

**No. SC88710**

---

**IN THE  
SUPREME COURT OF MISSOURI**

---

**BRUCE F. BIRD,**

**Respondent,**

**v.**

**MISSOURI BOARD FOR ARCHITECTS, PROFESSIONAL ENGINEERS,  
PROFESSIONAL LAND SURVEYORS AND LANDSCAPE ARCHITECTS,**

**Appellant.**

---

**Appeal from the Cole County, Missouri Circuit Court  
The Honorable Richard G. Callahan, Judge**

---

**APPELLANT'S SUBSTITUTE BRIEF  
AS IF RESPONDENT PURSUANT TO RULE 84.05(e)**

---

**JEREMIAH W. (JAY) NIXON  
Attorney General**

**KATHLEEN R. ROBERTSON  
Missouri Bar No. 57390  
Assistant Attorney General  
Post Office Box 899  
Jefferson City, Missouri 65102  
Phone: (573) 751-3321  
Fax: (573) 751-9456  
Kathleen.Robertson@ago.mo.gov**

**ATTORNEYS FOR APPELLANT**

**Table of Contents**

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES .....6

JURISDICTIONAL STATEMENT .....10

STATEMENT OF FACTS .....11

POINTS RELIED ON.....18

    I.    The Court of Appeals erred in finding that Bird’s petition for judicial review was inadequate, because a petition for judicial review is more like a notice of appeal than a petition filed in circuit court to initiate judicial proceedings, in that it merely initiates review of an agency decision.....18

    II.   The Board’s appeal is valid because the Circuit Court’s Judgment was a final, appealable judgment despite language remanding the cause to the AHC, because the Judgment left nothing for the AHC to decide and did not remand for the consideration of additional evidence.....19

    III.  The AHC did not err in finding that Bird’s professional engineering license was subject to discipline because the Board proved that Bird violated Missouri statutes and regulations in violations of § 327.441(6), RSMo, in that the signed and sealed plans for which he did not provide immediate personal supervision. ....20

IV.	The Board did not err in imposing three years’ suspension and one year’s probation on Bird’s professional engineering license because the AHC found cause to discipline based on Bird signing and sealing all plans for which he did not provide immediate personal supervision.....	21
V.	The Board’s imposition of three years’ suspension and one year’s probation was proper in the comments made for former Assistant Attorney General Sterner during closing arguments at the disciplinary hearing were not objected to and did not cause manifest injustice or miscarriage of justice. ....	22
VI.	The Board’s decision to impose three years’ suspension and one year’s probation was not arbitrary, capricious, unreasonable, or an abuse of discretion, and did not violate Bird’s constitutional rights because the AHC found cause to discipline Bird because he violated Missouri regulations and statutes by failing to provide immediate personal supervision on plans that he signed and sealed .....	23
	ARGUMENT .....	24
I.	The Court of Appeals erred in finding that Bird’s petition for judicial review is more like a notice of appeal than a petition filed in circuit court to initiate judicial proceedings, in that it merely initiates review	

of an agency decision. ....	24
A. Standard of Review .....	24
B. Background .....	24
C. A petition for judicial review is more like a notice of appeal than a petition filed to initiate judicial proceedings .....	25
1. Petitions that initiate judicial proceedings.....	25
2. Judicial review of Administrative Decisions in Circuit Court .....	26
II. The Board’s appeal is valid because the Circuit Court’s Judgment was a final, appealable judgment despite language remanding the cause to the AHC, because the Judgment left nothing for AHC to decide and did not remand for the consideration of additional evidence.....	29
III. The AHC did not err in finding that Bird’s professional engineering license was subject to discipline because the Board proved that Bird violated Missouri statutes and regulations in violation of § 327.441.2(6), RSMo, in that he signed and sealed plans for which he did not provide immediate personal supervision. ....	34
A. A standard of Review.....	34

B.	Bird violated 4 CSR 30-13.010 and §327.401.1, RSMo, by failing to provide immediate personal supervision for work done on plans that he signed and sealed.....	35
C.	An alleged custom allowing Bird’s conduct is not applicable, because written regulations trump unwritten customs.....	39
D.	4 CSR 30 13.010(1)(D) does not apply to this case .....	41
E.	Ignorance of the law does not excuse Bird’s conduct .....	44
IV.	The Board did not err in imposing three years’ suspension and one year’s probation on Bird’s professional engineering license because the AHC found cause to discipline based on Bird signing and sealing all plans for which he did not provide immediate personal supervision..	48
A.	Standard of Review .....	48
B.	The AHC found cause to discipline based upon Bird improperly signing and sealing all of the plans that had originally been prepared by McInnis .....	49
V.	The Board’s imposition of three years’ suspension and one year’s probation was proper in that comments made by former Assistant Attorney General Sterner during closing arguments at the disciplinary hearing were not objected to and did not cause manifest injustice of miscarriage of justice. ....	51

A.	Standard of Review .....	51
B.	Sterner’s comments did not cause manifest injustice or a miscarriage of justice and Bird failed to object to her comments at the disciplinary hearing .....	51
VI.	The Board’s decision to impose three years’ suspension and one year’s probation was not arbitrary, capricious, unreasonable, or an abuse of discretion, and did not violate Bird’s constitutional rights because the AHC found cause to discipline Bird because he violated Missouri regulations and statutes by failing to provide immediate personal supervision on plans that he signed and sealed.....	55
A.	Standard of Review .....	55
B.	The Board has discretion in the amount of discipline it chooses to impose .....	56
C.	Even if Bird’s constitutional claims were preserved, Bird failed to state valid Equal Protection or Due Process claims.....	59
1.	Bird’s Equal Protection Claim.....	59
2.	Bird’s Due Process Claim.....	61
	CONCLUSION .....	63
	CERTIFICATION OF SERVICE AND OF COMPLIANCE .....	64
	APPENDIX.....	65

## TABLE OF AUTHORITIES

### Cases

<i>Blevins v. Cushman Motors</i> , 551 S.W.2d 602 (Mo. banc 1977) .....	51
<i>Bruce Bird v. Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects</i> , WD66638, slip op., 2007 WL 1742864 (Mo. App. W.D. June 19, 2007) .....	17, 24
<i>Callier v. Dir. of Revenue</i> , 780 S.W.2d 639 (Mo. banc 1989) .....	23
<i>Coleman v. Gilyard</i> , 969 S.W.2d 271 (Mo. App. W.D. 1998).....	51
<i>Department of Social Services v. Villa Capri Homes, Inc.</i> , 684 S.W.2d 327 (Mo. banc 1985).....	49
<i>Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors</i> , 744 S.W.2d 524 (Mo. App. E.D. 1988).....	39, 40
<i>Gard v. State Bd. Of Registration for the Healing Arts</i> , 747 S.W.2d 726 (Mo. App. W.D. 1988).....	58
<i>Grace v. Missouri Gaming Comm'n</i> , 51 S.W.3d 891 (Mo. App. W.D. 2001 . 20, 45, 46, 47	
<i>H &amp; V Engineering, Inc. v. Idaho State Bd. of Prof'l Eng'rs and Land Surveyors</i> , 113 Idaho 646 P.2d 55 (1987).....	44, 46
<i>Hickman v. Division of Employment Security</i> , 448 S.W.2d 270 (Mo. App. K.C. D. 1969) .....	30

*Holmes v. Missouri Dental Board*, 703 S.W.2d 11 (Mo. App. W.D. 1985) .....56

*Hutchens v. St. Louis County*, 848 S.W.2d 616 (Mo. App. E.D. 1993) 21, 34, 55, 60

*ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d  
371 (Mo. banc 1993).....25

*Kennedy v. Missouri Attorney General*, 922 S.W.2d 68 (Mo. App. W.D. 1996) ..23,  
25, 60

*KV Pharmaceutical Co. v. Missouri State Board of Pharmacy*, 43 S.W.3d 306  
(Mo. banc 2001).....57

*M.M. v. Missouri State Board of Accountancy*, 728 S.W.2d 726 (Mo. App. E.D.  
1987) .....57

*McCormack v. Capital Electric Constr. Co.*, 159 S.W.3d 387 (Mo. App. W.D.  
2005) .....22

*Missouri State Board of Registration for the Healing Arts v. Brown*, 121 S.W.3d  
234 (Mo. banc 2003)..... 33, 61

*Mo. Highway & Transp. Comm’n v. Meyers*, 785 S.W.2d 70 (Mo. banc 1990)....46

*Orbals v. Special School Dist. of St. Louis County*, 762 S.W.2d 437 (Mo. App.  
E.D. 1988).....23

*Price v. Labor and Industrial Relations Comm’n*, 811 S.W.2d 457 (Mo. App. W.D.  
1991) ..... 19, 29, 30

*Reeder v. Bd. of Police Comm’rs of Kansas City, Mo.*, 800 S.W.2d 5 (Mo. App.

W.D. 1990).....	46
<i>State Bd. of Registration for Healing Arts v. Boston</i> , 72 S.W.3d 260 (Mo. App. W.D. 2002).....	42
<i>State Board of Registration for the Healing Arts v. McDonagh</i> , 123 S.W.3d 146 (Mo. banc 2003).....	43
<i>State ex inf. Ashcroft v. Riley</i> , 590 S.W.2d 903 (Mo. banc 1979) .....	20, 40
<i>State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City</i> , 864 S.W.2d 437 (Mo. App. W.D. 1993) .....	21, 34, 48, 55
<i>State ex rel. Nixon v. American Tobacco Co.</i> , 34 S.W.3d 122 (Mo. banc 2000) ....	24
<i>State ex rel. Teefy v. Board of Zoning Adjustment of Kansas City</i> , 24 S.W.3d 681 (Mo. banc 2000).....	21, 34, 48, 55
<i>Tadrus v. Missouri Board of Pharmacy</i> , 849 S.W.2d 222 (Mo. App. W.D. 1993) 57	
<i>Taylor v. Civil Service Comm’n of St. Louis County, Missouri</i> , 969 S.W.2d 763 .19, 29, 30	
<i>Turner v. Labor and Industrial Relations Comm’n</i> , 793 S.W.2d 191 (Mo. App. W.D. 1990).....	19, 29, 30
<i>Tyler v. Mitchell</i> , 853 S.W.2d 338 (Mo. App. W.D. 1993).....	23, 60

**Treatises**

§ 327.031, RSMo .....11

§ 327.401.1, RSMo ..... 36, 39, 45

§ 327.441, RSMo ..... 13, 20, 34, 35, 36, 39, 45, 50, 56, 57

§ 512.020, RSMo ..... 19, 29

§ 536.100, RSMo ..... 10, 18, 49

§ 536.110, RSMo .....26

§ 536.140 RSMo ..... 10, 18, 24, 48, 55

§ 536.150, RSMo .....26

§ 621.045, RSMo .....32

327.401, RSMo .....35

621.110, RSMo .....32

Cole County Circuit Court Local Rule 71 .....27

Supreme Court Rule 84.05.....48

## **Jurisdictional Statement**

The Respondent, Bruce F. Bird, appealed the decision of the Administrative Hearing Commission (“AHC”) finding cause to discipline Bird’s professional engineering license and the decision of the Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects (the “Board”), suspending Bird’s professional engineering license for three years for signing and sealing plans that were not prepared under his immediate personal supervision. Under § 536.100, RSMo,<sup>1</sup> aggrieved parties may appeal the Board’s decisions to a Missouri circuit court for judicial review. This Court has jurisdiction under § 536.140.6, RSMo, to hear Appellant’s, the Board’s, appeal from the judgment of the Circuit Court of Cole County reversing the AHC and Board’s decisions. This case has been transferred, after opinion, from the Missouri Court of Appeals, Western District, to the Supreme Court. Thus, jurisdiction lies in the Supreme Court. Further, the Board incorporates Point II of its Argument to support its assertion that jurisdiction is proper in this court because the Circuit Court judgment was final.

---

<sup>1</sup> Unless otherwise stated, all statutory references are to the Revised Statutes of Missouri 2000.

## **Statement of Facts**

The Board is an agency of the State of Missouri created and established pursuant to § 327.031, RSMo, for the purpose of executing and enforcing the provisions of Chapter 327, RSMo, regulating the professional practice of architecture, engineering, land surveying, and landscape architecture. Bird is licensed by the Board as a professional engineer. (Record of Agency Proceeding for Judicial Review, Vol. II (“R.II”) 267). Bird is not licensed as an architect in Missouri. (R.II 267).

Allen McInnis is a Missouri licensed architect. (R.II 269). Gregory Andachter is a builder and developer employed by Landmark Builders of Blue Springs, Inc. (“Landmark”). (Record of Agency Proceeding for Judicial Review, Vol. III (“R.III”) 413). McInnis entered into a contract with Andachter and Landmark on April 4, 2001, under which McInnis’ firm, Allan G. McInnis & Associates, would provide professional services for the design of a combination warehouse and office for Landmark. (R.II 272-274; R.III 414-415; Record of Agency Proceeding for Judicial Review, Vol. I (“R.I”) 20-22).

McInnis’ firm prepared final site plan and grading plan drawings, consisting of ten pages labeled as “Cardinal Woods Commercial” (“Cardinal Woods drawings”), and gave a copy of the drawings to Andachter for review. (R.II 276-280; R.III 419; R.I 24-32). Andachter submitted the unsealed drawings to the City of Independence Planning Commission, which rejected the drawings. (R.III 419-420). Andachter then

contacted McInnis and instructed him to make modifications to the building that were necessary to obtain approval from the City of Independence. (R.II 310-311; R.III 420). McInnis' firm made modifications to the Cardinal Woods drawings, but McInnis declined to sign and seal those drawings until Andachter and Landmark paid for the modifications. (R.II 281, 310, 317; R.III 422-423, 431).

Rather than pay McInnis, Andachter entered into a contract with Bird and his firm, Bruce Bird Engineering, to "finish . . . up" McInnis' Cardinal Woods drawings. (R.III 426-427, 430). After obtaining a set of McInnis' Cardinal Woods drawings from Andachter, Bird contacted the structural engineer McInnis' firm had consulted regarding storm water drainage and detention. (R.II 290-291; R.III 442). Bird and his firm made structural calculations for the building, made computations for the storm water runoff and detention, revised the roof structure, moved a doorway, and reviewed the load. (R.III 443-444). Bird affixed his professional engineer's seal to and signed each of the ten pages of the Cardinal Woods drawings, which still bore McInnis' title block. (R.III 445-446; R.I 46-55). Nothing on the plans Bird signed and sealed reflected the nature and extent of the work he performed. (R.III, 450). The plans bearing Bird's signature and seal were submitted to the City of Independence for approval; Bird later asked the city for permission to withdraw the Cardinal Woods drawings. (R.III 455; R.I 56).

Bird was not in any way associated with McInnis, nor did he seek McInnis' permission to make any changes to McInnis' Cardinal Woods drawings. (R.II 281).

Following a hearing, the Administrative Hearing Commission ("AHC") issued a decision on August 30, 2004, concluding that Bird's professional engineer license was subject to discipline pursuant to § 327.441.2(6), RSMo. (Record of Agency Proceeding for Judicial Review, Vol. IV ["R.IV"] 521-522). That statute provides, in relevant part:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any license or certificate of authority required by this chapter or any person who has failed to renew or has surrendered such person's license or certificate of authority, for any one or any combination of the following causes:

.....

(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter[.]

(R.IV, 521-522).

The AHC found that Bird did not supervise each step of the preparation of the Cardinal Woods drawings because he did not supervise the work at McInnis' office.

(R.IV 523). As such, the AHC determined that Bird violated 4 CSR 30 13.010, which provides:

(1) Plans, specifications, drawings, reports, engineering surveys or other documents will be deemed to have been prepared under the immediate personal supervision of an individual licensed with the board only when the following circumstances exist:

(A) The client requesting preparation of plans, specifications, drawings, reports, engineering surveys or other documents makes the request directly to the individual licensed with the board or an employee of the individual licensed with the board so long as the employee works in the licensed individual's place of business and not a separate location;

(B) The individual licensed with the board shall supervise each step of the preparation of the plans, specifications, drawings, reports, engineering surveys or other documents and has input into their preparation prior to their completion;

....

(3) The individual licensed with the board shall supervise each step of the preparation of the plans, specifications, drawings, reports, surveys or other documents and has input into their preparation prior to their completion.

(R.IV 522-523).

The AHC found that “[t]he Board’s standard for reasonable care and competence, technical knowledge and skill, and public welfare is set forth in its Regulation 4 CSR 30-3.030(7).” (R.IV 522). That regulation, which was rescinded on February 29, 2004, but was in effect at the time of Bird’s conduct, stated: “The signing and sealing of plans, specifications, estimates, reports and other documents or instruments not prepared by the professional engineer or under his/her immediate personal supervision is prohibited.”

The requirement of immediate personal supervision, the AHC concluded, was set forth in the Board’s statutes. (R.IV 523). Section 327.401.1, RSMo, states the circumstances under which a professional engineer may sign and stamp the work of another:

1. The right to practice as an architect or to practice as a professional engineer . . . shall be deemed a personal right, based upon the qualifications of the individual, evidenced by such individual’s professional license and shall not be transferable; . . . any architect or any

professional engineer . . . may practice his or her profession through the medium of, or as a member or as an employee of, a partnership or corporation if the plans, specifications, estimates, plats, reports, surveys or other like documents or instruments of the partnership or corporation are signed and stamped with the personal seal of the architect, . . . [or] professional engineer . . . by whom or under whose immediate personal supervision the same were prepared and provided that the architect or professional engineer . . . who affixes his or her signature and personal seal to any such plans, specifications, estimates, plats, reports or other documents or instruments shall be personally and professionally responsible herefore.

(R.IV 523-524).

After the AHC found cause to discipline, the Board conducted a disciplinary hearing on November 8, 2004. (R.IV, 534). On November 22, 2004, the Board issued its Findings of Fact, Conclusions of Law and Order suspending Bird's professional engineer license for three years, followed by a one year period of probation. (R.IV 563-569).

On December 17, 2004, Bird filed a Petition for Review with the Circuit Court of Cole County ("Circuit Court"). (Legal File ["LF"] 6-44). Bird also filed a Motion to Stay Enforcement of Agency Order on December 28, 2004, which the Circuit Court

granted on May 11, 2005. (LF 45-47, 48). On December 30, 2005, the Circuit Court issued its Order and Judgment finding the issues in favor of Bird. (LF 120). The Board filed a Request for an Amended Order and Judgment Including Findings of Fact and Conclusions of Law on January 18, 2006, which was denied on March 27, 2006. (LF 121-123, 138). The Board timely appealed to the Court of Appeals, Western District. (LF 129-136).

On June 19, 2007, the Western District handed down its decision in *Bruce Bird v. Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*, WD66638, slip op., 2007 WL 1742864 (Mo. App. W.D. June 19, 2007). The Court of Appeals dismissed the appeal because, it concluded, Bird had not preserved the issues he appealed by including them in his petition for judicial review filed at Circuit Court. *Id.* At 2, 4-5. Therefore, the Court of Appeals dismissed the case and sent it back to the Circuit Court with instructions to dismiss Bird's petition for judicial review. *Id.* At 5.

Bird filed an Application for Transfer with the Supreme Court on August 13, 2007, which was granted on October 30, 2007.

## **Points Relied On**

**I. The Court of Appeals erred in finding that Bird's petition for judicial review was inadequate, because a petition for judicial review is more like a notice of appeal than a petition filed in circuit court to initiate judicial proceedings, in that it merely initiates review of an agency decision.**

§ 536.110, RSMo.

§ 536.130, RSMo.

§ 536.140, RSMo.

**II. The Board's appeal is valid because the Circuit Court's Judgment was a final, appealable judgment despite language remanding the cause to the AHC, because the Judgment left nothing for the AHC to decide and did not remand for the consideration of additional evidence.**

§ 512.020, RSMo.

*Taylor v. Civil Service Comm'n of St. Louis County, Missouri*, 969 S.W.2d 763 (Mo. App. E.D. 1998).

*Price v. Labor and Industrial Relations Comm'n*, 811 S.W.2d 457 (Mo. App. W.D. 1991).

*Turner v. Labor and Industrial Relations Comm'n*, 793 S.W.2d 191 (Mo. App. W.D. 1990).

**III. The AHC did not err in finding that Bird’s professional engineering license was subject to discipline because the Board proved that Bird violated Missouri statutes and regulations in violation of § 327.441.2(6), RSMo, in that he signed and sealed plans for which he did not provide immediate personal supervision.**

§ 327.401.1, RSMo.

4 CSR 30 13.010(1).

*State ex inf. Ashcroft v. Riley*, 590 S.W.2d 903 (Mo. banc 1979).

*Grace v. Missouri Gaming Comm’n*, 51 S.W.3d 891 (Mo. App. W.D. 2001).

**IV. The Board did not err in imposing three years' suspension and one year's probation on Bird's professional engineering license because the AHC found cause to discipline based on Bird signing and sealing all plans for which he did not provide immediate personal supervision.**

*State ex rel. Teefy v. Board of Zoning Adjustment of Kansas City*, 24 S.W.3d 681 (Mo. banc 2000).

*Hutchens v. St. Louis County*, 848 S.W.2d 616 (Mo. App. E.D. 1993).

*State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City*, 864 S.W.2d 437 (Mo. App. W.D. 1993).

**V. The Board's imposition of three years' suspension and one year's probation was proper in that comments made by former Assistant Attorney General Sterner during closing arguments at the disciplinary hearing were not objected to and did not cause manifest injustice or a miscarriage of justice.**

*Coats v. Hickman*, 11 S.W.3d 798 (Mo. App. W.D. 1999).

*McCormack v. Capital Electric Constr. Co.*, 159 S.W.3d 387 (Mo. App. W.D. 2005).

**VI. The Board's decision to impose three years' suspension and one year's probation was not arbitrary, capricious, unreasonable, or an abuse of discretion, and did not violate Bird's constitutional rights because the AHC found cause to discipline Bird because he violated Missouri regulations and statutes by failing to provide immediate personal supervision on plans that he signed and sealed.**

*Callier v. Dir. Of Revenue*, 780 S.W.2d 639 (Mo. banc 1989).

*Ortbals v. Special School Dist. Of St. Louis County*, 762 S.W.2d 437 (Mo. App. E.D. 1988).

*Tyler v. Mitchell*, 853 S.W.2d 338 (Mo. App. W.D. 1993).

*Kennedy v. Missouri Attorney General*, 922 S.W.2d 68 (Mo. App. W.D. 1996).

## Argument

**I. The Court of Appeals erred in finding that Bird’s petition for judicial review was inadequate, because a petition for judicial review is more like a notice of appeal than a petition filed in circuit court to initiate judicial proceedings, in that it merely initiates review of an agency decision.**

### A. Standard of Review

Appellate review of the sufficiency of pleadings is a question of law, and thus, this Court independently determines those issues. *See State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000).

### B. Background

The Court of Appeals erred in finding that Bird’s petition for judicial review was insufficient in that it did not contain the claims Bird raised on appeal. *Bird v. Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*, slip op. at 4-5, 2007 WL 1742864 (Mo. App. W.D. June 19, 2007). The Court of Appeals found that Bird failed to allege “any specific claims of error” in his petition for judicial review filed in circuit court, but instead alleged that he denied the allegations in the complaint and that the Final Order violated the grounds set out in § 536.140, RSMo. *Id.* At 2. The Court of Appeals likened a petition for judicial review to “any other petition for suit in the circuit court [that] functions to initiate the judicial process by a pleading which defines the issues to be

met by the adversary and motivates a court to its adjudicative function.” *Id.* At 4 (internal citations omitted). Thus, because Bird failed to specifically allege his claims in his petition for judicial review, the Court of Appeals reasoned that he failed to state a claim, and both the circuit court and Court of Appeals lacked jurisdiction over the case. *Id.* At 5. The Court of Appeals dismissed the appeal and remanded the case back to the circuit court with directions to dismiss Bird’s petition for judicial review. *Id.*

C. A petition for judicial review is more like a notice of appeal  
than a petition filed to initiate judicial proceedings

A petition for judicial review is more like a notice of appeal than a petition that initiates a judicial proceeding. While both are called petitions and both are generally filed in circuit court, the differences between them, and between the proceedings each initiates, are substantial and demonstrate that the two petitions should not be treated as if they were the same.

*1. Petitions that initiate judicial proceedings*

Missouri is a fact pleading state. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993). In Missouri, unlike in the federal courts, it is the role of pleadings to “identify facts upon which the plaintiff’s claim rests.” *Id.* At 380. A petition must state allegations of fact in support of each essential element of the cause plead. *Kennedy v. Missouri Attorney General*,

922 S.W.2d 68, 70 (Mo. App. 1996). This requirement of fact pleading is necessary because a petition initiates a judicial proceeding – the petition is generally the first pleading filed in a case and functions, among other things, to inform the court and parties what issues will be litigated. Further, there is generally a statute of limitations of at least a year for a filing a petition that initiates a judicial proceeding.

## *2. Judicial review of Administrative Decisions in Circuit Court*

A petition for judicial review, however, is very different from a petition that initiates a judicial proceeding. A petition for judicial review initiates an appeal of an administrative decision. Accordingly, when reviewing an administrative proceeding, a circuit court acts like a court of appeals: it reviews the proceedings of the tribunal below. Because of this, a petition for judicial review is more like a notice of appeal and should be treated as such.

Chapter 536, RSMo, the Administrative Procedures Act, does not indicate what is supposed to be in a petition for judicial review. Section 536.140, RSMo, sets out the grounds for challenging a decision, such as that the decision was against the weight of the evidence or arbitrary and capricious. But that is a standard to be applied by the court, not an attempt to define the content of the petition for judicial review.

Under § 536.110, RSMo,<sup>2</sup> a party has 30 days from the mailing of the decision

---

<sup>2</sup> Section 536.110, RSMo, governs petitions for judicial review for contested cases. Review of uncontested cases is governed by § 536.150, RSMo,

of an administrative agency to file a petition for judicial review in circuit court. This means a party has only 30 days to receive the decision, decide whether to appeal, and prepare and file a petition for judicial review – as opposed to at least a year for a petition that initiates a judicial proceeding. Further, the record on appeal, which includes the transcript of the administrative proceeding, is to be filed in the circuit court within 30 days *after* the petition for judicial review is filed. § 536.130, RSMo. So preparing the petition for judicial review is usually done without the benefit of the record. From a practical standpoint, including all claims a party may wish to pursue in a petition for judicial review is not feasible; undoubtedly, some, perhaps many, claims will emerge or change based on examination of the record and research. The statutes do not address what happens after the record is filed, but in many circuit courts, including Cole County Circuit Court, where this case was heard at the circuit court level, the parties then file briefs and provide oral argument for the court. *See* Cole County Circuit Court Local Rule 71.

As the petition for judicial review is simply a notice of appeal, there is no need to require fact pleading in petitions for judicial review. By the time an administrative contested case reaches circuit court, the case has already been litigated, often with discovery prior to the litigation, and there is a decision on the merits. The issues have already been defined. The claims raised on appeal in the circuit court will usually be

---

and is not at issue here.

based on issues that arose during the litigation or in the administrative decision. Just as there is no need for specific detail in a notice of appeal as to the claims that will be raised during the appeal, there is no need for such a high level of specificity in a petition for judicial review. Thus, the Court of Appeals erred in finding Bird's petition for judicial review was insufficient.

**II. The Board’s appeal is valid because the Circuit Court’s Judgment was a final, appealable judgment despite language remanding the cause to the AHC, because the Judgment left nothing for the AHC to decide and did not remand for the consideration of additional evidence.**

This Court has jurisdiction only over final, appealable orders. § 512.020, RSMo. In this case, the Circuit Court’s Judgment was a final, appealable order, even though, on its face, it issued a remand, because the Judgment stated that it was a final order and judgment, and it disposed of all issues by finding that the AHC decision was unlawful, unreasonable, and unsupported by substantial and competent evidence on the record as a whole.

The Judgment did, of course, remand to the AHC “for rehearing and findings not inconsistent with this order.” (LF 120). But the Circuit Court did not remand so that the Commission could hear additional evidence. This is exactly the circumstance cited in *Taylor v. Civil Service Commission of St. Louis County, Missouri*, 969 S.W.2d 763, 764-765 (Mo. App. E.D. 1998) as one which gives rise to the jurisdiction of an appellate court to review the decision at issue. In *Taylor*, the court differentiated its case from the scenarios in *Price v. Labor and Industrial Relations Commission*, 811 S.W.2d 457 (Mo. App. W.D. 1991) and *Turner v. Labor and Industrial Relations Commission*, 793 S.W.2d 191 (Mo. App. W.D. 1990) because in *Price* and in *Turner*, as here, the trial court remanded the cases to the administrative tribunal to enter

specific orders rather than directing the administrative tribunal to consider additional evidence in further proceedings. *Price*, 811 S.W.2d at 457-58; *Turner*, 793 S.W.2d at 194. Therefore, those judgments were ripe for appellate review because all issues were decided, leaving nothing more for the agency to do. *See Taylor*, 969 S.W.2d at 764-65. Further, the order at issue in *Taylor*, which was found not to be a final, appealable judgment, specifically stated that the case was being remanded for consideration of additional evidence. *Id.* *See also Hickman v. Division of Employment Security*, 448 S.W.2d 270, 271, 274 (Mo. App. K.C. D. 1969).

Here, the Circuit Court ruled in its Judgment:

Now on this 30<sup>th</sup> day of December, 2005, this matter is again taken up by the court for the purpose of entering its final order and judgment.

The Court, having heard the argument of counsel, having reviewed the administrative record, and being fully advised in the premises, finds the issues in favor of the Petitioner and against the Respondent.

WHEREFORE, this Court finds that the Findings of Fact, Conclusion [sic] of Law, Decision and Order of the Administrative Hearing Commission in case No. 03-0563 AR, unlawful, unreasonable and unsupported by substantial and competent evidence on the record as a whole. This cause is REMANDED to the Administrative Hearing Commission for rehearing and findings not inconsistent with this order.

(LF 120).

The Judgment clearly stated that the Circuit Court resolved the issues in favor of Bird and against the Board. The only issue before the AHC in this case was whether Bird should be disciplined; after the AHC found cause to discipline Bird, the Board determined the amount of discipline to be imposed. The Circuit Court reversed the decision of the AHC, finding that the AHC's decision that Bird was subject to discipline was unlawful, unreasonable, and unsupported by competent and substantial evidence. Therefore, there is nothing further for the AHC to decide.

The Circuit Court did not remand this case for the purpose of the Commission to consider additional evidence. Furthermore, the Judgment clearly stated that it was a "final order and judgment" and that the Court "[found] the issues in favor of the Petitioner and against Respondent." (LF 120). This expresses the intent of the Circuit Court for its Judgment to be final. If the Circuit Court had intended the Commission to consider additional evidence, the Court would have used language in the Judgment to suggest that the Commission needed to relook at the evidence to determine whether Bird should have been disciplined.

Bird argues that the Judgment was not final because the Circuit Court "expressed its concerns with the severity of the discipline imposed by the Board,"<sup>3</sup>

---

3 While the Circuit Court did seem concerned with the amount of discipline imposed (*see* Circuit Court Transcript ["Tr."] 2, 6, 18, 33), the Circuit

and thus, remanded to the “agency”<sup>4</sup> to rehear the case. (Respondent’s Brief [“Bird’s Brief”] at 27). Bird misreads the Circuit Court’s Judgment and misunderstands the nature of these proceedings. Professional license discipline cases are bifurcated: the AHC decides whether there is cause to discipline and, if the AHC finds cause to discipline, then the relevant board decides the amount of discipline to impose. *See* §§ 621.045, 621.110, RSMo (as amended). The Circuit Court reversed the decision of the AHC, and remanded the case back to the AHC. As the AHC decided only that Bird was subject to discipline, reversing that decision means that there is no discipline for the Board to impose. Thus, the cause cannot be remanded to decide the amount of discipline, regardless of whether that was the issue that concerned the Circuit Court.<sup>5</sup>

---

Court’s Judgment referenced only the decision of the AHC. (LF 120). Moreover, the Circuit Court seemed confused on whether it could review the Board’s imposition of discipline or could review only the decision of the AHC. (Tr. 2, 18).

4 Throughout his brief, Bird refers generically to the “agency,” and does not differentiate between the decision of the AHC and that of the Board. *See* Bird’s Brief at 42, 43, 57, 60, and 64.

5 Further, to the extent that Bird challenges the discipline imposed by the Board on constitutional grounds (*see* Bird’s Brief at 64-69), “it is clear that an equal protection claim based on disparate punishments is one kind of case in which a remand is not ‘proper to require.’” *Missouri State Board of Registration for the*

The Judgment was a final, appealable order. While the language used gave the appearance of remand, the effect of the language in the Judgment showed the intent of the Circuit Court that this be a final, appealable judgment. Therefore, the appeal should be allowed to go forward.

---

*Healing Arts v. Brown*, 121 S.W.3d 234, 237 (Mo. banc 2003).

**III. The AHC did not err in finding that Bird’s professional engineering license was subject to discipline because the Board proved that Bird violated Missouri statutes and regulations in violation of § 327.441.2(6), RSMo, in that he signed and sealed plans for which he did not provide immediate personal supervision.**

A. Standard of Review

This appeal involves a reversal of a decision by the AHC and Board, and as such, this Court reviews the administrative decision, not the trial court’s judgment. Supreme Court Rule 84.05(e); *see also* § 536.140, RSMo. Review of administrative decisions is “limited to determination of ‘whether the Board’s action is supported by competent and substantial evidence upon the whole record or whether it is arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction.’” *State ex rel. Teefy v. Board of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000) (quoting *Hutchens v. St. Louis County*, 848 S.W.2d 616, 617 (Mo. App. E.D. 1993)). Further, “[i]n determining whether substantial evidence existed to support the [agency’s] decision, an appellate court must view the evidence and reasonable inferences therefrom in a light most favorable to the decision.” *Teefy*, 24 S.W.3d at 684 (quoting *State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City*, 864 S.W.2d 437, 440 (Mo. App. W.D. 1993)).

B. Bird violated 4 CSR 30-13.010 and § 327.401.1, RSMo, by failing to provide immediate personal supervision for work done on plans that he signed and sealed.

The Board can discipline a licensee for failure to comply with Missouri statutes and regulations. § 327.441.2(6), RSMo. Section 327.401.1, RSMo, states the circumstances under which a professional engineer may sign and stamp the work of another:

1. The right to practice as an architect or to practice as a professional engineer . . . shall be deemed a personal right, based upon the qualifications of the individual, evidenced by such individual's professional license and shall not be transferable; . . . any architect or any professional engineer . . . may practice his or her profession through the medium of, or as a member or as an employee of, a partnership or corporation if the plans, specifications, estimates, plats, reports, surveys or other like documents or instruments of the partnership or corporation are signed and stamped with the personal seal of the architect, . . . [or] professional engineer . . . by whom or under whose immediate personal supervision the same were prepared and provided that the architect or professional engineer . . . who affixes his or her signature and personal seal to any such plans, specifications, estimates, plats, reports or other documents or instruments shall be personally and professionally

responsible therefore.

The Board has promulgated regulations to enforce § 327.441.2, RSMo, as authorized by § 327.401.1, RSMo. At the time of Bird's conduct, 4 CSR 30 13.010<sup>6</sup> provided:

(1) Plans, specifications, drawings, reports, engineering surveys or other documents will be deemed to have been prepared under the immediate personal supervision of an individual licensed with the board only when the following circumstances exist:

(A) The client requesting preparation of plans, specifications, drawings, reports, engineering surveys or other documents makes the request directly to the individual licensed with the board or an employee of the individual licensed with the board so long as the employee works in the licensed individual's place of business and not a separate location;

(B) The individual licensed with the board shall *supervise each step of the preparation* of the plans, specifications, drawings, reports, engineering surveys or

---

6 The version of 4 CSR 30-13.010 that Bird quotes on pages 46-48 of his brief is not the version that was in effect at the time of Bird's conduct.

other documents and has input into their preparation prior to their completion;

....

(3.) The individual licensed with the board shall *supervise each step of the preparation* of the plans, specifications, drawings, reports, surveys or other documents and has input into their preparation prior to their completion.

(Emphasis added).

Further, “[t]he Board’s standard for reasonable care and competence, technical knowledge and skill, and public welfare is set forth in its Regulation 4 CSR 30-3.030(7),” which, at the time of Bird’s conduct, provided: “The signing and sealing of plans, specifications, estimates, reports and other documents or instruments not prepared by the professional engineer or under his/her immediate personal supervision is prohibited.” (R.IV 522).

Bird did not comply with the requirements of 4 CSR 30 13.010. The plans in question were originally prepared by and under the supervision of McInnis. (R.II 276-280; R.III 419; R.I 24-32). After a fee dispute, the client took McInnis’ plans to Bird for revision. (R.III 426-427, 430). Bird did not seek permission from McInnis, or otherwise contact him, regarding revising the plans. (R.II 281). Bird and his staff revised the plans, and Bird placed his seal on each page of the plans and signed them.

(R.III 442-446; R.I, 46-55). The AHC found that Bird violated 4 CSR 30 13.010 because “[h]e did not supervise each step of the plans’ preparation” in that he did not provide immediate personal supervision for the work performed at McInnis’ office. (R.IV 523).

Bird asserts repeatedly that his conduct amounted to a minor technical violation. (Bird’s Brief at 42, 65). His concession that it was a violation is enough to sustain the AHC’s decision authorizing discipline. But his claim that the violation was merely technical ignores the nature of the seal and signature in the engineering profession and the severity of his offense. Signing and sealing plans is very important in the engineering profession, akin to a lawyer signing a pleading under Supreme Court Rule 55.03. The proper use of an engineer’s seal and signature is outlined in specific detail in the Board’s statutes and regulations. Requirements for engineers to follow are stringent because of the responsibility they have to the public:

The statutory provisions make clear that Missouri has established a stringent set of requirements for professional engineers practicing in the state. The thrust of those requirements is professional accountability by a specific individual certified engineer. These requirements establish the public policy of the state for the protection of the public. They require that plans for construction of structures in this state which require engineering expertise be prepared by or under the direct supervision of a

specified certified engineer and that that engineer bear personal and professional responsibility for those plans. The affixing of his seal on the plans makes him responsible for the entire engineering project and all documents connected therewith unless he specifically disclaims responsibility for some document relating to or intended to be used for any part of the engineering project.

*Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 535-36 (Mo. App. E.D. 1988).

By signing and sealing plans, an engineer takes responsibility for the contents of the plans. § 327.401, RSMo. *See also* § 327.411.1, RSMo (“such licensee shall be held personally responsible for the contents of all such documents sealed by such licensee”). Bird asserts that he was willing to take responsibility for the plans (Bird’s Brief at 48, 52, 56), but this ignores that, under the law and regulations in effect at the time, he was prohibited from signing and sealing plans that he did not prepare or for which he did not provide immediate personal supervision.

C. An alleged custom allowing Bird’s conduct is not applicable, because written regulations trump unwritten customs.

Bird argues that his license should not be disciplined because he acted in accordance with the customs of the engineering profession. (Bird’s Brief at 52). He claims that it is acceptable and customary for engineers to work on and sign others’

drawings as part of overall construction projects.<sup>7</sup> *Id.* Bird’s argument is flawed because professional customs must give way to statutory regulations. This Court has stated:

Where established customs and practices are challenged and found to run counter to plain and unambiguous language of controlling regulatory statutes such customs and practices must give way to the law, which this Court must declare as it is and not as some would prefer that it had been written. . . . It is self evident that a custom or usage repugnant to the express provision of a statute is void.

*State ex inf. Ashcroft v. Riley*, 590 S.W.2d 903, 907 (Mo. banc 1979) (internal citations omitted) (involving a sheriff’s violation of an official duty). Further, “[c]ustom, practice, or ‘bottom line’ necessity cannot alter [an engineer’s] responsibility. Evidence of such matters is simply irrelevant in defense of the charges here.” *Duncan*, 744 S.W.2d at 537 (internal citations omitted) (discussing claims of a custom that allowed engineers to allow non-engineers to design structural elements).

---

<sup>7</sup> Even if a custom is as good as law, Bird did not establish that a profession-wide custom existed. The only evidence regarding the alleged custom was Bird’s testimony, in which he stated that the practice “is followed by some other engineers and architects. I don’t know if - if it’s followed by all.” (R.III 440).

An alleged unlawful custom does not excuse Bird's conduct. The AHC found that Bird did not personally supervise each step of the plans' preparation because he did not supervise the work at McInnis' office. (R.IV 523). Signing and sealing the plans violated 4 CSR 30 13.010 and § 327.401.1, RSMo; and Bird's license is subject to discipline despite alleged customary practices within the profession. Therefore, the decision to discipline Bird was proper, and Bird's request that it be reversed should be denied.

D. 4 CSR 30 13.010(1)(D) does not apply to this case.

Bird cites Board regulation 4 CSR 30 13.010(1), which states, in pertinent part:

(D) In circumstances where a licensee in responsible charge of the work is unavailable to complete the work, or the work is a site adaptation of a standard design plan, or the work is a design plan signed and sealed by an out of jurisdiction licensee, a successor licensee may take responsible charge by performing all professional services to include developing a complete design file with work or design criteria, calculations, code research, and any necessary and appropriate changes to the work. The non professional services, such as drafting, need not be redone by the successor licensee but must clearly and accurately reflect the successor licensee's work. The burden is on the successor

licensee to show such compliance. The successor licensee shall have control of and responsibility for the work product and the signed and sealed originals of all documents.

But this provision does not apply to the present case for two reasons.

First, as the AHC found, the provision was not effective until June 30, 2003, and was, therefore, not in effect when Bird's conduct occurred. (R.IV 525). The AHC rejected Bird's argument that 4 CSR 30-13.010(1)(D) should apply regardless of its effective date because, "Regulation 4 CSR 30-13.010 represents the standard of practice as a matter of law." (R.IV 525). Statutes and regulations are presumed to operate prospectively unless it is clear the legislature intended retrospective application. *See State Bd. Of Registration for Healing Arts v. Boston*, 72 S.W.3d 260, 263 (Mo. App. W.D. 2002). Because 4 CSR 30 13.010(1)(D) was not in effect when Bird placed his signature and seal on McInnis' plans, this regulation does not apply.

Second, even assuming *arguendo* that the regulation applies, McInnis was not unavailable to complete the work. He refused to place his signature and seal on the plans when a dispute arose over payment for McInnis' services. (R.II 281, 310, 317; R.III 422-423, 431). Refusing to complete unpaid services did not render McInnis unavailable, because McInnis was only unavailable to work for the price Andachter was willing to pay – which was nothing. Further, Bird never contacted McInnis to determine whether McInnis was, in fact, unavailable. Bird cannot claim that he acted

because McInnis was unavailable if he never made the effort to determine this fact.<sup>8</sup>

Regulation 4 CSR 30 13.010(1)(D) did not apply to Bird's situation because Bird had no authority to place his signature and seal on the work when the architect in responsible charge was available, the work was not a site adaptation of a standard design plan, and the work was not a design plan signed and sealed by an out of jurisdiction licensee. Bird's conduct violated the Board's regulation and statute governing immediate supervision, and his license was subject to discipline. Therefore, the decision to discipline Bird's license was proper, and this Court should affirm the decisions of the AHC and the Board.

Bird argues that the amendment of this rule means that the Board should not discipline Bird, and states that the AHC noted Judge Wolff's concurring and dissenting opinion in *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 166 (Mo. banc 2003), for the proposition that the Board should be bound by its standards.<sup>9</sup> (Bird's Brief at 53). Bird neglects to mention that the AHC also noted that, "because Bird did not meet the requirements of Regulation 4 CSR 30-13.010(1)(D), it is an issue neither before us as a cause for discipline nor before the

---

8 The AHC did not "decide the meaning of unavailable because Bird did not comply with the requirement that his drafting clearly and accurately reflect his work." (R.IV 526).

9 Bird failed to cite to anything in the Record to support this assertion.

Board as to the appropriate degree of discipline.” (R.IV 526, n. 3). Further, as stated above, 4 CSR 30-13.010(1)(D) would not apply to Bird’s conduct because, even if Bird had met the other requirements, McInnis was not unavailable.

E. Ignorance of the law does not excuse Bird’s conduct.

Bird claims that disciplining his license violates his constitutional rights because he had no reason to believe that his conduct was a violation of professional standards. (Bird’s Brief at 51-52). He cites a case styled *H & V Engineering, Inc. v. Idaho State Bd. Of Prof’l Eng’rs and Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987), in which the court held that the due process rights of engineers in Idaho were violated when their licenses were suspended or revoked because the regulations failed to adequately warn them as to what conduct would subject them to discipline. *H & V Engineering*, 747 P.2d at 60 61.

The case before this Court is distinguishable from *H & V Engineering* because Bird’s misconduct is prohibited under Chapter 327, RSMo. Accepted conduct is also defined in 4 CSR 30 13.010, which states in relevant part:

(1) Plans, specifications, drawings, reports, engineering surveys or other documents will be *deemed* to have been prepared *under the immediate personal supervision of an individual* licensed with the board *only when* the following circumstances exist:

(A) The client requesting preparation of plans,

specifications, drawings, reports, engineering surveys or other documents makes the request directly to the individual licensed with the board or an employee of the individual licensed with the board so long as the employee works in the licensed individual's place of business and not a separate location.

(B) The individual licensed with the board shall *supervise each step of the preparation* of the plans, specifications, drawings, reports, engineering surveys or other documents and has input into their preparation prior to their completion;

....

(3) The individual licensed with the board shall *supervise each step of the preparation* of the plans, specifications, drawings, reports, surveys or other documents and has input into their preparation prior to their completion.

(Emphasis added).

Bird's claim that he was not familiar with that regulation or §§ 327.401.1 and 327.441.2(6), RSMo, does not excuse his violations. Persons are conclusively presumed to know the law. *Grace v. Missouri Gaming Comm'n*, 51 S.W.3d 891, 903

(Mo. App. W.D. 2001). *See also Reeder v. Bd. Of Police Comm'rs of Kansas City, Mo.*, 800 S.W.2d 5, 6 (Mo. App. W.D. 1990) (ignorance of law or mistake of law is not an excuse for violating the law). In *Grace*, the managing partner of an excursion gambling boat was fined because he consumed alcoholic beverages in a non gaming area of the casino in violation of a state regulation. *Id.* At 894. The *Grace* defendant argued that imposing the fine would violate his due process rights because he could not, under the circumstances, have known about the regulation he was charged with violating. *Id.* Moreover, the defendant in *Grace* argued that he had conducted himself consistently for almost five years without knowledge of the regulation, and applying the regulation to him would render it vague, ambiguous, and uncertain. *Id.* At 902. The court in *Grace* disagreed with the defendant and held, ““The statute must define the proscribed conduct with sufficient definiteness that ordinary people can discern what acts are prohibited[.]’ . . . [and] ‘the offensive conduct must be defined in a manner which does not encourage arbitrary and discriminatory application.’” *Id.* At 903 (internal citations omitted). The court in *Grace* determined that the statute at issue was not unconstitutionally vague and stood “by the principle that “[p]ersons are conclusively presumed to know the law.”” *Id.* (quoting *Mo. Highway & Transp. Comm’n v. Meyers*, 785 S.W.2d 70, 75 (Mo. banc 1990)).

The *Grace* decision supports the *H & V Engineering* holding that statutes must clearly state what conduct is prohibited. In *Grace*, the court determined that

individuals are presumed to know the law as it is put forth in sufficiently definite statutes and individual behavior and professional customs must conform to those statutes. *Id.* Because the statutes and regulation at issue here are clear and unambiguous in their description of prohibited conduct, Bird's license is subject to discipline for violating those laws despite his claimed ignorance and the alleged customs of his profession. Like the *Grace* defendant, Bird is conclusively presumed to know the law and is held accountable for violating it. And simply because Bird engaged in similar conduct in the past without facing consequences does not make his conduct acceptable. The decision to discipline Bird's license was proper, and Bird's request to reverse the decision should be denied.

**IV. The Board did not err in imposing three years' suspension and one year's probation on Bird's professional engineering license because the AHC found cause to discipline based on Bird signing and sealing all plans for which he did not provide immediate personal supervision.**

A. Standard of Review.

This appeal involves a reversal of a decision by the AHC and Board, and as such, this Court reviews the administrative decision, not the trial court's judgment. Supreme Court Rule 84.05(e); *see also* § 536.140, RSMo. Review of administrative decisions is "limited to determination of 'whether the Board's action is supported by competent and substantial evidence upon the whole record or whether it is arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction.'" *State ex rel. Teefy v. Board of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000) (quoting *Hutchens v. St. Louis County*, 848 S.W.2d 616, 617 (Mo. App. E.D. 1993)). Further, "[i]n determining whether substantial evidence existed to support the [agency's] decision, an appellate court must view the evidence and reasonable inferences therefrom in a light most favorable to the decision." *Id.* (quoting *State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City*, 864 S.W.2d 437, 440 (Mo. App. W.D. 1993)).<sup>10</sup>

---

<sup>10</sup> Bird contends that the Standard of Review for this issue is governed by *Department of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 333

B. The AHC found cause to discipline based upon Bird improperly signing and sealing all of the plans that had originally been prepared by McInnis.

Bird asserts that the AHC's findings "imply" and make it "appear" that Bird's impropriety was limited to architectural matters only and that the Board disciplined him for other conduct. (Bird's Brief at 58). Tellingly, Bird cites nothing within the AHC's decision to support his assertion. The AHC specifically found that Bird violated the standards for immediate supervision because "[h]e did not supervise each step of the *plans*' preparation because he did not supervise the work at McInnis' office." (R.IV 523) (emphasis added). The AHC made no indication that it was finding cause to discipline based only on some of the plans Bird signed and sealed but did not supervise the preparation of; indeed, because the AHC spoke generally of "plans" instead of referring to specific plans, the logical interpretation of the AHC's decision would be that it found cause to discipline based on Bird signing and sealing all of the plans originally prepared by McInnis. Further, considering that the AHC found that Bird did not improperly practice architecture (R.IV 521), there was no reason for the AHC to limit its decision that there was cause to discipline Bird due to

---

(Mo. banc 1985). (Bird's Brief at 59-60). However, *Villa Capri Homes* does not set forth a standard of review, but only states that "[p]etition for review was sought on both appeal and cross-appeal pursuant to § 536.100-140, RSMo 1978." *Id.* at 329.

his failure to supervise plans he signed and sealed solely to architectural plans.

The Board incorporated the AHC's decision in its disciplinary order. (R.IV 564). Nothing in the Board's decision suggests that the Board imposed discipline for conduct other than that found by the AHC to be grounds for discipline. That failure to provide immediate personal supervision provided a basis for the Board to impose discipline and supports the Board's decision to suspend Bird's license for three years followed by a one year period of probation, which was within the authorized range of discipline allowed under statute. *See* § 327.441.3, RSMo.

**V. The Board’s imposition of three years’ suspension and one year’s probation was proper in that comments made by former Assistant Attorney General Sterner during closing arguments at the disciplinary hearing were not objected to and did not cause manifest injustice or a miscarriage of justice.**

A. Standard of Review.

Bird<sup>11</sup> failed to object to former Assistant Attorney General Sterner’s comments during the hearing, and thus waived the objection. *Blevins v. Cushman Motors*, 551 S.W.2d 602, 616 (Mo. banc 1977). Because Bird waived his objection to Sterner’s comments, review is limited to determining if there was plain error under Supreme Court Rule 84.13©. A claim for plain error should only be reviewed “if it ‘facially establishes substantial grounds for believing that a manifest injustice or a miscarriage of justice would result if left uncorrected.’” *Coats v. Hickman*, 11 S.W.3d 798, 805 (Mo. App. W.D. 1999) (quoting *Coleman v. Gilyard*, 969 S.W.2d 271, 274 (Mo. App. W.D. 1998)).

B. Sterner’s comments did not cause manifest injustice or a miscarriage of justice, and Bird failed to object to her comments at the disciplinary hearing.

Bird contends that Sterner negatively influenced the disciplinary hearing before

---

11 Bird was not represented by counsel at the disciplinary hearing. (Bird’s Brief at 17; R. IV 538).

the Board by making statements of alleged facts outside the record during closing arguments. (Bird's Brief at 62-64). Sterner stated that Andachter "basically ruined" McInnis and McInnis "is now in bankruptcy over this situation." (R.IV 536). The Board finds no facts in the record to support that portion of the closing argument. But Bird did not object to that argument or otherwise challenge Sterner's statements during closing argument. Rather, Bird commented on Sterner's argument stating to the Board, "You know that what happened to him, he did two [sic] himself." (R.IV 537).

To the extent Sterner's statements during closing argument were objectionable, review, as stated above, is limited to determining if there was plain error. This situation is similar to that in *Coats v. Hickman*, 11 S.W.3d 798 (Mo. App. W.D. 1999). In *Coats*, the defendant appealed from a judgment on her personal injury claim arising from a motor vehicle accident. *Id.* at 801. Coats claimed that the trial court erred in overruling her objection to and motion for a new trial with respect to comments her opponent made during closing arguments that were not supported by the record. *Id.* The court affirmed the trial court decision and held: "Relief should rarely be granted on assertions of plain error as to closing argument because, 'in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention.'" *Id.* at 806 (quoting *State v. Silvey*, 894 S.W.2d 662, 670 (Mo. banc

1995)).

This case is similar to *Coats*. Like *Coats*, Bird did not object to or otherwise challenge statements made during closing arguments that he now claims were improper. Further, nothing in the record suggests that the comments had a decisive effect.

Rather than establish that Sterner's comments themselves had an impermissible adverse effect, Bird argues that Sterner's comments "suggest" that the Board members based their decision on "prejudice and a desire to punish an engineer who dared to challenge an architect who failed to do his job." (Bird's Brief at 64). It is unclear how Bird arrives at this conclusion as Sterner's comments could not have suggested anything about Board members' states of mind during the hearing, especially as Sterner's comments came at the end of the hearing, and Sterner was not a decision maker. To the contrary, board member Warman specifically asked whether the claimed ruining of McInnis was the result of the lawsuit. (R.IV 536). Further, board member Mathis noted that McInnis filed the lawsuit against Andachter and that the lawsuit "kind of backfired" on McInnis. (R.IV 536-537).

Bird does not cite any facts to demonstrate that it is reasonably probable that the Board would have made a different decision had Sterner not made the comments. Because Bird had the opportunity to object to the closing comments, and the comments did not have a decisive effect, affirming the decision to discipline Bird's

license would not produce a manifest injustice or a miscarriage of justice. That decision was proper and should be upheld.

**VI. The Board’s decision to impose three years’ suspension and one year’s probation was not arbitrary, capricious, unreasonable, or an abuse of discretion, and did not violate Bird’s constitutional rights because the AHC found cause to discipline Bird because he violated Missouri regulations and statutes by failing to provide immediate personal supervision on plans that he signed and sealed.**

A. Standard of Review.

This appeal involves a reversal of a decision by the AHC and Board, and as such, this Court reviews the administrative decision, not the trial court’s judgment. Supreme Court Rule 84.05(e); *see also* § 536.140, RSMo. Review of administrative decisions is “limited to determination of ‘whether the Board’s action is supported by competent and substantial evidence upon the whole record or whether it is arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction.’” *State ex rel. Teefy v. Board of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000) (quoting *Hutchens v. St. Louis County*, 848 S.W.2d 616, 617 (Mo. App. E.D. 1993)). Further, “[i]n determining whether substantial evidence existed to support the [agency’s] decision, an appellate court must view the evidence and reasonable inferences therefrom in a light most favorable to the decision.” *Id.* (quoting *State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City*, 864 S.W.2d 437, 440 (Mo. App. W.D. 1993)).

Under § 536.140.2(1), an agency decision can also be reviewed to determine if it is “in violation of constitutional provisions.” Because “an aggrieved party cannot plead or prove that other punishments are disparate until the punishment for that party has been imposed...equal protection claims of this kind must be heard and decided in the first instance by the circuit court rather than the board.” *Brown*, 121 S.W.2d at 237. In this case, however, the Circuit Court did not decide any constitutional questions in its Judgment (LF 120), so there is no decision for this court to review.

B. The Board has discretion in the amount of discipline it chooses to impose.

Bird cites no authority for his contention that the discipline imposed by the Board was “unusually harsh.” (Bird’s Brief at 65). The Board acted within its statutory authority to suspend Bird’s license followed by a period of probation. When the AHC has found cause to discipline for any of the grounds set out in § 327.441.2, RSMo, the Board has discretion to “singly or in combination” censure, place on probation, suspend, or revoke the licensee’s license. § 327.441.3, RSMo. *See also Holmes v. Missouri Dental Board*, 703 S.W.2d 11, 13 (Mo. App. W.D. 1985) (“There is a wide range of sanctions available to the Board . . . ranging from censure to revocation of license. The appropriate sanction within that range is confided to the discretion of the Board”). Bird states, “Bird could have been reprimanded, and the public adequately protected, by more lenient punishment. Thus, the Board’s Disciplinary Order is arbitrary and capricious.” (Bird’s Brief at 68). Simply because

the Board could have imposed more lenient discipline if it wished does not automatically make its imposition of more severe discipline arbitrary and capricious. *See M.M. v. Missouri State Board of Accountancy*, 728 S.W.2d 726, 727 (Mo. App. E.D. 1987) (“The mere fact the harshest penalty was imposed here and not in another case does not, by itself, prove the Board abused its discretion”). Bird’s opinion as to the proper amount of discipline notwithstanding, the Board has discretion to impose the amount of discipline it feels is warranted, and that decision is “left largely to the discretion of the Board.” *Tadrus v. Missouri Board of Pharmacy*, 849 S.W.2d 222, 228 (Mo. App. W.D. 1993). Discretion is left to the Board because “[t]he idea of the administrative agency is that its members have a specialized knowledge of the profession they regulate. For that reason, the Board is better equipped than the courts to determine the gravity of the infractions of which [Bird] has been found guilty, and to determine the appropriate sanctions.” *Id.*; *see also KV Pharmaceutical Co. v. Missouri State Board of Pharmacy*, 43 S.W.3d 306, 310-11 (Mo. banc 2001). The discipline imposed on Bird was well within the range authorized by law and was not arbitrary and capricious or an abuse of discretion.

Bird is incorrect in asserting that his conduct was a “limited violation.” (Bird’s Brief at 65). The AHC found cause to discipline pursuant to § 327.441.2(6), RSMo, for violating Missouri regulations and statutes. (R.IV 521-522). Violating Missouri regulations and statutes by improperly signing and sealing plans that he did not

supervise the preparation of is not a “limited violation.” Due to the seriousness of Bird’s conduct, as explained above in section IIIB, the Board acted within its discretion to impose the amount of discipline it believed was appropriate, and that decision was not arbitrary, capricious, or an abuse of discretion.<sup>12</sup>

In cases where a court has reversed the discipline imposed by a board, the board in question failed to consider evidence of rehabilitation or good moral character, or some of the grounds for discipline were reversed. In *Gard v. State Bd. Of Registration for the Healing Arts*, Gard, a doctor, was convicted of a drug offense and the board revoked his license. 747 S.W.2d 726, 728 (Mo. App. W.D. 1988). At the disciplinary hearing, however, Gard presented significant evidence of his rehabilitation. *Id.* at 729-30. The court of appeals held “the objective standards, replete in the record, of appellant’s rehabilitation, which are undisputed, may be used to determine, *under the particular facts here*, whether the Board abused its discretion in revoking his license.”

---

12 Bird also claims that the Board took away his “entire livelihood.” (Bird’s Brief at 67). By his own admission, Bird holds a land surveyor’s license in Missouri. (Bird’s Brief at 6; R.II 437). Further, the Board suspended Bird’s license; it did not revoke it. (R.IV 565). At the end of the period of suspension, Bird can resume practicing engineering. (R.IV 565-566). Bird can also hire a licensed engineer to perform engineering work and provide immediate personal supervision over work performed by Bird or any of Bird’s employees.

*Id.* at 730 (emphasis in original). Under those facts, the court of appeals found the board abused its discretion. *Id.* Similarly, in *Boyd v. State Bd. of Registration for the Healing Arts*, the court of appeals reversed the discipline in part, but only after reversing some of the grounds for discipline and considering significant evidence of good moral character presented by four different witnesses. 916 S.W.2d 311, 313-18 (Mo. App. E.D. 1995).

Here, there is no allegation that the Board failed to consider evidence of rehabilitation or good moral character. Indeed, Bird presented no evidence of rehabilitation or good moral character at the disciplinary hearing; the only evidence Bird presented was his own testimony, and the Board was free to determine Bird's credibility. Further, despite Bird's arguments to the contrary, there is substantial and competent evidence to support the AHC's finding that there was cause to discipline Bird's license. *See supra* Point III. Bird's argument that the Board considered inaccurate information is also unpersuasive, considering that the Board members themselves corrected the inaccurate information. *See supra* Point IV. Because of its expertise, the Board is vested with the discretion to determine the appropriate amount of discipline, and there is no evidence that the Board abused its discretion in doing so.

C. Even if Bird's constitutional claims were preserved, Bird failed to state valid

Equal Protection or Due Process claims.

*1. Bird's Equal Protection Claim*

Bird never demonstrates how his treatment by the Board differed from others' treatment by the Board. Bird's only assertion of how his constitutional rights were violated is that "[t]he severity of the three-year suspension, especially in light of the inappropriate comments during the disciplinary hearing, *suggests* that Bruce Bird is being singled out for more severe punishment in a manner which *may* violate his constitutional rights." (Bird's Brief at 67) (emphasis added). Bird alleges no facts showing that his treatment differed from others in the same situation and fails to state an equal protection claim, because "[i]t is not enough under the equal protection clause for a claimant to assert that he has been deprived of a benefit granted to others." *Tyler v. Mitchell*, 853 S.W.2d 338, 341 (Mo. App. W.D. 1993).

In *Tyler*, the plaintiff had alleged that "thousands of other unnamed similarly-situated persons" had received different treatment from him; the court found that the plaintiff's equal protection claim had been properly dismissed. *Id.* Similarly, in *Kennedy v. Missouri Attorney General*, 922 S.W.2d 68 (Mo. App. W.D. 1996), the court affirmed the dismissal of the plaintiff's equal protection claims because:

Review of Mr. Kennedy's petition reveals that his allegations fail to demonstrate any basis for his equal protection claim. . . . Furthermore, Mr. Kennedy does not plead specific facts that show other defendants who committed offenses prior to the August 28, 1994, effective date are treated differently than he. His only contention is that he does not

benefit from the change in the life sentence calculation as does an unnamed defendant who committed an offense after August 28, 1994.

*Id.* at 71.

Here, Bird does not even allege that similarly situated persons had received different treatment from the Board. He merely alleges that the amount of discipline imposed and comments made by a person who was not a decision maker “suggest” that the Board “singled out” Bird in a way that “may” have violated his constitutional rights. (Bird’s Brief at 67). Even if Bird had alleged that others in similar situations had been treated differently than he was, “[i]t is well settled that the government’s imposition of punishment of one person more harshly than another does not, of itself, give rise to an equal protection violation.” *Missouri State Board of Registration for the Healing Arts*, 121 S.W.2d at 236. Therefore, Bird has failed to articulate a proper equal protection claim.

## 2. *Bird’s Due Process Claim*

With regard to his Due Process claim, Bird only asserts that “[t]he right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process.” (Bird’s Brief at 65). Bird fails to explain how he was not provided with the “safeguards of due process,” either procedurally or substantively, but claims that the discipline imposed by the Board was “unusually harsh” without explaining the basis for that conclusion. A general

statement of the law does not state a claim for which relief can be granted. Thus, Bird failed to state a Due Process claim.

## **Conclusion**

The Judgment of the AHC and Board should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

Kathleen R. Robertson  
Assistant Attorney General  
Missouri Bar No. 57390

P.O. Box 899  
Jefferson City, Missouri 65102  
Phone No. (573) 751-3321  
Fax No. (573) 751-9456

ATTORNEYS FOR APPELLANT  
MISSOURI BOARD FOR ARCHITECTS,  
PROFESSIONAL ENGINEERS,  
PROFESSIONAL LAND SURVEYORS  
AND LANDSCAPE ARCHITECTS

**Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 7th day of December, 2007, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

John E. Taylor, L.C.  
11115 Ash  
Leawood, Kansas 66211

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 11,598 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

---

Assistant Attorney General

## **Appendix Index**

Cole County Circuit Court Local Rule 71 .....	A1
4 CSR 30-13.010.....	A4
§ 327.401, RSMo .....	A6