



**BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

Michael Paul Maness,

PETITIONER

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, and
ORDER ON REVIEW**

Case No DOPL 2005-47

INTRODUCTION

Michael Paul Maness ("Petitioner") brings this request for agency review before the Department of Commerce ("Department"), challenging an adverse decision from the Division of Occupational and Professional Licensing ("Division")

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to the Utah Administrative Procedures Act ("UAPA"), Utah Code Annotated, Section 63-46b-12, and the Department of Commerce Utah Administrative Procedures Act Rules ("Department Rules"), Utah Administrative Code, R151-46b-12

ISSUES REVIEWED

- 1 Whether Petitioner has established that a continuance of the agency review proceeding is appropriate until completion of the criminal matter against him
 - a Whether transcripts from a preliminary hearing and other hearings held in a criminal matter against Petitioner are part of the Division record for purposes of agency review

1
b Whether a recording not submitted into evidence at the Division hearing is part of the Division's record

2 Whether Petitioner has established error on the part of the Division to require reversal

3 Whether Petitioner may obtain discovery on agency review to require the Division to answer his questions regarding proper draping techniques for breast massage

FACTS

1 On May 9, 2006, a hearing was held before an Administrative Law Judge designated as presiding officer by the Division Director (hereafter, "Presiding Officer") to consider Petitioner's conduct with respect to two female clients, one of whom was a police officer who presented for treatment under a different name. Both female clients testified at the hearing. Although the police officer testified about an audio recording of her appointment with Petitioner, that recording was not submitted into evidence. The officer testified that she gave the recording to another individual and was later informed that the recording did not work. Hearing Transcript, 70 10-17, 75 2-25

2 Petitioner was represented by counsel at the Division hearing. However, other than cross examining the Division's witnesses, Petitioner's counsel chose not to present a defense on Petitioner's behalf because of the pending criminal allegations against him. In questioning the police officer, Petitioner's counsel referred to a preliminary hearing in the criminal matter, and asked the officer only one question regarding her preliminary hearing testimony (whether she testified that Petitioner rubbed her breasts and touched her nipples).¹

¹ Hearing Transcript, 71 18-19

1
The issue of the preliminary hearing came up again on re-direct² However, Petitioner's counsel chose not to submit the transcript of the preliminary hearing into evidence, and she asked no further questions regarding the officer's testimony at the preliminary hearing

3 On July 11, 2006, the Division revoked Petitioner's license to practice as a massage therapist, concluding that Petitioner had engaged in unlawful and unprofessional conduct by touching the clients in a sexual manner, engaging in lewd, indecent and unlawful behavior, failing to properly drape the clients, and providing breast massages without a request from the clients, and without proper procedures such as a written informed consent

4 On August 11, 2006, appearing *pro se*, Petitioner filed a timely request for agency review Petitioner submitted a transcript of the Division hearing on August 31, 2006

5 In various telephone calls with a different Administrative Law Judge who had been assigned to the agency review matter (hereafter, "ALJ"), Petitioner asked questions regarding agency review procedures, including whether the agency review matter could be postponed until completion of a criminal case against him and stating his belief that the witnesses "perjured themselves" The ALJ notified Petitioner that his memorandum in support of agency review must specifically state the findings and conclusions of the Division that he believes are in error, that he must marshal the evidence in support of the findings he challenges and cite to the appropriate parts of the hearing transcript and any legal authority that support his request for agency review The ALJ further notified Petitioner that agency review is limited to the Division's record and that any testimony in a criminal proceeding was likely not a part of the Division's record, unless it was specifically raised during the Division hearing Executive Director's Order of Suspension, issued March 15, 2007, p 2

² *Id.*, 77 1-2

1

6 On September 14, 2006, Petitioner delivered to the Department a transcript of the preliminary hearing held on March 30, 2005 in the criminal matter against him. The transcript appeared in a manila envelope that was not sealed. A voice mail message that same day from Petitioner stated that he wanted the transcript "sealed" until a final determination was made as to whether this transcript could be considered in the agency review proceeding. Thus, the ALJ and the Executive Director have not reviewed that transcript.

7 On September 15, 2006, the ALJ conducted a telephonic conference with Petitioner and the Division's counsel. The ALJ notified Division's counsel about Petitioner's submission of the transcript from the criminal matter and his voice mail message requesting that the transcript be "sealed." Division's counsel questioned the authority to seal the transcript and argued that she could not address its relevance to this matter until she had an opportunity to review the transcript. Petitioner began to make arguments as to why the transcript should be considered on agency review. Division's counsel stated that she had no opportunity to prepare for such arguments, nor an opportunity to review the transcript of the criminal matter. The ALJ suggested scheduling deadlines to brief the issue. However, Petitioner raised the possibility of postponing the agency review proceedings until completion of the criminal matter. The Division indicated no objection as long as its revocation Order was in place.

8 The ALJ confirmed that the Division's Order was still effective as no request for a stay had been made and no stay order had been issued. The parties then agreed that the agency review proceeding would be suspended for a period of six months, and that Petitioner

would submit a statement in writing to the Executive Director no later than March 15, 2007 indicating the status of the criminal proceeding. On September 21, 2006, an Order of Suspension was issued stating these terms³

9 On March 13, 2007, Petitioner submitted a written request for a further continuation of the agency review proceedings. A conference call with the parties was thus conducted on March 14, 2007. The Division indicated its concerns about an open-ended suspension, and agreed to a six-month suspension on the condition that briefing deadlines be established. The Division's counsel stated that the Division would not stipulate to any further suspensions of agency review proceedings. Based upon the parties' stipulation, therefore, a Modified Order of Suspension and Scheduling Order was issued on March 22, 2007, whereby the Petitioner was ordered to file his memorandum in support of agency review by the deadline of September 24, 2007, the Division to file its response memorandum by October 5, 2007, and Petitioner to file his reply memorandum no later than October 15, 2007.

10 On June 18, 2007, Petitioner wrote a letter to the Division's counsel asking her to answer various questions he posed as to the proper techniques for a breast massage and as to past sanctions against licensees. Petitioner acknowledged that these questions had not been raised at the Division hearing. Petitioner's June 18, 2007 letter, p. 2. Petitioner did not file a motion requesting such discovery or any memorandum to support such a motion.

³ A Corrected Order of Suspension and Notice of Correction was issued on September 22, 2006, noting that the original Order of Suspension incorrectly stated the deadline date for Petitioner to submit a written statement regarding the status of the criminal matter against him as March 15, 2006, the correct date being March 15, 2007.

1

11 By letter dated July 2, 2007, the Division's counsel responded, stating that the Division objected to his letter and any attempt to supplement the Division record through the agency review proceedings

12 On September 17, 2007, Petitioner submitted a letter dated September 13, 2007, in which he asked for the definition of "the record" for an appeal and that the Division's "position on the undraping of breast tissue " be revealed

13 By letter dated September 17, 2007, the ALJ referred Petitioner to UAPA and the Department's Rules as a guide to determine the definition of "the record " She further notified Petitioner that on agency review, the parties' opportunity to express their positions would be through the filing of memoranda The ALJ further reminded Petitioner of the filing deadlines previously established

14 On September 24, 2007, Petitioner submitted a letter by facsimile, which Petitioner asked to be treated as a memorandum in support of agency review Petitioner argued in that memorandum that the transcript of the preliminary hearing in the criminal proceeding is part of the record and thus appropriate for review by the Executive Director He also requested an extension of the agency review matter until completion of the criminal proceeding, and argued that the Department's Rules should be liberally construed to permit such an extension

15 The Division filed its Objection to Extension and Motion to Dismiss on October 5, 2007

16 The Petitioner did not file a timely reply memorandum or otherwise respond to the Division's Objection and Motion Thus, on October 31, 2007, the Division filed a Request to Submit For Decision its Objection to Extension and Motion to Dismiss

17 By letter to the Division's counsel dated November 6, 2007 and copied to the ALJ, Petitioner stated that he had not received the Division's Objection and Motion. He explained that the criminal matter had been once again continued, this time because the officer's tape recording from her appointment with Petitioner had been discovered. He requested that a hearing be held to clarify what constitutes the record, and that the newly discovered recording considered part of the record. Finally, he asked for an opinion to address the questions he previously posed to Division's counsel regarding draping of a client.

CONCLUSIONS OF LAW

1 The standards for agency review within the Department of Commerce correspond to those established in Utah Code Ann. § 63-46b-16(4).⁴ Therefore, to grant relief to Petitioner, the Executive Director must determine, "on the basis of the agency's record," that the party 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

⁴Utah Admin. Code R151-46b-12(7)

the inconsistency, or
(iv) otherwise arbitrary or capricious

Subsection 63-46b-16(4) In addition, a party requesting agency review bears the burden of setting forth any factual or legal basis in support of that request, including adequate supporting arguments and citation to appropriate legal authority Utah Admin Code R151-46b-12(3)(b)

2 In this case, the Division revoked Petitioner's license upon its conclusions that Petitioner had engaged in unlawful and unprofessional conduct Petitioner's request for agency review from that decision does not specifically allege any error in the Division's proceedings or identify any specific findings or conclusions of the Division that he wishes to challenge Rather, Petitioner refers to "invented" and "perjured" testimony Petitioner's Letter Dated August 8, 2006, p 1 Petitioner also states that the recording of the officer's appointment was "completely concealed from the discovery and was also omitted from the statements of every other official involved" *Id*

3 The Division requests that this matter be dismissed The Division argues that an indefinite continuation until the criminal proceeding is completed is not appropriate, because Petitioner's intent in continuing agency review is to supplement the Division record, which is not permissible According to the Division, it is unlikely that the result of the criminal proceeding will change the outcome of this case, given the differing standards of proof in the two proceedings The Division further maintains that Petitioner has failed to marshal the evidence or to allege any error as to the Division's conclusions

4 "As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar" *Thompson v Commerce et al* 2007 UT App 97 (unpublished mem decision), p 1, citations omitted "At

the same time. “because of [their] lack of technical knowledge of law and procedure [, *pro se* appellants] should be accorded every consideration that may reasonably be indulged”⁵ *Id* citations omitted “Thus, even though appellate courts are ‘generally lenient with *pro se* litigants,’ those litigants must still follow the appellate rules” *Id*, citing *Lundahl v Quinn*, 2003 UT 11, ¶ 4, 67 P 3d 1000

5 Considering the *Thompson* decision and the provision in the Department Rules that the Rules “shall be liberally construed to secure the just, speedy, and economical determination of all issues presented in adjudicative proceedings before the department,”⁵ the Executive Director will be generally lenient with Petitioner and consider his letter dated November 13, 2007 to the Division’s counsel as a reply memorandum, even though it was not timely⁶ and even though it was not filed with the Executive Director but merely copied to the ALJ

6 Similarly, Petitioner’s request for agency review will not be dismissed as requested by the Division but will be considered on its merits to address the issues Petitioner has raised, even though he has not specifically identified the bases upon which he challenges the Division’s decision as required by Subsection 63-46b-16(4) Petitioner’s statements in his request for agency review to the effect that the witnesses provided fabricated or perjured testimony appear to be a challenge to the Division’s findings based upon the testimony of the two witnesses (i.e., that Petitioner touched the witnesses’ breasts, gave breast massages without consent, used improper draping techniques and other such findings) Division’s Findings of Fact Conclusions of Law and Recommended Order, ¶ 3-11 Petitioner’s claim

⁵ Subsection R151-46b-5(1)

⁶ Petitioner has provided no explanation for why he would not have received the Division’s Objection to Extension and Motion to Dismiss, when he has received all prior and subsequent mailings

1
that the officer's recording of the appointment was not properly provided to Petitioner could be deemed a challenge to the Presiding Officer's determinations as to discovery and whether to admit evidence into the record

A. Request for Continuance

7 Petitioner's main focus since August 2006 when he filed the request for agency review has been to obtain continuances. As Petitioner has now briefed the issue of whether the transcripts from the criminal proceeding can be considered part of the Division record, that matter is ready for decision.⁷

Transcripts from the

8 The Division's proceedings were conducted in accordance with UAPA procedures, because the disciplinary action involving a professional license is a formal "adjudicative proceeding." Subsections 63-46b-2(1)(a) and R156-46b-201(2)(a). Thus, formal adjudicative proceedings were held before the Division, including discovery and a hearing in which Petitioner had an opportunity to question the Division's witnesses and present evidence on his own behalf. Subsections R151-46b-9 and R151-46b-10. Petitioner was entitled to agency review based upon his timely filing of a request with the Executive Director. Subsections 63-46b-12 and R151-46b-12. However, agency review is limited to the Division's record. Subsections 63-46b-16(4) and R151-46b-12(7).

9 "Record" is defined in Subsection R151-46b-2(11) as "the record of a hearing in an adjudicative proceeding or the record of the entire adjudicative proceeding, as used in context." On agency review, the Executive Director considers the "agency's record" pursuant to Subsection 63-46b-16(4). Thus, it is appropriate to look not only to the record of the

⁷ Prior to his September 24, 2007 filing, Petitioner had only asked questions about whether the transcripts were part of the record and had not briefed the issue.

Division hearing (i.e., the hearing transcript), but also to the record of the “entire adjudicative proceeding.” Under Subsection R151-46b-18(1), the “record of an adjudicative proceeding” is defined to include

[T]he pleadings and exhibits filed by the parties, the recording of any hearing under Subsection R151-46b-10(11), any transcript of a hearing, and orders or other documents issued by any presiding officer in the adjudicative proceeding or on agency review or reconsideration of the adjudicative proceeding

10 Petitioner states that the definition of “record” includes the record of “any hearing.” November 6, 2007 letter, page 2. He also argues that during the agency review proceeding, he filed the transcript of the preliminary hearing, and therefore it becomes part of the record in the adjudicative proceeding as “a pleading or exhibit filed by the parties” under Subsection R151-46b-18(1). September 24, 2007 letter (Memorandum in Support of Agency Review), p. 1. However, Petitioner misreads the definitions. Subsection R151-46b-18(1) does not contain a reference to the record or transcript of “any hearing,” but rather a reference to “any transcript of a hearing” in an adjudicative proceeding. Thus, this definition includes the possibility that more than one transcript of a particular hearing in an adjudicative proceeding could become part of the record. It does not mean that the transcript of a criminal or civil matter automatically becomes part of an adjudicative proceeding.

11 The transcript from a civil or criminal matter could become part of an adjudicative proceeding, however, if it is taken into evidence as part of the Division’s proceedings. That did not happen here. The preliminary hearing in the criminal case was held over a year before the Division hearing⁸ but Petitioner failed to introduce it into evidence at the Division hearing. Petitioner’s opportunity to use the transcript from the preliminary hearing to impeach the witness was at the time of the Division hearing. However, Petitioner’s

⁸ The preliminary hearing was held on March 30, 2005, the Division hearing was held on May 9, 2006

counsel made a strategic decision not to present any evidence in Petitioner's behalf. Although she referred to the preliminary hearing, she did not attempt to use any part of that transcript to impeach the Division's witness. Hearing Transcript, pages 71 and 77.

12 Petitioner's submission of the preliminary hearing transcript during the agency review proceedings is ineffective. Agency review is limited to the record as comprised by the Division. Subsection 63-46b-16(4). The Executive Director cannot consider any information not previously considered by the Division. The transcripts from the criminal matter were not entered into evidence at the Division level and cannot be reviewed now on agency review. Petitioner's filing of the transcript during agency review attempts to supplement the Division record, but the record on appeal may be supplemented only "because of an omission or exclusion, or a dispute as to the accuracy of reporting, *and not to introduce new material into the record*." *State v. Law*, 2003 UT App 228, ¶ 2, 75 P 3d 923, *citing Olson v. Park-Craig-Olson, Inc.*, 815 P 2d 1356, 1359 (Utah Ct. App. 1991) (emphasis added). Petitioner does not claim that there was any error in reporting what occurred in the Division's proceeding.

Police Officer's Recording of Massage Therapy Appointment

13 The recording by the police officer is also not part of the Division's record. Had the recording been admitted into evidence at the time of the Division hearing, the Executive Director could consider it on agency review, but it was not presented at the Division level and cannot be considered now. In addition, it is unclear if that tape recording would make any difference in this administrative proceeding. Even if the recording were to show that the officer's testimony was false about what Petitioner did during the massage therapy appointment, there is still the testimony of the other witness, which could alone support the Division's findings and conclusions.

14 Thus, Petitioner's request for a continuance of the matter is denied. This adjudicative proceeding has been pending since August 2006, the Division having previously stipulated to two six-month continuances. The standard of proof in this adjudicative proceeding was a "preponderance of the evidence"⁹ while the standard of proof in the criminal matter is "beyond a reasonable doubt." Even if Petitioner is successful in demonstrating reasonable doubt to be acquitted from criminal charges, such a result does not mean that the revocation of Petitioner's license will be affected. The Division already considered the evidence and determined that the evidence supported its findings and conclusions that Petitioner engaged in unlawful and unprofessional conduct as defined in Section 58-1-501. The Department cannot keep this matter open indefinitely just to see if the witnesses make statements inconsistent with their testimony at the Division hearing. The criminal matter has been pending for over three years.¹⁰ There have been numerous continuances for various reasons and even now, as Petitioner states in his November 6, 2007 letter, no trial date has been set. Therefore, Petitioner's request for a continuance is denied, and the arguments he has expressed in his memorandum in support of agency review will now be considered on the merits.

B. Failure to Establish Error

15 Under the *Thompson* analysis, even though Petitioner is appearing *pro se*, he is bound by the rules regarding agency review. Thus, before the Executive Director can grant relief on agency review, Petitioner must establish, on the basis of the agency's record, that he has been "substantially prejudiced" by the Division. Subsections R151-46b-12(7) and

⁹ Subsection R151-46b-10(9)

¹⁰ The information was filed on October 1, 2004. Division's Notice of Prehearing Conferences Pending Evidentiary Motions Order on Motion to Continue Hearing and Scheduling Order, p. 2

63-46b-16(4) A party challenging an agency's findings of fact must show that the findings are not supported by substantial evidence when viewed in light of the whole record

Subsection 63-46b-16(4)(g) The burden remains upon the party challenging the facts to marshal all of the evidence in support of the decision and to show that despite such evidence, the decision is not supported by substantial evidence Subsection R151-46b-12(3)(c), *Tippets v DOC* 2007 UT App 366 The failure to so marshal the evidence permits the Executive Director to accept the findings of fact made by the Division as conclusive Utah Admin Code R151-46b-12(3)(c), *Tippets*, citing *Martinez v Media Paymaster Plus*, 2007 UT 42, ¶ 19, 164 P 3d 384

16 Petitioner has not marshaled the evidence in the record in support of the Division's findings or to show that the findings are not supported by substantial evidence He has failed to refer to the hearing record at all Therefore, the Executive Director will accept the Division's findings as conclusive

17 Petitioner's claim that the officer's recording was wrongfully withheld from discovery has not been properly briefed and cannot be considered He cites no legal authority to support any allegation of error or abuse of discretion by the Presiding Officer with respect to the recording See *State v Cruz-Mesa* 2003 UT 32, ¶ 7-8, 76 P 3d 1165, citing *Jensen v Intermountain Power Agency*, 1999 UT 10, ¶ 12, 977 P 2d 474 (holding that a judge's decision to admit or exclude specific evidence is reviewed for an abuse of discretion) See also *Tippets*, 2007 UT App 366, and *Gilley v Blackstock*, 2002 UT App 414, footnote to ¶10, 61 P 3d 305 (issues not adequately briefed will not be considered)

18 Petitioner has shown no error by the Presiding Officer There is no indication that his counsel attempted to compel discovery of the tape recording or otherwise attempt to

introduce the recording into evidence. At the Division hearing, Petitioner's counsel asked the witness why she did not mention the recording in her police report or during the preliminary hearing. Hearing Transcript, 70 10-17, 75 2-25. However, counsel made no objections or motions with respect to the recording. Thus, Petitioner failed to properly preserve this issue for review by the Executive Director. See *Tippets*, 2007 UT App 366, citing *Esquivel v Labor Comm'n*, 2000 UT 66, ¶ 34, 7 P 3d 777 (issues not raised in the agency proceeding are considered waived and will not be addressed by a court on review) ¹¹

19 The issue of continuing the Division proceedings until the resolution of the criminal matter was considered by the Division. The Presiding Officer considered the facts and applied the rule of law established in *Securities and Exchange Commission v Dresser Industries Inc*, 628 F 2d 1368, 1375 (D C Cir 1980) and *Rosenburg v Board of Education*, 710 P 2d 1095, 1101 (Utah 1986). Division's Notice of Prehearing Conferences Pending Evidentiary Motions Order on Motion to Continue Hearing and Scheduling Order, pp 6-9. He determined that to promote the public interest, it would be a gross miscarriage of justice to indefinitely continue the adjudicative proceeding. *Id.*, p 9. Although Petitioner has asked that the agency review proceeding be continued (See above), he has not stated a challenge to the Presiding Officer's determination not to continue the Division's proceedings, nor has he briefed the issue for agency review. Therefore, that matter is not properly before the Executive Director and will not be considered. *Tippets*, 2007 UT App 366

¹¹ In his November 6, 2007 letter or Reply Memorandum, Petitioner refers to his recent telephone conversation with the Division's Presiding Officer, when they apparently discussed the newly discovered recording of Petitioner's appointment with the police officer. However, the Executive Director presides over an agency review matter, and Petitioner's contact with the Division's Presiding Officer while agency review was pending was inappropriate. Therefore, the content of the telephone conversation between Petitioner and the Division's Presiding Officer is not relevant and not part of the record on agency review.

C. No Discovery On Agency Review

20 Petitioner has on two occasions posed questions to the Division's counsel in attempts to discover the Division's position regarding proper draping techniques when performing breast massages. However, the opportunity for discovery was during the Division's proceedings. Subsection R151-46b-9. By failing to pursue discovery on this point during the Division's proceedings, Petitioner forfeited that opportunity. There is no procedure for discovery on agency review. Subsections 63-46b-12 and R151-46b-12. Thus, the Division is not required to respond to Petitioner's questions regarding draping techniques.

D. Summary

21 In summary, Petitioner's request for a continuance is denied. Petitioner has failed to properly challenge the Division's findings of fact, which are hereby accepted as conclusive. He has also failed to establish any abuse of discretion or other error by the Division. The Division does not need to respond to Petitioner's requests for discovery presented for the first time on agency review.

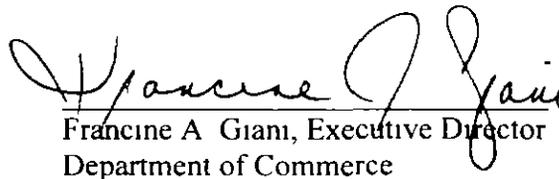
ORDER ON REVIEW

The Executive Director has made the above findings of fact and conclusions of law, and it is therefore ordered that the Division's decision revoking Michael Paul Maness' license as a massage therapist is hereby affirmed

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-16, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v Department of Commerce et al*, 981 P 2d 414 (Utah App 1999) within 20 days after the date of this Order pursuant to Section 63-46b-13

DATED this 12th day of December, 2007


Francine A. Gian, Executive Director
Department of Commerce