IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

Appeal No. SD29088

ROGER WORLEY,
Appellant,

vs.

RONALD HOFFMAN, et al.
Respondents.

Appeal from the Circuit Court of Greene County, Missouri
The Honorable Charles David Darnold
Case No. 31104CC2668

RESPONDENT'S BRIEF

Paul F. Sherman
Missouri Bar No. 34048
Mann, Walter, Bishop & Sherman, P.C.
1108 E. Walnut
P.O. Box 1072
Springfield, Missouri 65801-1072
Phone: (417) 877-9138
Facsimile: (417) 877-0469
E-mail: pfs@mannwalterlaw.com
ATTORNEYS FOR RESPONDENTS

(Oral Argument Requested)

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JURISDICTIONAL STATEMENT

Respondents challenge this Court's jurisdiction to entertain this appeal, or parts thereof, for the reasons that Appellant's "Introduction and Jurisdictional Statement" is deficient and fails to comply with Missouri Rule 84.04(b) in that it contains bare recitals, argument and draws conclusions concerning matters not preserved and first raised only in subsequent amendments in the Circuit Court. Further, Respondents challenge the sufficiency of Appellant's Points Relied On in that the points do not state "wherein and why" the Respondent Board's action was error in accordance with Missouri Rule 84.04(d). Specifically, Appellant starts at Point I which begins "The circuit court erred . . .". No action or specific ruling by the Board is set forth, nothing is properly preserved for review, and the bare allegations that the trial court or the Board erred is plainly inadequate. *Thermmel v. King*, 570 S.W.2d 679, 685 (Mo. 1978). Moreover, Appellant's "Introduction and Statement of Facts" is not "fair and concise" as required by Missouri Rule 84.04(c), contains bare assertions, mis-numbering confusion, rambling narration and argument for 17 pages. Additionally, the Transcript of Proceedings conducted before the Hearing Examiner, Judge Dennis Budd, constituting seven volumes of proceedings taking place on seven separate dates, is wholly absent and not contained in Appellant's Legal File. L.F. "000047, 000112;" Appendix pp. A52-A53, A1-A2. This was Appellant's duty, therefore Appellant preserves nothing for appeal. *Olsen v. Liberty Group Missouri Holdings, Inc.*, 250 S.W.3d 720, 721 (Mo. App. W.D. 2008); *Krastanoff v. Williams*, 231 S.W.3d 205, 207 (Mo. App. E.D. 2007); *Collins v. State of Missouri*, 226 S.W.3d 906, 913 (Mo. 2007); *Powell v. Powell*, 250 S.W.3d 831, 832 (Mo. App.

W.D. 2008). Respondents therefore do not adopt Appellant's "Introduction and Jurisdictional Statement" and request this appeal be dismissed for failure to comply with Rules 81.12 and 84.04(b), (c) and (d). *Rushing v. City of Springfield*, 180 S.W.3d 538, 540-41 (Mo. App. S.D. 2006); *The Firm Entertainment Group, LLC v. City of St. Louis, et al.*, _____ S.W.3d _____ (Case No. ED91291) (Mo. App. E.D. – filed 11/25/08) ("A party's failure to substantially comply with Rule 84.04 preserves nothing for appellate review and is insufficient to invoke our jurisdiction.").

Respondents do agree Section 536.140, RSMo. defines the scope of appellate review, Greene County is within Section 466.060, RSMo. and that this Court does not review the Order and Judgment of the Circuit Court attached to Appellant's Notice of Appeal, but Respondents make no further comment concerning the sufficiency of Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Respondents object to Appellant's Statement of Facts and the seven (7) volume Legal File ultimately filed by Appellant herein on August 4, 2008, for the Appellant's failure to number consecutively as required by Rule 81.14 in that the pages are confusingly bates-stamped twice, three times where scratched out. Further, Rule 84.04(c) and (i) requires Appellant set forth "fair and concise" statements of fact with "citation to specific page references to the record on appeal . . .". *Covington v. Better Business Bureau*, 253 S.W.3d 95, 97 (Mo. App. E.D. 2008). Failure to comply with Rule 84.04 preserves nothing for review and is inadequate to invoke the jurisdiction of this Court. *Ward v. United Engineering Co.*, 249 S.W.3d 285, 288 (Mo. App. E.D. 2008).

For example, without belaboring the matter, at Statement of Facts Number 3 Appellant cites to "R. 573*ff*; R. 99" which for "R. 573" is actually number-stamped "000505, 000573" (Vol. III of VII) "000573, 000641" (Vol. IV of VII) and for "R. 99" is actually number-stamped "000099, 000161" (Vol. I of VII) [Halfaker curriculum vitae] and appears to have nothing to do with Statement Number 3. This confusion is repeated throughout Appellant's Statement of Facts.

At other places the Appellant's Statement of Facts is argument, such as at Number 9 where Appellant cites to "R. 573" again, plus "R. 1018" (Appellant's Second Amended Petition) and "R. 1034" (Answer) and makes no effort to cite this Court to the actual "Policemen's and Firemen's Pension Plan" Section 2-473 (non-duty) and 2-474 (duty), bates-stamped "000518, 000586". More argument is apparent throughout, such as Number 12 reference to Asst. City Attorney Yendes by reference the Second Amended

Petition and Answer again, "R. 1019; R. 1035." Even so, as confusingly mis-numbered and mis-cited as Appellant's Statement of Facts appears, nowhere therein is there any citation by Appellant to any objection ever raised before either the Hearing Examiner Budd or the Board to Asst. City Attorney Carl Yendes' services as the Board's attorney and authorized legal advisor. See "Policemen's and Firemen's Pension Plan" at Section 2-454, L.F. "000508, 000576" which provides "The city attorney or assistant city attorney shall act as legal advisor of the board of trustees." Moreover, the Administrative Hearing transcripts themselves are not provided.

At page 8 of his Brief Appellant also adds argument to his facts entitling "Due Process Violation", at page 12 "The Legal Standard for "Duty-Related"" and at page 13 where Appellant improperly commences argument on "The Board of Trustees' Decision."

Without waiving objection, these Respondents see no benefit to this Court in rewriting Appellant's 17 pages of his "Statement of Facts." However, pursuant to Missouri Rule 84.04(f), Respondents do make the following additions, corrections and modifications of the "Statement of Facts" submitted by Appellant.

Parties did agree and filed "Stipulation of Facts and Admissibility of Evidentiary Items" with Hearing Examiner Budd. L.F. "000099, 000037" through L.F. "000039, 000101."

The Board did "[a]fter reviewing the decision of the hearing examiner and the record in this matter . . ." issue its "Findings of Fact, Conclusions of Law and Decision of

the Board of Trustees" dated May 13, 2004. L.F. "000001, 000063" through "000024, 000086."

The Board is authorized and did reject Hearing Examiner Budd's Decision. See Section 2-449(d) at L.F. "000506, 000574;" L.F. "000001, 000063." The Board's findings, conclusions and Decision speaks for itself. L.F. "000001, 000063" through "000024, 000086."

Regarding Asst. City Attorney Carl Yendes, there was no objection raised, nor record ever made or preserved, against his proceeding as attorney on behalf of the Board or before Hearing Examiner Budd at any time. L.F. "000001, 000063" through L.F. "000036, 000098." Appellant's original "Petition" and "Petitioner's First Amended Petition for Judicial Review of the Record" to the Circuit Court make no mention nor any claim of any violation by or about or concerning Asst. City Attorney Carl Yendes' representation of or before the Board. L.F. "000001, 000010" through "000030," "000037" through "000040." Board counsel provided the Board on March 11, 2004 the exhibits admitted and the transcripts of the Administrative Hearing (Vols. I-VII). Appendix pp. A1-A2. However, the Administrative Hearing transcripts are not included in Appellant's Legal File Volumes I-VII herein, further complicating and adding to the deficiencies of Appellant's Legal File the lack of a transcript. L.F. "000047, 000112;" Appendix pp. A52-A53.

Appellant argues further at subpart 20 in his "Introduction and Statement of Facts" with reference to the Circuit Court case that on April 8, 2004, that Asst. City Attorney Yendes "presented argument to the Board of Trustees on Mr. Worley's case," "Yendes'

arguments," at subpart 21 and at subpart 22 "additional evidence." Over Respondents' objection, the Circuit Court did allow discovery with interrogatories to which Board Members provided answers that no discussion outside the record occurred. Appendix pp. A3-A51.

Dr. Rice evaluated Appellant on whether he was disabled or not, and, if so, was the disability pre-existing or work-related. L.F. "000182, 000245." Dr. Rice found Appellant's concrete thinking and insight "is the key to the problems he recurrently has." L.F. "000198, 000261" through "000199, 000262." His disability was not due to his work but was a cognitive disorder. L.F. "000200, 000263." Dr. Rice opined Appellant's depression and anxiety were secondary to his cognitive disorder, not work-related but "the way he was born." L.F. "000206, 000269." If he did not have cognitive problems he would not have other problems. L.F. "000222, 000285." He compared it to a person with a learning disorder not knowing until they are asked to read. Police work exposed his condition, but did not cause it. L.F. "000226, 000289."

Dr. Halfaker evaluated Appellant to be depressed, anxious and on a clinical scale elevated sensitivity "to criticism and often attributes malevolent intent to benign situations." L.F. "000075, 000137." He diagnosed Appellant to have obsessive-compulsive personality disorder. L.F. "000087, 000149." He is very detail-oriented, rigid and hard on himself. L.F. "000077, 000139." Dr. Halfaker testified Appellant's "personality disorder is developed from a young age . . . you would not develop those traits in response to the stress of work. It would be something that was present prior to that." L.F. "000093, 000155." His personality characteristics were pre-existing with

Appellant doing everything to control and avoid negative feedback. L.F. "000083, 000145."

Dr. Neal spent one (1) hour with Appellant. L.F. "000365, 000429." He testified Appellant's condition could be an idiosyncratic response from Appellant to reasonable supervision. L.F. "000374, 000438." Dr. Neal was not asked, nor did he make a formal diagnosis of Appellant's disorder or condition. L.F. "000441, 000504." Dr. Kuich did not testify. L.F. "000037-000040," 000099-000102," "000049-000062."

Examples of such conduct by Appellant appear throughout the testimony transcript record not provided by Appellant. For example, "ticket-stacking" for a citizen violating a stop sign. On another occasion writing tickets in front of the Municipal Court while on break. He had a personal ticket goal of writing the most tickets. His judgment and demeanor were the subject of many complaints. L.F. "000008, 000070," "000010, 000072."

STANDARD OF REVIEW

The scope of appellate review in contested cases is defined by Section 536.140, RSMo. This presents limited jurisdiction and judicial review the exclusive remedy. *Deffenbaugh Ind. Inc. v. Potts*, 802 S.W.2d 520, 522-23 (Mo. App. W.D. 1990). Included in review pursuant to Section 536.140 is that the Board's decision is reviewed, not the judgment of the circuit court. *Chipperfield v. Missouri Air Conservation Commission*, 229 S.W.3d 226, 234 (Mo. App. S.D. 2007). On appeal the Board's Decision will be affirmed "unless it is unsupported by competent and substantial evidence upon the whole record; is arbitrary, capricious or unreasonable; or constitutes an abuse of discretion." Id. at 234. There is deference in Section 536.140, RSMo. to the Board's decisions (review of the evidence in light most favorable to the decision) and the admonition that this Court may not substitute its judgment for that of the Board. Appellate review is, however, "limited to preserved errors only as defined in the petition for review before the circuit court." Id. (citations omitted). The Respondent Board believes its lawful Decision was based on the evidence and inferences arising therefrom with the competent and substantial evidence presented.

POINTS RELIED ON

POINT I

(ANSWERING POINT I)

THE CIRCUIT COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST APPELLANT ON SECOND AMENDED PETITION FOR REVIEW UNDER CHAPTER 536 AND DENYING APPELLANT A DUTY-RELATED DISABILITY BECAUSE THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD AND AUTHORITY TO SUPPORT THE BOARD'S DECISION, IN THAT:

1. THIS APPELLATE COURT REVIEWS THE BOARD'S DECISION, NOT THE JUDGMENT OF THE CIRCUIT COURT; SO THAT POINT I SHOULD BE DISMISSED AS IMPROPER AND WITHOUT JURISDICTION;

2. APPELLANT FAILED TO OBJECT AT FIRST OPPORTUNITY, DESIGNATE SPECIFICALLY AND PRESERVE A PURPORTED DUE PROCESS VIOLATION FOR JUDICIAL REVIEW;

3. MULTIPLE ROLES OF THE BOARD'S ATTORNEY WERE AUTHORIZED, PROPER AND AFFORDED APPELLANT JUDICIAL REVIEW INTO THE CIRCUIT COURT.

Fleming Foods v. Runyan, 634 S.W.2d 183, 192 (Mo. en banc 1982)

Cochran v. Board of Education of Mexico School District No. 59, 815 S.W.2d 55, 61 (Mo. App. E.D. 1991)

Rose v. State Board of Registration, 397 S.W.2d 570 (Mo. 1965)

Anderson v. Missouri Local Government Employees Retirement System, 864 S.W.2d 372, 373 (Mo. App. W.D. 1993)

POINT II

(ANSWERING POINT II)

THE BOARD OF TRUSTEES DID NOT ERR IN REJECTING THE DECISION OF THE HEARING EXAMINER AND DENYING APPELLANT A DUTY-RELATED DISABILITY PENSION BENEFIT BECAUSE THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE RECORD TO SUPPORT THE BOARD'S DECISION AS AUTHORIZED BY SECTION 2-449 OF CITY CODE.

Rushing v. City of Springfield, 180 S.W.3d 538, 540-41 (Mo. App. S.D. 2006)

The Firm Entertainment Group, LLC v. City of St. Louis, et al., ____ S.W.3d ____ (Case No. ED91291) (Mo. App. E.D. – filed 11/25/08)

Missouri Church of Scientology v. State Tax Commission, 560 S.W.2d 837 (Mo. 1977)

POINT III

(ANSWERING POINT III)

THE BOARD OF TRUSTEES DID NOT ERR IN REJECTING THE DECISION OF THE HEARING EXAMINER AND DENYING APPELLANT A DUTY-RELATED DISABILITY PENSION BENEFIT BECAUSE THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE RECORD TO SUPPORT THE BOARD'S DECISION AS AUTHORIZED BY SECTIONS 2-449 AND 2-474 OF CITY CODE.

Chipperfield v. Missouri Air Conservation Commission, 229 S.W.3d 226, 234 (Mo. App. S.D. 2007)

Mitchell v. City of Springfield, 410 S.W.2d 585 (Mo. App. S.D. 1966)

Wall v. Police Pension Board, 533 N.E.2d 458 (Il. App. 1988)

Robbins v. Board of Trustees, 687 N.E.2d 39 (Il. 1997)

ARGUMENT

POINT I

(ANSWERING POINT I)

THE CIRCUIT COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST APPELLANT ON SECOND AMENDED PETITION FOR REVIEW UNDER CHAPTER 536 AND DENYING APPELLANT A DUTY-RELATED DISABILITY BECAUSE THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD AND AUTHORITY TO SUPPORT THE BOARD'S DECISION, IN THAT:

1. THIS APPELLATE COURT REVIEWS THE BOARD'S DECISION, NOT THE JUDGMENT OF THE CIRCUIT COURT; SO THAT POINT I SHOULD BE DISMISSED AS IMPROPER AND WITHOUT JURISDICTION;

2. APPELLANT FAILED TO OBJECT AT FIRST OPPORTUNITY, DESIGNATE SPECIFICALLY AND PRESERVE A PURPORTED DUE PROCESS VIOLATION FOR JUDICIAL REVIEW;

3. MULTIPLE ROLES OF THE BOARD'S ATTORNEY WERE AUTHORIZED, PROPER AND AFFORDED APPELLANT JUDICIAL REVIEW INTO THE CIRCUIT COURT.

1. JUDICIAL REVIEW PURSUANT TO SECTION 536.140, RSMo.

Judicial review begins with the Missouri Constitution at Article V, Section 18. This has been interpreted to require the reviewing Court adhere to the rule of deference to the findings of fact. *Wood v. Wagner Electric Corporation*, 197 S.W.2d 647 (Mo. en

banc 1946). In deciding competent and substantial evidence, the reviewing Court does not substitute its judgment on the facts for the Board's own. *Fleming Foods v. Runyan*, 634 S.W.2d 183, 192 (Mo. en banc 1982). "Arbitrary and capricious" is defined as "arbitrary and unreasonable, where not based on substantial evidence." *Burrows v. County Court of Carter County*, 308 S.W.2d 299, 305 (Mo. App. 1957).

Appellate review is undertaken of the administrative decision, not the judgment of the circuit court. *Klein v. Missouri Department of Health and Senior Services*, 226 S.W.3d 162, 164 (Mo. 2007). The initial administrative decision, such as that made by a hearing examiner, is not the decision reviewed on appeal – the appellate court reviews the ultimate agency decision. *Adamson v. DTC Calhoun Trucking Inc.*, 212 S.W.3d 207, 213 (Mo. App. S.D. 2007). In the instant case this would be the Board's Decision, not the Circuit Court's Judgment.

2. FAILURE TO PRESERVE.

Referencing Section 536.140, RSMo., fundamental to judicial review of constitutionality is the mandatory pre-requisites necessary to preserve same for review. *Beryayiff v. City of St. Louis*, 963 S.W.2d 225, 230 (Mo. App. E.D. 1998) provides: "(1) raise the question at the first opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state facts showing such violation; and (4) preserve the constitutional question throughout for appellate review." In sum, if a party fails to assert his claim at the first opportunity it is not preserved for appeal. Id.

At all times represented by counsel, Appellant never objected to Asst. City Attorney Carl Yendes' role as legal advisor pursuant to Section 2-454, whether before the Board or in any hearing before the Hearing Examiner, Judge Dennis Budd. L.F. "000508, 000576." Note Appellant's initial Petition and Amended Petition to the Circuit Court are wholly without any complaint of Attorney Yendes' role at any time. L.F. "000010" – "000030;" "000037" – "000040." It was not until Appellant's Second Amended Petition before the Circuit Court that Appellant first complained of Attorney Yendes' role as advisor to the Board. L.F. "001020" at 19-20. However, even then and since, at no time has Appellant ever explicitly raised the constitutionality of Section 2-454. L.F. "000508, 000576."

It is well-settled that a claim of error will not be considered by an appellate court unless it was presented and preserved for appeal. *Wagner v. Piehler, M.D.*, 879 S.W.2d 789, 793 (Mo. App. W.D. 1994).

Interestingly, Appellant offers up at page 35 of his Brief the self-serving Affidavit of one of his previous attorneys and his own to support his claim now that the Board's legal advisor was present while the affiants were excluded. These affidavits were provided the Circuit Court, not the Board, for summary judgment purposes. L.F. "001152." Perhaps unintended but more obvious and significant from each is that neither affiant purports therein to have objected to Attorney Yendes' role, at the time of Board Decision or at any time. L.F. "001130" through "001132;" "001124" through "001127." Failure to object constitutes waiver. *Bridges v. State Bd.*, 419 S.W.2d 278 (Mo. App.

1967). These affidavits attest to the veracity of Respondent's assertions that Appellant never objected to Attorney Yendes' role as the Board's legal advisor.

Even if Appellant had objected and preserved, fundamental is that attorney-client communications are privileged. *Upjohn Co. v. United States*, 101 S.Ct. 677, 683 (1981); Section 491.060(3), RSMo. Closed sessions are further authorized by statute. Section 610.021, RSMo. Appellant was allowed discretionary latitude in discovery this issue by the Circuit Court resulting in the Board Member's answers to interrogatories generally that Attorney Yendes did not communicate outside the record. Appendix pp. A3-A51.

Moreover, claimants seeking disability retirement benefits bear the burden of proof. *Anderson v. Missouri Local Government Employees Retirement System*, 864 S.W.2d 372, 373 (Mo. App. W.D. 1993). There is a presumption in favor of the honesty and impartiality of administrative decision makers. *Wagner v. Jackson Co. Board*, 857 S.W.2d 285, 290 (Mo. App. W.D. 1993). In *Anderson*, plaintiff's claim was denied when he failed to prove he injured his back at work while tying his boots but for his prior non-work-related auto accident. Id. at 374. Note the similar line of authorities expressly cited from other jurisdictions and relied on in the Board's Decision itself. L.F. "000020, 000082" through "000022, 000084." Included was *Robbins v. Board of Trustees*, 687 N.E.2d 39, 45 (Il. 1997) where the Illinois Supreme Court held an officer's anxiety over his job performance (which civilians regularly suffer) and was not sufficient to support a duty related disability benefit.

The Board is entitled to a presumption of fairness. *Gamble v. Hoffman*, 732 S.W.2d 890, 895 (Mo. en banc 1987). There is authority to uphold the Board's Decision

even if the Decision itself does not affirmatively state the record was reviewed. *Burgdorf v. Board of Police Commissioner*, 936 S.W.2d 227, 232 (Mo. App. E.D. 1996) (subsequently overruled for unrelated other reason). But it was. L.F. "000024, 000086." If the record was not properly processed, which it was, then the remedy would be to remand the matter back to the Board. *Medvik v. Ollendorff*, 727 S.W.2d 473, 475 (Mo. App. E.D. 1987). Even so, to preserve this as error Appellant Worley would have had to file timely objection with the Board to allow it to take corrective action, but Appellant did not. *Ruffin v. City of Clinton*, 849 S.W.2d 108, 113 (Mo. App. W.D. 1993). Appellant has waived any due process claim.

3. MULTIPLE ROLE PROPER.

Lack of jurisdiction and Appellant's failure to timely object and preserve notwithstanding, multiple roles of the Board's attorney are proper and do not violate due process. *Cochran v. Board of Education of Mexico School District No. 59*, 815 S.W.2d 55, 61 (Mo. App. E.D. 1991). In *Cochran*, the School Board's attorney Leonatti not only investigated but also prosecuted a teacher on the school system's behalf. Leonatti also attended the School Board's closed session while it deliberated taking minutes and offering advice on procedure as the School Board's legal advisor. Afterwards, Leonatti also drafted the proposed findings of fact and conclusions of law. Id. at 59. Leonatti's conduct was found proper and upheld. Id. at 60.

In the instant case Appellant's duty-disability claim began with his application to this Board "on or about September 23, 2002." L.F. "000037, 000099." The transcripts of Appellant's Administrative Hearing (Vols. I-VII) and exhibits admitted were provided

the Board on March 11, 2004. Appendix A1-A2. The Board's Decision specifically recites "after reviewing the decision of the hearing examiner and the record in this matter, the Board of Trustees has decided to reject the decision of the hearing examiner and substitute in its place the following findings of fact, conclusions of law and decision." L.F. "000001, 000063." Same is dated May 13, 2004. L.F. "000024, 000086."

Multiple hats are not unusual in the conduct of municipal affairs. A more recent case along the lines of *Cochran* is *Lewis v. City of University City*, 145 S.W.3d 25 (Mo. App. E.D. 2004). In *Lewis*, the appellate court also reviewed the agency's decision, not the judgment of the trial court. Id. at 29. According to the facts of *Lewis*, one person on behalf of the City of University City both prosecuted and judged the merits of the case. Noted in *Lewis* is that "a combination of roles, by itself, however, is not reversible error for a denial of due process claim, provided the hearing is subject to judicial review." Id. at 31 (citations omitted). Also in *Rose v. State Board of Registration*, 397 S.W.2d 570 (Mo. 1965) is noted "the due process clause does not guarantee . . . any particular form or method of state procedure." Id. at 574.

Appellant's argument in "Overview – Point I" is wholly unsupported by the record in this case, was not preserved and is frivolous. Appellant has received judicial review. Without evidence, or a preserved record for that matter, Appellant nevertheless concludes the role of the Board's legal advisor "constitutes an egregious violation of due process law . . .". Appellant Brief at p. 32. Attorney Yendes' involvement was proper, authorized and occurred in full view of Appellant and his attorneys, whether before the

Hearing Examiner or with the Board, without Appellant's objection. Point I should be denied.

POINT II

(ANSWERING POINT II)

THE BOARD OF TRUSTEES DID NOT ERR IN REJECTING THE DECISION OF THE HEARING EXAMINER AND DENYING APPELLANT A DUTY-RELATED DISABILITY PENSION BENEFIT BECAUSE THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE RECORD TO SUPPORT THE BOARD'S DECISION AS AUTHORIZED BY SECTION 2-449 OF CITY CODE.

At no time has Appellant ever objected or claimed any ordinance of the City was unconstitutional. City Code Section 2-449(d) provides in part that the Board is to "accept, modify or reject the hearing examiner's decision . . .". L.F. "000506, 000574." Where rejected or modified, the Board is to state such reasons for doing so in its decision. L.F. "000506, 000574." This the Board has done. L.F. "000001, 000063" through "000024, 000086." However, Point II makes no reference to the Board's Decision. Appellant's Point II is deficient and non-compliant with the "wherein and why" Rule in that Point II does not identify the legal basis of Appellant's claim of error. Missouri Rule 84.04(d). It appears Appellant claims the Board "based its decision on evidence outside the record failed to review the record" without clarity or conciseness of reference to the record so that Respondent cannot ascertain and is left to guess what Appellant means or intends with Point II.

Much of the argument portion of Point II repeats Point I's reference to Asst. City Attorney Yendes' role, which has been conversed previously and will not be repeated

here. Without any evidence whatsoever Appellant then concludes "[t]he Board's Decision rests entirely on evidence that was not in the record." Appellant's Brief at p. 42. There is no summary or substance with reference to the record, just argument without basis. Point II is insufficient and should be dismissed for failure to comply with Missouri Rule 84.04. *Rushing v. City of Springfield*, 180 S.W.3d 538, 541 (Mo. App. S.D. 2006); *The Firm Entertainment Group, LLC v. City of St. Louis, et al.*, _____ S.W.3d _____ (Case No. ED91291) (Mo. App. E.D. – filed 11/25/08) (points provide no legal reason to support the claim of error).

Appellant's failure to supply the transcript notwithstanding, the case authority Appellant cites in Point II is readily distinguishable and Appellant cites no evidence in the Board's Decision that was not in the record.

Clark v. FAG Bearings Corp., 134 S.W.3d 730 (Mo. App. S.D. 2004) was the appeal of a workers' compensation award. Employer challenged claiming lack of sufficient causation evidence of the cervical injury. Specifically argued were the legal sufficiency of two opinion items found by the Commission to support causation. Id. at 734. No such specificity is referenced or claimed or presented in Appellant's Point II. The Commission's award was found supported by the evidence and affirmed.

In *Davis v. Research Medical Center*, 903 S.W.2d 557 (Mo. App. W.D. 1995) it was again a workers' compensation appeal. Recognizing in *Davis* is that the Court on Appeal reviews the Commission's decision. Id. at 569. Specifically, the Employer challenged the award for a surgery and application of the "treating physician rule." Id. at

560. Again, no such specificity is raised or claimed in Appellant's Point II. The Commission's award was found supported and was affirmed.

Appellant cites to *Knapp v. Missouri Local Government Employees Retirement System*, 738 S.W.2d 903 (Mo. App. W.D. 1987) for appeal by a journeyman lineman denial of his duty disability benefits. Specifically, Plaintiff Knapp had suffered ankle injuries but the decision of the city ignored the medical opinion and adduced no medical evidence of its own. Id. at 913. Again, no such specificity is raised or claimed in Appellant's Point II.

Finally, in *Missouri Church of Scientology v. State Tax Commission*, 560 S.W.2d 837, the church claimed tax exemption which was denied by the Tax Commission with extensive findings and conclusions. Id. at 840. Denial of the tax exemption was affirmed.

Appellant concludes his Point II argument with the statement "[t]he Board of Trustees made no specific finding and could not properly ignore that evidence." (emphasis added). Noteworthy is the deficiency that Appellant makes no effort in his Point II to identify or establish what "evidence" he means to include for his conclusion, again unsupported.

Dr. Tom Kuich did not testify. L.F. "000037-000040," "000099-000102," "000049-000062." Dr. Shawn Rice did testify, but the significance of the purport of "a letter to psychiatrist Dr. Shawn Rice" is unknown and, again, neither preserved nor raised in Point II.

Like the Tax Commission in *Missouri Church of Scientology*, the Board went to great lengths (24 pages) to document its findings, conclusions and Decision. L.F. "000001, 000063" through "000024, 000086." Nowhere in Point II does Appellant make any reference to the contents of the Board's Decision.

For example, the Board's Decision specifically addresses Dr. Rice's psychiatric evaluation of Appellant which found Appellant with a cognitive disorder that was pre-existing and that his concrete thinking caused him difficulties, not the job. L.F. "000016, 000078." His work and environment did not exacerbate Appellant's cognitive difficulties. L.F. "000017, 000079."

Also in the Board's Decision, Dr. Halfaker, a psychologist, testified Appellant possessed many characteristics of an obsessive compulsive disorder, a condition the work environment does not cause. L.F. "000015, 000077." The Board's Decision found the opinions and conclusions of Drs. Rice and Halfaker "to be of substantial weight, credible and persuasive . . .". L.F. "000023, 000085." "Appellant's disability condition was not the direct result of occupational duties, either alone or as an aggravation of an existing condition." L.F. "000022, 000084."

Point II should be dismissed.

POINT III

(ANSWERING POINT III)

THE BOARD OF TRUSTEES DID NOT ERR IN REJECTING THE DECISION OF THE HEARING EXAMINER AND DENYING APPELLANT A DUTY-RELATED DISABILITY PENSION BENEFIT BECAUSE THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE RECORD TO SUPPORT THE BOARD'S DECISION AS AUTHORIZED BY SECTIONS 2-449 AND 2-474 OF CITY CODE.

Section 2-474(a) of Springfield's City Code Retirement Plan Provisions provides in part as follows:

> (a) Any participant, irrespective of length of service, who becomes disabled as the direct result of occupational duties, including but not limited to accidents and or hazards peculiar to the employment, shall, be entitled to a duty disability pension . . . (emphasis added).

In its Conclusions of Law the Board specifically cites Sections 2-474 (Duty Disability) and 2-473 (Non-Duty Disability), as well as 2-441 which defines "disability" as follows:

> "Disability means disability from performing the labor or occupation which the member was following at the time of the accident, sickness or injury, and not some vocation which he might be able to follow after the accident, sickness or injury."

Fundamental to the analysis is that this Court's review is limited to the record made before the agency, not the Circuit Court. *City of Valley Park v. Armstrong*, ____ S.W.3d ____ WL#706503 (Mo. App. E.D. 2008) (citing *McKenzie v. Missouri Department of Social Services*, 983 S.W.2d 196, 198 (Mo. App. E.D. 1998); *Chipperfield* at 229 S.W.3d 234. Abstract statements of error provide nothing for review. *The Firm Entertainment Group, LLC*, Case No. ED91291 (filed 11/25/08).

Appellant has wholly failed to provide this Court the seven (7) volumes of transcript taken and provided the Board. Appendix pp. A1-A2. Once again, Appellant's record is incomplete in this contested case and Point III should be dismissed for matters briefed *supra* herein, failure to follow the rule preserves nothing for review and violations of the rule constitute grounds for dismissal.

Such failures and violations of the rule notwithstanding, Appellant also has the burden of proof to establish by substantial, credible and competent evidence. *Sprague v. City of Springfield*, 641 S.W.2d 814, 820 (Mo. App. S.D. 1982). In *Sprague* the fireman applicant for duty disability claimed his chronic bronchitis was a condition caused by on-the-job inhalation of smoke and noxious fumes. Id. at 815. Denial by the board was affirmed by the trial court and reviewed *ex gratia* on appeal. Id. The City in *Sprague* overcame a statutory presumption urged by the applicant that his bronchitis was duty-related. Further, applicant was held to be required to show his disability was the direct result of his duties. Id. at 818. No such presumption applies to the facts of the instant case and the Board clearly found no direct causal connection between Appellant's duties and his disability. L.F. "000019, 000081."

The court in *Sprague*, Appellant and the Board all cite to *Mitchell v. City of Springfield*, 410 S.W.2d 585 (Mo. App. S.D. 1966). In *Mitchell* a fireman sought a duty disability pension for a heart ailment. The burden of proof on the fireman was greater for the larger benefit of a duty disability, requiring he "go further and show a direct causal connection between his duties and his disability, or, as one case puts it, that his disability occurred because he was a fireman rather than merely while he was a fireman. *Mitchell* at 586 (citations omitted). This was "to reserve the more substantial pension for him who sacrifices his health in the public interest and who, on that account, is the more meritorious object of public concern." Id. In *Mitchell* the physical stress and mental strain of being a fireman for years was the applicant's argument. Denial by the board was affirmed on appeal. Id. at 591.

Specifically in *Mitchell*, as in the instant case, the applicants urged that they were denied a fair hearing and that the record required the board grant them a duty disability "since it involved only the law to the facts." Id. at 588. The appellate court disagreed with the applicants and found no further inquiry necessary since the board's decision was supported by "competent and substantial evidence." Id.

The Board in its Decision in the instant case went further into detail, noting both *Sprague* and *Mitchell* concerned physical, not mental, problems. The Board also considered *Hay v. Schwartz*, 982 S.W.2d 295 (Mo. App. W.D. 1998), a fire marshal's claim for duty disability benefits for anxiety attacks suffered in response to years of covering emergencies. Once again, the fireman applicant had the burden of establishing his entitlement to benefits. Id. at 300. However, the board and district in *Hay* offered no

medical testimony to rebut Hay's claim, the medical was undisputed. Id. at 302. In other words, the credible evidence determination employed by the Board in the instant case was not performed in *Hay*.

In doing so, the Board also looked to other jurisdictions for guidance as well. For example, in *Wall v. Police Pension Board*, 533 N.E.2d 458 (Il. App. 1988) the alleged stress of job was denied because it was not proven unique to law enforcement. *Wall* at 463. The court in *Wall* included facts similar, such as Wall complaining that he was frustrated because his career was not advancing, or that he had difficulty dealing with negativity. Noted by the Court in *Wall* was that "[t]hese complaints are common to any type of employment." Id. at 444-45. The board's denial was affirmed. Another case similar from Illinois, *Robbins v. Board of Trustees*, 687 N.E.2d 39 (Il. 1997) also affirmed denial of duty-related disability. Robbins' anxiety was over his job performance, not over a specific act of duty, so that denial by the board was affirmed. Id. at 542-43. The Board also included Iowa (*Moon v. Board of Trustees*, 548 N.W.2d 565, 568 (IA 1996)). L.F. "000021, 000083."

In response, Appellant cites to *State ex rel. Nance v. Board of Trustees*, 961 S.W.2d 90 (Mo. App. W.D. 1998). In *State ex rel. Nance*, Mr. Nance was a fireman who injured his back while on duty rupturing a disc lifting a 300 lb. person. He had other medical conditions at the time pre-existing so Mr. Nance's claim for duty-related was denied. That board decided the back injury at work was not the "sole" cause of Nance's disability. Id. at 91. However, those facts or facts similar and that finding are nowhere contained in the Board's Decision in the instant case regarding Appellant.

Rather, there was no evidence Appellant was injured in a specific act of duty as a police officer. Quite the contrary, the Board specifically found and decided Appellant's "disabling condition is not a direct result of occupational duties." The Board found Drs. Halfaker and Rice credible and persuasive. L.F. "000023, 000085" through "000024, 000086."

Appellant ignores the record. The evidence presented includes that Dr. Rice found Appellant's concrete thinking a cognitive disorder he was born with, such as one born with a learning disability. L.F. "000198, 000261" through "000199, 000262;" "000226, 000289." Dr. Halfaker adds Appellant is sensitive to criticism because he is possessed from a young age an obsessive-compulsive personality disorder. L.F. "000087, 000149;" "000093, 000155." This explains to the Board Appellant's "ticket-stacking" propensity, his desire to write the most tickets because his judgment is either black or white, his insight is such that he "often attributes malevolent intent to benign situations." L.F. "000075, 000137." There were numerous examples in the evidence of problem ticket instances, chain of command difficulties with Appellant, reassignment, Appellant's attitude and continuing issues upon evaluation. Many are contained in the Board's Decision. L.F. "000005, 000067" through "000014, 000076." Others still are contained in the seven transcripts of the Administration Hearing which Appellant did not include in his Legal File. Appendix pp. A1-A2, A52-A53; L.F. "000112, 000047."

Thus, the Board decided Appellant "failed to meet his burden of proof that his disabling condition was the direct result of occupational duties, either alone or as an aggravation of an existing condition." L.F. "000022, 000084." The Board did find

Appellant disabled, but his disability was not duty-related, and so finding based on competent and substantial evidence should not be disturbed. Appellant's disability was caused or occasioned from a young age and did not occur because or from a specific act of duty as a policeman. Rather, his disability was revealed while he was a policeman for the City, hence not duty-related.

CONCLUSION

There was competent and substantial evidence to support the Board's Decision denying Appellant a duty-related disability. For all of the reasons foregoing and contained in this Board's Decision the Board and these Respondents pray this Court affirm the Board's Decision.

Respectfully submitted,

MANN, WALTER, BISHOP & SHERMAN, P.C.

By: _____

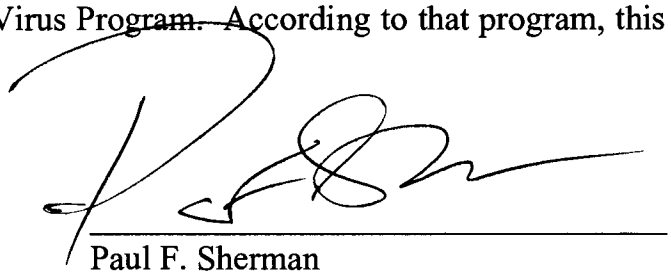
Paul F. Sherman, #34048
P.O. Box 1072
1108 E. Walnut
Springfield, MO 65801-1072
Phone: (417) 877-9138
Facsimile: (417) 877-0469
E-mail: pfs@mannwalterlaw.com
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I, Paul F. Sherman, hereby certify as follows:

The attached Brief complies with the limitations contained in Supreme Court Rule 84.06(b). The Brief was completed using Microsoft Word for Windows in Times New Roman, size 13 font. This certifies that this document contains 6,834 words and 636 lines of text, excluding the cover page, this Certificate of Compliance with Rule 84.06(c), the Certificate of Service, the signature block and Appendix, not exceeding this Court's limit of 27,900 words and 1,980 lines of text.

The floppy disk filed with this Brief contains a copy of this Brief. It has been scanned for viruses using Symantec AntiVirus Program. According to that program, this disk is virus-free.

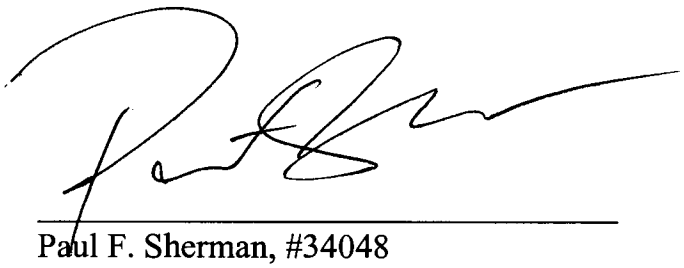


Paul F. Sherman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the attached Brief and a floppy disk containing a copy of this Brief were mailed, postage prepaid, on the 11th day of December, 2008 to:

David J. Moen, Esq.
David J. Moen, P.C.
613 East McCarty Street
Jefferson City, MO 65101
ATTORNEYS FOR APPELLANT



Paul F. Sherman, #34048
Attorneys for Respondents