

1989

# Verdon C. Brinkerhoff v. Fred C. Schwendiman : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 890499 IN THE UTAH COURT OF APPEALS

VERDON C. BRINKERHOFF,

Plaintiff/Respondent

Case No. 890499-CA

v.

FRED C. SCHWENDIMAN, Chief,  
Driver License Services,  
Department of Public Safety,  
State of Utah,

Category No. 2

Defendant/Appellant

BRIEF OF APPELLANT

- - - - -

THIS IS AN APPEAL FROM A TRIAL DE NOVO IN THE  
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT  
LAKE COUNTY, STATE OF UTAH, THE HONORABLE  
RICHARD H. MOFFAT, JUDGE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

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VERDON C. BRINKERHOFF, :  
Plaintiff/Respondent, : Case No. 890499-CA  
v. :  
FRED C. SCHWENDIMAN, Chief, :  
Driver License Services, :  
Department of Public Safety, :  
State of Utah, : Category No. 2  
Defendant/Appellant. :  
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VERDON C. BRINKERHOFF, :

Plaintiff/Respondent, : Case No. 890499-CA

v. :

FRED C. SCHWENDIMAN, Chief, :

Driver License Services, :

Department of Public Safety, : :

State of Utah, : Category No. 2

Defendant/Appellant. : :

— — — — —

This is an appeal from a trial de novo in the Third Judicial District Court of Utah, reinstating respondent's driver's license, which license was suspended following an administrative adjudicative proceeding of the Division of Driver License Services, Department of Public Safety, (DLS), State of Utah. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(a).

Utah Code Ann. § 63-46b-3(1)

Utah Code Ann. § 63-46b-4(3)

Utah Code Ann. § 63-46b-5(1)(i) & (ii)

Utah Code Ann. § 63-46b-6

Utah Code Ann. § 63-46b-11

Utah Code Ann. § 63-46b-15(1)(a)

Utah Code Ann. § 78-3-4(5)

Utah Const. art. I, § 7

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the failure of DLS to notify respondent personally in writing prior to the administrative adjudicative proceeding whether the proceeding was to be conducted formally or informally resulted in a denial of due process under Utah law and the Utah and United States Constitutions.

2. Whether the Order of Suspension issued to respondent by DLS failed to substantially comply with Utah Code Ann. § 63-46b-5(1)(i), so as to deny respondent due process of law under determinative constitutional provisions, statutes and rules.

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Third District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, presiding.

The Third District Court judgment reinstated the driver's license of Verdon C. Brinkerhoff (Brinkerhoff) the respondent, following a decision by DLS in an informal adjudicative proceeding to suspend Brinkerhoff's driving privileges for 90 days for driving under the influence of



alcohol. In accordance with Utah Code Ann. §§ 41-2-130 and 41-2-131, and based upon sworn testimony and official documents, DLS and the District Court found that:

1. The arresting officer had reasonable grounds to believe that Brinkerhoff was operating a motor vehicle while under the influence of alcohol, in violation Utah Code Ann. § 41-6-44 (T. 64).

2. Brinkerhoff consented to an intoxilizer test which measured his blood alcohol concentration at .10 grams in violation of Utah Code Ann. § 41-6-44 (T. 64).

3. Neither the DUI Summons and Citation/Notice of Intent to Suspend or Revoke/Temporary Driver License, nor the notice of administrative hearing provided to Brinkerhoff prior to the DLS hearing, contained any language that would have informed him as to whether the administrative procedure was formal or informal in nature.

4. The order and decision served upon Brinkerhoff following the administrative adjudicative proceeding did not contain the reasons for decision as required by Utah Code Ann. § 63-46b-5(1)(i) & (ii), and that said order was conclusary and merely stated the language of the applicable statute.

5. Because of the failure of DLS to comply with the requirements of the Administrative Procedures Act in designating the hearing as formal or informal and failing to state in the order and decision the reasons therefore, respondent was denied due process and is entitled to the relief of reinstatement of his driving privilege.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

On October 26, 1988, Sergeant Ferraro of the South Salt Lake City Police Department arrested respondent, Verdon C. Brinkerhoff, for operating a motor vehicle while under the influence of alcohol in violation of Utah Code Ann. § 41-6-44. After Brinkerhoff was arrested, Officer Ferraro requested a blood alcohol concentration test and gave him the department's standard admonition explaining the possible consequences if the result of the test was .08 grams or greater (T. 12). Brinkerhoff consented and submitted to an intoxilizer test. The results indicated a blood alcohol concentration of .105 grams (T. 5-6).

After the intoxilizer test, Brinkerhoff was given a Miranda warning and was asked a few questions about his drinking. He was then personally served with a DUI Summons and Citation, Notice of Intent to Suspend and Temporary License which notified Brinkerhoff in writing of the intent of DLS to suspend his driver license for a period of 90 days, which suspension would begin 31 days from the date of the summons and citation. The summons also notified Brinkerhoff of his right to request a hearing before the Driver License Division to determine if his license should be suspended. (See Addendum A).

The record shows that Brinkerhoff timely requested a hearing before the Driver License Division concerning the propriety of the suspension of his license. Counsel for Brinkerhoff also requested discovery of all materials intended to be used by DLS at the administrative hearing. Those materials were provided by the Department, along with a notice of the time

set for hearing (See Addendum B). A hearing was given with testimony being taken, and all relevant documents and evidence were before the hearing examiner. (See Addendum C). The hearing examiner found the suspension appropriate. A record of the findings of fact and conclusions of the hearing officer were prepared, which record was made available to respondent upon request (See Addendum D).

At the beginning of the Administrative hearing, counsel for respondent asked the hearing officer, Brian Call, whether the hearing was being conducted as a formal or informal hearing. The hearing officer stated that it was an informal hearing and no further objection or motion was made at that time by respondent. (See Addendum C at 3). Only after the conclusion of the administrative hearing, did counsel for respondent state that the action should be dismissed on the grounds that DLS had not complied with the Administrative Procedures Act in that no notice had been given prior the hearing whether the hearing was to be conducted formally or informally. (See Addendum C at 25-26).

On November 25, 1988, DLS mailed Brinkerhoff an Order of Suspension (See Addendum E) indicating that the Brinkerhoff's license had been suspended for a period of three months effective November 25, 1988, and stating the reasons for the decision. The order also indicated that Brinkerhoff had the right to appeal the action of the department within 30 days in a court of record. On December 2, 1988, Brinkerhoff filed a Verified Petition for Judicial Review in the Third District Court, in and for Salt Lake County, State of Utah. In addition, Brinkerhoff also filed an ex

parte motion for stay of the Order of Suspension of DLS pending the outcome of the trial de novo in the District Court. The motion for stay of the Order of Suspension was granted by Judge Moffat on December 5, 1988, and Brinkerhoff's full driving privileges were reinstated during the pendency of the judicial review. (See Addendum F). Brinkerhoff was then given a trial de novo at the District Court level.

#### SUMMARY OF ARGUMENT

The DUI Citation, Notice of Intent to Suspend and Notice of Hearing provided to respondent prior to the administrative adjudicative hearing, gave respondent actual notice of DLS' intent to suspend his license for 90 days for driving under the influence of alcohol and notified him of his opportunity for a hearing prior to suspension. In addition, the promulgation and publication of administrative rules by DLS, indicating that its administrative hearings are conducted informally under UAPA, gave respondent constructive notice that his hearing was to be informal.

The Order of Suspension sent respondent pursuant to Utah Code Ann. § 63-46b-5(1)(i) complied in all material respects with the statute by providing the decision, the reasons for the decision, notice of any right of administrative or judicial review and the time limits for requesting review. Formal findings of fact and conclusions were prepared by the hearing officer and made available to respondent upon request in writing. By failing to request the formal findings and conclusions from DLS, respondent should not now be allowed to claim he did not have access to them.

DLS complied with the Utah Administrative Procedures Act and its own administrative rules in the conduct of respondent's administrative hearing in all material respects. Pursuant to these procedures, respondent requested and received discovery of documents germane to the proceedings and appeared and fully participated in the hearing. Participation included the opportunity to present any relevant evidence and to cross-examine witnesses. By participating fully in the administrative process and failing to timely request that the proceeding be converted to a formal proceeding pursuant to Utah Code Ann. § 63-46b-4(3), respondent should now be estopped from asserting his due process rights have been violated.

Procedural due process, under the Utah and United States Constitutions, require that a person be given reasonable notice and an opportunity to be heard and present any claim or defense. Respondent was given notice and an opportunity to be heard at the administrative level. In addition, in an effort to cure any minor procedural deficiencies, respondent was given a trial de novo in the District Court in which he had a full opportunity to conduct discovery and present any claim or defense. The record fully supports the fact that respondent's due process rights were adequately safeguarded and the forms used by DLS in its hearing process were adequately clear to provide notice of the right to hearing and met due process requirements.

## ARGUMENT

### POINT I

#### DIVISION OF DRIVER LICENSE SERVICES SUBSTANTIALLY COMPLIED WITH THE ADMINISTRATIVE PROCEDURES ACT IN THE CONDUCT OF ITS ADMINISTRATIVE HEARING PROCESS.

Utah Code Ann. § 63-46b-3(1) provides that all adjudicative administrative proceedings shall be initiated by a notice of agency action if the proceedings are initiated by the agency. Subsection (2)(a)(v) further provides that notice of the agency action shall include "a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under §§ 63-46b-4 and 63-46b-5 or formally according to the provisions of §§ 63-46b-6 to 63-46b-11." In addition, Utah Code Ann. § 63-46b-5(1)(i) requires that after the close of an informal adjudicative proceeding, the presiding officer shall issue a signed order in writing that states the decision, the reasons for the decision, a notice of any right of administrative or judicial review available and time limits for filing an appeal or requesting review.

Failure to notify whether the hearing was formal or informal, and failure to put formal findings of fact and conclusions in the subsequent order are the only two areas in which Brinkerhoff asserts DLS failed to comply with the Administrative Procedures Act. The record supports that these are the reasons the District Court determined to reinstate Brinkerhoff's license (T. 65-66).

Section 63-46b-4 of the Administrative Procedures Act, allows an agency to designate by rule whether its adjudicative

proceedings are to be conducted informally or formally, according to the procedures established in the act. This section also provides that all agency adjudicative proceedings not designated as informal by the agency shall be conducted formally. DLS promulgated such rules through the rule-making process, held public hearings on the rules as required by law, and made them generally available to the public. The rules are published in the Utah Administrative Code to ensure easy public access and allow affected parties to ascertain the contents of the rules. The rule-making process and publication of rules are designed to communicate to the general public the standards by which the agency operates in its administrative hearings. Brinkerhoff had easy access to these rules and chose not to avail himself of them. (See Addendum G.)

Rule R712-017-3 of the Utah Driver License Division Rules for Administrative Proceedings defines hearing as "an informal adjudicative proceeding where evidence is to be taken to determine an issue of fact and adjudicate a prior legal right based on the division record, evidence, documents and information." (See Addendum G p. 1). In addition, Rule R712-017-6 (see Addendum G. p. 2) designates all adjudicative proceedings, except actions mandated by statute, as informal unless "converted to formal in the discretion of the presiding officer or supervisor." Utah Code Ann. § 63-466-4(3) also allows an administrative hearing to be converted from formal to informal or informal to formal. Such a conversion of a hearing under the statute would not negate the entire proceeding, even if a party

had been originally notified that the hearing was to be conducted in another manner. Obviously notice of whether the hearing was to be formal or informal, alone, is not determinative of whether the proceeding is fundamentally fair to the affected party.

The promulgation and publication of the administrative rules provided constructive notice of the informal nature of the adjudicative proceeding, and substantially complied with the clear intent of the statute. If respondent chose not to avail himself of the published rules of the Department, he should not now be able to assert that he had not received actual notice as to the informal nature of the proceeding. Respondent requested and received, prior to the hearing, all documents used by Driver License Services in the hearing. (See Addendum B.) If he was, in reality, unaware of the nature of the proceedings he needed merely ask the Department in his request for documents.

Following the conclusion of the administrative hearing, respondent received a signed Order of Suspension indicating the decision by the presiding officer of Driver License Services and the reasons for the decision. (See Addendum E). The reason for the decision was stated in the order as follows:

The grounds for such action is Utah Code Ann. § 41-2-130 and that a peace officer had reasonable grounds to believe you had been operating a motor vehicle in violation of U.C.A. § 41-6-44 (driving under the influence law).

The Administrative Procedures Act in § 63-46~~b~~<sup>5</sup>(1)(i) requires only four items be contained in the signed order. They are as follows: (1) the decision (see Addendum ~~E~~, para. 1), (2) the reasons for the decision (see Addendum ~~E~~, para. 3), (3) a notice



of any right of administrative or judicial review available to the parties (see Addendum E, para. 7), (4) the time limits for filing an appeal or requesting review (see Addendum E, para. 7). The signed order provided to Brinkerhoff contained each of the four items listed. Under the statute it need contain no more.

In the District Court proceedings, Judge Moffat determined that the Department's Order of Suspension did not comply with the Act in that it stated a legal conclusion of the statute rather than setting forth the factual basis of the decision. The Court indicated that this factual basis should be contained in the order that is mailed to the parties and failure to do so results in prejudicial error necessitating reinstatement of the driver's license (T. 66). The Court indicated that the parties are entitled under the statute to know what the facts were upon a decision was based (T. 66).

Appellant does not deny that a party to an administrative hearing is entitled to know the basis upon which the decision is reached. However, in driver license suspension hearings, the issue is so narrow as to be covered by the statement of the reason for decision in the order. The actual findings and conclusions of the hearing officer are made a part of the administrative record and are available upon request. Rule R712-017-9 (Addendum G) requires a presiding officer to make a written summary of relevant findings of fact and legal conclusions arrived at, along with a brief recommendation. The rule further indicates that these findings, conclusions and recommendations are to be transmitted to a superior for the

preparation of an order, such as was done in this case, and made available to the parties upon request in writing. (See R712-017-9(7) Addendum G). The benefit to a party in requiring DLS to mail a copy of this report following each hearing would be substantially outweighed by the additional time and cost involved. The mere fact that Brinkerhoff chose not to provide the Driver License Service with a written request for the findings, conclusions and recommendations of the hearing officer, should not permit him to maintain that he was unaware of this information. Nowhere in the statute is it required that the order itself contain these findings of fact and conclusions, but only that it contain the four items discussed, supra, pg. 9.

In discussing adjudicative procedure, Kenneth Culp Davis stated:

the closest approach to a unifying principle is that courts set aside the administrative choice only for clear illegality or for abuse of discretion; this principle is applied to many problems, including pleadings, intervention, place and time of hearings, delay, consolidation of proceedings, degree of formality and informality, order of proceedings and off the record discussions.

See Davis, Administrative Law Text, (3d ed. 1972 pg. 212) (emphasis added).

In the instant case, there has been no "clear illegality" or "abuse of discretion". The DUI Citation and Notice of Intent to Suspend (Addendum A) accompanied with the notice of hearing (Addendum B p. 3), gave Brinkerhoff notice of Driver License Services' intention to suspend his license for 90 days and notified him of his opportunity for a hearing prior to

the suspension. The promulgation of administrative rules by DLS also gave Brinkerhoff constructive notice of the informal nature of the proceedings. See Smith v. Mahoney, 590 P.2d 323 (1979).

## POINT II

BY FAILING TO TIMELY OBJECT TO THE INFORMAL NATURE OF THE ADMINISTRATIVE PROCEEDINGS, RESPONDENT SHOULD NOW BE ESTOPPED FROM ASSERTING THAT THE INFORMAL PROCEEDINGS DENIED HIM PROCEDURAL DUE PROCESS.

Utah Code Ann. § 63-46b-4(3) provides that any time before a final order is issued in an adjudicative proceeding, the presiding officer may convert an informal proceeding to a formal proceeding, if such a conversion would be in the public interest and not unfairly prejudice the rights of any party. The record of the administrative adjudicative hearing clearly indicates that counsel for respondent questioned the hearing examiner at the beginning of the hearing as to whether the proceeding was being conducted formally or informally. (See Addendum C p. 3). Upon being notified that the proceeding was informal, the hearing proceeded with no further objections. Respondent was able to cross-examine witnesses of the department, call his own witnesses and present any evidence he felt germane to the proceeding.

In closing argument at the administrative hearing, respondent's counsel stated, "... this per se action should be dismissed on the grounds that the division has not complied with the Administrative Procedures Act in the following respects. First of all, the first time we received notice that this was a formal or informal hearing was when Mr. Call himself indicated that this was an informal hearing." Respondent however, made no

indication of how he was prejudiced from this failure of notice or in any way denied an opportunity to discover any relevant information or to appear and be fully heard. (See Addendum C pgs. 25-26). Had Brinkerhoff been in any way prejudiced by the informal nature of the hearing, counsel should have requested the hearing officer to allow the proceeding to be converted to a formal hearing as allowed pursuant to § 63-46b-4. Respondent, as a result of his own inaction, should now be estopped from claiming he was prejudiced by the proceeding in which he fully participated.

The Supreme Court of Utah has recognized that a driver's license is a privilege and not a fundamental right. Smith v. Mahoney, 590 P.2d 323 (1979). Although the privilege is constitutionally protected, due process under the fifth and fourteenth amendments to the United States Constitution and under Utah Const. art. I, § 7 only require that a person be given notice of intention to terminate the license and an opportunity for hearing prior to termination. Smith at 324, 325. The forms used by DLS in the instant case were adequate to give notice of an intent, to suspend and of the right to a hearing. By appearing and fully participating Brinkerhoff obviously had notice of the hearing and an opportunity to be heard prior to his license being terminated. Such participation should now preclude respondent from asserting his due process rights were somehow violated. Counsel for Brinkerhoff had a duty to request the hearing be conducted formally at the outset.

DLS has also been informed and believes that counsel for respondent had actual notice of the informal nature of the proceedings. Respondent's counsel has appeared at other driver license suspension hearings which have also been conducted on an informal basis. Counsel's actual notice of the nature of the proceedings from prior hearings should not allow him to now claim DLS failed to notify him of the informal nature of this proceeding.

### POINT III

THE JURISDICTION OF THE DISTRICT COURT TO REVIEW BY TRIAL DE NOVO THE FINAL ORDER OF THE DIVISION OF DRIVER LICENSE SERVICES GUARANTEES RESPONDENT REASONABLE NOTICE, OPPORTUNITY TO BE HEARD AND TO PRESENT ANY CLAIM OR DEFENSE RELATIVE TO THE PROCEEDING.

Utah Code Ann. § 41-2-131 allows a person whose license has been suspended or revoked by the Division to seek judicial review of DLS's final order. The Administrative Procedures Act in § 63-46b-15(1)(a) states that "the district court shall have jurisdiction to review by trial de novo all final agency actions resulting from any informal adjudicative proceedings." DLS's adjudicative proceedings are informal as provided by Administrative Rule R712-017-6. Finally, Utah Code Ann. § 78-3-4(5) provides that the district court has jurisdiction to review agency adjudicative proceedings as set forth in chapter 46b, title 63, "and shall comply with the requirements of that chapter in its review of agency adjudicative proceedings." This includes the requirement that the Utah Rules of Civil Procedure and Utah Rules of Evidence be applied.

The Utah Code, prior to the Utah Administrative Procedures Act (UAPA), provided no uniform procedures for agency adjudication and judicial review. Some agency decisions were reviewed "on the record" by an appellate court but with various standards of review, other agencies were made subject to "on the record" review by trial courts and still other agencies received de novo review in a trial court. With the adoption of UAPA in 1987, and numerous amendments enacted in 1988, an attempt was made to resolve these disparities. In the overview of UAPA written by Allen D. Sullivan, Vice-Chairman of the Advisory Committee, the statement is made that one of the purposes of the act was to give a "uniform and rational framework for judicial review of agency action." (See Addendum H).

UAPA reflects two principles for the development of a uniform system for judicial review of agency action. First, agencies that devote sufficient formality, due process protection and record building into an administrative adjudication should be entitled to deference as to the factual record and findings by a reviewing court. An agency that processes a large number of cases, on the other hand, at more informal levels of procedure with a lower level of due process protection, should be reviewed de novo for the protection of the affected party. The number of hearings DLS is required to conduct are too numerous to allow a formal hearing at the agency level on each one. Therefore, judicial review de novo by the District Court assures the affected party a fair opportunity to present evidence and be heard.

The Utah Administrative Advisory Committee, responsible for drafting the 1988 amendments to UAPA, indicated that the term de novo, as used in § 63-46b-15, was to be given its standard legal definition. The committee stated in the Comments on the Drafting and Interpretation of the Utah Administrative Procedures Act as follows:

The advisory committee considered defining but chose not to define the following terms: decision; de novo review; hearing and order. The advisory committee concluded that these terms have an accepted legal meaning in the State of Utah and that any ambiguities ought to be resolved within the judicial system. (emphasis added). (See Addendum H).

The standard meaning of de novo literally means anew, afresh or a second time. Black's Law Dictionary 392 (5th ed. 1979). In this case, such was the meaning given de novo by Judge Moffat. Judge Moffat stated "It is a trial de novo. All new evidence comes in and all old evidence comes in; to enable you to put it in under the Utah Rules of Evidence even procedure comes in. It is truly not an appeal from a prior decision." (T. 62).

Embodied in the term procedural due process is reasonable notice and an opportunity to be heard and present any claim or defense." See In Re Nelson, 437 P.2d 1008 (N.M. 1968) and Parham v. Cortese, 407 U.S. 67 (1972). The very purpose of the two-track system under UAPA is to allow an agency with a large number of hearings to hold them at a more informal level, with the added requirement that the affected party be given the additional protection of de novo review at the District Court. While an informal hearing does not allow the same constitutional safeguards as a formal hearing, the informal hearing coupled with

a trial de novo at the District Court level ensures an individual that his due process rights will be protected. Even if we assume Brinkerhoff was in some way prejudiced by not being informed in the original notice that the administrative hearing was informal, a de novo trial in the District Court would have provided a full opportunity to conduct discovery and have an opportunity to be heard and present any claim or defense.

The district court should only be allowed to set aside the administrative decision for clear illegality, for abuse of discretion, or if the agency acted arbitrarily and capriciously. By setting aside the decision based on a minor procedural deficiency the District Court is not providing a trial de novo as required by statute, but rather merely reviewing the record of the administrative hearing. De novo review allows the District Court to cure minor deficiencies at the agency level and provide an affected party his day in court. To allow the District Court to overturn the Department's ruling, based on a minor procedural defect would result in raising technicalities over the merits and in effect, do away with the informal hearing process. No longer would minor procedural deficiencies at the administrative level be able to be cured by a trial de novo in the District Court. All administrative hearings would have to be conducted formally, requiring huge increases in number of employees and expenses for agencies, such as DLS, that handle large numbers of hearings.

In a per curiam opinion, the United State Supreme Court in Jennings v. Mahoney, 404 U.S. 25 (1971), addressed the procedural due process afforded a Utah motorist under the Utah



Motor Vehicle Safety Responsibility Act. The Court affirmed the decision of the Utah Supreme Court in Jennings v. Mahoney, 26 Utah 2d 128, 485 P.2d 1404 (1971), which held that a review of the administrative action based on reports and other evidence submitted was not a denial of due process. In citing Bell v. Burson, 402 U.S. 535 (1971) the United States Supreme Court stated that "'before the state may deprive [him] of his driver's license and vehicle registration," the State must provide "a forum for the determination of the question" and a "meaningful ... 'hearing appropriate to the nature of the case.'" Burson at 541-42. The Court continued as follows:

There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by Bell v. Burson. This case does not, however, require that we address that question. The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which defendant was afforded the opportunity to present evidence and cross-examine witnesses (emphasis added).


Such is the case in the instant fact situation. Brinkerhoff was afforded at least the same due process protections as in Jennings. He was given a "forum for the determination of the question" and a "meaningful hearing appropriate to the nature of the case" at the administrative level. In addition, the District Court stayed DLS' suspension of his license pending completion of judicial review in the District Court. The District Court then conducted a de novo hearing in which Brinkerhoff was afforded the opportunity to present any relevant evidence and cross-examine witnesses.

### CONCLUSION

The forms used by DLS in the conduct of its administrative hearing were adequately clear to give notice of respondent's right to a hearing and met due process requirements. In addition, DLS complied in all material respects with the requirements of the Utah Administrative Procedures Act by publishing rules detailing the nature of its administrative hearings and procedure and issuing a final order after the close of the proceeding. Respondent appeared and fully participated in the administrative hearing and failed to timely object or request conversion of the proceedings from informal to formal. Based upon his failure to act, respondent should be estopped from asserting he was prejudiced by the informal nature of the proceedings. Finally, regardless of the procedure incorporated at the administrative level, review by trial de novo in the District Court assured respondent a full opportunity to conduct discovery, present any relevant evidence and cross-examine witnesses. Based upon the foregoing, Appellant respectfully requests this court to reverse the District Court reinstatement of respondent's drivers license and allow the 90 day suspension by DLS to continue.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 1989.

R. PAUL VAN DAM  
Attorney General

  
RICHARD D. WYSS  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellant, was mailed, postage prepaid, to William R. Russell, attorney for respondent, 8 East Broadway, Suite 213, Salt Lake City, Utah 84101, this 6 day of November, 1989.

A handwritten signature in cursive script, appearing to read "Robert D. Epps", written over a horizontal line.

## ADDENDA

## ADDENDUM A

<b>DUI SUMMONS AND CITATION</b>		ISSUING ENFORCEMENT AGENCY <u>SOUTH SALT LAKE POLICE</u>		CASE NO <u>XC-12210</u>	CITATION NO. <b>D 20591</b>
STATE OF UTAH		NAME (Last) (First) (Middle) <u>BRINKERHOFF</u> <u>VERNON</u> <u>CLIFF</u>			DOB <u>1-5-33</u>
COUNTY OF <u>SALT LAKE</u>		ADDRESS (City) (State) <u>717 PINE BLVD</u> <u>SLC</u> <u>UT</u>			Zip <u>84115</u>
CITY OF <u>SOUTH SALT LAKE</u>		Driver License No <u>1434577</u>	License Class <u>A1M</u>	Expires <u>10</u>	State <u>UT</u>
THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN OF <u>SALE</u>		Height <u>5'4"</u>	Weight <u>150</u>	Eyes <u>Blue</u>	Sex <u>M</u>
ED AT <u>500 So. STATE</u>		Vehicle Make <u>Ford</u>	Vehicle Type <u>Truck</u>	Vehicle Year <u>85</u>	Color <u>Red</u>
<u>SALE LAKE, UT.</u>		Vehicle License No <u>1434577</u>		State <u>UT</u>	Expires <u>10</u>
<u>24115</u>		Accident <u>Yes</u>		No	Direction of Travel <u>N S E W</u>
Within 5 nor more than (14) days after issuance of citation		THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING UTAH CODE COUNTY CODE CITY CODE NO. ON THE <u>26</u> DAY OF <u>DECEMBER</u> 19 <u>85</u> MILITARY TIME <u>1935</u> LOCATION <u>2475 So. STATE</u> MILE POST NO. VIOLATION(S) <u>DRIVING UNDER THE INFLUENCE OF</u> <u>DRUGS AND ALCOHOL (1A102)</u> WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN SIGNATURE <u>[Signature]</u> I CERTIFY THAT A COPY OF THIS SUMMONS AND CITATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW. I FURTHER CER- TIFY THAT THE COURT TO WHICH THE DEFENDANT HAS BEEN DIRECTED TO APPEAR IS THE PROPER COURT PURSUANT TO SECTION 77-7-19, U.C.A. OFFICER <u>FERRARO</u> BADGE NO. <u>62411</u> COMPLAINANT <u>CS# 3:7-42-1224</u> DATE OF CITATION <u>10-26-85</u>			
PERSE OCT 28 1988		DRIVERS LICENSE DIVISION		DATE SENT TO DLD	DOCKET NO

**VALID**  
**READ CAREFULLY SURR. LIC.**

is citation is not an information and will not be used as an information without your consent. If an information is  
d you will be provided a copy by the court. You MUST appear in court on or before the time set in this citation.  
YOU FAIL TO APPEAR AN INFORMATION WILL BE FILED AND THE COURT MAY ISSUE A WARRANT FOR  
OUR ARREST.

NOTICE OF INTENT TO SUSPEND OR REVOKE: You are hereby notified that thirty-one (31) days from the date of  
s notice your privilege to operate motor vehicles in the State of Utah will be suspended pursuant to Section 41-2-19.6  
A for a period of ninety (90) days thereafter, or for a period of one hundred twenty (120) days if this is the second  
subsequent occurrence of this offense OR if a peace officer has indicated you have refused to submit to a  
chemical test to determine the alcohol or drug content of your breath, blood or urine, you are hereby notified  
at thirty-one (31) days from the date of this notice your privilege to operate motor vehicles in the State of  
ah will be revoked pursuant to 41-6-44.10 UCA for a period of one (1) year. YOU HAVE THE RIGHT TO RE-  
QUEST A HEARING ON THIS SUSPENSION OR REVOCATION. The hearing is not for purposes of granting you  
limited license but only to determine whether or not your license should be suspended or revoked.

The department will NOT contact you further regarding a hearing unless you request a hearing in writing. Your WRIT-  
IN REQUEST must be sent WITHIN TEN (10) DAYS of the date of arrest to the DRIVER LICENSE DIVISION at  
01 South 2700 West, P.O. Box 30560, Salt Lake City, Utah 84130-0560. Upon your timely written request for a  
aring you will be notified of a time and place to appear. If you fail to appear or request a hearing, your driver license  
suspension or revocation will become effective as indicated above. The administrative hearing is civil in nature and  
es not satisfy the requirement for you to appear in court.

TEMPORARY DRIVER LICENSE: This entire information **X** is VALID as a temporary driver license for a period of  
du (20) days from the date of this notice. It is NOT VALID as a temporary driver license

## ADDENDUM B

WILLIAM R RUSSELL

ATTORNEY AT LAW

102 WEST 500 SOUTH SUITE 202  
SALT LAKE CITY UTAH 84101  
(801) 322 5904

November 1, 1988

Office of Driver License Services  
4501 South 2700 West  
P.O. Box 30560  
Salt Lake City, UT 84130-0560

Re: VerDon Brinkerhoff  
D.L. No. 1434579  
D.O.B. 8-5-38

TO WHOM IT MAY CONCERN:

This letter is a formal request for an administrative hearing concerning the Notice of Intent to Suspend or Revoke issued to the above-named individual on October 28, 1988. This shall also serve as a formal demand for you to immediately return his driver's license to him.

Please send me a complete copy of all materials which you intend to admit into evidence or use in any way at the administrative hearing.

Please notify me of the time and place for the hearing requested herein. Thank you for your cooperation in this matter.

Sincerely,



William R. Russell

cc: VDB

ROUTING RECORD		
TO	DATE	INIT
DuL	11-2-88	JF



Brinkerhoff

NORMAN W. BANGERTER, GOVERNOR



JOHN T. NIELSEN, COMMISSIONER  
D. DOUGLAS RODRERO, DEPUTY COMMISSIONER  
L. DALE ELTON, DEPUTY COMMISSIONER

STATE OF UTAH  
DEPARTMENT OF PUBLIC SAFETY

Pursuant to your request for discovery, please find attached photocopies or facsimiles of the following documents which are specific to the hearing notification enclosed herein sent to the Department containing the following documents:

- ☒ ENVELOPE
- ☒ DUI CITATION
- ☒ DUI REPORT FORM
- ☒ INTOXILYZER TEST RECORD
- ☐ SUPPLEMENTAL REPORT
- ☐ OTHER \_\_\_\_\_

These are the only documents on file with this Department at this time specific to the aforementioned arrest with the exception of the Department of Public Safety intoxilyzer test record of the intoxilyzer used (if any) as a result of the arrest. These documents may be reviewed at the Driver License Office where the hearing is to be held on the date of the hearing.

I hereby certify the aforementioned documents were placed in the envelope containing the hearing notification sent to the attorney of record in that case.

November 4, 1988

Dated

*P.B. Jackson*  
Signature of Department Employee

3122k

DRIVER LICENSE DIVISION  
Fred Schwendiman, Director



4501 South 2700 West - 3rd Floor South  
P.O. Box 30560 - Salt Lake City, Utah 84130-0560  
Telephone: 801-965-4437



DOB: 8-5-38

DA: 10-26-88

STATE OF UTAH  
DEPARTMENT OF PUBLIC SAFETY

NORMAN H. BANGERTER, GOVERNOR

JOHN T. NIELSEN, COMMISSIONER  
D. DOUGLAS BODRERO, DEPUTY COMMISSIONER

November 4, 1988

Verdon C. Brinkerhoff  
917 Park Row  
Salt Lake City, Ut 84105

FILE NO.: 1434579  
D.O.B.: 8-5-38

Under Title 41, Utah Code Annotated 1953, a hearing will be held by this Department regarding the items checked below.



Your request for an administrative hearing regarding this Department's intention to suspend your driving privileges as a result of your arrest for driving under the influence on 10-26-88



Your request for an administrative hearing regarding this Department's intention to revoke your driving privileges as a result of your arrest for driving under the influence and alleged refusal to submit to a chemical test on \_\_\_\_\_



We have received information that on \_\_\_\_\_ you were driving while your driving privilege was under revocation/-suspension. Failure to appear at this hearing may result in extension of your revocation or suspension.

Your hearing has been set as follows:

DATE: November 21, 1988  
TIME: 2:00 p.m. *OK*  
PLACE: 187 North 1000 W. (Fairgrounds)  
Salt Lake City, Ut  
538-8490

CERTIFICATE  
OF MAILING

NOV 04 '88

I certify that on the date above, as an employee of the Drivers License Division, Utah State Department of Public Safety, I deposited the United States Mail, Salt Lake City, Utah, the original order, of which this is an exact copy, in an envelope with postage stamp and address to the person named in the order at his or her last address as shown by the records of the Department.

IF YOU ARE UNABLE TO APPEAR AT THE TIME INDICATED, YOU MUST NOTIFY THE OFFICE AT LEAST FIVE (5) DAYS BEFORE THE SCHEDULED TIME, AND UPON REASONABLE REQUEST, A NEW HEARING DATE MAY BE SCHEDULED.

William R. Russell  
Attorney at Law  
102 W. 500 So. #202  
Salt Lake City, Ut 84101

Very truly yours,

*Phil Himmelberger*

Phil G. Himmelberger, Bureau Chief  
Driver Services

Encl: File copy to attny.  
pbj/114-1



DOB: 8-5-38

STATE OF UTAH  
DEPARTMENT OF PUBLIC SAFETY  
NORMAN H. BANGERTE, GOVERNOR

CIT. #: D20591  
CASE #: 8813210  
DA: 10-26-88

JOHN T. NIELSEN, COMMISSIONER  
D. DOUGLAS BODRERO, DEPUTY COMMISSIONER

November 4, 1988

Chief Val Bess, For  
Officer Ferraro #L24U  
South Salt Lake Police  
44 East Oakland Ave.  
Salt Lake City, Ut 84115

In reply, please refer to  
FILE NO.: 1434579  
RE: Verdon C. Brinkerhoff

This Department has received a Report of Arrest for Driving Under the Influence regarding the above named individual. It is requested that you appear for a hearing on this matter which has been requested by the driver and which has been set as follows:

DATE: November 21, 1988

TIME: 2:00 p.m.

PLACE: 187 North 1000 W. (Fairgrounds)  
Salt Lake City, Ut  
538-8490

It is important that you appear at this hearing. If you are unable to appear at the time indicated, the hearing will be held and action will be taken accordingly.

Very truly yours,

*Phil Himmelberger*

Phil G. Himmelberger, Bureau Chief  
Driver Services

cc: Chief Val Bess, For  
Officer Lewis  
Officer Mattingly  
South Salt Lake Police  
44 East Oakland Ave.  
Salt Lake City, Ut 84115

CERTIFICATE  
OF MAILING

NOV 04 '88

I certify that on the date  
above, as an employee of the  
Drivers License Division, Utah  
State Department of Public  
Safety, I deposited the United  
States Mail, Salt Lake City,  
Utah, the original order, of  
which this is an exact copy, in  
an envelope with postage  
stamp and address to the  
person named in the order at  
his or her last address as  
shown by the records of the  
Department.

Employee of Department

## ADDENDUM C

Transcription of Official Tape  
of the Hearing  
November 21, 1988

H.O.: Bryan W. Call  
Att.: William R. Russell

Driver: Verdon C. Brinkerhoff  
DL # 1434579  
D.O.B.: August 5, 1938

H.O.: Today's date is November the 21, 1988. Time set for the hearing is 2:00 P.M. It's an administrative suspension hearing held for Don C. Brinkerhoff he is present. His date of birth is August 5, 1938. Driver license number is 1434579. Mr. Brinkerhoff is being represented by William R. Russell. Date of the arrest is October the 26, 1988. Location of the hearing is Fairgrounds Driver License Office. Hearing Officer is Bryan Call. Arresting Officer is Sergeant Ferraro of the South Salt Lake City Police Department. Witness Officer, Officer Lewis, also of the South Salt Lake City Police Department. This hearing is being conducted at the driver's request in accordance with the Utah Administrative Procedures Act and Utah Code Annotated 41-2-130, following his arrest for driving while under the influence of alcohol or drugs or a combination of alcohol and drugs. The issues to be determined are: If the peace officer had grounds to believe the driver had been in actual physical control of a vehicle while under the influence of alcohol and/or drugs, was requested to take a chemical test, was warned of the potential consequences of taking the test, and test results if any. All formalities required in court proceedings need not be used in this hearing.

However, the Division shall substantially comply with the fundamental rules of due process. Sworn testimony will be taken and the parties may have witnesses testify. The driver may testify and may cross examine others who testify. If the license is suspended the driver has the right within 30 days, to petition the proper court for an appeal hearing. At this time I will swear in those who are going to testify. Both Officers will stand. You going to have your client testify?

Att.: Yes.

H.O.: Mr. Brinkerhoff will you also stand and raise your right hand? Do you each of you swear to tell the whole truth and nothing but the truth, so help you, God?

Officer: I do.

Witness: I do.

Driver: I do.

H.O.: Thank you. For the record all have answered affirmatively. Sergeant Ferraro could you identify those documents for the record, please.

Officer: This is the DUI report I filled out on Mr. Brinkerhoff on the 26th of October.

H.O.: Thank you. The following documents and information are part of the records for this hearing. The Officer's report submitted in compliance with Utah Code Annotated 41-2-130. Notice and citation served by the officer of the Department's intent to suspend, and information on how to receive a hearing by the Department. Hearing request made within ten days. Test machine record of test results. Operational checklist of test instruments. Department of Public Safety affidavit that

indicates the breath testing instrument was checked according to Department Standards. Two affidavits being dated October 21st and November the 2nd of 1988. At this time Sergeant Ferraro would you give us your testimony please.

Officer: Yes. Ah . . .

Att.: Excuse me, Mr. Call could I ask if this is being conducted as a formal/informal at this time?

H.O.: As a informal hearing.

Att.: Informal?

H.O.: Yes. Okay, Officer.

Officer: Ah, we were dispatched to an accident about 2695 South 300 West. That was at ah, 1935 hours on the 26th of October. Ah, upon arrival myself and Officer Lewis which were in separate vehicles. Officer Lewis handled the accident and during the accident investigation it was determined that Mr. Brinkerhoff had had some alcohol to drink. Ah, I asked, I handled the DUI part of this accident. And we did smell alcohol on the ah, Mr. Brinkerhoff's breath and I asked him if he had any alcohol to drink, he told me that he had only one beer he also told me that he had taken a valium after work. Ah, I gave him field sobriety tests, I gave him five field sobriety tests which he was unable to do. At that time I did place him under arrest for driving under the influence of alcohol or drugs. After placing him under arrest for that I did transport him to the South Salt Lake Police Station where he was read the .08 admonition. And at that time he did submit to a chemical test. He was requested to take a breath test and was given a breath test by Officer Warner who was unable to be here today. The

results of that breath test was a .105.

Att.: I'll object to that response on the grounds that it is not from the Officer's observation and ask that it be stricken.

Officer: I may also add I was present during the breath test and watched it being administered. The test was administered by Officer Warner who followed the operational check list and the machine was found to be functioning correct.

H.O.: How did you determine that Mr. Brinkerhoff was ah, had been driving or was in actual physical control of the vehicle.

Officer: Ah, the witness in the, the other party that was involved in the accident also he admitted to me that he was driving the vehicle.

H.O.: You said you gave five field sobriety tests, would you please tell me what they were and how he performed on those?

Officer: I gave him, the first test was an alphabet test he said that ah, very slow. I requested him to say A through Z. He did A through S then stopped and went W through Z. Next test was the finger count test I had him count his fingers with his thumb 1 to 4 then 4 to 1, I asked him to do that test twice. Ah, his fingers were shaky and he did not complete that test, he couldn't get his fingers in sequence with the numbers. The third test was the heel to toe test, I requested him to walk nine steps out and nine steps return. His balance was unsteady during that test, he stumbled on step 7 out, he stumbled on his turn, and he stumbled on returns 3 and 4 steps. The fourth test was a finger to nose test ah, during this test his balance was unsteady. I requested him to touch his nose with his right index finger, he did touch the tip with that. I asked him to



do his left, he touched under his nose with his left. I asked him his left and right again which he did touch the tip at each time. The five, number five test was the nystagmus gaze, which I noted no smooth pursuit and there was 45 degree and maximum deviation eye jerking.

H.O.: You stated you were present when the breath test was administered?

Officer: Yes.

H.O.: Do you know if Officer Warner is certified to operate the machine?

Officer: Yes, he is.

H.O.: And how do you know that?

Officer: Ah, my certification expired a couple of months ago so I had to have him come in and perform the test for me, since he does have a current certification.

H.O.: Counselor would you like to question this Officer?

Att.: Uh huh. How do you know his is current, his certification, Sergeant?

Officer: Well, in part of the training ah, in the training division there's two Sergeants that handle that. And I know because of that, that he is current on his certification, that is a mandatory thing within our Department that they stay certified.

Att.: When did he get certified?

Officer: I don't have the dates with me.

Att.: When does he, when does the certification run?

Officer: I don't have the dates with me.

Att.: But you feel that he is certified at the time of this.

Officer: Yes, all the Department was certified on the same day. I was

out of town at the last certification. It was just last year that they were certified.

Att.: Ahem, did you transport Mr. Brinkerhoff from the scene?

Officer: Yes I did.

Att.: Okay. Were you an only person, were you in a police cruiser.

Officer: Yes, I was.

Att.: Were you the only other person, other than Mr. Brinkerhoff in that cruiser?

Officer: Yes.

Att.: Okay. Ahem, you said that you got a dispatch at 1935 is that stating your testimony correctly Sergeant?

Officer: Yes.

Att.: How did you know that? Ah, I can't find it right here on the form except the citation is that where you are getting your information?

Officer: That's the time dispatch gave me that she dispatched this . . .

Att.: Okay. The citation, the military time . . .

Officer: That would be 7:35.

Att.: Uh huh. Is that, is that what you are referring to as far as your recollection as to the time of dispatch?

Officer: Yes.

Att.: Okay. Do you have a notation in your report as to when you arrived on the scene?

Officer: Ah, yeah, let me get the accident report here. 1937 see (inaudible).

Att.: Uh hum. Sergeant directing your attention to page two of the standardized report form at the very top of that is the field sobriety test you referred to. Ahem, on the bottom of that

section under field sobriety test it says unable to do test.

Ah, did you mean one test, or all of the tests or what were you speaking of specifically there Sergeant?

Officer: Well, all of his tests he was unable to perform satisfactorily.

Att.: Officer, you don't mean that he was unable to attempt them, just that he didn't do them satisfactorily is that . . .

Officer: Correct.

Att.: Okay. Is there any special significance do you use the parenthesis that are found in there for any special reason Sergeant?

Officer: Yes. The way I do it is I write down the test I gave and then in parenthesis I write what I asked them to do . . .

Att.: Uh huh.

Officer: . . .then I put what they did do.

Att.: Specifically like a 9/9 that would mean that you instructed him to do nine up turn around and do nine back. Is that what that would mean to you?

Officer: Yes.

Att.: And the parenthesis around the A to Z said do the whole alphabet and so forth.

Officer: Yes.

Att.: Okay. Ahem, on the finger count you've got 1-4-4-1 twice in parenthesis, is that your instructions Sergeant?

Officer: Yes.

Att.: Okay. So you did instruct him and did you, did you instruct him to do a 1-4-4-1? Finger count?

Officer: Yes, 1 to 4 and then 4 to 1.

Att.: Oh. Oh, okay so it's not 1-4-4-1 . . .

Officer: No. It's . . .

Att.: It's 1-2-3-4 . . .

Officer: It's 1 to 4 and then 4 to 1.

Att.: Okay. So you ascend, go up in numbers 1-2-3-4.

Officer: Right.

Att.: Then 4-3-2-1 and you instructed him to do that twice is that correct? And you demonstrated that to him is that correct?

Officer: Yes.

Att.: Is that right? Okay. Ahem, test number four finger to nose ah, in the parenthesis again Sergeant it says right, left, left, right. And that was both demo, both explained and demonstrated in that order is that correct?

Officer: Yes.

Att.: A right two left and then right.

Officer: Yes.

Att.: Okay. Now he did hit his tip three out of four times, is that right?

Officer: Yes, sir.

Att.: And he did follow those instructions as far as the sequence of left and right, is that correct?

Officer: Yes.

Att.: Okay. Ah, Sergeant at the time that you administered the gaze nystagmus test to Mr. Brinkerhoff were his glasses on or off?

Officer: Ah, I had him remove them, his glasses.

Att.: You had him remove his glasses.

Officer: Yes.

Att.: Where was this test performed Sergeant?

Officer: I believe they were in the parking lot of the company at 2695

South 300 West.

Att.: Uh hum. Where did he put his glasses do you remember?

Officer: I believe he just held them, to the best of my ability.

Att.: Okay.

Officer: My recollection.

Att.: Okay. Did you have Mr. Brinkerhoff under observation from the time you arrived at the scene until the time of the intoxilyzer test was given?

Officer: Well, on and off. Ah, I was giving damage release stickers and . . .

Att.: Uh huh.

Officer: stuff like that but . . .

Att.: Sergeant, specifically in reference to my last question, from the time that he entered your police cruiser under arrest, until the time that the test was given, were you observing him the whole time?

Officer: Yes.

Att.: Okay. Was he handcuffed at times?

Officer: Yes, he was.

Att.: Upon arrest?

Officer: Yes.

Att.: Okay. And ah, when you took him in to have the intoxilyzer test administered you stated that Officer Warner, was he at the station Sergeant?

Officer: I don't remember whether he was in there or I called him.

Att.: Okay. Ahem, did you go anywhere after the time that you got to the station ah, until Officer Warner administered the test?

Officer: Ah, yeah, I believe I went into dispatch a couple of times

after Officer Warner got there and was with Mr. Brinkerhoff.

Att.: Okay. And how long before the test would that have been last time that you went into dispatch?

Officer: Ah, I don't really remember I was in and out so . . .

Att.: Let me ask you this ah, . . .

Officer: (inaudible) was why Officer Warner getting the test prepared I was doing a couple of other things like getting his information from dispatch and that so . . .

Att.: You were in another room?

Officer: Yeah.

Att.: Okay. Now, I'm sorry Sergeant you are a lot more familiar with the South Salt Lake complex than I am. Ah, the court is down in the basement, right?

Officer: The City Hall . . .

Att.: Yes, uh huh.

Officer: The Police Station is separate in a separate building.

Att.: Where is it? Sergeant.

Officer: It's just west of the main complex.

Att.: Oh it's just down that little street that runs parallel to the freeway. . .

Officer: Yeah . . .

Att.: I see.

Officer: By the tennis courts there . . .

Att.: Right, by the park. Okay. So ah, dispatch is in a separate area from the area, from the area where you keep the intoxilyzer machine, is that right?

Officer: Yes.

Att.: Okay.

Officer: A couple of rooms apart?

Att.: Alright. Ahem, Sergeant do you recall Mr. Brinkerhoff asking you if he could get a drink of water when he got to the station?

Officer: Um, no I don't recall.

Att.: You don't recall one way or another whether he did or not?

Officer: No, no.

Att.: Ahem, what was Mr. Brinkerhoff's general demeanor Sergeant, was he belligerent, combative, ah, aggressive . . .

Officer: No he was, no he was very cooperative.

Att.: Did he make any statements to you as to why the police were called? To the accident, whether he initiated that call or the other driver?

Officer: No. I don't know who called, Officer Lewis can answer that, I don't know who was the complainant.

Att.: Alright. Another question about the dispatch Sergeant, sorry to skip around so much. You say that you got a dispatch, you were dispatched at 1935 military time.

Officer: Uh hum.

Att.: Now that is the actual time that your dispatcher radios to you that there is an accident, 10:50, right?

Officer: That's when she gets a call, she stamps a card when the call comes in.

Att.: When she receives the call is the 1935 that we have been talking about, is that right?

Officer: Uh hum.

Att.: And you, from the accident report have said that you arrived on the scene at 1937 military time.

Officer: Right.

Att.: Just two minutes between when she, when according to procedures she would have received the call and stamped it in . . .

Officer: Yes.

Att.: Just two minutes, okay? Was there anybody in the vehicle with Mr. Brinkerhoff?

Officer: Yes, there was.

Att.: Could you describe that passenger real briefly?

H.O.: Counselor, I don't believe that has any pertinence to this hearing.

Att.: He was a witness to the thing. I want to know what statements he made. I think it's pertinent.

H.O.: I don't see that there is any pertinence as to what a passenger had to do with this case.

Att.: As to what another person said, or observed, or what they did?

H.O.: Do you have any of those witnesses here?

Att.: No.

H.O.: Then I don't see any pertinence in going into the involvement in the case then.

Att.: So your telling me I can't ask the question?

H.O.: Yeah, I won't allow that testimony to be entered on the record.

Att.: Okay. Sergeant, may I refer your attention to no, excuse me, I will withdraw that. Sergeant, do you recall any statement by Mr. Brinkerhoff that he had, had an ulcer condition?

Officer: I don't remember anything about ulcers. He did tell me he had a heart and blood pressure problem.

Att.: Uh hum.



Officer: Unless, (inaudible) he did have an ulcer I have it written on the ah, third page back. At the time I asked him the questions he told me he had ulcers also.

Att.: I see on the interview portion of the ah, . . .

Officer: Yes.

Att.: Okay. Did ah, you ask him if he had any regurgitation or belching problems as a result of his ulcer?

Officer: No I didn't.

Att.: Okay. That's all I have.

H.O.: Okay. Officer Lewis do you want to give us your testimony please?

Witness: Okay, I was dispatched to the scene on an accident. I arrived ah, to begin the investigation at 1935. Ah, upon beginning the investigation I, standard procedures is to hand out driver exchange forms and driver statement forms. Ahem, I requested, the vehicles were still out in the 300 West at the time I arrived. I instructed the drivers to move the vehicles. Mr. Brinkerhoff did move his vehicle into the parking lot at 29, correction, 2695 South 300 West parking lot. Ah, while I was giving the ah, forms to Mr. Brinkerhoff I did smell an odor of alcohol upon his person at the time. Ah, then I proceeded to do, begin my investigation of the accident. The only other time I had contact with Mr. Brinkerhoff was when he was under arrest and sitting in the police car of Sergeant Ferraro. Ah, I observed him breathing deep, he looked like he was hyperventilating.

H.O.: I don't have any questions of Officer Lewis, do you counsel?

Att.: I have nothing.

H.O.: Okay. Are you going to have your client testify?

Att.: Yes, I am.

H.O.: If you want to proceed with that.

Att.: Just, just a moment I have to think whether I am or not. Can I have just one minute with my client?

H.O.: Sure, we'll go off the record while you step out.

Att.: Thank you.

H.O.: We are back on record now. Counsel are you going to have your client testify?

Att.: Yes. He will testify. Would you state your name please?

Driver: Ah, Verdon C. Brinkerhoff.

Att.: Uh huh. Don, you've heard the testimony of the two Officers about the evening of the 26th of October, haven't you?

Driver: Yes.

Att.: Okay. Don would you briefly explain to the hearing examiner ah, generally what happened that day? Towards the end of work.

Driver: Alright. Ah, as I stayed some after work to complete a project I was working on. I am also taking a college refresher course so I completed my lesson ah, lessons for that course and I also completed my monthly bills, I had them in that little red bag that . . .

Att.: What time do you get off work, Don?

Driver: 4:00 o'clock.

Att.: And you stayed until when?

Driver: When I left the area it was ah, little after six, I'd say six fifteen or twenty.

Att.: By the area, what do you mean, Don?

Driver: I am talking about the Magna ah, . . .

Att.: Where do you work?

Driver: 80, 41st West, or 41st South and 8400 West.

Att.: Did you have plans for that evening Don, and if so what were they?

Driver: Ah, previously I'd plan to meet a fellow by the name of Kimble Vance Ett at the Towne and Country. But we normally meet and play pool one time a week.

Att.: What is the location of the Towne and Country, Don?

Driver: It's 33 South and just off 3rd West, just East of it some.

Att.: Uh hum. Did you in fact go to the Towne and Country that evening, Don?

Driver: I, I stopped to see if he was still there, yes.

Att.: Best recollection of when you left your place of employment, Don.

Driver: Oh, twenty after six.

Att.: Twenty after six P.M.

Driver: P.M.

Att.: Uh hum. Your best recollection or estimate as to when you got to the Towne and Country.

Driver: Approximately quarter to seven.

Att.: Uh hum. Ah, Don did you have anything to drink in the Towne and Country?

Driver: Yes, I did. I ordered, I ordered one beer.

Att.: Did you drink that?

Driver: Yes, I did.

Att.: What was it in a mug, glass, schooner . . .

Driver: It was in a schooner.

Att.: Uh huh.

Driver: (Inaudible)

Att.: About how tall?

Driver: Oh I think it is the eight ounce glass.

Att.: Alright.

Driver: Whatever that is.

Att.: Ah, did you have any more beer after that?

Driver: Ah, thinking back I was talking to a fellow who was sitting adjacent to me. He did refill my glass ah, not refill it totally but he did have some, he had a pitcher.

Att.: Uh huh. And how many times did he do that, Don?

Driver: He did that twice ah, once ah, when we were talking and I went to the restroom before leaving and he filled it just before I left.

Att.: Okay. So you can't be exactly sure how many full glasses you had to . . .

Driver: I had . . .

Att.: With complete precision? What is your best estimate as to how many total . . .

Driver: I, I ordered one and he put, he refilled it and when I say refill it was not totally empty at the time.

Att.: Uh huh. How long do you think you spent in the Towne and Country, Don.

Driver: Ah, maybe 45 minutes or at approximately 7:30 I left . . .

Att.: Did you have any. . .

Driver: Within 5 minutes . . .

Att.: Did you have any hard liquor at that time?

Driver: No.

Att.: Okay. Don ah, how was it that you are so conscious about how

much you drink?

Driver: I used to be a very heavy drinker and I, in 19 I lost my wife, she died. My business ah, through the 1979, 82 time frame I was drinking very heavily, mostly at home.

Att.: When did that stop Don?

Driver: In the middle of the year 1982, I got a DUI in 1982

Att.: Uh hum.

Driver: And for the two years I attended the Utah Alcoholism Foundation. Then the . . .

Att.: Do you limit yourself since then Don?

Driver: I go out one day a week.

Att.: Do you go out and drink as much as you want on that day?

Driver: No, I limit it to two drinks. I never buy more than two drinks.

Att.: Okay. Don ah, in the testimony of the Sergeants as well as reported, it states here that you complained of an ulcer problem. What is the extent of the ulcer problem?

Driver: I have duodenum ulcers, I have peptic ulcers.

Att.: Does that cause, have any physical manifestations other than the discomfort?

Driver: Yes.

Att.: What are those.

Driver: I have severe gas problems when I drink.

Att.: You mean gas, do you mean like vilification or

Driver: Yes.

Att.: You mean ah . . .

Driver: I belch ah, I'm not supposed to drink at all on an empty stomach.

Att.: Uh huh. Did you have any belching problem that evening?

Driver: Yes, I did.

Att.: Ah, when?

Driver: I think from the ah, time I left the club on.

Att.: Uh huh. Ah, on the examination, or on the statement of the Sergeant that you just heard Don, he stated that there was a pause in your A,B,C's . . .

Driver: Yes.

Att.: Do you have any explanation for that, Don?

Driver: Yes. I was belching between the, on the two letters, I said them under my breath my (inaudible) was W,X,Z.

Att.: Don, how long do you figure. First of all let me ask you this, do you remember another Officer, not Officer Lewis, not Sergeant Ferraro, but another Officer came in and administered an intoxilyzer test to you?

Driver: Yes, I do.

Att.: Now he isn't either one of these two gentleman here today is he?

Driver: No.

Att.: How long was he in your presence Don, by that I mean you could see him in the same room?

Driver: He was there maybe 10 minutes. I'm ah . . .

Att.: That's fine. Okay. Ahem, Don would you ah, briefly explain and skip as much irrelevant detail as you can, just explain to the Hearing Examiner what happened when you left the Towne and Country Bar.

Driver: As I was leaving a fellow who later identified himself as a Alex Sandaval . . .

Att.: Uh huh.

Driver: Asked if he could ride with me, or if I would give him a ride

to 17th South. That was not my route home, I take the I 80 to 13th East. But ah, I decided I'd give him a ride. Ah, we left directly . . .

Att.: Was it dark, was it light, was it (inaudible). . .

Driver: In front of the Towne and Country it was very dark and I had to get on to, to get on third West I had to go through pot holes and a barricade which were not well lit at all. Ah . . .

Att.: Do you believe that your head lights were on or off, at that time?

Driver: I know that they were on . . .

Att.: Okay . . .

Driver: There is no question.

Att.: And ah, then you proceeded North on Third West, is that correct?

Driver: Yes, that's right.

Att.: Would you describe the incidence leading right up to the accident.

Driver: We drove ah, North on ah, Third West and ah, approximately two minutes or less later I was traveling through the 27th South intersection. And just as I had gone through the intersection a fellow who later I found out that his name was Mr. (inaudible) or however it is pronounced, came shooting across the curb into the northbound lanes and braked when he saw my headlights, when he hit his car. At the same time almost, I instantly, I hit my brakes as the skid marks will show, or probably ah, evidence. And just before impact in his side door which we were sliding towards, I released the brakes slightly so I could get some rolling friction. But my front tires and I was able to negotiate enough of a turn in the vehicle that our

vehicles collided. Front at the front passenger side of my car and front of the front wheel drivers side of the other car.

Att.: Do you have any indication that, that person saw your vehicle approaching before impact, Don?

Driver: He wasn't even looking as he came across the curb. He turned and stared at us as my headlights lighted up his whole vehicle. He had a shocked, stunned look on his face.

Att.: Uh huh. At any time from the time you left the Towne and Country parking lot until the collision happened were you headlights off?

Driver: Not at anytime.

Att.: Okay. Don, I'm going to ask you what I marked as exhibit A and ask if you can identify that please.

Driver: Yes, this is a sketch I made at the scene ah, ah, approximately the positions of the two vehicles as I was going through the intersection. Approximately the position I was in when I, the front of his car started to immerge ah, across the curb. And the final resting position after the front ends of the two vehicles had come to ah, stop.

Att.: Don, did you personally prepare that? I mean make these marks and these other indications?

Driver: Yes, I did.

Att.: Did you base that upon your recollection?

Driver: I based that on my recollection and I also went down and counted the trees and so on.

Att.: Uh huh. Did you base this on any other persons recollection?

Driver: No.

Att.: So this is made up from, as you just testified, from your, that



evening plus subsequent observations plus subsequent observations . . .

Driver: Yes.

Att.: Okay. We offer this as an exhibit on behalf of Mr. Brinkerhoff showing the accident area.

H.O.: Okay. I will accept that in the record.

Att.: Don, just briefly to clean up, there is obstruction there where the vehicle came out . . .

H.O.: Excuse me, just for clarification, could I have you mark a North direction on there so there isn't any question.

Driver: Let me, excuse me, do that right here now.

H.O.: Okay.

Driver: That's North.

H.O.: Okay.

Att.: Don ah, for clarification are there any obstructions in the area where the vehicle was pulling out of as it relates to your line of sight approaching (inaudible) direction?

Driver: Yes. There were a number of telephone poles. There were some small pine trees. There was eight shade trees and one large cottonwood tree. In addition there were other cars in that parking lot when I pulled in. I couldn't tell you if there were any parked in the stalls between the ah, intersection and the driveway when the accident occurred, because I was not looking in the parking lot at that time. And it was some minutes, quite a few minutes later before we pulled in the parking lot.

Att.: Uh huh. When was the first time that this other driver said something about your headlights not being on?

Driver: That was after I refused to move the vehicle, my vehicle along with his into the parking lot.

Att.: You insisted that they stay where they were on the roadway?

Driver: Stay where they were until the police arrived.

Att.: Now was that before he went to call the police or after, that he made a statement about your headlights?

Driver: He I, I think he was arguing with Mr. Sandaval about this before he went to make the telephone call. He, I had a very concoursly conversation. He asked me if we would pull those cars in and I said not until the police come. And that was about all we had to say to each other.

Att.: Mr. Brinkerhoff, could you feel the affects of the beer when you pulled out of the Towne and Country lot?

Driver: Not at all.

Att.: Did you feel the affects of the beer as you were driving up third West just before the collision?

Driver: Not at all.

Att.: Did you feel the affects of the beer anytime that evening?

Driver: Yes.

Att.: When was the first time you felt the affects of the beer?

Driver: I started to feel affects as ah, ah, as we were finishing the forms in the parking lot. About that time.

Att.: About how long was that after the collision . . .

Driver: (inaudible) 40 minutes.

Att.: 30 or 40 minutes. Okay. Ah, Don, do you have an estimate as to what your speed was when you cleared the 27th South intersection.

Driver: 35 miles an hour. I looked at my instrument panel just prior

to ah, ah, entering the intersection.

Att.: Uh huh. Ah, did you see this vehicle stop Don, the other vehicle?

Driver: It didn't even hesitate.

Att.: Were it's lights on?

Driver: I, they weren't when we stopped. He could have turned them off. I don't know that.

Att.: Don, ah, immediately before you took the intoxilyzer test had you, did you exchange any belching that you referred to?

Driver: Yes, and I asked Sergeant Ferraro if I could get a drink of water. Aand he said ah, not until after the breath test. And I said well that's fair.

Att.: Okay.

Driver: I felt a lot of stomach discomfort at the time.

Att.: Alright. How long does it normally take you to get home from the Towne and Country Don, do you have any idea?

Driver: Yes. Ah, I drove the route afterwards down to the Towne and Country from my home and it took 11 minutes. I came back the route I would have gone if I would have took Mr. Sandaval and dropped him off at 17th South, and that was a little over 15 minutes.

Att.: Uh huh. That's all I have.

H.O.: Do you have any closing statements you would like to make?

Att.: Yes. The ah, largest and most obvious problem that we have got here, first of all is the Baker Rule. Ah, we have no legal residual evidence that the Baker Rule was followed. Ah, to the contrary, the undisputed testimony on the record is that Mr. Brinkerhoff was in fact suffering from ah, if not regurgitation

at least some belching at the time, due to his Peptic and Duodenal ulcer condition. Ah, we would assert that without the showing that the Baker rule was followed ah, that the test is inadmissible and cannot be considered as part of the record. Ah, further related issue is now evidence ah, that we have before us that shows that the Officer who administered the test was certified. I understand that Sergeant Ferraro is in charge of that. And ah, that he may very well know, but he doesn't know the expiration date of the thing. Ah, we don't know if the Officer was certified on that night. But, that is a subsidiary to the Baker Rule problem that we've got on this case. Ah, there is no showing that any person observed Mr. Brinkerhoff for the 20 minute continuous period. In fact, the uncontroverted evidence in front of the examiner here today is that no one observed him for a continuous 20 minute period before that time. My client testified that the observation was for a ten minute period ah, that ah, Officer, Sergeant Ferraro as his testimony indicates was doing other things at that time. We have no showing of Baker Rule. Ah, our primary factual contingent is that we've got ah, an intoxilyzer result that shows .10. Mr. Brinkerhoff is just a few minutes away from consuming his last beer ah, and what we've got here is a blood alcohol level. I would ask ah, excuse me I'm not being very clear here. We've asked the examiner take judicial notice of the Widmark formula. And the ah, little cards that are promulgated by this division that show that the ah, time that it takes to simulate alcohol into the system is more than a period of just five minutes or so. That ah, what we've got

here is Mr. Brinkerhoff operating a vehicle ah, very safely avoiding a complete side slam of this vehicle that comes on to the road ah, and nearly avoiding an accident, just barely clipping the front of it. Would indicate that he was not intoxicated at that point, due to the response time that he nearly avoided the accident completely. And that the other driver was at fault. Ah, what we are submitting to this ah, this Hearing Examiner is the proposition that Mr. Brinkerhoff while he was operating that vehicle was under the .08 limit. That the accident was not his fault and therefore he was not driving under the influence to a degree which impaired his ability to drive safely. After ah, the Officers show up and they do the necessary paperwork, and it takes awhile to get the information from the drivers. His blood alcohol level was climbing during that period and finally exceeded .08, and then topped out some about an hour after the collision happened at a .10. We submit that there is not a showing that he was not under the influence at the time he operated that vehicle. Only that it was sometime subsequent that his blood alcohol level exceeded the legal Perse limit of .08. Other than the Baker Rule the intervening intoxication I do have ah, a couple of statements I need to make for the purpose of the record. That is that this Perse action should be dismissed on the grounds that the Division has not complied with the Administrative Procedures Act in the following respects. First of all, the first time that we received notice that this was a formal or informal hearing was when Mr. Call himself indicated that this was an informal hearing. As provided ah, by in section 63-46

B-3 of the Utah Code any agency action for an Admin, for a  
judicated proceeding must be initiated by a notice which  
contains the following information. Most notably of which is,  
and I will quote from the statute that the ah, judicative  
agency notice must be signed and it says signed, not stamped by  
the presiding Officer of the Division. Ah, the other  
requirements have been met with the exception that under  
(inaudible) 2 A b or 5 ah, there is no statement in the notice  
to whether the injudicated proceeding is to be conducted  
informally according to certain sections, or formally according  
to other sections. Ah, with those two deficiencies ah, we  
believe that the notice is not sufficient under that  
Administrative Procedures Act and therefore, ah, the results  
should be no action by the Division. Also, I didn't say this,  
there is no signature on the notice as well as not indicating  
whether it is formal or informal. On that submit it.

H.O.: Okay. We will complete the hearing and you will be advised by  
mail as the results of the hearing.

Att.: Thanks.

TRANSCRIPTION CERTIFICATION

STATE OF UTAH  
DEPARTMENT OF PUBLIC SAFETY

THIS IS TO CERTIFY that the Departmental Hearing of the matter of State of Utah versus Verdon C. Brinkerhoff, File Number 1434579 was electronically recorded by the Driver License Division.

That such recording was transcribed by me into typewriting; and that a true and correct transcription of said recording, to the best of my knowledge, is set forth in the foregoing pages.

WITNESS MY HAND this 19th day of December 1988.

by

A handwritten signature, appearing to read "S. Jackson", is written over a horizontal line.

DRIVER LICENSE DIVISION

## ADDENDUM D



114-1 SL

**DEPARTMENT OF PUBLIC SAFETY  
DRIVER LICENSE DIVISION**

Findings of Proceedings on Hearing for Administrative Suspension  
(Utah Code Ann. 41-2-130)

Date of Hearing	Time Set For Hearing	Name and Address of Driver	Hearing Officer
11-21-88	2:00 p.m.	Verdon C. Brinkerhoff 917 Park Row SLC UT 84105	Bryan W. Call
Name and Address of Attorney		Date of Birth	Arresting Officer
William R. Russell 102 W. 500 S #202 SLC UT 84101		DL Number	Sgt. Ferraro
Witness		Date of Arrest	Agency
		8-5-38	80 SL P1
Witness		Location of Hearing	Witness
		10-26-88	Lewis SoSLPD
		Fairgrounds	

**OPENING STATEMENT**

This hearing is being conducted at the driver's request in accordance with the Utah Administrative Procedures Act and Utah Code Ann. 41-2-130, following his/her arrest for driving while under the influence of alcohol or drugs or a combination of alcohol and drugs. The issue to be determined are: if the peace officer had grounds to believe the driver had been in actual physical control of a vehicle while under the influence of alcohol and/or drugs, was requested to take a chemical test, was warned of the potential consequences of taking the test, and was informed of the test results if any.

All formalities required in court proceedings need not be used in this hearing. However, the Division shall substantially comply with the fundamental rules of due process. Sworn testimony will be taken and the parties may have witnesses testify. The driver may testify and may cross examine others who testify.

If the license is suspended the driver has the right within 30 days, to petition the proper court for an appeal hearing.

Those testifying will be sworn and the hearing shall proceed.

.....

**The following documents and information are part of the records for this hearing:**

- |                                     |                          |   |
|-------------------------------------|--------------------------|---|
| Yes                                 | No                       |   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | The officer's report submitted in compliance with Utah Code Ann. 41-2-130.  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Notice and citation served by the officer of the Department's intent to suspend, and information on how to receive a hearing by the Department. |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Hearing request made within ten days.   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Test machine record of test results, if any.  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Operational checklist of test instrument.   |

- Yes ☒ No ☐ Department of Public Safety affidavit that indicates the breath testing instrument was checked according to Department Standards (41-6-44.3 UCA)  
*10-21-88 11-2-88*
- ☒ ☐ Other (ie Documents and/or information received in behalf of the driver and/or other evidence received which is made official record for the purpose of this hearing).  
Explain: *Accident diagram by Mr Brinkerhoff*

### TESTIMONY AND EVIDENCE PRESENTED

1. Sworn testimony of officer.

- a. Following are the facts and conclusions presented by the peace officer leading the peace officer to believe the party had been driving or in actual physical control of a motor vehicle while under the influence of alcohol, any drug or a combination of alcohol and any drug:

*Sgt Ferraro was dispatched to an accident scene. Mr Brinkerhoff admitted being the driver. He had an odor of alcohol and was unable to perform the 5 field tests as instructed.*

- b. The driver was placed under arrest: No ☐ Yes ☒ Charge(s) *DUI*
- c. The driver was advised prior to the chemical test that test results could result in suspension of his/her driving privilege No ☐ Yes ☒
- d. Officer who administered chemical test was certified to do so: No ☐ Yes ☒
- e. Department procedure and rules were followed by the peace officer in the administration of the chemical test No ☐ Yes ☒
- e(1) Evidence and/or information received indicating the test machine was ☒ was not ☐ properly working:
- e(2) The driver submitted to a chemical test as requested by a peace officer which showed a reliable test result of *1105* %.

2. Testimony by witness officer or other witness(es): Name: *Lewis*

*Officer Lewis did the accident investigation and noticed an odor of alcohol on Mr Brinkerhoff*

3. Substance of testimony or evidence by driver or witness(es) Name Brinkerhoff

Mr Brinkerhoff described the accident and stated he did everything he could to avoid it. He stated he had three drinks and has ulcers. He said he belched during the field tests and prior to the intoxilyzer test.

4 Substance of statement and or questions by driver's legal counsel

Counsel questioned the Sgt. about the accident, field tests, intoxilyzer test and Baker rule. Counsel argues that the Baker rule was not followed because his client belched prior to the test and there is no direct evidence that Officer Warner is certified so the intoxilyzer test should be eliminated. His client had drunk just prior to the test so at the time of the driving his client was under the .08 limit. The notice of the hearing is "stamped" and not "signed" and does not state formal or informal proceeding so no action should be taken.

**PRESIDING OFFICERS FINDINGS OF FACT AND CONCLUSION OF LAW:**

- A The peace officer had reason to believe that the driver had ☒ had not ☐ violated Utah Code Ann 41-6-44 and was arrested for the same
- B The driver was ☒ was not ☐ placed under arrest for D U I.
- C The driver was ☒ was not ☐ advised of the possible revocation/suspension of his/her driving privilege
- D The chemical test was ☒ was not ☐ administered by an officer certified to do so
- E Proper procedures and standards were ☒ were not ☐ followed by the peace officer to insure the operation of the test machine to be reliable, with the results of .105 %
- F Department of Public Safety affidavit indicated the breath testing instrument used was ☒ was not ☐ reliable and in proper working order according to Department Standards (UCA 41-6-44 3)

G. All procedures and requirements were ☒ were not ☐ followed by the reporting officer pursuant to Utah Code Ann. 41-2-130. (Explain what procedures were not followed, if any):

H. Officer did ☒ did not ☐ appear.

Reasons for non-appearance: \_\_\_\_\_

I. Additional findings of fact not covered above:

#### CONCLUSIONS:

BASED UPON THE FOREGOING FINDINGS OF FACT, IT IS CONCLUDED THAT ALL OF THE STATUTORY PROVISIONS REQUIRED TO SUSPEND THE DRIVING PRIVILEGE PURSUANT TO UTAH CODE ANN. 41-2-130 WERE ☒ WERE NOT ☐ PROVIDED IN THIS CASE, AND THE FOLLOWING DECISION IS RENDERED:

☒ To suspend the driving privilege by authority of Utah Code Ann. 41-2-130.

☐ Take No Action:  
Explain: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Comments by Presiding Officer:

*Counsel's arguments are either without merit or do not prejudice the proceedings.*

Presiding Officer: Bryan W. Cal

FOR CENTRAL OFFICE USE ONLY

Reviewed by: M. A. H. S.

## ADDENDUM E



STATE OF UTAH  
DEPARTMENT OF PUBLIC SAFETY

10-26-88  
DOB: 08-05-38

NORMAN H. BANGERTER, GOVERNOR

JOHN T. NIELSEN, COMMISSIONER  
D. DOUGLAS BODRERO, DEPUTY COMMISSIONER  
L. DALE ELTON, DEPUTY COMMISSIONER

VERDON C. BRINKERHOFF  
917 PARK ROW  
SALT LAKE CITY, UT. 84105

ORDER OF SUSPENSION  
FILE NUMBER 001434579

BY AUTHORITY OF TITLE 41, UTAH CODE ANNOTATED 1953, IT IS  
HEREBY ORDERED THAT YOUR PRIVILEGE TO OPERATE A MOTOR  
VEHICLE ON THE HIGHWAYS OF THIS STATE IS SUSPENDED FOR A  
PERIOD OF 3 MONTHS EFFECTIVE 25 NOVEMBER 1988.

IT IS FURTHER ORDERED THAT IF YOU HAVE NOT ALREADY DONE SO, YOU  
IMMEDIATELY SURRENDER TO THIS DEPARTMENT YOUR UTAH DRIVER LICENSE, IF  
ANY, AND ALL OTHER LICENSES ISSUED TO YOU.

THE GROUNDS FOR SUCH ACTION IS U.C.A. 41-2-130 AND THAT  
A PEACE OFFICER HAD REASONABLE GROUNDS TO BELIEVE YOU HAD  
BEEN OPERATING A MOTOR VEHICLE IN VIOLATION OF U.C.A.  
41-6-44 (DRIVING UNDER THE INFLUENCE LAW).

UTAH LAW REQUIRES ANY PERSON WHOSE UTAH DRIVING PRIVILEGE  
HAS BEEN SUSPENDED OR REVOKED TO PAY A \$50.00 FEE FOLLOWING  
THE REVOCATION OR SUSPENSION PERIOD TO HAVE THIS PRIVILEGE  
REINSTATED. IN ADDITION TO THE REINSTATEMENT FEE, A \$25.00  
ADMINISTRATIVE SERVICE FEE WILL BE ASSESSED WHEN THE  
PRIVILEGE TO DRIVE HAS BEEN ADMINISTRATIVELY SUSPENDED OR  
BEING ARRESTED FOR DRIVING UNDER THE INFLUENCE.

IF YOU HAVE NOT VOLUNTARILY SURRENDERED WITHIN 20 DAYS  
LICENSES AND PERMITS AND A PICKUP ORDER HAS BEEN ISSUED FOR  
THESE ITEMS, AN ADDITIONAL \$25.00 FEE WILL BE ASSESSED AT  
THE TIME OF REINSTATEMENT.

IT IS A MISDEMEANOR TO OPERATE ANY MOTOR VEHICLE UPON  
HIGHWAYS OF THIS STATE WHILE YOUR DRIVER LICENSE IS  
SUSPENDED OR REVOKED.

YOU MAY APPEAL THIS ACTION IN A COURT OF RECORD IN THE  
COUNTY OF YOUR RESIDENCE WITHIN THIRTY (30) DAYS.

cc: William R. Russell  
Attorney at Law  
102 West 500 South #202  
Salt Lake City, UT 84101

RESPECTFULLY YOURS,

FRED C. SCHWENDIMAN, DIRECTOR  
DRIVER LICENSE SERVICES

CERTIFICATE OF REINSTATEMENT  
I hereby certify that the above named person is an  
employee of the Driver License Division of the Utah  
State Department of Public Safety, and that he is  
in the United States Mail Mail Order Service  
Utah the original order of which is in the  
exact copy in an envelope and postage  
stamp and addressed to the person named in  
the order. at his or her last address as shown  
by the records of the Department  
NOV 25 1988

Date

Employee of Department

## ADDENDUM F

COPY FOR YOUR  
INFORMATION

WILLIAM R. RUSSELL (2833)  
Attorney for Plaintiff  
102 West 500 South, #202  
Salt Lake City, Utah 84101  
Telephone: (801) 322-5904

DEC 5 3 45 PM '88

CLERK  
DEPUTY CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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VERDON C. BRINKERHOFF,	:	
Petitioner,	:	EX PARTE MOTION FOR
vs.	:	STAY OF ORDER OF
	:	SUSPENSION
FRED C. SCHWENDIMAN, Director,	:	
and the Office of Driver	:	Case No. <u>880907874AA</u>
License Services,	:	Judge <u>R. H. Moffat</u>
Respondent.	:	

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The Petitioner, VerDon Brinkerhoff, by his attorney of record William R. Russell, hereby moves this Court, EX PARTE, for its Order staying the operation of the Order of Suspension of the Petitioner's driving privilege, which was issued by the Department of Public Safety, Office of Driver License Services.

In support thereof, Petitioner respectfully shows this Court:

1. Petitioner has petitioned this Court for judicial review, by Trial De Novo, of the Order of Suspension of his driving privilege for three months pursuant to Section 41-2-131 Utah Code Ann.

2. Unless such stay is granted, operation of the




Suspension will work immediate, permanent and irreparable harm upon the Petitioner as he will be unable to operate a motor vehicle to and from his place of employment.

3. Petitioner has no adequate remedy at law, as prospective monetary damages are incalculable.

4. Petitioner respectfully requests that the Court not require any security be given by me in that the rights of defendants affected by the relief sought are not so significant and/or capable of being quantified that would require that security be posted. In addition, defendants will not suffer if Petitioner's driving privilege is restored pending judicial review.

This Motion is further supported by the Verified Petition filed herein.

DATED this 2<sup>nd</sup> day of December, 1988.

  
\_\_\_\_\_  
WILLIAM R. RUSSELL  
Attorney for Petitioner

Certificate of Mailing

I hereby certify that on this 5<sup>th</sup> day of December, 1988, I mailed a copy of the foregoing Ex Parte Motion, postage prepaid, to

Mr. Bruce M. Hale, Jr.  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114

  
\_\_\_\_\_

WILLIAM R. RUSSELL (2833)  
Attorney for Petitioner  
102 West 500 South, #202  
Salt Lake City, Utah 84101  
Telephone: (801) 322-5904

DEC 5 3 47 PM '88

BY [Signature]  
DEPUTY CLERK

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

**COPY FOR YOUR  
INFORMATION**

VERDON C. BRINKERHOFF, :  
Petitioner, :  
vs. : STAY OF ORDER OF  
SUSPENSION  
FRED C. SCHWENDIMAN, Director, :  
and the Office of Driver : Case No. 880907924AA  
License Services, : Judge R. H. Moffat  
Respondents. :

The Motion of Petitioner, VerDon C. Brinkerhoff, for a stay of the operation of the Order of Suspension of his driving privileges, issued by the Utah Department of Public Safety, Office of Driver License Services, having come before this Court Ex Parte for hearing this 5<sup>WRR</sup> day of December, 1988, and the Court having reviewed the Verified Petition and other matters filed herein, and good cause appearing therefor, it is hereby

ORDERED:

1. That the operation of the Order of Suspension issued by the above agency, effective November 25, 1988, relating to the driving privileges of the Petitioner, is hereby stayed during the pendency of these proceedings.

2. The Office of Driver License Services is commanded

to forthwith amend any and all records and/or data relating to the driving privileges of the Petitioner to reflect that such privilege is in effect, until further order of this Court.

DATED this 5 day of December, 1988.

BY THE COURT:

DISTRICT JUDGE

Certificate of Mailing

I hereby certify that on this 5<sup>th</sup> day of December, 1988, I mailed a copy of the foregoing Stay of Order of Suspension, postage prepaid, to

Mr. Bruce M. Hale, Jr.  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114

STATE OF UTAH )  
COUNTY OF SALT LAKE ) SS

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ATTACHED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT  
THIS 5 DAY OF Dec 1988  
H. DIXON HINDLEY, JR.  
BY [Signature] DEPUTY

NORMAN H. BANGERTE, GOVERNOR



JOHN T. NIELSEN, COMMISSIONER  
D. DOUGLAS BODRERO, DEPUTY COMMISSIONER  
L. DALE ELTON, DEPUTY COMMISSIONER

STATE OF UTAH  
DEPARTMENT OF PUBLIC SAFETY

Verdon C. Brinkerhoff  
917 Park Row  
Salt Lake City, Ut 84105

File No. 1434579  
D.O.B. 8-5-38

Dear driver:

In compliance with an Order from the Court, your driving privilege has been reinstated pending your appeal of an Order of Suspension resulting from your arrest for Driving Under the Influence.

Any further action in this matter will depend upon the disposition of your appeal.

If your driver's license has been received by this department, it has been enclosed herein.

Very truly yours,

Fred C. Schwendiman  
Bureau Chief  
Driver License Services

cc: William R. Russell  
Attorney at Law  
102 W. 500 So. #202  
Salt Lake City, Ut 84101



## ADDENDUM G

**R712-017 UTAH DRIVER LICENSE DIVISION RULES FOR ADMINISTRATIVE PROCEEDINGS**  
**R712-017-1 The short title of this rule shall be Driver License Division, Rules for Administrative Proceedings.**

**R712-017-2 Authority**

The authority for these rules is U.C.A. 41-2-102.5 and 63-46b-1 et seq. (1988).

**R712-017-3 Definitions**

The following terms and phrases are defined as follows:

(1) Division - the division is the Driver License Division of the Utah Department of Public Safety.

(2) Division Record - the division record shall consist of its entire file including written reports by the department employees and documents or exact copies received, including information received by magnetic or electronic means or otherwise. It includes minutes, written comments, the presiding officer's written statements and summaries of the material, testimony, evidence and findings of fact and law, recommendations and orders.

(3) Hearing - a hearing is an informal adjudicative proceeding where evidence is taken to determine an issue of fact and adjudicate a prior legal right based on the division record, evidence, documents and information.

(4) Petition - a petition is a timely, written request for agency adjudicative action that is allowed by rule or law.

(5) Presiding Officer - A presiding officer is a division employee, acting under the division director or supervisors with written or unwritten responsibilities to conduct adjudicative proceedings and make decisions and recommendations. The term "hearing officer", as used by the division, is a presiding officer.

(6) Recording - a recording is the verbatim magnetic tape recording of sworn or unsworn testimony or information and may become part of the division records. A division record may be complete without a recording.

(7) Request - a request is an application to ask the division to take action; i.e., issue a driver license and is not a petition (request for adjudicative hearing).

**R712-017-4 Purpose and Intent of Rule**

It is intended that these rules not make substantive changes in the law but are only guidelines and procedural rules. The purpose is to clarify procedures under the Utah Rulemaking Act and the Utah Administrative Procedures Act as stated in the advisory committees' overview on "Coverage of the Act" ("It does not govern the substantive questions with which agencies deal.") and "Comments to the Act" taking the federal approach. The rule is not intended to extend legal rights, privileges or duties not granted or required by Utah law. These rules are intended to facilitate the administration of the driver's license statutes contained in Title 4 of the Utah Code and to maintain the highest degree of public safety possible.

These rules do not apply to nonadjudicative actions that are required by Utah law. Examples of nonadjudicative actions required by the Utah Code are: the initial issuance of a driving permit subject to the statutory conditions and requirements to obtain a license contained under U.C.A. 41-2-103 through 125 (1987). This also includes nonadjudicative actions mandated by law based on a receipt of an official record under U.C.A. 41-2-127, U.C.A. 41-2-601, (the Nonresident Violator Compact), U.C.A. 41-2-501, (the Driver License Compact) and U.C.A. 41-12a (Financial

Responsibility of Motor Vehicle Owners and Operators Act). These examples are not all inclusive.

#### **R712-017-5 Petitions for Adjudication**

Petitions requesting division adjudicative action or responses to notice of agency action must be timely filed with the division, must be written, clear and concise and include but not limited to the following.

(1) A clear designation of the parties with any necessary data including the date of the prior occurrence or action.

(2) The reason for the petition.

(3) The petitioner's full name, address, zip code, telephone number, and driver license number or date of birth or division file number.

(4) The petition must be dated, signed and timely received. The department will not proceed on a petition unless the above requirements are reasonably met or the division is required to by statute.

#### **R712-017-6 Designations**

All division adjudicative actions except actions mandated by statute are designated to be informal proceedings unless converted to formal in the discretion of the presiding officer or supervisor. The presiding officer may convert an informal proceeding to a formal proceeding only if approved by his supervisor and the conversions will enhance efficiency of the proceeding and it will not unreasonably increase costs and it is in the interest of public safety. Recordings may be made in adjudicative proceedings under U.C.A. 41-2-130, 201, 202, 41-6-44.10, 41-2-12a et seq.

#### **R712-017-7 Hearings**

Hearings or informal adjudicative proceedings will be held only if required by Title 41, Chapters 2, 6, 12(a) of the Utah Code. There must also be a timely written petition and a controversy involving a prior valid license.

#### **R712-017-8 Hearing Procedures**

The adjudicative proceedings will be held in the various locations used by the division throughout the state at the times and places designated by the division director or employees or at a place agreed to by the petitioner and the division. The hearings should be open, informative, informal orderly proceedings.

(1) Timeliness. Adjudicative proceedings will only be held if there is a timely written petition, request or response. A petition for adjudication must be filed within 20 days of the date of the action unless otherwise required by statute or division notice or default and the action will be entered without further notice.

(2) Evidence. The parties and witnesses may testify, under oath or affirmation, present evidence and comment only on the pertinent issues. The presiding officer has discretion to hear and exclude irrelevant, repetitious, immaterial, or privileged information or evidence. The presiding officer may consider hearsay evidence. The presiding officer may also receive and consider documentary evidence deemed to be reliable including copies or excerpts.

(3) Notice. Notice may be given as provided for under U.C.A. 41-2-122 or by other means, telephonic or otherwise agreed to by the parties in order to meet the statutory requirements. All notices shall be given on forms approved by the department. Approved forms are deemed signed by the

presiding officer. The notice need only reasonably inform the parties as to the date, time, and basic purpose of the hearing. The parties are deemed to have knowledge of the law. The division need not state the type of hearing as the presiding officer may convert the informal hearing at any time as provided under U.C.A. 63-46b-4(3).

(4) Information. The division may provide information and documents that are not confidential and are relevant to the proceedings and issue subpoenas for witnesses to be paid for by the requesting party if timely requested and providing it will not delay the proceedings.

(5) Official Notice. The presiding officer has discretion to take official notice of the Department of Public Safety's records, procedures, rules, policies, technical or scientific facts within his or the agency's specialized knowledge or experience or any other facts that could be judicially noticed under Utah law.

(6) Presiding Officer. The presiding officer has discretion to decide on the taking of evidence on the relevant issues, administer oaths and affirmations, issue subpoenas, rule on offers of proof and the relevancy of evidence, take depositions only if the ends of justice would so serve; regulate the course of the hearing, hold conferences to encourage settlement, clarify the issues, simplify the evidence, facilitate discovery, or expedite the proceedings and dispose of all procedural requests or similar matters. The presiding officer may limit time periods and control the extent of argument and is not subject to the formal rules of evidence as the factual and legal issues dictate.

One presiding officer is not bound by the decision of another presiding officer in another proceeding.

The presiding officer may take "appropriate measures to preserve the integrity of the hearing" UCA 63-46(b)-8(2).

(7) Comment. The presiding officer has discretion to accept written comment and expert testimony may be invited.

(8) Record. The presiding officer may choose to make a verbatim recording or record the testimony, information and documents on forms provided by the division with "quotations of the verbatim testimony" sufficient for court review.

#### **R712-017-9 Findings, Conclusions, Recommendations and Order**

The presiding officer should make a brief written summary of relevant findings of fact and the legal conclusions arrived at with a brief recommendation. These recommendations will be final but are open to possible review by the director or his designate. Any review will be strictly on whether the evidence supports the findings and the law supports the conclusions or recommendations. The director will not make choices on the believability or integrity of the witnesses.

(1) Brevity. The findings, conclusions and recommendations should briefly state in writing the above reasons and be signed by the presiding officer.

(2) Material Facts - The findings should briefly "summarize" the verbatim facts or testimony presented unless it is presented in documentary form.

(3) Recommendation - The recommendation by the presiding officer for agency action may be in the form of check boxes on forms approved by the director.

(4) Findings of Fact and Conclusions - The findings of fact and conclusions may be in check box form as approved by the director on forms of the division.



(5) Reasons - The presiding officer may give additional reasons for the recommendation if necessary but only if the reasons are not obvious.

(6) Transmit - The findings, conclusions and recommendations of the presiding officer should be transmitted to a superior as soon as possible for preparation of an order. They may be in computerized, handwritten, typed or in any form reasonably calculated to facilitate the proceeding and review.

(7) Notice to the Petitioner - The division will mail to the petitioner written notice of the order to the last known address of the petitioner or parties as provided in U.C.A. 41-2-122. The written findings, conclusions and recommendations are available only to the parties and upon request in writing.

#### **R712-017-10 Division Discretion**

The Department of Public Safety and the Driver License Division maintains any discretion granted by law or statute and is not limited in its discretion by these rules.

#### **R712-017-11 Exemptions**

These rules do not apply if the director or a presiding officer finds imminent peril to public safety health or welfare.

#### **R712-017-12 Procedural Only**

These rules are subject to change as needed and these rules will be periodically reviewed by the division in light of its experience and any changes in common or statutory law. They are intended to be procedural only and to not to dictate any substantive law.

#### **R712-017-13 Prior Policies**

These rules adopt the prior actions, procedures, forms, policy statements, and rules of the division as they are considered part of the division's present policies and procedures that comply or will comply with the intent of these rules and the Utah Administrative Procedures Act.

#### **R712-017-14 Failure to Respond**

If the petitioner fails to timely respond to a departmental request or notice, default will be deemed and the division will take the action stated in the notice or order or whatever action it deems necessary under the circumstances.

#### **R712-017-15 Time**

The division maintains discretion to shorten or lengthen any time periods deemed to be necessary in the interest of public safety or as required or permitted by Utah law. This rule is not intended to change any jurisdictional statutory time periods. In computing any prescribed time period not covered by division rule time periods may be computed in accordance with Rule 6 of the Utah Rules of Civil Procedure.

#### **R712-017-16 Knowledge of the Law Presumed**

The division deems that the petitioner has a knowledge of the published Utah law and these rules and the division policies and, therefore, need not delineate and inform petitioner of all possible issues, basis, or content of the Utah Operators License Act.

**R712-017-17 Declaratory Orders**

The division will not issue declaratory orders and any orders or recommendations are not deemed to be declaratory orders unless a declaratory statement is deemed necessary by the division director.

**R712-017-18 Stays**

Any division orders issued subsequent to adjudicative proceedings are final and will not be stayed by the division or its employees nor will the division respond to petitions for stays of final division orders except by court order under extraordinary or rare circumstances showing immediate, substantial, irreparable injury and imminent danger to public safety, health or welfare.

**R712-017-19 Emergency Proceedings**

The division orders and proceedings, especially those under 41-2-127 to 130, are not emergency proceedings under U.C.A. 63-46b-20 but complies with the statutory mandates of the substantive driver license acts. Notice and orders are not emergency even though the time periods may be under 30 days.

**R712-017-20 Construction**

These rules shall be construed to secure a prompt and economical determination of the relevant issues before the division and to comply with the general procedural intent and purpose of U.C.A. 63-46b et seq.

**R712-017-21 Severability**

In the event any part of these rules may be held unconstitutional or unenforceable the remaining parts are severed and effective.

**KEY: Administrative Proceedings**  
1987

41-2-102.5  
63-46b-1

## ADDENDUM H

**Comments of the  
Utah Administrative  
Law Advisory Committee  
on the Drafting and Interpretation of the  
Utah Administrative Procedures Act  
(Including the 1988 Amendments)**

Using the 1981 version of the Model State Administrative Procedure Act (MSAPA) as a guide and adapting the MSAPA to Utah's needs, the Utah Administrative Law Advisory Committee (Advisory Committee) drafted the Utah Administrative Procedures Act (UAPA). The Advisory Committee, appointed by Attorney General David L. Wilkinson, consisted of the following members: Stephen M. Hadley, Carl S. Hawkins, Dallin W. Jensen, D. Mark Jones, KayCee McGinley, Stephen F. Mecham, Karl N. Snow, Jr.; Alan L. Sullivan, A. Robert Thorup, and Stephen G. Wood. Mr. Hawkins served as chairman and Mr. Wood served as reporter to the Advisory Committee from April 1983 until December 1986. In December 1986, Mr. Wood was appointed as chairman, Mr. Sullivan was appointed as vice-chairman and Mr. Thorup was appointed to direct the lobbying efforts of the Advisory Committee on behalf of the UAPA.

The Advisory Committee prepared two sets of Committee Comments for the UAPA. The original set was based on discussions within the Advisory Committee and explanations given by the Advisory Committee to the Legislature and its committees during the legislative process in 1987. When the UAPA - Senate Bill No. 35 before the 1987 General Session of the Utah Legislature - was passed by the House of Representatives on February 23, 1987, Representative Bishop, the House sponsor, moved to reproduce and make available to the public the Committee Comments as part of the legislative history of the UAPA. This motion was unanimously adopted. See House Journal, Day 43, February 23, 1987, at 705. When the Legislature unanimously passed the Utah Administrative Act Amendments - Senate Bill No. 86 before the 1988 General Session of the Utah Legislature - in 1988, the Advisory Committee revised the original set of Committee Comments to reflect the changes made by this legislation. The revised Committee Comments, like the original Committee Comments, were based on discussions within the Advisory Committee and explanations given by the Advisory Committee to the Legislature and its committees during the legislative process. The purpose of the Committee Comments is to assist all - the public, state agencies, the courts and attorneys - who will use the UAPA to better understand its provisions.

**63-46b-1 Scope and Applicability COMMENTS**

Subject to the exceptions enumerated in Sections 63-46b-1(2), 63-46b-1(5) and 63-46b-1(7), Section 63-46b-1(1) states that the UAPA covers all adjudicative proceedings conducted by state agencies of the State of Utah and judicial review of these adjudicative proceedings.

The procedures contained in the UAPA supercede existing, conflicting procedures in other statutes. In this connection, the Legislature required the Advisory Committee to prepare specific repealers of existing, conflicting procedures in other statutes.

Section 63-46b-2(1)(a) defines "adjudicative proceeding" to mean "an agency action or proceeding described in Section 63-46b-1." See also Section 68-3-12. Section 68-3-12 is not a part of the UAPA but contains generic definitions and rules of construction. Section 68-3-12(2)(a) defines "adjudicative proceeding" to mean "(i) all actions by a board, commission, department, officer, or other administrative unit of the state that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license, and (ii) judicial review of all such actions."

Section 63-46b-2(1)(b) defines "agency" to include "a board, commission, department officer or other administrative unit of this State, including the Agency Head, agency employees, or other persons acting on behalf of or under the authority of the Agency Head" but to exclude "the Legislature, the courts . . . the Governor" and "any political subdivision of the State or any administrative unit of a political subdivision of the State."

The UAPA does not cover rulemaking. See Section 63-46b-1(2)(a). The UAPA, however, should not be interpreted as discouraging agencies from engaging in appropriate rulemaking, particularly rulemaking to elaborate on agency procedure consistent with the UAPA. See Section 63-46b-1(6). Rulemaking is governed by the Administrative Rule Making Act rather than the UAPA. See Utah Code Annotated 63-46a-1 et seq.

The UAPA does not cover proceedings that are informational or investigative rather than adjudicative. The UAPA also does not cover certain agency actions that might otherwise be classified as adjudicative proceedings. See Sections 63-46b-1(2)(b) through 63-46b-1(2)(n). Sections 63-46b-1(2)(b) through 63-46b-1(2)(n) are functional exemptions to the UAPA that should be construed narrowly to effectuate uniformity in adjudicative proceedings.

The UAPA does not cover "contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in such contracts . . . ." See Section 63-46b-1(2)(g). This functional exemption does not exempt leases that are the equivalent of a permit or license.

The UAPA does not affect legal remedies otherwise available to compel an agency to take action or to challenge an agency's rules. See Section 63-46b-1(3).

An agency, prior to the beginning of an adjudicative proceeding, or the presiding officer, during an adjudicative proceeding, is authorized to request or order conferences with parties and interested persons to facilitate settlement or streamline the adjudicative proceeding. See Section 63-46b-1(4). Consequently, some of the purposes of such conferences are to encourage settlement, to clarify the issues, to simplify the evidence, to facilitate discovery, or to expedite the proceedings. A presiding officer is also authorized to grant a timely motion either to dismiss or for summary judgment, if the requirements of Rules 12(b) or 56 of the Utah Rules of Civil Procedure and the UAPA are met. The well-developed caselaw concerning Rules 12(b) and 56 should assist presiding officers in deciding motions made under Section 63-46b-1(9).

Section 63-46b-1(7) has some similarity to the comparable provision in the MSAPA (Section 1-

104) The intent of the Committee is that Section 63-46b 1(7) be narrowly construed

The UAPA is not an alternative source of jurisdiction. See Section 63-46b-1(8). The approach of the UAPA is identical to the federal approach. See *Califano v. Sanders*, 430 U.S. 90 (1977).

A presiding officer is authorized to lengthen or shorten time periods prescribed by the UAPA for good cause. See Section 63-46b 1(9). Time periods for judicial review, however, are not affected by Section 63-46b 1(9). The Advisory Committee, moreover, urges agencies to use the authority contained in Section 63-46b-1(9) sparingly to preserve the uniformity of procedure mandated by the Legislature.

#### 63-46b-2 Definitions COMMENTS

The UAPA contains many terms that require definition. Many of the definitions chosen were borrowed from the MSAPA.

Section 63-46b 2(1)(a) of the UAPA and Section 68-3-12 which contains general rules of statutory construction define "adjudicative proceedings." The MSAPA does not define "adjudicative proceedings." Section 1-102(2) of the MSAPA does define "agency action," a term that embraces both adjudicative proceedings and rulemaking.

Section 63-46b-2(1)(b) is patterned after the comparable provision in the MSAPA (Section 1-102(1)).

Section 63-46b 2(1)(c) is identical to the comparable provision in the MSAPA (Section 1-102(3)).

Section 63-46b 2(1)(e) is identical to the comparable provision in the MSAPA (Section 1-102(4)).

Section 63-46b 2(1)(f) is partially patterned after the comparable provisions in the MSAPA (Sections 1-102(6) and 1-102(7)). The intent of the Advisory Committee is that Section 63-46b 2(1)(f) be broadly construed.

Section 63-46b 2(1)(g) is patterned after the comparable provision in the MSAPA (Section 1-102(8)). The intent of the Advisory Committee is that Section 63-46b 2(1)(g) be broadly construed.

Section 63-46b 2(1)(h) is partially patterned after the comparable provision in the MSAPA (Section 4-202(a)). Although Section 63-46b 2(1)(h) is found in the definitional section of the UAPA, the provision, particularly Sections 63-46b 2(1)(h)(ii) and 63-46b 2(1)(h)(iii), is not strictly definitional but imposes directions to and limitations on those persons who can serve as a presiding officer. See also Section 63-46b 2(2).

The Advisory Committee considered defining but chose not to define the following terms: decision, de novo review, hearing and order. The Advisory Committee concluded that these terms have an accepted legal meaning in the State of Utah and that any ambiguities ought to be resolved within the judicial system.

#### 63-46b-3 Commencement of Adjudicative Proceedings COMMENTS

Adjudicative proceedings can be commenced either by an agency (Section 63-46b-3(1)(a)) or by a person other than an agency (Section 63-46b-3(1)(b)).

Section 63-46b 3(2)(a)(x) is identical to the comparable provision in the MSAPA (Section 4-206(c)(6)). Sections 63-46b 3(2)(a)(i) and 63-46b-3(2)(a)(ix) are patterned after the comparable provisions in the MSAPA (Sections 4-206(c)(1), 4-

206(c)(2) and 4-206(c)(5)). Sections 63-46b 3(2)(a)(ii), 63-46b 3(2)(a)(vii) and 63-46b 3(2)(a)(xi) have some similarity to the comparable provisions in the MSAPA (Sections 4-206(c)(3), 4-206(c)(4), 4-206(c)(8) and 4-206(c)(7)).

The agency's role in eliciting the information required by Section 63-46b 2(3)(a) and (b) can be active as well as passive. Section 63-46b 2(3)(c) authorizes the agency by rule to prescribe one or more printed forms that will serve as the request for agency action when completed and filed with the agency. This same form could provide space and guidance consistent with the UAPA for any response due from a person who is required to respond to the request for agency action. The agency also can provide personnel who will answer questions or assist individuals in completing and processing the request for agency action.

Notice normally is given by mail in the case of adjudicative proceedings commenced by a person other than the agency. Notice can be given by publication when required by statute. Compare Sections 63-46b 3(2)(b)(ii) and 63-46b 3(3)(e)(ii).

A written response within 30 days is normally required for formal adjudicative proceedings. See Sections 63-46b 3(2)(a)(vi) and 63-46b 3(3)(e)(iii)(D). Agencies can facilitate compliance with this requirement by designing forms that satisfy the requirement. Response times shorter than 30 days are permitted if required by applicable federal law. See Section 63-46b 3(5). Response times longer than 30 days are permitted on the basis of an agency rule. See Section 63-46b 3(5). The agency must provide for a longer response time in advance and only for certain designated classes of adjudicative proceedings. Normally, no comparable requirement exists for informal adjudicative proceedings. Compare Sections 63-46b 3(2)(a)(vi) and 63-46b 5(1)(a).

The default provisions of the UAPA referred to in Section 63-46b-3(2)(a)(vii) are found in Section 63-46b 11.

Commencement of an adjudicative proceeding by a person other than an agency is not a matter of right but depends on the existence of a law permitting the initiation of an adjudicative proceeding.

Section 63-46b 3(3)(e)(iii)(D) embodies a reasonableness standard. The notice provision should be construed and applied to facilitate notice to persons reasonably known to be interested. The notice provision does not impose a responsibility to locate persons whose identity is unknown or whose location cannot be reasonably discovered.

Some agencies may be involved in adjudicative proceedings where there are multiple applications from competing applicants. Section 63-46b 2(7) authorizes agencies in this situation to consolidate these multiple competing applications into a single comparative adjudicative proceeding.

Section 63-46b 2(4) provides that agencies should set by rule the time within which a request for agency action must be filed with the agency in cases where initial agency determinations or actions are not governed by the UAPA but review of these initial agency determinations or actions are governed by the UAPA. The intent of the Advisory Committee is that this provision be interpreted as encouraging agencies to promulgate such rules. The failure of an agency to provide a time period normally should be interpreted to mean that the period for filing is continuously open in the absence of unusual circumstances.

## ADDENDUM I

- (ii) any action taken by an agency in response to committee recommendations, and
- (iii) any recommendations by the committee for legislation

1969

**63-46a-11.5. Legislative reauthorization of agency rules — Extension of rules by governor.**

(1) All grants of rulemaking power from the Legislature to a state agency in any statute are made subject to the provisions of this section

(2) (a) Except as provided in Subsection (b), every agency rule that is in effect on January 1 of any calendar year expires on May 1 of that year unless it has been reauthorized by the Legislature during its annual general session

(b) Notwithstanding the provisions of Subsection (1)(a), an agency's rules do not expire if

(i) the rule is explicitly mandated by a federal law or regulation, or

(ii) a provision of Utah's constitution vests the agency with specific constitutional authority to regulate

(3) (a) Prior to January 1 of each year, the Administrative Rules Review Committee shall have omnibus legislation prepared for consideration by the Legislature during its annual general session

(b) The omnibus legislation shall be substantially in the following form "All rules of Utah state agencies are reauthorized except for the following"

(c) Before sending the legislation to the governor for his action, the Administrative Rules Review Committee shall send a letter to the governor and to the agency explaining specifically why the committee believes any rule should not be reauthorized

(4) The Legislature's reauthorization of a rule by legislation does not constitute legislative approval of the rule, nor is it admissible in any proceeding as evidence of legislative intent

(5) (a) If an agency believes that a rule that has not been reauthorized by the Legislature or that will be allowed to expire should continue in full force and effect and is a rule within their authorized rulemaking power, the agency may seek the governor's declaration extending the rule beyond the expiration date

(b) In seeking the extension, the agency shall submit a petition to the governor that affirmatively states

(i) that the rule is necessary, and

(ii) a citation to the source of its authority to make the rule

(c) (i) If the governor finds that the necessity does exist, and that the agency has the authority to make the rule, he may declare the rule to be extended by publishing that declaration in the Administrative Rules Bulletin on or before April 15 of that year

(ii) The declaration shall set forth the rule to be extended, the reasons the extension is necessary, and a citation to the source of the agency's authority to make the rule

(d) If the omnibus bill required by Subsection (3) fails to pass both houses of the Legislature, the governor may declare all rules to be extended by publishing a single declaration in the Administrative Rules Bulletin on or before April 15 without meeting requirements of Subsections (b) and (c).

1969

**63-46a-12. Interested parties.**

(1) An interested person may petition an agency requesting the making, amendment, or repeal of a rule

(2) The division shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition

(3) A statement shall accompany the proposed rule, or amendment or repeal of a rule, demonstrating that the proposed action is within the jurisdiction of the agency and appropriate to the powers of the agency

(4) Within 30 days after submission of a petition, the agency shall either deny the petition in a writing stating its reasons for the denial, or initiate rulemaking proceedings in accordance with Section 63-46a-4

1967

**63-46a-13. Declaratory judgment to determine validity of rule.**

(1) The validity or applicability of a rule may be determined in an action for declaratory judgment in any district court of this state with appropriate venue, if it is alleged that the rule, or its potential application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff

(2) In an action for declaratory judgment on a rule, the agency shall be made a party to the action

(3) A declaratory judgment by a court may be rendered whether or not the plaintiff has requested the agency to pass upon the applicability of the rule in question. However, the issue of applicability may not be determined by the district court while the issue is under consideration by the agency during any proceeding pending before that agency or during the time the agency's decision concerning applicability is subject to appeal or being considered on appeal

1965

**63-46a-14. Contesting a rule.**

A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this chapter shall commence within two years of the effective date of the rule

1965

**63-46a-15. Repealed.**

1968

**63-46a-16. Utah Administrative Code as official compilation of rules.**

The code shall be received in all the courts, and by all the judges, public officers, commissions, and departments of the state government as evidence of the administrative law of the state of Utah and as an authorized compilation of the administrative law of Utah

1967

**CHAPTER 46b**

**ADMINISTRATIVE PROCEDURES ACT**

**Section**

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63-46b-21 Decision  
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63-46b-1. **Scope and applicability of chapter.**  
(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state of Utah and govern

(a) all state agency actions that determine the legal rights duties privileges, immunities, or other legal interests of one or more identifiable persons, including all agency actions to grant, deny revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license and

(2) The provisions of this chapter do not govern

(a) the procedures for promulgation of agency rules or the judicial review of those procedures or rules

(b) the issuance of any notice of a deficiency in a decision to waive penalties

(b) the issuance of any notice of a deficiency in the payment of a tax, the decision to waive penalties or interest on taxes, the imposition of, and any tax assessment, except that the provisions of this chapter govern any agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of those actions.

(c) state agency actions relating to extradition, to the granting of pardons or parole, commutations or terminations of sentences, or to the rescission, termination, or revocation of parole or probation, to the discipline of, resolution of grievances of, supervision of, confinement of, or the treatment of, inmates or residents of any correctional facility or mental institution, or persons on probation or parole, or judicial review of those actions,

(d) state agency actions to evaluate, discipline, employ, transfer, reassign, or promote students or teachers in any school or educational institution, or judicial review of those actions, applications for employment and internal agency actions concerning those actions.

(e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions,

(f) the issuance of any citation or assessment under Chapter 9, Title 35, the Occupational Safety and Health Act, except that the provisions

of this chapter govern any agency action commenced by the employer or other person authorized by law to contest the validity or correctness of such a citation or assessment, to state agency actions relating to management and contracts for the purchase of supplies.

(g) state agency actions relating to management of state funds, and contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in such contracts, or judicial review of those actions,

(h) state agency actions under Article 3, Chapter 1, Title 7, and Chapters 2, 8a, and 19, Title 7, or Title 63 or judicial review of

(h) state agency action under 1, Title 7, and Chapters 2, 8a, and 19, and Chapter 30, Title 63 or judicial review of those actions,

(i) the initial determination of any person's eligibility for unemployment benefits, the initial determination of any person's eligibility for benefits under Chapters 1 and 2, Title 35, or the initial determination of a person's unemployment tax liability,

(j) state agency actions relating to the distribution or award of monetary grants to or between governmental units, or for research, development, or the arts, or judicial review of those actions, in consequence of any notice of violation or

(k) the issuance of any notice of violation or order under Chapter 8, 11, 12, 13, or 14, Title 26, except that the provisions of this chapter govern any agency action commenced by any person authorized by law to contest the validity or correctness of any such notice or order,

(1) state agency actions, to the extent required by federal statute or regulation to be conducted in accordance with federal procedures, and

(m) the initial determination of any person's eligibility for government or public assistance benefits, or the right of any person to obtain documents or information from an agency, and

(n) state agency actions relating to hunting or licenses for use of state recre-

(n) state agency actions relating to hunting or fishing licenses, or licenses for use of state recreational facilities

(3) The provisions of this chapter do not affect any legal remedies otherwise available to

- (a) compel an agency to take action, or
- (b) challenge an agency's rule

(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from

- (a) requesting or ordering conferences with interested persons to

(a) requesting or ordering concerned parties and interested persons to

(1) encourage settlement,

(1) encourage settlements,

- (ii) clarify the issues,
- (iii) simplify the evidence,

- (ii) clarify the evidence,
- (iii) simplify the evidence,
- (iv) facilitate discovery, or
- (v) aid in the understanding of the evidence.

- (iii) simplify
- (iv) facilitate discovery, or
- (v) expedite the proceedings

- (iv) facilitate the proceeding
- (v) expedite the proceeding

(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rule of Civil Procedure are met by the moving party except to the extent that the requirements of those rules are modified by this chapter.

(5) (a) Declaratory proceedings authorized by Section 63-46b-21 are not governed by this chapter except as explicitly provided in that section.

(b) Judicial review of declaratory proceedings authorized by Section 63-46b-21 are governed by this chapter.

(6) This chapter does not preclude an agency enacting rules affecting or governing adjudic proceedings or from following any of those rules the rules are enacted according to the procedure



lined in Chapter 46a, Title 63, the Utah Administrative Rulemaking Act, and if the rules conform to the requirements of this chapter.

(7) If the attorney general issues a written determination that any provision of this chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of those provisions to that agency shall be suspended to the extent necessary to prevent the denial. The attorney general shall report the suspension to the Legislature at its next session.

(8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

#### 63-46b-2. Definitions.

(1) As used in this chapter:

(a) "Adjudicative proceeding" means an agency action or proceeding described in Section 63-46b-1.

(b) "Agency" means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head, but does not mean the Legislature, the courts, the governor, any political subdivision of the state, or any administrative unit of a political subdivision of the state.

(c) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by statute.

(d) "Declaratory proceeding" means a proceeding authorized and governed by Section 63-46b-21.

(e) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by statute.

(f) "Party" means the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

(g) "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.

(h) (i) "Presiding officer" means an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding.

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as presiding officer through all phases of a proceeding.

(i) "Respondent" means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person.

(j) "Superior agency" means an agency required or authorized by law to review the orders of another agency.

(2) This section does not prohibit an agency from designating by rule the names or titles of the agency head or the presiding officers with responsibility for adjudicative proceedings before the agency.

#### 63-46b-3. Commencement of adjudicative proceedings.

(1) Except as otherwise permitted by Section 63-46b-20, all adjudicative proceedings shall be commenced by either:

(a) a notice of agency action, if proceedings are commenced by the agency; or

(b) a request for agency action, if proceedings are commenced by persons other than the agency.

(2) A notice of agency action shall be filed and served according to the following requirements:

(a) The notice of agency action shall be in writing, signed by a presiding officer, and shall include:

(i) the names and mailing addresses of all persons to whom notice is being given by the presiding officer, and the name, title, and mailing address of any attorney or employee who has been designated to appear for the agency;

(ii) the agency's file number or other reference number;

(iii) the name of the adjudicative proceeding;

(iv) the date that the notice of agency action was mailed;

(v) a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under Sections 63-46b-4 and 63-46b-5, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(vi) if the adjudicative proceeding is to be formal, a statement that each respondent must file a written response within 30 days of the mailing date of the notice of agency action;

(vii) if the adjudicative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

(viii) if the adjudicative proceeding is to be informal and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, a statement that the parties may request a hearing within the time provided by the agency's rules;

(ix) a statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained;

(x) the name, title, mailing address, and telephone number of the presiding officer; and

(xi) a statement of the purpose of the adjudicative proceeding and, to the extent known by the presiding officer, the questions to be decided.

(b) When adjudicative proceedings are commenced by the agency, the agency shall

(i) mail the notice of agency action to each party,

(ii) publish the notice of agency action, if required by statute, and

(iii) mail the notice of agency action to any other person who has a right to notice under statute or rule

(3) (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by his representative, and shall include

(i) the names and addresses of all persons to whom a copy of the request for agency action is being sent,

(ii) the agency's file number or other reference number, if known,

(iii) the date that the request for agency action was mailed

(iv) a statement of the legal authority and jurisdiction under which agency action is requested

(v) a statement of the relief or action sought from the agency, and

(vi) a statement of the facts and reasons forming the basis for relief or agency action

(b) The person requesting agency action shall file the request with the agency and shall send a copy by mail to each person known to have a direct interest in the requested agency action

(c) An agency may, by rule, prescribe one or more printed forms eliciting the information required by Subsection (3)(a) to serve as the request for agency action when completed and filed by the person requesting agency action

(d) The presiding officer shall promptly review a request for agency action and shall

(i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed,

(ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial, or

(iii) notify the requesting party that further proceedings are required to determine the agency's response to the request

(e) (i) Any notice required by Subsection (3)(d)(iii) shall contain the information required by Subsection 63-46b-5(1)(i) in addition to disclosure required by Subsection (3)(d)(iii) of this section

(ii) The agency shall mail any notice required by Subsection (3)(d) to all parties, except that any notice required by Subsection (3)(d)(iii) may be published when publication is required by statute

(iii) The notice required by Subsection (3)(d)(iii) shall

(A) give the agency's file number or other reference number,

(B) give the name of the proceeding

(C) designate whether the proceeding is one of a category to be conducted informally according to the provisions of rules enacted under Sections 63-46b-4

cable rule authorizing that designation, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11,

(D) in the case of a formal adjudicative proceeding and where respondent parties are known, state that a written response must be filed within 30 days of the date of the agency's notice if mailed or within 30 days of the last publication date of the agency's notice, if published,

(E) if the adjudicative proceeding is to be formal, or if a hearing is to be held in an informal adjudicative proceeding, state the time and place of any scheduled hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in a scheduled and noticed hearing may be held in default,

(F) if the adjudicative proceeding is to be informal, and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, state the parties' right to request a hearing and the time within which a hearing may be requested under the agency's rules, and

(G) give the name, title, mailing address, and telephone number of the presiding officer

(4) When initial agency determinations or actions are not governed by this chapter, but agency and judicial review of those initial determinations or actions are subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules

(5) For designated classes of adjudicative proceedings, an agency may, by rule, provide for a longer response time than allowed by this section, and may provide for a shorter response time if required or permitted by applicable federal law

(6) Unless the agency provides otherwise by rule or order, applications for licenses filed under authority of Chapters 3, 4, and 5, Title 32A, are not considered to be a request for agency action under this chapter

(7) If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the agency may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege

1988

#### 63-46b-4. Designation of adjudicative proceedings as formal or informal.

(1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted informally according to the procedures set forth in rules enacted under the authority of this chapter if

(a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter,

(b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures,

(c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations, and

(d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter

(3) Any time before a final order is issued in any adjudicative proceeding the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding or an informal adjudicative proceeding to a formal adjudicative proceeding if

(a) conversion of the proceeding is in the public interest, and

(b) conversion of the proceeding does not unfairly prejudice the rights of any party 1987

#### **63-46b-5. Procedures for informal adjudicative proceedings.**

(1) If an agency enacts rules designating one or more categories of adjudicative proceedings as informal adjudicative proceedings the agency shall, by rule, prescribe procedures for informal adjudicative proceedings that include the following

(a) Unless the agency by rule provides for and requires a response no answer or other pleading responsive to the allegations contained in the notice of agency action or the request for agency action need be filed

(b) The agency shall hold a hearing if a hearing is required by statute or rule, or if a hearing is permitted by rule and is requested by a party within the time prescribed by rule

(c) In any hearing the parties named in the notice of agency action or in the request for agency action shall be permitted to testify, present evidence, and comment on the issues

(d) Hearings will be held only after timely notice to all parties

(e) Discovery is prohibited but the agency may issue subpoenas or other orders to compel production of necessary evidence

(f) All parties shall have access to information contained in the agency's files and to all materials and information gathered in any investigation, to the extent permitted by law

(g) Intervention is prohibited, except that the agency may enact rules permitting intervention where a federal statute or rule requires that a state permit intervention

(h) All hearings shall be open to all parties

(i) Within a reasonable time after the close of an informal adjudicative proceeding, the presiding officer shall issue a signed order in writing that states the following

(i) the decision,

(ii) the reasons for the decision,

(iii) a notice of any right of administrative or judicial review available to the parties, and

(iv) the time limits for filing an appeal or requesting a review

(j) The presiding officer's order shall be based on the facts appearing in the agency's files and on the facts presented in evidence at any hearings

(k) A copy of the presiding officer's order shall be promptly mailed to each of the parties

(2) (a) The agency may record any hearing

(b) Any party, at his own expense, may have a reporter approved by the agency prepare a transcript from the agency's record of the hearing

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute 1988

#### **63-46b-6. Procedures for formal adjudicative proceedings — Responsive pleadings.**

(1) In all formal adjudicative proceedings, unless modified by rule according to Subsection 63-46b-3(5), the respondent, if any, shall file and serve a written response signed by the respondent or his representative within 30 days of the mailing date or last date of publication of the notice of agency action or the notice under Subsection 63-46b-3(3)(d), which shall include

(a) the agency's file number or other reference number,

(b) the name of the adjudicative proceeding,

(c) a statement of the relief that the respondent seeks,

(d) a statement of the facts, and

(e) a statement summarizing the reasons that the relief requested should be granted

(2) The response shall be filed with the agency and one copy shall be sent by mail to each party

(3) The presiding officer, or the agency by rule, may permit or require pleadings in addition to the notice of agency action, the request for agency action, and the response. All papers permitted or required to be filed shall be filed with the agency and one copy shall be sent by mail to each party 1988

#### **63-46b-7. Procedures for formal adjudicative proceedings — Discovery and subpoenas.**

(1) In formal adjudicative proceedings, the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure

(2) Subpoenas and other orders to secure the attendance of witnesses or the production of evidence in formal adjudicative proceedings shall be issued by the presiding officer when requested by any party, or may be issued by the presiding officer on his own motion

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute 1987

#### **63-46b-8. Procedures for formal adjudicative proceedings — Hearing procedure.**

(1) Except as provided in Subsections 63-46b-3(d)(1) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions

(b) On his own motion or upon objection by a party, the presiding officer

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious,

(ii) shall exclude evidence privileged in the courts of Utah,

(iii) may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document,

(iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of

technical or scientific facts within the agency's specialized knowledge.

(c) The presiding officer may not exclude evidence solely because it is hearsay.

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

(e) The presiding officer may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing.

(f) All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath.

(g) The hearing shall be recorded at the agency's expense.

(h) Any party, at his own expense, may have a person approved by the agency prepare a transcript of the hearing, subject to any restrictions that the agency is permitted by statute to impose to protect confidential information disclosed at the hearing.

(i) All hearings shall be open to all parties.

(2) This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing. 1968

#### 63-46b-9. Procedures for formal adjudicative proceedings — Intervention.

(1) Any person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding with the agency. The person who wishes to intervene shall mail a copy of the petition to each party. The petition shall include:

(a) the agency's file number or other reference number;

(b) the name of the proceeding;

(c) a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and

(d) a statement of the relief that the petitioner seeks from the agency.

(2) The presiding officer shall grant a petition for intervention if he determines that:

(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

(3) (a) Any order granting or denying a petition to intervene shall be in writing and sent by mail to the petitioner and each party.

(b) An order permitting intervention may impose conditions on the intervenor's participation in the adjudicative proceeding that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.

(c) The presiding officer may impose the conditions at any time after the intervention. 1967

#### 63-46b-10. Procedures for formal adjudicative proceedings — Orders.

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of

the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

(2) The presiding officer may use his experience, technical competence, and specialized knowledge to evaluate the evidence.

(3) No finding of fact that was contested may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(4) This section does not preclude the presiding officer from issuing interim orders to:

(a) notify the parties of further hearings;

(b) notify the parties of provisional rulings on a portion of the issues presented; or

(c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding. 1968

#### 63-46b-11. Default.

(1) The presiding officer may enter an order of default against a party if:

(a) a party in an informal adjudicative proceeding fails to participate in the adjudicative proceeding;

(b) a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice; or

(c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63-46b-6.

(2) An order of default shall include a statement of the grounds for default and shall be mailed to all parties.

(3) (a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63-46b-12, or reconsideration under Section 63-46b-13, only on the decision of the presiding officer on the motion to set aside the default.

(4) (a) In an adjudicative proceeding begun by the agency, or in an adjudicative proceeding begun by a party that has other parties besides the party in default, the presiding officer shall, after issuing the order of default, conduct any further proceedings necessary to complete the adjudicative proceeding without the participation of the party in default and shall determine all issues in

the adjudicative proceeding, including those affecting the defaulting party

(b) In an adjudicative proceeding that has no parties other than the agency and the party in default, the presiding officer shall after issuing the order of default, dismiss the proceeding 1988

#### **63-46b-12. Agency review — Procedure.**

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

(b) The request shall

(i) be signed by the party seeking review,  
(ii) state the grounds for review and the relief requested,

(iii) state the date upon which it was mailed, and

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

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

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

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

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

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

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

(c) The order on review shall contain

(i) a designation of the statute or rule permitting or requiring review,

(ii) a statement of the issues reviewed,

(iii) findings of fact as to each of the issues reviewed,

(iv) conclusions of law as to each of the issues reviewed,

(v) the reasons for the disposition,

(vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded,

(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties, and

(viii) the time limits applicable to any appeal or review 1988

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

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a

superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested

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

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

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

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request the request for reconsideration shall be considered to be denied 1988

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

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

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

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

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

(i) the administrative remedies are inadequate, or

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

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b)

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter 1988

#### **63-46b-15. Judicial review — Informal adjudicative proceedings.**

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1968

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

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure [Rules of the Utah Supreme Court], except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious. 1968

#### 63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law;

(iii) set aside or modify agency action;

(iv) enjoin or stay the effective date of agency action; or

(v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute. 1967

#### 63-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

(a) the agency violated its own rules in denying the stay; or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances. 1987

#### 63-46b-19. Civil enforcement.

(1) (a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.

(b) The action seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

(c) Venue for an action seeking civil enforcement of an agency's order shall be determined by the requirements of the Utah Rules of Civil Procedure.

(d) The action may request, and the court may grant, any of the following:

- (i) declaratory relief;
- (ii) temporary or permanent injunctive relief;
- (iii) any other civil remedy provided by law; or
- (iv) any combination of the foregoing.

(2) (a) Any person whose interests are directly impaired or threatened by the failure of an agency to enforce an agency's order may timely file a complaint seeking civil enforcement of that order, but the action may not be commenced

(i) until at least 30 days after the plaintiff has given notice of his intent to seek civil enforcement of the alleged violation to the agency head, the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement;

(ii) if the agency has filed and is diligently prosecuting a complaint seeking civil enforcement of the same order against the same or a similarly situated defendant; or

(iii) if a petition for judicial review of the same order has been filed and is pending in court.

(b) The complaint seeking civil enforcement of an agency's order must name, as defendants, the agency whose order is sought to be enforced, the agency that is vested with the power to enforce the order, and each alleged violator against whom the plaintiff seeks civil enforcement.

(c) Except to the extent expressly authorized by statute, a complaint seeking civil enforcement of an agency's order may not request, and the court may not grant, any monetary payment apart from taxable costs.

(3) In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, a defendant may defend on the ground that:

- (a) the order sought to be enforced was issued by an agency without jurisdiction to issue the order;
- (b) the order does not apply to the defendant;
- (c) the defendant has not violated the order; or
- (d) the defendant violated the order but has subsequently complied.

(4) Decisions on complaints seeking civil enforcement of an agency's order are reviewable in the same manner as other civil cases. 1987

#### 63-46b-20. Emergency adjudicative proceedings.

(1) An agency may issue an order on an emergency basis without complying with the requirements of this chapter if:

(a) the facts known by the agency or presented to the agency show that an immediate and significant danger to the public health, safety, or welfare exists; and

(b) the threat requires immediate action by the agency.

(2) In issuing its emergency order, the agency shall:

(a) limit its order to require only the action necessary to prevent or avoid the danger to the public health, safety, or welfare;

(b) issue promptly a written order, effective immediately, that includes a brief statement of findings of fact, conclusions of law, and reasons for the agency's utilization of emergency adjudicative proceedings; and

(c) give immediate notice to the persons who are required to comply with the order.

(3) If the emergency order issued under this section will result in the continued infringement or impairment of any legal right or interest of any party, the agency shall commence a formal adjudicative proceeding in accordance with the other provisions of this chapter. 1987

#### 63-46b-21. Declaratory orders.

(1) Any person may file a request for agency action, requesting that the agency issue a declaratory order determining the applicability of a statute, rule, or order within the primary jurisdiction of the agency to specified circumstances.

(2) Each agency shall issue rules that:

(a) provide for the form, contents, and filing of petitions for declaratory orders;

(b) provide for the disposition of the petitions;

(c) define the classes of circumstances in which the agency will not issue a declaratory order;

(d) are consistent with the public interest and with the general policy of this chapter; and

(e) facilitate and encourage agency issuance of reliable advice.

(3) (a) An agency may not issue a declaratory order if:

(i) the request is one of a class of circumstances that the agency has by rule defined as being exempt from declaratory orders; or

(ii) the person requesting the declaratory order participated in an adjudicative proceeding concerning the same issue within 12 months of the date of the present request.

(b) An agency may issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party, only if that person consents in writing to the determination of the matter by a declaratory proceeding.

(4) Persons may intervene in declaratory proceedings if:

(a) they meet the requirements of Section 63-46b-9; and

(b) they file timely petitions for intervention according to agency rules.

(5) An agency may provide, by rule or order, that other provisions of Sections 63-46b-4 through 63-46b-13 apply to declaratory proceedings.

(6) (a) After receipt of a petition for a declaratory order, the agency may issue a written order:

(i) declaring the applicability of the statute, rule, or order in question to the specified circumstances;

- (ii) setting the matter for adjudicative proceedings;
- (iii) agreeing to issue a declaratory order within a specified time, or
- (iv) declining to issue a declaratory order and stating the reasons for its action.
- (b) A declaratory order shall contain:
  - (i) the names of all parties to the proceeding on which it is based;
  - (ii) the particular facts on which it is based, and
  - (iii) the reasons for its conclusion.
- (c) A copy of all orders issued in response to a request for a declaratory proceeding shall be mailed promptly to the petitioner and any other parties.
- (d) A declaratory order has the same status and binding effect as any other order issued in an adjudicative proceeding.
- (7) Unless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, the petition is denied.

1988

**63-46b-22. Transition procedures.**

- (1) The procedures for agency action, agency review, and judicial review contained in this chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on and after January 1, 1988.
- (2) Statutes and rules governing agency action, agency review, and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988.

1987

**CHAPTER 47****COMMISSION ON STATUS OF WOMEN****Section**

- 63-47-1. Creation — Purpose.
- 63-47-2. Members — Appointment — Terms — Vacancies.
- 63-47-3. Qualifications of members.
- 63-47-4. Election of chairman — Meetings.
- 63-47-5. Duties.
- 63-47-6. Administrative assistant — Appointment of personnel.
- 63-47-7. Authority to accept funds, gifts, and donations.
- 63-47-8. Enactment of bylaws and rules.

**63-47-1. Creation — Purpose.**

There is hereby established the Governor's Commission on the Status of Women. The purpose of the commission shall be to advise and confer with the governor and state agencies concerning issues of importance to women and families in Utah and to serve as a contact and co-ordinating group to analyze state and local programs to determine whether they adequately serve women and protect the rights of men, women and families.

1973

**63-47-2. Members — Appointment — Terms — Vacancies.**

The commission shall consist of fifteen members to be appointed by the governor for terms of four years, except that initially eight members shall be appointed for four years, and seven members shall be

appointed for two years. Subsequent appointments shall be for terms of four years. Vacancies shall be filled for the balance of the unexpired term. Members may serve two consecutive appointments.

1973

**63-47-3. Qualifications of members.**

Not more than eight members of the commission may be from one political party. Members shall be appointed from persons with a demonstrated record of leadership and involvement, and a willingness to make a commitment to the furtherance of the purposes of the commission. The commission shall make recommendations to the governor concerning appointment of members.

1973

**63-47-4. Election of chairman — Meetings.**

Commission members shall elect a chairman, and may appoint such other officers from its membership as is deemed necessary. The commission shall meet in regular meetings and may meet at special meetings at the request of the chairman or the governor.

1973

**63-47-5. Duties.**

The commission shall take action to carry out the following duties:

- (a) Confer with and advise the governor and heads of various state departments regarding discriminatory legislation and practices, and the planning of programs of particular concern to women.
- (b) Serve as a clearinghouse for co-ordination and evaluation of programs, services and legislation affecting women.
- (c) Receive and refer complaints concerning alleged violation of women's rights and responsibilities and if necessary report such action to the governor.
- (d) Conduct studies, workshops, or fact-finding hearings to develop recommendations for constructive action in all areas of interest to women.
- (e) Conduct or participate in educational programs concerning issues of importance to women and families.
- (f) Encourage community organizations and state and local units of government to institute activities designed to meet women's needs.
- (g) Participate in gaining support of changes deemed necessary through the development of legislation and community education.
- (h) Establish a liaison between the governor and national advisory organizations on the status of women, and represent the governor and the state at meetings of such national organizations.

1973

**63-47-6. Administrative assistant — Appointment of personnel.**

The commission shall appoint a qualified administrative assistant to facilitate the efficient performance of the duties prescribed by this act. That person may appoint such other personnel as the commission determines to be necessary.

1973

**63-47-7. Authority to accept funds, gifts, and donations.**

The commission may receive and accept federal funds, private gifts, donations or funds from any source. All moneys shall be deposited with the state and shall be continuously available to the commission to carry out the purposes of this act.

1973

**63-47-8. Enactment of bylaws and rules.**

The commission may enact bylaws or other rules for its own governance.

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