

EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

I. **Materiality.** Even if the point is proved, does it matter? Examples:

- (a) My company is incorporated.
- (b) I did not personally engage in the conduct at issue. It was an employee/independent contractor. *See Rogers v. Division of Real Estate*, 790 P.2d 102, 107 (Utah Ct. App. 1990): "[An individual] is answerable at law for breaches of his or her statutory duty to the public."
- (c) The conduct at issue was already addressed by another agency/another state/another adjudication and has been fully resolved.
- (d) The conviction/regulatory action the agency is seeking to hold against me was unfairly conducted in violation of my Constitutional rights.
- (e) Nobody relied on the alleged conduct. Nobody was damaged by the alleged conduct.
- (f) My victim has failed to mitigate damages; is guilty of contributory negligence; failed to conduct due diligence; could have figured out that I am a shyster, but wasn't smart enough to do it.
- (g) The investigators who interviewed me were not nice and wouldn't even listen to my side of the story.
- (h) I was not given an attorney when I was being investigated and interviewed.
- (i) The agency never notified me of this requirement/prohibition. *See Heinecke v. Dept. of Commerce*, 810 P.2d 459, 465 (Utah App. 1991): "Contrary to Heinecke's arguments, there is no due process violation in this case. As they apply in this case, the statutes and rules governing the nursing profession provided Heinecke with adequate notice of the standards of the nursing profession."
- (j) The alleged conduct took place more than X years ago.
 - i. *Rogers v. Division of Real Estate*, 790 P.2d 102, 105-06 (Utah Ct. App. 1990): "[A]n administrative disciplinary hearing is not a civil proceeding."
 - ii. *Nevada v. United States*, 463 U.S. 110, 141 (1983) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)): The doctrine of laches "is no defense to a suit by [the government] to enforce a public right or protect a public

interest."

(k) The agency has never enforced, or sought to enforce, this statute in this way.

- i. Burden of proof to establish inconsistency is on the person making the claim. *See SEMECO Indus. v. State Tax Comm'n*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting): "In the typical challenge to agency action, the party challenging the action carries the burden of demonstrating its impropriety."
- ii. An agency is allowed to modify its approach to enforcement over time. If an agency determines that a prior approach was incorrect, it is not bound by that "precedent." *See William Raveis Real Estate, Inc. v. Commissioner of Revenue Services*, 665 A.2d 1374, 1378 (Conn. 1995) (quoting *National Labor Relations Board v. Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944): "An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. . . . Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials."

Note that these cases are **persuasive** authority. I have never found equivalent language in a Utah, 10th Circuit, or Supreme Court case.

Bear in mind 63G-4-102(4) (Scope and applicability of chapter): "This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

- (a) requesting or ordering a conference with parties and interested persons to:
 - (i) encourage settlement;
 - (ii) clarify the issues;
 - (iii) simplify the evidence;
 - (iv) facilitate discovery; or
 - (v) expedite the proceeding[.]"

Also bear in mind 63G-4-206(2) (Procedures for formal adjudicative proceedings – Hearing procedure): "This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing."

- II. **Relevance.** Does the fact being proved help make a material point more or less likely? Make the objection, but don't dwell on it—presiding officers sometimes take the position that everything comes in, and that relevance will be sorted out later. Consider: "My objection is of record. I am confident that the presiding officer and the Board will be able to arrive at the correct decision in this case, even if the record includes some irrelevant evidence. I would ask that the order note the objection if the Board determines to rely on this evidence. If the

Board determines not to rely on this evidence, I would request that the order note its irrelevance."

III. Hearsay.

(a) Formal proceedings:

- i. Hearsay comes in unless the person who objects to the hearsay establishes an additional basis for exclusion. 63G-4-206(1)(c): "The presiding officer may not exclude evidence solely because it is hearsay." HOWEVER...
- ii. 63G-4-206(1)(d): "The presiding officer *shall* afford to all parties the opportunity to present evidence, argue, respond, *conduct cross-examination*, and submit rebuttal evidence." AND...
- iii. 63G-4-203(3): "A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence."
- iv. Issues:
 1. How can 63G-4-206(1)(c) be reconciled with 63G-4-206(1)(d)?
 2. How much legally admissible evidence is necessary to satisfy 63G-4-203(3)?
- v. Hearsay presented not for its truth, but for its un-truth. Examples:
 1. "I'm with the alarm company. It looks like your system is due for an upgrade."
 2. "Our company is licensed, bonded, and insured."
 3. "As your agent, I can go ahead and sign the contract for you."
 4. "Interest rates are not going to go up in the next 12 months."
 5. "I have completed all required continuing education and am fully qualified for a renewed license."
 6. "Your investment is fully secured by liens on real property."
 7. "I can personally guarantee the first \$10,000 of your investment."
 8. "I know of an emerald mine in Peru that is being run by a clergyman."
 9. "I've discovered a way to infuse ordinary tap water with nanonutrients. One gallon of this water can power an ordinary home for a full month."

(b) Informal—no residuum rule. 63G-4-203(1)(j): "The presiding officer's order shall be based on the facts appearing in the agency's files and on the facts presented in evidence at any hearings." But what about due process (informal hearing = trial by chaos)?

IV. Has the argument/issue been properly raised? Watch out for closing arguments.

V. Where can you ask the presiding officer to take notice?

(a) 63G-4-206(1)(b)(iv): "On the presiding officer's own motion or upon objection by a party, the presiding officer may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the

agency, and of technical or scientific facts within the agency's specialized knowledge."

(b) Notice in action:

- i. Order issued *sua sponte* *In the Matter of Brent Allen Morgan* (SD-14-0039) and *Summit Development and Lending Group, Inc.* (SD-14-0040) to strike affirmative defense: "The presiding officer takes notice that the Division has no contractual relationship with the individuals who have not only sued Respondents civilly, but have also agreed to provide testimony in this administrative proceeding. *See* Utah Code Ann. § 63G-4-206(1)(b)(iv). The Department of Commerce has specialized knowledge as to its own contracts. Neither the Department nor the Division is under contract with the witnesses in this case. Therefore, privity of contract is not at issue."
- ii. Final order issued *In the Matter of Vision Security, LLC et al* (DCP 83238): "Respondent Thomas, as the qualifier for Vision Security's alarm company license, was at all relevant times charged by statute with directing the employees of Vision Security, either individually or through others. Utah Code Ann. § 58-55-304(4). Pursuant to Utah Code Ann. § 63G-4-206(1)(b)(iv), the presiding officer takes notice of these duties, as being facts within the specialized knowledge of the Department of Commerce."

VI. Can anything be handled through a pre-hearing dispositive motion? Know your agency's precedent, and consider rulemaking.

(a) Rulemaking mandate:

- i. 63G-3-201(2): In addition to other rulemaking required by law, each agency *shall* make rules when agency action:
 - authorizes, requires, or prohibits an action;
 - provides or prohibits a material benefit;
 - applies to a class of persons or another agency; and
 - is explicitly or implicitly authorized by statute.
- ii. 63G-3-201(3): Rulemaking is also *required* when an agency issues a written interpretation of a state or federal legal mandate.
- iii. 63G-3-201(6): Each agency shall enact rules incorporating the principles of law not already in its rules that are established by final adjudicative decisions within 120 days after the decision is announced in its cases.

(b) Examples:

- R156-1-102(16)(b): The following factors may not be considered as mitigating circumstances:

- (i) forced or compelled restitution;
 - (ii) withdrawal of complaint by client or other affected persons;
 - (iii) resignation prior to disciplinary proceedings;
 - (iv) failure of injured client to complain;
 - (v) complainant's recommendation as to sanction; and
 - (vi) in an informal disciplinary proceeding brought pursuant to Subsection 58-1-501(2)(c) or (d) or Subsections R156-1-501(1) through (5):
 - (A) argument that a prior proceeding was conducted unfairly, contrary to law, or in violation of due process or any other procedural safeguard;
 - (B) argument that a prior finding or sanction was contrary to the evidence or entered without due consideration of relevant evidence;
 - (C) argument that a respondent was not adequately represented by counsel in a prior proceeding; and
 - (D) argument or evidence that former statements of a respondent made in conjunction with a plea or settlement agreement are not, in fact, true.
- R164-32-1. Codification of Precedent.
 - (1) Authority and purpose.
 - (a) The Division enacts this rule pursuant to Utah Code Subsections 63G-3-201(2), (3), (6) and Section 61-1-24.
 - (b) This rule incorporates the principles of law:
 - (i) that are established by final adjudicative decisions by the Utah Securities Commission, the Division Director, or an Administrative Law Judge; and
 - (ii) where:
 - (A) agency action meets criteria requiring rulemaking as set forth in the Utah Administrative Rulemaking Act; or
 - (B) the Division issues a written interpretation of a state or federal legal mandate.
 - (2) Limited liability company exemption, Section 61-1-13(1)(ee)(ii)(B). Pursuant to SD-12-0076 (Aug. 8, 2013), a material issue of fact as to whether a respondent may claim the limited liability company exemption is created by a single investor's sworn statement that the investor:
 - (a) purchased shares in an LLC solely for investment purposes;
 - (b) took no part in the management of the LLC; or
 - (c) was geographically distant from the activities through which the LLC was managed.
 - (3) Common enterprise, Section 61-1-13(1)(s)(i). Pursuant to SD-13-0018, 0019, 0020 (Nov. 8, 2013), a common enterprise includes a circumstance in which value tendered by an offeree is:
 - (a) deposited into the offerer's personal or business financial account(s); and
 - (b) subjected to the offerer's personal control and oversight.
 - (4) False statement or material omission, Section 61-1-1(2).
 - (a) Pursuant to SD-13-0018, 0019, 0020 (Nov. 8, 2013), a rebuttable presumption of material omission is created by an investor's sworn statement that, had a

- certain piece of information been provided, it would have caused the investor to:
- (i) question or disbelieve representations made by the offerer in connection with the transaction; or
 - (ii) decline to purchase the offered security.
- (b) Pursuant to SD-11-0041, 0042 (April 7, 2014), an offerer makes a material omission by failing to disclose:
- (i) specific information about the investment itself, including:
 - (A) the identity of the person to whom funds will be entrusted;
 - (B) the track record of the investment; or
 - (C) risk factors; or
 - (ii) the offerer's:
 - (A) criminal history;
 - (B) regulatory history; or
 - (C) financial history, including:
 - (I) bankruptcies; or
 - (II) civil judgments.
- (c) Pursuant to SD-13-0030 (Oct. 14, 2014), an offerer makes a material omission by failing to disclose:
- (i) specific information about the investment itself, including:
 - (A) financial statements of the common enterprise;
 - (B) history of late or missed payments to investors;
 - (C) methodology for valuing shares or similar investment units;
 - (D) basis for any unit value that is represented or anticipated as deriving from:
 - (I) future sale of the units;
 - (II) future sale or acquisition of the common enterprise; or
 - (II) any similar future event; or
 - (E) registration status of the security being offered; or
 - (ii) the offerer's:
 - (A) tax liens; or
 - (B) licensure or lack thereof.
- (d) Pursuant to SD-11-0041, 0042 (April 7, 2014), it is not necessary that money change hands or that an investor suffer a financial loss before an administrative action may be taken against an offerer for false statement or material omission.
- (e) Pursuant to SD-11-0041, 0042 (April 7, 2014), liability for a false statement or material omission is not limited to the person who creates or first promotes an investment.
- (5) Statutes of limitation, including Section 61-1-21.1.
- (a) Pursuant to SD-12-0001 (March 27, 2014), the statute of limitation specified in Section 61-1-21.1 is inapplicable to an administrative disciplinary hearing.
 - (b) Pursuant to SD-14-0039, 0040 (Jan. 6, 2015), there is no statute of limitation applicable to administrative actions filed by the Division under the Uniform Securities Act where no civil complaint is filed.

(c) Precedent in action:

- i. Final order issued *In the Matter of Brent Allen Morgan* (SD-14-0039) and *Summit Development and Lending Group, Inc.* (SD-14-0040): "The Commission has previously held that an offeror's failure to disclose his lack of licensure and his failure to register his offering constitute material omissions. *See* Utah Administrative Code R164-32-1(4)(c)(i)(E) and R164-32-1(4)(c)(ii)(B). Respondents' failure to make these disclosures constitutes additional violations of Section 61-1-1(2)."
- ii. Order issued on motion for summary judgment *In the Matter of Benjamin Richard Magelsen*, RE-14-74087: "The presiding officer takes notice of the Commission's precedent pursuant to Utah Code § 63G-4-206(1)(b)(iv). In this case, Applicant failed to disclose two criminal cases, and the Division suspended his license for 60 days. This result was fully consistent with Commission precedent. *See*, for example, the orders issued in the following dockets: RE-15-75599 (03/18/2015); RE-15-75642 (05/20/2015); RE-15-75649 (04/15/2015); RE-15-75887 (03/26/2015); RE-15-75646 (04/15/2015); RE-15-75929 (04/22/2015); RE-15-75601 (04/15/2015); RE-14-73902 (12/17/2014); RE-15-74660 (01/16/2015); RE-14-73854 (02/18/2015); RE-14-74135 (12/17/2014)."
- iii. Final order issued *In the Matter of Vision Security, LLC et al* (DCP 83238): "Vision Security misunderstands the statutory language. The term "knowingly" means that the act—not the violation—was done with awareness, or while the actor was conscious. The term "intentionally" means that the act—not the violation—was done on purpose, or not accidentally. The Division is not required to prove that an actor knew he was violating the statute or intended a bad result for the consumer. Where Vision Security's agents were conscious during the consumer transactions discussed in this order, and where they made their statements on purpose, the statutory language is satisfied. For a more thorough discussion of the "knowingly or intentionally" language of the statute, see the order issued *In the Matter of Monkey Mountain, LLC*, case number DCP 82354."