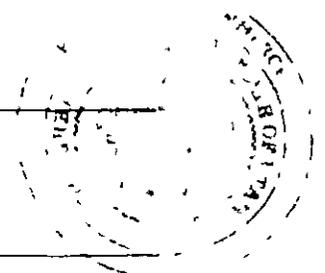


**BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**



IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

E. Timothy Schomburg,

PETITIONER

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

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INTRODUCTION

E Timothy Schomburg ("Petitioner") brings this request for agency review before the Department of Commerce ("Department") seeking review of a decision by the Division of Occupational and Professional Licensing ("Division"), which denied his application for renewal of a license as an unarmed private security officer

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 establish that the new arguments and evidence raised for the first time in his reply memorandum on agency review may be considered
- 2 Whether Petitioner failed to properly challenge a finding of fact
- 3 Whether the Division's decision to deny Petitioner's renewal application was reasonable in light of Petitioner's unprofessional conduct

FINDINGS OF FACT

1 Petitioner was initially licensed as an unarmed private security officer by the Division on October 6, 2004

2 In June 2007, Petitioner entered into a plea in abeyance agreement to a charge of disorderly conduct, a Class C Misdemeanor in the Sandy Justice Court. The charge was based on a vehicular altercation, a road rage incident with another driver. It is not clear from the Division's record whether the plea in abeyance agreement was successfully completed and whether the charge was dismissed or reduced.

3 On August 4, 2008, Petitioner successfully renewed his license as a real estate agent with the Utah Division of Real Estate. He also obtained a concealed weapon permit through the Department of Public Safety on October 28, 2008. As part of these applications, Petitioner disclosed the 2007 plea in abeyance agreement.

4 On October 28, 2009, Petitioner submitted his online renewal application for a license as an unarmed private security officer. He did not note the plea in abeyance agreement in the questionnaire accompanying his application for renewal.

5 By letter dated November 13, 2008, the Division notified Petitioner that his application was denied.

6 Petitioner requested a hearing by letter dated November 19, 2008. In this letter he admitted the May 2007 charge was based on "a total lack of judgment" on his part. He also attached a letter dated November 20, 2008, in which he explained that he did not have the paperwork when he completed the online renewal and made a mistake as to the date of the plea in abeyance.

7 A hearing was held before the Security Services Licensing Board on February 12, 2009. At the hearing, Petitioner appeared *pro se*.

8 On March 12, 2009, the Division Director entered an Order adopting the Board's Findings of Fact, Conclusions of Law and Recommended Order (hereafter collectively referred to as the "Order"), thus denying Petitioner's renewal application. The Order referred to a guilty plea and a conviction on the disorderly conduct charges, rather than to a plea in abeyance agreement.

9 Petitioner filed a timely request for agency review by the Executive Director and submitted a memorandum titled "Agency Review" to support his request.

10 The Division filed its Memorandum Opposing Request for Agency Review.

11 In his Reply Memorandum in Support of Agency Review to Allow Renewal of License ("Reply"), Petitioner provided new information regarding a *nunc pro tunc* order purportedly entered with respect to the disorderly conduct charge, and he argued that the matter was dismissed as of May 8, 2007, before the plea in abeyance agreement was entered. The Exhibit A attached to the Reply brief is stylized as "Order to Dismiss Nunc Pro Tunc, Sandy Justice Court, Salt Lake County." It does not bear an actual signature by Judge Susan Weidauer and does not bear any court filing stamp.

12 The Division was thus given an opportunity to file a supplemental response to address Petitioner's new information and arguments, and Petitioner was given an opportunity to file a supplemental reply memorandum. On December 14, 2009, the Division filed its supplemental response. Petitioner has not filed a supplemental reply.

CONCLUSIONS OF LAW

1 In this matter, the Division concluded that Petitioner engaged in unprofessional conduct such that the Division could deny his renewal application. Utah Code Ann. §58-1-401(2) permits the Division to refuse to renew a license if the licensee has engaged in unprofessional conduct as defined by statute or rule. Subsection 58-1-501(2) defines unprofessional conduct to include

(c) engaging in conduct that results in conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere which is held in abeyance pending the successful completion of probation with respect to a crime of moral turpitude or any other crime that, when considered with the functions and duties of the occupation or profession for which the license was issued or is to be issued, bears a reasonable relationship to the licensee's or applicant's ability to safely or competently practice the occupation or profession

(h) practicing or attempting to practice an occupation or profession requiring licensure under this title by any form of action or communication which is false, misleading, deceptive, or fraudulent

2 The Division concluded that Petitioner engaged in unprofessional conduct under Subsection 58-1-501(2)(c) and (h) as follows

Applicant has been convicted of a crime which directly reflects his lack of both good judgment and self restraint in avoiding a verbal confrontation and a resulting physical altercation. Given the nature of Applicant's misconduct, the Board readily concludes that he engaged in unprofessional conduct violative of §58-1-501(2)(c)

Any security officer may become involved in a disputed matter with a member of the public, which necessarily requires that the officer remain in control of any potentially disruptive incident. Accordingly, it is critical that a security officer continuously maintains a well measured demeanor and exercises good judgment to avoid any response which could worsen the situation.

The Board readily finds and concludes Applicant became a willing participant in the verbal confrontation and physical altercation with the other driver. The Board duly notes Applicant was not performing any duties as a private security officer when the May 28, 2007 incident

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occurred Nevertheless, the nature and seriousness of Applicant's conduct during the incident in question raises significant concerns whether potentially disruptive circumstances in the workplace would prompt Applicant to respond in a similarly unwarranted fashion

It is obvious Applicant submitted a false application to the Division and he thus engaged in unprofessional conduct violative of §58-1-501(2)(h) when he failed to disclose the conviction in question The Board questions Applicant's suggestion that he simply forgot when the criminal matter arose Applicant apparently had no such lack of memory when he submitted his application for licensure as a real estate sales agent and sought to obtain a concealed weapons permit

Those applications were most likely submitted within 3-6 months of Applicant's request to renew his unarmed private security officer license Applicant's failure to similarly disclose his conviction when he sought to renew that license is inexcusable The Board seriously doubts the nondisclosure was simply due to the fact that Applicant had paid the fine on his conviction approximately three (3) months earlier when he wanted to simply forget that criminal proceeding

Order, pp 6-7 A balancing of aggravating and mitigating circumstances follows, ending with a discussion of the public health and safety and a concern that there was a lack of sufficient assurance that Petitioner would not engage in the same type of aggressive or confrontational behavior in any troublesome workplace setting *Id*, p 10

3 On agency review, Petitioner raises various arguments including those summarized below

(a) that the Board's Findings of Fact were not supported by a "residuum" of competent legal evidence, specifically, that the Division based its decision on a police report that would not have been admissible in a court of law.

(b) that this police report was improperly used at the hearing to refresh the recollection of a witness

(c) that during the hearing, the Division's counsel and the Administrative Law Judge improperly referred to the plea in abeyance agreement as a conviction and that such incorrect references improperly tainted the Board.

(d) that the Order incorrectly referred to a conviction and incorrectly referred to the court costs assessed against Petitioner as a fine, and

(e) that the finding that Petitioner’s failure to disclose the criminal matter was due to a selfish motive to avoid adverse action on his application was not supported by substantial evidence

Petitioner’s “Agency Review,” p 3

4 Petitioner’s Reply brief provides new evidence, attached as Exhibit A, which purports to be an order from Judge Weidauer dismissing the criminal matter against Petitioner *nunc pro tunc* to a date before the entry of the plea in abeyance. Petitioner argues that as a result of the *nunc pro tunc* order, no criminal matter in fact existed at the time he applied for renewal of his license as an unarmed private security officer license. Thus, Petitioner reasons that there was no criminal matter that needs to be considered in conjunction with his application.

5 The Division has argued in its supplemental response memorandum that Petitioner’s Exhibit A to the Reply Brief cannot be considered on agency review, and that Petitioner has failed to establish the authenticity of the *nunc pro tunc* order. Petitioner did not file a supplemental reply memorandum to address the authenticity issue or to establish why the Executive Director would have the authority to consider this new evidence.

A. Nunc Pro Tunc Order Cannot Be Considered

6 For agency review, the Department of Commerce has adopted the same standards as those applied by the appeals courts in judicial review of formal adjudications set forth in Utah Code Annotated Section 63G-4-403(4) Utah Admin Code R151-46b-12 (7). Thus, the Division is correct that the Executive Director’s review is limited to the Division’s record pursuant to Subsection 63G-4-403(4). In *State v Weaver* 2005 UT 49,

¶ 17, 122 P 3d 566, the Supreme Court identified the only instances when an issue may be raised for the first time on appeal (1) where the appellant establishes that the trial court committed “plain error”, (2) where “exceptional circumstances” exist, or (3) in some situations, where a claim of ineffective assistance of counsel is raised on appeal *Id* at ¶ 18

7 In this matter Petitioner has not argued the existence of exceptional circumstances, ineffective assistance of counsel, or plain error As a result, the *nunc pro tunc* order, even if it had been established to be authentic, cannot be considered Petitioner did not even raise this new information or its related arguments in the opening brief on agency review, but waited until filing his reply brief See *Weaver*, 2005 UT 49, ¶ 19 (holding that a party seeking appellate review on issues not brought before the lower court must articulate the justification for review in the party's opening brief)

B. Failure to Preserve Arguments

8 Because the Department of Commerce has adopted the standards set forth in Subsection 63G-4-403(4), case law principles such as a requirement that issues be preserved in a lower tribunal apply to the Executive Director's review of a Division decision Thus, Petitioner was required to raise legal issues at the Division level in order to properly preserve them for review by the Executive Director See *Badger v Brooklyn Canal Co*, 966 P 2d 844, 847 (Utah 1998) (“level of consciousness” test applied to administrative agency case, requiring a party to raise any issues and allow the hearing officer an opportunity to correct any deficiencies), *Brinkerhoff v Schwendiman*, 790 P 2d 587, 589 (Utah Ct App 1990) (holding that a party must raise an objection in an earlier

proceeding or waive its right to litigate the issue in subsequent proceedings, a principle not limited to the trial court setting but equally to administrative hearings)

9 Petitioner argues that the Order was improperly based on a police report that would not have been admissible in a court of law, and that the report was improperly used at the hearing to refresh the recollection of a witness. However, Petitioner has failed to establish that he properly objected at the hearing to the admissibility of the police report or the use of the report when the witnesses testified. By failing to record his objections at the hearing, Petitioner did not raise the issues to the level of consciousness of the Administrative Law Judge who conducted the hearing. These arguments were therefore not properly preserved for review by the Executive Director.

10 Although Petitioner was not represented by counsel at the hearing, a person choosing to appear *pro se* in an adjudicative proceeding is held to the same standard of knowledge and practice as any qualified member of the bar. *Thompson v DOC*, 2007 UT App 97, 2007 Utah App LEXIS 106. Petitioner is therefore held to the same standard of preserving arguments for appeal.

11 Moreover, at the hearing, Petitioner admitted that the altercation took place, and that both individuals reacted emotionally and loudly and that it progressed to a physical contact, he repeatedly stated that he made an error in judgment, a mistake, in getting out of his vehicle. Hearing Transcript, 8 2-10, 9 8-9, 14 16-17, 24 21-24, 25 1, 26 13-15, 34 1-7. Thus, the residuum of evidence upon which the Order was based consisted of Petitioner's own testimony at the hearing and his November 19, 2008 letter. The only thing Petitioner disputed about the incident was who actually initiated the

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physical violence *Id.*, 16 5-20, 17 6-18 However, the Order was not based on who initiated the physical attack Finding #5 states

Applicant's conviction arose from a vehicular altercation with another driver which occurred at approximately 10 40 p m on May 8, 2007 After driving in extremely close proximity, Applicant and another driver both stopped and exited their vehicles They then engaged in a verbal confrontation, which escalated to mutually aggressive physical contact witnessed by various members of the public

The mere fact that Petitioner became involved in mutually aggressive behavior was relevant to the Board *See also*, Order p 6 ("Applicant has been convicted of a crime which directly reflects his lack of good judgment and self restraint in avoiding a verbal confrontation and a resulting physical altercation Applicant became a willing participant in the verbal confrontation and physical altercation with the other driver")

C. Failure to Properly Challenge the Findings of Fact

12 Petitioner challenges the Division's finding that he had a selfish motive in failing to disclose the criminal matter in his renewal application The Order states

Applicant's failure to disclose his criminal conviction to the Division when he applied to renew his license was borne of a selfish motive to avoid adverse action on his application which could terminate his continued employment as an unarmed private security officer It is obvious such an economic consideration as the paramount factor which influenced Applicant's nondisclosure to the Division, whereas Applicant's disclosure of his conviction to the Utah Division of Real Estate and Utah Department of Public Safety would not have jeopardized his primary and ongoing livelihood

Order, p 9 This finding was not listed as a finding of fact section, but appeared in the Conclusions of Law section Nevertheless, what motivated Petitioner to prepare his application as he did is a question of fact, and not a conclusion of law *See Davencourt at Pilgrims Landing Homeowners Ass'n v Davencourt at Pilgrims Landing, LC* 2009 UT

65, ¶ 73, 221 P 3d 234 (in interpreting a contract, the intent of the parties is a question of fact)

13 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 63G-4-403(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), *First Nat'l Bank v County Bd Of Equalization*, 799 P 2d 1163, 1165 (Utah 1990). 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), *Campbell v Box Elder County*, 962 P 2d 806, 808 (Utah Ct App 1998).

14 Instead of marshaling the evidence in support of the Division's finding that Petitioner's failed to disclose his record because he wanted to avoid termination of his employment, Petitioner states that the only real evidence presented at the hearing was his testimony that he had made an honest mistake very early in the morning, and that the Division presented no evidence to the contrary. Petitioner's "Agency Review," pp 4-5. He then refers to those parts of the record that support his position, and leaves it to the Executive Director to sort out what evidence actually supported the findings. Because this method does not completely meet the marshaling requirement,¹ the Executive Director will accept the Division's findings of fact as conclusive. Subsection R151-46b-12(3)(c), *Campbell* at 808.

15 In addition, 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

¹ *Hemeke v Dept of Commerce* 810 P 2d 459 (Utah Ct App 1991)

omitted) Here, the Division and the Board considered Petitioner's testimony that he made a mistake, that he was tired, that it was early in the morning, that he threw out the papers after completing his application for a real estate agent renewal license and the weapons permit, and then forgot that the disorderly conduct charge was in 2007. However, the Board found relevant Petitioner's testimony relating to the time frame in which he applied for renewal of the real estate agent license, the weapons permit and the unarmed private security officer renewal. Hearing Transcript, pp 41-42, Order, p 7. See also Petitioner's letter dated November 19, 2008 regarding Petitioner's economic concerns. The Board determined Petitioner's credibility and was entitled to draw reasonable inferences from his testimony and the documentary evidence. The Executive Director will not substitute her judgment for that of the Board.

D. References at the Hearing to a Conviction Constitute Harmless Error

16 The hearing record indicates that the term "conviction" was frequently used when referring to Petitioner's disorderly conduct charge. Petitioner argues that these references improperly tainted the Board. The Division does not dispute that a plea in abeyance agreement when properly terminated results in no conviction on an individual's record. The incorrect references to a conviction were indeed regrettable, but are not cause for reversal. Any error as to the terminology used at the hearing was harmless.

17 An error is harmless if it "is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings." *Morton Int'l Inc. v State Tax Comm'n*, 814 P 2d 581, 584 (Utah 1991). It is true that at the hearing, there were references to a conviction on the disorderly conduct charge, but it was

also made clear that Petitioner entered into a plea in abeyance agreement. In questioning Petitioner, the Administrative Law Judge clarified that Petitioner entered into a plea in abeyance agreement.

The Court: In each instance you indicated and acknowledged that you had the conviction?

Mr. Schomberg: Uh-huh (affirmative).

The Court: Let me just back up a second. When you entered the plea to this matter on the criminal case, you were entering it on a plea in abeyance basis. What were you required to do as a consequence of the court order?

Mr. Schomberg: Just pay a fine. That's all. And I can't remember. I think it was, like, I think it worked out to be \$500 - something, and I had to pay -- I can't remember now. I think it was, like, \$35 a month or \$40 a month, or whatever it was, so that's what I did.

Hearing Transcript, 31 18-25, 32 1-6. See also *Id.* 7 6-7, 11 18-19, 31 21-25, 44 10.

18. Moreover, under the applicable law, a plea in abeyance carries the same weight and consequence as a conviction for the disorderly conduct charge. The definition of unprofessional conduct includes engaging in conduct that results in a *conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere which is held in abeyance* pending the successful completion of probation with respect to any crime that, when considered with the functions and duties of the occupation or profession for which the license was issued or is to be issued, bears a reasonable relationship to the licensee's or applicant's ability to safely or competently practice the occupation or profession. Subsection 58-1-501(2)(c). Thus, whether it was a conviction or a plea in abeyance, the Board properly considered the disorderly conduct charge in light of the duties and functions of an unarmed private security officer. Any confusion about the references at the hearing to a conviction was not relevant.

E. References in the Order to a Conviction Must be Corrected

19 The Division recognizes that the Order referred to a conviction rather than a plea in abeyance agreement, and points out that its November 13, 2008 denial letter correctly referenced the plea in abeyance agreement. This clerical error in the Order must be corrected pursuant to Utah Administrative Code R151-46b-11(3), which provides

Clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the department on its own initiative or on the motion of any party and after such notice, if any, as the department orders. Such mistakes may be so corrected at any time prior to the docketing of a petition for judicial review or as governed by Rule 11(h) of the Utah Rules of Appellate Procedure.

See also Career Service Review Board v Dept of Corrections, 942 P 2d 933, 945 (Utah 1997) (holding that every tribunal has some power to correct its own mistakes). Thus, the Division shall correct its order within the 30 days from the date of these Findings of Fact, Conclusions of Law and Order on Review.

20 Petitioner also finds fault with a reference in the Order as to a fine assessed against Petitioner and argues that in fact court costs were assessed. However, Petitioner fails to recall his testimony at the hearing that a \$500 fine was assessed against him. Hearing Transcript, 32 1-12, 33 2-3, 42 5. Thus, the Order need not be corrected on that point.

F. Failure to Establish Abuse of Discretion by the Division

21 When a governing statute grants explicit discretion to the Division, the Executive Director applies a reasonableness and rationality standard of review. *Barnard v Motor Vehicle Div*, 905 P 2d 317, 320 (Utah 1992). Under Subsections 58-1-106(1)(h), 58-1-202(1)(d), 58-1-301(2)(a) and 58-1-401, the Division and the licensing

boards are given explicit discretion to screen license applications and to determine whether an applicant meets the qualifications for licensure. Thus, the Executive Director may overturn the Division's decision only if it is unreasonable or irrational.

22 In this case, it was not unreasonable for the Division to conclude that Petitioner engaged in unprofessional conduct such that denial of his application was warranted. The Division has a duty to protect the public from licensees who might cause harm or injury. Utah Code Ann. §13-1-1. As indicated above, the Division relied upon Petitioner's own testimony and considered Petitioner's arguments as well as aggravating and mitigating circumstances and set forth its analysis in a detailed order that addressed the evidence in light of the applicable professional conduct provisions. The conclusion that a reasonable relationship existed between Petitioner's failure to remove himself from a potentially charged situation and the duties of an unarmed private security officer who must maintain control of potentially disruptive situations was not unreasonable.

G. Summary

23 Petitioner has failed to establish reversible error on agency review. He submitted new evidence that cannot be considered at this level and that has not been authenticated. He failed to preserve arguments for agency review by failing to object to the admission of the police report or the use of the report at the hearing to refresh a witness' recollection. Even though he represented himself at the hearing, Petitioner is held to the same standard as a petitioner represented by legal counsel. Petitioner failed to marshal the evidence and show that the Division's findings as to his intent when he completed the renewal application was not based on substantial evidence in light of the whole record, resulting in the adoption of the Division's findings as conclusive. The

references at the hearing to a conviction rather than a plea in abeyance constitute harmless error that would not have resulted in a different outcome, since a plea in abeyance to a disorderly conduct charge requires the same considerations as a conviction. However, the Order must be corrected within 30 days to remove any references to a conviction.

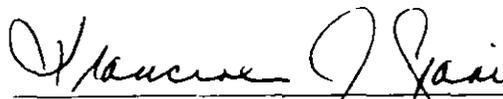
ORDER ON REVIEW

For the foregoing reasons, the decision of the Division of Occupational and Professional Licensing denying the application of E Timothy Schomburg is affirmed but modified as herein indicated.

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 10th of March, 2010


Francine A. Gian, Executive Director
Utah Department of Commerce