

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

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

All American Construction, Inc.,

PETITIONER

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

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INTRODUCTION

This matter came before the Department of Commerce (Department) upon a filing on behalf of Petitioner All American Construction, Inc. after an adverse action taken by the Division of Occupational and Professional Licensing (Division) and the Construction Services Commission (Commission).

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of a Division decision is conducted pursuant to Utah Code Annotated Section 63G-4-301 and Utah Administrative Code R151-4-901 *et seq*.

ISSUES REVIEWED

Whether Petitioner has failed to establish any error by the Division in revoking Petitioner's license for failure to maintain financial responsibility and for misrepresentations on a renewal application.

FINDINGS OF FACT

1 On March 21 2008, a judgment information was entered against Steve Wakeman Petitioner's owner, in favor of Thomas and Terri Mainwaring in the amount of \$69,761.48 plus costs and interest, in the Third District Court, Case No. 086906354.

2 On February 23 2011, a Notice of Agency Action was issued by the Division against Petitioner's contractor license for failure to maintain financial responsibility based on the Mainwaring judgment. The Notice was also based on Petitioner's misrepresentation in its renewal application that all judgments had been paid in full.¹ The Notice notified Petitioner that there would be no evidentiary hearing, but it was entitled to submit a written response.

3 Petitioner, represented by counsel, filed a response on March 28 2011, explaining that the Mainwaring judgment had been entered against Mr. Wakeman in the state of Arizona without his knowledge, but that the judgment had been discharged in April 2008 in the Bankruptcy court upon Mr. Wakeman's filing for bankruptcy protection.

4 By letter dated April 11 2011, the Division notified Petitioner's counsel that based upon Petitioner's written response, an amended notice would be filed against Petitioner's license for failure to disclose Mr. Wakeman's bankruptcy filing. The letter also notified counsel that Petitioner could demonstrate financial responsibility by providing a license bond, and that in order for the bond amount to be determined

¹ Petitioner answered "Yes" to the renewal application question "[h]ave all judgments, liens, taxes and child support payments been paid as required and have all bankruptcies been reported to DOPL?"

Petitioner would need to submit a copy of its most recent income tax return and financial statement

5 Also on April 11, 2011, an Amended Notice of Agency Action was filed against Petitioner. In addition to the Mainwaring judgment and failure to disclose that judgment upon renewal, the Amended Notice alleged that substantial debts and obligations and a negative equity of \$115,080.00 resulted in Mr. Wakeman's bankruptcy filing, and that Petitioner failed to disclose the bankruptcy filing upon renewal of its license. The Amended Notice again notified Petitioner that it was not entitled to an evidentiary hearing, but could submit a written response within 30 days.

6 On May 11, 2011, Petitioner's counsel submitted Petitioner's credit report and argued that a bond would not be required because the bankruptcy filing was more than three years ago.

7 By letter dated May 18, 2011, Petitioner's counsel was notified that the Commission would review the matter on June 22, 2011, and that the Division staff was recommending a \$150,000.00 bond amount.

8 No one appeared on behalf of Petitioner at the June 22 meeting. On July 27, 2011, the Division and the Commission entered their Findings of Fact, Conclusions of Law, and Order, assessing a fine of \$500.00 for misrepresentations in his renewal application, ordering Petitioner to post a bond in the amount of \$150,000.00 within 30 days from the date of the order, and revoking Petitioner's license if it failed to post the bond within 30 days.

9 Petitioner filed a timely request for agency review. The Division filed its response and Petitioner has filed a reply brief.

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"),² Utah Code Annotated Section 63G-4-403(4)

2 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 the hearing record and to appropriate legal authority. Section R151-4-902(2)

3 Petitioner has failed to state factual and legal arguments to challenge the Division decision and has not stated a basis for review. Therefore, the appropriate standard of review is reasonableness. *Barnard v. Motor Vehicle Div.*, 905 P.2d 317, 320 (Utah 1992) (holding that when a governing statute grants explicit discretion to the Division, the Executive Director applies a reasonableness and rationality standard)

4 Under Utah Code Ann. §§ 58-1-106(1)(d) and (h), 58-1-401, and 58-55-103(1)(b)(iv), the Division and the Commission are given explicit discretion to take administrative action against persons in violation of the laws and rules administered and enforced by the Division to revoke a license or take other action upon a licensee. The Division and the Commission are expressly authorized to determine whether a contractor meets financial responsibility requirements, and if they find that financial responsibility

² Utah Admin. Code R151-4-905

has not been met, they may prohibit the licensee from engaging in the construction trades or may require a bond in an amount they determine to be appropriate Section 58-55-306

5 In addition, the Division and the Commission may revoke or otherwise act upon the license of any licensee who has engaged in unprofessional or unlawful conduct Section 58-1-401 Unprofessional conduct has been defined to include failing to maintain financial responsibility Subsection 58-55-502(1) It is unlawful conduct to willfully or deliberately misrepresent or omit a material fact in connection with an application to obtain or renew a contractor license Subsection 58-55-501(9)

6 Petitioner has failed to establish any abuse of discretion by the Division and the Commission in revoking its license, issuing a \$500 fine and requiring a \$150,000.00 bond Petitioner's request for agency review states that Mr. Wakeman could not attend the June 22 meeting of the Commission and that he contacted the Division and informed a staff member that he could not attend. Petitioner asks that the bond amount be reduced to \$50,000.00 However, neither Wakeman nor Petitioner's counsel submitted a written request for an extension of the proceedings before the date of the proceeding and no showing has been made that an extension was appropriate The Division had previously notified Petitioner that no evidentiary hearing was available Even if Mr. Wakeman could not attend the Commission meeting on June 22, Petitioner was represented by counsel during the Division's proceedings and counsel could have appeared on his behalf Petitioner's counsel was aware that a bond of \$150,000.00 would be recommended by Division staff, if counsel could not appear they could have

submitted a written request to reduce the bond amount with arguments as to why a lesser amount was appropriate in light of the applicable law

7 In addition, the Executive Director's review is based on the Division's record. Subsection 63G-4-403(4) Petitioner's request to reduce the bond amount on agency review is inappropriate, as Petitioner did not allow the Division and the Commission an opportunity to consider his request.³ Moreover, Petitioner has not stated an appropriate basis to reduce the amount, saying only that it costs \$6,000 to obtain a \$150,000.00 bond. It does not challenge the findings about the Mainwaring judgment or the financial issues that led to Mr. Wakeman's bankruptcy filing, or the fact that Petitioner did not disclose these items in the renewal application.

8 Finally, based on the circumstances of this case, the Division and the Commission's action was reasonable given Petitioner's unlawful conduct in failing to disclose the judgment against its owner and its owner's bankruptcy filing and based on unprofessional conduct in failing to maintain financial responsibility. The Division and the Commission reasonably rejected Petitioner's argument that three years had passed since the bankruptcy filing such that a bond should not be required. Petitioner's unlawful conduct cannot be ignored. A licensee should not be rewarded for failing to disclose negative financial information relevant to its license and later arguing that sufficient time has lapsed since its negative financial status.

³ In its Reply, Petitioner makes yet another new request on agency review that cannot be considered, asking that the license be placed on inactive status.

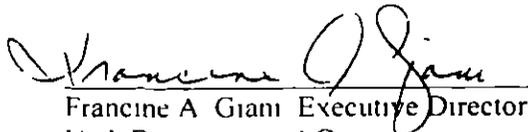
ORDER

For the foregoing reasons the order of the Division of Occupational and Professional Licensing and the Construction Services Commission revoking Petitioner's contractor license is hereby affirmed. If Petitioner applies for reinstatement of its license, it must post a \$150,00.00 bond.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court 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-4-402, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bougeois 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 30th of December 2011


Francine A. Gian, Executive Director
Utah Department of Commerce