

1992

Gregory T. Ambus v. Utah State Board of
Education, The Estate of James R. Moss, Jay B.
Taggart, Neola Brown, Keith T. Checketts, John M.
R. Covey, Ruth Hardy Funk, Darlene Hutchison,
Frances Hatch Merrill, M. Richard Maxfield,
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Brief of Appellant

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Utah Supreme Court

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IN THE SUPREME COURT, STATE OF UTAH

GREGORY T. AMBUS,

Plaintiff/Appellant,

vs.

UTAH STATE BOARD OF
EDUCATION, THE ESTATE OF
JAMES R. MOSS, deceased,
individually and as
Superintendent of the UTAH
STATE BOARD OF EDUCATION,
JAY B. TAGGART, NEOLA BROWN,
KEITH T. CHECKETTS, JOHN
M.R. COVEY, RUTH HARDY FUNK,
DARLENE HUTCHISON, FRANCES
HATCH MERRILL, M. RICHARD
MAXFIELD, DONALD G.
CHRISTENSEN, MARGARET R.
NELSON, VALERIE J. KENSON,
and JOHN MILLECAM, individually:
and as members of the UTAH
STATE BOARD OF EDUCATION;
GAIL L. MLADEJOVSKY, MARILYN
WENZEL, JEANINE T. BOSCH,
JOHN L. JAUSSEI, and PAUL J.
RASBAND, individually and as
members of the Professional
Practices Advisory Commission;
and ROGER C. MOURITSEN,
individually and as Executive
Secretary of the UTAH STATE
BOARD OF EDUCATION,

Defendants/Appellee.

APPELLANT'S BRIEF

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UTAH SUPREME COURT
BRIEF

DOCKET NO. 920204

Appellate
Court No. 920204

District: 890901757AA

Priority No. 15

Appeal From Order Of
The Third Judicial
District Court, County
of Salt Lake, State of
Utah.

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JURISDICTION

The Utah Supreme Court has jurisdiction in this matter due to the Utah Court of Appeals transferring the case on its own motion, pursuant to Rule 44 of the Utah Rules of Appellate Procedure. The Utah Court of Appeals had original jurisdiction of this matter pursuant to Section 78-2a-3(2)(a), U.C.A. (1953), as amended, and Rule 3(a) and 4(b) Ut. R. App. P.

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITH PREJUDICE.
 - A. INTRODUCTION
 - B. THE DEFENDANT UTAH STATE BOARD OF EDUCATION AND THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE PERSONS UNDER TITLE 42 U.S.C. SECTION 1983 AND MAY BE SUED IN STATE COURT FOR PROSPECTIVE INJUNCTIVE RELIEF, ANCILLARY ATTORNEYS FEES, AND COURT COSTS
 - C. THE PLAINTIFF HAS STANDING TO SUE FOR INJUNCTIVE AND DECLARATORY RELIEF BECAUSE A CASE OR CONTROVERSY STILL EXISTS
 - D. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS
 - i. THE TRIAL COURT ERRED AS THE AMENDED COMPLAINT WAS TIMELY FILED
 - ii. THE TRIAL COURT ERRED AS RELATION BACK IS PROPER AS TO THE ORIGINAL DEFENDANTS
 - iii. THE CURRENT APPLICABLE STATUTE OF LIMITATIONS HAS BEEN UNCONSTITUTIONALLY RESTRICTED
 - E. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS UNDER 42 U.S.C. SECTION 1983, 1988 ARE BARRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT AND THE LAW OF THE CASE
 - F. THE TRIAL COURT ERRED IN FINDING THE INDIVIDUAL DEFENDANTS, SUED IN THEIR PERSONAL CAPACITIES UNDER 42 U.S.C. SECTION 1983, ARE ENTITLED TO QUALIFIED IMMUNITY
 - i. QUALIFIED IMMUNITY APPLIES ONLY TO OFFICIALS PERFORMING DISCRETIONARY FUNCTIONS

ii. THE DEFENDANTS VIOLATED CLEARLY ESTABLISHED
CONSTITUTIONAL AND STATUTORY LAW

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO RULE ON
THE PLAINTIFF'S CAUSES OF ACTION ALLEGING
DEPRIVATIONS OF PROPERTY AND LIBERTY INTERESTS
DIRECTLY UNDER THE FEDERAL AND STATE CONSTITUTIONS.

STANDARD OF REVIEW

The Order denying the Plaintiff and Appellant's Motion for Reconsideration and the Order granting the Defendants' Motion to Dismiss are based upon questions of law or mixed questions of law and fact as the Plaintiff and Appellant's Amended Complaint was dismissed on a U.R.C.P. 12(b) Motion to Dismiss.

When reviewing a decision of a lower court reviewing de novo an order of an administrative agency, the Appellate Court acts as if it were reviewing the administrative agency decision de novo or directly. Cowling v. Board of Oil, Gas & Mining, 177 Utah Adv. Rep. 6 (Utah 1992).

Consequently, when reviewing a Motion to Dismiss based on a de novo review of an administrative decision under Rule 12(b), an Appellate court must accept the material factual allegations of the complaint as true, and the trial court's ruling should be affirmed only if it appears beyond reasonable doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Zinermon v. Burch, 110 S.Ct. 975,

979 (1990); Bryson v. City of Edmond, 905 F.2d 1386, 1390 (10th Cir. 1990); Colman v. Utah State Land Board, 795 P.2d 622, 624-25 (Utah 1990); Provo City Corp. v. Willden, 768 P.2d 455, 456 (Utah 1989); City Arrow Industries, Inc. v. Zions First Nat'l Bank, 767 P.2d 935, 936 (Utah 1988).

Likewise, this court is obliged to construe the complaint in the light most favorable to the plaintiff and appellant, and to indulge all reasonable inferences in his favor, Heiner v. S.J. Groves & Sons Co., 790 P.2d 107 (Ut.App. 1990), and any questions of mixed fact and law which involve primarily a consideration of legal principles are reviewed de novo. In Re Ruti-Sweetwater, Inc., 836 F.2d 1262, 1266 (10th Cir. 1988).

Determinative Constitutional, Statutory Provisions Regulations

There are no constitutional provisions, statutes, rules or regulations whose interpretation is believed to be solely determinative of the outcome of this case. Many Constitutional provisions, provisions of the Utah Code, and Internal regulations of the Defendants are, however relevant to the disposition of this case, and will be so noted.

STATEMENT OF THE CASE

A.

NATURE OF THE ACTION

This is a Section 1983 civil rights action, and an action for direct enforcement of specific constitutional rights under the United States and Utah Constitutions, on behalf of a secondary science teacher to recover his teaching certificate, damages and attorneys fees as a result of the Defendants' denial of the Plaintiff's clearly established rights to substantive and procedural due process. This action involves unique constitutional due process issues regarding pre and post suspension revocation hearings, substantive due process issues relative to revocation hearings, and the role of the district court in fashioning remedies.

B.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was filed March 20, 1989. During the course of the proceedings, the District Court issued five (5) Minute Entry decisions. The Decisions were based upon:

Plaintiff's Motion for Preliminary Injunction:
Issued April 3, 1989, and April 10, 1989, (District Court Index at p. 145, 155-156).

Defendants' Motion to Dismiss Plaintiff's damages prior to discovery: Issued May 15, 1989, and May 16,

1989, (Index Ibid, at p. 177, 178).

Plaintiff's Motion for Partial Summary Judgment:
Issued November 1, 1989, and November 9, 1989, (Index
Ibid, at p. 256, 257-259).

Defendants' Motion for Dismiss Plaintiff's Amended
Complaint: Issued August 28, 1991, and November 26,
1991 (Supp. Index Ibid, at p. 474-476, 490-492).

Plaintiff's Motion for Reconsideration: Issued
December 9, 1991, and March 16, 1992, (Supp. Index
Ibid, at p. 493, 500-501).

In summary, the District Court held that the
Plaintiff had not made a showing of irreparable harm and
denied the Motion for Preliminary Injunctive Relief (Index
Ibid, at p. 145, 155-156), granted the Defendants' Motion
to Dismiss relative to the Plaintiff's civil rights claims
prior to discovery as barred by the Utah Governmental
Immunity Act (Ibid, at p. 177-178), and denied the
Plaintiff's Motion for Partial Summary Judgment concerning
the Defendants' use of expunged and sealed records in
revoking the Plaintiff's certificate to teach (Ibid, at p.
256, 257-259). During the proceedings below, the
Plaintiff conducted discovery in the form of
interrogatories, requests for admissions, and requests for
production of documents. (Ibid. at 260-326).

The Plaintiff then filed a successful interlocutory
appeal to this court. Ambus v. Utah State Board of
Education, 800 P.2d 811 (Utah 1990). Following this

decision, the Plaintiff refiled his Motion for Partial Summary Judgment and the Motion was granted by the trial court. As a consequence the Plaintiff's teaching certificate was restored, but without other relief, and the Plaintiff was given thirty (30) days to file an amended complaint to demonstrate what damages, if any, were caused by the wrongful revocation of his certificate. (Ibid, at p. 356-360).

Thereafter, the Plaintiff filed his amended complaint. The Defendants filed a Motion to Dismiss the amended complaint, and the Court granted the Defendants' Motion to Dismiss by Minute Entry, without memorandum decision, findings, or any indication of the basis for the ruling. (Ibid, at p. 474-476).

Prior to the Court issuing a final decision, the Plaintiff filed a Motion for Reconsideration based upon an intervening United States Supreme Court decision¹, which was contrary to the holding of the trial court. The Defendants responded in opposition and filed a prepared order. (Index Ibid, at p. 493, 500-501). The Court denied the Plaintiff's Motion for Reconsideration.

¹ Hafer v. Melo, ____ U.S. ____, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

C.

RELEVANT FACTS

This is a civil rights action pursuant to Title 42 U.S.C., Sections 1983, 1988, and Title 28 U.S.C., Sections 1331 and 1343, also pursuant to the United States and Utah Constitutions, and directly under the due process clauses of the Fifth and Fourteenth Amendments, and Article I Sec. 7, 11, of Utah's Constitution for direct enforcement thereof, where the Plaintiff originally sought de novo judicial review of an informal adjudicative proceedings, pursuant to Section 63-46(b)-15 U.C.A. 1953, as amended; and also pursuant to Section 78-3-4(5) U.C.A. (1953), as amended, seeking redress for procedural and substantive constitutional, and statutory violations. (Addendum A).

The Plaintiff received his Standard Secondary Teaching Certificate with biological and Physical Science endorsements (on August 13, 1981) listing with the Defendants his permanent address, at 3316 El Serrito Dr., SLC, UT 84109² (Index at p. 281). Thereafter the Plaintiff commenced teaching in Utah's secondary schools, attained tenured status and until the events in this case, the Plaintiff's certificate was valid in all respects and

² Except as specifically noted, the following facts are undisputed as material factual allegations contained within the Plaintiff's Amended Complaint and Exhibits attached thereto.

entitled him to teach in any public school in the State of Utah or in any other State having reciprocity.

In August of 1982, the Plaintiff was approved for employment with Granite School District, listing the same permanent address as with the Defendants USBE in 1981. (Index at p. 146-147).

The Plaintiff's Certificate provided the Plaintiff with a protected property and liberty interest. The Defendants do not dispute that the Plaintiff's certificate was both suspended and then revoked without notice or hearing of any kind. (Index at p. 402-420).

The Defendants Utah State Board of Education (herein "USBE") are charged by the Utah Constitution, Article X Sec. 8, and by Utah law, Section 53A-1-401 U.C.A. (1953), as amended, with the general supervision and control of the Utah public school system. As part of the Defendant USBE's duties of general supervision and control, it, and it alone, has the authority to issue and revoke teaching certificates pursuant to Section 53A-6-101 et. seq. U.C.A. (1953), as amended, see Section 53A-6-104 U.C.A. (1953) as amended.

The Defendants Utah Professional Practices Advisory Commission (herein "UPPAC"), agents of the Defendant USBE, have authority to receive and act upon complaints involving immoral or unprofessional conduct, and to make

"recommendations" to the Defendant USBE to revoke or suspend a state teaching certificate. Section 53A-7-101 et. seq. U.C.A. (1953), as amended.

The Plaintiff taught school in Utah until February 19, 1987, when his employer, Granite School District terminated his employment. Through the grievance process, the Plaintiff was reinstated. Granite School District refused to reinstate him and Plaintiff filed a lawsuit in the United States District Court for the District of Utah, Civil No. C88-0059G in December 1987.³ From September 1987 through June 1988 the Plaintiff taught school in Arizona, and at all times material herein, his permanent address was still valid. (Index at p. 146-147).

On January 27, 1988 the Tribune published a news account of Plaintiff's federal lawsuit as a result of Granite School District's refusal to reinstate the Plaintiff. (Index at p. 275). Based upon these news accounts, Defendant Roger Mouritsen, filed a Complaint against the Plaintiff before the Defendant UPPAC on March 18, 1988. The basis of the Defendants' action was the Tribune news article which indicated that the Plaintiff was allegedly arrested for drug distribution upon the

³ This action is pending in the Tenth Circuit Court of Appeals. Oral argument was completed on March 9, 1992 and a decision is expected soon.

allegations of an informer who was an addict and felon.
(Index at p. 59).

The alleged events occurred during off-duty hours at the Plaintiff's residence. The charges were subsequently dismissed and expunged, well over one year prior to the Defendants' complaint. The complaint of March 18, 1988 did not specify if the Plaintiff was charged with immorality, unprofessional or incompetent conduct, or with evident unfitness for service.

Under Section 53A-7-111 U.C.A. (1953), as amended, the Defendant USBE through its agent Defendant Roger Mouritsen, and Defendant UPPAC were required to provide notice of hearing to be sent to the Plaintiff's last known address and to the permanent address shown on the records of the commission. (Emphasis Added). The Defendant Roger C. Mouritsen allegedly mailed a copy of the Complaint to the Plaintiff on March 18, 1988 to the address of 831 E. Stratford Ave., SLC, UT 84106 and it was allegedly returned unclaimed. (Index at p. 59-63)⁴

On April 11, 1988, the Defendant Roger Mouritsen, allegedly mailed a notice of hearing for May 20, 1988 to

⁴ Alleged mail receipts, including the receipt for certified mail form, and copy of the envelope proffered by the Defendants, do not show an official postmark, postage, certified fee, and or date stamped by the U.S. Postal Service. (Index at p. 62-63).

the Plaintiff at the same address of 831 E. Stratford Ave., SLC, UT 84106.⁵ (Index at p. 64-67)

Unknown to the Plaintiff, the Defendant UPPAC conducted a hearing on May 20, 1988. The UPPAC, without inquiring if notice of hearing had been sent to the permanent address of the Plaintiff, recommended that the Plaintiff's Certificate be suspended until such time as the Plaintiff requested a hearing. The UPPAC tendered no findings of fact, reasons, or conclusions of law for this action. (Index at p. 68-69).⁶

Likewise, unknown to the Plaintiff, on July 12, 1988, the Defendant UPPAC, and Defendant USBE Certification Committee held another hearing attended by Defendants of the USBE, M. Richard Maxfield, and Darlene Hutchison. Again, no notice of hearing, or even alleged attempt of notice was provided to the Plaintiff at his permanent address listed with the Defendants. The Defendant Certification Committee recommended to the Defendant USBE

⁵ Likewise, the Defendants proffered alleged mail receipts, including the receipt for certified mail, and a copy of the envelopes, again none of which show an official postmark, postage, certified fee, and or date stamped by the U.S. Postal Service, which were supposed returned unclaimed.

⁶ The Defendants admit that at no time was the complaint or notice of hearing sent to the permanent address the Plaintiff listed with the Defendants in 1981, as required by Section 53A-7-111 U.C.A. (1953), as amended. (Index at p. 130, 281).

that the Plaintiff's Certificate be revoked rather than suspended. The Certification Committee tendered no findings of fact, reasons, or conclusions of law for this action. (Index at p. 70).

On August 24, 1988, Defendant Roger Mouritsen, contacted the Plaintiff's employer, Salt Lake City School District, who in turn notified the Plaintiff that the Defendant USBE had revoked the Plaintiff's Certificate on August 19, 1988. (Index at P. 71) At this time, the Salt Lake City School District terminated the Plaintiff's employment because of the Defendants' allegations that the Plaintiff had no valid teaching certificate. There were no findings of fact, reasons, or conclusions of law, and this was the first occasion that the Plaintiff learned that action had been taken, or was pending, concerning his certificate. (Index at p. 71).

On August 24, 1988, pursuant to Defendant Superintendent James Moss' instructions, the Plaintiff surrendered his Certificate on August 26, 1988 under protest because Defendants' revocation was in violation of due process of law. (Index at p. 72).

On September 26, 1988, the Plaintiff was notified that the Defendants had scheduled a hearing "to consider reinstatement of your teaching certificate." (Index at p. 73).

On September 27, 1988, Plaintiff personally and through counsel, demanded that Plaintiff's Certificate be restored prior to any hearing both by constitutional and statutory prescription, that the Plaintiff was entitled to due process before his certificate was revoked and not after, and that Plaintiff be granted a de novo hearing. (Index at p. 76-78).

On October 13, 1988, Plaintiff's counsel again demanded that Plaintiff's Certificate be restored prior to a de novo hearing. (Index at p. 80-82) On October 20, 1988 the Defendants provided an informal hearing to "reconsider" whether the Plaintiff's certificate should be revoked. The Defendants failed to return the Plaintiff's Certificate prior to the hearing. The hearing was declared by the hearing officer to be an "informal hearing" and was conducted as such under the Defendants' Rules for Adjudicative Proceedings. No official record was maintained. At the hearing, the Plaintiff provided specific written objections which included lack of due process. (Index at p. 83-86). Additionally, the Plaintiff objected to the hearing unless Plaintiff's certificate was restored and was then granted a de novo hearing. (Ibid).

On January 5, 1989, the Defendant UPPAC hearing committee Wenzzel, Bosch, Jaussi, and Rasband, through the

hearing officer, Defendant Mladejovsky issued its decision recommending that the decision of the State Board of Education be upheld. No findings of fact, reasons, or conclusions of law were provided for this action. (Index at p. 88)

On March 16, 1989, the Plaintiff was informed of the decision by transmittal letter from Defendant Superintendent Moss. This letter also stated that the Defendant USBE also accepted the hearing panel's decision. No findings of fact, reasons, or conclusions of law were provided for this action. (Index at p. 89).

On March 20, 1989, Plaintiff requested that the Defendants stay its Order revoking Plaintiff's certificate. On March 21, 1989 Defendant Moss denied the Plaintiff's request for a stay of revocation pending judicial review. (Index at p. 90) No findings of fact, reasons, or conclusions were stated. Subsequent to the filing of the initial complaint on March 20, 1989, the course of the proceedings are as previously described.

SUMMARY OF ARGUMENTS

The Defendants' policy or practice failed to provide constitutionally adequate notices of hearing. The suspension and revocation of the Plaintiff's certificate violated clearly established federal and state constitutional and statutory law. The Defendants'

unlawful conduct deprived the Plaintiff of his certificate to teach and damaged the liberty and privacy interests of the Plaintiff's good name, reputation and professional image sufficiently to impose a stigma and disability depriving him of employment opportunities in this and every state in the United States. Once constitutional violations are properly alleged and established, this court is required and empowered to design legal and equitable remedies effective to cure the constitutional violations.

The Plaintiff through counsel petitioned the court for judicial review asserting four causes of action in his Amended Complaint. The First Cause of Action restated the original Complaint's prayer for declaratory and injunctive relief restoring the Plaintiff's Certificate, and for prospective ancillary relief of attorney's fees incurred, court costs, costs of appeal and other ancillary relief deemed proper by the court. The Defendant USBE and its members were properly sued in their entity and official capacity for prospective injunctive relief and attorneys fees.

In respect to the Second through Fourth Causes of Action, Plaintiff alleged general, special, compensatory and punitive damages against the Defendants in their individual capacities. The individual Defendants were

properly sued in their individual capacities for acts taken in their official capacities.

The Plaintiff maintains the applicable statute of limitations does not apply in this action due to relation back to the original complaint where the original defendants are sued in a different capacity to properly satisfy the existing judgment.

The Plaintiff also maintains that he has suffered a distinct and palpable injury creating a personal stake in the outcome of this dispute, and has viable claims for damages and attorneys fees already incurred.

The Plaintiff maintains that the defense of the Utah Governmental Immunity Act is inapplicable to claims of violations of federal law under 42 U.S.C. Section 1983. Neither the Utah Governmental Immunity Act nor qualified immunity apply here as the deprivations caused by the Defendants occurred while acting in their ministerial capacities and while performing ministerial duties which were constitutionally owed to the Plaintiff. Even so, the Defendants have violated clearly established legal rights of the Plaintiff which disallows a qualified immunity defense.

Defendants have not cited authority or facts on which this court can condone or countenance their constitutional

violations and unlawful conduct in breaching constitutional duties owed to the Plaintiff.

POINT ONE

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT WITH PREJUDICE.

A. INTRODUCTION

In Ambus v. State Board of Education, supra, this Court reversed the District Court and granted the Plaintiff's Motion for Summary Judgment on the Plaintiff's Third Cause of Action in his original complaint which complained about the Defendant's use of sealed and expunged records in the post-revocation hearing. The Court remanded to permit the Defendants the opportunity of introducing any other evidence it had on the alleged misconduct of the Plaintiff if any existed.

On remand following the decision in Ambus, supra, the District Court granted the Plaintiff's Motion for Partial Summary Judgment on the Third Cause of Action when the Defendants offered no further evidence of alleged misconduct by the Plaintiff. The District Court ordered the restoration of the Plaintiff's certificate, ordered the Defendants to notify each school district that the certificate had been restored, ordered that the Defendants provide satisfactory proof of compliance, and permitted

the Plaintiff to amend his complaint to more particularly set forth his elements of damages which occurred as a result of the wrongful revocation of the Plaintiff's Certificate to teach.

The Plaintiff filed his Amended Complaint on December 26, 1990. The Amended Complaint restated the causes of action alleged in his original Complaint; however it set forth the parties, the capacity of the parties being sued, and the damages with greater particularity. The District Court's dismissal of the Plaintiff's Amended Complaint denied him any relief in the form of damages, attorneys fees, or court costs and forms the basis of this appeal.

The Amended Complaint describes the parties to the suit and the capacities in which they are sued. Paragraph 3 alleges that the Utah State Board of Education is sued as a "state entity" for prospective injunctive relief, attorneys fees, and court costs. Paragraphs 4 through 7 alleges that the individual members of the Defendant USBE and others, are sued in their official capacities as well as their individual capacities. No damages are sought against the individual defendants in their official capacities.

The Amended Complaint, like the original complaint, seeks prospective injunctive relief restoring Plaintiff's

certificate plus ancillary attorneys fees and costs against the Utah State Board of Education as a state entity and the individual members in their official capacities. The Amended Complaint, like the original complaint, seeks general, special, and punitive damages against the individual defendants in their individual capacities for the Plaintiff's loss of employment, medical expenses, mental and emotional distress, and related damages.

The gravamen of the Plaintiff's Amended Complaint is the wrongful revocation of his certificate to teach resulting in the damages alleged. The Amended Complaint asserts four causes of action. The first cause of action requests judicial review and injunctive relief, attorneys fees, and costs restoring the Plaintiff's certificate to teach. The second cause of action alleges that the Defendants failed to provide appropriate due process by failing to provide any pre-deprivation hearing prior to the revocation of the Plaintiff's certificate, by failing to restore the Plaintiff's certificate before the Defendant conducted their "reconsideration hearing", and by failing to provide any findings or conclusions, all of which resulted in the loss of Plaintiff's employment, corresponding special and general damages, along with

attorneys fees and costs. The third cause of action alleges that the use of sealed and expunged records during the post-deprivation hearing violated the Plaintiff's constitutional and statutory rights, which was determined by this Court in Ambus, supra, and sought corresponding attorneys fees and costs. The fourth cause of action seeking damages alleges that the post-deprivation hearing violated no due process by the use of the sealed and expunged records, by failing to restore the Plaintiff's Certificate before the "reconsideration hearing", and by failing to have any findings of fact or conclusions of law resulting in a deprivation of the Plaintiff's liberty and property rights.

B.

**THE DEFENDANT UTAH STATE BOARD OF EDUCATION AND THE
INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE
PERSONS UNDER TITLE 42 U.S.C. SECTION 1983 AND MAY BE SUED
IN STATE COURT FOR PROSPECTIVE INJUNCTIVE RELIEF,
ANCILLARY ATTORNEYS FEES, AND COURT COSTS.**

The District Court restored the Plaintiff's Certificate to teach. As such, the Plaintiff was a successful party under Title 42 U.S.C. Section 1988 for purposes of attorneys fees and court costs. Nevertheless, the District Court dismissed the Plaintiff's Amended Complaint without even considering them.

Clearly, the District Court erred. While state agencies and officers in the official capacities are not

"persons" for purposes of assessing damages against them, Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), they certainly are for purposes of prospective injunctive relief and corresponding attorneys fees. As Will explained, 105 L.Ed.2d at 58, n. 10:

"Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under Section 1983 because 'official-capacity' actions for prospective relief are not treated as actions against the State."

The Will Court cited Kentucky v. Graham, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985) for this proposition.

Attorneys fees and court costs are proper awards under Title 42 U.S.C. Section 1988 as ancillary to the relief of prospective injunctive relief. Hutto v. Finney, 437 U.S. 678 (1978).

Accordingly, the District Court erred in not considering the Plaintiff's request for attorneys fees and costs by dismissing his Amended Complaint.

C.

THE PLAINTIFF HAS STANDING TO SUE FOR INJUNCTIVE AND DECLARATORY RELIEF BECAUSE A CASE OR CONTROVERSY STILL EXISTS.

The Defendants asserted at the trial court level that no case or controversy existed after the Plaintiff's teaching certificate had been restored to him.

Accordingly, they argued that the Plaintiff's complaint had to be dismissed.

In response, the Plaintiff asserted that a case and controversy existed under the Plaintiff's claims for injunctive and declaratory relief because no attorneys fees or court costs had been awarded which were ancillary to the claims for injunctive and declaratory relief and because the Defendants offered no proof of compliance with the Court's Order that each state, which was notified of the Plaintiff's revocation to teach, was subsequently notified of the reinstatement.⁷

No question exists that attorneys fees and court costs are core elements in civil rights cases seeking injunctive and declaratory relief. Hutto v. Finney, supra; Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); and Missouri v. Jenkins by Ageyi, 109 S.Ct. 2463 (1989). Indeed, Congress enacted Section 1988 of the Civil Rights Act to insure that successful litigants receive a reasonable attorneys fee because they fulfill a role of private attorney generals.

The Plaintiff restated his cause of action for

⁷ As of this date, the Plaintiff remains unsuccessful in finding a school district in Utah or elsewhere which will hire him. He has been effectively "black-balled".

injunctive relief in his Amended Complaint because he had not been awarded his attorneys fees and court costs and because no satisfactory proof of compliance with the Court's Order had been provided. Likewise, the Plaintiff has suffered a "distinct and palpable injury" and the Plaintiff's viable claims for damages has created a personal stake in the outcome of this dispute, accordingly, a case and controversy still exists. Provo City Corp. v. Willden, 768 P.2d 455, 456-457 (Utah 1989).

D.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S
CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF
LIMITATIONS.

i.

THE TRIAL COURT ERRED AS THE AMENDED COMPLAINT WAS
TIMELY FILED.

In the instant case, the Plaintiff learned of the suspension and revocation of his certificate on August 24, 1988. However, he was required to exhaust his administrative remedies which consisted of the "reconsideration hearings" which ended on March 21, 1989 when the Defendant Moss denied a stay. The Plaintiff filed this action on March 20, 1989. Therefore, the federal claims in the instant action were more than timely filed initially.

The Plaintiff's Amended Complaint was also timely filed. As stated above, he was required to exhaust his

administrative remedies. The Plaintiff learned of the decision denying reconsideration on March 16, 1989.

Consequently, the statute of limitations period never commenced until the completion of the "reconsideration" decisions were completed and the Plaintiff was notified of the decision, or March 16, 1989. The amended complaint was filed well within the statute's period which the Defendants claim as their defense. It was filed on December 26, 1990.

ii.

**THE TRIAL COURT ERRED AS RELATION BACK IS PROPER AS
TO THE ORIGINAL DEFENDANTS.**

After the successful interlocutory appeal to this court in Ambus, supra, the trial court allowed the Plaintiff thirty (30) days to file an amended complaint. (Index at p. 356-359). The Plaintiff filed his amended complaint December 26, 1990. (Index at p. 370-401). The complaint names the Utah State Board of Education and all of the the original Defendants in their official and individual capacities who were involved in violating the constitutional and statutory rights of the Plaintiff. (Index at p. 370-373).

The Defendants claim that the applicable statute of limitations is Section 78-12-28(3) U.C.A. (1953), as amended (1987). The Defendants claim that the Plaintiff's

Certificate was revoked on August 24, 1988, and because the Amended Complaint was filed on December 26, 1990, it is barred by Section 78-12-28(3).

As previously mentioned the Plaintiff initiated this action March 20, 1989, for violations of his constitutional and statutory rights without notice, hearing, findings or due process of law and requested damages and attorneys fees, well within the limitations period the Defendants' claim as a defense.

Even assuming the Defendants' argument that this limitations period applies, under both U.R.C.P. 15(a-c) and its federal counterpart F.R.C.P. 15(a-c), relation back to the original pleading is allowed here because (1) Defendant Superintendent Moss was served with the original complaint within the limitations period putting all of the Defendants on notice in their official capacities; (2) the State Attorney General's Office has represented all of the Defendants from the outset; (3) there is no change in the parties before the court, all parties have been on notice of the facts out of which the claims arose; (4) relation back is allowed as the Plaintiff only seeks to change the capacity in which the Defendants are sued to properly satisfy the judgment, (5) the Defendants have claimed no cognizable prejudice in their motion to dismiss, and,

indeed, cannot since the Defendants had notice that the Plaintiff was attempting to assert claims against them, (6) no prejudice exists in fact because a change in the Defendants capacities only means that the parties themselves have been identified correctly and have received notice; (7) the delay in amending the complaint was caused by the Plaintiff's interlocutory appeal in Ambus, supra; (8) an amendment is proper even if a statute of limitations has run during the intervening time. Ringwood v. Foreign Auto Works, Inc., 768 P.2d 1350 (Ut.App. 1990); Meyers v. Interwest Corp., 632 P.2d 879 (Utah 1981); Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976).

The rule in the State of Utah, under U.R.C.P. 15(a), and its federal counterpart, provides liberally for amendment of pleadings. Especially before trial, leave to amend "shall be freely given when justice so requires", and the adverse party is given a fair opportunity to meet it. Gillman v. Hansen, 486 P.2d 1045 (Utah 1971); Foman v. Davis, 371 U.S. 178 (1962). U.R.C.P. 15(c) states:

"[W]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence, set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Ringwood v. Foreign Auto Works, Inc., supra, at 1359.

These rules were adopted to pursue the broad policy which favors resolution of disputes on the merits rather than legal technicalities, and relation back is allowed under the rules even if a statute of limitations has run during the intervening time. Meyers v. Interwest Corp., supra at 882.

In the instant case, this is particularly valid where, the real parties have an identity of interest, were alerted to the proceedings from their inception, and the Defendants have exploited the running of the statute of limitations, and now raise the defense in a motion to dismiss, because they know that they are the proper parties. Courts have even allowed Plaintiffs to claim an estoppel where an initial pleading error has been exploited until the running of the statute of limitations. Doxey-Layton Co. v. Clark, supra, at 906.

Amending the Plaintiff's complaint to include the Defendants in their individual capacities is proper as the constitutional deprivation caused by the Defendants are the same unconstitutional acts set forth in the original complaint. The Plaintiff's amended complaint makes no change in the parties before the court.

Consequently, the identity of interest and constructive notice have been satisfied through the

Defendants and their agents, and through its attorneys, who have had actual knowledge from the inception of this action within the limitations period, and relation back is proper, as no new conduct, transaction, or occurrence is alleged. Doxey-Layton Co. v. Clark, supra at 906; Kirk v. Cronvich, 629 F.2d 404, 407-408 (5th Cir. 1980); Metropolitan Paving Co. v. International U. of OP. Eng., 439 F.2d 300, 306 (10th Cir. 1971); Morrison v. Lefevre, 592 F.Supp. 1052, 1057-58 (S.D.N.Y. 1983); Florence v. Krasucki, 533 F.Supp. 1047, 1054 (W.D.N.Y. 1982); Seber v. Daniels Transfer Co., 619 F.Supp. 1311, 1314 (W.D.Pa. 1985); Taliferro v. Costello, 467 F.Supp. 33, 35-36 (Ed.Pa. 1979).

Likewise, the instant Defendants have been on notice of the facts out of which the claims arose. The Plaintiff's amendment to include damages does not import any new or different causes of action, or a change in the legal theory of the case under the instant facts, and results in no prejudice to the Defendants. Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179 (Utah 1983); Roper v. Spring Lake Development Co., 789 P.2d 483 485 (Colo.App. 1990).

The Plaintiff's amended complaint has done no more than change the manner in which to properly satisfy the

judgment against the Defendants. This has been held proper in the case of change in capacity of both Defendants' and Plaintiff's, and upholds the philosophy underlying the purpose of both U.R.C.P. 15(a-c) and F.R.C.P. 15(a-c), rejecting the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and upholds the principle that pleading is to facilitate a proper decision on the merits; and relation back is proper when only a change in the capacity of the instant Defendants is sought. Conley v. Gibson, 355 U.S. 41, 48 (1957); Myers v. Interwest Corp. supra, at 882; 3 Moore's Federal Practice Section 15.15[4.-1] at 15-157: "Where plaintiff sought to change the capacity in which the action is brought, or in which defendant is sued, there is no change in the parties before the court, all parties are on notice of the facts out of which the claim arose and relation back was allowed in both the case of the plaintiff and the defendant."; Metropolitan Paving Co. v. International U. of Op. Eng., supra, at 306; Kirk v. Cronvich, supra; Oppenheimer Mendez v. Acevedo, 512 F.2d 1373 (1st Cir. 1975); Cook v. Holland, 575 S.W.2d 468, 477 (K.Y.App. 1978); Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968).

In the interest of justice and in accord with the

interlocutory appeal in Ambus, supra, it was an abuse of the trial court's discretion to reject the amended complaint, as it has prejudiced the Plaintiff's remedy at law. Neither the Eleventh Amendment nor State Sovereign immunity can bar suits for money damages brought against State officials in their individual capacities when they are alleged to have violated federal law. Hafer v. Melo, ____ U.S. ____, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); Martinez v. California, 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488 (1980); Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 115 (1985); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)

iii.

THE CURRENT APPLICABLE STATUTE OF LIMITATIONS HAS BEEN UNCONSTITUTIONALLY RESTRICTED.

The well plead facts of the Plaintiff's amended complaint shows he timely filed his federal claims. Yet the Defendants claim the Plaintiff's federal claims are barred by the two year Statute of Limitations found in Section 78-12-28(3) U.C.A. (1953), as amended (1987). This court has already questioned the validity of the shortend limitations period contained in the statute. Maddocks v. Salt Lake City Corp., 740 P.2d 1337, 1339 n. 1 (Utah 1987).

The Plaintiff submits that the Utah legislature's

restriction of Section 78-12-28(3), and attempt to replace Section 78-12-25(2), now codified as 78-12-25(3) U.C.A. (1953), as amended, (1987), has unconstitutionally restricted his civil rights claim, and discriminates against federal civil rights remedies. A proper limitations period is four years, the limitations period for personal injury actions.

Utah's statute ignores the admonitions of the United States Supreme Court, and Tenth Circuit Court of Appeals, which hold that because 42 U.S.C. Section 1983 claims are best characterized as personal injury actions, i.e., injury to the rights of another, that a State's personal injury statute of limitations should be applied to all Section 1983 claims. Owens v. Okure, 109 S.Ct 573, 577 (1989); Wilson v. Garcia, 471 U.S. 261, 280, 105 S.Ct. 1938, 1949, 85 L.Ed.2d (1985); Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984) (in banc).

In Wilson v. Garcia, supra at 265, 105 S.Ct. at 1941, the United States Supreme Court approved and upheld the Tenth Circuit Court of Appeals characterization of Section 1983 claims as remedies for personal injury actions. In Wilson supra, 105 S.Ct. at 1947, the court determined that, in considering whether all Section 1983 claims should be characterized in the same way for limitations

purposes, it was necessary to look to the remedy which Section 1983 provides. The court characterized the rights enforceable under Section 1983 in the following manner:

"Finally we are satisfied that Congress would not have characterized Section 1983 as providing a cause of action analagous to state remedies for wrongs committed by public officials. It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. Congress therefore intended that the remedy provided in Section 1983 be independently enforceable whether or not it duplicates a parallel state remedy. Monroe v. Pape, 365 U.S. 167, 173, 81 S.Ct. 473, 476 (1961)....In veiw of our holding that Section 1983 claims are best characterized as personal injury actions, (emphasis supplied) the Court of appeals correctly applies the 3-year [personal injury statute] statute of limitations.

The court thus decided that one "simple broad characterization" of all Section 1983 actions was appropriate under Section 1988, as it best fit the statute's remedial purpose. Id. at 272, 105 S.Ct. 1945.

In Owens v. Okure, supra, 109 S.Ct. at 582, and 582 n. 12, the United States Supreme Court again upheld the principles enunciated in Wilson v. Garcia, supra, and held that courts considering Section 1983 claims should borrow the general or residual statute for personal injury actions. The court recognized that Wilson had rejected recourse to other claimed limitations provisions in the

first instance, and held that:

"Courts should resort to residual statutes of limitation only where state law provides multiple statutes of limitations for personal injury actions and the residual one embraces, either explicitly or by judicial construction, unspecified personal injury action."

Such was the case in Utah when Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984) (in banc) was decided. At that time, Utah had a general personal injury "residual provision" which applied to all actions for relief not otherwise provided for by law. Id. at 1367. After Mishmash, the Utah legislature amended Section 78-12-28(3). In doing so, the Utah legislature ignored the federal court decisions concerning the use of the proper statutes of limitations for personal injury actions. The Utah legislature also ignored the United States Supreme Court admonition to apply the residual statute.

The Plaintiff urges this court to adopt the proper characterization of a Section 1983 civil rights claim as a matter of federal law. The federal values at issue in selecting a limitations period for Section 1983 claims in Utah's state courts require this court to follow the federal remedial nature of compensation and deterrence under Section 1983, and adopt a state rule which follows this courts judicial construction of personal injury

actions. This court's rule for the State of Utah will allow the Utah courts to follow the admonition of the United States Supreme Court in Wilson, and Owens supra:

"[t]hat the borrowed period of limitations not discriminate against the federal civil rights remedy"); Wilson supra at 471 U.S. 276, 105 S.Ct. 1947; "[F]ederal interests in uniformity, certainty, and the conclusion that Congress favored this simple approach; see also Id., at 272, 105 S.Ct. at 1945 "[A] simple, broad characterization of all Section 1983 claims best fits the statute's remedial purpose". Owens v. Okure, supra, 109 S.Ct. at 576; ([t]he state rule is adopted as "a federal rule responsive to the need whenever a federal right is impaired.") ([C]ongress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.") Wilson, supra at 270, 1943.

The Plaintiff urges this court to adopt the Wilson standard of a "broad characterization" of Section 1983 actions in Utah's state courts and to take into account practicalities that are involved in litigating federal civil rights claims, and to follow this court's own decisions concerning personal injury actions, and to adopt the four (4) year statute of limitations found in Section 78-12-25(3) (1953), as amended, as applicable in Section 1983 actions. Owens v. Okure, supra at 578 citing Felder v. Casey, 487 U.S. _____, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988); Salt Lake City v. Industrial Comm., 17 P.2d 239,

240 (Utah 1932).

E.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S CLAIMS UNDER 42 U.S.C. SECTION 1983, 1988 ARE BARRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT AND THE LAW OF THE CASE.

The Plaintiff submits that the Utah Governmental Immunity Act, cannot control the Plaintiff's 42 U.S.C. Section 1983 claims. The "Act" may not provide immunity for ministerial violations of constitutional rights. As the United States Supreme Court held that:

"Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 or Section 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insured that the proper construction may be enforced...The immunity claim raises a question of federal law." Martinez v. California, 444 U.S. 277, 283-284 n. 8, 105 S.Ct. 553, 558 n. 8, 62 L.Ed.2d 481, 488 n. 8, (1980) citing Hampton v. Chicago, 484 F.2d 602, 607 (7th Cir. 1973), cert denied, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471.

This court has recognized that Utah's Governmental Immunity Act may not bar a valid Section 1983 claim.

Maddocks v. Salt Lake City Corp., supra.

Likewise, the Plaintiff's federal claims may not be barred by failure to meet notice of claim requirements. The notice of claim statutes are pre-empted by federal

law. Felder v. Casey *supra*; Edwards v. Hare, 682 F.Supp. 1528, 1535 (D.Utah 1988).

The Plaintiff re-emphasizes that the Defendants in their individual official capacities are "persons" reachable under Section 1983 when sued for prospective, injunctive, equitable relief for conduct violative of federal law. As the United States Supreme Court explained in Will v. Michigan Dept. of State Police, 491 U.S. at 71 n. 10 109 S.Ct. at 2311 n. 10, 109 S.Ct. at 2311 n. 10, 105 L.Ed.2d at 58 n. 10:

"Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under Section 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." citing Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14 (1985); Ex parte Young, 209 U.S. 123, 159-160, 28 S.Ct. 441, 454 (1908) see Corum v. University of North Carolina, 413 S.E. 2d 276, 284 (N.C. 1992); Gray v. University of Kansas Medical Center, 715 F.Supp. 1041, 1043 (D.Kansas 1989).

The individual Defendants sued in their official capacities are likewise reachable for the ancillary relief of attorneys fees incurred to the prospective equitable relief of the return of the Plaintiff's Certificate Missouri v. Jenkins, 110 S.Ct. 1651 (1990); Missouri v. Jenkins By Agyei, 109 S.Ct. 2463 (1989); Hutto v. Finney, 437 U.S. 678, 690 98 S.Ct. 2565, 2573, 57 L.Ed.2d 522

(1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2222, 49 L.Ed.2d 614 (1976); Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); Lorenc v. Call, 789 P.2d 46 (Ut. App. 1990).

The damages for the Plaintiff's properly alleged constitutional violations by the Defendants in their individual personal capacities for these acts, likewise, may not be immunized by state law. Hafer v. Melo, _____ U.S. _____, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The trial courts holding that the Plaintiff's federal claims are barred by the Utah Governmental Immunity Act was clear error.

The trial court also adopted the Defendants' contention that the Plaintiff's claims are barred by the law-of-the-case doctrine. The Defendants argued before the trial court that the court should not reverse itself on this issue even though the trial court's initial decision was wrong. The Plaintiff alleged that the doctrine of the law of the case did not prevent a judge from reconsidering his previous nonfinal orders. The Plaintiff submitted that the Defendants' violation of clearly established constitutional and statutory law, and

this court's decision in Ambus v. Utah State Board of Education, 800 P.2d 811 (Utah 1990), constituted grounds for the court to reconsider its previous erroneous applications of the law. Plumb v. State of Utah, 809 P.2d 734 (Utah 1990). The trial court's failure to reconsider its previous erroneous applications of the law was clear error.

F.

THE TRIAL COURT ERRED IN FINDING THE INDIVIDUAL
DEFENDANTS, SUED IN THEIR PERSONAL CAPACITIES UNDER 42
U.S.C. SECTION 1983, ARE ENTITLED TO QUALIFIED
IMMUNITY.

i.

QUALIFIED IMMUNITY APPLIES ONLY TO OFFICIALS PERFORMING
DISCRETIONARY FUNCTIONS.

The well plead facts of the Plaintiff's amended complaint alleges ministerial violations of the Plaintiff's civil rights under Section 42 U.S.C. Section 1983, 1988, as well as under the United States and Utah Constitutions for direct enforcement thereof, by State officials in their personal capacities, acting under color of law. Damages are sought from the individuals in their personal capacities.

The trial court adopted the Defendants' contention that the "individual" defendants, inasmuch as they are sued in their personal capacities under 42 U.S.C. Section 1983, are entitled to "qualified immunity." (Index at p.

490-492). The court's decision did not identify the law upon which it relied nor did it state the basis for its conclusion (Ibid.)

It is well established that the instant Defendants are state governmental officials who may be sued in their individual capacities for damages for violations of federal law under Section 1983. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 40 L.Ed.2d 90 (1974); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 52 L.Ed. 714 (1908). These holdings were recently affirmed and applied in Hafer v. Melo, _____ U.S., 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

Admittedly, the instant Defendants may raise a defense of qualified immunity for discretionary acts. If an assertion of qualified immunity is raised, it is evaluated under the standard enunciated by in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Normally, qualified immunity is a defense which must be pleaded in an answer to a complaint, Gomez v. Toledo, 446 U.S. 636, 100 S.Ct. 1920 64 L.Ed.2d (1980); Harlow v. Fitzgerald, supra, at 815, 102 S.Ct. at 2736. In the instant case the Defendants have not plead the defense in an answer, but have raised the defense as a

motion to dismiss.

Under these circumstances the Tenth Circuit Court of Appeals has identified the appellate standards for reviewing qualified immunity upon a motion to dismiss. Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988); Wolfenbarger v. Williams, 826 F.2d 930, 932-934 (10th Cir. 1987). Under a Motion to Dismiss the Defendants must be deemed challenging the sufficiency of the complaint on its face, i.e., the Plaintiff's pleaded facts fail to show that the Defendants conduct was ministerial or violated clearly established constitutional or statutory law of which a reasonable person would have known.

At the trial court, the Plaintiff responded by identifying the Defendants' acts which violated the law by failing to provide notice, hearings, findings, and violation of the expungement code, as ministerial operational acts that were constitutionally, statutorily and administratively regulated duties owed to the Plaintiff.

The Plaintiff likewise identified constitutional and statutory law that Defendants violated which was clearly established when the alleged violations occurred. Cleveland Board of Education v. Loudermill, 470 U.S. 532,

542 (1985); Matter of Noren, 621 P.2d 1247 (Utah 1980); State v. Jones, 581 P.2d 141 (1978); (Index at p. 452-463). While the Plaintiff agrees that the principles enunciated in Harlow v. Fitzgerald supra, controls these issues, it does not require entry of judgment in favor of the Defendants in the instant case.

An evaluation of qualified immunity under Harlow v. Fitzgerald supra, at 817-818, 102 S.Ct. 2737-2738, sets forth a presumptive knowledge of and respect for basic clearly established constitutional rights, and sets forth an objective standard for determining whether qualified immunity will act as a bar to further litigation in a suit by providing that:

"government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

On the other hand, a Defendant official may be held personally liable for an allegedly unlawful official action if he was performing ministerial functions, or if his discretionary conduct was violative of what has been come to be known as the Harlow "objective legal reasonableness test." Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 2727, 73 L.Ed.2d (1987).

In Anderson supra, at 639, 107 S.Ct. at 3039, the

Supreme Court attempted to explain what the court meant by "clearly established" as used in Harlow supra. In order to make "clearly established law" meaningful with regard to the "objective legal reasonableness test", the court set forth the more particularized inquiry:

"The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent."

This approach has been recongized by the Tenth Circuit, in Garcia By Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987); and Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991). This approach does not expect officials to anticipate the evolution of law, but does not give the officials "liability-free violations of constitutional or statutory requirements." Insisting on a precise factual correspondence between the conduct at issue and reported case law is tantamount to such a license. People of Three Mile Island v. Nuclear Reg. Com'rs, 747 F.2d 139, 145 (3rd Cir. 1984).

Courts interpreting Harlow supra, have determined that Harlow, has created a two-part analysis to determine if qualified immunity should apply to defendants in any

given case. Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991). The Defendant public official must first factually prove that he was acting within the scope of his "discretionary authority" when the alleged wrongful acts occurred, and if so proven, the Plaintiff must come forward with the burden of proof demonstrating that the Defendant public officials' actions violated clearly established statutory or constitutional or law.

This court need not decide the clearly established" issue in this case because qualified immunity is recognized only as a threshold matter under Harlow supra, where the defendant officials are performing "discretionary functions." Harlow supra, 457 U.S. 818, 102 S.Ct. at 2738; Wolfenbarger v. Williams, supra at 932; Utah State Univ., Etc. v. Sutro & Co., 646 P.2d 715 (Utah 1982); Dobos v. Driscoll, 537 NE.2d 558 (Mass. 1989); Breault v. Chairman of the Bd. of Fire Comm'rs, 513 N.E.2d 1277 (Mass. 1987) (where acts are ministerial, no valid claim of qualified immunity can be raised).

Courts are familiar with the discretionary-ministerial distinction. Discretionary decisions occur on a broad, policy-making level and ministerial decisions take place at the implementing, ministerial, or operational level. Little v. Utah Div. of Family

Services, 667 P.2d 49, 51 (Utah 1983); Frank v. State of Utah, 613 P.2d 517 (Utah 1980).

In the instant case, assuming that the decision of the Defendants to bring charges against the Plaintiff to suspend or revoke his certificate were "discretionary", once that decision was made, the ministerial, operational, or implementing hearing process was initiated and the defendants accepted specific constitutional and statutory duties owed to the Plaintiff. The Plaintiff has alleged facts, and the admissions already made by the Defendants in this case shows, that the constitutional, statutory, and regulatory duties of notice, hearings, findings, and violations of the expungement code, bearing upon the claims of the constitutional rights of the Plaintiff, were constitutional duties that were breached by the Defendants that were owed the Plaintiff. Wolfenbarger supra at 935; Little v. Utah State Div. of Family Services supra 51; Berkovitz By Berkovitz v. U.S., 108 S.Ct. 1954, 1959 (1988); Westfall v. Erwin, 108 S.Ct. 580 (1988)(recognizing that conduct cannot be discretionary if prescribed by law); Jackson v. Kelly, 557 F.2d 735, 737-739 (10th Cir. 1977). Consequently, the qualified immunity defense of the Defendants must fail.

ii.
**THE DEFENDANTS VIOLATED CLEARLY ESTABLISHED
CONSTITUTIONAL AND STATUTORY LAW.**

Even assuming the Defendants' conduct was "discretionary", the constitutional violations alleged in the instant case are the intentional deprivations of the Plaintiff's certificate, property, liberty, and privacy interests without due process of law. The Defendants do not dispute that the Plaintiff's certificate constitutes an entitlement to a property and liberty interest, or that their violations of due process or the expungement code deprived the Plaintiff of these interests. Nor do they dispute that a deprivation occurred.

The questions then for the court are whether, in light of clearly established statutory and constitutional law and the facts of this case, whether reasonable officials should have known that it was not lawful for them to (1) violate due process and suspend and revoke the Plaintiff's certificate without prior notice and an opportunity for the Plaintiff to respond, without any findings of fact or conclusions of law, and then to notify every state in the United States of the revocation; (2) refuse to return the Plaintiff's certificate prior to its reconsideration hearings; (3) use sealed and expunged

records in violation of Utah's Expungement Act, at the reconsideration hearings in order to support the Defendants' original suspension and revocation of the Plaintiff's certificate; and (4) then without any findings or conclusions uphold its original revocation resulting in the deprivation of the Plaintiff's property and privacy interests which are secured by the United States Constitution as well as the expungement code.

In 1988, when the Defendants' actions breached their duties owed to the Plaintiff, the law was clearly established that the Plaintiff was, by constitutional, statutory, and administrative prescription, entitled to notice, and opportunity to respond prior to suspension and revocation of a protected property, and liberty interest. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985); Board of Regents v. Roth, 408 U.S. 564, 572 92 S.Ct. 2701 (1972); Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972); Bailey v. Kirk, 777 F.2d 567, 575 (10th Cir. 1985); Miller v. City of Mission, Kan., 705 F.2 368, 373 (10th Cir. 1983); Celebrity Club Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293 (Utah 1983).

It was clearly established in March of 1988 through March of 1989 that the Defendants should have returned

the Plaintiff's certificate, prior to its reconsideration hearings, as the Plaintiff was entitled due process in the first instance. At a minimum, the subsequent "reconsideration hearings" were constitutionally inadequate due to the failure of the Defendants to return the Plaintiff's certificate. Cleveland Board of Ed. v. Loudermill *supra*, at 547 n. 12, 84 L.Ed.2d at 507 n. 12; Carlson v. Bos, 740 P.2d 1269 (Utah 1987); Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972).

It was clearly established in March of 1988 through March of 1989 that the Plaintiff was entitled to protection from arbitrary deprivations of his property, liberty and privacy interests protected by statutory entitlement. Whalen v. Roe, 429, U.S. 589, 599 n. 23, 97 S.Ct. 876 n. 23, 51 L.Ed.2d 64 (1977); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507 (1971); Wolfenbarger v. Williams, 826 F.2d 930, 933-934 (10th Cir. 1987); Miller v. City of Missions *supra*, at 373; Celebrity Club Inc. v. Utah Liquor Control Comm'n *supra*.

It was clearly established in March of 1988 through March of 1989 that the Plaintiff possessed a protectable legitimate expectation under the constitution that information found in a sealed and expunged file would remain confidential while in the State's possession. Nixon

v. Administrator of General Services, 433 U.S. 425, 457-58, 97 S.Ct. 2777, 2797-90, 19 L.Ed.2d 576 (1977). Additionally, it was clearly established that the Plaintiff had a statutory expectation that the expunged evidence would not be used by the Defendants to summarily suspend and revoke the Plaintiff's certificate. Likewise, it was clearly established under decisional law in Utah. In State v. Jones, 581 P.2d 141 (Utah 1978), expunged records were found inadmissible as evidence in cases like the one before this court. Further this court's holding in Matter of Noren, 621 P.2d 1247 (Utah 1981), forbade the use of expunged records as evidence of moral turpitude in state governmental license revocation proceedings. Also, Doe v. Utah Dept. of Public Safety, 782 P.2d 489 (1989) was pending before this Court and the trial court had already decided that the State could not use sealed and expunged records in a licensing matter. The clear language of Utah's Expungement Statute and these cases should have made it sufficiently clear that the instant defendants should have understood what they were doing violated the Plaintiff's rights secured thereunder. In light of this "pre-existing law", the instant Defendants' unlawfulness is apparent. The Defendants attempted to carve out an exception for itself that was not provided

for in the statute nor supported by prior case law.

Ambus v. Utah State Board of Ed. supra.

The Defendants' ministerial acts of depriving the Plaintiff of his entitlement to his property, liberty and privacy interests created and secured by state law, have damaged the Plaintiff's good name, reputation and professional image sufficiently to impose a "badge of infamy" and disability that has foreclosed the Plaintiff's freedom to take advantage of employment opportunities in every state in the United States.

The Plaintiff's constitutional right to engage in his occupation was deprived by the Defendants' violations of clearly established constitutional and statutory law. The Plaintiff's certificate, and privacy interests, were benefits and entitlements secured by state law, and likewise, his liberty and privacy interests constitutionally protected. Under these circumstances the Defendants should not be entitled to qualified immunity and the lower court's ruling is clear error.

POINT TWO

THE TRIAL COURT ERRED IN FAILING TO RULE ON THE PLAINTIFF'S CAUSES OF ACTION ALLEGING DEPRIVATIONS OF PROPERTY AND LIBERTY INTERESTS DIRECTLY UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The Plaintiff's Amended Complaint alleges specific deprivations of property and liberty interests directly

under the United States and Utah Constitutions. In Paragraph 16, the Plaintiff alleges that his certificate is property and his name and reputation are liberty interests within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution as well as under Article 1 Section 7 of the Utah Constitution, and related provisions. Paragraphs 19, 37, 44, and 48 asserts that the deprivation of the Plaintiff's property and liberty interests violates these same provisions of the United States and Utah Constitutions. The District Court failed to rule on these allegations.

The Plaintiff contends that he has stated viable causes of action against the Defendants directly under the Fifth and Fourteenth Amendments to the United States Constitution as well as directly under Article 1 Section 7 of the Utah Constitution. These constitutional provisions were created specifically to protect property and liberty interests of citizens which were safeguarded by the respective Constitutions. Clearly, an implied cause of action under the stated Federal Constitutional provisions is proper. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); and Bell v. Hood, 327 U.S. 678, 684 (1946). As the United States Supreme Court has recognized:

"Where legal rights have been invaded,

and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done....Our government has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." Franklin v. Gwinnett County Public Schools and William Prescott, 112 S.Ct. 1028, 1033 (1992) (quoting Bell v. Hood *supra* and Marbury v. Madison, 1 CRANCH 137, 163 (1803)).

Consistent with the federal notice of an implied cause of action directly under the federal constitution, state courts have also found an implied cause of action directly under state constitutions. In a case having defenses asserted similar to the instant controversy, the North Carolina Supreme Court dismissed the government's defenses and found that an individual may redress an unlawful deprivation of liberty or property interests by an implied cause of action directly under the North Carolina's Constitution. Corum v. University of North Carolina, 413 S.E.2d 276 (N.C. 1992). Also see: Bagg v. University of Tex. Medical Branch, 726 S.W.2d 582 (Tex.Ct. App. 1987); Widgeon v. Eastern Shore Hosp. Center, 479 A.2d 921, 927-929 (Md. 1984) (citing numerous state courts redressing a state or federal constitutional deprivation by an implied damage action); Fenton v. Groveland Community Serv. Dist., 135 Cal.App. 3d 797 (Cal.App. 1982); Gay Law Student Association v. Pacific Telephone

Co., 595 P.2d 592 (Cal. 1979); Porten v. University of San Francisco, 64 Cal. App. 825 (Cal. App. 1976)(damages awarded for improper disclosure of academic records).

While this court has yet to address the issue, this Court has recognized that the people of Utah established the Utah Constitution as a limitation on the power of the government, and that the Utah Constitution, Article 1, Section 22, is self-executing and needs no legislation to activate it. Coleman v. Utah State Land Board, 795 P.2d 622, 634-635 (Utah 1990). Similarly, the due process clauses of both the United States and Utah Constitutions need no legislation to activate them and a damage remedy to redress violations should be implied as a matter of law.

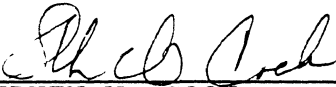
RELIEF SOUGHT

The Plaintiff respectfully requests this Court to reverse the District Court's Order dismissing the Plaintiff's Complaint and remanding for the purpose of addressing the damage claims of the Plaintiff. The Plaintiff also requests this Court to award attorneys fees and for the successful prosecution of this appeal.

ORAL ARGUMENT

The Plaintiff requests oral argument in this matter.

DATED this 8 day of July, 1992.



STEPHEN W. COOK
Attorney for Appellant

CERTIFICATE OF SERVICE

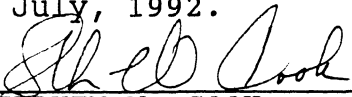
STATE OF UTAH)
 : ss.
County of Salt Lake)

STEPHEN W. COOK, being duly sworn, says:

Stephen W. Cook, of the law firm COOK & DAVIS,
attorney for Plaintiff/Appellant herein; served the
attached APPELLANT'S BRIEF upon:

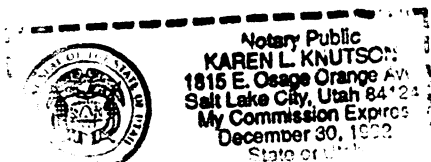
Brent A. Burnett
Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

by placing a true and correct copy thereof in an envelope
and depositing the same, sealed, with first-class postage
prepaid thereon, in the United States Mail at Salt Lake
City, Utah, on the 7 day of July, 1992.



STEPHEN W. COOK

Subscribed and sworn to before me this 8 day of
July, 1992.



My Commission Expires:
12-30-92



Notary Public

Residing at Salt Lake County

A D D E N D U M

STEPHEN W. COOK, USB # 0720
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FILED
DISTRICT COURT
DEC 26 3 33 PM '90
Clerk
DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GREGORY T. AMBUS,
Plaintiff.

vs.

UTAH STATE BOARD OF
EDUCATION, THE ESTATE OF
JAMES R. MOSS, deceased,
individually and as
Superintendent of the UTAH
STATE BOARD OF EDUCATION,
JAY B. TAGGART, NEOLA BROWN,
KEITH T. CHECKETTS, JOHN
M.R. COVEY, RUTH HARDY FUNK,
DARLENE HUTCHISON, FRANCES
HATCH MERRILL, M. RICHARD
MAXFIELD, DONALD G.
CHRISTENSEN, MARGARET R.
NELSON, VALERIE J. KENSON,
and JOHN MILLECAM, individually
and as members of the UTAH
STATE BOARD OF EDUCATION;
GAIL L. MLADEJOVSKY, MARILYN
WENZEL, JEANINE T. BOSCH,
JOHN L. JAUSSEI, and PAUL J.
RASBAND, individually and as
members of the Professional
Practices Advisory Commission;
and ROGER C. MOURITSEN,
individually and as Executive
Secretary of the UTAH STATE
BOARD OF EDUCATION,

Defendants.

SECOND AMENDED
VERIFIED PETITION FOR
JUDICIAL REVIEW
AND COMPLAINT

Civil No. 890901757AA

Judge James S. Sawaya

The Plaintiff, Gregory T. Ambus, by and through his counsel, Stephen W. Cook, hereby petitions for judicial review as follows:

FIRST CAUSE OF ACTION

(Judicial Review)

1. Jurisdiction is vested in this Court under and by virtue of the doctrine of concurrent jurisdiction pursuant to Title 42, United States Codes, Sections 1983, 1985, and 1988 and Title 28, United States Code, Sections 1331 and 1343; also pursuant to the United States and Utah Constitutions for direct enforcement thereof; also pursuant to Section 63-46(b)-15 U.C.A. (1953), as amended; and also pursuant to Section 78-3-4 U.C.A. (1953), as amended.

2. The Petitioner is Gregory T. Ambus whose mailing address is 3316 El Serrito Drive, Salt Lake City, Utah 84109.

3. The Defendant Utah State Board of Education is a respondent agency and its mailing address is 250 East 500 South, Salt Lake City, Utah 84111. It is sued in the capacity as a "state entity" for purposes of Title 42, U.S.C., Sections 1983, 1985 and 1988 and prospective

injunctive relief, attorneys fees, and court costs.

4. The Estate of Defendant James R. Moss is sued for his individual acts and for his acts in an official capacity as Superintendent of the Utah State Board of Education.

5. The Defendants Jay B. Taggert, Neola Brown, Keith T. Checketts, John M. R. Covey, Ruth Hardy Funk, Darlene Hutchison, Frances Hatch Merrill, M. Richard Maxfield, Donald G. Christensen, Margaret R. Nelson, Valerie J. Kenson, and John Millecam, are sued individually and in their official capacities as members of the Utah State Board of Education.

6. The Defendants Gail L. Mladejovsky, Marilyn Wenzel, Jeanine T. Bosch, John L. Jaussi, and Paul J. Rasband are sued individually and in their official capacities as members of the Utah State Professional Practices Advisory Commission, an agent of the Utah State Board of Education.

7. The Defendant Roger C. Mouritsen is sued individually and in his official capacity as Executive Secretary of the Utah State Board of Education. At all times herein material, the Defendant Roger C. Mouritsen

aided, assisted, and encouraged all other individual Defendants in the deprivation of Petitioner's rights, privileges, and liberties as hereinafter set forth.

8. At all times herein material, the Defendants were acting under color of law and deprived the Petitioner of rights, privileges, and liberties protected by the Constitution and laws of the United States and State of Utah. In addition, at all times pertinent herein, the Defendants were performing ministerial acts which created policies which operated to deprive the Petitioner of such rights, privileges, and liberties.

9. The title and date of the final agency action to be reviewed is the initial revocation of the Petitioner's teaching certificate on August 19, 1988 and the final revocation of the Petitioner's teaching certificate on March 16, 1989. A copy of such initial agency action is attached as Exhibit A and a copy of final agency action is attached hereto as Exhibit B.

10. The persons who were parties to the informal adjudicative proceedings that led to the agency action are the Petitioner and the Defendants as identified above.

11. A copy of the written order from the informal

proceeding is attached as Exhibit C.

12. The Defendant Utah State Board of Education is a state agency charged by the Utah Constitution, Article X, Section 8 and by Utah Law, Section 53A-1-401 U.C.A. (1953), as amended, with the general supervision and control of the public school system.

13. As part of the Defendant Utah State Board of Education's duties of general supervision and control, it has authority to issue and revoke certificates to teach under Section 53A-6-101 et. seq. U.C.A. (1953), as amended.

14. Under Section 53A-6-104 U.C.A. (1953), as amended, the Defendant Utah State Board of Education may revoke or suspend state certificates "for immoral, unprofessional, or incompetent conduct or evident unfitness for services authorized by the certificates.

15. On August 13, 1981, the Defendant Utah State Board of Education issued to Petitioner a Standard Secondary Certificate with Biological and Physical Science endorsements.

16. Petitioner's Certificate to teach constitutes property within the meaning of the Fifth and Fourteenth

Amendments to the United States Constitution and Article I Section 7 of the Constitution of Utah and related provisions. Petitioner's good name and reputation are liberty interests also protected by the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 7 of the Constitution of Utah and related provisions.

17. At all times herein material, the Petitioner's Certificate was valid until revoked by the Defendant Utah State Board of Education for cause as described herein.

18. On March 18, 1988, the Defendant Utah State Board of Education, through the Defendant Roger C. Mouritsen, filed a Complaint against the Petitioner for, "Information was received indicating that Gregory Ambus as charged with two counts of drug distribution and one count of drug selling, stemming from alleged marijuana exchanges with or witnessed by a police informant."

19. Any revocation of the Petitioner's Certificate to teach on the basis of the allegations in the Complaint or on the basis of immorality, unprofessional or incompetent conduct deprived the Petitioner of his liberty and property interests under the Fifth and Fourteenth

Amendments to the United States Constitution and under Article I Section 7 of the Utah Constitution and related provisions.

20. On August 17, 1988, the Petitioner was employed by the Salt Lake City School District pursuant to a written contract which is attached hereto as Exhibit D and is incorporated by reference herein.

21. On August 19, 1988, the Defendant Utah State Board of Education initially revoked the Petitioner's Certificate by letter dated August 24, 1988 from the Defendant State Superintendent which is attached hereto as Exhibit A and is incorporated by reference herein.

22. On August 24, 1988, the Petitioner requested reconsideration of the revocation by letter which is attached hereto as Exhibit E and is incorporated by reference herein.

23. On August 24, 1988, the Salt Lake City School District terminated the Petitioner's contract of employment with the Salt Lake City School District because the Petitioner's Certificate had been revoked.

24. On September 26, 1988, the Defendants scheduled a hearing to consider reinstatement of the Petitioner's

Certificate. See Exhibit F which is attached and incorporated by reference herein.

25. On September 27, 1988, Petitioner through his counsel specifically protested the revocation of Petitioner's Certificate to teach without due process and demanded that the Certificate be restored prior to any further hearings. See Exhibit G which is attached and incorporated by reference herein.

26. On October 20, 1988, an informal hearing was conducted by the Defendants. In such hearing, the Petitioner denied any wrongdoing. In addition, the Petitioner objected to the hearing on several bases. See Exhibit H which is attached and incorporated by reference herein.

27. On March 16, 1989, the Defendants notified the Petitioner of its final agency action that its initial revocation of the Petitioner's Certificate was upheld. The Defendants did not issue any findings of fact or conclusions of law to justify any revocation as required by statute or as required by the United States Constitution or the Constitution of Utah.

28. The Petitioner is entitled to judicial review by

trial de novo under Section 63-46(b)-15 U.C.A. (1953), as amended.

29. The Defendants unlawfully revoked the Petitioner's Certificate in violation of Section 53A-6-104 U.C.A. (1953), as amended, and the Petitioner's right to due process of law in that the Petitioner's alleged conduct was not immoral, unprofessional, incompetent, or evident unfit for services authorized by his Certificate.

30. The Petitioner lacks an adequate remedy at law.

31. The Petitioner is entitled to a preliminary and final Order, Judgment, and Decree restoring the Petitioner's Certificate to teach.

32. The Petitioner is entitled to a reasonable attorneys fees.

WHEREFORE, the Petitioner prays for relief and judgment as more particularly set forth herein.

SECOND CAUSE OF ACTION

(Pre-Deprivation Hearing)

33. The Petitioner incorporates by reference paragraphs 1 through 32 of his First Cause of Action as if specifically set forth herein.

34. Petitioner's Certificate to teach could not

revoked without a prior deprivation hearing with full substantive and procedural due process of law being afforded. Such legal rights were clearly established prior to the events complained of herein.

35. On May 20, 1988, the Defendant Professional Practices Advisory Commission through the actions of the individual Defendant members, recommended to the Defendant State Board of Education that the Petitioner's teaching certificate be suspended until such time as the Petitioner requested a hearing before the Commission.

36. On August 24, 1988, the Defendant Utah State Board of Education through the actions of the individual Defendant members, revoked the Petitioner's Certificate to teach without prior notice or hearing to the Petitioner. By law, any such revocation was because the Petitioner engaged in conduct which was immoral, unprofessional, incompetent, or unfit. Nevertheless, the Defendants made no findings of fact or conclusions of law which justified any suspension or revocation.

37. The actions of the Defendants, as described in the preceding two paragraphs violated the Petitioner's right to procedural and substantive due process of law as

provided in the Utah and United States Constitutions, and the Amendments thereto, as well as the Petitioner's right to equal protection and due process of law under Section 1983 and 1985, Title 42, United States Code.

38. As a result of the Defendants acts and violations as set forth above, the Petitioner was wrongfully deprived of liberty and property interests. In particular, the wrongful revocation of the Petitioner's Certificate to teach resulted in his loss of employment from August 24, 1988 to the present and resulted in damage to the Petitioner's good name and reputation, not only in the State of Utah but also in each state of the United States.

39. The Petitioner is entitled to damages and/or equitable monetary relief ancillary to injunctive relief for his loss of employment opportunities from the defendants in their individual capacities, from August 24, 1988 until the Plaintiff receives a proper pre-deprivation hearing or until the Plaintiff receives comparable gainful employment, whichever first occurs.

40. As a further result of the individual defendants' wrongful acts, the Petitioner has suffered,

and continues to suffer loss of professional reputation and standing, substantial mental and emotional distress and suffering, including medical expenses, all to his general damages in the amount of \$500,000.00 and special damages in the amount of \$5,000.00.

41. The individual defendants knew or should have known, that the Petitioner was clearly entitled to a proper pre-deprivation hearing and such rights were clearly established at such time. The failure to provide such a hearing was in callous and malicious disregard of the Petitioner's constitutional rights, constituted cruel indifference to his personal well-being, and was substantially lacking in good faith. The Petitioner is therefore entitled to punitive damages in an amount found to be reasonable by the Court as a wholesome warning to the defendants and to others similarly situated to avoid conduct of the nature complained of herein.

42. The Plaintiff is entitled to a reasonable attorney's fee.

WHEREFORE, the Petitioner prays for relief and judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

(Use of Expunged Proceedings)

43. The Plaintiff incorporates by reference Paragraphs 1-42 of his First and Second Causes of Action as if specifically set forth herein.

44. In revoking the Petitioner's Certificate, the Defendants utilized evidence which was expunged, sealed, and judicially pardoned by Orders of this Court and by law all in violation of the due process provisions of the United States Constitution, its Amendments, as well as the Constitution of Utah. In addition, the alleged conduct of the Petitioner which formed the basis of the revocation occurred more than one year prior and the use thereof by the Defendants violated Section 78-12-29(2) U.C.A. (1953), as amended.

45. The Petitioner is entitled to an Order restoring the Petitioner's Certificate to teach.

46. The Petitioner is entitled to a reasonable attorney's fee.

WHEREFORE, the Petitioner prays for relief and judgment as more particularly set forth herein.

FOURTH CAUSE OF ACTION

(Post Deprivation Hearing)

47. The Petitioner incorporates by reference Paragraphs 1-46 of his First, Second, and Third Causes of Action as if specifically set forth herein.

48. The individual Defendants' use of expunged, sealed, and pardoned evidence in suspending, revoking, and failing to reinstate the Petitioner's Certificate violated the Petitioner's right to due process and equal protection of the law in violation of the Utah and United States Constitution and its Amendments. In addition, the individual Defendants' use of such evidence violated the Petitioner's right to privacy and adversely affected his liberty interests in maintaining his good name, professional standing, and position in society. Lastly, the individual Defendants failed to provide any findings of fact or conclusions to support its actions in violation of the Utah and United States Constitution, and its Amendments.

49. As a result of the individual defendant's wrongful acts, the Plaintiff suffered the loss of his employment from August 24, 1988 to the present not only in

the State of Utah but each of the United States. The Plaintiff is entitled to damages from the individual defendants for such loss until he becomes re-employed, in an amount found reasonable by the Court. In the alternative, the Petitioner is entitled to damages for lost income and future earnings.

50. As a further result of the individual defendants' wrongful acts, the Petitioner has suffered, and continues to suffer loss of professional reputation and standing, substantial mental and emotional distress and suffering, including medical expenses, all to his general damages in the amount of \$500,000.00 and special damages in the amount of \$5,000.00.

51. The individual defendants knew, or should have known, that the Petitioner was clearly entitled to privacy and a proper due process hearing, including findings, and such rights were clearly established at such time. The failure to respect the Petitioner's privacy and the failure to provide a due process hearing with findings were in callous and malicious disregard of the Petitioner's constitutional rights, constituted cruel indifference to his personal well-being, and was

substantially lacking in good faith. The Petitioner is therefore entitled to punitive damages in an amount found to be reasonable by the Court as a wholesome warning to the defendants and to others similarly situated to avoid conduct of the nature complained of herein.

52. The Plaintiff is entitled to a reasonable attorney's fee.

WHEREFORE, the Petitioner respectfully petitions for relief as follows:

1. For Judicial Review of the Agency's actions by trial de novo pursuant to Section 63-46(b)-15 U.C.A (1953), as amended;

2. For a preliminary and permanent injunction requiring the Respondent to immediately reinstate the Petitioner's Certificate;

3. For a Judgment restoring the Plaintiff's certificate to teach nunc pro tunc as of the date of revocation;

4. For damages to be found by the Court for the Petitioner's loss of employment opportunities;

5. For the sum of \$500,000.00 in compensatory damages for the Petitioner's mental and emotional

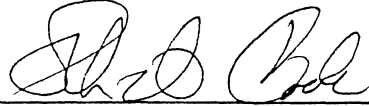
distress;

6. For special damages in the amount of \$5,000.00;

7. For punitive damages in an amount found
reasonable by the Court; and,

8. For reasonable attorney's fees and costs of
court.

DATED this 26 day of December, 1990.

A handwritten signature in cursive script, appearing to read 'S. W. Cook', written over a horizontal line.

STEPHEN W. COOK
Attorney for Plaintiff

Plaintiff's address:

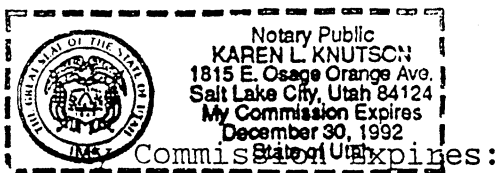
3316 El Serrito Drive
Salt Lake City, Utah 84109

STATE OF UTAH)
 :SS.
COUNTY OF SALT LAKE)

COMES NOW GREGORY T. AMBUS, having first been duly sworn upon oath, and deposes and says that he is the plaintiff in the above action, that he has read the foregoing Second Verified Petition for Judicial Review and Complaint and executed the same, and that he knows the contents thereof to be true, except to those items stated on information, and believes those items to be true.

Gregory T. Ambus
GREGORY T. AMBUS

SUBSCRIBED AND SWORN to before me this 26th day of December, 1990.



Karen L. Knutson
NOTARY PUBLIC
Residing in Salt Lake County

CERTIFICATE OF SERVICE

STATE OF UTAH)
 : ss.
County of Salt Lake)

KAREN L. KNUTSON, being duly sworn, says:

That she is employed in the offices of Cook & Davis,
attorneys for Plaintiff herein; and that she served the
attached SECOND AMENDED VERIFIED PETITION FOR JUDICIAL
REVIEW AND COMPLAINT upon:

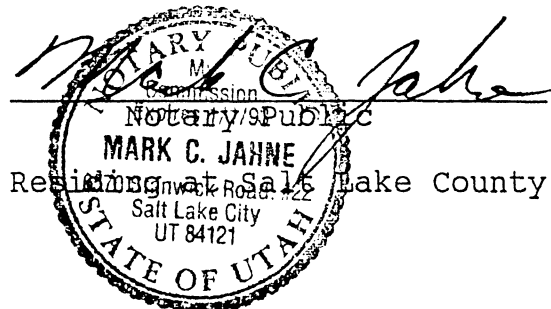
Mr. John S. McAllister
Assistant Attorney General
36 South State
1100 Beneficial Life Tower
Salt Lake City, Utah 84111

by placing a true and correct copy thereof in an envelope
and depositing the same, sealed, with first-class postage
prepaid thereon, in the United States Mail at Salt Lake
City, Utah, on the 26th day of December, 1990.


KAREN L. KNUTSON

Subscribed and sworn to before me this 26th day of
December, 1990.

My Commission Expires:
1-1-93



UTAH STATE OFFICE
OF EDUCATION

James R. Moss
State Superintendent of Public Instruction



UTAH STATE BOARD OF EDUCATION
UTAH STATE BOARD FOR VOCATIONAL EDUCATION

Keith T. Chocketts/Chair • Ruth Hardy Funk/Vice Chair
Neda Brown • Donald G. Christensen • John M. R. Covey
Darlene C. Hutchison • Valerie J. Kelson
M. Richard Maxfield • Margaret R. Nelson

August 24, 1988

Gregory Thomas Ambus
649 East 1600 South
Bountiful, Utah 84010

Dear Mr. Ambus:

The Utah State Board of Education at its regular meeting held on August 19, 1988, took formal action to revoke your Standard Secondary Certificate with Biological and Physical Science endorsements effective immediately. This action is based on a hearing held and recommendation made by the Utah Professional Practices Advisory Commission.

Since your certificate reflects validity through June 30, 1991, it is required that you surrender your certificate to this office immediately. You may mail or deliver your certificate to us in person.

Sincerely,

James R. Moss
State Superintendent
of Public Instruction

JRM:RCM:rm

UTAH STATE OFFICE
OF EDUCATIONJames R. Moss
State Superintendent of Public InstructionUTAH STATE BOARD OF EDUCATION
UTAH STATE BOARD FOR VOCATIONAL EDUCATIONRuth Hardy Funk/Chair • Neola Brown/Vice Chair
Keith T. Checketta • Donald G. Christensen
John M. R. Covey • Darlene C. Hutchinson
Valene J. Kelton • V. Jay Liechty • M. Richard MaxfieldRECEIVED AT
COOK & WILDE

MAR 16 1989

March 16, 1989

Gregory T. Ambus
649 East 1600 South
Bountiful, Utah 84010

Dear Mr. Ambus:

The State Board of Education has received the findings and recommendation from the appeal panel appointed to consider your request for reinstatement of your teaching certificate. The panel recommended that "the decision of the State Board of Education made on August 18, 1988, be upheld, i.e., that the revocation of Gregory Ambus' teaching certificate be upheld." A copy of the Hearing Officer's letter to me dated January 5, 1989, is enclosed.

The Utah State Board of Education has directed me to inform you that they accept the panel recommendation and that the revocation will stand.

Sincerely yours,

James R. Moss
by Steve W. Cameron
James R. Moss
State Superintendent
of Public Instruction

JRM/la/01

enclosure

cc: Stephen W. Cook (hand delivered 3-16-89)

EXHIBIT

C

PROFESSIONAL

PRACTICES

ADVISORY

COMMISSION

250 East Fifth South Street

Salt Lake City, Utah 841

Jeanine T. Bosch
Chairman
1455 South Madera Hills
Bountiful, UT 84010

Dan M. Wells
Vice-Chairman
Cleveland,
UT 84518

Denise M. Daniels
RFD 3 Box 212
Spanish Fork, UT 84660

Kyle D. Dye
Rt. 1 Box 1342
Roosevelt, UT 84066

E. Art Eichbauer
1487 East Bob Lane
Sandy, UT 84092

Rosalie S. England
220 Tule Circle
Tooele, UT 84074

John L. Jaussi
Box 523
Coalville, UT 84017

Gail L. Mladejovsky
2826 E. Thunderbird Dr.
Salt Lake City, UT 84109

Paul J. Rasband
485 East 520 North
American Fork, UT 84003

Marilyn Wenzel
1075 South 950 East
St. George, UT 84770

Betty Yanowitz
3327 E. Chaundra Ave.
Salt Lake City, UT 84124

January 5, 1989

Superintendent James R. Moss
Utah State Office of Education
250 East 500 South
Salt Lake City, Utah 84111

Dear Superintendent Moss:

On October 20, 1988, a hearing panel was convened to consider a request of Gregory T. Ambus for reinstatement of his teaching certificate. The Rules for Adjudicative Hearings were invoked and Ms. Gail Mladejovsky was appointed hearing officer by the State Board of Education to hear the appeal. Members of the hearing panel were Marilyn Wenzel, Jeanine Bosch, John Jaussi, and Paul Rasband.

Mr. Ambus was represented by counsel at the hearing which was held in the Salt Lake City School District Offices. Subsequent to the hearing, the panel reviewed the evidence and the following is a motion made on December 16, 1988, by John Jaussi and seconded by Paul Rasband:

The hearing panel recommends that the decision of the State Board of Education made on August 18, 1988, be upheld, i.e., that the revocation of Gregory Ambus' teaching certificate be upheld.

Sincerely,

Gail L. Mladejovsky

Gail L. Mladejovsky
Hearing Officer

GLM:rm

Executive Secretary
Roger C. Mouritsen

ALT LAKE CITY SCHOOL DISTRICT

EXHIBIT

D

440 East First South
Salt Lake City, Utah 84111

Name Gregory T. Ambus

Date 8-17-88

You have been approved for recommendation to the Board of Education for employment to a position in the Alt Lake City School District as indicated below (For contract teachers the first two years are provisional status. Your employment is conditioned upon the Continuing Written Agreement.)

Position: Teacher Time/FTE: Full (1.0)
Salary: 18,342* Step/Lane/Code: 6-8
Calendar Months Pay Period Base: Biweekly _____ Monthly Y
Effective Date: 1988-89 School Year Vacation (12 Month contracts only):
*Salary to be adjusted per 1988-89 negotiations.
You are tentatively assigned to: Highland-Physical Science

Upon approval by the Board, this becomes a contractual agreement and you should not sign it unless you are able and intend to fulfill your part of the agreement, including reporting for work on all of the days designated in the calendar, except leave days as provided by the policies and regulations of the Board of Education. You may not sign another contract while this one is in force. If this offer of employment is acceptable to you and you are confident that you can fulfill the terms and conditions expressed herein, you should sign and return it to the Personnel Office within (5) five days.

Before this contract is effective, the employee shall furnish the following (CHECKED) documents which must be acceptable to the Board of Education:

- ☒ A Physical Examination Report by a doctor of medicine on a form provided by the Board at the employee's expense
- ☒ A Tuberculin Test
- ☒ An Enrollment Form for Utah State Retirement System
- ☒ A W-4 Income Tax Withholding Form
- ☒ Insurance Registration Forms
- ☒ A copy of the employee's Social Security Card and Driver's License (or photo I.D. card)
- ☒ Form I-9
- ☒ Valid Teaching Certificate for Utah appropriate to assignment
- ☒ Official Transcript(s) of credits and evidence of all acquired academic degrees (Must include the institution, date, major(s) and minor(s) of each degree)
- ☒ State Annual Information Sheet
- ☒ Verification of prior experience
- ☒ Documentation of Military Service
- ☒ License or Permit _____
- ☒ Other Documentation _____

[Signature]
Administrator for Personnel Services

I accept the offer indicated above and agree to abide by the policies and procedures of the Board of Education, and I agree that I will give the School District thirty days' advance notice in writing of my resignation (for classified personnel fifteen days' notice shall be given).

Signed Gregory T. Ambus Date 8-17-88

Address 1119 E 1600 S City Bountiful State Utah Zip 84010

Soc. Security # 529-91-5446 Birthdate 10-2-55 (Mon-Day-Yr) Phone # 292-3540

NOTE: 9-month personnel paid monthly must select a 12-pay or a 10-pay schedule:

EXHIBIT

E

Gregory T. Ambus
649 E. 1600 S.
Bountiful, Utah 84010
801-292-3340

August 24, 1988

Mrs. R. Moss, Superintendent
Utah State Board of Education
100 East 500 South
Salt Lake City, Utah 84111

Dear Dr. Moss,

I am requesting an emergency meeting with you or the Utah State Board of Education. I have submitted to Dr. Mouritsen copies of the Hearing Decision which was held before Garth Mangum May 19, 1987. Having reviewed some of the file concerning the revocation of my certificate, I did not respond to the notices because I did not receive them. I was in Arizona coaching and teaching and Granite School District is well aware of my address.

I have also submitted pages 22-27 of a rough draft of my attorney's memorandum concerning our current court case. These pages review our situation concerning the hearing process for educators and Utah statute 53-51-7.

I have written this letter to request this emergency meeting based on winning the above mentioned hearing, being hired in Salt Lake School District, and being denied the ability to teach there. The hearing process with Dr. Mangum should allow me to reap my Utah Teaching Certificate, and to accept the position with Salt Lake District.

Thank You for your time in reviewing this matter.

Sincerely,

Gregory T. Ambus

Gregory T. Ambus

EXHIBIT

F

PROFESSIONAL

PRACTICES

ADVISORY

COMMISSION

250 East Fifth South Street

Salt Lake City, Utah 84111

Gene T. Bosch
rman
South Madera Hills
Bountiful, UT 84010

M. Wells
-Chairman
eland,
4518

se M. Daniels
Box 212
Isa Fork, UT 84660

D. Dye
Box 1342
velt, UT 84066

t Eichbauer
East Bob Lane
UT 84092

se S. England
ule Circle
e, UT 84074

-- Jausi
23
ille, UT 84017

-- Mladejovsky
Thurnderbird Dr.
ake City, UT 84109

. Rasband
st 520 North
an Fork, UT 84003

n Wenzel
outh 950 East
orge, UT 84770

ranowitz
Chaundra Ave.
ike City, UT 84124

September 26, 1988

Gregory T. Ambus
649 East 1600 South
Bountiful, Utah 84010

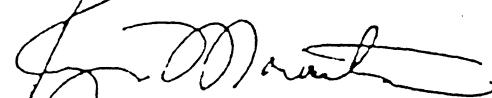
Dear Mr. Ambus:

A hearing to consider reinstatement of your teaching certificate has been scheduled before a panel of the Utah Professional Practices Advisory Commission. The list of the names of the individuals assigned to hear your case is enclosed. The hearing will be held Thursday, October 6, 1988, in the West Board Room of the Utah State Office of Education, 250 East 500 South, Salt Lake City, Utah, beginning at 2:00 p.m.

Should you be unable to meet at the time and place scheduled or if you object to any member of the hearing panel, please notify us immediately. Otherwise, we will expect you to be in attendance. You may bring legal counsel and any witnesses or others that you wish to have testify in your behalf. We have enclosed a copy of our Rules of Procedure for Hearing Complaints.

If you have any question regarding procedure for the hearing, please let me know.

Sincerely,



Roger C. Mouritsen, Ph.D.
Executive Secretary

RCM:rm

Enclosures

cc: Stephen W. Cook, Attorney at Law
Twila Bringhurst (secretary to the
State Board of Education)
William Christopoulos, Granite School District
Dale Manning, Salt Lake City

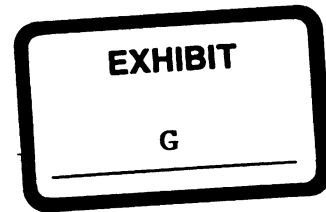
Secretary
Mouritsen
State Office of Education

STEPHEN W. COOK
ROBERT H. WILDE
RONALD E. KUNZ

—
JOHN K. RICE
NICHOLAS J. ANGELIDES
EID C. DAVIS

COOK AND WILDE
A PROFESSIONAL LAW CORPORATION

6925 UNION PARK CENTER, SUITE 490
MOOREDALE, UTAH 84047



TELEPHONE 801-255-6000
FAX 801-561-3829

September 27, 1988

Dr. Roger C. Mouritsen, Executive Secretary
Utah Professional Practices Advisory Commission
State Office of Education
250 East 500 South
Salt Lake City, Utah 84111

RE: Gregory T. Ambus

Dear Dr. Mouritsen:

As your file reflects, I represent Gregory T. Ambus. I am in receipt of a letter addressed to Mr. Ambus dated September 22, 1988 from you. Based upon the facts set forth below, as I understand them, the purpose of this letter is to request that Mr. Ambus' certificate be immediately restored to him pending a new de novo due process hearing to revoke such certificate if such is still desired.

The following are the facts as I understand them:

(a) On July-30, 1981 Mr. Ambus registered his address with the Board of Education as 3316 El Serrito Drive, Salt Lake City, Utah 84109.

(b) For approximately four years, until January 23, 1987, Mr. Ambus was employed with the Granite School District. As of that date, Mr. Ambus' address was 831 Stratford Avenue, Salt Lake City, Utah 84106.

(c) Since January 23, 1987, to the present, many school officials knew where Mr. Ambus resided, or where he could be contacted, and knew that he was represented by me, as his counsel, in litigation pending before the United States District Court for the District of Utah.

Dr. Roger C. Mouritsen, Executive Secretary
September 27, 1988
Page Two

(d) On March 18, 1988, two years after the alleged event, Dr. Mouritsen filed a complaint before the U.P.P.A.C. because, "Information was received indicating that Gregory Ambus was charged with two counts of drug distribution and one count of drug selling, stemming from alleged marijuana exchanges with or witnessed by a police informant."

(e) The Complaint of Dr. Mouritsen was sent to 831 Stratford Avenue, Salt Lake City, Utah. Apparently, Granite School District provided this address. Such correspondence was returned by the post office.

(f) On April 11, 1988, Dr. Mouritsen sent a Notice of Hearing to 831 Stratford Avenue, Salt Lake City, Utah 84105. Such correspondence was returned unclaimed.

(g) Mr. Ambus never received the correspondence described above.

(h) Apparently on May 20, 1988, a hearing of some unknown kind was held and a recommendation to suspend was provided.

(i) On August 19, 1988, the State Board of Education revoked Mr. Ambus' certificate.

(j) On August 24, 1988, Mr. Ambus requested immediate review by the State Board of Education.

(k) Apparently the State Board of Education referred the matter back before the U.P.P.A.C.

(l) As I understand Dr. Mouritsen's letter dated September 26, 1988, the hearing now scheduled for October 6, 1988, is not a de novo due process hearing. Rather, it is a hearing to "consider reinstatement" of Mr. Ambus' certificate.

Dr. Roger C. Mouritsen, Executive Secretary
September 27, 1988
Page Three

With the above facts in mind, I would suggest that Mr. Ambus' certificate ~~be~~ reinstated immediately and that, if still requested by the Complainant, a hearing be held to determine whether the certificate be revoked.

First, Section 53-50-12.5 U.C.A. (1953), as amended, requests that written notice of hearing be sent "to the last known address and to the address shown on the records of the commission" [emphasis added]. Such was not done in this case and my client never received any notice of the hearing.

Second, both by ~~constit~~itutional and statutory prescription, my client ~~is~~ entitled to due process before his certificate is ~~revoked~~ and not after.

I would like to ~~resol~~ve this issue immediately and short of judicial ~~intervention~~. Would you please have your counsel contact me ~~immedi~~ately should any questions exist.

Sincerely,



Stephen W. Cook

SWC:dn

cc: Gregory T. Ambus

STEPHEN W. COOK, USB #0720
COOK & WILDE, P.C.
Attorneys for Respondent
6925 Union Park Center, Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000

STATE BOARD OF EDUCATION

UTAH PROFESSIONAL PRACTICES ADVISORY COMMISSION

STATE BOARD OF EDUCATION	:	
	:	
Claimant.	:	
	:	NOTICE OF OBJECTIONS
vs.	:	
	:	
GREGORY T. AMBUS,	:	
	:	
Respondent.	:	

The Respondent, Gregory T. Ambus, by and through his counsel, hereby provides formal notice of objections to the present proceeding:

1. Lack of Due Process: Prior Revocation Notices.

On March 18, 1988, Roger C. Mouritsen filed a Complaint with the U.P.P.A.C. against the Respondent. A copy of the Complaint was mailed to Respondent at 831 Stratford Avenue which was never received by the Respondent and which was returned to the U.P.P.A.C. On April 11, 1988, a notice of hearing was sent to the Respondent to the same address,

which apparently was not received and was returned again as described above. A hearing was held on May 20, 1988 and the U.P.P.A.C recommended that the Respondent's Certificate be suspended. The State Board of Education revoked his certificate on August 19, 1988 for unprofessional behavior. Mr. Ambus first learned of this action on August 24, 1988 when he was-suspended from teaching in the Salt Lake School District.

The Respondent personally and through his counsel have notified the U.P.P.A.C. that the Respondent was not given actual notice of the proceedings. Both have notified the State Board of Education and the U.P.P.A.C. that the Respondent's right to due process has been violated and has demanded that his certificate to teach be restored prior to any further hearings. The Respondent therefore objects to these proceedings until his certificate is returned.

Cleveland Board of Education vs. Loudermill, 479 U.S. 532 (1985); Pease v. Industrial Commission, 694 P.2d ⁶¹³1207 (Utah 1983); and Worrall v. Ogden City, 616 P.2d 598 (Utah 1980).

2. Lack of Due Process: Present Hearing Notices.

Despite the Respondent's requests to do so, the Respondent has not received any notice of any specific issue to be

decided in these proceedings. There is no question that the Respondent is entitled to such notice. Section 63-460-3 U.C.A. (1953), as amended; Nelson v. Jacobsen, supra; Worrall v. Ogden City, supra. In addition, Utah's Administrative Procedure Act has not been followed in many respects as provided by law. For example, see Section 63-46(b)-3(2) U.C.A. (1953), as amended.

3. Lack of Due Process: Constitutionality of Section 53A-6-104 U.C.A. (1953), as amended. The Respondent objects to any proceedings based upon such statute because the same is unconstitutionally void. Burton v. Cascade School District Union High School No. 5, 512 F.2d 850 (9th Cir. 1975); State v. Musser, 223 P.2d 193 (Utah 1950).

4. Statute of Limitations. This action is barred by the applicable statute of limitations, Section 78-12-29 (2) U.C.A. (1953) as amended.

5. Expungement. No action may be taken against the Respondent due to any events associated with the charges which were filed against the Respondent which were dismissed, expunged, and sealed. Such actions are binding upon the State Superintendent as a State entity and as a State official Section 78-18-2 U.C.A. (1953) as amended.

Moreover, the alleged offense was non job related and consideration may only be given to job related convictions, Section 53A-3-410(4) U.C.A. (1953), as amended. An unproved offense is no basis for State action in revoking a certificate.

6. Objection to Committee and Presiding Officer.

Upon information and belief, the presiding officer and members of the Committee were on the same committee which recommended suspension of the Respondent's certificate on May 20, 1988. The Respondent is entitled to a fair and impartial presiding officer and committee members.

DATED this 20 day of October, 1988.



STEPHEN W. COOK

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Objections was hand-delivered, to the Presiding Officer, Gail Mladejovoky, this 20 day of October, 1988.

Shirley Cook