

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

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

Stacie Powell,

PETITIONER

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

DOPL-OSC-2-2007-51

INTRODUCTION

This matter came before the Department of Commerce upon a request for agency review filed by Stacie Powell ("Petitioner") seeking review of an adverse decision by 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 Utah Code Annotated, Section 63G-4-301 and Utah Administrative Code, R151-46b-12

ISSUES REVIEWED

- 1 Whether Petitioner failed to properly challenge any Division findings of fact
- 2 Whether Petitioner failed to establish that the Division's decision of license revocation is unreasonable in light of Petitioner's failure to comply with the critical terms of a Stipulation and Order and in light of Petitioner's prior disciplinary history

FINDINGS OF FACT

1 Petitioner received her Utah registered nurse license on October 2, 1996
Petitioner also had an Arizona registered nurse license

2 On April 5, 2004 Petitioner self-reported to the Arizona Board of
Licensing that she had inappropriately used controlled substances. She entered into an
agreement to participate in a professionals-in-recovery program for three years. During
this time, Petitioner tested positive for oxycodone on four occasions and tested positive
for alcohol on one occasion. Petitioner also failed to undergo a chemical dependency
evaluation, and failed to meet several other requirements of the agreement. Petitioner's
Arizona license was thus revoked on November 3, 2006.

3 Petitioner's January 5, 2007 online application to renew her Utah license
contained a "no" answer to the question whether she had surrendered or had any
disciplinary action taken against a license to practice in a regulated profession since the
last renewal.

4 On March 7, 2007, Petitioner entered into a Stipulation and Order with the
Division revoking her Utah license, but staying that revocation in favor of a five-year
probation subject to certain terms and conditions.

5 On September 8, 2008 the Division issued an Amended Notice of Agency
Action alleging that Petitioner failed to comply with the terms of the 2007 Stipulation and
Order by failing to provide samples for drug analysis on 24 separate occasions, failing to
submit monthly self-assessment reports, and failing to submit required documentation of
her participation in a professional support group and participation in a 12-step program.

6 Petitioner's current attorney represented Petitioner in negotiations with the Division at that time. During the negotiations, Petitioner indicated that the reasons she did not provide samples for drug analysis was due to concerns about the integrity of the samples she provided on previous occasions due to actions or omissions on the part of the employees of the drug testing company. Nevertheless, Petitioner entered into a second Stipulation and Order issued on December 1, 2008. Petitioner thus agreed to meet various terms and conditions for a period of four years, including meeting with the Board, providing the Division copies of prescriptions, providing samples for drug analysis to a company designated by the Division, and notifying the Division of changes in employment.

7 The Stipulation and Order further contained the following relevant provisions:

¶ 7(1)(f) The Division shall determine when and where [Petitioner] is to submit for testing. Any report from a drug testing company that indicates that [Petitioner] failed to provide a sample for drug analysis as directed *may be considered a positive drug test result for [Petitioner] and may subject [Petitioner] to additional sanctions.* If [Petitioner] believes that proper procedure was not followed by any person during the collection and transfer of the sample, [Petitioner] shall inform the Division in writing within one week of providing the sample.

¶ 7(1)(h) The Division may take appropriate action to impose sanctions if (i) [Petitioner] tests positive for alcohol, a prescription drug, a controlled substance, or any mood altering substance which cannot be accounted for, or (ii) [Petitioner] violates any federal, state or local law relating to [Petitioner]'s practice, the Controlled Substance Act, or a term or condition of this Stipulation and Order. Sanctions may include revocation or suspension of

[Petitioner]'s license, or other appropriate sanction, in the manner provided by law

¶ 12 *If [Petitioner] violates any term or condition of this Stipulation and Order, the Division may take action against [Petitioner], including imposing appropriate sanctions, in the manner provided by law. Such sanction may include revocation or suspension of [Petitioner]'s license, or other appropriate sanction*

¶ 13 [Petitioner] has *read each and every paragraph* contained in this Stipulation and Order [Petitioner] *understands each and every paragraph* contained in this Stipulation and Order [Petitioner] *has no questions* about any paragraph or provision contained in this Stipulation and Order

December 1, 2008 Stipulation and Order, Case No DOPL-OSC-2007-51, pp 6 and 10
(emphasis added)

8 On or about September 30, 2009, the Division filed a Verified Motion for Order to Show Cause, alleging that Petitioner violated the 2008 Stipulation and Order

9 A hearing was held before the Board of Nursing on January 14, 2010

10 On May 18, 2010, the Division issued its Order revoking Petitioner's license to practice as a registered nurse

11 Petitioner filed a timely request for agency review on June 15, 2010
Petitioner has requested oral argument

CONCLUSIONS OF LAW

1 The standards for agency review within the Department of Commerce correspond to those established by the Utah Administrative Procedures Act ("UAPA"), Utah Code Annotated Section 63G-4-403(4) Utah Admin Code R151-46b-12(7)

2 A review of the record on review indicates that the parties have more than adequately briefed the issues in this case. Therefore, pursuant to her discretion in Utah Code Ann. §63G-4-301(4) and Utah Admin. Code, R151-46b-12(6), the Executive Director hereby denies Petitioner's request for oral argument.

3 In this matter, the Division concluded that Petitioner engaged in unprofessional conduct by failing to comply with the 2008 Stipulation and Order in that she failed to meet with the Division on a scheduled date, failed to provide the Division a copy of a prescription for hydrocodone, failed to notify the Division of a change in employment status, and failed to sign up for drug testing with the company designated by the Division, Compass Vision. The Order noted that a brief license suspension or an extension of her probationary status might have been appropriate for some of these violations, but her failure to register for participation in the drug testing program with Compass Vision was so serious a violation that only revocation was appropriate. Order, pp. 10-12. The Division reasoned that given Petitioner's "history of unprofessional conduct relative to the prior unauthorized use of controlled substances, the requirement that [Petitioner] submit to drug testing was a fundamental and critically important aspect" of the 2008 Stipulation and Order and given her repeated violations of prior orders, entering into more restrictive probationary terms would be futile and the adequate protection of the public health, safety and welfare required revocation of her license. *Id.* pp. 13-15.

4 On agency review, Petitioner states the Division erred in concluding that she had a drug and alcohol abuse problem, and that she was a risk to the public health, safety and welfare. Memorandum in Support of Agency Review, pp. 7-9. Thus, she argues that the decision was arbitrary and capricious. *Id.*, p. 7. Petitioner states she made

a poor decision in failing to register with Compass Vision, but she argues that revocation of her license was too excessive a sanction. *Id.* pp. 9-10. Finally, in her Reply Memorandum, Petitioner raises for the first time the argument that the Division should not have considered her disciplinary history with the State of Arizona. Reply, p. 5.

A. Division's Findings of Fact Accepted as Conclusive

5 The Division's findings are accepted as conclusive as Petitioner has failed to identify any findings that she wishes to challenge or to properly marshal the evidence in support of those findings. The Department's UAPA rules provide

If a party challenges a finding of fact in the order subject to review, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence. A party challenging the facts bears the burden to marshal or gather all of the evidence in support of a finding and to show that despite such evidence, the finding is not supported by substantial evidence. The failure to so marshal the evidence permits the executive director to accept a division's findings of fact as conclusive. A party challenging a legal conclusion must support the argument with citation to any relevant authority and also cite to those portions of the record that are relevant to that issue.

Utah Admin. Code R151-46b-12(3)(c) (emphasis added)

6 Petitioner relies on Utah Code Ann. § 63G-4-403(4) for relief, alleging that the "agency action is based upon a determination of fact that is not supported by substantial evidence when viewed in light of the whole record." She argues that the Division assumed Petitioner had a substance abuse problem. There is no such finding by the Division, however.¹ Rather, the Division's findings related to specific violations of the 2008 Stipulation and Order and to Petitioner's prior disciplinary history. Petitioner has not identified any of those findings as incorrect in light of the Division record.

¹No such finding exists, because Petitioner's unauthorized use of controlled substances was not an issue at the hearing. Hearing Transcript 44:10-16.

B. Argument Stricken Regarding Consideration of Arizona History

7 Petitioner argues in her Reply Memorandum that the prior disciplinary history including what occurred in Arizona should not be considered. However, Petitioner failed to raise this argument in her opening memorandum on agency review. The Executive Director will not consider matters raised for the first time in a reply brief. *Coleman v Stevens*, 2000 UT 98, ¶ 9, 17 P 3d 1122. Even if the Executive Director were inclined to consider this issue, Petitioner has failed to establish that she properly preserved it for appeal. *See Badger v Brooklyn Canal Co.*, 966 P 2d 844, 847 (Utah 1998) (to properly preserve an issue for appeal, the issue must be raised in a timely fashion, must be specifically raised, and must introduce "supporting evidence or relevant legal authority"). A review of the hearing record indicates that Petitioner's counsel initially allowed the testimony about the Arizona disciplinary record to come in. Later she objected on the basis of relevance, but provided no supporting evidence or legal authority, and she later seemed to abandon the objection altogether.² Because Petitioner failed to preserve the issue of the Division considering the Arizona disciplinary record, and she failed to raise it in her opening brief on agency review, that argument is hereby stricken.

²As the Division presented its witnesses there were questions and testimony regarding Petitioner's prior disciplinary history in Arizona as the basis for the Utah 2007 Stipulation and Order. Petitioner's counsel raised no objections to that line of questioning. Hearing Transcript, 37 1-25, 38 1-17, 50 6-14. Subsequently, Petitioner testified and was cross-examined by the Division's counsel, who asked Petitioner if her Arizona license was revoked for controlled substance abuse, Petitioner's counsel objected on the basis of relevance. *Id.* 81 17-25. The Administrative Law Judge conducting the hearing redirected the questioning to the reasons behind the 2007 Stipulation and Order. The Division's counsel thus asked Petitioner if the 2007 Stipulation and Order referenced the prior license revocation in Arizona, Petitioner answered 'Yes'. The Division's counsel then asked Petitioner about the basis for the revocation in Arizona, and Petitioner provided her answers. Petitioner's counsel raised no further objections as to the Arizona history being admitted into the record. *Id.* 82 1-25, 83 1-25.

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C. Reasonableness of Division's Decision

8 Petitioner challenges the Division's conclusion that she engaged in unprofessional conduct deserving of a license revocation. When a governing statute grants explicit discretion to the Division, the Executive Director applies a reasonableness and rationality standard in reviewing the Division's interpretations of applicable law to the facts. *Barnard v. Motor Vehicle Div.*, 905 P.2d 317, 320 (Utah 1992). Under Utah Code Ann. §§ 58-1-106(1)(h), 58-1-202(1)(d) and 58-1-401, the Division and the Board are given explicit discretion to take action upon the license of a licensee who has engaged in unprofessional conduct. Thus, the Executive Director may overturn the Division's decision only if it is unreasonable or irrational.

9 Challenges to an agency action as arbitrary and capricious are also reviewed under a reasonableness standard. *Maverick Country Stores, Inc. v. Industrial Commission*, 860 P.2d 944, 950 (Utah App. 1993), *Bourgeois v. Dept. of Commerce*, 2002 UT App 5, ¶7, 41 P.3d 461 (Utah App. 2002). Finally, in reviewing a sanction by an agency where the agency has broad discretionary powers, its decision will not be disturbed "unless it is clearly unreasonable or otherwise an abuse of that discretion." *Johnson-Bowles v. Division of Sec.* 829 P.2d 101, 116 (Utah Ct. App.), *cert. denied*, 843 P.2d 516 (Utah 1992). In this case, Subsection 58-1-401(2) provides the Division broad discretionary authority to sanction the license of a licensee who has engaged in unlawful or unprofessional conduct. Thus, the Executive Director will not disturb the Division's decision unless it is clearly unreasonable.

10 Petitioner has failed to establish that the revocation of her license was clearly unreasonable under the circumstances of this case. The Division found and

Petitioner admitted that she is in violation of several provisions of the 2008 Stipulation and Order, the most important of which was failing to register with Compass Vision. The drug screening was the only objective way for the Division to determine whether Petitioner was engaging in unauthorized substance abuse. Hearing Transcript, 49 22-25, 50-17

11 Petitioner understood that the Division's reasons for requiring her to submit to drug testing was due to her disciplinary history in Arizona, which resulted from allegations of drug or alcohol abuse. Hearing Transcript, 84 2-25, 85 1-24. Although Petitioner denies any drug or alcohol abuse then or now, it was reasonable for the Division to rely on the Arizona agreement that Petitioner entered into and the subsequent license revocation order without being required to relitigate the circumstances behind that matter. See *Butts v Wyoming State Board of Architects*, 911 P 2d 1062 (Wyo 1996), *Marek v Board of Podiatric Medicine* 16 Cal App 4th 1089, 1097, 20 Cal Rptr 2d 474, 479 (Ct App 1993) review denied (Cal Sept 16, 1993) (Holding that licensing boards may deny licensure or may sanction a license based upon another jurisdiction's disciplinary sanctions, even where those sanctions result from a stipulation in which the applicant or licensee denies the underlying allegations)

12 Petitioner attempts to explain her failure to register with Compass Vision, saying she had concerns about the reliability of the Compass Vision procedures. However, she notified the Division of those concerns before, yet she still chose to enter into the 2008 Stipulation and Order, expressly agreeing to comply with all its terms.

13 The sanction of revocation was not unreasonable given Petitioner's prior history of substance abuse that led to the Arizona license revocation her noncompliance with

the 2007 Stipulation and Order, her entering into the 2008 Stipulation and Order despite concerns about the critical drug screening provision and then completely failing to meet that and other terms. Petitioner states that she is willing to comply with the registration requirements now and that she is entitled to another chance. As finders of fact, the Board and the Division are entitled to determine the credibility of witnesses and to draw reasonable inferences from the evidence presented. *State v. Waldron*, 2002 UT App 175, ¶ 16, 51 P 3d 21 (citations omitted). Here, the Division and the Board heard Petitioner testify and they had grave concerns about Petitioner's credibility and her reliability in light of her prior history. Hearing Record, pp. 90-111, Order, pp. 12-14. Under the circumstances, the Executive Director will not substitute her own judgment for that of the Division and the Board.

14. Moreover, the sanction of revocation was a direct consequence of Petitioner's failure to comply with her contractual agreement with the Division. In signing the 2008 Stipulation and Order, Petitioner agreed that the failure to provide a sample for drug analysis may be considered a positive drug test result. Stipulation and Order, ¶ 7(1)(f). Thus, her failure to register with Compass Vision since 2008 when the Stipulation and Order was executed has resulted in untold numbers of positive drug test results, as failing to register resulted in the failure to provide a drug sample. Petitioner agreed that the Division may impose sanctions for positive drug test results or for any violations of the Stipulation and Order, and that sanctions could include revocation. *Id.*, ¶¶ 7(1)(h) and 12. Petitioner agreed that she read each and every paragraph of the Stipulation and Order and had no questions. *Id.* ¶ 13. Petitioner was represented by counsel during the negotiations for 2008 Stipulation and Order, who would have assumedly advised Petitioner as to the importance of complying with all provisions of the

agreement as well as the resulting consequences. The sanction of revocation was therefore an appropriate consequence for breaching the terms of her contractual agreement.

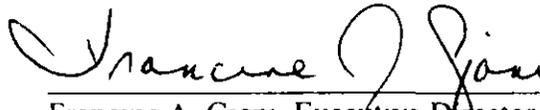
ORDER ON REVIEW

For the foregoing reasons, the Division's Findings of Fact are accepted as conclusive for Petitioner's failure to identify any Division finding that she wished to challenge or to marshal the evidence in support of such finding. Petitioner's argument regarding the admissibility of the Arizona disciplinary history is stricken, as she did not raise it in her opening brief on appeal and did not preserve the issue at the Division level. Petitioner failed to establish that the sanction of revocation was unreasonable given her prior history and in light of the fact that revocation was an agreed-upon consequence for failing to comply with the 2008 Stipulation and Order. The Division's Order is thus 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 63G-4-401 and 63G-4-403, 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 63G-4-302.

Dated this 2nd day of February, 2011


Francine A. Gian, Executive Director
Utah Department of Commerce