIT "G"

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST
FOR AGENCY RECONSIDERATION BY
KEITH W. BOURGEOUS

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ORDER ON REVIEW

Case No. DOPL Misc.

INTRODUCTION

This matter comes before the Executive Director on the request of the Petitioner, Keith W. Bourgeois (hereafter "Petitioner"), by and through counsel, for agency reconsideration of the denial of his application to be licensed as a professional engineer in the State of Utah by the Division of Occupational and Professional Licensing (hereafter "Division") and the upholding of such denial by the Executive Director of the Department of Commerce (hereafter "Department").

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of a Division's decision from which agency review is permitted is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code. Agency reconsideration of an order for which agency review is unavailable is conducted pursuant to Section 63-46b-13, Utah Code Annotated, and Rule R151-46b-13 of the Utah Administrative Code.

ISSUES REVIEWED

1. Whether Petitioner is entitled to agency reconsideration.

FINDINGS OF FACT

1. On September 24, 1997 the Division issued a denial letter to Petitioner advising him that his application for licensure as a Professional Engineer had been denied because of Petitioner's failure to document that he had graduated from an EAC/ABET accredited program in engineering. Along with the denial letter the Petitioner was furnished with a letter advising him of the minimal requirements necessary to obtain agency review along with a copy of the applicable Department rules governing agency review.
2. On October 23, 1997 Petitioner filed a request for agency review but failed to follow the Department rules by filing a copy of the order for which review was sought.
3. On October 24, 1997 the Department issued an Order on Review dismissing Petitioner's appeal for failure to comply with the rules governing agency review.
4. On October 30, 1997 the Petitioner filed a request for reconsideration of the Department's dismissal of his appeal which included a copy of the Division's order denying him licensure. Petitioner alleged that the failure to include the Division's order had been mere oversight on his part and excusable neglect in the copying and mailing process.
5. On November 4, 1997 the Department issued an Order denying the request to reopen the Order on Review as Petitioner stated no grounds upon which relief could be granted. The Order cited that the basis for the Division's denial was Petitioner's failure to document graduation from an EAC/ABET accredited engineering program and that Petitioner only established the possession of a TAC/ABET which failed to meet the requirements put into law in 1992 to become effective July 1, 1996.

CONCLUSIONS OF LAW

1. UTAH CODE ANN. §63-46b-12(1)(a) states that:

If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

2. UTAH CODE ANN. §63-46b-13(1)(a) provides that:

Within 20 days after the date that an order is issued **for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable**, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested. (Emphasis added).

3. UTAH ADMIN. R151-46b-12(1) states that:

An aggrieved party may obtain agency review of a final order by filing a request with the executive director or the department within thirty days following the issuance of the order.

4. Utah Admin. R151-46b-13 provides for reconsideration only to the Real Estate Appraiser Registration and Certification Board from orders issued by that board. No other reconsideration is authorized by such rule.

5. The *Utah Administrative Procedures Act* is clear that reconsideration is available only if agency review is unavailable to the aggrieved party from the adverse agency action for which review is sought. The Department rules are equally clear that agency review by the Executive Director is available from all agency actions taken by the Department's inferior agencies and the boards and commissions thereunder with the sole exception of the Real Estate Appraiser Registration and Certification Board.

5. The Order on Review issued by the Department on October 24, 1997 contained the following:

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petitioner for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

6. The Order issued by the Department on November 4, 1997 in response to Petitioner's subsequent filing contained the following notice:

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petitioner for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

7. Agency review is available at the Department level from all actions taken by divisions under the Department or any of the boards and commissions operating under the auspices of the various divisions, with the sole exception of a single board under the Real Estate Division of the Department for which reconsideration exists as the sole appeal available within the Department before administrative remedies are exhausted and the aggrieved party becomes eligible for judicial review. Therefore, agency reconsideration does not exist from the Orders issued by the Executive Director and Petitioner's and Petitioner's recourse, as he was informed on two occasions, was to appeal the Department's order to the District Court.

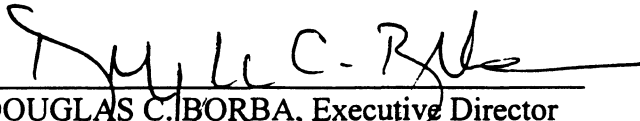
8. A final order was previously entered by the Executive Director on the issues raised by Petitioner herein and this matter no longer resides within the jurisdiction of the Department. "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569 (Utah App. 1989).

ORDER

The Executive Director of the Department of Commerce having made the above Findings of Fact and Conclusions of Law, it is, therefore

ORDERED that the Request for Agency Reconsideration heretofore filed by Keith W. Bourgeois should be and is hereby dismissed.

SO ORDERED this the 27th day of December, 1997.



DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

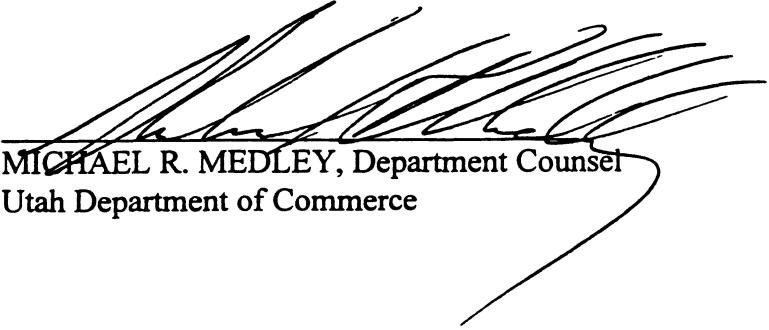
CERTIFICATE OF MAILING

I certify that on the 29th day of December, 1997, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

Cass C. Butler, Esq.
Callister, Nebeker & McCullough
Attorneys at Law
10 East South Temple, Suite 800
Salt Lake City UT 84133
ATTORNEYS FOR KEITH W. BOURGEOUS

and caused a copy to be hand-delivered to:

J. Craig Jackson, Director
Division of Occupational and Professional Licensing
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

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Salt Lake City, Utah 84111



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

EXHIBIT "H"

R153-20-4. Committee Membership

The committee shall consist of five (5) members appointed by the appointing authority; four shall be licensed sanitarians in good standing and one shall be a member of the general public.

(a) Members shall be residents of the State of Utah.

(b) The four licensed members shall be qualified, practicing sanitarians who have been registered by the State of Utah for a period of five (5) years or more.

(c) Terms of committee members shall be given five (5) years. Each committee member shall serve until the appointment and qualification of his successor or until one year has elapsed since the expiration of the term for which he or she was appointed, whichever occurs first. Vacancies occurring prior to the expiration of the term shall be filled by an appointee for the unexpired time. The appointing authority, with concurrence of the committee, may remove a committee member for misconduct, incompetency, neglect of duty, or other sufficient cause after due notice and a hearing.

R153-20-5. Duties of Committee

(a) The members of the committee shall, as soon as appointed, organized and annually thereafter in the month of July elect from their members a chairman, vice chairman and secretary.

(b) The committee shall hold meetings at least once per quarter to review, evaluate and approve, if qualified, applications for registration as sanitarians, prepare and approve minutes and reports, and transact all other business as may be necessary.

(c) The committee shall approve issuance of Certificates of Registration to applicants who have been found to be qualified for registration as a sanitarian.

(d) The committee may hold hearings for the purpose of administrative items and adjudication of such matters as may properly come before it, make the necessary determination in conjunction therewith, and issue such orders as may be consistent with their findings. The committee may designate one or more of its members as a hearing agent. Such agent or representative shall conduct hearings in a manner provided by law.

(e) A simple majority of the committee shall constitute a quorum, and special meetings of the committee may be called by the chairman or at a request by two committee members upon written request by five applicants or Registered Sanitarians.

(f) All committee meetings shall comply with the Utah Open Meetings Act.

R153-20-6. Records of Proceedings

(a) The committee shall keep a record of its proceedings.

(b) The committee shall maintain a register of all applications for registration which shall show:

- (1) Name of applicant.
- (2) Date of applicant.
- (3) Action taken by committee.
- (4) Such other pertinent information that may be deemed necessary by the committee.

(c) The Division of Registration shall maintain a current registry of all sanitarians.

R153-20-7. Fees

(a) Application: As determined by the Division of Registration and ratified by the committee.

(b) Renewal: As determined by the Division of Registration and ratified by the committee.

R153-20-8. Denial of Registration

(a) The committee may recommend denial of registration to the director on the following grounds:

(1) If the applicant or holder of registration is not of good moral character or has been guilty of unprofessional conduct.

(2) If he has been convicted of crime involving moral turpitude.

(3) If he has obtained or attempted to obtain registration by fraud.

(4) If he is not a citizen of the United States.

(b) Upon denial of an application for registration, the committee shall notify the applicant of the action, stating (1) the reason for denial and (2) that the applicant has the right to a hearing if written request for hearing is made within 30 days after service of the notice of denial.

R153-20-9. Suspension and Revocation of Registration

(a) The committee may recommend suspension or revocation of a license on the grounds of:

(1) Conviction of a crime, if the crime is substantially related to the qualifications, functions and duties of the business or profession for which the registration was issued.

(2) Knowingly making a false statement of fact required to be revealed in an application or renewal for such registration.

(3) Unprofessional conduct, which shall include the following:

- (a) Deceit.
- (b) Misrepresentation.
- (c) Violation of contract.
- (d) Fraud.
- (e) Negligence.
- (f) Professional incompetence.
- (g) Unethical practice.

(b) Upon suspension or revocation, the committee shall notify the registrant in the manner specified for denial or registration.

R153-20-10. Use of Title

Only a person who has qualified as a Registered Sanitarian and holds a valid license for use in the State of Utah shall have the right and privilege of using the title "Registered Sanitarian" and to use the abbreviation "R.S." after his name.

R153-20-11. Violation

It shall be unlawful for any person to represent oneself as and/or perform duties as a sanitarian without being duly registered by the Utah State Division of Registration, reviewed by the committee, and the holder of a valid license.

1987 58-20-2.1(2)(a)

R153-22. Rules of the Representative Committee for Professional Engineers, Engineers-in-Training and Land Surveyors

R153-22-1. General

R153-22-2. Engineer-in-Training

R153-22-3. Minimum Requirements for Engineering

Graduates to be Licensed by Examination for all Approved Branches (Section 58-22-12 (1) (a)) Includes:

R153-22-4. Minimum Requirements for Licensure Without Graduation from an Approved Engineering School (Section 58-22-12 (1) (b)) Includes:

R153-22-5. Reciprocity

R153-22-6. Section 58-22-12 (1) (c): Eminence

R153-22-7. General Information

R153-22-8. Land Surveyors

R153-22-1. General

a. Application for licensure must be made on forms provided by the Division of Occupational & Professional Licensing, Heber M Wells Building, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145.

b. Writing on the application must be legible, preferably typewritten or printed in ink. The application must be executed in every detail. Insert the letters "NA" (not applicable) as a reply to questions which do not apply to you.

c. In addition to the application form, the following are required:

1. Graduation from college or university (official transcript of credits showing degrees received.)

2. College training without graduation (official transcript of credits from ALL colleges or universities attended.)

3. Transcripts with "Issued to Student" stamped on them will NOT be accepted. Transcripts MUST be mailed DIRECTLY from the university to the Division of Occupational & Professional Licensing.

d. Applicant must fill out an ABSTRACT OF APPLICANT'S STATEMENT OF QUALIFICATIONS and make Nine (9) identical copies. This abstract must include applicant's name, address, place and date of birth, education, and his/her professional experience records as indicated. One (1) copy of this abstract and a copy of the "Letter of Recommendation" form supplied by the Division of Occupational & Professional Licensing, must be mailed by the applicant to each of the eight (8) references provided on page three (3) of the application. A stamped envelope, addressed to the Division of Occupational & Professional Licensing, Heber M. Wells Building, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145, shall also be included. (The ninth copy is included with the application.) Each reference, in turn, should respond to the engagement(s) of the applicant's work that he knows about, completes the "letter of recommendation" form and mails it directly to the Division of Occupational & Professional Licensing.

e. It is the applicant's responsibility to send out the requests for "LETTERS OF RECOMMENDATIONS" and make sure they are returned to the Division of Occupational & Professional Licensing.

f. Names of eight persons for reference are required. A minimum of five (5) references must be received, of which at least three (3) shall be from registered professional engineers before the application will be reviewed. References shall not be relatives of the applicant either by birth or marriage. References must be well acquainted with your engineering experience and at least one (1) reference must attest favorably to enough of the experience claimed, that the total experience requirements of 2202 b and 2203 b are met.

R153-22-2. Engineer-In-Training

a. Graduation in an approved engineering curriculum of four (4) years or more from an engineering school or college approved by the Committee, and successfully passing the eight (8) hour written examination in the fundamentals of engineering as prescribed by the Committee. The fundamentals of engineering examination which has been prescribed is prepared by the National Council of Engineering Examiners. It covers the following basic engineering

subjects: Engineering Economics, Electrical Theory, Dynamics, Statics, Mechanics of Materials, Material Science, Thermodynamics, Fluid Mechanics, Computer Science, and Systems Theory.

1. Application to take the EIT examination involves filing either a long or short form with the Utah Division of Occupational & Professional Licensing. The short form may be used by:

(a) Applicants in the last year of an approved curriculum leading to a BS degree in Engineering (not Engineering Technology) at a Utah college or university. Approved curricula include Agricultural Engineering, Chemical Engineering, Civil Engineering, Electrical Engineering, Fuels Engineering, Industrial Engineering, Mechanical Engineering, and Mining Engineering.

(b) Applicants in the last year of an MS or Ph.D. in any of the above disciplines.

(c) Applicants presently holding a BS, MS, or Ph.D. in any of the above disciplines from a Utah college or university.

(d) Applicants holding a BS from an ABET-accredited (Accreditation Board for Engineering and Technology) undergraduate program from outside Utah.

(e) Applicants holding an MS or Ph.D. from a school with an ABET-accredited (Accreditation Board for Engineering and Technology) undergraduate degree in the same field as the graduate degree.

b. Without graduation from an approved engineering curriculum, a specific record of four (4) years or more of experience in engineering work supported by favorable reference letters from employers and successfully passing the eight (8) hour written examination in basic engineering subjects as described in 2202 a. Applicants desiring to take the EIT on the basis of experience MUST use the long form application.

1. A degree in engineering technology is NOT considered to be an engineering degree, and persons desiring to take the EIT with a technology degree must submit evidence to the committee of at least two (2) years of engineering experience supported by favorable reference letters from employers in addition to the technology degree, these persons MUST use the long form application available from the Division of Occupational & Professional Licensing.

c. The Engineer-In-Training Certificate is not subject to renewal and is valid for only ten (10) years from the date the examination is passed.

R153-22-3. Minimum Requirements for Engineering Graduates to be Licensed by Examination for all Approved Branches (Section 58-22-12 (1) (a)) Includes:

a. Graduation from an approved engineering school and having an Engineer-In-Training Certificate obtained by passing an eight (8) hour written examination in the fundamentals of engineering (Official certification of passing this examination must be mailed to the Division of Occupational & Professional Licensing by the state in which the applicant passed the examination), and

b. Having a specific record of four (4) years or more (at the time the application is submitted, and within the filing deadline) of active practice in engineering work after graduation indicating the applicant is competent to be placed in responsible charge of such engineering work.

1. In counting years of experience, credit not in excess of one (1) year for satisfactory graduate study

In engineering may be accepted.
Engineering teaching at a rank not lower than assistant professor may be accepted as qualifying experience, on a year for year basis.

3. The mere execution, as a contractor, of work designed by a professional engineer, or the supervision of the construction of such work as a foreman or superintendent, shall not be deemed to be the practice of engineering.

4. The work ordinarily performed by persons who operate or maintain machinery or equipment is not considered as the practice of engineering.

c. Passing an eight (8) hour written professional engineering examination as prescribed by the Committee.

R153-22-4. Minimum Requirements for Licensure Without Graduation from an Approved Engineering School (Section 58-22-12(1))

(b) Includes:

a. Passing the eight (8) hour fundamentals of engineering examination as per section 2202 b.

b. Having a specific record of eight (8) years or more (at the time the application is submitted) of active practice in engineering work indicating that the applicant is competent to be placed in responsible charge of such engineering work:

1. The satisfactory completion of each year of a curriculum in engineering approved by the Committee shall be considered as one (1) year of experience.

2. Graduation in a curriculum other than engineering (approved by the Committee) from a college or university of recognized standing will be considered as equivalent of up to two (2) years of experience, that no applicant shall receive credit for more than four (4) years experience because of undergraduate educational qualifications.

3. The mere execution, as a contractor, of work designed by a professional engineer, or the supervision of construction work such as a foreman or superintendent, shall not be deemed to be the practice of engineering.

4. The work ordinarily performed by persons who operate or maintain machinery or equipment is not considered as the practice of engineering.

c. Passing of the second eight (8) hour written examination as prescribed by the Committee.

R153-22-5. Reciprocity

a. The Committee will, upon application and the payment of the established fee, approve the registration as a Professional Engineer or any person who holds a current certificate of registration issued to him by proper authority of any state, territory or possession of the United States, or of any country, if the applicant's qualifications meet the requirements of this Act and the original license or certificate will grant similar privileges to persons licensed or registered in the state of Utah.

b. A holder of a certificate from another state obtained by "experience" or "residence" or by means other than a written examination of the type described in item 2207-c, is not eligible for registration by reciprocity in the state of Utah.

c. The form entitled, "Certificate of Secretary of State Board Issuing Original License" must be mailed by the applicant to the states in which he took and passed the fundamentals examination and/or the professional engineering examination. (If the EIT and the PE examinations were taken in different states, a form MUST be mailed to both states). A stamped envelope, addressed to the Division of

Occupational & Professional Licensing, Heber M. Wells Building, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah, 84145, shall be included. The form must be sent directly to the Division of Occupational & Professional Licensing by the issuing office(s).

d. Holders of NCEE Certificates (NCEE Blue Covers) need only complete Page 1 (including the recent photograph) and Page 3 (except for the reference section) of the Utah application for Certification and submit the required fee. The applicant should then have his NCEE Record sent directly by NCEE to the Division of Occupational & Professional Licensing for review by the Committee.

e. College transcripts must be sent to the Division directly from the university.

R153-22-6. Section 58-22-12(1) (c): Eminence

The Committee may license an applicant without examination provided the applicant can demonstrate to the Committee's satisfaction which justifies the special recognition of eminence. To do this, the applicant must submit evidence that he/she is an engineer of outstanding reputation and distinction in the field of engineering and that he/she has been engaged in the practice of engineering for twelve (12) or more years, of which at least five (5) years shall have been in responsible charge of important engineering work. An applicant for eminence may not be less than thirtyfive (35) years of age and shall demonstrate:

a. Adherence to high ethical standards.

b. Integrity in the practice of the profession.

c. Outstanding engineering accomplishments and ability which might be established by the following:

1. Significant contributions to technical literature.

2. Work on technical engineering committees.

3. Patents.

4. Monumental engineering achievements.

5. Academic Achievement.

d. Demonstrate outstanding contributions to the profession of engineering which may be established by:

1. Membership in technical activities and/or professional societies.

2. Leadership in technical/professional societies.

3. Contributions to technical/professional societies.

4. Work on educational committees such as college accrediting visitation committees.

R153-22-7. General Information

a. The Utah law regulating the Practices of Professional Engineers and Engineers-In-Training as contained in Title 58, Chapter 22, Section 12 of the Utah Code Annotated.

b. Any person having the necessary qualifications prescribed by this act to entitle him to registration, shall be eligible for such registration, although he may not be practicing his profession at the time of making his application.

c. No person shall be eligible for registration as an engineer who is not of good character and reputation. Conviction of a felony, prior revocation of a license, and unfavorable references are examples of causes for denial of registration.

d. The appropriate fee must accompany the application.

e. The written examinations consist of two (2) eight (8) hour examinations; the first eight (8) hour examination is in engineering fundamentals and the second eight (8) hour examination is in an accredited branch of engineering to be selected by the appli-

EXHIBIT "I"

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[\[Title R151 Table of Contents\]](#)

(R151. Commerce, Administration.)

R151-46b. Department of Commerce Administrative Procedures Act Rules.

R151-46b-1 Title.

R151-46b-2 Definitions.

R151-46b-3 Authority - Purpose.

R151-46b-4 Supplementing Provisions of Rule R151-46b.

R151-46b-5 General Provisions.

R151-46b-6 Representation of Parties.

R151-46b-7 Pleadings.

R151-46b-8 Filing and Service.

R151-46b-9 Discovery.

R151-46b-10 Hearings.

R151-46b-11 Orders.

R151-46b-12 Agency Review.

R151-46b-13 Agency Reconsideration.

R151-46b-14 Exhaustion of Administrative Remedies.

R151-46b-15 Stay and Other Temporary Remedies Pending Judicial Review.

R151-46b-16 Emergency Adjudicative Proceedings.

R151-46b-17 Declaratory Orders.

R151-46b-18 Record of an Adjudicative Proceeding.

R151-46b-1 Title.

These rules are known as the "Department of Commerce Administrative Procedures Act Rules."

R151-46b-2 Definitions.

In addition to the definitions in Title 63, Chapter 46b, Administrative Procedures Act, which apply to these rules:

- (1) "Agency head" means the executive director of the department, the director of a division, or the administrative secretary of the committee, respectively, as used in context.
- (2) "Applicant" means a person who submits an application.
- (3) "Application" means a request for licensure, certification, registration, permit, or other right or

no later than five days after the filing of a response to the request for agency review.

(6) Oral Argument

The request for agency review or the response thereto shall state whether oral argument is sought in conjunction with agency review. The department may order or permit oral argument if the department determines such argument is warranted to assist in conducting agency review.

(7) Standard of Review.

The standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings, as set forth in Subsection 63-46b-16 (4).

(8) Type of Relief.

The type of relief available on agency review shall be the same as the type of relief available on judicial review, as set forth in Subsection 63-46b-17 (1)(b).

(9) Order on Review.

The order on review shall identify the effective date of the order and shall comply with the requirements of Subsection 63-46b-12 (6).

R151-46b-13 Agency Reconsideration.

(1) Filing requirements for agency reconsideration.

(a) Before seeking judicial review of any order or decision entered by the Real Estate Appraiser Registration and Certification Board, an aggrieved party may file a petition for reconsideration by the board pursuant to Section 63-46b-13.

(b) The request shall be signed by the party seeking reconsideration and filed with the Division of Real Estate, which shall provide a copy of the request to the board. Any response to the request for reconsideration shall be filed with the division within ten days of the filing of the request for reconsideration. The division shall provide a copy of any response to the board.

(2) Effect of filing.

Upon the timely filing of a request for reconsideration by the board, the effective date of the previously issued order or decision shall be suspended pending the completion of reconsideration.

(3) Order on reconsideration.

Any written order on reconsideration shall be issued by the board no later than 20 days after the filing of the request. Any order on reconsideration shall set forth an effective date and constitutes final agency action for purposes of Section 63-46b-14. The order shall provide notice to any aggrieved party of any right to judicial review.

R151-46b-14 Exhaustion of Administrative Remedies.

EXHIBIT "J"

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[\[Title R051. Table of Contents\]](#)

(R51. Agriculture and Food, Administration.)

R51-2. Administrative Procedures for Informal Proceedings Before the Utah Department of Agriculture and Food.

R51-2-1 Authority.

R51-2-2 Designation of Formal and Informal Proceedings.

R51-2-3 Definitions.

R51-2-4 Construction.

R51-2-5 Commencement of Proceedings.

R51-2-6 Hearings.

R51-2-7 Intervention.

R51-2-8 Pre-hearing Procedure.

R51-2-9 Continuance.

R51-2-10 Parties to a Hearing.

R51-2-11 Appearances and Representation.

R51-2-12 Testimony, Evidence and Argument.

R51-2-13 Decisions and Orders.

R51-2-14 Request for Reconsideration.

R51-2-1 Authority.

A. These rules establish and govern the administrative proceedings before the Utah Department of Agriculture and Food, as required by Sections 63-46b-5 and 4-1-3.5.

B. These rules govern all adjudicative proceedings commencing on or after January 1, 1988. Adjudicative proceedings commencing prior to January 1, 1988, are governed by procedures presently in place.

R51-2-2 Designation of Formal and Informal Proceedings.

A. Emergency Orders: The Department may issue an order on an emergency basis without complying with these rules under the circumstances and procedures set forth in Section 63-46b-20.

B. All adjudicative proceedings of the Utah Department of Agriculture and Food here designated will be conducted as informal proceedings including the following, under the Utah Agricultural Code, Title 4:

R51-2-14 Request for Reconsideration.**A. Who may file**

Within ten days after the date that an order on review is issued, any aggrieved party may file a request for reconsideration by following the procedures of Section 63-46b-13 and the following additional rules. A request is not a prerequisite for judicial review.

B. Action on the Request.

The Commissioner shall issue a written order granting or denying the request for reconsideration. If an order is not issued within 20 days after the filing of the request, the request for rehearing shall be considered denied. Any order granting rehearing shall be strictly limited to the matter specified in the order.

[Indexing] KEY: government hearings, appellate procedures
1988

[Editor's note: Below are references to the Utah Code that are listed by the agency making this rule as authority for the rule.]

4-1-3.5 63-46b-5

Notice of Continuation March 19, 1998

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 R877. Motor Vehicle Enforcement.
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R861-1A. Administrative Procedures.

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R861-1A-1. Administrative Procedures Pursuant to Utah Code Ann. Section 59-1-210.

A. Definitions as used in this rule:

1. "Agency" means the Tax Commission of the state of Utah.
2. "Agency head" means the Tax Commission of the state of Utah, or one or more tax commissioners.
3. "Appeal" means appeal from an order of the Commission to an appropriate judicial authority.
4. "Commission" means the Tax Commission of the state of Utah.
5. "Conference" means an informal meeting of a party or parties with division heads, officers, or employees designated by division heads and informal meetings between parties to an adjudicative proceeding and a presiding officer.
6. "Division" means any division of the Tax Commission, including but not restricted to the Auditing Division, Property Tax Division, Motor Vehicle Division, Motor Vehicle Business Administration Division, Data Processing Division, and the Operations Division.
7. "Hearing" means a proceeding, formal or informal, at which the parties may present evidence and arguments to the presiding officer in relation to a particular order or rule.
8. "Officer" means an employee of the Commission in a supervisory or responsible capacity.
9. "Order" means the final disposition by the Commission of any particular controversy or factual matter presented to it for its determination.
10. "Presiding officer" means one or more tax commissioners, administrative law judge, hearing officer, and other persons designated by the agency head to preside at hearings and adjudicative proceedings.
11. "Quorum" means three or more members of the Commission.
12. "Record" means that body of documents, transcripts, recordings, and exhibits from a hearing submitted for review on appeal.
13. "Rule" means an officially adopted Commission rule.
14. "Rulemaking Power" means the Commission's power to adopt rules and to administer the laws relating to the numerous divisions.
15. All definitions contained in the Administrative Procedures Act, Utah Code Ann. Section 63-46b-2 as amended, are hereby adopted and incorporated herein.

R861-1A-2. Rulemaking Power Pursuant to Utah Code Ann. Section 59-1-210 and 63-46a-4.

A. Policy and Scope. In accordance with the responsibility placed upon it by law, the Commission shall enact appropriate rules. These rules shall prescribe practices and procedures for the Commission and other state and county officials and agencies over which the Commission has supervisory power and shall interpret laws the Commission is charged with administering when such interpretation is deemed necessary and in the public interest.

B. Preparation. In the preparation of rules the Commission may refer to appropriate materials and consult such parties as it deems advisable, whether or not such persons are employees of the Commission. Drafts of proposed rules may be submitted to the Office of the Attorney General for examination as to legality and form.

deemed necessary for a full and informed consideration of the issues

R861-1A-29. Agency Review and Reconsideration Pursuant to Utah Code Ann. Section 63-46b-13.

A Agency Review

1 All written decisions and orders shall be submitted by the presiding officer to the commission for agency review before the decision or order is issued. Agency review is automatic, and no petition is required.

B Reconsideration. Within 20 days after the date that an order is issued, any party may file a written request for reconsideration alleging mistake of law or fact, or discovery of new evidence.

1 The commission shall respond to the petition within 20 days after the date that it was received in the appeals unit to notify the petitioner whether the reconsideration is granted or denied.

(a) If no notice is issued within the 20-period, the commission's lack of action on the request shall be deemed to be a denial and a final order.

(b) For purposes of calculating the 30 day limitation period for pursuing judicial review, the date of the commission's order on the reconsideration or the order of denial is the date of the final agency action.

2 If no petition for reconsideration is made, the 30 day limitation period for pursuing judicial review begins to run from the date of the final agency action.

R861-1A-30. Ex Parte Communications Pursuant to Utah Code Ann. Sections 63-46b-5 and 63-46b-8.

A No commissioner or administrative law judge shall make or knowingly cause to be made to any party to an appeal any communication relevant to the merits of a matter under appeal unless notice and an opportunity to be heard are afforded to all parties.

B No party shall make or knowingly cause to be made to any commissioner or administrative law judge an ex parte communication relevant to the merits of a matter under appeal for the purpose of influencing the outcome of the appeal. Discussion of procedural matters are not considered ex parte communication relevant to the merits of the appeal.

C A presiding officer may receive aid from staff assistants if:

1 the assistants do not receive ex parte communications of a type that the presiding officer is prohibited from receiving, and,

2 in an instance where assistants present information which augments the evidence in the record, all parties shall have reasonable notice and opportunity to respond to that information.

D Any commissioner or administrative law judge who receives an ex parte communication relevant to the merits of a matter under appeal shall place the communication into the case file and afford all parties an opportunity to comment on the information.

R861-1A-31. Declaratory Orders Pursuant to Utah Code Ann. Section 63-46b-21.

A A party with standing may petition for a declaratory order to challenge:

1 the commission's interpretation of statutory language as stated in an administrative rule, or

2 the commission's grant of authority under a statute.

B The commission shall not accept a petition for declaratory order on matters pending before the commission in an audit assessment, refund request, collections action or other agency action, or on matters pending before the court on judicial review of a commission decision.

C The commission may refuse to render a declaratory order if the order will not completely resolve the controversy giving rise to the proceeding or if the petitioner has

other remedies through the administrative appeals processes. The commission's decision to accept or reject a petition for declaratory order rests in part on the petitioner's standing to raise the issue and on a determination that the petitioner has not already incurred tax liability under the statutes or rules challenged.

D A declaratory order that invalidates all or part of an administrative rule shall trigger the rulemaking process to amend the rule.

R861-1A-32. Mediation Process Pursuant to Utah Code Section 63-46b-1.

A Except as otherwise precluded by law, a resolution to any matter of dispute may be pursued through mediation.

1 The parties may agree to pursue mediation any time before the formal or informal hearing on the record.

2 The choice of mediator and the apportionment of costs shall be determined by agreement of the parties.

B If mediation produces a settlement agreement, the agreement shall be submitted to the presiding officer pursuant to R861-1A-33.

C If mediation fails to resolve the dispute, the matter will be scheduled for a formal or informal hearing pursuant to R861-1A-23.

R861-1A-33. Settlement Agreements Pursuant to Utah Code Sections 59-1-210 and 59-1-502.5.

A "Settlement agreement" means a stipulation, consent decree, settlement agreement or any other legally binding document or representation that resolves a dispute or issue between the parties.

B Procedure

1 Parties with an interest in a matter pending before a division of the Tax Commission may submit a settlement agreement for review and approval, whether or not a petition for hearing has been filed.

2 Parties to an appeal pending before the commission may submit a settlement agreement to the presiding officer for review and approval.

3 Each settlement agreement shall be in writing and executed by each party and each party's legal representative, if any, and shall contain:

a) the nature of the claim being settled and any claims remaining in dispute,

b) a proposed order for commission approval, and

c) a statement that each party has been notified of, and allowed to participate in settlement negotiations.

4 A settlement agreement terminates the administrative action on the issues settled before all administrative remedies are exhausted, and, therefore, precludes judicial review of the issues. Each settlement agreement shall contain a statement that the agreement is binding and constitutes full resolution of all issues agreed upon in the settlement agreement.

5 The signed agreement shall stay further proceedings on the issues agreed upon in the settlement until the agreement is accepted or rejected by the commission or the commission's designee.

a) If approved, the settlement agreement shall take effect by its own terms.

b) If rejected, action on the claim shall proceed as if no settlement agreement had been reached.

R861-1A-34. Advisory Opinions Pursuant to Utah Code Ann. Section 63-46b-1.

A Advisory opinions are written, informational statements of the commission's interpretation of statutes or administrative rules, or informational statements concerning the application of statutes and rules to specific facts and circumstances.

1 Advisory opinions address questions that have not otherwise been addressed in statutes, rules, tax bulletins,

UTAH ADMINISTRATIVE CODE
Administrative Services
R13. Administration

R13-1. Public Petitions for Declaratory Orders.

R13-1-1. Purpose.

(1) As required by Section 63-46b-21, this rule provides the procedures for submission, review, and disposition of petitions for agency declaratory orders on the applicability of statutes, rules, and orders governing or issued by the agency.

(2) In order of importance, procedures governing declaratory orders are:

- (a) procedures specified in this rule pursuant to Title 63, Chapter 46b;
- (b) the applicable procedures of Title 63, Chapter 46b;
- (c) applicable procedures of other governing state and federal law; and
- (d) the Utah Rules of Civil Procedure.

R13-1-2. Definitions.

Terms used in this rule are defined in Section 63-46b-2, except and in addition:

- (a) "agency" means the pertinent division or office of the Department of Administrative Services;
- (b) "applicability" means a determination if a statute, rule, or order should be applied, and if so, how the law stated should be applied to the facts;
- (c) "declaratory order" means an administrative interpretation or explanation of rights, status, and other legal relations under a statute, rule, or order;
- (d) "director" means the agency head or governing body with jurisdiction over the agency's adjudicative proceedings;
- (e) "order" is defined in Section 63-46a-2; and
- (f) "superior agency" means the Executive Director's Office of the Department of Administrative Services.

R13-1-3. Petition Form and Filing.

(1) The petition, or request for agency action, shall be addressed and delivered to the director, who shall mark the petition with the date of receipt.

(2) The petition shall:

- (a) be clearly designated as a request for an agency declaratory order;
- (b) identify the statute, rule, or order to be reviewed;

- (c) describe in detail the situation or circumstances in which applicability is to be reviewed;
- (d) describe the reason or need for the applicability review, addressing, in particular, why the review should not be considered frivolous;
- (e) include an address and telephone where the petitioner can be contacted during regular work days;
- (f) declare whether the petitioner has participated in a completed or on- going adjudicative proceeding concerning the same issue within the past 12 months; and
- (g) be signed by the petitioner.

R13-1-4. Reviewability.

The agency may not review a petition for declaratory orders that is:

- (a) not within the jurisdiction and competence of the agency;
- (b) trivial, irrelevant, or immaterial; or
- (c) otherwise prohibited by state or federal law.

R13-1-5. Intervention.

A person may file a petition for intervention under Section 63-46b-9 if delivered to the director within 20 days of the director's receipt of the declaratory order petition filed under Section R13-1-3.

R13-1-6. Petition Review and Disposition.

- (1) The director shall promptly review and consider the petition and may:
 - (a) meet with the petitioner;
 - (b) consult with counsel or the Attorney General; and
 - (c) take any action consistent with law that the agency deems necessary to provide the petition adequate review and due consideration.
- (2) The director may issue an order pursuant to Subsection 63-46b- 21 (6).
- (3) If the director orders an adjudicative proceeding under Subsection 63- 46b-21(6):
 - (a) the proceeding shall be formal and governed by the procedures of Title 63, Chapter 46b or other applicable law if a petition for intervention has been filed within the limits of Section R13-1-5; and
 - (b) shall be designated as informal and follow the appropriate procedures of Title 63, Chapter 46b, agency rules, or other applicable law, if a petition for intervention has not been filed within the limits of Section R13-1-5.

R13-1-7. Administrative Review.

A petitioner may seek review or reconsideration of a declaratory order by petitioning the director under the procedures of Sections 63-46b- 12 and 63- 46b-13.

(a) If the presiding officer issuing the declaratory order is the director, the petitioner may seek the review of the superior agency.

(b) The petitioner may appeal a director's review or reconsideration decision to the superior agency.

(c) If the petitioner receives no response from the superior agency within 20 days of filing a petition for review or reconsideration, the appeal shall be considered denied.

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[\[Title R460. Table of Contents\]](#)

(R460. Housing Finance Agency, Administration.)

R460-7. Public Petitions For Declaratory Orders.

R460-7-1 Purpose.

R460-7-2 Definitions.

R460-7-3 Petition Form Content and Filing.

R460-7-4 Reviewability.

R460-7-5 Petition Review and Disposition.

R460-7-6 Administrative Review.

R460-7-7 Extension of Time.

R460-7-1 Purpose.

(1) As required by Section 63-46b-21 , this rule provides the procedures for submission, form, content, filing, review, and disposition of petitions for agency declaratory orders regarding the applicability of statutes, rules, and orders governing or issued by the agency.

(2) The procedures governing agency declaratory orders shall be applied in the following order:

(a) the applicable procedures of Section 63-46b-21 ;

(b) the procedures specified in this R460-7;

(c) the Utah Rules of Civil Procedure;

(d) the applicable procedures of other governing state and federal law.

R460-7-2 Definitions.

Terms used in this rule are defined in Section 63-46b-2 , and in addition:

(1) "Applicability" means a determination if a statute, rule or order should be applied, and if so, how the law stated should be applied to the facts.

(2) "Declaratory order" means an administrative interpretation or explanation of rights, status, and other legal relations under a statute, rule or order.

(3) "Order" is defined in Section 63-46a-2.

R460-7-3 Petition Form Content and Filing.

(1) The petition shall be addressed and delivered to the executive director of the agency, who shall mark the petition with the date of receipt.

(2) The petition shall:

(a) be clearly designated as a request for an agency declaratory order;

(b) identify the specific statute, rule or order which is in question or to be reviewed;

(c) describe the reason or need for the applicability review, addressing, in particular, why the review should not be considered frivolous;

(d) include an address and telephone number where the petitioner can be contacted during regular work days;

(e) declare whether the petitioner has participated in a completed or on-going adjudicative proceeding concerning the same issue within the past 12 months;

(f) be signed by the petitioner.

(3) Any letter that expressly states the intent to request an agency declaratory ruling and substantially complies with the information required in this subsection shall be treated as fulfilling the requirements of this subsection even though a technical deficiency may exist in the letter.

R460-7-4 Reviewability.

(1) The agency shall review and consider the petition and may issue a declaratory order.

(2) The agency shall not review a petition for declaratory order that is:

(a) not within the jurisdiction of the agency;

(b) irrelevant or immaterial;

(c) subject to the restrictions of Section 63-46b-21 (3).

R460-7-5 Petition Review and Disposition.

(1) In promptly reviewing and considering the petition the agency may:

(a) meet with the petitioner;

(b) consult with counsel;

(c) take any action consistent with law that the agency deems necessary to provide the petition adequate review and due consideration.

- (2) After consideration of a petition for a declaratory order, the agency may issue a written order:
- (a) declaring the applicability of the statute, rule or order in question to the specified circumstances;
 - (b) which declines to issue a declaratory order and stating the reasons for its action;
 - (c) agreeing to issue a declaratory order within a specified time.
- (3) A declaratory order shall contain:
- (a) the names of all parties to the proceeding on which it is based;
 - (b) the particular facts on which it is based;
 - (c) the reasons for its conclusion.
- (4) A copy of all orders issued in response to a request for a declaratory order shall be mailed promptly to the petitioner and any other parties.
- (5) If the agency sets the matter for an adjudicative proceeding under Section 63-46b-21 (6)(a)(ii), the proceeding shall be designated as informal, pursuant to R460-6, and shall follow the appropriate procedures of Section 63-46b.

R460-7-6 Administrative Review.

A petitioner may seek review or reconsideration of a declaratory order by petitioning the agency under the procedures of Sections 63-46b-12 and 13 or as otherwise provided by law.

R460-7-7 Extension of Time.

Unless the petitioner and the agency agree in writing to an extension, if the agency has not issued a declaratory order within 60 days after receipt of the request for a declaratory order, the petition is denied.

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[Editor's note: Below are references to the Utah Code that are listed by the agency making this rule as authority for the rule.]

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