
IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 83217

BLAKE H. DONALDSON, D.O.,

Appellant,

v.

MISSOURI STATE BOARD OF REGISTRATION FOR THE
HEALING ARTS

Respondent.

Appeal from the Administrative Hearing Commission
Final Decision Issued on March 15, 2018
And the State Board of Registration for the Healing Arts
Final Decision Issued on September 25, 2019
Cole County, Missouri

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Decision issued on March 15, 2018, by the Administrative Hearing Commission and the Decision issued on September 25, 2019, by the State Board of Registration for the Healing Arts. Pursuant to Mo. Rev. Stat. § 621.145, the Decision of the Administrative Hearing Commission and the Decision of the State Board of Registration for the Healing Arts are treated as one decision for the purposes of judicial review. The Decision disposed of all claims at issue between the parties below, and thus is a final appealable judgment pursuant to § 512.020(5)1 and Rule 74.01 of the Missouri Rules of Civil Procedure.

This appeal presents no questions reserved for the exclusive jurisdiction of the Missouri Supreme Court pursuant to Mo. Const. Art. V, § 3. The underlying Decision was judicially reviewed and judgment was entered by the Circuit Court of Cole County, Missouri, and jurisdiction therefore properly lies in this Court pursuant to Mo. Rev. Stat. § 477.070.

Appellant's brief states he "attempted to have his suspension judicially reviewed on December 12, 2017, and on April 13, 2018...(Appellant Brief Page 11), he cites a civil action, *P.D., et al. v. Blake Donaldson, et al.*; *Case No. 17AE-CC00361* (Appellant Brief Page 20), and discusses security records of Appellant's office (Appellant Brief Page 56-57). This information is not properly before this Court because it was not considered, presented, or admitted into evidence by the Administrative Hearing Commission or the State Board of Registration for the Healing Arts. Respondent objects to the same based upon jurisdiction.

Respondent has included this Jurisdictional Statement pursuant to Rule 84.04(f) and Rule 30.06(a) due to Appellant's failure to include a Jurisdictional Statement in his brief.

STATEMENT OF FACTS

A. PROCEDURAL HISTORY

The State Board of Registration for the Healing Arts (hereinafter “Board”) filed its Complaint and Motion for Emergency Suspension against Blake H. Donaldson (hereinafter “Appellant” or “Donaldson”) on November 27, 2017, with the Administrative Hearing Commission pursuant to 334.102, RSMo (2013) requesting an emergency suspension of Appellant’s license as an osteopathic physician and surgeon. The Board presented evidence in the form of Affidavits that Appellant had engaged in sexual conduct with a minor child, P.D., who was also his patient, on multiple occasions. Such evidence showed that Appellant had repeatedly exercised his influence as P.D.’s physician to engage in sexual conduct with P.D. over the course of multiple years. This sexual conduct began while P.D. was only 16 years old. The Administrative Hearing Commission (hereinafter “AHC”) granted the Motion for Emergency Suspension on December 1, 2017 pursuant to RSMo 334.102.1 subsections (1), (2), and (8).

The AHC held a full hearing in this matter on February 22, 2018 and February 23, 2018, and on March 15, 2018, the AHC released its order finding there was sufficient reason for the Board to discipline Appellant’s license due to his actions in preying on a minor child. The Board held a hearing at its next meeting on August 3, 2018, to determine discipline of Appellant’s license, and released its decision after careful consideration on September 25, 2018.

B. SUBSTANTIVE FACTS AND EVIDENCE

P.D.'s testimony is verified, corroborated, and established by Donaldson's admissions. P.D. and Donaldson are the only two individuals with information and details concerning Donaldson's sexual acts upon P.D. All other witnesses were not present and can only offer testimony regarding tangential details. Throughout litigation, Donaldson attempted to control the completeness of facts presented by "taking the Fifth" and then arguing there were insufficient corroborating facts. He continues to claim P.D. was an unreliable witness despite corroborating P.D.'s testimony through multiple admissions.

Donaldson has made the following admissions himself which verify and corroborate P.D.'s testimony:

1. Donaldson knew P.D. (Exhibit 4: Video Interview (8:09)).
2. Donaldson was aware of P.D.'s age two years before the sexual act. He identified P.D. as a 14 year old male in the medical chart and signed chart. (LF 67, p. 18-38).
3. Donaldson was P.D.'s physician. (LF 67, p. 18-38; LF 30, p. 1; LF 70, p. 31 ; Exhibit 4: Video Interview).
4. Donaldson has a relationship with P.D. outside of his office. (Exhibit 4: Video Interview (8:10)).
5. Donaldson "friended" P.D. (Exhibit 4: Video Interview (8:10)).
6. Donaldson gave P.D. his personal cell phone number. (LF 30, p. 1; LF 70, p. 37).
7. Donaldson has chatted and texted with P.D. (Exhibit 4: Video Interview (8:14)).

8. Donaldson is familiar with the app Grindr - a chat app for gay, lesbian, bi-sexual individuals. (Exhibit 4: Video Interview (8:15)).
9. Donaldson is a member of Grindr and spoke to P.D. on Grindr. (Exhibit 4: Video Interview (8:15-16)).
10. Donaldson knew who P.D. was and that he was speaking to his patient on Grindr. (Exhibit 4: Video Interview (8:16)).
11. Donaldson was speaking to P.D. on Grindr “*around* Thanksgiving 2014”. (Exhibit 4: Video Interview (8:17)).
12. Donaldson had “very explicit text” with P.D. (Exhibit 4: Video Interview (8:20)).
13. Donaldson has expressed a desire to have a sexual relationship with P.D. (Exhibit 4: Video Interview (8:13)).
14. Donaldson gave P.D. his home address so P.D. could come to Donaldson’s house. (Exhibit 4: Video Interview (8:14)).
15. Donaldson gave P.D. his home address in December 2015. (Exhibit 4: Video Interview (8:14)).
16. Donaldson’s home address is [REDACTED], Parkville, Missouri 64152. (Exhibit 4: Video Interview (8:14)).
17. Donaldson has resided continuously at [REDACTED], Parkville, Missouri 64152 for approximately 20 years. (Tr. 159, L 13 – Tr. 160, L. 6; LF 30, p. 1; LF 70, p. 45).
18. Donaldson has seen P.D. without his parents. (Exhibit 4: Video Interview (8:12)).

19. Donaldson has seen P.D. without his parents “maybe three times and *I think each time he was over the age. He was 17, 16, 17.*” (Exhibit 4: Video Interview (8:12:15)).
20. Donaldson last saw P.D. at Donaldson’s house. (Exhibit 4: Video Interview (8:11)).
21. It is uncommon for Donaldson to have patients come to his house. (Exhibit 4: Video Interview (8:11)).
22. Donaldson was employed at and was the sole owner of Primary Care North Kansas City, LLC. (Tr. 162, L 1-11; LF 30, p. 1).
23. Donaldson has met with P.D. at his office afterhours. (Exhibit 4: Video Interview (8:18)).
24. Donaldson has met with P.D. at his office afterhours once or twice. (Exhibit 4: Video Interview (8:18)).
25. Donaldson does not remember the first time he met P.D. at his office afterhours. (Exhibit 4: Video Interview (8:18)).
26. P.D. was Donaldson’s patient. (LF 67, p. 18-38; LF 30, p. 1; LF 70, p. 31, Exhibit 4: Video Interview).
27. The last time Donaldson met P.D. at his office afterhours was “about six months ago”. (Statement given February 16, 2016. Six months prior: August 2015). (Exhibit 4: Video Interview). This corresponds with P.D.’s statement. (LF 67, p. 14-17).

28. Donaldson had a medical appointment with P.D. in August 2015 pursuant to P.D.'s medical records. (LF 67, p. 18-38, LF 30, p. 1).

29. The August 2015 appointment is the same appointment at which P.D. paid a thirty dollar (\$30.00) co-pay. (LF 67, p. 18-38, LF 30, p. 1). Donaldson gave P.D. back a thirty dollar (\$30.00) co-pay at an August 2015 appointment. (LF 30, p. 1; Tr. 51, L 9-17; Tr. 59, L 16-23).

30. Donaldson has a Mickey Mouse tattoo. Donaldson only identified the Mickey Mouse tattoo when asked, "Do you have any tattoos?" (Exhibit 4: Video Interview (8:19)).

31. Donaldson's wife would spend the majority of the time in Alabama with her father as identified in the Exhibit 1 text communication. (Tr. 161, L. 3-7; LF 30, p. 1).

While Appellant attempts to discredit the evidence against him, he ignores his own admissions corroborating P.D.'s testimony and the evidence. Appellant's admissions align with the text conversation entered into evidence and P.D.'s version of the sexual encounters. Appellant admitted to eliciting text communication with P.D. wherein he expressed a desire to have a sexual relationship with P.D. (LF 68, p. 50-71, Exhibit 4: Video Interview (8:20)). Copies of these texts were entered into evidence. (LF 68, p. 50-71). In the text communications, Appellant requested P.D. come to his address in December 2015. (LF 68, p. 53). Appellant then identified his own address. (LF 68, p. 54-55). In the same text communications, Appellant admitted he had a wife and admitted his wife was "moving to Alabama". (LF 68, p. 58-60). As identified above, Appellant has admitted to inviting P.D. to his house, admitted to his address, admitted to P.D. last

coming to his house in December, admitted to having a wife, admitted to his wife moving to Alabama. In the text communications, Donaldson went on to verify previous sexual acts on P.D. and planned future acts upon P.D. (LF 68, p. 64-68).

Respondent met the burden of proving their case by a preponderance of the evidence. “Preponderance of the evidence;” is defined as that degree of evidence that “is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642, (Mo. App. LEXIS 2000). Appellant spends a significant amount of effort attacking insignificant details in P.D.’s testimony, but failed to present any evidence in opposition.

P.D.’s testimony regarding Appellant’s sex acts required him to speak about the most private issues in a person’s life. P.D. had to speak to strangers about personal details most people wish to never say out loud. As P.D. was required to tell the facts of the sex acts he testified he felt like a criminal. He felt like he did something wrong. He said he felt ashamed of his sexuality and the fact that this was how he was forced to “come out” regarding his homosexuality. (LF 30, p. 1). Appellant’s credibility arguments play into this shame and embarrassment. Appellant attempts to argue that due to minor differences, P.D. must not be telling the truth. Appellant argues because there are differences in his written statement to the Platte County Sheriff, his testimony as a whole is not credible. However, Appellant does not take into account the fact that the first time P.D. was questioned about every minor detail of the events was in his deposition. The

Board attempted to admit P.D.'s deposition into evidence and Appellant argued it was cumulative.

Appellant is an adult man who manipulated his minor patient, an individual unable to consent, into sexual acts. To date, Donaldson has repeatedly, continuously, and consistently refused to answer whether he had sex with his minor patient. He has failed to produce any evidence supporting his silence in this matter. Meanwhile, the Board has presented Affidavits, witness testimony, evidence of explicit text messages, and Donaldson's own admissions to support the conclusion that Donaldson engaged in sexual activity with a minor patient.

STANDARD OF REVIEW

“The correct standard of review for administrative decisions governed by article V, section 18 of the Missouri Constitution which includes healings arts cases — is whether, considering the whole record, there is sufficient competent and substantial evidence to support the agency's decision. This standard would not be met in the rare case when the agency's decision is contrary to the overwhelming weight of the evidence.” *State Bd. of Registration for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 261, (Mo. App. W.D. 2012). The court does not review an agency decision de novo when reviewing questions of fact. *Id.* When the agency's decision involves a question of law, the court reviews the question de novo. *Id.*

“An appellate court reviews the decisions of the administrative agency, not the circuit court. The standard of review requires the appellate court to determine whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law. This Court must look to the whole record in reviewing the board's decision, not merely at that evidence that supports its decision. If the evidence permits either of two opposing findings, deference is afforded to the administrative decision.” *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310, (Mo. 2009). (*internal citations omitted*).

De Novo Review

“[S]tatutory interpretation is a question of law, and questions of law are reviewed de novo.” *State v. Dudley*, 303 S.W.3d 203, 206, (Mo. App. W.D. 2010).

Similarly, “[i]ssues regarding whether the notice provided to a disciplined employee satisfies the requirements of constitutional due process are a question of law. *Smith v. Rosa*, 73 S.W.3d 862, 864-65 (Mo. App. W.D. 2002).

Therefore, Points I, II, III, IV, VI, and IX may be reviewed de novo.

Appellant’s Brief states “Point X” should be reviewed de novo, but there is no “Point X” in Appellant’s Brief.

Clearly Contrary Review

When completing review, “the reviewing court must determine whether a decision of any administrative body is supported by competent and substantial evidence upon the whole record.” *Hanebrink v. Parker*, 506 S.W.2d 455, 457-458, (Mo. App. E.D. 1974). Substantial evidence “is evidence which has a probative force upon the issues.” *Id.* “During review, the court “as a matter of law passes upon the matter of substance and not of credibility. In other words an appellate court may say that particular evidence is substantial if the triers of the facts believed it to be true.” *Id.*

“Once it is determined that an administrative agency's decision was supported by competent and substantial evidence, a reviewing court must then determine whether or not that decision was clearly contrary to the overwhelming weight of the evidence. In examining the record and in applying these standards, a reviewing court must first view the record in a light most favorable to the findings of the Commission considering the favorable inferences which the Commission had a right to draw from the evidence before it, and then determine whether the Commission's findings, even if supported by competent and substantial evidence, are contrary to the overwhelming weight of the evidence. But the

weight of the evidence is not the quantity or amount thereof. Rather it is the weight in probative value; its effect in inducing belief. If the evidence before an administrative tribunal would warrant a finding either of two opposed ways, the reviewing court is bound by the tribunal's findings and it matters not that there may be evidence which would support a finding to the contrary. The determination of the credibility of the witnesses is a function of the administrative tribunal.” *Id.* (*internal citations omitted*)

Therefore, Points V, VII, and VIII should be reviewed under the standard of whether the agency decision is clearly contrary to the overwhelming weight of the evidence.

ARGUMENT

I. In Response to Appellant’s Point I: Appellant received sufficient due process because the Board provided Appellant with adequate notice of the Complaint and proceedings, and provided Appellant notice of the specific statutes to be used in the Complaint.

a. The Appellant had Notice of the Emergency Motion and Statutes

On November 27, 2017 the Respondent filed a “Complaint and Motion for Emergency Suspension” (LF 52, p. 7). In this Complaint and Motion, the pleading specifically identifies Section 334.102.1 for their authority to seek an emergency suspension. (LF 52, p. 8). This pleading clearly states in the wherefore clause, “moves this Commission to issue its Order granting an emergency suspension of the medical license...and ...conduct a hearing in this case pursuant to 334.102...” (LF 52 p. 11). This filing was timely and properly served upon Appellant pursuant to Section 334.102.2, RSMo within twenty-four hours of filing the Complaint and Motion. (LF 52 p. 44; LF 52

p. 50). The Appellant became aware of the emergency suspension motion within twenty-four hours of the Complaint being filed.

The requested suspension was requested on an emergency basis. Pursuant to Section 334.102.3, RSMo., the AHC must determine if probable cause exists for an emergency suspension “within” five days of receiving the Board’s complaint. In order to protect the public, the statute contemplates situations wherein the AHC may enter the emergency order immediately, essentially *ex-parte*, and before the Respondent is even provided the service packet. This situation is similar to a Missouri Order of Protection pursuant to the Domestic Violence Act wherein the Court can enter an *ex-parte* Order and hold a subsequent hearing.

Section 334.102.2 then states, “...Prior to **the hearing**, the licensee may file affidavits and certified court records for consideration by the administrative hearing commission.” (emphasis added). The term “the hearing” referenced in sub-part .2 refers to the “hearing identified in Section 334.102.4, which states, “The administrative hearing commission shall hold **a hearing** within forty-five days of the board's filing of the complaint to determine if cause for discipline exists.” The AHC’s “review [of] the information” in subpart .3 is not the hearing.

The AHC followed this procedure by granting the Board’s motion for emergency suspension on December 1, 2017, after receiving the Board of Healing Arts’ complaint on November 27, 2017. The AHC was operating within the prescribed procedures, and the Appellant was fully aware of the emergency motion.

b. The AHC Notice followed the Statutes and Regulations

Appellant was also served a Notice of Complaint and Notice of Hearing on November 28, 2017. (LF 52 p. 44; LF 52 p. 50). This notice stated as follows: “The procedures governing this case are found in chapters 536 and 621 of the Revised Statutes of Missouri, and in the Code of State Regulations, 1 CSR 15-3.200 through 3.510.” (LF 52, p. 41). As stated in 1 CSR 15-3.200, this chapter “contains all procedural regulations for all contested cases assigned to the Administrative Hearing Commission by statute except as otherwise provided for by law.”

The notice provided to Appellant from the AHC was not misleading. The notice provided the statutes and regulations governing the proceedings, and informed Appellant a Complaint had been filed. This notice also informed Appellant of the portions of the proceedings in which he could participate, including his required answer and a future hearing.

Chapters 536 and 621 of the Revised Statutes of Missouri provide the procedures for administrative hearings and administrative discipline. These regulations do not provide bases for discipline of a physician’s license. The actual bases for discipline were contained in the Complaint and Motion for Emergency Suspension. The Complaint and Motion for Emergency Suspension requested discipline pursuant to Section 334.100.2(4)(i) and (5), RSMo (2013), and Section 334.102.1(1), (2), and (8) RSMo (2013).

c. The Appellant had Due Process

Under the *Mathews* framework, Donaldson’s due process rights have not been violated. In *Mathews*, the Supreme Court evaluated whether an administrative process for

terminating social security benefits was constitutional. The Court found a social security welfare recipient had received satisfactory due process protections “especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.” *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). In *Mathews*, the recipient’s benefits were terminated prior to an evidentiary hearing, and could be reinstated if the recipient prevailed at the hearing. *Id.*

The Court stated, “The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.” *Id.* According to *Mathews*, such an opportunity exists in cases where a property interest is taken prior to an evidentiary hearing, so long as an evidentiary hearing is provided within a reasonable time. *Id.* This is precisely what happened here. Appellant received notice a Complaint had been filed against him. This Complaint contained the specific bases for discipline and emergency suspension statutes, while the Notice informed Appellant of the statutes and regulations governing the upcoming proceedings and that such Complaint had been filed. Appellant then received further due process throughout the evidentiary hearings conducted by the Board and AHC. Appellant had the opportunity to meet the case against him in multiple evidentiary hearings, and has received due process at each step.

Additionally, even had Appellant received more than the adequate notice provided, the fact that no criminal charges had been filed at the time of the Board’s

Motion for Emergency Suspension is not “profoundly relevant evidence” which would have prevented the AHC’s granting of the emergency suspension. Administrative proceedings are independent of criminal proceedings. *Lang v. Lee*, 639 S.W.2d 111, 114, (Mo. App. W.D. 1982). The Board presented sufficient evidence to the AHC to warrant an emergency suspension of Appellant’s license, and this evidence would not be refuted by a then-ongoing criminal investigation, which has no bearing on these administrative proceedings.

II. In Response to Appellant’s Point II: The Board of Healings and AHC did not violate 1 C.S.R. 15-3.446(2)(B) when seeking emergency suspension of Appellant’s license.

In the preceding case, the AHC did not violate 1 C.S.R. 15-3.446 because the AHC did not utilize 1 C.S.R. 15-3.446. 1 C.S.R. 15-3.446 provides for disposition by stipulation, consent order, and relief in the nature of judgment on the pleadings and relief in the nature of summary and other procedures.” 1 C.S.R. 15-3.446(1) states, “Generally. Decision without hearing means **a disposition**, or recommended disposition, **of the complaint on the merits.**” (*emphasis added*).

According to 1 C.S.R. 15-3.446(2)(B), “any party *may file a motion* for a decision without hearing on all or any part of the complaint except that, unless the commission grants leave otherwise, no party shall file a motion for decision without hearing— (B) In any case, less than forty-five (45) days before the hearing, except by leave of the commission for good cause.”

In the preceding case, no such motion or ruling was made as a disposition to the complaint. There was a two-day hearing on this disposition of the Complaint in this

matter. The Board of Healing Arts filed a Motion for Emergency Suspension with the AHC demonstrating the need for an emergency suspension of Donaldson's license. (LF 53, p. 7).

The AHC's Order does not violate 1 C.S.R. 15-3.446 because it was never used or requested by the parties or the Commission. The initial probable cause order on the emergency motion by the AHC was authorized by Section 334.102 RSMo and 1 C.S.R. 15-3.480. Such statutes and regulations were provided to Appellant in the initial Complaint. (LF 53).

III. In Response to Appellant's Point III: Mo. Rev. Stat. § 334.102 is not unconstitutional on its face because it provides an appropriate timeline for administrative review prior to judicial review, and this timeline has previously been affirmed as constitutional by the United States Supreme Court.

Section 334.102 is not unconstitutional because it provides an appropriate timeline for the administrative process and subsequent judicial review. The AHC and Board have followed the statutorily prescribed timeline for completing administrative review of such a matter, and this timeline is consistent with other similar timelines in Missouri. The Missouri legislature has already approved this timeline by writing it into law, and the US Supreme Court has analyzed similar timelines and found them constitutional. Furthermore, Appellant has sought continuances himself throughout this case. (LF 52 p. 88; LF 58 p. 5).

Appellant repeatedly attempted to seek premature judicial review/appeal in this matter. Judicial review is not appropriate until a final administrative decision has been

issued. The Appellant argues for and seeks to receive review prior to fully exhausting his administrative remedies. As stated by the Missouri Supreme Court in *Farm Bureau Town & Country Ins. Co. v. Angoff*, “[t]he exhaustion of administrative remedies doctrine is rooted in sound policy, as well as in both the state constitution and statutes.” *Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 352, (Mo. Sup. Ct. 1995). The court also noted the policy reasons for this doctrine, including “that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.” *Id.*

In the present case, Section 536.100, RSMo. states applicants are entitled to judicial review only after exhausting their administrative remedies. Section 621.110, RSMo. states these remedies include a hearing by the AHC and a hearing by the agency, the Board of Healing Arts. Under Section 621.145, RSMo., the AHC decision and a decision by the Board are treated as one decision. This statute further states that in cases where a disciplinary order may be entered by the agency, no AHC decision is final until the disciplinary order is entered. This procedure allows the administrative process to function efficiently utilizing their experience and expertise while leaving sufficient process for them to correct their own errors.

Appellant argues that if a complaint were brought under non-emergency suspension statutes, he would have still been able to practice medicine until after completing a judicial review and appeal. This is incorrect. In a non-emergency disciplinary case, the licensee may have their license revoked at the time of the Board’s

subsequent disciplinary hearing. The licensee would then potentially be without a license during the judicial review and appellate process unless a stay was sought and ordered. Additionally, some situations, including **sex with a minor patient**, necessitate immediate suspension to protect the public. The whole purpose of an emergency suspension statute is so agencies can act emergently to protect the public.

In the present case, no delay in review existed because the Board scheduled Appellant's disciplinary hearing at the first Board hearing after certification of the record pursuant to Mo. Rev. Stat. § 621.110, which states in relevant part:

Upon a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee and within one hundred twenty days of the date the case became ready for decision, the commission shall deliver or transmit by mail to the agency which issued the license the record and a transcript of the proceedings before the commission together with the commission's findings of fact and conclusions of law... Within thirty days after receipt of the record of the proceedings before the commission... The agency may receive evidence relevant to said issue from the licensee or any other source. After such hearing the agency may order any disciplinary measure it deems appropriate and which is authorized by law.

Section 621.110, RSMo requires the Board to schedule its disciplinary hearing within thirty days of receiving the license. After the Board received the AHC's record and a transcript of the proceedings together with the commission's findings of fact and conclusions of law, the Board scheduled Appellant's disciplinary hearing for the next available Board hearing date pursuant to the above statute. (LF 64, p. 15-16, LF 64, p. 17-18, L 58, p. 1-32). The Appellant stated the Board then "waited over six months before issuing its Order". This is incorrect. The Board's disciplinary hearing was held on August 3, 2018 and their Order was issued on September 25, 2018. (LF 51, p. 21-29 , LF

64, p. 15-16, LF 64, p. 17-18). The Board of Healing Arts did not delay in setting this matter under Missouri statutes or case law.

Appellant argues this Court should consider the decision in *Mathews v. Eldridge* as support for his position. However, under the *Mathews* framework, Appellant's due process rights have not been violated. In *Mathews*, the Supreme Court evaluated whether an administrative process for terminating social security benefits was constitutional. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). The Court found a social security welfare recipient had received satisfactory due process protections "especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final." *Id.* In *Mathews*, the recipient's benefits were terminated prior to an evidentiary hearing, and could be reinstated if the recipient prevailed at the hearing. *Id.*

Mathews listed three elements for consideration of due process: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The *Mathews* Court reviewed previous cases and noted that "Only in [one case] has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the

very margin of subsistence” *Id.* at 340. “The crucial factor in this context -- a factor not present in the case of... virtually anyone else whose governmental entitlements are ended -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.” *Id.* Appellant is not an individual “on the very margin of subsistence,” who would have been unable to eat while his license was suspended pending resolution of this case.

Furthermore, in reviewing the second factor, the Court found “the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.” *Id.* at 342. Appellant claims a 10 month delay prior to judicial review is unconstitutional, yet the Supreme Court has already determined a year-long delay of welfare benefits for workers unable to obtain other employment due to disability prior to judicial review is not unconstitutional. *Id.* The Court analyzed the “potential deprivation” and its likely effect on individuals, and found temporary income such as the income of family members and an individual’s savings bridged the gap between the denial and final adjudication. “All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard.” *Id.* Appellant does not meet the level of deprivation considered by *Mathews*, and has been afforded due process which will allow him adjudication of his claim in a manner found timely by the US Supreme Court.

The Appellant was afforded multiple meaningful times and manners in which to be heard and seek his remedy; however, throughout the administrative process and judicial review, the administrative agencies and courts found against the Appellant. Simply finding against the Appellant does not equate to him not being timely and meaningfully heard. Quite the contrary, he was heard at a two-day evidentiary hearing before the AHC, a disciplinary-evidentiary hearing before the Board, and a Judicial Review briefing/arguments in the Circuit Court.

IV. In Response to Appellant's Point IV: Appellant either failed to exercise due diligence to comply with the timeline provided in Section 334.102, RSMo., or made a legal determination to not enter into evidence the records he now claims were unfairly barred.

Donaldson's due process rights were not violated by the timeline in Section 334.102, RSMo. Donaldson sought to admit additional evidence of his own work schedule and records of his own private practice by contending he could not obtain them before the date of the AHC hearing. The AHC entered its decision on March 15, 2018. Appellant filed a Motion to Admit Additional Evidence on August 22, 2018. (LF 26 p. 54-56). At that time, the AHC did not have authority to reconsider a decision pursuant to *Woodman v. Director of Revenue*, 8 S.W.3d 154, 158 (Mo. App. W.D. 1999).

Furthermore, Donaldson either did not exercise reasonable diligence to obtain this information or made a legal determination not to offer this evidence at the underlying hearing before the AHC. This evidence was available and accessible to Donaldson prior to the AHC hearing. Donaldson chose not to depose or subpoena witnesses concerning this evidence despite knowing the allegations against him and the date of hearing. In this

same time period, Donaldson completed written discovery upon the Board. In this same time period, Donaldson subpoenaed other witnesses to trial. (LF 65, p. 82; LF 65, p. 83-84; Tr. 122, L. 21). In this same time period, the Board conducted depositions of P.D., Donaldson, and Grindr, and completed written discovery on Donaldson. (LF 52, p. 52-53; LF 52, p. 75-76; LF 52, p. 77-78; LF 52, p. 79-80; LF 52, p. 81-82; LF 52, p. 73). Donaldson had ample time to obtain records of his own work schedule and his own practice.

Additionally, an avenue exists through which a party can admit relevant evidence later. This is found in Section 536.140, RSMo., which allows evidence to be introduced during judicial review, but requires a finding that after the exercise of reasonable diligence the evidence could not have been produced. Section 536.140, RSMo. states:

3. Whenever the action of the agency being reviewed does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts, the court may upon application of any party conduct a de novo review of the agency decision.

4. **Wherever under subsection 3 of this section or otherwise the court is entitled to weigh the evidence and determine the facts for itself, the court may hear and consider additional evidence if the court finds that such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency.** Wherever the court is not entitled to weigh the evidence and determine the facts for itself, if the court finds that there is competent and material evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing before the agency, the court may remand the case to the agency with directions to reconsider the same in the light of such evidence. The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record. (emphasis added).

The Court in *Loeffler v. Kansas City*, defined reasonable diligence as, “embrac[ing] such watchfulness, caution and foresight as under all the circumstances... exercised by a careful and prudent man.” *Loeffler v. Kansas City*, 557 S.W.2d 656, (Mo. App. 1977). It cannot be said Appellant acted with reasonable diligence in not obtaining his own work records or the schedule for his own private practice. The AHC properly excluded this evidence pursuant to Missouri law.

Arguments regarding Appellant’s receipt of the investigative report 40 days before the hearing are also not relevant. Appellant received a copy of the complaint filed in this case at the very beginning of this action. Attached to the Complaint were all substantive affidavits and records. (LF 52, p. 7-11; LF 52, p. 12; LF 52, p. 13-15; LF 52, p. 16-31; LF 52, p. 32-35; LF 52, p. 36-38; LF 52, p. 39; LF 52, p. 40). He knew what the allegations were, the dates of the events, and those involved, from the start. Respondent and Appellant participated in discovery including objections pursuant to Regulation 1 CSR 15-3.420(1) which makes the Supreme Court rules of discovery, specifically, Rule 56.01, applicable. The Board provided and supplemented discovery pursuant to the rule. Additionally, 40 days is sufficient time for an individual to obtain their own work schedule and the security records of their own private practice. The legal decision to not introduce these records or the failure to obtain these records within a more than adequate timeframe rests solely on Appellant.

Section 334.102.4.(1), RSMo., states in relevant part:

The administrative hearing commission shall hold a hearing within forty-five days of the board's filing of the complaint to determine if cause for discipline exists. The administrative hearing commission may grant a request for a continuance, but shall

in any event hold the hearing within one hundred twenty days of the board's initial filing. The board shall be granted leave to amend its complaint if it is more than thirty days prior to the hearing. If less than thirty days, the board may be granted leave to amend if public safety requires.

The Legislature has created a timeframe within which the Board and AHC must operate. This provides physicians such as Donaldson with assurance their case will be completed timely and without undue delay. Such a timeframe is not unusual. For example, litigants in Missouri must respond to written discovery within thirty days pursuant to Rule 57.01(c). In situations involving individuals involuntarily detained for mental health concerns, Section 632.330, RSMo allows healthcare providers only 96 hours in which to file a petition to detain the patient for 21 more days, then only 2 more days to detain the patient without a trial on the matter. Definite timelines are not unusual in the legal system. Such timelines are neither a detriment to expedient litigation nor unconstitutional. They are an integral part of the legal system and necessary to prevent undue delay and uncertainty in the legal process.

V. In Response to Appellant's Point V: AHC did not act arbitrarily or capriciously when suspending Appellant's license under the emergency statute because whether an "emergency" exists presently is irrelevant to whether the statute allowing expedient suspension is applicable.

Appellant denies the existence of an emergency necessitating an emergency suspension of his license based on the events alleged by the Board having already ceased prior to the Board filing its Motion for Emergency Suspension.

The word "emergency" is a descriptor for the speed at which a license is suspended. It does not create an additional requirement that an emergency be ongoing.

The statute itself states in part:

334.102.1 “The board may apply to the administrative hearing commission for an emergency suspension or restriction of a licensee for the following causes:

(1) Engaging in sexual conduct, as defined in section 566.010, with a patient who is not the licensee's spouse, regardless of whether the patient consented;

(2) Engaging in sexual misconduct with a minor or person the licensee believes to be a minor. "Sexual misconduct" means any conduct of a sexual nature which would be illegal under state or federal law;

Nowhere does it require a presently occurring action. If the legislature intended to add this requirement, it would have stated this in the statute. Rather, the legislature recognized the seriousness of the offenses considered under Section 334.102, RSMo., and provided an avenue to expediently suspend a physician’s license based on these serious offenses. Donaldson is attempting to place more burdens on the Board than either the Legislature or the Board’s own regulations already require.

Donaldson reads the word “engaging” to require the sexual conduct to be presently occurring. Under this logic, the Board would be prevented from seeking an emergent suspension as long as the conduct had presently stopped. Simply stating that a physician is no longer having sex with his minor patient does not mean the physician was not “[e]ngaging in sexual conduct” with a patient not his spouse or a minor. There is no statutory timeframe requiring the conduct to be happening at the exact moment the Board seeks emergent suspension of a license. Rather, the correct reading of the word “engaging” is:

“[t]he board may apply to the administrative hearing commission for an emergency suspension or restriction of a licensee for...[e]ngaging in sexual conduct” with a patient not their spouse or a minor.

The Board may seek an emergent suspension of a physician’s license for the action of engaging in the above sexual conduct.

Additionally, Donaldson’s argument fails to weigh his perceived loss versus the State of Missouri’s perceived loss in protecting the citizens of Missouri against serious dangers to their health, safety or welfare.

In the underlying case, P.D. stated by Affidavit that he was a patient of Donaldson from May 2012 to February 2016. (LF 52, p. 13-15). P.D. stated that between August 19, 2014 and October 17, 2014, Donaldson engaged in sexual conduct with him. (LF 52, p. 13-15). At that time, P.D. was a minor. (LF 52, p. 13-15). Between October 18, 2014 and January 2016, when P.D. was age 17 or older, Donaldson continued to engage in sexual conduct with P.D. (LF 52, p. 13-15). On August 19, 2015, the sexual conduct occurred during a scheduled medical appointment. (LF 52, p. 13-15). The Board of Healing Arts has a countervailing interest in protecting patients, and minor patients, from sexual conduct with licensed physicians.

When an administrative body encounters charges involving “immoral conduct” committed by an individual with frequent contact with young people, the administrative body is rightly and “naturally motivated...to try to dispose of [the] case as expeditiously as possible.” *Lang v. Lee*, 639 S.W.2d 111, 114, (Mo. App. W.D. 1982). For example, in *Lang v. Lee*, a teacher was accused of taking “indecent and immoral liberties” with

underage students. *Id.* at 112. As a teacher, Lang was an individual in a professional capacity who had daily contact with young people. Thus, an ongoing danger existed to the young people presently in Lang’s purview. This and similar situations create an “overriding public interest in disposing of such charges” quickly and emergently. *Id.*

Additional arguments that the ‘allegations are too old,’ that ‘Donaldson was not arrested,’ or that ‘Donaldson did not violate criminal statutes’ are simply not relevant to the analysis of whether Appellant engaged in sexual conduct with a patient who is not the licensee's spouse, or engaged in sexual misconduct with a minor or person the licensee believes to be a minor. The administrative process governing physician’s licenses through the Board and AHC are civil matters entirely separate from any possible criminal prosecution. Section 334.102, RSMo and other statutes applicable to this case do not require criminal convictions or even criminal prosecutions. The lack of prosecution by Platte County police and judicial personnel has no bearing on this case.

VI. In Response to Appellant’s Point VI: The Administrative Hearing Commission’s finding of an adverse inference against Donaldson for attempting to obstruct the truth by remaining silent is authorized by law and appropriate under Missouri standards.

The AHC did not err in applying an adverse inference to Appellant’s refusal to participate in discovery and refusal to answer questions such as **whether he had sex with a minor patient**. “Fundamental fairness requires that a plaintiff be afforded some remedy lest a defendant defeat the claim by concealment. The balance inherent in our adversary system is distorted if one party to a civil action is permitted by invocation of the privilege against self-incrimination to unilaterally control full presentation to the fact finder of all

of the evidence pertaining to all of the issues. Thus, whether asserted by a plaintiff or a defendant, invocation of the privilege will, in most cases, require some form of judicial response of a remedial nature to eliminate any undue advantage which might flow from the ability to conceal pertinent evidence.” *Johnson v. Mo. Bd. Of Nursing Adm’rs*, 130 S.W.3d 619, (Mo. App. W.D. 2004).

Appellant’s main argument throughout his appeal is that Respondent lacks corroborating evidence to P.D.’s statements. This argument and Appellant’s attacks to credibility occur because of Appellant’s refusal to participate in discovery and provide pertinent, relevant information. (LF 68 p. 1-20). While Appellant has the right to assert the Fifth Amendment privilege, his assertion requires an equivalent remedy to the opposing party.

Fact finders can infer from an unanswered question that the answer to the question would have been unfavorable to the party invoking the privilege. *Green v. Miller*, 851 S.W.2d 553, 555, (Mo. App. W. D. 1993). The Appellant has never denied, under oath, the allegations made by the Board nor has the Appellant denied, under oath, the facts described by P.D. Rather, Appellant has refused to answer questions and asserts the privilege to avoid answering questions. During the investigation by the Platte County Detective, Appellant’s attorney stopped the interrogation and left with his client. (Exhibit 4: Video Interview). Later, during the Board’s investigation, Appellant’s lawyer prevented the Board Investigators from viewing the inside of Appellant’s house. (LF 70, P. 37). Appellant also prevented discovery and refused to answer deposition questions during litigation. (LF 68 p. 1-20).

When one party claims the Fifth Amendment privilege, they are essentially controlling the completeness of facts presented to the fact-finder, and are able to conceal pertinent evidence. *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 2004 Mo. App. LEXIS 132 (Mo. App. W.D. 2004).

Here, Appellant has used his assertion of his privilege throughout this case as a sword to prevent the discovery of evidence and then as a shield to prevent his testimony. The prejudice is great in this situation. Justice required the adverse inference be given to the questions the Appellant refused to answer. The inference required a finding that if a) he had answered truthfully, the answers would have been unfavorable to the Appellant or b) would have corroborated testimony given by the Respondent's witnesses on the subject matter. (see *Johnson v. Mo. Bd. Of Nursing Adm'rs*, 130 S.W.3d 619, (Mo. App. W.D. 2004), discussed *supra*).

Appellant argues the AHC should have applied factors enumerated in *State ex. rel. Pulliam v. Swink* rather than examining *Johnson*. When deciding *Johnson*, the Western District Court of Appeals recognized *Swink* in its decision, and did not find the two in opposition. *Johnson* is simply the 2004 version of the principles outlined by *Swink* in 1974.

The *Swink* court even noted its ruling “does not mean that litigants may pick and choose that which they will allow to be discovered.” *State ex rel. Pulliam v. Swink*, 514 S.W.2d 559, 561, (Mo. 1974). Appellant has repeatedly sought to stifle the investigations into his conduct throughout discovery and litigation, and the AHC appropriately applied an adverse inference against him based upon relevant, up-to-date Missouri law.

Even when applying *Swink*, Appellant does not fulfill the factors set forth.

Appellant's defense of a medical license is a voluntary participation in Court contrary to a criminal prosecution, which requires participation. Appellant asserted the privilege as a method to conceal evidence, to not be cooperative, and not in good faith. He refused to answer even the most basic questions at any point throughout discovery or trial. (LF 68 p. 1-20; Tr. 157, L. 21 – Tr. 200 L. 19.)

Appellant also attempts to argue the assertion of his Fifth Amendment Right was done in order to avoid falling into a perjury trap. This assertion fails because a “perjury trap” requires a calling of a witness for the primary purpose of obtaining testimony from him to later prosecute him for perjury. The phrase ‘perjury trap’ suggests the deliberate use of a judicial proceeding to secure perjured testimony. *United States v. Simone*, 627 F. Supp. 1264, 1268 (D.N.J. 1986). A “perjury trap” defense is utilized in a prosecution for perjury and must be affirmatively proven. When the grand jury is attempting to obtain useful information in furtherance of its investigation, the perjury trap doctrine does not apply. See *United States v. Brown*, 49 F.3d 1162, 1168 (6th Cir. 1995). There are no perjury charges against Appellant.

Even if Appellant needed to consider a “perjury trap” when crafting his defense, such a possibility did not require the AHC to adopt Appellant's reasoning. See *Lang v. Lee*, 639 S.W.2d 111, 114, (Mo. App. W.D. 1982). In *Lang*, the Board refused to grant a one week continuance to a teacher disputing his permanent status termination. *Lang v. Lee*, 639 S.W.2d 111, 113, (Mo. App. W.D. 1982). Upon review, the court found due process is not denied when the respondent in a civil case must choose between testifying

on their own behalf or remaining silent in order to prevent testimony from the civil case being used against them in a criminal case. *Id.*

In reaching this decision, the *Lang* court referenced and adopted reasoning from *Arthurs v. Stern*, 560 F.2d 477, (U.S. App. 1977), and *United States v. Kordel*, 397 U.S. 1, (1970). “In *Arthurs* a physician faced a civil hearing to determine whether or not his license to practice should be suspended or revoked for writing illegal prescriptions while criminal charges arising out of the same transaction were pending. The court held there was nothing inherently repugnant to due process in requiring the physician to make the choice between giving testimony at the hearing on the license issue with the knowledge such testimony might be used in the criminal case or to remain silent.” *Lang*, 639 S.W.2d at 114. In *Kordel*, “the Supreme Court held that the Federal Drug Administration was not required to withhold civil proceedings pending the outcome of criminal charges.” *Id.* Implementing such a requirement would destroy the efficacy of civil proceedings and prevent agencies from carrying out their purposes. *Id.*

As stated in *Lang*, requiring individuals to make difficult choices is not inherently repugnant in the legal system. *Id.* Rather, “difficult choices are not unknown in the legal system.” *Id.* Appellant’s assertion of a difficult choice does not invalidate the AHC’s properly rendered decision.

VII. In Response to Appellant's Point VII: The Administrative Hearing Commission's decision was based upon competent and substantial evidence, including Appellant's admissions and P.D.'s corroborated testimony, and is therefore not arbitrary or capricious pursuant to Section 536.140(2)(6), RSMo.

The AHC's decision is largely based on Appellant's own admissions before he began claiming the Fifth Amendment as his only answer. P.D.'s testimony is verified, corroborated, and established by Donaldson's admissions. P.D. and Donaldson are the only two individuals with information and details concerning Donaldson's sexual acts upon P.D. All other witnesses were not present and can only offer testimony regarding tangential details. Donaldson attempted to control the completeness of facts presented by "taking the Fifth" and then argued there were insufficient corroborating facts. See *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 2004 Mo. App. LEXIS 132 (Mo. App. W.D. 2004).

Donaldson has made the following admissions himself which verify and corroborate P.D.'s testimony:

1. Donaldson knew P.D. (Exhibit 4: Video Interview (8:09)).
2. Donaldson was aware of P.D.'s age two years before the sexual act. He identified P.D. as a 14 year old male in the medical chart and signed chart. (LF 67, p. 18-38).
3. Donaldson was P.D.'s physician. (LF 67, p. 18-38, LF 30, p. 1, Exhibit 4: Video Interview).
4. Donaldson has a relationship with P.D. outside of his office. (Exhibit 4: Video Interview (8:10)).
5. Donaldson "friended" P.D. (Exhibit 4: Video Interview (8:10)).

6. Donaldson gave P.D. his personal cell phone. (LF 30, p. 1).
7. Donaldson has chatted and texted with P.D. (Exhibit 4: Video Interview (8:14)).
8. Donaldson is familiar with the app Grindr - a chat app for gay, lesbian, bi-sexual individuals. (Exhibit 4: Video Interview (8:15)).
9. Donaldson is a member of Grindr and spoke to P.D. on Grindr. (Exhibit 4: Video Interview (8:15-16)).
10. Donaldson knew who P.D. was and that he was speaking to his patient on Grindr. (Exhibit 4: Video Interview (8:16)).
11. Donaldson was speaking to P.D. on Grindr “*around* Thanksgiving 2014”. (Exhibit 4: Video Interview (8:17)).
12. Donaldson had “very explicit text” with P.D. (Exhibit 4: Video Interview (8:20)).
13. Donaldson has expressed a desire to have a sexual relationship with P.D. (Exhibit 4: Video Interview (8:13)).
14. Donaldson gave P.D. his home address so P.D. could come to Donaldson’s house. (Exhibit 4: Video Interview (8:14)).
15. Donaldson gave P.D. his home address in December 2015. (Exhibit 4: Video Interview (8:14)).
16. Donaldson’s home address is [REDACTED], Parkville, Missouri 64152. (Exhibit 4: Video Interview (8:14)).
17. Donaldson has resided continuously at [REDACTED], Parkville, Missouri 64152 for approximately 20 years. (LF 30, p. 1).
18. Donaldson has seen P.D. without his parents. (Exhibit 4: Video Interview (8:12)).

19. Donaldson has seen P.D. without his parents “maybe three times and *I think each time he was over the age. He was 17, 16, 17.*” (Exhibit 4: Video Interview (8:12:15)).
20. Donaldson last saw P.D. at Appellant’s house. (Exhibit 4: Video Interview (8:11)).
21. It is uncommon for Donaldson to have patients come to his house. (Exhibit 4: Video Interview (8:11)).
22. Donaldson was employed at and was the sole owner of Primary Care North Kansas City, LLC. (LF 30, p. 1).
23. Donaldson has met with P.D. at his office afterhours. (Exhibit 4: Video Interview (8:18)).
24. Donaldson has met with P.D. at his office afterhours once or twice. (Exhibit 4: Video Interview (8:18)).
25. Donaldson does not remember the first time he met P.D. at his office afterhours. (Exhibit 4: Video Interview (8:18)).
26. P.D. was Donaldson’s patient. (LF 67, p. 18-38, LF 30, p. 1), Exhibit 4: Video Interview).
27. The last time Donaldson met P.D. at his office afterhours was “about six months ago”. (Statement given February 16, 2016. Six months prior: August 2015). (Exhibit 4: Video Interview). This corresponds with P.D.’s statement. (LF 67, p. 14-17).

28. Donaldson had a medical appointment with P.D. in August 2015 pursuant to P.D.'s medical records. (LF 67, p. 18-38, LF 30, p. 1).

29. The August 2015 appointment is the same appointment at which P.D. paid a thirty dollar (\$30.00) co-pay. (LF 67, p. 18-38, LF 30, p. 1). Donaldson gave P.D. back a thirty dollar (\$30.00) co-pay at an August 2015 appointment. (LF 30, p. 1).

30. Donaldson has a Mickey Mouse tattoo. Donaldson only identified the Mickey Mouse tattoo when asked, "Do you have any tattoos?" (Exhibit 4: Video Interview (8:19)).

31. Donaldson's wife would spend the majority of the time in Alabama with her father as identified in the Exhibit 1 text communication. (LF 30, p. 1).

While Appellant attempts to discredit the evidence against him, he ignores his own admissions corroborating P.D.'s testimony and the evidence. Appellant's admissions align with the text conversation and P.D.'s version of the sexual encounters. Appellant admitted to eliciting text communication with P.D. wherein he expressed a desire to have a sexual relationship with P.D. Copies of these texts were entered into evidence. (LF 68, p. 50-71). In the text communications, Appellant requested P.D. come to his address in December 2015. (LF 68, p. 53). Appellant then identified his own address. (LF 68, p. 54-55). In the same text communications, Appellant admitted he had a wife and admitted his wife was "moving to Alabama". (LF 68, p. 58-60). As identified above, Appellant has admitted to inviting P.D. to his house, admitted to his address, admitted to P.D. last coming to his house in December, admitted to having a wife, admitted to his wife moving

to Alabama. In the text communications, Appellant went on to verify previous sexual acts on P.D. and planned future acts upon P.D. (LF 68, p. 64-68).

Respondent met the burden of proving their case by a preponderance of the evidence. “Preponderance of the evidence;” is defined as that degree of evidence that “is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642, (Mo. App. LEXIS 2000). Appellant spends a significant amount of effort attacking insignificant details in P.D.’s testimony, but fails to present any evidence in opposition. The evidence Appellant did present at trial further collaborated P.D.’s testimony. Donaldson’s own witness, Frank Ybarra, testified he saw P.D. at Donaldson’s house while P.D. was Donaldson’s patient. Tr. 313, 315.

P.D.’s testimony regarding Appellant’s sex acts required him to speak about the most private issues in a person’s life. P.D. was required to speak to strangers about personal details most people wish to never say out loud. As P.D. was required to tell the facts of the sex acts he testified he felt like a criminal. He felt like he did something wrong. He said he felt ashamed of his sexuality and the fact that this was how he was forced to “come out” regarding his homosexuality. Tr. 132, L. 3. Appellant’s credibility arguments play into this shame and embarrassment. Appellant attempts to argue that due to minor differences, P.D. must not be telling the truth. Appellant argues because there are differences in his written statement to the Platte County Sheriff, his testimony as a whole is not credible. However, Appellant does not take into account the fact that the

first time P.D. was questioned about every minor detail of the events was in his deposition. The Board attempted to admit P.D.'s deposition into evidence and Appellant argued it was cumulative. Tr. 257, L. 19.

Appellant also argues the AHC did not provide any reasoning for why it repeatedly found P.D. credible. In *Lagud v. Kansas City Mo. Bd. of Police Comm'rs*, the Western District Court of Appeals rejected the argument that the Board of Police Commissioners must delineate specific evidence undermining a police officer's version of events. The court found such argument "disingenuous," and further stated: "The Board is not obligated to further defend its reasoning. Credibility of witnesses and the weighing of evidence are functions within the discretion of the Board, and the Board exercised its discretion in finding [another officer's] testimony to be credible." *Lagud v. Kansas City Mo. Bd. of Police Comm'rs*, 272 S.W.3d 285, 292, (Mo. App. W.D. 2008).

Even when a court has jurisdiction to review an AHC decision and does so "objectively and not in the light most favorable to the agency's decision," the court "defer[s] to the AHC on issues involving the credibility of witnesses and the weight and value to be given to their testimony." *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 230, (Mo. App. W.D. 2012). Donaldson argues at length to support the erroneous conclusion that P.D. is not a credible witness. However, P.D.'s credibility was affirmed by the AHC more than once. The AHC is in a better position than later courts to determine witness credibility, and has found P.D. credible.

Missouri courts have also repeatedly upheld a presumption "that administrative decisionmakers act honestly and impartially." *Buescher Mem. Home, Inc. v. Mo. State*

Bd. of Embalmers & Funeral Dirs., 413 S.W.3d 338, 342, (Mo. App. W.D. 2013). Thus, courts “will not assume that an administrative body was improperly influenced absent clear and convincing evidence to the contrary.” *Id.* at 344. Additionally, courts are not to substitute their judgment for that of the agency on factual matters, even though courts may review matters of law. *Jefferson City Apothecary, LLC v. Mo. Bd. of Pharm.*, 499 S.W.3d 321, 326, (Mo. App. W.D. 2016). However, at all times, the court “defer[s] to the AHC on issues involving the credibility of witnesses and the weight and value to be given to their testimony.” *Id.*

Donaldson has not presented clear and convincing evidence refuting this presumption. The AHC made factual findings regarding the basis for discipline and witness credibility, and these findings are remain valid.

VIII. In Response to Appellant’s Point VIII: The AHC’s finding that P.D. is credible is not arbitrary, capricious, or unreasonable, and this Court has no authority to review the credibility of witnesses because that function is completed by the AHC.

Missouri courts have repeatedly affirmed the position of the Administrative Hearing Commission as the “sole judge of witness credibility and of the weight and value to be given to the evidence.” *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 230, (Mo. App. W.D. 2012). Appellant spends significant amounts of time attempting to call P.D. into question. The AHC has already evaluated the credibility of P.D. who provided sworn testimony and of Appellant who refused to answer with a “yes” or “no” when asked if he had sex with a minor patient.

In *Lagud v. Kansas City Mo. Bd. of Police Comm'rs*, the Board of Police Commissioners determined Officer Lagud had committed misconduct while obtaining a urine sample from an allegedly intoxicated, handcuffed arrestee. *Lagud v. Kansas City Mo. Bd. of Police Comm'rs*, 272 S.W.3d 285, 292, (Mo. App. W.D. 2008). The arrestee provided minimal testimony on the encounter, but a second officer testified to witnessing most of the misconduct. *Id.* The Board of Police Commissioners found the second officer's testimony credible, and ruled to discipline Lagud even though Lagud's version of events differed from the second officer's version. *Id.* Even though conflicting testimony was presented by Lagud and the one eye witness testifying against him, such evidence was weighed and a judgment of the witnesses' credibility was completed during the administrative proceedings. *Id.* Upon judicial review, the Western District Court of Appeals reaffirmed the administrative proceedings as the best place for witness credibility judgments to occur, and deferred to those findings. *Id.*

Courts must "defer to the AHC on issues involving the credibility of witnesses and the weight and value to be given to their testimony" even when reviewing that decision "not in the light most favorable to the agency's decision." *Kerwin*, 375 S.W.3d at 225. Donaldson argues at length to support the erroneous conclusion that P.D. is not a credible witness, but P.D.'s credibility was affirmed by the AHC multiple times. The AHC is in a better position than later courts to determine witness credibility, and has found P.D. credible.

Missouri courts have also repeatedly upheld a presumption "that administrative decisionmakers act honestly and impartially." *Buescher Mem. Home, Inc. v. Mo. State*

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Appellant has not presented clear and convincing evidence refuting this presumption. The AHC made factual findings regarding the basis for discipline and witness credibility, and these findings remain valid.

In addition to the facts stated in other Points herein, and adopted for this Point, the following facts further support competent and substantial evidence which corroborates the testimony of P.D.

1. Respondent's date of birth is [REDACTED], 1961. Tr. 25; Exhibit 12, page 2.
2. Respondent has resided continuously at [REDACTED], Parkville, Missouri 64152 for approximately 20 years. Tr. 159; Exhibit 11, page 7.
3. Respondent was employed at and was the sole owner of Primary Care North Kansas City, LLC. Tr. 2.
4. P.D. was the Respondent's patient. Exhibit 12, page 2; Exhibit 4.
5. P.D. and Respondent were never married. Tr. 161.

6. Respondent was the sole primary/family physician of P.D. from 2012 through 2016. Tr. 15, 18; Exhibit 7.
7. The Respondent first saw P.D. as his physician for the purpose of providing medical treatment at Primary Care North Kansas City, LLC, on May 3, 2012. Exhibit 7, page 2.
8. P.D.'s date of birth is [REDACTED], 1997. Tr. 16.
9. While P.D. was Respondent's patient, in August 2014, Respondent engaged in sexual activity with P.D. of hand to genital contact, mouth to genital contact, and of inserting his penis into P.D.'s anus. Tr. 45, 46, 170, 180.
 - a. In August 2014 Respondent invited P.D. to Primary Care Kansas City North, LLC, after hours using the Grindr application. Tr. 43, 180.
 - b. While at Primary Care Kansas City North, LLC, Respondent used a medical numbing gel from the exam supply cabinet while inserting his penis into P.D.'s anus. Tr. 46, 182.
 - c. While Respondent engaged in the above sexual conduct of inserting his penis into P.D.'s anus, Respondent did not use a condom. Tr. 47, 178.
10. While P.D. was Respondent's patient, Respondent engaged in sexual activity with P.D. of mouth to genital contact while at Primary Care North Kansas City, LLC, during a scheduled medical appointment. Tr. 57, 58, 170.
 - a. During the above instance, Respondent was wearing a white doctor's coat. Tr. 56, 198.

- b. The above sexual contact took place in an exam room at Primary Care North Kansas City, LLC, during regular business hours, in which Respondent locked the door to the exam room. Tr. 58, 198.
 - c. Respondent told P.D. to return to Primary Care North Kansas City, LLC, after hours to continue sexual conduct after someone knocked on the locked exam room door. Tr. 58, 59; Exhibit 11 pg. 39.
 - d. P.D. returned to Primary Care North Kansas City, LLC, later that night. Tr. 59.
 - e. Respondent then engaged in sexual conduct with P.D. by kissing and hand to genital contact. Tr. 54, 55, 59, 170.
 - f. That night, Respondent gave P.D. \$30.00 cash, stating that this was a return of P.D.'s copay from the appointment earlier that day. Tr. 59; Exhibit 11 pg. 61.
11. While P.D. was Respondent's patient, Respondent engaged in sexual activity with P.D. of mouth to genital contact after hours at Primary Care North Kansas City, LLC. Tr. 53, 54, 55, 170, 186, 187.
- a. During the above instance, Respondent told P.D. that P.D.'s ejaculation tasted sweet. Tr. 54; Exhibit 11 pg. 40.
12. While P.D. was Respondent's patient, Respondent engaged in sexual activity with P.D. at Respondent's house at [REDACTED], Parkville, Missouri 64152. Tr. 60, 170, 179; Exhibit 4.

- a. Witness Frank Ybarra saw P.D. at Respondent's house while P.D. was Respondent's patient. Tr. 313, 315.
 - b. Respondent led P.D. into Respondent's bedroom. Respondent kissed P.D. while both were nude. Tr. 62.
 - c. Respondent and P.D. took a bath together. Respondent engaged in sexual conduct with P.D. of hand to genital conduct. Tr. 63; Exhibit 11 pg. 38.
 - d. Respondent and P.D. returned to the bedroom. Respondent engaged in sexual conduct with P.D. of mouth to genital contact. Tr. 63, 188; Exhibit 11 pg. 38.
 - e. While at Respondent's residence in February 2016, Respondent invited P.D. to a Valentine's Day orgy and showed P.D. a box full of sex toys. Tr. 65; Exhibit 11 pg. 57.
 - f. Respondent engaged in sexual conduct with P.D. of inserting his penis into P.D.'s anus. Tr. 66, 178.
13. Respondent communicated to P.D. about sexual activities unrelated to medical appointments through the cell phone application Grindr and text messages. Tr. 21, 28; Exhibit 4; Exhibit 11 pg 24, 25.
- a. Respondent had very explicit texts with P.D. Exhibit 4; Tr. 177.
 - b. Respondent expressed a desire to have sexual contact with P.D. Exhibit 4; Tr. 170.

- c. Respondent had an account on Grindr, a mobile application designed to allow gay and bisexual men to chat and connect, primarily for sexual interactions. Tr. 21, 169, 170; Exhibit 4; Exhibit 8.
- d. Respondent provided his cell phone number to P.D. Tr. 21, 172.
- e. P.D. messaged Respondent through Grindr in 2014 while P.D. was 16. Tr. 22, 179.
- f. P.D. informed Respondent of his identity through Grindr. Tr. 22, 179.
- g. P.D. informed Respondent that P.D. was his patient through Grindr. Tr. 24, 179; Exhibit 4.
- h. Respondent acknowledged that P.D. was his patient through Grindr. Tr. 24, 179; Exhibit 4.
- i. P.D. informed Respondent that P.D. was 16 years old through Grindr. Tr. 24, 179.
- j. After being informed of P.D.'s age through Grindr, Respondent informed P.D. that Respondent was not troubled by P.D.'s age. Tr. 25.
- k. While P.D. was Respondent's patient, Respondent and P.D. had the following text exchange:

P.D: "I'm off"
 Respondent: "Come on over if you want"
 P.D.: "I do haha give me like 20 minutes"
 Respondent: "Ok"
 Respondent: "Front door is open"
 P.D.: "Address?"
 Respondent: "[REDACTED] Parkville mo 64152" Tr. 34, 191; Exhibit 1.

- l. While P.D. was Respondent's patient, Respondent texted P.D. the following:

“Hey you reached out last night... Tonight is my last free night for a little while the wife will be home tomorrow to move more of her stuff to Alabama... I would really like to see you if you want to come over”
Tr. 35, 191; Exhibit 1.

- m. While P.D. was Respondent's patient, Respondent and P.D. had the following text exchange:

P.D: “Hey”
Respondent: “What’s up?”
P.D.: “Not a ton you?”
Respondent: “Just working til 7”
Respondent: “Craving some boy time (three Face With Tears of Joy emojis)”
P.D.: “Are you? Haha”
Respondent: “Yeah, you want to help me out with that?”
P.D.: “Yeah I do”
Respondent: “Sweet 730 tonight at my house?”
P.D.: “I can’t I have voice lessons at eight in Liberty but after that I could”
Respondent: “Ok cool”
P.D.: “Sweet ;)”
Respondent: “When is the last time you were f[**]ked?”
Respondent: “And be honest”
P.D.: “When you f[**]ked me”
Respondent: “Nice”
Respondent: “You can always count on my cock”
P.D.: Well thanks ;)”
Respondent: “So needing your ass” Tr. 36, 37, 38, 191, 192, 193; Exhibit 1.

- n. While P.D. was Respondent's patient, Respondent texted P.D. the following three messages in one day:

“Let me know when you are headed this way” “Daddy needs his boy” “Did you flake on me?” Tr. 39, 191.

- o. While P.D. was Respondent’s patient, Respondent sent P.D. naked photos of himself and photos of his penis. Tr. 41, 177, 178.
 - p. While P.D. was Respondent’s patient, Respondent requested that P.D. send him pictures. Tr. 42, 177, 178.
 - q. Respondent nicknamed himself as “daddy” and P.D. as “his boy.” Tr. 69, 193.
 - r. Respondent informed P.D. that he had sex videos and pictures on his phone and computer. Tr. 72; Exhibit 11 pg. 59.
14. While Respondent was P.D.’s primary care physician, Respondent visited P.D. at P.D.’s workplace of Applebee’s, during which time Respondent gave P.D. \$50.00. Tr. 67, 193.
15. P.D. saw a therapist about the sexual acts done to him by Respondent. Tr. 138.
16. P.D. had emotional distress and harm from Respondent’s actions. He had to undergo EMDR therapy. Tr. 139.
17. P.D. went to a therapist once a week until he left for college. Tr. 141.
18. P.D. switched Primary Care Physicians in 2016 because Respondent had sexually assaulted him. Tr. 19, 168.
19. After Respondent was no longer P.D.’s physician, Respondent messaged P.D. on Grindr saying hello and wishing that things were not ‘f[**]ked up’ between them. Tr. 73.

20. Witness Bailey confirms he has no knowledge of whether the alleged pictures of P.D. were doctored, edited or real. (Tr. 287). He has no knowledge of whether Respondent borrowed a different car during the first meeting with P.D. (Tr. 301-302). He has no knowledge of P.D.'s sexual history (Tr. 300). He has no knowledge of Respondent's attire when meeting P.D. (Tr. 301-302). He did confirm the large tub, double vanity, and litter box in the Respondent's bedroom just as P.D. had testified.

21. Witness Bailey condoned the actions by the Respondent. Witness Bailey told P.D.'s father, "...the relationship between P.D. and Dr. Donaldson was one that was good for P.D. because it gave P.D. a place to act out safely and that [A.D.] should actually thank Dr. Donaldson for providing that for P.D. rather than pursue any kind of, you know, trouble with him." Tr. 397.

22. A.D. further contradicted witness Ybarra's testimony regarding the Respondent wearing his white physician's coat as stated by P.D. Tr. 394.

IX. In Response to Appellant's Point IX: The AHC's decision to allow Commissioner Dandamudi to preside over Donaldson's emergency suspension and disciplinary hearing is not prohibited by Section 536.083, RSMo because the emergency suspension did not require a hearing.

Section 536.083, RSMo prohibits a hearing officer who conducted an administrative hearing regarding a particular issue from conducting administrative rehearings and appeals of the same issue between the same parties. On December 1, 2017, Commissioner Sreenivasa R. Dandamudi determined Donaldson's license should be suspended emergently. On February 22 and 23, 2018, the AHC, including

Commissioner Dandamudi, held a hearing to determine whether probable cause existed for the Board of Healing Arts to hold a disciplinary hearing. Despite Donaldson's conclusion to the contrary, Commissioner Dandamudi was not disqualified from serving as hearing officer at the February 2018 hearing by §536.083 RSMo.

Section 536.083 RSMo prohibits a hearing officer from conducting an administrative hearing regarding the same issues and parties as were present in a previous administrative hearing in which the same individual served as a hearing officer. However, the AHC did not hold a "hearing" for purposes of the Missouri Administrative Procedures Act in December 2017 on the issue of emergency suspension. A "hearing" for these purposes includes notice of issues, oral evidence taken under oath or affirmation, cross-examination of witness, the making of a record, and adherence to evidentiary rules.

Furthermore, a hearing was not required for the AHC to enter an emergency suspension order. Section 334.102, RSMo provides authority for such proceedings as well as the relevant procedures. Subsection 3 of the statute governs the AHC's responsibilities in deciding whether to grant the emergency suspension. This subsection states, "Within five days of the board's filing of the complaint, the administrative hearing commission shall review the information...If the administrative hearing commission finds that there is probable cause, the administrative hearing commission shall enter the order requested by the board." Thus, 536.083, RSMo does not even apply to this situation.

X. The record provided to this Court by Appellant is incomplete.

On or about January 14, 2020, Respondent filed a Motion to Supplement the Record

by means of the Court of Appeals ordering the Circuit Court Clerk to send up a CD of the certified record due to size restrictions on the electronic file. Respondent's brief was due January 16, 2020, and at that time, this Court had not ruled on the Respondent's Motion to Supplement. Therefore, this Brief is filed without citing pleadings, documents, or transcripts contained in the CD/documents from the April 1, 2019 filing "Correspondence Filed" in the underlying case, "Blake Donaldson v. Missouri Board of Registration for the Healing Arts, No. 18AC-CC00435" because this CD was not made a part of the legal file prior to Respondent's Brief deadline. Respondent cited other pleadings, documents, or transcripts from the legal file.

CONCLUSION

Throughout this case, different parties have phrased Appellant's actions as "ethical problems," "sexual misconduct," and other similar terms. The fact remains, though, that a minor patient cannot consent to intercourse or sexual conduct of any kind with their adult physician. Appellant raped his minor patient. The Board and AHC appropriately suspended his license because of his sexual acts on his patient. He has received full due process in the adjudication of this action.

WHEREFORE, Respondent respectfully requests this Court for its Order affirming the Decision of the Administrative Hearing Commission and the Decision of the State Board of Registration for the Healing Arts, and for such other and further relief as this Court deems just and proper in the premises.

CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing was sent via the Court's electronic filing system on January 22, 2019, to the following:

Scott R. Pool; Cody R. Holt
3225 Emerald Lane, Suite A
Jefferson City, Missouri 65109-6864
Attorneys for Appellant

/s/ Adam G. Grayson
Adam G. Grayson

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(B) AND (C)

The undersigned certifies that Respondent's Brief includes the information required by Rule 55.03, contains 12,592 words and therefore complies with the limitations contained in Rule 84.06(b), and was served upon Appellant pursuant to Rule 103.08.