

IN THE MISSOURI SUPREME COURT

JOHN T. IMPEY,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Case No. SC93698
)	
MISSOURI ETHICS COMMISSION, et al.,)	
)	
Respondents.)	

**APPEAL FROM THE COLE COUNTY CIRCUIT COURT, DIVISION NUMBER 1
THE HONORABLE JON BEETEM**

APPELLANT'S REPLY BRIEF

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Statement of Facts

The MEC misrepresented one fact to this court, claiming “... the Commission sought a fee through reconciliation of \$100 per RSMo. § 105.961.4(6). (L.F. 37.)” (Respondents' brief pg. 10, last paragraph). Page 37 of the Legal File is the MEC's Order to Impey to pay \$100. The actual term in § 105.961.4(6), “reconciliation agreements”¹, is not defined anywhere in chapters 105 or 536 RSMo, or by Missouri case law. The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute.” *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007). *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). In order to discern the intent of the General Assembly, the Court looks to statutory definitions or, if none are provided, the text's “plain and ordinary meaning”, which may be derived from a dictionary.

¹§ 105.961.4(6) RSMo provides in relevant part:

4. If ... the commission determines, by a vote of at least four members of the commission that some action other than referral for criminal prosecution or for action by the appropriate disciplinary authority would be appropriate, the commission shall take any one or more of the following actions:

...

(6) Through **reconciliation agreements** or civil action, the power to seek fees for violations in an amount not greater than one thousand dollars or double the amount involved in the violation (emphasis added).

Id. Thus, “[t]he construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes.” *Donaldson v. Crawford*, 230 S.W.3d 340, 342 (Mo. banc 2007). *Id.* The Court is also mindful that a particular statutory phrase cannot be read in isolation. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007). *Id.* Instead, “[t]he provisions of a legislative act are ... construed together and read in harmony with the entire act.” *Mo. Dep't of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 276 (Mo. banc 2001). *Id.* Reconciliation means: The action of bringing to agreement, concord or harmony, *The Oxford English Dictionary (1978)*; (1) Restoration of harmony between persons or things that had been in conflict. *Blacks Law Dictionary, 9th edition (2009)*. Agreement means: (1) a mutual understanding between 2 or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by 2 or more persons; (2) the parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade and course of performance. *Blacks Law Dictionary, 9th edition (2009)*.

The MEC has not produced a copy of a “reconciliation agreement” between Impey and the MEC. Nor has the MEC even suggested to this court the terms of a “reconciliation agreement” between Impey and the MEC. The MEC is acutely aware there is no “reconciliation agreement” between Impey and the MEC.

The MEC also claims “[t]he only action the Commission proposed to take in its September, 2012 filing was to seek the payment of a fee from Impey ‘[t]hrough reconciliation agreement’ pursuant to RSMo. § 105.961.4(6). (L.F. 37)”. A “reconciliation agreement” is not the only remedy mentioned in § 105.961.4(6), RSMo (S.B. 16, 1997). It also permits civil actions. The MEC’s Order to Impey mandates he pay them within 45 days from September 28, 2012. (L.F. 37). Impey never agreed to pay the MEC, nor did he pay them anything. There was no reconciliation agreement. In fact, the Missouri Attorney General’s Office (hereinafter “AG’s Office”), who represented the MEC in the circuit court and in this court, does not characterize the \$100 fine as a reconciliation agreement. (Pgs. 1 - 4, Appellant’s Reply Brief Appendix). The AG’s Office states, “[t]he Missouri Ethics Commission **assessed \$100 in fees against you** for violations of campaign finance laws during the August 2011 election.” (Emphasis added) (Pgs. 1 & 3, 1st ¶, Appellant’s Reply Brief Appendix). Assessed means to subject to a tax, charge or levy so determined. *Webster’s Unabridged Third New International Dictionary, 1993*. Subject (vb) means to bring under control or dominion; to reduce to subservience or submission. *Webster’s Unabridged Third New International Dictionary, 1993*. If an attorney having authority, either express or implied, to speak for his client, presents a claim to the debtor in a letter stating what the claim is, and in so doing, makes admissions as to its character, and if in a suit subsequently brought the client presented an entirely different theory as the basis of the

claim, the defendant has the right to present the letter. *Gibson v. Metropolitan Life Ins. Co.*, **147 S.W.2d 193, 197-98 (Mo.App. E.D. 1941)**.

Thus, in *Loomis v. New York, N. H. & H. R. R. Co.*, *159 Mass. 39, 34 N.E. 82*, the Court says: “An attorney *** employed to present and collect a claim is impliedly authorized to state to the debtor what the claim is. The plaintiff could not have expected that her attorney would collect her claim from the defendant, on demand, without stating the nature and particulars of it, so that the defendant could understand it, and make investigation in regard to its validity.” *Id.*

Neither the MEC nor the AG’s Office ever claimed a “reconciliation agreement” existed until the MEC’s Brief. In fact, until MEC’s Brief, both the MEC and the AG’s Office affirmatively stated the \$100 fine levied against Impey was not agreed to by Impey.

There is a case in which the parties to a contested case attempted to “conciliate” the “contested case” through an agreed settlement satisfactory to both sides. *Curtis v. Board of Police Com'rs of Kansas City*, **841 S.W.2d 259, 261 (Mo.App. W.D. 1992)**. The court in *Curtis* cited § 536.090, *RSMo* and *Davis v. Long*, **360 S.W.2d 307, 313-14 (Mo.App. E.D. 1962)** for the proposition that settlements of “contested cases” are permitted under the Missouri Administrative Procedure Act (hereinafter “MAPA”). A “reconciliation agreement” envisioned by § 105.961.4(6) *RSMo* is an informal resolution by consent agreement, agreed settlement, stipulation, consent order, default, or agreed settlement found

in §§ 536.060 and 536.090, RSMo. §§ 536.060 & 536.090, RSMo. *Davis v. Long*, 360 S.W.2d 307, 313-14 (Mo.App. E.D. 1962); *Curtis v. Board of Police Com'rs of Kansas City*, 841 S.W.2d 259, 261 (Mo.App. W.D. 1992). § 105.961.4(6) RSMo is the statutory authority permitting the MEC to informally resolve a contested case pursuant to § 536.060, RSMo.

Id. An administrative agency may only informally resolve a contested case where such settlement is permitted by law. § 536.060, RSMo; *Bodenhausen v. Missouri Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622 (Mo. Banc 1995). The proceeding between Impey and the MEC was obviously not an informal resolution, settlement agreement or “reconciliation agreement” because findings of fact and conclusions of law are required in “contested cases” but not in cases decided by consent agreement, agreed settlement, stipulation, consent order, default, or agreed settlement. § 536.090, RSMo. *Davis v. Long*, 360 S.W.2d 307, 313-14 (Mo.App. E.D. 1962). The MEC admits it entered findings of fact and conclusions of law in this case. (L.F. pgs. 29 - 37).

POINT I

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW, BECAUSE IMPEY DID NOT FAIL TO EXHAUST HIS ADMINISTRATIVE REMEDIES, IN THAT § 105.961 RSMO 1997 (S.B. 16) VIOLATES IMPEY’S CONSTITUTIONAL RIGHT GUARANTEED BY ARTICLE V, § 18 OF THE MISSOURI CONSTITUTION PROVIDING FOR DIRECT JUDICIAL REVIEW OF ALL FINAL DECISIONS, FINDINGS, RULES AND ORDERS OF ANY ADMINISTRATIVE OFFICER OR BODY EXISTING UNDER THE CONSTITUTION OR BY LAW, WHICH ARE JUDICIAL OR QUASI-JUDICIAL AND AFFECT PRIVATE RIGHTS (Responds to Respondent’s Argument I)

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Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006)

Jamison v. State, Dept. of Social Services, Div. of Family Services, 218 S.W.3d 399, 415 (Mo. Banc 2007)

§ 105.961, RSMo (S.B. 16, 1997)

§ 536.010(4), RSMo

§ 536.060, RSMo

§ 536.063, RSMo

§ 536.070, RSMo

§ 536.090, RSMo

§ 536.100, RSMo

§ 536.140, RSMo

§ 536.150, RSMo

POINT - II

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW BECAUSE § 130.031.8, RSMO IS UNCONSTITUTIONAL IN THAT IT DEPRIVES, INTERFERES WITH, SUBSTANTIALLY INFRINGES UPON, OR HEAVILY BURDENS IMPEY’S FUNDAMENTAL RIGHT OF FREE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 8 OF THE MISSOURI CONSTITUTION

(Responds to Respondent’s Argument III)

§ 105.961.3 & .5, RSMo (S.B. 16, 1997)

POINT - III

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW BECAUSE THE MISSOURI ETHICS COMMISSION DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE A \$100.00 FINE ON IMPEY IN THAT § 105.961 RSMo 2010 (S.B. 844) AND § 105.961 RSMo 1997 (S.B. 16) ARE BOTH UNCONSTITUTIONAL LEAVING § 105.961 RSMo 1991 (S.B. 262), IN EFFECT AND THE MISSOURI ETHICS COMMISSION DOES NOT HAVE THE AUTHORITY UNDER § 105.961 RSMo 1991 (S.B. 262) TO ORDER IMPEY TO PAY

A FINE OF \$100 (Responds to Respondent’s Argument III)

§ 105.961.3 & .5, RSMo (S.B. 16, 1997)

POINT - IV

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW BECAUSE IMPEY WAS AGGRIEVED BY THE MISSOURI ETHICS COMMISSION’S FINAL DECISION AND ORDER IN THAT IMPEY HAS A SPECIFIC AND LEGALLY COGNIZABLE INTEREST IN THE MISSOURI ETHICS COMMISSION’S FINAL DECISION AND ORDER WHICH HAS A DIRECT AND SUBSTANTIAL IMPACT ON IMPEY THAT OPERATES IMMEDIATELY, PREJUDICIALLY AND DIRECTLY UPON IMPEY’S PERSONAL AND PROPERTY RIGHTS OR INTERESTS (Responds to Respondent’s Argument II)

Parker v. City of Saint Joseph, 167 S.W.3d 219, (Mo.App. W.D. 2005)

§ 105.961.3 & .5, RSMo (S.B. 16, 1997)

§ 536.100, RSMo

ARGUMENT I

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW, BECAUSE IMPEY DID NOT FAIL TO EXHAUST HIS ADMINISTRATIVE REMEDIES, IN THAT § 105.961 RSMO 1997 (S.B. 16) VIOLATES IMPEY’S CONSTITUTIONAL RIGHT GUARANTEED BY ARTICLE V, § 18 OF THE MISSOURI CONSTITUTION PROVIDING FOR DIRECT JUDICIAL REVIEW OF ALL FINAL DECISIONS, FINDINGS, RULES AND ORDERS OF ANY ADMINISTRATIVE OFFICER OR BODY EXISTING UNDER THE CONSTITUTION OR BY LAW, WHICH ARE JUDICIAL OR QUASI-JUDICIAL AND AFFECT PRIVATE RIGHTS (Responds to Respondent’s Argument I)

A. The hearing before the MEC required by § 105.961.3, RSMo (S.B. 16, 1997) is a contested case

The Missouri Administrative Procedure Act (hereinafter “MAPA”) provides for **only** two types of cases: contested and non-contested. *Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006)*. A “contested case” is defined by MAPA as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” *Id. § 536.010(4), RSMo*. Whether a case is classified as a contested or noncontested case is not left to the discretion of the agency but is to be determined as a matter of law. *State ex rel. Valentine v. Board of Police Comm'rs of Kansas City, 813 S.W.2d 955, 957 (Mo.App.1991)*. *Bruemmer v.*

Missouri Dept. of Labor Relations, 997 S.W.2d 112, 116-17 (Mo.App. W.D.,1999). The key to the classification of contested and noncontested cases is the hearing requirement. *Id.* That is because both contested cases and non-contested cases determine legal rights, duties or privileges of parties. (Cf. § 536.010(4), RSMo and § 536.150.1, RSMo). A contested case is one in which a proceeding is contested in a hearing because of some requirement by law. *Hayward v. City of Independence, 967 S.W.2d 650, 652 (Mo.App.1998)*. *Id.*

§ 105.961.3, RSMo (S.B. 16, 1997) provide in relevant part:

3. When the commission concludes, based on the report from the special investigator..., that there are reasonable grounds to believe that a violation of any law has occurred ..., the commission **shall conduct a hearing** which shall be a closed meeting and not open to the public. **The hearing shall be conducted pursuant to the procedures provided by sections 536.063 to 536.090 and shall be considered to be a contested case for purposes of such sections. The commission shall determine, in its discretion, whether or not that there is probable cause that a violation has occurred.** If the commission determines, by a vote of at least four members of the commission, that probable cause exists that a violation has occurred, the commission may refer its findings and conclusions to the appropriate disciplinary authority over the person who is the subject of the report, as described in subsection 7 of this section. **After the commission determines by a vote of at least four members of the commission that probable cause exists that a violation has occurred, and the commission has referred the findings and conclusions to the**

appropriate disciplinary authority over the person subject of the report, the subject of the report may appeal the determination of the commission to the administrative hearing commission. Such appeal shall stay the action of the Missouri ethics commission. Such appeal shall be filed not later than the fourteenth day after the subject of the commission's action receives actual notice of the commission's action.

§ 105.961.3, RSMo (S.B. 16, 1997) requires the MEC to conduct a hearing to determine whether probable cause exists to believe Impey violated §130.031.8, RSMo. The hearing is a contested case because:

- a. there is a law that requires the MEC to conduct a hearing; and
- b. the legal rights, duties or privileges (whether or not a violation of §130.031.8,

RSMo occurred and, if so, Impey is to pay a fine of \$100) of specific parties (i.e., Impey and the MEC) are contested in and determined by that hearing. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006); *Bruemmer v. Missouri Dept. of Labor Relations*, 997 S.W.2d 112, 116-17 (Mo.App. W.D.,1999); § 536.010(4), RSMo.

Impey's right to appeal to the AHC was never triggered because, the commission never referred its findings and conclusions to any disciplinary authority over Impey § 105.961.3, RSMo (S.B. 16, 1997). There is nothing in the record that even suggests the MEC referred their findings and conclusions to anyone, even themselves. It didn't. The MEC stated, "[t]his is the final decision and order of the Missouri Ethics Commission ...". (L.F. 29).

Therefore, Impey's right to appeal to the AHC, found in § 105.961.3, RSMo was never triggered.

5. Upon vote of at least four members, the commission may initiate formal judicial proceedings in the circuit court of Cole County seeking to obtain any of the following orders:

(1) Cease and desist violation of any provision of sections 105.450 to 105.496, or chapter 130, or sections 105.955 to 105.963;

(2) Pay any civil penalties required by sections 105.450 to 105.496 or chapter 130;

(3) File any reports, statements, or other documents or information required by sections 105.450 to 105.496, or chapter 130; or

(4) Pay restitution for any unjust enrichment the violator obtained as a result of any violation of any criminal statute as described in subsection 7 of this section.

The Missouri ethics commission shall give actual notice to the subject of the complaint of the proposed action as set out in this section. **The subject of the complaint may appeal the action of the Missouri ethics commission, other than a referral for criminal prosecution, to the administrative hearing commission.** Such appeal shall stay the action of the Missouri ethics commission. Such appeal shall be filed no later than fourteen days after the subject of the commission's actions receives actual notice of the commission's actions. (Emphasis added). *§ 105.961.5, RSMo.*

Impey was obviously the subject of the complaint. However the MEC never voted to initiate formal judicial proceedings, or if they did, they never gave Impey actual notice thereof. The “contested case” before the MEC was not a formal judicial proceeding as required by § 105.961.5, RSMo. Neither the MEC nor the AHC has the power to render a judgment. That is the quintessential function of a court. *Percy Kent Bag Co. v. Missouri Comm'n on Human Rights*, 632 S.W.2d 480, 484 (Mo. banc 1982). A judgment is the judicial act of a court. *Fleming v. Clark Township of Chariton County*, 357 S.W.2d 940, 942[2–4] (Mo.1962). The MEC and AHC are not courts, but “adjunct executive agencies”, that exercise agency adjudicative power, that permits them to only ascertain facts and apply existing law to them. *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982). The MEC and AHC simply perform the same role as any administrative hearing officer authorized to hear contested cases within an agency, to render, on the evidence heard, the *administrative decision* of the agency. *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20[7] (Mo. banc 1990) (emphasis added). The MEC admits proceedings before the MEC and AHC are not formal judicial proceedings. “[T]he Commission's probable cause determination gave Impey an administrative remedy (not a judicial one), and that Impey had the right and obligation to pursue that remedy before bringing his case to the circuit court.” (Repondent's Brief pg. 25, 1st Paragraph). Impey's right to appeal to the AHC, found in § 105.961.5, RSMo was never triggered.

Impey's right to appeal to the AHC is only found in the foregoing sections, § 105.961.3 & .5, RSMo. There being no other avenue for Impey to follow for the AHC to review of the MEC's final decision and order, Impey had to petition the circuit court for judicial review. "To hold otherwise would be patently unfair to [Impey] who would be trapped in a hopeless 'Catch-22' situation: [Impey], after being deprived of property through agency action (i.e., fined \$100), was at once precluded by the [MEC] from exhausting any and all administrative remedies (i.e., they failed to refer their findings and conclusions to any disciplinary authority over Impey so Impey could appeal to the AHC) and at the same time denied judicial review because [he] had not exhausted [his] administrative remedies." *Dore & Associates Contracting, Inc. v. Missouri Dept. of Labor & Indus. Relations Com'n*, 810 S.W.2d 72, 76 (Mo.App. W.D. 1990). Since the MEC entered a final decision and order in a contested case, not a formal judicial proceeding, and didn't refer its findings and conclusions to a disciplinary authority over Impey, he could not appeal to the AHC. No further administrative proceedings were contemplated or permitted and Impey exhausted all of his administrative remedies. *Dore & Associates Contracting, Inc. v. Missouri Dept. of Labor & Indus. Relations Com'n*, 810 S.W.2d 72, 76 (Mo.App. W.D. 1990). Nothing in § 105.961.3 - .5, RSMo (S.B. 16, 1997) permits Impey to appeal to the AHC.

Contested cases provide the parties with an opportunity for a formal hearing with the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses, and require written findings of fact and conclusions of law. *Hagely v. Board of*

Education of the Webster Groves School District, 841 S.W.2d 663, 668 (Mo. banc 1992).

Id. The parties had a formal hearing before the MEC with the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses, and the MEC rendered written findings of fact and conclusions of law. We know this occurred because the MEC’s final decision and order says so (L.F. pg. 29, pg. 30, ¶s 3 & 4) and the hearing is required to be conducted pursuant to the procedures provided by §§ 536.063 to 536.090, RSMo. **§ 105.961.3, RSMo (S.B. 16, 1997)**. § 536.070, RSMo requires the presentation of evidence, including sworn testimony of witnesses and cross-examination of witnesses and § 536.090, RSMo requires written findings of fact and conclusions of law. The first sentence of the MEC’s Final Decision and Order states, “This is the final decision and order of the Missouri Ethics Commission following **a hearing** on a complaint filed by Petitioner by and through counsel, **pursuant to** § 105.961, RSMo, and **Chapter 536, RSMo.**” (Emphasis added) (L.F. 29). The only provisions for an administrative hearing found in Chapter 536 RSMo are contested cases provided by §§ 536.063 to 536.090. Additionally, the MEC’s claim that they sought a fee from Impey through a “reconciliation agreement” (Respondent’s Brief, pg. 10, last paragraph) is an admission this is a contested case, because a “reconciliation agreement” envisioned by § 105.961.4(6) RSMo (S.B. 16, 1997) is an informal resolution by consent agreement, agreed settlement, stipulation, consent order, default, or agreed settlement found in §§ 536.060 and 536.090, RSMo. **§§ 536.060 & 536.090, RSMo. *Davis v. Long*, 360 S.W.2d 307, 313-14 (Mo.App. E.D. 1962); *Curtis v.***

Board of Police Com'rs of Kansas City, 841 S.W.2d 259, 261 (Mo.App. W.D. 1992). Only contested cases may be resolved by informal resolution by consent agreement, agreed settlement, stipulation, consent order, default, or agreed settlement found in §§ 536.060 and 536.090, RSMo. §§ 536.060 & 536.090, RSMo. *Davis v. Long, 360 S.W.2d 307, 313-14 (Mo.App. E.D. 1962)*; *Curtis v. Board of Police Com'rs of Kansas City, 841 S.W.2d 259, 261 (Mo.App. W.D. 1992)*.

Contested case review is controlled by sections 536.100 to 536.140. *Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006)*. A party who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, shall be entitled to judicial review thereof, as provided in sections 536.100 to 536.140. § 536.100, RSMo.

MAPA does not explicitly define a “**non-contested case**,” but it has been defined by this Court as a decision that is **not** required by law to be determined after a hearing. *State ex rel. Wilson Chevrolet, Inc. v. Wilson, 332 S.W.2d 867, 870 (Mo.1960)*. *Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006)*. Clearly the hearing against Impey before the MEC was a contested case and not a non-contested case. However, even if Impey's hearing before the MEC was a non-contested case, review thereof is proper in the circuit court because the statutory prerequisites for review by the AHC weren't met.

When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a

decision **which is not subject to administrative review**, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, **and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action**, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed. **§536.150. 1, RSMo.**

As previously stated, neither of the statutory requirements in § 105.961.3 or .5, RSMo, for Impey to appeal to the AHC were triggered. Therefore, the MEC rendered a decision not

subject to administrative review and there is no other provision for judicial inquiry or review of the MEC's decision. Impey had to file an action in the circuit court for review of the MEC's decision.

B. The MEC's Final Decision and Order does not lack the finality necessary for a contested case

The MEC rendered Findings of Fact, Conclusions of Law and Order ("Final Decision and Order"). (L.F. 29 - 37). The first sentence of the MEC's Final Decision and Order states, "This is the final decision and order of the Missouri Ethics Commission ...". (L.F. 29). This suggests to Impey the decision by the MEC is final. However, the MEC, after having made this declaration, now suggests their final decision and order is not, in fact, "final". This seems somewhat spurious.

The use of the words "final and binding" indicates finality for purposes of appellate review. They do not indicate tentative, provisional, or contingent decisions that are subject to reconsideration. *See National Treasury Employees Union v. Federal Labor Relations Auth.*, 712 F.2d 669, 670 (D.C. Cir.1983). Had these words not been used, one might attempt to deem the PAB decision as an intermediary agency decision, being final only after AHC review. The use of these terms, however, precludes such a reading. Moreover, a reading of these terms as merely interlocutory agency action would be inconsistent with

the option granted to the aggrieved party to proceed immediately to review by the circuit court. *Asbury v. Lombardi*, 846 S.W.2d 196, 202 (Mo. Banc 1993).

The exhaustion of administrative remedies is a statutory prerequisite for judicial review under MAPA, § 536.100. *Parker v. City of Saint Joseph*, 167 S.W.3d 219, 221 (Mo.App. W.D. 2005); *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 316 (Mo.App. W.D. 2011) citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) and *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473 (Mo. banc 2009). “The purpose of exhaustion is to prevent premature interference with agency processes so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record that is adequate for judicial review.” *Doody v. State, Dep’t of Soc. Servs., Div. of Child Support Enforcement*, 993 S.W.2d 563, 565 (Mo.App.1999). *Id.* Exhaustion occurs when every step of the administrative procedure has been completed and the agency renders a final decision. *Maynes Const. v. City of Wildwood*, 965 S.W.2d 949, 952 fn. 1 (Mo.App.1998). *Id.* “A decision is final if the agency arrived at a terminal, complete resolution of the case.” *Hayward v. City of Independence*, 967 S.W.2d 650, 652 (Mo.App.1998). *Id.*; *Dore & Associates Contracting, Inc. v. Missouri Dept. of Labor & Indus. Relations Com’n*, 810 S.W.2d 72, 75-76 (Mo.App. W.D. 1990); *Hayward v. City of Independence*, 967 S.W.2d 650, 652 (Mo.App.1998). An order lacks finality when it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration by

the issuing agency. *Id.* The MEC’s final decision and order is a terminal, complete resolution of the case before it that is not tentative, provisional, contingent, subject to recall, revision or reconsideration by the MEC. To suggest Impey is required to appeal to the AHC instead of seek judicial review in the circuit court violates Article V, § 18 of the Missouri Constitution.

It doesn't matter whether or not the MEC's decision was “final” so long as it was a “contested case”. “If the agency or any board, other than the administrative hearing commission, established to provide independent review of the decisions of a department or division that is authorized to promulgate rules and regulations under this chapter fails to issue a final decision in a contested case within the earlier of:

- (1) Sixty days after the conclusion of a hearing on the contested case; or
- (2) One hundred eighty days after the receipt by the agency of a written request for the issuance of a final decision,

then the person shall be considered to have exhausted all administrative remedies and shall be considered to have received a final decision in favor of the agency and shall be entitled to immediate judicial review as provided in sections 536.100 to 536.140 or other provision for judicial review provided by statute.” § 536.100, *RSMo.* The MEC concluded, based on the report from its special investigator there were reasonable grounds to believe Impey violated § 130.031.8 *RSMo.*, and, the MEC conducted a hearing for independent review of the decision of the MEC. If the MEC failed to issue a final decision, its decision

became final 60 days after the hearing and Impey is deemed to have exhausted his administrative remedies, to have received a final decision in favor of the MEC and is entitled to immediate judicial review as provided in sections 536.100 to 536.140. **§ 536.100, RSMo.**

The medical licensing cases cited by the MEC are inapposite. A specific type of contested case is a precondition to professional discipline: The Medical Licensing Board may discipline a physician only if the AHC first finds cause for discipline. §§ 536.010(2), 621.135, 621.045.1 & 621.110; § 334.100.3 RSMo Supp.1989; *State Board of Registration for the Healing Arts v. De Vore*, 517 S.W.2d 480, 485–86 (Mo.App.1974). *See also Missouri Real Estate Comm'n v. McCormick*, 778 S.W.2d 303, 304 (Mo.App.1989); *State ex rel. Odom v. Missouri Board of Pharmacy*, 777 S.W.2d 336, 338 (Mo.App.1989); *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 456–57 (Mo.App.1988); *Dunning v. Board of Pharmacy*, 630 S.W.2d 155, 159 (Mo.App.1982). ***Bodenhausen v. Missouri Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622-23 (Mo. Banc 1995).** The AHC may find cause for discipline only after the Board files a complaint with the AHC. §§ 621.045.1 & 621.110; § 334.100.3 RSMo Supp.1989. ***Id. at 623.*** Once the AHC issues its decision, the Board may impose discipline by choosing among its options to revoke or suspend a license, impose probation, restrict or limit a license, issue a warning or reprimand, deny an application, or require medical care or continuing education. § 334.100.3 RSMo Supp.1989. ***Id.*** The AHC's written decision—consisting of findings of fact and conclusions of law—cannot be waived in a physician discipline case. §§ 621.045.1, 621.110, 536.090 &

536.060(3); § 334.100.3 RSMo Supp.1989; cf. *Weber v. Firemen's Retirement System*, 872 S.W.2d 477, 480 (Mo. banc 1994). *Id.*

Contrary to the MEC's claim, this court in *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399 (Mo. Banc 2007), approved of a probable cause standard in a CANRB hearing, so long as the respondents receive de novo judicial review. *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 415 (Mo. Banc 2007). Therefore, the MEC is wrong when it claims that the probable cause standard in § 105.961.3, RSMo (S.B. 16, 1997) means the final decision and order of the MEC is not final. Impey is entitled to de novo review before the circuit court because the action of the MEC does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts. § 536.140.3, RSMo. Either §130.031.8, RSMo violates Impey's freedom of political speech or it doesn't.

ARGUMENT - II

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW BECAUSE § 130.031.8, RSMO IS UNCONSTITUTIONAL IN THAT IT DEPRIVES, INTERFERES WITH, SUBSTANTIALLY INFRINGES UPON, OR HEAVILY BURDENS IMPEY’S FUNDAMENTAL RIGHT OF FREE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 8 OF THE MISSOURI CONSTITUTION

(Responds to Respondent’s Argument III)

The MEC’s only claim is Impey failed to exhaust his administrative remedies. As stated in Argument I Supra., there were no administrative remedies available for Impey to pursue. The conditions precedent to Impey's statutory right to appeal to the AHC never occurred. *§ 105.961.3 & .5, RSMo (S.B. 16, 1997)*. Impey had no other administrative avenues to pursue. His only recourse was a Petition for Review to the circuit court. Therefore, Impey exhausted all of his administrative remedies.

ARGUMENT - III

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW BECAUSE THE MISSOURI ETHICS COMMISSION DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE A \$100.00 FINE ON IMPEY IN THAT § 105.961 RSMo 2010 (S.B. 844) AND § 105.961 RSMo 1997 (S.B. 16) ARE BOTH UNCONSTITUTIONAL LEAVING § 105.961 RSMo 1991 (S.B. 262), IN EFFECT AND THE MISSOURI ETHICS COMMISSION DOES NOT HAVE THE AUTHORITY UNDER § 105.961 RSMo 1991 (S.B. 262) TO ORDER IMPEY TO PAY A FINE OF \$100 (Responds to Respondent’s Argument III)

The MEC’s only claim is Impey failed to exhaust his administrative remedies. As stated in Argument I Supra., there were no administrative remedies available for Impey to pursue. The conditions precedent to Impey's statutory right to appeal to the AHC never occurred. *§ 105.961.3 & .5, RSMo (S.B. 16, 1997)*. Impey had no other administrative avenues to pursue. His only recourse was a Petition for Review to the circuit court. Therefore, Impey exhausted all of his administrative remedies.

ARGUMENT - IV

THE TRIAL COURT ERRED IN DISMISSING IMPEY’S PETITION FOR REVIEW BECAUSE IMPEY WAS AGGRIEVED BY THE MISSOURI ETHICS COMMISSION’S FINAL DECISION AND ORDER IN THAT IMPEY HAS A SPECIFIC AND LEGALLY COGNIZABLE INTEREST IN THE MISSOURI ETHICS COMMISSION’S FINAL DECISION AND ORDER WHICH HAS A DIRECT AND SUBSTANTIAL IMPACT ON IMPEY THAT OPERATES IMMEDIATELY, PREJUDICIALLY AND DIRECTLY UPON IMPEY’S PERSONAL AND PROPERTY RIGHTS OR INTERESTS (Responds to Respondent’s Argument II)

The MEC argues its probable cause determination is simply a condition precedent to enforcement action and therefore Impey is not aggrieved by it. The MEC states, “... Commission’s probable cause determination gave Impey an administrative remedy (not a judicial one), and that Impey had the right and obligation to pursue that remedy before bringing his case to the circuit court.” The administrative remedy to which the MEC refers is an appeal to the AHC. The MEC claims Impey failed to exhaust his administrative remedies. As stated in Argument I Supra., there were no administrative remedies available for Impey to pursue. The conditions precedent to Impey's statutory right to appeal to the AHC never occurred. *§ 105.961.3 & .5, RSMo (S.B. 16, 1997)*. Impey had no other administrative avenues to pursue. His only recourse was to file an action in the circuit court.

Therefore, Impey exhausted all of his administrative remedies. If as suggested by the MEC its decision wasn't final, it became so 60 days after the September 24, 2012 hearing. **§ 536.100, RSMo**. Impey was aggrieved by the MEC's probable cause determination he violated **§ 130.031.8, RSMo**, and was Ordered to pay a \$100 fine for doing so.

Parker v. City of Saint Joseph, 167 S.W.3d 219, (Mo.App. W.D. 2005) is inapposite. In *Parker*, the arbitration process was a statutory requirement prior to filing a petition for review in the circuit court. However, as has been repeatedly stated before, there was no requirement in **§ 105.961.3 or § 105.961.5, RSMo (S.B. 16, 1997)** for Impey to appeal to the AHC because the MEC didn't refer its findings and conclusions to the appropriate disciplinary authority, and, the MEC did not vote to initiate formal judicial proceedings. **§ 105.961.3&.5, RSMo (S.B. 16, 1997)**. Impey's right to appeal to the AHC was never triggered.

Conclusion

Wherefore, for the foregoing reasons, this court should reverse the trial court's dismissal of John Impey's Petition for Review, and, declare § 105.961 RSMo, 1997 (S.B. 16) unconstitutional because it violates Article V, § 18 of the Missouri Constitution, declare § 130.031.8, RSMo unconstitutional because it violates Impey's right to free Speech protected by the First Amendment to the United States Constitution and Article I § 8 of the Missouri Constitution, declare the Missouri Ethics Commission exceeded its statutory authority when it Ordered John Impey to pay a fine of \$100, declare Impey is aggrieved by the Final Decision and Order of the MEC, award John Impey his costs and expenses, including his reasonable attorney's fees, remand this matter to the Circuit Court with directions to the Circuit Court to enter judgment in favor of John Impey and against the Missouri Ethics Commission, award John Impey his costs, expenses and attorney's fees and for such other and further relief as the court deems just and proper.

CERTIFICATION

I hereby certify:

1. The claims, defenses, requests, demands, objections, contentions, or arguments contained herein are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. The brief complies with the limitations contained in Rule 84.06(b) and the number of words in the brief is 6,976 according to the word count in WordPerfect X4 which is the word processing system used to prepare this brief.

3. The electronic copy of this brief filed with the court has been scanned for viruses and it is virus free.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on the 3rd day of April, 2014, I served Appellant’s Reply Brief, electronically, on Matthew James Laudano, Assistant Attorney General, 207 West High Street, PO Box 899, Jefferson City, Missouri 65102, Attorney for Respondents by uploading it to the electronic case file.

/s/ R. Todd Wilhelmus

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