

1998

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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

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

Recommended Citation

Brief of Appellee, *Bourgeois v. Utah Department of Commerce*, No. 981518 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1768

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE COURT OF APPEALS, STATE OF UTAH

KEITH W. BOURGEOUS

Plaintiff/Appellant,

Case No. 981518-CA

District Court No. 98-0900810

UTAH DEPARTMENT
OF COMMERCE

Priority No. 15

Defendant/Appellee.

BRIEF OF APPELLEE

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

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO. 981518-CA

JEFFREY C. HUNT (#4988)

Assistant Attorney General

JAN GRAHAM (#1231)

Attorney General

160 East 300 South, 5th Floor

Salt Lake City, Utah 84114-0872

Telephone: (801) 366-0310

Attorneys for Defendant/Appellee

Cass C. Butler

Callister Bebeker & McCullough

Gateway Tower East, Suite 900

10 East South Temple

Salt Lake City, Utah 84133

Attorney for Plaintiff/Appellant

FILED

Utah Court of Appeals

DEC 21 1998

Julia D'Alesandro
Clerk of the Court

IN THE COURT OF APPEALS, STATE OF UTAH

KEITH W. BOURGEOUS	:	
Plaintiff/Appellant,	:	Case No. 981518-CA
v.	:	District Court No. 98-0900810
UTAH DEPARTMENT OF COMMERCE	:	Priority No. 15
Defendant/Appellee.	:	

BRIEF OF APPELLEE

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

JEFFREY C. HUNT (#4988)
Assistant Attorney General
JAN GRAHAM (#1231)
Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114-0872
Telephone: (801) 366-0310
Attorneys for Defendant/Appellee

Cass C. Butler
Callister Bebeker & McCullough
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

	Page
JURISDICTION AND NATURE OF THE PROCEEDINGS	1
ISSUES PRESENTED AND STANDARD OF REVIEW	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
SUMMARY OF THE ARGUMENTS	7
ARGUMENT	8
I. THE UTAH ADMINISTRATIVE PROCEDURES ACT EXPRESSLY PROVIDES FOR AGENCY RECONSIDERATION ONLY WHERE AGENCY REVIEW IS UNAVAILABLE. AGENCY REVIEW REGARDING THE DIVISION’S DECISION WAS NOT ONLY AVAILABLE, BOURGEOUS AVOIDED HIMSELF OF IT.	8
II. THE DOCTRINE OF EQUITABLE ESTOPPEL IS LEGALLY AND FACTUALLY INAPPLICABLE TO THIS CASE	21
III. EVEN IF AGENCY RECONSIDERATION WAS NOT EXPRESSLY PRECLUDED, RESPONDENT’S REQUEST WAS UNTIMELY	24
CONCLUSION	26
ADDENDA	
ADDENDUM 1 DEPARTMENT’S NOTICE OF DENIAL OF BOURGEOUS’ APPLICATION	
ADDENDUM 2 BOURGEOUS’ REQUEST FOR AGENCY REVIEW	
ADDENDUM 3 THE ORDER ON AGENCY REVIEW	

ADDENDUM 4	BOURGEOUS' REQUEST TO REOPEN AGENCY REVIEW
ADDENDUM 5	DEPARTMENT'S ORDER DENYING BOURGEOUS' REQUEST TO REOPEN AGENCY REVIEW
ADDENDUM 6	BOURGEOUS' REQUEST FOR AGENCY RECONSIDERATION
ADDENDUM 7	DEPARTMENT'S ORDER DENYING BOURGEOUS' REQUEST FOR AGENCY RECONSIDERATION
ADDENDUM 8	BOURGEOUS' COMPLAINT TO 3RD DISTRICT COURT
ADDENDUM 9	JUDGE RONALD NEHRING'S ORDER OF DISMISSAL
ADDENDUM 10	1987 LAWS OF UTAH, CHAPTER 161 SECTION 269 (§ 63-46B-13(1))
ADDENDUM 11	1988 LAWS OF UTAH, CHAPTER 72, SECTION 23 (§ 63-46B-13(1)(A))

TABLE OF AUTHORITIES

CASES

	Page
<u>49th Street Galleria v. Tax Commission</u> , 860 P.2d 996 (Utah App. 1993)	18
<u>Alta Industrial Ltd. v. Hurst</u> , 846 P.2d 1282 (Utah 1993)	2
<u>Angelos v. First Interstate Bank of Utah</u> , 671 P.2d 772 (Utah 1983), quoting <u>Leaver v. Grose</u> , 610 P.2d 1262 (Utah 1980)	21
<u>Career Service Review Board v. Department of Corrections</u> , 942 P.2d 933 (Utah 1997)	18
<u>Evans & Sutherland v. Tax Commission</u> , 953 P.2d 435 (Utah 1997)	18
<u>Harper Investments v. Auditing Division</u> , 868 P.2d 813 (Utah 1994)	18
<u>Harrington v. Industrial Commission</u> , 942 P.2d 961 (Utah App. 1997)	18
<u>Holland v. Career Service Review Board</u> , 856 P.2d 678 (Utah App. 1993)	22
<u>Knowledge Data systems v. Tax Commission</u> , 865 P.2d 1387 (Utah App. 1993)	18
<u>Lunnen v. Utah Department of Transportation</u> , 886 P.2d 70 (Utah App. 1994)	18
<u>Maverick Country Stores v. Industrial Commission</u> , 860 P.2d 944 (Utah App. 1993)	16, 17, 25
<u>Nelson v. Board of Equalization of Salt Lake County</u> , 943 P.2d 1354 (Utah 1997) ...	18
<u>Newspaper Agency Corp. v. Auditing Division Of Utah State Tax Comn.</u> , 938 P.2d 266 (Utah 1997)	18
<u>Orton v. Utah State Tax Commission, Collection Division</u> , 864 P.2d 904 (Utah App. 1994)	18
<u>Parkdale Care Center v. Frandsen</u> , 837 P.2d 989 (Utah App. 1992)	18

<u>Ring v. Industrial Commission, Second Fund</u> , 744 P.2d 602 (Utah Ct. App. 1987)	13, 14, 25
<u>Silva v. Department of Employment Security</u> , 786 P.2d 246 (Utah Ct. App. 1990)	11, 12
<u>State v. Larsen</u> , 865 P.2d 1355 (Utah 1993)	2, 3
<u>State v. Mitchell</u> , 824 P.2d 469 (Utah App. 1991)	2
<u>Thompson v. Jackson</u> , 743 P.2d 1230 (Utah Ct. App. 1987)	11
<u>Trujillo v. Jenkins</u> , 840 P.2d 877 (Utah 1992)	2
<u>Utah Association of Counties v. Tax Comn. Of the State of Utah ex rel. MCI Telecommunications Corp.</u> , 895 P.2d 825 (Utah 1995)	18
<u>Visitor Information Center Authority of Grand County v. Customer Service Division, Utah State Tax Comn.</u> , 930 P.2d 1196 (Utah 1997)	18

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 63-46b-0.5 (1997)	9
Utah Code Ann. § 63-46b-12 (1997)	4, 5, 9, 11, 14, 19
Utah Code Ann. §63-46b-13 (1988)	2
Utah Code Ann. § 63-46b-13 (1997)	5, 10, 14, 15, 19, 20, 24
Utah Code Ann. §§ 63-46b-14 (1997)	9, 10, 11
Utah Code Ann. § 78-2a-3 (1996)	1

OTHER AUTHORITIES

1987 Laws of Utah, Chapter 161, Section 269 (§ 63-46b-13(1))	15
--	----

1988 Laws of Utah, Chapter 72, Section 23 (§ 63-46b-13(1)(a))	16
Utah Adm. Code §§ R151-46b-12 (1997)	9, 10
Utah Adm. Code § R151-46b-13 (1997)	5, 6, 10
Utah Adm. Code § R151-46b-14 (1997)	9
Utah Adm. Code § R156-46b-202 (1997)	9
Utah Adm. Code § R861-1A-29 (1997)	19

IN THE COURT OF APPEALS, STATE OF UTAH

KEITH W. BOURGEOUS	:	
Plaintiff/Appellant,	:	Case No. 981518-CA
v.	:	District Court No. 98-0900810
UTAH DEPARTMENT OF COMMERCE	:	Priority No. 15
Defendant/Appellee.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Appellant, Keith W. Bourgeois, appeals from an order of Third Judicial District Court Judge Ronald E. Nehring, dismissing his complaint for judicial review of a informal administrative action for lack of jurisdiction based upon its untimely filing. The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(a) (1996).

ISSUES PRESENTED AND STANDARD OF REVIEW

The Department of Commerce disagrees with Appellant's statement of issues in his brief, and therefore it submits the following statement of issues, followed by the applicable standard of review:

1. Does the Utah Administrative Procedures Act, specifically Utah Code Ann. § 63-46b-13 (1988), preclude Agency Reconsideration in cases in which Agency Review was available? If so, was Agency Review available to the appellant? Standard of Review: The trial court's interpretation of statutes and rules is a question of law reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993). Likewise, legislative intent is a question of law reviewed for correctness. State v. Mitchell, 824 P.2d 469, 471-72 (Utah App. 1991).

2. Is the Department of Commerce estopped from raising the issue of the timeliness of the Appellant's complaint for judicial review based upon a notice of appeal rights contained in an order entered after Appellant's time period to seek judicial review had already expired? Standard of Review: The application of the doctrine of equitable estoppel is a mixed question of law and fact. The examination and interpretation of the common law legal standard is a question of law reviewed for correctness. Trujillo v. Jenkins, 840 P.2d 877, 778-79 (Utah 1992). The issue of whether Appellant relied upon the representation to his detriment is a question of fact and therefore reviewed under a clearly erroneous standard. Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993).

3. Even if Agency Reconsideration was authorized by law, was the Appellant's request, coming more than 20 days after the Department's Order on Review, timely? If not, was the subsequent complaint for judicial review timely? Standard of Review: The trial court's interpretation of statutes and rules is a question of law reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993).

STATEMENT OF THE CASE

On September 2, 1997, Keith W. Bourgeois applied with the Division of Occupational and Professional Licensing of the Department of Commerce for licensure as a Professional Engineer. The application was denied by the Division in an informal administrative action on September 24, 1997 for "failure to document graduation from the required EAC/ABET accredited program in engineering." (Addendum 1). Bourgeois requested Agency Review on October 21, 1997. (Addendum 2). An order on Agency Review was entered October 24, 1997, denying his request for Agency Review based upon his failure to comply with the rules governing Agency Review, and advising him of his right to seek judicial review within 30 days. (Addendum 3). Bourgeois requested the Agency Review be reopened on October 30, 1997. (Addendum 4). On November 4, 1997, the Division denied this request for failure to state a basis upon which the request could be granted and again advised Bourgeois of his right to seek judicial review within 30 days. (Addendum 5). Bourgeois again petitioned the Department, this time on

November 21, 1997, for Agency Reconsideration. (Addendum 6). The Division denied this request on December 29, 1997, holding that Agency Reconsideration is statutorily precluded because Agency Review was available. (Addendum 7). On January 23, 1998, Bourgeois filed a complaint with the Third District Court seeking judicial review of the denial of licensure. (Addendum 8). Judge Ronald E. Nehring dismissed Bourgeois' complaint on July 22, 1998, for lack of jurisdiction because the complaint was filed late. (Addendum 9). Bourgeois filed his notice of appeal to this court.

STATEMENT OF FACTS

On September 2, 1997, Appellant (hereafter "Bourgeois") applied with the Division of Occupational and Professional Licensing (Division) of the Department of Commerce (Department) for licensure as a professional engineer. The application for licensure was denied by the Division on September 24, 1997 for "failure to document graduation from the required EAC/ABET accredited program in engineering." (Addendum 1).

On October 21, 1997, Bourgeois requested Agency Review with the Department pursuant to Utah Code Ann. § 63-46b-12 (1997) . (Addendum 2). On October 24, 1997, the Department issued its Order on Review denying Bourgeois' request for relief from the Division's denial of licensure for failing to comply with the rules governing Agency

Review. (Addendum 3). Contrary to Bourgeois' assertions to the trial court and now to this Court, the Order on Review complied with the requirements of Utah Code Ann. §63-46b-12(6)(c) (1997). The Order clearly dismissed Bourgeois' Request for Agency Review, and it informed Bourgeois of his right to seek judicial review and the time frame from which appeal must be taken. (The *complete* "Order on Review" is attached as Addendum 3).

Although the Order on Review advised Bourgeois he could seek judicial review of the order within 30 days, he elected to file a unique request with the Department on October 30, 1997 to reopen Agency Review for consideration of information he failed to provide in the original request. (Addendum 4). The Department issued another order on November 4, 1997, denying Bourgeois' request to reopen Agency Review on the grounds he failed to state a basis upon which the request could be granted. This Order again informed Bourgeois of his right to seek judicial review within 30 days. (Addendum 5).

Ignoring the two previous notices that he may seek judicial review, Bourgeois next petitioned the Department on November 21, 1997, for Agency Reconsideration, ostensibly pursuant to Utah Code Ann. § 63-46b-13 (1997) and Utah Admin. Code § R151-46b-13 (1997). (Addendum 6). The Department dismissed the request for Agency Reconsideration on December 29, 1997 for lack of jurisdiction, noting that Utah Code Ann. § 63-46b-13 (1997) and Utah Admin. Code § R151-46b-13 (1997) expressly preclude Agency Reconsideration where Agency Review is available. (Addendum 7).

The Department found that Agency Review was available, that Bourgeois availed himself of Agency Review concerning the license denial (as evidenced by his October 21, 1997 request for Agency Review and the Department's October 24, 1997 Order on Review), and therefore Agency Reconsideration was expressly precluded. (Id.)

On January 23, 1998, Bourgeois filed an action in the Third Judicial District Court for judicial review challenging the merits of the Division's September 24, 1997 decision to deny his license application. (Addendum 8). Bourgeois' complaint did not challenge the Department's December 29, 1997 denial of his Motion for Reconsideration, nor the Department's November 4, 1997 refusal to reopen agency review. (Id.). On July 22, 1998, Judge Ronald E. Nehring dismissed Bourgeois' complaint, ruling:

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 Complaint requesting judicial review was filed on January 23, 1998, more than 30 days beyond the Department's [October 24, 1997] Order on Review. Accordingly, the Complaint was filed untimely and the Court is without jurisdiction to consider the matter.

(Addendum 9).

Bourgeois filed his notice of appeal to this Court on August 19, 1998.

SUMMARY OF THE ARGUMENTS

1. Agency reconsideration is expressly precluded where agency review is available. The legislative history of the Utah Administrative Procedures Act makes it clear that if agency review of the Department's order was available in the first instance, agency reconsideration is precluded. The interpretation of "unavailable" urged by Bourgeois, i.e., that "unavailable" includes "exhausted," is specious logic without support in case law and inconsistent with legislative history. The order on review was not defective or inadequate in any manner. It clearly notified Bourgeois of his right to judicially appeal within 30 days, yet he chose to file two more attempts at administrative review, neither of which were authorized by statute or rule. He thereafter filed a complaint for judicial review which was properly dismissed by the District Court for lack of jurisdiction because it was filed more than 30 days after the entry of the order on review, the final agency action.

2. Equitable estoppel is legally and factually inapplicable. Bourgeois could not have possibly relied to his detriment on the appeal notice contained in the December 29, 1997 order dismissing his unauthorized request for reconsideration, because it was issued more than a month after his right to judicial review *expired*. Bourgeois was advised in the Department's October 24, 1997 order on review of his right to judicial review within 30 days and he chose to disregard the notice, instead filing a request to reopen review, not provided for in law, and a request for reconsideration, expressly precluded under these

circumstances by the Utah Administrative Procedures Act. The Department fulfilled its obligation to notify Bourgeois of his right to judicial appeal in its order on review, and it had no obligation to respond to his request for reconsideration.

3. Assuming, arguendo, Bourgeois had a right to reconsideration, his request for reconsideration was untimely, making his request for judicial review untimely. In circumstances in which reconsideration is appropriate, the request must be made within 20 days of entry of the final agency action. Although Bourgeois' request was made within 20 days of the order responding to his novel request to reopen review, that request was without basis in statute or rule and the resulting order dismissed the request for failure to state a basis for the request. He cannot toll the time period for filing the request for reconsideration by filing an intervening, improper request. Bourgeois' request for reconsideration was filed November 21, 1997, more than 20 days after the Department's October 24, 1997 order on review.

ARGUMENT

POINT I: THE UTAH ADMINISTRATIVE PROCEDURES ACT EXPRESSLY PROVIDES FOR AGENCY RECONSIDERATION ONLY WHERE AGENCY REVIEW IS UNAVAILABLE. AGENCY REVIEW REGARDING THE DIVISION'S DECISION WAS NOT ONLY AVAILABLE, BOURGEOUS AVOIDED HIMSELF OF IT.

The denial of an application for licensure by the Division of Occupational and

Professional Licensing is classified as an “informal adjudicative proceeding”¹ under the Utah Administrative Procedures Act². “Agency Review,” as defined in Utah Code Ann. § 63-46b-12, is available through the Department of Commerce to any aggrieved party seeking relief from an informal adjudicative action, such as licensure denial, by simply filing a request for Agency Review within 30 days after the issuance of the order to be challenged.³ The Department is required by both statute and rule to issue a written “Order on Review” responding to the issues and claims for relief raised in the request for Agency Review.⁴ The Order on Review constitutes final agency action⁵ for purposes of the requirement to exhaust administrative remedies found in the Utah Administrative Procedures Act.⁶ A party may seek de novo judicial review of a final agency action in the District Court after exhausting all available administrative remedies.⁷ The “party shall file a petition for judicial review of final agency action *within 30 days after the date*

¹ Utah Admin. Code § R156-46b-202(1)(e) (1997).

² Utah Code Ann. § 63-46b-0.5 (1997) et seq.

³ Utah Admin. Code § R151-46b-12 (1997).

⁴ Utah Code Ann. § 63-46b-12(6) (1997) and Utah Admin. Code § R151-46b-12(9) (1997).

⁵ Utah Admin. Code § R151-46b-14(2) (1997).

⁶ Utah Code Ann. § 63-46b-14(1) (1997).

⁷ Utah Code Ann. § 63-46b-14 (1997).

that the order constituting final agency action is issued. . . .” (Emphasis added).⁸

By the express terms of its definition, “Agency Reconsideration” is not available to challenge an order resulting from Agency Review. An aggrieved party may request Agency Reconsideration “[w]ithin 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 [Agency Review] *is unavailable. . . .*” (Emphasis added).⁹ In other words, Agency Reconsideration is not available where Agency Review is.

Moreover, the only example of Agency Reconsideration found in the Department’s administrative rules is in cases where the aggrieved party is challenging an order or decision entered by the Real Estate Appraiser Registration and Certification Board.¹⁰ Because Agency Review is not available as to any order or decision entered by that Board,¹¹ Agency Reconsideration is the form of administrative appeal. With the exception of the decisions of that one board, Agency Review is the exclusive administrative remedy available to challenge licensure denials before any other professional licensing Board of the Department of Commerce.¹² As such, with the

⁸ Utah Code Ann. § 63-46b-14(3)(a) (1997).

⁹ Utah Code Ann. § 63-46b-13(1)(a) (1997).

¹⁰ Utah Admin. Code § R151-46b-13(1)(a) (1997).

¹¹ Utah Admin. Code § R151-46b-12(2) (1997).

¹² Utah Admin. Code §§ R151-46b-12 (1997) and R151-46b-13(1)(a) (1997).

exception noted above, Agency Review will always constitute the final agency action from which a petition for judicial review must follow within 30 days of issuance of an Order on Review in order to preserve the appeal.

“The fundamental and initial inquiry of a court is always to determine its own jurisdictional authority over the subject matter of the claims asserted. Upon a determination by the court that its jurisdiction is lacking, its authority extends no further than to dismiss the action.” Thompson v. Jackson, 743 P.2d 1230, 1232 (Utah Ct. App. 1987). Without the proper filing of a petition for judicial review within 30 days of an agency’s *final agency action* under the Utah Administrative Procedures Act (Utah Code Ann. §§ 63-46b-14(3)(a) (1997) and 63-46b-15 (1997)), the court is without jurisdiction to consider the appeal. (Emphasis added). Silva v. Dept. of Employment Security, 786 P.2d 246, 247 (Utah Ct. App. 1990).

Bourgeois was clearly instructed in the October 24, 1997 Order on Review that an appeal of the decision must be directed to the District Court for judicial review.¹³ He disregarded that instruction and instead elected to file two successive requests for

¹³ Bourgeois claims that the Order on Review was defective in that it failed to comply with the requirements of Utah Code Ann. § 63-46b-12(6)(c) (1997). Specifically, he claims that the order does not contain conclusions of law, notice of further administrative or judicial review rights, notice of applicable time limits for appeal, and a statement as to whether the underlying decision was affirmed or reversed. In support of his assertion, he provided this Court with the first and third pages of a four page order. Pages 2 and 4 are omitted. See Appellants "Exhibit D." The complete four page order sent to Bourgeois by the division contains conclusions of law, notice of further administrative or judicial review rights, notice of applicable time limits for appeal, and a statement dismissing the request for agency review. (See Addendum 3).

administrative relief, neither of which was authorized in statute or rule. The Order on Review issued October 24, 1997 was the Department's final agency action from which Bourgeois could judicially challenge the merits of the license denial. The complaint for judicial review sought judicial review and relief from the denial of Bourgeois' application for licensure as a professional engineer. However, his appeal rights extinguished on November 23, 1997, 30 days after the final agency action (the October 24, 1997 order based upon Agency Review).¹⁴ Given Bourgeois' untimely filing of his petition for judicial review, the District Court properly ruled that it was without jurisdiction to consider the matter. Silva v. Dept. of Employment Security, 786 P.2d 246, 247 (Utah App. 1990).

Neither the Utah Administrative Procedures Act nor the Utah Administrative Code permit Bourgeois to file more than one request for Agency Review or to petition for Agency Reconsideration after receiving Agency Review. His request to reopen Agency Review and subsequent petition for Agency Reconsideration cannot be used to create a string of agency orders from which appeals are taken so as to preserve or resurrect an otherwise extinguished right to judicial review in the District Court. Endorsing such a

¹⁴ In dismissing Bourgeois' complaint, the District Court ruled that the November 4, 1997 order, which Judge Nehring called the "order on review," was the Final Agency Action, from which Bourgeois had 30 days to judicially appeal. The Division's position is that the October 24, 1997 order on review was the Final Agency Action from which to appeal. However, from whichever order is deemed the "Final Agency Action," Bourgeois' judicial complaint filed January 23, 1998 was untimely.

procedure would allow litigants to receive administrative review after review, each challenging the outcome of the preceding review. This process could theoretically perpetuate itself indefinitely, thus eliminating any finality to the administrative action.

In a similar administrative case arising from the Industrial Commission, the Utah Court of Appeals concluded that a claimant's successive requests for administrative review which were not permitted by statute would not toll the statutorily prescribed time for appeal. Ring v. Industrial Commission, Second Fund, 744 P.2d 602 (Utah Ct. App. 1987).¹⁵ In Ring the claimant exercised his right to request administrative review challenging the decision of a Commission administrative law judge. Following issuance of the order denying review, the claimant filed a "Motion for Review Supplement," not permitted by statute, which was also denied. He then filed a petition for judicial review within 30 days of the order denying an unauthorized motion but beyond 30 days of the order denying the authorized motion for Agency Review. The Court concluded that the order denying Agency Review (and not the order resulting from the subsequent novel, unauthorized motion) was the operative order from which to appeal judicially within 30 days. It did not matter whether the unauthorized motion was seen as merely an attempt to

¹⁵ The reasoning in Ring v. Industrial Commission, Second Fund is presented as persuasive argument and not as binding precedent. Appellee recognizes that the Utah Administrative Procedures Act was enacted in 1987, one year after the administrative ruling at issue in the Ring decision. Nonetheless, the reasoning of the court is directly on point, and consistent with the provisions of the Utah Administrative Procedures Act.

supplement the authorized review:

[I]n filing a motion for review a claimant has an obligation to raise all issues that can be presented at that time. Those issues which are not raised are waived. Accordingly, the filing of material which purports to “supplement” a motion does not act to revive the motion after it has been denied by the adjudicating tribunal. (Citations omitted).¹⁶

The court dismissed the petition for judicial review concluding that “[f]urther consideration or action by the Commission which is not permitted by statute will not toll the statutorily prescribed time for appeal.”¹⁷ The court further reasoned:

Present statutory provisions regarding worker’s compensation jurisdiction do not allow for subsequent motions to the Commission for review once it has disposed of the case on the merits.

. . . .

Accordingly, the filing of material which purports to “supplement” a motion does not act to revive that motion after it has been denied by the adjudicating tribunal.

. . . .

Petitioner is entitled to “one bite of the apple” on review. . . . That opportunity cannot be expanded into a multi-course buffet by such devices as re-considerations or supplemental filings after a motion for review has been denied by the Commission. (citations omitted).¹⁸

Bourgeois urges this Court to adopt a different interpretation of Utah Code Ann. §63-46b-13 (1997). He asserts that the headings prefacing Utah Code Ann. § 63-46b-12 (1997) and Utah Code Ann. § 63-46b-13 (1997) supercede the clear language of § 63-

¹⁶ 744 P.2d 602 at 603.

¹⁷ Id.

¹⁸ Id. at 603-604.

46b-13 (1997) limiting agency reconsideration to cases where agency review is unavailable. He urges that Agency Review is “unavailable” for purposes of Utah Code Ann. § 63-46b-13 (1997), if it has been used and exhausted. Bourgeois’ argument is specious. The requirement of unavailability relates to Agency Review, and the subject matter reviewed during Agency Review is the Division’s order denying licensure. The requirement of unavailability of Agency Review therefore relates to the review of the merits of the Division’s order denying Bourgeois licensure.

Legislative history dispels any doubt concerning this point. In 1987 the Administrative Procedures Act was enacted and § 63-46b-13 of the original act explicitly authorized agency reconsideration, even in cases in which agency review was previously sought and received. The Administrative Procedures Act, as originally enacted, provided:

Within ten days after the date that an order on review is issued, or within ten days after the date that a final order is issued for which agency review is unavailable, any party may file a request for reconsideration, stating the specific grounds upon which relief is requested. . . . (Emphasis added).

1987 Laws of Utah, Chapter 161, Section 269 (§ 63-46b-13(1)). (Addendum 10). The Legislature amended the section in 1988 to read as it is currently found in the Administrative Procedures Act, limiting reconsideration to instances where agency review is unavailable.¹⁹ (Addendum 11) The fact that the legislature originally chose to

¹⁹ "Within 20 days after the date that an order is issued for which review by the agency or superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a request for reconsideration with the agency,

expressly provide for Agency Reconsideration after *either* Agency Review or “after the date that a final order is issued for which agency review is unavailable” clearly demonstrates legislative intent that the “unavailable” agency review means unavailable in the first instance. If “unavailable” agency review included instances where agency review had been utilized and exhausted, as Bourgeois urges, the first clause would be redundant of the second. When the legislature chose to amend the section in 1988 to eliminate agency reconsideration “[w]ithin ten days after the date that an order on review is issued,” they clearly evidenced a desire to make agency reconsideration available only when agency review was unavailable in the first instance. Any other interpretation of the language of the statute would render the legislature’s 1988 amendment meaningless. Because Agency Review of the Division’s order denying Bourgeois licensure was available, Bourgeois’ request for reconsideration was appropriately dismissed by the Department for lack of jurisdiction and it cannot now be used to extend the previously expired deadline for seeking judicial review.

Bourgeois’ reliance on dicta in a footnote in Maverick Country Stores v. Industrial Commission, 860 P.2d 944 (Utah App. 1993) is misplaced. This Court was not called upon, and therefore did not consider, the issue of whether the Agency Reconsideration was appropriate in its holding or in dicta. The issue addressed in footnote 11 in

stating the specific grounds upon which relief is requested.” 1988 Laws of Utah, Chapter 72, Section 23 (§ 63-46b-13(1)(a)). (See Addendum 11).

Maverick Country Stores²⁰ was whether a party, *otherwise entitled to reconsideration*, could simultaneously file a motion for Agency Reconsideration and appeal to the courts.²¹ This issue is different from a consideration of whether Agency Reconsideration is authorized at all. Much more to the point is footnote 9 in Maverick Country Stores not cited by Bourgeois:

As our supreme court has noted in a different setting, if we allow a second motion for reconsideration or “re-reconsideration” what is to prevent another motion for re-re-reconsideration? Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically [this could go on] *ad infinitum*.

Maverick Country Stores, 860 P.2d 944 at 951, n. 9 (Citations omitted). The duplication of administrative reviews that concerned this Court in Maverick Country Stores was also the concern of the legislature when it amended the Utah Administrative Procedures Act to eliminate Agency Reconsideration when Agency Review is available.

Bourgeois cites, but does not discuss, a plethora of Utah appellate court cases for the proposition that, “Utah Courts have repeatedly reviewed, under a de novo standard, petitions from agency denials of requests for reconsideration of an earlier final agency

²⁰ 860 P.2d at 951.

²¹ This Court stated, “[§63-46b-13] provides a petitioner with the option of applying to the agency for reconsideration or appealing to the courts. It does not provide petitioner the opportunity to pursue both routes concurrently. . . .”

action or ‘Agency Review’”.²² None of the cases cited by Bourgeois are on point. Although each of the cases is an appeal originating from an administrative order on agency reconsideration, *none of those cases address, directly or in dicta, the issue of whether § 63-46b-13 permits reconsideration where agency review of the merits of the order is available.* The cases discuss procedural issues, especially issues relating to the date upon which the judicial review filing deadline begins to run from a legitimate request for reconsideration. They do not, however, support Bourgeois’ contention that he was entitled to agency reconsideration in this case or that his petition for judicial review is timely.

In only one case cited by Bourgeois did the appellant received both review and reconsideration: 49TH Street Galleria v. Tax Commission.²³ However, that case is distinguishable from the case at bar because the Tax Commission has chosen to establish,

²² Evans & Sutherland v. Tax Commission, 953 P.2d 435 (Utah 1997); 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); Career Service Review Board v. Department of Corrections, 942 P.2d 933 (Utah 1997); Utah Association of Counties v. Tax Com’n. Of the State of Utah ex rel. MCI Telecommunications Corp., 895 P.2d 825 (Utah 1995); Harper Investments v. Auditing Division, 868 P.2d 813 (Utah 1994); Harrington v. Industrial Commission, 942 P.2d 961 (Utah App. 1997); Lunnen v. Utah Department of Transportation, 886 P.2d 70 (Utah App. 1994); Orton v. Utah State Tax Commission, Collection Division, 864 P.2d 904 (Utah App. 1994); Knowledge Data systems v. Tax Commission, 865 P.2d 1387 (Utah App. 1993); 49th Street Galleria v. Tax Commission, 860 P.2d 996 (Utah App. 1993); Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992).

²³ 860 P.2d 996 (Utah App. 1993).

through its rule making authority, a procedure by which every order prepared by a presiding officer is automatically reviewed by the Agency *before* a Final Agency order is entered.²⁴ This automatic review is not the same as the Agency Review contemplated by Utah Code Ann. § 63-46b-12 (1997). The automatic review by the Tax Commission is a review by the Commission of the findings, conclusions, and order prepared by the presiding officer, a designated employee who serves as a hearing officer. Conversely, the Agency Review contemplated in § 63-46b-12 (1997) is a *post-order* review by a superior agency of an order issued by an inferior agency.²⁵ The review done by the tax commission is further distinguishable because it is automatic without request; it is not an elective by either party. Conversely, the review contemplated in § 63-46b-12 (1997) is not automatic, it requires that a request be made within 30 days of entry of the order. The only elective administrative appeal in Tax Commission decisions is Agency

²⁴ Utah Admin. Code § 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 alleging new evidence.

....

²⁵ Agency Review pursuant to Utah Code Ann. §63-46b-12 is distinguishable from Agency Reconsideration pursuant to Utah Code Ann. §63-46b-13 because Agency Review is a review of an order of an inferior agency by a superior agency, while Agency Reconsideration is a reconsideration of an order by the same agency issuing the order.

Reconsideration pursuant to Utah Code Ann. § 63-46b-13 (1997).²⁶ Because the Tax Commission has chosen to establish a unique procedure through its rule making authority, with both automatic review *before orders are entered* and elective Agency Reconsideration within 20 days *after an order is entered*, the existence of both *prior* review of orders by the Tax Commission and Agency Reconsideration in 49th Street Galleria does not support Bourgeois' position that he is entitled to both *post-order* Agency Review as contemplated by §63-46b-12 and Agency Reconsideration as contemplated by §63-46b-13.

Bourgeois further argues in the alternative that the Department's action of issuing its December 29, 1997 order in response to his request for reconsideration validated the request, thus extending the filing deadline for judicial review. He cites 49th Street Galleria in support of this position. However, 49th Street Galleria holds that the 30-day period for seeking judicial review begins to run on the date the request for reconsideration is deemed denied unless an order is issued, in which case the date of the order is the operative date. The holding was limited to the "deemed denied" provisions of § 63-46b-13(3)(b) (1997), which states that a request for reconsideration is deemed denied if not responded to by the agency within 20 days of filing. Because the Tax Commission provided by rule for automatic Commission review of orders of the presiding officer before entry of the order, followed by a right to elective Agency Reconsideration, there

²⁶ Supra, note 24.

was no issue as to the propriety of the Agency Reconsideration in 49th Street Galleria. Nowhere in 49th Street Galleria is it held or suggested that an agency's response *to a statutorily precluded request for reconsideration* validates it and revives an otherwise expired opportunity for judicial review. Moreover, the Department did not address the merits of Bourgeois' request for reconsideration. The request was summarily denied because reconsideration was statutorily precluded and the Department thus lacked jurisdiction to consider the matter. The Department cannot create jurisdiction for a reconsideration request by issuing an order holding it lacks jurisdiction to consider the request.

Lastly, § 63-46b-13 (1997) prohibits reconsideration where agency review is available and does not give the Department authority or discretion to operate in contravention of that requirement. The Department's action in responding to Bourgeois' request cannot independently endow jurisdiction where it is statutorily precluded.

POINT II: THE DOCTRINE OF EQUITABLE ESTOPPEL IS LEGALLY AND FACTUALLY INAPPLICABLE TO THIS CASE.

"The doctrine of estoppel has application when one, by his acts, representations, or conduct, or by his silence when he ought to speak, induces another to believe certain facts exist and such other *relies thereon to his detriment*." Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 777 (Utah 1983) (emphasis added), quoting Leaver v. Grose, 610

P.2d 1262, 1264 (Utah 1980). It is not enough to simply rely upon the acts, representations, conduct, or silence of another, but the reliance must result in detriment. Holland v. Career Service Review Board, 856 P.2d 678 (Utah App. 1993).

The “Notice of Right to Appeal” language included in the Department’s December 29, 1997 order states that the order can be challenged by judicial review. From this language, Bourgeois argues the Department is estopped from challenging the current petition for judicial review as lacking jurisdiction. His analysis and argument, however, neglect to consider three dispositive factors.

First, Bourgeois could not have relied to his detriment upon the order’s Notice of Right to Appeal language. The Department’s October 24, 1997 Order on Review dismissing his original request for agency review was the final agency action with respect to his license denial. Bourgeois lost his opportunity to judicially challenge the order by failing to file a petition for judicial review on or before November 23, 1997, the 30th day following the issuance of the order.²⁶ He cannot claim he forewent seeking judicial review in reliance on an order that was not issued until December 29, 1997, more than

²⁶ In its “Order of Dismissal,” the District Court incorrectly identified the date of the Department’s Order on Agency Review as November 4, 1997. The Order on Agency Review was actually dated October 24, 1997. The November 4, 1997 order was based upon Bourgeois’ request to reopen Agency Review, an action not permitted by statute or rule. The thirty day deadline to file for judicial review from October 24, 1997, was November 23, 1997. Despite the apparent mistake on dates, it is clear that the District Court found that the Order on Agency Review was the final agency action, triggering Bourgeois’ 30 day period to seek judicial review. Bourgeois’ complaint for judicial review was well beyond either date.

one month beyond the date his right to judicial review *expired*. Bourgeois did not rely to his detriment.

Second, Bourgeois was fully advised in the Department's October 24, 1997 Order on Review that any challenge to the order must be made to the district court within 30 days.²⁷ He elected to disregard the order's appeal instructions by filing a request to reopen agency review on October 30, 1997 and a request for agency reconsideration on November 21, 1997. Neither request was permitted by statute or rule, and therefore neither request operated to extend the time to file for judicial review.

Finally, the right to appeal language Bourgeois asserts he relied upon in the Department's December 29, 1997 order states that "[j]udicial 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." (Emphasis added). (See Bourgeois' Complaint, Addendum "8"). The Department's December 29th order did not address the merits of the license denial, it dismissed Bourgeois' request for reconsideration solely on the basis that reconsideration was not permitted by law in his case and the Department lacked jurisdiction to consider the matter. The complaint requesting judicial review singularly challenged the merits of the license denial and did not challenge the Department's finding that it lacked jurisdiction to consider Bourgeois' request for reconsideration.

²⁷ The Department's Order on Agency Review was not defective or deficient in any manner. See note 13.

Without citing authority, Bourgeois argues that the Department somehow had a duty to notify him that Agency Reconsideration was improper in time for him to file a timely judicial review. The Department fulfilled its duty to advise Bourgeois of his appellate rights in the preceding two orders, which contained notices of his right to appeal judicially within 30 days. Bourgeois chose to ignore those notices.

**POINT III: EVEN IF AGENCY RECONSIDERATION WAS NOT EXPRESSLY
PRECLUDED, RESPONDENT'S REQUEST WAS UNTIMELY.**

Utah Code Ann. §63-46b-13 requires that a request for Agency Reconsideration be made 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. . . .” The November 21, 1997, request for reconsideration was only within 20 days of the November 4, 1997 order responding to his novel request to reopen agency review, a request which was not permitted by statute or rule. Assuming for purposes of argument Bourgeois’ request for reconsideration filed on November 21, 1997 was statutorily permitted in this case, it was filed more than 20 days beyond the Department’s October 24, 1997 order dismissing Agency Review, which constituted final agency action.

It should be noted, however, that although the District Court found that the “order on agency review” was the final agency action, Judge Nehring identified the date of that order as November 4, 1997. This appears to be a mistake, because it is clearly contrary to

the uncontested evidence that the order on agency review was entered October 24, 1997.

The November 4, 1997 order was based upon Bourgeois' request to *reopen* Agency Review, a request with no basis in law.

Whether or not Bourgeois' November 21 request for Agency Reconsideration was made within 20 days depends upon whether the November 4 or the October 24 order is considered the final agency action. Judge Nehring correctly identified the "order on agency review" as the final agency action, but he incorrectly identified the date of that order as November 4, 1997. Under the reasoning of this court in Maverick Country Stores,²⁸ as previously quoted in this brief, the trial court should not give validity to the November 4 order based upon Bourgeois' request to reopen Agency Review (for "rereview") because there was no basis in law for his request. Bourgeois should not be allowed to enlarge the jurisdictional time period for seeking judicial review of the license denial by filing a string of untimely and/or unauthorized requests for administrative review. Ring v. Industrial Commission, Second Fund, 744 P.2d 602 (Utah Ct. App. 1993).²⁹

²⁸ 860 P.2d 944 at 951, fn 9.

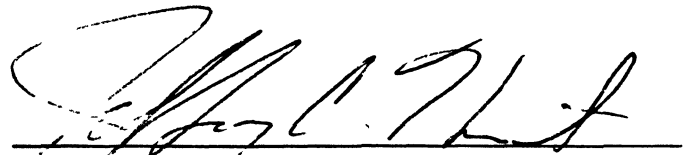
²⁹ Supra, note 14.

CONCLUSION

For the reasons stated above, the Department asks that the Court affirm the District Court's dismissal of Bourgeois' complaint for judicial review.

RESPECTFULLY SUBMITTED this 21 day of December, 1998.

JAN GRAHAM
Attorney General

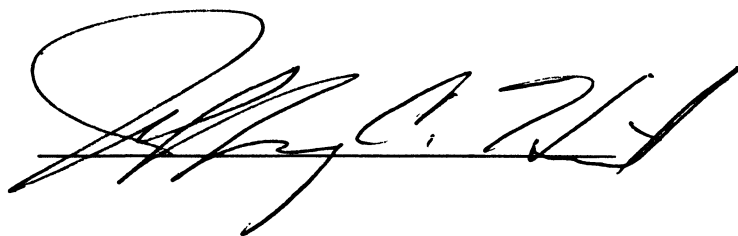
A handwritten signature in black ink, appearing to read "Jeffrey C. Hunt", written over a horizontal line.

JEFFREY C. HUNT
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of December, 1998, I mailed two copies of the attached Appellee's brief, by first class mail, postage prepaid, to the following address:

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

A handwritten signature in black ink, appearing to read "Cass C. Butler", written over a horizontal line.

ADDENDUM 1

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
180 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



ADDENDUM 2

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

ADDENDUM 3

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

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

:
:
:
:
:

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

Division of his application for licensure as an Engineer. Petitioner did not furnish a copy of the denial letter appealed from, although he was instructed by letter and a copy of the rules that perfection of a Request for Agency Review requires the furnishing of the order allegedly wrongly entered.

2. It is impossible from the request for agency review to determine whether the appeal was timely filed or the reasons for the Division's determination to deny licensure to Petitioner.

CONCLUSIONS OF LAW

1. The Division's denial letter to Petitioner would have included a copy of the *Department of Commerce Administrative Procedures Act Rules*, along with instructions as to the minimal requirements which must be met in order to obtain agency review. Among other things the rules provide, in UTAH ADMIN. R151-46b-12:

(3) Content of a Request for Agency Review and Submission of the Record.

(a) The content of a request for agency review shall be in accordance with Subsection 63-46b-12(1)(b). **The request for agency review shall include a copy of the order which is the subject of the request.**

(b) A party requesting agency review shall set forth any factual or legal basis in support of that request, including adequate supporting arguments and citation to appropriate legal authority and to the relevant portions of the record developed during the adjudicative proceeding.

(c) If a party challenges a finding of fact in the order subject to review, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence. A party challenging a legal conclusion must support their argument with citation to any relevant authority and also cite to those portions of the record which are relevant to that issue. . . .

(f) **Failure to comply with this rule may result in dismissal of the request for agency review.** (Emphasis added).

2. Petitioner failed to comply with the requirement that he furnish the Executive Director with a copy of the order which is being challenged. Without being supplied such basic information as the decision and reason that the Division determined that Petitioner was not

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

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.

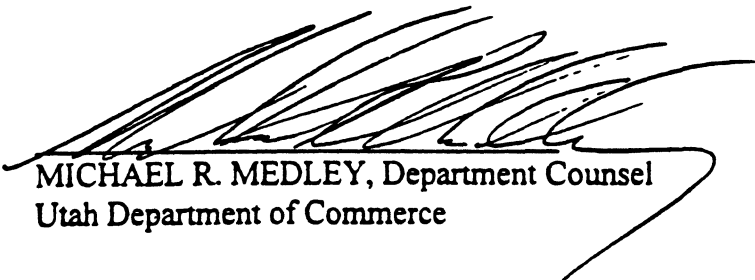
CERTIFICATE OF MAILING

I certify that on the 27th day of October, 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

and caused a copy to be hand-delivered to:

Craig Jackson, Director
Division of Occupational and Professional Licensing
160 East 300 South
Salt Lake City, Utah 84145



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

ADDENDUM 4

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

ADDENDUM 5

October 24th.

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE AGENCY
REVIEW OF
KEITH WYATT BOURGEOUS

:
:
:
:
:

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

ADDENDUM 6

CALLISTER NEBEKER
& McCULLOUGH

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

GATEWAY TOWER EAST SUITE 900

10 EAST SOUTH TEMPLE

SALT LAKE CITY, UTAH 84133

TELEPHONE 801-530-7300

FAX 801-364-9127

LOUIS H. CALLISTER
GARY R. HOWE
L. S. MCCULLOUGH, JR.
FRED W. FINLINSON
DOROTHY C. PLESHE
JOHN A. BECKSTEADT
JAMES R. HOLBROOK
W. WALDAN LLOYD
H. RUSSELL HETTINGER
JEFFREY L. SHIELDS
STEVEN E. TYLER
CRAIG F. MCCULLOUGH
RANDALL D. BENSON
GEORGE E. HARRIS, JR.
T. RICHARD DAVIS

DAMON E. COOMBS
BRIAN W. BURNETT
CASS C. BUTLER
LYNDA COOK
JOHN H. REES
MARK L. CALLISTER
P. BRYAN FISHBURN
JAN M. BERGESON
LAURIE S. HART
JOHN B. LINDSAY
HOWARD B. GEE
DOUGLAS K. CUMMINGS
ZACHARY T. SHIELDS
GREGORI PESCI

OF COUNSEL
RICHARD H. NEBEKER
EARL P. STATEN
JEFFREY N. CLAYTON
LUCY KNIGHT ANDRE

LOUIS H. CALLISTER, SR.
(1904-1983)
FRED L. FINLINSON
(1906-1995)

TO CALL WRITER DIRECT

November 21, 1997

¹ ALSO MEMBER ARIZONA BAR
² ALSO MEMBER MISSOURI BAR
³ ALSO MEMBER CALIFORNIA BAR
⁴ ALSO MEMBER OHIO BAR

(801) 530-7422
cassbutler@cnmlaw.com

Douglas C. Borba, Executive Director
Utah Department of Commerce
Heber M. Wells Building
160 East 300 South, Box 146701
Salt Lake City, Utah 84114-6701

VIA HAND DELIVERY

Re: Keith W. Bourgeois

Dear Director Borba:

Enclosed are the following documents:

1. Request for Agency Reconsideration of an Order issued November 4, 1997.
2. Memorandum of Points & Authorities in support of Request for Agency Reconsideration;
3. Request for Record;
4. Order dated November 4, 1997, received by Petitioner Keith W. Bourgeois, constituting the Order from which this Request for Agency Reconsideration is being submitted; and
5. Request for Oral Argument.

Thank you for your attention to this matter.

Sincerely,



CASS BUTLER

CCB:jbm
cc: Keith W. Bourgeois
203831-1

ADDENDUM 7

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

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

:
:
:
:

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.

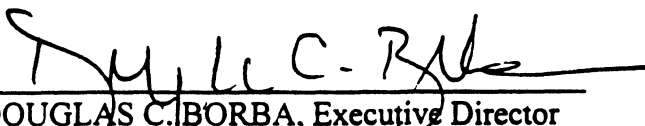
8. A final order was previously entered by the Executive Director on the issues raised by Petitioner herein and this matter no longer resides within the jurisdiction of the Department. "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Varian-Eimac, 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. BOURGEOIS

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

ADDENDUM 8

CASS C. BUTLER (4202)
CALLISTER NEBEKER & McCULLOUGH
Gateway Tower East
10 East South Temple, Suite 800
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

Attorneys for Keith W. Bourgeois

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

KEITH W. BOURGEOUS,)	COMPLAINT
)	
Plaintiff,)	
vs.)	
)	Civil No. 98-0900810
UTAH DEPARTMENT OF COMMERCE,)	
)	Judge Pat B. Brian
Defendant.)	
)	

* * * * *

Plaintiff Keith W. Bourgeois, by way of Complaint, alleges and complains of Defendant the Utah Department of Commerce, for cause of action, as follows:

NATURE OF THE CASE

1. This is an action seeking judicial review of an informal adjudicative proceeding pursuant to U.C.A. 53-46b-15(1)(a). Plaintiff Bourgeois seeks review of Defendant's Final Agency Decision dated December 29, 1997, denying him a license as a Professional Engineer in the State of Utah.

THE PARTIES

2. Plaintiff Keith W. Bourgeois is a resident of the State of Utah with his mailing and primary place of residence at 2761 South 3000 West, Syracuse, Utah 84075.

3. Defendant the Utah Department of Commerce is a Utah Agency located at 160 East 300 South, Salt Lake City, Utah. Within the Utah Department of Commerce is the Division of Occupational and Professional Licensing ("DOPL"). U.C.A. § 58-1-103. DOPL administers and enforces all licensing laws of Title 58, including U.C.A. § 58-22, regarding engineers and their licenses.

JURISDICTION AND VENUE

4. This Court has jurisdiction to hear Plaintiff's Complaint and review by trial de novo all final agency actions resulting from the informal adjudicative proceedings against Plaintiff pursuant to U.C.A. §§ 63-46b-15 and 78-3-4(7).

5. Venue is proper in this Court pursuant to U.C.A. § 78-13-7.

Legislative Background

6. The current version of the Professional Engineers and Professional Land Surveyors Licensing Act, as revised, (U.C.A. §58-22), became effective July 1, 1996, when Governor Leavitt signed into force Senate Bill SB-0235, which amended the 1994 version of the Act. One of the stated purposes of the licensing amendments to the 1994 version was to correct certain sunset provisions in the prior law.

7. Under the prior law (U.C.A. § 58-22-302 (1994)), an applicant qualified for professional engineering license provided he or she met one or more of the following: (1) Four years experience, (2) an engineering degree from a program accredited by the Technology Accreditation Commission/Accreditation Board for Engineering and Technology ("TAC/ABET") plus 2 years experience, or (3) a degree from an Engineering Accreditation Commission/Accreditation Board for Engineering Technology ("EAC/ABET") curriculum. In addition, the applicant was to have passed the Fundamentals in Engineering Examination, the Principals and Practices Examination, the Utah Law and Rules Examination, and obtain an additional 4 years of qualifying experience under the supervisor of a licensed engineer.

8. The 1994 law also provided that after July 1, 1996, the education requirement could be completed by an EAC/ABET curriculum "or equivalent curriculum" approved by the Division in cooperation with the Board. However, this part of the 1994 version never became effective due to the amendments of 1996 in Senate Bill SB-0235.

9. The amendments were proposed on January 12, 1996, by Senator Craig Petersen. After 6 drafts and other revisions, the bill was presented to the Senate Business, Labor and Economic Standing Committee. The Standing Committee passed the Bill out favorably on February 16, 1996. Senate Bill SB-235 proposed a number of amendments to the Engineering Licensing Law, including the admission criteria for

taking the Fundamentals of Engineering Examination, which criteria was not previously codified.

10. As a prerequisite to taking the Fundamentals Examination, the Amendment required enrollment in or graduation from an EAC/ABET or TAC/ABET curriculum (or such other curriculum as may be established by the Division in cooperation with the Board). This statutory acceptance of either an EAC/ABET or TAC/ABET curriculum remained consistent throughout all of the bill's subsequent drafts, despite the Committee's modifications to such things as whether or not Utah would grant reciprocity to out of state engineers, whether an applicant would have to establish good moral character, etc.

11. The final version of SB-2035 which passed the Committee and was signed into law by the Governor, provided that the education requirement for a professional engineering license would be: "an earned Bachelors or Masters Degree from an engineering program meeting criteria established by Rule by the Division in collaboration with the Board". U.C.A. §58-22-302(d). The final version also included the EAC/ABET or TAC/ABET accreditation curriculum.

12. Over two months after the new Amendments (effective September 17, 1996), the Department of Commerce and DOPL promulgated R156-22, "Professional Engineers and Professional Land Surveyors Licensing Act Rules." The new regulation did not recognize TAC/ABET degrees or other degrees meeting criteria established by the "Division in Collaboration with the Board."

13. In addition, the new regulation R156-22-202(2), 1996), sought to protect those who were "unsuccessful in obtaining licensure by experience before July 1, 1996" by not requiring such applicants to repeat their pre-July 1, 1994 supervised experience once they had obtained an EAC/ABET degree.

STATEMENT OF ENTITLEMENT TO RELIEF

14. Pursuant to U.C.A. § 63-46b-15(2) (a) (viii), Plaintiff Bourgeois is entitled to relief because (a) his application for a professional engineer license should have been evaluated by defendant under the pre-July 1, 1996 requirements which recognized TAC/ABET accredited engineering degrees inasmuch as Plaintiff received his engineer-in-training certificate and commenced his qualifying experience before the July 1, 1996 change; (b) Defendant and DOPL have treated Plaintiff unfairly and differently than other professional engineer applicants; and (c) Defendant and DOPL's denial of Plaintiff's application and Rule R156-22-201 are based upon an erroneous interpretation of U.C.A. § 58-22-302 and 306 (1996), which require the acceptance of a TAC/ABET accredited engineering degree.

FIRST CAUSE OF ACTION

(Violation of U.C.A. § 63-46b-14(4) (d))

15. On June 9, 1989, Plaintiff Bourgeois received a Bachelors of Science in Electrical Engineering Technology from Weber State University. Plaintiff Bourgeois's Engineering Degree was in an accredited program recognized by TAC/ABET.

16. Later that year Plaintiff applied with DOPL to take the Fundamentals in Engineering Examination ("FE") offered by the National Assessment Institute. On October 29, 1989, Plaintiff Bourgeois received a passing score on the FE exam.

17. Plaintiff Bourgeois also applied in 1989 with the Utah Department of Commerce and was given an Engineer-in-Training Certificate. The Certificate No. 9451-0999-0 was issued pursuant to the then applicable Department of Commerce Regulation R153-22-2(c) which stated that the Certificate was valid for 10 years without renewal.

18. After receiving the Engineer-in-Training Certificate, Plaintiff Bourgeois commenced working on the requirement of qualifying experience under the supervision of a licensed engineer. In June of 1991, Plaintiff Bourgeois accepted a new job which provided only 50% of qualifying time towards the then 6 years required for licensure under U.C.A. § 58-22-5 (1990).

19. Plaintiff Bourgeois continued working on his qualifying time and completed the necessary years of experience in 1997 (2 years before his Engineer-in-Training Certificate No. 9451-0999-0 would have expired), whereupon he applied to take the NCEES Principles and Practices Engineering Examination.

20. On April 18, 1997, Plaintiff Bourgeois received a passing score on the Principles and Practices Engineering Exam.

Plaintiff Bourgeois' application for license was received by DOPL on September 2, 1997.

21. By letter dated September 24, 1997, DOPL denied Plaintiff Bourgeois' application for "failure to document graduation from the required EAC/ABET accredited program in engineering." Plaintiff Bourgeois subsequently sought Agency Review on October 21, 1997.

22. On October 24, 1997, Defendant the Utah Department of Commerce dismissed Plaintiff Bourgeois' request on the grounds for "failure to comply with the rules governing agency review." Upon further consideration, the Agency denied on November 4, 1997, a request "to reopen the Order".

23. Plaintiff Bourgeois subsequently requested agency reconsideration of the denial and on December 29, 1997, Defendant denied and dismissed the request, which denial exhausted Plaintiff's administrative remedies. A copy of the December 19, 1997 Denial is attached hereto as Exhibit "A" and is incorporated by reference.

24. Under the Department's regulation applicable in 1989 (R153-22-2), Plaintiff Bourgeois met the educational requirements for an Engineer-in-Training certification. At that time a degree in Engineering Technology was not considered to be an engineering degree for purposes of the Certificate and DOPL required that the applicant complete 2 years of engineering experience prior to application to take the Engineer-in-Training examination. However, degrees in

engineering at a Utah College or University including chemical engineering, civil engineering, electrical engineering, etc., were recognized as fulfillment of the educational requirements. (See R153-22-2(a)(1)(a) (1989)). Plaintiff Bourgeois met the educational requirements because he had earned an electrical engineering degree.

25. The then applicable regulation also provided that an Engineer-in-Training Certificate was not subject to renewal and was valid for 10 years from the date the examination was passed (R153-22-2(c) (1989)).

26. Once awarded the Engineer-in-Training Certificate, Plaintiff Bourgeois was deemed to have completed the then applicable educational requirements for licensure and only needed to complete his work experience and pass the PE examination.

27. By failing to recognize Plaintiff Bourgeois' completion of the educational requirements for licensure as met by the Engineer-in-Training Certificate, the Department has acted improperly and has effectively eviscerated Plaintiff Bourgeois' 10 year Engineer-in-Training Certificate previously awarded to him by DOPL.

28. The Defendant and DOPL's denial of Plaintiff Bourgeois' application for professional licensure was improper and violated the Standards under U.C.A. § 63-46b-16(4)(d) and therefore should be reversed.

29. WHEREFORE, Plaintiff Bourgeois demands relief as is more fully set forth in his prayer for relief.

SECOND CAUSE OF ACTION

(Violation of U.C.A. § 63-46b-16(4) (h) (iii))

30. Plaintiff realleges and incorporates by reference all of the allegations in paragraphs 1 through 29 of this Complaint.

31. Defendant and DOPL denied licensure to Plaintiff Bourgeois because they treated his application as not being filed prior to July 1, 1996. Yet, in the case of John P. Hunter, the Department took a different position.

32. Mr. Hunter did not have a EAC/ABET degree either and also made final application after July 1, 1996. Yet, the Department treated Mr. Hunter's earlier application (presumably his application for the FE exam and to be an intern), as the applicable application for commencing the licensure process. In so doing, the Defendant stated,

The problem in this case was that your client [Mr. Hunter] filed a new application rather than amending his old one. When he filed the appealed application he did not qualify under the law now in effect.

33. The Department went on to reason in Mr. Hunter's case that he should have been considered under the old law which permitted TAC/ABET degrees because his "initial application" was before July 1, 1996. Like Mr. Hunter, Plaintiff Bourgeois's initial application was before July 1, 1996, yet the Department has treated Plaintiff Bourgeois differently than Mr. Hunter.

engineering at a Utah College or University including chemical engineering, civil engineering, electrical engineering, etc., were recognized as fulfillment of the educational requirements. (See R153-22-2(a)(1)(a) (1989)). Plaintiff Bourgeois met the educational requirements because he had earned an electrical engineering degree.

25. The then applicable regulation also provided that an Engineer-in-Training Certificate was not subject to renewal and was valid for 10 years from the date the examination was passed (R153-22-2(c) (1989)).

26. Once awarded the Engineer-in-Training Certificate, Plaintiff Bourgeois was deemed to have completed the then applicable educational requirements for licensure and only needed to complete his work experience and pass the PE examination.

27. By failing to recognize Plaintiff Bourgeois' completion of the educational requirements for licensure as met by the Engineer-in-Training Certificate, the Department has acted improperly and has effectively eviscerated Plaintiff Bourgeois' 10 year Engineer-in-Training Certificate previously awarded to him by DOPL.

28. The Defendant and DOPL's denial of Plaintiff Bourgeois' application for professional licensure was improper and violated the Standards under U.C.A. § 63-46b-16(4)(d) and therefore should be reversed.

WHEREFORE, Plaintiff Bourgeois demands relief as is more fully set forth in his prayer for relief.

SECOND CAUSE OF ACTION

(Violation of U.C.A. § 63-46b-16(4) (b) (iii))

29. Plaintiff realleges and incorporates by reference all of the allegations in paragraphs 1 through 28 of this Complaint.

30. Defendant and DOPL denied licensure to Plaintiff Bourgeois because they treated his application as not being filed prior to July 1, 1996. Yet, in the case of John P. Hunter, the Department took a different position.

31. Mr. Hunter did not have a EAC/ABET degree either and also made final application after July 1, 1996. Yet, the Department treated Mr. Hunter's earlier application (presumably his application for the FE exam and to be an intern), as the applicable application for commencing the licensure process. In so doing, the Defendant stated,

The problem in this case was that your client [Mr. Hunter] filed a new application rather than amending his old one. When he filed the appealed application he did not qualify under the law now in effect.

32. The Department went on to reason in Mr. Hunter's case that he should have been considered under the old law which permitted TAC/ABET degrees because his "initial application" was before July 1, 1996. Like Mr. Hunter, Plaintiff Bourgeois's initial application was before July 1, 1996, yet the Department has treated Plaintiff Bourgeois differently than Mr. Hunter.

WHEREFORE, the Defendant has violated U.C.A. § 63-46b-16(4)(iii) by acting in a manner contrary to prior practices, and Plaintiff Bourgeois demands relief as is more fully set forth in his prayer for relief.

THIRD CAUSE OF ACTION

(Violation of U.C.A. § 63-46b-16(4)(a) and (b))

33. Plaintiff realleges and incorporates by reference all of the allegations in paragraphs 1 through 32 of this Complaint.

34. Under U.C.A. §58-22-302 the EAC/ABET and TAC/ABET curriculums are treated equally for purposes of taking the Fundamentals of Engineering Examination. The State Legislature made no distinction between the two curriculums. Furthermore, at no place in the Statute did the State Legislature state that a TAC/ABET curriculum would be unacceptable in meeting the education requirements for licensure.

35. By recognizing the TAC/ABET curriculum as acceptable and on equal footing with an EAC/ABET curriculum for purposes of taking the Professional Engineering Examination, the State Legislature has implicitly required the Department of Commerce and DOPL to recognize such a curriculum as well, consistently throughout all requirements for licensure.

WHEREFORE, Rule 156-22-201 which recognizes only an EAC/ABET engineering program and not also a TAC/ABET engineering program is in direct violation and contradiction of the Statute and Plaintiff

Bourgeois demands relief as is more fully set forth in his prayer for relief.

FOURTH CAUSE OF ACTION

(Violation of U.C.A. § 63-46b-16(4)(g))

36. Plaintiff realleges and incorporates by reference all of the allegations in paragraphs 1 through 35 of this Complaint.

37. Defendant's actions are based upon a determination of facts which are not supported by substantial evidence in violation of U.C.A. § 63-46b-16(4)(g).

WHEREFORE, Plaintiff Bourgeois demands relief as is more fully set forth in his prayer for relief.

FIFTH CAUSE OF ACTION

(Violation of U.C.A. § 63-46b-16(4)(h)(i))

38. Plaintiff realleges and incorporates by reference all of the allegations in paragraphs 1 through 37 of this Complaint.

39. Defendant's actions abuse the discretion delegated to Defendant by Statute and are in violation of U.C.A. § 63-46b-16(4)(h)(i).

WHEREFORE, Plaintiff Bourgeois demands relief as is more fully set forth in his prayer for relief.

SIXTH CAUSE OF ACTION

(Arbitrary and Capricious)

40. Plaintiff realleges and incorporates by reference all of the allegations in paragraphs 1 through 39 of this Complaint.

Defendant's actions are arbitrary and capricious, in violation of U.C.A. § 63-46b-16(4)(h)(iv).

WHEREFORE, Plaintiff Bourgeois demands relief as is more fully set forth in his prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Bourgeois demands judgment in his favor and against Defendant the Utah Department of Commerce as follows:

1. That pursuant to the First Cause of Action, this Court enter judgment in favor of Plaintiff and against Defendant by Ordering Defendant to grant Plaintiff a license for Professional Engineer in the State of Utah, and entering judgment against Defendant in an amount to be determined at trial, together with all costs, plus a reasonable attorney's fee.

2. That pursuant to the Second Cause of Action, this Court enter judgment in favor of Plaintiff and against Defendant by Ordering Defendant to grant Plaintiff a license for Professional Engineer in the State of Utah, and entering judgment against Defendant in an amount to be determined at trial, together with all costs, plus a reasonable attorney's fee.

3. That pursuant to the Third Cause of Action, this Court enter judgment against Defendant by Striking as unconstitutional and contrary to Statute Defendant's Regulation R156-22, and entering judgment against Defendant in an amount to be determined at trial, together with all costs, plus a reasonable attorney's fee.

4. That pursuant to the Fourth Cause of Action, this Court enter judgment in favor of Plaintiff and against Defendant by Ordering Defendant to grant Plaintiff a license for Professional Engineer in the State of Utah, and entering judgment against Defendant in an amount to be determined at trial, together with all costs, plus a reasonable attorney's fee.

5. That pursuant to the Fifth Cause of Action, this Court enter judgment in favor of Plaintiff and against Defendant by Ordering Defendant to grant Plaintiff a license for Professional Engineer in the State of Utah, and entering judgment against Defendant in an amount to be determined at trial, together with all costs, plus a reasonable attorney's fee.

6. That pursuant to the Sixth Cause of Action, this Court enter judgment in favor of Plaintiff and against Defendant by Ordering Defendant to grant Plaintiff a license for Professional Engineer in the State of Utah, and entering judgment against Defendant in an amount to be determined at trial, together with all costs, plus a reasonable attorney's fee.

Dated this 23rd day of January, 1998.



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

ADDRESS OF PLAINTIFF:
2761 South 3000 West
Syracuse, Utah 84075

200472-1

ADDENDUM 9

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).

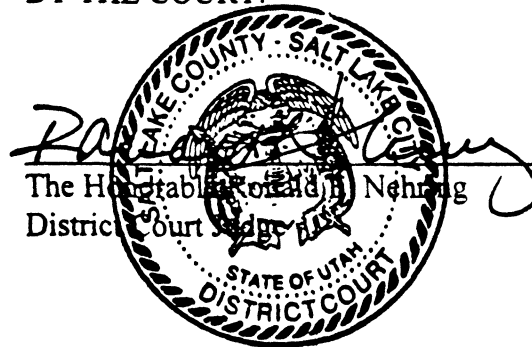
Plaintiff's Complaint requesting judicial review was filed on January 23, 1998, more than 30 days beyond the Department's Order on Review. Accordingly, the Complaint was filed untimely and the Court is without jurisdiction to consider the matter.

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:



Approved as to form:

A handwritten signature in black ink, appearing to read "Cass C. Butler", written over a horizontal line.

Cass C. Butler
Attorney for Plaintiff

ADDENDUM 10

(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.

Section 269. Section Enacted.

Section 63-46b-13, Utah Code Annotated 1953, is enacted to read:

63-46b-13. Agency review - Reconsideration.

(1) Within ten days after the date that an order on review is issued, or within ten days after the date that a final order is issued for which agency review is unavailable, any party may file a written request for reconsideration, stating the specific grounds upon which relief is requested. Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order or the order on review.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for rehearing shall be considered to be denied.

Section 270. Section Enacted.

Section 63-46b-14, Utah Code Annotated 1953, is enacted to read:

63-46b-14. Judicial review - Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action except in actions where judicial review is expressly prohibited by statute, only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(2) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued.

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Section 271. Section Enacted.

Section 63-46b-15, Utah Code Annotated 1953, is enacted to read:

63-46b-15. Judicial review - Informal adjudicative proceedings.

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency action resulting from informal adjudicative proceedings, except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record according to the standards of Subsection 63-46b-16 (4).

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleading and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

Section 272. Section Enacted.

Section 63-46b-16, Utah Code Annotated 1953, is enacted to read:

63-46b-16. Judicial review - Formal adjudicative proceedings.

(1) The Supreme Court or other appellate court designated by statute has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action in the form required by the Utah Rules of Appellate Procedure.

(b) The Utah Rules of Appellate Procedure govern all additional filings and proceedings in the

ADDENDUM 11

agency, the aggrieved party may file a written request for review within ~~(ten)~~ 30 days after the issuance of the order with the person or entity designated for that purpose by this statute or rule.

(b) The request shall:

~~((a))~~ (i) be signed by the party seeking review;

~~((b))~~ (ii) state the grounds for review and the relief requested;

~~((c))~~ (iii) state the date upon which it was mailed; and

~~((d))~~ (iv) be sent by mail to the presiding officer and to each party.

(2) Within 15 days of the mailing date of the request for review, ~~or within the time period provided by agency rule, whichever is longer,~~ any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6)(a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.

(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.

Section 23. Section Amended.

Section 63-46b-13, Utah Code Annotated 1953, as enacted by Chapter 161, Laws of Utah 1987, is amended to read:

63-46b-13. Agency review — Reconsideration.

(1)(a) Within ~~(ten days after the date that an order on review is issued, or within ten)~~ 20 days after the date that ~~(a final)~~ an order is issued for which ~~(agency)~~ 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.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order ~~(or the order on review)~~.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for ~~(rehearing)~~ reconsideration shall be considered to be denied.

Section 24. Section Amended.

Section 63-46b-14, Utah Code Annotated 1953 as enacted by Chapter 161, Laws of Utah 1987, is amended to read:

63-46b-14. Judicial review — Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

~~(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:~~

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; ~~or,~~

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

~~((2))~~ (3)(a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued ~~or is considered to have been issued~~