

1994

Merit Electrical & Instrumentation, a corporation,
and Jonathan Carl Juretech, Christopher M.
Schiffman, Dan A. Johnson, and Kit Vaness v. Utah
Department of Commerce, Division of
Occupational and Professional Licensing: Brief of
Respondent

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.

James B. Lee, Barbara K. Polich, William J. Stilling; attorneys for petitioners.

Robert K. Hunt; Assistant Attorney General; Jan Graham; Attorney General; attorneys for respondent.

Recommended Citation

Brief of Respondent, *Merit Electrical v. Department of Commerce*, No. 940435 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/6089

This Brief of Respondent 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.

IN THE UTAH COURT OF APPEALS

MERIT ELECTRICAL & INSTRUMENTATION, a corporation, and
JONATHAN CARL JURETICH,
CHRISTOPHER M. SCHIFFMAN, DAN
A. JOHNSON, and KIT VANESS

Petitioners

vs.

UTAH DEPARTMENT OF COMMERCE,
DIVISION of OCCUPATIONAL and
PROFESSIONAL LICENSING

Respondent on appeal

Priority No. 14

Court of Appeals # 940435-CA

BRIEF OF RESPONDENT

Petition For Review

James B. Lee (1919)
Barbara K. Polich (2620)
William J. Stilling (6339)
Attorneys for Petitioner
201 South Main Street
Suite 1880
P.O. Box 45898
Salt Lake City, Utah
84145-0898
Telephone: (801) 532-1234

Attorneys for Petitioners

Robert K. Hunt (#5722)
Assistant Attorney General
JAN GRAHAM (#1231)
Utah Attorney General
Consumer Rights Division
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1600

Attorneys for Respondent

UTAH COURT OF APPEALS
BRIEF

UTAH

KFJ

50

.A10

DOCKET NO. 940435

FILED

FEB 07 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MERIT ELECTRICAL & INSTRUMENTATION, a corporation, and
JONATHAN CARL JURETICH,
CHRISTOPHER M. SCHIFFMAN, DAN
A. JOHNSON, and KIT VANESS

Petitioners

vs.

UTAH DEPARTMENT OF COMMERCE,
DIVISION of OCCUPATIONAL and
PROFESSIONAL LICENSING

Respondent on appeal

Court of Appeals # 940435-CA

BRIEF OF RESPONDENT

James B. Lee (1919)
Barbara K. Polich (2620)
William J. Stilling (6339)
Attorneys for Petitioner
201 South Main Street
Suite 1880
P.O. Box 45898
Salt Lake City, Utah
84145-0898
Telephone: (801) 532-1234

Attorneys for Petitioners

Robert K. Hunt (#5722)
Assistant Attorney General
JAN GRAHAM (#1231)
Utah Attorney General
Consumer Rights Division
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1600

Attorneys for Respondent

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
DETERMINATIVE STATUTES	1
STATEMENT OF THE CASE/STATEMENT OF FACTS	2
ISSUE PRESENTED/STANDARD OF REVIEW	4
SUMMARY OF ARGUMENTS	4
ARGUMENT	
POINT I THERE IS NO CONSTITUTIONAL OR STATUTORY PROVISION ALLOWING THIS COURT TO REVIEW A NONFINAL ADMINISTRATIVE ORDER RESULTING FROM AN INFORMAL ADJUDICATIVE PROCEEDING	5
A. The Conversion Order Does Not Result from a Formal Adjudicative Proceeding	5
B. The Conversion Order Does Not constitute Final Agency Action	7
POINT II UTAH LAW DOES NOT GRANT THIS COURT DISCRETION TO CREATE AN EXCEPTION TO ITS STATUTORILY DEFINED JURISDICTION AND ADOPT THE COMMON LAW FEDERAL COLLATERAL ORDER DOCTRINE	8
CONCLUSION	11
ADDENDA	
ADDENDUM A UTAH CODE ANNOTATED	
ADDENDUM B PETITIONERS' NOTICES OF RESPONSE	
ADDENDUM C UTAH CODE SECTIONS AND ADMIN. RULES	
ADDENDUM D MOTION TO CONVERT TO FORMAL ADJUDICATIVE PROCEEDINGS	
ADDENDUM E ORDER CONVERTING CITATIONS TO FORMAL ADJUDICATIVE HEARING	
ADDENDUM F ORDER VACATING CONVERSION	
ADDENDUM G ORDER CONVERTING CITATION TO FORMAL ADJUDICATIVE PROCEEDING	
ADDENDUM H ORDER ON REVIEW	

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Barney v. Division of Occ. & Prof. Lic.</u> , 828 P.2d 542 (Utah App.) <u>cert. denied</u> , 843 P.2d 516 (Utah 1992) . . .	3, 7, 11
<u>Blaine Hudson Printing v. Utah State Tax Comm'n.</u> , 870 P.2d 291 (Utah App. 1994)	4
<u>Cohen v. Beneficial Indus. Loan Corp.</u> , 337 U.S. 541 (1949) . .	9, 10
<u>DeBry v. Salt Lake County Bd of Appeals</u> , 764 P.2d 627 (Utah App. 1988)	5, 6
<u>Southern Utah Wilderness Alliance v. Board of State Lands</u> , 830 P.2d 233 (1992)	6, 7, 11
<u>Tyler v. Department of Human Services</u> , 874 P.2d 119 (Utah 1994)	10

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

28 U.S.C. § 1291 (1993)	9
28 U.S.C.A. § 1292 (1993)	9
Utah Admin. Code R156-46b-202 (1992)	1, 6
Utah Admin. Code R156-46b-4 (1994)	2
Utah Code Ann. § 58-1-109 (1994)	3
Utah Code Ann. § 58-55-4 (1994)	2
Utah Code Ann. § 58-55-6 (1990)	1
Utah Code Ann. § 58-55-13 (1993 Cum. Supp.)	1, 2
Utah Code Ann. § 58-55-301 (Supp. 1994)	2
Utah Code Ann. § 63-46b-4 (1990)	1, 2, 3, 6
Utah Code Ann. § 63-46b-15 (1993)	1, 2, 8, 10
Utah Code Ann. § 63-46b-16 (1993)	8
Utah Code Ann. § 63-46b-16 (1993)	1, 4, 5, 6, 8
Utah Code Ann. § 78-2a-3 (Supp. 1993)	1, 4, 5, 10

IN THE UTAH COURT OF APPEALS

MERIT ELECTRICAL & INSTRUMENTATION, a corporation, and
JONATHAN CARL JURETICH,
CHRISTOPHER M. SCHIFFMAN, DAN
A. JOHNSON, and KIT VANESS

Petitioners

vs.

UTAH DEPARTMENT OF COMMERCE,
DIVISION of OCCUPATIONAL and
PROFESSIONAL LICENSING

Respondent on appeal

Court of Appeals # 940435-CA

BRIEF OF RESPONDENT

- - - - -

JURISDICTION

Respondents do not agree that this Court has any jurisdiction to determine the merits of a nonfinal order resulting from an informal proceeding. See UTAH CODE ANN. § 78-2a-3(2)(a) (Supp. 1993) or UTAH CODE ANN. § 63-46b-16 (1993).

DETERMINATIVE STATUTES

1. UTAH CODE ANN. § 58-55-6(2) (1990)
2. UTAH CODE ANN. § 58-55-13(4) (1993 Cum. Supp.)
3. UTAH CODE ANN. § 63-46b-4
4. UTAH CODE ANN. § 63-46b-15(1)
5. UTAH CODE ANN. § 63-46b-16 (1993)
6. UTAH CODE ANN. § 78-2a-3 (Supp. 1993)
7. Utah Administrative Code § 156-46b-202 (1) (n)

STATEMENT OF THE CASE/STATEMENT OF FACTS

The petitioner, Merit Electrical and Instrumentation, Inc. is not licensed as an electrical contractor in the State of Utah, and its employees, Jurelich, Schiffman, Johnson and Vaness are not licensed electricians. Kennecott Utah Copper, Inc. hired petitioners to perform electrical work on a smelter building, which is part of Kennecott's ongoing renovation project.

On December 9, 1993, the Division of Occupational and Professional Licensing issued citations to Merit Electrical and Instrumentation, Inc. and four of its employees for performing electrical work without a license, in violation of UTAH CODE ANN. § 58-55-4 (1994) (now UTAH CODE ANN. § 58-55-301 (Supp. 1994)).¹

Addendum A. All five Petitioners contested the Citations. The answers to the citations are compiled collectively in Addendum B.

The citations were issued pursuant to UTAH CODE ANN. § 58-55-13(4) (1993 Cum. Supp.) (now UTAH CODE ANN. 58-55-503(4) (1994)). Contested citation hearings are classified as informal adjudicative hearings by Utah Administrative Code R156-46b-4(2)(d) (1994) (now R156-46b-202(1)(n)), in accordance with UTAH CODE ANN. § 63-46b-4(1), which authorizes the division to classify proceedings by rule. Jurisdiction over an action to judicially review an informal administrative hearing is vested in the district court by trial de novo, pursuant to UTAH CODE ANN. § 63-46b-15(1). Addendum C.

¹ A record has not been compiled in this case; therefore, there will be no references to a page in the record.

Because the citations were contested, an informal hearing was scheduled. However, prior to the hearing, on or about February 11, 1994, the division moved to convert the proceedings from an informal hearing to a formal hearing pursuant to UTAH CODE ANN. § 63-46b-4(3) (1990). Addendum D.

An order converting the proceedings to a formal hearing was issued by the informal hearing officer. Addendum E. However, when petitioners objected, the order was vacated on March 4, 1994. Addendum F. The parties filed briefs with the presiding hearing officer of the informal proceeding, who issued a new order on April 5, 1994, converting the proceedings to a formal hearing. Addendum G.

On May 5, 1994, petitioners filed a request for agency review of the conversion order with the director of the Department of Commerce. The Executive Director of the Department of Commerce issued an order on June 27, 1994, refusing to review the conversion order on the grounds that she lacked jurisdiction because the conversion order was not a final agency order. See UTAH CODE ANN. § 58-1-109(8) (1994). The matter was remanded for further proceedings. Addendum H.

Petitioners then sought review of the non-final order with this Court on July 27, 1994. On its own motion, the Court of Appeals requested consideration of this case for summary disposition based on Barney v. Division of Occ. & Prof. Lic., 828 P.2d 542 (Utah App.) cert. denied, 843 P.2d 516 (Utah 1992). The

Court denied summary disposition and requested that the jurisdictional issues be briefed and argued to the Court.

ISSUE PRESENTED/STANDARD OF REVIEW

Does this Court have jurisdiction to review a nonfinal agency order resulting from an informal adjudicative proceeding? The jurisdictional issue has not been addressed or decided by any lower tribunal; thus, there is no standard of appellate review. However, whether jurisdiction exists is a question of law. Blaine Hudson Printing v. Utah State Tax Comm'n., 870 P.2d 291 (Utah App. 1994).

SUMMARY OF ARGUMENTS

Employers like Kennecott benefit financially every day they are permitted to use unlicensed and unregulated construction workers like petitioners, in violation of Utah law. Licensed and regulated electricians cost more and are more demanding because they are unionized. This petition for review is a frivolous attempt to use the appellate court to further delay a hearing on the merits before the licensing agency.

This Court's jurisdiction is generally defined in UTAH CODE ANN. § 78-2a-3, but specifically limited in the Utah Administrative Procedures Act ("UAPA"), UTAH CODE ANN. § 63-46b-16. Utah law does not give this Court jurisdiction to review an order resulting from an informal agency adjudication. Furthermore, as this Court has clearly held, Utah law does not allow this Court to review a nonfinal agency order. Unlike the federal system,

this Court has no discretion to adopt a common law doctrine to circumvent its statutorily defined jurisdictional parameters.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL OR STATUTORY PROVISION ALLOWING THIS COURT TO REVIEW A NONFINAL ADMINISTRATIVE ORDER RESULTING FROM AN INFORMAL ADJUDICATIVE PROCEEDING.

A. The Conversion Order Does Not Result from a Formal Adjudicative Proceeding.

Absent a specific statute granting this court a right to review this matter, this court cannot claim jurisdiction. The Court of Appeals is a statutory court whose jurisdiction "must be provided by statute." DeBry v. Salt Lake County Bd of Appeals 764 P.2d 627 (Utah App. 1988). This Court has jurisdiction to review agency action only when "the legislature expressly authorizes review." Id. at 628. Pursuant to the Constitution of the State of Utah, all jurisdiction must be provided by statute. Utah Const. art. VIII, § 5.

The entire jurisdiction of the Court of Appeals to review administrative orders emanating from the Division of Occupational and Professional Licensing is set out in UTAH CODE ANN. § 78-2a-3(2) (Cum. Supp. 1994) and in UAPA at UTAH CODE ANN. § 63-46b-16(1) (1993). Section 78-2a-3(2) defines the outer boundaries of this Court's jurisdiction and states in pertinent part: "The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: (a) The **final** orders and decrees resulting from **formal** adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies." While Section 78-2a-3

generally grants this Court jurisdiction over interlocutory appeals, it does not allow the Court of Appeals discretion to review nonfinal, informal administrative orders. This Court has recognized that Section 78-2a-3 "defines the outermost limits of our appellate jurisdiction, allowing us to review agency decisions only when the legislature expressly authorizes a right to review." DeBry, 764 P.2d at 627-8. UAPA specifically limits this Court's jurisdiction by allowing judicial review only of final agency action resulting from formal adjudicative proceedings. UTAH CODE ANN. § 63-46b-16(1) (1993).

Both UAPA and Section 78-2a-3 require the agency order on direct judicial review by this court to arise from a formal agency action and to constitute final agency action. There is no basis for jurisdiction in this case, since the order converting these proceedings to a formal hearing was issued by the presiding officer assigned to hear contested citations, which are classified as informal hearings. UTAH CODE ANN. § 63-46b-4(1); Utah Admin. Code R156-46b-202 (1)(n). Thus, it resulted from an informal adjudicative proceeding.

It is prerequisite to this Court's jurisdiction that the contested order originate from a formal adjudicative proceeding. The Utah Supreme Court has clearly recognized the legislative grant of jurisdiction to Utah's appellate courts only to review actions in formal adjudicative proceedings. Southern Utah Wilderness Alliance v. Board of State Lands, 830 P.2d 233, 234 (1992). In that case, the jurisdictional linchpin was likewise

whether the agency action challenged arose from a formal or an informal adjudicative proceeding. The court reviewed the language of both UAPA and its own jurisdictional statute, and held:

These provisions make clear that this court has jurisdiction over all dispositive orders arising from formal adjudicative proceedings, while the district courts have jurisdiction over final agency actions resulting from informal proceedings.

830 P.2d at 236. Since the matter arose from an informal proceeding, the petition for review was dismissed for lack of jurisdiction.

Southern Utah Wilderness Assn. conclusively declares the dispositive effect that both Section 78-2a-3 and 63-46b-16 have in this case since no formal adjudicative hearing has been scheduled and the only order which petitioners seek to challenge in judicial review is the conversion order issued from the informal hearing officer. If since the agency order challenged does not result from a formal adjudicative proceeding, this Court has no jurisdiction.

B. The Conversion Order Does Not Constitute Final Agency Action.

Even if this order did result from a formal adjudicative proceeding, this court would lack jurisdiction over the petition for review. The order converting the proceedings is not a final order since this case has yet to be heard on its merits. In Barney v. Division of Occ. & Prof. Lic., 828 P.2d 542 (Utah App.), cert. denied, 843 P.2d 516 (Utah 1992), petitioner claimed to be subject to double jeopardy because action was taken against

him administratively and criminally. Barney's motion to dismiss the administrative charges was denied, and he petitioned for judicial review of that order. This Court concluded it had no jurisdiction, holding that "UTAH CODE ANN. § 63-46b-16(1) (1989) grants this court jurisdiction to review **final** agency actions resulting from formal adjudicative proceedings." Id. at 544 (emphasis in original). The Court concluded such "finality" exists when

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

Id. at 544. Thus, UAPA prohibits judicial review of all agency action that has not culminated in a disposition of all issues before the agency. UTAH CODE ANN. §§ 63-46b-15(1)(a), and 16 (1). In this case, a formal hearing is still pending and the merits have yet to be heard.

II. UTAH LAW DOES NOT GRANT THIS COURT DISCRETION TO CREATE AN EXCEPTION TO ITS STATUTORILY DEFINED JURISDICTION AND ADOPT THE COMMON LAW FEDERAL COLLATERAL ORDER DOCTRINE.

Petitioners concede the conversion order is interlocutory, but argue that it should nonetheless be deemed "final" for purposes of the judicial review provided for in sections 63-46b-15 and -16, through application of the "collateral order doctrine." However, UAPA does not permit judicial review of any type of nonfinal order resulting from an informal administrative proceeding. The statute leaves this Court with no discretion to adopt a common law doctrine creating an exception to the plain

language restricting this Court's jurisdiction to review administrative orders. This Court cannot by case law reshape its statutorily defined jurisdiction.

The collateral order doctrine was first enunciated Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949). Cohen was a derivative action brought in federal court by shareholder plaintiffs. The corporate defendant filed a motion to require plaintiff to post security for reasonable expenses it incurred in the action, in accordance with a state law requirement. The federal district court denied the motion, ruling that the state law did not apply to the federal action. The corporate defendant appealed this order and the Court of Appeals reversed the trial court. Id. at 543-45.

Addressing the appealability of the trial court's order as a threshold matter, the Supreme Court concluded that it was an appealable "final decision" within the federal statute fixing the appellate jurisdiction of the federal Circuit Courts of Appeal, 28 U.S.C. § 1291. Cohen, 337 U.S. at 545.

However, the Utah statute fixing this court's power to review the orders of agencies governed by UAPA precludes this Court from deeming an interlocutory order to be reviewable. The federal appellate courts have this power pursuant to 28 U.S.C.A. §§ 1291 and 1292 (1993), which give them jurisdiction over appeals from "final decisions" of district courts, as well as certain interlocutory court orders. Therefore, the federal

statute defining federal appellate jurisdiction allowed appeals from orders other than final trial court judgements. See Cohen, 337 U.S. at 545.

The United States Supreme Court's ability to fashion an interlocutory appeal was contingent on the specific language of the federal appellate courts' jurisdictional mandate. "It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable." Id. In contrast, UAPA limits this Court's jurisdiction by authorizing judicial review only of "final agency actions." Utah Code Ann. §§ 63-46b-15(1)(a), -16(1) (1993).² This Court has specific and unambiguous jurisdictional limits and is legislatively mandated to consider only petitions for review of final orders or decrees from formal adjudicative proceedings. There is no discretion vested in this Court to fashion a common law exception to this statutorily defined jurisdiction. As the Utah Supreme Court has noted, "[i]n the absence of a specific statute granting us jurisdiction over a writ of review from an

² In the context of appellate jurisdiction of Utah courts to consider appeals from trial courts, the only governing statute is broad like the federal statute, permitting this Court to exercise appellate jurisdiction over interlocutory appeals. Utah Code Ann. § 78-2a-3(2) (Supp. 1994). Thus, judicial adoption of the "collateral order doctrine" to deem final an interlocutory trial court order is not precluded in Utah. Nonetheless, the Utah Supreme Court has not yet found an appropriate situation meriting use of the doctrine. See Tyler v. Department of Human Services, 874 P.2d 119 (Utah 1994).

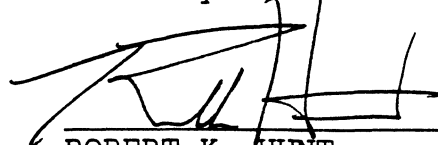
agency proceeding, we have no jurisdiction." Southern Utah Wilderness Alliance, 830 P.2d at 234 (citing DeBry, 764 P.2d at 628).

CONCLUSION

Given the unalterable limits of this Court's jurisdiction, Petitioners' request for review of the nonfinal, informal administrative order is a frivolous attempt to delay a hearing on the merits of the licensing issue as long as possible. As this Court stated in Barney, "[i]t is a court's first duty to determine if it has jurisdiction. If the court concludes that it does not have jurisdiction, it retains only the authority to dismiss the case." 828 P.2d at 544 (citing Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah App. 1989)). Respondent respectfully requests that the petition for review be promptly dismissed for lack of jurisdiction so that the Division may proceed with a formal adjudication on the merits.

Submitted this 7th day of February, 1995.

JAN GRAHAM
Attorney General

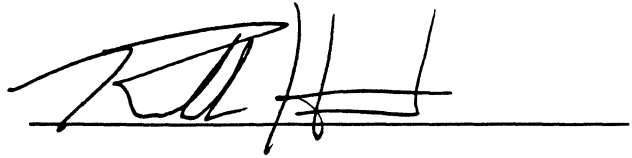
A handwritten signature in black ink, appearing to read 'Robert K. Hunt', is written over a horizontal line.

ROBERT K. HUNT
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 1995, I caused to be mailed, first-class postage prepaid, two copies of the foregoing BRIEF OF RESPONDENT to:

James B. Lee (1919)
Barbara K. Polich (2620)
William J. Stilling (6339)
Attorneys for Petitioner
201 South Main Street
Suite 1880
P.O. Box 45898
Salt Lake City, Utah
84145-0898

A handwritten signature in black ink, appearing to be "JBL", is written over a horizontal line.

ADDENDA

ADDENDUM A

58-55-4. License required — License classifications.

(1) (a) Any person engaged in the construction trades licensed under this chapter, or as a contractor regulated under this chapter, shall become licensed under this chapter before engaging in that trade or contracting activity in this state unless specifically exempted from licensure under Section 58-55-6.

(b) The license issued under this chapter and the business license issued by the local jurisdiction in which the licensee has its principal place of business shall be the only licenses required for the licensee to engage in a construction trade or as a contractor within the state.

(c) Neither the state nor any of its political subdivisions may require of a licensee any additional business licenses, registrations, certifications, contributions, donations, or anything else established for the purpose of qualifying a licensed contractor to do business in that local jurisdiction, except for contract prequalification procedures required by state agencies, or the payment of any fee for the license, registration, or certification established as a condition to do business in that local jurisdiction.

(2) The division shall issue licenses under this chapter to qualified persons in the following classifications:

- (a) general engineering contractor;
- (b) general building contractor;
- (c) residential and small commercial contractor;
- (d) specialty contractor;

- (e) journeyman plumber;
- (f) apprentice plumber;
- (g) residential journeyman plumber;
- (h) residential apprentice plumber;
- (i) master electrician;
- (j) residential master electrician;
- (k) journeyman electrician;
- (l) residential journeyman electrician;
- (m) residential trainee electrician; and
- (n) apprentice electrician.

(3) An applicant may apply for a license in one or more classification or specialty contractor subclassification. A license shall be granted in each classification or subclassification for which the applicant qualifies. A separate application and fee must be submitted for each license classification or subclassification.

History: C. 1953, 58-55-4, enacted by L. 1989, ch. 128, § 4; 1990, ch. 73, § 3; 1992, ch. 303, § 3; 1993, ch. 155, § 2; 1993, ch. 297, § 261.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added "and" at the end of Subsection (1)(j), deleted former Subsection (1)(k), relating to backflow device technicians, and redesignated former Subsection (1)(l) as present Subsection (1)(k).

The 1992 amendment, effective April 27, 1992, added Subsection (1)(h), renumbering former Subsections (1)(h) through (1)(k) as Subsections (1)(i) through (1)(l), and substi-

tuted "shall" for "will" in the second sentence of Subsection (2).

The 1993 amendment by ch. 155, effective May 3, 1993, inserted Subsections (1)(g) and (1)(h), and made designation and stylistic changes.

The 1993 amendment by ch. 297, effective July 1, 1993, added Subsection (1), redesignated former Subsections (1) and (2) as Subsections (2) and (3), and substituted "residential master electrician" for "master residential electrician" in Subsection (2)(h).

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

ADDENDUM B

December 27, 1993

Utah Department of Commerce
Division of Occupational & Professional Licensing
Construction Compliance Section
P. O. Box 45805
160 East 300 South
Salt Lake City, Utah 84145

Re: Utah Department of Commerce
Division of Occupational & Professional Licensing
Construction Compliance Section Citations

Gentlemen:

Enclosed please find the responses of MERIT Electrical & Instrumentation, Inc., Jonathan Carl Jurelich, Christopher M. Schiffman, Dan A. Johnson and Kit Vaness Carson to the following citations:

1. MERIT Electrical & Instrumentation, Inc., Citation Number 1986;
2. Jonathan Carl Jurelich, Citation Number 1841;
3. Christopher M. Schiffman, Citation Number 1917;
4. Dan A Johnson, Citation Number 1918;
5. Kit Vaness Carson, Citation Number 1842.

As indicated in each "Notice of Response" MERIT Electrical & Instrumentation, Inc. and each of the individual employees deny committing the offense described in the citation and we request a hearing to contest the citations. MERIT Electrical & Instrumentation, Inc., and the individual employees contest the citations because we are exempt from licensure. Section 58-55-6(2) Utah Code Annot., 1990 exempts from licensure ". . . any person engaged in . . . construction and repair relating to . . . metal and coal mining. . . . All of MERIT Electrical & Instrumentation, Inc.'s work for which it and the individual employees were cited involves construction relating to metal mining.

Utah Department of Commerce
December 27, 1993
Page 2

Please advise MERIT Electrical & Instrumentation , Inc., and the individual employees of the date, time and place of the citation hearing at their addresses listed in each Notice of Response. Please provide notice to MERIT Electrical & Instrumentation, Inc., of the citation hearing concerning it and the individual employees at the following additional addresses:

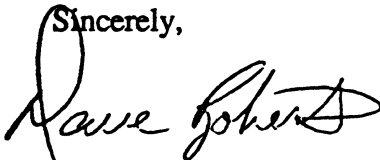
1. MERIT Electrical & Instrumentation, Inc.
Attn: Dave Roberts
Richard Cloy
17723 Airline Highway
Prairieville, Louisiana 70769
2. MERIT Electrical & Instrumentation, Inc.
Attn: Clint Cloy
12000 W. 2100 South
P. O. Box 266
Magna, Utah 84044

Please also advise our attorney Armin J. Moeller, Jr., of the citation hearing for MERIT Electrical & Instrumentation, Inc., and the individual employees at his address:

Armin J. Moeller, Jr., Esquire
Phelps Dunbar
P. O. Box 23066
Jackson, Mississippi 39225-3066

Should you have any questions concerning these matters, please contact me at (504) 673-8850.

Sincerely,



Dave Roberts
President

DR/tm

NOTICE OF RESPONSE

Department of Commerce
Division of Occupational & Professional Licensing
Instruction Compliance Section
P.O. Box 45805
Salt Lake City, Utah 84145



CITATION # 01986 DATE OF CITATION: 12-9-93
NAME: MERIT ELECTRICAL INST. INC. PHONE NUMBER: 801-252-0705
ADDRESS: 12000 WEST 2100 SOUTH
MAGNA, UTAH 84044

THE CITATION ISSUED TO YOU MAY BE CONTESTED BY NOTIFYING THE DIVISION IN WRITING WITHIN 20 CALENDAR DAYS OF THE SERVICE OF THE CITATION THAT YOU WISH TO CONTEST THE CITATION AT A HEARING CONDUCTED UNDER TITLE 63, CHAPTER 46b, ADMINISTRATIVE PROCEDURES ACT. A CITATION WHICH IS NOT CONTESTED BECOMES THE FINAL ORDER OF THE DIVISION AND IS NOT SUBJECT TO FURTHER REVIEW. ANY PERSON WHO FAILS TO COMPLY WITH A CITATION AFTER IT BECOMES THE FINAL ORDER OF THE DIVISION IS GUILTY OF A CLASS A MISDEMEANOR AND THE DIVISION MAY REFUSE TO ISSUE OR RENEW OR MAY SUSPEND, REVOKE, OR PLACE ON PROBATION A LICENSE YOU HOLD OR APPLY FOR.

PLEASE SELECT ONE OF THE FOLLOWING ALTERNATIVE RESPONSES IN RESPONDING TO THE CITATION ISSUED TO YOU:

- ☐ 1. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION, CHOOSE NOT TO CONTEST THE CITATION AND TO COMPLY WITH ITS SANCTIONS, AND HEREBY SUBMIT THE FINE SHOWN ON THE DOPL CITATION FINE SCHEDULE ON THE REVERSE SIDE OF THE CITATION.
- ☐ 2. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION BUT REQUEST A HEARING TO EXPLAIN THE CIRCUMSTANCES OF THE OFFENSE.
- ☒ 3. I DENY COMMITTING THE OFFENSE DESCRIBED IN THE CITATION AND REQUEST A HEARING TO CONTEST THE CITATION.

I CERTIFY THAT I HAVE KNOWINGLY AND VOLUNTARILY MADE THE ABOVE ELECTION OF RIGHTS. I UNDERSTAND THAT IF I REQUEST A HEARING, THE DIVISION WILL NOTIFY ME IN WRITING OF THE HEARING DATE AND THAT IF I FAIL TO APPEAR AT THE HEARING, A DEFAULT JUDGEMENT WILL BE ENTERED AGAINST ME.

I FURTHER UNDERSTAND THAT THE ISSUES TO BE DECIDED BY THE PRESIDING OFFICER AT A HEARING ARE FIRST, WHETHER THE CITED OFFENSE IS SUPPORTED BY COMPETENT EVIDENCE; SECOND, WHETHER THE CITATION SHOULD HAVE BEEN ISSUED; AND IF SO, THIRD, WHETHER THE SANCTION IMPOSED BY THE CITATION SHOULD BE AFFIRMED, REJECTED OR MODIFIED (DECREASED, INCREASED, SUSPENDED, REMITTED, OR VACATED).

SIGNATURE: Richard W. Clay DATE: 12/27/93

NOTICE OF RESPONSE



Department of Commerce
Division of Occupational & Professional Licensing
Construction Compliance Section
P.O. Box 45805
100 East 300 South
Salt Lake City, Utah 84145

CITATION # 01918 DATE OF CITATION: 12-9-93
NAME: DAN A. JOHNSON PHONE NUMBER: _____
ADDRESS: 12000 WEST 2100 SOUTH
MAGNA, UTAH 84044

THE CITATION ISSUED TO YOU MAY BE CONTESTED BY NOTIFYING THE DIVISION IN WRITING WITHIN 20 CALENDAR DAYS OF THE SERVICE OF THE CITATION THAT YOU WISH TO CONTEST THE CITATION AT A HEARING CONDUCTED UNDER TITLE 63, CHAPTER 46b, ADMINISTRATIVE PROCEDURES ACT. A CITATION WHICH IS NOT CONTESTED BECOMES THE FINAL ORDER OF THE DIVISION AND IS NOT SUBJECT TO FURTHER REVIEW. ANY PERSON WHO FAILS TO COMPLY WITH A CITATION AFTER IT BECOMES THE FINAL ORDER OF THE DIVISION IS GUILTY OF A CLASS A MISDEMEANOR AND THE DIVISION MAY REFUSE TO ISSUE OR RENEW OR MAY SUSPEND, REVOKE, OR PLACE ON PROBATION A LICENSE YOU HOLD OR APPLY FOR.

PLEASE SELECT ONE OF THE FOLLOWING ALTERNATIVE RESPONSES IN RESPONDING TO THE CITATION ISSUED TO YOU:

- ☐ 1. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION, CHOOSE NOT TO CONTEST THE CITATION AND TO COMPLY WITH ITS SANCTIONS, AND HEREBY SUBMIT THE FINE SHOWN ON THE DOPL CITATION FINE SCHEDULE ON THE REVERSE SIDE OF THE CITATION.
- ☐ 2. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION BUT REQUEST A HEARING TO EXPLAIN THE CIRCUMSTANCES OF THE OFFENSE.
- ☒ 3. I DENY COMMITTING THE OFFENSE DESCRIBED IN THE CITATION AND REQUEST A HEARING TO CONTEST THE CITATION.

I CERTIFY THAT I HAVE KNOWINGLY AND VOLUNTARILY MADE THE ABOVE ELECTION OF RIGHTS. I UNDERSTAND THAT IF I REQUEST A HEARING, THE DIVISION WILL NOTIFY ME IN WRITING OF THE HEARING DATE AND THAT IF I FAIL TO APPEAR AT THE HEARING, A DEFAULT JUDGEMENT WILL BE ENTERED AGAINST ME.

I FURTHER UNDERSTAND THAT THE ISSUES TO BE DECIDED BY THE PRESIDING OFFICER AT A HEARING ARE FIRST, WHETHER THE CITED OFFENSE IS SUPPORTED BY COMPETENT EVIDENCE; SECOND, WHETHER THE CITATION SHOULD HAVE BEEN ISSUED; AND IF SO, THIRD, WHETHER THE SANCTION IMPOSED BY THE CITATION SHOULD BE AFFIRMED, REJECTED OR MODIFIED (DECREASED, INCREASED, SUSPENDED, REMITTED, OR VACATED).

SIGNATURE: [Signature] DATE: 12-28-93

NOTICE OF RESPONSE



Division of Commerce
Occupational & Professional Licensing
Compliance Section
Box 45805
East 300 South
Lake City, Utah 84145

CITATION # 01917 DATE OF CITATION: 12-9-93
NAME: CHRISTOPHER M. SCHIFFMAN PHONE NUMBER: 801-252-0705
ADDRESS: 12000 WEST 2100 SOUTH
MAGNA, UTAH 84044

THE CITATION ISSUED TO YOU MAY BE CONTESTED BY NOTIFYING THE DIVISION IN WRITING WITHIN 20 CALENDAR DAYS OF THE SERVICE OF THE CITATION THAT YOU WISH TO CONTEST THE CITATION AT A HEARING CONDUCTED UNDER TITLE 63, CHAPTER 46b, ADMINISTRATIVE PROCEDURES ACT. A CITATION WHICH IS NOT CONTESTED BECOMES THE FINAL ORDER OF THE DIVISION AND IS NOT SUBJECT TO FURTHER REVIEW. ANY PERSON WHO FAILS TO COMPLY WITH A CITATION AFTER IT BECOMES THE FINAL ORDER OF THE DIVISION IS GUILTY OF A CLASS A MISDEMEANOR AND THE DIVISION MAY REFUSE TO ISSUE OR RENEW OR MAY SUSPEND, REVOKE, OR PLACE ON PROBATION A LICENSE YOU HOLD OR APPLY FOR.

PLEASE SELECT ONE OF THE FOLLOWING ALTERNATIVE RESPONSES IN RESPONDING TO THE CITATION ISSUED TO YOU:

- ☐ 1. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION, CHOOSE NOT TO CONTEST THE CITATION AND TO COMPLY WITH ITS SANCTIONS, AND HEREBY SUBMIT THE FINE SHOWN ON THE DOPL CITATION FINE SCHEDULE ON THE REVERSE SIDE OF THE CITATION.
- ☐ 2. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION BUT REQUEST A HEARING TO EXPLAIN THE CIRCUMSTANCES OF THE OFFENSE.
- ☒ 3. I DENY COMMITTING THE OFFENSE DESCRIBED IN THE CITATION AND REQUEST A HEARING TO CONTEST THE CITATION.

I CERTIFY THAT I HAVE KNOWINGLY AND VOLUNTARILY MADE THE ABOVE ELECTION OF RIGHTS. I UNDERSTAND THAT IF I REQUEST A HEARING, THE DIVISION WILL NOTIFY ME IN WRITING OF THE HEARING DATE AND THAT IF I FAIL TO APPEAR AT THE HEARING, A DEFAULT JUDGEMENT WILL BE ENTERED AGAINST ME.

I FURTHER UNDERSTAND THAT THE ISSUES TO BE DECIDED BY THE PRESIDING OFFICER AT A HEARING ARE FIRST, WHETHER THE CITED OFFENSE IS SUPPORTED BY COMPETENT EVIDENCE; SECOND, WHETHER THE CITATION SHOULD HAVE BEEN ISSUED; AND IF SO, THIRD, WHETHER THE SANCTION IMPOSED BY THE CITATION SHOULD BE AFFIRMED, REJECTED OR MODIFIED (DECREASED, INCREASED, SUSPENDED, REMITTED, OR VACATED).

SIGNATURE: Chris Schiffman DATE: 12-28-93

NOTICE OF RESPONSE

Commerce
Occupational & Professional Licensing
Compliance Section
Jon
45805
300 South
Lake City, Utah 84145



CITATION # 01841 DATE OF CITATION: 12-9-93
NAME: Jonathan Cal Jurelich PHONE NUMBER: 801-252-0745
ADDRESS: 12000 WEST 2100 SOUTH
MAGNA, UTAH 84044

THE CITATION ISSUED TO YOU MAY BE CONTESTED BY NOTIFYING THE DIVISION IN WRITING WITHIN 20 CALENDAR DAYS OF THE SERVICE OF THE CITATION THAT YOU WISH TO CONTEST THE CITATION AT A HEARING CONDUCTED UNDER TITLE 63, CHAPTER 46b, ADMINISTRATIVE PROCEDURES ACT. A CITATION WHICH IS NOT CONTESTED BECOMES THE FINAL ORDER OF THE DIVISION AND IS NOT SUBJECT TO FURTHER REVIEW. ANY PERSON WHO FAILS TO COMPLY WITH A CITATION AFTER IT BECOMES THE FINAL ORDER OF THE DIVISION IS GUILTY OF A CLASS A MISDEMEANOR AND THE DIVISION MAY REFUSE TO ISSUE OR RENEW OR MAY SUSPEND, REVOKE, OR PLACE ON PROBATION A LICENSE YOU HOLD OR APPLY FOR.

PLEASE SELECT ONE OF THE FOLLOWING ALTERNATIVE RESPONSES IN RESPONDING TO THE CITATION ISSUED TO YOU:

- ☐ 1. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION, CHOOSE NOT TO CONTEST THE CITATION AND TO COMPLY WITH ITS SANCTIONS, AND HEREBY SUBMIT THE FINE SHOWN ON THE DOPL CITATION FINE SCHEDULE ON THE REVERSE SIDE OF THE CITATION.
- ☐ 2. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION BUT REQUEST A HEARING TO EXPLAIN THE CIRCUMSTANCES OF THE OFFENSE.
- ☒ 3. I DENY COMMITTING THE OFFENSE DESCRIBED IN THE CITATION AND REQUEST A HEARING TO CONTEST THE CITATION.

CERTIFY THAT I HAVE KNOWINGLY AND VOLUNTARILY MADE THE ABOVE ELECTION OF RIGHTS. I UNDERSTAND THAT IF I REQUEST A HEARING, THE DIVISION WILL NOTIFY ME IN WRITING OF THE HEARING DATE AND THAT IF I FAIL TO APPEAR AT THE HEARING, A DEFAULT JUDGEMENT WILL BE ENTERED AGAINST ME.

FURTHER UNDERSTAND THAT THE ISSUES TO BE DECIDED BY THE PRESIDING OFFICER AT A HEARING ARE FIRST, WHETHER THE CITED OFFENSE IS SUPPORTED BY COMPETENT EVIDENCE; SECOND, WHETHER THE CITATION SHOULD HAVE BEEN ISSUED; AND IF SO, THIRD, WHETHER THE SANCTION IMPOSED BY THE CITATION SHOULD BE AFFIRMED, REJECTED OR MODIFIED (DECREASED, INCREASED, SUSPENDED, REMITTED, OR VACATED).

SIGNATURE: Jon Jurelich

DATE: 12/28/93

NOTICE OF RESPONSE

Division of Commerce
Division of Occupational & Professional Licensing
Production Compliance Section
Box 45805
East 300 South
Salt Lake City, Utah 84145



CITATION # B1842 DATE OF CITATION: 12-9-93
NAME: KIT VANESS CARSON PHONE NUMBER: 801-252-0705
ADDRESS: 12000 WEST 2100 SOUTH
MAGNA, UTAH 84044

THE CITATION ISSUED TO YOU MAY BE CONTESTED BY NOTIFYING THE DIVISION IN WRITING WITHIN 20 CALENDAR DAYS OF THE SERVICE OF THE CITATION THAT YOU WISH TO CONTEST THE CITATION AT A HEARING CONDUCTED UNDER TITLE 63, CHAPTER 46b, ADMINISTRATIVE PROCEDURES ACT. A CITATION WHICH IS NOT CONTESTED BECOMES THE FINAL ORDER OF THE DIVISION AND IS NOT SUBJECT TO FURTHER REVIEW. ANY PERSON WHO FAILS TO COMPLY WITH A CITATION AFTER IT BECOMES THE FINAL ORDER OF THE DIVISION IS GUILTY OF A CLASS A MISDEMEANOR AND THE DIVISION MAY REFUSE TO ISSUE OR RENEW OR MAY SUSPEND, REVOKE, OR PLACE ON PROBATION A LICENSE YOU HOLD OR APPLY FOR.

PLEASE SELECT ONE OF THE FOLLOWING ALTERNATIVE RESPONSES IN RESPONDING TO THE CITATION ISSUED TO YOU:

- ☐ 1. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION, CHOOSE NOT TO CONTEST THE CITATION AND TO COMPLY WITH ITS SANCTIONS, AND HEREBY SUBMIT THE FINE SHOWN ON THE DOPL CITATION FINE SCHEDULE ON THE REVERSE SIDE OF THE CITATION.
- ☐ 2. I ADMIT COMMITTING THE OFFENSE DESCRIBED IN THE CITATION BUT REQUEST A HEARING TO EXPLAIN THE CIRCUMSTANCES OF THE OFFENSE.
- ☒ 3. I DENY COMMITTING THE OFFENSE DESCRIBED IN THE CITATION AND REQUEST A HEARING TO CONTEST THE CITATION.

I CERTIFY THAT I HAVE KNOWINGLY AND VOLUNTARILY MADE THE ABOVE ELECTION OF RIGHTS. I UNDERSTAND THAT IF I REQUEST A HEARING, THE DIVISION WILL NOTIFY ME IN WRITING OF THE HEARING DATE AND THAT IF I FAIL TO APPEAR AT THE HEARING, A DEFAULT JUDGEMENT WILL BE ENTERED AGAINST ME.

I FURTHER UNDERSTAND THAT THE ISSUES TO BE DECIDED BY THE PRESIDING OFFICER AT A HEARING ARE FIRST, WHETHER THE CITED OFFENSE IS SUPPORTED BY COMPETENT EVIDENCE; SECOND, WHETHER THE CITATION SHOULD HAVE BEEN ISSUED; AND IF SO, THIRD, WHETHER THE SANCTION IMPOSED BY THE CITATION SHOULD BE AFFIRMED, REJECTED OR MODIFIED (DECREASED, INCREASED, SUSPENDED, REMITTED, OR VACATED).

SIGNATURE: Kit Carson DATE: 12-28-95

ADDENDUM C

58-55-13. Penalty for unlawful conduct — Citations.

(1) Any person who violates Subsections 58-55-2(32)(a) through (n), (p), or (q), or who fails to comply with a citation issued under this section after it is final, is guilty of a class A misdemeanor. Any person who violates the provisions of Subsection 58-55-2(32)(h) or (m) may not be awarded and may not accept a contract for the performance of the work. Any licensee who submits a notice of intent to request an increase in the monetary limit under Subsection 58-55-21(5), but who is not granted an increase sufficient to cover the award of a contract upon which he has bid, may not be awarded and may not accept the contract.

(2) Any person who violates the provisions of Subsection 58-55-2(32)(o) is guilty of an infraction unless the violator did so with the intent to deprive the person to whom money is to be paid of the money received, in which case the violator is guilty of theft, as classified in Section 76-6-412.

(3) Grounds for immediate suspension of the licensee's license by the division and the board include the failure by a licensee to make application to, report to, or notify the division with respect to any matter for which application, notification, or reporting is required under this chapter or rules adopted

under this chapter, including applying to the division for a new license to engage in a new specialty classification or to do business under a new form of organization or business structure, filing with the division current financial statements, notifying the division concerning loss of insurance coverage, or change in qualifier.

(4) (a) If upon inspection or investigation, the division concludes that a contractor has violated the provisions of Subsections 58-55-2(32)(a), (b), (c), or any rule or order issued with respect to these subsections, and that disciplinary action is appropriate, the director or his designee from within the division for each alternative respectively, shall, promptly issue a citation to the contractor according to this chapter and any pertinent rules, attempt to negotiate a stipulated settlement, or notify the contractor to appear before an adjudicative proceeding conducted under Title 63, Chapter 46b, Administrative Procedures Act.

(i) Any person who is in violation of the provisions of Subsection 58-55-2(32)(a), (b), or (c), as evidenced by an uncontested citation, a stipulated settlement, or by a finding of violation in an adjudicative proceeding, may be assessed a fine pursuant to Subsection (4)(i) and may, in addition to or in lieu of, be ordered to cease and desist from violating Subsection 58-55-2(32)(a), (b), or (c).

(ii) Except for a cease and desist order, the licensure sanctions cited in Section 58-55-12 may not be assessed through a citation.

(b) Each citation shall be in writing and describe with particularity the nature of the violation, including a reference to the provision of the chapter, rule, or order alleged to have been violated. The citation shall clearly state that the recipient must notify the division in writing within 20 calendar days of service of the citation if the recipient wishes to contest the citation at a hearing conducted under Title 63, Chapter 46b, Administrative Procedures Act. The citation shall clearly explain the consequences of failure to timely contest the citation or to make payment of any fines assessed by the citation within the time specified in the citation.

(c) The division may, in its discretion, issue a notice in lieu of a citation.

(d) Each citation issued under this section, or a copy of each citation, may be served upon any person upon whom a summons may be served in accordance with the Utah Rules of Civil Procedure and may be made personally or upon his agent by a division investigator or by any person specially designated by the director or by mail.

(e) If within 20 calendar days from the service of a citation, the person to whom the citation was issued fails to request a hearing to contest the citation, the citation becomes the final order of the division and may not be subject to further agency review. The period to contest a citation may be extended by the division for cause.

(f) The division may refuse to issue or renew, suspend, revoke, or place on probation the license of a licensee who fails to comply with a citation after it becomes final.

(g) The failure of an applicant for licensure to comply with a citation after it becomes final is a ground for denial of license.

(h) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

(i) Fines shall be assessed by the director or his designee according to the following:

(i) for a first offense handled pursuant to Subsection (4)(a), a fine of up to \$1,000;

(ii) for a second offense handled pursuant to Subsection (4)(a), a fine of up to \$2,000; and

(iii) for any subsequent offense handled pursuant to Subsection (4)(a), a fine of up to \$2,000 for each day of continued offense.

(5) Any penalty imposed by the director under Subsection (4)(i) shall be deposited into the Commerce Service Fund. Any penalty which is not paid may be collected by the director by either referring the matter to a collection agency or bringing an action in the district court of the county in which the person against whom the penalty is imposed resides or in the county where the office of the director is located. Any county attorney or the attorney general of the state is to provide legal assistance and advice to the director in any action to collect the penalty. In any action brought to enforce the provisions of this section, reasonable attorney's fees and costs shall be awarded.

History: C. 1953, 58-55-13, enacted by L. 1993, ch. 297, § 266; 1993, ch. 9, § 7.

Repeals and Reenactments. — Laws 1992, ch. 303, § 10 repealed former § 58-55-13, as enacted by L. 1989, ch. 128, § 13, defining unprofessional conduct, and enacted former § 58-55-13, effective April 27, 1992.

Laws 1993, ch. 297, § 266 repeals former § 58-55-13, as enacted by Laws 1992, ch. 303, including examples in the definition of "unpro-

fessional conduct," and enacts the present section, effective July 1, 1993.

Amendment Notes. — The 1993 amendment by ch. 9, amending this section as repealed and reenacted by ch. 297, rewrote Subsection (1) and substituted "58-55-2(29)(o)" for "58-55-2(29)(n)" (now 58-55-2(32)(o); see § 58-55-2 and its notes) in Subsection (2).

R156-46b. Utah Administrative Procedures Act Rules.

R156-46b-1. Purpose.

R156-46b-2. Definitions.

R156-46b-3. General Provisions.

R156-46b-4. Formal and Informal Adjudicative Proceedings.

R156-46b-1. Purpose.

The purpose of these rules is to clarify the procedures for adjudicative proceedings before the Division of Occupational and Professional Licensing and to designate those categories of adjudicative proceedings within the Division of Occupational and Professional Licensing which will be conducted on a formal or informal basis, in accordance with Title 63, Chapter 46b, Utah Administrative Procedures Act, Title 58, Chapter 1, Division of Occupational and Professional Licensing, and the Rules of Procedure for Adjudicative Proceedings before the Department of Commerce.

R156-46b-2. Definitions.

The definitions set forth in Sections 58-1-2 and 63-46b-2 and R151-46b-2 are incorporated by reference and shall apply to these rules.

R156-46b-3. General Provisions.

The general provisions set forth in R151-46b-3 are incorporated by reference and shall apply to these rules.

R156-46b-4. Formal and Informal Adjudicative Proceedings.

(1) Any adjudicative proceedings as to the following matters shall be conducted on a formal basis:

(a) A request for agency action and any proceedings thereafter conducted before a special appeals board subsequent to the denial of an application for an initial license, certificate, registration, permit or other authority to engage in a profession or occupation. A request for such agency action shall be filed within 30 days after the issuance of the denial of the application for licensure, certification, registration, permit or other authority to engage in a profession or occupation.

(b) The refusal to renew any license, certificate, registration, permit or other authority to engage in a profession or occupation.

(c) An action which may result in the revocation, suspension or probation of any license, certificate, registration, permit or other authority to engage in a profession or occupation.

(d) The issuance of a cease and desist order except in conjunction with a citation issued under Title 58, Chapter 55, Construction Trades Licensing Act.

(e) The issuance of a fine except in conjunction with a citation issued under Title 58, Chapter 55, Construction Trades Licensing Act.

(f) Any proceedings conducted subsequent to the immediate suspension of a controlled substance license.

(2) Any adjudicative proceedings as to the following matters shall be conducted on an informal basis:

(a) The application for, and issuance or denial of, an initial license, certificate, registration, permit or other authority to engage in a profession or occupation, including any application by a person whose license, certificate, registration, permit or other authority to engage in a profession or occupation was revoked.

(b) The application for, and issuance of, a renewal of an active or inactive license, certificate, registration, permit or other authority to engage in a profession or occupation.

(c) The issuance of a public or private reprimand.

(d) Any hearing held in conjunction with a citation issued under Title 58, Chapter 55, Construction Trades Licensing Act.

(e) Any independent proceedings to subsequently modify the terms of suspension or probation set forth in a previously entered order.

(f) The eligibility of a licensee for placement or continued participation in a diversion program.

(3) Pursuant to Subsection 63-46b-1(2)(f), a citation issued under Title 58, Chapter 55, Construction Trades Licensing Act, is not an adjudicative proceeding governed by Title 63, Chapter 46b, Administrative Procedures Act, unless the citation is contested.

(4) All adjudicative proceedings as to any matters not specifically listed herein shall be conducted on an informal basis.

(5) Hearings are not required for informal proceedings unless required by statute or rule, or permitted by rule and requested by a party within the time prescribed by rule. Unless otherwise provided, a request for a hearing permitted by rule must be submitted in writing no later than 20 days following the issuance of the notice of agency action if the proceeding was initiated by the division, or together with the request for agency action if the proceeding was not initiated by the division.

(6) Any final order issued by the division is subject to agency review consistent with the provisions of Section 63-46b-12 and the Rules of Procedure which govern Adjudicative Proceedings before the Department of Commerce.

1992

58-1-6(1), 63-46b-1(5)

63-46b-4. Designation of adjudicative proceedings as formal or informal.

(1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted informally according to the procedures set forth in rules enacted under the authority of this chapter if:

(a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter;

(b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures;

(c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations; and

(d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding.

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

(3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if:

(a) conversion of the proceeding is in the public interest; and

(b) conversion of the proceeding does not unfairly prejudice the rights of any party.

History: C. 1953, 63-46b-4, enacted by L. § 315 makes the act effective on January 1, 1987, ch. 161, § 260. 1988.

Effective Dates. — Laws 1987, ch. 161,

63-46b-15. Judicial review — Informal adjudicative proceedings.

- (1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings.
- (b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.
- (2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:
- (i) the name and mailing address of the party seeking judicial review;
 - (ii) the name and mailing address of the respondent agency;
 - (iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;
 - (iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;
 - (v) a copy of the written agency order from the informal proceeding;
 - (vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;
 - (vii) a request for relief, specifying the type and extent of relief requested;
 - (viii) a statement of the reasons why the petitioner is entitled to relief.
- (b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.
- (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.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes.

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

NOTES TO DECISIONS

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 pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988).

ADDENDUM D

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
Heber M. Wells Building
160 East 300 South - P.O. Box 45805
Salt Lake City, Utah 84145-0805
Telephone: (801) 530-6628

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

IN THE MATTER OF THE)	MOTION TO CONVERT TO
CITATIONS ISSUED TO)	FORMAL ADJUDICATIVE
MERIT Electrical &)	PROCEEDINGS
Instrumentation, Inc.)	
Jonathan Carl Juretich)	CITATION NOS. 1986
Christopher M. Schiffman)	1841
Dan A. Johnson)	1917
Kit Vaness Carson)	1918
)	1842

COMES NOW the Division of Occupational and Professional Licensing ("Division") by and through William S. Essex, Jr., Supervisor, Bureau of Investigations, Construction Trades Licensing Section, and requests pursuant to Utah Code Annotated, (1990 Replacement) ("U.C.A."), § 63-46b-4(3), that the adjudicative proceeding initiated by the issuance of Citation Nos. 1986, 1841, 1917, 1918, and 1842 to MERIT Electrical & Instrumentation, Inc., Jonathan Carl Juretich, Christopher M. Schiffman, Dan A. Johnson, and Kit Vaness Carson be converted to a formal adjudicative proceeding.

STATEMENT OF FACTS

Citation No. 1986, 1841, 1917, 1918, and 1942 was issued to MERIT Electrical & Instrumentation, Inc., Jonathan Carl Juretich, Christopher M. Schiffman, Dan A. Johnson, and Kit Vaness Carson on

December 9, 1993. James W. Grant B. Antone Robinson, and Wayne J. Holman, Division Investigator, issued the citation pursuant to the authority granted in § 58-55-6((6)). The citation was issued for an alleged violation of § 58-55-2(32)(a), U.C.A.

Section 58-55-2(32)(a), U.C.A. provides that it is unlawful for any person to Engaged in or represented himself to be engaged in a construction trade or acted as or represented himself to be acting as a contractor in a construction trade requiring licensure while not licensed or excepted from licensure.

MERIT Electrical & Instrumentation, Inc., Jonathan Carl Juretech, Christopher M. Schiffman, Dan A. Johnson, and Kit Vaness Carson ("Respondents") submitted a Notice of Response to the Division on December 27, 1994 in which he denied committing the offense described in the citation and requested a hearing to contest the citation.

"Respondents" base their denial of the charge on Section 58-55-6(2) U.C.A., 1990 exempts from licensure"...any person engaged in...construction and repair relating to...metal and coal mining. Ruling on this point of law requires the expertise of the Administrative Law Judge and the Contractors Licensing Board.

STATEMENT OF AUTHORITY

Subsection 63-46b-4(1), U.C.A., permits agencies to designate categories of adjudicative proceedings by rule. Rule 156-46b-4,

Utah Administrative Rules (1992), designates any hearing held in conjunction with a citation issued under Chapter 55, Title 58, Construction Trades Licensing Act as an informal adjudicative proceeding.

Subsection 63-46b-4(3), U.C.A. provides that any time before a final order is issued in an adjudicative proceeding, the presiding officer may convert an informal adjudicative proceeding to a formal adjudicative proceeding if:

(a) conversion of the proceeding is in the public interest; and

(b) conversion of the proceeding does not unfairly prejudice the rights of any party.

Subsection 63-46b-5(1)(c) provides that in informal adjudicative proceedings, the parties are entitled to "testify, present evidence, and comment on the issues."

Subsection 63-46b-8(1)(d) provides that in formal adjudicative proceedings, the parties are entitled to "present evidence, argue, respond, conduct cross-examine, and submit rebuttal evidence."

ARGUMENT

Respondents challenge the Division's issuance of the citations relevant to this processing and urge 58-55-6(2) U.C.A., 1990 applies to exempt them from licensure that statute provides and exception for "...any person engaged in...construction and repair relating to...metal and coal mining." Any ruling on this legal argument requires the expertise of both the Administrative Law Judge, Contractors Licensing Board and Electricians Board.

It is further anticipated that both sides will call a number of witnesses and require the need to follow the formal process of direct and cross examination. A formal proceedings will also allow the intervention and presentation of evidence by other interested parties.

STATEMENT OF AUTHORITY

Subsection 63-46b04(1), U.C.A., permits agencies to designate categories of adjudicative proceedings by rule. Rule 156-46b-4.

Conversion of the proceedings to a formal adjudicative proceeding is therefore permitted by Section 63-46b-4(3) and is appropriate given the circumstances present in this case.

Wherefore the Division requests that its motion be granted unless the Respondent files an objection to the motion within 20 days from the date of this motion and the objection shows good cause why the motion should not be granted.

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

DATE: February 11, 1994

BY: William S. Essex, Jr.

William S. Essex, Jr., Supervisor
Bureau of Investigations
Construction Trades Licensing Section

MAILING CERTIFICATE

I hereby certify that on the 11th day of February, 1994, a true and correct copy of the foregoing MOTION TO CONVERT TO FORMAL ADJUDICATIVE PROCEEDINGS was sent first class mail, postage prepaid, to the following:

MERIT Electrical & Instrumentation, Inc.
Attn: Dave Roberts
Richard Cloy
17723 Airline Highway
Prairieville, Louisiana 70769

MERIT Electrical & Instrumental, Inc.
Attn: Clint Cloy
12000 West 2100 South
P O Box 266
Magna, Utah 84044

Armin J. Moeller, Jr., Esquire
Phelps Dunbar
P O Box 23066
Jackson, Mississippi 39225-3066

Christopher M. Schiffman
c/o MERIT Electrical & Instrumental, Inc.
12000 West 2100 South
P O Box 266
Magna, Utah 84044

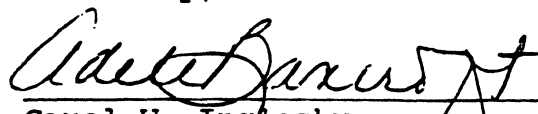
Jonathan Carl Jurecich
1081 East Sapphire Drive
Sandy, Utah 84094

Dan A. Johnson
c/o MERIT Electrical & Instrumental, Inc.
12000 West 2100 South
P O Box 266
Magna, Utah 84044

James C. Cloy
6500 South James Point Drive #3x
Murray, Utah 84107

Kit Vaness Carson
353 South 1st West
Tooele, Utah 84074

Darrell Bostwick
254 West 400 South
Salt Lake City, Utah 84111


~~Carol W. Inglesby~~
Administrative Assistant

ADDENDUM E

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
Heber M. Wells Building
160 East 300 South - P.O. Box 45805
Salt Lake City, Utah 84145-0805
Telephone : (801) 530-6628

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

IN THE MATTER OF THE	:	ORDER CONVERTING CITATION
CITATION ISSUED TO	:	TO FORMAL ADJUDICATIVE
Merit Electrical &	:	PROCEEDINGS
Instrumentation, Inc.,	:	CITATION NOS. ¹⁹⁸² 1846
Jonathan Carl Juretech,	:	1841
Christopher M. Schiffman,	:	1917
Dan A. Johnson, and	:	1918
Kit Vaness Carson	:	1842
(Respondent)		

CASE NO. OPL-94-24

The Division in the above matter and prior to a hearing being conducted has by motion requested this matter be converted to formal adjudicative proceedings pursuant to Section 63-46b-4(3) of the Utah Code Annotated (1953), as amended.

The basis given for the motion is that the content and scope of the presentation anticipated in this case exceed the parameters considered when citations hearings were set as informal adjudicative proceedings and therefore the public interest, rights of the parties, issues and testimony involved in this case can be better protected and addressed in a formal adjudicative proceeding and that no party is prejudiced by the conversion.

It is noted from the files on these matters an attorney has already made appearances in each of these matters and it appears

the parties expect the proceedings to go beyond the limitations imposed by Subsection 63-46b-5(1)(c). It also appears that no party will be prejudiced by conversion to a formal proceedings as no hearing or other proceedings has yet been held in this matter.

ORDER

Having found that conversion of this proceeding is in the public interest and does not unfairly prejudice the rights of any party and unless Respondents, within 20 days of the date of this order, files a written objection to the motion to convert to formal adjudicative proceedings, it is ordered that this matter is converted from informal adjudicative proceedings to formal adjudicative proceedings. This matter shall be rescheduled for hearing before the Contractors Licensing Board.

The Respondents shall have 20 days from the date of this order to file a written objection to this order. If the Respondents so object this order shall be vacated and a new order will thereafter be issued determining whether or not conversion is appropriate in this case.

Dated this 11th day of February 1994.



Dan S. Jones, Presiding Officer

MAILING CERTIFICATE

I hereby certify that on the 11th day of February, 1994, a true and correct copy of the foregoing ORDER CONVERTING CITATIONS ISSUED TO FORMAL ADJUDICATIVE PROCEEDINGS was sent first class mail, postage prepaid, to the following:

MERIT Electrical & Instrumentation, Inc.
Attn: Dave Roberts
Richard Cloy
17723 Airline Highway
Prairieville, Louisiana 70769

MERIT Electrical & Instrumental, Inc.
Attn: Clint Cloy
12000 West 2100 South
P O Box 266
Magna, Utah 84044

Armin J. Moeller, Jr., Esquire
Phelps Dunbar
P O Box 23066
Jackson, Mississippi 39225-3066

Christopher M. Schiffman
c/o MERIT Electrical & Instrumental, Inc.
12000 West 2100 South
P O Box 266
Magna, Utah 84044

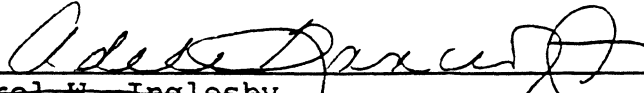
Jonathan Carl Jurecich
1081 East Sapphire Drive
Sandy, Utah 84094

Dan A. Johnson
c/o MERIT Electrical & Instrumental, Inc.
12000 West 2100 South
P O Box 266
Magna, Utah 84044

James C. Cloy
6500 South James Point Drive #3x
Murray, Utah 84107

Kit Vaness Carson
353 South 1st West
Tooele, Utah 84074

Darrell Bostwick
254 West 400 South
Salt Lake City, Utah 84111



Carol W. Inglesby
Administrative Assistant

~~Carol Inglesby, Administrative Assistant~~

ADDENDUM F

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
Heber M. Wells Building
160 East 300 South - P.O. Box 45805
Salt Lake City, Utah 84145-0805
Telephone : (801) 530-6628

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

IN THE MATTER OF THE	:	ORDER VACATING CONVERSION OF
CITATION ISSUED TO	:	CITATIONS TO FORMAL ADJUDICATIVE
Merit Electrical &	:	PROCEEDINGS AND NOTICE OF HEARING
Instrumentation, Inc.,	:	CITATION NOS. 1846
Jonathan Carl Juretech,	:	1841
Christopher M. Schiffman,	:	1917
Dan A. Johnson, and	:	1918
Kit Vaness Carson	:	1842
(Respondent)		

The Division in the above matter and prior to a hearing being conducted by motion requested this matter be converted to formal adjudicative proceedings pursuant to Section 63-46b-4(3) of the Utah Code Annotated (1953), as amended.

Pursuant to the Division's motion an order was signed granting the motion to convert proceeding on February 11, 1994. That order provided that if the Respondents filed a written objection to the motion to convert to formal adjudicative proceedings, the order would be vacated and a new order will thereafter be issued determining whether or not conversion is appropriate in this case.

On the 3rd day of March 1994, the Respondents filed an objection to the motion to convert.

The Respondent's have also requested a hearing on the

Division's Motion to Convert and the Respondent's Objection thereto.

ORDER

Having found that the Respondents have filed a written objection to the motion to convert these proceedings to formal adjudicative proceedings as allowed by the prior order, it is ordered that the order of conversion of proceedings dated February 11, 1994 is hereby vacated.

This matter is hereby rescheduled for hearing on the Division Motion to Convert Proceedings and Respondents Objection thereto to be conducted on March 28, 1994 at 2:00 p.m. in Room 451 of the Heber Wells Building 160 East 300 South, Salt Lake City, Utah.

Dated this 4th day of March 1994.



Dan S. Jones, Presiding Officer

MAILING CERTIFICATE

I hereby certify that on the 4th day of March, 1994, a true and correct copy of the foregoing ORDER VACATING CONVERSION OF CITATIONS TO FORMAL ADJUDICATIVE PROCEEDINGS AND NOTICE OF HEARING was sent first class mail, postage prepaid, to the following:

MERIT Electrical & Instrumentation, Inc.
Attn: Dave Roberts
Richard Cloy
17723 Airline Highway
Prairieville, Louisiana 70769

MERIT Electrical & Instrumental, Inc.
Attn: Clint Cloy
12000 West 2100 South
P O Box 266
Magna, Utah 84044

Armin J. Moeller, Jr., Esquire
Phelps Dunbar
P O Box 23066
Jackson, Mississippi 39225-3066

Christopher M. Schiffman
c/o MERIT Electrical & Instrumental, Inc.
12000 West 2100 South
P O Box 266
Magna, Utah 84044

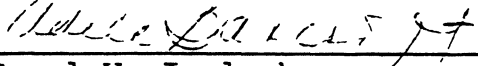
Jonathan Carl Juretech
1081 East Sapphire Drive
Sandy, Utah 84094

Dan A. Johnson
c/o MERIT Electrical & Instrumental, Inc.
12000 West 2100 South
P O Box 266
Magna, Utah 84044

James C. Cloy
6500 South James Point Drive #3x
Murray, Utah 84107

Kit Vaness Carson
353 South 1st West
Tooele, Utah 84074

Darrell Bostwick
254 West 400 South
Salt Lake City, Utah 84111



Carol W. Inglesby
Administrative Assistant

Carol Inglesby, Administrative Assistant

ADDENDUM G

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
Heber M. Wells Building
160 East 300 South - P.O. Box 45805
Salt Lake City, Utah 84145-0805
Telephone : (801) 530-6628

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

IN THE MATTER OF THE	:	ORDER CONVERTING CITATION	
CITATION ISSUED TO	:	TO FORMAL ADJUDICATIVE	
Merit Electrical &	:	PROCEEDINGS	
Instrumentation, Inc.,	:	CITATION NOS.	1846
Jonathan Carl Juretech,	:		1841
Christopher M. Schiffman,	:		1917
Dan A. Johnson, and	:		1918
Kit Vaness Carson	:		1842
(Respondent)			

The above matters came on for hearing on the Division's motion to convert the above citation to formal adjudicative proceedings on March 28, 1994. The Presiding Officer being fully advised in the premises now enters the following Conclusions of Law and Order.

CONCLUSIONS OF LAW

Jurisdiction.

The Respondents in their objection to Motion and Order have alleged that upon entry of the order converting these matters to formal adjudicative proceedings entered on February 11, 1994, the presiding officer divested himself of any further jurisdiction in the matter until the ALJ remanded the matter as an informal hearing.

This argument is without merit. The February 11, 1994 order clearly retained jurisdiction if the order was objected to. Specifically, the applicable portion of the order reads as follows:

The Respondents shall have 20 days from the date of this order to file a written objection to this order. If the Respondents so object this order shall be vacated and a new order will thereafter be issued determining whether or not conversion is appropriate in this case.

Must Citation be heard as informal hearings.

The Respondents claim that Utah Administrative Code Section R156-46b-4(2)(d) requires that citation hearings shall be conducted on an informal basis, and therefore the Division is violating its own rules in its motion to convert the matter to formal adjudicative proceedings.

This argument is without merit. The Division in designating citation hearings as informal adjudicative proceedings, did not eliminate the possibility that appropriate cases could be converted to formal adjudicative proceedings. To the contrary it is noted that the Division's Bureau of Investigations, Policies and Procedures manual dated December 1, 1993 anticipated that such conversions to formal proceedings would occur in appropriate cases and included model forms drafted for the purposes of conversion of such cases to formal proceedings. It therefore appears this possibility of converting matters to formal proceedings was a factor in designating citations as informal procedures.

Furthermore the Utah Administrative Procedures Act at Utah Code Annotated § 63-46b-4(3) clearly provides, "any" informal proceeding may be converted to formal proceedings.

Criteria for Conversion.

Having found that there is no prohibition against converting to formal proceedings and having found no specific Division rules on the criteria for conversion of such matters to formal adjudicative proceedings, the applicable requirements to support an order of conversion to formal procedures is found at Utah Administrative Procedures Act, Utah Code Annotated § 63-46b-4(3) which requires that the conversion of the proceedings is in the public interest and conversion of the proceedings does not unfairly prejudice any party.

Public Interest.

The Division has cited the public interest in conversion of this case in that the proceeding to be conducted are highly disputed in what may be a novel interpretation of the facts and law which may require the cross examination of witnesses and require submittal of rebuttal evidence in order fully address the issues in the case, and may require the expertise of the contractors licensing board.

I find the public interest has been sufficiently shown in these cases.

Subsection 63-46b-5(1)(c) provides that in informal adjudicative proceedings, the parties are entitled to "testify, present evidence, and comment on the issues".

This is compared to subsection 63-46b-8(1)(d) which provides that in formal adjudicative proceedings, the parties are entitled to "present evidence, argue, respond, conduct cross-examination and

submit rebuttal evidence".

In most citation hearings, the limited scope of the hearing is sufficient to adequately address all issues that need to be presented to fully advise the presiding officer of the premises in the case.

The wider scope of the formal proceeding is designed to assure the parties are given full and fair opportunity to present and argue their respective cases. This full opportunity to present the respective case in a formal proceeding appears to be the very reason that a trial de novo is allowed in an appeal to district court if the parties have only been accorded an informal hearing and not allowed if the parties have had a formal hearing. (To be addressed more later).

The Respondents have argued that the sole issue in this case is a matter of law and therefore there are no factual issues and therefore cross examination is not needed and therefore an informal hearing can resolve the matter.

This argument is without merit.

The parties are disputing whether the work that was the basis for the citation is included in the exemption allowed under Utah Code Annotated section 58-55-6-(2) for construction and operation incidental to metal or coal mining. The parties dispute whether the construction of a refinery operation is sufficiently related to "mining" to allow the exemption in these cases.

Black's law dictionary defines mining as, "The process or business of extracting from the earth the precious or valuable

metals, either in their native state or in their ores."

It would appear from the plain language of the exemption may not include refining ore which would not be done at the mine site itself where the "extracting from the earth" occurs. The extent of how far the language "incidental to" goes is a mixed question of law and fact.

It is inconceivable, as a presiding officer, that I can decide this issue without receiving factual testimony of what is the relationship of the mine site to the refinery site. It is equally apparent to me that in order to have this issue adequately addressed that any such testimony of how closely related these activities are should be subject to cross examination by the other parties in order to fully evaluate this case.

Therefore I find that conversion to formal proceedings is necessary to the proper resolution of the matter. It would be a needless waste of the resources of both parties to force the parties to conduct an informal hearing when a formal hearing is necessary to fully resolve the issues. It appears that forcing the parties to participate in an informal hearing in such a case, no matter which party prevailed, would only force an appeal so that the parties could fully present their case in a formal setting. It is in the public interest for appropriate cases to be resolved with full presentation of the case to avoid unnecessary waste of resources and to have the matter adequately addressed at the first hearing of the matter.

No unfair prejudice to any party.

The Respondents have alleged that they will be denied their right to trial de novo at district court if the matter is converted to an formal proceedings and is therefore prejudicial and therefore conversion is not allowed.

This argument is without merit.

The import of the trial de novo is that a party at some stage must be given the full opportunity to present its case with all the appropriate protections and rights accorded a formal hearing.

The fact that conversion to formal proceedings may change the rights on appeal at district court is not dispositive. If it were, any conversion to formal proceedings would be impossible. Since conversion is clearly allowed, this right to trial de novo cannot be the deciding factor of whether or not to order the conversion.

The only prejudicial effect that I can find presented by these matters, of whether an a order should be issued converting the matters to formal proceedings, is that the parties right to fully present the case in these matters may prejudiced in an informal setting because of the limitation of the informal hearing and therefore find that these matters must be converted in to formal proceedings in order to adequately address the issue at hand.

It is difficult to find a situation where being accorded the full scope of a hearing to the parties in a formal proceeding could be prejudicial to the presentation of their case.

It is noted that the motion for conversion was made prior to any hearing on these citations. The Respondents have not been

prejudiced by preparing for hearing in one setting and then being required to hear the matter in another setting.

The Respondent have claimed that defending the actions in a formal hearing will cost them more in defense costs and time and therefore is prejudicial to them and therefore should not be converted. Again if this were the deciding criteria no cases could be converted to formal proceedings, in that the formal proceedings by nature of the allowed presentation will take more time. Therefore, this factor alone is not "unfairly" prejudicial to the party.

Finally, the Respondents have claimed that there may be improper motives behind these citations or other improper actions may happen in a formal proceeding preceding that should not be allowed to happen.

I can find no merit to this argument. Quite to the contrary, if improprieties are at issue in this case it would only further heighten the need that these matters be held in a setting which can adequately address and rule upon such allegations. I can find no basis whatsoever to conclude that any motions or proceedings that would be conducted on a formal basis would not be handled according to applicable law.

ORDER

Having found that conversion of this proceeding is in the public interest and does not unfairly prejudice the rights of any party, it is ordered that this matter is converted from informal adjudicative proceedings to formal adjudicative proceedings. This matter shall be rescheduled for hearing before the Contractors Licensing Board.

Dated this 5th day of April 1994.



Dan S. Jones, Presiding Officer

ADDENDUM H

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF:	:	ORDER ON REVIEW
MERIT ELECTRICAL AND	:	
INSTRUMENTATION INC.	:	
JONATHAN CARL JURETICH	:	CITATION NOS.
CHRISTOPHER M. SCHIFFMAN	:	OPL-94-28, OPL-94-29,
DAN A. JOHNSON AND	:	OPL-94-30, OPL-94-31
KIT VANESS CARSON	:	and OPL-94-32

INTRODUCTION

This case began with issuance of the above-enumerated citations by the Division of Occupational and Professional Licensing ("DOPL") of the Department of Commerce. Respondents requested a hearing to contest the citations. Pursuant to Department Rule 156-46b-202(m), hearings in citation cases are designated as informal under the Utah Administrative Procedures Act. However, on motion of DOPL, the hearing officer converted the proceedings to formal (the "Conversion Order"), and it is that conversion that Respondents contest. Respondents filed a request for review with the Executive Director of the Department, requesting that the Conversion Order be reversed and that the Division enter an order setting an informal hearing.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

The review of this matter is being conducted by the Executive Director of the Department of Commerce pursuant to Utah Code Ann. Section 63-46b-12, and Rule 151-46b-13 of the Rules of Procedure for Adjudicative Proceedings before the Department of Commerce.

THE ISSUES REVIEWED

1. Respondents raise the following issues:
 - a. The Division has no authority to convert proceedings from informal to formal;
 - b. Even if it does, conversion here is improper under Utah Code Ann. §63-46b-4(3) because conversion is not in the public interest and will cause unfair prejudice to Respondents; and
 - c. The Conversion Order is an impermissible attempt at rulemaking.
2. Initially, however, the issue to be addressed is whether the Conversion Order is reviewable by the Executive Director.

FINDINGS OF FACT

No evidence has yet been presented to establish any of the factual allegations relevant to the citation in this proceeding. However, the procedural history of this case can be summarized as follows:

1. On or about December 9, 1993, DOPL issued citations to Merit Electrical & Instrumentation, Inc. ("Merit") and four of its employees alleging violations of the Utah Construction Trades Licensing Act (Utah Code Ann. Title 58, Chapter 55). The citations are

based on allegations that Merit unlawfully employed electricians who were unlicensed and not exempt from licensure under the Act.

2. The citations were consolidated into one proceeding. Pursuant to a request by DOPL, and following briefing by the parties, the hearing officer issued the Conversion Order dated April 5, 1994. Respondents filed a Request for Reconsideration. They also filed a Request for Review with the executive director. Both parties have thoroughly briefed the issue in various memoranda in support. The hearing, previously scheduled to be conducted before the Contractors' Licensing Board, has been continued without date pending completion of this review.

CONCLUSIONS OF LAW

1. Section 63-46b-14(1) of the Utah Administrative Procedures Act, Utah Code Ann. Title 63, Chapter 46b ("UAPA") allows a party to seek judicial review of "final agency action". The finality requirement applies to agency action taken in either informal or formal proceedings.

2. UAPA is silent, however as to whether interim orders entered in proceedings before a division are subject to agency review by the head of the department. Clearly, an order is not "final" -- for purposes of judicial review -- if it reserves something to the agency for further decision. See Sloan v. Board of Review, 781 P. 2d 463 (Utah Ct. App. 1989).

3. The Utah Court of Appeals issued an unpublished opinion in Eliason v. Buhler, et al (Case No. 900518, December 5, 1990) (copy attached). In that case, the executive director of the Department of Commerce had issued an order on review prior to the conclusion of an administrative proceeding. However, the court stated that:

Utah Code Ann. §63-46b-12 (1989) permits further administrative review of an administrative law judge's order only "[i]f a statute or the agency's rules permit parties to any adjudicative proceeding to seek [such] review."

The Court ordered the executive director of the Department of Commerce to vacate an order on review because he had no authority to review an interim order.

The statute on which the Court relied in the Eliason case, §13-1-12, has since been repealed. That statute had permitted an appeal to the executive director "at the close of an adjudicative proceeding". Section 13-1-8.5 generally applies to all departmental adjudicative proceedings and thus requires the department to follow the UAPA. Section 63-46b-12 of the UAPA provides that a party may file a request for review *if permitted to do so by any statute or rule*. No statute exists which authorizes agency review of interim orders. Further, departmental rules which govern agency review are silent as to whether any such review is permitted.

5. Section 58-1-109, addressing administrative proceedings before DOPL, expressly provides:

The *final* order of the director [or his designee] may be appealed by filing a request for agency review with the executive director or his designee within the department.
(§58-1-109(8))(Emphasis added)

Section §58-1-109 limits agency review to final orders. The Conversion Order is not a final order. Thus, no proper legal basis exists to conduct agency review of that order during the pendency of proceedings before the Division.

7. Because of this ruling, I am not considering the issues raised by Respondents.

ORDER

Respondents' request for review of the Conversion Order is denied and this case is remanded to the Division for further proceedings.

Dated this 27th day of June, 1994



Constance B. White, Executive Director
Department of Commerce

NOTICE OF RIGHT OF JUDICIAL REVIEW

Judicial review of this Order, if it is available, may be sought by filing a Petition for Review within thirty (30) days after the issuance of this Order. Any Petition for such Review shall comply with the requirements set forth in Section 63-46b-14 and Section 63-46b-16.