

1993

Worth L. Annette C. Orton v. Collection Division of Utah State Tax Commission : Unknown

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

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

Unknown.

Unknown.

Recommended Citation

Legal Brief, *Worth L. Annette C. Orton v. Collection Division of Utah State Tax Commission*, No. 930320 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5210

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs 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.

LAW OFFICES

STRONG & HANNI

A PROFESSIONAL CORPORATION

SIXTH FLOOR BOSTON BUILDING

NINE EXCHANGE PLACE

SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 532-7080

TELEFAX (801) 532-5544

ESTABLISHED 1888

GORDON R. STRONG
(1909-1969)

GLENN C. HANNI, P.C.
HENRY E. HEATH
PHILIP R. FISHLER
ROGER H. BULLOCK
ROBERT A. BURTON
R. SCOTT WILLIAMS
DENNIS M. ASTILL
S. BAIRD MORGAN
STUART H. SCHULTZ
PAUL W. HESS
PAUL M. BELNAP

STEPHEN J. TRAYNER
JOSEPH J. JOYCE
BRADLEY W. BOWEN
VICTORIA K. KIDMAN
ROBERT L. JANICKI
ELIZABETH L. WILLEY²
PETER H. CHRISTENSEN¹
H. BURT RINGWOOD
DAVID R. NIELSON
ADAM F. TRUPP

¹ALSO MEMBER OREGON BAR
²ALSO MEMBER WASHINGTON, D.C. BAR

UTAH October 4, 1993

DOCUMENT

KFU

50

FILED

OCT - 8 1993

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, Utah 84102

A.O.

DOCKET NO. 930320

COURT OF APPEALS

Re: Worth L. and Annette C. Orton v. Collection Division of
Utah State Tax Commission, Case No. 930320-CA

Dear Ms. Noonan:

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure and in response to the submission of pertinent supplemental authorities by the Utah State Tax Commission, appellants hereby call to the court's attention several recently identified decisions. These cases pertain to pages 1 through 8 of petitioners'/appellants' reply brief.

The cases enclosed with this letter and considered supplemental authority are:

1. Maverick Country Stores, Inc. v. Industrial Comm. of Utah, 1993 WL355459 (Utah Ct. App. 1993) [not yet released for publication] (in which the court specifically recognizes that following submission of a motion for reconsideration a petitioner "no longer has a 'final agency action' from which to appeal.");

2. Northwest Central Pipeline v. State Corp. Comm., 735 P.2d 241 (Kan. 1987) (giving definition to the term final agency action when agency issues more than one Order);

3. Lopez v. Career Services Review Bd., 834 P.2d 568, 572 (recognizing necessity for appellate courts to have unambiguous final administrative orders from which to calculate jurisdictional time periods).

Sincerely,

STRONG & HANNI

By

Dennis M. Astill

AFT:mrs

oner during his conditional release and what those conditions should be.

The problem that I have in this case is that it is entirely possible that the evidence developed by the plaintiffs in their discovery may show that the members of the Kansas Adult Authority did not follow its proscribed regulations and adopted a blanket policy to release a prisoner on conditional release *in every case without any concern whatsoever for the safety of the public.*

Before the nonliability of the members of the KAA in this case can be determined, it is my opinion that the trial court should have reviewed the rules, regulations, and guidelines established by the KAA and then considered the nature and extent of the decision-making process actually utilized by the KAA in releasing Bradley R. Boan.

Before paroling a prisoner, the Kansas Adult Authority is specifically required to "consider all pertinent information regarding each inmate, including but not limited to the circumstances of the offense of the inmate; the presentence report; the previous social history and criminal record of the inmate; the conduct, employment, and attitude of the inmate in prison; and the reports of such physical and mental examinations as have been made." K.S.A. 1986 Supp. 22-3717(g). The same considerations which govern the decision whether to parole or discharge a prisoner also should govern the conditions to be attached to the release. K.S.A. 1986 Supp. 22-3718 requires that an inmate eligible for conditional release shall be subject to such written rules and conditions as the authority may impose. The Kansas Adult Authority regulations state that conditional releasees may be placed, "under mandatory in-state parole supervision" for 90 to 120 days or longer and they may be subject to the same treatment and conditions as all other parolees while on parole. K.A.R. 45-10-1.

In my judgment, these rules and regulations require the Kansas Adult Authority to consider the welfare of society when determining whether to impose conditions on releasees. In *Hopkins v. State*, 237

Kan. 601, 702 P.2d 311 (1985), it is stated that discretion implies the exercise of discriminating judgment within the bounds of reason. Whether the Kansas Adult Authority breached a nondiscretionary duty by exercising its discretion in bad faith and in a reckless manner cannot be determined without a full and complete analysis of the factual circumstances, which have not been developed in this case.

In my judgment, this case should be reversed and remanded to the trial court with directions to afford the parties an opportunity to develop the facts, so that both the trial court and an appellate court can determine whether or not the Kansas Adult Authority is liable in failing to carry out its obligation to impose conditions on a conditional release in order to protect the public.

HERD, J., joins the foregoing dissenting opinion.



241 Kan. 165

NORTHWEST CENTRAL PIPELINE CORPORATION, n/k/a Williams Natural Gas Company, Petitioner-Appellant,

v.

The STATE CORPORATION COMMISSION of the State of Kansas, Michael Lennen, Chairman, Margalee Wright, Commissioner, Keith R. Henley, Commissioner, and their respective successors in office, as members of the State Corporation Commission, et al., Respondents-Appellees.

Nos. 59735, 59738, 60143 and 60187.

Supreme Court of Kansas.

March 27, 1987.

Petitions were filed seeking judicial review of actions of the Corporation Commission relative to an oil company's application to amend its basic proration order to permit

infill drilling. The Shawnee District Court, James P. Buchele and Fred S. Jackson, JJ., and the Gray District Court, Don C. Smith, J., dismissed the appeals on procedural grounds. Appeal was taken. The Supreme Court, McFarland, J., held that: (1) petitions for judicial review which were filed before final action on rehearing were premature, even if the Corporation Commission did not permit the introduction of additional evidence on rehearing; (2) the failure to permit additional evidence did not render the granting of a rehearing a nullity so as to make the underlying order final agency action; (3) a pipeline company was not required to seek a rehearing on the rehearing order so as to nullify the effect of the pipeline company's loss of the "race to the courthouse"; and (4) the pipeline company was not denied due process.

Affirmed.

Lockett, J., concurred in result.

1. Administrative Law and Procedure §704

Mines and Minerals §92.61

Corporation Commission's decision granting amendment of oil company's basic proration order to permit infill drilling in field was not final for purposes of judicial review after Commission granted rehearing, even if Commission permitted introduction of additional evidence only on some issues.

2. Administrative Law and Procedure §704

Mines and Minerals §92.61

Corporation Commission's failure to open door to additional evidence on all issues, after rehearing was granted from order permitting infill drilling in field, did not render granting of rehearing a nullity for purposes of determining whether petitions for review from original order were premature.

3. Administrative Law and Procedure §704

Mines and Minerals §92.61

Pipeline company's petition for judicial review, which was filed before Corporation

Commission entered its order on rehearing of original order permitting amendment of oil company's basic proration order to permit infill drilling in field, was premature for purposes of determining whether county in which pipeline company filed petition for judicial review had jurisdiction over another county in which royalty owners' association filed petition for judicial review on date of rehearing order. K.S.A. 55-606(a).

4. Administrative Law and Procedure §664

Mines and Minerals §92.61

Pipeline company was not required to seek modification of rehearing order via additional motion for rehearing before Corporation Commission, even if order on rehearing substantially modified original order, and, therefore, pipeline company's filing of motion for additional rehearing did not defeat jurisdiction of county in which royalty owners' association filed its petition for judicial review after royalty owners' association won "race to courthouse." K.S.A. 55-606, 66-118b.

5. Administrative Law and Procedure §664

Mines and Minerals §92.61

Pipeline company could not nullify effect of its loss of "race to courthouse" by simply filing additional motion for rehearing after Corporation Commission entered rehearing order in proceeding in which oil company sought amendment of its basic proration order to permit infill drilling. K.S.A. 55-606, 66-118b.

6. Administrative Law and Procedure §481

Mines and Minerals §92.59

Pipeline company had no constitutional or statutory right to rehearing of order in which Corporation Commission permitted infill drilling in proration order or, if rehearing was granted, to have reconsideration of all issues contained in underlying order on which rehearing was granted. U.S.C.A. Const.Amends. 5, 14.

7. Constitutional Law §318(7)

Each interested party in Corporation Commission order on application to amend

oil company's basic proration order to permit infill drilling did not have due process right to judicial review in district court of its choice; rather, judicial review was to proceed in district court which first acquired jurisdiction. KSA 55-606(a); U.S. C.A. Const.Amend. 5, 14.

Syllabus by the Court

1. Where the Kansas Corporation Commission grants rehearing on an order concerning amendment of a basic proration order, a petition for judicial review filed prior to the filing of the order on rehearing is premature as no final Kansas Corporation Commission order has been entered. The fact that the Kansas Corporation Commission order granting rehearing specified certain areas on which additional evidence would be permitted and supplemental oral arguments allowed does not render the balance of the order ripe for judicial review.

2. Where the Kansas Corporation Commission grants rehearing on an order concerning proration, there is no statutory requirement that a party aggrieved by the order entered on rehearing seek rehearing on the rehearing order as a condition to seeking judicial review.

3. Judicial review of a Kansas Corporation Commission order relative to proration is discussed and held to lie in the district court first acquiring jurisdiction in the matter. The filing of a motion for rehearing of the order on rehearing does not defeat the jurisdiction of the court first acquiring jurisdiction on a proper petition for judicial review in the matter.

4. A party does not have a constitutional or statutory right to have motions for rehearing granted by the Kansas Corporation Commission in a proration matter or, if granted, to have reconsideration of all issues contained in the order on which rehearing was granted. Denial of due process arguments relative to rehearings before the Kansas Corporation Commission are discussed and rejected.

Mark H. Adams, II, of Adams & McCarthy, of Wichita, argued the cause, and J.D. Steelman, Jr., Associate Gen. Counsel, of

Northwest Central Pipeline Corp., of Tulsa, Okl., was with him on the briefs, for petitioner-appellant.

Kirby A. Vernon, Asst. Gen. Counsel, argued the cause, and Brian J. Moline, Gen. Counsel, Kansas Corp. Com'n, was with him on the brief, for respondents-appellees.

John C. Lovett, of Cities Service Oil and Gas Corp., of Tulsa, Oklahoma, and Stanford J. Smith and Stanford J. Smith, Jr., of Robbins, Tinker, Smith & Metzger, of Wichita, were on the briefs, for respondent-appellee Cities Service Oil and Gas Corp.

Steven D. Gough and Alan R. Pfaff, of Kahrs, Nelson, Fanning, Hite & Kellogg, of Wichita, were on the briefs, for respondent-appellee Amoco Production Co.

N.E. Maryan, Jr., of Mobil Oil Corp., of Denver, Colo., and Jerome E. Jones, and Patricia A. Gorham, of Hershberger, Patterson, Jones & Roth, of Wichita, were on the briefs, for intervenor Mobil Oil Corp.

Neil O. Bowman, of Mesa Operating Ltd. Partnership, of Amarillo, Tex., J.A. Hannah, of Tenneco Oil Co., of Oklahoma City, Okl., and Richard C. Byrd, of Anderson, Byrd & Richeson, of Ottawa, were on the brief, for intervenors Mesa Operating Ltd. Partnership and Tenneco Oil Co.

McFARLAND, Justice:

This consolidated case involves four appeals filed by Northwest Central Pipeline Corporation (Northwest Central) in cases where judicial review was being sought of certain actions by the Kansas Corporation Commission (KCC) relative to infill drilling in the Kansas Hugoton Field. Each of the four appeals was dismissed on procedural grounds by the respective district court and Northwest Central appeals therefrom.

CHRONOLOGY OF EVENTS

- | | |
|----------------|---|
| July 31, 1984 | - Cities Service Oil and Gas Corporation filed application with KCC to amend its basic proration order to permit infill drilling in the Kansas Hugoton Field. |
| April 24, 1986 | - KCC order filed permitting infill drilling. |
| May 5-8, 1986 | - Various motions for rehearing filed by interested parties including Northwest Central. |
| May 15, 1986 | - KCC grants rehearing, permitting introduction of additional evidence only on some issues. |

- May 22, 1986 - Panhandle Eastern Pipe Line Company files motion with KCC seeking clarification of May 15, 1986, order relative to whether, for judicial review purposes, certain portions of the April 24, 1986, order were final orders.
- May 27, 1986 - KCC order filed relative to May 22, 1986, motion in which KCC states no part of the April 24, 1986, order is a final order.
- June 16, 1986 - Northwest Central files actions in Shawnee County and Gray County district courts seeking judicial review of KCC's order of April 24, 1986, permitting infill drilling (appeal Nos. 59,735 and 59,738).
- July 18, 1986 - KCC's order on rehearing filed at 1:15 p.m. which triggered the following filings on the same date:
 - (1) Southwest Kansas Royalty Owners Association files for judicial review in Stevens County District Court at 1:16 p.m.
 - (2) Northwest Central files for judicial review in Shawnee County District Court at 2:22 p.m. (appeal No. 60,187).
- July 31, 1986 - Northwest Central files motion with KCC seeking rehearing on the July 18, 1986, order on rehearing.
- August 6, 1986 - (1) Rehearing of rehearing order denied by KCC.
 (2) Northwest Central files an action in Shawnee County District Court seeking judicial review of all KCC orders relative to the Cities Service application for infill drilling including denial of Northwest Central's "rehearing of rehearing" motion.

The above listing provides the basic sequence of events involved in the consolidated appeals herein. Additional facts will be stated as needed for discussion of particular issues.

ISSUE I. DID THE RESPECTIVE DISTRICT COURTS ERR IN DISMISSING EACH OF THE FOUR ACTIONS HEREIN ON PROCEDURAL GROUNDS?

APPEAL NOS. 59,735 and 59,738

These two petitions for judicial review were filed the same day (June 16, 1986) in the Shawnee and Gray county district courts (86-C-849 and 86-C-24 respectively) and are essentially identical. In each case the action was dismissed on the ground it was premature. More particularly, the courts held that the KCC's April 24, 1986, order was not a final order by virtue of the granting of the rehearing on May 15, 1986, as clarified by the May 27, 1986, KCC order. As the application was still pending before the KCC, no final agency action had been taken. Northwest Central contends, alternatively, that:

1. The April 24, 1986, order was final as to all matters upon which the KCC did not

permit the introduction of additional evidence upon rehearing.

2. The failure of the KCC to permit additional evidence on all aspects of the original order upon rehearing rendered the granting of rehearing a nullity, thereby making the April 24, 1986, order a final agency action.

[1] Neither contention has any merit. The effect of the first contention would be to allow piecemeal judicial review of the KCC actions on matters before it. Assume an order covers ten issues. The KCC then has second thoughts or reservations concerning its determination on the first issue and grants rehearing for the purpose of hearing additional evidence and argument on that issue. Intervenor A might not like the determination of issue two and seeks judicial review thereof. Intervenor B might not like what the KCC did on issue four and seeks judicial review thereof, and so on. The result would be piecemeal judicial review actions pending in various courts while the KCC is still concerned with the rehearing of its order. Obviously, the KCC would be limited on the rehearing to the first issue and would be unable to modify any other part of its original order even if a modification of the first issue would necessitate modification of other parts of the original order. The result would be a procedural nightmare that would seriously diminish the KCC's ability to function. There is no statutory authority for piecemeal judicial review of the KCC order herein. The parties concede that judicial review of the KCC's action herein can only be had by filing a petition for judicial review within 30 days after a final order has been entered. The specific statutes relative to judicial review will be discussed in a later issue. The question before us in this issue is when the agency action, or parts thereof, became final.

[2] The alternative contention that the failure of the KCC to throw the door open to additional evidence on all issues rendered the granting of the rehearing a nullity is equally untenable. The issues raised by the application were complex and the hearing thereon lasted some 56 days, in-

volving over 100 witnesses and 12,000 pages of transcript. The May 15, 1986, order stated the KCC had enough evidence in all but limited areas and limited new evidence to those areas. There is nothing weird about such a limitation. To hold otherwise could have greatly delayed final determination of the application for no useful reason. Appellate courts frequently limit submission on rehearing which focuses attention on the area of concern. This does not result in the balance of the appellate opinion becoming final or the granting of the rehearing a nullity.

The order of May 15, 1986, granting rehearing caused the April 24, 1986, order in its totality not to be a final agency action. The May 27, 1986, order clarifying the order granting rehearing merely spelled out that which was inherent in the May 15, 1986, order—namely, that no part of the April 24, 1986, order was a final agency action. Hence, no judicial review of any portion of the April 24, 1986, order (or the order of May 15, 1986, granting rehearing) was permissible until the order on rehearing was filed (July 18, 1986). The district courts involved in these two appeals were clearly correct in dismissing these two actions for judicial review filed on June 16, 1986, as being premature on the grounds no final order of agency action had been taken.

APPEAL NO. 60,187

[3] On July 18, 1986, at 1:15 p.m. the KCC entered its order upon rehearing. At 1:16 p.m. the same day, Southwest Kansas Royalty Owners Association filed an action in Stevens County District Court (86-C-30) seeking judicial review thereof. The Stevens County case is not before us. At 2:22 p.m. of the same day, Northwest Central filed its action for judicial review in Shawnee County District Court (86-C-1010). This case was dismissed on the ground the Stevens County District Court had first acquired jurisdiction. This determination is in accord with K.S.A. 1986 Supp. 55-606(a) which provides that an "action for review shall be brought in the district court having venue and *first acquiring jurisdiction of the matter.*" Clearly, the Stevens County

District Court action was filed prior to the Shawnee County action and thus Stevens County first acquired jurisdiction as between these two petitions. Northwest Central does not argue that its July 18, 1986, appeal (86-C-1010) is prior to the Stevens County case. Rather, it contends one or more of its other three petitions for judicial review was or were proper and that July 18, 1986, was not a legally permissible time for seeking judicial review. Under no theory of Northwest Central would its July 16, 1986, petition for judicial review be valid, but it has appealed from its dismissal (60,-187) apparently as a matter of routine procedure.

We find no error in the district court's dismissal of Northwest Central's July 18, 1986, petition for judicial review.

APPEAL NO. 60,143

[4] The KCC entered its order on rehearing on July 18, 1986. On July 31, 1986, Northwest Central filed a motion seeking rehearing on the rehearing order. This motion was denied by the KCC on August 6, 1986. Northwest Central filed for judicial review in Shawnee County on the same day (86-C-1084). The district court dismissed the petition on the ground that jurisdiction lay in Stevens County in case No. 86-C-30 filed July 18, 1986. Northwest Central appeals from said dismissal in appeal No. 60,143.

Northwest Central contends that, inasmuch as the KCC's July 18, 1986, order on rehearing substantially modified its April 24, 1986, order that it had the duty to seek modification thereof via a motion for rehearing and that the time for judicial review did not commence until the motion was denied on August 6, 1986.

In support of its position, Northwest Central cites K.S.A. 1986 Supp. 66-118b, which provides in pertinent part:

"No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall make application for a rehearing as herein provided. Such application shall set forth specifically the ground or grounds on which the applicant considers such order or decision to

be unlawful or unreasonable. No party shall, in any court, urge or rely upon any ground not set forth in the application. *An order made after a rehearing, abrogating, changing or modifying the original order or decision, shall have the same force and effect as an original order or decision, including the obligation to file an application for rehearing, as provided in this section, as a condition precedent to filing an action for review thereof.*" (Emphasis supplied.)

The difficulty with applying this statute is that K.S.A. 1986 Supp. 66-118b applies to KCC proceedings involving public utilities. The proceedings herein are not brought under the act of which K.S.A. 1986 Supp. 66-118b is a part. The statutory requirement of seeking a rehearing of a rehearing order is not contained in the judicial review statutes applicable herein. K.S.A. 1986 Supp. 55-606 provides in pertinent part:

"(a) Any action of the commission pursuant to K.S.A. 55-601 through 55-609, and amendments thereto, is subject to review in accordance with the act for judicial review and civil enforcement of agency actions. *The action for review shall be brought in the district court having venue and first acquiring jurisdiction of the matter.* Notwithstanding the provisions of K.S.A. 77-622 and amendments thereto, the authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the agency action.

"(b) *Before any action for judicial review may be brought by a person who was a party to the proceeding resulting in the agency action, a petition for rehearing shall first be filed with the commission within 10 days from the date of the agency action in question.* The rehearing shall be granted or denied by the commission within 10 days from the date the petition is filed and if not granted within 10 days it shall be taken as denied. If a rehearing is granted the matter shall be set for hearing as promptly as convenient and shall be de-

termined by the commission within 30 days after it is submitted.

"An action for judicial review may be brought by any person aggrieved by the agency action, whether or not such person was the applicant for rehearing. If no petition for rehearing is filed, any person aggrieved by the agency action who was not a party to the proceeding before the commission may bring an action for judicial review of such agency action.

"(c) Any action for review pursuant to this section shall have precedence in any court and on motion shall be advanced over any civil cause of different nature pending in such court. In any such action, a county abstract may be filed by the commission or any other interested party." (Emphasis supplied.)

K.S.A. 1986 Supp. 55-606 refers to the act for judicial review and civil enforcement of agency actions, K.S.A. 77-601 *et seq.* K.S.A. 1986 Supp. 77-613(b) provides:

"A petition for judicial review of an order is not timely unless filed within 30 days after service of the order, but the time is extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies."

[5] Northwest Central argues that its motion for rehearing of the rehearing order was a timely attempt to exhaust its administrative remedies and it had 30 days after the denial thereof to seek judicial review. Under this logic, Northwest Central contends it can nullify the effect of its loss of the July 18, 1986, footrace to the courthouse by simply filing another motion for rehearing. This is an unreasonable position to assume. The act for judicial review, of which K.S.A. 1986 Supp. 77-613(b) is part, is a broad act covering all manner of agency actions, the vast bulk of which concern one party's dealings with an agency. In the matter before us, a large number of parties intervened in the proceeding on the Cities Service application seeking amendment of its basic proration order to permit infill drilling. A major policy of the KCC was at issue, the determination of which would have far-reaching effects on the pro-

duction of natural gas in Kansas. K.S.A. 1986 Supp. 55-606 establishes the procedure by which rehearing of the order herein may be obtained and does not authorize a rehearing on a rehearing. The July 18, 1986, order on rehearing was a final order and the Stevens County District Court acquired jurisdiction of the judicial review thereof on July 18, 1986, pursuant to K.S.A. 1986 Supp. 55-606(a). Northwest Central has sought and received permission to intervene in the Stevens County action and obtain judicial review of all or any portion of the first KCC order.

We conclude the Shawnee County District Court properly dismissed 86-C-1084 on the ground the Stevens County District Court had first acquired jurisdiction of the matter in issue.

ISSUE NO. 2. WERE NORTHWEST CENTRAL'S DUE PROCESS RIGHTS VIOLATED BY THE PROCEDURES HEREIN?

[6] This issue is an amalgam of complaints concerning what Northwest Central perceives to be egregious treatment it has received from the KCC. In its lachrymose recital of the KCC's actions herein, Northwest Central contends its due process rights have been violated. The logic of Northwest Central's argument is, however, difficult to follow. Northwest Central does not contend it was in any manner restricted or deprived of the opportunity for full hearing before the KCC prior to the entry of the KCC's order of April 24, 1986. The shabby treatment complaints all arise in connection with the granting of the rehearing and Northwest Central's untimely petitions for judicial review. Northwest Central contends, in essence, it had a right to have the KCC review all issues on rehearing and that the KCC only reviewed certain issues. There is no right to a rehearing—the granting or denial of a rehearing is discretionary with the KCC. Under its order granting rehearing, the KCC could have changed any part of its April 24, 1986, order although the introduction of additional evidence and subsequent oral argument was limited to certain areas. Northwest Central has no due process right to have all

issues reviewed on rehearing before the KCC.

[7] As far as judicial review is concerned, such review is statutory. There is no due process right for each interested party to have judicial review in the district court of each party's choice. Judicial review was obtained in the Stevens County District Court as the court first acquiring jurisdiction under K.S.A. 1986 Supp. 55-606(a). Northwest Central does not contend that it was limited in any way from full participation therein.

We conclude this issue is without merit.

The judgments are affirmed.

LOCKETT, J., concurs in the result.



12 Kan.App.2d 74

Charles L. CARTER, Appellee,

v.

KOCH ENGINEERING, Appellant,

and

Aetna Insurance Company, Insurance
Carrier/Appellant.

No.. 59331.

Court of Appeals of Kansas.

April 9, 1987.

Review Denied May 15, 1987.

Employer and insurer appealed judgment of Sedgwick District Court, Paul W. Clark, J., awarding workers' compensation. The Court of Appeals, Brazil, J., held that: (1) finding that worker had lost 80% of use of his forearm was supported by substantial evidence; (2) healing period compensation could be properly awarded; (3) worker's violation of rules related to method of running punch press did not take his activities beyond course of his employment; and (4) worker's failure to use safety devices

tion	Rank (R)	Database	Mode
Copy	R 1 OF 1	UT-CS	Page
E AS: 1993 WL 355459 (UTAH APP.)			

ICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

MAVERIK COUNTRY STORES, INC., Petitioner,

v.

The INDUSTRIAL COMMISSION OF UTAH and Vicky Ann McCord, Respondents.

Nos. 920206-CA, 910413-CA.

Court of Appeals of Utah.

Sept. 7, 1993.

For BILLINGS, JACKSON, and RUSSON.

AMENDED OPINION [FN1]

BILLINGS

Maverik Country Stores brings separate appeals from two decisions of the Industrial Commission of Utah. The first appeal is from the Industrial Commission's determination that Maverik violated Utah Code Ann. ss 34-35-1 to - 988 & Supp.1993), the Utah Anti-Discrimination Act, in its treatment of Vicky Ann McCord. The second appeal is from the Industrial Commission's ruling on Maverik's request for agency review was untimely. We dismiss the first appeal and affirm the ruling in the second. We remand for assessment of attorney fees.

FACTS

Jones, a Maverik store manager, hired Ms. McCord as a convenience store clerk on September 30, 1988. [FN2] McCord worked six hour shifts, four days a week at \$3.35 per hour during her two weeks of part-time employment. While at work on October 14, 1988, McCord experienced tightness in her chest and asked Jones if she could go to the hospital. The doctor at the hospital indicated McCord's heart was fine. McCord subsequently called Jones and offered to work her shift. Jones told her to stay home and rest. While talking to Jones later that day, Jones stated her mother had died from heart problems and her son had recently had open heart surgery. She expressed concern over the seriousness of McCord's heart problems and indicated she would be afraid to leave McCord in the store alone. Jones then terminated McCord's employment. McCord had answered "no" to an inquiry on the employment application regarding whether she had any heart problems which would limit her ability to perform the job. She did have a condition known as mitral valve prolapse which the parties stipulated was a "usually benign condition." A doctor examined McCord after she was terminated and found employment posed no risk to her.

McCord subsequently filled out a company form, a Record of Employee Counseling, describing the event and indicating she was very concerned McCord's heart problem would reoccur if she continued her job with Maverik. In a later letter to the Utah Anti-Discrimination Division (UADD), Jones again focused on her concern about a stress related reoccurrence. At the hearing before the administrative law judge (ALJ) on the discrimination claim, Jones mentioned additional factors for the termination. These were McCord's difficulty in changing the gas pump meters and allegations that McCord smelled of alcohol at work.

These factors, however, were never discussed in the termination hearing.

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

AS: 1993 WL 355459, *1 (UTAH APP.)

Interview nor noted on the termination form.

McCord subsequently sought employment at numerous locations from 1989 to 1991. She worked for a short time as a janitor at an elementary school but was forced to quit due to an unrelated illness.

McCord filed a complaint alleging a violation of the Utah Anti-Discrimination Act with the UADD on October 24, 1988. The UADD found for McCord in an order issued January 24, 1991. Maverik requested a formal hearing before an ALJ. The hearing was held on May 15, 1991. The ALJ issued findings of fact and conclusions of law on June 26, 1991. The ALJ's June 26, 1991 decision included a specific reservation of the issue of appropriate attorney fees. On September 10, 1991, the ALJ issued a Supplemental Order disposing of the issue of attorney fees.

On July 26, 1991, Maverik filed a Writ of Review with this court (first appeal). The first appeal is from the ALJ's Order of June 26, 1991. On August 1, 1991, McCord and the Industrial Commission filed motions to dismiss the first appeal based on Maverik's failure to exhaust administrative remedies and obtain a final order. On September 16, 1991, this court ordered those motions denied, and requested the parties include arguments on those issues in their briefs on the merits.

Despite its pending appeal, Maverik then filed a Request for Review by the Industrial Commission of the ALJ's June 26, 1991 and September 10, 1991 orders. The date the request was filed is unclear. Counsel for Maverik signed and dated the request October 10, 1991. The request has two received dates stamped on it, October 11, 1991 and October 15, 1991. In later orders referring to the request, the Industrial Commission refers to both dates as the date it received the request. For the purposes of our review, we assume the request was received October 11, 1991.

February 28, 1992, the Industrial Commission denied Maverik's Request for Review based on its untimeliness. [FN3] On March 19, 1992, Maverik filed a request with the Industrial Commission to reconsider its denial of the Request for Review. On March 30, 1992, the Industrial Commission denied Maverik's request for Reconsideration. In this denial, the Industrial Commission recognized it could have allowed the late Request for Review if Maverik had shown good cause for extension of the time period. The Industrial Commission found, however, that Maverik had failed to show good cause for the extension. April 3, 1992, Maverik filed a "Limited Request for Reconsideration" in which it finally attempted to show good cause for its late filing of the final Request for Review. The Industrial Commission did not respond to this late motion. On April 7, 1992, Maverik filed a Writ of Review with this court (second appeal). The second appeal is from the Industrial Commission's order Denying Review and Order Denying Request For Reconsideration.

THE FIRST APPEAL--EXHAUSTION OF ADMINISTRATIVE REMEDIES

As a threshold matter, we must determine whether we have jurisdiction over the first appeal. Regardless of who raises the issue, we must dismiss a case if we determine we do not have jurisdiction. *Silva v. Department of Employment Security*, 786 P.2d 246, 247 (Utah App.1990) (per curiam); see also *Thompson v. Thompson*, 743 P.2d 1230, 1232 (Utah App.1987) (per curiam). "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App.1989).

E AS: 1993 WL 355459, *2 (UTAH APP.))

the basic purpose underlying the doctrine of exhaustion of administrative remedies "is to allow an administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Tidson*, 405 U.S. 34, 37, 92 S.Ct. 815, 818 (1972); see also *Pacific Ironmountain Express Co. v. Tax Comm'n*, 316 P.2d 549, 5511 (Utah 1957) (recognizing correction rationale). Exceptions to the doctrine exist. For example, in instances where there is a chance that irreparable injury would occur if exhaustion was required or where requiring exhaustion would serve no useful purpose, the doctrine will not be applied. See *Tax Comm'n v. Person*, 782 P.2d 519, 524 (Utah 1989); see also Utah Code Ann. 63-46b-2(a) & (b) (1989).

In this case, Maverik appealed directly to this court thirty days after the ALJ's ruling. The Utah Anti-Discrimination Act provides that following the issuance of an order after a formal hearing pursuant to the Act "either party may file a written request for review of the order ... in accordance with subsection 63-46B-12." Utah Code Ann. s 34-35-7.1(11)(a) (Supp.1993). This allows parties to an anti-discrimination hearing to take advantage of the general UAPA agency review process. If no timely review is filed "the order by the presiding officer becomes the final order of the commission." *Id.* s 34-35-7.1(11)(b). This section provides that the Industrial Commission need not act to reverse the ALJ's order in any way for that order to take effect. Thus, on the day Maverik filed its petition for review the ALJ's order was a final enforceable order of the Industrial Commission.

The next subsection of the Anti-Discrimination Act, however, requires an aggrieved party to file for agency review under subsection 11(a) or lose the opportunity for judicial review. [FN4] That subsection provides: "An order of the commission under Subsection (11)(a) is subject to judicial review as provided in Section 63-46b-16." *Id.* s 34-35-7.1(12) (emphasis added). Subsection 12 could have easily provided that a final order under Subsection 11 is subject to judicial review under UAPA. The clear import of the legislature's omission of orders final under subsection 11(b) is that they are not subject to judicial review. Subsection 12 simply embodies the general principle that a party must exhaust its administrative remedies prior to obtaining judicial review. Therefore, a party adversely affected by an order of an ALJ in an anti-discrimination hearing cannot obtain judicial review of that order until it has been subject to administrative review. *Cf. Highty Homeowners Inc. v. Public Serv. Comm'n*, 779 P.2d 682 (Utah 1989) (holding Utah Code Ann. 54-7-15(2)(b) required application for rehearing prior to judicial appeal).

Furthermore, the principle of exhaustion of administrative remedies is currently embodied in the general provisions of UAPA. One section provides: "A party may seek judicial review only after exhausting all administrative remedies available...." Utah Code Ann. s 63-46B-12(2) (1989) (emphasis added). This provides additional support for our decision. [FN5] We have no jurisdiction over the first appeal and have no choice but to dismiss it. [FN6]

II. THE SECOND APPEAL

A. Industrial Commission's Jurisdiction

Maverik contends the filing of the first appeal, regardless of its timeliness, ousted the Industrial Commission of jurisdiction to continue to act in the

AS: 1993 WL 355459, *3 (UTAH APP.))

. Thus, according to *Miiverik*, every action taken by the Industrial Commission after the ALJ's June 26 Order is a nullity. *Maverik* would have us send to the Industrial Commission for entry of the Supplemental order on attorney fees and the agency appeals process. *Maverik* does not provide any relevant authority supporting this contention.

Other courts have consistently recognized an appeal from a non-final order does not divest the administrative tribunal of jurisdiction. For example, in *Fiebig v. Wheat Ridge Regional Center*, 782 P.2d 814 (Colo.App.), cert. denied, (Colo. Oct. 2, 1989), the court held an untimely petition for judicial review did not divest the agency of jurisdiction to act. *Id.* at

In *Fiebig*, an employee appealed his termination to the State Personnel Board. The Board referred the complaint to a hearing officer who ruled the allegations of sexual misconduct against the employee were without merit. The hearing officer, however, upheld the termination on the grounds the employee could no longer perform his job due to the allegations. Both parties appealed the decision to the Board. The Board ruled the hearing officer's findings were sufficient and remanded the case to the officer for a new hearing. The employer appealed the Board's ruling to the court of appeals. Subsequently, hearing the Board ordered was held and the hearing officer ruled in favor of the employee. The employer filed a motion with the Board to declare the hearing officer's order invalid on the grounds the appeal to the court invalidated the agency's jurisdiction. The Board denied the motion. The court of appeals upheld the Board's ruling because "an appeal to a court without jurisdiction does not divest the agency of jurisdiction to proceed with the action on the merits." *Id.* at 816. Accord *Northwest Central Pipeline Co. v. State Corp. Comm'n*, 735 P.2d 241 (Kan.1987).

Similarly, we have recognized a notice of appeal filed while a trial court is considering a proper post-judgment motion does not confer jurisdiction on this court. *DeBry v. Fidelity Nat. Title Ins. Co.*, 828 P.2d 520, 523 (Utah 1992), cert. denied, (Utah May 14, 1993). We reasoned "to permit an appeal to be an affront to judicial economy" because allowing the trial court to dispose of the motion might eliminate needless appeals and discourage pointless appeals. *Id.* See also *Williams v. City of Valdez*, 603 P.2d 483, 488 (Alaska 1980) (holding appeal brought from non-final order of a trial court does not divest court of jurisdiction); *Knox v. Dick*, 665 P.2d 267, 269 (Alaska 1983) (holding "appeal from a non-appealable order does not divest the trial court of jurisdiction"). Likewise here, allowing an untimely appeal to divest the agency of jurisdiction creates the possibility of multiple appeals and needless delays.

For the rule for which *Maverik* argues, a party who prematurely appeals an agency decision could unjustly delay further agency action. The rationale behind allowing continuing jurisdiction in the agency following an appeal from a non-final order applies with equal force to allow continuing jurisdiction where the action is subject to further administrative review. We thus follow sister jurisdictions and conclude appeals from agency orders subject to further administrative review do not divest the agency of jurisdiction. Therefore, the Industrial Commission had jurisdiction to act after the first appeal was filed.

B. Timeliness

McCord and the Industrial Commission argue we should dismiss the second appeal. COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

AS: 1993 WL 355459, *5 (UTAH APP.)

al because Maverik's Request for Review of the Final Order of the ALJ was timely. Maverik responds its request was timely because either (1) Utah Rule of Civil Procedure 6(e) gives it three extra days to file the appeal, (2) the filing date is the date of mailing or, (3) the Industrial Commission abused its discretion in failing to extend the filing deadline by one day. The Final Order was issued September 10, 1991 and Maverik filed its Request for Review September 11, 1991. Whether URCP 6(e) is applicable or whether the crucial date is the mailing date are questions that involve the agency's application or interpretation of general law which we review under section 63-46b-16(4)(d) for correction of error. *Morton Int'l. Inc. v. Auditing Div.*, 814 P.2d 581, 89 (Utah 1991); *King v. Industrial Comm'n*, 850 P.2d 1281, 1285-86 (Utah 1993). See also *SEMECO v. Auditing Div.*, 849 P.2d 1167, 1172 (Utah 1992) (Durham, J., dissenting).

Date of Filing

A request for review must be filed "within 30 days after the issuance of the order...." Utah Code Ann. § 63-46B-12(1)(A) (1989). The request must also "be sent by mail to the presiding officer and to each party." *Id.* § 63-46B-12(1)(B)(IV). The parties agree the order was dated and issued September 10, 1991. See *Dusty's Inc. v. Auditing Div.*, 842 P.2d 868, 870 (Utah 1992) (holding administrative order is issued on date on face of order).

Maverik first argues that Utah Rule of Civil Procedure 6(e) gives it a three day extension on the thirty day filing deadline. That rule provides: "Whenever a party ... is required to do some act ... within a prescribed period after the service of a notice ... upon him and the notice ... is served by mail, 3 days shall be added to the prescribed period." Utah R.Civ.P. 6(e) (emphasis added).

That rule must be read in light of section 63-46B-12(1)(A) of UAPA which requires a party to appeal thirty days after the issuance of the administrative ruling. Thus, Rule 6(e) does not apply because under section 63-46B-12(1)(A) of UAPA the time for appeal runs from the issuance of an order not from the service of an order on a party.

Filing Requirement

Maverik next argues Utah Rule of Civil Procedure 5 [FN7] somehow supports its contention the date of mailing is the relevant date. Rule 5(d) explicitly recognizes a distinction between the filing of documents and the service of documents on a party. See Utah R.Civ.P. 5(d). [FN8] All the language of Rule 5(d) relied on by Maverik relates to service on a party not to the filing of documents necessary to start an appeal and is, thus, inapposite. Likewise, Maverik's attempted reliance on the language of section 63-46B-12(1)(B)(IV) is unavailing. The requirement that requests for review be sent to the presiding officer and the opposing party is a requirement of service, not of filing.

Further, it is clear that under the procedural rules which govern our courts, filing requires actual delivery to the court. For example, in *Silva v. Department of Employment Sec.*, 786 P.2d 246 (Utah App.1990) (per curiam), we reversed, for lack of jurisdiction, a claim of a petitioner whose petition for review to this court arrived one day late in the mail. The petition had been filed two days prior to the day the petition was due. We noted: "The argument that an appeal is filed when mailed has been consistently rejected in the past and we reject it here." *Id.* at 247 (citing *Isaacson v. Dorius*,

3 AS: 1993 WL 355459, *6 (UTAH APP.))

P.2d 849 (Utah 1983); State v. Palmer, 777 P.2d 521 (Utah App.1989)). Isaacson, the supreme court noted that interpreting filing as mailing would lead to chaos in appellate procedure. Isaacson, 669 P.2d at 851. Maverik provides no reason why we should interpret the term filing as used in 3 inconsistently with how we interpret it under the procedural rules used in 4 ts. Thus, absent a showing of good cause for an extension, the term filing 5 used in section 63-46B-12 requires, as a prerequisite to the agency taking 6 jurisdiction over a review, actual delivery of the necessary documents to the 7 agency within the thirty day time limit.

Extension of Filing Deadline

Maverik next argues the Industrial Commission abused its discretion by failing to grant a one day extension of the filing deadline. Maverik does not identify the portion of 63-46b-16(4) under which it asks us to review this claim.

King v. Industrial Comm'n, 850 P.2d 1281, 1286 n. 6 (Utah 1993) (encouraging counsel to clearly identify the portion of 63-46b-16(4) for which review is sought). Because the authority to grant an extension of filing deadline is not in an agency-specific statute, but rather a general provision of UAPA, and because Maverik is arguing an abuse of discretion standard, it appears Maverik is necessarily seeking review under Utah Code sections 63-46b-16(4)(h)(iv) (1988). That catch-all portion of section 63-46b-16(4) provides we can grant relief if the agency action is "arbitrary or capricious." Id. We review agency action under this section for reasonableness. Anderson v. Public Serv. Comm'n, 839 P.2d 822, 824 (Utah 1992). See also SEMECO v. Auditing Div., 849 P.2d 1167, 1174 (Utah 1993) (Ham, J., dissenting).

The Original Request for Reconsideration

When an agency to extend any deadline established under UAPA the petitioner must show good cause. See Utah Code Ann. s 63-46b-1(9) (1988). In its Request for Reconsideration, Maverik made no attempt to show good cause. The Industrial Commission, in its order denying the Request for Reconsideration, specifically notes Maverik's failure to show good cause. Thus, the Industrial Commission's decision denying Maverik a one day extension is not unreasonable in light of Maverik's complete failure to articulate any facts on which to base good cause determination.

The Second Request for Reconsideration

In a document captioned "Limited Request for Reconsideration" filed January 13, 1992, six days after the original Request for Reconsideration was denied and four days before the second appeal was filed, Maverik finally attempts to show good cause. There is no authorization for a "Limited Request for Reconsideration" in UAPA. Counsel's failure to comply with the rules which set forth the requirements for getting an extension of the filing deadline does not give him the right to create another layer of administrative appeal. [FN9] Section 63-46b-1(9) of UAPA provides a petitioner with the right to file more than one request for reconsideration. [FN10] Endorsing such a procedure would allow frivolous counsel to use the right to reconsideration as a tool for needless, in some cases, harmful delay. Thus, this filing was appropriately regarded by the Industrial Commission. [FN11]

ATTORNEY FEES

Because we reject both appeals, we necessarily affirm the award of costs and attorney fees and the award of damages authorized by the ALJ. The ALJ awarded COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

AS: 1993 WL 355459, *7 (UTAH APP.))

l costs of \$1536.26 to McCord. She awarded \$19,731 in legal fees to
rd. She also awarded \$11,832.80 in back pay to McCord. [FN12] These
ls are authorized by Utah Code Ann. s 34-35-7.1(9) (1988). We also award
rd attorney fees on appeal under the same statute. Thus, we remand the
to the Industrial Commission for the sole purpose of assessing the
ropriate amount of attorney fees for this appeal.

CONCLUSION

erik brought the first appeal prior to exhausting the available
istrative remedies. Maverik brought the second appeal from a reasonable
ig of the Industrial Commission that Maverik's Request for Review was
ely. Thus, we dismiss case
ber 910413-CA and affirm the Order of the Industrial Commission in case
er 920206-CA. We remand the case to the Industrial Commission for the sole
purpose of assessing attorney fees on appeal.

15, 1988 to March 31, 1990	
35 per hr for 24 hrs a week	
0.40 per week for 76 weeks	6,110.40
1, 1990 to March 31, 1991	
80 per hr for 24 hrs a week	
1.20 per week for 52 weeks	4,742.40
1, 1991 to June 26, 1991	
.25 per hr for 24 hrs a week	
02.00 per week for 12.5 weeks	1,275.00
total	12,127.80

s earnings at Ashley Elementary	295.00
Pay award equals	\$11,832.80

CONSON And RUSSON, JJ., concur.

FN1. This opinion replaces the earlier opinion in cases No. 920206-CA and
No. 910413-CA, issued June 3, 1993, pursuant to cross-petitions for
rehearing granted August 28, 1993.

FN2. Because Appellant does not challenge the factual findings of the
Industrial Commission, we recite the facts in accord with those findings.
See King v. Industrial Comm'n, 850 P.2d 1281, 1285 (Utah App. 1 993).

FN3. In the Order denying the Request for Review, the Industrial
Commission also addressed and rejected Maverik's claims on the merits.
Because of our ultimate conclusion, we need not and do not comment on the
propriety of the Industrial Commission's disposition on the merits.

FN4. We note our concern that despite the inordinate amount of briefing
and conflict in this case, no party to either of these appeals directed us
to the determinative statute.

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

FN5. Because we find the Anti-Discrimination Act required Maverik to petition for review by the Industrial Commission, we do not directly address, but merely acknowledge, some conflict between our decision and *Heinecke v. Department of Commerce*, 810 P.2d 459 (Utah App.1991). Although the Industrial Commission asks us to revisit that decision, we find it unnecessary at this time. In *Heinecke*, we focused on the language of Utah Code Ann. s 63-46B-12(1)(A) (1989) and held a petitioner need not avail himself of a review permitted by agency rule prior to filing an appeal to this court. We distinguished such permissive review from review which is statutorily mandated. *Id.* at 462. See also *Hi-Country Homeowners Assoc. v. Public Service Comm'n*, 779 P.2d 682, 684 (Utah 1989) (holding review pursuant Utah Code Ann. s 54-7-15(2)(b) must be exhausted prior to judicial appeal).

In *Heinecke*, however, we did not address the impact of Utah Code Ann. s 63-46b-14(2) (1989) which provides: "A party may seek judicial review only after exhausting all administrative remedies available...." *Id.* See also *Tax Comm'n v. Iverson*, 782 P.2d 519, 524 n. 3 (Utah 1989) (citing section 63-46b-14 for proposition petitioner must exhaust administrative remedies prior to judicial review). According to the Industrial Commission section 63-46b-14(2) requires a party to utilize every possible agency review prior to filing an administrative appeal. We note *Heinecke* was rendered without the benefit of briefing by counsel. *Heinecke*, 810 P.2d at 462. Further, we specifically recognized we might revisit *Heinecke* at an appropriate point in the future. *Id.* at 464 n.6. That day still awaits.

FN6. Regardless of the premature nature of its appeal, Maverik asks us to apply Utah Rule of Appellate Procedure 4(c) and find the appeal procedurally proper. Maverik fails to note, however, that Rule 4(c) does not apply to petitions for review of administrative actions. See Utah R.App.P. 18.

FN7. Rule 5 relates to the service and filing of papers. See Utah R.Civ.P. 5.

FN8. That section provides:

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admissions and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

Utah R. Civ. P. 5(d) (emphasis added).

FN9. As our supreme court has noted in a different setting, if we allow a second motion for reconsideration or "re-reconsideration" what is to prevent another motion for re-re-reconsideration? " 'Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically [this could go on] ad infinitum.' " *Watkiss & Campbell v.*

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

3:AS: 1993 WL 355459, *7 (UTAH APP.)

FOA & Sons, 808 P.2d 1061, 1064 (Utah 1991) (quoting *Drury v. Lanceford*, 415 P.2d 662, 663 (1966)) (alteration added).

FN10. Likewise, under the administrative law scheme in place prior to UAPA we noted that a petitioner could not file successive motions for review. See *Ring v. Industrial Comm'n*, 744 P.2d 602, 603 (Utah App.1987) (per curiam). Under that scheme filing material which purports to supplement an already denied motion did not revive the motion. *Id.* As we explicitly noted in *Ring*, a petitioner is only "entitled to 'one bite of the apple' on review before the Industrial Commission." *Id.* at 604. Under UAPA, the same reasoning applies to requests for reconsideration, a petitioner has only one opportunity to apply for reconsideration. See also *Utility Trailer Sales of Salt Lake, Inc. v. Fake*, 740 P.2d 1327, 1329 (Utah 1987) (recognizing rule against repetitive adjudications in arbitration setting); *Tuom v. Duane Hall Trucking*, 675 P.2d 1200, 1202 (Utah 1984) (recognizing rule against repetitive challenges to Industrial Commission determinations of spousal dependency); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Utah App.1989) (recognizing rule against successive post-judgment motions).

FN11. Even if we were to treat the second Request for Reconsideration as procedurally proper, we would dismiss the second appeal. The request would reinvoke the jurisdiction of the Industrial Commission. Under UAPA, because the Industrial commission did not respond to the request it would be deemed denied April 23, 1992 by operation of law. See Utah Code Ann. 63-46B-13(3)(B) (1989); *Lopez v. Career Serv. Review Bd.*, 834 P.2d 568, 572 (Utah App.1992), cert. denied, 843 P.2d 1042 (Utah 1992). Therefore no "final agency action" for this court to review existed until after April 23, 1992.

UAPA provides:

Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46B-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency.... Utah Code Ann. s 63-46B-13(1)(A) (1989) (emphasis added). This section provides a petitioner with the option of applying to the agency for reconsideration or appealing to the courts. It does not provide a petitioner the opportunity to pursue both routes concurrently. The emphasized language indicates a petitioner who decides to file a request for reconsideration no longer has a "final agency action" from which to appeal. The petitioner must wait until the request is either responded to in writing or denied by operation of law. Section 63-46B-13(1)(A) provides a request for reconsideration is not a mandatory step in exhausting administrative remedies or reaching "finality" to give the courts jurisdiction over an appeal. Under UAPA, a request for reconsideration asks the highest level of administrative decision maker to reassess a claim they have previously examined. A request for review, on the other hand, asks a higher level decision maker to evaluate the claim. Compare Utah Code Ann. 63-46B-12 (1989) (agency review procedures) with *id.* s 63-46B-13 (requests for reconsideration). Petitioners who choose to take advantage of the

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

≡ AS: 1993 WL 355459, *7 (UTAH APP.))

statutory provision that allows them to request reconsideration must thereafter accept the consequences, one of which is that an appeal to the judicial system cannot be made until the agency acts on the request. Thus, the second request for reconsideration would have given the Industrial Commission another opportunity to address the merits. Therefore, as of April 7, 1992, Maverik would have no final order from which to appeal. Under this analysis, the second appeal would be brought from a non-final order over which we have no jurisdiction and we would dismiss it.

Further, the window for Maverik to file an appeal from the Industrial Commission's denial of the second request would have been from April 23, 1992 to May 23, 1992. Thus, regardless of the analysis we apply, Maverik is left without judicial review of the merits.

FN12. Counsel for Maverik has consistently complained no actual damages amount was set in the ALJ's order. He apparently is unwilling to do the math using the formula established in the ALJ's original order. To eliminate any confusion and reduce future conflict in this unnecessarily contentious litigation, we set forth the back pay calculation using the formula established in the ALJ's original order.

IF DOCUMENT

COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS

today and make that a part of the record and I will consider the timeliness and determine from that whether I can consider the merits.

The administrative law judge did not mislead Armstrong such that her right to a fair hearing was jeopardized.

[5] Armstrong also argues her due process rights were compromised by the short duration of the appeals period. We disagree. The Utah Supreme Court previously rejected this argument in addressing the short statutory appeals period for those appealing judgments from small claims courts. Before a 1988 amendment increased the appeals period to ten days, an appellant had only five days in which to appeal a small claims court judgment. Nevertheless, the supreme court found this time period did not deprive appellants of their constitutional rights. *See, e.g., Larson Ford Sales, Inc. v. Silver*, 551 P.2d 233, 233 (Utah) (small claims court appellant having five days to appeal is not denied equal protection and is "given a reasonable time within which to take an appeal"), *appeal dismissed* 429 U.S. 909, 97 S.Ct. 299, 50 L.Ed.2d 277 (1976); *accord Hume v. Small Claims Court*, 590 P.2d 309, 311 (Utah 1979); *see also Kapetanov v. Small Claims Court*, 659 P.2d 1049, 1052 (Utah 1983) (small claims courts' five-day appeals period does not offend due process and fact that other civil appellants have a thirty-day appeals period "is of no consequence").

CONCLUSION

We conclude the Board did not err in declining to address the merits of Armstrong's untimely appeal. Armstrong failed to demonstrate good cause for filing her appeal late, the deadline for filing an appeal is not ambiguous, and Armstrong's constitutional rights were not jeopardized. Therefore, we affirm.

ORME and RUSSON, JJ., concur.



George A. LOPEZ, Petitioner,

v.

CAREER SERVICE REVIEW BOARD
and Industrial Commission of
Utah, Respondents.

No. 910501-CA.

Court of Appeals of Utah.

May 27, 1992.

State employee sought review of jurisdictional hearing conducted by Career Service Review Board wherein Board determined that it did not have jurisdiction to hear his employment grievance. The Court of Appeals, Bench, P.J., held that: (1) proceeding was a formal adjudicative one that it could properly review; (2) letter from hearing officer was not "written order" and employee's petition for judicial review, filed within 30 days of date his request for reconsideration of hearing officer's decision was deemed denied, was timely; (3) hearing officer's refusal to consider employee's written proffer of facts did not violate due process; and (4) Board lacked jurisdiction, insofar as employee was not subjected to "de facto suspension" when he opted to take unpaid leave of absence in order to attend law school, and employing agency did not violate personnel rule by deciding not to allow him to job share.

Affirmed.

1. Administrative Law and Procedure ⇐796

Questions regarding whether administrative agency has afforded petitioner due process in its hearings are questions of law, and court therefore does not give deference to agency's actions. U.S.C.A. Const.Amends. 5, 14.

2. Appeal and Error ⇐842(1)

Jurisdictional determinations are questions of law to which Court of Appeals gives no deference.

3. Administrative Law and Procedure
⇨701

Officers and Public Employees ⇨72.41

Administrative appeal by state employee seeking review of jurisdictional hearing conducted by Career Service Review Board, wherein Board determined that it did not have jurisdiction to hear employee's grievance, was formal adjudicative proceeding that Court of Appeals could properly review; hearing was conducted and there was no showing that any of the statutory requirements of formal hearing set forth in Utah Administrative Procedure Act had not been met. U.C.A.1953, 63-46b-8, 63-46b-16.

4. Administrative Law and Procedure
⇨723

Officers and Public Employees ⇨72.47

Hearing officer's letter sent nine days after state employee requested that officer reconsider her decision, stating that officer had read employee's motion and that it had not persuaded her to change her decision, was not "written order" within meaning of Utah Administrative Procedure Act, insofar as it was not sufficiently detailed; thus, employee's request for reconsideration was deemed denied as matter of law 20 days after it was filed, and his petition for judicial review, filed within 30 days of deemed denial, was timely. U.C.A.1953, 63-46b-10(1), 63-46b-13(3)(a, b), 63-46b-14(3)(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. Administrative Law and Procedure
⇨469

Constitutional Law ⇨278.4(5)

Officers and Public Employees ⇨72.16

Even if hearing officer improperly refused to consider state employee's written proffer of facts, that refusal did not violate due process, absent showing that hearing officer's actions were patently unfair; employee was allowed to testify at length in lieu of written statement, which did not contain a single fact that employee was not allowed to present orally. U.S.C.A. Const. Amends. 5, 14.

6. Officers and Public Employees ⇨72.61

State employee had burden of showing that his grievance fit into statutorily designated category in order to bring that grievance before Career Service Review Board. U.C.A.1953, 67-19a-202(1).

7. Officers and Public Employees ⇨72.22

For purposes of determining whether Career Service Review Board had jurisdiction of its grievance, senior investigator with Utah State Industrial Commission was not given "de facto suspension" when Commission required him to take unpaid leave of absence in order to attend law school; employee made conscious decision to attend law school after being formally notified that he would be required to take a leave of absence if he did so. U.C.A.1953, 67-19a-202(1).

8. Officers and Public Employees ⇨72.22

For purposes of determining whether Career Service Review Board had jurisdiction to hear state employee's grievance, Utah State Industrial Commission's decision not to allow senior investigator to job share did not violate personnel rule, insofar as rule gave Commission full discretion as to whether job sharing would be allowed. U.C.A.1953, 67-19a-202(1).

Lynn J. Lund, Salt Lake City, for petitioner.

Benjamin A. Sims and Thomas C. Sturdy, Salt Lake City, for respondents.

Before BENCH, P.J., and ORME and RUSSON, JJ.

BENCH, Presiding Judge:

Petitioner Lopez seeks review of a jurisdictional hearing conducted by respondent Career Service Review Board (the Board), wherein the Board determined that it did not have jurisdiction to hear Lopez's employment grievance. We affirm.

FACTS

Lopez is a senior investigator with the Utah State Industrial Commission (the Commission). He claims that in 1989 he

saw a clear trend by the Commission towards using investigators with legal training.¹ Since Lopez had no legal training, he decided that it would be to his professional advantage to attend law school. He applied for and was accepted to the University of Utah law school. Upon learning of his acceptance, Lopez requested that he be allowed to work part-time while attending law school. His immediate supervisor informed him in writing that his proposal to work part-time was rejected. Lopez nevertheless pursued additional discussions in an attempt to accommodate the interests of the Commission. Various alternatives were discussed, but none was accepted.

Lopez claims that at one point in the discussions his supervisor asked him to draft a contract reflecting his proposal to work part-time on a job share basis. Lopez assumed that the request indicated that his job share proposal had been accepted. The contract he prepared, however, was never expressly accepted or rejected by the Commission.

Lopez went to law school. Part of his proposed plan was that he would use his annual leave while adjusting to law-school life. He therefore took approximately one month of annual leave at the beginning of the school year. When he attempted to return to work part-time, however, he was informed that his proposal to job share was still unacceptable. The Commission offered him the opportunity to work at a temporary level for 19 hours a week, but, because it was a temporary position, he would be required to relinquish his career service status. In the alternative, the Commission was willing to grant him a leave of absence without pay, thereby keeping his status intact. The only other alternative was for him simply to resign his position. Lopez opted to take the leave of absence

and, under protest, signed an agreement to that effect. Following his first year of law school, Lopez returned to full-time work with the Commission in his former position.

Lopez filed a grievance that progressed unsuccessfully through the Commission's internal review process. Lopez then requested an evidentiary hearing before the Board. Inasmuch as there was some question whether the Board was authorized to hear the grievance, the administrator of the Board ordered that a jurisdictional hearing be conducted. The administrator then recused himself due to a conflict caused by his involvement with an advisory board of the Commission, and a hearing officer was appointed to conduct the hearing.

At the hearing, Lopez "proffered" his version of the facts in writing. The hearing officer refused to accept his written version due to its length and argumentative nature. The Commission proposed its own "chronology" of events and documents, which was admitted without objection from Lopez. Lopez was then allowed to testify as to any facts he felt were relevant. His counsel questioned him for approximately three hours. The hearing officer then ruled that the grievance did not come within any of the statutory categories over which the Board had jurisdiction. The hearing officer further held that Lopez was not harmed by the Commission's actions because he was allowed to return to his former position after the leave of absence.

In accordance with section 13 of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-1 to -22 (1989), Lopez requested that the hearing officer reconsider her decision.² The decision was not altered, and Lopez filed this petition for

1. The Commission denies any trend, but it does admit that in advertisements for investigators it had indicated that preference would be given to those with legal training.
2. The Commission asserts that UAPA does not govern this case because UAPA does not apply to "internal personnel actions within an agency concerning its own employees, or judicial review of those actions." Section 63-46b-1(2)(c). The Board errs in asserting that the Board's

actions constitute "internal personnel actions within an agency." The Board is an agency external to the Commission to which personnel matters are appealed. UAPA therefore applies. This conclusion is supported by statutory language within the chapter establishing the Board that indicates UAPA applies to actions by the Board. *See, e.g.*, Utah Code Ann. §§ 67-19a-202(2), 67-19a-203(6) (1986).

review. He alleges three principal errors by the hearing officer: (1) the refusal to accept his written proffer of facts was a denial of due process, (2) the conclusion that the Board did not have jurisdiction to hear his grievance was erroneous, and (3) the finding that he was not harmed by the Commission's actions was clearly erroneous.

STANDARD OF REVIEW

[1,2] Questions regarding whether an administrative agency has afforded a petitioner due process in its hearings are questions of law. We therefore do not give deference to the agency's actions. *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 (Utah App.1991). Jurisdictional determinations are questions of law to which we give no deference. *Department of Social Servs. v. Vigil*, 784 P.2d 1130, 1132 (Utah 1989).

OUR JURISDICTION

Before addressing the merits of the petition, we consider two threshold questions as to whether this court has jurisdiction.

Formal or Informal Proceedings

[3] The first jurisdictional question involves whether this administrative appeal should be before the district court. UAPA provides that district courts have exclusive jurisdiction over administrative appeals from informal adjudicative proceedings. Section 63-46b-15. Administrative appeals from formal adjudicative proceedings are to be made either to this court or to the supreme court. Section 63-46b-16.

Administrative appeals that are improperly brought to this court are to be transferred to the district court pursuant to Utah Rule of Appellate Procedure 44. *Alumbaugh v. White*, 800 P.2d 825 (Utah App.1990). In *Alumbaugh*, the administrator of the Career Services Review Board conducted an administrative review of an employee's grievance file without a hearing. We held that the absence of a hearing made the Board's action informal, despite the Board's designation of all adjudicative

proceedings as formal, and transferred the case to district court for a trial de novo. *Id.*

In the present case, the hearing officer conducted a hearing. Lopez was allowed to appear before the hearing officer and to present his position. Evidence and documents were accepted into the record, and a court reporter was present. There has been no showing that any of the requirements of a formal hearing, as set forth in section 8 of UAPA, have not been met. Since there was a hearing, and there is no showing of any violations of section 8, we conclude that this was a formal adjudicative proceeding that we may properly review.

Timeliness

[4] The second jurisdictional question involves the timeliness of Lopez's petition to this court. The hearing officer entered her decision on July 2, 1991. Lopez requested on July 22nd that the hearing officer reconsider her decision. On July 31st, the hearing officer sent Lopez a letter. The full text of the letter was as follows: "I have read your *Motion for Reconsideration and Evidentiary Hearing*. This letter is to notify you that your motion has not persuaded me to change my decision." Lopez filed this petition for review on September 3rd.

Subsection 14(3)(a) of UAPA provides: "A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to be issued under Subsection 63-46b-13(3)(b)." Subsection 13(3) applies to requests that an agency reconsider its action and provides:

(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

The issue is whether the letter from the hearing officer constitutes a "written order." If it does, then Lopez's appeal is untimely, the thirty days having run their course on August 30th, four days before Lopez filed his petition. If the letter did not constitute a written order, then Lopez's request for reconsideration was deemed denied, as a matter of law, on August 11th, twenty days from his request. Lopez's filing on September 3rd would therefore be timely.

Section 10 of UAPA requires considerable detail in agency orders issued in connection with formal adjudicative proceedings. It states, in pertinent part:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact ...;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

Utah Code Ann. § 63-46b-10 (1989).

An ambiguous letter, merely indicating that the request for reconsideration was unpersuasive, does not constitute a "written order" as described in subsection 10(1). As a matter of appellate necessity, we must have unambiguous final administrative orders from which we may calculate jurisdictional time periods. Otherwise, our jurisdiction can become uncertain.

Inasmuch as the hearing officer's letter was insufficient to constitute a written order as anticipated by subsection 13(3)(a), Lopez's request for reconsideration is

deemed denied on August 11th under subsection 13(3)(b). His petition for review is therefore timely.

THE MERITS

Proffer of Facts

[5] Lopez first asserts that the hearing officer denied him due process by not considering his written proffer of facts. He relies upon *Tolman* for the proposition that "due process demands a new trial when the appearance of unfairness is so plain that [the appellate court is] left with the abiding impression that a reasonable person would find the hearing unfair." *Tolman*, 818 P.2d at 28 (quoting *Bunnell v. Industrial Comm'n*, 740 P.2d 1331, 1333 n. 1 (Utah 1987)). Even if it were improper for the hearing officer to refuse to consider Lopez's written version of the facts, as asserted by Lopez, he has nevertheless failed to present to this court any explanation of how the actions of the hearing officer were patently unfair. At the hearing, Lopez was allowed to testify at length in lieu of the written statement. He has not directed us to a single fact contained in the written statement that he was not allowed to present orally to the hearing officer. Given Lopez's opportunity to testify, we simply are not left with an abiding impression that a reasonable person would find the hearing unfair.

Jurisdiction of Board

The Board was established to provide state civil service employees with a forum for appealing personnel decisions outside the agency for which they work. The Board, however, does not have jurisdiction to hear all appeals of all personnel matters. Its jurisdiction is statutorily limited to certain agency actions.

(a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules, issues concerning the equitable administration of benefits, reduc-

tions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.

(b) *The board has no jurisdiction to review or decide any other personnel matters.*

Utah Code Ann. § 67-19a-202(1) (Supp. 1991) (emphasis added).³

When an employee files a grievance with the Board, subsection 403(2)(a) requires the Board's administrator to determine the following factors before the Board may hear the grievance.

(i) whether or not the employee is a career service employee and is entitled to use the grievance system,

(ii) whether or not the board has jurisdiction over the grievance,

(iii) whether or not the employee has been directly harmed; and

(iv) the issues to be heard.

Utah Code Ann. § 67-19a-403(2)(a) (Supp. 1991).

In order to make the determinations required, the administrator may "hold a jurisdictional hearing, where the parties may present oral arguments, written arguments, or both." Subsection 67-19a-403(2)(b)(i). This was the basis and goal of the jurisdictional hearing from which Lopez now appeals.⁴

[6] Lopez initially challenges the hearing officer's determination that the Board lacked jurisdiction by asserting that the Board's administrator erroneously placed the "burden of proof" on Lopez to prove that the Board had jurisdiction. It is axiomatic that a party wishing to bring a matter before a tribunal with limited subject matter jurisdiction must present sufficient facts to invoke the limited jurisdiction of that tribunal. *Department of Social*

Servs. v. Vijil, 784 P.2d 1130, 1132 (Utah 1989). It was therefore necessary for Lopez to show that his grievance fit into one of the categories of grievances designated in subsection 202(1) in order to bring his grievance before the Board.

[7] Lopez argues the Board has jurisdiction because the Commission's requirement that he take a leave of absence without pay was a "de facto suspension." The hearing officer, however, found that Lopez made a conscious decision to attend law school and that his decision was made after he had been formally notified that he would be required to take a leave of absence if he were to attend law school. The hearing officer also found that the ongoing discussions between Lopez and the Commission concerning other possible work alternatives had not resulted in a meeting of the minds. Given the hearing officer's factual findings, it is clear that the unpaid leave of absence was the direct result of Lopez's unilateral and voluntary decision to attend law school. It was not in any way initiated by the Commission. The record is clear that Lopez was always free to remain in his job full time as long as he did not elect to attend law school. He may not now transform the direct result of his own voluntary decision into a "de facto suspension" by the Commission.

[8] Lopez also argues that the Commission violated several personnel rules when it refused to allow him to work during law school. As stated in subsection 202(1), grievances arising from violations of personnel rules are within the Board's jurisdiction. Lopez points to Human Resource Management Rule R468-5-12, which states with our emphasis:

3. All other matters may be grieved only to the level of the department head whose decision is final and unappealable to the Board. See Utah Code Ann. § 67-19a-302(2) (Supp.1991).

4. Lopez asserts that the hearing officer improperly treated the jurisdictional hearing as a hearing on the merits. There is some language in the hearing officer's decision that supports his claim. As indicated in subsection 403(2)(b), the jurisdictional hearing is to consider the four

factors set out in subsection 403(2)(a). If an employee's grievance meets the statutory requirements in subsection 403(2)(a), the employee is entitled to a hearing on the merits of the claim. Any language suggesting that the hearing officer considered the actual merits of Lopez's grievance was nevertheless harmless since the factual findings clearly show that jurisdiction was lacking as a matter of law.

program of job sharing as a means of increasing opportunities for career part-time employment. In the absence of an agency program, individual employees *may* request approval for job sharing status through agency management.

Utah Admin.Code § R468-5-12 (1991).

The hearing officer held that the Commission's decision not to allow Lopez to job share was not a violation of this policy because the rule gives the Commission full discretion whether to allow job sharing. The hearing officer reasoned that since there was no mandate that job sharing be allowed, job sharing was a privilege that might be granted by the Commission, but it was not a right to which Lopez was entitled by law. Since the Commission's decision not to allow job sharing was within its discretion, Lopez's complaint could not logically constitute a claim that a personnel rule had been "violated." We agree.

Discretionary personnel powers granted to agencies do not constitute mandates. Absent a statutory mandate that an employee receive a certain benefit, the employee may not demand it as a right. Since there was no mandate requiring the Commission to allow Lopez to job share, Lopez has failed to identify any personnel rule that was violated by the Commission's refusal to allow him to job share. Jurisdiction therefore was properly denied.⁵

Harm to Lopez

Finally, Lopez claims that the hearing officer erred when she found that he had not been harmed by being "required" to take an unpaid leave of absence because he was able to return to his former position. Whether Lopez was directly harmed by the Commission's action is the third factor to be determined at a jurisdictional hearing. *See* section 67-19a-403(2)(a)(iii). However, the hearing officer did not need to reach this issue because she determined that Lopez's grievance did not fall within the cate-

had jurisdiction. Regardless of whether or not Lopez was harmed, the Board could not hear the grievance. We therefore need not address this final claim of error.

CONCLUSION

The hearing officer's finding that the Board lacked jurisdiction to hear Lopez's grievance is affirmed.

ORME and RUSSON, JJ., concur.



Jasbir S. BHATIA, Petitioner,

v.

DEPARTMENT OF EMPLOYMENT
SECURITY; and Pizza Hut of
Utah, Respondents.

No. 910498-CA.

Court of Appeals of Utah.

June 2, 1992.

Cook sought judicial review of final decision of Board of Review of Industrial Commission denying his application for unemployment compensation benefits. The Court of Appeals, Billings, Associate P.J., held that cook who stormed out of restaurant during middle of busy shift after uttering vulgarity to manager was discharged for "just cause" and not entitled to unemployment compensation benefits.

Affirmed.

Bench, P.J., concurred and filed opinion.

5. Lopez also points to the Human Resource Management Rules regarding "Time Limited Positions," Utah Admin.Code § R468-5-10 (1991), and "Education Assistance," Utah Admin.Code § R468-10-4 (1991). We limit our discussion to

the policy on job sharing since our analysis applies equally to all three policies. Under these rules, agencies are given the ability to create time limited positions and provide education assistance *in their discretion*.