

1992

Kent Blaine Hansen, Brent D. Hansen v. Division of Occupational and Professional Licensing : Reply Brief of Petitioners Kent and Brent Hansen

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

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

Paul Van Dam; Utah Attorney General; Robert Steed; Assistant Attorney General; Attorneys for Respondent.

Jackson Howard, Leslie W. Slauch, Linda J. Barclay; Howard, Lewis, and Petersen; Attorneys for Petitioners.

Recommended Citation

Reply Brief, *Hansen v. Occupational and Professional Licensing*, No. 920302.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4274

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO.

UTAH SUPREME COURT

BRIEF

920302

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENT BLAINE HANSEN, and
BRENT D. HANSEN,

Petitioners/
Appellants,

vs.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING,

Respondent/
Appellee.

:

:

:

:

:

:

Case No. 920291-CA

920302

REPLY BRIEF OF PETITIONERS KENT AND BRENT HANSEN

APPEAL FROM AN ORDER
OF THE UTAH COURT OF APPEALS

JACKSON HOWARD #1548,
LESLIE W. SLAUGH #3752 and
LINDA J. BARCLAY #4967, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR PETITIONERS

PAUL VAN DAM #3312
Utah Attorney General, and
ROBERT STEED #6036
Assistant Attorney General
36 South State, #1100
Salt Lake City, Utah 84111

ATTORNEYS FOR RESPONDENT

FILED

SEP 3 1992

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENT BLAINE HANSEN, AND BRENT D. HANSEN,	:	
Petitioners/ Appellants,	:	Case No. 920291-CA
	:	
v	:	
DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING,	:	
Respondent/ Appellee.	:	

REPLY BRIEF OF PETITIONERS

APPEAL FROM AN ORDER OF THE UTAH COURT OF APPEALS

JACKSON HOWARD #1548,
LESLIE SLAUGH, #3752 and
LINDA J. BARCLAY #4967, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR APPELLANTS

PAUL VAN DAM #3312
Utah Attorney General and
ROBERT STEED #6063, for:
Assistant Attorney General
36 South State #1100
Salt Lake City, Utah 84111

ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

I.	THE SUPREME COURT SHOULD GRANT PETITIONERS' WRIT OF CERTIORARI.	1
II.	THE DIVISION HAS FAILED TO SHOW THAT THE COURT OF APPEALS ABUSED ITS DISCRETION IN DENYING PETITIONERS' PETITION FOR INTERLOCUTORY APPEAL	1
IV.	SECTION 63-46B-14(2) DISPELS THE REQUIREMENT OF FINALITY OF ADMINISTRATIVE DECISIONS IN CASES COMING WITHIN ITS PURVIEW.	3
V.	PETITIONERS HAVE RAISED VALID CLAIMS OF IRREPARABLE HARM AND INADEQUATE ADMINISTRATIVE REMEDIES.	4
VI.	THE POTENTIAL HARM TO PETITIONERS FAR EXCEEDS THE PUBLIC INTEREST IN PROCEEDING TO HEARING PRIOR TO RESOLUTION OF THE PRESENT ISSUES.	5

APPENDIX

TABLE OF AUTHORITIES

Cases Cited:

<u>Baird v. State</u> , 574 P.2d 713 (Utah 1978)	3
<u>Barney v. Division of Occupational and Professional Licensing</u> , 828 P.2d 542 (Utah Ct. App. 1992)	3
<u>DeBry v. Salt Lake County Board of Appeals</u> , 764 P.2d 627 (Utah Ct. App. 1988)	2, 3
<u>Hardy v. Hardy</u> , 776 P.2d 917 (Utah Ct. App. 1989)	2
<u>Heaton v. Second Injury Fund</u> , 796 P.2d 676 (Utah 1990)	3
<u>S & G, Inc. v. Morgan</u> , 797 P.2d 1085 (Utah 1990)	4
<u>State in re R.D.S.</u> , 777 P.2d 532 (Utah Ct. App. 1989)	3
<u>State v. Chindgren</u> , 777 P.2d 527 (Utah Ct. App. 1989)	3
<u>Tax Comm'n v. Iverson</u> , 782 P.2d 519 (Utah 1989)	1

Statutes and Rules Cited:

Utah Code Ann. § 63-46b-14(2) (1991)	1-5
Utah Code Ann. § 78-2a-3(2) (1991)	2
Utah R. App. P. 19	2
Utah R. App. P. 46	1
Utah R. Civ. P. 65B	2

I. THE SUPREME COURT SHOULD GRANT PETITIONERS' WRIT OF CERTIORARI.

Two of the considerations listed in Utah R. App. P. 46 apply, contrary to the Division's assertion, to the present case: Subsection (c) is applicable because the Court of Appeals, through its Order, has brought into question its recognition of the exception to the general rule requiring exhaustion of judicial remedies set forth in Utah Code Ann. § 63-46b-14(2) (1991). This creates a substantial departure from the previous Utah decision in Tax Comm'n v. Iverson, 782 P.2d 519, 524 (Utah 1989), in which the Utah Supreme Court recognized that an exception for the general rule requiring exhaustion exists where "there is a likelihood that some oppression or injustice is occurring such that it would be unconscionable not to review the alleged grievance."

Subsection (d) of Rule 46 applies to the present case because the Court of Appeals has apparently decided that there is no situation in which interlocutory review of an administrative order is possible, despite the clear language of § 63-46b-14(2). This is an important question of state law which has not been directly settled by the Supreme Court, but should be.

II. THE DIVISION HAS FAILED TO SHOW THAT THE COURT OF APPEALS ABUSED ITS DISCRETION IN DENYING PETITIONERS' PETITION FOR INTERLOCUTORY APPEAL.

While petitioners do not dispute the fact that the Court of Appeals summarily dismissed petitioners' Petition without stating its reasons for doing so, it is not clear from the face of the Order that the Court made no determination as to jurisdiction. The predominant arguments raised below by both parties revolved around

the issue of the Court of Appeals's jurisdiction, so it is at least arguable that the Court considered jurisdiction in its Order. (Please see the Appendix to this brief and Division's Appendix C.)

The Court of Appeals considered Utah Code Ann. § 78-2a-3(2) (1991) as grounds for appellate jurisdiction because the Division raised this section as grounds for denying jurisdiction in its arguments below. "A matter is sufficiently raised if it is submitted to the [lower] court, and the court is afforded an opportunity to rule on the issue." Hardy v. Hardy, 776 P.2d 917, 919 (Utah Ct. App. 1989).

Petitioners' Petition substantially complies with the requirements for a petition for extraordinary writ in Utah R. App. P. 19, and neither Rule 19 nor Utah R. Civ. P. 65B require that a motion be filed as asserted by the Division. Rule 65B states that "[t]here shall be no special form of writ," and Rule 19 designates the required filing as a "petition for extraordinary writ."

III. THE UTAH COURT OF APPEALS HAS JURISDICTION TO REVIEW NON-FINAL ADMINISTRATIVE ORDERS IN THE EXCEPTIONAL CIRCUMSTANCES OUTLINED IN § 63-46B-14(2).

Due process of law in the context of administrative actions, despite the Division's assertions to the contrary, includes judicial review when such is provided for by statute. See DeBry v. Salt Lake County Board of Appeals, 764 P.2d 627, 627 (Utah Ct. App. 1988). Petitioners' argument is based upon statutes, including § 63-46b-14(2), which relieve a party seeking judicial review from the requirement of exhausting any and all administrative remedies if the administrative remedies are inadequate or "exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion." Summary denial

of judicial review under the present circumstances could, accordingly, be a denial of petitioners' due process rights.

The Division's cited cases do not support its contention that the Court of Appeals lacks jurisdiction in the present case. DeBry deals with an appeal from a final order of a local governmental agency for which there was no statutory provision creating a right to judicial review. Barney v. Division of Occupational and Professional Licensing, 828 P.2d 542 (Utah Ct. App. 1992); Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); and Baird v. State, 574 P.2d 713 (Utah 1978) are not applicable to the present case because none of the petitioners in these cases, unlike the present petitioners, raised any allegation of irreparable harm or insufficient administrative remedies, thereby invoking § 63-46b-14(2). None of these cases have, accordingly, ruled on the narrow issue currently before this Court, so are not controlling.

Generally accepted rules of statutory construction, including those requiring courts to give the words used in statutes their plain, ordinary meaning, State in re R.D.S., 777 P.2d 532, 537 (Utah Ct. App. 1989), and requiring related statutes to be read together and construed harmoniously, State v. Chindgren, 777 P.2d 527, 529 (Utah Ct. App. 1989), require that the appellate courts recognize the exception to the rule of finality spelled out in § 63-46b-14(2). Adherence to this rule does not, as the Division suggests, violate this Court's compliance with the UAPA.

IV. SECTION 63-46B-14(2) DISPELS THE REQUIREMENT OF FINALITY OF ADMINISTRATIVE DECISIONS IN CASES COMING WITHIN ITS PURVIEW.

The Division's position that a party cannot obtain judicial review without obtaining a final administrative order unless he

completely bypasses the administrative forum is not supported by case law, and is inconsistent with § 63-46b-14(2), so should be disregarded. First, S & G, Inc. v. Morgan, 797 P.2d 1085 (Utah 1990), cited to by the Division, does not state that the only way to avoid the requirement of exhaustion of administrative remedies is to bypass the administrative forum, but held the opposite, finding that a party which did not participate in the administrative hearing did not have standing to appeal the agency's decision. Second, generally accepted canons of statutory interpretation require that a statute, including § 63-46b-14(2), be interpreted according to its common, plain meaning if possible. The language stating that "the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies" not only refers to bypassing the agency altogether, but also to not proceeding to a final order even if the party is appearing before the agency. The Division's arguments that interlocutory orders that deal with procedural or evidentiary issues or which do not affect the rights of the parties are not contemplated in § 63-46b-14(2) conflict with the statute; the statutory language is not so restrictive, but includes "any and all administrative remedies." It is, further, obvious that procedural and evidentiary orders affect the rights of the parties.

V. PETITIONERS HAVE RAISED VALID CLAIMS OF IRREPARABLE HARM AND INADEQUATE ADMINISTRATIVE REMEDIES.

The potential harm petitioners will suffer should review of the Division's orders not be allowed has been outlined in the previous Petition. Notably, although this case has received some press coverage, this is insubstantial compared to the coverage

which will occur should petitioners be required to go through an evidentiary hearing which is open to the press and public. The ensuing harm which petitioners will sustain to their personal and business reputations will be even more substantial. Although petitioners may have made a few statements to the press, they have generally been in the nature of damage control, and made in response to public announcements and allegations made by the Division and several of its witnesses. The Division's continual recitation of the argument that publicity will not affect the dental board only serves to beg the argument that petitioners have raised concerning potential damage to their reputations. This court can substantially minimize bad publicity by granting petitioners' Petition and reversing the Division's order authorizing a public hearing.

VI. THE POTENTIAL HARM TO PETITIONERS FAR EXCEEDS THE PUBLIC INTEREST IN PROCEEDING TO HEARING PRIOR TO RESOLUTION OF THE PRESENT ISSUES.

Petitioners do not dispute the well settled principles that the government's interest in protecting the public health or safety is paramount, or that the right of physicians or dentists to practice their professions is necessarily subordinate to that interest, so the Division's arguments to this effect beg the issue. The real issue, which should have been addressed but was not by the Division, is the balancing of the potential irreparable harm to petitioners against the interest of the public in pursuing a final order before seeking judicial review, which balancing is required by § 63-46b-14(2).

In summary, the Division has raised no argument which can succeed in defeating Petitioner's arguments.

DATED this 2d day of September, 1992.

Linda J. Barclay

JACKSON HOWARD,
LESLIE SLAUGH, and
LINDA J. BARCLAY

Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing was mailed to the following, postage prepaid, this 2nd day of September, 1992.

Paul Van Dam,
Utah Attorney General
Robert Steed
Assistant Attorney General
36 South State, #1100
Salt Lake City, Utah 84111

Linda J. Barclay

ATTORNEY

APPENDIX

PAUL VAN DAM (#3312)
Attorney General
ROBERT E. STEED (#6036)
Assistant Attorney General
Fair Business Enforcement Unit
36 South State Street, #1100
Salt Lake City, Utah 84111
Telephone:(801) 533-3200

IN THE UTAH COURT OF APPEALS

KENT BLAINE HANSEN AND BRENT)	
D. HANSEN,)	MOTION IN OPPOSITION
)	TO PETITIONERS' PETITION FOR
Petitioners,)	REVIEW OR, IN THE
)	ALTERNATIVE, FOR
)	EXTRAORDINARY RELIEF
vs.)	
)	
DIVISION OF OCCUPATIONAL)	
AND PROFESSIONAL LICENSING,)	Agency Case No. OPL-89-47
)	
)	
Respondent.)	

Respondent, the Division of Occupational and Professional Licensing ("Division"), by and through counsel, Robert E. Steed, Assistant Attorney General, submits the following memorandum in opposition to Petitioners' Petition For Review Or, In The Alternative, For Extraordinary Relief.

STATEMENT OF FACTS

1. Petitioners are licensees of the Division of Occupational & Professional Licensing ("Division"). Petitioners are licensed to practice Dentistry and to prescribe and administer controlled substances.

2. Petitioners are brothers who practice Dentistry together in two offices located in Spanish Fork and Midvale, Utah.

3. In August 1989, a petition was filed by the Division alleging that Petitioners engaged in unprofessional conduct

including incompetence in the practice of dentistry, fraudulent billing practices, over-prescribing controlled substances, engaging in sexual acts with a patient in exchange for drugs and taking lewd nude photographs of a patient while she was under the influence of nitrous oxide.

4. On June 14, 1991, counsel for the Division filed a Motion in Limine to Exclude Irrelevant Evidence. Petitioners filed their response on June 26, 1992. Oral argument was heard on the Division motion in limine on April 1, 1992.

5. On April 17, 1992, Administrative Law Judge, Stephen Eklund, issued an order permitting Petitioner's to present evidence of K.W.'s or any other witness' prior sexual behavior "with a licensed health care professional within the context of a physician/patient relationship, both on cross-examination of that witness and for possible impeachment purposes of rebuttal." (Order on Division's Motion in Limine, April 17, 1992 p.9) Only evidence of K.W.'s or another witness' "general prior sexual history or reputation shall be excluded." Id.

6. On June 21, 1991, Petitioners filed a motion to close the hearing to the public and a memorandum regarding the appropriate standard of proof for disciplinary hearings. The Division filed a response to Petitioner's motion on July 1, 1991. With respect to the motion to close the hearing, the Salt Lake Tribune filed a petition to intervene on July 1, 1991. Administrative Law Judge Stephen Eklund granted the Tribune's petition on July 2, 1991.

7. On April 1, 1992 oral argument on Petitioners' motion to close was heard before the administrative law judge and the Dentist and Dental Hygienist Licensing Board. Pursuant to section 52-4-1 et seq. the Board voted four to two to keep the hearing open. On April 7, 1992 the administrative law judge issued an order on behalf of the Board providing that the hearing would remain open to the public.

8. On April 1, 1992, oral argument on the standard of proof was heard by the administrative law judge. The administrative law judge issued an order on April 17, 1992 stating that preponderance of the evidence was the standard of proof in administrative proceedings

ARGUMENT

I. THE UTAH COURT OF APPEALS LACKS JURISDICTION TO REVIEW THE ORDERS OF THE ADMINISTRATIVE LAW JUDGE AT THIS JUNCTURE

Petitioners' request for interlocutory review of the orders of the administrative law judge is not properly before this court. Petitioners' request is based on Rule 14 and Utah Code Ann. § 63-46b-14(2)(b)(1991) or in the alternative, Rule 19 of the Utah Rules of Appellate Procedure and Rule 65B of the Utah Rules of Civil Procedure. Despite Petitioners' alternative theories of jurisdiction, Petitioners have overlooked section 78-2a-3(2)(a) and section 63-46b-16(1) which vest this court with jurisdiction to review "final orders" from administrative agencies. Utah Code Ann. §§ (1953 as amended).

Section 78-2a-3(2)(a) vests the Court of Appeals with "appellate jurisdiction, including jurisdiction of interlocutory appeals, over the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceeding." Utah Code Ann. § (1992). Moreover, section 63-46b-16(1) of the Administrative Procedures Act restates that the Court of Appeals "has jurisdiction to review all final agency action resulting from formal adjudicative proceedings. Utah Code Ann. § (1989).

The orders of the administrative law judge, that Petitioners seek to have reviewed by this court are not final orders nor do the interlocutory orders of the administrative law judge constitute final agency action. A final order will be issued by the Division only after formal adjudicative proceedings in this matter have been concluded and all issues pending before the Division have been determined.

In Sloan v. Board of Review of Industrial Commission, the Utah Court of Appeals dismissed an appeal taken from an order of the Industrial Commission for lack of jurisdiction. The Industrial Commission adopted the findings of the administrative law judge but remanded the issue of whether claimant was entitled to medical expenses. 781 P.2d 463 (Utah App. 1989). The Sloan court held that the remand order was not a final appealable order. "We agree that an order of the agency is not final so long as it reserves something to the agency for further decision." Id. at 464.

Attempts to seek interlocutory review of non-final orders of the agency is not new to the Division. For example, in Barney v. Division of Occupational and Professional Licensing, the Utah Court of Appeals recently dismissed an appeal filed by a licensed health facility administrator whose license is the target of disciplinary proceedings initiated by the Division. Case No. 910755-CA (Utah Ct. App. March, 26, 1992)¹ The respondent, Barney, accused of physically assaulting patients and administering contaminated pills to patients, filed an appeal from the order of the administrative law judge, Stephen Eklund, denying his motion to dismiss the Division's petition. Referring to Sloan, the court held it did not have jurisdiction to review the order of the administrative law judge because that order lacked "finality".

[T]he requirement of finality contemplates that the agency proceedings have been brought to their conclusion by disposition of all issues before the agency. The denial of a motion to dismiss allows the proceeding to continue in the agency and is not a final order for purposes of judicial review.

Id. at 3. (emphasis added)²

¹. The Division acknowledges that this opinion, although scheduled to be published, has yet to be published and may be revised or withdrawn prior to publication.

². In an unpublished opinion, the Utah Court of Appeals in Eliason v. Buhler et al. dismissed an appeal in which a physician, charged with sexually abusing male patients, brought an appeal citing to Rule 65B(b)(2) and (4), Utah Rules of Civil Procedure, and Extraordinary Writs under Rule 19 of the Utah Rules of Appellate Procedure. The Eliason court dismissed the appeal because no final order had been issued pursuant to Utah Code Ann. § 13-1-12(1)(a) (1990). While this opinion does not establish a binding precedent, it is consistent with appeals court's ruling in Sloan and Barney.

2. SECTION 63-46b-14(2)(b) DOES NOT CREATE AN EXCEPTION TO THE REQUIREMENT OF FINAL AGENCY ACTION

Petitioners misinterpret section 63-46b-14(2)(b) as allowing this court to review non-final agency orders. Although section 63-46b-14(2)(b) does provide an exception to the requirement that a party exhaust all administrative remedies before seeking judicial review, it does not excuse the requirement that there be final agency action or a final order. Once a case is proceeding in the administrative forum, review of the agencies orders can only be had after a final order is issued. Utah Code Ann. § 78-2a-3(2)(a) (1992), Utah Code Ann. § 63-46b-16(1)(1989).

To excuse their failure to exhaust administrative remedies or await a final order, Petitioners claim that they will suffer irreparable harm if the proceedings before the Division are allowed to continue on its present course. Petitioners specifically refer to the publicity this matter, which is nearly three years old, has received in the media and press. Although a complete review of the publicity and attention this matter has received in the press is not warranted and is irrelevant, it suffices to say the Petitioners themselves have made numerous statements to the press, including statements to the national and local media. However, regardless of the attention the press or media has imparted to these proceedings, it is evident that the Dental Board, who will serve as the fact finder in this matter, have been unaffected by it. During a special voir dire proceeding on April 1, 1992, counsel for Petitioners was allowed to question the Board about its knowledge of the case and any

conflict that might warrant the recusal of a Board member. During voir dire, it became clear that the Dental Board has not been affected and has remained unaware of pre-hearing publicity concerning this case. In fact, counsel passed for cause all members of the Board excluding its public member who served as a past director of the Department of Commerce. The public member was subsequently recused from participating in these proceedings because of his prior role with the Division.

Despite, Petitioners assertion that these proceedings are becoming a "media event", the Dental Board has remained impartial and unaffected by any media attention given this matter. Moreover, Petitioners can not be "convicted" by the Dental Board in any event. The Board's sole responsibility is to determine whether Petitioners have violated the rules and laws governing their profession and what, if any, sanction should be imposed on Petitioners' licenses. Consequently, petitioners' claims, unsupported by memoranda or exhibit, concerning the adverse impact of publicity in this case is without merit and is irrelevant to whether this court has jurisdiction to review the interlocutory orders of the administrative law judge.

**3. A FINAL ORDER WILL BE ISSUED ONLY AFTER THE
COMPLETION OF ADJUDICATIVE PROCEEDINGS BEFORE THE
ADMINISTRATIVE LAW JUDGE AND DENTAL BOARD**

Final orders of the Division are rendered only at the culmination of adjudicative proceedings before the administrative law judge and the professional or occupational board. Section 13-1-12 provides, "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." Utah Code Ann. § (Supp. 1991). See also, Utah Code Ann. § 58-1-16 (Supp. 1991).

Because no final order has been issued, judicial review of the Administrative Law Judge's orders is premature and procedurally inappropriate. There are numerous issues, including findings on the merits of the allegations, that still must be determined by the agency. Despite Petitioners' assertion that it would be more efficient to resolve legal disputes on appeal to this court before the hearing, this would be the least efficient manner to resolve the legal issues raised by Petitioners. In the event Petitioners are absolved of any professional violation, review by this court would be moot. Moreover, rather than review the orders of the Division in piecemeal fashion, it would be more practicable to review the orders of the administrative law judge in conjunction with all other grounds for appeal that may be filed subsequent to the hearing.

4. PETITIONERS HAVE NOT COMPLIED WITH RULE 19 FOR EXTRAORDINARY RELIEF

Petitioners' motion seeks review of the interlocutory orders of the administrative law judge under Rule 14 or Rule 19 of the Utah Rules of Appellate Procedure. Admittedly, Petitioners have decided to file this motion first as a Rule 14 motion. According to Petitioners this excuses the fact that no memoranda or points and authorities or other supporting documentation has been filed to support their request. While Rule 14 does not expressly

require a memorandum on the merits at the time of filing, Rule 23(a)(3)(4) does.

Moreover, Petitioners' reliance on Rule 14 as a jurisdictional basis to obtain review of an interlocutory order from an administrative agency is misplaced. As discussed above, the court does not have jurisdiction to review non-final agency decisions and Rule 14 does not provide any extraordinary relief or alternative remedy that would vest the Court of Appeals with jurisdiction to review interlocutory orders.

Petitioners' request for agency review bears some resemblance to the requirements of Rule 5 concerning Discretionary appeals from interlocutory orders. Judging from the content of Petitioner's memorandum, it contains verbatim the content requirements for petitions submitted under Rule 5. However, because Rule 5 applies exclusively to the orders of "district court, juvenile court, or circuit court", it would have no application to the interlocutory orders of administrative agencies. This is not excluding the fact that under Rule 5, Petitioners' request for review and this response would be considered untimely.

As a practical matter, Petitioners should have filed a motion and memorandum on the merits in so far as they intend to base their appeal on alternative theories of jurisdiction. Because Petitioners are seeking extraordinary relief under Rule 19, they should be required to do more than submit mere claims and assertions, unsupported by affidavits, exhibits or any

competent evidence. It simply is not fair or judicially economical for the courts to be placed in the position of telling petitioners what theory of jurisdiction they will accept and then give leave to the parties to comply with the filing requirements of the rules. Rather than give the court a choice of alternative theories of jurisdiction, Petitioners should have provided this court with specific grounds and legal arguments to support their jurisdictional arguments.

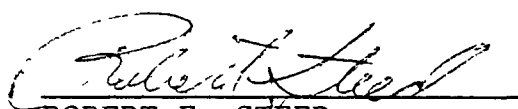
Because, Petitioners cite Rule 19 as an alternative theory of jurisdiction, they are required to comply with the requirements for a motion under Rule 19. Among other things that are lacking in Petitioners' motion, Rule 19 of the Utah Rules of Appellate Procedure requires that Petitioners' motion include "a statement explaining why it is impractical or inappropriate to file the petition in the district court" and "a memorandum of points and authorities in support of the petition. Consequently, Petitioners' request for review pursuant to Rule 19 is not properly before this court and Respondent retains the right to respond to any motion, properly filed before this court, for extraordinary relief. This however, is contingent on whether Petitioners can now timely file a motion for extraordinary relief with this court. In any event, the same arguments addressed above relating to the exhaustion of administrative remedies and finality of administrative orders apply with equal force to Petitioners' request for extraordinary relief.

Respondent respectfully requests that the court dispose of all jurisdictional issues and deny Petitioners' request for judicial review.

CONCLUSION

Petitioners request for review of interlocutory orders of the administrative law judge is procedurally improper. This court lacks jurisdiction to review the orders of the administrative law judge until the Division issues a final order in this matter. Although the requirement also applies with equal strength to Petitioners' request for extraordinary relief, Petitioners' request is not properly before this court until the requirements of Rule 19 are fulfilled. Consequently, Respondent request that Petitioners' request for judicial review be denied for lack of jurisdiction.

Submitted this 27th day of May, 1992.


ROBERT E. STEED
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Robert Steed certify that on May 27, 1992.

I served a copy of the attached MEMORANDUM IN OPPOSITION TO PETITIONERS' PETITION FOR REVIEW OR, IN THE ALTERNATIVE, FOR EXTRAORDINARY RELIEF to Jackson Howard, counsel for Petitioners in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Jackson Howard, Esq.
Howard, Lewis & Petersen
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603

Robert Steed