

**OCCUPATIONAL AND PROFESSIONAL
LICENSING MODIFICATIONS**

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Lyle W. Hillyard

This act modifies provisions of the Division of Occupational and Professional Licensing Act related to reinstatement of licenses and diversion procedures. The act provides that for licenses reinstated no later than 120 days after expiration the reinstatement goes back to the date of expiration. The act allows diversion in licensee disciplinary matters as well as for self-referrals. The act defines and provides for the extension and termination of a diversion agreement. The act details the effect of a diversion agreement on charges against a licensee of unprofessional or unlawful conduct that are under the division director's jurisdiction. The act establishes a procedure to be followed by the division in the event the licensee makes an intentional misrepresentation of fact in the stipulation of facts part of the diversion agreement.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

58-1-308, as last amended by Chapter 313, Laws of Utah 1994

58-1-404, as last amended by Chapter 234, Laws of Utah 1999

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **58-1-308** is amended to read:

58-1-308. Term of license -- Expiration of license -- Renewal of license --

Reinstatement of license -- Application procedures.

(1) (a) Each license issued under this title shall be issued in accordance with a two-year renewal cycle established by rule.

(b) A renewal period may be extended or shortened by as much as one year to maintain established renewal cycles or to change an established renewal cycle.

(2) (a) The expiration date of a license shall be shown on the license.

(b) A license that is not renewed prior to the expiration date shown on the license

automatically expires.

~~[(a)]~~ (c) A license automatically expires prior to the expiration date shown on the license upon the death of a licensee who is a natural person, or upon the dissolution of a licensee that is a partnership, corporation, or other business entity.

~~[(b)]~~ (d) If the existence of a dissolved partnership, corporation, or other business entity is reinstated prior to the expiration date shown upon the entity's expired license issued by the division, the division shall, upon written application, reinstate the applicant's license, unless it finds that the applicant no longer meets the qualifications for licensure.

~~[(e)]~~ (e) Expiration of licensure is not an adjudicative proceeding under Title 63, Chapter 46b, Administrative Procedures Act.

(3) (a) The division shall notify each licensee in accordance with procedures established by rule that the licensee's license is due for renewal and that unless an application for renewal is received by the division by the expiration date shown on the license, together with the appropriate renewal fee and documentation showing completion of or compliance with renewal qualifications, the license will not be renewed.

(b) Examples of renewal qualifications which by statute or rule the division may require the licensee to document completion of or compliance with include:

- (i) continuing education;
- (ii) continuing competency;
- (iii) quality assurance;
- (iv) utilization plan and protocol;
- (v) financial responsibility;
- (vi) certification renewal; and
- (vii) calibration of equipment.

(4) (a) (i) An application for renewal that complies with Subsection (3) is complete.

(ii) A renewed license shall be issued to applicants who submit a complete application, unless it is apparent to the division that the applicant no longer meets the qualifications for continued licensure.

(b) (i) The division may evaluate or verify documentation showing completion of or compliance with renewal requirements on an entire population or a random sample basis, and may be assisted by advisory peer committees.

(ii) If necessary, the division may complete its evaluation or verification subsequent to renewal and, if appropriate, pursue action to suspend or revoke the license of a licensee who no longer meets the qualifications for continued licensure.

(c) The application procedures specified in Subsection 58-1-301(2), apply to renewal applications to the extent they are not in conflict with this section.

(5) (a) Any license that is not renewed may be reinstated at any time within two years after nonrenewal upon submission of an application for reinstatement, payment of the renewal fee together with a reinstatement fee determined by the department under Section 63-38-3.2, and upon submission of documentation showing completion of or compliance with renewal qualifications.

(b) The application procedures specified in Subsection 58-1-301(2) apply to the reinstatement applications to the extent they are not in conflict with this section.

(c) Except as otherwise provided by rule, a license that is reinstated no later than 120 days after it expires shall be retroactively reinstated to the date it expired.

(6) (a) If not reinstated within two years, the holder may obtain a license only if he meets requirements provided by the division by rule or by statute for a new license.

(b) Each licensee under this title who has been active in the licensed occupation or profession while in the full-time employ of the United States government or under license to practice that occupation or profession in any other state or territory of the United States may reinstate his license without taking an examination by submitting an application for reinstatement, paying the current annual renewal fee and the reinstatement fee, and submitting documentation showing completion of or compliance with any renewal qualifications at any time within six months after reestablishing domicile within Utah or terminating full-time government service.

Section 2. Section **58-1-404** is amended to read:

58-1-404. Diversion -- Procedure.

(1) As used in this section, "diversion" means suspending action to discipline a licensee who is or could be charged in a Notice of Agency Action with certain offenses within the category of unprofessional or unlawful conduct on the condition that the licensee agrees to participate in an educational or rehabilitation program or fulfill some other condition.

(2) (a) (i) The director may establish, as circumstances require, a diversion advisory committee for each occupation or profession or similar groups of occupations or professions licensed by the division.

(ii) The committees shall assist the director in the administration of this section.

(b) (i) Each committee shall consist of at least three [~~or more~~] licensees from the same or similar occupation or profession as the person whose conduct is the subject of the committee's consideration. [~~The~~]

(ii) The director shall appoint the members of a diversion advisory committee [~~shall be appointed by the director~~] from nominations submitted by the corresponding board established for the same or similar occupation or profession under Section 58-1-201 or from other qualified nominees developed by or submitted to the division.

(iii) Committee members may not serve concurrently as members of the corresponding board.

(iv) Committee members shall serve voluntarily without remuneration.

(v) The director may:

(A) dissolve any diversion advisory committee[;];

(B) remove or request the replacement of any member of a committee[;]; and

(C) establish any procedure that is necessary and proper for a committee's administration.

(3) The director may, after consultation with the appropriate diversion advisory committee and by written agreement with the licensee, divert the licensee to a diversion program[;]:

(a) at any time after receipt by the division of a complaint[~~, prior to notifying a licensee that formal disciplinary action for unprofessional conduct is being considered against the~~

licensee, or prior to the conclusion of a hearing under Section 58-1-108.] against the licensee when no adjudicative proceeding has been commenced;

(b) at any time prior to the conclusion of a hearing under Section 63-46b-8 when an adjudicative proceeding has been commenced against the licensee; or

(c) after a self-referral by a licensee who is not the subject of a current investigation, complaint, or adjudicative proceeding.

(4) ~~[The]~~ (a) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division shall define by rule the particular offenses within the category of unprofessional or unlawful conduct which may be subject to diversion.

(b) A licensee may be eligible for a diversion program only once for the same or similar offense, whether the diversion program was in this state or another jurisdiction, and is not eligible if previously disciplined by the division, by a licensing agency of another state, or by a federal government agency for the same or a similar offense. ~~[Diversion programs may not be longer than]~~

(c) The term of a diversion agreement shall be five years or less, but may be extended for an additional period of time as agreed to by the parties in writing.

(d) A decision by the director not to divert a licensee is not subject to appeal or judicial review.

(5) A licensee may be represented by counsel:

(a) during the negotiations for diversion[;];

(b) at the time of the execution of the diversion agreement[;]; and

(c) at any hearing before the director relating to a diversion program.

~~[(6) Any diversion agreement entered into between the division and the licensee shall contain a full detailed statement of the requirements agreed to by the licensee and the reasons for diversion.]~~

~~[(7) A diversion agreement may not be approved unless the licensee in the agreement knowingly and intelligently waives the right to a hearing under Section 58-1-108.]~~

~~[(8) The director shall dismiss the charges against a licensee who has completed the~~

requirements of his diversion agreement. ~~The licensee may not thereafter be subject to disciplinary action for the conduct involved.]~~

~~[(9) Diversion is not a determination that charges have been proven. If the charges are dismissed following diversion, the matter shall be treated as if the charge had never been filed, except the fact that a licensee has completed a diversion program and the terms and conditions of the diversion program may be considered by the division in determining appropriate disciplinary action to be taken in the event the licensee is charged in the future with the same or a similar offense. No reporting or release of information regarding the diversion program of an individual licensee or the fact that charges were filed may be made to anyone outside the division. The licensee may not be required to report to any person, agency, or corporation the fact that he has been subject to a diversion program if the licensee successfully completes the diversion program. Negotiations or hearings regarding diversion may not be subject to the requirements of Title 52, Chapter 4, Open and Public Meetings.]~~

~~[(10) If, during the course of the diversion of a licensee, information is brought to the attention of the director that the licensee has violated the diversion agreement, and if it appears in the best interest of the public to proceed with the charges, the director after consultation with the diversion advisory committee, shall cause to be served on the licensee an order to show cause specifying the facts relied upon by the director to terminate diversion and which sets a time and place for a hearing to determine whether or not the licensee has violated the diversion agreement. If, after the hearing, the director finds that the licensee has failed to comply with any terms or conditions of the diversion agreement, the director shall proceed with the charges against the licensee which resulted in the diversion agreement plus any additional charges of unprofessional conduct arising from a violation of the diversion agreement.]~~

~~[(11) The administrative statute of limitations for taking disciplinary action described in Subsection 58-1-401(5) shall be tolled during a diversion program.]~~

(6) (a) As used in this section, "diversion agreement" means a written agreement between the division, through its director, and the licensee, which specifies formal terms and conditions the licensee must fulfill in order to comply with the diversion program.

(b) (i) A diversion agreement shall contain a full detailed statement of the requirements agreed to by the licensee and a full detailed stipulation of the facts upon which the diversion agreement is premised.

(ii) The facts stipulated in the diversion agreement shall constitute binding admissions of the licensee:

(A) in any proceeding under Subsection (6)(c) or (6)(d) to terminate the diversion agreement and impose disciplinary sanctions against the licensee; and

(B) in any disciplinary proceeding based on unprofessional or unlawful conduct that is not the basis of the diversion agreement.

(c) The diversion agreement shall provide that if the licensee makes an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement, the director shall initiate the procedures set forth in Subsection (13) to terminate the diversion agreement and issue an order of license revocation.

(d) (i) The diversion agreement shall provide that if the licensee fails to comply with its terms, the director shall initiate the procedures set forth in Subsection (14) to terminate the diversion agreement and issue an order of license suspension, which shall be stayed in favor of an order of probation having the same terms as those which comprised the diversion agreement.

(ii) The division may waive and not include as probationary requirements any terms of the diversion agreement it does not consider necessary to protect the public.

(iii) The term of the order of probation shall be as provided in Subsection (14)(c)(ii).

(e) The division director may not approve a diversion agreement unless the licensee, as part of the diversion agreement:

(i) knowingly and intelligently waives the right to a hearing under Title 63, Chapter 46b, Administrative Procedures Act, for the conduct upon which the diversion agreement was premised;

(ii) agrees to be subject to the procedures and remedies set forth in this section;

(iii) acknowledges an understanding of the consequences of making an intentional misrepresentation of fact in the stipulation of facts contained in the diversion agreement; and

(iv) acknowledges an understanding of the consequences of failing to comply with the terms of the diversion agreement.

(7) (a) If the division and the licensee enter into a diversion agreement after the division has commenced an adjudicative proceeding against the licensee, the director shall stay that proceeding pending completion of the diversion agreement.

(b) The order staying the adjudicative proceeding shall be filed in that proceeding and may reference the diversion agreement.

(8) (a) Upon successful completion of a diversion agreement, the director shall dismiss any charges under the director's jurisdiction of unprofessional or unlawful conduct that were filed against the licensee.

(b) Whether or not an adjudicative proceeding had been commenced against the licensee, the division may not thereafter subject the licensee to disciplinary action for the conduct which formed the basis of the completed diversion agreement.

(c) Neither the execution of a diversion agreement nor the dismissal of filed charges constitute disciplinary action, and no report of either may be made to disciplinary databases.

(d) The division may consider the completion of a diversion program and the contents of the diversion agreement in determining the appropriate disciplinary action if the licensee is charged in the future with the same or similar conduct.

(e) The order of dismissal shall be filed in the adjudicative proceeding in which the misconduct was charged and may reference the diversion agreement.

(9) (a) Acceptance of the licensee into diversion does not preclude the division from investigating or continuing to investigate the licensee for any unlawful or unprofessional conduct committed before, during, or after participation in the diversion program.

(b) Acceptance of the licensee into diversion does not preclude the division from taking disciplinary action or continuing to take disciplinary action against the licensee for unlawful or unprofessional conduct committed before, during, or after participation in the diversion program, except for that conduct which formed the basis for the diversion agreement.

(c) Any licensee terminated from the diversion program for failure to comply with the

diversion agreement is subject to disciplinary action by the division for acts committed before, during, and after participation in the diversion program, including violations identified in the diversion agreement.

(10) The classification, retention, and disclosure of records relating to a licensee's participation in the diversion program is governed by Title 63, Chapter 2, Government Records Access and Management Act, except that any provision in the diversion agreement which addresses access to or release of diversion records regarding the licensee shall govern the access to and release of those records.

(11) Notwithstanding any other provision of this section, the fact that the licensee completed a diversion program and the contents of the diversion agreement itself may be considered by the division in determining the appropriate disciplinary action if the licensee is charged in the future with the same or similar conduct.

(12) Meetings regarding the diversion program are not subject to Title 52, Chapter 4, Open and Public Meetings.

(13) (a) If, during the course of the diversion agreement, information is brought to the attention of the director that the licensee made an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement, the director shall cause to be served upon the licensee an order to show cause specifying the information relied upon by the director and setting a time and place for hearing to determine whether or not the licensee made the intentional material misrepresentation of fact and whether the agreement should be terminated on that ground.

(b) Proceedings to terminate a diversion agreement on the grounds that the licensee made an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement and to issue an order of license revocation shall comply with Title 63, Chapter 46b, Administrative Procedures Act, except as follows:

(i) the notice of agency action shall be in the form of an order to show cause, which shall contain all of the information specified in Subsection 63-46b-3(2), except a statement that a written response to the order to show cause is required;

(ii) no written response to the order to show cause is required;

(iii) discovery is prohibited, but the division may issue subpoenas or other orders to compel production of necessary evidence on behalf of either party and all parties shall have access to information contained in the division's diversion file to the extent permitted by law;

(iv) the hearing shall be held only after timely notice to all parties; and

(v) any agency review or reconsideration of an order terminating a diversion agreement or of an order of license revocation pursuant to this Subsection (13) shall be limited to the division director's findings of fact, conclusions of law, and order which arose out of the order to show cause proceeding.

(c) Upon finding the licensee made an intentional material misrepresentation of fact in the stipulation of facts contained in the diversion agreement and that terminating the agreement is in the best interest of the public, and issuing an order to that effect, the director shall issue an order of license revocation, revoking the licensee's professional license.

(d) The order terminating the diversion agreement and the order of license revocation shall include findings of fact and conclusions of law as determined by the director following the hearing or as otherwise stipulated and agreed to by the parties.

(e) If the diversion agreement being terminated was entered into after the division had commenced an adjudicative proceeding against the licensee, that adjudicative proceeding shall be considered to be merged into the order of license revocation and it may not constitute a basis for any separate disciplinary action against the licensee.

(f) The order terminating the diversion agreement and the order of license revocation shall notify the licensee of the right to request agency review or reconsideration.

(14) (a) If, during the course of the diversion agreement, information is brought to the attention of the director that the licensee has violated the diversion agreement and if it appears in the best interest of the public to proceed with charges, the director, after consultation with the diversion advisory committee, shall cause to be served upon the licensee an order to show cause specifying the facts relied upon by the director and setting a time and place for hearing to determine whether or not the licensee has violated the diversion agreement and whether the

agreement should be terminated.

(b) Proceedings to terminate a diversion agreement and to issue an order of license suspension and probation, and proceedings to terminate the probation and lift the stay of a license suspension, shall comply with Title 63, Chapter 46b, Administrative Procedures Act, except as follows:

(i) the notice of agency action shall be in the form of an order to show cause, which shall contain all of the information specified in Subsection 63-46b-3(2), except a statement that a written response to the order to show cause is required;

(ii) no written response to the order to show cause shall be required;

(iii) discovery is prohibited, but the division may issue subpoenas or other orders to compel production of necessary evidence on behalf of either party and all parties shall have access to information contained in the division's diversion file to the extent permitted by law;

(iv) the hearing shall be held only after timely notice to all parties; and

(v) any agency review or reconsideration of an order terminating a diversion agreement or of an order of license suspension and probation pursuant to this Subsection (14) shall be limited to the division director's findings of fact, conclusions of law, and order which arose out of the order to show cause proceeding.

(c) (i) Upon finding the licensee has violated the diversion agreement and that terminating the agreement is in the best interest of the public, and issuing an order to that effect, the director shall issue an order of license suspension, suspending the licensee's professional license, but shall stay that suspension in favor of an order of probation, consisting of the same terms as those which comprised the diversion agreement.

(ii) The period of probation shall be the time period which remained under the diversion agreement, or five years from the date of the order of license suspension and probation, whichever is longer, unless otherwise agreed by the parties.

(iii) The period of probation is tolled during any time in which the licensee does not have an active license in the state.

(d) (i) The order terminating the diversion agreement and the order of license suspension

and probation shall include findings of fact and conclusions of law as determined by the director following the hearing or as otherwise stipulated and agreed to by the parties.

(ii) The findings of fact may include those facts to which the licensee stipulated in the diversion agreement and any additional facts as the director may determine in the course of the hearing.

(e) If the diversion agreement being terminated was entered into after the division had commenced an adjudicative proceeding against the licensee, that adjudicative proceeding shall be considered to be merged into the order of license suspension and probation and it may not constitute a basis for any separate disciplinary action against the licensee.

(f) The order terminating the diversion agreement and the order of license suspension and probation shall notify the licensee of the right to request agency review or reconsideration.

(g) (i) The terms and conditions of the order of license suspension and probation may be amended by order of the director, pursuant to motion or stipulation of the parties.

(ii) The order of the director on the motion shall not be subject to agency review, but is subject to agency reconsideration under Section 63-46b-13.

(h) (i) If, during the course of probation, the director has reason to believe the licensee has violated the order of suspension and probation, the director shall cause to be served upon the licensee an order to show cause why the probation should not be terminated and the stay of suspension lifted.

(ii) The order to show cause shall specify the facts relied upon by the director and shall set a time and place for hearing before the director to determine whether or not the licensee has violated the order of suspension and probation and whether that order should be terminated and the stay of suspension lifted.

(15) (a) Nothing in this section precludes the division from issuing an emergency order pursuant to Section 63-46b-20.

(b) If the division issues an emergency order against a licensee who is subject to a diversion agreement with the division, that diversion agreement shall be immediately and automatically terminated upon the issuance of the emergency order, without compliance with the

provisions of Title 63, Chapter 46b, Administrative Procedures Act.

(c) (i) A licensee whose diversion agreement has been terminated pursuant to Subsection (15)(b) is entitled, upon request, to a posttermination hearing to challenge the termination of the diversion agreement.

(ii) The request shall be considered a request for agency action and shall comply with the requirements of Subsection 63-46b-3(3).

(iii) The division shall uphold the termination of the diversion agreement if it finds that:

(A) the licensee violated the diversion agreement; and

(B) it is in the best interest of the public to terminate the diversion agreement.

(16) The administrative statute of limitations for taking disciplinary action described in Subsection 58-1-401(5) shall be tolled during a diversion program.