

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
Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MERIT ELECTRICAL &)	
INSTRUMENTATION, a)	PETITIONERS' BRIEF
corporation, and JONATHAN CARL)	
JURETICH, CHRISTOPHER M.)	
SCHIFFMAN, DAN A. JOHNSON, and	)	Citation Nos. 1846, 1341,
KIT VANESS,	)	1917, 1918 and 1842
	)	(Consolidated)
Respondents below and)	
Petitioners on appeal,	)	COURT OF APPEALS # 940435-CA
)	
vs.	)	PRIORITY 14
)	
UTAH DEPARTMENT OF COMMERCE,)	
DIVISION OF OCCUPATIONAL AND)	
PROFESSIONAL LICENSING,)	
)	
Respondent on appeal.)	

PETITION FOR REVIEW FROM THE ORDER
ON REVIEW OF THE UTAH DEPARTMENT OF COMMERCE,

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §§ 78-2a-3(2)(a) (Supp. 1993) and 63-46b-16 (1993).

On August 18, 1994, this Court issued a Notice of Consideration for Summary Disposition to review the issue of whether it possesses subject matter jurisdiction to hear the present Petition for Review. On September 2, 1994, Petitioners, Merit Electrical & Instrumentation, Juretech, Schiffman, Johnson, and Vaness (referred to hereinafter collectively as "Merit"), submitted a Memorandum in Opposition to Summary Disposition, asserting that this Court has jurisdiction because the agency order in this case is final under the Collateral Order Doctrine. Thereafter, Judge Jackson issued an Order, denying the Court's motion for summary dismissal and deferring ruling on the jurisdictional issue until plenary presentation and consideration of the issues raised by the Petition for Review. Merit's arguments for appellate jurisdiction in this case are fully set out in their memorandum attached as Addendum A.

ISSUES ON APPEAL

1. Is it unlawful for the Respondent, the Department of Commerce, Division of Occupational and Professional Licensing ("Division") to convert citation proceedings to a formal adjudication in light of its own procedural rules mandating that contested citations be conducted as informal adjudicatory proceedings?

Standard of Review: Merit raised this issue before the Division in the Memorandum in Support of Request for Review of Order Converting Citation to Formal Adjudicative Proceedings dated, May 5, 1994. See Addendum B, Memo. at 4-7. Utah appellate courts review challenges based on an agency's failure to follow its own procedures for correction of error. Utah Code Ann. § 63-46b-16(4)(e) (1993); Krantz v. Utah Dept. of Commerce, 856 P.2d 369, 370 (Utah Ct. App. 1993).

2. Assuming arguendo that the Division has discretion to convert proceedings under Utah Code Ann. § 63-46b-4, has the Division abused its discretion?

Standard of Review: Merit raised this issue before the Division in the Objection to Motion and Order Converting Contest of Citations, dated March 3, 1994, and in the Memorandum in Support of Request for Review of Order Converting Citation to Formal Adjudicative Proceedings, dated May 5, 1994. See Addendum C at 4 and Addendum B, Memo. at 8. A challenge to an agency decision in the face of a purported statutory grant of discretion is affirmed only if the agency decision is reasonable and rational. Utah Code Ann. § 63-46b-16(h)(i) (1993); Morton Int'l, Inc. v. Utah State Tax Comm'n, 814 P.2d 581, 587 (Utah 1991).

3. Does conversion under Utah Code Ann. § 63-46b-4(3), deny Merit equal protection?

Standard of Review: Merit raised this issue before the Division in the Memorandum in Support of Request for Review of Order Converting Citation to Formal Adjudicative Proceedings, dated

May 5, 1994. See Addendum B, Memo. at 16. Utah appellate courts show no deference to an agency's decision regarding the constitutionality of governing statutes or the constitutionality of an agency's decisions. Accordingly, the Court of Appeals reviews constitutionality of the Division's decision to convert the contested citation hearing to a formal proceeding in this case for correctness. Utah Code Ann. § 63-46b-16(4)(a) (1993); Questar Pipeline v. Utah State Tax Comm'n, 817 P.2d 316, 317-18 (Utah 1991); Avis v. Board of Review, 837 P.2d 584, 586 (Utah Ct. App. 1992).

DETERMINATIVE LAW

The following constitutional provisions, statutes, and administrative rules are determinative of the issues on appeal. The text for each of these is attached in full at Addendum D.

1. United States Constitution, amendment XIV, § 1.
2. Utah Constitution, article I, § 24.
3. Utah Code Ann. § 63-46b-4 (1993).
4. Utah Code Ann. § 63-46b-16 (1993).
5. Utah Admin. R156-46b-202 (1994).
6. Utah Admin. R156-46b-403 (1994).

STATEMENT OF THE CASE

In this case, Merit challenges an order of the Division converting citation proceedings from informal to formal.

On or about December 9, 1993, the Division issued citations to Merit Electrical and Instrumentation, Inc. and four employees alleging violations of the Utah Construction Trades Licensing Act.

Utah Code Ann. § 58-55-1 et seq. (1994).¹ The Division claims that Merit Electrical violated § 58-55-2(32)(c)² of the Act by hiring unlicensed and non-exempt electricians as employees to perform electrical construction work in connection with a refinery modernization project owned by Kennecott Utah Copper Corporation, located near Salt Lake City, Utah. The Division claims that each of the individuals cited violated § 58-55-2(32)(a)³ by engaging in a construction trade requiring a license (electrical) while not licensed or exempted from licensure. Merit contests the citations because the electrical work at the site is "construction and repair relating to . . . metal and coal mining" and is therefore exempt from licensure under Utah Code Ann. § 58-55-6(2) (1994).⁴

Merit timely filed notice with the Division contesting the citations, denied violating the Act, and requested a hearing in accordance with the Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. § 63-46b-1, et seq., and the applicable rules at Utah Admin. R156-46b-1 (1994), et seq.⁵ Despite the classification

¹ Effective May 2, 1994, the Construction Trades Licensing Act was renumbered. Thus, § 58-55-1 became § 58-55-101. In this brief, Petitioners will refer to sections of the Act by reference to the numbering system that was in effect at the time the citations were issued and which appear on the citations. The corresponding new sections will be referenced in footnotes the first time any section appears in the body of the brief.

² Corresponding to Utah Code Ann. § 58-55-501(3) (Supp. 1994).

³ Corresponding to Utah Code Ann. § 58-55-501(1) (Supp. 1994).

⁴ Corresponding to Utah Code Ann. § 58-55-305(2) (Supp. 1994).

⁵ As of August 31, 1994, the Division amended the rules governing agency adjudicatory procedures, but did not change the substance of the rule sections cited in this brief. Citations to the Division's rules will be to those in effect at the time the Conversion Order occurred. The corresponding new rule numbers will be cited in a footnote the first time a citation to a rule occurs. Copies of the new rules are included in Addendum E.

of hearings to contest citations as informal proceedings under R156-46b-202(1)(m),⁶ the Division, on February 11, 1994, filed a Motion to Convert to Formal Adjudicative Proceedings ("Motion to Convert"). That same day, the presiding officer granted the Division's motion and issued an Order Converting Citation to Formal Adjudicative Proceedings. Merit timely filed an objection to the Division's motion and the presiding officer's order. In response, the presiding officer vacated his order on March 4, 1994. After both parties submitted further responsive pleadings, the presiding officer conducted a hearing on the Motion to Convert on March 28, 1994. On April 5, 1994, the presiding officer issued a second Order Converting Citation to Formal Adjudication Proceedings ("Conversion Order"). Merit filed a Request for Review of Order Converting Citation to Formal Adjudicative Proceedings, dated May 5, 1994. The Executive Director of the Department of Commerce issued an Order on Review which denies Merit's Request for Review. Merit asks this Court to vacate the April 5, Conversion Order⁷ because the Conversion Order: (i) violates the Division's procedural rules, (ii) is unlawful under the governing statute, (iii) was an abuse of discretion, insofar as the governing statute provides discretion, and (iv) denies Merit equal protection under the law.

⁶ Corresponding to Utah Admin. R156-46b-202(1)(n).

⁷ Two orders are currently at issue: (i) the Department of Commerce's Order on Review, issued on June 27, 1994, in which the Director of the Department of Commerce refused to review the Conversion Order, and (ii) the underlying April 5 Conversion Order. Except as separately referenced, these orders will be collectively referred to as the Conversion Order.

STATEMENT OF FACTS

1. On December 9, 1993, the Division issued citations to Merit Electrical and Instrumentation, Inc. and four of its employees alleging violations of the Utah Construction Trades Licensing Act. Utah Code Ann. § 58-55-1 et seq. (1993).

2. The Division bases the citations on its allegation that Merit Electrical hired unlicensed electricians to perform electrical construction work in connection with the refinery modernization project owned by Kennecott Utah Copper Corporation and thereby violated § 58-55-2(32)(c) of the Construction Trades Licensing Act.

3. With respect to the individual employees, the Division alleges that they engaged in electrical contracting work without a license or without exemption from licensure in violation of § 58-55-2(32)(a).

4. Citations were timely contested in accordance with the instructions included on the citations, the UAPA, and the applicable agency rules, which provide that contested citations be adjudicated as informal proceedings for which an evidentiary hearing is required. See Utah Admin. Code R156-46b-202(1)(m) (1994). Merit contests the citations because the electrical work at the site is "construction and repair relating to . . . metal and coal mining" and is therefore exempt from licensure under Utah Code Ann. § 58-55-6(2) (1994).

5. On February 11, 1994, despite its own rule, which classifies hearings to contest citations as informal, see Utah Admin. R156-46b-202(1)(m) (1994), the Division filed a Motion to Convert to Formal Adjudicative Proceedings. See Addendum F.

6. On the same day, the presiding officer, without the benefit of briefing, issued an Order Converting Citation to Formal Adjudicative Proceedings. See Addendum G.

7. In response to the Merit's objection, the presiding officer vacated the order on March 4, 1994. See Addendum H.

8. On April 5, 1994, the presiding officer issued a second Order Converting Citation to Formal Adjudicative Proceedings. See Addendum I.

9. On May 5, 1994, Merit filed a Request for Review of the Conversion Order, see Addendum B, and a Notice of Substitution of Counsel.

10. On June 27, 1994, the Executive Director of the Department of Commerce issued an Order on Review denying Merit's Request for Review on the ground that the Department has no jurisdiction to review the Conversion Order, and remanded the proceedings to the Division. See Addendum J.

11. Merit timely filed a Petition for Review with this Court on July 27, 1994.

12. The Court of Appeals issued a Notice of Consideration for Summary Disposition on August 18, 1994, on the grounds that the Petition For Review is taken from an interlocutory agency order and the Court therefore lacked subject matter jurisdiction.

13. On October 7, 1994, after the parties filed memoranda supporting their positions, Judge Jackson issued an order denying the Court's own motion for summary dismissal and required plenary presentation of the case.

SUMMARY OF ARGUMENTS

Merit has petitioned this court to vacate the Conversion Order, which converts consolidated citation proceedings from an informal to a formal adjudication. The effect of the conversion is to change the procedures used at the administrative hearing level and, more significantly, to alter the nature of judicial review of the agency decision. Specifically, the Conversion Order, in denying Merit's objections, justified the Division's failure to comply with the its own rules mandating citation proceedings to be conducted as informal hearings, by placing reliance on the Division's policy manual which contains model forms for conversion and by summarily relying upon the language contained in the Utah Code Ann. § 63-46b-4, which provides for conversion of agency proceedings in limited circumstances. The order concluded that the explicit statutory prerequisites which require conversions: (i) to be in the public interest and (ii) not to be prejudicial to the parties, had been met.

The reasoning and conclusions of law underpinning the Conversion Order are flawed, and as a result the order violates the Division's own rules, is contrary to law, and is otherwise an abuse of discretion. Merit further asserts that Utah Code Ann. § 63-46b-4 deprives Merit of equal protection under the law, both because the conversion statute is unconstitutional on its face and as applied in this case.

As an initial matter, the Conversion Order is contrary to the Division's own rules that contested citations be adjudicated as

informal proceedings which include a required evidentiary hearing. Nowhere in the rules is there a reservation of discretion to change the mandated informal hearing. Moreover, on its face, Utah Code Ann. § 63-46b-4 does not permit conversion in cases where the Division has designated a particular proceeding as informal by rule. Statutory language aside, an agency cannot promulgate a rule that limits its statutory discretion and then exercise its discretion, as if the rule did not exist. In this case, the Division limited its discretion to convert by promulgating a rule that mandates an informal proceeding for contested citations. Therefore, it cannot now convert to a formal proceeding.

Even assuming arguendo that the Division has authority to convert, it has abused its discretion in this case because the Conversion Order fails to satisfy the statutory requirements for conversion. The hearing procedures the presiding officer seeks, and uses to justify the conversion, are already available as part of the informal evidentiary hearing mandated by the Division's own rules discussed in the Division's policy manual. Examination of witnesses, submittal of rebuttal evidence and use of the expertise of the Contractor's Licensing Board are all, as sought, available to the Division in the context of the informal hearing. Thus, the basis for justifying the public interest is purely illusory. Similarly, the criterion that the parties will not be prejudiced is not met. When an agency engages in an unlawful procedure or fails to follow prescribed procedures, it is presumed, as a matter of law, that the party claiming relief has been "statutorily

prejudiced." Furthermore, the conversion denies Merit the right to a de novo trial (where the rules of evidence and civil procedure are fully applicable). Thus, neither prong of the conversion statute has been met and it must be reversed as an abuse of discretion.

In addition, Utah Code Ann. § 63-46b-4 is unconstitutional both on its face and as it applied in this case because it deprives Merit, as part of a class contesting citations, of equal protection of the law. In order to provide equal protection to all parties contesting citation proceedings, the statute must insure that similarly situated parties within the class are treated similarly. The conversion statute does not, on its face, provide such justification. The criteria, especially the public interest requirement, are vacuous in that they provide no guidance for determining which parties are selected from a similarly situated class for different treatment. The class in this case consists of parties contesting citations, yet, the statute provides no guidance for either identifying that class or for determining which parties from the class are singled out for a different procedural track. Denial of equal protection by the application of the statute is evidenced by the fact that the Division converted only one other citation proceeding from a formal to an informal proceeding. Accordingly, the conversion statute must be considered to be arbitrary and constitutionally prohibited.

ARGUMENTS

I. THE DIVISION'S CONVERSION ORDER MUST BE VACATED AS THE ORDER IS CONTRARY TO THE DIVISION'S OWN PROCEDURAL RULES, IS CONTRARY TO LAW, AND IS OTHERWISE AN ABUSE OF DISCRETION.

The Conversion Order, dated April 5, 1994, must be vacated as the reasoning and conclusions of law underpinning the order, and denying Merits' objections, are flawed. The order violates the Division's own procedural rules, is contrary to law and is otherwise an abuse of discretion.

Specifically, the Conversion Order concludes that any argument that the conversion is in violation of the Division's own procedural rules, Utah Admin. R156-460-202(1)(m) and 403(3) is without merit, because the Division's Bureau of Investigations, Policies and Procedures Manual ("Division's Policies") "anticipated that such conversions to formal proceedings would occur in appropriate cases and included model forms drafted for the purpose of conversion of such cases to formal proceedings." See Conversion Order at 2 (Addendum I). The Conversion Order further concludes that Utah Code Ann. § 63-46b-4(3) "clearly provides, 'any' informal proceeding may be converted to form proceeding." See Addendum I at 2.

Having summarily dismissed the binding effect of its own rules, the order then goes on to review the criteria for conversion, that is: (i) is conversion in the public interest and (ii) does conversion unfairly prejudice any party. The presiding officer found that the public interest criterion was met because the Merit proceeding is "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 [to] fully address the issues in the case, and may require the expertise of the Contractor's Licensing Board." Conversion Order at 3 (Addendum I). As to any prejudicial effect, the presiding officer found that: (i) informal proceedings did not provide adequate procedures for adjudicating the issues involved and (ii) denying Merit the right to a district court was not a basis for conducting an informal proceeding.

Each of these arguments must fail. First, the Conversion Order is unlawful for the simple reason that the Division has failed to follow the procedure which it has prescribed for itself in Rule 156-46b-202(1)(m). It is the basic tenant of administrative law that an agency cannot violate its own rules and regulations. Those rules have the force and effect of law and equally bind the agency and those being regulated.⁸ Second, Utah Code Ann. § 63-46b-4 (1993), on its face, does not permit conversion when an agency has chosen, by formal rulemaking, to mandate that a particular class of proceedings be adjudicated informally. The language of the statute aside, after a rule mandating a particular type of proceeding has been promulgated, the Division has, de facto, chosen to limit any grant of discretion

⁸ Even the Division recognizes that its own rules have the force of law. The Division's Orientation and Reference Manual for Professional Licensing Board Members, states: "There are two basic types of laws with which the Boards and Division deal in the licensing and regulation of designated occupations or professions. . . . The first are statutes. . . . The second type of law are rules." Orientation Manual at 8 (1994) (Addendum K).

that it might otherwise have. Lastly, assuming arguendo the Division retains discretion to convert licensing procedures from informal to formal proceedings, the Conversion Order in this case cannot stand because it fails to satisfy the statutory requirements for conversion. In short, the Division can find no refuge in Utah Code Ann. §63-46b-4 for converting the instant proceedings and the order should be vacated. Each of these arguments is addressed, in turn, below.

A. The Division's Conversion Order Must be Vacated as the Order is Contrary to the Division's Rules Which Mandate that Contested Citations Shall be Adjudicated by an Informal Proceeding with an Evidentiary Hearing.

1. The Division's Rules Mandate that an Informal Proceeding with an Evidentiary Hearing be Conducted to Adjudicate the Citations at Issue in This Case.

The UAPA provides two tracks for adjudicative proceedings within state agencies--formal and informal. Under Utah Code Ann. § 63-46b-4 (1993), all agency adjudicative proceedings are formal unless the agency's rules designate that they are informal. Formal adjudications embody a trial-like proceeding that includes, among other characteristics, discovery, motion practice, an evidentiary hearing on the record, intervention, and written findings of fact and conclusions of law. See Utah Code Ann. § 63-46b-6 through 10 (1993). For an informal proceeding, however, discovery and intervention are prohibited, and no hearing occurs unless provided for by rule or statute.⁹ See Utah Code Ann. § 63-46b-5 (1993).

⁹ A hearing may be conducted on the record at the request and expense of the parties and the production of evidence may be required at the hearing. Utah Code Ann. § 63-46b-5(1)(e) & (2)(a) (1993).

Most importantly, while the UAPA guarantees a trial de novo in district court to parties to an informal proceeding, with attendant appeal, a party to a formal proceeding can only appeal an unfavorable ruling to an appellate court with the attendant limited review (e.g., appellate courts grant great deference to agency factual determinations). Id. at 63-46b-15 and 16. Thus, the most critical difference between a formal and informal adjudication is that parties to an informal adjudication can obtain two levels of judicial review--at the district court and appellate court--whereas parties to a formal adjudication have only one opportunity for review.

Pursuant to Utah Code Ann. § 63-46b-4(1) (1993), the Division has designated proceedings to adjudicate contested citations issued under the Construction Trades Licensing Act, Utah Code Ann. § 58-55-13(4) (1994),¹⁰ as informal. See Utah Admin. R156-46b-202(1)(m) (1994). Furthermore, as allowed by Utah Code Ann. § 63-46b-5, the Division's rules specifically mandate an evidentiary hearing for adjudication of contested citations. Utah Admin. R156-46b-403(3) (1994).

Merit contested the licensing citations issued to them in accordance with Utah Code Ann. § 58-55-13(4) (1994). Despite its own rule mandating that contested citations be informally adjudicated, the Division successfully converted the citations proceedings from informal to formal. The effect of this conversion

¹⁰ Corresponding to Utah Code Ann. § 58-55-503(4) (Supp. 1994).

is to place Merit on a procedural track which is contrary to the Division's rules and therefore contrary to law.¹¹

2. The Conversion to a Formal Proceeding Violates the Division's Procedural Rules.

By converting the citations proceedings to a formal adjudication in the face of its own rules mandating an informal adjudication with an evidentiary hearing, the Division has violated its own procedural rules. In State ex rel. Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259, 1263 (Utah 1980), the Utah Supreme Court unequivocally held that agencies must abide by their own procedural rules or face reversal on appeal. The Division has engaged in the same sort of procedural misstep as the agency in Merit and must similarly be reversed.

In Merit, the Merit System Council excluded a Department of Community Affairs representative from an administrative hearing, despite the fact that the Merit Council's procedural rules provided that a representative of the agency could be present during such a hearing. The Court held that "administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purposes. Such is the essence of arbitrary and capricious action." Id. Accordingly, the Court remanded the case to the agency because "[t]he council cannot violate its own procedural rules." Id.; see also Frisby v. United

¹¹ By failing to comply with its own rules and by placing Petitioners on a different track with a different set of procedural safeguards, the Division has also deprived them of due process. See D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145 (Utah Ct. App. 1989) (the Division's unlawful procedure or decision making process constitutes due process violation).

States Dept. of Housing & Urban Dev., 755 F.2d 1052, 1055 (3rd Cir. 1985) ("Failure on the part of the agency to act in compliance with its own regulations is fatal to such action."); Hartnett v. Cleland, 434 F. Supp. 18 (D.S.C. 1977) (when an administrative agency takes any action affecting the rights of a party, the agency "must scrupulously comply with its own rules and regulations").

The Division in this case is attempting to do exactly what the Merit Court prohibited--violate its own procedural rules. The transgression is blatant. The Division's rules provide for an informal adjudication with attendant de novo review in district court, and yet the Division has converted to a formal proceeding with limited appellate review.

Moreover, the regulatory scheme governing this case illustrates the Division's special concern for and attention to contested citation adjudications. The Division did not simply classify citation hearings as informal, but also "required" an evidentiary hearing for such proceedings. Utah Admin. R156-46b-403(3) (1994). This is noteworthy because "[e]videntiary hearings are not required for informal division adjudicative proceedings unless required by statute or rule, or permitted by rule and requested by a party" Utah Admin. R156-46b-403(1) (1994). While the Division designated some twenty proceedings as informal, see Utah Admin. R156-46b-202(1) (1994), it required the additional safeguard of a hearing only for contested citations and one other proceeding. See id. at 46b-403(3).

In the same vein, the Division's Policies state that informal proceedings are intended to address the specific issue in dispute in the instant case: "Was there a legal basis to issue the citations?" See Division's Policies at 45 (Addendum L). When a party contests the legal basis of a citation the Division's Policies provide certain explicit procedural rights. For example, parties are entitled to "testify, present evidence, and comment on the issues at the hearing. In putting on evidence Respondents may testify, call and examine witnesses, and introduce evidence." Id. at 37. This framework suggests that the Division thoughtfully contemplated the nature of such adjudications and devised a proceeding that limited the complexity involved in discovery and intervention, but that ensured procedural rights commensurate with the complexity of issues involved with contested citations.

The Division cannot now abandon its own procedural rules. "Such is the essence of arbitrary and capricious action" and constitutes reversible error. Merit, 614 P.2d at 1263.

3. The Utah Administrative Procedure Act Requires This Court to Vacate the Conversion Order.

Based on the forgoing discussion, the Division has clearly violated its own procedural rules by converting the citations to a formal proceeding. The UAPA explicitly requires that Merit be granted relief from the Conversion Order.

Under the UAPA:

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:

. . . .

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

Utah Code Ann. § 63-46b-16(4) (1993). Once an appellate court finds that an agency failed to follow its own procedures, it presumes substantial prejudice and grants relief. Krantz v. Utah Dept. of Commerce, 856 P.2d 369, 371 (Utah Ct. App. 1993). Having shown that the Division has "failed to follow [its] prescribed procedure," Merit respectfully requests this Court to grant relief by vacating the Conversion Order.

B. Utah Code Ann. § 63-46b-4 Does Not Authorize Conversion of Proceedings Designated by Rule as Informal.

Careful reading of Utah Code Ann. § 63-46b-4 reveals that the statute does not permit conversion of proceedings that an agency has designated informal by rule. Accordingly, the Division has no statutory or regulatory discretion to convert Merit's citations proceedings.

Utah Code Ann. § 63-46b-4 (1993), which the Division relies on to convert the citation proceedings, provides:

(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

(2) Subject to the provisions of Subsection (3), all agency 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.

(emphasis added). When read in isolation, subsection (3) appears to allow conversion of any proceeding. However, when the three sections are read as a whole, it becomes apparent that subsection (3) serves solely to modify default proceedings delineated in subsection (2). The Legislature did not preface subsection (1) with the same limiting language as subsection (2), and therefore intended subsection (1) to stand alone and independent of subsection (3). If the Legislature intended for subsection (3) to apply to designated hearings, such as the hearings at issue in this case, it would have made subsection (1) "subject to the provisions of Subsection (3)," as it did with subsection (2). Cf. Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944, 947 (Utah Ct. App. 1993) (concluding that omission of or reference to a specific adjacent subsection of a statute evidences legislative intent). Since the Division, by way of Rule 156-46b-202(1)(m), has specifically designated contested citation hearings as informal adjudicative proceedings, the proceedings in this case fall within the ambit of subsection (1), and are therefore not subject to Conversion under subsection (3). Accordingly, the presiding

officer acted beyond his statutory authority in converting the present adjudication to a formal proceeding, and the Conversion Order is void.

Setting the language of the statute aside, the Division cannot, as a matter of law, convert Merit's citation proceedings. By lawfully promulgating a rule designating citation proceedings as informal, the Division abrogated any discretion it claims under the Conversion Statute to convert Merit's hearing from an informal to a formal adjudication. Once an agency promulgates a rule limiting its discretion, it cannot reassert its authority to exercise discretion while its rule is in effect. It is well established that "[e]ven if the action of an agency is discretionary by statute, the agency's own regulations must be complied with by the agency after they are issued." California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1049 (D.D.C. 1985).

The seminal case in this area illustrates the point. In United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed. 681, 74 S. Ct. 499 (1954), the Immigration Act of 1917 provided the Attorney General with authority to exercise discretion in considering appeals to deportation decisions. The Attorney General had issued regulations which delegated that authority to the Board of Immigration Appeals. When the Attorney General interfered with an appeal of a deportation order, the Supreme Court held that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." Id. at 267, 98 L.Ed. 686.

Therefore, even though a statute provided the Attorney General with certain discretionary powers, he could not exercise those powers because "the regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation." Id. at 267, 98 L.Ed. 686. See also John S. Service v. John Foster Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L.Ed.2d 1403 (1957) (even though statute granted Secretary of State broad discretion in discharging employees, Secretary was nonetheless bound by the agency's procedural rules, which limited that discretion).

To the extent the Conversion Statute provides the presiding officer any discretion to convert a proceeding, the Accardi Doctrine applies with equal vigor to the instant case. The Division has opted to promulgate rules that limit its discretion by providing for a particular procedural track, namely the informal track. The Division has limited its discretion further by mandating a particular type of hearing for informal proceedings related to citations. See Utah Admin. R156-46b-403(3) (1994) (evidentiary hearing required).

In the very same rule that governs this proceeding, the Division retained its discretion to convert other proceedings.¹² For example, Utah Admin. R156-46b-202(1)(q) (1994) provides that declaratory orders are designated informal "when determined by the director to be conducted as an informal adjudicative proceeding." It is disingenuous for the Division to say now that it silently

¹² The Division has not promulgated a rule retaining discretion to convert informal proceedings to formal.

retained discretion to convert contested citation proceedings when it explicitly retained discretion for another type proceeding in the same rule, but did not do so for citation proceedings such as those at issue.

Just as the regulation in Accardi prescribed the procedures to be followed for deportation appeals, the Division's rules governing this case prescribe the procedure for citation hearings. The Division cannot now attempt to exercise discretion under the statute while its own rule, which limits its discretion, is in full force and effect. By doing so the Division violates its own procedural rule, which is fatal to its decision. See Frisby v. United States Dept. of Housing & Urban Devel., 755 F.2d 1052, 1055 (3d Cir. 1985); State ex rel. Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259, 1263 (Utah 1980).

C. **Even if Conversion is Permissible for Adjudications Mandated as Informal, in This Case, the Division Fails to Satisfy the Statutory Requirements for Conversion Under Utah Code Ann. § 63-46b-4(3).**

Even assuming the Division has authority to convert, the Division has failed to meet the statutory requirements for conversion in the instant case, and thereby abused its discretion. The Conversion Statute provides that the presiding officer may convert an informal adjudicative proceeding to a formal proceeding only 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.

Utah Code Ann. § 63-46b-4(3) (1993). Despite the UAPA requirement that both conditions for conversion be met, the presiding officer's decision to convert this hearing fails to meet either prerequisite.

1. The Presiding Officer Failed to Show that the Conversion Order is in the Public Interest.

The presiding officer's basis for converting is summarized in the Conversion Order:

the proceeding to be conducted are [sic] 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 to fully address the issues in the case, and may require the expertise of the contractors licensing board.

See Conversion Order at 3 (Addendum E). Close scrutiny of the presiding officer's rationale shows that these factors do not support a finding that conversion is in the public interest. The procedures that the presiding officer seeks are already available under the informal evidentiary hearing mandated by the Division's own rules.

The resolution of Merit's citations requires the Division to resolve exactly the kind of issue contemplated by an informal adjudication. The Division's Policies provide:

The only issues properly before the presiding officer are as follows:

- a. Was there a legal basis to issue the citation?
- b. If so, was it fair to issue the citation?
- c. If so, what is the appropriate penalty?

See Division's Policies at 45 (emphasis added) (Addendum L). The question confronting the presiding officer in the instant case is whether there is a legal basis for the citations issued to Merit, that is, whether Merit's activities fall within the statutory exemption from licensure for persons "engaged in . . . construction and repair relating to . . . metal and coal mining." Utah Code Ann. § 58-55-6(2) (1994). The fact that this issue is, in the words of the presiding officer, "highly disputed" has no bearing whatsoever on the public interest. If "highly disputed" issues can serve as a reasonable basis for conversion, the Division could convert any time a party does not acquiesce to the allegations in a citation.

Additionally, conversion is not necessary so as to avail the Division of the procedures identified in the Conversion Order. Those procedures are equally available in the mandated informal proceeding. The presiding officer simply failed to recognize the extent of procedures available in an informal adjudication for contested citations. The UAPA explicitly provides parties to an informal hearing with the right to "testify, present evidence, and comment on the issues." Utah Code Ann. § 63-46b-5(1)(c) (1993). While the UAPA is silent on the right to cross-examine, the Division's Policies and Procedures provide that parties can "testify, call and examine witnesses, and introduce documentary evidence."¹³ See Division's policies at 37, (Addendum L). Since

¹³ The UAPA is entirely silent on cross-examination and rebuttal evidence with regard to informal hearings. When the Legislature wanted to prohibit an activity during informal proceedings it did so explicitly. For

it would violate due process for an administrative agency to permit parties to testify without permitting cross-examination, see D.B. v. Division of Occupational and Professional Licensing, 779 P.2d 1145 (Utah Ct. App. 1989), the right to "examine witnesses" necessarily implies the right of the opposing party to cross-examine. Furthermore, the presiding officer can "issue subpoenas or other orders to compel production of necessary evidence." Utah Code Ann. § 63-46b-5(e) (1993). These informal adjudication procedures, provide the presiding officer an ample procedural armamentarium for resolving whether Merit's activities are exempt from licensure as "construction and repair relating to . . . metal and coal mining."

Similarly, the presiding officer's claimed need for the expertise of the Contractors and Electricians Licensing Boards can be adequately addressed through an informal proceeding. The Director of the Division has authority to designate "an individual or body of individuals to conduct or to assist the director in conducting any part or all of an adjudicative proceeding." Utah Code Ann. § 58-1-109(1) (1993). If the director believes that the issues surrounding resolution of the citations require the expertise of the Contractors Licensing Board or the Electricians Licensing Board, he can designate those boards to assist the presiding officer during the informal adjudicative proceeding. In

example the UAPA explicitly prohibits discovery and intervention for informal proceedings. See Utah Code Ann. § 63-46b-5(e) and (g). Interestingly, Utah Code Ann. § 3-46b-6-10, which outline formal proceedings, is also silent on whether rebuttal evidence is allowed.

essence, the Board can become a de facto expert for the presiding officer. Consequently, a formal proceeding offers absolutely no additional opportunity for the presiding officer to utilize the expertise of the Contractors and Electricians Licensing Board.

In a separate vein, the Contractors and Electricians Boards are unlikely to provide any expertise in this matter. The main issue to be decided in this case is whether Merit's activities are exempt from licensure because electrical work at the refinery is "construction and repair relating to . . . metal and coal mining." Utah Code Ann. § 58-55-6(2) (1994). While these boards might well have specialized insight into construction and electrical issues, they have no more expertise in determining whether a particular activity is related to an integrated mining operation than they have in assessing whether a particular activity constitutes the practice of law. Consequently, the involvement of these boards will be wholly unhelpful in adjudicating the citations and cannot justify the Conversion Order on the basis of being in the public interest.

In view of the presiding officer's inherent fact finding powers, his basis for justifying the public interest is purely illusory and cannot withstand the slightest scrutiny. Accordingly, since the presiding officer did not fulfill his burden of showing that the public interest requirement under the conversion statute is met, the Conversion Order does not satisfy the dual requirements of the Conversion Statute and must be vacated as an abuse of discretion.

2. The Conversion Order Unfairly Prejudices Merit.

The Conversion Order similarly falls because the presiding officer failed to meet the second requirement for conversion, which provides that the presiding officer must show that conversion "does not unfairly prejudice the rights of any party." Utah Code Ann. § 63-46b-4(3)(b) (1993). When an agency engages in an unlawful procedure, or fails to follow prescribed procedures, a court presumes that the party claiming relief has been "substantially prejudiced." Krantz v. Utah Dept. of Commerce, 856 P.2d 369, 371 (Utah Ct. App. 1993). In this case, the Division has failed to adjudicate Merit's citations informally as its own rules prescribe. See Utah Admin. R156-46b-202(1)(m). Furthermore, as is more fully discussed elsewhere in this brief, conversion denies Merit the right to a de novo trial, where the rules of evidence and civil procedure are fully applicable with no deference to the agency's findings and conclusions. Accordingly, Merit has been unfairly prejudiced, and the Conversion Order fails.

Despite the requirement that the presiding officer show that both requirements under the Conversion Statute be met before converting a proceeding, he failed to show that either requirement is met in this case. The basis for the Conversion Order is therefore, outside "the bounds of reasonableness" and the Conversion Order constitutes an abuse of discretion. Morton Int'l, Inc. v. Utah State Tax Comm'n, 814 P.2d 581, 586 (Utah 1991). Merit therefore asks this Court to vacate the Order and to remand this case for an informal adjudication before the Division.

**II. THE CONVERSION STATUTE, UTAH CODE ANN. § 63-46B-4(3),
DENIES MERIT EQUAL PROTECTION UNDER THE LAW.**

The Conversion Statute is unconstitutional both on its face and as it is applied in this case because it deprives Merit, as part of a class contesting citations, of equal protection under the law. It is unconstitutional on its face because it permits the Division to create two adjudicatory tracks, formal and informal, for similarly situated parties. These tracks embody very different procedural rights, particularly where the right to judicial review is concerned. In order to provide equal protection to all parties contesting citation proceedings, the statute must ensure that similarly situated parties within a class are treated similarly. Yet, Utah Code Ann. § 63-46b-4 allows conversion under subpart (3) if conversion is in the public interest and if conversion will not prejudice the rights of any party. Without more, on its face, these criteria cannot provide sufficient criteria to ensure that those who are similarly situated will be treated the same. Just as importantly, as applied in this case, the Conversion Statute violates equal protection guarantees because it has allowed the Division to single out Merit for unfair treatment different than others who contest citations.

A. The Conversion Statute is Unconstitutional on its Face.

At its core, the principle of equal protection¹⁴ means "persons similarly situated should be treated similarly." Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984). As to parties before administrative agencies, "[e]qual protection protects against discrimination within a class." State Tax Comm'n v. Department of Finance, 576 P.2d 1297, 1298 (Utah 1978). When a statute unfairly creates two classes, that statute "must be considered to be arbitrary and constitutionally prohibited." Id. at 1298.

There is nothing particularly novel about this argument. Utah courts consistently strike down statutes that permit agencies to create two classes from a similarly situated group. In Amax Magnesium Corp. v. Utah State Tax Comm'n, 796 P.2d 1256 (Utah 1990), for example, the Utah Supreme Court held that a tax statute violated the equal protection clause of the Utah Constitution by unfairly creating two classes of taxpayers. In that case, the State and Tooele County assessed properties for tax purposes by the same method. However, a statute permitted the State to tax property at 100% of its assessed value and permitted Tooele County to tax property based on 80% of its value. The Court reasoned that the statutory classification of property on the basis of who taxed it created two classes of properties assessed by the same method. Therefore, the classification "arbitrarily discriminated against

¹⁴ Utah Constitution Article I, section 24 reads: "All laws of a general nature shall have uniform operation." The Utah Supreme Court has explained that "principles and concepts embodied in the federal equal protection clause and the state uniform operation of the law provision are substantially similar." Blue Cross and Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989).

one class merely because it is a state-assessed property." Id. at 1261. Since the discrimination bore no reasonable relationship to the statutory scheme, the statute violated the uniform operation of the law clause in the Utah Constitution. Id.; see also Lee v. Gaufin, 867 P.2d 52 (Utah 1993) (medical malpractice statute of limitations denied equal protection because it discriminated against minors); Malan v. Lewis, 693 P.2d 661 (Utah 1984) (guest statute denied equal protection because it singled out nonpaying passengers from a larger class); Continental Bank and Trust Comp. v. Farmington City, 599 P.2d 1242 (Utah 1979) (licensing tax arbitrarily created an impermissible class for tax purposes); Broadbent v. Gibson, 140 P.2d 939 (Utah 1943) (Sunday closing law unconstitutional because it treated similar businesses differently).

In a similarly reasoned case, the Utah Supreme Court held that the Tax Commission singled out the State Insurance Fund for unfair treatment by making it pay a tax that private insurers did not have to pay. State Tax Comm'n v. Dept. of Finance, 576 P.2d 1297 (Utah 1978). In holding the statute authorizing the tax unconstitutional, the Court reasoned that while "the legislature has considerable discretion in the designation of classifications . . . the court must determine whether such classifications operate equally on all persons similarly situated." Id. at 1298. When a statute permits a party to be singled out for unfair treatment, the statute "must be considered to be arbitrary and constitutionally prohibited." Id.

Like the statutes in Amax and Department of Finance, the Conversion Statute permits the Division to create two classes from among similarly situated parties--one class receives an informal adjudication by rule and the other receives a formal adjudication by conversion. Additionally, the Conversion Statute provides no useful criteria for assuring that parties subject to conversion receive equal protection. The Conversion Statute merely provides that the presiding officer can convert if: (i) conversion is in the public interest and (ii) conversion does not unfairly prejudice any party.

In order to meet equal protection requirements, a statute must justify creating separate classifications from a similarly situated group to ensure that parties within that classification are treated similarly. The Conversion Statute does not, on its face provide such justification. These criteria, especially the public interest requirement, are vacuous in that they provide no guidance for determining which parties are selected from a similarly situated class for different treatment. The class in this case consists of parties contesting citations, yet, the statute provides no guidance for determining which parties from that class are singled out for a different procedural track. Accordingly, the Conversion Statute "must be considered to be arbitrary and constitutionally prohibited." Dept. of Finance, 576 P.2 at 1298. Merit therefore asks this Court to vacate the Conversion order that was issued pursuant to the statute.

B. The Conversion State is Unconstitutional as Applied in this Case.

In order for the Conversion Statute to be constitutional under equal protection principles, "[w]hat is critical is that the operation of the law be uniform." Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993). The Conversion Statute has been used in this case unfairly to single out Merit for conversion to the formal adjudicatory track.

The fact that Merit was singled out for special treatment is evidenced by the Division's response to Merit's GRAMA requests. Those requests illustrate that of the 1,313 citations issued since October 1992, only six have been converted to formal adjudication. See Division's Response to Request for Record attached as Addendum M. Five of these six consist of the citations in this case. Even considering only the 314 cases listed as going to hearings,¹⁵ the Division has singled out Merit from a large group of similarly situated parties for singular, special treatment among those.¹⁶ Id.

By converting the citation hearings, the Division deprives Merit of the rights embodied in an informal proceeding. Most significantly, the Division has deprived Merit of the right to litigate their claims in district court. The UAPA provides that

¹⁵ The Attorney General's office later clarified this GRAMA response by letter which stated that, after reviewing the Division's docket, only 58 citations actually went to hearing.

¹⁶ A Utah appellate court can take judicial notice just as any trial court can. Under the Utah Rule of Evidence 201, this Court can take judicial notice of the Division's response to a GRAMA request. See Moore v. Utah Technical College, 727 P.2d 634, 639 n.17 (Utah 1986) (Supreme Court can take judicial notice of administrative proceedings and actions).

parties to an informal adjudication are entitled to de novo trial in district court, Utah Code Ann. § 63-46b-1520 parties to a formal hearing are entitled only to appellate review. Id. at § 63-46b-16. Appellate review differs tremendously from a de novo trial. A de novo trial in district court provides a party appealing an administrative agency decision the opportunity to present its case to an impartial trier of fact for a fresh look under the Rules of Evidence. An appeals court, on the other hand, grants substantial deference to the administrative agency, and will only overturn an agency's decision on limited grounds. See id.; see generally Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581 (Utah 1991); SEMECO Indus., Inc. v. State Tax Comm'n, 849 P.2d 1167, 1170-74 (Utah 1993) (Durham, J., dissenting). The Conversion Statute, therefore, permits the Division to substantially reduce Merit's access to judicial review relative to that afforded to other parties who contest citations.

Since the Conversion Statute arbitrarily discriminates against Merit by allowing the Division to deprive them of rights available to other similarly situated parties, the statute denies Merit its right to equal protection under the law. Merit accordingly asks this Court to vacate the Conversion Order because it constitutes an agency action based on a statute that "is unconstitutional on its face or as applied." Utah Code Ann. § 63-46b-16(4)(a) (1993).

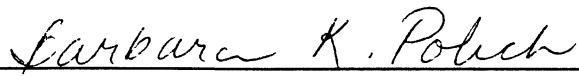
CONCLUSION

By converting Merit's hearing to a formal adjudication, the Division has engaged in an unlawful procedure by failing to follow

its own procedural rules that require an informal hearing for contested citation hearings. The Division's claim to convert by the discretion granted in the Conversion Statute is erroneous because the Division forfeited that discretion when it promulgated the rule mandating an informal hearing for contested citations. Furthermore, the Conversion Order fails to meet the two statutory requirements set out in the Conversion Statute. First, the Conversion Order fails the public interest requirement because the presiding officer justified the Conversion Order on the illusory notion that additional procedures are necessary to adjudicate the instant case. However, an informal proceeding with an evidentiary hearing already provides him all the additional procedures that he seeks. Secondly, conversion fails to satisfy the no prejudice requirement because it allows the Division to convert in contravention of its own prescribed proceedings. Finally, the Conversion Statute violates Merit's right to equal protection because it permits the Division to create two classes, one that receives a mandated informal hearing with two-level judicial review, and one that receives a formal hearing with single-level judicial review. Because the statute fails to provide sufficient criteria for distinguishing which parties obtain a particular track, it unfairly and arbitrarily classifies parties contesting citations. By applying the Conversion Statute in this case, the presiding officer deprived Merit of equal protection by denying it the opportunity to adjudicate its case informally. Accordingly,

Merit respectfully asks this Court to vacate the Conversion Order and to remand this case for an informal agency adjudication.

DATED this 8th day of December, 1994.



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 1994,
I caused to be delivered two (2) true and correct copies of the
foregoing **PETITIONERS' BRIEF**, to:

Robert K. Hunt
Utah Assistant Attorney General
111 State Capitol
Salt Lake City, Utah 84114-0810

Barbara K. Polich

Tab A

SEP 02 1994

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IN THE UTAH COURT OF APPEALS

* * * * *

MERIT ELECTRICAL &)	
INSTRUMENTATION, a)	MEMORANDUM IN OPPOSITION TO
corporation, and JONATHAN CARL	)	SUMMARY DISPOSITION
JURETICH, CHRISTOPHER M.)	
SCHIFFMAN, DAN A. JOHNSON, and)	
KIT VANESS,	)	Citation Nos. 1846, 1841,
	)	1917, 1918 and 1842
Petitioners,	)	(Consolidated)
)	
vs.	)	COURT OF APPEALS # 940435-CA
)	
UTAH DEPARTMENT OF COMMERCE,)	
DIVISION OF OCCUPATIONAL AND)	
PROFESSIONAL LICENSING,)	
)	
Respondent.)	

* * * * *

Petitioners submit this Memorandum in response to this court's Notice of Consideration For Summary Disposition pursuant to Utah Rules of Appellate Procedure 10(e). Petitioners urge this court to consider their Petition for Review on its merits because the court has jurisdiction to review the propriety of the Division of Occupational and Professional Licensing Order Converting Citation to Formal Adjudicative Proceeding ("Conversion Order").¹

¹ Two orders are currently at issue. Petitioners are appealing the Department of Commerce's Order on Review, issued on June 27, 1994, and the underlying Conversion Order. They actually seek judicial relief from the Conversion Order, and will refer to the Conversion Order as the subject of the appeal throughout this Memorandum.

INTRODUCTION

This court requested the parties to submit memoranda addressing whether it has jurisdiction to review the underlying order in this case because the order at first glance appears to lack finality as that term is applied in Barney v. Division of Occupational and Professional Licensing, 828 P.2d 542 (Utah App. 1992). The Barney court refused to review an administrative order denying petitioner's motion to dismiss because the order was not final. The petitioners in that case did not raise, nor did the court discuss, whether the order was final under the Collateral Order Doctrine.

The Collateral Order Doctrine is a well established, practical construction of the final order rule that allows a court to review orders that finally determine important rights of a party when the issues are separate from the underlying action and would escape review if the court waits until the entire case is fully adjudicated. Cohen v. Beneficial Indus. Loan Corp, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225-26 (1949). A court can review orders as final under the Doctrine if they: "[1] conclusively determine the disputed question, [2] resolve an important issue [3] completely separate from the merits of the action, and [4] [are] effectively unreviewable on appeal from a final judgment." Nixon v. Fitzgerald, 457 U.S. 731, 742, 102 S.Ct. 2690 (1982).

In this case, Petitioners challenge a Division order, that converts a hearing for citations from an informal to a formal

proceeding.² Conversion violates Petitioners' due process rights because the Division's own rule, see Utah Admin. Code R156-46b-202(1)(m) (1994), designates citation hearings as informal.³ Insofar as the Utah Administrative Procedures Act affords Petitioners a right to de novo district court review for informal agency proceedings, see Utah Code Ann. § 63-46b-15 (1993), but only provides for limited review of formal proceedings, see Utah Code Ann. § 63-46b-16 (1993), the Division's violation of its own rule deprives Petitioners of their right to a trial de novo in district court. Moreover, the Division's conversion establishes two procedurally distinct tracks for adjudicating citations. Since the Division's own rules have established citation hearings as informal proceedings, the conversion produces an inconsistent operation of the law, thereby depriving Petitioners of equal protection under the law. See Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993).

If Petitioners are forced to go forward with a formal hearing, they will participate in the very proceeding that violates their constitutional rights without ever having an opportunity to present

² The Division purports to be acting pursuant to its authority under Utah Code 63-46b-4, which reads in pertinent part:

(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.

³ While the Division has provided the Director with discretion concerning the informal designation in other sections of Rule 156-46b-202, see, e.g., id. at (q), it has not provide the Director with the same discretion with respect to contested citation hearings.

their constitutional arguments to an appellate court. Accordingly, the Division's order to convert the proceedings is a final order under the Collateral Order Doctrine because it finally determines Petitioners' constitutional rights, which are entirely separate from the merits of the citations and which are unreviewable once Petitioners are forced to proceed formally. Therefore, this court has jurisdiction pursuant to Utah Code Ann. §§ 78-2a-3(2)(a) & 63-46b-16 because the order that petitioners appeal is final.

PROCEDURAL BACKGROUND

1. On or about December 9, 1993, the Division issued citations to Merit Electrical & Instrumentation, Inc. and four employees (collectively referred to as "Petitioners") alleging that Merit hired unlicensed electricians to perform work in connection with a refinery modernization project owned by Kennecott Copper and that the named employees engaged in electrical contracting work without licenses or without exemption from licensure.

2. Petitioners contest the citations because the electrical work at the site is exempt under Utah Code Ann. § 58-55-305(2) (1993), which exempts from licensure "construction and repair relating to . . . metal and coal mining."

3. Division rules designate hearings for contested citations as informal and provide no discretion to the Division to change. See Utah Admin. Code R156-46b-202(1)(m).

4. On April 5, 1994, the Presiding Officer issued the Conversion Order.

5. On May 5, 1994, Petitioners filed a Request for Review of the Conversion Order on the bases that, in light of the Division's own rule that designates citation hearings as informal, conversion to a formal proceeding: (i) violates Petitioners' right to due process insofar as the Conversion Order precludes de novo review by a district court and a hearing conducted under the Utah Rules of Evidence and (ii) deprives Petitioners of equal protection because conversion produces an inconsistent operation of law, whereby Petitioners forfeit rights embodied in the informal process. See Memorandum in Support of Request for Review attached as Exhibit A; and Memorandum in Support of Motion to Stay attached as Exhibit B.

6. On June 27, 1994, the Executive Director of the Department of Commerce issued an Order on Review denying Petitioners' Request for Review of the Conversion Order and remanded the proceedings to the Division.

7. Petitioners filed a Petition for Review with the Utah Court of Appeals on July 27, 1994 initiating the instant appeal.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE CONVERSION ORDER BECAUSE THE CONVERSION ORDER IS FINAL UNDER THE COLLATERAL ORDER DOCTRINE.

A. The Collateral Order Doctrine Is A Practical Construction Of The Final Order Rule To Achieve Justice.

This court has jurisdiction to review the Conversion Order under Barney v. Division of Occupational and Professional Licensing, 828 P.2d 542 (Utah App. 1992), because the Collateral Order Doctrine is entirely consistent with the finality requirement. The Doctrine is an established principle of

jurisprudence that permits courts to review orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221 (1949). To qualify for review under the Doctrine, an order must: "[1] conclusively determine the disputed question, [2] resolve an important issue [3] completely separate from the merits of the action, and [4] [be] effectively unreviewable on appeal from a final judgment." Nixon v. Fitzgerald, 457 U.S. 731, 742, 102 S.Ct. 2690.

The United States Supreme Court first announced the Doctrine because it was faced with the finality requirement imposed by 28 U.S.C. § 1291. In Cohen, the Court reviewed a district court order denying application of a state statute, which required shareholders bringing a derivative action to provide security for litigation costs. According to the Court, 28 U.S.C. § 1291 required that "[s]o long as the matter remains open, unfinished or inconclusive, there may be no appeal." Id. at 546; Compare Barney, 828 P.2d at 544 ("an order of [an] agency is not final so long as it reserves something for the agency for further decision."). Nonetheless, the Court refused to rigidly apply the finality requirement because once a final judgment on the merit is concluded, "it will be too late effectively to review the present order and the rights

conferred by the statute, if it is applicable, will have been lost, probably irreparably." Cohen, 457 U.S. at 546.

After forty-five years, the Supreme Court still applies the Doctrine, "not as an exception to the 'final decision' rule, but as a 'practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., 62 U.S.L.W. 4457, 4458 (U.S. June 6, 1994). Therefore, federal and state courts continue to review a "narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final'" Id., 62 U.S.L.W. at 4458; see, e.g., Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 11, 103 S.Ct. 927 (1983) (district court order to stay respondent's action seeking order to compel arbitration was reviewable under the Doctrine); United States v. Deffenbaugh Indus., 957 F.2d 749 (10th Cir. 1992) (discovery order denying defendant access to grand jury record appealable under the Doctrine); In re Newport Savings and Loans Ass'n, 928 F.2d 472, 474-75 (1st Cir. 1991) (court reviewed the district court's refusal to grant "leave" to foreclose upon a mortgage, despite the fact that the forfeiture proceeding under the "drug money" statute was still in progress); R.W. v. Hampe, 626 A.2d 1218 (Pa. Super. Ct. 1993) (order partially sealing the record in medical malpractice case reviewable under the Doctrine).

Precisely the same judicial policies that underpin the Doctrine in other jurisdictions require application of the Doctrine to agency proceedings in Utah. Parties to agency proceedings have no explicit right to appeal important questions that will escape

review once a final decision on the merits is entered. Rule 18 of the Utah Rules of Appellate Procedure specifically precludes parties to an agency adjudication from seeking a discretionary appeal under Rule 5. Thus, while the Doctrine is unnecessary to protect important rights of civil litigants who have access to a discretionary appeal route, the Doctrine is the only means available to parties in an agency adjudication for securing judicial relief from rulings on important rights that escape review upon final judgment. See Tyler v. Department of Human Services, 874 P.2d 119 (Utah 1994) (Collateral Order Doctrine is not applicable when a party can seek discretionary appellate review pursuant to Rule 5). Accordingly, this court should not woodenly apply the finality doctrine, but rather should utilize the Collateral Order Doctrine as a means to effect justice in a manner consistent with the finality doctrine articulated in Barney.

B. The Conversion Order Satisfies All Requirements Of The Collateral Order Doctrine.

The Conversion Order is reviewable as a final order because it satisfies every requirement of the Collateral Order Doctrine. As noted above, an order is reviewable as final if it:

- (1) conclusively determines the disputed question;
- (2) resolves an important issue;
- (3) is completely separate from the merits of the action; and
- (4) is effectively unreviewable on appeal from a final decision on the merits.

Nixon, 457 U.S. at 742.

Application of requirements one and three to the instant case is unquestionable. The Conversion Order conclusively determines the question of whether Petitioners have a right to an informal

hearing in accordance with the Division's own rule, Utah Admin. Code R156-46b-202(1)(m), designating citation hearings as informal. Moreover, the constitutional issues at the heart of the question are completely separate from the merits of the citations.

With respect to the second requirement, the Conversion Order conclusively resolves important constitutional issues. The Conversion Order deprives Petitioners of due process by removing them from an agency mandated forum that permits de novo review in district court as a matter of statutory right. See Utah Code Ann. § 63-46b-15 (1993). As a result, Petitioners are forced through a formal proceeding, which strips them of the right to seek review in the district court, and instead leaves them with a more limited review by appeal to this court. Id. at §63-46b-16; see Town of Chesapeake Beach v. Pessoa Const. Co., 625 A.2d 1014, 1020 (Md. 1993) (order denying stay of arbitration was important for purposes of the Doctrine because "[i]f the parties are incorrectly forced into the wrong forum, the loss to each may be significant"). Moreover, the Division has deprived Petitioners of equal protection under the law because conversion to a formal proceeding, in the face of a rule designating citation hearings as informal, produces inconsistent operation of the law -- some parties to citation hearings receive fuller judicial review and others receive only limited review. Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993). If this court refuses to review these issues, the Division becomes the de facto final arbiter of Petitioners' constitutional rights. Such

a result is entirely at odds with the proper role of an administrative agency.

Finally, the Conversion Order meets the fourth requirement for application of the Doctrine -- that the decision be effectively unreviewable on appeal from a decision on the merits -- because once Petitioners enter the formal proceeding, their options for seeking judicial relief are fixed.⁴ The effect of the Conversion Order is to force Petitioners to contest the citations through a formal adjudicatory proceeding despite the Division's own rule that such hearings are designated as informal. See Utah Admin. Code R156-46b-202(1)(m). Thus, without review by this court, the Petitioners will be forced to participate in the very proceeding from which they seek relief.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction to review the Petition for Review on its merits and this Court should therefore order briefing of the issues underlying the Petition.

DATED this 2nd day of September, 1994.



JAMES B. LEE
BARBARA-K. POLICH
WILLIAM J. STILLING
of and for
Attorneys for Petitioners
PARSONS BEHLE & LATIMER

⁴This is particularly poignant because discretionary appeal through Rule 5 of the Rules of Appellate Procedure is foreclosed. Thus, refusal by this Court to hear the Petition slams shut the only door open to Petitioners for appellate review.

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of September, 1994, I caused to be hand-delivered, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO SUMMARY DISPOSITION** to:

Robert K. Hunt
Utah Assistant Attorney General
111 State Capitol
Salt Lake City, Utah 84114-0810

Patricia Dwyer

Tab B

JAMES B. LEE (1919)
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RECEIVED
MAY 05 1994

DIVISION OF OCCUPATIONAL
AND PROFESSIONAL LICENSING

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

* * * * *

In the Matter of:)	
	)	REQUEST FOR REVIEW OF ORDER
MERIT ELECTRICAL & INSTRUMENTATION, a corporation, and	)	CONVERTING CITATION TO
JONATHAN CARL JURETICH,	)	FORMAL ADJUDICATIVE PRO-
CHRISTOPHER M. SCHIFFMAN, DAN	)	CEEDINGS DATED APRIL 5, 1994
A. JOHNSON, and KIT VANESS)	
CARSON, individuals,	)	Citation Nos. 1846, 1841,
	)	1917, 1918
	)	and 1842
Respondents.	)	(Consolidated)

* * * * *

Pursuant to Utah Code Ann. § 63-46b-12, Respondents seek review of the Order Converting Citation to Formal Adjudicative Proceedings dated April 5, 1994, which Order was entered by Dan S. Jones, Presiding Officer.

The Order is appealed on the grounds that: 1) the Division has no authority to convert a citation hearing to a formal proceeding because it has specifically classified contested citation hearings as informal proceedings; 2) even if the Division has authority to convert the proceedings, the

criteria of Utah Code Ann. § 63-46b-4(3) have not been met insofar as converting the proceeding on the above-referenced citations is not in the public interest and will cause unfair prejudice to the rights of Respondents; and 3) the Division's conversion order is an attempt to engage in impermissible rulemaking.

A memorandum in support of this petition is filed contemporaneously with the filing of the petition and is incorporated herein.

DATED this 5th day of May, 1994.

PARSONS BEHLE & LATIMER

By


Barbara K. Polich

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 1994, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing REQUEST FOR REVIEW OF ORDER CONVERTING CITATION TO FORMAL ADJUDICATIVE PROCEEDINGS DATED APRIL 5, 1994, to:

Robert K. Hunt
Utah Assistant Attorney General
111 State Capitol
Salt Lake City, Utah 84114-0810

and a copy to be hand delivered, in addition to the copy mailed, on the same date to:

Dan S. Jones, Presiding Officer
Bureau of Investigations
DOPL Construction Trades Licensing Section
Division of Occupational and Professional Licensing
Heber M. Wells Building
160 East 300 South
P.O. Box 45805
Salt Lake City, Utah 84114

William S. Essex, Jr., Supervisor
Bureau of Investigations
DOPL Construction Trades Licensing Section
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BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE, STATE OF UTAH

* * * * *

In the Matter of:	)	MEMORANDUM IN SUPPORT OF
	)	REQUEST FOR REVIEW OF
MERIT ELECTRICAL & INSTRUMEN-	)	ORDER CONVERTING CITATION
TATION, a corporation, and	)	TO FORMAL ADJUDICATIVE
JONATHAN CARL JURETICH,	)	PROCEEDINGS
CHRISTOPHER M. SCHIFFMAN, DAN)	
A. JOHNSON, and KIT VANESS	)	Citation Nos. 1846, 1841
CARSON, individuals,	)	1917, 1918 and 1842
)	
Respondents.	)	(Consolidated)

* * * * *

This Memorandum is submitted in support of Respondents' petition for review of the April 5, 1994 order converting the hearing for the above-captioned citations to formal adjudication.

INTRODUCTION

The Presiding Officer in this case acted beyond his authority when he entered an Order Converting Citation to Formal Adjudication Proceedings ("Conversion Order") because the Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. § 63-46b-4 (1993), does not authorize conversions in cases, such as this one, where the Division of Occupational and Professional Licensing ("Division") has by rule specifically designated an adjudication as

informal. Even if the Presiding Officer has discretion to convert designated hearings, his Conversion Order is invalid because conversion in this case does not satisfy the dual statutory requirements that the conversion must "be in the public interest" and that the conversion "does not unfairly prejudice the right of any party." Id. at (3). The Presiding Officer's claim that he requires more expansive procedures is not in the public interest, and is, in fact, contrary to the public interest. Moreover, the conversion unfairly deprives the Respondents of their due process rights to a hearing conducted under the Utah Rules of Evidence and Rules of Civil Procedure. In addition, the conversion establishes a two track procedural system, and arbitrarily relegates Respondents to a track that treats them unfairly, thereby violating their rights to equal protection under the law. Erosion of due process and violation of equal protection not only prejudice Respondents specifically, but harm the public generally. Finally, the conversion to a formal proceeding in this case is simply a mechanism for converting the adjudication to de facto rulemaking. For each of the reasons, the Conversion Order must be reversed and Order For a Return to Informal Adjudication should be entered.

PROCEDURAL SETTING

On or about December 9, 1993, the Division issued citations to Merit Electrical and Instrumentation, Inc. ("Merit")

and four employees (collectively referred to hereinafter as "Respondents") alleging violations of the Utah Construction Trades Licensing Act. Utah Code Ann. § 58-55-1 et seq. (1993). The Division claims that Merit violated § 58-55-2(32)(c) of the Act by hiring unlicensed and non-exempt electricians as employees to perform electrical construction work in connection with a refinery modernization project owned by Kennecott Utah Copper, located near Salt Lake City, Utah. The Division claims that each of the individual respondents violated § 58-55-2(32)(a) by engaging in a construction trade requiring a license (electrical) while not licensed or exempted from licensure. All respondents contest the citations because the electrical work at the site is "construction and repair relating to . . . metal and coal mining" and is therefore exempt from licensure under Utah Code Ann. § 58-55-6(2) (1993).

All respondents timely filed notice with the Division contesting the citations. Each respondent denied violating the Act and requested a hearing in accordance with the UAPA, Utah Code Ann. § 63-46b-1, et seq., and the applicable rules at Utah Admin. Code R156-46b-1, et seq. Despite the classification of hearings to contest citations as informal proceedings under R156-46b-202(1)(m), the Division, on February 11, 1994, filed a Motion to Convert to Formal Adjudicative Proceedings ("Motion to Convert"). That same day, the Presiding Officer granted the Division's motion and issued

an Order Converting Citation to Formal Adjudicative Proceeding. Respondents timely filed an objection to the Division's motion and the Presiding Officer's order. In response, the presiding officer vacated his order on March 4, 1994. After both parties submitted further responsive pleadings, the Presiding Officer conducted a hearing on the Motion to Convert on March 28, 1994. On April 5, 1994, the Presiding Officer issued a second Order Converting Citation to Formal Adjudication Proceeding ("Conversion Order"). A Notice of Hearing was issued by the Division the same day, which set the formal adjudication of the citations for May 25, 1994. Pursuant to Utah Code Ann. § 63-46b-12, Respondents timely seek review of the Conversion Order and this Memorandum is in support of that Request for Review.

Respondents incorporate all arguments presented to the Presiding Officer in prior pleadings and present new arguments as follows.

ARGUMENT

- I. THE DIVISION HAS NO AUTHORITY TO CONVERT A CITATION HEARING TO A FORMAL PROCEEDING BECAUSE IT HAS SPECIFICALLY CLASSIFIED CONTESTED CITATION HEARINGS AS INFORMAL PROCEEDINGS.

The Division cannot convert a proceeding, which it has specifically designated by rule as informal, to a formal hearing because it has no statutory or regulatory discretion to do so.

Utah Code Ann. § 63-46b-4, which the Division relies on to convert the citation proceedings, provides:

(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

(2) Subject to the provisions of Subsection (3), all agency 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.

(emphasis added). When read in isolation, subsection (3) appears to allow conversion of any proceeding. However, when the three sections are read as a whole, it becomes apparent that subsection (3) serves solely to modify default proceedings delineated in subsection (2). If the Legislature intended for subsection (3) to

apply to designated hearings, it would have made subsection (1) "subject to the provisions of Subsection (3)," as it did with subsection (2). Cf. Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944, 947 (Utah Ct. App. 1993) (concluding that omission of or reference to a specific adjacent subsection of a statute evidences legislative intent). Since the Division, by way of Rule 156-46b-202(1)(m), has specifically designated contested citation hearings as informal adjudicative proceedings, the Presiding Officer acted beyond his authority in converting the present adjudication to a formal proceeding. See State ex rel. Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980) (holding procedural rules "cannot be ignored or followed by the agency to suit its own purposes").

The wisdom of the Legislature in enacting Utah Code Ann. § 63-46b-4 to designate a proceeding as formal or informal, while providing for conversion only in subsection (2) proceedings, is apparent in the instant case. The Division has, as noted previously, designated contested citation hearings as informal. Utah Admin. R156-46b-202(1)(m). However, in addition to merely designating citation hearings as informal, the Division utilized its experience with citation hearings, considered the special

nature of citation hearings,¹ and required by rule that evidentiary hearings be conducted when citations are contested. Additionally, while the Division has provided the Director with discretion concerning the informal designation in other sections of Rule 156-46b-202, see, e.g., id. at (q), it has not provide the Director with the same discretion with respect to contested citation hearings. The provision for an evidentiary hearing demonstrates the Division's recognition that a full informal hearing is not only necessary, but is also sufficient to resolve contested citations.² To allow the Division to arbitrarily change its mind in a particular case after carefully crafting the procedural requirements for contested citations would nullify the rulemaking embodied in Rule 156-46b-202.

The UAPA does not provide the Presiding Officer with authority to convert the proceedings in the present case to an informal adjudication. The Conversion Order is, therefore, invalid.

¹ Under the Construction Trades Licensing Act, the peculiar situation arises where the person cited has the burden to prove their innocence because a violation is presumed unless a citation is contested. Utah Code Ann. § 58-55-13(4)(a)(i) (1993). The Division designated contested citation hearings as informal in light of this statutory framework. Therefore, a contested citation hearing is designed to protect the rights of the person cited, and has no public interest implication. To implicate public interest in a contested citation hearing would undermine the Respondents' opportunity to afford themselves the protections under the Division's rules.

² It is noteworthy that the division designated twenty procedures as informal under R156-46b-202(1), but only required evidentiary hearings for two types of proceedings, one of which is a contested citation hearing. Obviously, the Division recognized that citations often present complicated factual issues and mandated more rigorous procedures than are typically required for informal adjudications under the UAPA.

II. EVEN IF THE DIVISION HAS AUTHORITY TO CONVERT THE PROCEEDINGS, THIS CASE FAILS TO MEET THE STANDARDS SET FORTH IN UTAH CODE ANN. § 63-46B-4(3).

Even if the Division has the authority to convert the proceeding, converting the citation hearing to a formal adjudication is impermissible because the conversion is not in the public interest and it unfairly prejudices Respondents' rights. Utah Code Ann. § 63-46b-4(3) provides in part that the Presiding Officer may convert an informal adjudicative proceeding to a formal proceeding only 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.

Despite the UAPA requirement that both conditions for conversion be met, the Presiding Officer's decision to convert this hearing satisfies neither. The decision to convert is not in the public interest because a formal proceeding does not enhance the Presiding Officer's ability to decide the determinative issues. Moreover, conversion to a formal proceeding deprives Respondents of the substantive procedural rights embodied in a district court trial, and violates their rights to equal protection by depriving them of the same opportunity to adjudicate the citations informally, as other similarly situated persons. Accordingly, the Presiding Officer's Conversion Order must be reversed.

**A. THERE IS NO BASIS TO CONVERT TO A FORMAL
ADJUDICATION AS A MATTER OF PUBLIC INTEREST.**

Contrary to the Presiding Officer's finding that a formal adjudication is necessary in order to resolve the issues in question, adequate procedural mechanisms exist under informal proceedings to allow the Presiding Officer to gather facts necessary for ruling on the citations.

According to the Presiding Officer, the public interest warrants a formal hearing because the issues surrounding the citations

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 to fully address the issues in the case, and may require the expertise of the contractors licensing board.

Conversion Order at 3. As explained below, none of the desired, additional procedural mechanisms are necessary because, under informal adjudication procedures, the UAPA provides an ample procedural armamentarium for resolving whether the Respondents' activities are exempt under the Construction Trades Licensing Act.

The Presiding Officer already possesses significant and sufficient authority under the UAPA to gather all the necessary evidence during an informal adjudication. In the first instance, unlike the vast majority of informal adjudications in other

contexts, the Division explicitly requires evidentiary hearings for contested citations. See Utah Admin. Code R156-46b-403(3)(a). Moreover, the UAPA explicitly provides parties to an informal adjudication hearing with the right to "testify, present evidence, and comment on the issues." Utah Code Ann. § 63-46b-5(1)(c) (1993). Accordingly, parties can provide the Presiding Officer with all the information at their disposal to advocate their positions.

As the Presiding Officer noted in his Conversion Order, the factual determination in this matter involves "the relationship of the mine site to the refinery site." Conversion Order at 5. All of the evidence necessary for the Presiding Officer to interpret the mining exemption under Utah Code Ann. § 58-55-6(2) would most likely be in the possession of the parties. The parties themselves are in the best position to present all relevant evidence pertaining to whether work at the site relates to mining. In light of the parties' ability to provide all relevant evidence, it is entirely unnecessary for the Presiding Officer to solicit evidence from outside sources through a formal procedure. If the Presiding Officer believes that the parties will inadequately present all pertinent information, he can rely on the statutory authority to "issue subpoenas or other orders to compel production of necessary evidence." Id. at (e).

Moreover, it is unnecessary for the parties to have the right to cross-examine witnesses as the Presiding Officer claims. Nothing in the procedures for an informal adjudication prevents the Presiding Officer from questioning the parties if he feels the need to understand the evidence more fully. Given the Presiding Officer's authority to question the parties, it is hard to imagine that the Presiding Officer's ability to adjudicate the citations will be strengthened by providing the parties with the ability to cross-examine witnesses and present rebuttal evidence. The right of cross-examination is therefore superfluous for the purpose of enhancing the Presiding Officer's ability to gather facts and accordingly it has no public interest implication.

Similarly, the Presiding Officer's claimed need for the expertise of the contractors licensing board can be adequately addressed through an informal proceeding. The Director of the Division of Occupational and Professional Licensing has authority to designate "an individual or body of individuals to conduct or to assist the director in conducting any part or all of an adjudicative proceeding." Utah Code Ann. § 58-1-109(1) (1993). If the director believes that the issues surrounding resolution of the citations require the expertise of the Contractors Licensing Board, he can designate that board to assist the Presiding Officer during the informal adjudicative proceeding. In essence, the Board can become a de facto expert for the Presiding Officer. Consequently,

a formal proceeding offers absolutely no additional opportunity for the Presiding Officer to utilize the expertise of the Contractors Licensing Board.

In view of the Presiding Officer's inherent fact gathering powers, there is no basis as a matter of public interest to convert to a formal adjudication. Thus, failing the first requirement for conversion under the UAPA, the Conversion Order should be reversed.

B. CONVERTING TO A FORMAL ADJUDICATION IS IMPERMISSIBLE UNDER UTAH CODE ANN. § 63-46B-4(3) BECAUSE CONVERSION UNFAIRLY PREJUDICES THE RESPONDENTS' RIGHTS.

Allowing the Division to arbitrarily and capriciously change to a formal proceeding raises equal protection and due process issues in the instant case. In essence, the Division has created two procedural tracks with different rights and protections. The Division appears to have singled out the Respondents for a more costly and cumbersome track, which provides less procedural protections. Conversion of the citation hearing to an informal adjudication deprives Respondents' of their rights to a de novo hearing conducted under the Utah Rules of Evidence and Rules of Civil Procedure, as embodied in the informal scheme.

1. Conversion Violates Respondents' Due Process Rights

Conversion violates Respondents' due process rights because it deprives them of procedural safeguards guaranteed under

UAPA and the Utah Administrative Code. Respondents' due process rights are implicated in this case because courts "first look to relevant statutes" to determine what protection due process requires in a particular case. Von Hake v. Thomas, 759 P.2d 1162, 1169 (Utah 1988); see also State ex rel. Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980) (holding procedural rules "cannot be ignored or followed by the agency to suit its own purposes").

The Utah Administrative Code provides that a "contested citation hearing held in accordance with subsection 58-55-13(4) "is classified as an informal adjudicative proceeding. Utah Admin. Rule 156-46b-202(1)(m) (1994). Parties seeking judicial relief from an informal proceeding have a right to a de novo trial in the district court governed by the Utah Rules of Evidence, see Utah Code Ann. § 63-46b-15(1)(a) & (3)(b) (1993), which prohibit the use of hearsay and irrelevant evidence. See Utah R. Evid. 402 and 802. Conversion to a formal adjudication would deprive Respondents of their right to receive a hearing where hearsay and irrelevant evidence are excluded because, contrary to the Division's assertions otherwise, formal adjudications are not governed by the Utah Rules of Evidence. See Division's Response to Motion and Order at 4; Transcript of Hearing on Motion to Convert at 6-7.

In fact, during a formal hearing, the UAPA explicitly permits the use of evidence which would be excluded under the Utah

Rules of Evidence. For example, the UAPA mandates that the "presiding officer may not exclude evidence solely because it is hearsay." Utah Code Ann. § 63-46b-8(1)(c) (1993). If the citation is adjudicated under formal proceedings, Respondents would acquire the right to cross-examine witnesses, but would be unable to effectively utilize their right because, by definition, hearsay evidence cannot be cross-examined. The procedural safeguard of cross-examination, which the Presiding Officer relied on so heavily in his Conversion Order, would offer Respondents no protection against hearsay evidence. In light of the fact that third parties can more easily intervene in a formal proceeding than under Rule 24 of the Utah Rules of Civil Procedure, the inevitable intervention by groups not a party to the citation proceeding magnifies the Respondents' dilemma. Not only will they be faced with hearsay evidence that becomes part of the only factual record available for appellate review, but they must face the onslaught of such evidence from a multitude of intervenors who will attempt to flood the proceedings with evidence, hearsay and otherwise, to support their own agendas.

In the same vein, irrelevant material may taint the record under a formal proceeding. While the "presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious," there is no mandate that he must do so. Utah Code Ann. § 63-46b-8(1)(b)(i) (1993). Contrast the UAPA's permissive

language with the Utah Rules of Evidence: "Evidence which is not relevant is not admissible." Utah R. Evid. 402. Like the problem with hearsay, intervention of outside parties amplifies the potential for introduction of irrelevant evidence. Not only will Respondents lose the right to exclude irrelevant evidence, but the expense they incur in trying to fend off such evidence from numerous parties will increase dramatically. Although an increase in defense costs alone might not amount to unfair prejudice of Respondents' rights, increased defense costs, in conjunction with deprivation of due process rights, certainly rises to the level of unfair prejudice.

If Respondents have an opportunity to develop a new record before a trial court, the problems with hearsay and inadmissible evidence would evaporate. The de novo trial would be conducted under the Utah Rules of Evidence and a new record can be developed which is free from irrelevant evidence and hearsay. However, once a formal procedure occurs, the Division deprives Respondents of their opportunity to develop a new record.

While a formal hearing may be a "trial-type" proceeding, see Kirk v. Division of Occupational and Professional Licensing, 815 P.2d 242, 245 (Utah Ct. App. 1991), the due process protections afforded by the formal proceeding fall far short of those available in an actual de novo trial. The Presiding Officer's conversion will deprive Respondents of their due process rights and will

unfairly prejudice them. Accordingly, the Conversion Order should be reversed.

2. Conversion Violates Respondents' Right to Equal Protection

Conversion to a formal proceeding violates Respondents' rights to equal protection because it essentially establishes two tracks for adjudicating citations, an informal track by designation and a formal track by conversion. Each of these tracks affords Respondents with different procedural rights and safeguards from other persons within the same class (i.e., persons contesting citations). Because Respondents are members of a larger class, equal protection mandates that they be treated the same as all other members of the class. State Tax Comm'n v. Department of Finance, 576 P.2d 1297, 1298 (Utah 1978) ("Equal protection protects against discrimination within a class."). Because the Respondents have "been singled out from among a larger class" of persons contesting citations, the Division's imposition of a different set of procedures "must be considered to be arbitrary and constitutionally prohibited." Id.

The Respondents do not argue that either the formal or informal proceedings are inherently defective. Rather, they are asserting that all persons similarly situated--anyone contesting citations--should be afforded the same procedural rights. Thus, once a particular proceeding is designated by rulemaking as

informal, the Respondents, as well as all other similarly situated persons contesting citations should be entitled to the rights embodied in that informal adjudicatory process. Any effort to deprive Respondents of those rights because they are working for a large mining concern is particularly egregious.

In State Tax Commission v. Department of Finance, 576 P.2d 1297 (Utah 1978), the Utah Supreme Court held that the State Tax Comm'n deprived the State Insurance Fund of equal protection because it imposed a tax upon the Fund that was not imposed upon private insurers. The Court ruled that the Fund and the private insurers all belonged to the same class, namely companies providing workmen's compensation. Therefore, the tax imposed solely upon the Fund was "arbitrary and constitutionally prohibited." Id. at 1298.

Likewise, the Division in this case cannot arbitrarily modify its own regulatory scheme and convert to a formal hearing. To do so singles out Respondents, and deprives them of the right to avail themselves of the protections embodied in the UAPA and the Division's rules. The conversion to a formal proceeding deprives Respondents of equal protection and must therefore be reversed.

III. THE DIVISION'S CONVERSION ORDER IS AN ATTEMPT TO ENGAGE IN RULEMAKING

The Conversion Order is simply an effort to revive an unsuccessful attempt to make rules restricting the mining exemption

under the Utah Construction Trades Licensing Act. On October 15, 1993, the Division published a proposed rule that limited the meaning of "related to metal and coal mining"--the very terms that the Presiding Officer must apply to resolve the citations. See Utah State Bull. 93-20 at 8 (October 15, 1993). After a public hearing on the proposed rule, the Division abandoned the change because it concluded that the issue was best left to the Legislature. The conversion to a formal adjudication is an attempt to accomplish by adjudication, what the Division itself concluded could not be accomplished by rulemaking.³

A formal citation proceeding, with the likelihood of intervention by a multitude of "interested" parties, would convert the evidentiary hearing into a public hearing more akin to the rulemaking process than adjudication. Moreover, third parties would infuse the hearings with broad policy concerns that are irrelevant to resolution of the citations. As noted above, if irrelevant evidence is admitted at the hearing, the Respondents have no opportunity to correct the record.

The issue at hand for the Presiding Officer is whether the Respondents activities at the site were related to mining. The parties to this action are in the best position to provide evidence

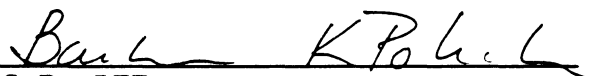
³ The Division's efforts to promulgate a rule that limited the definition of related to "metal and coal mining" severely taints its ability to impartially adjudicate the present case because it has essentially established its position on the determinative question in this case.

necessary to determine the relatedness of the refinery site to mining activities. There is no need for the Division to engage in de facto rulemaking to resolve the validity of the citations. The Conversion Order should be overturned to prevent the Presiding Officer not only from converting to a formal proceeding, but also to prevent him from converting an adjudication into de facto rulemaking.

CONCLUSION

For the foregoing reasons, the Respondents request that the Conversion Order be reversed and that the Division enter an order setting a time for an informal hearing.

DATED this 5th day of May, 1994.



JAMES B. LEE
BARBARA K. POLICH
WILLIAM J. STILLING
PARSONS BEHLE & LATIMER
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 1994, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF REQUEST FOR REVIEW OF ORDER CONVERTING CITATION TO FORMAL ADJUDICATIVE PROCEEDINGS

to:

Robert K. Hunt
Utah Assistant Attorney General
111 State Capitol
Salt Lake City, Utah 84114-0810

and a copy to be hand delivered, in addition to the copy mailed, on the same date to:

Dan S. Jones, Presiding Officer
Bureau of Investigations
DOPL Construction Trades Licensing Section
Division of Occupational and Professional Licensing
Heber M. Wells Building
160 East 300 South
P.O. Box 45805
Salt Lake City, Utah 84114

William S. Essex, Jr., Supervisor
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Robert K. Hunt

Tab C

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Attorneys for Respondents

COPY

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

In The Matter Of:	:	OBJECTION TO MOTION AND
	:	ORDER CONVERTING CONTEST
MERIT ELECTRICAL &	:	OF CITATIONS TO FORMAL
INSTRUMENTATION,	:	ADJUDICATIVE PROCEEDING
a corporation, and JONATHAN	:	AND REQUEST FOR HEARING
CARL JURETICH, CHRISTOPHER M.	:	
SCHIFFMAN, DAN A. JOHNSON, and	:	Citation Nos. 1846, 1841
KIT VANESS CARSON, individuals,	:	1917, 1918
	:	and 1842
Respondents.	:	
	:	(consolidated)

Respondents, acting by and through their attorneys, hereby object to the Motion of the Division of Occupational and Professional Licensing ("the Division") to convert respondents' contest of the above-referenced citations to a formal adjudicative proceeding, and to the Order of the presiding officer granting that motion dated February 11, 1994, and hereby request a hearing of the Motion, Order and this Objection.

PROCEDURAL BACKGROUND

This matter arises from citations issued by the Division asserting violations of the Utah Construction Trades Licensing Act, Utah Code Annotated §58-55-1 et seq. ("the Act"). On or about December 9, 1993, the Division issued a citation to Merit Electric & Instrumentation ("Merit"), under Section 58-55-2(32)(c) of the Act claiming that Merit hired unlicensed and non-exempt electricians as employees to perform electrical construction work in connection with the refinery modernization project owned by Kennecott Copper Corporation ("Kennecott"), located on Kennecott's property near Salt Lake City, Utah. On that same day, the Division issued citations to each of the individual respondents, asserting that each violated Section 58-55-2(32)(a) of the Act by engaging in a construction trade requiring trade licensure (electrical) while not licensed or exempted from licensure.

Both Merit and its employees dispute the citations on the basis that such work and employment are exempted from licensure under Utah Code Annotated §58-55-6(2), Exemptions from Licensure.

Merit and each of the individual respondents timely filed an appropriate notice with the Division contesting citations. Each (1) denied they violated the Act as asserted in the citations, and (2) requested a hearing in accordance with the Utah Administrative Procedures Act ("the UAPA"), Utah Code Annotated §63-46(b)-1 et

seq., and the Rules applicable to the Division under the UAPA ("the Division Rules").¹

Rule 156-46b-4(2)(d) of the Division Rules specifically requires that any hearing held in conjunction with a challenge to a citation issued under the Act be heard at the Division level as an informal adjudicative proceeding. Under the UAPA, an agency may move to convert an informal proceeding to a formal proceeding in an appropriate case, but only where specific criteria are satisfied. On or about February 11, 1994, the Division moved the presiding officer to convert this matter to a formal proceeding under Utah Code Annotated §63-46b-4(c). That same day, the presiding officer granted that motion and by Order dated February 11, 1994, converted this matter to a formal adjudicative proceeding, subject to the objection of respondents being filed within 20 days following the date of the Order. The respondents object to the conversion to a formal proceeding, and this objection is timely filed.

The basis for respondents' objection is that none of the required criteria have been met and, therefore, this matter is not an appropriate case for conversion. The conversion of this matter, if allowed, will substantially and irreparably prejudice the respondents and undermine their right to both procedural and substantive due process of law, and deny them the protections of the procedural requirements of the UAPA and the Division's own procedural rules. For the reasons set forth below, the respondents

¹ The Division Rules relating to the Utah Administrative Procedures Act are codified in the Utah Administrative Code §R156-46b-1 et seq.

object to the conversion of this matter from an informal proceeding to a formal proceeding.

ARGUMENT

THE REQUISITES FOR CONVERSION TO A FORMAL ADJUDICATIVE PROCEEDING UNDER UTAH CODE ANNOTATED §63-46B-4(3) HAVE NOT IN FACT BEEN SATISFIED SO THAT CONVERSION IS NOT PERMITTED NOR JUSTIFIED IN THIS PARTICULAR MATTER.

Utah Code Annotated §63-46b-4(3), the authority under which the presiding officer has ordered the conversion of this matter to a formal adjudicative proceeding requires the Division to show by substantial evidence that (a) the conversion is in the public interest, AND (b) that the conversion of the proceeding does not unfairly prejudice the rights of any party. Without any hearing on the matter, the presiding officer made a ruling converting this matter which decision is not supported by any evidence of record nor any fact relevant to the resolution of the subject challenges to the citations on the refinery project.

- 1. No Legitimate Public Interest will be Served by Conversion of this Matter to a Formal Adjudicative Proceeding.**

At issue in this case is the narrow question of whether Merit's employees who do electrical trade work are required to be licensed by the Division prior to engaging in electrical construction work on the Kennecott refinery. The determination of that narrow legal issue depends only upon the application of the Utah Legislature's express exemption from licensure stated in Utah Code Annotated §58-55-6(2), of persons engaged in construction and repair work related to metal mining, to the electrical work at the

refinery project. This case turns solely upon determining whether the refinery is "related to" Kennecott's Utah metal mining operation as stated in the exemption. No person other than the respondents and Kennecott have any "legal interest" whatsoever in that determination. The mere curiosity regarding the resolution of this matter by other purely political or economic interest groups does not create an issue of public interest where none otherwise exists.

Since the time the exemption was enacted in 1957, neither the Division nor any of its previous incarnations have required construction tradesmen working at the refinery to be trade licensed by the State of Utah. That history irrebuttably demonstrates that the public interest as expressed in the exemption has been served and satisfied at the refinery site for nearly 40 years. The public interest in this case requires and compels the determination that the citations be withdrawn and the matter closed without any further proceedings. The Division has made no showing that any legitimate public interest is in issue in this matter, and there is no basis for converting this matter to a formal adjudicative proceeding. Therefore, the motion to convert should be denied.

2. Conversion of this Proceeding Will Unfairly Prejudice the Rights of All Respondents.

The respondents in this matter, Merit and its employees, are entitled to be treated like any other persons cited for violations of the Act. That is, they are entitled to contest the citations relating to the specific project, and have no obligation to fund or

participate in litigation not related to the specific issues raised in the citations. The Division's attempt to convert the proceeding from informal to formal is for the express purpose of allowing other parties to attempt to intervene and for the Division to obtain an advisory decision regarding the full scope and extent of the metal and coal mining exemption. The conversion of this matter to a formal adjudicative proceeding by the Division is designed and intended to expand the litigation to issues unrelated to the matter of Merit and its employees, and to provide a political arena where much broader and irrelevant questions relating to what the law should or should not be may be addressed by parties who are completely alien to this matter. Such a formal proceeding will degenerate to a debate on broad public policy topics which debate is only appropriate for the legislative process.² These public

² In 1993, the Division published proposed rule changes which attempted to narrow the statutory exemption for metal and coal mining. On October 28, 1993, a hearing was held before the Administrative Law Judge with regard to the proposed rule changes. As a result of the discussion at the hearing, as well as the advice of the Division's counsel, the proposed rule was withdrawn. At the hearing, it was represented to the Administrative Law Judge that the issue would be taken to the Utah legislature to attempt to modify or narrow the exemption by statute. However, with the 1994 legislative general session just completed, there has been no proposed legislation enacted or even introduced regarding the metal and coal mining exemption from contractor or trade licensing. Despite the withdrawal of the proposed rule and the failure to introduce legislation regarding the exemption, the Division has issued the citations to Merit and its employees based upon a standard as stated in the aborted proposed rule; although that standard is completely different from the standard used for approximately 40 years with regard to the exemption. In other words, what the Division could not do or failed to do with the rule making process and legislative process with regard to the exemption, it has now chosen to do it by sheer force of Administrative fiat. Although the exemption has not changed for almost 40 years, the Division has chosen to enforce it in a

policy issues are irrelevant to the challenged citations at issue in this matter. The only relevant issue is whether the exemption covers Merit and its employees at the Kennecott refinery modernization project.

The conversion of this matter to a formal adjudicative proceeding will require Merit and its employees to incur substantial expense in both time and money in order to contest the citations and to deal with massive amounts of irrelevant and inflammatory evidence relating to the political agenda of unions, trade associations or others, geared toward coercing Kennecott into an agreement to employ their members instead of the most effective and efficient contractors and employees on the various Kennecott projects. That prejudice to respondents will be both real and substantial.

The clear reason behind the motion to convert, is the desire of the Division to provide a means whereby other parties might intervene in this matter in order to initiate a debate as to what the law ought to be relating to the application of the exemption, rather than what the law is and has been for nearly 40 years. The Division, by converting this matter to a formal proceeding, is intent on initiating what is nothing more than a de facto Declaratory Order proceeding which is binding upon respondents without regard to their consent to be subjected to such a proceeding. For, as the Division well knows, a ruling stemming

completely different way than ever before, without following any rule making or legislative process to effect the change.

from a Declaratory Order proceeding is not binding on any interested party who does not consent to be bound by the ruling. Utah Code Annotated §63-46b-21(3)(b). The Division is attempting to do by administrative fiat what it is, as a practical matter, unable to do under the UAPA, to the substantial detriment and prejudice of Merit and its employees.

There is no showing by the Division that any other party has any legal interest in the outcome of the challenges to the citations, or that intervention is necessary or desirable for the resolution of the specific issue presented by the challenge to the citations. Because there is no basis or need for any third party to intervene in this matter, there is no reason to convert the matter from informal to formal.³

Under the intervention provisions relating to formal adjudicative proceedings, only parties who can demonstrate that they have "legal rights or interests" in the matter may intervene and be heard on the record in the proceeding. Utah Code Annotated §63-46b-9(1)(c). Neither the Act, the UAPA nor the Division Rules define what constitutes a legal right or interest for purposes of determining the right of a third party to intervene in a formal adjudicative proceeding. However, the case law in Utah under Rule 24 of the Utah Rules of Civil Procedure is both instructive and binding as to what showing is required before a party is entitled to intervene. For example, in Lima v. Chambers, 657 P.2d 279,

³ Although the Division may want to avoid a de novo review by the Utah State District Court as provided under the Division Rules and the UAPA provisions governing informal proceedings.

_____ (Utah 1982), the Utah Supreme Court announced that "[t]o justify intervention, the party seeking intervention must demonstrate a direct interest in the subject matter of the litigation such that the intervenor's rights may be affected, for good or for ill." (emphasis added) More specifically, the Court stated:

[The required] interest does not include a mere, consequential, remote or conjectural possibility of being in some manner affected by the result of the original action. It must be such a direct claim upon the subject matter of the action that the intervenor will either gain or lose by direct operation of the judgment to be rendered.

657 P.2d at _____ (quoting State v. Craig, 364 S.W.2d 343, 346 (Mo. Ct. App. 1963)(emphasis added). Since the decision in Lima, the Utah Court of Appeals has found that "the test normally applied to the right to intervene is whether the person seeking to intervene may gain or lose by a direct legal operation and the effect of the Judgment." Interstate Land Corporation v. Patterson, 797 P.2d 1101 (Utah App. 1990)(citing Commercial Block Realty v. USF&G, 28 P.2d 1081, 1083 (Utah 1934))(emphasis added).

No other party has any legal right or interest which will be "directly affected" by a judgment in this matter. For example, no judgment to be rendered in this matter will create any entitlement by members of any union to be employed on the project. No judgment to be rendered in this matter will or can obligate Kennecott to contract with members of any particular trade association. Such groups have no direct legal interest or right which will in any way be directly enhanced or impaired by the outcome of this citation contest. The politically or ideologically driven beliefs of such

groups as to whether the refinery is "related to" Kennecott's metal mining operation are irrelevant to the resolution of this matter. No other party who would have any hope of proving a direct interest in the outcome of this case has identified itself or expressed any interest whatsoever in being involved. No showing of a need to provide a forum for qualified intervenors has been made by the Division. Therefore, a conversion to a formal proceeding is not warranted in this case and will materially prejudice the respondents' rights to substantive and procedural due process otherwise provided for under the rules governing informal proceedings.

In the order, the presiding officer seems to attach major significance to the fact that respondents have retained legal counsel to represent them in this matter. That fact is absolutely irrelevant and inappropriate to any decision or consideration of the conversion of this matter from an informal to a formal adjudicative proceeding. Parties contesting citations under the Act are certainly entitled to have legal counsel represent them and cannot be prejudiced for having exercised their right to counsel. The criteria for determining whether conversion is warranted do not provide for consideration of whether any party has retained legal counsel.

CONCLUSION

Based upon the foregoing, respondents request that the matter be remanded for informal proceedings consistent with the UAPA and the Division Rules. Further, the respondents respectfully request

a hearing of the Division's Motion and Order as well as this Objection.

DATED this 3rd day of March, 1994.

WALSTAD & BABCOCK

By: 

Darrel J. Bostwick
Jeffery R. Price

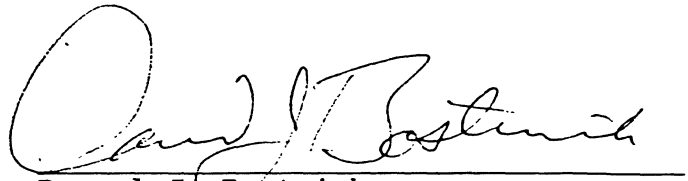
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CERTIFICATE OF SERVICE

I, Darrel J. Bostwick, hereby certify that on this 3rd day of March, 1994, I caused to be served a true and correct copy of Object to Motion and Order Converting Contest of Citations to Formal Adjudicative Proceeding upon William S. Essex, Jr., Supervisor, Bureau of Investigations, DOPL Construction Trades Licensing Section by hand delivering same to his offices located at Division of Occupational and Professional Licensing, Heber M. Wells Building, 160 East 300 South, Post Office Box 45805, Salt Lake City, Utah 84145-0805, and to Betsy L. Ross, Esquire, Utah

Assistant Attorney General, by mailing the same to her office located at State Office Building, #4120, Salt Lake City, Utah 84114.



Darrel J. Bostwick

Tab D

CONSTITUTION OF THE UNITED STATES OF AMERICA

PREAMBLE

Article

- I. [LEGISLATIVE DEPARTMENT]
- II. [EXECUTIVE DEPARTMENT]
- III. [JUDICIAL DEPARTMENT]
- IV. [STATE AND TERRITORIAL RELATIONS]
- V. [AMENDMENT]
- VI. [MISCELLANEOUS PROVISIONS]
- VII. [ADOPTION]

AMENDMENTS I-X [BILL OF RIGHTS]
AMENDMENTS XI-XXVI

PREAMBLE

We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

[LEGISLATIVE DEPARTMENT]

Section

1. [Legislative powers vested in Congress.]
2. [House of Representatives.]
3. [Senate.]
4. [Election of members — Sessions.]
5. [Organization — Proceedings — Adjournment.]

Section

6. [Compensation — Privileges — Holding other office.]
7. [Bills and resolutions — Veto.]
8. [Powers of Congress.]
9. [Powers denied Congress.]
10. [Powers denied the states.]

Section 1. [Legislative powers vested in Congress.]

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Sec. 2. [House of Representatives.]

[1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2.] No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States

AMENDMENT XIV**Section**

1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]

Section

4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

CONSTITUTION OF UTAH

PREAMBLE

Article

- I. Declaration of Rights.
- II. State Boundaries.
- III. Ordinance.
- IV. Elections and Right of Suffrage.
- V. Distribution of Powers.
- VI. Legislative Department.
- VII. Executive Department.
- VIII. Judicial Department.
- IX. Congressional and Legislative Apportionment.
- X. Education.
- XI. Counties, Cities and Towns.
- XII. Corporations.
- XIII. Revenue and Taxation.
- XIV. Public Debt.
- XV. Militia.
- XVI. Labor.
- XVII. Water Rights.
- XVIII. Forestry.
- XIX. Public Buildings and State Institutions.
- XX. Public Lands.
- XXI. Salaries.
- XXII. Miscellaneous.
- XXIII. Amendment and Revision.
- XXIV. Schedule.

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

Cross-References. — Enabling Act permitting adoption of Constitution, Enabling Act, § 1 et seq.

NOTES TO DECISIONS

ANALYSIS

Construction.

- All language to be given effect.
- Applicability of maxims.
- Construction by legislature.
- In light of circumstances surrounding origin.
- Inclusion of Constitution in "law."
- Intent.
- Limitation of powers.
- Prospective operation.
- Provisos.

—Same word used repeatedly.

—Substitution of one word for another.

Definition of Constitution.

Relation to state.

Construction.

—All language to be given effect.

When possible, effect should be given to all of language used in constitutional provision. *Halling v. Industrial Comm'n*, 71 Utah 112, 263 P. 78 (1927).

project did not unconstitutionally grant benefits to private individuals; any benefits were strictly incidental to the public purpose of ter-

mination of urban blight. *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975).

COLLATERAL REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d Franchises §§ 9 to 23.

C.J.S. — 37 C.J.S. Franchises § 26.
Key Numbers. — Franchises ⇨ 11.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

History: Const. 1896.

Cross-References. — Prohibition on pri-

vate or special laws, Utah Const., Art. VI, Sec. 26.

NOTES TO DECISIONS

ANALYSIS

In general.
Age of majority.
Agent for service of process.
Automobile license law.
Construction with Art. VI, § 26.
Contract carrier permit.
Cosmetologists' license law.
Criminal actions.
—Investigations.
—Prosecution.
—Sentence.
Criminal sentence.
Disparate tax assessments.
Excess revenue refunds.
Guest statutes.
Inheritance Tax Law.
Insurance premium tax exemption.
Intoxicating liquor.
Licenses.
Massage parlor ordinance.
Municipal employment prerequisites.
Notice requirements.
Property.
—Responsibility for water service.
Public employees' retirement system.
Public officers' bonds.
Public officers' salaries.
Road poll tax.
School activities.
Search warrants.
Sunday closing laws.
Tax sales.
Unfair Practices Act.

In general.

All laws shall operate uniformly wherever uniform laws can be enacted. *State v. Holtgreve*, 58 Utah 563, 200 P. 894, 26 A.L.R. 696 (1921).

Objects and purposes of law present touchstone for determining proper and improper

classifications. *State v. Mason*, 94 Utah 501, 78 P.2d 920, 117 A.L.R. 330 (1938); *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

One who assails legislative classification as arbitrary has burden of proving it to be such. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for differentiation between classes or subject matters included, as compared to those excluded, provided differentiation bears reasonable relation to purposes of act. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Before legislative enactment can be interfered with, court must be able to say that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Only where some persons or transactions excluded from operation of law are, as to the subject matter of the law, in no differentiable class from those included in its operation, is the law discriminatory in the sense of being arbitrary and unconstitutional, and if reasonable basis to differentiate can be found, law must be held constitutional. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

Inability of legislature to make perfect classification does not render statute unconstitutional. *State v. J.B. & R.E. Walker, Inc.*, 100 Utah 523, 116 P.2d 766 (1941).

In determining whether classification made by legislature is unconstitutional, discrimination is very essence of classification and is not objectionable unless founded upon unreasonable distinctions. *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P.2d 464 (1948).

An act is never unconstitutional because of

(7) If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the agency may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege.

History: C. 1953, 63-46b-3, enacted by 1987, ch. 161, § 259; 1988, ch. 72, § 16.

NOTES TO DECISIONS

ANALYSIS

Applicable law.
Defect in notice.
— Waiver.
Dismissal.

Applicable law.

The reference to "applicable law" in Subsection (3)(a) is a reference to an agency's enabling statute as adopted by the legislature, not an agency's rules as adopted by the agency. *Nielson v. Division of Peace Officer Stds. & Training*, 851 P.2d 1201 (Utah Ct. App. 1993).

Defect in notice.

— Waiver.

Motorist's failure to object to the manner of

notice or type of hearing at the beginning of a driver's license suspension hearing, when he was clearly informed that the proceeding would be conducted informally, precluded him from complaining, on appeal, that the original notice of hearing sent to him did not advise him whether the hearing was to be formal or informal. *Brinkerhoff v. Schwendiman*, 790 P.2d 587 (Utah Ct. App. 1990).

Dismissal.

Dismissals without prejudice are authorized under Subsection (3)(d)(iii). *Doubletree, Inc. v. Industrial Comm'n*, 797 P.2d 464 (Utah Ct. App. 1990).

63-46b-4. Designation of adjudicative proceedings as informal — Standards — Undesignated proceedings formal.

(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.

- (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).

R156-46b-202. Informal Adjudicative Proceedings.

(1) The following adjudicative proceedings initiated by a request for agency action are classified as informal adjudicative proceedings:

- (a) approval or denial of application to take a licensure examination;
- (b) disqualification of examination results for cheating on examination;
- (c) request for rescoring of examination;
- (d) approval of application for initial licensure, renewal or reinstatement of licensure, or relicensure;
- (e) denial of application for initial licensure or relicensure;
- (f) denial of application for reinstatement of licensure submitted pursuant to Subsection 58-1-308(6)(a);
- (g) denial of application for reinstatement of restricted, suspended, or probationary licensure during the term of the restriction, suspension, or probation;
- (h) determination of monetary limit under Section 58-55-21, in conjunction with approval of application for initial licensure or relicensure, or in conjunction with an application for increased monetary limit;
- (i) approval or denial of application for inactive or emeritus licensure status;
- (j) approval or denial of request to surrender licensure;
- (k) approval or denial of request for entry into diversion program under Section 58-1-404;
- (l) matters relating to diversion program;
- (m) contested citation hearing held in accordance with Subsection 58-55-13(4);
- (n) board of appeal held in accordance with Subsection 58-56-8(3);
- (o) approval or denial of request for modification of disciplinary order;
- (p) informal advice determining the applicability of statute, rule or order to specified circumstances;
- (q) declaratory order determining the applicability of statute, rule or order to specified circumstances, when determined by the director to be conducted as an informal adjudicative proceeding;
- (r) approval or denial of request for correction of procedural or clerical mistakes;
- (s) approval or denial of request for correction of other than procedural or clerical mistakes; and
- (t) all other requests for agency action not specifically classified as formal adjudicative proceedings in Subsection R156-46b-201(1).

(2) A disciplinary proceeding initiated by a Notice of Agency Action issued pursuant to a Petition seeking exclusively the issuance of a private reprimand is classified as an informal adjudicative proceeding.

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The Mead Corp.

R156-46b-403. Evidentiary Hearings in Informal Adjudicative Proceedings.

(1) Evidentiary hearings are not required for informal division adjudicative proceedings unless required by statute or rule, or permitted by rule and requested by a party within the time prescribed by rule.

(2) Unless otherwise provided, a request for an evidentiary 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.

(3) Evidentiary hearings are required for the following informal proceedings:

(a) R156-46b-202(1)(m), contested citation hearing held in accordance with Subsection 58-55-13(4); and

(b) R156-46b-202(1)(n), board of appeal held in accordance with Subsection 58-56-8(3).

(4) Evidentiary hearings are permitted for the following informal proceedings:

(a) R156-46b-202(1)(b), disqualification of examination results for cheating upon an examination;

(b) R156-46b-202(1)(l), matters relating to a diversion program; and

(c) R156-46b-202(2)(a)(i), issuance of a private reprimand.

(5) Unless otherwise agreed by the parties, no evidentiary hearing shall be held in an informal adjudicative proceeding unless timely notice of the hearing has been served upon the parties as required by Subsection 63-46b-5(1)(d). Timely notice means service of a Notice of Hearing upon all parties not later than ten days prior to any scheduled evidentiary hearing.

(6) Parties shall be permitted to testify, present evidence, and comment on the issues at an evidentiary hearing in a division informal adjudicative proceeding.

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Tab E

R156-46b-202. Informal Adjudicative Proceedings.

(1) The following adjudicative proceedings initiated by a request for agency action are classified as informal adjudicative proceedings:

- (a) approval or denial of application to take a licensure examination;
- (b) disqualification of examination results for cheating on examination;
- (c) request for rescoring of examination;
- (d) approval of application for initial licensure, renewal or reinstatement of licensure, or relicensure;
- (e) denial of application for initial licensure or relicensure;
- (f) denial of application for reinstatement of licensure submitted pursuant to Subsection 58-1-308(6)(a);
- (g) denial of application for reinstatement of restricted, suspended, or probationary licensure during the term of the restriction, suspension, or probation;
- (h) determination of monetary limit under Section 58-55-21, in conjunction with approval of application for initial licensure or relicensure, or in conjunction with an application for increased monetary limit;
- (i) approval or denial of application for inactive or emeritus licensure status;
- (j) approval or denial of claims against the Residence Lien Recovery Fund created under Title 38, Chapter 11, except those in which the claimant is precluded from obtaining the required civil judgment or administrative order against the original contractor involved in the claim because the original contractor filed bankruptcy;
- (k) approval or denial of request to surrender licensure;
- (l) approval or denial of request for entry into diversion program under Section 58-1-404;
- (m) matters relating to diversion program;
- (n) contested citation hearing held in accordance with Subsection 58-55-13(4);
- (o) board of appeal held in accordance with Subsection 58-56-8(3);
- (p) approval or denial of request for modification of disciplinary order;
- (q) informal advice determining the applicability of statute, rule or order to specified circumstances;
- (r) declaratory order determining the applicability of statute, rule or order to specified circumstances, when determined by the director to be conducted as an informal adjudicative proceeding;
- (s) approval or denial of request for correction of procedural or clerical mistakes;
- (t) approval or denial of request for correction of other than procedural or clerical mistakes; and
- (u) all other requests for agency action not specifically classified as formal adjudicative proceedings in Subsection R156-46b-201(1).

(2) A disciplinary proceeding initiated by a Notice of Agency Action issued pursuant to a Petition seeking exclusively the

issuance of a private reprimand is classified as an informal adjudicative proceeding.

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R156-46b-403. Evidentiary Hearings in Informal Adjudicative Proceedings.

(1) Evidentiary hearings are not required for informal division adjudicative proceedings unless required by statute or rule, or permitted by rule and requested by a party within the time prescribed by rule.

(2) Unless otherwise provided, a request for an evidentiary 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.

(3) Evidentiary hearings are required for the following informal proceedings:

(a) R156-46b-202(1)(n), contested citation hearing held in accordance with Subsection 58-55-13(4); and

(b) R156-46b-202(1)(o), board of appeal held in accordance with Subsection 58-56-8(3).

(4) Evidentiary hearings are permitted for the following informal proceedings:

(a) R156-46b-202(1)(b), disqualification of examination results for cheating upon an examination;

(b) R156-46b-202(1)(m), matters relating to a diversion program; and

(c) R156-46b-202(2), issuance of a private reprimand.

(5) Unless otherwise agreed by the parties, no evidentiary hearing shall be held in an informal adjudicative proceeding unless timely notice of the hearing has been served upon the parties as required by Subsection 63-46b-5(1)(d). Timely notice means service of a Notice of Hearing upon all parties not later than ten days prior to any scheduled evidentiary hearing.

(6) Parties shall be permitted to testify, present evidence, and comment on the issues at an evidentiary hearing in a division informal adjudicative proceeding.

(c) 1990, 1991, 1993, 1994 By The Michie Company, A Division of The Mead Corp.

Tab 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	)	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

Tab G

689.01
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

EB 1 4 1994

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 Jurecich,	:		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 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 _____ 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 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

Tab H

1680.01 MAR 07 1994

680.01
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 Jurecich,	:	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 _____ 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
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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
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Tab I

08193
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DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
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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 Jurelich,	:		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.

Tab J

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.

Tab K

**ORIENTATION AND REFERENCE MANUAL
FOR
PROFESSIONAL/OCCUPATIONAL LICENSING
BOARD MEMBERS**

August 1994

**State of Utah
Department of Commerce
Division of Occupational and
Professional Licensing**

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**ORIENTATION AND REFERENCE MANUAL
for
PROFESSIONAL/OCCUPATIONAL LICENSING BOARD MEMBERS**

Introduction

The Division of Occupational and Professional Licensing is an agency within the Department of Commerce and is charged with licensing and regulating persons engaged in specific occupations and professions designated by the legislature.

There is established for most of the regulated occupations and professions, a Board or Committee to act, advise and otherwise assist the Division in regulation of the specific occupation or profession.

This Orientation and Reference Manual has been prepared to assist new Board members to come to an understanding of their role as a Board member, of the role of the Board, of the role of the Division, of the method by which licensure is approved or denied, and of the manner by which disciplinary action is taken against the license of a person who acts unlawfully or unprofessionally.

Organization

The Department of Commerce is managed by an Executive Director who is appointed by the Governor, and who serves as a member of the Governor's cabinet.

Within the Department are the Divisions of Occupational and Professional Licensing, Public Utilities, Corporations, Securities, Real Estate, Consumer Protection, and the Committee of Consumer Services.

The Division of Occupational and Professional Licensing, with which Board members will now have a close association, is managed by a Director who is appointed by the Executive Director with the approval of the Governor.

The Division has within it the following major "working groups" into which fall its various duties and responsibilities:

1. Bureaus of Health Professions Licensing I and II;
2. Bureau of Occupations and Professions Licensing;
3. Bureau of Construction Trades Licensing;
4. Bureau of Financial Audit
5. Bureau of Investigations;
6. Medical Malpractice Prelitigation Section; and
7. Administration.

Action of the Legislature has caused over forty (40) occupations or

professions including over sixty (60) primary license classifications to be under the responsibility of the Division

The Division is assisted in the licensing and regulation of persons in these specific classifications by over forty (40) Boards. Each Board is assigned by the Division Director to a Bureau Manager for the purposes of administration.

Board Appointments

Members of the Boards are appointed by the Executive Director of the Department of Commerce after their selection has been confirmed by the Governor.

Appointments are made from nominations made by associations or groups representing regulated classifications, by individuals who have an interest in regulation of the classification, by the Boards themselves, or from other credible and responsible sources.

Boards are generally made up of five (5) members of whom four (4) are persons licensed in the regulated classification, and one (1) is a lay member from the public. There are a few boards which have greater numbers such as the Board of nursing which is made up of thirteen (13) members, and the Physicians Licensing Board which is made up of seven (7) members. In all cases there is at least one member who is a lay member from the public.

Appointments are generally for a term of five (5) years. There are some "interim" appointments necessary when a Board member is not able to continue service and a replacement must be named. In those cases, the appointment will be for the remaining unexpired portion of the original appointee's term.

A Board member may serve two consecutive terms; but, may not serve more than two consecutive terms. A member who has once served two consecutive terms may be reconsidered for appointment again after an absence from board service for a minimum of two years.

Duties and Responsibilities of the Board

The Board is a vital part of the process of licensure and regulation. Contained within the Board are those who have the vital and necessary knowledge to make informed decisions particular to a specific occupation or profession. The public member of the Board has the unique responsibility to be the most pronounced voice in the public interest. The Division cannot function effectively in the public interest without the advice and counsel of its Boards.

The statute has generally defined the duties, functions and

responsibilities of the Boards under the "Division of Occupational and Professional Licensing Act". This is found in Chapter 1 of Title 58, Utah Code Annotated, and is commonly referred to by the Division and the Boards as the "umbrella chapter". The Board duties are primarily contained in Section 8 of Chapter 1, as follows:

58-1-202. Boards - Duties, functions, and responsibilities.

The duties, functions and responsibilities of each board include, but are not limited to, the following:

- (1) recommending to the director appropriate rules;
- (2) recommending to the director policy and budgetary matters;
- (3) approving and establishing a passing score for applicant examinations;
- (4) screening applicants and recommending licensing renewals reinstatement, and relicensure actions to the director in writing;
- (5) assisting the director in establishing standards of supervision for students or persons in training to become qualified to obtain a license in the occupation or profession it represents; and
- (6) acting as presiding officer in conducting hearings associated with adjudicative proceedings and in issuing recommended orders when so designated by the director.

There is set forth in another section, certain duties and responsibilities of the Division which are to be carried out in collaboration with the Board. They are contained in Section 9 of Chapter 1, as follows:

58-1-203. Duties, functions, and responsibilities of division in collaboration with board.

- (1) defining which schools, colleges, universities, departments of universities, or other institutions of learning are reputable and in good standing;
- (2) prescribing license qualifications;
- (3) prescribing rules governing applications for licenses;
- (4) providing for a fair and impartial method of examination of applicants;
- (5) defining unprofessional conduct, by rule, to supplement the definitions under this chapter or other licensing chapters;
- (6) establishing advisory peer committees to the

- board and prescribing their scope of authority;
and
- (7) establishing conditions for reinstatement and
renewal of licenses.

Please note, this statute assigns these duties and responsibilities to the Division; but, directs that the Division shall collaborate with the Board in making its decision and in taking action.

Duties and Responsibilities of the Division - Contrast With Duties and Responsibilities of the Board

The duties and responsibilities specifically assigned to the Division as they are set forth in Chapter 1 of Title 58, the "umbrella chapter" are as follows:

58-1-106. Division - Duties, functions, and responsibilities.

The duties, functions and responsibilities of the division include, but are not limited to, the following:

- (1) prescribing, adopting, and enforcing rules to administer this title;
- (2) investigating the activities of any person governed by the laws and rules administered and enforced by the division;
- (3) subpoenaing witnesses, taking evidence and requiring by subpoena duces tecum the production of any books, papers, documents, records, contracts, recordings, tapes, correspondence, or information relevant to an investigation upon a finding of sufficient need by the director;
- (4) taking administrative and judicial action against persons in violation of the laws and rules administered and enforced by the division, including, but not limited to, the issuance of cease and desist orders;
- (5) seeking injunctions and temporary restraining orders to restrain unauthorized activity;
- (6) giving public notice of board meetings;
- (7) keeping records of board meetings, proceedings, and actions and making those records available for public inspection upon request;
- (8) issuing, refusing to issue, revoking, suspending, renewing, refusing to renew, or otherwise acting upon any license or licensee;
- (9) preparing and submitting to the governor and the Legislature an annual report of the division's operations, activities, and goals;
- (10) preparing and submitting to the executive director of the department a budget of the

- (11) expenses for the division;
establishing the time and place for the
administration of examinations; and
- (12) preparing lists of licensees and making these
lists available to the public at cost upon
request unless otherwise prohibited by state or
federal law.

A comparison of the duties and responsibilities of the Division and the duties and responsibilities of the Board generally establishes the Board in an advisory, recommending, and assisting role supporting the Division in taking appropriate action. Development of a positive relationship in the public interest between the Division and Boards requires an understanding of the respective roles assigned by the Legislature, and respect for the integrity and intent of each body by the other.

Board Meetings

Board meetings for many Boards are held once each month. For some Boards who do not have an influx of new applicants for licensure or other necessary business, the meetings may be held on a quarterly basis, and rarely on a semi-annual or annual basis.

Monthly meetings are usually scheduled on the same day of each month to permit all Board members to plan their schedules.

Meetings are held in the Heber M. Wells Building, 160 East 300 South, Salt Lake City, Utah and are normally held in one of the conference rooms on the fourth floor. The specific room number is normally included in an advance mailing of the Agenda for the meeting and is also posted on the day of the meeting in the lobby on the 4th floor immediately adjacent to the elevator.

Parking is available in the covered parking garage on the north side of Third South, directly across from the Heber M. Wells Building. Reimbursement for parking is \$3.00 each meeting day.

The agenda for a meeting is usually established by the Board Secretary in consultation with the Board Chairman and the Bureau Manager responsible for the particular occupation or profession. Any Board member can request that an item be placed on the agenda by simply contacting the Board Secretary who will then coordinate it with others as necessary.

Board meetings for most Boards are concluded within four hours; however, some Boards meet for a full day to complete their monthly business.

If a Hearing is held on the day of a Board Meeting to either

consider pending rules or to consider a disciplinary matter before the Board, the meeting may require a "long full day". Rarely a disciplinary Hearing is complex enough that it will extend for more than one day. In those cases, the Administrative Law Judge who will preside at the Hearing will contact each Board member in his preparation of a Scheduling Order to facilitate the matter being heard in its entirety before the maximum number of Board members.

A quorum present at a meeting is necessary for the Board to conduct business. A quorum is a simple majority of the Board members who have been appointed to the Board. If a Board meeting is scheduled and a quorum does not appear, business cannot be conducted and the time of those who did appear is wasted. Each Board member's attendance is valuable and demonstrates a courtesy to other members.

Meetings of a Board are generally open to the public. Meetings can be closed however upon a finding that there exists one of the following reasons to close a meeting:

- (1) discussion of the character, professional competence, or physical or mental health of an individual;
- (2) strategy sessions with respect to collective bargaining, litigation, or purchase of real property;
- (3) discussion regarding deployment of security personnel or devices; and
- (4) investigative proceedings regarding allegations of criminal misconduct.

To close a meeting, there must first be a quorum present to conduct business, and two-thirds of those present must vote to close the meeting. The reason for holding a closed meeting and the vote of each member of the Board shall be recorded in the minutes of the meeting.

Notice of meetings of the Board are required and the Division facilitates the appropriate and required notice. It is unlawful to hold a meeting of the Board without notice or without compliance with the provisions under which an emergency meeting may be held. Accordingly, it is important that Board members do not arrange to hold a meeting of the Board, or any meeting which could be interpreted to be a meeting of the Board, without total compliance with the Open and Public Meeting Act, Chapter 4, Title 52.

Each Board is assigned to a Bureau Manager who supervises an individual who acts as the Board Secretary. The Board Secretary records, transcribes, and presents for approval of the Board, minutes of each Board meeting. The Board Secretary is also charged with knowing the statute and rules concerning the particular profession/occupation, the policies and procedures by which applications are handled in the division, and the action alternatives which the Board may consider during its meetings. The

Board Secretary is a vital resource and aid to the Board and should become the Board's "right hand".

Conflicts of Interest

The ability of persons to serve on a Board is enabled by their personal integrity and their ability to fairly and honestly deal with issues which come before them.

It is important that Board members avoid involvement in anything which may compromise their ability to fulfill their Board responsibilities.

Certainly Board members will be expected to be informed about the profession or occupation they are called upon to regulate. They will have contact with persons who are regulated and persons who are served by those regulated. Some will appropriately try to influence Board members' decisions. That is expected and Board members will want to listen carefully to the positions put forward in order to consider all sides of an issue.

There are some attempts at influence or pressure which are not appropriate and may well be unlawful. If a Board member experiences such an attempt, or has questions about the appropriateness of any contact, he or she should immediately consult the Bureau Manager to whom the Board has been assigned, or the Division Director and discuss with him or her the circumstances. If the advice of others is needed, the Manager or Director will arrange for such advice.

If Board members are involved in discussion of, voting upon, or otherwise acting as Board members on any issue in which they may have a conflict of interest, they should make that conflict known to the person presiding. If it is in a Board meeting, they should declare the conflict to the Chairman of the Board to permit appropriate advice and counsel to them and to the rest of the Board. If the conflict arises in an Administrative Hearing, they should declare the conflict to the Administrative Law Judge to permit a ruling as to whether they can participate in the proceeding.

It is possible that failure of a Board member to declare a conflict may result in subsequent discovery of the conflict and an invalidation of action taken by the Board. While that is certainly serious, the more serious consequence is that the member's actions may have compromised the fair and equitable handling of an issue before the Board to the detriment of an applicant for license or a licensee.

It is unfair for individual Board members to represent to anyone what the position of the Board might be on a certain issue if the

Board has not taken a position on that issue in a formal meeting of the Board. Such a statement of position may well mislead a person who relies upon that position and later finds out the Board's actual position is entirely different. Each Board member must respect the potential position of all Board members and let the business of the Board and its decisions be represented by action taken in formal meetings of the Board.

Laws

There are two basic types of laws with which the Boards and Division deal in the licensing and regulation of designated occupations or professions.

The first are statutes. Statutes are laws which are passed by the Utah State Legislature. The primary statutes with which Board members deal are as follows:

1. Division of Occupational and Professional Licensing Act, Chapter 1, Title 58, Utah Code Annotated;
2. Occupation/Profession Specific Licensing Act, a specific Chapter, Title 58, Utah Code Annotated;
3. Utah Administrative Rulemaking Act, Chapter 46a, Title 63, Utah Code Annotated; and
4. Administrative Procedures Act, Chapter 46b, Title 63, Utah Code Annotated.

In order for there to be a change in statutes, the Legislature must act by passing a new statute or by amending the existing statute. That means that a statute can only be changed while the legislature is in session.

The second type of law are rules. Rules are adopted by the Division in compliance with the Utah Administrative Rulemaking Act. Rules cannot be used to create new law for which the basis does not exist in statute. Rules are the "flesh" put on the "skeleton" of the statute. Because rules are adopted by the Division, they can be repealed, replaced, or amended by the Division. It is important to remember that if the Legislature has not established the basis for law by rule in the statute, the Division cannot establish the rule.

The Division carefully consults with the Boards in its effort to cause there to be changes in the statutes by enactment, amendment, or repeal; and, involves the Boards significantly in the development of rules to go through the administrative rulemaking process. Mutual efforts between the Boards and Division to cause the adoption, amendment, or repeal of rules normally involves a

written comment period and a public hearing during which written and verbal comments about the rules are carefully considered.

Licensure

The evaluation of applicants for licensure is one of the two major functions and responsibilities of the Division.

Licensure is based upon the fact that an applicant meets some minimum standard. Licensure does not represent that the licensee has done anything more than meet minimum qualifications.

The minimum standard is set forth in the law, either under the statute or rule pertaining to a particular license qualification.

Many Boards have facilitated licensure by defining for the division the exact criteria to be used in determining if an applicant meets the minimum qualifications. In those cases, Division personnel evaluate the applicant against the established criteria. If the criteria are clearly met, licensure is granted. If criteria are clearly not met, licensure is denied. When necessary, the application is referred to the Board for consideration and its recommendation with respect to licensure. This method of handling applications for licensure results in the most expeditious handling of applicants.

Other Boards have reserved the right to review in detail every application and to make a specific recommendation regarding each. This is usually associated with those classifications in which there are subjective qualifications for licensure such as experience or specific content in college course work. The expertise of the Board is necessary to permit there to be an appropriate review. This method of handling applications for licensure results in a longer delay in granting licensure and subjects the process to some criticism by individuals anxious to enter into practice.

The Board, in consultation with the Division, must carefully consider the process by which licensure is granted or denied as there must be a careful balance between the right of the public to rely on the licensure process, and the right of the individual applicant to have a timely and fair review of the application. It seems much wiser to withhold granting a license to an individual about whom there is some question, rather than to grant the license in haste and then discover action is necessary to revoke, suspend or restrict the license because the person is not competent.

It is not uncommon to have complaints leveled against the division and its Boards claiming that there is "gatekeeping" going on. This is a term applied to attempts to limit entry in to a profession by qualified persons by using the licensure process to artificially

restrict entry into the market. The Division will very carefully observe and evaluate recommendations of the Boards and the timely handling of applications to ensure that any such claim has no basis in fact.

Under the laws to which the Division and Boards are subject, the authority to grant the license rests with the Division. The Board is to make a recommendation with respect to licensure. It is very rare that the Division does not follow the recommendation of a Board. The advice and recommendation of the Board is given the greatest consideration.

The applicant may appeal the licensing decision to the Executive Director of the Department who may choose to convene a Special Appeals Board. A Special Appeals Board is made up of three individuals of whom one is a member of the profession/occupation under consideration. The Special Appeals Board hears the evidence presented by the applicant justifying issuance of the license and the evidence presented by the Attorney General's Office defending the decision of the Board and Division in denying the license. The decision of the Special Appeals Board is binding upon the Division. If the decision is adverse to the applicant, he still may appeal the decision to the Utah Court of Appeals.

In choosing to deny a license, the Board must give attention to its ability to clearly articulate the reasons for denial and to make sure the minutes of the meeting accurately set forth the reasons. The Board is afforded governmental immunity for its official actions; however, governmental immunity may not protect a Board member who acts maliciously without regard for the facts. If a Board member is ever asked to consider licensure of an individual about whom the member cannot act fairly, the member should declare the conflict of interest and excuse himself from voting on that particular matter. However, caution must be exercised. Just because a Board member may be privileged to information about an applicant which may indicate the individual may not be qualified for licensure, does not mean that he or she should not bring that information to the attention of the Board and vote on the matter if he or she can do so based upon cause, the facts, the public interest, and not a malicious intent to damage or harm the applicant.

Disciplinary matters

Unfortunately, licensees sometimes engage in unprofessional or unlawful conduct related to the occupation or profession in which they are licensed; or, unlicensed persons engage in acts or practices which are regulated under title 58.

When such violations occur, the Bureau of Investigation normally conducts an investigation. If the investigation fails to document

unlawful or unprofessional conduct, the case is closed.

If investigation documents unprofessional or unlawful conduct and the Office of the Attorney General determines that the investigation was adequate and that the proposed Petition is legally sufficient, the investigator who conducted the investigation files a Petition before the Division. A Petition is a document much like a Complaint filed in a criminal case. It describes the allegations of unprofessional or unlawful conduct and the laws which have been violated.

The Division counsel reviews the Petition and determines if there is a basis to consider disciplinary action. If a basis is found, he issues a Notice of Agency Action which is mailed together with the Petition to the subject of the investigation, now called the Respondent. The Notice of Agency Action advises the Respondent that the action has been filed, describes the action, defines the procedures which will be followed, and advises the Respondent of his legal options.

A Respondent is given thirty days to file a Response to the Petition. A Response is the Respondent's opportunity to admit, deny, or offer any explanation with respect to the allegations which have been filed against him.

There are primarily two methods in which a matter is then resolved.

In the first method, the Respondent contacts the Office of the Attorney General and requests to settle the case pending against him. The Office of the Attorney General consults with the Investigator and Bureau Manager. The Bureau Manager consults with a member of the Board. The Office of the Attorney General negotiates a Stipulation in which the Respondent admits to unlawful or unprofessional conduct and agrees to those sanctions necessary to protect the public health, safety, and welfare. Sanctions may include reprimand, restriction, probation, suspension, and revocation of one's license and/or a cease and desist order. The Stipulation is then presented to the Division Director for his approval. The Director may either accept the Stipulation and issue an Order adopting its terms or may suggest modification to or reject the Stipulation.

In the second method, if a matter is inappropriate for settlement, is appropriate but is not achieved, or if the Respondent simply denies the allegations and demands the matter be heard, a Hearing is scheduled before the appropriate Board. A Hearing is not unlike a trial. The Division sets forth its case and the Respondent has an opportunity to defend himself. Normally both sides are represented by counsel.

The Administrative Procedures Act requires that all Hearings be held before a "Presiding Officer", who it defines as the Division

Director. However, the Act permits the Director to designate another individual or group of individuals to perform part of or all of his role. Because of the complexity and diversity of our proceedings, the director designates an Administrative Law Judge as the Presiding Officer to regulate the proceedings and the appropriate Board as the Presiding Officer to act as fact finder. The Director participates in the hearing to assist him in later acting upon the Boards' Recommended Order. The Director is not present during the Board's deliberations.

As fact finder of the proceedings, the Board hears the evidence presented at the hearing, deliberates upon the evidence, and enters Findings of Fact, Conclusions of Law, and a Recommended Order.

As regulator of the proceedings, the Administrative Law Judge presides over motion practice and admissibility of evidence, and ensures that the proceedings are fair and orderly. Following the hearing, the Administrative Law Judge advises the Board during its deliberations and puts in writing the Board's Findings of Fact, Conclusions of Law and Recommended Order.

One of the questions which always arises with a Board member who must consider a Recommended Order is, "What are the options we may consider in making a recommendation?" The answer is generally that Orders usually contain any one of more of the following conditions:

1. Private censure or reprimand;
2. Public censure or reprimand;
3. Probation for some designated period of time with specific terms and conditions directed at protecting the public from continued acts or omissions which have represented the Respondent's practices in the past;
4. Suspension of license for some designated period;
5. Suspension of license for some designated period followed by probation with specific terms and conditions as in (3) above;
6. Suspension of license, suspension stayed, probation with specific terms and conditions as in (3) above;
7. Revocation of license;
8. Revocation of license, revocations stayed, suspension for some designated period, followed by probation with specific terms and conditions as in (3) above; and
9. Revocation of license, revocation stayed, probation with specific terms and conditions as in (3) above.

In considering a Recommended Order, Board members should be

imaginative and draft an Order which offers creative solutions to the problems identified in the Hearing.

Following issuance, the Board's written Findings of Fact, Conclusions of Law, and Recommended Order are presented to the Division Director for his review and issuance of a Final Order. In almost every case, the Director's Final Order affirms the Board's Recommended Order. However, on very infrequent occasions, the Director's Final Order modifies or rejects a part or all of the Board's Recommended Order and enters new or amended Findings of Fact and Conclusions of Law.

After entry of an Order, the Respondent may appeal the Order to the Executive Director of the Department of Commerce through a Request for Agency Review, and after exhausting his administrative remedies, may appeal the Order to the Utah Court of Appeals. During the time in which the appeal is being considered, the effect of the Order is usually stayed, meaning it does not go into effect until the Executive Director or Court of Appeals has ruled on the appeal.

Compensation

Generally, a Board member is reimbursed for attendance at Board meetings at the rate of \$60.00 for a half day meeting and \$90.00 for a full day meeting.

Because of the number of Boards and the frequency of meetings, the cost of reimbursement for Boards can be a very substantial amount. Because of very tight budget restrictions, the Division asks for the cooperation of Boards in conducting their meetings in an efficient manner. This will help the Division live within its budget and not require diversion of funds from other programs such as an already limited out-of-state travel budget for Board members.

Board members who are state employees being paid in their regular position at the time Board meetings are held are not compensated for their attendance at Board meetings.

If a Board member is required to travel on state business, the Board member will be compensated for the costs of travel, lodging, meals and other necessary expenses in accordance with existing state policy.

The obligation to compensate Board members for Board attendance must be pre-approved by the Bureau Manager responsible for the particular Board. The obligation to compensate Board members for travel must be pre-approved by the Division Director and Department Executive Director.

Media Contacts

There may be occasions when the representatives of the media contact Board members for comment on an issue facing the Board or one involving the profession or occupation regulated by the Board.

The media serve the public and have been helpful to the Division in having the public understand the role of the Division and its Boards. It is our intent to be cooperative in every way possible.

Remember that Boards may be called upon to act as fact finders and to issue a Recommended Order in a case involving a licensee. If Board members discuss a particular case with the media, they may well disqualify themselves from being able to fulfill their duties in hearing that case in a formal Hearing.

If a Board member has any questions about discussing any matter with the media, please feel free to call the Bureau Manager, the Division Director, or even the Executive Director of the Department for counsel and advice.

Liaison With the Division

A Board member's primary contact with the Division is the Bureau Manager with Division management responsibility for their Board and the Board Secretary assigned to their Board.

The Bureau Manager represents the Division in the normal working relationship between the Board and the Division. The manager is charged with knowing the position and philosophy of the Division Director, the Department Executive Director and the Governor with respect to the "business of the Division".

The Board Secretary is supervised by the Bureau Manager and is a senior licensing specialist in the Bureau to which the particular Board is assigned and therefore, is very knowledgeable about the process of licensing.

Board members are certainly welcome to communicate directly with the Division Director in any matter they desire.

Tab L

**DIVISION OF OCCUPATIONAL
AND PROFESSIONAL LICENSING**

BUREAU OF INVESTIGATIONS

**POLICIES
and
PROCEDURES**

Effective Date: December 1, 1993

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When property is ordered turned over to the Division, the Chief shall determine the appropriate disposition. If the property is to be destroyed, the Chief shall assign two investigators to accomplish the destruction. The assigned investigators shall:

- (1) Inventory the items to be destroyed.
- (2) Note the time, date, and method of destruction.
- (3) Thoroughly destroy the items.
- (4) Return a sworn affidavit to the Director of the Department attesting to the destruction.

At no time will an investigator authorize a law enforcement agency to keep any property seized under the authority of the Controlled Substance Act.

I. CITATIONS.

(A) CITATION PROGRAM POLICIES AND PROCEDURES

1. These investigative policies and procedures implement the citation program established by §58-55-13, U.C.A.
2. Where appropriate, citations may be issued by DOPL investigators for the following offenses:
 - a. 58-55-2(32)(a). Engaging in a construction trade, acting as a contractor, or representing oneself to be engaged in a construction trade requiring licensure, unless the person doing any of these is appropriately licensed or exempted from licensure under this chapter;
 - b. 58-55-2(32)(b). Acting in a construction trade beyond the scope of the license held; or
 - c. 58-55-2(32)(c). hiring or employing in any manner an unlicensed person, other than an employee for wages who is not

required to be licensed under this chapter, to engage in a construction trade for which licensure is required or to act as a contractor or subcontractor in a construction trade requiring licensure.

3. For purposes of the citation program an investigator is defined as an investigator assigned to the Contractors Section of the Bureau of Investigations and an auditor assigned to the Bureau of Financial Audit.
4. When a citation is inappropriate, investigators shall, as appropriate, close a complaint or an investigation without action, screen a completed case with the Division Enforcement Counsel for stipulated settlement or for review prior to issuance of a Notice of Agency Action commencing an informal adjudicative proceeding, or screen a completed case with the Office of the Attorney General for review prior to issuance of a Notice of Agency Action commencing a formal adjudicative proceeding.
5. Citations shall only be issued for citable offenses that are actually observed by an investigator or are documented by an investigator through a completed investigation in which the investigator has had recent personal contact with the subject of the investigation. All citations will be issued in person by the investigator to the recipient of the citation.
6. Citations shall not be issued beyond six months following the date of the citable offense.
7. Investigators are instructed to utilize the citation program to encourage compliance with the Construction Trades Licensing Act. When appropriate extenuating or mitigating circumstances are present, an investigator may choose to advise an offender that the

investigator will not issue a citation if the offender comes into compliance with applicable law within a reasonable period of time.

8. Before issuing citations for citable offenses, investigators shall ensure that every element of the offense for which a citation is to be issued is supported by competent evidence and shall explore possible defenses and mitigating, extenuating, and aggravating circumstances, if any. Investigators shall promptly record such information in the documentation section on the back side of the investigator's copy of the citation.

9. The format for citations shall be as established at exhibit 1. Citations shall be color coded and bear the following legend:

Copy 1 - Recipient Copy

Copy 2 - Division Copy

Copy 3 - Supervisor Copy

Copy 4 - Investigator Copy

Numbered books of citations shall be issued to each DOPL investigator and shall be an accountable item.

10. There is established a DOPL Recommended Citation Fine Schedule at exhibit 2. The Schedule shall appear on the reverse side of the recipient's copy of citations.

11. The DOPL Citation Fine Schedule shall apply to all citations issued by investigators in which a fine is issued. If an investigator believes a more serious outcome is warranted in an individual case, the investigator shall proceed by filing a petition.


12. Investigators are encouraged to issue cease and desist orders with each citation. Normally, a cease and desist order should be issued in addition to a fine; however, where appropriate, a cease and desist order may be issued without a fine. Investigators shall

promptly record their justification for the issuance of a cease and desist order without a fine in the documentation section on the back side of the investigator's copy of the citation.

13. When a person to be cited has committed multiple offenses under the same or different offense codes, investigators should evaluate the seriousness of the overall violation of law in determining whether to issue a single citation or multiple citations. Multiple offenses cited under a single citation shall collectively be considered as a single offense. The applicable fine from the DOPL Citation Fine Schedule for a citation involving multiple offenses shall be the fine applicable to the most serious offense.
14. Every citation shall include a fine and/or a cease and desist order. At the present time, the division has opted not to implement a notice in lieu of a citation, as permitted by Section 58-55-13(4)(c), U.C.A.
15. There is established a Notice of Response format at exhibit 3. Notices of Response shall be included in the back of citation books. Investigators shall provide a Notice of Response to the each recipient of a citation.
16. If the recipient of a citation refuses to sign for the receipt of the citation, this fact shall be noted in the remarks section of the citation.
17. Investigators shall avoid advising the recipient of a citation how to respond to a citation. Instead, the recipient should be referred to the Citation and the Notice of Response documents themselves or to their attorney. Care should be taken to avoid

creating any impression that the fine and/or cease and desist order imposed by the citation is effective immediately without an opportunity to be heard.

18. Investigators shall not negotiate stipulated settlements or accept payment of administrative fines.
19. Investigators shall coordinate the issuance of a citation with their supervisor no later than the next business day following issuance and shall promptly send or deliver to the Division its copy of the citation. The supervisor shall promptly perform a Citation Quality Control Review and may choose to dismiss a citation where appropriate.
20. Citations become final upon receipt of a Notice of Response reflecting that the recipient of a citation has chosen not to contest the citation. If no response is received from the recipient of a citation, the citation shall become final 20 days from the service thereof. If a citation is timely contested, it becomes final upon entry of an order by the presiding officer affirming or modifying the citation.
21. Following the issuance of citations, investigators shall not subsequently issue follow-on citations for a continuation of the offense at the same location to the recipient of an initial citation until the initial citation becomes final unless, upon a showing of unusual and compelling circumstances, the investigator's supervisor approves a deviation from this policy. Deviations shall be recorded in the documentation section on the back side of the investigator's copy of the citation.

22. The Division shall notify each person contesting a citation of the date, time, and place of the scheduled hearing along with the identity of the presiding officer by completing the Notice of Hearing on the reverse side of the Notice of Response (exhibit 4), and mailing a copy of the Notice of Hearing to the person by first class mail, postage prepaid.
23. Hearings for contested citations requested on or before the first of each month shall, unless circumstances require the Division to schedule a different date, be held on the 3rd Monday of that month beginning at 9:00 a.m., in room 428, before a Presiding Officer designated by the Division Director. If the 3rd Monday is a holiday, the hearing shall be moved to the fourth Monday of the month.
24. If the recipient of a citation denies committing the offense cited, it is the Division's burden to present competent evidence on each of the issues under consideration at a hearing to a preponderance of evidence standard.
25. It is the Respondent's right to testify, present evidence, and comment on the issues at a hearing. In putting on evidence, Respondents may testify, call and examine witnesses, and introduce documentary evidence. 
26. Either party may testify, present evidence or comment on the issues at a hearing with or without the assistance of counsel.
 - a. When proceeding without counsel, a Respondent may and the Division shall simply inform the Presiding Officer what evidence is available for presentation and permit the Presiding Officer to take such evidence as he deems appropriate.

- b. A Respondent may in addition choose to act as his own counsel.
 - c. It is the responsibility of a party who is proceeding without counsel, to arrange to have all necessary evidence available for presentation at the hearing.
27. The public perception of the hearing process hinges on their perception of the role of the Presiding Officer. The integrity of the role of Presiding Officer is therefore critical and must be fully understood, scrupulously respected, and carefully protected by all involved in the citation process, particularly the Division.
- a. The Presiding Officer is appointed by the Director, Division of Occupational and Professional Licensing, Department of Commerce.
 - b. The Presiding Officer is appointed as an impartial and objective fact finder designated to review the contested citations on the hearing docket. He is not an advocate of either the Division or the Respondent.
 - c. In reviewing a contested citation, it is the Presiding Officer's responsibility to determine whether the offense shown on a contested citation is supported by competent evidence and if so, whether the citation should have been issued. If both questions are answered in the affirmative by the presiding officer, it is the Presiding Officer's responsibility to then determine whether the sanction imposed by the citation should be affirmed, rejected, or modified.
 - d. In accordance with §63-46b-5(e) and Rule 2 of the Model Administrative Discovery Rules for Agency Adjudicative Proceedings, the Presiding Officer may issue subpoenas or other orders to compel the production of necessary evidence,

by his own action or upon the request of either party. Normally, the Presiding Officer will only issue a subpoena or other order upon the request of a party and it is the responsibility of the party requesting the subpoena or other order to show probable cause for the issuance of the order.

- e. To ensure that contested citation hearings are handled consistently by Presiding Officers, the Informal Contested Citations Hearing Instructions, the Presiding Officer Script and Presiding Officer Model Orders at exhibits 5, 6, 9, and 10 respectively, are prepared as recommended guides.
- 28. Issuing investigators shall be responsible for initial entry of their citations into the CRIS data base.
 - 29. The Administrative Assistant to the Division Director shall be responsible for tracking the receipt of Notices of Response, for preparing a monthly Contested Citation Hearing Docket and a monthly Uncontested Citation Report, and for creating and maintaining Citation Hearing Files. Citation Hearing Files shall be maintained by year of issuance and citation number.
 - 30. The Supervisor, Bureau of Investigations, Construction Trades Licensing Act Section, shall be responsible for a monthly Pending Citation Report and Closed Citation Report using the CRIS data base. Disposition shall be determined by an evaluation of Citation Quality Control Reviews, the Citation Hearing Docket, the Uncontested Citation Report, Orders issued by the Presiding Officer, and the passage of time.
 - a) The Pending Citation Report shall be alphabetically arranged and shall contain the following information:
 - i) person cited;

- ii) date of issuance;
- iii) place of issuance;
- iv) offense code;
- v) sanction;
- vi) issuing investigator;
- vii) response deadline; and
- viii) current status.

b) The Closed Citation Report shall be alphabetically arranged and shall contain the following information:

- i) person cited;
- ii) date of issuance;
- iii) place of issuance;
- iv) offense code;
- v) sanction;
- vi) issuing investigator;
- vii) disposition; and
- viii) method of disposition.

CITATION

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



ISSUED PURSUANT TO § 58-55-13(5) UTAH CODE ANNOTATED (1953), AS AMENDED, AS FOLLOWS:

ISSUED TO:		DL#:
DOB:	S.S.#:	DOPL#:
HOME ADDRESS:		PHONE#:
DBA/EMPLOYER:		DOPL LIC#:
BUSINESS ADDRESS:		PHONE#:
DATE OF OFFENSE:	DATE ISSUED:	TIME OF OFFENSE:
LOCATION OF OFFENSE:		
<u>OFFENSE CODE</u>	<u>DESCRIPTION</u>	
<input type="checkbox"/> §58-55-2(32)(a)	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.	
<input type="checkbox"/> §58-55-2(32)(b)	Acted in a construction trade beyond the scope of the license held.	
<input type="checkbox"/> §58-55-2(32)(c)	Hired or employed in any manner an unlicensed contractor or person who was required to be licensed.	
REMARKS:		
<input type="checkbox"/> ADMINISTRATIVE FINE (See reverse)		<input type="checkbox"/> CEASE AND DESIST ORDER
I ACKNOWLEDGE RECEIPT OF THIS CITATION AND CERTIFY THAT I HAVE READ AND UNDERSTAND THE RIGHTS ADVISEMENT CONTAINED BELOW AND HAVE BEEN PROVIDED A NOTICE OF RESPONSE		I CERTIFY THAT THE INFORMATION IN THIS CITATION IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.
_____ RECIPIENT'S SIGNATURE	_____ DATE	_____ INVESTIGATOR'S SIGNATURE

READ CAREFULLY

This citation 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 so contested becomes the final order of the Division and is not subject to further agency 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.

EXHIBIT 2

MAXIMUM FINE SCHEDULE PERMITTED BY § 58-55-13(4)(i), U.C.A.

First Offense	\$1,000
Second Offense	\$2,000
Subsequent Offenses	\$2,000 per day

DOPL CITATION FINE SCHEDULE

FIRST OFFENSE

<u>Violation</u>	<u>All Except Electrical or Plumbing</u>	<u>Electrical or Plumbing</u>
58-55-2(32)(a)	\$200.00	\$400.00
58-55-2(32)(b)	\$200.00	\$400.00
58-55-2(32)(c)	\$400.00	\$600.00

SECOND OFFENSE

<u>Violation</u>	<u>All Except Electrical or Plumbing</u>	<u>Electrical Plumbing</u>
58-55-2(32)(a)	\$600.00	\$1,000.00
58-55-2(32)(b)	\$600.00	\$1,000.00
58-55-2(32)(c)	\$800.00	\$1,200.00

THIRD OFFENSE

Citations shall not be issued for third offenses except in extraordinary circumstances approved in writing by the Division Director.

Note: If multiple offenses are cited on the same citation, the fine shall be determined by evaluating the most serious offense.

Exhibit 3
NOTICE OF RESPONSE

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



CITATION # _____ DATE OF CITATION: _____
NAME: _____ PHONE NUMBER: _____
ADDRESS: _____

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: _____ DATE: _____

Exhibit 4

NOTICE OF HEARING

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

"NUMBER"

Pursuant to your request, a Citation Hearing has been scheduled for _____, beginning at _____ in Room _____ of the Heber M. Wells Bldg, located at 160 East 300 South, Salt Lake City, UT. The presiding officer is _____. The hearing is your opportunity to put on evidence and comment on the issues.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this meeting should notify Jud Weiler, ADA Coordinator, Division of Occupational and Professional Licensing, 160 East 4300 South, Salt Lake City, Utah 84145-0805, phone 530-6731, at least three working days prior to the meeting.

MAILING CERTIFICATE

I hereby certify that on the _____ day of _____, 199__, a true and correct copy of the foregoing NOTICE OF HEARING was sent first class mail, postage prepaid, to the following:

(Recipient of Citation)
(Address)
(City), (State) (Zip)

(Name)
(Title)

EXHIBIT 5

INFORMAL CONTESTED CITATION HEARING INSTRUCTIONS

1. At your request, the citation you received has been scheduled for a hearing as shown in the Notice of Hearing. Your case will be heard in the order shown on the hearing docket posted on the hearing room door.
2. These instructions have been prepared to help you understand the hearing process and to enable you to prepare for your hearing.
3. The statutes and rules governing contested citation hearings are the following: Chapter 46b, Title 63, Utah Administrative Procedures Act; Chapter 1, Title 58, Division of Occupational and Professional Licensing Act; Chapter 55, Title 58, Construction Trades Licensing Act; and Rules 151-46b and 156-46b, Utah Administrative Procedures Act rules.
4. Dan S. Jones has been designated by the Director of the Division of Occupational and Professional Licensing to serve as the Presiding Officer for these hearings. Please address him as Mr. Jones.
5. The Presiding Officer is an neutral fact finder designated to review contested citations. He is not an advocate for the Division or for the Respondent.
6. The only issues properly before the Presiding Officer are as follows:
 - a. Was there a legal basis to issue the citation?
 - b. If so, was it fair to issue the citation?
 - c. If so, what is the appropriate penalty?
7. You may represent yourself or be represented by counsel. Ordinarily, the Division is not represented by counsel at contested citation hearings.
8. If you are denying the offense, it is the Division's responsibility to prove its case against you by a preponderance of the evidence. If you are admitting the offense, it is your responsibility to prove that the citation should be dismissed or that the penalty should be reduced.
9. The Administrative Procedures Act provides that the parties in an informal hearing are entitled to testify, present evidence and comment on the issues. In presenting evidence, the parties may examine witnesses and submit exhibits.
10. At the request of either party, the Presiding Officer will examine the witnesses called by a party.

11. Exhibits should be premarked numerically by the Division and alphabetically by the Respondent. Where several exhibits will be offered, an index is desirable.
12. The Presiding Officer will exclude any evidence he deems irrelevant, repetitious, or improper.
13. If the Presiding Officer finds that the citation is appropriate, he will impose the fine shown on the DOPL Citation Fine Schedule unless good cause is shown for a lesser or greater amount.
14. If a fine is imposed, it is payable immediately unless good cause is shown for delayed payment. Scheduling the hearing results in a significant delay in which you can prepare to pay a possible fine. Therefore, good cause may be difficult to establish.
15. Appearing at this hearing does not in itself constitute good cause for a reduction in fine. Rather, you must prove that a reduction in fine is justified.
16. Moreover, compliance with the law after your citation was issued is not considered good cause for a reduction in fine. Likewise, noncompliance with the law after your citation was issued is not good cause to increase any fine imposed in this case. However, it could result in additional disciplinary action.
17. Ordinarily, a written order will be entered at the conclusion of each hearing. However, where necessary, the Presiding Officer will take a case under advisement and mail a decision to the parties as soon as possible following the hearing.
18. The order will include a notice of any right of administrative or judicial review available to the parties.
19. If you have any questions concerning these instructions please ask the Presiding Officer for an explanation before your case is heard. You will be asked to submit a signed copy of these instructions to the Presiding Officer at that time.

I affirm that I have read and understand the instructions outlined above.

Respondent

Tab M

Division of Occupational & Professional Licensing
160 East 300 South
P.O.Box 45805
Salt Lake City, Utah 84145-0805



RESPONSE TO REQUEST FOR RECORD

Requester: William J. Stilling Parsons, Behler & Latimer

Written Request Received:

Date: 7-18-94

☒ Request approved: ☐ In full ☒ In part

☒ Record(s) are attached.

☐ Call _____ to make arrangements.

☐ A fee of \$ _____ is due for duplicating the record(s).

☐ Because the record is non-public, we require evidence of your identity before the record can be released.

☐ The attached Disclosure and Agreement must be completed and returned before the non-public record(s) can be released.

☐ Request denied: ☐ In full ☐ In part

☐ Notice of Denial of Request for Records is attached for explanation.

☐ Request is neither approved or denied: ☐ In full ☐ In part

☐ Notice of Estimated Time Required to Respond to Request for Records is attached for explanation.

☒ Other: - See explanatory comments on backside

☐ The Division does not maintain the following record(s) you request: _____

☐ The entity that we believe does maintain the record is: _____

Contact Person: Carol Inglesby

Telephone: 530-6626

EXPLANATORY COMMENTS:

Request #1 - Documents are enclosed with regards to the citation issued to Dockery Roofing. ~~The other cases that have been converted to formal are the Merit Electrical et al cases. I believe your office has already received copies of these cases. If you need an additional copy, please contact me 530-6626.~~

Request #2 - In reviewing records, there have been no adjudicative proceedings that were converted from informal to formal or formal to informal with the exception of the citation cases mentioned above.

Request #3 - not applicable

Request #4 - In a telephone conversation with Barbara Polich of your office on 7-26-94 with Robert Hunt, she indicated your office did not want a copy of all citations issued but would rather have a statistical summary regarding citations. That summary is enclosed. In your request you asked for "the procedural track for adjudicating those citations". Our office is unclear as to exactly what you are asking for. The Division does have a citation policies and procedures manual. However, that manual is a protected record. You may however want to contact Robert Hunt, Assistant Attorney General, regarding possible release of the manual with the understanding its contents would remain protected.

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

Carol W. Engquist

Date: 7-28-94

Title: Administrative Assistant

MAILING CERTIFICATE

I hereby certify that on the 28 day of July, 1994, a true and correct copy of the foregoing **RESPONSE TO REQUEST FOR RECORD** was sent first class mail, postage prepaid, to the requester at the following address indicated on the Request for Record(s):

William J. Stilling
Parsons Behler & Latimer
201 South Main Street Suite 1800
SLC UT 84101

Carol W. Engquist

Title: Adminstrative Assistant

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CITATION STATS
From 10-01-92 To 07-15-94

CITATIONS ISSUED	1313
COMPLIANCE WITH CITATION	971
DISMISSED BY DIVISION	25
OVERTURNED AT HEARING	43
CEASE AND DESIST	76
CONVERTED TO FORMAL ACTION	6

Merit Electric
Kit Carson
Jonathan Juretech
Dan Johnson
Chris Schiffman
Dockery Roofing, Inc.

CITATION CRIMINAL PROSECUTION	1
PENDING ENFORCEMENT/CRIMINAL	1
PENDING ENFORCEMENT/CIVIL	61
ISSUED PENDING RESPONSE	133
ISSUED PENDING HEARING	6
WENT TO HEARINGS	314
CITATION FINES	\$274,840.00
UNCONTESTED CITATIONS	1,094