

1992

Kent Blaine Hansen and Brent D. Hansen v. Division of Occupational and Professional Licensing : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF

920302

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENT BLAINE HANSEN, and
BRENT D. HANSEN,

Petitioners/
Appellant,

vs.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING,

Respondent/
Appellee.

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Case No. 920291-CA

920302

PETITION FOR CERTIORARI

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JUN 30 1992

CLERK SUPREME COURT
UTAH

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in denying Petitioners' Petition for Review of non-final administrative orders, when Petitioners, pursuant to Utah Code Ann. § 63-46b-14(2)(b) (1991) and Utah Rule of Civil Procedure 65B, made a showing that absent review of the orders, Petitioners would be irreparably harmed and had no other means of redress?

ORDER OF THE COURT OF APPEALS

A copy of the unpublished Order in the above-encaptioned case, issued by the Court of Appeals on May 29, 1992, is attached as an exhibit to this Petition.

SUPREME COURT JURISDICTION

The Order of the Utah Court of Appeals from which Petitioners seek review is dated May 29, 1992. There has been no request for rehearing or extension for time to petition for certiorari.

Utah Code Ann. § 78-2-2(3) (1991) confers jurisdiction upon the Supreme Court to review this Order:

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals

. . . .

CONTROLLING STATUTES

Utah Constitution Art. I, Sec. 11

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Code Ann. § 78-2a-3(2) (1991)

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer.

Utah Code Ann. § 63-46b-14(2) (1991)

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

. . . .

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Utah Rule of Civil Procedure 65B

(a) **Availability of remedy.** Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful imprisonment), paragraph (c) (involving

other types of wrongful restraint on personal liberty), paragraph (d) (involving wrongful use of public or corporate authority) or paragraph (e) (involving the wrongful use of judicial authority and the failure to exercise such authority). There shall be no special form of writ. The procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

. . . .

(e) Wrongful use of judicial authority or failure to comply with duty.

(1) Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph (e) may petition the court for relief.

(2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust, or station; or (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled.

(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) Scope of review. Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

STATEMENT OF THE CASE

Course of Proceedings Below

The five interlocutory orders from which Petitioners brought their Petition for Review were entered by the Division of Occupational and Professional Licensing, Administrative Law Judge (A.L.J.) J. Steven Ecklund presiding, on April 7, 1992 and April 17, 1992. Petitioners timely filed a Petition for Review Or, In The Alternative, For Extraordinary Relief in the Utah Court of Appeals on May 7, 1992. The Court of Appeals denied petitioners' Petition by an Order dated May 29, 1992. It is from this Order that Petitioners bring this Petition for Certiorari.

Statement of the Facts

On August 17, 1989, the Division of Occupational and Professional Licensing of the Utah Department of Commerce (Division) filed a Notice of Agency Action against Petitioners, seeking to suspend or revoke Petitioners' dental licenses for unprofessional conduct under the provisions of Utah Code Ann. § 58-7-2(6) (1989). Among other things, the Division alleged that Petitioners had violated the provisions of Utah Code Ann. §§ 58-7-1.1(7)(k), -(l), -(q), and -(r) by, among other things, taking lewd nude photographs of K.W., a patient, and performing unnecessary treatments in order to exchange drugs for K.W.'s sexual favors.

On April 30, 1991, Petitioners filed a motion to dismiss the action. On May 23, 1991, the Division heard oral arguments on this motion and entered a preliminary order as to the identity of the

presiding officer. On April 1, 1992, in oral argument, Petitioners requested a clarification of this order. On April 7, 1992, A.L.J. Ecklund filed a Supplemental Notice and Accompanying Order, which stated that the Board of Dentists and Dental Hygienists would act as the presiding officer to determine factual issues and render a written recommended order, and that the A.L.J. would act as the presiding officer for legal issues and would assist the Board in preparing that order.

On June 20, 1991, Petitioners filed a motion to close the hearing on the matter to all members of the press and public. On July 1, 1991, the Division filed an opposing memorandum. The Salt Lake City Tribune filed a petition to intervene in this motion. On July 2, 1991, the Division granted the Tribune's motion to intervene, and on July 3, 1991, the Tribune filed its memorandum in opposition to Petitioners' motion. On July 9 and 10, 1991, Petitioners filed replies to the submissions of the Division and the Tribune. Oral argument on this motion was heard on April 1, 1992 by A.L.J. Ecklund. On April 7, 1991, he ordered that Petitioners' motion to close the hearing be conducted before the Board, and that the hearing was governed by the Open and Public Meetings Act because the Board, rather than the A.L.J., was the presiding officer authorized to enter findings of fact, conclusions of law and order subsequent to any hearing on the merits. He also denied Petitioners' motion to close the hearing, ordering that the hearing be open to the press and public.

On June 14, 1991, the Division filed a motion seeking to exclude certain evidence, including: (1) K.W.'s prior sexual history and general reputation, and (2) evidence of that nature as to similarly situated witnesses. Petitioners filed a response to this motion on July 1, 1991. On July 2, 1991, the Division filed a reply memorandum. A.L.J. Ecklund heard oral argument on this motion on April 1, 1992. He ordered that evidence of K.W.'s and other witnesses' general prior sexual history or reputation be excluded from the proceedings on April 17, 1992.

On July 11, 1991, the Division filed a brief on the issue of the standard of proof which should govern a hearing on the merits of the action. Petitioners filed a response on June 21, 1991, to which the Division replied on July 1, 1991. A.L.J. Ecklund also heard this motion on April 1, 1992. Following oral argument, on April 17, 1992, he ordered that the standard of proof for professional licensure proceedings initiated by the Division of Occupational and Professional Licensing is the preponderance of the evidence rather than clear and convincing evidence.

Petitioners attempted to appeal all of these interlocutory orders to the Court of Appeals.

ARGUMENT

- I. THE UTAH COURT OF APPEALS PROPERLY HAS JURISDICTION OVER THIS APPEAL PURSUANT TO UTAH CODE ANN. § 78-2a-3(2) (1991) AND UTAH CODE ANN. § 63-46b-14(2) (1991).**

This Petition sets forth an issue of first impression in the State of Utah: Is there any statutory provision for interlocutory

appellate review of orders of state administrative agencies and, if there is such provision, did the Court of Appeals err in denying Respondents' Petition for Review?

Two Utah statutes define the jurisdiction of the Court of Appeals over orders of administrative agencies, Utah Code Ann. § 78-2a-3(2) (1991) and Utah Code Ann. § 63-46b-14(2) (1991).

Section 78-2a-3(2), in relevant part, states:

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies . . .

(Emphasis added.)

A. The Legislature Has Granted Appellate Jurisdiction Over Interlocutory Appeals From State Agencies To The Utah Court Of Appeals.

One of the basic rules of statutory construction is that words used in statutes should be given their ordinary, plain meaning, In re R.D.S., 777 P.2d 532, 537 (Utah Ct. App. 1989); State v. Stromberg, 783 P.2d 54, 60 (Utah 1989), because the plain, ordinary meaning is the best indication of legislative intent. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038 (Utah 1989). As a corollary, unambiguous language in a statute may not be interpreted to contradict its plain meaning. Bonham v. Morgan, 788 P.2d 497, 500 (Utah 1989); accord Camp v. Office of Recovery Services, 779 P.2d 242, 245 (Utah Ct. App. 1989). Thus, a statute should be read according to its literal wording "unless it would be unreasonably

confusing or inoperable." Amax Magnesium Corp. v. Utah State Tax Comm'n, 796 P.2d 1256, 1258 (Utah 1990).

Further, in interpreting legislation, this Court must assume that "the legislature advisedly adopted each term of a statute," and must, accordingly, "construe statutory provisions to make them harmonious with the other statutes relevant to the subject matter." State v. Chindgren, 777 P.2d 527, 529 (Utah Ct. App. 1989); accord Amax Magnesium Corp., 796 P.2d at 1258; State v. Coando, 784 P.2d 1228, 1230 (Utah Ct. App. 1989). This is because "the intent of the Legislature is revealed in the use of the term in the context and structure in which it is placed." Taylor v. Utah State Training School, 775 P.2d 432, 435 (Utah Ct. App. 1989). Accordingly, this Court must favor a construction "which gives effect to all of [the statute's] provisions," Pate v. Marathon Steel Co., 784 P.2d 428, 430 (Utah 1989); accord McBride v. Carter, 784 P.2d 141, 143 (Utah 1989), so must give "effect to each . . . word, phrase, clause, and sentence where reasonably possible." Chris & Dick's Lumber & Hardware v. Tax Comm'n of the State of Utah, 791 P.2d 511, 516 (Utah 1990), Howe, J., dissenting. This Court "may not take, strike, or read anything out of a statute or delete, subtract, or omit anything therefrom." Id. Statutory language may only be omitted, eliminated, or disregarded as surplusage "when the words of a statute are . . . meaningless or inconsistent with the intention of the legislature otherwise plainly expressed in the statute." Id. Thus, "[a] court will not construe a particular

provision of a statute so as to neutralize or modify other provisions if any other construction of the particular provision is at all tenable." Id. Section 78-2a-3(2), accordingly, must be interpreted by this Court according to its plain, ordinary meaning and, to the extent reasonably possible, the interpretation must include the meaning of all words, phrases, clauses, and sentences in the statute.

The emphasized language in section 78-2a-3(2) unambiguously indicates that the Court of Appeals has "interlocutory appellate jurisdiction" over "final orders" and "decrees" of state agencies. Because "orders" and "decrees" issuing from state agencies are essentially the same thing, the term "decrees" should be distinguished from the term "final orders," to utilize each term of the statute. Because the statute has already provided that the Court of Appeals has interlocutory jurisdiction, a reasonable interpretation is that "final orders" applies to final agency action and "decrees" applies to non-final agency action, thereby giving the Court jurisdiction over both final and non-final administrative actions.

In contrast, interpreting "final orders and decrees" to mean "final orders and final decrees" would make the legislature's use of the term "decrees" redundant and without meaning, in violation of the canons of statutory interpretation. If the legislature had intended to limit the Court's jurisdiction to final orders only, it presumably would have used the language it has used elsewhere

for this purpose, "final agency action." See, e.g., Utah Code Ann. § 63-46b-16(1) (1991). To adopt the position that the Court of Appeals only has jurisdiction over final agency orders, this Court would have to disregard the phrase "including jurisdiction of interlocutory appeals" in the initial statement, which is applicable by its position to the entire subsection, including subsection (a). This statute, accordingly, should be interpreted to give the Court of Appeals jurisdiction over both final orders and interlocutory decrees coming from state agencies.

B. The Utah Administrative Procedures Act Allows Judicial Review Of Non-Final Agency Actions In Compelling Circumstances.

The Court of Appeals is required, pursuant to Utah Code Ann. § 78-2a-3(4) (1991) to "comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings." One of these requirements, Utah Code Ann. § 63-46b-16(1) (1991), states that "the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings." This statute sets forth the general rule that a party may seek judicial review of an agency action only after exhausting all available administrative remedies. See Tax Comm'n v. Iverson, 782 P.2d 519, 524 (Utah 1989). The steps required for exhaustion of available administrative remedies are specified by statute and generally include: (1) The initial final determination of the issue by the agency; (2) an additional application for review or rehearing; Hi-Country Homeowners Assn. v. Public Service Comm'n, 779 P.2d 682, 684 (Utah 1989); and (3)

in some cases, additional administrative appeals. See, e.g., Heinecke v. Department of Commerce, Div. of Occupational and Professional Licensing, 810 P.2d 459, 463 (Utah Ct. App. 1991) (there is no statutory requirement for agency review of an order of the Division of Occupational and Professional Licensing comparable to what Utah Code Ann. § 54-7-15 provides for the Public Service Commission). In the present case, we are concerned only with the first administrative remedy, the final determination of the issue by the agency.

There are exceptions to this general rule. The statutory justification for these exceptions is set forth in Utah Code Ann. § 63-46b-14(2) (1991), which provides as follows:

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

. . .

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Through the plain language of subsection (b), a party may seek judicial review prior to exhaustion of any or all administrative remedies if the administrative remedies are inadequate or the exhaustion of remedies would result in irreparable harm dispropor-

tionate to the public benefit derived from requiring exhaustion. Because a party may be relieved of the requirement of exhaustion with respect to "any or all administrative remedies," and because a final determination is an administrative remedy, a party may, under this language, seek judicial review of an interlocutory administrative order if it comes within either sub-subsection (i) or sub-subsection (ii).

The Utah Supreme Court has recognized that such exceptions to the general rule exist. For example, in Iverson, 782 P.2d at 524, the Court stated: "Exceptions to this rule exist in unusual circumstances where it appears that there is a likelihood that some oppression or injustice is occurring such that it would be unconscionable not to review the alleged grievance or where it appears that exhaustion would serve no useful purpose." See also State v. DuPere, 709 P.2d 493, 497 (Alaska 1985) ("in a proper case a court may exercise its discretion and provide judicial relief without requiring the claimant to exhaust his administrative remedies").

The Court of Appeals has, therefore, been explicitly granted interlocutory jurisdiction over appeals, including those from administrative actions. Further, the Utah Administrative Procedure Act (UAPA), by which the appellate courts are bound, authorizes interlocutory administrative appeals within the restrictions set forth by § 63-46b-14(2). Accordingly, if petitioners can show that their appeal comes within these requirements, this Court

should determine that the Court of Appeals erred in refusing to hear Petitioners' appeal.

1. There Is No Adequate Administrative Remedy For The Wrong Petitioners Assert.

To come within the requirements of subsection (i), Petitioners must show that "the administrative remedies are inadequate." Although the Utah appellate courts, to Petitioners' knowledge, have not ruled on what constitutes an inadequate remedy, other jurisdictions have. As an example, the Arizona Supreme Court accepted jurisdiction over an appeal of an interlocutory order of the Industrial Commission to the effect that the petitioner was not entitled to use a tape recorder during a medical examination. The court held that, because this was a discovery order and a tape recording of what was said during the examination would constitute admissible evidence at any Industrial Commission hearing, the petitioner did not have an adequate remedy after an award had been issued, and so came within this exception. Burton v. Industrial Comm'n of Arizona, 166 Ariz. 238, 801 P.2d 473, 474-75 (1990); see also Cussimano v. Kansas City Southern Ry. Co., 5 Kan. App. 2d 379, 617 P.2d 107, 113 (1980) ("[e]xhaustion of administrative remedies is a matter within the sound discretion of the courts and is not required when administrative remedies are inadequate"); accord Tiernan v. Trustees of California State University and Colleges, 188 Cal. Rptr. 115, 655 P.2d 317, 320, 33 Cal. 3d 211 (1983); Western Kansas Express, Inc. v. Dugan Truck Line, Inc. 11 Kan. App. 2d 336, 720 P.2d 1132, 1134 (1986); Mattoon v. City of

Norman, 617 P.2d 1347, 1350 (Okla. 1980). "As a general rule, the exhaustion requirement is only applicable when there is an available procedure which, if pursued successfully would accomplish the petitioner's desired result." Lyke v. Lane County, 70 Or. App. 82, 688 P.2d 411, 413 (1984).

In the present case, there is no statutorily delineated method of obtaining redress from an interlocutory order within the Division, or any provision for agency review of even a final order. Heinecke, 810 P.2d at 463. As such, there is no administrative procedure which would right the wrong which Petitioners assert. Further, because many of the issues raised by the appeal would be moot if a final order were obtained, especially the issues involving the open hearing procedure and the evidentiary issues, pursuing the actions until a final order is obtained would not provide an adequate remedy.

Many jurisdictions find that the requirement of exhausting administrative remedies is inapplicable when all that is involved in the appeal is statutory interpretation. For example, the court in Carter v. Alaska Public Employees Ass'n, 663 P.2d 916, 922 n. 19 (Alaska 1983) stated that the doctrine of exhaustion of remedies "is not applicable where the remedy sought is judicial rather than administrative," and that "[r]esolution of a question of statutory interpretation is judicial rather than administrative." The issues raised in Petitioners' Petition are all matters of

statutory interpretation, making judicial review even more desirable.

2. If Forced To Exhaust Administrative Remedies, Petitioners Will Suffer Irreparable Harm.

To come within the requirements of subsection (ii), Petitioners must show that "exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion." Continuing the present adjudication through to a final order would result in irreparable harm to Petitioners which would be totally out of proportion to the good anticipated from requiring petitioners to exhaust administrative remedies.

The major harm which will impact Petitioners should this Petition be denied, thereby forcing Petitioners to continue litigation under the present orders, is the complete, total, and irreparable damage to their personal and professional reputations which will result from an open and public hearing on the merits of the case. Because of the extremely controversial and inflammatory nature of the charges made by the Division against Petitioners, the propensity of key witnesses to make outrageous and inflammatory statements to the press, and the highly prejudicial nature of the evidence which might be introduced, Petitioners, even if they were ultimately cleared of the Division's charges, would, in all likelihood, lose their dental practices and personal reputations as a consequence of publicity in this matter. That any hearing on the merits will be highly publicized by the press and

other media is extremely likely; the Salt Lake Tribune has already intervened in opposition to Petitioners' motion to close the proceedings, and K.W., one of the more flamboyant witnesses for the Division, has already appeared on local and national television and made statements about the case. This relatively small amount of publicity has already had serious repercussions for Petitioners. Should the hearing on the merits of the case become a "media event," as would be the logical consequence of the Division's order, the ensuing publicity will only cause irreparable, uncontrollable, and incalculable damage to Petitioners' reputations and livelihoods. For this reason alone, judicial review of the open hearing order is critical to the administration of justice in this case.

The issue of the identity of the presiding officer, similarly, needs immediate judicial attention; the Division is only able to justify the application of the Open and Public Meetings Act to the present proceeding, the basis for its ruling that the hearing should be open to the press and public, because of its order making the Board, rather than the Administrative Law Judge, the trier of fact. The order identifying the Board as the presiding officer responsible for factual findings is, therefore, the cause of the public hearing issue. If the A.L.J. were the trier of fact, as the Utah Administrative Procedure Act contemplates, then the Division, in all probability, could not order an open hearing. Further, there is a substantial chance that this order, which

allows the Division to "switch" presiding officers at will during the course of this single matter, will result in substantial arbitrariness and prejudice to Petitioners.

Petitioners will also be exposed to substantial prejudice as a result of the remaining orders, which prejudice could be avoided if Petitioners were granted interlocutory review. Central to Petitioners' defense is evidence of K.W.'s reputation for and history of promiscuity, and evidence of her previous, extensive, and ongoing behavior pattern of seducing not only other medical practitioners but many other persons. As a consequence of the order excluding evidence of K.W.'s prior sexual history, Petitioners' defense will be substantially impaired. This problem should be remedied immediately, being an evidentiary issue which could become moot after the rendition of a final order because petitioners will not be able, under the order, to even proffer, let alone prove substantial evidence necessary for their defense, making an incomplete and ineffective record for appeal from the final order.

Accordingly, if Petitioners are required to exhaust their administrative remedies by obtaining a final agency order, they will be irreparably harmed. Because this irreparable harm will conceivably destroy Petitioners' personal and professional lives, regardless of the outcome of this proceeding, it is substantially greater than any interest the state may have in requiring exhaustion of remedies. Consequently, this case is an appropriate one for interlocutory review.

In summary, Petitioners can not only show one but both of the circumstances set forth in section 63-46b-14(2)(b), that the available administrative remedies are inadequate, and that exhaustion of remedies would result in irreparable harm.

The Utah Constitution, art. I, sec. 11, states, in part, that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessarily delay " Should Petitioners be barred from their interlocutory appeal, they will be irreparably injured in their reputations and businesses, and will have no recourse to the courts to attempt to resolve the problem prior to the occurrence of the injury. Such denial of judicial recourse is a violation of Petitioners' constitutional rights.

In conclusion, the Court of Appeals has jurisdiction, granted by statute, over interlocutory appeals, including interlocutory appeals from administrative actions, provided that: (1) There is no adequate administrative remedy, or (2) the petitioner will be irreparably harmed out of proportion to the benefit expected from exhausting administrative remedies, if forced to exhaust administrative remedies, including obtaining a final administrative order. In the present case, there is not only no administrative remedy, but the pursuit of a final order under the present decrees would result in incalculable damage to Petitioners' reputations and livelihoods regardless of the outcome of this proceeding.

This Court should, therefore, find that the Court of Appeals erred in denying Petitioners' Petition for Review.

II. THE UTAH COURT OF APPEALS PROPERLY HAS JURISDICTION OVER THIS APPEAL PURSUANT TO THE EXTRAORDINARY WRIT PROVISIONS OF RULE 65B OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 65B of the Utah Rules of Civil Procedure allows for relief to be granted under its provisions "where no other plain, speedy, and adequate remedy exists." If this Court should determine that a Petition for Review is unavailable to Petitioners, it should, alternatively, find that review by the Court of Appeals of the orders at issue is permissible under rule 65B.

Under rule 65B, which was enacted in its present form in 1991, relief is available for several categories of injury, including the wrongful use of or failure to exercise public authority. Utah R. Civ. P. 65(B)(e) (1992). Under subsection (e)(2), "[a]ppropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion"

Although the form of rule 65B has been substantially changed recently, the substantive intent behind the rule and the requirements for its application have not changed over the last several decades. The Utah appellate courts have given instruction as to how this rule is to be applied. Most instructive are the guidelines set forth in Anderson v. Baker, 5 Utah 2d 33, 296 P.2d 283 (1956):

(1) If the lower tribunal is without jurisdiction or is proceeding in excess of its jurisdiction and there is no adequate remedy, the writ should issue as a matter of right.

(2) If the lower tribunal is proceeding without jurisdiction, but it appears that there is an adequate remedy, the writ should generally not issue, but the court is not entirely without discretion.

(3) If the lower tribunal has jurisdiction but it appears that by an erroneous order it has placed one party in a position where he will be irreparably injured and that he has no adequate remedy to prevent the injury or retrieve his loss, then the court may in the exercise of its sound discretion use the writ as a procedure for immediate review.

(4) If there is no want or excess of jurisdiction and there is an adequate remedy, the writ should never issue.

Rules (1) and (4) are absolutes. Rules (2) and (3) are guidelines.

Id. at 285-86 (citations omitted) (emphasis in original) (emphasis added) (quoting Robinson v. City Court for City of Ogden, 112 Utah 36, 185 P.2d 256, 261 (1947)).

In the present case, Petitioners are appealing from orders of an administrative agency which are, in their view, abuses of the agency's discretion, thus falling squarely within subsection (e) of rule 65B. This situation also falls within section (3) of the Anderson guidelines, in that the Division has jurisdiction over the matter but the erroneous orders of the Division are placing petitioners in a position where they will be irreparably injured absent immediate review of the orders, and there is no other remedy of any sort available for Petitioners. That Petitioners will be irreparably injured has been discussed in detail in the preceeding

section. Accordingly, the Court may use this as a procedure for intermediate review if Petitioners have no adequate remedy to prevent irreparable injury.

It is axiomatic that a party who has an adequate remedy at law cannot avail himself of a rule 65B petition. See Crist v. Mapleton City, 28 Utah 2d 7, 497 P.2d 633, 634 (Utah 1972) (petitioners did not avail themselves of readily available remedies at law, so "placed themselves out of reach of the extraordinary writ of mandamus"). Should this Court determine that the Utah Court of Appeals does not have jurisdiction to entertain an interlocutory administrative appeal under the provisions of § 78-2a-3(2) and § 63-46b-14(2), Petitioners have no available or adequate remedy.


It is equally axiomatic that where there is no available or adequate remedy at law, a rule 65B petition is available. For example, the Utah Court of Appeals, in Davis County v. Clearfield City, 756 P.2d 704, 707 (Utah Ct. App. 1988), found that an action for extraordinary relief was the appropriate vehicle for obtaining review of the Davis City Council's decision to uphold denial of a conditional use permit sought by Davis County where there was no statutory provision for review of a city council action. Petitioners, should this Court determine that interlocutory review is otherwise unavailable, will be similarly situated with Davis County; a rule 65B writ should, therefore, be available to Petitioners.

Accordingly, even if this Court determines that an interlocutory appeal is unavailable under sections 78-2a-3(2) and 63-46b-14(2), it should find that the Court of Appeals erred in denying Petitioners' Petition because Petitioners are entitled to bring this Petition under rule 65B.

CONCLUSION

In conclusion, this Court should reverse the Order of the Court of Appeals denying Petitioners' Petition for Review on either of two alternative theories: Petitioners are entitled to interlocutory review of non-final orders of the Division on the grounds that such review is authorized under the (1) jurisdictional provisions of Utah Code Ann. § 78-2a-3(2) and § 63-46b-14(2), or (2) procedures for extraordinary relief set forth in rule 65B of the Utah Rules of Civil Procedure.

DATED this 26th day of June, 1992.



Jackson Howard,
Leslie Slaugh, and
Linda J. Barclay, for
HOWARD, LEWIS & PETERSEN

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this _____ day of June, 1992.

Brent A. Burnett
Robert E. Steed
Tax and Business Regulation Division
36 South State Street #1100
Salt Lake City, Utah 84111

SECRETARY

APPENDIX

MAY 29 1992

Mary Hoover

✓ **Thy T Noonan**
Clerk of the Court
Main Court of Appeals

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ORDER

Case No. 920291-CA

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Dated this 27th day of May, 1992.


Gregory K. Orme, Judge

Russell W. Bench
Russell W. Bench, Judge

Judith M. Billings
Judith M. Billings, Judge

RECEIVED

JUN 02 1992

HOWARD, LEWIS & PETERSEN

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of May, 1992, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Jackson Howard
Leslie W. Slaugh
Linda J. Barclay
Howard, Lewis & Petersen
Attorneys at Law
120 East 300 North
P.O. Box 778
Provo, UT 84603

Robert E. Steed
Brent A. Burnett
Assistant Attorney General
Tax & Business Regulation Division
36 South State Street, 1100 Floor
Salt Lake City, UT 84111

Dated this 29th day of May, 1992.

By

Dea Slaughter
Deputy Clerk

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	ORDER ON PROCEDURES
BRENT D. HANSEN	:	GOVERNING DISPOSITION OF
TO PRACTICE AS DENTISTS	:	RESPONDENTS' MOTION TO
AND TO PRESCRIBE AND ADMINISTER	:	CLOSE HEARING
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Jackson Howard and Leslie W. Slaugh for Respondents

Robert E. Steed for the Division of Occupational and
Professional Licensing

Sharon E. Sonnenreich for the Salt Lake Tribune

BY THE ADMINISTRATIVE LAW JUDGE:

On June 20, 1991, Respondents filed a motion to close the hearing in the above-entitled matter to all members of the press and public. On July 1, 1991, the Division filed a memorandum opposing that motion and the Salt Lake Tribune filed a petition to intervene with respect to the motion. By Order, dated July 2, 1991, the Court granted that petition and the Intervenor's memorandum in opposition to Respondents' motion was filed on July 3, 1991. Respondents filed replies to the submissions by the Division and the Intervenor on July 9, 1991 and July 10, 1991, respectively.

Oral argument on the motion was conducted on April 1, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Dentists and Dental Hygienists

Board. Aside from the merits of the motion, the narrow issue initially presented was the manner in which the motion should be addressed. Specifically, the issue is whether the motion is one properly before the administrative law judge or the Board. At the conclusion of argument in that regard, the Court entered an order, the terms of which are restated as follows:

CONCLUSIONS OF LAW

Respondents assert parties to a formal adjudicative proceeding have a statutory right to be present at any hearing, but urge the press and the public have no such right. Respondents thus contend the presiding officer may take appropriate measures to preserve the integrity of the hearing and may thus exclude the press and public in an appropriate case.

Respondents further assert the presiding officer in this proceeding is the administrative law judge. Since the Open and Public Meetings Act (Utah Code Ann. Section 52-4-1, et seq., hereinafter, the Act) only applies to meetings convened by a public body which consists of two or more persons, Respondents urge it is the administrative law judge - as the presiding officer - who is authorized to determine whether the subsequent hearing in this proceeding should be closed.

The Division and the Intervenor jointly contend the Act applies to the hearing to be conducted in this proceeding, any decision to close the hearing is thus governed by the Act and that determination is to be made by the public body before whom the hearing will be held.

The Act generally governs meetings convened by a public

body, as those terms are defined in Sections 52-4-2(1) and (2), respectively. Sections 52-4-2(1) defines "meeting" as:

. . . the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power. . . .

Section 52-4-2(2) defines "public body" as:

. . . any administrative, advisory, executive or legislative body of the state or its political subdivisions which consists of two or more persons that expends, disburses, or is supported in whole or in part by tax revenue and is vested with the authority to make decisions regarding the public's business

On April 11, 1977, an opinion was issued (#77-94) by James L. Barker of the Office of the Utah Attorney General to Ronald E. Casper, then Director of the Department of Registration, now known as the Division of Occupational and Professional Licensing. The just-stated opinion was in response to various questions concerning the scope of the Act with regard to meetings conducted by boards and committees established pursuant to Section 58-1-1 et seq. The opinion set forth the conclusion that such boards and committees are "public bodies" with the meaning of Section 52-4-2 and that quasi-judicial hearings "to determine findings and recommendations for disciplinary action" are subject to the Act.

The Utah Administrative Procedures Act (Section 63-46b-1 et seq., hereinafter, the UAPA) does not expressly provide that hearings conducted in formal adjudicative proceedings are subject to the requirements of Section 52-4-1 et seq. Section 63-46b-8

generally sets forth hearing procedures applicable in formal adjudicative proceedings. Subsection (1)(i) of that statute merely provides all hearings "shall be open to all parties". However, Comments of the Utah Administrative Law Advisory Committee on the Drafting and Interpretation of the UAPA (Code Co. at 14) provide as follows:

Non-parties may also be afforded the opportunity to observe hearings. See e.g., Section 52-4-1 et seq. (Open and Public Meetings Act).

Given the foregoing, the Court concludes the Act applies to hearings conducted in professional disciplinary licensure proceedings initiated by the Division if the presiding officer at the hearing is a "public body" within the meaning of Section 52-4-2(2). The Court also notes Section 13-1-11, which authorizes the Department to employ administrative law judges "to conduct hearings for the department". If an administrative law judge is the presiding officer duly authorized to conduct a hearing and subsequently enter an order pursuant to Section 13-1-12(1)(a), the Act would not apply because an administrative law judge is not a "public body" within the meaning of the Act.

Section 63-46b-8(2) of the UAPA expressly provides that nothing in that section precludes the administrative law judge - as the presiding officer - "from taking appropriate measures necessary to protect the integrity of the hearing". Further, R151-46b-10(B) of the rules of procedure which govern departmental adjudicative proceedings provides:

Unless ordered by the department for good cause, if a hearing is conducted, it shall be open to the public.

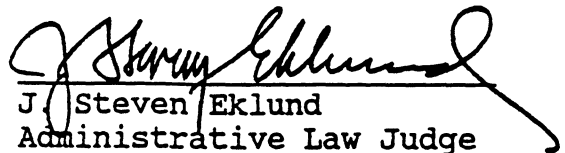
Pursuant to the just-quoted rule, an administrative law judge - as the presiding officer authorized to conduct a hearing - could determine to close the hearing for good cause (e.g., an in camera proceeding could be conducted, as was done at the conclusion of Respondents' April 1, 1992 voir dire examination of the Board). Such a determination would not be governed by the Act.

However, it is the Board which is duly authorized to act as the presiding officer in the subsequent hearing in this proceeding with respect to the entry of findings of fact, conclusions of law and any recommended order regarding Respondents' licenses. Thus, the hearing to be held is governed by the Act and the decision whether to close the hearing is a matter properly addressed to the Board.

ORDER

WHEREFORE, IT IS ORDERED that Respondents' motion to close the hearing to be conducted before the Board is a matter governed by the Act. The Board - as the presiding officer authorized to enter findings of fact, conclusions of law and a recommended order subsequent to any such hearing - shall address Respondents' motion and determine whether the hearing should be closed, consistent with the provisions of the Act.

Dated this 7th day of April, 1992


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	ORDER ON RESPONDENTS'
BRENT D. HANSEN	:	MOTION TO CLOSE HEARING
TO PRACTICE AS DENTISTS	:	
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Jackson Howard and Leslie W. Slaugh for Respondents

Robert E. Steed for the Division of Occupational and
Professional Licensing

Sharon E. Sonnenreich for the Salt Lake Tribune

BY THE BOARD:

On June 20, 1991, Respondents filed a motion to close the hearing in this proceeding to all members of the press and public. On July 1, 1991, the Division filed a memorandum in opposition to that motion and the Salt Lake Tribune filed a petition to intervene with respect to the motion. By Order, dated July 2, 1991, the Court granted that petition and the Intervenor's memorandum in opposition to Respondents' motion was filed on July 3, 1991. Respondents filed replies to the submissions by the Division and the Intervenor on July 9, 1991 and July 10, 1991, respectively.

Oral argument on Respondents' motion was conducted on April 1, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Dentists and Dental Hygienists

Board. Members of the Board present were Mark L. Christensen, Paul R. Lunt, Elizabeth A. Reinerth, Max A. Blackham, Floyd R. Tanner, and Roger E. Grua. The remaining Board member, William E. Dunn, was also present, but Mr. Dunn had been recused from any participation as a Board member in this proceeding and did not participate with respect to the pending motion.

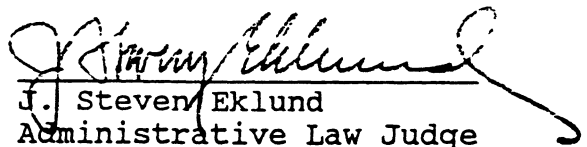
After the conclusion of oral argument, the Board deliberated the matter. Pursuant to Utah Code Ann., Section 52-4-1 et seq., the Board subsequently entered an order, the terms of which are restated as follows:

ORDER

WHEREFORE, IT IS ORDERED Respondents' motion to close the hearing to be conducted before the Board is denied. Specifically, Dr. Lunt, Ms. Reinerth, Dr. Blackham, and Dr. Tanner vote to conduct a hearing in this proceeding which shall be open to the press and public. Dr. Christensen and Dr. Grua would close the hearing.

Dated this 7th day of April, 1992

FOR THE BOARD


J. Steven Eklund
Administrative Law Judge

**BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	SUPPLEMENTAL NOTICE
BRENT D. HANSEN	:	AND ACCOMPANYING ORDER
TO PRACTICE AS DENTISTS	:	
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Jackson Howard and Leslie W. Slaugh for Respondents

Robert E. Steed for the Division of Occupational and
Professional Licensing

BY THE ADMINISTRATIVE LAW JUDGE:

The instant adjudicative proceeding was initiated pursuant to an August 17, 1989 Notice of Agency Action. The notice, which was signed by David E. Robinson as the Director of the Division of Occupational and Professional Licensing, recited a hearing would be conducted on October 4, 1989 and indicated the presiding officer at the hearing would be J. Steven Eklund, Administrative Law Judge for the Department of Commerce.

On April 30, 1991, Respondents filed a motion to dismiss. Oral argument was conducted with respect to that motion on May 23, 1991. Prior to conclusion of that argument, counsel for Respondents made inquiry regarding the procedures which would govern any subsequent hearing conducted to address whether a disciplinary sanction would enter as to Respondents' licenses. The Court informed counsel for Respondents as to the respective

roles of both the Dentists and Dental Hygienists Board and the Administrative Law Judge in that process.

Respondents now seek further clarification, urging the presiding officer in this proceeding should be the Administrative Law Judge, as initially indicated in the August 17, 1989 notice. Respondents assert the Administrative Law Judge should enter findings of fact, conclusions of law and then submit any recommendation to the Board for its review. On April 1, 1992, oral argument was presented as to the just-referenced matter and the Administrative Law Judge entered an order, the terms of which are restated as follows:

CONCLUSIONS OF LAW

Respondents assert this proceeding should be conducted in a manner consistent with that set forth in the August 17, 1989 notice. Specifically, Respondents urge no basis exists to designate various presiding officers to act in different capacities during the course of this proceeding. The Division contends the Utah Administrative Procedures Act (hereinafter, the UAPA) provides such flexibility and does not require the same individual or body of individuals to act as the presiding officer for all purposes throughout an adjudicative proceeding.

The UAPA clearly provides that different individuals or entities may act as the presiding officer with regard to a given phase of a proceeding. For example, Section 63-46b-3(2)(a) provides the notice of agency action shall be signed by "a presiding officer". Mr. Robinson thus acted as the presiding officer for that purpose when the August 17, 1989 notice of

agency action was issued. Section 63-46b-3(2)(a)(x) also requires the notice of agency action to identify the "name, title, mailing address and telephone number" of the presiding officer. The confusion in this case has been prompted by the August 17, 1989 notice, which failed to specifically and adequately inform Respondents as to the respective role of the Board and the Administrative Law Judge in this proceeding. In that regard, it is necessary to review the UAPA, the legislative history of Section 13-1-12 and Section 58-1-16 and the nature of agency practice pursuant to those statutes.

The UAPA, which became effective January 1, 1988, generally applies to all state agencies. Section 63-46b-2(h) defines "presiding officer" as:

. . . an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.

Section 63-46b-2(h) further provides:

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding;

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as the presiding officer during all phases of the proceeding.

The just-quoted statutes provide some guidance and limitations regarding who can serve as presiding officers. See Comments of Utah Administrative Law Advisory Committee on the Drafting and Interpretation of the UAPA (Code Co. at 11). Section 63-46b-2(h)(ii) and (iii) jointly operate to provide that different individuals or entities may act as the presiding officer with

respect to a given phase of a proceeding and, significantly, it is not necessary any given presiding officer during an earlier stage of a proceeding continue as the presiding officer throughout the latter stages of the proceeding.

Section 13-1-8.5(1) provides the Department of Commerce and its various divisions shall comply with the UAPA in their adjudicative proceedings. Section 13-1-1 provides the Department may employ administrative law judges to conduct hearings before the Department. Prior to January 1, 1988, Section 13-1-12 stated:

(1) The administrative law judge or an occupational board or representative committee, with assistance from the administrative law judge, shall render a written recommendation of administrative action, supported by findings of fact and conclusions of law . . .

Section 13-1-12 now provides:

(1)(a) At the close of an adjudicative proceeding, the administrative law judge or an occupational board or representative committee with assistance from the administrative law judge, shall issue an order.

Section 58-1-1 et seq. both establishes and generally governs the Division of Occupational and Professional Licensing. Section 58-1-16(1)(a) expressly provides the Division shall comply with the UAPA in all disciplinary licensure proceedings. Prior to January 1, 1988, Section 58-1-16 stated as follows:

(1)(a) Before suspending, revoking, or refusing to renew a license, and before issuing a cease and desist order, the division shall notify the licensee or license applicant of the action by letter deposited in the post office with postage prepaid

addressed to the last address of the licensee or license applicant known to the division, that the action is being considered and that the division will provide the licensee or license applicant with a formal hearing before an appropriate hearing officer or board, as designated by the director.

Section 58-1-16(2) further stated:

All hearings provided under this section shall be held before an appropriate hearing officer or board, as designated by the director, pursuant to Chapter 1, Title 13. The board or hearing officer shall render a written recommendation supported by the findings of fact and conclusions of law made at the hearing together with a recommendation for action. The director, with the concurrence of the appropriate board, may issue a written order based on the recommendations but is not bound to follow the recommendations of the administrative law judge or the hearing officer. The written order of the director shall include the rationale and justification for the decision. If the director does not issue an order within 10 days after the administrative law judge or the hearing officer has made the recommendations, the recommendations shall be binding on the parties to the administrative action.

Section 58-1-16 was amended, effective January 1, 1988. That statute now provides:

(a) All adjudicative proceedings shall be held before an appropriate presiding officer, as designated by the director;

(b) The presiding officer shall make written recommendations for action, findings of fact, and conclusions of law;

(c) The director, with the concurrence of the appropriate board, may issue a written order based on the recommendations but is not bound to follow the recommendations of the presiding officer;

(d) If the director does not issue an order within ten days after the presiding

officer has made the recommendations, the recommendations of the presiding officer shall become the order.

Section 58-7-2(6) specifically governs possible entry of a disciplinary sanction with respect to an individual licensed to practice dentistry. That statute provides:

The division, upon recommendation of the board, may suspend or revoke the license of a dentist or dental hygienist for unprofessional conduct and may reinstate such license.

Prior to January 1, 1988, Section 58-1-16 provided for a hearing before "an appropriate hearing officer or board" and recognized that either the board or the hearing officer was authorized to render a written recommendation. Subsequent amendments to Section 58-1-16 now generally provide that adjudicative proceedings may be held before "an appropriate presiding officer". The statute, as amended, reflects no legislative intent that the presiding officer could not be either an appropriate hearing officer or the board.

Prior to January 1, 1988, Section 13-1-12 authorized either an administrative law judge, or an occupational board or representative committee with assistance from the administrative law judge, to issue findings of fact, conclusions of law and a recommendation for action. Although that statute was subsequently amended, it still authorizes either the administrative law judge, or the board or committee with assistance from the administrative law judge, to issue an order at the close of an adjudicative proceeding (i.e. after the conclusion of a hearing).

The Court takes notice of the fact that the Division's practice has been to designate an administrative law judge as presiding officer for the purposes of ruling on questions of law and procedure and to also designate the appropriate board of the specific licensed profession to enter findings of fact, conclusions of law and a recommendation. Such has consistently been the prevailing agency practice, both prior to and after the 1988 amendments to Section 58-1-16 and Section 13-1-12. It appears that practice has been employed to utilize the respective expertise of an administrative law judge, consistent with the provisions of Section 13-1-11, as well as the recognized expertise of the various boards set forth in Title 58.

To the extent the term "presiding officer" - used in Section 58-1-16 - is ambiguous, a reasonable administrative interpretation and practice should be given some weight. Salt Lake City v. Salt Lake County, Utah, 568 P.2d 738 (1977); Cannon v. Gardner, Utah, 611 P.2d 1207 (1980). Given the reasonable administrative interpretation of - and practice under - the statutes in question, the Court concludes the instant adjudicative proceeding may properly be conducted in a similar manner and the August 17, 1989 notice failed to accurately identify that procedure.

Thus, supplemental notice is now provided that the Board will act as the presiding officer in this proceeding to thus render a written recommended order, supported by the findings of fact and conclusions of law. Consistent with Section 13-1-12(1)(a), further notice is now provided the administrative law

judge will assist the Board in preparing that order for its issuance. Consistent with Section 13-1-11 and the long standing practice in professional disciplinary licensure hearings, notice is further provided the administrative law judge will rule on questions of law and procedure which may arise, both prior to and during the hearing.

One further matter should be addressed. The Court notes Respondents previously filed a June 20, 1991 motion to recuse David E. Robinson from participating in this proceeding. Further, the Division has filed a March 10, 1992 notice, whereby Mr. Robinson has recused himself in that regard. Pursuant to Section 58-1-16, Mr. Robinson could have been otherwise authorized to act as the presiding officer as to any findings of fact, conclusions of law and recommended order entered by the Board.

This Court's March 19, 1992 Scheduling Order indicated oral argument could be presented as to whether any recommended order submitted by the Board may properly be subject to review and subsequent action by David L. Buhler, Executive Director of the Department of Commerce. The UAPA is silent as to both any procedure which governs possible recusal of a presiding officer and the consequences of any such recusal. However, Section 13-1-12(2) provides as follows:

If a division director is unable for any reason to fairly review or rule upon an order of the administrative law judge or a board or committee, the executive director shall review and rule upon the order.

Given the language of the just-quoted statute, it would appear

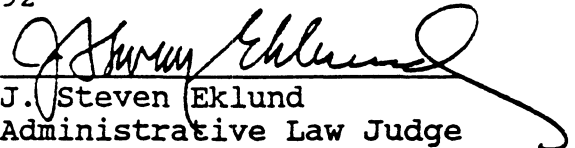
David L. Buhler is thus authorized to rule on any findings of fact, conclusions of law and recommended order subsequently entered by the Board in this proceeding. The Court will contact respective counsel on April 13, 1992 to identify whether Respondents anticipate filing any motion to recuse Mr. Buhler from participation in this proceeding.

ORDER

WHEREFORE, IT IS ORDERED that the Dentists and Dental Hygienists Board shall act as the presiding officer in this proceeding to render a written recommended order, supported by findings of fact and conclusions of law. Further, the administrative law judge will assist the Board in preparing that order for its issuance and the administrative law judge shall rule on all questions of law and procedure which may arise during the pendency of this proceeding.

It is further ordered that any motion to recuse David L. Buhler from participation in this proceeding shall be filed within ten (10) days after the Court has conducted a conference call with respective counsel to determine whether any such motion is anticipated.

Dated this 7th day of April, 1992


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	
BRENT D. HANSEN	:	ORDER ON DIVISION'S
TO PRACTICE AS DENTISTS	:	MOTION IN LIMINE
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Robert E. Steed for the Division of Occupational and
Professional Licensing

Jackson Howard and Leslie W. Slauch for Respondents

BY THE ADMINISTRATIVE LAW JUDGE:

By motion, dated June 14, 1991, the Division seeks to exclude certain evidence in the hearing to be conducted before the Dentists and Dental Hygienists Board in the above-entitled matter. Specifically, the Division urges: (1) evidence concerning K.W.'s prior sexual history and general reputation should be excluded; and (2) evidence of that nature as to other witnesses similarly situated should also be excluded.

Respondents filed a response to the just-described motion on July 1, 1991 and the Division's reply was filed July 2, 1991. Oral argument was conducted April 1, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the matter was taken under advisement.

The Court, now being fully advised in the premises, enters the following:

CONCLUSIONS OF LAW

The Division contends none of the above-referenced evidence is relevant as to whether Respondents engaged in unprofessional conduct, as alleged in the August 17, 1989 Petition. The Division further asserts the evidence should be excluded because its probative value - if any - is substantially outweighed by the danger of unfair prejudice, such evidence would confuse the issues and "drag out details of K.W.'s private life for no legitimate reason or purpose".

Respondents note Count I of the petition, which contains an allegation they took "sexual liberties" with certain patients. Respondents urge that allegation places the sexual activity of the supposed victims at issue, the Board must determine whether the actions allegedly taken were "liberties" or "invited responses" and evidence of the supposed victim's consent is thus relevant.

Respondents also contend K.W.'s past sexual conduct demonstrates her propensity to brazenly pursue sexual relations, the conduct which allegedly occurred between her and Respondents was prompted by her aggressive suggestion and the alleged conduct thus reflects an isolated incident not indicative of any public threat. Respondents thus assert evidence of K.W.'s consenting participation is a relevant mitigating factor to be considered by the Board as to any disciplinary sanction which may be warranted in this proceeding.

Section 63-46b-8 of the Utah Administrative Procedures Act (hereinafter, the UAPA) provides:

(1) . . . in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to avoid all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious . . .

..

Comments of the Utah Administrative Law Advisory Committee on the drafting and interpretation of the UAPA reflect as follows:

The intent of the Advisory Committee was that the grant of authority to the presiding officer found in Section 63-46b-8(1)(a) should be broadly construed. (Code Co. 1988 at 13-14).

The above-quoted statute does not expressly make the Utah Rules of Evidence applicable in formal adjudicative proceedings.

However, Section 63-46b-8(1)(b)(i) allows a presiding officer to exclude irrelevant evidence. Instructively, Rule 401 of the Utah Rules of Evidence defines relevant evidence as:

. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403 generally provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . ."

The evidence which is the subject of this pending motion

specifically involves Rule 404, which states:

(a) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

· · · · ·
(3) Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

Rule 608 governs evidence offered concerning the character and conduct of a witness as follows:

· · · · ·
(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

During oral argument on the pending motion, Respondents asserted K.W.'s credibility (or that of any other witness) may be assailed by evidence of the prior sexual history or reputation of that witness. Such assertion is without merit for numerous reasons. First, Rule 608 expressly precludes extrinsic evidence of that nature for such a purpose. Further, prior sexual history of a witness is not probative of the veracity of the witness. In State v. Johns, 615 P.2d 1260, 1264 (Utah 1980), the Utah Supreme Court stated as follows:

Because the law does not and should not recognize any connection between the veracity of a witness and her sexual promiscuity, the

proposed evidence has no relevancy in regard to the truthfulness of her testimony

Such evidence, if offered to attack the credibility of a witness, should be particularly excluded because "its primary purpose and effect" would be to "cast aspersions" on the witness and "besmirch her character" in the eyes of the Board. See Bullock v. Ungricht, 538 P.2d 190, 192 (Utah 1975).

The remaining issue is whether the evidence in question is admissible regarding K.W.'s possible consent (or that of any other patient) to the alleged conduct of either of the Respondents. In State v. Johns, supra, the Court stated:

. . . in cases involving forcible rape or aggravated sexual assault, the fact a woman has consented to sexual activity in the past under different circumstances and with individuals other than the defendant has little if any relevancy to the question of her consent and the situation involved here.

However, . . . there are some cases in which the reputation of the prosecutrix and in which specific prior sexual activity may become relevant and its probative value outweighs the detrimental impact of its introduction. Id. at 1263-64.

The Court thus set forth the following test:

While the balancing of the probative value of the evidence and its detrimental effect is entrusted to the discretion of the trial judge, in the usual case such evidence, either of general reputation or specific prior acts, is simply not relevant to any issue in the rape prosecution including the consent of the prosecutrix. Such evidence is admissible only when the court finds under the circumstances of the particular case such evidence is relevant to a material factual dispute and its probative value outweighs the inherent danger of unfair prejudice to the prosecutrix, confusion of issues, unwarranted invasion of the complaintant's privacy, consideration of undue delay and time waste,

and the needless presentation of cumulative evidence. Id at 1264. (Emphasis added.)

Although this is not a criminal proceeding, the just-stated principles are persuasive and should also be applied in this case.

Evidence of consensual participation by a patient with respect to unprofessional conduct allegedly undertaken by either of the Respondents has significant probative value as to both the circumstances which may have prompted whatever occurred between Respondents and a given patient and the nature of any disciplinary sanction which should enter if unprofessional conduct is found to have occurred. The Utah Court of Appeals has recognized the vital function of cross-examination in professional licensure disciplinary proceedings. D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145, 1147 (1989). Respondents may thus cross-examine any given patient concerning the specific circumstances of this case and the possible existence of the above-referenced mitigating factor.

Further, evidence of a patient's prior consensual sexual behavior with a licensed health care professional within the context of a physician/patient relationship has some probative value, insofar as it relates to the issue of consensual participation of that patient in this case. Within the just-stated constraints, Respondents may cross-examine such a witness in this proceeding as to that matter.

However, any evidence of a witness' general prior sexual history or reputation should be excluded for various reasons.

The right to cross-examine a witness "does not entail the right to harrass, annoy or humiliate [a] witness on cross-examination". State v. Chestnut, 621 P.2d 1228, 1233 (Utah 1980), quoting Evans v. Alaska, 550 P.2d 830, 837 (Alaska 1976). Character evidence of prior sexual behavior is often of "slight probative value, is very prejudicial and may confuse the issues at trial". State v. Moton, 749 P.2d 639, 644 (Utah 1988). As that Court further stated:

One of the trial judge's duties is to regulate the admission of character evidence so as to exclude evidence which tends to distract the trier of fact from the main question of what actually happened on a particular occasion. This process prevents the trier of fact from rewarding one individual and punishing another because of their respective characters, instead of focusing upon the evidence in the case. Id.

Given the foregoing, the Court necessarily concludes any evidence of a witness' prior sexual history or reputation - beyond the limited scope of cross-examination identified herein - would unduly subject either K.W. or another witness similarly situated to humiliation and constitute an unwarranted invasion of their privacy. The degree of unfair prejudice which would result is thus clear.

Importantly, such evidence would also tend to confuse the issues and mislead the Board by shifting what should be the predominant focus of this proceeding (i.e., the nature of whatever conduct occurred between Respondents and K.W. or other patients) to the myriad relationships which existed or conduct which occurred regarding any given patient and a third party.

Further, if any extrinsic evidence of that nature were allowed, it would also require the Board to assess the credibility of the various witnesses who testify regarding those relationships. Such would be particularly indirect and potentially fruitless process with respect to the Board's primary charge, which is to determine the nature of Respondents' conduct with respect to K.W. or other patients.

Respondents urge the Board is more capable than a common jury of assessing the evidence sought to be admitted and such evidence should thus be allowed, even though of minimal probative value, because a lesser risk of undue prejudice exists in this administrative setting. The Court is not persuaded Rule 403 is any less applicable in this adjudicative proceeding than it would be in a criminal or civil action. Simply put, the initial and continuing focus of this proceeding should be directed toward whatever conduct was undertaken by either Respondent with respect to those individuals referenced in the petition, the circumstances which prompted whatever may have occurred, whether any basis exists to impose a disciplinary sanction as to either Respondent and the nature of any sanction which is warranted.

Given the disposition of the pending motion, Respondents will thus be allowed to present and support their theory of the case, subject to restrictions which are necessary to ensure the evidence received in this proceeding is admitted within the proper scope of those issues to be addressed by the Board.

ORDER


Evidence of consensual participation by K.W. or another

patient with respect to unprofessional conduct allegedly undertaken by either of the Respondents is admissible in this proceeding. Respondents may thus cross-examine those witnesses concerning those circumstances in an attempt to establish the existence of such a mitigating factor.

Further, evidence of K.W.'s or another witness' prior sexual behavior with a licensed health care professional within the context of a physician/patient relationship shall be also admissible, both on cross-examination of that witness and for possible impeachment purposes on rebuttal.

However, evidence of K.W.'s or another witness' general prior sexual history or reputation shall be excluded for the reasons set forth herein.

Dated this 17th day of April, 1992


J. Steven Eklund
Administrative Law Judge

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
KENT BLAINE HANSEN AND	:	
BRENT D. HANSEN	:	ORDER ON APPLICABLE
TO PRACTICE AS DENTISTS	:	STANDARD OF PROOF
AND TO PRESCRIBE AND ADMINISTER	:	
CONTROLLED SUBSTANCES	:	CASE NO. OPL-89-47
IN THE STATE OF UTAH	:	

Appearances:

Robert E. Steed for the Division of Occupational and
Professional Licensing

Jackson Howard and Leslie W. Slauch for Respondents

BY THE ADMINISTRATIVE LAW JUDGE:

The instant adjudicative proceeding was initiated pursuant to an August 17, 1989 notice of agency action. Sparing detail, Respondents filed a motion to dismiss on April 30, 1991 and oral argument was conducted on May 23, 1991. Prior to the conclusion of oral argument, counsel for Respondents made inquiry regarding the standard of proof which would govern any subsequent hearing conducted to address whether a disciplinary sanction should enter as to Respondents' licenses.

The Court thus requested both parties to submit memoranda as to that matter. The Division filed its brief on June 11, 1991, Respondents filed their memorandum on June 21, 1991 and the Division's final reply was filed July 1, 1991. Oral argument was subsequently conducted April 1, 1992 and the Court took the matter under advisement.

The Administrative Law Judge, now being fully advised in the premises, enters the following:

CONCLUSIONS OF LAW

Respondents contend the applicable standard of proof in this proceeding should be clear and convincing evidence. Specifically, Respondents urge this proceeding is quasi-criminal in nature and that the Division seeks to impose a punitive sanction which would impinge on their constitutionally protected rights. Respondents also assert Utah courts have required clear and convincing proof in a civil contempt case and such a case is "strikingly similar" to this professional licensure disciplinary proceeding. Given both the nature of this proceeding and Respondents' respective interests in maintaining their ability to practice their chosen profession, they contend the Division should be required to prove its case by clear and convincing evidence.

The Division asserts Utah courts adhere to the general rule that the standard of proof in administrative proceedings is a preponderance of the evidence. The Division notes there is no statutorily established standard of proof which governs the instant proceeding and many other courts in other states have utilized the preponderance standard in professional licensure disciplinary proceedings.

In Rogers v. Division of Real Estate, 790 P.2d 102 (Utah 1990), the Utah Court of Appeals described a professional licensure disciplinary proceeding as:

. . . a special, somewhat unique, statutory proceeding, in which the disciplinary board investigates the conduct of a member of the profession to determine if disciplinary action is appropriate to maintain sound professional standards of conduct and protect the public. Id. at 105-06.

The Utah Court of Appeals has also recognized that a person "whose freedom to pursue his profession is seriously restricted by an official action . . . may compel the government to afford him a hearing complying with the traditional requirements of due process". D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145, 1146 (Utah App. 1989), quoting Endler v. Schutzbank, 68 Cal.2d 162, 436 P.2d 297, 304 (1968).

No statute exists which establishes the standard of proof applicable in this proceeding. The Utah Administrative Procedures Act (Sections 63-46b-1 et seq., hereinafter, the UAPA), those statutes governing the Department of Commerce (Sections 13-1-1 et seq.) and the Division of Occupational and Professional Licensing (Sections 58-1-1 et seq.) are all silent in that regard, although Section 63-46b-16(4)(g) of the UAPA provides the standard on judicial review as "substantial evidence when viewed in light of the whole record before the court". Further, Utah courts have not specifically addressed the appropriate standard of proof in professional licensure disciplinary proceedings initiated by the Division. Thus, the issue presented should be resolved based on a review of analogous cases decided by the courts of this state and the more persuasive decisions rendered by courts in other states.

The Utah Supreme Court has recognized that driver license

revocation proceedings are not necessarily "criminal" or "quasi-criminal" in nature. Ballard v. State Motor Vehicle Division, 595 P.2d 1302, 1304 (Utah 1979). In Ward v. Smith, 573 P.2d 781 (Utah 1978), the Court held a parole revocation hearing was an administrative, rather than a criminal, proceeding. *Id.* at 782. See also Johns v. Shulsen, 717 P.2d 1336 (Utah 1986); Walker v. Board of Pardons, 803 P.2d 1241 (Utah 1990).

In further contrast to prosecutions under criminal statutes, the Utah Supreme Court has acknowledged that a driver license revocation proceeding "requires proof only by a preponderance of the evidence and not beyond a reasonable doubt". Garcia v. Schwendiman, 645 P.2d 651, 652 (Utah 1982). The preponderance standard also applies in a parole revocation proceeding. Johns v. Shulsen, *supra*, at 1338; Walker v. Board of Pardons, *supra*.

Respondents contend their respective interests in the continuation of their livelihood are deserving of more protection than that afforded a motorist merely faced with the loss of driving privileges or a parolee who might lose their conditional freedom. Even assuming Respondents are correct, many courts in sister states have applied the preponderance standard of proof in professional licensure disciplinary proceedings. Rucker v. Michigan Board of Medicine, 138 Mich. App. 209, 360 N.W.2d 154, 155 (1984); In re Schultz, 375 N.W.2d 509, 514 (Minn. App. 1985); Forster v. Board, 103 N.W. 776, 714 P.2d 580, 582 (1986); Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 237 (Iowa 1991).

Other courts have utilized a clear and convincing evidence

test. Ettinger v. Board of Medical Quality Assurance, 185 Cal.Rptr. 601, 603 (1982); In re Zar, 434 N.W.2d 598, 602 (S.D. 1989). In Hogan v. Mississippi Board of Nursing, 457 So.2d 931 (Miss. 1984), the Court characterized a license revocation proceeding as "penal" in nature and thus required proof by clear and convincing evidence. Id. at 934. The South Dakota Supreme Court has emphasized a higher standard of proof should apply in such a proceeding due to the interest involved (i.e., a professional's career), stating:

The revocation of a license of a professional [person] carries with it dire consequences. It not only involves necessarily disgrace and humiliation, but it means the end of [his or her] professional career.

In re Zar, supra.

However, a professional licensure disciplinary hearing is not a criminal proceeding in nature. See Rogers v. Division of Real Estate, supra, and cases cited herein. Concededly, Respondents' respective interests in maintaining their professional livelihood and the possible deprivation of that ability as a result of this proceeding are substantial. In re Polk, 90 N.J. 550, 449 A.2d 7, 14 (1982). Nevertheless, this Court seriously questions Respondents' implicit suggestion that a license to practice dentistry represents a fundamental constitutional right. The New Jersey Court squarely rejected a similar contention in the case of In re Polk, supra, instructively stating as follows:

A license to practice a profession is not a basic individual right. While it embraces a

substantial individual interest which deserves abundant protection, it cannot be equated with a fundamental right, the reasonable regulation of which can be measured and justified only by a compelling state interest. The right to practice medicine itself is granted in the interest of the public and is "always subject to reasonable regulation in the public interest." Id. at 17 (Citation omitted).

In its persuasive and well reasoned decision, the Court further recognized the government's "paramount obligation to protect the general health of the public" and the right of physicians to practice their profession as being "necessarily subordinate to this governmental interest". Id at 14. Significantly, the Court concluded:

We are satisfied that the preponderance of the evidence burden of proof is sufficient for purposes of an administrative adjudication concerning professional guilt and discipline against a licensed medical doctor. In view of the subject matter of such proceedings, the nature of the evidence, the qualifications of witnesses, the special expertise of the tribunal, the relative advantages and resources of the parties, and the minimal risk of inaccurate or erroneous factfinding and final decisionmaking, confidence in a final adjudication would not be imperiled by employing the preponderance of the evidence standard. These proceedings do not demand an enhanced burden of proof. Id. at 16. (All emphasis herein added).

The Utah Supreme Court has frequently addressed the standard of proof applicable in an attorney disciplinary proceeding. In the early case of In re Hanson, 48 Utah 163, 158 P. 778 (1916), the Court commented that evidence in such a proceeding "should be clear and convincing" and such a rule "is based upon a most solid foundation". Id at 779. The Court later recognized the

applicable test as being a "clear preponderance of the evidence".
In re Barclay, 82 Utah 288, 24 P.2d 302, 305 (1933).

In a subsequent case, the Court stated that charges in an attorney disciplinary proceeding "should be clearly sustained by convincing proof and a fair preponderance of the evidence". In re McCullough, 97 Utah 533, 95 P.2d 13 (1939). More recently, the Court has stated as follows:

We agree that because of the seriousness of the consequences to the attorney involved touching upon the important right to follow his vocation and make a livelihood, that such is the established rule (i.e., the persuasion of his misconduct must be by clear and convincing evidence).

In re MacFarlane, 10 Utah 2d 217, 350 P.2d 631, 633 (1960). The somewhat misleading phrase "clear preponderance", as used by the Court in the case of In re Barclay, supra, has been defined by the Washington Supreme Court as follows:

"Clear preponderance" is an intermediate standard of proof in these cases, requiring greater certainty than "simple preponderance" but not to the extent required under "beyond reasonable doubt". This intermediate standard reflects the unique character of disciplinary proceedings. The standard of proof is higher than the simple preponderance normally required in civil actions because the stigma associated with disciplinary action is generally greater than that associated with most tort and contract cases. Yet because the interests in protecting the public, maintaining confidence, and preserving the integrity of the legal profession also weigh heavily in these proceedings, the standard of proof is somewhat lower than the beyond reasonable doubt standard required in criminal prosecutions.

In re Allotta, 109 Wash.2d 787, 748 P.2d 628, 630-31 (1988).

Respondents thus suggest the enhanced standard of proof in attorney disciplinary proceedings should also be applicable in professional disciplinary licensure proceedings initiated by the Division. Since the underlying purpose of disciplining both attorneys and physicians is protection of the public, one court has recognized the same enhanced standard should apply to a practitioner of either profession. Ettinger v. Board of Medical Quality Assurance, supra.

However, the New Jersey Supreme Court has acknowledged a "less stringent burden of proof" can be rationally applied in medical licensure proceedings "as more protective of society's important interest in individual life and health". In re Polk, supra, at 18. Further, the Iowa Supreme Court has upheld dissimilar standards of proof as between those professions "where the regulations being compared have been established by differing branches of government". Eaves v. Board of Medical Quality Examiners, supra.

The Minnesota Supreme Court has addressed the same issue and applied the preponderance standard of proof in a dental licensure disciplinary proceeding, stating:

We note the burden of proof in attorney disciplinary cases is clear and convincing evidence. Attorney disciplinary proceedings, under the supervision and control of the judiciary, are sui generis. Attorney misconduct, striking as it does, at the administration of our justice system, gives society a heightened interest in the outcome of attorney discipline. A higher standard of proof is indicated. (All citations omitted).

In re Wang, 441 N.W.2d 488, 492 (1989). The Court nevertheless

recognized the nature of the proceeding and appropriately provided the following caution:

. . . these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft. The reputation of a profession and the reputation of a professional as well as the public trust are at stake. Id.

Respondents cite other cases decided by the courts of this state where a clear and convincing standard of proof was applied. Wycoff Co. v. Public Service Commission, 13 Utah 2d 123, 369 P.2d 283 (1962); Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). However, neither of those cases involved a disciplinary sanction with respect to a professional license. Since those cases are distinctly different in nature from this proceeding, the principles set forth therein provide no meaningful guidance for purposes of the matter now under review. Further, this tribunal has previously concluded the standard of proof which should apply in professional disciplinary licensure proceedings initiated by the Division is a preponderance of the evidence. In re Barney (Case No. OPL-91-69, filed August 2, 1991).

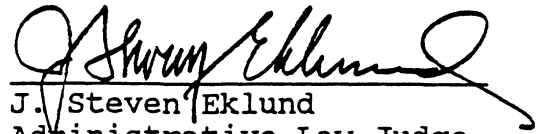
Based on the foregoing, a considered review of existing case law and the arguments presented by both parties, this Court is not persuaded the standard of proof previously applied in professional disciplinary licensure proceedings initiated by the Division should be abandoned. The Court further concludes the

clear and convincing standard of proof applied in attorney disciplinary proceedings in this state should not be extended as to govern this proceeding.

ORDER

WHEREFORE, IT IS ORDERED the standard of proof in this professional licensure disciplinary proceeding shall be a preponderance of the evidence.

Dated this 17th day of April, 1992


J. Steven Eklund
Administrative Law Judge

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Our File No. 19,199

Attorneys for Appellants

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

KENT BLAINE HANSEN and BRENT D. HANSEN,	:	PETITION FOR REVIEW OR, IN THE
	:	ALTERNATIVE, FOR
Petitioners,	:	EXTRAORDINARY RELIEF
	:	
vs.	:	Case No. OPL-89-47
	:	
DIVISION OF OCCUPATIONAL AND	:	
PROFESSIONAL LICENSING,	:	
	:	
Respondent.	:	

Kent Blaine Hansen and Brent D. Hansen, hereby petition the Utah Court of Appeals to permit an appeal from the interlocutory orders of the Honorable J. Steven Ecklund entered in this matter on the following dates:

1. Order on Procedures Governing Disposition of Respondents' Motion To Close Hearing, dated April 7, 1992.
2. Order on Respondents' Motion to Close Hearing, dated April 7, 1992.

3. Supplemental Notice and Accompanying Order, dated April 7, 1992.
4. Order on Division's Motion in Limine, dated April 17, 1992.
5. Order on Applicable Standard of Proof, dated April 17, 1992.

A copy of the orders sought to be reviewed are attached, as is a brief memorandum explaining the jurisdictional basis for this petition for review.

PERSONS SUBSTANTIALLY AFFECTED

Petitioners Kent Blaine Hansen and Brent D. Hansen are the only persons substantially affected by these orders of the Division, although such orders, to the extent that they represent ongoing and established procedures of the Division, may affect all persons against whom actions are brought by the Division.

STATEMENT OF FACTS

On August 17, 1989, the Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah filed a Notice of Agency Action against petitioners Kent Blaine Hansen and Brent D. Hansen. The Notice of Agency Action sought to suspend or revoke petitioners' dental licenses for unprofessional conduct under the provisions of Utah Code Ann. § 58-7-2(6). Among other things, the Notice alleged that petitioners had violated the provisions of Utah Code Ann. § 58-7-1.1(7)(k), (l), (q) and (r) by, among other things, the taking of lewd nude photographs of K.W., a patient, and performing unnecessary treatments in order to exchange drugs for K.W.'s sexual favors. The Notice also indicated that

the presiding officer would be J. Steven Ecklund, Administrative Law Judge for the Department of Commerce.

On April 30, 1991 respondents filed a motion to dismiss this action. On May 23, 1991, the Division heard oral arguments on this motion. As a result, it made a preliminary order as to the identity of the presiding officer. On April 1, 1992, in oral argument, respondents requested a clarification of the identity of the presiding officer. On April 7, 1992, Judge Ecklund filed a Supplemental Notice and Accompanying Order which stated that the Board of Dentists and Dental Hygienists would act as the presiding officer in the hearing to determine factual issues and rendering a written recommended order, and that the administrative law judge would act as the presiding officer regarding legal issues and would assist the Board in preparing that order.

On June 20, 1991, petitioners filed a motion to close the hearing on the matter to all members of the press and public. On July 1, 1991, the Division filed an opposing memorandum. The Salt Lake City Tribune filed a petition to intervene in this motion. On July 2, 1991, the Division granted the Tribune's motion to intervene, and on July 3, 1991, the Tribune filed its memorandum in opposition to petitioners' motion. On July 9 and 10, 1991, petitioners filed replies to the submissions of the Division and the Tribune. Oral argument on this motion was heard on April 1, 1992 by Judge Ecklund. On April 7, 1991, he ordered that petitioners' motion to close the hearing be conducted before the Board and that the hearing was governed by the Open and Public Meetings Act because the Board, rather than the Administrative Law

Judge was the presiding officer authorized to enter findings of fact, conclusions of law and a recommended order subsequent to any hearing on the merits. He also denied petitioners' motion to close the hearing, ordering that the hearing be open to the press and public.

On June 14, 1991, the Division filed a motion seeking to exclude certain evidence, including: (1) K.W.'s prior sexual history and general reputation, and (2) evidence of that nature as to similarly situated witnesses. Petitioners filed a response to this motion on July 1, 1991. On July 2, 1991, the Division filed a reply memorandum. Judge Ecklund heard oral argument on this motion on April 1, 1992. He ordered that evidence of K.W.'s and other witnesses' general prior sexual history or reputation shall be excluded from the proceeding on April 17, 1992.

On June 11, 1991, the Division filed a brief on the issue of the standard of proof which should govern a hearing on the merits of the action. Petitioners filed a response on June 21, 1991, to which the Division replied on July 1, 1991. Judge Ecklund also heard this motion on April 1, 1992. Following the oral argument, on April 17, 1992, he ordered that the standard of proof for professional licensure proceedings initiated by the Division of Occupational and Professional Licensing is the preponderance of the evidence rather than clear and convincing evidence.

Petitioners bring this Petition to appeal from all of these orders.

QUESTIONS OF LAW

1. Did the Administrative Law Judge err in ordering that the Board would act as presiding officer for the purpose of making findings of fact and conclusions of law and, at the same time in the same proceeding, that the Administrative Law Judge would be the presiding officer for purposes of ruling on questions of law and procedure?

2. Did the Administrative Law Judge err in denying petitioners' motion to close the hearing and in ordering that the hearing be open to the press and public?

3. Did the Administrative Law Judge err in ordering that petitioners' motion to close the proceedings to the public and press was governed by the Open and Public Meetings Act because the finder of fact in the present action was the Board rather than the Administrative Law Judge?

4. Did the Administrative Law Judge err in ordering that the evidence of K.W.'s and other witnesses' general prior sexual history be excluded from the proceeding?

5. Did the Administrative Law Judge err in determining that the standard of proof for professional licensing proceedings initiated by the Division of Occupational and Professional Licensing is the preponderance of the evidence rather than clear and convincing evidence?

Petitioners seek, for relief, the resolution of these issues.

ISSUES RAISED BEFORE THE AGENCY

The factual recitation above indicates that each of these issues was briefed and argued before the Division of Professional Licensing, and that the Administrative Law Judge considered

each of these issues and issued separate orders on them. Copies of each of these orders are attached to this Petition.

IMMEDIATE APPEAL NECESSARY

Immediate appeal from these orders is necessary because petitioners will be irreparably harmed if they are forced to continue litigating this matter under these orders in order to obtain a final judgment. The major harm which will, in all probability, ensue should this petition be denied and petitioners be forced to continue litigation under the present orders is the complete, total and irreparable damage to their personal and professional reputations resulting from an open and public hearing on the merits of the case. Because of the extremely controversial and inflammatory nature of the charges made by the Division against petitioners and the highly prejudicial nature of the evidence which might be introduced, petitioners, even if they were ultimately cleared of the Division's charges, would likely lose their dental practices and personal reputations as a consequence of extensive publicity in this matter. That any hearing on the merits will be highly publicized by the press and other media is extremely likely. The Salt Lake Tribune has already intervened in opposition to petitioners' motion to close the proceedings. K.W., one of the more controversial witnesses for the Division, has already appeared on local and national television and made statements about the case, which has already had serious repercussions for petitioners. Should this matter become a "media event," the ensuing trouble and loss of reputation for petitioners will be uncontrollable and incalculable. For this reason, an interlocutory appeal on this order is critical to the administration of justice.

Petitioners should not be tried and convicted in the media, as they will almost assuredly be, but the issue should be adjudicated within the non-public confines of the appropriate, legislatively established tribunal.

The issue of the identity of the presiding officer, similarly, needs immediate attention; the Division is only able to justify the application of the Open and Public Meetings Act to the present proceeding because of its order making the Board, rather than the Administrative Law Judge, the trier of fact. The order identifying the presiding officer responsible for factual findings as the Board is, therefore, the "cause" of the closure problem. If the Administrative Law Judge were the trier of fact, as the Utah Administrative Procedure Act contemplates, then the issue of closure of the hearing would possibly not exist. Further, there is substantial chance that this order, which allows the Division to "switch" presiding officers at will during the course of this single matter, in contravention of the intent of the Utah Administrative Procedures Act and other related statutes, will result in substantial arbitrariness and prejudice to petitioners.

Petitioners will also be exposed to substantial prejudice as a result of the remaining two orders, which prejudice could be avoided should this Court grant their Petition for Review. Central to petitioners' defense is evidence of K.W.'s reputation for sexual immorality in general, and her previous, extensive, and ongoing pattern of behavior in seducing other medical practitioners by means of offering sexual favors in return for controlled substances. As a consequence of the Administrative Law Judge's Order excluding evidence of K.W.'s prior sexual history, petitioners' defense will be substantially impaired. This problem should be

remedied immediately, not after rendition of a final order, because petitioners will not be able, under the present order, to even proffer, let alone prove substantial evidence necessary for their defense, making an incomplete and ineffective record for appeal from the final order.

ADVANCE TERMINATION OF LITIGATION

Resolution of all four of these issues on an interlocutory appeal will materially advance the termination of the litigation because all four of them, if not resolved now, will need to be resolved on an appeal if a final order adverse to petitioners is issued. The likelihood of such an adverse result is greatly increased by the exclusion of evidence of K.W.'s prior sexual history, which will deprive petitioners of a substantial and important defense, and the order determining that the applicable standard of proof is the preponderance of the evidence rather than clear and convincing evidence. Should an adverse final order issue, petitioners would appeal these very issues and this Court would consider the appeal. Should this Court find an abuse of discretion on even one of these orders, the matter would have to be heard again at a substantial waste of time and expense to all parties concerned, with the additional danger that memories would have faded and evidence lost. In the context of the present litigation, it would be in the clear interest of efficiency as well as fairness to grant petitioners' Petition for Review of these interlocutory orders.

JURISDICTIONAL BASIS

The present Petition for Review arises from four non-final administrative orders. This petition is, accordingly, brought under two alternative theories of jurisdiction: (1) an

interlocutory appeal under rule 14 of the Utah Rules of Appellate Procedure and Utah Code Ann. § 63-46b-14(2)(b) (1991), and (2) an extraordinary writ under rule 65B of the Utah Rules of Civil Procedure and rule 19 of the Utah Rules of Appellate Procedure.

Interlocutory Appeal

Under the new Utah Administrative Procedures Act (UAPA) and the applicable rules promulgated by the Division of Occupational and Professional Licensing, "[a] party aggrieved may obtain judicial review of final agency action" Utah Code Ann. § 63-46b-14(1). Although the UAPA provides substantial rules for review of final administrative orders, see e.g., Utah Code Ann. §§ 63-46b-12(1)(a) (1991), 63-46b-13(1)(a) (1991), and 63-46b-14 (1991), there appears to be absolutely no provision for an interlocutory appeal from an administrative order, except under following language from Utah Code Ann. § 63-46b-14(2)(b) (1991):

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

. . . .

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Under this language, a party need not exhaust any or all administrative remedies, including obtaining a final order, in order to seek judicial review of the proceeding if the administrative remedies are inadequate or the exhaustion of remedies would result in irreparable harm disproportionate to the public benefit received from exhaustion.

Administrative remedies are inadequate in the present case because irreparable harm will be done to the professional and personal reputations of petitioners, regardless of the outcome of this proceeding, should the hearings be open to the press and public. Petitioners will also be damaged by the three other orders, as discussed above, unless afforded immediate relief. There is no provision in the UAPA or elsewhere that serves to remedy any of these problems. Consequently, the available administrative remedies are inadequate. The damage that would be done to the individual petitioners' reputations and ability to defend themselves from the Division's charges should they not be afforded immediate relief would be devastating to them, effectively putting them out of business regardless of the ultimate outcome of the matter. This is, surely, "irreparable harm disproportionate to the public benefit derived from requiring exhaustion."

Accordingly, this Petition for Review is brought under the applicable provisions of the Utah Rules of Appellate Procedure, including rule 14, which allows for judicial review by the Supreme Court or the Court of Appeals "of an order or decision of an administrative agency, board, commission, committee, or officer." This language does not require that an order appealed from be a final order; because section 63-46b-14(2)(b) allows an interlocutory appeal under the present circumstances, this Petition should be granted.

Further, this Petition is brought within 30 days of the date of the first order appealed from, and supplies the information required in Rule 14. Because this petition is in the nature of an interlocutory appeal, petitioners, in an effort to assist the Court, have followed the

format of a rule 5 petition even though rule 5 is inapplicable to administrative orders under rule 18.

Extraordinary writ.

Rule 65B of the Utah Rules of Civil Procedure allows for relief to be granted under its provisions "where no other plain, speedy, and adequate remedy exists." If this Court should determine that a Petition for Review under rule 14 is unavailable to petitioners, this Court should grant review of the orders at issue under rule 65B.

Under this rule, which was enacted in its present form in 1991, relief is available for several categories of injury, including the wrongful use of or failure to exercise public authority. Utah R. Civ. P. 65B(e) (1992). Under subsection (e), "[a]ppropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion"

Although the form of rule 65B has been substantially changed recently, the substantive intent behind the rule, and the requirements for its application, have not changed over the last several decades. The Utah Supreme Court and the Utah Court of Appeals have given instruction as to how this rule governing extraordinary writs is to be applied. Most instructive are the guidelines set forth in Anderson v. Baker, 5 Utah 2d 33, 296 P.2d 283 (1956):

(1) If the lower tribunal is without jurisdiction or is proceeding in excess of its jurisdiction and there is no adequate remedy, the writ should issue as a matter of right.

(2) If the lower tribunal is proceeding without jurisdiction, but it appears that there is an adequate remedy, the writ should generally not issue, but the court is not entirely without discretion.

(3) If the lower tribunal has jurisdiction but it appears that by an erroneous order it has placed one party in a position where he will be irreparably injured and that he has no adequate remedy to prevent the injury or retrieve his loss, then the court may in the exercise of its sound discretion use the writ as a procedure for intermediate review.

(4) If there is no want or excess of jurisdiction and there is an adequate remedy, the writ should never issue.

Rules (1) and (4) are absolutes. Rules (2) and (3) are guides.

Id. at 285-86, (citations omitted) (emphasis in original) (quoting Robinson v. City Court for City of Ogden, 112 Utah 36, 185 P.2d 256, 261)).

In the present case, petitioners are appealing from orders of an administrative agency which are, in their view, abuses of the agency's discretion, thus falling squarely within subsection (e) of the rule. This situation also falls within section (3) of the Anderson guidelines, in that the Division has jurisdiction over the matter but the erroneous orders of the Division are placing petitioners in a position where they will be irreparably injured absent immediate review of the orders, and there is no other remedy of any sort available for petitioners. Consequently, this Court may, in the exercise of its sound discretion, use an extraordinary writ as a procedure for the intermediate review of the present orders.

It is axiomatic that a party who has an adequate remedy at law cannot avail himself of a rule 65B petition. For example, the plaintiff, in Crist v. Mapleton City, 28 Utah 207, 497

P.2d 633, 634 (Utah 1972), did not avail himself of readily available remedies at law, so "placed himself out of the reach of the extraordinary writ of mandamus." Likewise, the Anderson court ruled that "[a]n extraordinary writ is not a proceeding for general review, and cannot be used as such." Anderson, 296 P.2d at 285. Should this tribunal determine that an appeal under rule 14 is unavailable to petitioners, there is no other available remedy and petitioners should be entitled to review of the orders under rule 65B.

It is equally axiomatic that where there is no adequate remedy at law, a rule 65B petition is available. For example, the Utah Court of Appeals, in Davis County v. Clearfield City, 756 P.2d 704 (Utah Ct. App. 1988), found that an action for extraordinary relief was the appropriate vehicle for obtaining review of the Davis City Council's decision to uphold denial of a conditional use permit sought by Davis County where there was no statutory provision for review of a city council action. Id. at 707. Petitioners, should this Court determine that a rule 14 petition is unavailable, will be similarly situated with Davis County; a rule 65B writ should, therefore, be available to petitioners.

In the present case, it is impractical and inappropriate to file this petition for a writ in the Division because there is no procedural provision for filing such a writ before the Division and a request to to the Division to reverse the order will likely be an exercise in futility.

MEMORANDUM ON THE MERITS

A petition for review brought under rule 14 does not require a memorandum on the merits of the case to be filed at the time the Petition is filed; briefing occurs pursuant to rules

18, 24, and other applicable rules of the Utah appellate courts subsequent to the filing of the Petition. Rule 19 of the Utah Rules of Appellate Procedure requires that a Petition for Extraordinary Writ be accompanied by a memorandum of points and authorities in support of the Petition. Petitioner has not filed such a memorandum concurrently with this Petition for two reasons: First, petitioner has brought this Petition, in the first alternative, as a rule 14 Petition; should this Court determine that rule 14 relief is unavailable to petitioners then petitioners will promptly submit a rule 19 memorandum. Second, to adequately brief the merits of the issues, petitioners must have access to the transcript of the relevant proceedings before the Division. No transcript has yet been prepared, but, under the procedures outlined in rules 15 and 16 of the Utah Rules of Appellate Procedure, would become available. Should this Court grant review on either theory, petitioners seek the assistance of this Court in obtaining the record of the proceedings from the Division, including the relevant transcripts. Petitioners also seek leave of the court in either granting them the opportunity to fully brief the merits of the issues pursuant to rules 18, 24, and all other applicable rules or, in the alternative, granting them an extension of time in which to file a rule 19 memorandum of points and authorities on the merits of the issues.

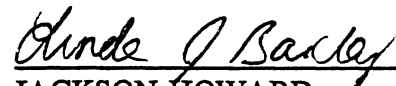
CONCLUSION

Petitioners respectfully request that this Court grant their Petition for Review under the provisions of rule 14 of the Utah Rules of Appellate Procedure and Utah Code Ann. §63-46b-12(2)(b). Should this Court determine that a Petition for Review is not available to petitioners

under these rules, petitioners request that this Court grant review through rule 65B of the Utah Rules of Civil Procedure and rule 19 of the Utah Rules of Appellate Procedure.

Should this Court grant review under either theory, petitioners seek the assistance of the Court in obtaining the record of the proceedings, including the relevant transcripts, from the Division, and permission to brief the merits of the issues in full upon receipt of the transcripts.

DATED this 7th day of May, 1992.



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Attorneys for Petitioners

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 7th day of May, 1992.

Brent A. Burnett
Robert E. Steed
Tax & Business Regulation Division
36 South State Street #1100
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Don Peters", written over a horizontal line.

SECRETARY