

2010

# Jeremy C. Smith v. Workforce Appeals board : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JEREMY C. SMITH,

Petitioner,

vs.

WORKFORCE APPEALS  
BOARD, DEPARTMENT OF  
WORKFORCE SERVICES and  
ALPINE SCHOOL DISTRICT,

Case No. 20100407-CA

Respondents.

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**REPLY BRIEF**

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PETITION FOR REVIEW OF A FINAL DECISION OF  
THE WORKFORCE APPEALS BOARD  
DEPARTMENT OF WORKFORCE SERVICES  
STATE OF UTAH

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UTAH APPELLATE COURTS

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## ARGUMENT

### POINT I

#### **THE BOARD ABUSED ITS STATUTORY AUTHORITY WHEN IT COLLECTED DISPUTED EVIDENCE IN A MANNER THAT VIOLATED ELEMENTARY FAIRNESS AND DEPARTMENT RULES.**

This Court in the case of *Grace Drilling v. Bd. of Review* expressly stated that elementary fairness in unemployment compensation adjudications includes a party's right to see adverse evidence and be afforded an opportunity to rebut such evidence. 776 P.2d 63, 70 (Utah 1989). Besides this common-law principle, statutory law requires adherence to rules of how evidence is presented in an administrative adjudication. Utah Code Ann. § 35A-4-508(5)(a) mandates “the manner in which disputed evidence is presented” in unemployment compensation proceedings “shall be in accordance with rules prescribed by the department . . . .” *Id.* In particular, the administrative code regulates decisions by a board. It prohibits consideration of evidence that was “reasonably available and accessible at the time of the due process hearing before the ALJ,” absent a showing of unusual and extraordinary circumstances. Utah Admin. Code R994-508-305(2).

The Board argues it has broad review authority to take any additional evidence it requires, period. This is not the law. A board may not exercise its authority to gather evidence without first asking, ‘Was the evidence we require reasonably available and accessible at the time of the hearing?’ If it was, the board must then affirmatively point to

unusual and extraordinary circumstances that kept the evidence from being presented in the ALJ's formal hearing. *Id.*

This Board acted unfairly, when, through counsel or its staff, it conducted ex parte communications with witnesses for reasons known only to itself and its representative.<sup>1</sup> Reportedly, staff spoke with 'contacts' at the driver license division and the city police offices. One of those agencies provided the Board with a standard DUI citation. (*Appellee's brief*, 9). The Board did not show good reasons for the manner in which it obtained this new evidence. Neither did it include the employer's counsel nor Mr. Smith's counsel in that investigation.

Much, if not all, of the information it subsequently obtained could have been presented to the ALJ at the time of the hearing. No reason is shown why it was not. As no facts are put forward as to how any party was kept from introducing that necessary information, department rule expressly bars it. Utah Admin. Code R994-508-305(2).

The principles laid down in *Grace Drilling* gives guidance to a board about accepting or refusing evidence on appeal. In *Grace Drilling*, a board refused to consider evidence because it was reasonably available but not introduced by the employer at the time of the hearing. The employer claimed presenting the evidence would violate

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<sup>1</sup> "Parties are not permitted to discuss the merits or facts of any pending case with the ALJ assigned to that case or with a member of the Board prior to the issuance of the decision, *unless all other parties to the case have been given notice and opportunity to be present.*" Utah Admin. Code R994-508-114 [Emphasis Added]. Moreover, "[a]s a party to the hearing, the Department or its representatives have the same rights and responsibilities as other interested parties to present evidence, bring witnesses, cross-examine witnesses, give rebuttal evidence, and appeal decisions." Utah Admin. Code R994-508-113 [Emphasis Added].



employee confidentiality. Later, the employer changed its position, and tried to submit the evidence to the board on appeal. The board declined to consider the evidence because doing so would deprive a claimant of the opportunity to rebut or cross-examine. This Court agreed.

In the present case, this Board should have refrained from contacting witnesses. It should have refused to consider their testimony about a standard DUI citation form for the same reasons. ASD did not produce the DUI citation at the hearing. Neither did it, or the department, claim their subpoena was violated, or that potential witnesses and documents were inaccessible. The Board's contacts provided a DUI citation form. That fact supports the position that such evidence would have been available for the hearing.

Although in *Grace Drilling* this Court upheld a Board's decision to refuse to accept evidence, the principle applies equally in situation where a Board abuses its discretion by accepting evidence it should not have.

The Board claims that any error it made through its ex parte investigation was harmless because it offered Mr. Smith a chance to rebut the Board's evidence through a motion for reconsideration. This argument is disingenuous. Mr. Smith has a right to a fair process using reliable evidence in reaching a decision. A chance to convince a board before it makes a decision is not the equivalent of a chance to rebut evidence after a decision has been made.

## POINT II

### **THE BOARD'S OWN INVESTIGATION SUPPORTS THE CREDIBILITY OF MR. SMITH'S STATEMENT THAT HE DID NOT RECEIVE TIMELY NOTICE OF A SUSPENSION OF HIS DRIVER LICENSE.**

Utah Code Section 53-3-223(4)(a)(iii) states a driver arrested for DUI is to be provided "in a manner specified by the division, basic information" on how to obtain a prompt hearing before the division. *Id.* The citation "may, if provided in a manner specified by the division, also serve as the temporary license certificate." *Id.* at subsection (b). However, what the law states should happen may be different from what actually does happen.

The Board claims that Mr. Smith "did not provide the Board with a copy of his citation as requested" (*Respondent's brief*, 13). This is not true. Mr. Smith was not asked to obtain a copy of his paperwork for presentation at the formal hearing.

The Board further asserts that because Mr. Smith did not produce a copy of his citation his failure is "additional evidence that [Mr. Smith] did receive the uniform citation." *Id.*

To the contrary, that fact is evidence to support his claim he did not receive proper notice in the form of a standard citation. Board staff contacted the city police offices and the division of motor vehicles looking for the form. (*Respondent's brief*, 9). The Board failed to produce his form. The fact that the Board's own investigation did not produce

Mr. Smith's citation is contradictory and conflicting evidence detracting from the Board's finding that Mrs. Smith's 'paperwork' must have been a standard DUI citation form.

### **POINT III**

#### **THE BOARD ERRONEOUSLY INTERPRETS UDLA AS REQUIRING A LICENSE SUSPENSION ON ALL DUI ARRESTS.**

The Board's conclusion that "[t]here is no way to read this citation and not know your driver's [sic] license was or would be suspended or revoked immediately or within 30 days" is a clearly erroneous interpretation of UDLA. (*Respondent's brief*, 16).

Assuming a person in Mr. Smith's situation received a standard DUI citation, that person could have read the citation differently from the Board's interpretation. That reading may be a reasonable interpretation under the statute, and to that person.

For example, the form reads, in part, "[a] criminal conviction of DUI (from court) or an adverse administrative determination (from the Driver License Division) will result in loss of driving privilege." (R. 161). Additionally, the form also states, in part, that "[f]ailure to properly request a hearing or to appear for a hearing, *may* [as opposed to *shall*] result in loss of driving privilege." *Id.* [Emphasis Added].

Hence, a person who pleads to a lesser charge than DUI, and who does not get notice of an adverse decision from the drivers division, even if he did not request a hearing, could reasonably believe he still had driving privileges even after his temporary license expired.

Moreover, the Board's interpretation that "UDLA provides that anyone arrested for DUI will lose his or her license unless a hearing with the Driver License Division is

requested” does not correctly state the law. (*Respondent’s brief*, 21). A person may be arrested for DUI, but: 1) the division may take no action after discovering the person did not receive a proper notification of his right to request a hearing; 2) an officer may not timely send a copy of the citation to the division for any action; or 3) the division may fail to act even when a hearing was not requested. In those situations, a person arrested for DUI will not lose his driver license under UDLA.

#### **POINT IV**

#### **THERE IS NOT A RESIDUUM OF COMPETENT EVIDENCE TO SUPPORT THE BOARD’S FINDING THAT MR. SMITH KNEW HIS DRIVER LICENSE WAS SUSPENDED AT THE TIME HE DROVE.**

There are only two possible bits of evidence from which the Board may have made its decision. The first of these is the alleged uniform DUI citation form that the Board obtained on its own. However, this scintilla of evidence was not part of the residuum of evidence as the Board’s counsel freely admits: “[t]he consideration of the citation was not decisive to the Board’s decision.” (*Respondent’s brief*, 9).

If counsel is correct, this Court only need consider whether only one other item of evidence is part of the residuum of evidence needed to support a finding.

If counsel is not correct, the standard DUI citation is not part of the residuum of evidence necessary in an administrative adjudication the principle expounded in *Kehl v. Schwendiman*, 735 P.2d 413, 417 (Utah 1987) because the document lacks proper foundation where the arresting officer did not testify the citation was prepared in regular course of business, contemporaneous with the arrest.

In considering whether the remaining bit is admissible in an administrative adjudicative proceeding, department rules come into play. It is well defined that findings of fact cannot be based exclusively upon hearsay unless that evidence is admissible under the Utah Rules of Evidence. All findings must be supported by a residuum of legal evidence competent in a court of law. Utah Admin. Code R994-508-111(4).

Hearsay evidence is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Prosper, Inc. v. Department of Workforce*, 2007 UT App 281, ¶ 12, 168 P.3d 344.

This remaining bit of evidence--which the Board would have this Court believe is part of the residuum--consists of an alleged statement by Mr. Smith, made out of court, to his union representative, Kimberly James, for communication to his attorney. Then, the statement the union representative, made out of court, is communicated to Paul Olson through e-mail, made out of court, to prove the truth of the matter asserted.

The hearsay within hearsay statement consisted of Mr. Smith's alleged acknowledgment, after he had reviewed the paperwork given him, of his missing a 'two-week deadline' crucial to maintaining or contesting the loss of his license. The Board offers the evidence as proof that he received a standard DUI form, containing a ten-day deadline to request a hearing, else "how did he know he had a deadline to avoid suspension of his license?" (*Respondent's brief*, 16).

Multiple reasons exist for not considering the statements in the e-mails, including without limitation: 1) the multiple layers of hearsay within e-mails; 2) not one person

testified laying foundation for the particular statements in the e-mails at the hearing before the ALJ; 3) the e-mails were never expressly referred to in any testimony by any person; 4) neither Kimberly James, Jeremy Smith, or Paul Olson were asked any questions about the e-mails; 5) the e-mail statement is an apparent repetition of what was intended by Mr. Smith to be a confidential communication to his attorney through his union representative<sup>2</sup>; and 6) no foundation or other testimony was ever given regarding the date, time or context of the particular statements, e.g., when did Mr. Smith ‘review his paperwork’, when did he realize a ‘two-week’ deadline existed, when he knew his license was lost, and so forth.

For these reasons, the hearsay statement is not admissible in a court of law, and the Board cannot base a finding exclusively upon it.

Even if this Court were to somehow find the statement admissible for the reasons other than those stated above, the hearsay statement alone is the extent of the residuum of evidence, and it constitutes no more than an inherently unreliable scintilla of evidence.

## **POINT V**

### **THE EMPLOYER DID NOT MEET ITS BURDEN OF PROOF ON THE KNOWLEDGE ELEMENT OF A JUST CAUSE DETERMINATION.**

The Board does not dispute that unknowingly driving on a suspended license is not a flagrant violation of a universal standard of conduct. Neither does the Board claim

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<sup>2</sup> If the statements were intended as communications to Mr. Smith’s union representative, or his attorney, they are inadmissible in their entirety as privileged communication. *See*, Utah Rules of Evidence, 504(b); *see also*, Utah Rules of Evidence, 507(b)(2); *compare*, *Doe v. Maret*, 1999 UT 74, ¶ 12, 984 P.2d 980.

that such conduct is an act of dishonesty. Rather, the Board rests upon the position that Mr. Smith “drove the Employer’s vehicle knowing he did not have a valid driver’s [sic] license.” (*Respondent’s brief*, 23). As stated above, the Board’s finding on that issue is supported by no more than a scintilla of evidence, at best.

Additionally, the Board’s assertion that Mr. Smith admitted “he thought he would be fired and believed he could get away with [not telling his employer]” is not unsupported by a residuum of competent evidence, for the reasons stated above.

Even if the Board considered a scintilla of evidence, which is not sufficient evidence, such scintilla is not relevant to the issue of whether Mr. Smith knew of the suspension of his license at the time he drove an employer vehicle.

The Board acknowledges that the employer had the burden proving that Mr. Smith was terminated for just cause, including establishing that Mr. Smith had knowledge of the expected conduct. The expected conduct was not knowingly driving on a suspended license. The employer did not meet that burden.

## **POINT VI**

### **MR. SMITH DID MEET HIS MARSHALING BURDEN.**

In an administrative adjudication setting, a Board’s findings will be upheld by this Court only if they are supported by substantial evidence. The Respondent points to no particular evidence that Mr. Smith did not marshal. Instead, the Board asserts that Mr. Smith “made no attempt to meet his marshaling burden” because he “pointed to no

evidence on the record to show that the findings of the Board are so ‘against the clear weight of the evidence’ that they are ‘clearly erroneous.’ ” (*Respondent’s brief*, p. 25).

The Board’s criticism of Mr. Smith’s citations to the admissible evidence on the record is overstated. Mr. Smith attempted to present a clear picture of the admissible evidence this Court should consider upon review. Again, the Board’s finding on Mr. Smith’s knowledge must be supported by a residuum of legal evidence competent in a court of law. Mr. Smith marshaled the evidence within that residuum.

Moreover, the Board misstates the standard of review. Mr. Smith does not need to show the findings are clearly erroneous. On the contrary, Mr. Smith need only show that the Board’s finding that Mr. Smith knew his driver license to be suspended at the time he drove an employer vehicle is supported by no more than a mere scintilla of evidence. *Grace Drilling, supra*, at 68.

### **CONCLUSION**

The Board did not have broad authority to take any evidence it required on appeal without following applicable department rules applicable to the decisions by the Board. Elementary fairness was infringed by the manner in which the Board took additional evidence. The Board’s interpretation of UDLA was erroneous.

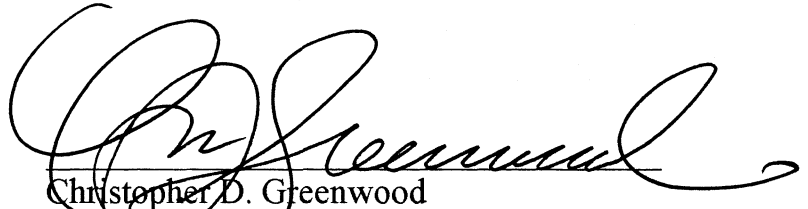
The employer did not meet its burden to show that Mr. Smith was discharged for just cause. The Board’s finding on the element of knowledge was not supported by substantial evidence on the record. Consequently, Mr. Smith’s claim was substantially prejudiced by the Board’s action. Therefore, the initial decision of the Department to



award unemployment compensation benefits should be upheld and the ALJ and the Board's decision to deny benefits should be reversed.

Respectfully submitted this 11<sup>th</sup> day of October, 2010.

GREENWOOD & BLACK



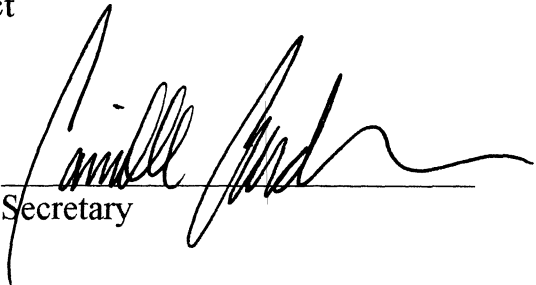
Christopher D. Greenwood  
Attorney for Petitioner  
Jeremy C. Smith

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused to be delivered to the U.S. Mails, first class, postage prepaid, two true and correct copies of the forgoing, REPLY BRIEF together with a Courtesy Brief on CD, on this 12 day of October, 2010, to the following:

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Secretary

**35A-4-508(5)(a).                      Review of decision or determination by division –  
Administrative law judge – Division of  
Adjudication – Workforce Appeals Board –  
Judicial Review by Court of Appeals – Exclusive  
Procedure.**

(5) (a) The manner in which disputed matters are presented, the reports required from the claimant and employing units, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the department for determining the rights of the parties, whether or not the rules conform to common-law or statutory rules of evidence and other technical rules of procedure.

**53-3-223(4).            Chemical test for driving under the influence –  
Temporary license – Hearing and decision –  
Suspension and fee – Judicial review.**

(4) (a) When a peace officer gives notice on behalf of the division, the peace officer shall:

- (i) take the Utah license certificate or permit, if any, of the driver;
  - (ii) issue a temporary license certificate effective for only 29 days from the date of arrest; and
  - (iii) supply to the driver, in a manner specified by the division, basic information regarding how to obtain a prompt hearing before the division.
- (b) A citation issued by a peace officer may, if provided in a manner specified by the division, also serve as the temporary license certificate.

**R994-508-111.**

**Evidence, Including Hearsay Evidence.**

(1) The failure of one party to provide information either to the Department initially or at the appeals hearing severely limits the facts available upon which to base a good decision. Therefore, it is necessary for all parties to actively participate in the hearing by providing accurate and complete information in a timely manner to assure the protection of the interests of each party and preserve the integrity of the unemployment insurance system.

(2) Hearsay, which is information provided by a source whose credibility cannot be tested through cross-examination, has inherent infirmities which make it unreliable.

(3) Evidence will not be excluded solely because it is hearsay. Hearsay, including information provided to the Department through telephone conversations and written statements will be considered, but greater weight will be given to credible sworn testimony from a party or a witness with personal knowledge of the facts.

(4) Findings of fact cannot be based exclusively on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence. All findings must be supported by a residuum of legal evidence competent in a court of law.

## **ADDENDUM A**

**R994-508-113.**

### **Department a Party to Proceedings.**

As a party to the hearing, the Department or its representatives have the same rights and responsibilities as other interested parties to present evidence, bring witnesses, cross-examine witnesses, give rebuttal evidence, and appeal decisions. The ALJ cannot act as the agent for the Department and therefore is limited to including in the record only that relevant evidence which is in the Department files, including electronically kept records or records submitted by Department representatives. The ALJ will, on his or her own motion, call witnesses for the Department when the testimony is necessary and the need for such witnesses or evidence could not have been reasonably anticipated by the Department prior to the hearing. If the witness is not available, the ALJ will, on his or her own motion, continue the hearing until the witness is available.

**R994-508-114.**

**Ex Parte Communications.**

Parties are not permitted to discuss the merits or facts of any pending case with the ALJ assigned to that case or with a member of the Board prior to the issuance of the decision, unless all other parties to the case have been given notice and opportunity to be present. Any ex parte discussions between a party and the ALJ or a Board member will be reported to the parties at the time of the hearing and made a part of the record. Discussions with Department employees who are not designated to represent the Department on the issue and are not expected to participate in the hearing of the case are not ex parte communications and do not need to be made a part of the record.

**R994-508-305.**

**Decisions of the Board.**

(1) The Board has the discretion to consider and render a decision on any issue in the case even if it was not presented at the hearing or raised by the parties on appeal.

(2) Absent a showing of unusual or extraordinary circumstances, the Board will not consider new evidence on appeal if the evidence was reasonably available and accessible at the time of the hearing before the ALJ.

(3) The Board has the authority to request additional information or evidence, if necessary.

(4) The Board may remand the case to the Department or the ALJ when appropriate. (5) A copy of the decision of the Board, including an explanation of the right to judicial review, will be delivered or mailed to the interested parties.



**Utah Rules of Evidence, Rule 504.**

**Lawyer-client.**

(a) Definitions. As used in this rule:

(1) A "client" is a person, including a public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in a rendition of professional legal services.

(4) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.

(5) A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the professional relationship.

(6) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

## ADDENDUM A

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.

(d) Exceptions. No privilege exists under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) Document attested by lawyer. As to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

**Utah Rules of Evidence, Rule 507.**

**Miscellaneous matters.**

(a) A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

(b) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was

(1) compelled erroneously or

(2) made without opportunity to claim the privilege.

(c) (1) Comment or inference not permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to instruction that no inference may be drawn therefrom.

(4) Exception. In a civil action, the provisions of subparagraph (c) do not apply when the privilege against self-incrimination has been invoked.