NO. SC83783

IN THE SUPREME COURT OF MISSOURI

Mark M. Tendai, M.D.,

Appellant,

v.

Missouri State Board of Registration for the Healing Arts,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY,
NINETEENTH JUDICIAL DISTRICT, DIVISION I
THE HONORABLE THOMAS J. BROWN, III

BRIEF OF RESPONDENT

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CORRECTED STATEMENT OF FACTS

Petitioner[1] Dr. Mark M. Tendai (hereafter Dr. Tendai), a licensee of the Missouri State Board of Registration for the Healing Arts (hereafter the Board of Healing Arts or the Board), filed his ***Petition for Judicial Review Pursuant to Section 536.100 and for Stay Order Pursuant to Section 536.120*** (hereafter referred to as "***Petition for Judicial Review***") in the Circuit Court of Cole County, Missouri, and sought to have the Court overturn discipline against his medical license imposed by the Board of Healing Arts in its ***Findings of Fact, Conclusions of Law and Order*** dated May 15, 2000 (hereafter referred to as "***Board Disciplinary Order***."). (L.F. 01940) The ***Board Disciplinary Order***, in turn, was based on ***Findings of Fact and Conclusions of Law*** issued by the Missouri Administrative Hearing Commission on September 2, 1999, wherein the Commission found cause for discipline against Dr. Tendai's license based on violations of Section 334.100.2(5), RSMO, related to his treatment of patient S.G. (hereafter referred to as "***Commission Findings***.")(L.F. 01935)

The Administrative Hearing Commission found that Dr. Tendai had engaged in a course of conduct in his treatment of patient S.G. which was held to be incompetence, gross

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[1]Dr. Tendai is the petitioner in this case. However, Dr. Tendai was the respondent before the Administrative Hearing Commission and the Board of Healing Arts. To avoid confusion, the Board will refer to petitioner as "Dr. Tendai" and respondent as "the Board." Exhibits from the administrative process are referred to as they were marked. For the purpose of identifying exhibits, Dr. Tendai is "respondent" and the Board is "petitioner."

negligence and conduct harmful and dangerous to the health of the patient. (L.F. 1034) The Commission also found that, in his treatment of patient S.G., Dr. Tendai failed, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of Dr. Tendai's profession and that Dr. Tendai was thereby guilty of "repeated negligence" within the meaning of Section 334.100.2(5), RSMO. (L.F. 1034) The Commission thus found that Dr. Tendai's conduct as set out in Count I and Count III of the First Amended Complaint provided a basis for discipline by the Board under the provisions of Section 334.100.2(5). (L.F. 1034) Based on the ***Commission Findings***, the ***Board Disciplinary Order*** was issued on May 15, 2000. (L.F. 01935)

Dr. Tendai appeared before the Board at his disciplinary hearing on April 28, 2000. (L.F. 01122) Dr. Tendai was represented by counsel and presented testimony and evidence in his own behalf. (L.F. 01122) Dr. Tendai testified before the Board that he no longer practiced in the area of obstetrics and had not done so for some three-and-one-half years. (L.F. 01155) Dr. Tendai testified that he had stop doing obstetrics and focused on gynecology because he "got tired" and "that it was time I got to know my kids a little better and needed a little bit more of a life . . . " (L.F. 01155) Counsel described Dr. Tendai's elimination of his obstetrics practice as the result of a "long-standing plan." (L.F. 01189)

The disciplinary action imposed by Respondent Board, as set out in the ***Board Disciplinary Order*** included a public reprimand, together with a suspension of Dr. Tendai's medical license for a period of sixty (60) days. (L.F. 01935) The Board also ordered that,

after Dr. Tendai's period of suspension, his license would be restricted in that Dr. Tendai may not practice obstetrics or perform obstetrical procedures in the State of Missouri. Dr. Tendai was also ordered to attend a medical records seminar. The ***Board Disciplinary Order*** required that Dr. Tendai immediately return to the Board his wall-hanging certificate, license and pocket card, and all other indicia of licensure, to be held by the Board during the period of suspension.

Dr. Tendai immediately sought relief from the Circuit Court of Cole County, which granted its ***Ex Parte Order Staying Enforcement of Disciplinary Order Pursuant to Section 536.120, RSMO***, on May 15, 2000. (L.F. 01974) In his ***Petition for Judicial Review*** filed in Circuit Court, Dr. Tendai claimed that the orders of the Administrative Hearing Commission and the Board of Healing Arts, respectively, were not based on substantial and competent evidence. (L.F. 01940) Dr. Tendai further argued that Respondent Board of Healing Arts violated the Missouri Open Meetings Law by holding closed deliberations after the completion of Dr. Tendai's scheduled disciplinary hearing in front of the Board, which hearing was held in open session on April 28, 2000, after due notice to Dr. Tendai and the public. (L.F. 01940)

In accordance with Missouri law and Board custom and practice, the Board went into closed session upon completion of hearing the evidence in Dr. Tendai's disciplinary hearing. Dr. Tendai reasoned that the failure to conduct deliberations in open session is a violation of the Open Meetings Law, thereby vitiating his license discipline as imposed by the Respondent Board, as set out in the Board's ***Disciplinary Order*** issued on May 15, 2000. The Circuit

Court of Cole County, Hon. Thomas J. Brown, III, entered his ***Order and Judgment on Petition for Review Under Chapter 536.100, RSMo***, on May 29, 2001. (L.F. 01983) The Circuit Court rejected all of Dr. Tendai's challenges to the Orders of the Administrative Hearing Commission and the Board of Registration for the Healing Arts, except that the Court remanded the case to the Board for the entry of findings of fact as to the similarity or dissimilarity of Dr. Tendai's case to the prior Board disciplinary cases cited by Dr. Tendai**.** (L.F. 01985-86)

ii. <u>POINTS RELIED ON</u>

I. THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN ITS APPLICATION OF THE DISCIPLINARY TERMS "INCOMPETENCE,"

"REPEATED NEGLIGENCE," "CONDUCT DANGEROUS TO A PATIENT," AND "GROSS NEGLIGENCE" UNDER THE PROVISIONS OF SECTION 334.100.2(5), RMSO, IN THAT THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND, AS APPLIED, DID NOT VIOLATE DR. TENDAI'S DUE PROCESS RIGHTS.

State v. Young, 695 S.W.2d 882, 883 (Mo. banc 1985)

State of Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 46 S.Ct. 384, 385, 70 L.Ed. 818 (Mo. 1926)

Artman v. State Bd. of Registration for Healing Arts, 918 S.W.2d 247 (Mo. banc 1996)

II. THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN FINDING THAT DR. TENDAI HAD VIOLATED SECTION 334.100.2(5), RSMo, IN THAT DR. TENDAI'S TREATMENT OF PATIENT S.G. VIOLATED THE APPLICABLE STANDARDS OF CARE.

State ex rel. Drury Displays, Inc. v. City of Olivette, 976 S.W.2d 634, 635 (Mo. App. E.D. 1998).

Bush v. Kansas City Public Service Co., 350 Mo. 876, 169 S.W.2d 331, 334 (Mo. 1943)

State ex rel. Drury Displays, Inc. v. City of Olivette, 976 S.W.2d 634, 635 (Mo. App. E.D. 1998).

State Bd. of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 442 (Mo.App. W.D.1991).

III. THE BOARD OF REGISTRATION FOR THE HEALING ARTS DID NOT ERR IN IMPOSING DISCIPLINE ON DR. TENDAI'S LICENSE AS A RESULT OF THE COMMISSION'S FINDINGS OF "INCOMPETENCY," "GROSS NEGLIGENCE," "REPEATED NEGLIGENCE," AND CONDUCT DANGEROUS TO THE HEALTH OF A PATIENT, WHICH FINDINGS AND CONCLUSIONS INCLUDING THE FINDING THAT DR. TENDAI PRESENTED FALSE EVIDENCE TO THE COMMISSION IN ORDER TO ESTABLISH A DEFENSE IN THE FORM OF THE "STICKY NOTES" WHICH THE COMMISSION FOUND TO HAVE BEEN MADE AND ADDED TO THE PATIENT FILE AFTER THE FACT.

In re Estate of Latimer, 913 S.W.2d 51, 57 (Mo. App. W.D. 1995)

Conway v. Mo. Com'n on Human Rights, 7 S.W.3d 571, 575 (Mo. App. E.D. 1999)

State Bd. of Registration for the Healing Arts v. Finch, 514 S.W.2d 608, 616 (Mo.App.1974)

IV. THE BOARD OF HEALING ARTS DID NOT ERR IN ITS ORDER IMPOSING DISCIPLINE UPON DR. TENDAI'S MEDICAL LICENSE, IN THAT SAID ORDER WAS MADE UPON LAWFUL PROCEDURE, WAS AUTHORIZED BY LAW, WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE, DID NOT INVOLVE AN ABUSE OF DISCRETION, AND WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD.

Christiansen v. State Board of Accountancy, 764 S.W.2d 943 (Mo. App. W.D. 1988)

Brownstein v. Rhomberg-Haglin & Assoc., Inc., 824 S.W.2d 13, 15 (Mo. banc 1992)

Missouri Hosp. Ass'n v. Air Conservation Comm'n, 874 S.W.2d 380, 397 (Mo. App. W.D. 1994)

iii. ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN ITS APPLICATION OF THE DISCIPLINARY TERMS "INCOMPETENCE," "REPEATED NEGLIGENCE," "CONDUCT DANGEROUS TO A PATIENT," AND "GROSS NEGLIGENCE" UNDER THE PROVISIONS OF SECTION 334.100.2(5), RMSO, IN THAT THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND, AS APPLIED, DID NOT VIOLATE DR. TENDAI'S DUE PROCESS RIGHTS.

Standard of Review

Judicial review of the orders of the Board of Healing Arts and the Administrative Hearing Commission is authorized under the provisions of Sections 621.145, RSMo,1994, as well as 536.100 through 536.150, RSMo,1994. ***The Board Disciplinary Order*** and the ***Commission Findings***, may be reviewed and challenged if the agency action:

(A) is in excess of statutory authority and/or jurisdiction of the agency;

(B) is unsupported by competent and substantial evidence upon the whole record;

(C) is unauthorized by law;

(D) is arbitrary, capricious and unreasonable;

(E) involves abuse of discretion;

(F) erroneously announces and applies Missouri law;

and therefore is reviewable by this Court under the provisions of Sections 621.145, RSMO,1994 , and Section 536.140, RSMo,1994.

The agency decision must be upheld if it is supported by substantial evidence upon the whole record. Section 536.140.2(3), RSMo 1994. The record must be viewed in the light most favorable to the agency decision. *State Bd. of Registration for the Healing Arts v. Finch*, 514 S.W.2d 608, 616 (Mo.App. 1974); *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo. 1999). Upon review in a physician licensure proceeding, decisions of the Administrative Hearing Commission are presumed valid and the burden is on the attacking party to overcome the presumption. *Hernandez v. State Board of Registration for Healing Arts*, 936 S.W.2d 894, 900 (Mo.App. W.D.1997). The Agency's findings of fact are given great deference as the fact-finding process is a function of the agency and if evidence would warrant either of two opposed findings, the reviewing court must uphold the factual determinations the agency has made. *Fritzshall v. Bd. of Police Comm'rs*, 886 S.W.2d 20, 23 (Mo.App. W.D. 1994)(citing *Overland Outdoor Advertising Co., Inc. v. State Highway Comm'n*, 616 S.W.2d 563, 566 (Mo. App. W.D. 1981)).

(A.) <u>Due Process Arguments</u>

Dr. Tendai makes the claim that all or virtually all of the stated bases for discipline set out under the provisions of Section 334.100.2(5), RSMo, are void for vagueness and the statute as applied to him thereby violates his right to procedural due process. Statutes are

presumed to be constitutional and will be held to be unconstitutional only if they clearly contravene some constitutional provision. *State v. Young*, 695 S.W.2d 882, 883 (Mo. banc 1985). Doubts will be resolved in favor of constitutionality. *Id.* It was held early on that this section of the Healing Arts Practice Act is not generally a denial of equal protection of the laws or due process. *State of Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 46 S.Ct. 384, 385, 70 L.Ed. 818 (Mo. 1926). It is not enough for a physician challenging the statute governing discipline to show that the statute might operate unconstitutionally in some cases. *Artman v. State Bd. of Registration for Healing Arts,* 918 S.W.2d 247 (Mo. banc 1996). Rather, the physician must show that, as applied to him, the Board used its power in an arbitrary or discriminatory manner. *Id.*

Due process requires that a statute prohibiting certain activity provide 1) reasonable notice of the proscribed activity and 2) guidelines so that the governmental entity responsible for enforcing the statute may do so in a nonarbitrary, nondiscriminatory fashion. *City of Festus v. Werner*, 656 S.W.2d 286, 287 (Mo.App.E.D. 1983). Upon a challenge to a statute as being unconstitutionally vague, the language is to be treated by applying it to the facts at hand. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 233 (Mo. banc 1982).

The statute in question, Section 334.100.2(5), RSMo, is a disciplinary statute which has as its purpose the protection of the public, and as such, is remedial rather than penal. *Younge v. State Board of Registration for the Healing Arts*, 451 S.W.2d 346, 349 (Mo.1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 910, 25 L.Ed.2d 102 (1970). Remedial

statutes are to be construed to meet the cases which are clearly within the spirit or reason of the law, or within the evil the statute was designed to remedy, provided such interpretation is not inconsistent with the language used, with all reasonable doubts resolved in favor of applicability of the statute to the particular case. *State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103, 106 (Mo. banc 1982).

In *Perez v. Missouri State Bd. of Registration for the Healing Arts*, 803 S.W.2d 160 (Mo. App. W.D. 1991), the Western District Court of Appeals held that the section prohibiting a physician from engaging in dishonorable, unethical, or unprofessional conduct or conduct of a character likely to deceive, defraud, or harm the public was not unconstitutionally vague or overbroad as it was applied to a physician who engaged in sex with a patient while using his position of trust to gain her confidence and trust. The Court held that "Dr. Perez clearly engaged in dishonorable, unethical and unprofessional conduct of a character likely to harm the public." 803 S.W.2d at 165. Section 334.100.1(10) was held by the Court of Appeals not to have been applied in an arbitrary or discriminatory fashion under the facts of that particular case.

In the present case the Commission held that Dr. Tendai failed to follow the applicable professional standards of care for treating IUGR (intrauterine growth retardation) and was therefore guilty of "gross negligence" and "incompetence." "We conclude that Tendai violated the standard of care after November 2, 1992, by failing to refer the patient to a perinatologist or by failing to conduct tests and deliver the baby after

its lungs reached maturity." (Commission's Findings of Fact and Conclusions of Law, p. 17-18). The Commission explained:

> There is no provision for discipline for ordinary negligence under section 334.100.2(5), only for repeated negligence and gross negligence. We conclude that Tendai's omissions in the treatment of S.G. constitute a gross deviation from the standard of care and demonstrate a conscious indifference to a professional duty.
>
> We further conclude that Tendai's conduct demonstrated a general lack of a disposition to use his professional ability; thus, there is cause to discipline his license for incompetence. His conduct was also harmful to the health of a patient. Therefore, we conclude that there is cause to discipline Tendai's license under section 334.100.2(5) for his treatment of S.G.[2]

[2]Commission Findings of Fact and Conclusions of Law, p. 18.

Although the statute itself does not define "incompetence" or "gross negligence," the case law has developed definitions for these terms. "Incompetence" has been judicially defined as "a general lack of present ability or lack of a disposition to use a present ability to perform a given duty." *Missouri Bd. for Architects , Prof'l Engineers & Land Surveyors v. Duncan*, No. AR-84-0239 at 116-17 (Mo. Admin. Hearing Comm'n, November 15, 1985), aff'd, 744 S.W.2d 524 (Mo. App. E.D. 1988). "Gross negligence" has been judicially defined as "an act or course of conduct which demonstrates a conscious indifference to a professional duty" that constitutes "a gross deviation from the standard of care which a reasonable person would exercise in the situation." *Id.* at 533 and note 6. It is difficult for the Board to conceive of more complete and thorough definitions for these two statutory terms.

Contrary to the assertion of Dr. Tendai, the terms "incompetence" and "gross negligence" have been applied in a physician discipline case under Section 334.100. The Western District Court of Appeals recently considered and approved the *Duncan* definition of "incompetence" in *Bever v. State Board of Registration for the Healing Arts*, 2001WL 68307 *7 (W.D. Mo. January 30, 2001).[3] "We believe that the definition [of

[3]The Board in the *Bever* case moved for transfer to this Court, which was granted. The Board later dismissed its appeal to this Court with the consent of Dr. Bever, in light of the fact that the Legislature had amended the Open Meetings Law to provide that Board disciplinary hearings may be held in closed session, thus mooting the issue present on that

"incompetence"] used by the AHC was proper." *Id.* The Bever court also applied the established judicial definition of "gross negligence" in this physician discipline context. "The term 'gross negligence' means an act or course of conduct which demonstrates a conscious indifference to a professional duty." WL 68307 *3 (The Court cites *Duncan v. Missouri Bd. for Architects, Prof'l. Eng'rs and Land Surveyors*, 744 S.W.2d 524, 533 (Mo.App.E.D.1988)) The *Bever* case was a physician disciplinary case tried under Section 334.100.2(5).

Section 334.100.2(5) is clearly constitutional and provided due process to Dr. Tendai under the facts of this case. Dr. Tendai totally ignored patient S.G.'s condition of IUGR. He offered her no treatment and made no referral to a physician who could treat her. As a result, patient S.G.'s baby died unnecessarily. Dr. Tendai violated the applicable standards of care and was thus negligent. The Commission justifiably characterized his conduct as "incompetence," "gross negligence," and conduct harmful to the health of a patient.

II. THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN FINDING THAT DR. TENDAI HAD VIOLATED SECTION 334.100.2(5), RSMo, IN THAT DR. TENDAI'S TREATMENT OF PATIENT S.G. VIOLATED THE APPLICABLE STANDARDS OF CARE.

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State Board of Registration for Healing Arts, 936 S.W.2d 894, 900 (Mo.App. W.D. 1997). The Agency's findings of fact are given great deference as the fact-finding process is a function of the agency and if evidence would warrant either of two opposed findings, the reviewing court must uphold the factual determinations the agency has made. *Fritzshall v. Bd. of Police Comm'rs*, 886 S.W.2d 20, 23 (Mo.App. W.D.1994)(citing *Overland Outdoor Advertising Co., Inc. v. State Highway Comm'n*, 616 S.W.2d 563, 566 (Mo. App. W.D.1981)).

Factual Overview

In the present case, both the ***Commission Findings*** and the ***Board Disciplinary Order*** are supported by competent and substantial evidence upon the whole record, are not arbitrary, capricious or unreasonable, were entered in accordance with applicable Missouri law and procedure, and do not involve an abuse of discretion. Dr. Tendai's basic argument, as set out in his ***Appellant's Brief,*** is that the Administrative Hearing Commission incorrectly accepted the Board's evidence as credible, as against his own unsubstantiated, self-serving testimony. As this Court is well aware, witness credibility determinations are for the Commission, not for a court on judicial review. *State ex rel. Drury Displays, Inc. v. City of Olivette*, 976 S.W.2d 634, 635 (Mo. App. E.D. 1998). Dr. Tendai's arguments are not meritorious. This Court should reject Dr. Tendai's appeal in its entirety.

We will begin our discussion of the issues by taking a detailed look at the evidence supporting the Administrative Hearing Commission's findings on Counts I and III of the

First Amended Complaint. (***First Amended Complaint***, L.F. 136)[4]. The Commission did find in Dr. Tendai's favor on Count II of the First Amended Complaint. As will be seen, the Commission's findings of fact on Counts I and III were grounded on substantial and competent evidence.

In his ***Appellant's Brief,*** counsel for Dr. Tendai repeatedly refers to the "overwhelming" evidence that Dr. Tendai properly advised patient S.G. about her condition of IUGR and what to do about it. In fact, however, the evidence supporting that proposition came solely from Dr. Tendai's own personal testimony. Patient S.G. strongly denied in her testimony that Dr. Tendai had given her the claimed advice. The ongoing patient record did not contain a single instance of documentation by Dr. Tendai of his supposed advice to patient S.G. about this life-threatening condition. Of course, the "sticky notes" did purport to document Dr. Tendai's claimed advice to patient S.G. However, the Administrative Hearing Commission not surprisingly refused to consider the "sticky notes," at least partially based on the Commission's finding that one of the notes contained a comment on the fetus' "two-vessel cord," which was not discovered until the ultrasound at Cox South several weeks later.

A further factor was no doubt Dr. Tendai's tortured explanation of how the two "sticky notes" came to be created separately, then both lost, then both found, after his

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[4]We will cite to the Legal File as "L.F." with the page and line numbers, where appropriate.

office submitted patient S.G.'s "flow chart" to the Board. (L.F. 310, line 15, to page 313, line 19)(Both "sticky notes" started, correctly filed, pulled back out, second entry made on "sticky note," then misfiled; same sequence of events with each "sticky note.") Most important to the Commission in making its factual findings rejecting Dr. Tendai's trial testimony might well have been the testimony of Board Investigator Bryan K. Hutchings.

Investigator Hutchings testified in rebuttal that he interviewed Dr. Tendai on April 6, 1993, and that he advised Dr. Tendai of the details patient S.G.'s complaint. (Testimony of Bryan K. Hutchings, Trial Transcript, page 478, lines 14 to 18)(L.F. 766). This interview took place only three or four months after the demise of patient S.G.'s baby. Investigator Hutchings testified that he presented Dr. Tendai with a release signed by patient S.G. to allow the Board to have copies of her medical records. (Id. at p. 477, line 17-24)(L.F. 765). Investigator Hutchings testified that Dr. Tendai did not make any claim that he had made recommendations to patient S.G. which patient S.G. refused to follow. (Id. at p. 479, lines 3 to 23)(L.F. 767). Instead, Investigator Hutchings testified that Dr. Tendai indicated that at the time he felt that the best course of action for patient S.G. was to carry her baby to term. Investigator Hutchings stated that Dr. Tendai indicated disagreement with the practice of immediate delivery of IUGR babies which Dr. Tendai indicated to Investigator Hutchings was the standard approach of the local perinatologist. (Id. at page 480, lines 2 to 8)(L.F. 768).

Dr. Tendai's statements to Investigator Hutchings within three or four months after the event are of course completely at odds with his later explanations of his conduct toward

patient S.G. The Board would submit that Investigator Hutchings' trial testimony would provide a good basis for the Commission's rejection of Dr. Tendai's testimony of the actions toward patient S.G and her purported noncompliance with his alleged advice and instructions. The Administrative Hearing Commission dismissed Dr. Tendai's later version of the facts, noting that he had "changed his story" after his interview with Investigator Hutchings. (AHC, ***Findings of Fact and Conclusions of Law***, p. 7, ftnt. 4, L.F. 01034). The AHC had every right to accept the testimony of Investigator Hutchings as more credible than Dr. Tendai's testimony.

The Commission made the specific finding that the "sticky notes" Dr. Tendai presented in evidence to support his defensive testimony were made after the fact. The AHC specifically found that the "sticky notes" appeared to have been made up after the fact and did not reflect the true course of events in patient S.G.'s care. (AHC, ***Findings of Fact and Conclusions of Law***, p. 7, ftnt. 4, L.F. 279). Such a state of facts brings to mind the maxim, *falsus in uno, falsus in omnibus*, which, if strictly applied, means that when a witness has testified falsely to any one material fact his testimony as a whole should be disregarded. As stated in *Bush v. Kansas City Public Service Co.*, 350 Mo. 876, 169 S.W.2d 331, 334 (Mo. 1943): "The falsehood which will authorize the disregarding of a witness' testimony must be as to a material matter, or at least as to a matter which the witness believes to be material, and a witness is not to be discredited because of a discrepancy, or contradiction, or even deliberate falsehood as to an irrelevant or immaterial

matter." The AHC clearly found Dr. Tendai to be guilty of a significant and material falsehood. The AHC was certainly justified in disregarding his entire testimony.

(1) On Count I, Dr. Tendai Negligent in Failure to Inform Patient S.G. of IUGR and In Failure to Monitor the Procession of Failure to Thrive Indexes with Nonstress Tests and Otherwise

(a) The Factual Background

Dr. Tendai, practicing as an obstetrician/gynecologist in Springfield, Missouri, saw a pregnant patient S.G. for the first time on April 14, 1992. (Petitioner's Exhibit 3, Respondent's office medical records for patient S.G.)(L.F. 1356-57). Dr. Tendai estimated the gestational age of patient S.G.'s fetus as seven weeks. (Id.) Monthly visits continued through September 21, 1992. (Id.) During this time frame, the only abnormality, complication, or problem noted by Dr. Tendai was that patient S.G. tested positive for chlamydia. (Id.) Patient S.G. was treated for this condition. (Id.) Following the September 21, 1992 monthly visit, patient S.G saw Dr. Tendai every other week. (Id.)

On October 16, 1992, after an in-office ultrasound, Dr. Tendai suspected the fetus had intrauterine growth retardation (IUGR). (Id.) IUGR is a potentially life-threatening problem for the fetus but the treatment for IUGR is well-established and adequate treatment and management normally addresses the problem in most cases. (Petitioner's Exhibit 1, Deposition of Dr. William Cameron, page 9, line 19 to page 10, line 20)(L.F. 784-85). At that time, on October 16, 1992, patient S.G. was instructed by Dr. Tendai to

have an ultrasound performed at Cox South Hospital in Springfield, Missouri. This ultrasound was performed on November 2, 1992. (Petitioner's Exhibit 3, Report of Radiological Consultation, dated January 25, 1993)(L.F. 1361). The radiologist's opinion was that the fetus had IUGR and the radiologist also noted that a two-vessel umbilical cord was present instead of the normal three-vessel cord. (Id.)

After receiving the results of the Cox ultrasound, Dr. Tendai diagnosed a condition of IUGR. (Testimony of Dr. Tendai, Trial Transcript, page 231, line 15 to line 25)(L.F. 521). According to patient S.G., Dr. Tendai never so much as mentioned IUGR and patient S.G. unequivocally testified that Dr. Tendai did not refer her to a perinatologist or any other specialist. (Petitioner's Exhibit 2, Deposition of patient S.G., April 2, 1998, page 16, line 1 to page 17, line 2)(L.F. 851). Dr. Tendai did not recommend more frequent monitoring. (Id.) Dr. Tendai did not recommend amniocentesis. (Id. at page 69, lines 17 to 19)(L.F. 903). Dr. Tendai did not indicate to patient S.G. that there was a problem with her baby. (Id.) Patient S.G. just thought that she was going to have a small baby but she did not consider this to be a critical problem. (Id. at page 22, lines 2 to 12)(L.F. 857). Nobody told her that this could be a serious problem. (Id. at page 15, lines 20 to 25)(L.F. 850). According to patient S.G., at no time after this ultrasound did Dr. Tendai suggest to S.G. that a visit to a perinatologist would be wise under the circumstances. (Id. at page 22, lines 2 to 12)(L.F. 857).

On November 28, 1992, late in the evening, patient S.G. went to Cox South Hospital and complained that she had not felt any fetal movement for about twenty-four hours.

(Petitioner's Exhibit 3, Respondent's office medical records for patient S.G.)(L.F. 1354-1454). No fetal heart tones were detected. (Id.) After an ultrasound, patient S.G. was transferred to the delivery room and delivered baby Mariah, a stillborn child. (Id.) Dr. Tendai was not present. (Id.) Twenty-six days elapsed after Dr. Tendai's formal diagnosis of IUGR and fetal demise on November 28, 1993. During this 26-day period, Dr. Tendai took no steps whatsoever to treat or manage patient S.G.'s condition of IUGR. (Id.)

The autopsy conducted revealed that "[i]ntrauterine fetal death was most likely due to the combined effects of a tight nuchal cord with severe chronic villitis of unknown etiology involving the placenta with associated intrauterine fetal growth retardation." (Petitioner's Exhibit 3; Necropsy Report, dated January 20, 1993)(L.F. 1370). The report went on to state that "[u]mbilical artery thrombosis is a common finding in placental vessels of stillborns. Other findings included a two- vessel umbilical cord. Although the two-vessel cords are associated with an increased incidence of fetal congenital malformations, no other congenital malformations are identified." (Id.)

(b) The Findings of the Administrative Hearing Commission

With respect to Dr. Tendai's treatment of patient S.G., as set out in Count I of the Board's ***First Amended Complaint***, such conduct was found by the Administrative Hearing Commission to constitute gross negligence, incompetence, and conduct harmful to a patient under Section 334.100.2(5), RSMo, in that Dr. Tendai recognized the problem of IUGR, but failed after November 2, 1992, to take a practical course of action to counter the

intrauterine growth retardation or, in the alternative, to refer patient S.G. to a perinatologist capable of doing so. A perinatologist is a specialist in problems of late pregnancy. The AHC also found that Dr. Tendai's treatment of patient S.G. amounted to "repeated negligence" within the meaning of Section 334.100.2(5), RSMo, on Count III of Petitioner's First Amended Complaint. The record demonstrates that the AHC based its decision on substantial and competent evidence upon the whole record. This Court should sustain and uphold the AHC's findings.

(c) The Expert Testimony

According to the testimony of the Board's expert witness, Dr. William Cameron, M.D., Dr. Tendai diagnosed IUGR but failed to initiate any kind of measure "to monitor the procession of failure to thrive indexes." (Petitioner's Exhibit 1, Deposition of Dr. William Cameron, February 10, 1998, page 9, line 19 to page 11, line 5)(L.F. 784-86). Dr. Cameron testified that no monitoring was done, Dr. Cameron indicating that monitoring could have been done by biophysical profile, which includes an ultrasound and nonstress testing to assess the activity of the baby in response to movement and/or to look for fetal heart activity. (Id. at page 16, line 24 to page 17, line 14)(L.F. 791-92). Dr. Cameron testified that twice-weekly biophysical monitoring was required by the standard of care as well as twice-weekly nonstress testing. (Id.) Dr. Tendai's own expert witness, Dr. William T. Griffin, M.D., concurred with Dr. Cameron that, based on his initial review of the ongoing patient record, nonstress testing could have and should have been done by Dr.

Tendai and that his failure to do so violated the standard of care. (Testimony of Dr. William Griffin, Trial Transcript, page 381, line 23 to page 382, line 6)(L.F. 669-70).

Dr. Tendai violated the applicable standards of care in his treatment of patient S. G. Dr. Tendai failed to refer patient S.G. to a perinatologist. Dr. Tendai testified that he did not have the equipment to conduct a nonstress test in his office in 1992, at the time patient S.G. needed nonstress testing. (Testimony of Respondent, Trial Transcript, page 236, lines 6 to 13)(L.F. 526). Therefore, Dr. Tendai had a duty to refer patient S.G. to a physician such as a perinatologist who had the means and ability to conduct the required testing. Although Dr. Tendai claims to have made such a recommendation to patient S.G., patient S. G. denies that such a recommendation was made and Dr. Tendai's patient records for patient S.G. do not document such referral. (Petitioner's Exhibit 3, Respondent's office medical records for patient S.G.)(L.F. 1353-1454).

In particular, Dr. Tendai's own medical expert, Dr. William T. Griffin, M. D., testified that based on his review of the medical record demonstrated that adequate fetal monitoring was not conducted after the diagnosis of IUGR was made by Dr. Tendai. (Testimony of Dr. William Griffin, Trial Transcript, page 381, line 23, to page 382, line 6)(L.F. 669-70).

Based on the medical record and according to Dr. Griffin's testimony, Dr. Tendai violated the applicable standard of care in his treatment of patient S. G. by failing to refer patient S.G. to a perinatologist or other physician capable of providing patient S.G. with appropriate care, to-wit: administering nonstress testing two times per week. Dr. Griffin

did testify in answer to counsel's question that, assuming Dr. Tendai had repeatedly told patient S.G. that she needed to go see a perinatologist, then Dr. Tendai would have met the standard of care. (Testimony of Dr. William Griffin, Trial Transcript, page 387, line 21, to page 388, line 21)(L.F. 675-76). Of course, the Commission rejected Dr. Tendai's factual testimony on this point.

Dr. Tendai failed to discuss the results of the ultrasound done at Cox with patient S.G. and failed to advise patient S.G. of his diagnosis of IUGR and the ramifications of such diagnosis and the treatment options available to patient S.G. (Petitioner's Exhibit 2, Deposition of patient S.G., April 2, 1998, page 22, lines 2 to 12)(L.F. 857). Dr. Tendai's failure to discuss the results of the ultrasound done at Cox with patient S.G. in itself constituted a violation of the applicable standard of care. (Testimony of Dr. William Griffin, Trial Transcript, page 420, line 2, to line 17)(L.F. 708).

Dr. Cameron felt that baby Mariah's death was preventable, testifying as follows:

> This baby didn't have to die. This was a preventable death. And by monitoring her properly, which would have taken some labor-intensive care, the death could have been foreseen, at least long enough to remove the baby by cesarian section, if necessary, and I am sure it would have been. And these babies usually, even with failure to grow in utero, when they are removed from that poisonous environment generally will

> thrive, and with proper nourishment, in about six months they will catch up with their - - the other babies of like age.

(Petitioner's Exhibit 1, Deposition of Dr. William Cameron, February 10, 1998, page 10, lines 10 to 20)(L.F. 785).

(d) Dr. Tendai Defends His Conduct by Claiming Patient Noncompliance–the "Sticky Notes"

Count I of the ***First Amended Complaint*** essentially boiled down to whether the Commissioner believed Dr. Tendai or whether, on the other hand, she believed patient S.G. Dr. Tendai testified that he fully advised patient S.G. of her condition of IUGR and the available treatment options but that patient S.G. repeatedly refused to follow his recommendations. (Testimony of Dr. Tendai, Trial Transcript, page 235, lines 1 to 6; page 238, lines 13 to 19)(L.F. 525-28). Patient S.G. testified that Dr. Tendai at no time discussed her condition of IUGR or presented her with any recommendations or treatment options. (Petitioner's Exhibit 2, Deposition of patient S.G., April 2, 1998, page 22, lines 2 to 12)(L.F. 857). The ongoing patient medical record does not document that Dr. Tendai discussed IUGR with patient S.G. or provided her with any recommendations or treatment options. (Petitioner's Exhibit 1, Deposition Transcript of Dr. William Cameron, February 10, 1998, page 17, lines 15 to 17 (L.F. 792); Petitioner's Exhibit 3, Respondent's office medical record for patient S.G.(L.F. 1353-1454)).

Dr. Tendai offered into evidence two "sticky notes" which were allegedly a part of the ongoing patient record and which purported to document appropriate advice as to IUGR by Dr. Tendai and a refusal of Dr. Tendai's advice by patient S.G. However, the Court should note that the "sticky notes" were not presented to the Board when copies of all of patient S.G.'s medical files were requested from Dr. Tendai. (Testimony of Bryan K. Hutchings, Trial Transcript, page 479, line 1 through 3 (L.F. 767); Testimony of Dr. Tendai, Trial Transcript, page 298, line 19 to page 299, line 24; page 248, lines 4 to 19)(L.F. 587-88; L.F. 538)). Further, Dr. Tendai did not provide or even mention the existence of the "sticky notes" when interviewed by the Board's investigator Bryan K. Hutchings on April 6, 1993. (Testimony of Bryan K. Hutchings, Trial Transcript, page 479, lines 1 to 3)(L.F. 767). Dr. Tendai claimed that both "sticky notes" were misfiled and recovered some time after he initially provided S.G.'s patient records to the Board. (Testimony of Dr. Tendai, Trial Transcript, page 302, line 2, to page 305, line 6)(L.F. 591-94).

It is worth noting that Dr. Tendai's own expert witness, Dr. William T. Griffin, M.D., refused to consider the "sticky notes" as Dr. Griffin did not consider the "sticky notes" as part of the official medical record on patient S.G. (Testimony of Dr. William Griffin, Trial Transcript, page 414, lines 7 to 12)(L.F. 702).

(e) <u>The Administrative Hearing Commission finds that Dr. Tendai made up evidence--Dr. Tendai's defensive "sticky notes" added to record after the fact</u>

The Administrative Hearing Commission specifically found that the "sticky notes" appeared to have been made up by Dr. Tendai "after the fact." (AHC Findings of Fact and Conclusions of Law, page 7, footnote 4)(L.F. 279). The Commission stated:

> Tendai argues that he did refer S.G. to a perinatologist, but that she was in denial and refused to go to a perinatologist. We find that he did not refer her to a perinatologist because he believed that the perinatologist delivered babies too early, and he decided that the best course of action would be to attempt to carry the baby to term. Our finding is based on the testimony of the Board's investigator, to whom Tendai gave this explanation when the Board began its investigation (Tr. at 480) and on S.G.'s testimony by videotaped deposition. Tendai then changed his story and argued that he found "sticky notes" pertaining to S.G. that had been mistakenly placed in another file. He argues that he wrote personal matters on the "sticky notes" and that the "sticky notes" detail S.G.'s reaction to his diagnosis and her refusal to see a perinatologist. We do not find this explanation believable, as the "sticky notes" appear to have been written after the fact. For example, the "sticky note" entry for October 16, 1992, states that the fetus possibly had a two-vessel cord, when the chart for the same date indicates that a three-vessel cord, and a two-vessel

cord was not revealed until the hospital ultrasound on November 2, 1992.

(***Commission Findings***, page 7, footnote 4)(L.F. 279).

Except for Dr. Tendai's own personal testimony, there was no evidence in the record to support a finding by the Commission of patient noncompliance by patient S.G. Dr. Tendai's expert witness, Dr. Griffin, testified that his review of the patient record did not disclose any instance of documented patient noncompliance by patient S.G. (Testimony of Dr. William Griffin, Trial Transcript, page 460, line 24, to page 461, line 3)(L.F. 748-49). Reinforced by the absence of documentation by Dr. Tendai that he made the proper recommendations and that patient S.G. refused his advice, the Commission found credible patient S.G.'s testimony that Dr. Tendai failed to discuss IUGR with her and further failed to provide her with treatment alternatives and options. Patient S.G. credibly testified that Dr. Tendai at no time indicated to her that the small size of her baby presented any serious medical problem. (Petitioner's Exhibit 2, Deposition of Patient S.G., April 2, 1998, page 22, lines 2 to 12)(L.F. 857). Patient S.G., a very young woman of limited education and sophistication, credibly testified that she believed that she simply had a small baby and that the small size of her baby did not present a significant medical problem. (Id.) The record supports the testimony of patient S.G. that Dr. Tendai made no mention to her of IUGR or suggested any treatment alternatives to her and the Commission so found.

(f) Dr. Tendai Never Mentions Patient Noncompliance in Interview with Board Investigator -- Claims Felt it Best to Allow Pregnancy to Proceed Uninterrupted

The Board's investigator Bryan K. Hutchings testified in rebuttal that he interviewed Dr. Tendai on April 6, 1993, and advised Dr. Tendai of the details of patient S.G.'s complaint. (Testimony of Bryan K. Hutchings, Trial Transcript, page 478, lines 14 to 18)(L.F. 766). Investigator Hutchings testified that he presented Dr. Tendai with a release signed by patient S.G. to allow the Board to have copies of all of her medical records. Investigator Hutchings testified that Dr. Tendai did not in that interview make any claim that he had made recommendations to patient S.G. which patient S.G. refused. (Id. at lines 3 to 23). Instead, Investigator Hutchings testified that Dr. Tendai indicated that at the time he felt that the best course of action for patient S.G. was to carry her baby to term. (Id. at lines 21 to 23). Investigator Hutchings indicated that Dr. Tendai indicated disagreement with the practice of immediate delivery of IUGR babies which Dr. Tendai indicated to Investigator Hutchings was the standard approach of perinatologists. (Id. at page 480, lines 2 to 8)(L.F. 768). According to Investigator Hutchings, Dr. Tendai repeatedly referred to the perinatologist in question as "she." (Id. at lines 11 to 15). It is noted that Dr. Tendai usually referred patients to Dr. Patricia Dix, a female perinatologist at Cox Medical Center. (Testimony of Respondent, Trial Transcript, page 321, lines 3 to 5)(L.F. 610). Dr. Dix was apparently the only perinatologist in the Springfield area to accept Medicaid patients, according to Dr. Tendai.

On cross-examination, Dr. Tendai's counsel inquired of Investigator Hutchings as to whether he had "a list of questions that you asked him." (Id., page 482, line 24, to line 25)(L.F. 770). Investigator Hutchings indicated that he had. Investigator Hutchings was

asked if he had brought those questions to the hearing and he indicated that he had. (Id., page 483, line 2, to line 3)(L.F. 771). Investigator Hutchings further indicated during cross-examination that he had written down Dr. Tendai's answers during the interview. (Id., page 483, line 6, to line 7)(L.F. 771). Investigator Hutchings did therefore have available at trial his personal notes from his interview with Dr. Tendai conducted on April 6, 1993. Investigator Hutchings' testimony was based on his memory and his contemporaneous notes. Investigator Hutchings' trial testimony was therefore extremely credible.

If patient S.G. repeatedly failed and refused to follow his advice and recommendations, as claimed by Dr. Tendai, resulting in the death of her baby, it would seem probable that this would have been mentioned by Dr. Tendai when interviewed by Board Investigator Bryan Hutchings. Dr. Tendai claims that he repeatedly begged his patient to take measures to save her baby but that she flatly refused and the baby died. One would not think that this sort of thing happens to a physician just every day and that such an outcome would be memorable.

Dr. Tendai's failure to mention the supposed patient noncompliance in his interview with the Board's investigator strongly suggests that Dr. Tendai's claims of patient noncompliance constitute an after-the-fact justification for his failure to properly care for the patient. If patient S.G. had in fact repeatedly failed and refused to follow his advice and her baby had died because of that, Dr. Tendai would surely have reported this to the Board investigator interviewing him about patient S.G.'s complaint to the Board. Dr. Tendai wanted the Commission to believe that he was hauled before the Board by patient S.G. after the

death of her baby, accused of negligence, his records demanded, and his statement taken by a Board investigator, but that patient S.G.'s purported total refusal to follow his advice and guidance–slipped his mind? The Commission found Dr. Tendai's testimony not to be credible and it is simply not very hard to understand why.

(2) Summary of Evidence Under Count I - - the Board has Presented Substantial Evidence Justifying Discipline of Dr. Tendai's License

Dr. Tendai suspected IUGR on October 16, 1992. Dr. Tendai confirmed IUGR on November 2, 1992, after an ultrasound at Cox Medical Center. Baby Mariah was born dead on November 28, 1992. (Petitioner's Exhibit 3, Respondent's office medical record for patient S.G.)(L.F. 1353-1454). Dr. Tendai had a period of 26 days to try to manage S.G.'s condition of IUGR. Dr. Tendai took no steps whatsoever to manage and treat the condition of IUGR. Dr. Tendai claimed that he gave the appropriate advice but that, for some unexplainable reason, patient S.G. refused his advice and let her baby die *in utero.* Patient S.G. adamantly disputed Dr. Tendai's version of events.

Patient S.G. testified credibly that Dr. Tendai never discussed treatment options for the IUGR condition. (Petitioner's Exhibit 2, Deposition of patient S.G., April 2, 1998, page 22, lines 2 to 12)(L.F. 857). Dr. Tendai's ongoing patient record does not support his testimony that he gave patient S.G. the proper advice but that she refused to follow his advice. (Petitioner's Exhibit 3, Respondent's office medical record for patient S.G.)(L.F. 1353-1454). The Board's investigator met with Dr. Tendai shortly after receiving patient

S.G.'s complaint and Dr. Tendai failed to mention giving any advice such as a referral to a perinatologist and Dr. Tendai at no time suggested patient noncompliance. (Testimony of Bryan Hutchings, Trial Transcript, page 481, lines 1 to 23)(L.F. 769). When meeting with the Board's investigator, Dr. Tendai claimed that he felt the best course of action was just to ride out the pregnancy rather than refer patient S.G. to a perinatologist who would want to immediately deliver the baby. (*Id*. at page 479, line 21 to page 480, line 8)(L.F. 767-68). Even Dr. Tendai's own expert witness believes that the ongoing patient record discloses a violation of the applicable standard of care in Dr. Tendai's failure to conduct nonstress testing. (Testimony of Dr. William Griffin, Trial Transcript, page 381, line 23, to page 382, line 6)(L.F. 669-70).

The Board's expert found what he termed total neglect on the part of Dr. Tendai in the failure to implement any monitoring of the procession of failure to thrive indexes. (Petitioner's Exhibit 1, Deposition Transcript of Dr. William Cameron, February 10, 1998, page 10, lines 4 to 6)(L.F. 785).

Dr. Tendai engaged in a course of conduct which was found by the Commission to be incompetent, grossly negligent and harmful and dangerous to the mental or physical health of the patient while in the performance of functions or duties of a profession regulated under Chapter 334, RSMO Supp. 1990-92. The Commission found that Dr. Tendai failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of Dr. Tendai's profession. The Commission correctly found that Dr. Tendai's conduct as set out in Count I of the First Amended Complaint provided a basis for discipline

by the Board under the provisions of Section 334.100.2(5). The Commission correctly found that Dr. Tendai's conduct as set out in Count III of the First Amended Complaint provided a basis for discipline by the Board under the provisions of Section 334.100.2(5) as constituting "repeated negligence."

The Commission's findings of fact are supported by substantial and competent evidence upon the whole record and are not arbitrary, capricious, or unreasonable. This Court should sustain the Board's ***Disciplinary Order*** and the Administrative Hearing Commission's ***Findings of Fact and Conclusions of Law*** and judgment entered for Respondent Board of Healing Arts.

(Appellant's Points) (A) and (B) No standard of care evidence for doctor referring to perinatologist where the only one available does not agree with referring doctor's philosophy

As the Board understands Dr. Tendai's argument, he makes the claim that the Board did not present expert testimony as to the standard of care applicable when a referring physician has only one perinatologist available to make a referral and the referring physician does not agree with the philosophy of the available perinatologist as to the applicable standard of care in the given situation. Of course, the basic fallacy of this argument is that there was only one perinatologist available for Dr. Tendai to make a referral. Apparently, there is only one perinatologist in the Springfield area who accepts Medicaid, patient S.G. being a Medicaid patient. Surely, Dr. Tendai was capable of finding a perinatologist within a

reasonable distance who would have been willing to care for patient S.G. In any event, there was no proof in the record that other willing and qualified perinatologists were not available to see patient S.G.

Dr. Tendai had a duty to monitor and treat patient S.G.'s condition of IUGR. He either had a duty to do the necessary tests himself or, in the alternative, to make a referral to a physician who could do the required testing. A perinatologist clearly would have been in a position to perform the nonstress testing and other measures necessary to monitor the fetus. That Dr. Tendai apparently felt that the readily available perinatologist had a tendency to deliver IUGR babies too soon, does not excuse him from his professional duty to either perform the requisite monitoring on patient S.G. himself or to make a referral to a physician who could. The Board presented expert testimony to this effect.

The Board ought not to be required to present expert testimony negating every excuse Dr. Tendai is able to come up with to justify his failure to do the required testing or to make a referral to a physician who would. Dr. Tendai failed to make a referral and thereby retained the professional responsibility to comply with the standards of care applicable. Dr. Tendai failed to do so. His excuse is that he would have referred to a perinatologist to do the required testing, but that there was only one available, and that he did not agree with her philosophy. So he did nothing and the baby died. The Board presented expert testimony to the effect that you either perform the required tests or make a referral to have them performed. Dr. Tendai did neither. No other expert testimony was necessary.

(Appellant's Points) (C) and (D) "Repeated Negligence" under Section 334.100.2(5), RSMo

The Administrative Hearing Commission found under Count III of the First Amended Complaint that Dr. Tendai had been guilty of "repeated negligence" in his treatment of patient S.G. The Commission found negligence at patient visits on November 2, November 9, November 16, and November 23, 1992. The Commission found that on each of these visits that Dr. Tendai found no growth or, on November 23, 1992, minimal growth, "yet Tendai did not refer her to a perinatologist or conduct testing or deliver the baby." (AHC, ***Findings of Fact and Conclusions of Law***, p. 22, L.F. 294). "Repeated negligence" is defined in Section 334.100.2(5), RSMo Supp.1992, as "the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member (sic) of the applicant's or licensee's profession[.]" (*Id*.)

Dr. Tendai cites no Missouri case law supporting his proposition that "repeated negligence" requires multiple patients. It appears to require multiple <u>occasions</u> rather than multiple patients. The Commission clearly had a substantial basis for finding negligence by Dr. Tendai on more than one occasion. Every time he tested patient S.G. for new growth in her fetus, found no growth, and then did nothing, he was negligent. As noted by the Commission, Dr. Tendai did this several times in the month of November, 1992. Count III of the First Amended Complaint based on "repeated negligence" is supported by substantial evidence of record.

The Board's First Amended Complaint clearly puts Dr. Tendai on notice that the Board raises multiple issues of negligence with respect to Count I (patient S.G.) (L.F. 00018) Count III of the First Amended Complaint incorporates all of the paragraphs of

Count I and Count I specifically. (L.F. 0018) Count I refers to several different instances of negligence. (L.F. 00013-16). The Board adequately pleaded that Dr. Tendai was guilty of "repeated negligence" in his treatment of patient S.G.

The Missouri State Medical Association (MSMA)[5] filed an amicus curiae brief in support of issues raised by Dr. Tendai. MSMA objects to the Administrative Hearing Commission's (AHC) application of § 334.100.2(5), RSMo, to Dr. Tendai's care and treatment of S.G. Specifically, MSMA believes the record showed facts involving one patient, being treated for one condition, during the same course of treatment, within a limited time-frame; and, as such, it was impermissible for the AHC to conclude that Dr. Tendai's conduct constituted "repeated negligence" under § 334.100.2(5). (***MSMA Brief, p. 10***). To the Board's knowledge, MSMA does not in any way condone Dr. Tendai's conduct in his care of S.G. or assert that Dr. Tendai exhibited good practice in his care and treatment. Instead, MSMA asserts as questions of law and public policy that the statute was applied incorrectly. Respectfully, the Board disagrees with this position and asserts that the AHC's application of the statute was proper and consistent with the overall purpose of Chapter 334, RSMo.

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[5] MSMA is a private, voluntary, non-profit organization of physicians and medical students within the state of Missouri. While the Board disagrees with MSMA's position as set forth in its brief, the Board does not object to or dispute its interest in this matter as an amicus curiae.

Section 334.100.2(5), RSMo, states that the Board may seek authority to hold a disciplinary hearing when:

> Any conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient or the public; or incompetency, gross negligence or repeated negligence in the performance of the functions or duties of any profession licensed or regulated by this chapter. For the purposes of this subdivision, "repeated negligence" means the failure, on more than one occasion, to use that degree of skill and learning ordinarily used under the same or similar circumstances by the member of the applicant's or licensee's profession.

MSMA is correct that the issue presented to the Court is straightforward; what does "repeated negligence" mean. Here, the Legislature has provided a definition of "the failure, on more than one occasion, to use that degree of skill and learning ordinarily used . . . ." In other words, there must be a breach in the appropriate standard of care and that breach must take place "on more than one occasion." However, MSMA's conclusion that the AHC's definition of "occasion" is impermissible is not correct.

The primary purpose of the statutes authorizing the Board to discipline a physician's license is to safeguard the public health and welfare. *State Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 442 (Mo.App. W.D.1991). Because the statutes are remedial and not penal in nature, they should be construed liberally. *Bittiker v. State*

Bd. of Registration for Healing Arts, 404 S.W.2d 402, 405 (Mo. App. W.D. 1966). Under accepted rules of statutory construction, words in statutes are given their "plain and ordinary meaning" as derived from the dictionary. *Abrams v. Ohio Pacific Exp.,* 819 S.W.2d 338, 340 (Mo. 1991); *Trailiner Corp. v. Director of Revenue*, 783 S.W.2d 917, 920 (Mo. banc 1990); Section 1.090, RSMo. "Courts have no authority to read into a statute a legislative intent which is contrary to the intent made evident by the plain and ordinary language of the statute." *Baldwin v. Director of Revenue, State of Mo.*, 38 S.W.3d 401, 2000 WL 818908, *3 (Mo.App. W.D. 2000), citing, *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). "The legislature is 'presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction.'" *Moran v. Kessler*, 41 S.W.3d 530, 534 (Mo.App. W.D. 2001). There is no room for construction where words are plain and admit to but one meaning. *State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 224 (Mo. banc 1986).

MSMA's position is largely based on the dictionary definition utilized which stated that occasion meant "a situation or set of circumstances" or "a circumstance, occurrence or state of affairs." (***Amicus Brief, p. 12-13***). MSMA then applied this definition to its assertion that Dr. Tendai's care of S.G., which involved "one treatment, for one condition, twice in one week," to conclude that repeated negligence could not occur. (***Id.***). This

position, however, does not correctly define the term "occasion" and does not apply the term to all findings of fact made by the AHC.

MSMA's definition of "occasion," which it views as ambiguous, is derived from Webster's Third New International Dictionary published in 1961. The Board does not believe a 40-year definition is controlling when more recent dictionary definitions give provide for an unambiguous meaning. *See generally*, *State ex. rel. Brown v. Board of Education*, 294 Mo. 106, 242 S.W. 85, 87 (1922). Occasion is defined by The American Heritage College as: "1a) An event or a happening; an incident. 1b) The time at which an event occurs. 2) A significant event. 3) A favorable or appropriate time or juncture; an opportunity." THE AMERICAN HERITAGE COLLEGE DICTIONARY 943 (Third ed.1997). The Board believes this definition is sufficiently clear that further statutory construction is not warranted and, based on the facts presented to the AHC, justified a determination of repeated negligence here.

MSMA argues that Dr.Tendai was held responsible for repeated negligence when he merely was administrating "one course of continuing treatment of one patient for one condition." "So the AHC's finding of repeated negligence is based on Dr. Tendai's care of *one* patient, and one treatment – an examination, given during one week, for one condition – her pregnancy." (***Amicus Brief***). This statement, however, unduly limits the AHC's findings.

The AHC made the following determinations: 1) "Tendai violated the standard of care after November 2, 1992, by failing to refer the patient to a pertinatologist or by failing

to conduct tests and deliver the baby after its lungs reached maturity;" and 2) "Tendai's conduct caused or contributed to the stillbirth of the baby." The AHC concluded that this conduct constituted gross negligence. (L.F. 01034, AHC, p.17-18)). The AHC also found as part of its findings of fact that Dr. Tendai treated S.G. on November 9, November 16, and November 23, after he was deemed to have been in breach of the standard of care. The AHC found that S.G.'s "fundus showed no growth on November 2, 9, 16, and minimal growth on November 23, yet Tendai did not refer her to a pertinalogist or conduct testing and deliver the baby." (L.F. 01034, AHC, p.3-6, 22)). In other words, on three separate and discreet occasions, Dr. Tendai examined and treated S.G. and on three separate and discreet occasions, Dr. Tendai failed to follow the applicable standard of care. He failed to realize that S.G.'s fetus was suffering from IUGR and to take the appropriate steps needed to treat the condition.

MSMA argues that § 334.100.2(5), RSMo, implies a time-frame of more than one week. First, § 334.100.2(5) does not expressly require any time-frame as offered by MSMA. MSMA suggestion that under the AHC's interpretation that physician would risk discipline for repeated negligence for "misdiagnosing the same patient regarding the same ailment twice in the same two-minute office visit. Not only is the illustration ludicrous as conceded by MSMA, it is contrary to the plain and ordinary meaning of the term "occasion." The occasion would not be each failure to diagnose, but each event, each time, each date, each opportunity during which the physician committed a breach of the applicable standard of care. The following hypotheticals illustrates this point. First,

assume Dr. Tendai was accused of over prescribing Demerol on November 9, Lorcet on November 16, and Vicodin November 23. Suppose the Board, exercising its discretion, charged each controlled substance as a separate count in its complaint and a final count for repeated negligence. Under MSMA's position, there would be no basis for finding repeated negligence. Second, assume Dr. Tendai was found to have seen two patients on the same day. In each case there was IUGR, yet Dr. Tendai failed to refer either patient to a perinatologist. Under MSMA's position, there would be no basis for repeated negligence or for discipline unless gross negligence was found.

MSMA offers no case law to directly support its position that repeated negligence could exist here as a matter of law. In fact, the one case that appears to come closest to contemplating this issue, *Dorman v. Board of Registration for the Healing Arts*,__ S.W. 3d. ____ , 2001 WL 1180692 (Mo.App. W.D. 2001), supports the Board's position. The other case cited, *Montgomery v. South County Radiologists, Inc., et al.*, 49 S.W.3d 191, 194 (Mo. banc 2001) is distinguishable. *Mongtomery* involved a question involving the statute of limitations for medical malpractice actions. Given that § 516.105, RSMo, is outside the authority conferred upon the Board pursuant to Chapter 334, and that *Montgomery* deals with the filing of a private civil cause of action as opposed to remedial administrative action brought by a state agency, the Board does not believe the decision is relevant to deciding this question.

The basic thrust of the Healing Arts Practice Act is that one act of negligence on one occasion is not a basis for discipline. The Legislature has proceeded on the common sense

understanding that even the most conscientious physician can make a mistake. Thus, "repeated negligence" or "gross negligence" is necessary to justify disciplinary action by the Board. The Board would submit that this case illustrates the proper operation of the statute. Had Dr. Tendai but one instance of simple negligence in his care of patient S.G., disciplinary action would not have been appropriate. However, Dr. Tendai repeatedly examined patient S.G., repeatedly discovered that the fetus had not grown, and repeatedly did nothing about it. This course of conduct occurred over a period of 26 days before the baby finally died in the womb. Dr. Tendai had multiple opportunities to do the right thing but on no occasion did he do so. Dr. Tendai was repeatedly negligent over a period of almost a month. The Commission had an adequate basis for its finding of "repeated negligence" on Count III.

(Appellant's Point) (E) The "overwhelming" evidence that Dr. Tendai gave patient S.G. the proper advice

(1) The "Overwhelming" Evidence is basically that Dr. Tendai said he didn't do it a whole bunch of different times

Counsel for Dr. Tendai repeatedly refers to the "overwhelming" evidence that Dr. Tendai gave patient S.G. all the appropriate advice about IUGR. Counsel for Dr. Tendai proceeds as though saying "overwhelming" enough times will make it so. In point of fact, the evidence of record for Dr. Tendai's story is far from overwhelming. The only evidence supporting Dr. Tendai's claims of giving the appropriate advice about IUGR and patient S.G.'s supposed non-compliance is Dr. Tendai's own personal testimony. The patient "flow

chart" made during the course of treatment does not document any such advice or any such patient non-compliance. No nurse or staff member confirmed Dr. Tendai's testimony. Patient S.G. adamantly denied that Dr. Tendai's version of events was true. In addition, Dr. Tendai told Board Investigator Hutchings a completely different story. Only the aforementioned "sticky notes" purported to confirm any part of Dr. Tendai's story. As noted above, the Administrative Hearing Commission gave the "sticky notes" no credence whatsoever. Dr. Tendai's own expert witness, Dr. Griffin, refused to consider the "sticky notes" a part of the patient record. (Testimony of Dr. Griffin, L.F. 702, lines 7 to 12). The evidence was not "overwhelming." The evidence in fact made it abundantly clear that Dr. Tendai was not being truthful. This Court simply cannot say that the Commission's findings and conclusions relative to Dr. Tendai's treatment of patient S.G. were not supported by substantial and competent evidence upon the whole record.

(2) Testimony of Dr. James Johnson--Board Staff Physician Interviewed Respondent and Gave Him Credit for Telling Truth - - Board Staff Physician Not Aware that Patient S.G. Disputing Respondent's Version of Events - - Commission Took Dr. Johnson's Testimony for What It Was Worth

Dr. Tendai complains that the Board ignored the opinion of Dr. James Johnson, without comment. Dr. Tendai presented the deposition testimony of Dr. James S. Johnson, M.D., formerly employed by the Board of Healing Arts as a staff physician reviewing complaints. Dr. Tendai presented Dr. Johnson's deposition and deposition exhibits as Respondent's Exhibit J. Among Dr. Johnson's deposition exhibits was Deposition Exhibit

2 and Deposition Exhibit 4, both of which reflect Dr. Johnson's findings. In the "Medical Staff Opinion," Deposition Exhibit 4, Dr. Johnson stated as follows:

> In my opinion, Dr. Tendai made an attempt to have this patient, [patient S.G.] follow her care with weekly and biweekly visits, but she refused and she also refused a referral to a perinatologist as requested.

(Respondent's Exhibit J, Deposition of Dr. James Johnson, January 12, 1999, Deposition Exhibit 1)**.**

It is obvious from the language employed by Dr. Johnson that he accepted Dr. Tendai's statements as to what happened with patient S.G. at face value. Dr. Johnson had been present when Dr. Tendai appeared for his medical staff interview and gave his version of events. (Respondent's Exhibit J, Deposition of Dr. James S. Johnson, page 23, lines 11 to 14)**.** As a further matter, Dr. Johnson was not aware of patient S.G.'s version of events and did not know that patient S.G. disputed Dr. Tendai's version of events. (Id. at page 24, lines 3 to 13)**.** Dr. Johnson admitted that he essentially gave respondent credit for telling the truth and wrote out his opinion accordingly. **(**Id. at page 23, line 24 to page 24, line 2). However, on later review, Dr. Johnson found nothing in the patient record supporting respondent's statements as to what he supposedly told patient S.G. (Id. at page 26, line 24 to page 27, line 2).

The Medical Staff Opinion is accomplished for the internal use of the Board of Healing Arts. Not having any special legal effect in this case, Dr. Johnson's opinion stands

on its own merits. It is clear that Dr. Johnson heard Dr. Tendai's side of the case and gave him credit for telling the truth. Dr. Johnson did not have the benefit of having patient S.G.'s input. The Commission simply took Dr. Johnson's testimony for what it was worth.

The Board would suggest that Dr. Johnson's Medical Staff Opinion would have the same legal status as a traffic court's verdict on a municipal charge as to who caused a traffic accident or whether negligence was involved. *Cf.*, *Howard v. Riley*, 409 S.W.2d 154 ((Mo. 1966)(fact of conviction not admissible unless upon guilty plea); *Ferguson v. Boyd*, 448 S.W.2d 901 (Mo. 1970). The municipal court's verdict in a traffic accident is considered as not relevant in a civil proceeding. The court views the municipal court's finding as essentially a separate and non-binding finder of fact in a separate proceeding. A civil court reserves the right to make its own independent decision as to fault based on the evidence presented. In this case, the Commission must make its own independent decision as to what happened. While Dr. Johnson chose to accept Dr. Tendai's version of events, this Commission is not required to do so and, in light of the record, should not do so.

As in the case of the issuance of a traffic ticket by a policeman or the finding of guilty in a traffic court, Dr. Johnson's review and opinion would merely constitute the independent opinion of another fact finder on the issue herein under consideration by the Commission. Dr. Johnson's opinion is not binding on the Board or the Commission. Dr. Johnson clearly gave respondent the benefit of the doubt on credibility issues and was not even aware that patient S.G. was disputing respondent's version of events. The Commission clearly took Dr. Johnson's opinion for what it was worth–his personal opinion of what

happened based only on talking with Dr. Tendai. The Commission was free to reject Dr. Johnson's opinion on the facts and reach its own.

III. THE BOARD OF REGISTRATION FOR THE HEALING ARTS DID NOT ERR IN IMPOSING DISCIPLINE ON DR. TENDAI'S LICENSE AS A RESULT OF THE COMMISSION'S FINDINGS OF "INCOMPETENCY," "GROSS NEGLIGENCE," "REPEATED NEGLIGENCE," AND CONDUCT DANGEROUS TO THE HEALTH OF A PATIENT, WHICH FINDINGS AND CONCLUSIONS INCLUDING THE FINDING THAT DR. TENDAI PRESENTED FALSE EVIDENCE TO THE COMMISSION IN ORDER TO ESTABLISH A DEFENSE IN THE FORM OF THE "STICKY NOTES" WHICH THE COMMISSION FOUND TO HAVE BEEN MADE AND ADDED TO THE PATIENT FILE AFTER THE FACT.

Standard of Review

Judicial review of the orders of the Board of Healing Arts and the Administrative Hearing Commission is authorized under the provisions of Sections 621.145, RSMo,1994, as well as 536.100 through 536.150, RSMo,1994. ***The Board Disciplinary Order*** and the ***Commission Findings***, may be reviewed and challenged if the agency action:

(A) is in excess of statutory authority and/or jurisdiction of the agency;

(B) is unsupported by competent and substantial evidence upon the whole record;

(C) is unauthorized by law;

(D) is arbitrary, capricious and unreasonable;

(E) involves abuse of discretion;

(F) erroneously announces and applies Missouri law;

and therefore is reviewable by this Court under the provisions of Sections 621.145, RSMo,1994 , and Section 536.140, RSMo,1994.

The agency decision must be upheld if it is supported by substantial evidence upon the whole record. Section 536.140.2(3), RSMo 1994. The record must be viewed in the light most favorable to the agency decision. *State Bd. of Registration for the Healing Arts v. Finch*, 514 S.W.2d 608, 616 (Mo.App.1974); *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo. banc 1999). Upon review in a physician licensure proceeding, decisions of the Administrative Hearing Commission are presumed valid and the burden is on the attacking party to overcome the presumption. *Hernandez v. State Board of Registration for Healing Arts*, 936 S.W.2d 894, 900 (Mo.App.

W.D.1997). The Agency's findings of fact are given great deference as the fact-finding process is a function of the agency and if evidence would warrant either of two opposed findings, the reviewing court must uphold the factual determinations the agency has made. *Fritzshall v. Bd. of Police Comm'rs,* 886 S.W.2d 20, 23 (Mo.App. W.D. 1994)(citing *Overland Outdoor Advertising Co., Inc. v. State Highway Comm'n,* 616 S.W.2d 563, 566 (Mo. App. 1981)).

(1) The Board Prohibits Dr. Tendai from Practicing Obstetrics

Dr. Tendai complains in his brief that the Board issued its Disciplinary Order and included a provision therein prohibiting him from practicing Obstetrics. The record indicates that a part of Dr. Tendai's pitch to the Board for minimal discipline was his testimony that he was no longer practicing Obstetrics, had not been practicing Obstetrics for some three-and-one-half years, and wanted to henceforth limit his practice to Gynecology. (L.F. 01155; Transcript, Board Disciplinary Hearing, page 34). Based on this testimony, the Board merely formalized the limitation of Dr. Tendai's practice to Gynecology. Counsel described Dr. Tendai's elimination of his obstetrics practice as the result of a "long-standing plan." (L.F. 01189) Dr. Tendai and his counsel essentially invited the Board to include this provision in the ***Board's Disciplinary Order***.

Looked at another way, if Dr. Tendai did not intend to practice Obstetrics in the future, as he testified before the Board, then he has not been harmed by the Board's ***Disciplinary Order*** prohibiting him from doing so.

(2) Other Board Disciplinary Orders

Counsel for Dr. Tendai goes to great lengths to set out numerous other disciplinary cases generated by the Board during the past few years. Counsel contends that Dr. Tendai's discipline was more burdensome than that of many of the other licensees disciplined by the Board in the past few years. The one factor which counsel does not take into account is the Commission's finding that Dr. Tendai tendered the fraudulent "sticky notes" as evidence in a Board proceeding, both in the AHC and before the Board. As noted above, the AHC specifically found that the "sticky notes" appeared to have been made up after the fact and did not reflect the true course of events in patient S.G.'s care. (AHC, ***Findings of Fact and Conclusions of Law***, p. 7, ftnt. 4, L.F. 279). The mendacity of a litigant is traditionally a relevant factor to be considered by the court. The Board certainly had a right to consider findings by the AHC to the effect that Dr. Tendai lied under oath and made up phony evidence in his efforts to blame the death of her baby on this young, naive girl.[6] The presence of mendacity alone would justify any ostensible difference in discipline between Dr. Tendai's case and the cited cases involving other physicians.

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[6]*See, e.g., In re Estate of Latimer*, 913 S.W.2d 51, 57 (Mo. App. W.D. 1995), where the Court quoted the trial court's factual findings: "Defendant was aware of its own mendacity in trying to claim that it had no policy of recalling employees when it clearly did. That mendacity, and Defendant's attempt to cover up its actions, evidences indifference to the rights of Plaintiff and an evil motive." To the same effect is *Conway v. Mo. Com'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App. E.D. 1999).

Certainly the integrity--or lack thereof–demonstrated by a physician in the course of a license disciplinary action is a reasonable factor for the Board to take into account in fashioning the appropriate discipline. Integrity would seem to be an important characteristic in the medical profession. There was no showing in the record that the other physicians disciplined by the Board prior to Dr. Tendai's disciplinary hearing lied to the Board, made up phony evidence, and/or testified falsely under oath in the AHC, as Dr. Tendai was found by the AHC to have done.

In addition, the AHC did not just simply find Dr. Tendai negligent in his care of patient S.G. The Commission held that Dr. Tendai was grossly negligent and acted with incompetence and in a way which was harmful to the health of a patient. The Commission concluded that Dr. Tendai effectively ignored patient S.G.'s condition of IUGR, a treatable condition, and permitted her baby to die *in utero*. The Commission made the specific finding that "[w]ith proper care, S.G.'s baby would have been born alive." (AHC, ***Findings of Fact and Conclusions of Law***, p. 9, finding No. 40, L.F. 281).

The Commission quoted the Board's expert witness, Dr. Cameron, who testified that: "This baby didn't have to die. This was a preventable death." (*Id*. at L.F. 290). The Commission concluded that "Tendai's omission in the treatment of S.G. constitute a gross deviation from the standard of good care and demonstrate a conscious indifference to professional duty." It is a fortunate thing indeed that the Board is rarely presented with findings by the AHC of this level of negligence on the part of a licensee.

Dr. Tendai's conduct in the present case is distinguishable from that of other disciplinary cases based on his extreme degree of negligence, based on the Commission's findings that he made up phony evidence in the form of the "sticky notes," and based on the Commission's necessarily implied finding that he lied under oath about the circumstances surrounding the treatment of patient S.G. and the creation of the "sticky notes." Findings related to the licensee's mendacity made by the AHC are legitimate considerations for the Board to take into account in fashioning a licensee's specific discipline. The presence of mendacity findings by the AHC alone makes Dr. Tendai's case distinguishable from the other license disciplinary cases cited by counsel, most of which are settlement agreements between the Board and the licensee.

IV. THE BOARD OF HEALING ARTS DID NOT ERR IN ITS ORDER IMPOSING DISCIPLINE UPON DR. TENDAI'S MEDICAL LICENSE, IN THAT SAID ORDER WAS MADE UPON LAWFUL PROCEDURE, WAS AUTHORIZED BY LAW, WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE, DID NOT INVOLVE AN ABUSE OF DISCRETION, AND WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD.

Standard of Review

Judicial review of the orders of the Board of Healing Arts and the Administrative Hearing Commission is authorized under the provisions of Sections 621.145, RSMo,1994, as well as 536.100 through 536.150, RSMo,1994**.** ***The Board Disciplinary Order*** and the ***Commission Findings***, may be reviewed and challenged if the agency action:

(A) is in excess of statutory authority and/or jurisdiction of the agency;

(B) is unsupported by competent and substantial evidence upon the whole record;

(C) is unauthorized by law;

(D) is arbitrary, capricious and unreasonable;

(E) involves abuse of discretion;

(F) erroneously announces and applies Missouri law;

and therefore is reviewable by this Court under the provisions of Sections 621.145, RSMo,1994 , and Section 536.140, RSMo,1994.

The agency decision must be upheld if it is supported by substantial evidence upon the whole record. Section 536.140.2(3), RSMo 1994. The record must be viewed in the light most favorable to the agency decision. *State Bd. of Registration for the Healing Arts v. Finch*, 514 S.W.2d 608, 616 (Mo.App.1974); *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783, 786 (Mo. banc 1999). Upon review in a physician licensure proceeding, decisions of the Administrative Hearing Commission are presumed valid and the burden is on the attacking party to overcome the presumption. *Hernandez v. State Board of Registration for Healing Arts*, 936 S.W.2d 894, 900 (Mo.App. W.D. 1997). The Agency's findings of fact are given great deference as the fact-finding process is a function of the agency and if evidence would warrant either of two opposed findings, the reviewing court must uphold the factual determinations the agency has made. *Fritzshall v. Bd. of Police Comm'rs*, 886 S.W.2d 20, 23 (Mo.App. W.D.1994)(citing *Overland Outdoor Advertising Co., Inc. v. State Highway Comm'n*, 616 S.W.2d 563, 566 (Mo. App. 1981)).

(A.) <u>Administrative Procedure Act Issues</u>

Dr. Tendai makes the claim that the Board failed to comply with the procedural and notice requirements of the Administrative Procedure Act, chapter 536, RSMo 1994. Dr. Tendai argues that the Board is required to follow all the requirements under chapter 536, which are clearly applicable to the Administrative Hearing Commission. However, Dr. Tendai fails to acknowledge that the Legislature has specified in Section 621.110, RSMo 1994, the procedure to be followed in a Board disciplinary hearing following up a finding

of a basis for license discipline by the Commission. Section 621.110, RSMo 1994, provides in part as follows:

> Within thirty days after receipt of the record of the proceedings before the commission and the findings of fact, conclusions of law, and recommendations, if any, of the commission, the agency shall set the matter for hearing upon the issue of appropriate disciplinary action and shall notify the licensee of the time and place of the hearing . . ..

Section 621.110, RSMo 1994. The Board followed the statutory requirements and notified Dr. Tendai of the time and place of the hearing. The ***Notice of Disciplinary Hearing*** was hand-delivered and personally served on Dr. Tendai by Board Investigator Bryan K. Hutchings on February 29, 2000. (***Notice of Disciplinary Hearing***, Supplement to Record on Appeal, page 68). Dr. Tendai in fact attended the hearing, was represented by counsel, and presented testimony and evidence on his own behalf.

The Administrative Hearing Commission entered its ***Findings of Fact and Conclusions of Law*** on September 2, 1999. Because the Administrative Hearing Commission found that there was cause to discipline Dr. Tendai's medical license under Section 334.100.2(5), RSMo, the Board notified Dr. Tendai that a disciplinary hearing would be held to consider appropriate disciplinary action and specifically of the time and place of the hearing, as required by Section 621.110, RSMo. (***Notice of Disciplinary Hearing***, Supplement to Record on Appeal, page 65-68). Pursuant to the statutory notice requirement, a disciplinary hearing

was held by the Board on April 28, 2000, at 9:00 A.M. at the Lodge of the Four Seasons in Lake Ozark, Missouri. A true copy of the Board's ***Notice of Disciplinary Hearing*** dated February 25, 2000, is made an exhibit hereto and incorporated by reference herein as though fully set forth. The ***Notice of Disciplinary Hearing*** was personally served on Dr. Tendai by Board Investigator Bryan K. Hutchings on February 29, 2000. (***Notice of Disciplinary Hearing***, Supplement to Record on Appeal, page 65-68).

The Board believes itself to be in full and complete compliance with all applicable procedural law and regulations. Specifically, the Board believes that it is in full compliance with Section 334.100, RSMo, governing the filing of disciplinary actions in the Administrative Hearing Commission. As a further matter, the Board believes itself to be in full and complete compliance with the requirements of Section 621.110, RSMo, (***Commission's findings and recommendations—hearing by agency on disciplinary action***), which governs disciplinary hearings held by the Board after findings of a statutory basis for license discipline against the licensee.

The Board believes that the specific provisions of chapter 334 and chapter 621, RSMO, control and govern the Board's actions, over the general provisions of the Administrative Procedure Act, chapter 536, RSMo. The Board believes that the notice requirements set out in Section 536.067, RSMo, if applicable, were met by the notice provided by the Administrative Hearing Commission at the outset of the Board's action against Dr. Tendai in the Administrative Hearing Commission.

Under the provisions of Section 621.110, RSMo, (Commission's findings and recommendations—hearing by agency on disciplinary action), Dr. Tendai is entitled to notice of the time and place of any disciplinary hearing, which notice has been provided. The specific provisions of Section 621.110 override and supercede any apparent contrary facial requirements of chapter 536.

The Board believes that the specific provisions of chapter 334 and chapter 621, RSMO, control and govern the Board's actions, over the general provisions of the Administrative Procedure Act, chapter 536, RSMo. It is an established rule of statutory interpretation and construction that the specific controls over the general. *Greenbrier Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. 1996); *O'Flaherty v. State Tax Com'n of Missouri*, 680 S.W.2d 153 (Mo. 1984).

The Board believes that all of the procedural requirements provided in chapter 536 were in fact complied with by the procedures followed in the Administrative Hearing Commission. The statutes simply set out separate requirements for the procedures to be followed in Board disciplinary hearings. Chapter 621, RSMO. Those procedures were scrupulously followed in Dr. Tendai's disciplinary hearing. The Court should sustain the Board's ***Disciplinary Order***.

(B.) Open Meetings Law Issues

Dr. Tendai claims that the ***Disciplinary Order*** of the State Board of Registration for the Healing Arts ("the Board") was the product of a closed meeting held in violation of the

Missouri Open Meetings Law, §§ 610.010-610.030, RSMo.[7] Dr. Tendai asserts that closing the disciplinary proceeding at the conclusion of the evidence at his disciplinary hearing, constitutes a violation of the open meetings provision, based on the 1993 legislative amendment to Chapter 610 contained in House Bill 170 which defined the term "public business."

The Missouri Open Meetings Law does not apply to the deliberations of the Board after a disciplinary licensing proceeding has been held. First, the deliberations of the Board are not a "public meeting" as that term is used in §610.010(5) and thus, the deliberations do not fall under the Open Meetings law. Second, the Board is acting in a quasi-judicial function when it conducts disciplinary hearings. When acting in this capacity, the Board should be treated as other adjudicative bodies where the deliberations are properly held in closed session. Finally, even if the Court decides that the Open Meetings Law applies to the Board deliberations, §621.021 contains a statutory exception which allows the Board to go into closed session for deliberations. As to Dr. Tendai's contention that the Board violated Chapter 536, RSMO, by not providing a complete record of the proceedings to the reviewing court, this contention is without merit since the deliberations are not a proceeding or hearing before the Board.

(1). Dr. Tendai Cannot Enforce the Open Meetings Law under Section 536, RSMO

The Open Meeting Law contains a specific statutory procedure for filing a petition to enforce the statute. § 610.027, RSMo 1994; § 610.030, RSMo 1994. In the present case,

[7] All statutory references are to RSMo 1994 unless indicated otherwise.

Dr. Tendai chose not to file a petition to enforce the Open Meetings Law under § 610.030, RSMo 1994. Instead, Dr. Tendai merely filed a petition to review the actions of the Board and the AHC under the provisions of the Administrative Procedure Act, Chapter 536, RSMo 1994. Therefore, the appeal of the alleged failure of the Board to follow the requirements of the Open Meetings Law has only the status of any other garden variety procedural requirement, virtually all of which can be waived if not timely raised in the administrative agency. The statute only provides that agency action can be voided on a petition to enforce the Open Meetings Law. § 610.027.4, RSMo 1994. Dr. Tendai has filed no such action.

This is not an action seeking judicial enforcement of the Open Meetings Law pursuant to § 610.027, RSMo 1994. That statute has never been cited by Dr. Tendai as the basis of his petition for review of the Board's Order revoking his license. This is merely an appeal of a Board disciplinary order pursuant to Chapter 536 by a doctor anxious to find any technical basis to upset the Board's Order disciplining his license. Even so, under the terms of the statute and case authority, agency action done in violation of the Open Meetings Law is merely voidable, not void.[8] *State ex rel. Churchill Truck Lines, Inc. v. Public Service Commission*, 555 SW. 2d 328, 337 (Mo. App. W.D. 1977).

(2). <u>The deliberations of the Board in a disciplinary hearing are not a public meeting subject</u>

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[8]*See*, § 610.027.4, RSMO 1994, which requires the court to determine whether agency action should be voided because of the violation of the Open Meetings Law after weighing the public and private interests involved.

to the Open Meetings Law

It has been consistently found that a licensing board's deliberative process is not a "public meeting" under the statutory construction or intendment of Chapter 610, RSMo and may, therefore, be closed.

(a) *Christiansen v. State Board of Accountancy* has not been superseded by statute

In *Christiansen v. State Board of Accountancy*, 764 S.W.2d 943 (Mo. App. W.D. 1988), the Court held that licensing disciplinary proceedings are not subject to the provisions of the Sunshine Laws. The *Christiansen* Court stated that "any [sic] licensing agency can conduct closed meetings when such meetings pertain to disciplinary matters. Such meetings are not within the prescription of Chapter 610." *Id*. at 951.

Dr. Tendai contends that *Christiansen* has been superseded by statute, specifically the adoption in 1993 in House Bill 170 of a statutory definition of the phrase "public business" in §610.010(3), RSMo defining the term to include "all matters which relate in any way to the performance of the public governmental body's functions or the conduct of its business." Dr. Tendai claims that since "public business" was not expressly defined previously, there existed a basis for the Court in *Christiansen* to conclude that a licensing disciplinary proceeding is not a "public meeting," under then §610.010(3), RSMO 1986.[9] Dr. Tendai now suggests that the

[9] Under 1993 Amendments, the definition of "public meeting" was moved from §610.010(3) to § 610.010(5). The definition itself did not change except for the addition of the phrase "whether corporeal or by means of communication equipment." This phrase

newly established “public business” definition under § 610.010(3), RSMo Supp. 1993, broadens the definition of “public meeting” under § 610.010(5), RSMoSupp. 1993, and requires that the deliberation portion of a licensing disciplinary proceeding must now be open.

This argument is unpersuasive for two reasons. First, Dr. Tendai fails to state how the express definition of “public business” expands its plain and ordinary meaning. Courts traditionally give words their plain and ordinary meaning when used in a statute, unless there is an express definition provided. *See, Brownstein v. Rhomberg-Haglin & Assoc., Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992). There is nothing in the express statutory definition of "public business" which goes beyond the plain meaning of the phrase. The Court in *Christiansen* understood the plain meaning of the phrase "public business" as used in the statutory definition of "public meeting." And with that understanding the Court found that the deliberations of a licensing board after a disciplinary hearing did not fall within the provisions of the Open Meetings Law. The addition of the statutory definition of "public business" has not changed the holding in *Christiansen*. Thus, this Court should follow the precedent set in *Christiansen* and find that the deliberations of the Board are not subject to the provisions of Chapter 610.

Second, *Christiansen* states it is “understood that Chapter 610 insures to the public open proceedings (except for noted exceptions) of acts by governmental bodies, unless otherwise provided by law.” 764 S.W.2d at 950. Some licensees have pointed out that one of the principal activities of the Board is the disciplining of physicians’ licenses. The Board

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has no bearing on the issue at hand.

agrees that this is one of its principal responsibilities. Yet under *Christiansen*, this reading does not mean such acts fall under the purview of Chapter 610, RSMo. The fact that the legislature has now clarified the meaning of the term "public business" as it appears in the definition of "public meeting" should not change the *Christiansen* holding. Can it really be contended that the licensing and disciplining of physicians under § 334.100.2, RSMo, was not part of the business of the Board prior to the 1993 amendment? Was not the Board a public entity prior to the 1993 amendment? Surely, absent a clear showing that the legislature intended to greatly expand the "public business" definition, which Dr. Tendai has failed to make, there is no basis to contend that *Christiansen* is now superseded.

(b) *Christiansen* has not been changed by the decision in *Kansas City Star v. Fulson*

It has been argued by some that *Kansas City Star Co. v. Fulson*, 859 S.W.2d 934 (Mo. App. W.D. 1993) has somehow superseded the holding in *Christiansen*. The Court in *Kansas City Star* found that the term "public business" as used in the definition of "public meeting" was not defined by case law or statute. *Id*. at 940.[10] The Court went on to find that "public business encompasses those matters over which the public governmental body has supervision, control, jurisdiction or advisory power." *Id*. at 940. The Court did not overrule the holding in *Christiansen*. It simply gave the phrase "public business" its plain and ordinary meaning. Again, such statutory construction by the Court is consistent with the holding in *Christiansen*. It does nothing to change the holding that deliberations of a licensing Board are not subject to

[10] The decision in this case was issued before House Bill 170 became effective.

the Open Meetings Law and thus, the deliberations can be held in closed session. Additionally, this case is distinguishable from *Christiansen* for three reasons. First, *Kansas City Star* deals with the members of the Kansas City School Board as opposed to one of the eighteen licensing agencies identified in § 621.045, RSMo that must follow explicit procedures outlined in that statute before disciplining a license. Second, the case involves the question of whether an interpersonal workshop constituted a public meeting as opposed to the question of disciplinary licensing proceedings. Third, the case involves harmonizing two portions of the same statutory provision ("public business" versus "informal gathering") as opposed to the application of the scope of Chapter 610, RSMo Therefore, *Kansas City Star* is also inapposite to this appeal.

(3). The Board was justified in deliberating in closed session since it was acting in its quasi-judicial function

When the Board conducts disciplinary proceedings, it is operating in a quasi-judicial capacity. In order to carry out its quasi-judicial function, the Board must be allowed to act in a manner similar to courts and other judicial bodies. This includes the ability to conduct deliberations in closed session, since courts and other judicial bodies are not required to deliberate in open session. In May 1997, the Missouri Court of Appeals of the Western District decided *Nasrallah v. State Board of Chiropractic Examiners*, 1996 WL 678640 (Mo.App.W.D. 1996), which is particularly instructive with regard to the quasi-judicial functions of the Board. Although *Nasrallah* was ultimately dismissed by the Missouri Supreme Court and as such might not constitute a binding precedent, the case remains instructive for its

discussion and analysis of the present issue.[11] In *Nasrallah*, a chiropractor argued that a licensing board violated the Open Meetings Law by closing its deliberations after a disciplinary hearing similar to the facts in Dr. Tendai's appeal. Like Dr. Tendai, the chiropractor had relied on case law and statutory changes subsequent to *Christiansen*, supra, to support their position.[12]

The *Nasrallah* Court concluded that based on the quasi-judicial function of the Board, there existed justification, apart from the reasons set forth in *Christiansen*, to close the deliberations. The Court recognized that a licensing board has a number of statutory duties and activities, which "cannot be described as strictly executive, legislative or judicial." *Id*. at 2. However, the Court found it clear that when a licensing board "engages in disciplinary proceedings, once they are authorized by the Administrative Hearing Commission, it is

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[11] The case was transferred to the Missouri Supreme Court. Before it could be decided the parties settled the case. Thus, the Supreme Court did not have an opportunity to decide the issues presented.

[12] *Nasrallah* relied upon *Remington v. City of Boonville*, 701 S.W.2d 804 (Mo.App. W.D. 1985) and the statutory change to the Open Meetings Law which defined "public business." The Court of Appeals found *Remington* to be inapposite because it was concerned with a Board of Zoning Adjustment as opposed to one of the eighteen licensing agencies identified in §621.045 that must file complaints with the Administrative Hearing Commission before disciplining a licensee. The Court found that it did not have to decide whether *Christiansen* had been superseded by statute since it found other justification for the Board to hold closed deliberations.

abundantly clear that the Board is operating in a quasi-judicial capacity." *Id*. at 2.

The Court in *Nasrallah* further pointed out that the Missouri Supreme Court recognized that "executive agencies may exercise 'quasi-judicial' powers that are 'incidental and necessary to the proper discharge of their administrative functions, even though by doing so they at times determine questions of a 'purely legal nature.'" *Id*. at 3 (quoting in part *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982). This is the case even though an administrative agency acting in a quasi-judicial capacity "is not and cannot be a court in a Constitutional sense." *Id*. at 3. In such instances, these executive agencies "are exercising 'adjudicative powers' by ascertaining facts and applying existing law thereto in order to resolve issues. By definition, the term 'adjudicate' means 'to hear and decide judicially.' Thus, when an administrative agency is acting in a quasi-judicial capacity, it is judicially hearing and deciding the matter before it." *Id.* at 3 (citations omitted).

The Court of Appeals explained that while judicial proceedings are usually open, judicial deliberations are not. While the exact origin of closed deliberation cannot be pinpointed, the Court said, the reason is "ancient and is grounded in strong public policy." *Id*. at 3. The Court properly pointed to the importance that all such deliberations be closed because:

> The process of analysis, thoughtful consideration and reaching a decision must be permitted to take place in an atmosphere of peace and privacy, free from the possibility of undue pressure from the presence of partisans. Thoughtful review of evidence and documents, and research of applicable law, is absolutely necessary to sound judicial decision.

Id. at 3.

As has been seen, the State Board of Registration of the Healing Arts is an administrative agency authorized to perform varied duties. However, from the foregoing, it is apparent that when the Board is engaged in disciplining a licensee pursuant to § 334.100 and § 621.110, it is acting in a quasi-judicial capacity and exercising adjudicative power. In such circumstances, the Court of Appeals stated that courts have agreed "with the proposition that where judicial duties and powers are conferred, there is necessarily implied therein the prerogative of carrying out those duties in the way the judiciary traditionally functions" and further, that "such proposition is consistent with a practical application of the Sunshine Law." *Id*. at 4. Thus, harmonizing the statutory framework of the Board with the Open Meetings Law requires that in order for the Board to carry out its statutory duties, it must be allowed to conduct disciplinary deliberations in closed session.

It has been argued by some that the deliberations of the Board is not a "judicial proceeding" that would take it outside of the requirements of Chapter 610, RSMo. That is not the issue. The Board does not dispute that the deliberation is not a "judicial proceeding." The Court of Appeals in *Nasrallah* found that the Sunshine Law is generally applicable to the Board as an "administrative governmental entity created by the . . . statutes of this state." 1996 WL 678640, at 4. The Court states that "even when the Board is operating in a quasi-judicial capacity, conducting hearings, taking evidence, hearing arguments and receiving suggestions, it is still operating in what one court has described as the 'information obtaining' phase of its activities, and it is clear the legislature intended that such phase of the Board's operations be

open to the public." *Id.* at 4. However, when "the Board reaches . . . the 'decision-making' phase of such a proceeding, when it is deliberating, it is engaging in a judicial function." *Id.* The Court found that it is this phase which is properly conducted in closed session. The same considerations "sustaining closed judicial deliberations are applicable to the Board's deliberations." *Id.* The Court recognized that "public deliberations would stifle freedom of debate and independence of thought. To deny that free interchange to the Board would be to defeat the object of the disciplinary proceeding." *Id.* at 4.

Allowing the Board to conduct its deliberation in closed session is the result of examining the statutory authority and duties of the Board in relation to the Open Meetings Law. It is a basic tenet of statutory interpretation that a court has a duty to view statutory provisions in light of all other legislative acts, harmonizing all when possible, and the court has a duty not to construe a statute in a manner which yields an absurdity. *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 397 (Mo. App. W.D. 1994); *Hyde v. City of Columbia*, 637 S.W.2d 251, 262-63 (Mo.App. W.D. 1982). This accurately reflects that the process of deliberation cannot even reasonably be open to the public since it is a "process" as opposed to an "event or an occurrence." *Nasrallah* at 5. The Court in *Nasrallah* properly gave a practical interpretation to the Open Meetings Law in light of the statutory duties of the Board. This interpretation harmonizes provisions of both laws thereby allowing the Board to operate efficiently while still allowing public viewing of those parts of the process that are typically open.

(4) <u>The Board was also Properly Authorized to Close the Deliberations Pursuant to a Statutory</u>

Exception Contained in §610.021

Section 610.021(1), RSMO, 1993, provides an exception to Missouri's Open Meetings Law, as follows:

> Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys.

In the event the Court determines that the deliberations of the Board in a licensing disciplinary proceeding are within the purview of Chapter 610, RSMo, the above statutory exception provides a basis for closing the deliberations. As stated, words are given their plain and ordinary meaning when used in a statute. *Brownstein*, supra. Here, a licensing disciplinary proceeding is a legal action (or cause of action) involving a public governmental body and confidential or privileged communications between that body and its attorney. In this context, the deliberations involve communications between the Board and its attorney during the deliberative process. This attorney is not the same one who serves as the Board's attorney in presenting the Board's case-in-chief at the hearing, but rather this is a separate attorney who serves as the Board's legal adviser to consult with the Board on questions of law and fact that may arise during deliberations. Examples of such reliance include questions of whether a disciplinary measure could be viewed as arbitrary or capricious; whether or not a finding of fact may be viewed as sufficient and competent evidence, the weight that should be given to a particular piece of evidence, and the admissibility of evidence.

The Board points out that a licensee has the right under § 536.070, RSMO, to have evidence, which was objected to and sustained, nonetheless be heard and preserved in the record and that it is not unreasonable to assume that the Board may need the guidance of counsel on this matter or the others listed above. Surely, such communications between the Board and its counsel are privileged or confidential. To force such discussions to be viewed in a public proceeding would have a chilling effect on the ability of the Board to have a frank and open discussion with counsel. Board members may be hesitant to ask certain questions less they are thought of as appearing to be ignorant of the process. Furthermore, the Board's counsel may be reluctant to give a frank answer for concern that it would disclose information in other matters or instances that are closed by statute.

(5) Since the Deliberations of the Board are Not Required to be Held in Open Session, the Board Properly Filed the Record with the Reviewing Court Pursuant to Chapter 536, RSMo.

Dr. Tendai's claim that the Board violated Chapter 536, RSMo, by filing an incomplete record with the reviewing Court, is without merit. Dr. Tendai claims the record is incomplete since the Board did not file a transcript of the deliberations. The Board filed the entire record of all proceedings before the Board at Dr. Tendai's disciplinary hearing. The deliberations of the Board do not fall within the prescription of Chapter 536 since it has been shown that the deliberations are not a proceeding before the Board. The reviewing Court has a record upon which to decide whether the decision of the Board was an abuse of discretion; that is, the Findings of Fact, Conclusions of Law and Disciplinary Order of the Board. Additionally, the Court has the transcript from the disciplinary hearing where Dr. Tendai was given the

opportunity to put on evidence pursuant to §621.110, RSMo. Dr. Tendai's claim that the Board violated Chapter 536 is without merit.

(6) Circuit Court Rules that interest of the public in having the Board promptly and appropriately discipline Missouri physicians outweighed the public's interest in having the Board's deliberations conducted in an open meeting

In its ***Order and Judgment on Petition for Review Under Chapter 536.100, RSMo***, the Circuit Court held that the Open Meetings Law had not been violated. Further, the Circuit Court ruled pursuant to the provisions of Section 610.027.4, RSMo 1994, that the interest of the public in having the Board promptly and appropriately discipline Missouri physicians outweighed the public's interest in having the Board's deliberations conducted in an open meeting, assuming that the Open Meetings Law would require such a result. (L.F. 01983, 01985-86 (paragraph 7)) Although a judicial review of administrative action typically is considered to be a review of the underlying administrative action and not a review of a lower court's action, in this case this Court is effectively reviewing the action of the Circuit Court as to the Open Meetings Law issues. The Board believes that the Circuit Court correctly held that the interest of the public in having a physician promptly and appropriately disciplined outweighs the public's interest in having the Board's deliberations conducted in an open meeting.

(7) Legislature passes bill to allow deliberations of licensing boards in closed session

It appears that the issues raised related to the Open Meetings Law have been mooted by the passage by the Legislature and signing by the Governor on July 11, 2001, of House Bill

No. 567, which amends the Open Meetings Law (as Section 620.010.14(8)) to provide that professional licensing boards may conduct deliberations and voting in licensing disciplinary cases in closed session. If the issues in the present case have not been mooted, at least the passage of House Bill No. 567 may be considered to provide guidance as to the intent of the Legislature in passing the questioned 1993 amendments to the Open Meetings Law. Clearly, it was the intent of the Legislature that deliberations in Board discipline cases be conducted in closed session.

(8) Conclusion regarding Open Meetings Law Issues

The Board properly conducted Dr. Tendai's disciplinary hearing and properly held its deliberations in closed session. The deliberations are not subject to the Open Meetings Law or alternatively, there exists an exception under which the Board could hold the deliberations in closed session. Dr. Tendai's Open Meetings Law claim is without merit. This appeal is not an action seeking judicial enforcement of the Open Meetings Law pursuant to § 610.027, RSMo 1994, which statute has never been cited by Dr. Tendai as the basis of his petition for review of the Board's Order revoking his license. This appeal is merely an appeal of a Board disciplinary order pursuant to Chapter 536. Even so, under the terms of the statute and case authority, agency action done in violation of the Open Meetings Law is merely voidable, not void. The Circuit Court correctly held that the Board did not violate the Open Meetings law in conducting its deliberations in closed session. The Circuit Court further held that any interest on the part of the public in having an open meeting was outweighed in this case by the public's interest in having an efficient disciplinary system for

Missouri physicians. The Circuit Court was correct on both counts and this Court should affirm the Circuit Court's rulings. In any event, it appears that the Legislature has now amended the statute to specifically provide that Board disciplinary deliberations may be held in closed session. Therefore, it appears that this issue is moot.

iv. Summary and Request for Relief

The Administrative Hearing Commission found multiple grounds for disciplining Dr. Tendai based on substantial and competent evidence. The decision reached by the Commission was in full accordance with Missouri law and procedure and was not arbitrary, capricious or unreasonable. The Commission did not abuse its discretion. In imposing discipline upon Dr. Tendai's medical license, the Board of Healing Arts followed all rules regarding notice and fair hearing as promulgated by applicable Missouri statutes. The Board's Disciplinary Order was based on substantial and competent evidence. In addition, the Board properly closed its deliberations on Dr. Tendai's case. The Board in doing so did not violate the Missouri Open Meetings Law, §§ 610.010-610.030, RSMo 1994.

This Court should affirm the Findings of Fact and Conclusions of Law of the Administrative Hearing Commission, affirm the disciplinary action of the Board of Healing Arts, and deny Dr. Tendai's appeal.

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I hereby certify that a one copies of the foregoing and one copy of the disk required by

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Special Rule No. 1, Respondent hereby certifies that this brief complies with the limitations contained in Special Rule No. 1(b) and that, according to the word count feature in WordPerfect, the entire brief contains 19,418 words. Respondent further certifies that, pursuant to Special Rule No. 1(f), it is filing with this brief a computer disk which contains a copy of the above and foregoing brief, which was prepared using WordPerfect 8.0, and Respondent also certifies that the disk has been scanned for viruses and is virus-free.

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