

1981

The State of Utah, Department of Social Services v. Roger C. Higgs, Kurt Mathia, and George C. Melis : Brief of Plaintiff-Appellant

Utah Supreme Court

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



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsKathryn Collard; Attorney for Defendants-RespondentsDon R. Peterson; Attorney for Plaintiff-Appellant

Recommended Citation

Brief of Appellant, *Utah v. Higgs*, No. 17607 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2581

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

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, DEPARTMENT
OF SOCIAL SERVICES,

Plaintiff-Appellant,

vs.

ROGER C. HIGGS, KURT MATHIA,
and GEORGE C. MELIS,

Defendants-Respondents.

:
:
:
:
:
:

CASE NO. 17,607

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE KENNETH RIGTRUP, DISTRICT JUDGE, PRESIDING.

DON R. PETERSEN
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84601

Attorney for Plaintiff-Appellant

KATHRYN COLLARD
COLLARD, KUHNHAUSEN, PIXTON & DOWNES
417 Church Street
Salt Lake City, Utah 84111

Attorney for Defendants-Respondents

FILED

JUN 29 1981

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, DEPARTMENT :
OF SOCIAL SERVICES, :

Plaintiff-Appellant, :

vs. :

ROGER C. HIGGS, KURT MATHIA, :
and GEORGE C. MELIS, :

Case No. 17,607

Defendants-Respondents. :

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE KENNETH RIGTRUP, DISTRICT JUDGE, PRESIDING.

DON R. PETERSEN
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84601

Attorney for Plaintiff-Appellant

KATHRYN COLLARD
COLLARD, KUHNHAUSEN, PIXTON & DOWNES
417 Church Street
Salt Lake City, Utah 84111

Attorney for Defendants-Respondents

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
ISSUES PRESENTED.....	2
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT	
POINT I.....	7
A NEW STATUTE WILL NOT APPLY TO PROCEEDINGS ALREADY COMMENCED IF SO DOING WILL LIMIT THE RIGHT OF APPEAL.	
POINT II.....	12
THE NEW GRIEVANCE LAW IS SILENT AS TO ITS APPLICATION TO PENDING PROCEEDINGS, THEREFORE RETROACTIVE APPLICATION OF THE LAW IS EXPRESS- LY PROHIBITED.	
POINT III.....	15
THE PLAINTIFF-APPELLANT HAS A STATUTORY AND CONSTITUTIONAL RIGHT OF APPEAL.	
POINT IV.....	17
BY EXPRESS AGREEMENT, THE PARTIES WAIVED THE ADDITIONAL PROCEDURAL STEPS UNDER THE NEW GRIEVANCE LAW.	
CONCLUSION.....	19
APPENDIX "A".....	

TABLE OF CASES AND AUTHORITIES CITED

	<u>Page</u>
<u>Archer v. Utah State Land Board</u> , 15 Utah 2d 321, 392 P.2d 622 (1964).....	7,8,14
<u>Boucofski v. Jacobsen</u> , 36 Utah 165, 104 P. 117 (1909).....	8-11,16
<u>First of Denver Mortgage Investors v. C. N. Zundel and Associates</u> , 600 P.2d 521 (1979).....	18
<u>Industrial Commission v. Agee</u> , 56 Utah 63, 189 P. 414 (1920)..	10
<u>In re Ingraham's Estate</u> , 106 Utah 337, 148 P.2d 340 (1944)....	13
<u>McCarrey v. Utah State Teachers' Retirement Board</u> , 111 Utah 251, 177 P.2d 725 (1947).....	13
<u>Peatross v. Board of Commissioners</u> , 555 P.2d 281 (Utah 1976)..	16,17
<u>State v. Kelbach</u> , 569 P.2d 1100 (Utah 1977).....	15,20
<u>Union Pacific Railroad Company v. Trustees, Inc.</u> , 8 Utah 2d 101, 329 P.2d 398 (1958).....	13

TABLE OF STATUTES

Utah Const., art. VIII, §7.....	16,18
U.C.A. §68-3-3 (1978).....	11,13
U.C.A. §68-3-5 (1978).....	7,11,20
U.C.A. §68-3-12(5) (1978).....	17
U.C.A. §68-3-21 (1978).....	11
U.C.A. §67-13-14 (1978, repealed 1979).....	3
U.C.A. §67-17-4 (1978, repealed 1979).....	17,18
U.C.A. §67-17-5 (1978, repealed 1979).....	3
U.C.A. §67-17-6 (1978, repealed 1979).....	1, 3
U.C.A. §67-17-6(5) (1978, repealed 1979).....	1,5,14,15
U.C.A. §67-19-23 (Supp. 1979).....	18

U.C.A. §67-19-25 (Supp. 1979).....	1
U.C.A. §67-19-25(6) (Supp. 1979).....	12
U.C.A. tit. 67, Ch. 17 (1968, repealed 1979).....	4,12,1 15,19,
U.C.A. tit. 67, ch. 19 (Supp. 1979).....	4,12,1 14,19
U.C.A. tit. 67, ch. 19 (S.B. 271, 1981).....	13

OTHER AUTHORITIES

73 Am.Jur.2d <u>Statutes</u> §349 (1974).....	14
73 Am.Jur.2d <u>Stipulations</u> §4 (1974).....	18

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, DEPARTMENT :
OF SOCIAL SERVICE,

Plaintiff-Appellant,

vs.

Case No. 17,607

ROGER C. HIGGS, KURT MATHIA,
and GEORGE C. MELIS,

Defendants-Respondents. :

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an action seeking judicial review, pursuant to Utah Code Annotated §67-17-6(5), of an administrative decision entered in an employee grievance proceeding.

DISPOSITION IN LOWER COURT

The defendant-appellees (grievants) initiated grievance proceedings against the plaintiff-appellant (Department) pursuant to Utah Code Annotated §67-17-6, and their grievances were heard according to the five-step procedure outlined therein. Part of the step-five decision rendered by Dr. A. J. Wann, State Hearing Officer, was adverse to the Department. The Department therefore filed a complaint with the Third Judicial District Court seeking judicial review of the administrative decision (R.2-4), and the grievants moved to dismiss on the ground that the court lacked jurisdiction over the subject matter, since §67-19-25 (enacted after the step-five hearing

had been scheduled) did not provide for an appeal by the Department from the step-five decision (R.12-21). The Honorable Kenneth Rigtrup, District Judge, granted the grievants' motion (R.36-36). (A copy of the decision is attached hereto as Appendix "A".) The Department appeals from the dismissal of its complaint.

RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks to have its complaint reinstated, permitting judicial review of the administrative decision.

ISSUES PRESENTED

1. Should a new statute be applied to proceedings commenced and nearly completed under the predecessor statute, where such would deprive the parties of any right of appeal?
2. May a statute be applied retroactively where the legislature has not expressly so provided?
3. Does the Constitutional right of appeal apply to proceedings held before an administrative tribunal?
4. Did the express agreement of the parties have the effect of waiving the extra administrative step permitted under the new statute?

STATEMENT OF FACTS

In August and September of 1978, the defendants-respondents (grievants) initiated employee grievance proceedings against the plaintiff-appellant (Department) (R.41). The grievants objected to actions taken (including an investigation) by the Department in response to the grievants' offer to

provide consulting services to child support enforcement agencies in other states. The nature of the offered consulting work was very similar to the work the grievants had been employed to provide for the Department; the Department's investigation was designed to determine whether a conflict of interest existed. (R.41,48)

When the grievants began the grievance procedures against the Department, Utah law provided for a five-step grievance procedure: (1) an oral discussion with the grievant's immediate supervisor; (2) a written appeal to the grievant's immediate supervisor; (3) a written appeal to the grievant's second-level supervisor; (4) a written appeal to and hearing before the department head; and (5) a written appeal to and hearing before the state grievance hearing officer. Utah Code Ann. §67-17-6 (repealed 1979). These grievance procedures were available only to current state employees. Utah Code Ann. §67-17-5 (repealed 1979). Appeal of dismissal or termination could be made to the Merit Council. Utah Code Ann. §67-13-14 (repealed 1979).

Grievant Matthia completed Steps 1 through 4 of the grievance procedure (R.42). Grievants Higgs and Melis completed steps 1 through 3, but their employment with the Department terminated before the Step 4 hearing was held. (R.41). Higgs and Melis appealed their termination to the Merit Council, but subsequently dropped that appeal and request for reinstatement (R.43, see also R. 47). (The hearings appealed from, therefore, did not address the issue of whether the grievants should be

reinstated to their former positions; rather, at issue was the propriety of the steps taken to investigate the grievants' conduct.) All the grievants appealed to the State Hearing Officer for a Step 5 hearing. (R.42-44).

At a prehearing conference held on April 24, 1979, before the newly-appointed State Hearing Officer, Dr. Wann, it was agreed by all present (including all the parties to this action) that the grievances of Higgs and Melis were to be referred back to the 4th level for a hearing, and that the hearing of Matthia (and also of Higgs and Melis if they chose to appeal the 4th level decision) would be heard by Dr. Wann on July 30 through August 3, 1979. (R. 43).

"It was further agreed by all concerned that these cases should be heard through to their final resolution in accordance with the provisions of the then governing statute," Chapter 17 of Title 67, Utah Code Annotated, even though the parties were aware that the Legislature was considering a new management act, Senate Bill 179, which would, if enacted, become effective during the pendency of these proceedings. (R.44)

After the grievance process was four-fifths complete and after the Step 5 hearing had been scheduled, but before it was actually held, Senate Bill 179 was signed into law by the Governor, with an effective date of July 1, 1979. The new law, codified as Chapter 19 of Title 67, Utah Code Annotated, provides for a six-step procedure for the resolution of grievances. Steps 1 through 5 are essentially the same as under the old law. However, the statute provided that only an employee,

and not an agency, could appeal from Step 5 to the new Step 6. Step 6 provided for an appeal and hearing before a personnel review board created by the new law. The appeal apparently was to be based on the record from the Step 5 hearing and also on new evidence and testimony presented before the personnel review board.

Grievants Higgs and Melis were not satisfied with the results at Step 4, and appealed to Step 5. On July 3, the Department obtained an Order to Show Cause seeking a restraining order ordering Higgs and Melis to show cause why they should not be restrained from proceeding with the Step 5 hearing. One of the bases of the Order to Show Cause was that the new statute had eliminated the state hearing officer position held by Dr. Wann and that the new procedural provisions were now in effect. (R. 44).

The Third District Court Judge David K. Winder denied the request for a restraining order (R.45), implicitly agreeing that the "old" law would continue to govern the proceedings.

The Step 5 hearing was held as scheduled, with testimony being heard over a three-day period (R.46). Over four months later, Dr. Wann entered his decision, denying four and sustaining five of the nine grievances presented. (R.62).

As authorized by Utah Code Ann. §67-17-6(5), the Department filed a complaint in the Third Judicial District Court appealing from the administrative decision rendered by Dr. Wann (R.2-4).

The Court, the Honorable Kenneth Rigtrup presiding, granted the grievants' Motion to Dismiss, stating that the Department had not exhausted all available administrative remedies as provided by the "new" statute (R.36-37). The Department properly perfected this appeal from the decision of the District Court (R.65).

Since the filing of this appeal, the Legislature has again changed the employee grievance laws. The new law, S.B. 271, signed by the Governor on March 20, 1981, although permitting an agency to appeal from Step 5 to Step 6, provides no avenue of appeal on either the law or the facts if the Step 6 decision is adverse to the agency.

The 1981 law also changes Step 6 from a hearing in which evidence and testimony could be taken to one based wholly on the record from the Step 5 hearing.

SUMMARY OF ARGUMENT

Utah has provided by statute that the repeal of any statute does not affect any proceeding commenced under the statute repealed, and that no statute is retroactive unless expressly so declared by the Legislature. This court has established that the law is to be fixed as of the commencement of an action. Where procedural statutes have been applied to pending actions, it has been only to preserve a right of appeal, which this court has declared to be a valuable and constitutional right. Where application of a new procedural statute would deprive a party of the right to appeal, this court has held that such statutes do not apply to pending

actions.

Judicial economy and efficiency require that the law not be changed during the pendency of an action. Foreseeing such a change, the parties to this action stipulated and agreed to conclude the proceedings according to the law in effect when they were commenced. That agreement should be honored by the courts.

For the reasons stated, the order of the district court incorrectly applied the new statute to proceedings commenced and nearly completed under the old, and, therefore, the decision of the district court should be reversed.

ARGUMENT

POINT I

A NEW STATUTE WILL NOT APPLY TO PROCEEDINGS
ALREADY COMMENCED IF SO DOING WILL LIMIT THE
RIGHT TO APPEAL.

Utah has provided by statute that "[t]he repeal of a statute does not . . . affect . . . any proceeding commenced under or by virtue of the statute repealed." Utah Code Ann. §68-3-5 (1978). The rule is not limited to only those statutes that affect substantive rights--it speaks of any proceeding. It is a rule of construction that applies to all statutes in Utah.

Case law supports this rule. In Archer v. Utah State Land Board, 15 Utah 2d 321, 392 P.2d 622 (1964), a case very similar to the one at bar, the plaintiff-appellant filed a complaint seeking judicial review of an action by the defendant-appellee Utah State Land Board. After the original

complaint was filed but before an amended complaint could be filed, the Legislature passed a bill providing for an administrative review of Land Board actions. The change was clearly procedural in nature. The defendant Land Board moved for dismissal on the grounds that the court now lacked jurisdiction, apparently alleging that the plaintiff had not exhausted the administrative remedies made available, by the new statute, after the proceeding was commenced. This Court reversed, stating that:

This question can best be resolved by remarking that ordinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint. We see no good reason for departing from the basic rule in this case.

392 P.2d at 624.

Although the quote from Archer speaks of fixing the law as of the time of the original complaint, the same reasoning that led to that holding would also require that the law in the instant case be fixed as of the time the grievance proceedings were initiated.

The courts have occasionally departed from this rule, but only if necessary to preserve a right of appeal. An example is Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909). In that case, the district judge made findings of fact and conclusions of law on March 16, 1907. Nine days later, on March 25, an amendment went into effect authorizing the judge to make additional findings of fact or conclusions of law after the entry of judgment. On June 8, the losing party

moved the court to make additional findings, and the court took the motion under advisement. On September 21, 1907, the court finally entered additional findings of fact, but refused to enter additional conclusions of law.

Meanwhile, more than six months (the time for taking an appeal to the Supreme Court) had passed since the original entry of judgment. The losing party took its appeal, within six months of the second judgment, from the judge's refusal to enter additional conclusions of law.

The appellee argued that the judge had no authority to enter additional findings, as the new statute was passed after judgment had been entered, and that therefore the appeal had not been timely made.

The court, in order to preserve the appellant's right to appeal, allowed the new statute to apply, stating that:

Every case must, to a considerable extent, depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice.

104 P. at 119-120 (citation omitted, emphasis added).

The Court concluded:

[A]s such amendment pertained merely to a matter of procedure, we are clearly of the opinion that the amendment applied to this as well as to all the pending actions. Moreover, the right to an appeal is a constitutional, as well as a valuable right and ought not to be denied except where it is clear the right does not exist, or has been lost or abandoned. The motion to dismiss

the appeal is therefore denied.

104 P. at 120.

Therefore, it appears that new laws will be applied to pending actions if necessary to preserve a right of appeal. However, the new law will not be applied if its application will serve to deny the right of appeal.

This conclusion is born out in Industrial Commission v. Agee, 56 Utah 63, 189 P. 414 (1920), where the Court declined to apply a new procedural statute to a pending action.

In that case a widow applied to the Industrial Commission for compensation for the death of her husband. The Commission denied the claim, and the widow appealed (in September 1918) to the district court, as authorized by the statute then in force. The Commission's demurrer to the widow's complaint was sustained by the district court, and this court reversed and sent the case back. There were additional procedural maneuverings. During the pendency of the action, the Legislature passed an act providing that appeals from the Industrial Commission must be made to the Supreme Court within 30 days, and that no other court had jurisdiction to review Commission decisions. (The 30-day time for appeal had long since passed.)

The Industrial Commission petitioned the Supreme Court for a writ of prohibition to stop the district judge (Agee) from proceeding to exercise jurisdiction, citing several cases (including Boucofski, supra) in support of the proposition that procedural statutes are to be applied to pending actions,

and that therefore the district court no longer had jurisdiction.

The Court held that the new procedural statute did not apply to actions pending at its enactment, stating that:

[T]he Constitution of the state of Utah guarantees every litigant the right of appeal . . . ; that to hold, under the circumstances, that the district court is without jurisdiction would in effect deprive the claimant of any legal remedy and nullify the express guaranty of our Constitution of the right of the defendant to have her day in court.

189 P. at 415.

The Court explained that the Legislature, when it enacted the new statute, had in mind the predecessors of three statutes, Utah Code Ann. §§68-3-5, 68-3-21, and 68-3-3, which respectively state that "[t]he repeal of a statute does not . . . affect . . . any action or proceeding commenced under or by virtue of the statute repealed," that statutes "are to be liberally construed with a view to effect the objects of the statutes and to promote justice," and that "[no statute] is retroactive unless expressly so declared." The Court also considered the case of Boucofski, supra, where a procedural enactment had been applied to a pending action.

The Court concluded that these authorities compelled the conclusion that, since to apply the new statute to pending actions would deprive the appellant of the right of appeal, the procedural provisions of the new statute should be applied only to future cases.

In the instant case, the Department's only avenue of

appeal is to the District Court under the old law. Section 67-19-25(6) provides that an appeal from a step-five hearing must be made within 10 working days following the receipt of the step-five decision. Dr. Wann entered his decision on January 15, 1980, and it was mailed to the parties on January 28, 1981. The Department of Social Services, acting under the belief that the parties would honor their stipulation (that the "old" law would govern the proceedings), did not make any appeal to Step-six, but instead proceeded as authorized under Chapter 17. There, the new step-six hearing is not available to the Department, as the time for perfecting an appeal to the Personnel Review Board under the new statute has passed.

If the Supreme Court were to now hold that the proceedings should henceforth be conducted in accordance with the new law, the Department will have no avenue of appeal.

Therefore, in harmony with the above-cited cases, the new Chapter 19 of Title 67 should not be held to govern the grievance proceedings commenced and nearly completed before its effective date. Those grievance proceedings should be concluded, as they commenced, pursuant to the provisions of Chapter 17 of Title 67.

POINT II

THE NEW GRIEVANCE LAW IS SILENT AS TO ITS APPLICATION TO PENDING PROCEEDINGS, THEREFORE RETROACTIVE APPLICATION OF THE LAW IS EXPRESSLY PROHIBITED.

No express provision of Chapter 19, of Title 67 provides

that the procedure created therein shall have retroactive effect with respect to outstanding grievance procedures initiated prior to the effective date of that Chapter. The law of Utah is abundantly clear that absent express legislative mandate requiring retroactive application of newly enacted statutory provisions, such provisions will be deemed prospectively applicable only. The Utah Code has so provided since 1898:

No part of these revised statutes is retroactive, unless expressly so declared.

(U.C.A. §68-3-3, emphasis added.) See also, Union Pacific Railroad Company v. Trustees, Inc., 8 Utah2d 101, 329 P.2d 398, 399 (1958), footnote 11.

The Utah Supreme Court has undeviatingly adhered to this proposition. In Union Pacific Railroad Company, supra, the Court noted:

[A]s to any statutory question, Utah's policy demands the inclusion of an express authorization to justify any retrospective application of a statute.

Id., 329 P.2d at 399 (emphasis added).

Thus, unless the particular enactment expressly provides for retroactive application, its operation and effect are deemed prospective only. In re Ingraham's Estate, 106 Utah 337, 148 P.2d 340, 341 (1944), see also, McCarrey v. Utah State Teachers' Retirement Board, 111 Utah 251, 177 P.2d 725, 726 (1947).

Thus, because Chapter 19 of Title 67 contains no provision

whatsoever expressly mandating retroactive application of the substantive and procedural rights contained therein, under no conceivable circumstance could such provisions be deemed to operate retroactively. Furthermore, the grievance procedures initiated by these defendants were more than four-fifths complete as of the effective date of Chapter 19. The law is well-settled in Utah that the facts and law in a given lawsuit are to be applied as of the date of the initiation of the action. Archer v. Utah State Land Board, 15 Utah2d 321, 392 P.2d 622, 624 (1967).

In addition, if Chapter 19 is applied retroactively as required by the district court, it would operate to deprive the Department of a valuable vested right of appeal embodied in Chapter 17. See Utah Code Ann. §67-17-6(5). The general rules, univerrally recognized, absolutely prohibits the retroactive application of newly enacted statutory provisions when such would operate as a deprivation or other impairment of vested rights. 73 Am.Jur.2d Statutes §349 (1974). This Court has already considered the issue of whether newly enacted statutory provisions, not expressly made retroactive. This Court has stated:

But more important than any of the above is the oft proclaimed salutary principle: that ours is a government of laws and not of men. Accordingly, the law should not be changed simply because of the will or desire of judges as to what the law is or ought to be. Much less so, should it be so changed during the course of a particular proceeding to have a retroactive effect thereon. Notwithstanding the fact that the change the state advocates

would vindicate the position taken in the dissent referred to, to so rule in this case retroactively would violate what we regard as a higher principle: that of honoring the established law. If there is to be such a change in the law, whether by legislative act or by judicial decision, it seems that it should have only prospective effect and that fairness and good conscience require that it should not be applied retroactively to adversely affect rights as they existed at the time a particular controversy arose.

State v. Kelbach, 569 P.2d 1100, 1102 (Utah 1977, emphasis added).

Having begun their grievances under Chapter 17, Title 67, the grievants are bound by the procedural provisions contained therein. Section 67-17-6(5) outlines the procedures to be followed during the course of and subsequent to the step-five administrative hearing.

The section recognizes a statutory right of appeal from the decision of the step-five hearing officer, both in favor of the aggrieved employee and in favor of the State and its agencies. Pursuant to the authority of this section of the Code, the Department filed this action on June 13, 1980. The Department's complaint vested the district court with jurisdiction to consider the Department's appeal of the decision of the hearing officer at the step-five administrative hearing, and this Court should reverse the district court's dismissal of the Department's complaint.

POINT III

THE PLAINTIFF-APPELLANT HAS A STATUTORY AND CONSTITUTIONAL RIGHT OF APPEAL.

The Utah Supreme Court has stated that:

[T]he right to an appeal is a constitutional, as well as a valuable right and ought not to be denied except where it is clear the right does not exist, or has been lost or abandoned.

Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117, 120 (1909).

Therefore, any doubts the district court may have had regarding the Department's right to appeal the adverse administrative decision should have been resolved in favor of allowing the appeal.

This right of appeal was reaffirmed in the recent case of Peatross v. Board of Commissioners, 555 P.2d 281 (Utah 1976). The plaintiff's business license had been revoked, and she protested in various proceedings, including an administrative hearing before the defendant Commission at which the plaintiff was represented by counsel. The plaintiff petitioned the district court for a trial de novo, rather than for a review of the record as was done in the instant case. This court, although denying the trial de novo the plaintiff requested, did hold that the plaintiff had a right to have a court review the record. The court stated:

[W]e are in accord with the proposition that a party who deems himself to be wronged by unlawful or capricious and arbitrary action of a public official or department of government does and should have a right of access to the courts to review and test the validity of his contention.

555 P.2d at 283.

The court explained that this right of review is implemented through the Utah Constitution, Article VIII, Section 7, which provides: that "[t]he District Court shall have . . .

appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same . . ."

The fact that the plaintiff-appellant at bar is a governmental entity rather than a natural person should not affect its right to a review of a decision rendered by another governmental entity. The court in Peatross stated that a "party" had a right of access to the courts to seek review of the administrative decision. The rules of construction for the Utah statutes provide that "[t]he word 'person' includes bodies politic . . ." Utah Code Ann. §68-3-12(5) (1978). These authorities indicate that it is the policy of this state that political entities have the same rights as natural persons.

When the grievants commenced their proceedings against the Department, Utah law provided that both parties had the right to seek review in the courts of the decision rendered by the administrative tribunals. The Utah Constitution explicitly provides that the district court has appellate jurisdiction over all inferior tribunals. It was error for the district court to hold that the new grievance law, enacted when these proceedings were nearly complete, deprived the court of its constitutionally-conferred jurisdiction to review Dr. Wann's decision. The order dismissing the plaintiff-appellant's complaint should therefore be reversed.

POINT IV

BY EXPRESS AGREEMENT, THE PARTIES WAIVED
THE ADDITIONAL PROCEDURAL STEPS UNDER THE
NEW GRIEVANCE LAW.

Code Ann. §67-19-23) grievance laws provide that the parties may, by mutual agreement, waive any of the steps of the grievance procedure. To prevent fraud, the statute requires that the waiver be evidenced by a writing. This requirement is met by the signed decision of Dr. Wann which states that "[I]t was further agreed by all concerned that these cases should be heard through to their final resolution in accordance with the provisions of the then governing statute . . ." (R.44).

It is a general rule that, although parties may not stipulate as to points of law or to invest a court with jurisdiction which it would not otherwise have, parties may stipulate to matters "relating merely to the conduct of a pending proceeding." 73 Am.Jur.2d Stipulations §4 (1974), First of Denver Mortgage Investors v. C. N. Zundel and Associates, 600 P.2d 521, 527 (Utah 1979). The courts are ordinarily bound by those stipulations. 600 P.2d at 527.

It was established in the previous argument that the Utah Constitution confers jurisdiction on the district courts to review the decisions of all inferior tribunals. Utah Const. Art. VIII §7. The law under which these proceedings were had specifically allowed the parties to waive any additional appeal steps that might exist (Utah Code Ann. §67-17-4), and in any event, such a stipulation could not be considered a matter of law, but rather simply a matter "relating merely to the conduct of a pending proceeding." Therefore, the stipulation of the parties did not in anyway encroach upon the domain of the court, and it should have been honored.

To deny effect to the stipulation would also work a great injustice upon the Department. In reliance on the express agreement of the parties that the proceedings would continue to be held according to Chapter 17, the Department looked to that statute to determine its right of appeal and the procedure for taking such appeal. Since the time for taking an appeal under the new Chapter 19 has now passed, a failure to honor the stipulation of the parties would serve to deny the Department of even the minimal right of appeal granted by Chapter 19, and would leave them caught between two laws with absolutely no remedy. The decision of the district court denying effect to the stipulation was therefore error, and should be reversed.

CONCLUSION

The law concerning employee grievance proceedings against the State is apparently in a state of flux. Since the grievants initiated their complaints against the Department in 1978, the law has been changed twice. The first change added an extra step to the hearing process. The second change changed the nature of that extra step. In reliance on a stipulation of the parties, the Department determined its right of appeal from the original law. It is at best uncertain whether they can now return and attempt to file an appeal, over a year late, under the new law. It is also uncertain whether, if such an appeal were taken, the step-six hearing would be conducted as provided at the time the grievants perfected their appeal from the step-five decision (a hearing

based on the record and on new testimony and evidence) or whether the 1981 change in the law would apply (a hearing based solely on the record).

No proceeding can be efficiently conducted if the law under which it is held is so frequently changed. The Legislature has recognized this, and specifically provided that a repeal of a statute does not affect any proceeding commenced under the statute repealed. Utah Code Ann. §68-3-5 (1978). This court has stated that laws should not be changed during the course of a particular proceeding. State v. Kelbach, 569 P.2d 1100, 1102 (Utah 1977). This rule is especially important where the valuable and constitutional right of appeal is at stake.

For the reasons above stated, the parties are in need of guidance from this Court concerning which law should apply to these proceedings. This Court should hold that these proceedings may be completed as they commenced pursuant to Chapter 17 of Title 67, Utah Code Annotated, and that therefore the order of the district court dismissing the Department's complaint should be reversed and the complaint reinstated.

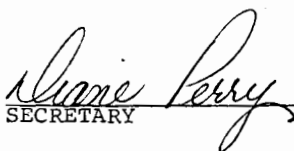
Respectfully submitted this 26th day of June, 1981.



DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff-Appellant

MAILED two (2) copies of the foregoing Brief of Plaintiff-Appellant to Ms. Kathryn Collard, Attorney for Defendants-

Respondents, 417 Church Street, Salt Lake City, Utah, 84111,
this 26th day of June, 1981.


SECRETARY

2/13/81

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE - STATE OF UTAH

FILE NO. C-80-4179

TITLE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

State of Utah, Department of : Don R. Petersen

Social Services, :

vs. :

Roger C. Higgs, Kurt Mathia and : Kathryn Collard

George C. Melis :

Karen Busch

CLERK

Gayle Campbell

REPORTER

Bill Hylar

BAILIFF

HON. Kenneth Ristrup

JUDGE

DATE: July 22, 1980 -

Late-filed exhibit received
7/25/1980.Defendants' Motion to Dismiss is granted.

Section 67-19-21, Utah Code Annotated (79 Supp.), provides that "Any claim or charge by a career service employee of the state ... may be submitted for solution through the grievance procedure set forth in this chapter." The Court observes there is no time limitation contained herein preventing utilization of the grievance procedures contained in this chapter for grievances which arose prior to the effective date of the Act of July 1, 1979, and which grievance complaints were initiated under the predecessor Chapter 17 of Title 67, U.C.A.

Notwithstanding the agreement of the parties to pursue the grievance procedures set forth in Chapter 17, Title 67, on the claims of grievance which took place in July, August and September 1978, the Court concludes it is not bound thereby. Counsel for Plaintiff in his Memorandum in Opposition to Motion to Dismiss at page 5 thereof recognizes that the handling of the grievances in question under the provisions of the predecessor Employees' Grievance Procedure vs. the current State Personnel Management Act involves "procedural provisions".

Although Step 5 of the Procedural steps contained in Section 67-17-6, Utah Code Annotated (repealed 7/1/79) provided for appeal to the appropriate court of law, the Court concludes that the substantive rights of the parties are not abridged by utilization of the procedural steps contained in Section 67-19-25, Utah Code Annotated (79 Supp.), since

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE - STATE OF UTAH

FILE NO. C-80-4179-cont.

TITLE: (V PARTIES PRESENT)

COUNSEL: (V COUNSEL PRESENT)

State of Utah, Department :
of Social Services vs. :
Roger C. Higgs, et al. ✓ :
Continued :

CLERK

HON.

JUDGE

REPORTER

DATE:

BAILIFF

(c) providing for an appeal to the personnel review board reserves to the parties the right of appeal to the district court.

Plaintiff's apparent preference for a judicial review of the non-law trained hearing officer's decision as opposed to further proceedings before a lay board is not sufficient basis to avoid the necessity of exhausting all available administrative remedies before resort is had to the courts.

