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MAR 12 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| GARY AUSTIN,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>ARIZONA REGISTRAR OF CONTRACTORS,<br><br>Defendant/Appellee. | 2 CA-CV 2008-0175<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20082798

Honorable Michael O. Miller, Judge

AFFIRMED

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Gary Austin — Tucson
In Propria Persona

Terry Goddard, Arizona Attorney General
By Marjorie S. Becklund — Tucson
Attorneys for Defendant/Appellee

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B R A M M E R, Judge.

**¶1** Appellant Gary Austin appeals from the trial court's judgment affirming the decision of the Arizona Registrar of Contractors (ROC) denying Austin's application for a contractor's license. We affirm.

## Factual and Procedural Background

**¶2** We view the evidence in the light most favorable to sustaining the agency's decision. *See Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, ¶ 2, 54 P.3d 355, 358 (App. 2002). The underlying facts, however, are largely undisputed.[1] Austin was convicted in 1990 of two, class-two felonies, first-degree burglary and armed robbery. He was released from prison, apparently after having served eleven years of his consecutive, ten-year sentences, and having completed in 2002 all supervision related to his convictions.

**¶3** In November 2007, Austin applied to the ROC for a contractor's license, disclosing on his application that he had been convicted of a felony. The ROC denied his application in December 2007, stating he had "failed to establish good character and reputation as required by A.R.S. § 32-1122.D" and had "been convicted of a felony, which would constitute a violation of A.R.S. § 32-1154.A.8, if a license were to be issued."

**¶4** Austin asked the Office of Administrative Hearing (OAH) to review that decision. *See* A.R.S. §§ 41-1092 through 41-1092.12. After a hearing, the OAH

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[1]Austin's statement of the facts contains no citations to the record and therefore does not comply with Rule 13(a)(4), Ariz. R. Civ. App. P. We have therefore disregarded it, *see Flood Control Dist. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985), and have instead relied on the ROC's statement of facts and our review of the record.

Administrative Law Judge (ALJ) determined that Austin's felony convictions "may be grounds for denying [him] a contractor's license" but that the ROC had a "degree of discretion" and was therefore not required to deny Austin's application based on his felony convictions. The ALJ nonetheless recommended the ROC affirm its denial, concluding that, despite his evidence of rehabilitation, Austin had not "sufficiently established the good character and reputation" required to obtain a license due to the "relatively brief passage of time" between the end of his prison sentences and his application. The ALJ opined, however, that Austin could later "establish the required good character and reputation" if he "continue[d] to pursue, achieve, and maintain a good work ethic and social responsibility." The ROC adopted the ALJ's recommendation and issued a final decision denying Austin's license application.

**¶5** Austin then sought judicial review of the ROC's final decision in superior court pursuant to the Administrative Review Act (ARA), A.R.S. §§ 12-901 through 12-914. The trial court affirmed the ROC's decision but disagreed with the ALJ that the ROC had any obligation "to consider [Austin's] additional evidence beyond the fact of the felony conviction[s]." This appeal followed.

**Discussion**

**¶6** "When an administrative decision is appealed to the superior court pursuant to the [ARA], the superior court decides only whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion." *Havasu Heights Ranch & Dev.*

*Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990). We review the trial court's judgment "to determine whether the record contains evidence to support [it]" and, therefore, necessarily reach the same underlying issues. *Id.* We review any legal conclusions de novo. *See Tornabene*, 203 Ariz. 326, ¶ 12, 54 P.3d at 361.

**¶7** The arguments Austin raises in his opening brief are difficult to parse. He raises them piecemeal throughout his brief, some without citation of authority, and fails to cite to the record. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief shall contain "citations to the authorities, statutes and parts of the record relied on"). As we understand his arguments, however, Austin contends the trial court improperly denied his request for a trial de novo, asserts a felony conviction cannot by itself justify denial of a contractor's license, and argues he has otherwise demonstrated good character as required by § 32-1122(D). Austin also raises several constitutional claims, asserting that denying him a license on the basis of his felony conviction violates his right to equal protection under the law, violates double jeopardy principles, and constitutes cruel and unusual punishment. He also asserts the governing statutes are impermissibly vague and claims he was not afforded due process. We address each argument in turn.

Trial de Novo

**¶8** Austin contends he "was denied a Trial De Novo and therefore could never get discovery from [the ROC.]" The trial court rejected Austin's request for a trial de novo,

stating he had failed to provide an explanation "supporting the need for additional evidence" and "the issues on appeal require a legal ruling rather than additional evidence." We first observe that Austin was not entitled to a trial de novo in these circumstances. *See* § 12-910(C); § 41-1092.02(A). However, in reviewing an administrative decision a trial court shall, if requested, hold an evidentiary hearing "to the extent necessary to make the determination required," § 12-910(A), namely, whether the administrative decision was unsupported by substantial evidence, contrary to law, arbitrary, capricious, or an abuse of discretion. § 12-910(E). If we construe Austin's request as one for an evidentiary hearing, as the trial court apparently did, the request was insufficient because it did not identify the evidence Austin sought to admit. *See* Ariz. R. P. Jud. Rev. Admin. Decis. 10. Accordingly, the court did not err in denying Austin's request.[2]

Good Character

**¶9** To qualify for a contractor's license, an applicant must "be of good character and reputation." A.R.S. § 32-1122(D). Austin asserts a felony conviction should not result in an "automatic denial" of a license application and, thus, the ROC should be required to show some additional cause supporting its denial.

[2]Austin also asserts he was denied discovery because "the original OAH hearing does not even have a provision for discovery." But Austin misstates the law: a party to an administrative hearing may apply for permission to depose witnesses and request that the ALJ subpoena witnesses and documents. § 41-1092.07(C),(F)(4). Indeed, the notice of hearing Austin received from the OAH informed him he could request subpoenas.

> Lack of good character and reputation may be established by showing that a person has engaged in contracting without a license or committed any act that, if committed or done by any licensed contractor, would be grounds for suspension or revocation of a contractor's license or by showing that the person was named on a contractor's license that was suspended or revoked in another state.

*Id.* A felony conviction is grounds for a license suspension. § 32-1154(A)(8). Thus, a felony conviction may establish an applicant's lack of good character. But we agree with the ALJ and the ROC here that the legislature's use of the word "may" in § 32-1122(D) means the ROC has discretion whether to deny a license application on the basis of a felony conviction.[3] *See City of Chandler v. Ariz. Dep't of Transp.*, 216 Ariz. 435, ¶ 10, 167 P.3d 122, 125 (App. 2007) (use of word "may" in statute indicates permissive intent).

**¶10** Because the ROC has discretion, its discretion is subject to review for abuse. But this does not mean that, as Austin suggests, it is the ROC's burden to show some additional justification for denial. Nothing in the record suggests Austin submitted any additional materials with his application that might have established his good character. There was thus no reason for the ROC to consider anything other than Austin's felony convictions in initially denying his application, and plainly the ROC did not act improperly

[3]The trial court reached a different conclusion, holding that Austin's felony convictions conclusively established his lack of good character and that the ROC was not required to consider any evidence of his rehabilitation. But this interpretation ignores the permissive language of § 32-1122(D). Nonetheless, "if the trial court based its ruling upon the wrong reasons but was correct in its ruling for any reason, the appellate court is bound to affirm." *City of Tucson v. Morgan*, 13 Ariz. App. 193, 195, 475 P.2d 285, 287 (1970).

in doing so. *See Rios Moreno v. Ariz. Dep't of Econ. Sec.*, 178 Ariz. 365, 367, 873 P.2d 703, 705 (App. 1994) (agency abuses its discretion when it "fails to consider the relevant facts"); § 32-1122(A)(3) (ROC shall "[c]onduct investigations [it] deems necessary").

**¶11** Nor was the ROC obligated at the administrative hearing to provide some additional justification for denying the application. Instead, it was Austin's burden to show the ROC should grant his application. *See* § 41-1092.07(G)(1) (applicant has burden of persuasion "[at] a hearing on an agency's denial of a license"). Austin apparently testified at the hearing and submitted several letters from community members in support of his application,[4] and the ALJ found it undisputed that Austin had been a model prisoner, that he had been "released from all types of probation" in 2002, that his civil rights had been restored, and that he was fully qualified for the license he sought. The ALJ also noted Austin had acquired both his general education diploma and a baccalaureate degree and owned and operated a carpet-cleaning business and several halfway houses. As he was required to do, the ALJ weighed that evidence against the fact of the two felony convictions and Austin's relatively recent release from supervision, ultimately concluding Austin had failed to prove his good character. That determination, adopted by the ROC, was supported by the record. *See Havasu Heights*, 167 Ariz. at 386, 807 P.2d at 1122. Austin does not suggest otherwise

[4]Austin did not provide the trial court a transcript of the OAH hearing pursuant to § 12-904(B)(5). We therefore must presume that transcript supports the ALJ's decision. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

but instead essentially asserts the ALJ should have reached a different conclusion.[5] However, "[w]e will not substitute our judgment for that of the agency if it was persuaded by the probative force of the evidence before it . . . , even where the question is . . . debatable and one in which we would have reached a different conclusion had we been the original arbiter of the issues raised by the application." *Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988).

**¶12** Austin also maintains there must be "a relationship between the felony and the license being sought" in order to justify denial. He admits the plain text of the statute does not support his contention, but reasons "the state and federal constitutions as well as case law" do. Assuming for purposes of argument that such a relationship is required, it exists here. Several of the reasons for a license suspension listed in § 32-1154(A) relate to the license-holder's honesty and truthfulness. For example, a license may be suspended for abandoning a contract without justification, § 32-1154(A)(1); "misrepresentation of a material fact," § 32-1154(A)(6); "[t]he doing of a wrong or fraudulent act" resulting in injury, § 32-1154(A)(7); or "false, misleading, or deceptive advertising," § 32-1154(A)(16).

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[5]Austin does suggest the ALJ erred by citing his recent release from prison as a factor weighing against his application, because his conduct has been exemplary since his incarceration began. But the ALJ did consider Austin's conduct while in prison, noting he had been a "model prisoner." Moreover, Arizona law supports the ALJ's decision to focus on the end of Austin's sentences rather than the date of his offenses. For example, a felony conviction is inadmissible as evidence for impeachment purposes "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Ariz. R. Evid. 609(b).

Similarly, felony convictions are, by their nature, probative of honesty and truthfulness. *See* Ariz. R. Evid. 609(a); *State v. Aguirre*, 130 Ariz. 54, 57, 633 P.2d 1047, 1050 (App. 1981) ("Any felony, even if it does not involve false statement or dishonesty, has probative value on the issue of the defendant's credibility."). Therefore, any felony conviction is directly relevant to whether a person has "good character and reputation" for purposes of § 32-1122(D).

**¶13** In a related argument, Austin asserts that § 32-1122(E) prescribes a one-year "period of atonement" for violations and crimes and that because his convictions occurred in 1990 they did not warrant denial of his license. Section 32-1122(E) provides: "A person who has been convicted of contracting without a license is not eligible to obtain a license under this chapter for one year after the date of the last conviction." But contracting without a license is a class one misdemeanor, *see* A.R.S. § 32-1164(A)(2), and thus is a far less serious crime than the felonies for which Austin was convicted. Moreover, the statute does not provide that contracting without a license ceases to be relevant to an applicant's good character if it occurred more than a year before the application. *See* § 32-1122(D) ("Lack of good character and reputation may be established by showing that a person has engaged in contracting without a license . . . ."). Nor does the statute suggest a comparable period should apply for felonies. Instead, the ROC must weigh those felony convictions against any other evidence of good character the applicant presents.

Constitutional Claims[6]

**¶14** Austin claims the governing statutes are unconstitutional on a variety of bases. "We presume statutes are constitutional, and one claiming that a statute is unconstitutional bears a heavy burden." *Curtis v. Richardson*, 212 Ariz. 308, ¶ 27, 131 P.3d 480, 486 (App. 2006). Indeed, "[w]e will not declare [a statute] unconstitutional unless we are satisfied beyond a reasonable doubt that [it] is in conflict with the federal or state constitutions." *Chevron Chem. Co. v. Superior Court*, 131 Ariz. 431, 438, 641 P.2d 1275, 1282 (1982). Accordingly, "we resolve all uncertainties in favor of constitutionality." *Kotterman v. Killian*, 193 Ariz. 273, ¶ 31, 972 P.2d 606, 617 (1999).

*Equal Protection*

**¶15** Austin argues that denying him a license based on his felony conviction violates his equal protection rights under the Fourteenth Amendment because it improperly classifies him based on his status as a felon. "To establish an equal protection violation, a party must establish (1) that it was treated differently than those who are similarly situated, and (2) when disparate treatment does not implicate fundamental rights or suspect

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[6]On appeal, Austin raises several Arizona constitutional claims he had raised for the first time in the trial court. We only address arguments made before the ALJ. *See Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, ¶ 8, 985 P.2d 633, 636 (App. 1999) ("Generally, a failure to raise an issue before an administrative tribunal precludes judicial review of that issue . . . ."); *Tornabene*, 203 Ariz. 326, n.7, 54 P.3d at 361 n.7 (failure to raise constitutional argument before ALJ waives claim). In any event, we find no authority suggesting the Arizona Constitution provides greater protection in these circumstances than does the United States Constitution.

classification, that the classification bears no rational relation to a legitimate state interest." *Curtis*, 212 Ariz. 308, ¶ 18, 131 P.3d at 485. Conversely, if the disparate treatment implicates a fundamental right or suspect classification, the treatment "must be narrowly tailored to serve a compelling governmental interest." *Calderon-Palomino v. Nichols*, 201 Ariz. 419, ¶ 9, 36 P.3d 767, 771 (App. 2001). Assuming, arguendo, that Austin has established disparate treatment,[7] he has failed to establish the classification is suspect, involves a fundamental right, or is not rationally related to a state interest.

**¶16** Despite Austin's apparent argument to the contrary, the right to pursue a particular occupation is not a fundamental right. *See Caldwell v. Pima County*, 172 Ariz. 352, 355, 837 P.2d 154, 157 (App. 1991). The right to pursue one's chosen profession is "'subject to the paramount right of the state under its police powers to regulate business and professions in order to protect the public health, morals and welfare.'" *Ariz. State Bd. of Dental Exam'rs v. Fleischman*, 167 Ariz. 311, 314, 806 P.2d 900, 903 (App. 1990), *quoting Cohen v. State*, 121 Ariz. 6, 10, 588 P.2d 299, 303 (1978). Nor is a classification based on conviction of a felony constitutionally suspect, and Austin does not argue otherwise. *Cf. State v. Rascon*, 110 Ariz. 338, 339, 519 P.2d 37, 38 (1974).

**¶17** There is also no doubt that the state has a legitimate interest in insuring contractors are of good character. *See Westinghouse Elec. Corp. v. Rhodes*, 97 Ariz. 81, 84,

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[7]There is no evidence in the record suggesting the ROC always, or even routinely, denies contractor's licenses to felons. The plain language of the governing statutes, however, permits the ROC to differentiate between felons and applicants with no felony convictions.

397 P.2d 61, 63 (1964) ("Statutes relating to licensing requirements for contractors are regulatory measures designed for protection of the public against the unscrupulous and unqualified."). Austin argues, however, that denying licenses to felons is not rationally related to that purpose. He asserts that, despite his felony convictions, because he is bonded and insured, can be put "in charge of a [construction] crew," and can otherwise "perform every single facet of contracting under another person's license," there is no reason to bar him from being licensed except "to keep him from sharing in the profits" of being a licensed contractor. What Austin's argument overlooks, however, is that, when he performs these functions for a licensed contractor, that individual would likely be responsible for any potential wrongdoing by Austin under the doctrine of respondeat superior. *See generally* Restatement (Third) of Agency § 7.03 (2006). And, as we explained in ¶ 12 *supra*, felony convictions are relevant to a person's character. Thus, denying a contracting license to a convicted felon plainly bears a rational relationship to the state's legitimate interest in insuring contractors are of good character.

**¶18** Austin also suggests that, because the state has not barred felons from "owning and operating businesses" or from "working in people's homes," it is improper for it to restrict them from being licensed contractors. But it is within the state's discretion to decide how to regulate different occupations and whether to require licensure. Moreover, we find no authority suggesting the state may not properly conclude that demonstrating good character is relevant to obtaining a license for some occupations and not others, as long as

the distinction is not wholly arbitrary. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932) ("[N]othing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"), *quoting Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924). Austin has not demonstrated that the distinctions our legislature has made between contracting and other types of occupations are arbitrary, and we find nothing in the record and no authority supporting that conclusion. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

*Double Jeopardy*

**¶19** Austin next argues that denying his license application based on his felony convictions punishes him for those convictions and thus violates the constitutional prohibition against double jeopardy. A sanction qualifies as punishment for purposes of double jeopardy "only if the legislature intended the penalty to be criminal in nature or if, 'by the clearest proof,' the purpose or effect of the penalty is so punitive as to transform it into a criminal penalty." *Brodsky v. State*, 218 Ariz. 508, ¶ 7, 189 P.3d 1081, 1084 (App. 2008), *quoting Hudson v. United States*, 522 U.S. 93, 100 (1997). We find no indication the

legislature intended as a criminal sanction the possible denial of a contractor's license to felons. Instead, as we have explained, the state has a legitimate interest in insuring that licensed contractors are of good character, and a felony conviction is relevant to that determination. *See Westinghouse Elec. Corp.*, 97 Ariz. at 84, 397 P.2d at 63. Nor do we find authority suggesting that the denial or revocation of a professional license due to criminal conduct is a punishment implicating double jeopardy principles.[8] Indeed, we find ample authority holding otherwise. *See Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994) (revocation of chiropractor's license for criminal conduct did not violate double jeopardy because sanction remedial);[9] *see also Wendte v. Alaska Bd. of Real Estate Appraisers*, 70 P.3d 1089, 1094 (Alaska 2003) ("[R]evoking or suspending a professional license is not 'punishment' for double jeopardy purposes when it furthers a regulatory goal."); *Borrego v. Agency for Health Care Admin.*, 675 So. 2d 666, 668 (Fla. Dist. Ct. App. 1996) (revocation of professional license does not violate double jeopardy if it serves public

[8]Austin relies on *United State v. Halper*, 490 U.S. 435 (1989), for the proposition that "a disproportionately large civil sanction" can "constitute punishment within double jeopardy's multiple punishment prohibition." But the United States Supreme Court overruled *Halper* in *Hudson*. *See Hudson*, 522 U.S. at 101-03.

[9]Austin attempts to distinguish *Schillerstrom* because the criminal conduct it discussed was closely related to the license in question and constituted "one interrelated series of events"—Schillerstrom had submitted false bills to insurance companies and lied about his pending felony prosecution on his license renewal application. 180 Ariz. at 157, 885 P.2d at 469. But, as we have explained, any felony conviction is relevant to an applicant's character. *See* ¶ 12 *supra.* And, in *Schillerstrom*, the reason Division One of this court found the revocation did not violate double jeopardy principles was because it was remedial in nature, not because it arose out of the same events as the felony prosecution. *Id.* at 470-71, 885 P.2d at 158-59.

welfare); *Clark v. Tyrrell*, 750 N.W.2d 364, 373 (Neb. Ct. App. 2008) ("[T]he revocation or suspension of a professional license generally does not constitute punishment for the purposes of double jeopardy analysis.").

*Cruel and Unusual Punishment*

**¶20** Austin also contends that denying him a license constitutes cruel and unusual punishment for his felony convictions in violation of the Eighth Amendment. This argument fails for the same reason as his double jeopardy argument; the denial of his license application was not a criminal sanction but instead served a prophylactic, regulatory purpose. *See Rasky v. Dep't of Registration & Educ.*, 410 N.E.2d 69, 79 (Ill. App. Ct. 1980) ("[R]evocation of a professional license is not a criminal sanction and the [E]ighth [A]mendment has no application."). In any event, Austin did not raise this argument at the administrative hearing and, thus, has waived it on appeal. *See Pavlik*, 195 Ariz. 148, ¶ 8, 985 P.2d at 636.

*Void for Vagueness*

**¶21** Austin additionally asserts the definition of "good character" is impermissibly vague. *See Golob v. Ariz. Med. Bd.*, 217 Ariz. 505, ¶ 28, 176 P.3d 703, 710 (App. 2008) (impermissibly vague statute violates due process). "A statute need not be drafted with absolute precision or define all of its terms," nor is it void for vagueness if it fails to define a term if "it gives fair notice of behavior that should be avoided." *Curtis*, 212 Ariz. 308, ¶ 27, 131 P.3d at 486. Division One of this court rejected in *Curtis* an argument similar to

Austin's, concluding that the "good character" requirement to obtain a real estate license was not impermissibly vague because the governing statutes clearly defined acts that demonstrated a lack of good character and thus was "not without any standards." *Id.* ¶ 28; *see* A.R.S. § 32-2153. Moreover, Division One observed that any decision denying a license was subject to judicial review "to protect against arbitrary application of the law." *Curtis*, 212 Ariz. 308, ¶ 28, 131 P.3d at 487.

**¶22** Similarly, § 32-1154 lists a wide range of conduct that may, because it affords grounds for license suspension or revocation, establish a lack of good character. *See* § 32-1122(D) (evidence that applicant committed act constituting grounds for license revocation may establish lack of good character). And, any ROC decision is likewise subject to judicial review. Additionally, we find no authority—and Austin cites none—suggesting the legislature's failure to define precisely what Austin must show to establish his good character despite his felony convictions renders the statutory scheme constitutionally infirm. A determination of good character is necessarily discretionary. Where an applicant has a felony conviction, a good-character determination requires a careful balancing of the nature and severity of the felonies, when they were committed, and the evidence of the applicant's rehabilitation and good character. The ALJ examined the relevant evidence and balanced those factors, and we find no basis to disturb its conclusion. Nor do we find an abuse of discretion in the ROC's decision to adopt it or in the trial court's affirming decision.

*Due Process*

**¶23** Austin additionally asserts "[t]here has been no legitimate due process in [his] case." His argument, however, largely reiterates the arguments we have already addressed. And we do not find any indication Austin was not afforded ample due process. Although he complains the ALJ did not address all of the legal arguments he raised below, the ALJ was not required to do so explicitly. By recommending the ROC deny Austin's license application, the ALJ implicitly rejected Austin's arguments. In any event, as we have explained, none of them warrants relief.

**Disposition**

**¶24** For the reasons stated, we find Austin's constitutional and statutory arguments unpersuasive and conclude the evidence supported the trial court's judgment affirming the ALJ's and ROC's decisions. We therefore affirm.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

JOSEPH HOWARD, Judge