

2016

**Fur Breeders Agricultural Cooperative, (Employer No. 002612-0).
Petitioner/Appellant, vs. Department of Workforce Services,
Workforce Appeals Board, Respondent/Appellee. : Brief of
Appellant**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Scott Rawlings; attorney for appellant.

Nathan R. White; attorney for appellee.

Recommended Citation

Brief of Appellant, *Fur Breeders Agricultural v. Workforce Services*, No. 20161064 (Utah Court of Appeals, 2016).

https://digitalcommons.law.byu.edu/byu_ca3/4130

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 Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APEALS

Fur Breeders Agricultural Cooperative, :
 (Employer No. 002612-0). :
 :
 Petitioner/Appellant, :
 :
 vs. :
 :
 Department of Workforce Services, : Appellate Case No.
 : 20161064-CA
 Workforce Appeals Board, :
 :
 Respondent/Appelle. :

BRIEF OF APPELLANT

APPEAL

Appeal from Decision of Workforce Appeals Board

Department of Workforce Services

NATHAN R. WHITE
 Workforce Appeals Board
 Department of Workforce Services
 140 East 300 South
 P.O. Box 45244
 Salt Lake City, UT 84145-0244

R. SCOTT RAWLINGS
 3441 Decker Lake Drive
 Suite 201
 Salt Lake City, UT 84119

Attorney for Respondent/Appelle

Attorney for Petitioner/
 Appellant

FILED
 UTAH APPELLATE COURTS
 MAY 10 2017

IN THE UTAH COURT OF APEALS

Fur Breeders Agricultural Cooperative, :
(Employer No. 002612-0). :
:
Petitioner/Appellant, :
:
vs. :
:
Department of Workforce Services, : **Appellate Case No.**
:
Workforce Appeals Board, : **20161064-CA**
:
Respondent/Appelle. :

BRIEF OF APPELLANT

APPEAL

Appeal from Decision of Workforce Appeals Board

Department of Workforce Services

NATHAN R. WHITE
Workforce Appeals Board
Department of Workforce Services
140 East 300 South
P.O. Box 45244
Salt Lake City, UT 84145-0244

R. SCOTT RAWLINGS
3441 Decker Lake Drive
Suite 201
Salt Lake City, UT 84119

Attorney for Respondent/Appelle

**Attorney for Petitioner/
Appellant**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2-4

**STATEMENT OF
JURISDICTION.....4-5**

**ISSUE PRESENTED FOR
REVIEW.....5-6**

**STANDARD FOR
REVIEW.....7**

**STATEMENT OF THE
CASE.....8**

**STATEMENT OF THE FACTS RELEVANT TO
ISSUES ON APPEAL.....8-12**

**SUMMARY OF THE
ARGUMENTS.....12-14**

ARGUMENTS.....14-35

**CONCLUSION AND RELIEF
SOUGHT.....35-36**

TABLE OF AUTHORITIES

Adams v. Board of Review of Indus. Comm'n, 821 P,2d 1, 4...7,28

<i>Department of the Airforce v. Swider</i> , 824 P.2d 448, 451 (Utah App. 1991).....	29, 31
<i>Drake v. Industrial Comm 'n</i> , 939 P.2d 177, 181 (Utah 1997)..	7
<i>Evolocity Inc. v. Department of Workforce Servs.</i> , 2015 UT App 61, 374 P.3d 406.....	31
<i>First National Bank of Boston v. County Board of Equalization</i> , 799 P.2d 1163 (Utah 1990).....	29, 31, 34
<i>Grace Drilling Co. v. Board of Review</i> , 776 P.2d 63, 67 (Utah App 1989).....	28, 29, 31
<i>LaSal Oil Co. v. Department of Env'tl. Quality</i> , 843 P.2d 1045, 1047 (Utah App 1992).....	28
<i>Leach v. Board of Review Indus. Comm 'n</i> , 123 Utah 423, 260 P.2d 744, 748 (Utah 1953).....	28, 31
<i>Martinez v. Media Paymaster Plus</i> , 207 UT 42, 164 P.3d 384.....	7
<i>Needle Inc. v. Dept 't pf Workforce Servs.</i> , 2016 UT App 84 (Utah Ct. App. 216).....	29
<i>Petro-Hunt, LLC v. Dep 't pf Workforce Servs.</i> , 197 P.3d 107, 114 (Utah App 2008).....	26, 27
<i>Savage Indus., Inc. v. Utah State Tax Comm 'n</i> , 811 P.2d 665, 669 (Utah 1991).....	7
<i>Tasters Ltd., v. Department of Employment Sec.</i> , 863 P.2d 12 (Utah 1993).....	29, 31, 33

STATE STATUTES

Utah Code Ann. §35A-4-204.....	16
--------------------------------	----

Utah Code Ann. §35A-4-204(1).....	8, 12, 16, 17
Utah Code Ann. §35A-4-204(3).....	8, 12, 17
Utah Code Ann. § 35A-4-208.....	8, 12
Utah Code Ann. §35A-4-402(3).....	34
Utah Code Ann. §35A-4-508(4)(5).....	5
Utah Code Ann. §63G-4-401.....	5
Utah Code Ann. §63G-46b-16(4).....	13, 28, 29, 31, 33, 35

RULES

Utah Admin. Code R994-204-303.....	13, 18
Utah Admin. Code R994-204-303(1)(b).....	6, 17, 27
Utah Admin. Code R994-204-303(1)(b)(iii).....	17
Utah Admin Code R994-204-303(1)(iv).....	33
Utah Admin Code R994-204-303(1)(b)(iii).....	27, 33
Utah Admin. Code R994-204-303(1)(b)(v).....	33
Utah Admin. Code R994-204-303(2)(b).....	6, 17

STATEMENT OF JURISDICTION

The Utah Court of Appeals has original jurisdiction under Utah Code Ann. §35A-4-508(4)(5), Utah Employment Security Act, Utah Administrative Code (1997); and, Utah Code Ann. §63G-4-401.

ISSUES PRESENTED FOR REVIEW

Issue #1: Did Workforce Services Adjudicative Division err in the application of rules/guidelines, weight of testimony and determination of off-duty Unified Police Officers as employees of Appellant rather than independent contractors based upon the 03/01/2016 “Determination of Employment” (Mark Peterson, Field Auditor) ¹[R 72-76]; Hearing Officer Susan Cottam’s “Conclusion” of 07/20/2016; Telephonic Hearing before Hon. Gary Gibbs, ALJ on October 5, 2016 “Decision and Order ¹[R 104-143]; and, Department of Workforce Services Appeals Unit “Decision” of 12/07/2016 ¹[R151-166]?

Issue #2: Did the Board of Appeals err in application of the weight and the particular scrutiny of the facts of the service relationship, as set forth in Utah Administrative Rules, subsections R994-204-303(1)(b) and R994-204-303(2)(b), having failed to weigh the importance of each factor depending upon the unique service and factual context of the services performed by off-duty Unified Police Department (UPD) Officers to this Appellant, in which some factors do not apply to certain such unique circumstances?

Issue #3: Did the Board of Appeals err in refusing or not giving full consideration to prior testimony given before Hearing Officer Susan Cottom (07/20/2016) which was noted by the ALJ as records/documents provided in the "...original Department Decision..."; at which direct testimony was provided by two (2) UPD detectives who participated in providing independent contractor services to Appellant, but otherwise not given consideration by the ALJ in his "Decision and Order" ¹[R 110]?

¹ "R" refers to the Record in this case and the numbered pages from the Record.

STANDARD OF REVIEW

Absent a legislative grant of discretion, this court reviews an agency's interpretation of its organic statute for correctness, granting no deference to the agency's interpretation. *Martinez v. Media-Paymaster Plus*, 2007 UT 42, 164 P.3d 384.

Whether an administrative agency's findings are adequate is a legal determination that requires no deference. *See Adams v. Board of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991).

Court will reverse an administrative agency's findings of fact "only if the findings are not supported by substantial evidence." *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997).

A determination of substantial prejudice is required as a prerequisite to appellate review to "...ensure that a court will not issue advisory opinions reviewing agency action when no true controversy has resulted." *Savage Indus., Inc v. Utah State Tax Comm'n*, 811 P.2d 665, 669 (Utah 1991).

STATEMENT OF THE CASE

This is an appeal from the final Decision of the Board of Appeals, Workforce Services entered in this matter on December 7, 2016 and more specifically upholding the decision of the Administrative Law Judge entered on October 12, 2016 holding that off-duty Unified Police Department officers providing additional police presence near and Close to Appellant, Fur Breeder Agricultural Cooperative (FBAC)'s building, plant and facilities during evening/night times and hours when there is consistent police presence otherwise near FBAC, are deemed employees of FBAC and not independent contractors pursuant to §§35A 4-204(1), 204(3), and 208 of the Utah Employment Security Act.

STATEMENT OF FACTS RELEVANT TO ISSUES ON APPEAL

Findings, reasoning and conclusions of the law of the Administrative Law Judge, where not inconsistent with the decision of Workforce Appeals Board were adopted in full.

Appellant FBAC manufactures and distributes animal feed (primarily mink feed) for member mink ranchers in Utah and southern Idaho.

FBAC has been and continues to be a target of past criminal activities, including arson which utterly destroyed its principal place of business located in Salt Lake County, Utah; together, with continuing threats of destruction and theft of its property from individuals who purportedly have objections to and oppose the fur industry.

FBAC has felt the need to have some additional police presence near and close to its facilities during those hours and times when there is inconsistent police presence through the Unified Police Department (UPD).

FBAC, having been made aware of such potential increased police presence availability, by and through a related entity to UPD, under a separate service administered and offered through UPD's "Secondary Employment" program; contacted said program administrator. FBAC was advised that UPD policies prohibit its officers from working outside of the "Secondary Employment" program when providing services to private industry, but makes provision for its officers to

enlist in and provide independent contractor services by and through a “Secondary Employment” program which is a separate and distinct office/administrator coordinating those officers desirous of off-duty work.

During the period of 2014-2015, at issue in this appeal, individual UPD off-duty officers enrolled in the non-affiliated “Secondary Employment” program through UPD. All off-duty UPD officers were enrolled in and provided service log access to UPD’s “Secondary Employment” program, which otherwise was not made known to or had any access to by FBAC.

FBAC had no notice, had no knowledge of participating UPD off-duty officers, who were randomly assigned by and through the “Secondary Employment” program and its administrator. FBAC provided no direction as to the police presence to be provided, gave no instruction, training, pace or other factors relative to control of the presence to be provided. UPD “Secondary Employment” office would send an invoice to FBAC, identifying the several officers by name, social security number and hours of presence. On FBAC’s part, it would make/issue checks to each individual officer as an independent

contractor so identified as such by the "Secondary Employment" program.

Administrative Law Judge, Hon. Gary S. Gibbs, issued the following:

FINDINGS OF FACT:

The Appellant manufactures and distributes animal feed to farms who raise animals for their fur. The Appellant has had concerns about threats of destruction of its property from individuals who may be against the industry. The Appellant desired to have security and a greater police presence around its facility during times when the Appellant was not present. The Appellant contacted the Unified Police Department (UPD) requesting additional police presence around its facility. The Unified Police Department has a secondary employment program that coordinates secondary employment for its police officers. According to UPD policies it prohibits police officers from working outside the UPD providing security services outside the secondary employment program. The UPD agreed to assist in the scheduling of police officers to provide presence and security at the Appellant's facility. During the years 2014 and 2015, the individuals on Exhibits 21 through 27 of the hearing record as being included as employees provided services to Appellant as police officers or security officers. The Appellant paid the officers directly after the Appellant (sic UPD) provided the names and times the officers provided their services to the Appellant. The UPD set the fee for the officers' services at \$30 per hour, which the Appellant paid.

All of the officers were employees of the UPD. The UPD pays officers \$700 per year for them to purchase any tools or equipment or supplies needed to provide services as a police officer. Often this amount is not sufficient to cover all costs and the officers at times may purchase items using their own money. The officers also provide services to other companies through the UPD secondary employment program.

The officers enroll in the secondary employment program with the UPD in order to be available for the secondary jobs and indicate when they would be available to provide these services. The UPD would then schedule the officers according to the Appellant's needs.

When the officers provided the services to the Appellant they wore UPD uniforms and drove a UPD vehicle.

The Appellant did not require the officers to follow any instructions as to how to provide their services. The Appellant provided no training and did not require them to perform their services in any certain pace or sequence. The officers provided services on an as-needed basis.
[R 137-138]

SUMMARY OF THE ARGUMENTS

Board of Appeals concluded that off-duty UPD officers engaged in providing police/law enforcement presence for hire are employees and not independent contractors and to have provided a service for a wage under a contract for the Appellant, pursuant to the provisions of §§35A 4-204(1), 204(3), and 208 of the Utah Employment Security Act. The Board in support of its conclusions extracts and cites portions of various Rules and case law. The Board relies heavily on Utah Admin. Code R994-204-303 as codified in Utah Employment Security Act, provisions set forth herein-above. However, in doing so and in providing case

law precedence seemingly ignores Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-16(4) by failing to give due weight and credence to substantial evidence when viewed in light of the whole record before the Board. Problematic in the Board's Decision are Findings of Fact, when viewed in a favorable light to the record in its entirety and the unique facts and laws relative to off-duty UPD police officers performing secondary employment skills. Findings of Fact of the initial Hearing Officer and the Administrative Law Judge on appeal, which most reasonably and accurately reflect the true nature of the off-duty UPD officers, their unique challenge to establishing an independent business and reasonable compliance under such unique facts in the compliance with and to R994-204-303 Independent Contractor Status are at odds with the Decision of the Board. Appellant FBAC herein provides statutory and case law precedence establishing the legitimacy of the independent contractor relationship between off-duty UPD officers and

the services provided to Appellant.

ARGUMENT

REASONS AND CONCLUSIONS OF LAW SUPPORTING ALJ'S DECISION AND ORDER, AND AS INCORPORATED IN THE BOARD OF APPEALS DECISION, ARE NOT REFLECTED IN THE FACTS PRESENTED

The Hon. Gary S. Gibbs stated in the Administrative Law Telephonic Hearing of October 5, 2016 in response to concerns raised by Appellant FBAC as to the prior Hearing before Workforce Services Hearing Officer, Susan Cottom, held prior to July 20, 2016, with written "Conclusion" issued and mailed on July 20, 2016 [R81-87]; the following statement/representation [R 6] when challenged by FBAC as to the representations by Ms. Susan Cottom relative to what records, testimony and information would be maintained and included in the official records for appeal; and as subsequently included in the Board of Appeals records for consideration, found in the records [R 165]: "Where not inconsistent with this decision, the reasoning and conclusions of law of the Administrative Law Judge are adopted in full." By reasonable extension, the Hon. Gary S. Gibbs, ALJ stated:

“So, I’m gonna go through the documents that were used in the original Department Decision which I may use in making my Decision as well.” [R 6]

Appellant FBAC reasonably relied on the statement and representation of the ALJ, which include by extension that evidence, testimony (which included, among others, Kenneth Hansen as coordinator for UPD, Heather Lyn Drips in her capacity as a UPD detective and Zach Bench as a UPD detective who testified that both of said officers had participated in rendered police presence on behalf of Appellant FBAC under UPD’s “Secondary Employment” program. [R 81]. FBAC contends that the “Finding of Fact” issued by Hearing Officer Susan Cottom address inconsistencies found in her “Conclusion” of July 20, 2016 [R 86]; the Administrative Law Judge’s “Reasoning and Conclusions of Law” [R 138-142] and “Decision and Order” [R 143] date issued and sent on October 12, 2016: and, the Board of Appeals “Decision” [R .165]. Appellant FBAC cites the relevant omission from the “Findings of Fact” as found in the records of Hearing Officer Susan Cottom, concerning “Officers” as follows:

“Officers

Officers used by the Appellant are employees of the Unified Police Department (UPD). UPD has a program within their department for Officers searching for secondary employment. UPD Officers seeking part time jobs outside of the department must coordinate through the Secondary Employment Coordinator (Coordinator). The Appellant contacts the Secondary Employment Coordinator (Coordinator) or UPD and specifies when and where they need officers. The Coordinator lists the job in the UPD software system.

Many of these secondary jobs are considered by UPD to be contract work. UPD's secondary employer states; 'It is the responsibility of the employer to maintain all Federal and State Tax records in accordance with City, State, and Federal guidelines for each officer employed.' Officers access the system twice a month and submit their name for jobs they are interested in working. Officers are assigned jobs and receive their schedule from the UPD Coordinator. UPD determines the hourly pay Officers received for these jobs. The Appellant receives an invoice from UPD listing the individual Officers that provided security services for them. The Appellant issues individual checks to the Officers. The Appellant sends the checks to the UPD Coordinator to distribute to the Officers. Appellant issues the Officers a 1099 at the end of the year for their services.

"Officers use their UPD uniforms and police vehicles when providing services for the Appellant. They also use guns, handcuffs, radios and bullet proof vests. Some of the equipment is purchased by them and some of it is the property of UPD. The Appellant is charged a fee by UPD for the use of the car and gas. UPD expects the Officers to respond to any emergency calls if they are needed while working these part time jobs. The Officers work for several different companies through UPD's secondary employment system. Officers have not obtained business licenses, liability insurance, or Workers Compensation insurance with the intent of being independent.

"The Appellant gives general instructions to the Officers regarding the security detail. The Officers are expected to adhere to UPD's secondary employment policy. Officers are trained on how to handle various incidents and threats. The scheduling is handled by UPD's software system. If an Officer scheduled to work for Appellant is unable to work the shift, the UPD Coordinator must approve the replacement. The Appellant and their staff have very little interaction with the Officers during their shift. The UPD Coordinator is the liaison between the Appellant and the Officers. [R 81-83], (Emphasis added).

Appellant FBAC cites §35A-4-204, Utah Code Ann. **Definition of**

Employment. in support of its contention that UPD off-duty officers providing a police presence near its premises grants a statutory exception to the Employment Security Act for determination of independent contractor status, per the following provision:

U.C.A. §35A-4-402(3) provides such on the following criteria:
“...it is shown to the satisfaction of the division that:

- (a) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of hire for services; and
- (b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individuals contract of hire and in fact.

In addition to the record of and prior testimony of UPD Secondary Employment Coordinator Kenneth Hansen, UPD Detective Heather Lyn Drips, UPD Detective Zach Bench and Appellant FBAC General Manger Christopher Falco; the following uncontroverted testimony was summarily received at the Administrative Law Telephonic Hearing before the Hon. Gary G. Gibbs on October 5, 2016, the following testimony is and should be held determinative of independent contractor status of off-duty UPD officers under Administrative Rules R994-204-303(1)(b) and R994-204-303(2)(b) which states that these sections are intended only as aids in the analysis for the facts of each case, more specifically noting that the degree of importance of each factor varies

depending on the service and the factual context in which it is performed.

Finally, noting that some factors do not apply to certain services and, therefore should not be considered.

Administrative Law Rule R994-204-303. Factors for Determining Independent Contractor Status, provide guidelines for determination through special scrutiny of the facts unique to the employment relationship to aid in determining whether a worker is independently established in a like trade, occupation, profession or business that is free from control and direction. Each service and the weight of each factor expressed as merely guidelines are intended only as aids in each case.

R994-204-303:

- (1) **Independently Established.**
 - (a) An individual will be considered customarily engaged in an independently established trade, occupation, profession, or business if the individual is, at the time the service is performed, regularly engaged in a trade, occupation, profession, or business of the same nature as the service performed, and the trade, occupation, profession, or business is established independently of the alleged employer. In other words, an independently established trade, occupation, profession, or business is created and exists apart from a relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence.
 - (b) The following factors, if applicable, will determine whether a worker is customarily engaged in an independently trade or business:

(i) **Separate Place of Business.** The worker has a place of business separate from that of the employer.

(ii) **Tools and Equipment.** The worker has a substantial investment in the tools, equipment, or facilities customarily required to perform the services. However, “tools of the trade” used by certain trades or crafts do not necessarily demonstrate independence.

(iii) **Other Clients.** The worker regularly performs services of the same nature for other clients and is not required to work exclusively for one employer.

(iv) **Profit or Loss.** The worker can realize a profit or risk a loss from expenses and debts incurred through an independently established business activity.

(v) **Advertising.** The worker advertises services in telephone directories, newspapers, magazines, the Internet, or by other methods clearly demonstrating an effort to generate business.

(vi) **Licenses.** The worker has obtained any required and customary business, trade or professional licenses.

(vii) **Business Records and tax Forms.** The worker maintains records or documents that validate expenses, business asset valuation or income earned so he or she may file self-employment and other business tax forms with the Internal Revenue Service and other agencies.

(c) If an employer proves to the satisfaction of the Department that the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service in question, there will be a rebuttable presumption that the employer did not have the right of or exercise direction or control over the service.

(2) **Control and Direction.**

(a) When an employer retains the right to control and direct the performance of a service, or actually exercises control and direction over the worker who performs the service, not only as to the result to be accomplished by the work but also the manner and means by which that result is to be accomplished, the worker is an employee of the employer for the purposes of the Act.

(b) The following factors, if applicable, will be used as aids in determining whether an employer has the rights of or exercises control and direction over the service of a worker:

(i) **Instructions.** A worker who is required to comply with the other persons' instructions about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions.

(ii) **Training.** Training a worker by requiring or expecting an experienced person to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the employer for who the service is performed expects the service to be performed in a particular method or manner.

(iii) **Pace of Sequence.** A requirement that the service must be performed at a pace or ordered sequence of duties imposed by the employer indicates control or direction. The coordinating and scheduling of the services of more than one worker does not indicate control or direction.

(iv) **Work on Employer's Premises.** A requirement that the service be performed on the employer's premises indicates that the employer for who the service is performed has retained a right to supervise and oversee the manner in which the service is performed a right to supervise and oversee the manner in which the service is performed especially if the service could be performed elsewhere.

(v) **Personal Service.** A requirement that the service must be performed personally and may not be assigned to others indicates the right to control or direct the manner in which the work is performed.

(vi) **Continuous Relationship.** A continuous service relationship between the worker and the employer indicates that an employer-employee relationship exists. A continuous relationship may exist where work is performed regularly or at frequently recurring although irregular intervals. A continuous relationship does not exist where the worker is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.

(vii) **Set Hours of Work.** The establishment of set hours or a specific number of hours of work by the employee indicates control.

(viii) **Method of Payment.** Payment by the hour, week, or monthpoints to employer-employee relationship, provided that the method of payment is not a convenient way of paying progress billing as part of a fixed price agreed upon as the cost of a job. Control may also exist when the employer determines the method of payment.

1. Independently Established Trade or Business

Workforce Appeals Board initial and primary analysis focused on the issue of an “Independently Established Trade or Business, citing Rule 994-204-303.as the prevailing guideline for determination of an employer-employee relationship as opposed to Appellant FBAC’s assertion that its agreement with off-duty UPD officers was as independent contractors. Appellant FBAC hereby incorporates the Findings of Hearing Officer Susan Cottom previously recited herein as [R81-83] and” Reasoning and Conclusions of Law” of ALJ Hon. Gary S. Gibbs in both support of err in reaching a determination that off-duty UPD officers are employees as opposed to independent contractors. The record of testimony before the Adjudicative Division on October 5, 2016 contains the following material facts, when added to and considered in light of the Findings, to the establishment of a trade or business by said officers. The record reflects the following testimony.

Kenneth William Hansen testified that he is a Detective with Unified Police Department and also serves as the Secondary Employment Coordinator [R125], Hansen testified that Unified Police Department has a policy that all secondary employment of its officers requires application/paperwork submission to the Secondary Employment Coordinator and receive approval to perform such police presence services. In qualifying for eligibility, UPD has certain software called "Power Detail" that is used in UPD's Secondary Employment System. Said Secondary Employment and use of Power Detail functions as a clearing house for secondary employment opportunities for those officers desiring off-duty employment opportunities. Secondary Employment with Power Detail is used by UPD to avoid corruption and to make the distribution to off-duty employment opportunities fair and equitable to all UPD officers voluntarily seeking supplementary income opportunities in the trade/profession of their professional training. [See Hansen R 125-126].

The Secondary Employment program offered through UPD, and its Power Detail require that participating officers set a standard for dress and the Department's requirements for service. Secondary Employment negotiates the rate of compensation and provides bi-monthly invoicing to Appellant and other such entities requesting like services. UPD requires that off-duty officers be in uniform and conduct themselves as certified law enforcement officers,

they must meet UPD standards and requirements of which Appellant FBAC has no input or voice concerning the same. [See Hansen R 126-127]. Upon questioning, Hansen testified that to his knowledge state law prohibits law enforcement officers from having a private security license.[See Hansen R 128], By reasonable deduction, a duly licensed and certified law enforcement officer desiring secondary employment must use, employ and obtain approval through UPD Secondary Employment. By further reasonable extension, Secondary Employment and application of Power Detail by any one individual officer is voluntary and constitutes a separate and distinct “Separate Place of Business” for each officer due to the very intrinsic nature that it is neither mandatory and requires each participating officer to provide ongoing, current information as to time date and hours worked for each respective entity. [See Hansen R128-130]. Officers participating in the Secondary Employment program must agree to follow the requirements of the program, but in fact, ultimately contract with the separate entity absent further agreement with Secondary Employment [See Hansen R 126].

Appellant FBAC asserts that its contact with and arrangements for added security presence is strictly between the Secondary Employment Coordinator; and, that contact is/was merely an initial inquiry, agreement to use

off-duty officers, receive bi-monthly invoicing as to the names and social of the actual officers who provided service, to be followed by a year-end 1099 IRS tax form for monies paid to any particular officer. [See Falco, R 119]. In addition, Appellant FBAC had no direct contact with off-duty officers, had no input in which officers were assigned, provided no training or instruction and had no access to Secondary Employment Power Detail program and software. [See Falco R 119-124]. UPD Secondary Employment , as a separate and distinct entity, with a like separate and distinct place of business classified off-duty officers as independent contractors. Accordingly, under the terms of UPD Secondary Employment policies any and all off-duty officers were randomly assigned per “Power Detail System” software as mandated for all off-duty UPD officers seeking additional off-duty law enforcement opportunities. Appellant FBAC had no authority to use, request, hire, discharge or provide any personal instruction to the officers who were otherwise unknown by name until after the services to FBAC had been performed. Further, UPD Secondary Employment office, as a distinct and separate entity established for the benefit of off-duty officers as the entity for on behalf of said officers who qualified under the Secondary Employment policies to be eligible to request work opportunities. All off-duty UPD secondary employment is on a volunteer basis. Upon acceptance under Power Detail Systems software as administered by UPD

Secondary Employment, off-duty officers then selects, from potentially numerous listed job offers, those which a particular officer has interest in providing service to. No officer may proceed into the system without first having agreed to the terms and requirements as posted by UPD Secondary Employment. [See Falco R 113-121] and [See Hansen R 128-133]. Appellant FBAC was instructed and invoiced by UPD Secondary Employment for off-duty officers classified as independent contractors. All of the off-duty officers were assigned to FBAC without the knowledge of FBAC or instruction from FBAC. [Falco testimony] UPD Secondary Employment maintained a separate, distinct place of business at which and through Power Detail System software accessible only by qualified UPD officers could view various off-duty job opportunities, maintain individual off-duty officers work/billing hours, client lists, job requirements, etc with the purpose of matching eligible officers to a specific job and to rotate officers on an equitable basis. UPD Secondary Employment Office generated billing invoices to FBAC and other like entities seeking a law enforcement presence. The off-duty officers did not have access to any of FBAC facilities, including but not limited to restrooms, supplies, computers, office space or like FBAC premises; officers would otherwise patrol the general area of the real property and surrounding neighborhood from adjacent public streets. FBAC did not know or was unable to verify whether an

assigned off-duty officer, as invoiced by UPD Secondary Employment Office, did in fact provide any law enforcement presence for the dates and hours billed. [Falco testimony] Services rendered to FBAC and other like entities in need or requesting additional law enforcement presence were at all material times, by the terms of UPD Secondary Employment Office operating under the auspices of a separate office as evidenced by the generation of invoices to FBAC, collection of invoiced fees and distribution of payment checks. [Falco testimony]

In support of Workforce Appeals Board “Decision”, reference and citation to prior case law was made based upon the facts of *Petro-Hunt, LLC v. Dep’t of Workforce Servs.*, 197 P.3d 107, 114 (Utah App 2008) wherein the Board extrapolated the requirements that an individual was individually established and free from control and direction. The clear and undisputed testimony of the UPD Secondary Employment Coordinator, Kenneth Hansen, was that by state law and UPD policy, an off-duty officer could only perform security and provide police presence but for application and acceptance into the UPD Secondary Employment Office as a separate and distinct entity apart from UPD as a law enforcement agency. Only by and through UPD Secondary Employment Office, which is the sole means an off-duty officer may ply his/her unique certified skills and training in law enforcement could request, on a

voluntary basis, such additional like trade or business opportunities. As further testified, UPD Secondary Employment Office was a separate and distinct entity which provided “pass through” business communications and services for the benefit of off-duty officers which include invoicing, collection of fees, record keeping relative to dates, times, hours and rate of pay for each respective officer. A fair reading and application of *Petro-Hunt* and the unique facts of the services provided by off-duty UPD officers are clearly distinguishable. UPD Secondary Employment Office is in fact a separate place of business for the benefit of off-duty officers, further providing business records and record keeping as the same may be generally required by any independent contractor to maintain the R994-204-303(b)(i) “...place of business separate from that of an employer”, which under the facts at hand would be Appellant FBAC. Lost in the citation of *Petro—Hunt* is the crucial and essential fact, the purported independent contractor shared equipment with the employer. There is absolutely no such like fact in the matter before this Court. FBAC provides no tools or equipment to UPD officers and UPD officers provide no tools or equipment to FBAC. If the Court were to apply the conclusions drawn by the Board from *Petro-Hunt* then by reasonable extension of the argument, off-duty UPD officers would in fact be sole employees of UPD and most certainly not employees of FBAC. FBAC challenges the Board’s findings of fact in that they

are not supported by substantial evidence as required under §63-46b-16(4)(g). U.C.A., as viewed in light of the entire record before the court. See *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 67 (Utah App. 1989; *Department of the Air Force v. Swider*, 824 P.2d 448, 451 (Utah App. 1991. Quoting from *First National Bank of Boston v. County Board of Equalization*, 799 P.2d 1163 (Utah 1990), the Utah Supreme Court state that “ ‘[s]ubstantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reason mind to support a conclusion.’” Id. at 1165. The Court also stated that appellate courts, when applying the substantial evidence test of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-16(4), are required to consider not only the evidence supporting the Board’s findings but also the evidence negating them. Id. See *Swider*, 824 P.2d at 451, *Grace Drilling*, 776 P.2d at 68. No agency enjoys the discretion to exceed the authority vested in it by the Legislature for legal error, without deference. See Utah Code § 63-46b-16(4)(d) (1989). See also *Adams v. Board of Review*, 821 P.2d 1, 4 (Utah App. 1991); *LaSal Oil Co. v. Department of Envntl. Quality*, 843 P.2d 1045, 1047 (Utah App. 1992). Appellant FBAC contends and argues that the unique set of facts and statutory requirements imposed on law enforcement officers, taken in their entirety reasonably and rationally lead to a conclusion of independent

contractor status. In support of Appellant FBAC's contention, see *Tasters Ltd., Inc. v. Department of Employment Sec.*, 863 P.2d 12 (Utah 1993)

2. Tools and Equipment

Workforce Appeals Board cites the case of *Needle Inc. v. Dep't of Workforce Servs.*, 2016 UT App 84 (Utah Ct. App. 2016) in support of a finding that workers did not make a substantial investment in tools and equipment when they purchased computers ;and internet service before employment and not in relation to the service performed for the purported employer. Workforce Appeals Board quoted from *Needle*, in part:

[C]omputers and internet access are now common appurtenances of most citizens' daily lives, used for shopping, schoolwork, social connection, and entertainment, including online interaction. As a consequence, it was not error for the Board to conclude that the acquisition of a computer and internet access was not a "substantial investment" in tools of a trade

As in *Grace Drilling Co., Swider* and *First National Bank of Boston*, the § 63-46b-16(4) UAPA test has not been evenly and adequately applied to negating the Board's findings. Further, the aforementioned cases require the Board to not only consider the evidence supporting the Board's findings but also the evidence negating them. The Board of Appeals own Findings of Fact state:

[A]ll of the officers were employees of the UPD. The UPD pays officers \$700 per year for them to purchase any tools or equipment or supplies needed to provide services as a police officer. Often

this amount is not sufficient to cover all costs and the officers at times may purchase items using their own money.

Kenneth Hansen, UPD Secondary Employment Office Coordinator further testified that the \$700 dollar a year paid by UPD to its officers is insufficient to cover additional lights, body armor, their own weapons, boots and other annual tools of the trade. By necessity, UPD officers must make an investment in the tools of their primary occupation that would also be mandated by/or off-duty UPD secondary employment which by policy requires an off-duty officer providing law enforcement presence to be in uniform. [See Hansen R 127-128]. FBAC further advances the argument that each trade, profession or other independently established service relationships do not stand on equal footing when it comes to a factual determination of “substantial investment”, i.e. Certified Public Accounts working as independent contractors would not be reasonably likely to have a substantial investment in tools and equipment; but, rather it is the certification as such which is the substantial investment. Likewise, off-duty UPD officers providing a law enforcement presence is law enforcement training and certification driven investment by each respective officer who is voluntarily participating in secondary employment.

3. Other Clients, Profit or Loss, Advertising and Business Records

Workforce Appeals Board again cites and relies upon *Needles* in its “Decision”, applying Utah Admin. Code R994-204-303(1)(a) further citing *Leach v. Board of Review of Indus. Comm’n*, 123 Utah 423, 260 P.2d 744, 748 (Utah 1953), *Evolocity Inc. v. Department of Workforce Servs.*, 2015 UT App 61, 374 P.3d 406 (quoting Utah Admin. Code R994-204-303(1)(b)(iii) for the proposition that it was not error for the Department of Workforce Services to determine that a claimant “did not perform work for clients other than Evolocity”. Such an approach clearly ignores the testimony of Kenneth Hansen, UPD Secondary Employment Coordinator’s testimony.

Adherence to the “Standard of Review” promulgated in *Tasters Ltd., Inc v. Department of Employment Sec.*, 863 P.2d 12 (Utah App. 1993) the Board’s decision is and must be governed by the applicable provisions of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-16(4) (1989) wherein under UAPA, an agency’s factual findings will be affirmed “only if they are ‘supported by substantial evidence when viewed in light of the whole record before the court’” See *Grace Drilling Co., Swider* and *First National Bank of Boston*. The Utah Supreme Court has stated that “[s]ubstantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” Further, the Utah Supreme Court has also stated that appellate courts, when applying the

substantial evidence test under UAPA. Are required to consider not only the evidence supporting the Board's finding but also the evidence negating them. Taken in this light, the Board has acted to dismissively in considering the testimony of Kenneth Hansen ,UPD Secondary Employment Coordinator who testified on direct examination that off-duty officers did provide similar services for other companies besides FBAC. His testimony included a variety of companies/entities that off-duty officers provide services for under UPD Secondary Employment program which include, but not limited to construction company, marathon races and all other/different races and further opined that one would be unlikely to find any off-duty officer providing law enforcement presence that doesn't work for another company. Specifically, Mr. Hansen identified Allstate Insurance Company with a need for law enforcement presence for an attorney threatened by one of the customers due to a declination of claim. [See Hansen R 129).

Workforce Appeals Board likewise diminishes the uncontroverted evidence supporting "Profit and Loss" and "Advertising". Once again, both statutory provisions and legal precedence trump the Board's concerted effort to seemingly ignore the uncontroverted testimony of Kenneth Hansen and FBAC general manager, Christopher Falco. The essence of the Utah Administrative Procedures Act, (UAPA) test, codified in Utah Code Ann.,

§ 63-46b-16(4) 1989, as cited in *Tasters Ltd., Inc. v. Department of Employment Sec.* 863 P.2d 12 (Utah 1993) testified as to the profit potential and risk of loss (non-payment). [See Falco R 117-118]. Administrative Law Rule, R994-204-303(1)(b)(iv) “Profit or Loss” is notably silent as to the specifics of profit or risks of loss from expenses and debts incurred through an independently established business activity. By prior example provided by Appellant, a Certified Public Accountant working as an independent contractor has the reasonable expectation to realize a profit; but, risk of loss would be potentially minimal due to the apparent lack of need for any substantial investment in or risk of loss related to any investment. The CPA’s reasonable risk of loss would be comparable to that of an off-duty UPD officer who may not be paid for services rendered and conceivably lost the opportunity to provide like services to a paying client.

Workforce Appeals Board fails to consider the prior directives cited herein-above as the same relate to R994-204-303(1)(b)(v) “Advertising”. The uncontroverted testimony of Christopher Falco that he found and became aware of UPD Secondary Employment Program through word of mouth. The Rule does not exclude “word of mouth” as a clear demonstration of effort to generate business. The Court in *Tasters* reaffirmed the statutory test

promulgated under the Administrative Procedures Act (UAPA), codified in Utah Code Ann. § 63-46b-16(4) (1989), cited in *First National Bank of Boston*, 799 P.2d 1163 (Utah 1990) wherein the Court stated that appellate courts are required to consider not only the evidence supporting the Board's findings but also the evidence negating them. In this instance, there was no evidence presented to the contrary that "word of mouth" was not an effective, productive means to advertise UPD Secondary Employment services to the public.

4. Business Records

This issue has previously been addressed herein at paragraph 1.

Independently Established Trade or Business. Testimony of Kenneth Hansen, UPD Secondary Employment Coordinator established the role Power Detail System software, and qualified off-duty UPD officers seeking employment opportunities gain once accepted and provided secure log-in capability. Job opportunities, requirements, rate of pay, date/time/hour log retention for invoicing purposes to client, check collection and disbursement; together with an annual 1099 IRS statement of monies paid by FBAC to each respective off-duty officer, all constitute essential and reasonable records one would expect in an established, excluded business under Utah Code Ann. §35A-4-204, and the exemption guidelines applicable to establish independent

contractor status under Utah Administrative Rule, R994-204-303 and specifically R994-204-303 (1)(a) and R994-204-303(1)(b)(vii)..


CONCLUSION AND RELIEF SOUGHT

FBAC has demonstrated, as the record “Findings of Fact” issued by the Initial Hearing Officer (Susan Cottom), the ALJ’s “Findings of Fact” (Hon. Gary S Gibbs) and the Workforce Board of Appeals adoption of the Administrative Law Judge’s “Factual Findings” that at all material times off-duty UPD officers were established as exempt independent contractors by virtue of the relevant, unique facts to be considered under Utah Statutes and Administrative Rules, when applied under the legislative guidelines promulgated to make such employment determinations. The Utah Supreme Court made it clear and the plain language found in the Utah Administrative procedures Act (UAPA), Utah Code Ann. § 63-46b-16(4) that appellate courts, when applying the substantial evidence test under UAPA, are required to consider not only the evidence supporting the Board’s findings but also the evidence negating them. Further, the Utah Supreme Court has stated that substantial evidence is of such quantum and quality as there exists relevant evidence adequate to convince a reasonable mind to support a conclusion.

In the matter at hand, Appellant FBAC has provided relevant evidence adequate to convince a reasonable mind to support off-duty UPD officers performing law enforcement presence, under no control or supervision of client FBAC; and, otherwise providing credible, uncontroverted evidence as more specifically detailed in the Utah Administrative Rules, R994-204-303.

Appellant seeks a determination that off-duty UPD officers engaged in providing a police/law enforcement presence at or near the vicinity of Appellant FBAC/s facility be correctly classified as independent contractors and not employees of Appellant at all times material to the Workforce Services audit at issue and such potential future relationship Appellant may have with off-duty UPD officers performing consistent to the terms expressed herein.

DATED this 3rd day of May, 2017.



R. SCOTT RAWLINGS
Attorney for Petitioner/Appellant

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type volume limitation of Utah R. App. P. 24(f)(1) because this brief contains words, excluding the parts of the

24(f)(1) because this brief contains 7,357 words, excluding the parts of the exempted by Utah R. App. P 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman.

DATED this 3rd day of May, 2017.

/s/ R. Scott Rawlings

Certificate of Service

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT, was mailed by first class mail this 3rd day of May, 2017, to the following:

Nathan R. White
Attorney for Respondent
Workforce Appeals Board
Department of Workforce Services
140 East 300 South
P.O. Box 45244
Salt Lake City, Utah 84145-0244

/ /s/ R. Scott Rawlings