

.....

SUPREME COURT OF MISSOURI

.....

JUSTIN D. O'BRIEN

Petitioner/Appellant,

vs.

SANDY KARSTEN
Director, Department of Public Safety

Respondent.

.....

Case No. SC97656

.....

APPELLANT'S BRIEF

.....

David F. Barrett
Attorney at Law
Missouri Bar No. 43781
P.O. Box 104151
Jefferson City, MO 65110
(573) 340-9119
Fax: (573) 636-1003

dfbarrett@outlook.com

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

Table of Contents.....	2
Table of Cases, Statutes and Other Authorities.....	4
Jurisdictional Statement.....	7
Statement of Facts	8

Points Relied On:

Point I The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O’Brien, because an administrative agency’s determination that an individual committed a criminal offense violates the Separation of Powers provisions of the Missouri Constitution (Article II, §1), reviewable under § 536.140.2(1) RSMo., in that the determination of culpability for a criminal offense must be conducted before the judiciary and not administrative agencies. 14

Point II The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O’Brien, because the decision is unsupported by competent and substantial evidence upon the whole record, reviewable under § 536.140.2(3) RSMo., in that professional discipline is not punishment and there is uncontroverted evidence in the record that O’Brien’s prior service, psychological rehabilitation, and knowledge, skills and abilities make him fit to continue in the profession. 14

Argument 15

Conclusion 29

Certification	29
Certificate of Service	30
Appendix	

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases:

<u>Barry Service Agency Co. v. Manning</u> , 891 S.W.2d 882 (Mo. App. W.D. 1995)	25
<u>Bird v. Mo. Bd. of Architects, Prof'l Eng'rs, Prof'l Land Surveyors & Landscape Architects</u> , 259 S.W.3d 516 (Mo. banc 2008)	24
<u>Blue Springs Bowl v. Spradling</u> , 551 S.W.2d 596 (Mo. banc 1977)	20
<u>Boyd v. State Bd. of Reg'n for the Healing Arts</u> , 916 S.W.2d 311 (Mo. App. E.D. 1995)	14, 24
<u>Carpenter v. State Bd. of Nursing</u> , 508 S.W.3d 110 (Mo. banc 2016).....	9
<u>City of Springfield v. Belt</u> , 307 S.W.3d 649 (Mo. banc 2010)	14, 17, 18
<u>In re: Dyer</u> , 163 S.W.3d 915 (Mo. banc 2005).....	17
<u>Gard v. State Bd. of Reg'n for the Healing Arts</u> , 747 S.W.2d 726 (Mo. App. W.D. 1988)	14, 26
<u>State ex rel. Gibson v. Missouri Board of Chiropractic Examiners</u> , 365 S.W.2d 773 (Mo. App. E.D. 1963)	16
<u>Hampton v. Big Boy Steel Erection</u> , 121 S.W.3d 220 (Mo. banc 2003)	23
<u>State ex rel. Haughey v. Ryan</u> , 182 Mo. 349, 81 S.W. 435 (1904)	20
<u>Hill v. Boyer</u> , 480 S.W.3d 311 (Mo. banc 2016)	15
<u>Hink v. Helfrich</u> , 545 S.W.3d 335 (Mo. banc 2018).....	15
<u>Jennings v. Kansas City</u> , 812 S.W.2d 724 (Mo. App. W.D. 1991)	25
<u>Johnson v. Missouri Bd. of Nursing Adm'rs</u> , 130 S.W.3d 619, 627 (Mo. App. W.D. 2004)	18, 22

<u>Marbury v. Madison</u> , 1 Cranch (5 U.S.) 137 (1803)	20
<u>Mo. Bd. of Reg'n for the Healing Arts v. Levine</u> ,	
808 S.W.2d 440 (Mo. App. W.D. 1991)	25
<u>Mo. Dept. of Public Safety v. Dameron</u> , 161 S.W.3d 411 (Mo. App. W.D. 2005)	22
<u>Mo. Real Estate Comm. v. Berger</u> , 764 S.W.2d 706 (Mo. App. E.D. 1989)	18, 21
<u>Mo. Real Estate Comm. v. McCormick</u> , 778 S.W.2d 303 (Mo. App. S.D. 1989)	24
<u>Perry v. City of St. Louis Civil Service Commission</u> ,	
924 S.W.2d 861 (Mo. App. E.D. 1996)	24
<u>Sandstrom v. Montana</u> , 442 U.S. 510 (1979)	18, 21
<u>Slay v. Slay</u> , 965 S.W.2d 845 (Mo. banc 1998)	14, 17
<u>State Tax Com'n v. Administrative Hearing Com'n</u> ,	
641 S.W.2d 69 (Mo. banc 1982)	14, 19
<u>State v. Erwin</u> , 848 S.W.2d 476 (Mo. banc 1993)	18, 21
<u>State v. Evans</u> , 439 S.W.2d 170 (Mo. 1969)	18, 21
<u>State v. Shanklin</u> , 534 S.W.3d 240 (Mo. banc 2017)	15
<u>State v. Vaughn</u> , 366 S.W.3d 513 (Mo. banc 2012)	15
<u>Tap Pharmac. Prod. v. State Bd. of Pharmacy</u> , 238 S.W.3d 140 (Mo. banc 2007)	17
<u>Wasem v. Missouri Dental Board</u> , 405 S.W.2d 492 (Mo. App. E.D. 1966)	14, 24, 25
<u>Wolff v. State Board of Chiropractic Examiners</u> ,	
588 S.W.2d 4 (Mo. App. E. D. 1979)	16
Statutes:	
§ 161.333 RSMo.	20

§ 161.337 RSMo.....	20
§ 479.200.2 RSMo.....	18
§ 536.050(2) RSMo.....	19, 20
§ 536.100 RSMo.....	13
§ 536.140 RSMo.....	18, 23
§ 536.140.2(1) RSMo.	2, 14, 15
§ 536.140.2(3) RSMo.	2, 14, 23
§ 590.020.1 RSMo.....	13
§ 590.080.1(2) RSMo.	7, 16
§ 590.080.1 RSMo.....	16
§ 621.145 RSMo.....	24

Other Authorities:

U.S. Const. Art. I, § 18, cl. 8	19
U.S. Const. Art. III, § 1	19
Mo. Const. Art. II § 1	2, 7, 14, 15, 16, 21
Mo. Const. Art. V § 1	19
Mo. Const. Art. V § 3	7
Mo. Const. Art. V § 18	9
Rule 55.03.....	29
Rule 84.06(b)	29

JURISDICTIONAL STATEMENT

In this action the Appellant contends that § 590.080.1(2) RSMo., under which authority the Director of Public Safety revoked his license as a Peace Officer because he was determined in an administrative proceeding to have committed the criminal offense of domestic assault in the third degree, is unconstitutional under the Separation of Powers doctrine, Article II, § 1 of the Missouri Constitution, and thus the Supreme Court has exclusive appellate jurisdiction as the validity of statute of this state is at issue. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS¹

Justin O'Brien was, at the time of the circumstances giving rise to this matter, a licensed Missouri Peace Officer,² recently married to another Peace Officer.³ On September 26, 2013, he saw information on her cell phone that led him to believe she was having an affair.⁴ An argument and physical altercation ensued.⁵

Although the facts of the incident were contested, the Administrative Hearing Commission found that O'Brien, during the course of the fight, pushed his wife into a wall, onto the floor, and later, onto a sofa.⁶ He choked her, and he caused her to feel threatened and in danger of physical injury.⁷ O'Brien's wife fought back against the choking by kicking him in the groin.⁸ Although the timing is not clear, he threw her cell

¹ The majority of the facts recited are drawn from the Findings of Fact of the Administrative Hearing Commission. The Director did not include the AHC Decision in the administrative record before the Circuit Court. It was, however, attached as Exhibit 2 to the Petition for Judicial Review, and is part of the records as L.F. Doc. 4; App. A4.

² L.F. Doc. 4, p. 1, Finding of Fact ¶ 1.

³ L.F. Doc. 7, p. 6 and 9.

⁴ L.F. Doc. 4, p. 2, Finding of Fact ¶ 2.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id. ¶ 3

phone and broke the glass on it.⁹ She broke the glass in family pictures by throwing them on the floor.¹⁰ The spouse sustained bruising and soreness as a result of O'Brien's actions.¹¹

The spouse's brother, who witnessed part of the altercation, contradicted her account of the circumstances.¹² Specifically, he saw his sister kick O'Brien in the groin but did not see anything that precipitated that action.¹³ Although they briefly reconciled, the parties divorced after the spouse became pregnant with another man's child.¹⁴ AHC Tr. pp. 38-39; Admin Rec. Pt. 3 pp. 7-8.

⁹ Id. ¶ 2.

¹⁰ Id. ¶ 2.

¹¹ Id. ¶ 4.

¹² Although it is the province of the Administrative Hearing Commission to decide contested facts, judicial review of an administrative proceeding is of the entire record. Mo. Const. Art. V, § 18. And although the Court will generally defer to an agency's determination of credibility, Carpenter v. State Bd. of Nursing, 508 S.W.3d 110, 114 (Mo. banc 2016), no credibility determination was made as to this testimony. This fact is drawn from the brother's testimony before the AHC. Doc. 8. pp. 4-5.

¹³ Id.

¹⁴ Doc. 7, pp. 8-9

O'Brien was prosecuted despite the spouse's repeated requests that charges not be pursued.¹⁵ He pled guilty to misdemeanor peace disturbance on June 3, 2014.¹⁶ The circuit court suspended imposition of sentence.¹⁷ Prior to the hearing before the AHC he had successfully completed probation and the case is now a closed record.¹⁸

The Director of the Department of Public Safety¹⁹ filed a complaint seeking authority to discipline O'Brien's license on December 17, 2015.²⁰ The Administrative Hearing Commission heard evidence and found cause to discipline the license.²¹ A disciplinary hearing was convened on November 2, 2017.²²

¹⁵ L.F. Doc 8 p. 10 (Resp. Ex. B); L.F. Doc. 10 pp. 18-19 and L.F. Doc 11. p. 15 (AHC Ex. 3, Vessar Deposition).

¹⁶ L.F. Doc 8 p. 11.

¹⁷ Id.

¹⁸ L.F. Doc. 7, p. 6.

¹⁹ Lane Roberts was the Director of the Department of Public Safety at the time the administrative proceedings commenced. Charles "Drew" Juden was the Director who actually made the disciplinary determination. Sandy Karsten is now the Director of the Department of Public Safety. <https://dps.mo.gov/dir/about.php>, last visited 4/4/19.

²⁰ L.F. Doc 5, p. 7.

²¹ L.F. Doc. 4; App. A4.

²² L.F. Doc. 5, p. 1; App. A3. The transcript of the hearing is L.F. Doc. 14.

O'Brien testified at the disciplinary hearing. He told the Director about his services as a United States Marine, including two tours in Iraq.²³ He testified that he attended the Blue River Police Academy, then served as a police peace officer in Lathrop, Holt, Plattsburg, and as a sheriff's deputy in Holt County.²⁴ He is currently employed as a dispatcher for the Provost Marshall's Office in Ft. Leavenworth, Kansas.²⁵

O'Brien explained that after the fight with his wife he sought treatment for his war-relate psychological trauma for the first time.²⁶ Subsequent to that treatment he was told that the ultimate decision about whether to continue his career as a peace officer was one he would have to make.²⁷ Although he worked at the post office for awhile, at the time of the hearing he had returned to law enforcement as a dispatcher for the Provost Marshall.²⁸

A letter from the Police Chief in Trimble was admitted into evidence.²⁹ Chief Foster, who was not available to appear personally at the hearing, advised the Director that Trimble had commissioned O'Brien as a reserve officer and intended to employ him

²³ L.F. Doc. 14, p. 5.

²⁴ Id. at 5-7.

²⁵ Id. at 5, 7.

²⁶ Id. at 8-13.

²⁷ Id. at 14.

²⁸ Id. at 14-15.

²⁹ Id. at 15; L.F. Doc 5., p. 2.

full-time at the first opportunity.³⁰ Chief Foster averred that he was familiar with the circumstances the Director was evaluating, and wrote that he had no question regarding O'Brien's values, morals or integrity.³¹ In fact, Chief Foster had plans to use O'Brien's advanced training for the benefit of his and surrounding agencies.³²

Gerald Ramos, Jr., a 14 year police veteran, also testified on O'Brien's behalf.³³ Ramos was O'Brien's field training officer, and later his supervisor, in Lathrop.³⁴ He knows O'Brien personally and professionally.³⁵ Ramos testified that the circumstances that led to the proceedings were absolutely not typical of O'Brien.³⁶ Ramos has absolutely no concerns regarding O'Brien remaining a police officer, and provided examples of his conduct.³⁷

³⁰ L.F. Doc 5., p. 2.

³¹ Id.

³² Id.

³³ L.F. Doc. 14, pp. 17-18.

³⁴ Id. at 18.

³⁵ Id.

³⁶ Id. at 19.

³⁷ Id. at 19-20.

The Director revoked O'Brien's Peace Officer License on November 6, 2017.³⁸ Because of that revocation O'Brien cannot be commissioned as a peace officer in Missouri. § 590.020.1 RSMo.

O'Brien timely sought administrative review pursuant to § 536.100 RSMo., in the Circuit Court of Clinton County.³⁹ Review was had on the record and the court heard the arguments of counsel. The Circuit Court entered its Judgment affirming the disciplinary order on December 12, 2018.⁴⁰ A Notice of Appeal to this Court was filed on January 17, 2019.⁴¹

³⁸ L.F. Doc. 5, p. 1; App. A3.

³⁹ L.F. Doc 2.

⁴⁰ L.F. Doc. 15; App. A10.

⁴¹ L.F. Doc. 16.

POINTS RELIED ON

Point I

The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O'Brien, because an administrative agency's determination that an individual committed a criminal offense violates the Separation of Powers provisions of the Missouri Constitution (Article II, §1), reviewable under § 536.140.2(1) RSMo., in that the determination of culpability for a criminal offense must be conducted before the judiciary and not administrative agencies.

City of Springfield v. Belt, 307 S.W.3d 649 (Mo. banc 2010).

Slay v. Slay, 965 S.W.2d 845 (Mo. banc 1998).

State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69 (Mo. banc 1982).

Point II

The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O'Brien, because the decision is unsupported by competent and substantial evidence upon the whole record, reviewable under § 536.140.2(3) RSMo., in that professional discipline is not punishment and there is uncontroverted evidence in the record that O'Brien's prior service, psychological rehabilitation, and knowledge, skills and abilities make him fit to continue in the profession.

Boyd v. State Bd. of Reg'n for the Healing Arts, 916 S.W.2d 311 (Mo. App. E.D. 1995).

Gard v. State Bd. of Reg'n for the Healing Arts, 747 S.W.2d 726 (Mo. App. W.D. 1988).

Wasem v. Missouri Dental Board, 405 S.W.2d 492 (Mo. App. E.D. 1966)

ARGUMENT

Point I:

The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O’Brien, because an administrative agency’s determination that an individual committed a criminal offense violates the Separation of Powers provisions of the Missouri Constitution (Article II, §1), reviewable under § 536.140.2(1) RSMo., in that the determination of culpability for a criminal offense must be conducted before the judiciary and not administrative agencies.

Standard of Review

As recently stated in Hink v. Helfrich, 545 S.W.3d 335, 338 (Mo. banc 2018), “Challenges to the constitutional validity of a state statute are subject to de novo review.” State v. Shanklin, 534 S.W.3d 240, 241 (Mo. banc 2017), quoting, Hill v. Boyer, 480 S.W.3d 311, 313 (Mo. banc 2016). “Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.” Hill, 480 S.W.3d at 313-14 (Mo. banc 2016). The party bringing the constitutional challenge, “has the burden of proving the act clearly and undoubtedly violates the constitutional limitations.” State v. Vaughn, 366 S.W.3d 513, 517 (Mo. banc 2012).

Argument

Having an administrative agency determine whether or not a person committed a criminal offense is an affront to the doctrine of Separation of Powers under the United States Constitution, and explicitly stated in the Missouri Constitution (Art. II § 1).

Section 590.080.1(2) RSMo., provides that the Director of the Department of Public Safety may discipline a peace officer who has committed any criminal offense, whether or not a criminal charge has been filed. The Director does so by filing a complaint alleging such a violation with the Administrative Hearing Commission, “which shall conduct a hearing to determine whether the director has cause for discipline.” § 590.080.2 RSMo.

This approach to the determination that a licensee has committed a crime appears to have evolved from the decision Wolff v. State Board of Chiropractic Examiners, 588 S.W.2d 4 (Mo. App. E. D. 1979). Wolff pled guilty in federal court to mail fraud and imposition of sentence was suspended. His licensing board sought to discipline him but Wolff demurred, claiming that a suspended imposition of sentence could not establish he was, “guilty of [] criminal actions.” The court of appeals gave short-shrift to his argument, stating, “the determination is not whether judicial proceedings have occurred, but whether the licensee has committed a criminal act.” But it did so in a case where a plea had been tendered and accepted by a judicial officer.

The Wolff court cited State ex rel. Gibson v. Missouri Board of Chiropractic Examiners, 365 S.W.2d 773 (Mo. App. E.D. 1963) for the proposition that the judicial

proceedings were not significant. But in Gibson the issue was not whether a crime had been committed, but whether the practice act had been violated. By allowing the term “illegal” (the violation of the terms of a practice act in Gibson) to be inflated to include a determination that a person has committed a criminal offense is an expansion of executive power and an invasion of the responsibilities of the judiciary.

Recent Missouri Supreme Court decisions give reason to question the underpinnings of Wolff and its progeny. Although decided on more narrow grounds, the Missouri Supreme Court has rebuffed the attempt to turn even minor traffic violations into administrative cases. City of Springfield v. Belt, 307 S.W.3d 649 (Mo. banc 2010). A prosecutorial promise not to pursue other actions has been held to bar licensing sanctions. Tap Pharmac. Prod. v. State Bd. of Pharmacy, 238 S.W.3d 140 (Mo. banc 2007). And a legislative attempt to ease the case-load burden on judges by making the findings of a commissioner a judgment was strongly rebuffed at the end of the last century. Slay v. Slay, 965 S.W.2d 845 (Mo. banc 1998).

Labeling an individual a criminal was of Constitutional significance to the Founding Fathers. The Missouri Supreme Court has noted the narrowing of the benefits of an SIS, including in the context of professional licensing. In re: Dyer, 163 S.W.3d 915 (Mo. banc 2005). The question is whether the judiciary will tolerate the expansion of questions regarding convictions and guilty pleas to findings of violations of the criminal law by administrative agencies. Properly limiting the power to declare conduct criminal (as opposed to merely illegal) to the judiciary will eliminate this issue.

As held in City of Springfield v. Belt, 307 S.W.3d 649 (Mo. banc 2010), administrative agencies cannot assess financial penalties – even \$100 – for violations of the law. The City of Springfield had the authority to establish a municipal court. In fact, it had. But it chose to handle cases alleging disobedience to red lights by motor vehicle operators as an administrative action. The Missouri Supreme Court rebuffed that attempt, holding that the determination of red light violations was the peculiar responsibility of the courts.

The advantages to the Director in pursuing a determination that a peace officer has committed a crime in an administrative proceeding are essentially the same reasons why Springfield wanted to handle red light tickets administratively. The most immediate issue has to do with the burden of proof. In a criminal case, the burden of proof is beyond a reasonable doubt. State v. Erwin, 848 S.W.2d 476, 481 (Mo. banc 1993) quoting Sandstrom v. Montana, 442 U.S. 510, 520 (1979). Before an administrative agency the burden of proof is a preponderance of the evidence. Mo. Real Estate Comm. v. Berger, 764 S.W.2d 706, 711 (Mo. App. E.D. 1989). In a criminal case the defendant cannot be compelled to testify against him or herself. State v. Evans, 439 S.W.2d 170 (Mo. 1969). That is not the case in an administrative proceeding. Johnson v. Missouri Bd. of Nursing Adm'rs, 130 S.W.3d 619, 627 (Mo. App. W.D. 2004). A person convicted in a municipal court has the right to a trial de novo in the circuit court. § 479.200.2 RSMo. Judicial review of an administrative decision is of the record, and deferential. § 536.140 RSMo. By avoiding resort to the courts for a determination of

whether a criminal offense occurred the Director faces a much easier burden. Springfield made the same attempt. It must not be allowed.

In a parallel vein, a previous attempt to expand the jurisdiction of the Administrative Hearing Commission was rebuffed in State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69 (Mo. banc 1982). This Court held:

By purporting to give the Administrative Hearing Commission the power to render declaratory judgments regarding the validity of agency rules, the legislature has attempted to elevate the Administrative Hearing Commission to the status of a court. Indeed, the Select Senate Committee on Administrative Rule Making, after reciting the language that it recommended constitute § 536.050(2), stated that "an aggrieved person would have his choice of following either the present provisions relating to declaratory judgment, or of filing a petition before the Administrative Hearing Commission. But he could not do both." Report of the Select Senate Committee on Administrative Rule Making, 78th Gen.Assem. 10-11 (1975). Unlike the United States Congress, however, the legislature cannot create a new species of court. The United States Constitution provides that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1 (emphasis added). See also id. art. I, § 8, cl. 9. The Missouri Constitution has no comparable provision but provides instead that "[t]he judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts." Mo. Const. art. V, § 1. The

legislature "has no authority to create any other tribunal and invest it with judicial power," State ex rel. Haughey v. Ryan, 182 Mo. 349, 355, 81 S.W. 435, 436 (1904), and cannot turn an administrative agency into a court by granting it power that has been constitutionally reserved to the judiciary.

Sections 161.333 and 536.050(2) clearly and unambiguously attempt to confer upon the Administrative Hearing Commission a power equal to the power of courts to render declaratory judgments declaring the validity or invalidity of agency rules. "[W]here the language of a statute is plain and admits of but one meaning there is no room for construction." Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 598 (Mo. banc 1977). We are compelled to hold that to the extent these statutes purport to authorize the Administrative Hearing Commission to render declaratory judgments, they contravene the Missouri Constitution. 9 The Administrative Hearing Commission was without subject matter jurisdiction, and its decree is therefore void.

Respondents would further argue that the purported grant of power to the Administrative Hearing Commission should be upheld because § 161.337 provides for judicial review and thus prevents the Administrative Hearing Commission from usurping the judicial function. That argument, carried to its logical conclusion, would mean that the legislative and executive branches could exercise powers constitutionally reserved to the judiciary as long as judicial review was available. Yet "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch (5 U.S.) 137,

177, 20 L.Ed. 60 (1803). The doctrine of separation of powers, which the people unequivocally embraced in adopting Article II, § 1 of the Missouri Constitution, would be reduced to a mere shibboleth were this attempted grant of power sustained.

State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69, 76-77 (Mo. banc 1982) (footnote omitted).

For the same reasons the AHC should not be allowed to determine whether or not a crime was committed. Its proper province is receipt of judicial records when a criminal offense has been pled and proved before the judiciary.

More egregiously, in this matter the AHC took upon itself to determine that the criminal case was not properly decided. Although charged initially with domestic assault, O'Brien ultimately pled guilty to a reduce charge of peace disturbance. L.F. Doc. 8, p. 11.

The Director, apparently believing that the courts somehow failed in this case, decided to administratively pursue the dismissed charge. Fortunately for the Director, she was not constrained by the Constitutional protections that the prosecutor was. The Director had the following advantages over the prosecutor: in a criminal case, the burden of proof is beyond a reasonable doubt. State v. Erwin, 848 S.W.2d 476, 481 (Mo. banc 1993) quoting Sandstrom v. Montana, 442 U.S. 510, 520 (1979). Before an administrative agency the burden of proof is a preponderance of the evidence. Mo. Real Estate Comm. v. Berger, 764 S.W.2d 706, 711 (Mo. App. E.D. 1989). In a criminal case the defendant cannot be compelled to testify against him or herself. State v. Evans, 439

S.W.2d 170 (Mo. 1969). That is not the case in an administrative proceeding. Johnson v. Missouri Bd. of Nursing Adm'rs, 130 S.W.3d 619, 627 (Mo. App. W.D. 2004).

A guilty plea to peace disturbance indisputably made O'Brien's license subject to discipline. Missouri Dept. of Public Safety v. Dameron, 161 S.W.3d 411 (Mo. App. W.D. 2005). As it was an abuse of discretion for the Administrative Hearing Commission to find that the licensee in Dameron did not commit an offense he had pled guilty to, it is just as abusive for the Director and the Commission to ignore the fact that the prosecutor determined that a domestic assault charge was inappropriate and that what occurred was a peace disturbance.

Permitting an administrative agency to usurp the powers of the judiciary and determine that an individual has committed a criminal offense violates the Separation of Powers doctrine of the federal and state constitutions.

Point II:

The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O’Brien, because the decision is unsupported by competent and substantial evidence upon the whole record, reviewable under § 536.140.2(3) RSMo., in that professional discipline is not punishment and there is uncontroverted evidence in the record that O’Brien’s prior service, psychological rehabilitation, and knowledge, skills and abilities make him fit to continue in the profession.

Standard of Review

The standard of review in an administrative case is established by the constitution. Article V, § 18 of the Missouri constitution provides that the award must be, “supported by competent and substantial evidence upon the whole record.” Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222-23 (Mo. banc 2003). This mandate is refined by § 536.140.2 RSMo., which provides:

The inquiry may extend to a determination of whether the action of the agency

- (1) Is in violation of constitutional provisions;
- (2) Is in excess of the statutory authority or jurisdiction of the agency;
- (3) Is unsupported by competent and substantial evidence upon the whole

record;

- (4) Is, for any other reason, unauthorized by law;
- (5) Is made upon unlawful procedure or without a fair trial;
- (6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion.

The administrative decision is reviewed directly, not the Circuit Court's judgment. Bird v. Mo. Bd. of Architects, Prof'l Eng'rs, Prof'l Land Surveyors & Landscape Architects, 259 S.W.3d 516, 520 (Mo. banc 2008). The administrative decision in this case is composed of the decision of the Administrative Hearing Commission and the Director's disciplinary order. § 621.145 RSMo.

Argument

The purpose of license discipline is not to punish members of the professions, but to protect the public. Boyd v. State Board of Registration for the Healing Arts, 916 S.W.2d 311, 316 (Mo. App. E.D. 1995); Wasem v. Missouri Dental Board, 405 S.W.2d 492, 497 (Mo. App. E.D. 1966). Discipline must have some rational basis for preventing public harm. Id. Although agencies have discretion in assigning the level of discipline against a licensee, that discretion is not unlimited. Boyd, 916 S.W.2d at 316. A reviewing court is empowered to set aside an agency's discipline where it is against the weight of the evidence or is arbitrary, capricious and unreasonable. Perry v. City of St. Louis Civil Service Commission, 924 S.W.2d 861, 865 (Mo. App. E.D. 1996).

To determine if the penalty assigned by the agency is an abuse of discretion, a reviewing court must look to see if the agency's decision is "against the logic of the circumstances," and indicates a, "lack of careful consideration." Missouri Real Estate Commission v. McCormick, 778 S.W.2d 303, 308 (Mo. App. S.D. 1989). An abuse of

discretion means a decision that defies reason and works an injustice. Jennings v. Kansas City, 812 S.W.2d 724, 736 (Mo. App. W.D. 1991).

In Boyd, the Court of Appeals determined that the Board's suspension of a physician's license was not supported by substantial and competent evidence. Boyd, 916 S.W.2d at 317. In that case, Dr. Boyd practiced medicine in Missouri without a valid license for a period of two months. After a disciplinary hearing, the Board suspended Dr. Boyd's license for six months followed by probation for five years. Because substantial and competent evidence in the record was absent to support this heavy discipline, the Court of Appeals reversed the Board's imposition of discipline.

In support of its decision, the court explained that the primary purpose of statutes authorizing a board to discipline a licensee is to safeguard the public health and welfare. Id., citing Missouri Board of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, 442 (Mo. App. W.D. 1991). An agency is required to make a decision based on, "some kind of objective data rather than mere surmise, guesswork or 'gut feeling'." Barry Service Agency Co. v. Manning, 891 S.W.2d 882, 893 (Mo. App. W.D. 1995). An agency may not act in a totally subjective manner without guidelines or criteria, or without substantial evidence to support their determination. Id. at 893-94.

In Wasem, 405 S.W.2d at 497, the court of appeals laid out both aggravating and mitigating circumstances in a case where a felony criminal conviction had been obtained by a guilty plea. The court was disturbed that the conduct did not occur on the spur of the moment, but on three separate days, one week apart, revealing a deep fault in Dr.

Wasem's moral structure. But there was no doubt of Dr. Wasem's high professional

competence. The court noted that he deserved and enjoyed a reputation for good character among his acquaintances, his patients, and his fellow dentists, and that reputation has not been shattered by his conviction. His criminal conduct was an isolated incident in an otherwise unblemished career. The Court of Appeals noted that criminal court expressed the opinion that Dr. Wasem was unlikely to reoffend.

O'Brien's matter can be similarly analyzed. The offense was a misdemeanor – peace disturbance. The events underlying it arose on a single occasion. They did not occur during the course of his professional practice, but rather were deeply personal. He spent months in in-patient treatment to address the issues that had developed during his war-time military service. The criminal court saw fit to suspend imposition of sentence, and O'Brien has now successfully completed his probationary terms. O'Brien's service to our country and the communities he served as a peace officer are of record. Other members of the profession testified that they believed his continued service would be beneficial.

An agency's obligation to carefully consider the evidence presented before it is also demonstrated in Gard v. State Bd. of Registration for the Healing Arts, 747 S.W.2d 726 (Mo. App. W.D. 1988). In that case, the Board revoked a physician's license after a criminal conviction in California resulted in his revocation in that state. Dr. Gard appealed the Missouri Board's revocation of his license in an action for judicial review like that in the instant case. The Missouri Court of Appeals overturned the Board's revocation as an unwarranted punitive sanction. Id.

In its reasoning, the court stated that despite Dr. Gard's conviction and revocation in California, he presented substantial evidence of competency to the Missouri Board such that revocation was not appropriate. By revoking his license despite this evidence, it was clear the Board ignored Dr. Gard's evidence and thereby abused its discretion. Id. Because the Board had no evidence to demonstrate that Dr. Gard was a threat to the public, the revocation of his license was excessive and an abuse of agency discretion. The revocation was accordingly overturned. Id.

Like the situation in Gard, the instant case presents no factual basis to impose revocation on O'Brien's license. There is no question as to his professional competency. He engaged in misconduct in a highly charged personal situation. The criminal court chose to suspend imposition of sentence. Other professionals testified that his professional endeavors could be continued.

The Police Chief in Trimble wrote a letter that was admitted into evidence because he was not available to appear personally at the hearing. L.F. Doc. 14, p. 15; L.F. Doc 5., p. 2. He advised the Director that O'Brien has been commissioned as a reserve officer with an intent to employ him full-time at the first opportunity. Chief Foster averred that he was familiar with the circumstances the Director was evaluating, and wrote that he had no question regarding O'Brien's values, morals or integrity. In fact, Chief Foster had plans to use O'Brien's advanced training for the benefit of his and surrounding agencies.

Gerald Ramos, Jr., a 14 year police veteran, also testified on O'Brien's behalf. L.F. Doc. 14, pp. 17-20. Ramos was O'Brien's field training officer, and later his supervisor in Lathrop. He knows O'Brien personally and professionally. Ramos testified

that the circumstances that led to the proceedings were absolutely not typical of O'Brien. Ramos had no concerns regarding O'Brien remaining a police officer, and provided examples of his conduct.

O'Brien explained that after the fight with his wife he sought treatment for his war-relate psychological trauma for the first time. Subsequent to that treatment he was told that the ultimate decision about whether to continue his career as a peace officer was one he would have to make. Although he worked at the post office for awhile, at the time of the hearing he had returned to law enforcement as a dispatcher for the Provost Marshall. L.F. 14, pp. 8-15.

On this record, and considering Boyd, Wasem, Gard, and the other cases cited in this section, the decision to permanently revoke O'Brien's license was an abuse of discretion.

CONCLUSION

For each and every of the foregoing reasons the Judgment of the Circuit Court should be reversed and the cause remanded for entry of judgment setting aside the decision of the Director of the Department of Public Safety and the associated decision of the Administrative Hearing Commission, with leave to conduct further proceedings in accordance with this Court's Opinion.

Respectfully submitted,

David F. Barrett

David F. Barrett
Missouri Bar No. 43781
P.O. Box 104151
Jefferson City, MO 65110
(573) 340-9119
Fax: (573) 636-1003

dfbarrett@outlook.com

ATTORNEY FOR APPELLANT

RULE 84.06 CERTIFICATION

The undersigned counsel certifies that this brief complies in all respects with Rule 84.06, in that he has signed it, above, in accordance with Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b), to wit: according to MS Word it contains 5,725 words.

Respectfully submitted,

David F. Barrett

David F. Barrett

CERTIFICATE OF SERVICE

A copy of this brief (including the Appendix thereto) was served upon Director's counsel, Assistant Attorney General Ross Keeling, through the Court's e-filing system on April 4, 2019.

Respectfully submitted,

David F. Barrett

David F. Barrett