

1992

# Judy A. Cordova v. G. Barton Blackstock, Bureau Chief, Records Bureau, Drivers License Division : Reply Brief

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

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JUDY A. CORDOVA,	*	
	*	APPELLANT'S REPLY BRIEF
Plaintiff-	*	
Appellee,	*	
	*	
v.	*	Case No. 920370-CA
	*	
G. BARTON BLACKSTOCK, Bureau	*	
Chief, Records Bureau, Drivers	*	
License Division,	*	
	*	Argument Priority No. -16-
Defendant-	*	
Appellant.	*	

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APPEAL FROM THE FINAL JUDGMENT OF THE THIRD DISTRICT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

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THE COURT

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IN THE UTAH COURT OF APPEALS

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	*	APPELLANT'S REPLY BRIEF
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IN THE UTAH COURT OF APPEALS

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JUDY A. CORDOVA,

Plaintiff-  
Appellee,

v.

G. BARTON BLACKSTOCK, Bureau  
Chief, Records Bureau, Drivers  
License Division,

Defendant-  
Appellant.

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Case No. 920370-CA

Argument Priority No. -16-

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REPLY BRIEF OF THE APPELLANT

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ARGUMENT

THE DEPARTMENT OF PUBLIC SAFETY, DRIVER'S LICENSE  
DIVISION CONDUCTED AN INFORMAL ADJUDICATIVE HEARING AT  
APPELLEE'S REQUEST AND HAS NOT VIOLATED HER RIGHT TO  
DUE PROCESS OF LAW.

The main thrust of Cordova's argument on appeal is that the Department of Public Safety, Driver's License Division (the "Department") failed to hold a hearing prior to revoking Cordova's driver's license and thus denied her the right to due process. The Department replies that a hearing was held that satisfied the demands of Utah law and the Due Process clause of

the United States Constitution. Further, the Department denies that Cordova had any constitutionally protected pre-deprivation right that was violated.

Utah law entitles an individual whose license is to be suspended the "opportunity" to be heard: "Upon written request, the division shall grant to the person [whose license is to be suspended] an opportunity to be heard within 29 days after the date of arrest." Utah Code Ann. § 41-2-130 (Supp. 1992). The Department's adjudicative hearings are conducted pursuant to the Utah Administrative Procedures Act and are designated as informal. 4 Utah Admin. R. 708-17-6 (1992). At an informal adjudicative hearing, the parties may appear, testify, present evidence, and comment on the issues. Utah Code Ann. § 63-46b-5(1)(c) (1989) (attached as Addendum "A"). The officer at such a hearing must base his order on the "facts appearing in the agency's files and on the facts presented in evidence at any hearing." Utah Code Ann. § 63-46b-5(1)(j) (1989). The officer may not exclude evidence solely because it is hearsay. 4 Utah Admin. R. 728-409-13(3) (1992).

Upon Cordova's request, the Department set a time for her to appear and testify at a hearing regarding the possible revocation of her driver's license. Brief of the Appellee at 4. Cordova does not contest the fact that she was notified of the hearing.

Brief of the Appellant at 4 (Uncontested statement of facts) (A copy of the notification is attached as Exhibit "A"). At the scheduled time, a hearing was held. Id. at 4-5. Cordova did not appear, and the hearing officer based his order upon the facts appearing in the agency's files. Utah Code Ann. § 63-46b-5(1)(j) (1989); Appellant's Brief at 4-5. Cordova's failure to appear and participate in the hearing held at her request and on her behalf cannot be translated into failure on the part of the department to conduct a hearing. Nor can Cordova claim that a hearing was not held because the police officers did not appear; the law clearly allows the hearing officer to base his decision on the information contained in the Department's file. Utah Code Ann. § 63-46b-5(1)(j) (1989).

The Supreme Court has held that the due process clause of the fourteenth amendment does not require a pre-deprivation hearing in driver's license revocation proceedings. Dixon v. Love, 431 U.S. 105 (1977); Mackey v. Montrym, 443 U.S. 1 (1979). In Mackey, the Court established the following due process standard when a driver's license is to be suspended by administrative action:

[W]hen prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying

the official action are as a responsible governmental official warrants them to be.

Mackey, 443 U.S. at 13. The Mackey test sets up a threshold requirement of post-deprivation review. If that review is available, then the pre-deprivation procedures need only provide a "reasonable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be."

Under Utah law, the Department's decision to revoke Cordova's driver's license was promptly reviewable by trial de novo in the district court. Utah Code Ann. § 63-45b-15 (Supp. 1992). Because the Mackey threshold requirement is satisfied, the Department need only demonstrate that its revocation procedures are designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are accurate.

In Mackey, the Court held that reliance upon a police officer's sworn report was rational and upheld an administrative scheme of revocation that included "independent review of the report . . . by a detached public officer." Mackey 443 U.S. at 16.

The hearing procedure followed by the Department in this case is nearly identical to that described in Mackey. In this case, the police officer's signed report was reviewed by a

detached public officer who concluded that the facts described in the report warranted administrative revocation. In addition, Cordova was given opportunity to appear and be heard. She had the opportunity to contest the facts described in the reports that made up the Department's file. Cordova waived that opportunity and the hearing officer properly found the report to be accurate. See Mackey 443 U.S. at 17-18 (upholding a statutory scheme that required an independent decision-maker to treat a police report as presumptively accurate).

CONCLUSION

At the request of Cordova the Department conducted a hearing that satisfied the requirements of Utah law. The officer conducting the hearing based his order on the evidence before him that was contained in the Department's file. This procedure is adequate to satisfy the demands of due process.

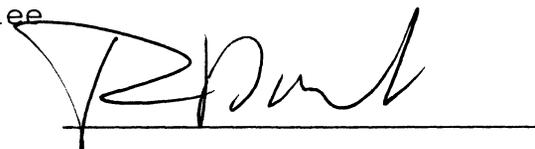
RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 1992.

  
THOM D. ROBERTS  
Assistant Attorney General  
Attorney for Defendant-  
Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT**, was mailed, postage-prepaid this 9<sup>th</sup> day of November, 1992, to the following:

Herschel Bullen, Esq.  
Attorney for Plaintiff-Appellee  
2749 Parleys Way, Suite 210  
Salt Lake City, Utah 84109

A handwritten signature in black ink, appearing to read "H. Bullen", is written over a horizontal line.

**EXHIBIT AND ADDENDUM**

**EXHIBIT "A"**

**NOTICE OF ADMINISTRATIVE HEARING**



DEPARTMENT OF PUBLIC SAFETY  
DRIVER LICENSE DIVISION

Norman H. Bangert  
Governor  
D. Douglas Bodrero  
Commissioner  
Brant Johnson  
Deputy Commissioner

Phil Himmelberger, Bureau Chief  
Driver Services Bureau  
4501 South 2700 West, 3rd floor  
P.O. Box 30560  
Salt Lake City, Utah 84130-0560  
(801) 968-4437

Date February 6, 1992

Judy A. Cordova  
3205 Starlite Circle  
West Jordan, UT 84088

File # 3458121  
Arrest Date: 01/24/92  
DOB: 04/07/59

Under Title 41, Utah Code Annotated 1953, an informal hearing will be held by this Department regarding the issues checked below:

/X/ 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 of alcohol or any drug on January 24, 1992.

The purpose of this hearing is to determine whether a peace officer had reasonable grounds to believe you have been operating or in physical control of a motor vehicle while in violation of UCA 41-6-44.

// Your request for an administrative hearing regarding this Department's intention to revoke your driving privilege as a result of your arrest for driving under the influence of alcohol or any drug and the issue of your alleged refusal to submit to a chemical test on \_\_\_\_\_.

The purpose of this hearing is to determine if you refused a chemical blood test after warning and request by a peace officer with reasonable grounds to believe you were operating or in physical control of a vehicle while under the influence of alcohol or any drug.

// You were driving while your driving privilege was under revocation/suspension. Failure to appear at this hearing may result in extension of your revocation/suspension.

**CERTIFICATE  
OF MAILING**

Your Hearing has been set as follows:

DATE: February 19, 1992  
TIME: 9:00 AM  
PLACE: 2780 West 4700 South  
West Valley City, UT 533-6660

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, this or her last address as shown by the records of the Department.

ONLY IF YOU ARE UNABLE TO APPEAR AT THE TIME INDICATED YOU MUST NOTIFY THE OFFICE AT LEAST FIVE (5) WORKING DAYS BEFORE THE SCHEDULED TIME AND ONLY UPON REASONABLE GROUNDS, WILL THE HEARING BE CONTINUED.

cc: Herschel Bullen, Attorney  
455 East 5th South #200  
Salt Lake City, UT 84111

Respectively,  
*Phil Himmelberger*  
Phil G. Himmelberger  
Bureau Chief  
Driver Services

**ADDENDUM "A"**

UTAH CODE ANN. § 63-46B-5 (1989)

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

**History:** C. 1953, 63-46b-4, enacted by L. § 315 makes the act effective on January 1, 1987, ch. 161, § 260. 1988.  
**Effective Dates.** — Laws 1987, ch. 161.

### **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.