

1980

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

Utah Supreme Court

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David M. Bown; Attorney for Petitioner-Respondent;

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

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| The New and Used Motor Vehicle |) | Case No. 16521 |
| Dealer's License, DICK and LAVONNE |) | |
| NOREN, dba Central R.V. Sales |) | |

PETITIONER

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY

HONORABLE ERNEST F. BALDWIN, JR., PRESIDING

DAVID M. BOWN
44 Exchange Place
Salt Lake City, Utah 84111

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

ROBERT B. HANSEN
Attorney General

MARK K. BUCHI
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

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

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ROBERT B. HANSEN
Attorney General

MARK K. BUCHI
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent-
Appellant Administrator of
The Utah State Motor Vehicle
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IN THE SUPREME COURT OF THE STATE OF UTAH

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| IN THE MATTER OF: |) | |
| |) | |
| The New-Used Motor |) | |
| Vehicle Dealer's License, |) | Case No. 16521 |
| DICK and LAVONNE NOREN, dba |) | |
| Central R.V. Sales |) | |

STATEMENT OF THE CASE

Petitioner--Respondent seeks affirmance of a decision of Third Judicial District Court, State of Utah, ordering the respondent-appellant, Administrator of Motor Vehicle Business Administration, to grant the application of petitioner -respondent 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 according to statute providing for an "original action" after appeal from a decision of the Administrator denying the application for a New-Used Motor Vehicle Dealer's License.

RELIEF SOUGHT ON APPEAL

Respondent seeks the affirmance of the Third District Court decision ordering the Administrator of Motor Vehicle Business Administration to forewith grant the application of respondent for a New-Used Motor Vehicle Dealer's License.

STATEMENT OF FACTS

On January 2, 1979, the respondents filed with the Motor Vehicle Business Administration Office an application

for a New-Used Motor Vehicle Dealer's License with a \$20,000.00 Corporate Surety Bond, and all the building clearances, county licenses, building inspection permits, etc., required by statute. Furthermore, respondent filed a record of Dick Noren's prior conviction record which at that time included convictions for the misdemeanor offenses, Failure to Deliver a Certificate of Title in 1958 and for Acting as a New-Used Motor Vehicle Dealer Without a License in 1977.

On January 28, 1979 the Administrator of the Motor Vehicle Business Administration notified respondent, Dick Noren, of his intent to deny respondent the requested license specifically listing as the reason for his action the two prior convictions. On March 12, 1979, a hearing was held before the Advisory Board of the Utah State Vehicle Business Administration, and on March 15, 1979, the Advisory Board recommended the Administrator deny respondent the license. The Administrator adopted the Advisory Board's findings of fact and ordered that no Motor Vehicle Dealer's License be issued. (TR. 16)

On April 10, 1979, the Honorable Raymond F. Uno granted Mr. Noren's motion to set aside his convictions and to dismiss and to discharge them pursuant to Section 77-35-17, Utah Code Annotated, (1953).

The respondent, on April 16, 1979, pursuant to 41-3-26, Utah Code Annotated, (1953), appealed the decision of the Administrator and petitioned the court for an original action (TR 2).

The Administrator sought summary judgment before the

Law and Motion Judge for the Third District Court. An affidavit was filed to contest the summary judgment motion, arguments were heard, and thereafter the motion to grant summary judgment was denied (TR. 12). The matter then proceeded to trial. On May 31, 1979, the Third District Court issued findings of fact and conclusions of law and ordered the Administrator of the Motor Vehicle Business Administration to grant respondent's the license that they originally sought.

POINT I

THE TRIAL COURT RULED CORRECTLY IN HOLDING THAT THE RESPONDENT'S PRIOR CRIMINAL CONVICTIONS WHICH HAD PREVIOUSLY BEEN SET ASIDE BY THE CONVICTING COURT, THE ACTIONS DISMISSED AND THE RESPONDENT DISCHARGED PURSUANT TO §77-35-17, UTAH CODE ANNOTATED (1953 AS AMENDED), WERE NOT ADMISSABLE AS "CONVICTIONS OF THE PROVISIONS OF THE MOTOR VEHICLE ACT" UNDER §41-3-8 (3) (a) AND (b).

It is submitted that §77-35-17, Utah Code Annotated (1953 as amended) is an "expungement" statute, which restores the criminal offender to his status quo ante thereby removing all evidence and the very existence of the prior conviction.

§77-35-17 provides that the Court may upon its own motion, "terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant." This Court has twice stated that the effect of the statute is to "expunge" the record of a conviction. See State v. Schrieber, 121 Utah 653, 245 P.2d 222 (1952); State v. Chambers, 533 P.2d 876, 878 (1975).

Mr. Justice Maughan in Chambers, at 878, wrote as follows: "The word 'expunge' properly describes a physical act not a legal one, (footnoting to Schriber, supra). However, in relation to §77-35-17, it has become fastened in our law by decision and practice as descriptive of what the Court can do under that statute. In this sense, it is expressive of cancel, revoke, set aside."

Other authorities certainly concur with Mr. Justice Maughan's statement. In LEGAL RIGHTS OF THE CONVICTED, Kerper & Kerper (1974) "the word expungement means to erase. The purpose of expungement statutes is to erase a criminal record as if it never happened in the first place."

In State v. Miller, 520 P.2d 1248, 1253 (1974) the Kansas Supreme Court said: "It may be stated that annulment of conviction statutes, often called expungement statutes, do not merely lift disabilities resulting from conviction and restore civil rights; they have the legal effect of restoring the reformed offender to his status quo existing prior to the conviction." See also, U.S. v. MacLeod, 385 F.2d 734, 750 (5th Cir. 1967) wherein the 5th Circuit Court ordered the District Court to expunge the record and to "return the individuals to their status quo ante."

In Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 Wash. L.Q. 147, 149, it was observed, "It is rather a redefinition of status; a process of erasing the legal event of a conviction or adjudication and thereby restoring to the regenerate offender the

Another authority states "expunge" means "to obliterate or to make void and of no effect." Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool, 13 Washburn L.H., 93, 94.

The appellant argues in Point I that §77-35-17, Utah Code Annotated (1953 as amended), does not "obliterate the record." In so doing he relies on certain dicta in State v. Chambers, supra, upon an observation of the authors of Legal Rights of the Convicted, relating to the admission of character evidence before an administrative body and two California cases upholding administrative license revocations.

In State v. Chambers, supra, the Court in addressing itself to the appellant's argument that Section 77-35-17.5 impliedly repealed or amended Section 77-35-17, distinguished the two statutes saying: "Proceeding under this statute the Court cannot seal the record, restrict its inspection, nor bring into operation circumstances which would allow response to inquiries relating to a conviction of crime, as though the conviction never occurred (all of which were statutorily provided for in §77-35-17.5). The Court can terminate the sentence, set aside a defendant's plea of guilty, the conviction, dismiss the action and discharge the defendant. The Court can also direct that copies of the order be dispatched to appropriate agencies--this the Court can do in aid of its order, that it may have its intended effect."

It is submitted that the distinctions between the two

statutes cited by the Court do not therefore require that the evidence of the convictions (which have been "cancelled, revoked and set aside") was admissable before the trial court. Rather is is submitted that the distinctions cited are largely a matter of procedure with the same resultant effect. That is to say that although the respondent herein, after the expunging of his convictions under §77-35-17, may not answer as he could under §77-35-17.5 that he had never been convicted of the offenses in question, he could nevertheless answer truthfully, that although he had been convicted of the offenses, that the convicting court had set aside the conviction, had dismissed the action and had discharged him and that therefore his conviction(s) do not now exist. On analysis, although there are procedural differences between the two statutes as to how the "physical act" of expungement is achieved, there seems to this writer to be only one basic difference between the statutes, this relating to the "secrecy protection" afforded under §77-35-17.5, which was obviously intended by the Legislature to hamper discovery of the "expunged conviction" by an inquiry to the public record. (although the Court could, by ordering the appropriate agencies to return all documents, etc., relating to the conviction, accomplish a practical "sealing" of the records). The respondent herein, does recognize that difference between the statutes. However, it is submitted that it does not follow that as appellant argues, that since the conviction is discoverable by inquiry to the public record or through the testimony of

he respondent himself, that the conviction is therefore admissible as herein even though the conviction has been set aside, dismissed and the respondent discharged therefrom.

As to the appellant's citation to the 1974 Kerper & Kerper book, Legal Rights of the Convicted, for the proposition that "expunged convictions" are admissible as "character evidence" before an administrative tribunal who have not been confined to the rules of evidence, arguing therefrom that the trial court herein who obtained its original jurisdiction by the same statute should therefore not be confined to its own rules of evidence. Arguments relating to the original jurisdiction issue will be presented more fully in a later Point. It is submitted, however, that the very nature of the trial court's jurisdiction distinguishes its procedural rules from that available to an administrative tribunal and it is argued therefore that the court's rules of evidence would not allow admission of the expunged conviction as it does not now exist.

The appellant cites to two California cases, Meyer v. Board of Medical Examiners, 34 Calif. 2d 62, 206 P.2d 1085 (1949) and In Re Phillips, 17 Calif. 2d 55, 109 P.2d 344, (1941), as specific examples wherein courts have upheld license revocations or denials "despite the fact that the basis for the denials (criminal convictions) were pardoned or set aside." (Appellant cited both cases as Colo(rado) cases in his brief--Respondent has concluded that this was merely a typographical error and not an attempt to mislead the Court). It is submitted that both of the

cases are so distinguishable from the instant cases so-as-to make them valueless as precedent in this case.

In In Re Phillips, supra, the California court upheld the disbarment of an attorney whose sentence had been "lifted" by serving a probationary term. The case did not, as herein, involve the statutory "expungement" of a conviction, but rather only the serving of a term of probation. Respondent agrees with the legal proposition announced in In Re Phillips, supra, but submits that because it does not purport to deal with expungement of a conviction, it has no precedent value herein.

In Meyer v. Bd. of Examiners, supra, the California court upheld the doctor's medical license revocation, even though the conviction was set aside following a probationary period. The doctor had argued that the (California) law announced in People v. MacKay, 203 p. 135, 138 (Calif. 1922) which had interpreted the then existing "expungement statute" "to place the defendant in a position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him." The respondent countered and the court so held that the very statute upon which the doctor relied for setting aside of his conviction was not an "expungement" statute (as herein) in that it had an expressed proviso that "makes the conviction (although set aside) to count against the defendant under prior conviction statutes (similar to our Habitual Criminal statute), or if it is offered for impeachment purposes in a subsequent prosecution." Meyer, 206 P.2d at

1088. The court expressly held that the statute involved therein was not an "expungement type statute" as herein, State v. Chambers, supra, and therefore is not precedent herein. Furthermore, the Meyers rationale is not now the state of the law in California that same having been repudiated in Loder v. Municipal Court for S.D. Jud. Dist., 553 P.2d 624, 635 (Calif 1976) which prohibited "the prior practice whereby the State and local agencies denied or revoked a business or professional license on the ground that a record of arrest or conviction demonstrated lack of good moral character."

The respondent submits that Mr. Justice Maughan's majority opinion in State v. Chambers, supra, has definitively ruled that §77-35-17 is an expungement type statute and that the respondent herein has therefore been restored to his status quo ante. However, in the event this Court sees fit to re-examine this proposition, the respondent makes the following argument in favor of the Chambers position.

In a problem of statutory interpretation, the Court should look to the purpose for which a statute is enacted to determine if it is applicable in a given situation. Young v. Barney, 433 P.2d 846 (Utah 1967). In Rowley v. Public Service Comm., 185 P.2d 514, 521 (Utah 1947) this Court stated that where the words are not explicit, the legislative intention is to be collected. . . "from the occasion and necessity of the laws from the mischief felt and the remedy in view. . . "

In this regard it is argued that the major reason a person

would have his record expunged is to renew his opportunity for employment or professional licensing. Expungement in Ohio, Assimilation into Society for the Former Criminal, 8 Akron Law Review 480, 490 (1975). To interpret §77-35-17, Utah Code Annotated (1953 as amended) as appellant herein argues would be to remove from the statute the very purpose and remedy it was intended to provide. If that were not the legislative intent, the legislature could have, as California did in the Meyers v. Bd. of Medical Examiners, *supra*, situation specifically provided that the remedy provided by §77-35-17 did not apply to licensing situations. That the Utah Legislature did not so provide is further argument for respondent's position herein.

The Kansas Supreme Court has analyzed the situation argued herein in holding the Kansas expungement statute was enacted for the purpose of relieving offenders from

the social and economic stigma resulting from criminal convictions and to offer them an added incentive to conform to social norms and to participate in our society without the added burden of a criminal conviction. An annulment of conviction (expungement type) statute is an aid to an ex-offender in recognition of the fact that ex-offenders need the understanding and respect of others--not their scorn and ill will. Such statutes are based on the philosophy that fallen men can rise again and should be helped to do so.

The Miller Court also noted that employment "perhaps as much as anything else influences a man's concept of himself and his worth, and accordingly influences the values which guide his conduct." See also Gough, The Expungement of Adjudication

Record..., supra, at 153.

It is submitted that only by interpreting §77-35-17 as wiping out the record of the conviction and returning the offender to his status quo ante is the purpose sought to be accomplished by the act fulfilled. The statute itself lays down specific procedural guidelines before an offender's record may be expunged, which includes the offender proving to a judge of the convicting court that he has proved himself deserving and ready to re-enter society. It should further be noted that these procedural guidelines clearly include an appeal from the decision of the convicting court to "expunge" if the court acted in excess of its discretionary powers. It is further noteworthy that no such appeal was pursued by the appellant herein. It is therefore submitted that the legislative purpose in enacting §77-35-17 Utah Code Annotated (1953 as amended), should be recognized and this Court should uphold the decision of the court below.

POINT II

THE TRIAL COURT RULED CORRECTLY IN GRANTING JUDGMENT FOR RESPONDENT IN AS MUCH AS SECTION 41-3-26 UTAH CODE ANNOTATED (1953) PROVIDES FOR AN ORIGINAL ACTION, WHICH IS A TRIAL de NOVO, AND THE APPELLANT WAS UNABLE TO PRESENT ANY EVIDENCE OF A VALID CONVICTION AS REQUIRED BY STATUTE.

Section 41-3-27, Utah Code Annotated, (1953), provides that "Should the applicant for a license or a license holder desire to appeal from the decision of the Administrator, he shall, ... file an original action in the District Court,...

its enactment, this court defined "original jurisdiction" as found in the Utah Constitution, Article VIII, Sec. 7. In State v. Johnson, 114 P.2d 1034 (1941) this court considered the question of whether the Utah Constitution required all criminal actions be first brought at the District Court level or whether the action may be brought upon appeal, according to the statutory plan, from an inferior court. The Utah Supreme Court states:

Original jurisdiction as contradistinguished is the right to hear the cause, to make its own determination of the issues from the evidence as submitted directly by the witnesses; or of the law as presented, uninfluenced or unconcerned or limited by any prior determination, or the action of any other court juridically determining the same controversy. Original jurisdiction as here used means the right of the court to make its own record, its own finding and determination. An original determination is one previously made. It is original in the sense that it stands alone upon its own base, not the outgrowth of some other. State v. Johnson, 114 P.2d at 1037. See also, Hakke v. Faux, 396 P.2d 867 (1964).

The Court further noted that the "purpose and effect of a trial de Novo on appeal was the invoking of original, as distinguished from appellate jurisdiction," Johnson, 114 P.2d at 1037. Aside or as part of the definition of original jurisdiction, the Court defined an "original judgment" and an original hearing" as follows:

Each judgment of the district court when first entered after trial is an original judgment, even though the cause may have been previously tried and a new trial granted. Each hearing which starts from "scratch" and permits the parties to produce all available proper evidence on all of the issues is an original hearing

before the court,--one unfettered, unlimited, or unconfined by the hearing had before any other court or tribunal. (emphasis added) State v. Johnson, 114 P.2d at 1038.

Other courts and authorities have likewise defined an "original action" or a "trial de Novo" as requiring a new trial, where the evidence is heard "as if it had never been heard before," in accordance with the traditional understanding. See 2. Am. Jur. 2d, Administrative Law, Sec. 698, 597. The definition of a classic de Novo review was stated by the Arizona Supreme Court in Herzberg v. State Ex Rel. Humphrey, 513 P.2d 966.969 (Arizona 1973).

When we consider a de Novo review without statutory limitations of any kind, that is, a classic de Novo reconsideration, the proceeding loses most of its character as a review, and is heard the same as though it were an original proceeding upon evidence introduced in the reviewing court, and with the reviewing court making an entirely independent determination unfettered by presumptions created by the decision of the administrative agency.

Appellant cites an Arizona case, Sulgar v. Arizona Corp Commission, 423 P.2d 145 (Arizona 1967) as authority for interpreting a de Novo hearing required by statute more narrowly (see brief of Appellant at 14). In Herzberg, 513 P.2d at 969, the Arizona Supreme Court noted that the limited scope of review required in Sulgar was applicable only when the statute explicitly granted a de Novo review and placed other restrictions upon the scope of review. It should be noted that the Arizona Supreme Court, interpreting the Arizona licensing statutes has

found the statutes require a "classic de Novo reconsideration." Herzberg, 513 P.2d at 969. In the present case the statute merely provides for an "original action" and does not contain any further restrictions on the scope of review. Therefore, the standard applied in Herzberg is applicable to the present case and requires a de Novo hearing.

The other cases cited by appellant to support the argument that a very narrow interpretation of a de Novo hearing is required are distinguishable on their facts because these cases concern the scope of review where a de Novo hearing was not required by a statute. Furthermore, appellant fails to distinguish the cases upon whether the administrative agency acted in a quasi-judicial or a legislative fashion. See 2 AM Jur 2d, Administrative Law, See 699, 600. The latter distinction will be discussed infra. Central Bank and Trust Co. v Brimhall, 497 P.2d 638 (Utah 1972) and Denver and Rio Grande Western v. Central Weber Sewer Improvement District, 287 P.2d 884 (Utah 1955) are both cases where statutes did not grant a trial de Novo or "original action" upon appeal from the administrative agency. See Denver and Rio Grande Western Co. v. Central Weber Sewer, 287 P.2d 887 wherein the court stated, "nor do we agree with the utilities that the act contemplates a trial de Novo." Appellant cites Denver and Rio Grand Western for the proposition that a trial de Novo is appropriate only in limited circumstances. Clearly, this is correct where the statute itself does not grant one. The United States Supreme Court

cases cited in appellant's brief, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814 and Camp v. Pitts, 411 R.S. 138 13 S. Ct. 814 (1971) are to the same effect. Indeed, these cases concern the scope of review from an informal administrative hearing where traditionally the scope of review has been most limited. See 3 Davis, Administrative Law, §16.09, 330, 331. See also, Nat'l Coal Operators Assn. v. Kleppe, 423 U.S. 388 (1976), noting that a de Novo hearing must be granted where the statute in question has provided for one.

United States v. District Court, 238 P.2d 1132 (Utah 1951) did involve a statute that provided for a trial de Novo. At page 1135 this Court held that the district court could not declare any rights or decide any issue that the administrator, under the terms of the statute, could not. It seems undeniable that in the present case when the court below decided the issue of whether there was any evidence the respondent had ever been convicted, he was deciding the same issue as that decided by the Administrator. This court at 1135, further stated, "The trial in the district court should be a trial de Novo, and limited to the particular question decided by the state engineer. Of course this does not mean that the evidence in the case or the decision of the district court would be the same as that of the engineer."

The final argument raised by appellant for refusing to give to 41-3-26, Utah Code Annotated, the clear meaning the words "original action" show the legislature intended, (See Salt Lake

City, Salt Lake County, 433 P.2d 846, 20 Utah 2d 108 (1967)), is based on Article V Sec. 1 of the Utah Constitution, which requires that the Utah Courts perform only "judicial functions." However, a court of law, engaged in finding facts and applying law, is engaged in the very essence of the judicial function. See Francisco v. Bd. of Directors of Bellevue Public Schools 537 P.2d 789 (Wash. 1975). It is only when the administrative agency is exercising "discretion" given to the agency by the legislature, that a court is barred by the separation of powers or functions doctrine from acting de Novo. 3 Davis Administrative Law, 542, §29.09. It is relevant that the United States Supreme Court when interpreting the Administrative Procedure Act. 5 U.S.C.A. §701 (a), stated that the "committed to agency discretion exception to judicial review is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

Appellant is basically arguing that a de Novo review of an administrative agency is per se unconstitutional. He cites no authority to support his point. Indeed, the holding of Peterson vs Livestock Comm., 181 P.2d 152, 156, (Mont. 1947), from which appellant quotes extensively, was that the District Court was correct in reversing the Commission as a matter of law, and it was not a matter of agency "discretion."

If the administrative agency is engaged in a quasi-judicial function, "according to the subject matter of the admin-

istrative review confronting the court in a particular case," (emphasis added) Floyd v. Department of Labor and Industries, 269 P.2d 563, 568 (Wash. 1954), a trial de Novo is not unconstitutional as an attempt to delegate a legislative function. As stated by the Washington Supreme Court in Floyd, 269 P.2d at 568:

It is apparent both from the decided cases and from the text books that the scope of judicial review of the actions of administrative agencies does vary with the subject matter of the review or the function of the agency. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67, 53 L.ed 150; Crowell v. Benson, 285 U.S. 23, 52 S. Ct. 285, 76 L.ed. 598; Uhler, Review of Administrative Acts, 178.

To support appellant's position, it would have to be shown that the Administrator was acting legislatively, not quasi-judicially, when he ruled, solely on the basis of section 41-3-8, Utah Code Annotated, (1953) and his findings of fact, that appellant should be denied a license. The Administrative Procedure Act, 5 U.S.C. §551, defines "adjudication" to include licensing.

The tests for determining whether the Administrator is acting in a judicial or legislative manner are stated in Floyd v. Department of Labor Industries, and Francisco v. Bd. of Directors, 537 P.2d 789, 792 (Wash. 1975). The Court in Francisco, at 793 stated "a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." See also

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S. Ct 67,69 (1908) and Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915). The determination of whether appellant had ever been "convicted" is a past fact and the effect of 41-3-8 and 77-35-17, Utah Code Annotated, are assuredly, statutes in existence. Another test laid down in Francisco is that a "judicial function resembles what courts customarily do." See 3 Davis, Administrative Law Treaties, 390, 395 §24.02. Under this test the court in Francisco determined the administrator acts quasi-judicially when he is "required to investigate facts, or ascertain the existence of a fact." Black's Law Dictionary (4th ed 1968). In the present case, the entire basis of the Administrator's decision was a finding of fact. In light of the actual issue involved in the present case, no discretionary or legislative functions can be found to have been thrust upon the District Court; therefore, no constitutional question of delegation of functions arises.

The Administrator based his decision entirely on the existence of records of convictions. In the "original action" or trial de Novo, the decision of the district court had to be based on evidence introduced before the court. The Administrator had the burden of coming forward with evidence of any record of a conviction. He could not rely on his own findings of fact as "evidence" to support his contention. His evidence was not refused; none was submitted.

The expungement statute, 77-35-17 Utah Code Annotated, does have the effect of wiping out "canceling, revoking, setting aside," the record. See State v. Chambers, 533 P.2d 876, 878 (Utah 1975). The petitioner, having shown the record had been expunged, thereby further proved the nonexistence of a record of conviction and that no record of conviction could be proved to have existed. The findings of fact the District Court makes must be supported by evidence introduced at the trial de Novo. The appellant simply did not and could not support his contention that appellant had ever been convicted, and, therefore, the court below was correct in a ruling as a matter of law for the Respondent.

POINT III

WHETHER OR NOT THE PROCEEDING BELOW WAS A TRIAL DE NOVO OR MERELY A REVIEW OF THE RECORD, THE DISTRICT COURT COULD HEAR NEW EVIDENCE IF HE THOUGHT "JUSTICE REQUIRED" UNDER RULE 65 B, UTAH RULES OF CIVIL PROCEDURE, AND REVERSE THE ADMINISTRATOR'S DECISION.

In Denver and R.G.W.R. Co. v Central Water Denver, 287 P.2d 884, 886 (Utah 1955) the Utah Supreme Court held that even where the statute does not provide for a trial de Novo, the court may receive, examine and weigh evidence. In Peatross v. Board of Commissioners of Salt Lake City, 555 P.2d 281, 284 (Utah 1976) this court held that a review of an administrative agency is by extraordinary writ, under Rule 65 B. This court further noted that Rule 65 B is "in the nature of a proceeding

in equity," and that the District Court "could take evidence if it thought that the interests of justice so required. See Denver and R.G.W.R. Co. v. Central Weber Imp. Dist., " Peatross 555 P.2d at 284. See also Child v. Salt Lake City, Civil Service Commission, 575 P.2d 195 (Utah 1978).

The above cited cases establish that the court below was acting within his discretion in hearing the evidence that respondent's record had been expunged. Appellant denies that the reviewing court could take into consideration a change of underlying facts citing Archer v. Utah State Land Board, 392 P.2d 672 (Utah 1964); and Peterson v. Livestock Comm., 181 P.2d 152 (Mont. 1947). The courts in both cases held that an administrative agency cannot find an applicant ineligible for a license or a lease upon the basis of a statutory amendment to the administrative scheme that has not yet taken effect. This holding would be applicable in the present case only if the statute in question, 41-3-8, Utah Code Annotated (1953), had been amended with an effective date in the future and one of the parties, upon appeal, was arguing for the application of the amendment.

Appellant in his brief argues that if the court below was engaged in a trial de Novo, then he was correct in reversing the Administrator, otherwise the court was bound to uphold the Administrator (See Appellant's Brief at 9). The latter argument, that the court could not reverse the Administrator upon review after hearing the evidence of a change in the underlying facts, is

incorrect. The Administrator based his decision upon the existence of the convictions. The court ruled as a matter of law that the effect of 77-35-17, Utah Code Annotated, (1953) was to remove the convictions and any evidence of them and to return respondent to his status quo ante, therefore, he was no longer "convicted" under terms of 41-3-8 (3) (a), Utah Code Annotated (1953).

An administrative determination of a question of law is not binding upon the reviewing court. In review of the determination, the court may exercise independent judgment, 2. Am. Jur 2d §626, 555. The appellant points to the language of Central Bank & Trust Co. v. Brimhall, 497 P.2d at 641. Mixed questions of law and fact are often treated as a question of law by the court where no special latitude is given the Administrator. 2 Am. Jur. 2d, Administrative Law §670, 539, 3 Davis, Administrative Law Treatise §30.05, 551.

The determination of the effect of 77-35-17, Utah Code Annotated, (1953) is a matter of statutory construction and determination of law. It does not call for the expertise of the agency. The court is the expert on matters of statutory interpretation. State v. The Aleut Corporation, 541 P.2d 730, (Alaska 1975) FCC v RCA Communications, 346 U.S. 86, 73 S. Ct 998 (1953). In Muklak Freight Lines, Inc. v. Nabors Alaska Drilling, Inc., 516 P.2d 408 (Alaska 1973) the Alaska Supreme

Court stated:

The controlling factors in this case weigh heavily against application of the reasonable basis test to the issues now under consideration. Those issues appear to have little to do with the Commission's expertise or particularized knowledge. Instead they concern constitutional and statutory interpretations requiring the special competency of the courts.

See also 3 Davis, Administrative Law, §30.06, 552 noting that the courts, and not the agencies, are the experts on matters of common law, statutory interpretation, and "problems transcending the particular field of the agency."

The court in the present case did not need to give deference to a finding of fact of the Administrator. The court determined the effect of the expungement statute, 77-35-17, Utah Code Annotated upon the facts as existed before the Administrator. In holding as a matter of law that 77-35-17, Utah Code Annotated, removed the fact of the convictions and that there was no longer any record to support finding a "conviction" under 41-3-8 (3) (a), Utah Code Annotated, the court was entirely within its authority and could make an independent judgment.

CONCLUSION

The trial court ruled correctly in overturning the decision of the Administrator to deny the license in question, the prior decision being based on the prior convictions of respondent which were "expunged" by the convicting court in the interim.

The trial court's decision was correct whether the "original action" was in the nature of a trial de Novo or a review of administrative decision. Respondent asks this court to affirm the trial courts decision to grant the license in question to respondent.

Respectfully submitted this _____ day of _____,
1980.

DAVID M. BOWN
Attorney for Respondent