

2000

# Keith W. Bourgeois v. Utah Department of Commerce : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KEITH W. BOURGEOUS,

Plaintiff/Appellant,

vs.

UTAH DEPARTMENT OF  
COMMERCE,

Defendant/Appellee.

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Case No. 20000780-CA

District Court No. 98-0900810

Priority No. 15

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**APPELLANT'S REPLY BRIEF**

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On Appeal from the Final Order of  
the Third District Court  
Honorable Ronald E. Nehring

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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Appellant Keith W. Bourgeois, through his counsel of record, submits this Reply Brief in Support of his Appeal.

**A. THE DEPARTMENT'S DENIAL OF BOURGEOUS' APPLICATION VIOLATED U.C.A. §68-3-5.**

Appellee, the Utah Department of Commerce, makes four arguments against any violation of U.C.A. §68-3-5, which can be summarized as: (1) the statute does not apply to educational requirements; (2) the statute can only apply to a license and Bourgeois had not yet received a license; (3) the statute does not apply if the State Legislature changes laws which may cause a person to lose his license after he has qualified under Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Utah 1935); and (4) the Department was given rule-making authority to determine educational requirements retroactively, which authority is outside of the purview of §68-3-5. (Appellee's Brief, pp. 10-14). Each of the Department's arguments fails and should be rejected by this Court.

First, U.C.A. §68-3-5 provides that "rights", "duties" and "penalties", as well as "actions or proceedings" that are "commenced under or by virtue" of a statute which is subsequently repealed shall not be affected by such repeal. The Engineer-in-Training Certificate which Bourgeois received in 1989 was statutorily provided for under the then applicable statute (U.C.A. §58-22-5, 1986), which stated among other things that the certification for an Engineer-in-Training would be granted if the applicant had graduated "from an engineering curriculum of four years or more approved by the board as being of satisfactory standing". (See copy of the 1986 statute at Exhibit "A" to Bourgeois' Opening Brief). Bourgeois' TAC engineering degree was approved by the Board before

§58-22-5 (1986) was repealed. In 1992, U.C.A. §58-22-5 was repealed and replaced with a new statute entitled "Qualifications for Licensure". The 1992 Act provided that:

(9) After July 1, 1996, an individual who has graduated from an approved TAC/ABET accredited engineering technology curriculum shall be required to complete the educational requirements of an EAC/ABET accredited engineering curriculum in order to complete the educational requirements for a license as a professional engineer.

As stated by the 1992 statute, the change that a TAC accredited degree would no longer be acceptable for licensure was not to take effect until July 1, 1996. However, prior to July 1, 1996, this statute was also repealed by Senate Bill 0235, the current version of the Professional Engineers and Professional Land Surveyors Licensing Act. The current version of the Act became effective July 1, 1996 and included the stated purpose of amending the 1994 version to change the "qualifications for licensure." (See Preamble, S.B. 0235, attached as Addendum E to Appellant's Opening Brief). One of the changes in qualifications was to remove the EAC degree-only requirement.

Nothing in U.C.A. §68-3-5 limits its application to only "licenses" and not certificates. Rather, the statute applies to rights, duties, penalties, actions and proceedings "commenced under or by virtue of the statute repealed." Thus, the Department's argument that U.C.A. §68-3-5 does not apply to educational qualifications approved and recognized by statute fails. Bourgeois' Engineer-in-Training Certificate was a statutorily created right which had accrued in 1989 with his receipt of the

Certificate. While the 1992 version of U.C.A. §58-22-5 did expressly state that after July 1, 1996, a TAC accredited degree would no longer be acceptable for licensure and thereby comported with the requirements of U.C.A. §68-3-3 that the retroactive effect be expressly declared<sup>1</sup>, this statute never went in effect. Other than providing insight to the Legislature's intent with the current law in continuing to recognize TAC degrees as before, the 1992 version never became effective and thereby does not support the Department's claims.

The Department's second argument that §68-3-5 only applies to licenses fails as well because the express language of the statute imposes no such limitation as the Department suggests.

The Department next claims that under Riggins v. District Court of Salt Lake County, 51 P.2d 645 (Utah 1935), the Legislature had the right to "change one of the requirements for licensure before Bourgeois was licensed and before he had fulfilled all of the requirements, especially after four years notice was given." (Department's Brief, p. 12). The Riggins case concerned various challenges to the constitutionality of the Liquor Control Act which affected at least one of the challenging party's liquor licenses by

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<sup>1</sup>Subsection 9 of U.C.A. §58-22-5 (1992), stated:

After July 1, 1996, an individual who has graduated from an approved TAC/ABET accredited engineering technology curriculum shall be required to complete the educational requirements of an EAC/ABET accredited engineering curriculum in order to complete the educational requirements for a license as a professional engineer.



restricting the number of licenses to one per five hundred persons within a city. The Utah Supreme Court quoted from Corpus Juris and other authorities that a license is not a contract or permanent right and "that free latitude is reserved by the Legislature to impose new or additional burdens on the licensee, or to alter the license, or to revoke it or annul it." (51 P.2d at 658). In rejecting the Appellants' constitutional challenges, the Utah Supreme Court stated: "It was competent for the Legislature under its police power to nullify the licenses theretofore issued." (Id.)

In the case at bar, Bourgeois is not challenging the constitutionality of §58-2, nor is Bourgeois contesting the State Legislature's authority to enact the 1992 Act (which would have expressly made Bourgeois' degree inadequate after July 1, 1996).

Bourgeois is challenging the Department's misinterpretation of the current Act.

Moreover, this case is not about the State Legislature revoking licenses of any engineer who was educated at Weber State instead of the University of Utah. Rather, this case is about the Department's attempt to retroactively affect Bourgeois' Engineer-in-Training Certificate (a right) when the statute (the 1996 and current version of the Act) did not reflect any intent by the State Legislature to do so. Without a pronouncement in the current Act that existing Engineer-in-Training Certificates were nullified after July 1, 1996 (as was done in the 1992 version which never took effect), the Section 68-3-5 protections apply to Bourgeois' Certificate and the Department cannot affect such right directly or indirectly.

In the related case of Cache County, et al. v. Property Tax Division, State of Utah, 922 P.2d 758 (Utah 1996), the Utah Supreme Court rejected the Tax Commission's effort to make a similar mistake. In that case, Cache County had entered into a Contingent Fee Agreement with a third party to assess property. At the time of the agreement there was no law which prohibited such agreements. Thereafter, U.C.A. §58-2-703(2)(c) became effective which prohibited such contingent fee agreements. The Utah Supreme Court acknowledged that §68-3-3 codified the "long-standing rule of statutory construction that a legislative enactment which alters the substantive law or affects vested rights will not be read to operate retrospectively unless the Legislature has clearly expressed that intention." 922 P.2d 758, 767 (Utah 1996). In concluding that §58-2-703(2)(c) contained no language reflecting any intent that the subsection should be applied retroactively, the Supreme Court concluded that the Legislature had no such intent and held that the Tax Commission had erroneously applied the section. (Id.) The Contingent Fee contract was held to be valid through its remaining term in spite of §58-2-703(2)(c). This Court should hold that Bourgeois' Certificate remained valid through the time of his application as well.

The Department's final argument is that once the Legislature gave the Department authority in 1996 to establish by rule the criteria for acceptable "Bachelor's or Master's Degree from an Engineering Program" (U.C.A. §58-22-302(1)(d)), the Department had authority to impose such criteria both prospectively and retroactively. Thus, the

Department argues that it can circumvent the protections of U.C.A. §68-3-5 even though the State Legislature could not. It is axiomatic that the Department cannot do something which the Legislature is prohibited from doing by statute. The Department's authority is derived from that given to it by the State Legislature. Alpine School Dist. Board v. State Tax Comm., 14 P.3d 125 (Ut. App. 2000) (agency's authority is not unfettered and only includes power conferred by the statute). Such authority cannot exceed the State Legislature's authority. Moreover, the legislative intent of the Act is derived from the plain meaning of the statute, not from the Department's unauthorized efforts to expand and overreach the authority delegated under U.C.A. §58-22-302. Even if this Court agrees with the Department and rules that the Act authorizes the Department to exclude TAC degrees for licensure after July 1, 1996, such a ruling should not apply retroactively to Bourgeois without the Legislature so stating. Such was this Court's ruling in Fussell v. Department of Commerce, 815 P.2d 250 (Utah App. 1991), where the educational statute for psychologists "was replaced with a stricter statutory education requirement" after Dr. Fussell had applied. Yet, consistent with U.C.A. §68-3-5, this Court applied the older statute because there was no expression from the Legislature that the stricter law be applied retroactively. 815 P.2d at 251, FN 3.

In its misguided effort to expand its authority even beyond the limits of Section 68-3-5, the Department cites to the repealed language of 1992 version to show "very clearly that the Legislature intended that the new educational requirements for licensure

be an EAC/ABET degree . . ." (Department's Brief at p. 23). As discussed above, the 1992 version and this language requiring only EAC degrees never went into effect. It was repealed by the current statute before July 1, 1996, which removed the very language the Department wishes this Court to rely upon. The Department next argues that it is flawed logic to rely upon Section 306 of the current Act to take a FE Examination with a TAC degree only to find out later that the applicant would be required to have an EAC degree. (Department's Brief at p.24). The Department argues that from 1992 to 1996 Appellant Bourgeois knew that the change was about to occur and therefore cannot claim that he misunderstood the change. The record clearly shows that there was no issue of fact as to what Bourgeois knew. Bourgeois understood that he had fulfilled the educational requirements upon the receipt of his Engineer-in-Training Certificate and that the changes proposed under the 1992 statute (which never went into effect) did not change the PPE Examination nor the work experience requirements after July 1, 1996, which were the only requirements Bourgeois had left to complete for licensure.

Instead, Bourgeois' argument went to new applicants who read the 1996 Act (after July 1, 1996) and observe that a TAC/ABET degree is acceptable for taking the FE Examination. Then, such applicant (after taking the FE Examination) finding out later that the Department's interpretation is contrary to the 1996 Act and that such applicant now is required to return to school and get a second engineering degree from a EAC accredited school before being permitted to take the PPE Examination and receive a

license. While this was what the Legislature intended with the 1992 Act, that Act never went into effect and was repealed. Under the current Act, the Legislature does intend an applicant obtain two engineering degrees from separate universities to meet the educational requirements for licensure. The provision was repealed before it became effective and this Court should stop the Department's efforts to the contrary.

**B. THE DEPARTMENT ACTED ARBITRARILY AND CAPRICIOUSLY IN ITS TREATMENT OF BOURGEOUS' AND HUNTER'S APPLICATIONS.**

The Department admits that it cited the wrong reason for granting Hunter his license. (Appellant's Brief, p. 15). The Department has never corrected its admitted error with Mr. Hunter. Moreover, the Department never discloses in this case what the right reasons were for granting Mr. Hunter a license. Instead, the Department makes a meaningless criticism of typographical error in Bourgeois' brief. Page 25 of Bourgeois' opening brief presented a chart which compared Mr. Hunter to Bourgeois. The Department claims that the "chart" is in error and that this "is a major error and is focal point in this case." (Department's Brief, p. 18). The Department claims that the error is on the second line in stating that Hunter and Bourgeois passed "the (PPE) exam prior to July 1, 1996." Even the Department has misquoted the typographical error. What the chart actually states on the second line is that both Hunter and Bourgeois passed the "PE Exam". PE should have been FE for Fundamentals of Engineering Examination. This

typographical error does not absolve the Department's arbitrary and capricious conduct.

The chart should have read as follows:

|                           | <u>Hunter</u>          | <u>Bourgeois</u> |
|---------------------------|------------------------|------------------|
| TAC Degree Received       | June 1987              | July 1989        |
| Passed PFE Exam           | October 1994           | October 1989     |
| EIT Received              | (Never applied)        | October 1989     |
| Effective Date of § 55-22 | -----July 1, 1996----- |                  |
| Passed PPE Exam           | October 1996           | April 1997       |
| Application               | February 1997          | September 1997   |
| Application Denied        | March 1997             | September 1997   |
| Agency Review Requested   | April 1997             | October 1997     |
| Licensed Granted          | April 1997             | ----             |

The Department wishes to focus on when Hunter first sat for the PPE examination and not when he made his application. The Department argues that "had Hunter's exam been correctly scored in the first place, he would have had more than two months to apply for licensure under the pre-July 1, 1996 requirements." (*Id.* at p. 15). The Department argues that Hunter applied within two months after receiving a passing score. The Department also claims that Hunter had completed all of the requirements for licensure before July 1, 1996 (Department's Brief at p. 17).

The record proves otherwise. It was over four months after Hunter's test was re-scored (R-356) that he applied for licensure, in February of 1997, and over eight months after the July 1, 1996 deadline. The Department ignores the record on this delay and makes no finding that a 4½ month delay by Hunter was the "right" reason. Because the

Department allowed Hunter 4½ months after he received his corrected score to file (and 8 months after the July 1, 1996 deadline), the Department was capricious in not allowing Bourgeois another 7 months (from February 1997 to September 1997) in making his application so that Bourgeois could complete the experience requirement. Moreover, most of Mr. Hunter's verifications of experience by supervising engineers were dated in 1997 (R-358; 360; 362; 364; 366; 368; 370; 374; and 376), also over six months after the July 1, 1996 deadline. Thus, the record shows that Hunter did not complete the experience requirement and other requirements before July 1, 1996. To the extent that this Court accepts the Department's speculative argument regarding Hunter (he could have applied earlier if he had passed the test), it should give equal weight to Bourgeois' argument: Bourgeois understood that he had ten years to complete the work experience and final PPE examination from the date he received his Engineer-in-Training Certificate (R-231-232). Had Bourgeois been able to obtain one hundred percent of qualifying time by his employer (Phillips Petroleum), he could have completed the work experience requirements before the July 1, 1996 deadline. Moreover, Bourgeois' Engineer-in-Training Certificate (created by statute) was good for 10 years under the Department's own regulation (which Bourgeois understood at the time he started with Phillips), giving Bourgeois until 1999 to complete the work experience, which he did complete by 1997, two years early. Therefore, the Department's rationale for treating Hunter and Bourgeois differently fails and the Department has violated in its duty by acting arbitrarily and

capriciously by denying Bourgeois' application and granting Hunter's 1997 application for licensure.

**C. THE DEPARTMENT HAS VIOLATED RULE 24 OF THE UTAH RULES OF APPELLATE PROCEDURE BY PRESENTING EVIDENCE NOT PART OF THE RECORD.**

Addendums E and J of the Department's Brief enclose survey information which were not part of the record before the trial court. This Court need not and should not consider any facts not properly cited to or supported by the record. Uckerman v. Lincoln Nat. Life Ins. Co., 588 P.2d 142 (Utah 1978). Not only should this Court reject the Department's improperly filed documents, but this Court should ignore the Department's arguments on pages 26-28 of its brief which rely upon the improperly submitted evidence. Even if the Department had presented this new evidence to the trial court, it would not have refuted the fact that the Department's interpretation that a TAC degree is adequate for taking the FE exam but not the PPE is unique and contrary to all other jurisdictions. See pages 34-35 of Bourgeois' opening brief.

**CONCLUSION**

This Court should reverse the trial court's order upholding the Department's and DOPL's denial of Bourgeois' application for licensure. The Department has attempted to violate U.C.A. §68-3-3 and 5 by eliminating the statutorily awarded Engineer-in-Training Certificate to Bourgeois. The Department has also treated Bourgeois in an arbitrary and capricious manner and differently than a similarly-situated applicant, John



Hunter. Finally, the Department has acted inconsistent with and contrary to the authority and legislative intent of the Professional Engineers and Professional Land Surveyors Licensing Act of 1996. Because Bourgeois has completed all of the requirements and passed all of the examination, he should be awarded his Professional Engineer's License.

Bourgeois respectfully requests that this Court reverse the lower court's denial of his license, order the Department to grant him a Professional Engineer's License, and award him costs against the Department pursuant to Rule 34(b) of the Utah Rules of Appellate Procedure.

Respectfully submitted this 20<sup>th</sup> day of July, 2001.



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## CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, Gateway Tower East, Suite 900, 10 East South Temple, Salt Lake City, Utah 84133, and that in said two (2) true and correct copies of the attached **APPELLANT'S REPLY BRIEF** were caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 20<sup>th</sup> day of July, 2001.

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