

1979

In the Matter of The New and Used Motor Vehicle Dealer's License, Dick and Lavonne Noren, dba Central R.V. Sales : Brief of Respondent-Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

David M. Bown; Attorney for Petitioner-Respondent;

Robert B. Hansen; Mark K. Buchi; Attorneys for Respondent-Appellant;

Recommended Citation

Brief of Appellant, *State v. Noren*, No. 16521 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1777

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF:)

The New and Used Motor)
Vehicle Dealer's License,)
DICK and LAVONNE NOREN, dba)
Central R.V. Sales)

Case No. 16521

BRIEF OF RESPONDENT-APPELLANT ADMINISTRATOR OF THE
UTAH STATE MOTOR VEHICLE BUSINESS ADMINISTRATION

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
HONORABLE ERNEST F. BALDWIN PRESIDING

ROBERT B. HANSEN
Attorney General

MARK K. BUCHI
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84119

Attorneys for Respondent
Appellant Administrator of
the Utah State Motor Vehicle
Business Administration

DAVID M. BOWN
3007 South West Temple
Salt Lake City, UT 84115

Attorney for Petitioner-
Respondent Dick and Lavonne Noren,
dba Central R.V. Sales

FILED

SEP - 7 1979

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN COURT BELOW	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I: THE TRIAL COURT IMPROPERLY FAILED TO TAKE COGNIZANCE OF RESPONDENT'S TWO PRIOR CRIMINAL CONVICTIONS IN DECIDING HIS FITNESS TO HOLD A PUBLIC LICENSE	4
POINT II: WHETHER THE APPEAL AND ORIGINAL ACTION PROVIDED FOR IN UTAH CODE ANN. §41-3-26 IS A REVIEW OR A TRIAL DE NOVO, THE DISTRICT COURT IS LIMITED TO DECIDING WHETHER THE ADMINISTRATOR ACTED PROPERLY IN DENYING THE APPLICATION FOR A DEALER'S LICENSE	9
POINT III: AS THE INSTANT PROCEEDING IS A REVIEW OF THE RECORD OF AN ADMINISTRATIVE PROCEEDING, THE FACTS BEFORE THIS COURT ARE THE FACTS AS THEY EXISTED ON THE DATE OF THE HEARING BEFORE THE ADVISORY BOARD	20
CONCLUSION	22

AUTHORITIES AND CASES CITED

<u>Boise Water Corp. v. Idaho Public Utilities Comm'n</u> , 97 Idaho 832, 555 P.2d 163 (1976)	18
<u>Camp v. Pitts</u> , 93 S. Ct. 1241, 411 U.S. 138, 36 L. Ed. 2d 106 (1973)	15
<u>Central Bank and Trust Co. v. Brimhall</u> , 28 Utah 2d 14, 497 P.2d 638 (1972).	14
<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)	15
<u>Denver & R.G.W.R. Co. v. Central Weber Sevier Improvement District</u> , 4 Utah 2d 105, 287 P.2d 884 (1955)	15
<u>Denver & R.G.W.R. Co. v. P.S.C.</u> , 98 Utah 431, 100 P.2d 552 (1940)	15
<u>Heldenbrand v. Montana St. Bd. of Reg. for P.E. & L.S.</u> , 147 Mont. 271, 41 P.2d 744 (1966).	22
<u>Household Finance Corp. v. State</u> , 40 Wash. 2d 451, 244 P.2d 260 (1952)	13
<u>In re. Phillips</u> , 17 Colo. 2d 55, 109 P.2d 344 (1941).	7
<u>Merrill v. Merrill</u> , 83 Idaho 306, 362 P.2d 887 (1961)	19
<u>Meyer v. Bd. of Medical Examiners</u> , 34 Colo. 2d 62, 206 P.2d 1085 (1949)	7
<u>Opp. Colton Mills v. Administrators</u> , 312 U.S. 126, 85 L. Ed. 624, 61 S. Ct. 524 (1941).	6
<u>Pennsylvania R. Co. v. Dept. of Public Utilities</u> , 14 N.J. 411, 102 A.2d 618 (1954)	18
<u>People ex rel. Deneen v. Gilmore</u> , 214 Ill. 569, 73 N.E. 737 (1905)	7
<u>Peterson v. Livestock Comm'n</u> , 120 Mont. 140, 181 P.2d 152 (1947)	12,13
<u>Rowley v. P.S.C.</u> , 112 Utah 116, 185 P.2d 514 (1947)	20

<u>State of Utah v. U.S.</u> , 304 F.2d 23 (10th Cir. 1962), cert. denied 83 S. Ct. 47, 371 U.S. 826, 9 L. Ed. 2d 65	19
<u>Sulger v. Arizona Corp. Comm'n</u> , 5 Ariz. App. 69, 423 P.2d 145 (1967)	14
<u>United States v. District Court</u> , 121 Utah 1, 238 P.2d 1132 (1951)	10,12
<u>Whitney v. Continental Life</u> , 89 Idaho 96, 403 P.2d 573 (1965)	19

STATUTES CITED

5 U.S.C., § 556(d)	5
Utah Code Ann. § 41-3-8(3)(a)	4,5,20
Utah Code Ann. § 41-3-9	15
Utah Code Ann. § 41-3-24	15,17
Utah Code Ann. § 41-3-25	17
Utah Code Ann. § 41-3-26	9,10,11,12,17,19,20
Utah Code Ann. § 77-35-17	8
Utah Code Ann. § 77-35-17.5	8
Utah R. Civ. P. 52(a)	17,18
Utah R. Civ. P. 81(d)	6,17

CONSTITUTIONS CITED

UTAH CONST. art. V, § 1	11
-----------------------------------	----

SECONDARY SOURCES CITED

2 Am. Jur. 2d <u>Administrative Law</u> § 701	12
Kerper and Kerper, LEGAL RIGHTS OF THE CONVICTED (1974) . .	6
Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Vol. 9 (1971)	18

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF:

The New-Used Motor
Vehicle Dealer's License,
DICK and LAVONNE NOREN, dba
Central R.V. Sales

)
)
)
)
)
)

Case No. 16521

STATEMENT OF THE NATURE OF THE CASE

The respondent-appellant, Administrator of Motor Vehicle Business Administration, appeals from a decision of the Third Judicial District Court, State of Utah, which ordered the Administrator to grant the application of petitioners-respondents for a New-Used Motor Vehicle Dealer's License and to duly license them under the laws of the State of Utah. Jurisdiction was conferred upon the Third District Court by way of a statutorily provided appeal from a decision of the Administrator after he adopted the findings of the Advisory Board to deny the application for a New-Used Motor Vehicle Dealer's License.

DISPOSITION IN COURT BELOW

This case came before the Third District Court as an appeal from the decision of the Administrator of Motor Vehicle Business Administration in which the Administrator denied the application of Dick and LaVonne Noren for a New-Used Motor Vehicle Dealer's License. The Administrator filed motions for publication of the transcript of the hearing held before the Advisory Board to the Administrator and for summary judgment.

The law and motion judge for the Third District Court heard arguments on the Administrator's Motion for Summary Judgment and denied the same. The matter then proceeded to trial where, pursuant to stipulation by the respective counsel in open court, the Third District Court Judge narrowed the issue to that of deciding as a matter of law whether the proceeding in district court was a trial de novo or a review of an administrative decision. The court took the matter under advisement. A memorandum of law was filed by the Administrator after which the court ordered that the Administrator of the Motor Vehicle Business Administration forthwith grant the application of the petitioners for a New-Used Motor Vehicle Dealer's License.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Third District Court decision wherein the court substituted its judgment for that of the administrative body and an order affirming the decision of the Administrator of Motor Vehicle Business Administration in denying the respondents' application for a New-Used Motor Vehicle Dealer's License.

STATEMENT OF FACTS

In January of 1979 the respondents filed with the Motor Vehicle Business Administration an application for a New-Used Motor Vehicle Dealer's License (R. 15). The application was proper insofar as the formal requirements prescribed. Subsequently, the Administrator issued notice of an order to show cause hearing which notified the applicants that the Administra-

tor was contemplating denying the application on the grounds that Richard Scott Noren had been convicted in the City Court of Salt Lake City, Utah for two separate violations of the Motor Vehicle Code, failure to deliver a certificate of title, and acting as a used-motor vehicle dealer without a license (R. 15). Pursuant to statute, the Administrator directed the hearing on the order to show cause to be held before the Advisory Board. This statutorily created Advisory Board conducted a formal hearing on March 12, 1979. A stenographic record of the hearing of testimony, offers of proof and oral argument were made. The Board took the matter under advisement and subsequently issued formal findings of fact and a recommendation that no motor vehicle dealer's license be issued to the applicants therefor, for the reason of Richard Scott Noren's prior criminal convictions. Thereafter, the Administrator adopted the Advisory Board's findings of fact and ordered that no motor vehicle dealer's license be issued.

Pursuant to statute, the applicants appealed from the decision of the Administrator to the Third District Court by filing an original action. Prior to such an appeal, the applicants' motion to set aside his prior convictions was granted by the Honorable Raymond F. Uno of the Fifth Circuit Court (R. 16). The Administrator filed motions for publication of the transcript of the hearing held before the Advisory Board to the Administrator and for Summary Judgment (R. 4-6). The Law and Motion Judge for the Third District Court heard arguments on the Administrator's Motion for Summary Judgment and

denied the same (R. 12). The matter then proceeded to trial where, pursuant to stipulation by the respective counsel in open court, the Third District Court Judge narrowed the issue to that of deciding as a matter of law whether the proceeding in district court was a trial de novo or a review of an administrative decision. The court took the matter under advisement (R. 13). A memorandum of law was filed by the Administrator (R. 20-36), after which the court ordered that the Administrator of the Motor Vehicle Business Administration forthwith grant the application of the petitioners for a New-Used Motor Vehicle Dealer's License (R. 18).

POINT I

THE TRIAL COURT IMPROPERLY FAILED TO
TAKE COGNIZANCE OF RESPONDENT'S TWO
PRIOR CRIMINAL CONVICTIONS IN DECIDING
HIS FITNESS TO HOLD A PUBLIC LICENSE.

The trial court erred in excluding evidence of Richard Scott Noren's two prior criminal convictions for violations of the Motor Vehicle Dealers' Act. Utah Code Ann. §41-3-8, authorizes the Motor Vehicle Business Administrator to refuse to issue a license to a partnership applicant where he determines:

(3) (a) . . . that one or more of the partners . . . though not previously the holder of a license, was convicted in a court of record in the state of Utah of a violation of one or more of the terms and provisions of this act or of a rule or regulation promulgated by the administrator under the authority herein conferred upon him; and (b) that by reason of the facts and circumstances touching the organization, control, and management of the partnership or corporation business is likely that the policy of such business will be directed, controlled, or managed by individuals who, by reason of their conviction of a violation of the pro-

visions of this act, would be ineligible for a license and that by licensing such corporation or partnership the purposes of this act would likely be defeated.

Whether sitting as a review tribunal or as if it were the administrative body, the district court was bound to consider Mr. Noren's convictions of the Motor Vehicle Dealers' Act as evidence of his fitness for a public license. The legislature went to great length to specify that a conviction of a criminal violation of the very act which an applicant for an automobile dealer's license would be obliged to uphold, would be grounds for denying such a license. In its own words, the legislature stated that such a conviction demonstrates that the purposes of the Motor Vehicle Dealers' Act "would likely be defeated." In short, it is evidence of bad character and an individual possessing such character should not be trusted with a public license in an area of business so prone to consumer fraud and injury.

In the administrative setting, exclusionary rules have no applicability where evidence of good character is material and relevant. On the federal level, this is mandated in Title 5, U.S.C., §556(d). That provision excludes administrative hearings from the ambit of the exclusionary rules, through the Administrative Procedure Act. The standard which is applied to the admissibility issue is materiality and relevancy. The reason being, that the hearings are conducted in front of experts selected from the field of concern, and not in front of jurors selected for their "naivete'." All evidence is admitted which will aid the administrative body in its decision making.

The U.S. Supreme Court adopted the same standard in Opp Colton Mills v. Administrators, 312 U.S. 126, 85 L.Ed. 624, 61 S.Ct. 524 (1941):

. . . [I]t has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed. at 155 (emphasis added).

There is no such statutory requirement in Utah, and the Utah Rules of Evidence are not applied to administrative hearings, unlike the Utah Rules of Civil Procedure, which are applied pursuant to Rule 81(d).

Because the exclusionary rules do not apply to administrative hearings, the Advisory Board was correct in admitting and weighing evidence of petitioner's prior criminal convictions, and it would still be correct in so admitting and weighing such evidence if it were to rehear the matter, because the evidence should not be excluded from the administrative hearing. It is both material and relevant to petitioner's dealership license application.

This proposition finds support in case law and treatise discussion. In the area of licensing, most courts and legislatures have decided that a showing of "good character" is of the utmost importance. In Legal Rights of the Convicted, Kerper and Kerper, 1974, the authors observe that in determining an applicant's good character, administrative bodies have not been confined to rules of evidence when they wrote:

Although pardon and other forms of wiping out a conviction may remove particular civil disabilities, and, for example, permit

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

the convicted person to vote or serve on a jury, such a pardon or expungement proceeding does not necessarily, or even by implication restore "good character." . . . [C]onviction of a crime is generally held to be evidence that the offender lacks the requisite character for the professional license. Legal Rights of the Convicted at 44-45 (emphasis added).

The authors further explained at 821, that:

Generally, where an occupational licensing law disqualifies persons convicted of crime, pardon does not remove the disqualification nor does it automatically restore a license that has been revoked on the ground of a criminal conviction." See People ex rel. Deneen v. Gilmore, 214 Ill. 569, 73 N.E. 737 (1905) (emphasis added).

Appellant refers the court to two specific examples wherein courts have upheld administrative license revocations or denials despite the fact that the basis for the denials (criminal convictions) were pardoned or set aside. In Meyer v. Bd. of Medical Examiners, 34 Colo.2d 62, 206 P.2d 1085 (1949), the court upheld a doctor's medical license revocation by the Board of Examiners, even though the conviction was set aside following a probation period. The court reasoned that it was not the legislative intent to "obliterate the record" and "purge him of the guilt" "for all purposes" as if no action had "ever been presented against him." 206 P.2d at 1088. Similarly, in In Re Phillips, 17 Colo.2d 55, 109 P.2d 344 (1941), the court upheld a disbarment of an attorney holding that the lifting of his sentence by probation did not affect the fact that he was adjudged guilty of committing the crime as charged. It only served to restore some of his lost civil liberties.

The facts in the instant case do not cause any distinction from the above cases because the statute used to set aside

Mr. Noren's convictions does not operate to destroy evidence of his prior convictions from consideration as to his fitness to possess a motor vehicle dealer's license.

Utah Code Ann., §77-35-17, creates a remedy whereby persons may have a trial court "terminate or set aside a plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant." This statute was interpreted by the Utah Supreme Court and was distinguished from Utah Code Ann., §77-35-17.5, the section pursuant to which an expungement motion is made. In State v. Chambers, 533 P.2d 876 (Utah 1975), the court noted:

[Under §77-35-17] . . . [T]he court cannot seal the record, restrict its inspection, nor bring into operation circumstances which would allow a response to inquiries relating to a conviction of crime, as though such conviction had never occurred. The court can terminate the sentence, set aside a defendant's plea of guilty, the conviction, dismiss the action, and discharge the defendant
Id. at 878.

Thus, Mr. Noren is not able to respond that he has never been convicted of a crime. Likewise, his record is not sealed as it would be under a motion granted pursuant to §77-35-17.5. If Mr. Noren may not deny his convictions in a judicial proceeding then, a fortiori, under the rules noted earlier, he must answer as to his convictions in administrative proceedings. The evidence of his conviction is very much material and relevant and there is no basis for its exclusion as his guilt will always exist, even though the remainder of his sentence has been waived.

As the only proper basis cited by the lower court for a reversal of the order of the administrator was the absence of any evidence of the convictions, the lower court erred and should be reversed. Furthermore, as the district court should have taken cognizance of Mr. Noren's convictions, it should have sustained the Administrator's decision as a proper exercise of his discretion in following the provisions of Utah Code Ann., §41-3-8.

POINT II

WHETHER THE APPEAL AND ORIGINAL ACTION PROVIDED FOR IN UTAH CODE ANN. §41-3-26 IS A REVIEW OR A TRIAL DE NOVO THE DISTRICT COURT IS LIMITED TO DECIDING WHETHER THE ADMINISTRATOR ACTED PROPERLY IN DENYING THE APPLICATION FOR DEALER'S LICENSE.

On the day of the trial, the trial court narrowed the issue to be decided to whether Utah Code Ann., §41-3-26, provided a true trial de novo or whether it merely provided for a review of the Administrator's decision. If it was a true trial de novo, the judge would take cognizance of the setting aside of the convictions and reverse the Administrator. If the proceeding was a review, the judge must uphold the Administrator's decision. In making its decision, the lower court specifically found it did not have to decide the case upon the issue under which it took the case under advisement. After noting this conclusion, the trial court erroneously continued: "[T]he court finds in either event, the reviewing court would have been allowed to take into consideration a change of underlying facts."

This court decided a similar case to the instant one and held that a court reviewing the decision of an administrator charged with deciding the appropriateness of an application "should simply determine whether the application was rightly rejected." United States v. District Court, 121 Utah, 238 P.2d 1132, 1135 (1951). In that case the Court was reviewing a decision of the State Water Engineer. The legislature had provided a statutory scheme very similar to the one governing this proceeding. The legislature provided that any person aggrieved by the Engineer's decision may bring an "action in the district court for a plenary review thereof" and that the hearing therein "shall proceed as a trial de novo." The Utah Supreme Court took the use of the terms "review" and "trial de novo" as an indication that the court shall review only the issues of law and fact which were involved in the Engineer's decision.

Utah Code Ann., §41-3-26, provides a similar review standard as involved in United States v. District Court when it states that an applicant for a dealer's license may "appeal" by filing "an original action in district court." Thus, the trial court in the current controversy should have "simply determine[d] whether the application was rightly rejected." This conclusion is correctly based on several different points of law.

The first point which supports such a conclusion will be more extensively discussed in Point III, *infra*, but basically states that the facts before the district court and hence this court are the ones that existed on the date of the hearing before the Advisory Board.

The second point in favor of construing the instant action as a review of the case as it existed at the time the administrative decision, i.e. a review, is the rule of statutory construction which provides that if two interpretations of a statute are possible, one constitutional and the other unconstitutional, the constitutional construction will be the governing interpretation. This rule is relevant in the instant proceeding due to art. V. sec. 1 of the Utah Constitution which reads:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted. (Emphasis added.)

The lower court concluded that it was able to take cognizance of a withdrawal of convictions which were the basis of the Administrator's decision. In doing so, the court necessarily decided that it had jurisdiction of the case in a trial de novo. Such a construction of Utah Code Ann., §41-3-26, is an unconstitutional one.

Similar separation-of-powers language is found in most all state constitutions and it is this type of provision which has led to a view that true de novo trials are traditionally disfavored in legislative and administrative areas since, in essence, the court would be forced to exercise a power which has been expressly reserved to another branch of government by constitutional mandate. This would follow in this case since

the district court has no authority to issue a motor vehicle dealer's license upon application; such a power is reserved to the legislature.

Just as the United States v. District Court, the Court found the term "de novo" had a more restrictive meaning, other courts have conformed to the constitutional separation of powers restriction by giving statutes which provide for a trial or hearing de novo, a restrictive construction which precludes a court from substituting its judgment for that of the administrative agency. See 2 Am.Jur.2d Administrative Law, §701. The authors continue with a statement very much in point to the instant controversy.

A fortiori, statutes which do not expressly provide for trial de novo or substitution of judgment but are asserted to authorize such substitution of judgment by the court will not be given that construction where it is not necessary. Id. at 603 (emphasis added).

As §43-3-26 merely provides for an appeal and an original action, it is not necessary to give it the unconstitutional de novo interpretation.

The Montana Supreme Court adopted the entire line of thinking set forth above in Peterson v. Livestock Commission, 120 Mont. 140, 181 P.2d 152 (1947), when it held that the court may not exercise nonjudicial powers but may only review as to the lawfulness of the decision when it stated:

The lower court as well as this court . . . may not substitute their discretion reposed in boards and commissions by legislative act. (Citations omitted.)

A statute authorizing an appeal to a court from actions of a nonjudicial body is

unconstitutional in so far as it purports to foist nonjudicial functions on the court, or invade the powers of such body, as by empowering a court to control its executive or administrative discretion. (Citations omitted.)

It is generally held that a statute which attempts to place the court in the place of a commission or board to try a matter anew as an administrative body is unconstitutional as a delegation to the judiciary of nonjudicial powers (Citations omitted.)

Statutes providing for appeals somewhat similar to that under consideration have been held valid by interpreting them as not granting trials de novo in the full sense of that expression but as conferring authority for the court to pass upon the lawfulness only of the order of the board or commission. (Citations omitted.) Id. at 157 (emphasis added).

The Washington Supreme Court cited the Peterson case when it held a statutory provision, granting a trial de novo to an applicant for a license, unconstitutional. Household Finance Corp. v. State, 40 Wash.2d 451, 244 P.2d 260 (1952). The Washington court upheld the trial court in its conclusion that the scope of judicial inquiry under the de novo statute was "limited to determining whether or not the supervisor had acted arbitrarily, capriciously, or contrary to law." Id. at 262. After noting that the licensing and regulation of small loan companies was a legislative and administrative function, the court held:

We are constrained to hold that the portion of Rem.Supp.1941, §8371-23, which purports to vest in the superior court for Thurston county the right to reverse on a trial de novo a decision of the supervisor with reference to the granting of such a license and, in effect, to substitute its judgment for that of the supervisor as to whether or not a license should issue, is unconstitutional as an attempt to vest a nonjudicial power in a constitutionally

This court has recognized the existence of the various shades of meaning of the term "trial de novo." In Denver & R.G.W.R. Co. v. Public Service Comm., 98 Utah 431, 100 P.2d 552 (1940), the court noted that such a trial could entail either a complete retrial upon new evidence or a trial upon the record made before the lower tribunal. In analyzing the particular statute, the court opted for a complete retrial. The test to be applied to deciding this issue was further refined in Denver & R.G.W.R. Co. v. Central Weber Sevier Improvement District, 4 Utah2d 105, 287 P.2d 884, 886 (1955). The court indicated that a trial de novo was only appropriate if there was no record to review or if the procedures used at the hearing might be violative of due process.. To this same effect see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971) and Camp v. Pitts, 93 S.Ct. 1241, 1243, 411 U.S. 138, 36 L.Ed.2d 106 (1973).

It thus becomes imperative to analyze the nature of the appeal statute involved. In cases where the Administrator is contemplating denying the application for a motor vehicle dealer's license, Utah Code Ann., §41-3-24, directs that written notice be sent to the applicant setting forth a date on which a hearing will be held before the Administrator for the purpose of hearing evidence and argument in support of granting the application. Section 24 further directs that the Administrator may request the attendance of the Advisory Board (a board of five members created by U.C.A., §41-3-9, which consists of individuals whom are motor vehicle dealers, motor vehicle

wreckers or transporters) or direct the hearing to be held before said Board. If, as in the present case, the matter is referred to the Advisory Board, the Board must make written findings of fact with appropriate references to the mandatory stenographic record of the hearing. In addition, the Board makes recommendations based upon its findings and any dissenting members may file their own findings of fact and recommendations, which become a part of the record.

It would seem that the intent of such an extensive procedure is to insure a fair and adequate hearing of the matter and to create and preserve a record that could serve as a basis for judicial review. It would appear most illogical to provide for the creation of a special board made up of individuals with expertise in the motor vehicle business who are charged with the duty of evaluating the fitness of another individual to obtain a special license which entitles such a person to do business in the State of Utah and to require that they hire a stenographer to make written findings and a recommendation to the Administrator only to have it automatically go for naught once an appeal is merely filed in district court. It is obvious that every individual who has been denied a license upon action of the Advisory Board and Administrator will appeal to the district court if he gets a true trial de novo with no deference to the administrative proceeding below. This would follow since he has nothing to lose and everything to gain.

The deference to the administrative proceedings in the licensing of motor vehicle dealers is further demonstrated by

making reference to Utah Code Ann., §41-3-24 and 25. Section 24 goes to great length to insure substantial notice and other due process considerations. Section 25 empowers the Administrator with extensive subpoena powers over witnesses and papers both in behalf of the administrative body and the applicant. Again, the appellant will submit that such extensive instruction provided by the legislature indicates its intent to make the administrative proceeding the primary determinant of the right to a motor vehicle dealer's license. The very section which gave the respondents the right to appeal the Administrator's decision is the same section which requires written findings by the Administrator when making his decision. It is the appellant's vigorous contention that when Utah Code Ann., §41-3-26, provides that an applicant may appeal by filing an original action that it simply affords the applicant complete due process of law by providing a review of administrative action to ascertain whether the administrative body acted properly and within the bounds of the law.

This "review only" position argued by appellant, finds additional support by making reference to the statutorily provided administrative proceeding referred to above and the Utah Rules of Civil Procedure, Rule 52(a) and 81(d). Rule 81(d) makes the provisions of Rule 52(a) applicable to this review of an administrative decision when it reads:

"These Rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except in so far as the specific statutory procedure in connection with any such appeal or review is inconsistent with these rules." Emphasis added.

Therefore, Rule 52(a) would be applicable and the history of the rule is helpful in the instant proceeding. Rule 52(a) reads in part as follows:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon..."

In so requiring, one of the major purposes is to provide a record for later review courts of appeal. This follows in light of the following facts. As noted in the compiler's notes following Rule 52(a), as set forth in Utah Code Ann. (1953), this rule is based upon Rule 52(a) of the Federal Rules of Civil Procedure. Taking this history, Wright and Miller's observation of the history of Rule 52(a) as contained in Federal Practice and Procedure, Vol. 9, becomes relevant. Those authors explain that this former equity practice is applied to all civil actions tried without a jury "to aid the appellate court by affording it a clear understanding of the ground or basis of the decision...." Id. at 679. Other reasons are also given, but the prime consideration given by most courts is the creation of a record to review on appeal. The highest court in New Jersey so stated when it said:

"In recent years this court has been called upon frequently to point out that such findings are of the utmost importance, not only in insuring a responsible and just determination by the board but also in according a proper basis for the judicial review which is expressly afforded by statute and rules." Pennsylvania R. Co. v. Dept. of Public Utilities, 14 N.J. 411, 102 A.2d 618, 626 (1954). See also Boise Water Corp. v. Idaho Public Utilities Comm'n, 97 Idaho 832, 555 P.2d 163 (1976).

The Tenth Circuit also considers findings of fact essential as is demonstrated by the following:

"The intended purpose of the rule [52(a) FRCP] is to aid the appellate court in acquiring a clear understanding of the basis of the decision...." State of Utah v. U.S., 304 F. 2d 23 (10th Cir. 1962), cert. denied 83 S. Ct. 47, 371 U.S. 826. 9 L. Ed. 2D 65. See also, Whitney v. Continental Life, 403 P.2d 573, 89 Idaho 96 (1965), and Merrill v. Merrill, 362 P. 2d 887, 83 Idaho 306 (1961).

The legislature went to great length in providing an extensive and expensive two-tiered administrative proceeding. The initial tier or level, the hearing before the advisory board, requires a stenographic record, written findings of fact, and recommendations based thereon at the conclusion of all testimony and argument. In addition, any dissenting member may dissent in writing and this is expressly made a part of the record. The second tier is the decision by the administrator which must be in writing officially signed by him with reference to the stenographic report of the hearing as the basis of his action.

The appellant submits that all of the above discussions lead to the logical conclusion that Utah Code Ann. § 41-3-26 merely provides for a judicial review and in so doing requires the district court to view the facts and the law governing the controversy at the time the administrative hearing took place. The withdrawing of a conviction subsequent to the administrative hearing has no bearing on the instant controversy whatsoever. Moreover, the legislature should be given the

benefit of the statute that they enacted. This court has stated that where the intent is unclear, the intent of the legislature will prevail over the literal sense of meaning, and when words are not explicit, the intention is to be determined from the context of the statute. Rowley v. Public Service Commission, 112 Utah 116, 185 P.2d 514 (1947). By placing § 41-3-26 with its "appeal by filing an original action" language in context with the other provisions of the chapter dealing with such proceedings it becomes clear that the intent of the legislature was to provide a review of the record to determine the lawfulness of the administrative action.

POINT III

AS THE INSTANT PROCEEDING IS A
REVIEW OF THE RECORD OF AN
ADMINISTRATIVE PROCEEDING, THE
FACTS BEFORE THIS COURT ARE THE
FACTS AS THEY EXISTED ON THE
DATE OF THE HEARING BEFORE THE
ADVISORY BOARD

As was established in Point II, supra, the proceeding before this court, at this time is in the nature of a review and not a true trial de novo. Therefore, it becomes incumbent upon this court to determine whether the administrative body properly disposed of the matter. As was noted in Point II, Utah Code Ann. § 41-3-8, expressly gives convictions for violations of the motor vehicle code, applicable to dealers, as grounds for refusing a license to a prospective applicant. It seems clear that the relevancy of the conviction to the

denial of a license is the fact that the applicant has demonstrated a lack of regard for the very rules he promises to uphold if a license is issued to him. In short, the individual's character is at issue and in doubt.

With all this in mind, a rule of law established in Peterson v. Livestock Comm'n, 120 Mont. 140, 181 P.2d 152 (1947), is proffered by appellant as applicable to the case at hand. 2 Am. Jur. 2d Administrative Law § 757 cites Peterson for the proposition that changes in law subsequent to an administrative order should not affect the consideration of the administrative decision on appeal, i.e., the court on appeal should apply the substantive law in effect when the agency made its order. The Peterson court reasoned:

"It is our conclusion that since the function of the court on appeal is simply to determine whether the commission acted properly and according to law, the court in determining that question must apply the law in effect when the commission acted." 181 P.2d at 157.

Appellant submits that the reasoning of the Peterson court correspondingly mandates that the facts as they existed when the commission acted, are the facts that the reviewing court looks at on appeal from a decision of the administrator of the Motor Vehicle Business Administration.

The Utah Supreme Court adopted this basic rule in Archer v. Utah State Land Board, 15 Utah 2d 321, 392 P.2d 622, 624 (1964) when it stated:

"[O]rdinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint."

The court made this statement in response to an argument that a change in law between the filing of an original complaint and an amended complaint divested the court of jurisdiction. For an additional situation wherein a court applied this principle to a change in fact situation see Heldenbrand v. Montana St. Bd. of Reg. for P.E. & L.S., 147 Mont. 271, 41 P.2d 744 (1966).

Appellant simply urges the court to review the action of the administrator in that context.

CONCLUSION

The trial court erred when it substituted its judgment for that of the administrative body because the court only had jurisdiction to review the propriety of the administrative order. The expungement of Mr. Noren's convictions should have been of no concern to the court in any capacity in which it heard the case because the convictions are always admissible as to the issue of an individual's character and corresponding fitness to hold a public license. Appellant asks this court to reverse the lower court so as to sustain the decision of the Administrator of the Utah State Motor Vehicle Business Administration.

Respectfully submitted this 7th day of September, 1979.

ROBERT B. HANSEN
Attorney General

Mark K. Buchi

MARK K. BUCHI
Assistant Attorney General