

1989

Wyllis Dorman-Ligh v. State of Utah, Utah Higher Education Assistance Authority : Petition for Rehearing

Utah Court of Appeals

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Recommended Citation

Legal Brief, *Dorman-Ligh v. Utah*, No. 890482 (Utah Court of Appeals, 1989).

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DOCKET NO. _____ IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

WYLLIS DORMAN-LIGH,	:	
	:	
Defendant/Appellant,	:	
	:	COURT OF APPEALS NO. <u>890482-CA</u>
-v-	:	TRIAL COURT NO. <u>86-89411-CV</u>
	:	
STATE OF UTAH, UTAH HIGHER	:	
EDUCATION ASSISTANCE AUTHORITY,	:	
	:	
Plaintiff/Respondent.	:	

PETITION FOR REHEARING

Appeal from a Judgment of the Third Circuit Court, State of Utah,
Salt Lake County, Salt Lake Department, Honorable Dennis M. Fuchs

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ARGUMENT PRIORITY CLASSIFICATION: 14b

OCT 5 1990

Mary T. Fournier
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

WYLLIS DORMAN-LIGH,	:	
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-v-	:	COURT OF APPEALS NO. <u>890482-CA</u>
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TABLE OF CONTENTS

Table of Authorities	ii
Jurisdictional Authority	1
Issues on Appeal	1
Statement of the issues presented for rehearing	
Summary of Arguments	3
Conclusion	5
Mailing Certificate	7
Addendum	
Cases Cited	a
Utah Statutes	b

TABLE OF AUTHORITIES

Cases:

<u>Milne Truck Lines, Inc. v. Public Service Com'n. of Utah</u> , 707 P.2d 675 (Utah 1986)	4
<u>Milne Truck Lines, Inc. v. Public Service Com'n. of Utah</u> , 720 P.2d 1373 (Utah 1986)	4
<u>State Dept. of Community Affairs v. Utah Merit System Commission</u> , 614 P.2d 1259, 1262 (Utah 1980)	2,4,5,6
<u>State, Dept. of Social Services v. Higgs</u> , 656 P.2d 998 (Utah 1982)	6
<u>Vance v. Forham</u> , 671 P.2d 124 (Utah 1983)	5

Statutes:

Utah Code Ann. Title 53B (Replacement 1987)	3
Utah Code Ann. Sec. 53-47c-1 thru 9 (Supplement 1985)	1,2,4,6
Utah Code Ann. Sec. 53-47c-9 (Supplement 1985)	1,3
Utah Code Ann. Sec. 53B-14-101 thru 109 (Replacement 1987)	1
Utah Code Ann. Sec. 63-46-13 (Supplement 1978) (Repealed 1985)	1,4
Utah Code Ann. Sec. 78-2a-3(2)(d) (Replacement 1987)	1

JURISDICTIONAL AUTHORITY

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. Sec. 78-2a-3 (2)(d) (Repl. 1987). Further, under RULE 35 appellant may petition the court for a rehearing if appellant feels the court has overlooked or misapprehended points of law or fact. This petition is presented in good faith and is not for delay; and, appellant requests an answer to the petition for hearing.

ISSUES ON APPEAL

Statement of the issues presented for rehearing.

Appellant feels the court has neglected the points of law and fact presented in previous briefs and in the oral argument before the court. Appellant further states that the issue of whether or not the borrower owes the alleged initial amount of \$7,500.00 is not the issue at hand, as this is not disputed, but that the State of Utah Higher Assistance Authority, hereafter to be known as the UHEAA, failed to properly carry out statutory laws as to the Collection of Student Loans (CSL) Utah Code Ann. Sec. 53-47c-1,2,4, 5, 7 and 9 (Enacted 1982; Suppl. 1985) and to exhaust administrative remedies based on the CSL's Rules and Regulations as stated in Utah Code Ann. Sec. 53-47c-9 (Enacted 1982; Suppl. 1985).

During the oral argument before the court, the UHEAA's claim that the CSL statutory laws state 'may' rather than 'will' was only a smoke-screen to protect their errors; and, further the claim that the CSL statute is only to be used prior to placing of a tax lien against the defaulted borrower, is absurd. In fact, prior to placing a lien against the borrower, there must also be an abstract of an order of a hearing examiner. Further, to deny that administrative rules for hearings as required in CSL Utah Ann. Code Sec. 53-47c-9 (Supp. 1981) were not required by the State of Utah for the UHEAA is wanton misrepresentation. Utah Code Ann. Sec. 63-46-13 (Supp. 1978; Repealed 1985) states "Any state agency which has not previously submitted rules to the archivist or is otherwise not in compliance with the terms of

this act, shall do all things necessary to be in compliance .. on or before June 30, 1975. All rules which have been in use .. prior to June 30, 1975, shall continue in full force .." And based on State Dept. of Community Affairs v. Utah Merit System Commission, (614 P.2d 1259, 1262 (Utah 1980) the administrative rules of the UHEAA must conform to rather than be contrary and inconsistent with statutory law on the collection of student loans, and, cannot be ignored or followed by an agency to suit its own purposes. Therefore, the CSL statutory laws of the State of Utah must take precedence over the payment requirements of the Federal Government.

Borrower has never denied owing the loan monies in the amount of \$7,500.00. The question has continued to be how and when collection begins, what deferments are granted to one who is without funds, and, that the borrower felt the issues should have been argued in a hearing between the borrower and UHEAA prior to a court order. As stated in the Salt Lake Tribune article of Tuesday, August 28, 1990 ... "Many of the defaults could have been prevented if everyone involved in student loans --- students, post-secondary institutions, lenders, guarantee agencies and the federal and state governments --- had worked together." In the document filed with the court on the same day as the oral argument from the Federal Office of Postsecondary Education (FOPE) Sec. 682.410 it states that '... the agency shall institute a civil suit against the borrower for repayment of the loan, unless the agency determines, and documents in the borrower's file, that --- (B) The borrower does not have the means to satisfy a judgment on the debt, or a substantial portion thereof.' This provision requires the UHEAA make some effort to meet with the borrower to determine the above information and had an administrative hearing been held such information would have been revealed.

Borrower again requests that this matter be remanded to the UHEAA to be dealt with as suggested above in accordance with (1) the State of Utah CSL statutory law and administrative rules and regulations, (2) in determining

information as required by the U.S. FOPE, and, (3) in keeping with Education Secretary Cavazos recommendations that to eliminate defaults in student loans everyone involved 'must work together.' Plan May Cut Defaults on Student Loans, Salt Lake Tribune, Tues. Aug. 28.

SUMMARY OF ARGUMENTS

UHEAA's summary argument (p 6) states that appellant was not entitled to administrative remedies because Utah's Administrative Procedures Act (UAPA) did not take effect until January 1, 1988. Further that Chapter 14 of the Utah Code, Collection of Student Loans (CSL) did not take effect until April 27, 1987.

The first point of law or fact called into question by the petitioner is: How can the court continue to find for the UHEAA when throughout the court proceedings they neither followed the CSL or Utah Rule-Making Act (URMA) statutory laws of Utah in place prior to the start of the litigation because they were totally unaware of what those laws are?

The CSL was enacted in 1982 with changes made in 1985, and, was replaced in 1987 as follows:

Revision of Higher Education Law. -- Laws 1987, chapter 167 revised the state law relating to higher education, using provisions from former Title 53, Public Schools, and some sections from Title 63 to create a new Title 53B, State System of Higher Education, effective April 27, 1987. A table locating sections in Title 53B corresponding to those deleted from Titles 53 and 63 appears at the end of Title 53B.

Table of Corresponding Sections

Former Section	Present Section	Former Section	Present Section
53-47c-1	53B-14-101	53-47c-6	53B-14-106
53-47c-2	53B-14-102	53-47c-7	53B-14-107
53-47c-3	53B-14-103	53-47c-8	53B-14-108
53-47c-4	53B-14-104	53-47c-9	53B-14-109
53-47c-5	53B-14-105		

Similarly, under the CSL Utah Code Ann. Sec. 53-47c-9 (Supp. 1985) the statute specifically refers to the adoption of rules for the implementation of Sections

4 and 5, including rules for the conduct of hearings. There would be no provision for the promulgation of rules if the State of Utah had no administrative rules in place prior to 1988 when the UAPA went into effect. While it is true that the UAPA did not take effect until January 1, 1988, there were requirements for state agencies to have administrative rules in place as part of the Utah Administrative Rule-Making Act, Laws 1975 (ch 193) Sect. 63-46-13 (Supp. 1978) ...

... Any state agency which has not previously submitted rules to the archivist or is otherwise not in compliance with the terms of this act, shall do all things necessary to be in compliance with the terms of this act, on or before June 30, 1975. All rules which have been in use and practice by the state agencies prior to June 30, 1975, shall continue in full force and effect...

Therefore, failure by the UHEAA to follow statutory laws and administrative rules in effect prior to 1987 deprived the borrower of her rights to due process of law and if the decision of the lower court for judgment is affirmed by the Court of Appeals they become a party to allowing a state agency to neglect statutory law since as was stated by the court in State Dept. of Community Affairs v. Utah Merit System Commission, 614 P.2d 1259, 1262 (Utah 1980)

Administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by agency to suit its own purposes, and agency must be held to those regulations without compelling ground for not following them.

The second point of law or fact called into question by the petitioner is: since there were no adjudicative proceedings for the trial court to review, the court could not discharge its statutory duties within the law and protect appellant from the arbitrary and capricious administrative action of the UHEAA. In the cases Milne Truck Lines, Inc. v. Public Service Com'n. of Utah, 720 P.2d 1373 (Utah 1986) and 707 P.2d 675 (Utah 1985) the court determined

A court cannot discharge its statutory responsibility without making findings of fact on all necessary ultimate issues under the governing statutory standards. Therefore, in order for the court to perform its duty of reviewing agency's orders in accordance with established legal principles and to

protect parties and the public from arbitrary and capricious administrative action, the administrative agency must provide the court with complete, accurate and consistent findings of fact to show proper determination by the administrative agency toward the appellant. 720 P.2d 1373 (Utah 1986).

Findings of administrative agency should be sufficiently detailed to disclose steps by which ultimate factual conclusions or conclusions of mixed fact and law are reached to permit court to perform its duty of reviewing agency orders in accordance with established legal principles and protecting parties and public from arbitrary and capricious administrative action. 707 P.2d 675 (Utah 1985).

The third point of law or fact called into question by the petitioner is: since there were no adjudicative proceedings for the trial court to review, the court could not discharge its statutory duties to guarantee the petitioner's right to due process of law. Further the borrower's rights under the federal and state constitution were violated when she was denied her right to cross examine the UHEAA and/or its witnesses because of the failure of the administrative agency not to follow its statutory requirements for an administrative hearing.

In case ... at hearing his rights under federal and state constitution were violated because the administrative law judge failed to provide him with an opportunity to cross examine the division's witnesses at the hearing. It is the function of a court called on to review an order of an administrative agency to determine whether there has been due process of law. Vance v. Forham, 671 P.2d 124 (Utah 1983).

CONCLUSION

How then can the courts continue to find for the UHEAA when throughout the proceedings the UHEAA neither followed the Collection of Student Loans or Utah Rule Making Act statutory laws of Utah in place prior to the start of the litigation because they were totally unaware of what those laws are?

The borrower contends that she is being denied due process because the courts continue to allow the UHEAA to negate statutory laws while insisting that the borrower be held accountable for a debt without the mandatory administrative hearing to resolve heretofore stated dispute within the provisions of CSL Utah

Code Ann. Sec. 53-47c-5(2) and confirmed in State Dept. of Community Affairs v. Utah Merit System Commission, 614 P.2d 1259, 1262 (Utah 1980)

... All parties must be fully appraised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding...

Shouldn't the courts be protecting the rights of the borrower as well as the State of Utah. Appears that the courts are ignoring precedence established in State Dept. of Community Affairs v. Utah Merit System Commission, 614 P.2d 1259, 1262 (Utah 1980)

Administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by agency to suit its own purposes, and agency must be held to those regulations without compelling ground for not following them.

Since administrative rules and therefore administrative remedies were in place before this litigation was instigated under the Utah Administrative Rule-Making Act, Laws 1975 (ch 193) Sect. 63-46-13 (Supp. 1978) administrative remedies must first be exhausted before resort may be had to judicial review. State, Dept. of Social Services v. Higgs, 656 P.2d 998 (Utah 1982).

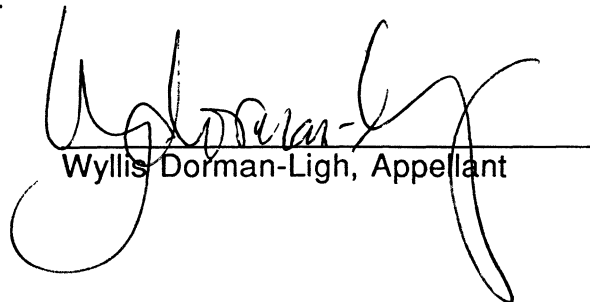
Therefore, since it is the duty of the court to require state agencies to follow statutory law and protect the appellant from any arbitrary and capricious action on the part of the plaintiff, petitioner asks this court to reverse the Summary Judgment of the trial court and remand this case back to the UHEAA for an administrative hearing as provided in CSL Utah Code Ann. Sec. 5 (Suppl. 1985) to resolve this dispute.

Had the UHEAA initially followed the statutory laws regarding Collection of Student Loans this dispute could have been equitably resolved and payment of the debt initiated through an administrative hearing without resorting to litigation in

keeping with recommendations outlined in Education Secretary Lauro Cavazos' handbook called Reducing Student Loan Defaults: A Plan for Action

... all those involved must accept a share of the blame for the student loan default crisis and take responsibility for resolving the problem. ... Many of the defaults could have been prevented if everyone involved in student loans --- had worked together. Plan May Cut Defaults on Student Loans, Salt Lake Tribune, Tues. Aug. 28.

Dated this 5th day of October 1990.

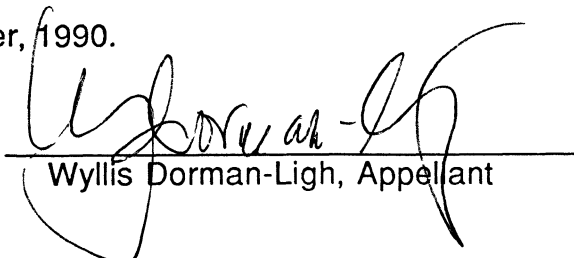

Wyllis Dorman-Ligh, Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing reply brief of appellant by depositing the same in the United States mail, postage prepaid to the following:

Jonathan K. Jensen, Asst. Attorney General
236 State Capitol
Salt Lake City, UT 84114

DATED this 5th day of October, 1990.

By 
Wyllis Dorman-Ligh, Appellant

CASES CITED

Milne Truck Lines, Inc. v. Public Service Com'n. of Utah, 707 P.2d 675 (Utah 1986) 4

Findings of administrative agency should be sufficiently detailed to disclose steps by which ultimate factual conclusions or conclusions of mixed fact and law are reached to permit court to perform its duty of reviewing agency orders in accordance with established legal principles and protecting parties and public from arbitrary and capricious administrative action.

Milne Truck Lines, Inc. v. Public Service Com'n. of Utah, 720 P.2d 1373 (Utah 1986) 4

A court cannot discharge its statutory responsibility without making findings of fact on all necessary ultimate issues under the governing statutory standards. Therefore, in order for the court to perform its duty of reviewing agency's orders in accordance with established legal principles and to protect parties and the public from arbitrary and capricious administrative action, the administrative agency must provide the court with complete, accurate and consistent findings of fact to show proper determination by the administrative agency toward the appellant.

State Dept. of Community Affairs v. Utah Merit System Commission, 614 P.2d 1259, 1262 (Utah 1980) 2,4,5,6

...Administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by agency to suit its own purposes, and agency must be held to those regulations without compelling ground for not following them.

... All parties must be fully appraised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding...

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Administrative remedies must first be exhausted before resort may be had to judicial review.

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In case ... at hearing his rights under federal and state constitution were violated because the administrative law judge failed to provide him with an opportunity to cross examine the division's witnesses at the hearing. It is the function of a court called on to review an order of an administrative agency to determine whether there has been due process of law.

UTAH STATUTES

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53-47c-4	53B-14-104	53-47c-9	53B-14-109
53-47c-5	53B-14-105		

Utah Code Ann. Section 53-47c-1 (Supplement 1985)

53-47c-1. Student loan delinquent or in default -- Authority of college, university or board of regents to collect.

If a national direct student loan or a student loan made pursuant to chapters 47 or 48 of title 53 is delinquent or in default, the state college, university, or board of regents responsible for collection of this loan may proceed under this act to collect the loan.

Title of Act. An act relating to collection of student loans; providing for notice of default; providing for a hearing; providing for appeals; providing a lien against tax refunds; providing for bonds; providing for rules and regulations; and providing an effective date. -- Laws 1982, Ch. 33.

Utah Code Ann. Section 53B-14-101 (Replacement 1987)

53B-14-101. Student loan delinquent or in default -- Authority to collect.

If a National Direct Student Loan or a student loan made under Chapter 11 or 12 of Title 53B is delinquent or in default, the state college, university, or board of regents responsible for collection of this loan may proceed under this chapter to collect the loan.

Utah Code Ann. Section 53-47c-2(1) and (2)(e)(g) (Supplement 1985)

53-47c-2. Mailing of notice of default -- Contents of notice.

(1) Upon default in payment of any student loan or any installment, thereof, the entity responsible for collecting the loan may send a notice, by certified mail, to the borrower at the borrower's last know address.

(2) The notice shall state:

(e) The right of the borrower to file a written response to the notice, to have a hearing, to be represented at the hearing, and to appeal any decision of the hearing examiner.

(f) The time within which a written response must be filed; and

(g) The power of the college, university, or board upon the failure of the borrower to respond or upon a decision of the hearing examiner adverse to the borrower, to obtain an order under this act ...

Utah Code Ann. Section 53B-14-102(1) and (2)(e)(g) (Replacement 1987)

53B-14-102. Mailing of notice of default -- Contents of notice.

(1) Upon default in payment of a student loan or an installment payment on a student loan, the entity responsible for collecting the loan may send a notice, by certified mail, to the borrower at the borrower's last know address.

(2) The notice shall state the following:

(e) the right of the borrower to file a written response to the notice, to have a hearing, to be represented at the hearing, and to appeal any decision of the hearing examiner.

(g) the power of the college, university, or board upon the failure of the borrower to respond or upon a decision of the hearing examiner adverse to the borrower, to obtain an order under this chapter ...

Utah Code Ann. Section 53-47c-4 (Supplement 1985)

53-47c-4. Hearing set after receipt of written notice -- Notice of hearing.

If a written response is received by the college, university, or board, a hearing shall be set within 30 days of the receipt of the response and written notice of the hearing mailed to the borrower at least 15 days before the date for the hearing.

Utah Code Ann. Section 53B-14-104 (Replacement 1987)

53B-14-104. Hearing set after receipt of written notice -- Notice of hearing.

If a written response to the notice sent under Section 53B-14-102 is received by the college, university, or board, a hearing is set within 30 days of the receipt of the response, and written notice of the hearing is mailed to the borrower at least 15 days before the date for the hearing.

Utah Code Ann. Section 53-47c-5 (Supplement 1985)

53-47c-5. Hearing examiner designated -- Representation at hearing -- Findings and order of examiner -- Continuance of hearing.

(1) The hearing shall be held before a hearing examiner designated by the college, university, or board who shall not be an officer or employee of the division or office of the college, university, or board responsible for collecting or administering student loans.

(2) The borrower and college, university, or board may be represented at the hearing by an attorney or other person, and may present evidence, exhibits, testimony, witnesses, and other material relative to the student, and payment and default thereof, as are relevant.

(3) The hearing examiner shall make specific written findings regarding the student loan, payments, default, and the balance due and shall enter a written order thereon. If the hearing examiner finds that there has been a default, the order shall state the fact of default and the balance due on the loan including interest, otherwise the order shall dismiss the claim of default of the college, university, or board.

(4) The findings and order of the hearing examiner shall be filed with the college, university, or board and copies mailed to the borrower within 10 days after conclusion of the hearing.

(5) The hearing may be continued by agreement of the parties and approval of the hearing examiner or upon order of the hearing examiner.

Utah Code Ann. Section 53B-14-105 (Replacement 1987)

53B-14-105. Designation of hearing examiner -- Representation at hearing -- Findings and order of examiner -- Continuance of hearing.

(1) The hearing under Section 53B-14-104 is held before a hearing examiner designated by the college, university, or board.

(2) The examiner may not be an officer or employee of the division or office of the college, university, or board responsible for collecting or administering student loans.

(3) The borrower and college, university, or board may be represented at the hearing by an attorney or other person, and may present evidence, exhibits, testimony, witnesses, and other material regarding the student loan, payments, and default as are relevant.

(4) The hearing examiner shall make specific written findings on the student loan, payments, default, and the balance due and shall enter a written order.

(5) If the hearing examiner finds the borrower has defaulted, the order shall state the fact of default and the balance due on the loan including interest. If the examiner finds no default, the order shall dismiss the claim.

(6) The findings and order of the hearing examiner are filed with the college, university, or board and copies mailed to the borrower within ten days after conclusion of the hearing.

(7) The hearing may be continued by agreement of the parties and approval of the hearing examiner or upon order of the hearing examiner.

Utah Code Ann. Section 53-47c-7(1)(2) (Supplement 1985)

53-47c-7(1)(2). Judicial review of order -- Filing complaint -- Hearing by district court de novo -- Filing of notice of complaint stays action on lien by tax commission.

(1) Judicial review of an order of a hearing examiner may be obtained by any party by filing a complaint with the district court within 20 days after the date of the order.

(2) If a complaint is filed, the matter shall be heard by the district court de novo.

Utah Code Ann. Section 53B-14-107(1)(2) (Replacement 1987)

53B-14-107(1)(2). Judicial review of order -- Filing complaint -- Hearing de novo -- Stay of action on lien by tax commission.

(1) Judicial review of an order of a hearing examiner issued under Section 53B-14-1-5 is obtained by any party by filing a complaint with the district court within 20 days after the date of the order.

(2) If a complaint is filed, the matter is heard by the district court de novo.

Utah Code Ann. Section 53-47c-9 (Supplement 1981)

53-47c-9. Board of regents may adopt rules for hearings.

The board of regents may adopt rules for the implementation of sections 53-47c-4 and 53-47c-5, including rules for the conduct of hearings and appointment of hearing examiners.

Utah Code Ann. Section 53B-14-109 (Replacement 1987)

53B-14-109. Rules for hearings.

The board may adopt rules for the implementation of Sections 53B-14-104 and 53B-14-105, including rules for the conduct of hearings and appointment of hearing examiners.

Utah Code Ann. Sec. 63-46-13 (Supplement 1978) (Repealed 1985)

63-46-13. Archivist responsibility and duty--Duty of agency not in compliance.

The Utah state archivist shall have the responsibility to administer the provisions of this act and to require state agencies to comply with its terms. The state archivist shall develop and implement procedures for rule-making hearings consistent with the purpose of this act. Any state agency which has not previously submitted rules to the archivist or is otherwise not in compliance with the terms of this act, shall do all things necessary to be in compliance with the terms of this act, on or before June 30, 1975. All rules which have been in use and practice by the state agencies prior to June 30, 1975, shall continue in full force and effect upon the filing of a certified copy of the rules with the state archivist on or before June 30, 1975.

Utah Code Ann. Section 78-2a-3(2)(d) (Replacement 1987)

78-2a-3.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(d) appeals from the circuit courts ...