

1993

Hercules Incorporated v. Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 930526

IN THE UTAH COURT OF APPEALS

HERCULES INCORPORATED,)	
)	Case No.: 930526-CA
Petitioner,)	
)	Priority Category: 14
vs.)	
)	
THE UTAH STATE TAX COMMISSION,)	
)	
Respondent.)	

ON APPEAL FROM THE UTAH STATE TAX COMMISSION

REPLY BRIEF OF PETITIONER

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FILED
Utah Court of Appeals

FEB 16 1994


Mary T. Noonan
Clerk of the Court

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TABLE OF CONTENTS

	<u>PAGE</u>
<u>STATEMENT OF THE CASE</u>	1
<u>CORRECTION OF THE COUNTY'S CLARIFICATION OF HERCULES' STATEMENT OF FACTS</u>	1
<u>POINT I - THE COMMISSION ERRED IN REQUIRING HERCULES TO REBUT THE APPRAISED VALUE ASSIGNED BY EDDIE KENT</u>	3
<u>POINT II - THE COMMISSION ERRED BY FAILING TO PROPERLY ACCOUNT FOR THE ECONOMIC AND FUNCTIONAL OBSOLESCENCE OF HERCULES' FACILITIES.</u>	
A. <u>ECONOMIC OBSOLESCENCE</u>	5
B. <u>FUNCTIONAL OBSOLESCENCE</u>	9
<u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

CASES:

PAGE

<u>Adams v. Bd. of Rev. of Ind. Comm.</u> , 821 P.2d 1 (Ut. App. 1991)	8
---	---

STATUTES:

Utah Code Ann. § 59-2-311	4
Utah Code Ann. § 59-2-322	4
Utah Code Ann. § 59-2-1331	4
Utah Code Ann. § 63-46b-16(4)(h)(iv) (1993)	8

APPENDIX A:

Statutes cited in brief.

Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Petitioner Hercules Incorporated ("Hercules") hereby submits this Reply Brief.

STATEMENT OF THE CASE

The Statement of the Case contained in Hercules' initial brief and in Salt Lake County's (the "County") brief is reasonably accurate. However, Hercules believes the County's purported clarification of Hercules' Statement of Facts needs correction.

CORRECTION OF THE COUNTY'S CLARIFICATION OF HERCULES' STATEMENT OF FACTS

1. Paragraph 1 of the County's clarification of Hercules' Statement of Facts states: "The County would note that the Bacchus works is responsible for 83% of the business of the Aerospace group." County brief at p. 5. This assertion is inaccurate and misleading. The Bacchus Works constitutes 83% of the physical assets of the Aerospace group, not 83% of the business of the Aerospace group. Transcript, ("Tr.") pp. 98-99. The record does not indicate what portion of the Bacchus Works assets are located in Davis County at Hercules' Clearfield, Utah facility, or what portion of the Bacchus works is located in Tooele County at Hercules' Tekoi Test Range.¹ Furthermore, the 83% of physical assets number does not show, in any way, the Bacchus Works'

¹ Hercules' Bacchus Works consists of Bacchus West, Plant 1, NIROP and Plant 3 all located in Salt Lake County, and Plant 2 located in Davis County at Clearfield, Utah as well as Tekoi Test Range which is in Tooele County. Tr. pp. 159-160.

relative contribution to earnings of the Aerospace Group as compared to those Hercules' Aerospace facilities which are located in other states, or counties in Utah other than Salt Lake County.

2. In paragraph 3 of the County's Clarification of Hercules' Statement of Facts the County states: "However, the testimony of David R. Peirson, Hercules' manager of state and local taxes, indicated that, as of the lien date, prospects for business growth were good." County brief at p. 6. The transcript citation, Tr. 108-09, which the County relies upon to support this assertion shows only that Hercules' prospects for production of the Titan rocket motor may have been good as of January 1, 1990. The record does not support any assertion, or implication, for production at the Bacchus works of other rocket motors. Thus, although Titan production may have "looked pretty good," other rocket motor production at the Bacchus works didn't look very good at all.

3. In paragraph 4 of the County's Clarification of Hercules' Statement of Facts, the County states: "On cross-examination, however, Mr. Peirson acknowledged that the loss might be recoverable." County brief at p. 7. This is misleading because

Mr. Peirson later testified that "Hercules never did recover these losses." Tr. pp. 162-63.²

POINT I

THE COMMISSION ERRED IN REQUIRING HERCULES TO REBUT THE APPRAISED VALUE ASSIGNED BY EDDIE KENT.

The County asserts that the Commission was correct in requiring Hercules to prove that Mr. Kent's appraised value of \$183 million was not the proper assessed value. The County states:

After Hercules called the value of its property for assessment purposes into question, the County reevaluated its use of this historical method, determining it to be incorrect and modified its original value, which resulted in a decrease of approximately \$28 million. . . .

Far from being discarded as an "unofficial assessment", the County's assessment, modified to take depreciation into consideration (including an economic obsolescence factor), is entitled to a presumption of correctness, the taxpayer (Hercules) having failed to provide a sound evidentiary basis to support its assertion of a lower valuation. County brief at pp. 11 & 12.

²

Q: What about the losses in the annual report listed for 1989, have they been recovered?

A: No they have not.

Q: What happened?

A: They haven't been recovered. The contracts haven't been completed, the Titan test firing was a failure. Even if we complete the Titan contract, even if we complete this test firing, the next firing of the Titan motor, we have four more to test successfully.

As pointed out in Hercules' initial brief, Mr. Kent's appraisal was not the County's official assessment which is entitled to any presumption of correctness. Mr. Kent's appraisal was not incorporated into the County Assessment book for delivery to the County Auditor by the County Assessor, under affidavit. See Utah Code Ann. § 59-2-311. The County Auditor did not transmit this \$183 million proposed value on the assessment books to the Commission. See Utah Code Ann. § 59-2-322. In other words, Mr. Kent's appraised value had no presumptive validity.

Furthermore, this appraised value was arrived at only in preparation for the hearing before the Utah State Tax Commission. Mr. Kent's appraisal was not even completed until September 10, 1991, more than nine (9) months after Hercules had already paid its taxes to the County based upon an assessed value of approximately \$211 million.³ Record, Exhibit R-4.

The original \$211 million assessment was the value the County asserted in the hearing before the Board of Equalization, Record Exhibit P-31, and was also asserted throughout all proceedings before the Utah State Tax Commission. This can be seen by examining the Motion for Directed Verdict brought by the County's attorney following the close of Hercules' case at the Commission hearing, Tr. pp. 690-700; and by reviewing the post-hearing

³ Taxes were due and paid by Hercules to Salt Lake County on November 30, 1990 for the lien date of January 1, 1990. See Utah Code Ann. § 59-2-1331.

memorandum filed by the County with the Commission; Record pp. 68-113.

Mr. Kent's appraisal is not an "adjustment," as urged by the County. It was an entirely new value prepared using a different appraisal methodology, solely for the Commission hearing, and was clear evidence that the County could not sustain a fair market value of \$211 million as it asserted before the Board of Equalization. Mr. Kent's appraisal opinion of a \$183 million value is not entitled to any presumption and the Commission erred when it required Hercules to demonstrate that this value was improper. In this proceeding the burden of proof was not Hercules'. Once the Commission rejected the County's assessment of approximately \$211 million, both parties bore an equal burden and that party which established value by a preponderance of the evidence should have prevailed. That party was Hercules.

POINT II

THE COMMISSION ERRED BY FAILING TO PROPERLY ACCOUNT FOR THE ECONOMIC AND FUNCTIONAL OBsolescence OF HERCULES' FACILITIES.

A. Economic Obsolescence.

Mr. Kent assigned a 10% economic obsolescence factor to Hercules' facilities. As pointed out in Hercules' initial brief, Mr. Shoup aggregated economic obsolescence, functional obsolescence and physical deterioration in order to arrive at an accumulated depreciation figure for Hercules' facilities. Hercules then

confirmed Mr. Shoup's assignment of accumulated depreciation by performing two utilization studies showing that Hercules' facilities were significantly under-employed as of January 1, 1990. See report by Richard Cloward, Record, Exhibit P-19, and report by Dr. Crawford, Record, Exhibit P-28. Hercules also presented substantial evidence to indicate why it suffered such massive and significant economic obsolescence.

Mr. Kent could not articulate any qualitative or quantitative analysis as to how he assigned his 10% economic obsolescence factor. His testimony was that the 10% figure was based upon "appraisal judgment." Tr. p. 1002. In other words, Mr. Kent's assignment was completely arbitrary.

Even though both parties identified the same external factors which caused Hercules' property to suffer from economic obsolescence, i.e. treaties, reduction and cancellation of missile contracts, the space shuttle disaster, the fall of the Berlin Wall, general peace efforts, etc., Mr. Kent gave no evidence, and could not articulate the way in which he determined that a 10% economic obsolescence factor should be applied to Hercules' facilities. Tr. p. 985. His determination was based solely upon appraisal

judgment. Tr. p. 868, 985 and 1002.⁴ The record shows that Mr. Kent has no experience in valuing the kind of industrial facility represented by Hercules' Bacchus works, i.e. in excess of 2 million square feet.

Hercules, in contrast, identified the factors which caused economic obsolescence, and then measured those factors by comparing the capacity of Hercules' Bacchus works with the actual utilization (production) accomplished at the Bacchus Works. This showed that the Bacchus Works was significantly and substantially under-

Tr. 868

Q: However, you did allocate a certain portion for external obsolescence; is that correct?

A: Yes. I was looking to the future and trying to determine the impact of ongoing peace negotiations and things of that nature as affecting Hercules' business. In my judgment, 10 percent is the allowable amount. It may be overstated.

Tr. 985

Q: What empirical evidence is contained in your appraisal to justify your assignment of 10 percent external obsolescence to the Bacchus Works?

A: My appraisal does not contain any, either.

Tr. 1002

Mr. WILLES: One of the issues I think that is going to be most significant in his hearing is going to be the economic obsolescence issue. I wanted to understand clearly in my mind your selection of 10 -percent and have you give -- or give you a chance to explain your understanding of where the 10 percent came from in this as opposed to five percent or 15 percent or some other number in there. Was there some market research method of arriving at that percentage number or how did you arrive at that 10 percent?

THE WITNESS: It was my opinion. It was my appraisal judgment and opinion that I concluded 10 percent. As I stated earlier, I may have, based on the information that I reviewed, overstated the external obsolescence.

utilized, and that the reason for this under-employment was that Hercules had no market for the products these facilities were designed to produce, i.e. rocket motors. Thus, the Commission's adoption of Mr. Kent's appraised value, as opposed to Hercules', was an arbitrary action because Mr. Kent's economic obsolescence assignment was wholly arbitrary. Utah Code Ann. § 63-46b-16(4)(h)(iv) (1993) mandates that Hercules be granted relief when the Commission's action is "otherwise arbitrary or capricious." See also Adams v. Bd. of Rev. of Ind. Comm., 821 P.2d 1, 4 (Ut. App. 1991).

The County tries to demonstrate that economic obsolescence should not be applied to the Bacchus Works because;

"Hercules '10k' report as of December 31, 1989 shows a backlog of orders for Hercules aerospace of approximately \$2.4 billion compared with \$2.2 billion on December 31, 1988. Bacchus Works represents 83% of Hercules' aerospace assets." County brief, p. 22.

What the County fails to point out is that there is no showing this backlog is for production which could be accomplished at the Bacchus Works. Hercules has 11 aerospace facilities. The Bacchus Works is one of those 11 plants. Mr. Peirson testified that the Bacchus Works is devoted to the production of strategic missiles, not tactical rocket motors. Tr. p. 99. The strategic missile business was declining. Tr. pp. 101-103. The Bacchus Works suffered a \$343 million loss in 1989, whereas Hercules' aerospace

in the aggregate suffered a \$243 million loss. Record, Exhibit P-18c, and Tr. pp. 111-113. This shows that Hercules' Bacchus Works was highly unprofitable whereas the other Hercules' aerospace facilities were, in fact, generating a net profit. Thus, the Bacchus Works continued to lose money whereas other Hercules' aerospace facilities were profitably employed. The County's attempt to show that no economic obsolescence should apply to the Bacchus Works due to a "backlog of orders," is improper, as that backlog of orders was applicable to other Hercules facilities but not to the Bacchus Works.

B. Functional Obsolescence.

Mr. Kent also assigned a 5% functional obsolescence to the facilities at NIROP and Plant 1. This 5% factor is another completely arbitrary action. The reason Mr. Kent gave for this 5% factor was that 5% of the building values were based upon Hercules' cost of construction, as opposed to replacement cost arrived at through application of the Marshall Valuation Service. Tr. pp. 861-62. This has nothing to do with whether or not these facilities were functionally obsolescent.

As shown in Hercules' initial brief, functional obsolescence which should be applied to Plant 1 and NIROP can easily be demonstrated by comparing the capacity of Plant 1 to Bacchus West. Plant 1 has twice the building space as Bacchus West, yet it only has production capacity of 300,000 pounds of propellant per month

as compared to 2,000,000 pounds per month capacity at Bacchus West, i.e. 15% of the capacity of Bacchus West. Moreover, there are 348 buildings in Plant 1 and 51 buildings in Bacchus West. Obviously, Plant 1 is an outdated, technologically obsolete facility suffering from significant functional disutility. Mr. Kent's assignment of a 5% functional obsolescence to Plant 1 because 5% of the buildings of the plant were valued based upon Hercules' cost is completely arbitrary, and bears no relationship to reality. This further evidences the error of the Commission's decision in adopting Mr. Kent's assignment of functional obsolescence as opposed to Hercules' proposed value for accumulated depreciation.

The County also asserts that Mr. Shoup double counted the value of Hercules' property by classifying some property as personal property. This is simply not true. As is clearly demonstrated in the record, Hercules asserted in the hearing that one of the major differences between the replacement cost new Mr. Kent assigned to Hercules' facilities, and the replacement cost new assigned by Mr. Shoup to Hercules' facilities was because Mr. Shoup classified a significant portion of Hercules facilities as personal property which Mr. Kent included as real property.

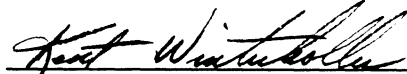
Simply stated this means that if Mr. Shoup were to include in his appraisal the personal property he did not initially appraise, i.e. all the facilities that Mr. Kent classified as real property, then the replacement cost difference is insignificant, less than

10%. The real difference between the parties in this case is the amount of accumulated depreciation assigned, including functional and economic obsolescence for Hercules, which should be deducted from the property's replacement cost to arrive at fair market value. Mr. Shoup and Hercules assigned accumulated depreciation of 89% for Plant 1, 78% for NIROP, 56% for Plant 3 and 44% for Bacchus West. Mr. Kent and the County assigned accumulated depreciation of 30.8% for Plant 1, 31.8% for NIROP, 17.8% for Plant 3, and 17.7% for Bacchus West. Mr. Kent's assignment was arbitrary because he could not identify any reasonable basis for his depreciation numbers.

CONCLUSION

As stated in Hercules' initial brief, the Court should reverse the Commission and remand this case for further proceedings requiring the Commission to apply the proper burden of proof.

DATED this 16th day of February, 1994.



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 1994,
I caused to be mailed, first class, postage prepaid, true and
correct copies of the foregoing **REPLY BRIEF OF PETITIONER**, to:

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Appendix A

COLLATERAL REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d State and
Local Taxation § 788 et seq.
Key Numbers. — Taxation ⇐ 334.

59-2-310. Assessment in name of claimant as well as owner.

Real property described on the assessment book need not be described a second time, but any person claiming the real property and a desire to be assessed for the land may have the person's name inserted with that of the person to whom the real property is assessed.

History: C. 1953, 59-2-310, enacted by L.
1987, ch. 4, § 78.

COLLATERAL REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d State and
Local Taxation § 740 et seq.

C.J.S. — 84 C.J.S. Taxation § 408.
Key Numbers. — Taxation ⇐ 337 et seq.

59-2-311. Completion and delivery of assessment book — Affidavit required — Contents of affidavit.

Prior to May 22 each year, the assessor shall complete and deliver the assessment book to the county auditor. The assessor shall subscribe an affidavit in the assessment book substantially as follows:

I, _____, the assessor of _____ County, do swear that before May 22, 19____, I made diligent inquiry and examination, and either personally or by deputy, established the value of all of the property within the county subject to assessment by me; that the property has been assessed on the assessment book equally and uniformly according to the best of my judgment, information, and belief at its fair market value; that I have faithfully complied with all the duties imposed on the assessor under the revenue laws; and that I have not imposed any unjust or double assessments through malice or ill will or otherwise, or allowed anyone to escape a just and equal assessment through favor or reward, or otherwise.

History: C. 1953, 59-2-311, enacted by L.
1987, ch. 4, § 79; 1988, ch. 3, § 98; 1988, ch.
169, § 30.

Amendment Notes. — The 1988 amendment by ch. 3, effective February 9, 1988, in the form of the affidavit, substituted "May 22" for "May 15" and substituted "at its fair market value" for "at 75% of its fair market value under Section 59-2-103 for residential property and at 100% of its fair market value under Section 59-2-103 for all other property."

The 1988 amendment by ch. 169, effective April 25, 1988, substituted "May 22" for "May 15" near the beginning of the form of the affidavit and made other minor stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Retrospective Operation. — Laws 1988, ch. 3, § 269 provides that the act has retrospective operation to January 1, 1988.

59-2-321. Extension of taxes on assessment book.

The general taxes of each city, town, school, and special taxing district shall be extended on the assessment book by the county auditor at the rate certified by the governing body of the city, town, school, and special taxing district at the time the state and county taxes are extended, and the whole tax shall be carried into a column of aggregates, and shall be collected by the county treasurer at the time and in the manner provided by law for collecting state and county taxes.

History: R.S. 1898, § 2691; L. 1903, ch. § 44; C. 1953, 59-8-2; renumbered by L. 132, § 1; C.L. 1907, § 2691; C.L. 1917, § 6105; 1987, ch. 4, § 147.
R.S. 1933 & C. 1943, 80-8-2; L. 1982, ch. 71,

59-2-322. Transmittal of statement to commission.

The county auditor shall, before June 8 of each year, prepare from the assessment book of that year a statement showing in separate columns:

- (1) the total value of all property;
- (2) the value of real estate, including patented mining claims, stated separately;
- (3) the value of the improvements;
- (4) the value of personal property exclusive of money; and
- (5) the number of acres of land and the number of patented mining claims, stated separately.

As soon as the statement is prepared the county auditor shall transmit the statement by mail to the commission.

History: R.S. 1898 & C.L. 1907, §§ 2600, 71, § 45; C. 1953, 59-8-3; renumbered by L. 2601; C.L. 1917, §§ 6000, 6001; R.S. 1933 & C. 1987, ch. 4, § 148; 1987, ch. 148, § 2.
1943, 80-8-3; L. 1981, ch. 241, § 9; 1982, ch.

59-2-323. Changes ordered by commission.

(1) The commission shall, before June 17 or within ten days after the county auditors of the state have filed their report with the commission as provided for under Section 59-2-322, each year transmit to the county auditor a statement of the changes made by it in the assessment book of the county, as provided under Section 59-1-210.

(2) As soon as the county auditor receives from the commission a statement of the changes made by it in the assessment book of the county, or of any assessment contained therein, the auditor shall make the corresponding changes in the assessment book, by entering the same in a column provided with the proper heading in the assessment book, counting any fractional sum when more than 50 cents as one dollar and omitting it when less than 50 cents, so that the value of any separate assessment shall contain no fractions of a dollar; but shall in all cases disregard any action of the county board of equalization or commission which is prohibited by law.

History: R.S. 1898 & C.L. 1907, § 2602; § 46; C. 1953, 59-8-4; renumbered by L. C.L. 1917, § 6002; R.S. 1933, 80-8-4; L. 1941, 1987, ch. 4, § 149; 1987, ch. 148, § 3.
ch. 82, § 1; C. 1943, 80-8-4; L. 1982, ch. 71,

NOTES TO DECISIONS

Partial payment of tax.

While no taxpayer may compel county treasurer to accept less than the whole tax levied against a separate parcel of property, except as provided by this section, yet county treasurer may in his discretion accept part payment and credit same upon tax assessed and, when that is done, if any part of the tax remains unpaid

on delinquent date, treasurer must proceed, as provided by law, to sell property for such unpaid tax, and penalty must be computed upon amount of tax remaining unpaid and delinquent, and interest after sale must be computed upon amount for which property was sold. *State ex rel. State Tax Comm'n v. Evans*, 79 Utah 370, 6 P.2d 161, 84 A.L.R. 766 (1932).

59-2-1331. Date tax is delinquent — Penalty — Interest — Payments.

(1) All taxes, unless otherwise specifically provided for under Section 59-2-1332, or other law, unpaid or postmarked after November 30 of each year following the date of levy, are delinquent, and the county treasurer shall close the treasurer's office for the posting of current year tax payments until a delinquent list has been prepared.

(2) All delinquent taxes are subject to a penalty of 2% of the amount of the taxes or \$10, whichever is greater. Unless the delinquent taxes, together with the penalty, are paid before January 16, the amount of taxes and penalty shall bear interest on a per annum basis from January 1 following the delinquency date. This interest rate is 600 basis points (6%) above the "Federal Discount Rate" that exists on January 1 following the date of delinquency.

(3) If the delinquency exceeds one year, the amount of taxes and penalty for that year and all succeeding years shall bear interest until settled in full through redemption or final tax sale. The interest rate to be applied shall be calculated for each year as established under Subsection (2) and shall apply on each individual year's delinquency until paid.

(4) The county treasurer may accept and credit on account against taxes becoming due during the current year, at any time before or after the levies are made, but not subsequent to the date of delinquency, either:

- (a) payments in amounts of not less than \$10; or
- (b) the full amount of the unpaid tax.

History: C. 1953, 59-2-1331, enacted by L. 1988, ch. 3, § 188; 1991, ch. 40, § 1.

Repeals and Reenactments. — Laws 1988, ch. 3, § 188 repeals former § 59-2-1331, as amended by L. 1987, ch. 4, § 209, relating to sale of undivided interests in land, and enacts the present section, effective February 9, 1988.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "or postmarked after" for "at noon on" and "post-

ing of current year tax payments" for "receipt of taxes" in Subsection (1); in Subsection (2), substituted "or \$10 whichever is greater" for "with a minimum penalty of \$10" in the first sentence and substituted "January 16" for "January 15" in the second sentence; and made changes in punctuation in Subsection (4).

Retrospective Operation. — Laws 1988, ch. 3, § 269 provides that the act has retrospective operation to January 1, 1988.

COLLATERAL REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d State and Local Taxation §§ 842, 856 to 865.

C.J.S. — 84 C.J.S. Taxation § 617.

Key Numbers. — Taxation ⇐ 526 et seq.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

History: C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25; 1990, ch. 132, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added the exception at the end of Subsection (1)(a).

NOTES TO DECISIONS

ANALYSIS

Final agency action.

Function of district court.

Right to judicial proceeding.
Cited.

Final agency action.

Industrial Commission's determination of wrongful discharge was not final, and so not reviewable under this section, because the commission and the parties had not resolved the issue of reimbursement for lost wages and benefits as required by § 34-28-19(2). *Parkdale Care Ctr. v. Frandsen*, 837 P.2d 989 (Utah Ct. App. 1992).

Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursu-

ant to Subsection (1)(a) of this section. In re *Topik*, 761 P.2d 32 (Utah Ct. App. 1988), cert. denied, 773 P.2d 45 (Utah 1989).

The only appellate jurisdiction statutorily delegated to the district court is to review informal agency adjudicative proceedings. *State v. Humphrey*, 794 P.2d 496 (Utah Ct. App. 1990).

Right to judicial proceeding.

District court erred in declining a de novo review of a dentist's claim to licensure by reciprocity, where there had been no proceeding on his application that was sufficiently judicial in nature, and he had not yet had the licensing agency's action reviewed in a "trial-type hearing." *Kirk v. Division of Occupational & Professional Licensing*, 815 P.2d 242 (Utah Ct. App. 1991).

Cited in *Southern Utah Wilderness Alliance v. Board of State Lands & Forestry*, 830 P.2d 233 (Utah 1992); *Bonneville Int'l Corp. v. Utah State Tax Comm'n*, 219 Utah Adv. Rep. 52 (Ct. App. 1993).

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

- (i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or
 - (ii) according to any other provision of law.
- (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
 - (b) the agency has acted beyond the jurisdiction conferred by any statute;
 - (c) the agency has not decided all of the issues requiring resolution;
 - (d) the agency has erroneously interpreted or applied the law;
 - (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
 - (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
 - (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
 - (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Cross-References. — Review of proceed-

ings before State Tax Commission, jurisdiction and standard, §§ 59-1-601, 59-1-610.

NOTES TO DECISIONS

ANALYSIS

Agency action.
 Applicability of section.
 Arbitrary action.
 Conflicting evidence.
 Factual findings.
 Final order.
 Function of district court.
 Jurisdictional hearing by board.
 Prior practice.
 Review.
 Standard of review.
 — Interpretation of statutory term.
 — Questions of law.
 Substantial evidence test.
 Substantial prejudice.
 Whole record test.
 Cited.

Agency action.

Whether the Industrial Commission acted contrary to its own rule is governed by Subsection (4)(h)(ii) of this section. *Ashcroft v. Indus-*

trial Comm'n, 855 P.2d 267 (Utah Ct. App. 1993).

Applicability of section.

Subsection (4) deals with judicial relief, not judicial review. It does not affect the degree of deference an appellate court grants to an agency's decision. Rather, it ensures that relief should not be granted when, although the agency committed error, the error was harmless. *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991).

Arbitrary action.

Industrial commission's denial of occupational disease disability benefits based upon a solitary finding regarding the ultimate issue of causation failed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, were reached, and therefore rendered the action arbitrary. *Adams v. Board of Review*, 821 P.2d 1 (Utah Ct. App. 1991).

Conflicting evidence.

In undertaking a review, the appellate court will not substitute its judgment as between two reasonably conflicting views, even though the court might have come to a different conclusion had the case come before it for de novo review. It is the province of the board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the board to draw the inferences. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

Appellate court refers to the assessment by the Board of Review of the Utah Industrial Commission on conflicting evidence. *Albertsons, Inc. v. Department of Emp. Sec.*, 854 P.2d 570 (Utah Ct. App. 1993).

Factual findings.

Under Subsection (4)(d), the appellate court will not disturb the board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality. *Pro-Benefit Staffing, Inc. v. Board of Review*, 775 P.2d 439 (Utah Ct. App. 1989); *Nelson v. Dep't of Emp. Sec.*, 801 P.2d 158 (Utah Ct. App. 1990).

Final order.

Administrative law judge's denial of motions to dismiss petitions of the Division of Occupational and Professional Licensing allowed the proceeding to continue in the agency and was not a final order for purposes of judicial review. *Barney v. Division of Occupational and Professional Licensing*, 828 P.2d 542 (Utah Ct. App.), cert. denied, 843 P.2d 516 (Utah 1992).

Nonfinal agency orders do not divest the agency of jurisdiction. *Maverik Country Stores, Inc. v. Industrial Comm'n*, 221 Utah Adv. Rep. 17 (Ct. App. 1993).

Function of district court.

Subsection (1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to § 63-46b-15(1)(a). In *re Topik*, 761 P.2d 32 (Utah Ct. App. 1988), cert. denied, 773 P.2d 45 (Utah 1989).

Jurisdictional hearing by board.

The Court of Appeals had jurisdiction over appeal from jurisdictional hearing conducted by a hearing officer appointed by the Career Service Review Board since the hearing was a formal adjudicative proceeding. *Lopez v. Career Serv. Review Bd.*, 834 P.2d 568 (Utah Ct. App. 1992).

Prior practice.

Ten agency decisions in which pharmacists committed equal or allegedly more significant violations of the law, but received substantially lighter penalties than petitioner received, raised a question about the consistency of his penalty with prior agency practice. *Pickett v. Utah Dep't of Commerce*, 218 Utah Adv. Rep. 51 (Ct. App. 1993).

Review.

Because POST (Division of Peace Officer Standards and Training) did not conduct any formal proceedings, and petitioner's filing of a "complaint" with POST about an officer did not require it to do so, the appellate court did not have jurisdiction to review POST's decision not to pursue decertification of POST officer. *Nielson v. Division of Peace Officer Stds. & Training*, 851 P.2d 1201 (Utah Ct. App. 1993).

Standard of review.

Under Subsection (4)(d), it is appropriate for a court to review an agency's interpretation of its statutorily granted powers and authority as a question of law, with no deference to the agency's view of the law. The correction-of-error standard will be applied to such an issue and the agency's statutory interpretation will be upheld only if it is concluded to be not erroneous. *Bevans v. Industrial Comm'n*, 790 P.2d 573 (Utah Ct. App. 1990).

Under Subsection (4)(d), a court may grant relief based upon an agency's erroneous interpretation of law. This incorporates the correction-of-error standard previously applied by the Utah courts in cases involving agency interpretations of law. *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664 (Utah 1991).

The legislature in enacting Subsection (4) intended that the same standard used for determining the harmfulness of error in appeals from judicial proceedings should apply to reviews of agency actions. Under this standard, an error will be harmless if it is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991).

Absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term. *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991); *Mor-Flo Indus., Inc. v. Board of Review*, 817 P.2d 328 (Utah Ct. App. 1991), cert. denied, 843 P.2d 516 (Utah 1992).

An agency's statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language. *Morton Int'l, Inc. v. Utah State Tax Comm'n*,

814 P.2d 581 (Utah 1991); *Uintah Oil Ass'n v. County Bd. of Equalization*, 853 P.2d 894 (Utah 1993).

Constitutional questions are characterized as questions of law, and under Subsection (4)(d), agency determinations of general law — which include interpretations of the state and federal constitutions — are to be reviewed under a correction-of-error standard, giving no deference to the agency's decision. *Questar Pipeline Co. v. Utah State Tax Comm'n*, 817 P.2d 316 (Utah 1991).

Under Subsection (4)(a), the Court of Appeals reviews the constitutionality of the statute upon which an agency's action is based without deference, as a conclusion of law. *Velarde v. Board of Review*, 831 P.2d 123 (Utah Ct. App. 1992).

Because courts should uphold agency rules if they are reasonable and rational, courts should also uphold reasonable and rational departures from those rules by the agency absent a showing that the departure violated some other right. *Union Pac. R.R. v. Auditing Div.*, 842 P.2d 876 (Utah 1992).

Deference is given to an agency's statutory construction only when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language. Absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term. *Horton v. Utah State Retirement Bd.*, 842 P.2d 928 (Utah Ct. App. 1992).

Since § 35-4-5(b)(1) provides that a claimant is ineligible for unemployment benefits if the individual is "discharged for just cause . . . if so found by the commission," the appellate court reviews the action of the Board of Review of the Utah Industrial Commission under Subsection (4)(h)(i) of this section for reasonableness. *Albertsons, Inc. v. Department of Emp. Sec.*, 854 P.2d 570 (Utah Ct. App. 1993).

—Interpretation of statutory term.

Absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term such as "injuriously exposed to the hazards of such disease" in § 35-2-105. However, when the legislature either expressly or implicitly grants the agency discretion to interpret or apply a statutory term, a court will review the agency's interpretation or application under a reasonableness standard. *Luckau v. Board of Review of Indus. Comm'n*, 840 P.2d 811 (Utah Ct. App. 1992).

—Questions of law.

Intermediate deference should be granted to an agency's interpretation or application of specific laws when the legislature has explicitly or implicitly delegated discretion to the

agency to interpret or apply that law. If there is no explicit delegation of discretion, and the issues are questions of constitutional law and statutory construction on which the commission's experience and expertise will be of no real assistance, the standard of intermediate deference should not be applied. *Zissi v. State Tax Comm'r*, 842 P.2d 848 (Utah 1992).

Substantial evidence test.

In applying the "substantial evidence test," the appellate court reviews the "whole record" before the court, and this review is distinguishable from both a de novo review and the "any competent evidence" standard of review. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

The "substantial evidence test" of Subsection (4)(g) grants appellate courts greater latitude in reviewing the record than was previously granted under the Utah Employment Security Act's "any evidence of substance test." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

"Substantial evidence" is more than a mere "scintilla" of evidence, though something less than the weight of the evidence. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

"Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163 (Utah 1990).

The party challenging the findings must marshal all of the evidence supporting the findings and show that despite the supporting facts, the agency's findings are not supported by substantial evidence. *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163 (Utah 1990); *Intermountain Health Care, Inc. v. Board of Review*, 839 P.2d 841 (Utah Ct. App. 1992).

Substantial prejudice.

Agency decision revoking social worker's license was reversed and his case was remanded for a new hearing, because the failure to afford him an opportunity to cross-examine the witnesses against him resulted in "substantial prejudice." *D.B. v. Division of Occupational & Professional Licensing*, 779 P.2d 1145 (Utah Ct. App. 1989).

The "substantial prejudice" phrase in Subsection (4) relates to the damage or harm suffered by the person seeking review and was written to ensure that a court will not issue advisory opinions reviewing agency action when no true controversy has resulted from that action. The phrase does not relate to the degree of deference a court must give an

agency decision. *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664 (Utah 1991).

Whole record test.

The "whole record test" necessarily requires that a party challenging the board's findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

Under the "whole record test," a court must consider not only the evidence supporting the board's factual findings, but also the evidence that fairly detracts from the weight of the board's evidence. *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989).

Cited in *Law Offices of David Paul White & Assocs. v. Board of Review*, 776 P.2d 20 (Utah Ct. App. 1989); *Zimmerman v. Industrial Comm'n*, 785 P.2d 1127 (Utah Ct. App. 1989); *Nyrehn v. Industrial Comm'n*, 800 P.2d 330 (Utah Ct. App. 1990); *Fred Meyer v. Industrial Comm'n*, 800 P.2d 825 (Utah Ct. App. 1990); *Heinecke v. Department of Commerce*, 810 P.2d 459 (Utah Ct. App. 1991); *In re SAM Oil, Inc.*, 817 P.2d 299 (Utah 1991); *Salt Lake County ex rel. County Bd. of Equalization v. State Tax Comm'n*, 819 P.2d 776 (Utah 1991);

Bennion v. ANR Prod. Co., 819 P.2d 343 (Utah 1991); *Johnson-Bowles Co. v. Department of Commerce*, 829 P.2d 101 (Utah Ct. App. 1991); *Department of Air Force v. Swider*, 824 P.2d 448 (Utah Ct. App. 1991); *Southern Utah Wilderness Alliance v. Board of State Lands & Forestry*, 830 P.2d 233 (Utah 1992); *Ferro v. Utah Dep't of Commerce*, 828 P.2d 507 (Utah Ct. App. 1992); *MCI Telecommunications Corp. v. Public Serv. Comm'n*, 840 P.2d 765 (Utah 1992); *Cross v. Board of Review*, 824 P.2d 1202 (Utah Ct. App. 1992); *Giesbrecht v. Board of Review*, 828 P.2d 544 (Utah Ct. App. 1992); *Stokes v. Board of Review*, 832 P.2d 56 (Utah Ct. App. 1992); *Stewart v. Board of Review*, 831 P.2d 134 (Utah Ct. App. 1992); *Holland v. State Office of Educ.*, 834 P.2d 596 (Utah Ct. App. 1992); *Anderson v. Public Serv. Comm'n*, 839 P.2d 822 (Utah 1992); *Gibson v. Department of Emp. Sec.*, 840 P.2d 780 (Utah Ct. App. 1992); *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045 (Utah Ct. App. 1992); *King v. Industrial Comm'n*, 850 P.2d 1281 (Utah Ct. App. 1993); *Board of Equalization v. Sinclair Oil Corp.*, 853 P.2d 892 (Utah 1993); *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 219 Utah Adv. Rep. 43 (Ct. App. 1993); *Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

63-46b-17. Judicial review — Type of relief.

- (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.
- (b) In granting relief, the court may:
 - (i) order agency action required by law;
 - (ii) order the agency to exercise its discretion as required by law;
 - (iii) set aside or modify agency action;
 - (iv) enjoin or stay the effective date of agency action; or
 - (v) remand the matter to the agency for further proceedings.
- (2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

History: C. 1953, 63-46b-17, enacted by L. 1987, ch. 161, § 273.