

1997

Leo N. Taylor v. Department of Commerce State of Utah, and Division of Occupational and Professional Licensing : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970030 - CA

IN THE COURT OF APPEALS, STATE OF UTAH

LEO N. TAYLOR,

:

Petitioner,

:

v.

:

Priority No. 1

DEPARTMENT OF COMMERCE,
STATE OF UTAH, and DIVISION OF
OCCUPATIONAL AND
PROFESSIONAL LICENSING,

:

Case No. 970030 CA

: Judge STEVEN J. EKLIN

:

Priority No. 1

Respondent.

OPENING BRIEF OF PETITIONER

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FILED

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COURT OF APPEALS

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Petitioner,	:	
v.	:	
DEPARTMENT OF COMMERCE,	:	Case No. 970030 CA
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PROFESSIONAL LICENSING,	:	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS OF CENTRAL IMPORTANCE TO APPEAL. . . .	4
STATEMENT OF CASE	5
SUMMARY OF ARGUMENTS	11
ARGUMENT	13
I. THE DIVISION HAS REVOKED DR. TAYLOR'S LICENSE BASED UPON DETERMINATIONS OF FACT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.	13
A. NO EVIDENCE OF GROSS INCOMPETENCE IN DR. TAYLOR'S TREATMENT OF HILLARY AND SHAKESBEAR.	19
1. Evidence of Treatment of Hillary.	20
2. Evidence of Treatment of Shakesbear.	23
B. NO EVIDENCE OF GROSS NEGLIGENCE IN DR. TAYLOR'S TREATMENT OF HILLARY, SHAKESBEAR AND CHAR. . . .	26
1. Evidence of Treatment of Hillary.	26
2. Evidence of Treatment of Shakesbear. . . .	27
3. Evidence of Treatment of Char.	35
C. THE DIVISION'S FINDING OF AGGRAVATING CIRCUMSTANCES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, VIOLATES DUE PROCESS AND CONSTITUTES UNLAWFUL DECISION MAKING PROCESS.	40

1.	Multiple instances of unprofessional conduct reflecting inability to provide minimally acceptable veterinary care or callous indifference to the conditions and needs of animals.	41
2.	Refusal to Acknowledge Wrongful Nature of Misconduct To the Board or Owners, No Evidence of Good Faith Efforts to Make Restitution or Rectify Consequences of Misconduct.	43
3.	Violation of Due Process, Unlawful Process and Departure from Prescribed Procedure.	44
II.	THE REVOCATION OF DR. TAYLOR'S LICENSE IS CONTRARY TO THE DIVISION'S PRIOR PRACTICE.	48
A.	Comparing The Six Prior Veterinary Formal Licensing Proceedings.	51
1.	The Division <i>Dismissed</i> A Claim Despite Allegations That A Veterinarian Was Illegally Practicing Medicine By Administering and Prescribing Controlled Substances To Human Beings.	51
2.	The Division Merely <i>Suspended</i> The Veterinarian's License for Three Months Who Was Found Guilty Of Seven Counts Of Second Degree Felony Theft, One Count Of Third Degree Felony Theft And One Class-A Misdemeanor For Embezzling Funds From A Clinic.	52
3.	In A Case Involving Unprofessional Conduct Of A Veterinarian With Respect To The Unsanitary And Non-complying Nature Of His Facility, The Division <i>Precluded</i> A Veterinarian From Practicing Until The Facility Was In Full Compliance With Statutes And Rules. . . .	53
4.	A Veterinarian Was Practicing Medicine On Human Beings By Administering Controlled Substances In An Attempt To Treat His Sons' Attention Deficit	

Disorders. Despite this Unlicensed Practice, The Division Placed The Veterinarian's Controlled Substance License On One-Year's <i>Probation</i> But His License To Practice Veterinarian Medicine Went Unsanctioned.	54
5. <i>Probation</i> For One Year Was The Penalty Imposed Upon A Veterinarian Who Allegedly Administered And Dispensed A Controlled Substance For Purposes Other Than Legitimate Veterinary Use.	55
6. The Division Ultimately Imposed A Three-Year <i>Probation</i> On A Veterinarian Who Admitted Administering Demerol To Himself, A Schedule-II Controlled Substance, And For Maintaining Fictitious Records To Hide His Personal Abuse.	56
B. The Division Has Acted In A Manner Inconsistent With Its Prior Practice.	57
CONCLUSION	61
CERTIFICATE OF SERVICE	62

TABLE OF AUTHORITIES

Cases

<i>Cannon v. Gardner</i> , 611 P.2d 1207 (Utah 1980)	60
<i>Chadwick v. Neilsen</i> , 763 P.2d 817 (Utah App. 1988)	16
<i>DB First v. Division of Occupational and Professional Licensing</i> , 779 P.2d 1145 (Utah App. 1989)	45
<i>DCR, Inc. v. Peak Alarm Co.</i> , 663 P.2d 433 (Utah 1983)	16, 35
<i>Dikeou v. Osborne</i> , 881 P.2d 943 (Utah App. 1994)	16, 22
<i>Grace Drilling Co. v. Board of Review</i> , 776 P.2d 63 (Utah App. 1989)	14
<i>In Re Kirk v. Division of Occupational and Professional Licensing</i> , 815 P.2d 242 (Utah App. 1991)	45
<i>In re: Richard Worthen</i> , No. 950536 and 950537	18
<i>King v. Indus. Comm'n of Utah</i> , 850 P.2d 1281 (Utah App. 1993)	1-3, 13, 14
<i>Miriam v. Board of Review</i> , 812 P.2d 447 (Utah App. 1991)	14
<i>Morris v. Public Service Comm'n</i> , 321 P.2d 644 (Utah 1958) (citations omitted)	46
<i>Nelson v. Jacobsen</i> , 669 P.2d 1207 (Utah 1983)	45, 46
<i>Pickett v. Utah Dept. of Commerce</i> , 858 P.2d 187 (Utah App. 1993)	50, 57, 58, 60
<i>Questar Pipeline Co. v. Tax Comm'n</i> , 817 P.2d 316 (Utah 1991)	15
<i>Rogers v. Division of Real Estate</i> , 790 P.2d 102 (Utah App. 1990)	2, 3
<i>SEMECO v. Utah State Tax Comm'n</i> , 849 P.2d 1167 (Utah 1993)	50

<i>State v. Singer</i> , 815 P.2d 1303 fn. 5 (Utah App. 1991)	16
<i>Stewart v. Board of Review</i> , 831 P.2d 134 (Utah App. 1992)	14
<i>Strange v. Osterlund</i> , 594 P.2d 877 (Utah 1979)	17, 18
<i>Utah Department of Administrative Services v.</i> <i>Public Service Comm'n</i> , 658 P.2d 601 (Utah 1983)	2, 4
<i>Zissi v. Tax Comm'n</i> , 842 P.2d 848 (Utah 1992)	1

Statutes

Utah Code Ann. § 58-1-101	6
Utah Code Ann. § 58-1-401(2)(a)	4, 15, 39, 44
Utah Code Ann. § 58-1-501(2)	5, 15, 44
Utah Code Ann. § 58-12-30	51
Utah Code Ann. § 58-17-7(1)	55
Utah Code Ann. § 58-28-1	6
Utah Code Ann. § 58-28-2(5)	54
Utah Code Ann. § 58-28-2(6)	5, 44
Utah Code Ann. § 58-28-2(7)(b)	56
Utah Code Ann. § 58-28-6(m)	55
Utah Code Ann. § 58-37-4(b)(iii)(D)	51
Utah Code Ann. § 58-37-6(2)(b)	54
Utah Code Ann. § 58-37-6(5)	56
Utah Code Ann. § 58-37-6(7)(a)(i)	51
Utah Code Ann. § 58-37-8(a)	55, 56
Utah Code Ann. § 63-46b-0.5	13

Utah Code Ann. § 63-46b-10	5, 47
Utah Code Ann. § 63-46b-16	1, 2, 3, 5, 12, 13, 14, 25, 40, 47, 48, 49, 50, 58, 59
Utah Code Ann. § 78-2a-3(2)(a)	1

Rules

Utah Admin. Code R156-28-8(3)	5, 44
Utah Admin. Code R153-28-3(A)(1)(a)(4)	53
Utah Admin. Code R153-28-3(A)(2)(b)	53
Utah Admin. Code R153-28-3(A)(2)(c)	53
Utah Admin. Code R153-28-3(A)(3)(a)	53
Ut. R. Crim. P. 22(a)	46, 47

Other

UTAH CONST., art. I, § 7	4
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(a) (1996) and Utah Code Ann. § 63-46b-16(1) (1988 as amended).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Findings of Fact of the hearing panel are supported by substantial record evidence.

a. As to issues of fact, the appeals court will change the Agency's Finding only if it "is not supported by substantial evidence when viewed in light of the whole record before the Court." Utah Code Ann. § 63-46b-16(4)(g); *King v. Indus. Comm'n of Utah*, 850 P.2d 1281, 1285 (Utah App. 1993) citing *Zissi v. Tax Comm'n*, 842 P.2d 848, 852-54 (Utah 1992).

2. Whether the Agency action in the case of Dr. Taylor's license revocation was unconstitutional and whether the Agency has engaged in lawful procedure or decision-making process, or has failed to follow a prescribed procedure?

a. As to issues of general law, the appeals court reviews Agency interpretations "under a correction of error standard, giving no deference to the Agency's decision." *King v. Indus. Comm'n of Utah*, 850 P.2d 1281, 1285 (Utah App. 1993); Utah Code Ann. § 63-46b-16(4)(d).

b. As to issues of agency specific law, the appeals court will determine whether the legislature explicitly granted

discretion to the Agency to interpret or apply statutory language at issue and if such a grant exists, the court will review the decision based on an abuse of discretion standard. *King v. Indus. Comm'n of Utah*, 850 P.2d 1281, 1291 (Utah App. 1993); Utah Code Ann. § 63-46b-16(4)(h)(i).

If the appeals court does not find an exclusive grant of discretion and if the statutory language is broad and expansive or subject to numerous interpretations, the appeals court will similarly review the decision based on an abuse of discretion standard. *Id.*

If the language is unambiguous and can be interpreted and applied based on traditional methods of statutory construction, the appeals court reviews the agency action based on a correction of errors standard. *Id.*; Utah Code Ann. § 63-46b-16(4)(d).

c. An agency's application of law to its factual findings will not be disturbed "unless its determination exceeds the bounds of reasonableness and rationality." *Rogers v. Division of Real Estate*, 790 P.2d 102 (Utah App. 1990) citing *Utah Department of Administrative Services v. Public Service Comm'n*, 658 P.2d 601 (Utah 1983).

3. Whether the Agency action proposed in this case was contrary to the Agency's prior practice or appropriately justified by the Agency upon fair and rational bases.

a. As to issues of general law, the appeals court reviews Agency interpretations "under a correction of error standard, giving no deference to the Agency's decision " *King v. Indus. Comm'n of Utah*, 850 P.2d 1281, 1285 (Utah App. 1993); Utah Code Ann. § 63-46b-16(4)(d).

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**CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND
REGULATIONS OF CENTRAL IMPORTANCE TO APPEAL.**

"No person shall be deprived of life, liberty
or property, without due process of law."

Utah Constitution, Art. I, § 7.

(2) The division may refuse to issue a
license to an applicant and may refuse to
renew or may revoke, suspend, restrict, place
on probation, issue a public or private
reprimand to, or otherwise act upon the
license of any licensee in any of the
following cases:

(a) the applicant or licensee has engaged
in unprofessional conduct, as defined by
statute or rule under this title;"

Utah Code Ann. § 58-1-401(2)(a) (1993 as amended)

(2) "Unprofessional conduct" means conduct,
by a licensee or applicant, that is defined as
unprofessional conduct under this title or
under any rule adopted under this title and
includes:

. . .

(b) violating, or aiding or abetting any
other person to violate, any generally
accepted professional or ethical standard
applicable to an occupation or profession
regulated under this title;

. . .

(g) practicing or attempting to practice an
occupation or profession regulated under this
title through gross incompetence, gross

negligence, or a pattern of incompetency or negligence;

Utah Code Ann. § 58-1-501(2)(b), (g)

(6) "unprofessional conduct" as defined in Section 58-1-501 and as may be further defined by rule includes:

(a) applying unsanitary methods or procedures in the treatment of any animal, contrary to rules adopted by the board and approved by the division;

Utah Code Ann. § 58-28-2(6)(a) (1993 as amended)

Utah Code Ann. § 63-46b-10 (full text attached as Appendix 0001)

Utah Code Ann. § 63-46b-16 (full text attached as Appendix 0002-0003)

(3) A veterinarian shall maintain a sanitary environment to avoid sources and transmission of infection to include the proper routine disposal of waste materials and proper sterilization and/or sanitation of all equipment used in diagnosis and/or treatment.

Utah Admin. Code R156-28-8(3) (1994 as amended)

STATEMENT OF CASE

1. Petitioner Dr. Leo N. Taylor is a licensed veterinarian **in the state** of Utah and has been licensed and practiced within the state since 1956. He maintains a large and small animal veterinary practice known as The Brookside Animal Hospital in West Jordan, Utah. See Transcript of March 18-20, 1996 Hearing, "Transcript," 316:15 through 317:10 (Appendix 00257). A copy of the Transcript is also attached to the Record as a separate document.

2. The Division of Occupational & Professional Licensing of the Department of Commerce ("Division") filed a Petition against Dr. Taylor on February 23, 1995 alleging he violated the Division of Occupational and Professional Licensing Act, Utah Code Ann. §§ 58-1-101, *et seq.*, and the Veterinary Practice Act §§ 58-28-1, *et seq.* The Division based its allegations against Dr. Taylor on five (5) different animals which Dr. Taylor allegedly treated during a sixteen (16) month period, July, 1993 to October, 1994. Petition, (R 456-468).

3. A hearing was held on March 18-20, 1996 before Administrative Law Judge J. Steven Eklund and a panel of two veterinarians and one lay person. At the conclusion of the three-day hearing, the Division entered a document styled "Findings of Fact, Conclusions of Law and Recommended Order," which was signed by Judge Eklund on April 12, 1996, "Findings", (Appendix 0004 to 0023).

4. Oscar, a cocker spaniel was operated on for a broken leg by Dr. Taylor, on July 10, 1993. Dr. Taylor repaired the fracture by inserting an intramedullary pin into the bone. On July 19, 1993, Oscar was taken to a second veterinarian who determined the fracture was not united and the intramedullary pin was not in its proper place. Oscar was later taken to a third veterinarian who specialized on orthopedic surgery who, on July 21, 1993 performed a second surgery on Oscar's leg. The Division found that Dr.

Taylor did not insert the intramedullary pin in the proper place and inappropriately used a galvanized pin and chromic gut in setting Oscar's leg. The Division further found that Dr. Taylor did not maintain records on Oscar's history and condition. Findings, p. 2 ¶ 3 to p. 5 ¶ 13 (Appendix 0005-0008).

5. Nadia, a chow/lab mix, was treated by Dr. Taylor for mastitis on December 23, 1993. The Division found that Dr. Taylor failed to maintain adequate records on Nadia's history and condition. Findings, p. 5 ¶¶ 14-17 (Appendix 0008).

6. Hillary, an English bulldog owned by Cindy Bue was artificially inseminated by Dr. Taylor on April 21 and 23, 1994. On June 18, Hillary exhibited labor pains prior to reaching full gestation. The Division found that Ms. Bue contacted Dr. Taylor and told him about Hillary's apparent labor pains. After Hillary passed two dead puppies, Ms. Bue took Hillary to Brookside Animal Hospital on June 19 in the morning. Dr. Taylor examined Hillary by palpation only, but failed to take an x-ray. Dr. Taylor told Ms. Bue the dead puppies were premature. Hillary stayed at Brookside Animal Hospital overnight and on June 20, Ms. Bue was informed by Brookside that Hillary had passed her last dead puppy and had been "flushed out", cleaning her uterus. After being released from Brookside, Hillary passed another dead puppy and was taken to a different clinic. The second veterinarian Dr. Chinn to an x-ray which showed one more puppy inside Hillary and a c-section was

performed to help Hillary pass the last dead puppy. The Division found that Dr. Taylor did not maintain adequate records regarding Hillary's history and conditions. Findings, p. 6 ¶ 18 through p. 8 ¶ 26 (Appendix 0009-0011).

7. Shakesbear, a chow-chow owned by Cheryl Devlin was seen by Dr. Taylor on May 24, 1994, after Shakesbear fell off a twelve (12) foot porch. Ms. Devlin's brother Alvin Dean Schofield took Shakesbear to Dr. Taylor who examined Shakesbear, took one x-ray and discovered spine and disk injuries. Dr. Taylor told Mr. Schofield that there was not a good chance Shakesbear would walk again and that he should consider euthanization to prevent Shakesbear from enduring more pain. When Mr. Schofield picked up Shakesbear from Brookside Animal Hospital on May 26, Shakesbear was purportedly wet and smelled of urine. Shakesbear was taken to a veterinary orthopedic specialist who determined that Shakesbear could feel pain in his hind quarters and gave Shakesbear a fifty-fifty (50/50) chance of recovering. Dr. Gary L. Petersen, an orthopedic specialist, felt that Dr. Taylor's x-ray should have been followed by another x-ray to reach the best diagnosis. The orthopedic specialist additionally opined that Shakesbear had urine burns because he was left sitting in his urine without the ability to move himself due to his injuries. The Division found that Dr. Taylor failed to take sufficient x-rays in diagnosing Shakesbear, that he did not nurse Shakesbear in a sanitary condition, and

failed to maintain adequate records regarding Shakesbear's history or conditions. Findings, p. 8 ¶ 27 to p. 9 ¶ 32 (Appendix 0011-0012).

8. Char, a Chinese shar-pei was taken to Dr. Taylor on October 11, 1994 to be spayed. Char died because she did not take the anesthesia well. Dr. Taylor performed a necropsy and opined that the dog had died due to an irregularly shaped heart, fluid around the heart and pneumonia. A second veterinarian Dr. Scott Vande Griend performed a necropsy and opined that the heart was not irregularly shaped and that he could find no edema of the lungs suggesting pneumonia. The Division concluded that Dr. Taylor misdiagnosed the cause of Char's death. Findings, p. 10 ¶ 33-34 (Appendix 0013).

9. After setting forth its 34 "Findings of Fact," each addressing Dr. Taylor's involvement with the various animals in question, the Division made several general, conclusory statements without reference to its Findings or the Record. (See Findings, pp. 2-10, Appendix 0005-0013)

10. Commencing on page 13 of the Findings of Fact, the Division undertook to define "negligence", "gross negligence" and "gross incompetence." See Findings pp. 13-16 (Appendix 0016-0019).

11. Completing its definition of "negligence", "gross negligence" and "gross incompetence" in the context of determination of unprofessional conduct, the Division, without

more, concluded that Dr. Taylor was grossly incompetent in using a galvanized rod and chromic gut in stabilizing Oscar's fractured leg, see Findings, p. 16; that Dr. Taylor was grossly incompetent in only palpating Hillary in the course of diagnosing her condition, see Findings p. 16; and, that Dr. Taylor was grossly incompetent in diagnosing Shakesbear's condition without adequate x-rays and in making an unsubstantiated prognosis. See Findings, p. 17 (Appendix 0020).

12. The Division also concluded that Dr. Taylor was grossly negligent "with respect to the treatment he provided every animal"; in his treatment of Oscar; as he failed to take an x-ray in diagnosing Hillary's pregnancy and in releasing the dog without adequate diagnosis and treatment; was grossly negligent in failing to take adequate x-rays of Shakesbear in diagnosing the dog, and in providing inadequate nursing observation and maintaining Shakesbear in a sanitary environment; and, was grossly negligent in misdiagnosing the cause of Char's death. See Findings, pp. 18-19 (Appendix 0021-0022).

13. The Division concluded that Dr. Taylor engaged in a repeated pattern of negligence in failing to record the medical histories, the surgical reports, the progress notes and the diagnoses of Oscar, Nadia, Hillary and Shakesbear. *Id.*, pp. 17-18 (Appendix 0020-0021).

14. The Division continued in its Findings that there were "numerous aggravating factors which should be considered regarding the disciplinary sanction to be imposed in this proceeding." Findings, p. 18 (Appendix 0021). These factors were set forth as Dr. Taylor's "multiple instances" of unprofessional conduct which supposedly reflected "an inability to provide minimal acceptable veterinary care or a callous indifference to the condition and needs of those animals," *Id.*; Dr. Taylor's uniform refusal "to acknowledge the wrongful nature of his misconduct to either this Board or any of the owners," Findings, p. 19 (Appendix 0022); Dr. Taylor's failure to maintain ongoing compliance with those professional standards which generally govern all veterinarians in the state," *Id.* at 19; and the absence of evidence that Dr. Taylor, "undertook any good faith efforts to make restitution or rectify the consequences of his misconduct." *Id.*

15. Based upon its Findings of Fact and Conclusions of Law, the panel recommended, and the Division adopted the order, that Dr. Taylor's license be revoked. See Findings, p. 20 (Appendix 0023); see also April 15, 1996 Order of the Division, Director J. Craig Jackson, (Appendix 0024).

SUMMARY OF ARGUMENTS

The Division's conclusion that Dr. Taylor was grossly incompetent in his treatment of Hillary and Shakesbear is not supported by substantial evidence as required by Utah Code Ann.

§ 63-46b-16(4)(g). No individual or expert testified that Dr. Taylor's conduct in handling those two animals manifested an extreme deficiency and the basic knowledge and skill in the treatment of these animals by Dr. Taylor.

Similarly, the conclusion by the Board that Dr. Taylor's treatment of Hillary, Shakesbear and misdiagnosis of the cause of Char's death amounted to gross negligence, is not supported by the evidence, nor was the evidentiary finding sufficiently linked to the ultimate conclusion of law of the Division. No witness testified, nor did any document indicate that the conduct of Dr. Taylor was of such an aggravated nature as to manifest indifference, utter forgetfulness, or heedless and palpable violation of a legal duty or legal obligation.

The Board also inappropriately considered, what it defined as "aggravating factors" which it considered in the imposition of the sanction and revocation of Dr. Taylor's license. These factors were not supported by the substantial evidence, and their consideration violates Dr. Taylor's due process and constitutes an unlawful application of the Administrative Procedures Act.

Finally, the sanction and revocation of Dr. Taylor's license is contrary to the Division's prior practice in dealing with veterinary licenses and was not appropriately justified by the Division by explanation of fair and rational bases, as required under Utah Code Ann. § 63-46b-16(h)(iii). The Division's Findings of Fact, Conclusions of Law and Proposed Order is devoid of any explanation of fair and rational bases for the revocation of Dr. Taylor's license as compared to the prior conduct considered and

acted upon by the Division. Prior licensees have engaged in abuse and misprescription of controlled substances, and in one instance criminal fraud, and yet no prior veterinarian has had his license revoked.

The matter should be reversed and remanded to enter Findings and Conclusions based on the record and to impose a sanction consistent with the prior practice of the Division.

ARGUMENT

I. THE DIVISION HAS REVOKED DR. TAYLOR'S LICENSE BASED UPON DETERMINATIONS OF FACT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

One of the bases by which a substantially prejudiced party can obtain relief under the Utah Administrative Procedures Act, "UAPA", Utah Code Ann. § 63-46b-0.5 *et seq.*, is if the conclusions of fact and law entered by the administrative agency are not supported "by substantial evidence when viewed in light of the whole record before the court. . ." Utah Code Ann. § 63-46b-16(4)(g). Dr. Taylor, a practicing veterinarian for over 40 years, has had his license revoked as a consequence of the Division's action. Whether or not the findings of the Agency are based on determinations of fact which are not supported by substantial evidence is determined by examining the entire record available to the court, not simply that which supports the findings of the administrative law judge. [citations omitted] *King v. Industrial Comm'n of Utah*, 850 P.2d 1281, 1285 (Utah App. 1993). The petitioner has the burden of marshalling "all of the evidence

supporting the findings and show[ing] that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Id.* at 1285 citing *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989). The review imposed by the appeals court is not to be as strict as a *de novo* review or as lenient as the "any competent evidence" review but "simply accords deference to the agency where two reasonable, yet conflicting, conclusions could have been reached." *Id.*

Substantial evidence has been defined by the Utah courts as "that which a reasonable person 'might accept as adequate to support a conclusion.'" *King* at 1285, citing *Stewart v. Board of Review*, 831 P.2d 134, 137 (Utah App. 1992) (quoting *Miriam v. Board of Review*, 812 P.2d 447, 450 (Utah App. 1991) (quoting *Grace Drilling Co. v. Board of Review* at 68)).

In order to fully understand the conclusions reached by the Division in this matter, in addition to reviewing the entire record, the Court must necessarily interpret issues of general law. This Court has previously determined that the level of review afforded agency decisions in interpreting issues of general law is guided by Utah Code Ann. § 63-46b-16(4)(d). *King* at 1285. That is, the court interprets agency decisions of general law "under a correction of error standard, giving no deference to the agency's

decision." *Id.* citing *Questar Pipeline Co. v. Tax Comm'n*, 817 P.2d 316, 318 (Utah 1991).

With regard to the license of Dr. Taylor to practice veterinary medicine in the state of Utah, the Division entered Findings of Fact and Conclusions of Law which set out to define "gross incompetence" and "gross negligence" as those terms are used in the Division's Licensing Act, Utah Code Ann. § 58-1-501(2)(g).

The Licensing Act authorizes the Division to revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee who engages in "unprofessional conduct". Utah Code Ann. § 58-1-401(2)(a) (1993 as amended). As applied to the action brought against the license of Dr. Taylor, Utah Code Ann. § 58-1-501(2) defines unprofessional conduct to include:

(b) Violating . . . any generally accepted professional or ethical standard applicable to an occupation or profession regulated under this title;

. . .

(g) Practicing . . . an occupation or profession regulated under this Title through gross incompetence, gross negligence, or a pattern of incompetency or negligence.

In order to take the first step in revoking the license of Dr. Taylor, it was necessary for the Division to define unprofessional conduct, and specifically "gross incompetence", "gross negligence" and "pattern of negligence." "Negligence" has been generally

defined by the Utah courts as "a failure to exercise the degree of care with which a reasonable person would have exercised under the same circumstances whether by acting or by failing to act." *DCR, Inc. v. Peak Alarm Co.*, 663 P.2d 433, 434-35 (Utah 1983). In a criminal context, the Utah courts have defined criminal negligence to occur when a person engages in conduct, under circumstances when he was aware or ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all circumstances as viewed from the actor's stand point. *State v. Singer*, 815 P.2d 1303, 1312 fn. 5 (Utah App. 1991). In the realm of medical malpractice in order to sustain a prima facie case of negligence, a plaintiff must show three elements, "(1) the standard of care by which the doctor's conduct is to be measured, (2) breach of that standard by the doctor, and (3) injury proximately caused by the doctor's negligence." *Dikeou v. Osborne*, 881 P.2d 943, 946 (Utah App. 1994) citing *Chadwick v. Neilsen*, 763 P.2d 817, 821 (Utah App. 1988). Utah courts have not defined "negligence", "gross negligence", or "gross incompetence" in the context of a license revocation proceeding.

In its Findings of Fact and Conclusions of Law, the Division defined negligence as "the failure to use the degree of care

required under the particular circumstances involved." See Findings, p. 15 (Appendix 0018).

Although the Utah Supreme Court has concluded that gross negligence falls on a continuum of culpability between simple negligence and intentional conduct, and involves elements of both (citing *Strange v. Osterlund*, 594 P.2d 877, 881 (Utah 1979)), since there are no Utah cases defining issues of "competency and negligence in a professional setting relative to licensure proceedings," the Division looked to other jurisdictions in articulating a definition of both. Findings, p. 14.

"Gross incompetence" was defined by the Division as "an extreme deficiency in the basic knowledge and skills necessary to practice at the minimum degree of necessary technical expertise or ability." [citations omitted] Division's Findings, p. 14. It defined "gross negligence" as substantially and appreciably higher in magnitude than ordinary negligence, conduct of an aggravated character as distinguished from a mere failure to exercise ordinary care. See Division's Findings, p. 15. In relying on case law from other jurisdictions, the Division used such descriptive terms and phrases as "indifference to present legal duty," "forgetfulness of legal obligations," "heedless and palpable violation of legal duty," and then noted that one body of case law defines "gross negligence" in terms of degree, and not kind, while other courts and jurisdictions have defined "gross negligence" in terms of the

kind of negligence, and not degree. *Id.* at 15-16. The language of this Court in the *Strange* decision, makes it clear that Utah courts have defined "gross negligence" in terms of degree. See *Strange* at 881. The Division falls short in its Order in setting forth the elements required of the Division in establishing a claim of "negligence", "gross negligence" or "gross incompetence" against Dr. Taylor. The Division did not expound on what the Division, in the context of a licensing action, must show in order to prove a *prima facie* case. Nor did the Division provide a reasoned basis or an explanation of the linkage between its Findings of Fact and its ultimate Conclusions. The absence of this link is critical to the Division's analysis since, without it, it is impossible to pinpoint precisely what standards are required in the industry and under the provisions of the Licensing Act, and to what extent they have been violated, if at all, by Dr. Taylor. This deficiency is precisely the problem addressed by the Utah Supreme Court recently, in the yet unpublished opinion of *In re: Richard Worthen*, No. 950536 and 950537, a portion of the text of which is attached hereto in the Appendix, (Appendix 0027) where the court observed

We expect the Commission's Findings to resolve questions of fact and provide an explanation of its assessment of the facts so as to provide a reasoned basis for its decision. There must be an explanation of the linkage between the raw facts and the Commission's ultimate conclusions, including an explanation of why the Commission drew the inferences from the facts that it did. Finally, the Commission must logically link its factual

findings and legal conclusions to the recommended sanction order to explain why it chose one sanction over another.

Id. at p. 29. This the Division here failed to do.

After defining negligence as set forth above, the Division merely concluded that Dr. Taylor's failure to "record a medical history or his physical examination . . ."; "to record an adequate surgery report . . .,"; " . . . to record progress notes. . . "; and, " . . . to record a diagnosis. . ." of Oscar, Hillary Nadia and Shakesbear, four of the five dogs treated giving rise to the complaints against Dr. Taylor, constituted "a repeated pattern of negligence . . ." See Findings, pp. 17-18 (Appendix 0020-0021).

After citing the language of the various jurisdictions, as if by way of guideline, and without further rational, the Division merely concludes that, "[r]espondent [Dr. Taylor] has practiced veterinary medicine in both a grossly incompetent and grossly negligence manner." Findings, p. 16 (Appendix 0019).

A. NO EVIDENCE OF GROSS INCOMPETENCE IN DR. TAYLOR'S TREATMENT OF HILLARY AND SHAKESBEAR.

The evidence elicited at hearing does not support the Division's conclusions in several respects. Among other things, the Division concluded that Dr. Taylor was "grossly incompetent" in his treatment of the dog Hillary, "when he elected to only palpate the dog as the sole means to diagnose her condition." The Division also concluded that Dr. Taylor was "grossly incompetent" in his treatment of Shakesbear, "when he diagnosed that dog's condition

without resort to any adequate x-rays" and suggested that the dog be euthanized. Findings, p. 16 (Appendix 0019).

1. Evidence of Treatment of Hillary.

The Division's claim based on the dog Hillary was supported by the testimony of Hillary's owner, Ms. Cindy Bue, and the veterinarian Ms. Bue visited subsequent to taking her dog to the Brookside Animal Hospital, Dr. Mayling M. Chinn, which spans pages 150-215 of the transcript (Appendix 0212-0229). Hillary was an English bulldog, which, according to the Findings of the Division, was artificially inseminated by Dr. Taylor on April 21, and 23 of 1994. See Transcript, 155:15-21 (Appendix 0214). On Friday, June 17, 1994, Hillary went into labor and her owner, Ms. Bue, contacted the Brookside Animal Hospital to take in Hillary. See Transcript 157:6-23 (Appendix 0214). Ultimately, Hillary went into labor and delivered all of her pups stillborn. Two of the pups were delivered before the animal was brought into the Brookside Animal Clinic. Ms. Bue testified that, at Brookside, Dr. Taylor "felt her stomach," examined the puppy that was stillborn and explained that the puppies were all premature, that Hillary was passing them fine by herself and no cesarian section would be required. See Transcript, 161:5 - 162:15 (Appendix 0215). Hillary, in fact, passed other puppies while at the Brookside Animal Clinic but Ms. Bue ultimately became impatient and came down and picked up her dog. See Transcript 162:16 - 167:6 (Appendix 0215-0217). Ms. Bue

then took Hillary home where her labor continued. See Transcript 168:4 - 170 (Appendix 0217). Hillary bore another stillborn pup. *Id.* Being unable to contact Brookside, Ms. Bue contacted the Central Valley Hospital and Dr. Chinn and took Hillary to that clinic where Dr. Chinn took x-rays, determined there were still puppies unborn and performed a c-section on Hillary, removing the last of the stillborn puppies. See Transcript 172:14 - 177:2 (Appendix 0218-0219). In her testimony, Dr. Chinn testified about her treatment of Hillary and interactions with Cindy Bue. Her testimony spanned from page 189 through page 212 (Appendix 0222-0228). In response to the propriety of palpating an English bulldog to determine the number and size of the litter, Dr. Chinn responded,

A: Palpation is always something you do on an exam. However, on many dogs, especially larger breed dogs or the anatomy of a bulldog can be difficult to palpate and determine number of puppies or if there are even puppies. It can be very difficult to do that.

Q: So would it be appropriate to do a radiograph to-.

A: Yeah. Yeah, radiography is the only way to determine first like pregnancy and then trying to determine the number of puppies. But even a radiograph may not tell you the exact number of puppies if there is a large litter, all the puppies on top of each other.

See Transcript, 193:22 to 194:10 (Appendix 0223).

In conclusion of her direct testimony, the following exchange took place:

Q: Do you have an opinion about the standard of care that Dr. Taylor provided for Hillary?

A: As far as the medical history or just overall?

Q: Well, based upon your review of the medical history and what Ms. Bue told you, do you have an opinion as to the standard of care that Dr. Taylor provided for Hillary?

A: I think initially in my opinion and also what is substantiated in our current veterinary texts that a thorough physical examination as well as performing at least an abdominal radiograph would have been helpful to assess the nature for Hillary.

Q: Based upon what you know that is that there was no radiograph performed by Dr. Taylor, did the standard of care that he provided for Hillary fall below the accepted standard?

A: From the information that I have, I feel that it did.

See Transcript 204:14 to 205:7 (Appendix 0226).

There is no further testimony from Dr. Chinn or any other veterinarian to the effect that Dr. Taylor's failure to palpate Hillary or take a radiograph constituted "an extreme deficiency in basic knowledge and skill", that is, gross incompetence as defined by the Division. Further, by comparing what the Utah courts have required in establishing a prima facie case in medical malpractice cases, see *Dikeou v. Osborne*, 881 P.2d 943, 946 (Utah App. 1994), there was no evidence offered by the Division of "the standard of care by which the doctor's conduct is to be measured," or that injury ensued proximately caused by Dr. Taylor's negligence. See

supra. The evidence provided by the Agency did not satisfy the *prima facie* requirements typically recognized in this Court in a malpractice context, much less a finding of gross incompetence, as that term has been defined by the Division and courts of other jurisdictions.

2. Evidence of Treatment of Shakesbear.

The Division also concluded that Dr. Taylor was grossly incompetent "when he diagnosed [Shakesbear's] condition without resort to any adequate x-rays" and suggested the dog be euthanized. Findings, at p. 17 (Appendix 0020). Shakesbear was a male chow-chow that fell off a twelve-foot porch, injured its back and was taken to the Brookside Animal Hospital on May 24, 1994. See Transcript 77:2 - 78:17 (Appendix 0194). After examining the chow and taking one x-ray, Dr. Taylor suggested that the chow be euthanized. See Transcript 77:19 - 78:17 and 87:8, 89:3 (Appendix 0194; 0196-0197). Seeking a second opinion, Alvin Dean Schofield, the brother of Shakesbear's owner, took the half-paralyzed Shakesbear to Dr. Gary Petersen. On the stand, after reviewing the radiograph taken by the Brookside Animal Clinic and Dr. Taylor, Dr. Petersen testified

A: This is a radiograph of what appears to be a dog, spinal x-ray primarily showing from about the ninth or tenth-eighth or ninth rib down to the level of the pelvis in generally what would be considered a dorsal/ventral or ventral/dorsal view.

Q: Do you have an opinion as to whether any of the disks along that spinal column are misaligned or out of position?

A: Based on this radiograph, I can't define any of them that are necessarily misaligned, no. There is some rotation of the spine. It tips (indicating), so it isn't an ideal view. Usually we see two views at the very least to make any determination of any sort. But based on what I'm seeing here, I cannot see obvious misalignment.

Q: You indicated that usually you see two views. Would it be appropriate for further radiographs to be taken to make a diagnosis?

A: In my opinion yes.

See Transcript 107:21 - 108:14 (Appendix 0202).

On cross-examination, Dr. Petersen testified that he has a specialty interest in neurology, although he is not a specialist in neurology. He was then asked

Q: Do all veterinarians have the same qualifications in that direction that you do?

A: No, I don't believe so.

There is no further testimony given with respect to x-rays in the diagnosis of these types of injuries. Notably there is no testimony given of the veterinary standard used in the diagnosis of spinal injuries, and in particular the use of radiographs in such diagnoses. Hence, under the standards typically applied by this Court in the medical malpractice arena, the Division failed to put on a prima facie case of negligence. Much more, there is no evidence that Dr. Taylor's failure to take a second x-ray manifests

an extreme deficiency in basic knowledge and skill in the practice of veterinary medicine. The best testimony which the Division could rely on in reaching its conclusion is that Dr. Petersen, "usually we see two views at the very least to make any determination of any sort." See Transcript 108:7-8 (Appendix 0202). The Agency's conclusion that Dr. Taylor's conduct in the treatment of Hillary and Shakesbear constituted gross incompetence is not supported by substantial evidence when viewed in light of the whole record. See Utah Code Ann. § 63-46b-16(g) (Appendix 0002). This deficiency in the evidence was apparently recognized by counsel in his opening and closing statement when he stated, "That's important to remember because we're really talking about malpractice here, the fact that Dr. Taylor has engaged in malpractice. And any time that happens, we have someone who feels like they've been damaged through that malpractice . . ." See Transcript 19:22 - 20:1 (Appendix 0180). And continued in his closing

It's the Division's position that it has presented evidence to you that Dr. Taylor has acted in a pattern of negligence. We have at least four cases here and all five of them, this is true, Dr. Taylor fell below the standard of care. And that's the legal definition of negligence, so we have a pattern. We also have a case here that involves gross negligence. And that's the Oscar case. Remember, that's an extreme departure from the standard of care. And it was Dr. Smith's opinion that Dr. Taylor engaged in an extreme departure from the standard of care [in treating Oscar]. . .

See Transcript 494:5-15 (Appendix 0303).

B. NO EVIDENCE OF GROSS NEGLIGENCE IN DR. TAYLOR'S TREATMENT OF HILLARY, SHAKESBEAR AND CHAR.

Similarly, the evidence which came in during the hearing does not support the Division's conclusion that Dr. Taylor was grossly negligent, as that term has been defined by the Division, in several respects.

1. Evidence of Treatment of Hillary.

The Division concluded that Dr. Taylor, "was grossly negligent when he took no x-ray to accurately and adequately diagnose Hillary's condition and when he improperly released that dog without adequate diagnosis and treatment." Findings, p. 17 (Appendix 0020). The sum total of the direct testimony given upon which the Division relied in reaching its conclusion is set forth above in the discussion of gross incompetence. Dr. Mayling M. Chinn, the expert relied on by the Division in putting on its case, did not testify whatsoever as to the propriety of Dr. Taylor releasing Hillary when he did. Further, her testimony as to her overall impressions of Dr. Taylor's treatment, and whether that treatment met any standard, is set forth in full text above. The testimony elicited does not even satisfy any sort of a prima facie showing of negligence, much less prove conduct of an aggravated character, substantially and appreciably higher in magnitude than ordinary negligence, manifesting an indifference to present legal duty, forgetfulness of legal obligations or a heedless and palpable

violation of legal duty, as the Division has defined gross negligence. The evidence at hearing does not support the Division's conclusion that Dr. Taylor was grossly negligent in his treatment of Hillary.

2. Evidence of Treatment of Shakesbear.

The Division concluded that Dr. Taylor was grossly negligent in his treatment of Shakesbear as he failed to "take an adequate x-ray to accurately diagnose the condition of that dog" and "failed to provide adequate nursing observation and care as to maintain Shakesbear in a sanitary environment." Findings, p. 17 (Appendix 0020). The sum total of any evidence which came in at the hearing which can even remotely be construed to support a finding of a standard and a breach of that standard with respect to supposed inadequate x-rays is set forth *in toto* above. The statement of Dr. Gary Petersen that in his opinion it would be "appropriate for further radiographs to be taken to make a diagnosis" is not adequate under Utah law or under the cases cited by the Division in articulating a definition of gross negligence, to support such a finding with respect to Dr. Taylor's diagnosis of Shakesbear. See Transcript 107:21 to 108:14 (Appendix 0202) cited and set forth *supra*.

In regard to the Division's conclusion that Dr. Taylor failed to provide adequate nursing observation and maintain Shakesbear in a sanitary environment, the following evidence was elicited.

First, Alvin Dean Schofield, Shakesbear's owner's brother, who was present when the dog was injured and took the injured animal to the Brookside Animal Hospital, testified that after being advised by Dr. Taylor that Shakesbear ought to be euthanized he concluded that he wanted a second opinion. See Transcript, 88:22 through 89:20 (Appendix 0197). Mr. Schofield went to the Brookside Animal Hospital to pick up the dog and then was asked to describe what he saw as Shakesbear was brought outside the clinic to his car.

A: Well, I drove my truck around there to the back where I'd guess they had this garage that they keep them in. It was all cement. And when he'd [Dr. Taylor] broughten (sic) Shakesbear out, I mean, he just reeked of urine so bad it was ungodly. And the thing that amazed me the most is when he did bring him out, he held Shakesbear by the tail to hold up his hind quarters. And it looked like, you know, he was wet so they had like squirted him off just before they had brought him out. I wrapped him up in a blanket and put him in the truck. And that's when I drove him directly over to Town and Country.

In State's Exhibit "10", a letter prepared by Mr. Schofield dated September 28, 1994, over four months after Shakesbear was taken to the Brookside Animal Hospital, Mr. Schofield described, "Shakesbear was brought in a room in the blanket I had brought him in with, he was muzzled and smelled of urine." When he came to pick up Shakesbear from the Brookside Animal Hospital, Mr. Schofield described in his letter, "[w]hen he came out, Shakesbear was wet and smelled extremely bad like urine. He had squirted him off with water . . ." See State's Exhibit "10", R 327.

In response to the examination of one of the board members,
Mr. Sperry, Mr. Schofield responded as follows:

Q: When you had the dog at Dr. Petersen's clinic, was it catheterized the whole time it was there? Do you know?

A: As far as I know, I'd taken the dog in there and gotten his--left it there until he gave me a prognosis on it. And from that time on, I think he had said that it would have to be catheterized and it was. When I next saw the dog, he'd been shaved where all the burns were and he was washed up because he reeked of urine so bad. I mean, I had to throw the blanket out. The thing was just ungodly because of the urine smell on it. But he was, I would say, twice to ten times better care of him. I mean, he was clean.

See Transcript 97:20 through 98:8 (Appendix 0199).

Dr. Petersen, the veterinarian who saw Shakesbear after it had been removed from the Brookside Clinic testified in regard to the condition of Shakesbear when presented at his clinic as follows:

Q: Could you tell the Board what you observed when you examined Shakesbear on May 26, 1994?

A: Yes. The dog was brought in paralyzed in the rear legs, unable to move his rear legs. It's rear end was soggy with urine, and the dog smelled of urine. The towel he was in was actually damp with what appeared to be urine.

. . .

There was a severe urine scald over the scrotum and thighs on both thighs of the dog. The hair was just all matted and sectioned in that soggy urine moisture.

Q: What would be the type of appropriate nursing care for an animal that was in Shakesbear's condition?

A: The dog certainly should have been catheterized to relieve that urine to drain bladder at least intermittently to prevent the urine scalding, raised on a rack or adapter that would allow the urine to drip away from the dog and not remain in contact with the dog's skin. If the hair became saturated, the hair would need to be shaved off so it just doesn't go into that urine moisture.

. . .

Q: Do you have an opinion as to the type of nursing care that was provided for Shakesbear?

A: In my opinion, it did not appear that this dog had received any care as far as treating this urine burn at all.

Q: In your opinion, did the care it received fall below the standard of care?

A: In my opinion, yes.

See Transcript, 103:9 through 105:2 (Appendix 0201).

While all the evidence submitted could reasonably be construed to support a conclusion of negligence, with respect to the nursing and observation provided Shakesbear by Dr. Taylor and Brookside Animal Hospital, it does not support a conclusion of gross negligence. There is no evidence that Dr. Taylor's conduct was of an aggravated character, substantially and appreciably higher in magnitude from ordinary negligence. See Findings, p. 15 (Appendix 0018). There is no evidence of indifference, forgetfulness or heedless and palpable violation of any sort of legal duty or

obligation. *Id.* Hence, the Division's conclusion that the nursing care provided Shakesbear by Dr. Taylor amounted to gross negligence is not supported by the evidence of record.

Moreover, there was no evidence presented at the hearing that the sanitary condition of the Brookside Animal Clinic facility fell below any articulated standard, much less was so far below as to be considered aggravated in character, or substantially and appreciably higher in magnitude than ordinary negligence. While the theme of the Brookside Animal Clinic being an unsanitary facility was introduced in the opening statement, the only evidence which could even remotely be argued to support such a conclusion is that with respect to the condition of Shakesbear, noted above, the testimony of Dr. Taylor, and that of Lori Larsen, an investigator for the Division. Dr. Taylor testified as follows:

Q: One of the Division's allegations is that your facilities are unsanitary.

A: Yeah. In a previous statement that was given by Lori Larsen that she answered the question of why she wrote that we have an unsanitary facility is that she saw a loose cat in the office. And the other one was that there was a dog that had urine stains on it and moist eczema; that she testified that it had all that urine burn and moist eczema. And what had taken place on the dog, any time you have damaged tissue on a dog, sometimes it takes about three days or four days before it starts to separate and to die and actually fall away.

Q: During the investigation of you which took over a year, did anybody ever come out from the Board of Health or from the Division

or anybody else come out and inspect your facilities out there for sanitation or other purposes?

A: No. No, and I might further comment, maybe I shouldn't, but in what she wrote up in that report saying we are dirty and unsanitary, I challenged her on that, that she could go out to other facilities without being announced and compare.

See Transcript 346:20 through 347:17 (Appendix 0265).

Dr. Taylor further testified in response to the questions of panel members:

Dr. Rees: Yes. There were some questions raised about sanitation, that sort of thing. And was Shakesbear bathed? Was he ever bathed? This is the dog with the paralysis.

A: Certainly they were cleaned up night and morning and put on clean towels or blankets. And you know as well as I, some of those cats that have FUS, that you have to put them on crates. And we do have a grate that we keep dogs on. A lot of times they'll crawl off the grate if they're in a big enough area, not in a small enclosure.

Dr. [Denzel E.] Taylor: You offered to have the dog cleaned up before Mr. Schofield took it home?

The witness: I certainly did. I offered to have him come back and get it or whatever. We did not have some help there until later, and we bathe it and clean the dog up before he took it home. And he said, "Oh, no, he'd take it." That was fine.

Dr. [Denzel E.] Taylor: Do you clean kennels night and morning? Is that part of the routine at the hospital?

A: Right.

See Transcript 398:24 through 399:21 (Appendix 0278).

Finally, Lori Larsen testified on cross-examination with respect to the sanitary conditions of the Brookside Animal Hospital:

Q: You were out at the hospital on three, four different occasions. You are the one who signed the Petition against Dr. Taylor, are you not?

A: Yes, I am.

Q: And in it you made allegations of unsanitary conditions and various other sorts of allegations. Let me ask you this, did you at any time during your investigation ever ask to see the operating room or where the kennels are, where the dogs are kept, any of the sterilization equipment or did you ask to go through the hospital?

. . .

(Objection made and ruled upon)

. . .

Q: (by Mr. Dahl) Let me ask you this. Did you ever go through the hospital?

A: No, I didn't take a tour of the hospital.

Q: And why not?

A: Well, I didn't need to. I wasn't there to inspect the hospital. I was there to talk with Dr. Taylor about the various allegations and get his perspective on each of them.

See Transcript, 466:13 through 467:14 (Appendix 0296).

Upon the examination of one of the board members, Mr. Sperry, Lori Larsen responded as follows:

Q: And you did not physically inspect the operation of Dr. Taylor's at all. You just were in his front reception area and the office area?

A: That's correct. I signed the Petition which contains all of the allegations, but the allegations are based on all of the information that's been gathered. So allegations of unsanitary conditions or unprofessional conduct are all based on the testimony of all the witnesses. And I signed the Petition for the investigating officer, but I did not inspect the facility myself.

See Transcript 470:22 to 471:7 (Appendix 0297).

On redirect, Ms. Larsen was led by the Division's counsel as follows:

Q: Mrs. Larsen, maybe we can clarify the issues of sanitary conditions. Is it true that the allegations of unsanitary conditions relate to individual animals rather than the facility itself?

A: That's correct.

See Transcript 472:9-13 (Appendix 0297). No further testimony exists with respect to the unsanitary nature of the Brookside Animal Hospital, or any facility or aspect of the facility operated by Dr. Taylor. No evidence was introduced as to sanitation at other local animal hospitals. The condition of one animal found to have been treated by Dr. Taylor does not substantially support the conclusion that the operation, maintenance and overall sanitary condition of the Brookside Animal Hospital, Dr. Taylor's facility, was operated below an established degree of care with which a reasonable person would have exercised under the same circumstances

. . ." of *DCR, Inc. v. Peak Alarm Co.*, 663 P.2d 433, 434-35 (Utah 1983). Nor does it support the conclusion and finding of negligence as that term is defined by the Division in its Findings of Fact and Conclusions of Law. See Findings p. 15 (Appendix 0018). It is a far greater leap and an even less substantially supported conclusion for the Division to have determined that the sanitary condition of Dr. Taylor's facility was maintained in a grossly negligent manner. See Findings, p. 17 (Appendix 0020). While, at best, substantial evidence may support the conclusion that Dr. Taylor was negligent in diagnosing and nursing Shakesbear, there is no evidence in the record which supports a conclusion of gross negligence with respect to any aspect of Dr. Taylor's care of Shakesbear or his failure to maintain a sanitary environment.

3. Evidence of Treatment of Char.

Finally, the Division concludes that Dr. Taylor was grossly negligent, "when he misdiagnosed the cause of Char's death." Findings, p. 17 (Appendix 0020). Char was a shar-pei, owned by Stephanie Picklesimer, who took Char into Dr. Taylor to get spayed. See Transcript, 119:1-11 (Appendix 0205). She was contacted the next morning and told that Char had not taken the anesthetic well and had died. Dr. Taylor suggested he could do an autopsy if Ms. Picklesimer wanted him to. She instructed him to proceed. See Transcript, 119:12-23 (Appendix 0205). After the autopsy was completed, Dr. Taylor contacted Ms. Picklesimer and told her that

Char "had pneumonia in both lungs, that she had an irregularly shaped heart, and there was fluid around the heart." *Id.* p. 122:20 through 123:2 (Appendix 0205-0206). This diagnosis was borne out by the State's Exhibit 15, a letter from Dr. Taylor to Ms. Picklesimer. Not being satisfied, Mr. and Ms. Picklesimer picked up Char's carcass and took it to the All Pet Complex for another necropsy. The All Pet Complex performed a necropsy, informed the Picklesimers that there was no pneumonia in either lung and Char's heart was normal. See Transcript, 128:20 through 129:13 (Appendix 0207).

The State's expert, Dr. Scott Vande Griend testified that he conducted the necropsy of Char and, at the conclusion describing his findings, answered the following questions.

Q: (By Mr. Allred) Dr. Vande Griend, are you familiar with the conclusions of Dr. Taylor's autopsy?

A: Yes, I received a copy of that just the other day. I hadn't seen it until then. At the time, I just had Mr. Picklesimer's anecdotal report of pneumonia.

Q: Do you agree with Dr. Taylor's conclusion that Char died of pneumonia and an irregularly shaped heart?

A: No, I do not.

Q: In your professional opinion, is there any excuse for the conclusion that Dr. Taylor reached when he performed a necropsy on Char?

A: No, I do not. In particular, if there was suspicion of pneumonia, some histopathology or microscopic studies should

have been submitted, which were not. I disagree.

Q: In your opinion, did Dr. Taylor's conclusions in his necropsy fall below the standard of care in the profession for performing a necropsy?

A: Yes.

See Transcript, 134:17 through 135:12 (Appendix 0208-0209).

On cross-examination, Dr. Vande Griend testified that he could not conclude from the necropsy what the cause of Char's death was.

He was then asked:

Q: Let me ask this. Neutering animals is an almost every day occurrence in veterinary medicine, is it not?

A: Yes, very common surgery, uh huh.

Q: And let me ask you this. Have you ever performed a surgery of this type and lost an animal?

A: Yes, I have.

Q: So in normal course of events, sometimes animals die from this procedure?

A: That is correct. But in the normal course of events in necropsy, if there is a physical finding in necropsy, it's not normal to report something that's not there.

Q: So what you do is you have a difference of opinion with Dr. Taylor?

A: Exactly.

See Transcript, 136:5-20 (Appendix 0209). Dr. Vande Griend also testified that Char's pericardial sac had been opened. "So if

there was any fluid on the heart, I couldn't determine that because it had leaked out."

Q: Were there any incisions into the lung?

A: I can't recall. I don't believe there were, but I can't say for certain because I can't exactly recall.

See Transcript, 143:1-13 (Appendix 0211).

A second expert called by the Division, Dr. Bret Neville, observed Dr. Vande Griend's necropsy of Char. He was then shown Dr. Taylor's conclusions as to the cause of death and asked if he agreed, to which he responded,

A: I do not. I saw no indication of a pneumonia. The heart appeared to me to be of normal size and normal consistency and normal shape and had no indication of fluid around the heart because, again, it was kind of--the pericardial sac was cut open.

Q: Do you have a professional opinion as to whether it's acceptable to make a misdiagnosis on this type of necropsy?

A: Anesthetic deaths or risk are always a concern whenever an animal is under anesthetic, and that's something that happens to every veterinarian I know. There is no indication of what Dr. Taylor said on the necropsy, so we still don't have an answer what caused it. But I guess I don't understand why Dr. Taylor said pneumonia and irregularly shaped heart when there wasn't.

Q: So is there an excuse for the conclusion he reached?

A: None that I can see.

See Transcript, 148:7 through 149:1 (Appendix 0212). Again, the evidence elicited at hearing falls short of supporting the Board's conclusion that Dr. Taylor's necropsy of Char and postmortem diagnosis was grossly negligent.

In all, no substantial evidence supports the Board's finding that Dr. Taylor acted in a grossly incompetent or grossly negligent way in the treating of Hillary, Shakesbear or the postmortem diagnosis of Char. At the very best, the findings of the Board which are supported by substantial evidence include an extreme departure in the care given one animal, Oscar, and negligence on behalf of Dr. Taylor and the Brookside Animal Hospital staff in his treatment of one animal, Shakesbear, and in the keeping and maintaining of medical records of animal histories, medical procedures, progress notes, and diagnoses of four animals. These findings were made as to a veterinarian who has practiced in the state for approximately forty years with no prior discipline sanction. See Transcript, 316:20-24 (Appendix 0257), Findings, p. 19 (Appendix 0022). Yet based on its findings, the Division imposed its most severe penalty allowed under the Act, that of revocation. See Utah Code Ann. § 58-1-401(2)(a) (1993 as amended). The conclusion of the Division and imposition of the penalty of revocation in this case is unprecedented and not at all reasonably explained by the Division in its Findings and Conclusions. See Argument, *infra*.

C. THE DIVISION'S FINDING OF AGGRAVATING CIRCUMSTANCES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, VIOLATES DUE PROCESS AND CONSTITUTES UNLAWFUL DECISION MAKING PROCESS.

In its final analysis of its Findings of Fact and Conclusions of Law, the Division concluded that "[t]here are numerous aggravating factors which should be considered regarding the disciplinary sanction to be imposed in this proceeding." Findings, p. 18 (Appendix 021). Those so-called "aggravating factors" are (1) multiple instances of unprofessional conduct which reflect either an inability to provide minimally acceptable veterinary care or a callous indifference to the condition and needs of those animals, *Id.*; (2) Dr. Taylor's uniform refusal to acknowledge the wrongful nature of his misconduct to either the Board or any of the owners of animals in question, Findings, p. 19 (Appendix 0022); (3) Dr. Taylor's inexcusable failure to "maintain ongoing compliance" with professional standards which generally govern all veterinarians in the State, *Id.*; and (4) that there is, "no evidence [Dr. Taylor] undertook any good faith efforts to make restitution or rectify the consequences of his misconduct." *Id.* No evidence supports this Finding of the Division of "aggravated factors." Moreover, the imposition by the Division of item nos. (2) and (4) above violates Dr. Taylor's due process and constitutes an unlawful decision making process or a failure to follow a prescribed procedure. See Utah Code Ann. § 63-46b-16(4)(e) (1988 as amended).

1. Multiple instances of unprofessional conduct reflecting inability to provide minimally acceptable veterinary care or callous indifference to the conditions and needs of animals.

The record before the Court does not support this conclusion. Relevant portions of the record and the evidence elicited below upon which such conclusions can be based are more fully set forth in the arguments above. As was recognized by counsel for the Division in his closing statement, at best the record evidence supports the conclusion that Dr. Taylor and his facility were negligent in the handling of five animals. In treating one of those animals, Oscar, according to the State's expert, Dr. Dale Smith, Dr. Taylor's conduct was an extreme departure from the accepted standard of practice. See Transcript, 276:1-20 (Appendix 0247). There was no evidence below of Dr. Taylor being indifferent or callous as to the needs of the animals he treated. Nor is there evidence that Dr. Taylor "inexcusably failed to maintain ongoing compliance" with the professional standards which govern all veterinarians in the state. See Findings, p. 19 (Appendix 0022). The evidence was that Dr. Taylor had seen somewhere in the neighborhood of 40,000 animals during the time period in question, and only five of those animals gave rise to the complaint set forth in the Division's Petition. There was no other testimony or documentary evidence that Dr. Taylor's conduct permeated his entire practice, extended beyond the five animals in question or in any

way impacted any other animals. As if to rebut Mrs. Taylor's and Dr. Taylor's testimony as to the number of other satisfied customers, counsel for the Division in his closing statement inappropriately stated, without reference to, or reliance on, any evidence before the Division,

The reason that five cases have appeared in this case is a question of time. We've been here two and a half days, and we've gone over five incidences (sic). It's true that Dr. Taylor has treated a large number of animals. It's also true that the Division had more complaints than these five. The Division selected the five strongest complaints that would show a pattern of negligence and, in one instance, a case of gross negligence. It's not necessary to put on every complaint that's brought to the Division's attention. Just like it's not necessary if someone is charged with bank robbery to put on evidence of every bank they didn't rob, it's not necessary for the Division to put on evidence of satisfied customers. All that's important is that the conduct that Dr. Taylor engaged in constitutes either simple negligence or gross negligence.

See Transcript 504:6-24 (Appendix 0305). No evidence suggested that Dr. Taylor's conduct extended beyond these animals in question. No evidence indicated Dr. Taylor was indifferent or callous toward the needs of the animals. It is only counsel for the Division's inappropriate statement, which is not evidence, upon which the Division could rely to reach its conclusion with respect to aggravation of Dr. Taylor's conduct.

2. Refusal to Acknowledge Wrongful Nature of Misconduct To the Board or Owners, No Evidence of Good Faith Efforts to Make Restitution or Rectify Consequences of Misconduct.

No evidence supports the conclusion by the Division that Dr. Taylor's conduct was aggravated by his failure to acknowledge the wrongful nature or to undertake good efforts to retribute or rectify the consequences of his misconduct. The only statements made in the transcript which could directly support such conclusion are the statements of counsel for the Division in his closing argument, which statements are notably not fact. Counsel proceeds:

Revocation is a serious thing, as I'm sure you can understand. We're talking about taking away the license of a veterinarian, taking away his ability to earn a livelihood. And revocation isn't asked for from the Division very lightly. In this case, we have a situation where Dr. Taylor has not accepted responsibility for any of these incidents. As you review the evidence, I think you'll see that Dr. Taylor has in each instance blamed someone else for the conduct involved here to one degree or another, some more egregious than others when you look at who he has blamed and who he has pointed the finger at.

Dr. Taylor really hasn't owned up to anything. . . .

See Transcript, 494:23 through 495:1- (Appendix 0303). Counsel for the Division then continues in his reply:

You know, I have feelings just like anyone else. And when Mr. Dahl said that Dr. Taylor's daughter is going to veterinary college and hopes to join Dr. Taylor within a year, I have the same reaction you probably have. That would be nice. But Dr. Taylor has

never had the attitude during this entire case or in the investigation before this case that he wanted to work something out. That's because he has never taken responsibility for what's occurred here. And the Division felt that it was important for you to hear the evidence so that you could decide if there's a risk to the public here. . . . This does not seem to be an individual who can be retrained or reeducated in his practice. It seems to be an individual who just won't own up to the conduct that I believe has proved by a preponderance of that evidence, by a greater weight. So there's nothing really the Division can do in working with Dr. Taylor to protect the public.

See Transcript, 504:25 through 505:22 (Appendix 0305).

The Division does not attempt to include in its Findings of Fact a finding along the lines of aggravation to the extent that it supports its conclusion of aggravated circumstances. See Findings, pp. 2-10 (Appendix 0005-0013). Indeed, no evidence supports the Division's conclusion of aggravation.

3. Violation of Due Process, Unlawful Process and Departure from Prescribed Procedure.

Further, in its definition of unprofessional conduct and those provisions under which the Division has revoked Dr. Taylor's license, Utah Code Ann. § 58-1-401(2)(a) and § 58-1-501(2)(b) and (g), § 58-28-2(6) and Utah Administrative Rule 156-28-8(3) (1994), there is no provision that failure to acknowledge, to make restitution or to rectify alleged wrongdoing is definitionally unprofessional conduct or a basis to revoke a license or take any action against the licensee. Nor did the Division alleged in its

Petition against Dr. Taylor that lack of contrition might constitute unprofessional conduct or aggravate the sanction ultimately imposed. See Petition, R 456-468.

It is clearly established that professionals who risk losing their professional licenses or means of employment through action of a public disciplinary body are entitled to due process. See e.g. *In Re Kirk v. Division of Occupational and Professional Licensing*, 815 P.2d 242, 244 (Utah App. 1991); and *DB First v. Division of Occupational and Professional Licensing*, 779 P.2d 1145, 1149 (Utah App. 1989) (social worker's license). Accordingly, to afford licensees due process, the hearing must be prefaced by timely notice which adequately informs the parties of specific issues they must be prepared to meet. *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) (citations omitted). In order not to deprive the parties of due process, the Utah Supreme Court determined that the Agency's

findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to offer evidence in explanation or rebuttal and nothing can be treated as evidence which is not introduced as such.

If the [agency] had intended to entertain the issue of unqualified cancellation, it should have notified [petitioner] and informed him specifically of the grounds upon which cancellation was being sought.

Morris v. Public Service Comm'n, 321 P.2d 644, 646 (Utah 1958) (citations omitted). It is also clearly established that due process

is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances. Rather, the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved.

Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983).

While purportedly affording Dr. Taylor in this case a chance to contest the charges brought against him, to cross-examine witnesses, rebut documentary evidence and avail himself to the adversary proceeding contemplated under the Utah Administrative Procedures Act, the Division now seeks to punish him, without the benefit of supporting substantial evidence, for not manifesting contrition to the Board and to his accusers.

An analogue may be the problem avoided in the criminal arena by Utah Rule of Criminal Procedure 22, which provides in relevant part: "Upon the entry of the plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than 2 or more than 45 days after the verdict or plea . . ." This rule affords a convicted defendant "an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be

given an opportunity to present any information material to the imposition of sentence." See Utah Rule of Criminal Procedure 22(a). Indeed, the Utah Administrative Procedures Act provides that:

(a) the presiding officer can issue interim orders to notify the parties of further hearings; (b) notify the parties of provisional rulings on a portion of the issues presented; or (c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding.

See Utah Code Ann. § 63-46b-10(4)(a) through (c) (1988 as amended).

Dr. Taylor was not notified in the original Petition that his contesting the charges leveled against him and failure to manifest contrition were elements of aggravation of his alleged unprofessional conduct. See Petition, R 456-468. No evidence was presented at trial by the Division supporting a conclusion of Dr. Taylor's recalcitrance as a basis for aggravation of his unprofessional conduct. Rather than enter its Findings of Fact and Conclusions of Law on that evidence before it, and then reserving and ordering a subsequent hearing regarding the imposition of sanction and affording Dr. Taylor the opportunity to put on evidence appropriately considered in the imposition of sanction, the Division merely combined its decision and somehow divined from the proceedings that Dr. Taylor's failure to acknowledge his wrong to the Board and to his accusers, his failure to make restitution or rectify his alleged wrongs and his overall recalcitrance

aggravated his alleged unprofessional conduct to the extent that his license should be revoked. See Findings, pp. 18-20 (Appendix 0021-0023).

By including this determination of aggravation and in its Findings of Fact and Conclusions of Law, the Division has violated Dr. Taylor's due process resulting in substantial prejudice to him through the revocation of his license held for over forty years without prior sanction. Since the Division's action was unconstitutional and as the Division has engaged in an unlawful procedure or decision making process and otherwise not availed itself to procedure prescribed under the Administrative Procedures Act, its Finding must be reversed.

II. THE REVOCATION OF DR. TAYLOR'S LICENSE IS CONTRARY TO THE DIVISION'S PRIOR PRACTICE.

As provided by the Utah Administrative Procedures Act, the Utah Court of Appeals shall grant relief, on the basis of an agency's record, if it determines that a person seeking judicial review has been substantially prejudiced because the agency action is contrary to the agency's prior practice. Utah Code Ann. § 63-46b-16(4)(h)(iii). However, any agency action which is contrary to its prior practice will not mandate this Court's relief if the agency justifies its inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency. *Id.*

The Division's revocation of Dr. Taylor's veterinarian license here is not just contrary to the Agency's prior practice, it is a

complete deviation from all prior formal licensing proceedings involving veterinarian licenses. Further, the Division did not attempt to justify or support this inconsistency by facts and reasons that demonstrate a fair and rational basis for it. In fact, in all the licensing actions taken against veterinarians, the Division has never permanently revoked a veterinarian's license. (Copies of substantive documents reflecting all formal action of the Division against veterinarians is annexed hereto as Appendix 0042 through 0173). Of six prior formal licensing proceedings involving veterinarians, not one license was suspended from veterinary practice entirely for more than a three-month period. (Appendix *Id.*) In stark contrast, Dr. Taylor's license was revoked. This drastic departure constitutes a major deviation from the Division's prior sanctions and without adequate explanation setting forth facts and reasons that demonstrate a fair and rational basis for its inconsistency, this Court should reverse the Division's Order. Utah Code Ann. 63-46b-16(4)(h)(iii).

Prior to commencing an action against Dr. Taylor, there have been six formal agency actions commenced by the Division involving veterinarian licenses. All six prior formal actions involve allegations of unprofessional conduct, as is the case at hand. All involve conduct related to the practice of veterinarian medicine. All apply the identical statutory framework within the same act and all resulted in the imposition of a sanction. Combined they

represent the prior formal agency action practice of the Division against which the sanction in Dr. Taylor's case must be compared.

This Court interpreted the language of Section 63-46b-16(4)(h)(iii) in *Pickett v. Utah Dept. of Commerce*, 858 P.2d 187 (Utah App. 1993). It concluded that provision "clearly and unambiguously requires consistent agency action in the absence of an adequate rationale for the departure from prior action. The language is mandatory and includes neither exceptions nor latitude for evading its requirements." *Id.* at 191. In *SEMECO v. Utah State Tax Comm'n*, 849 P.2d 1167, 1174 (Utah 1993), Justice Durham in a dissenting opinion, which this Court has adopted, asserted that:

Part (iii) of subsection (4)(h) permits relief for agency action that is contrary to the agency's prior practice. This provision also demands reasonableness and rationality review, explicitly permitting the inconsistency if the agency can demonstrate a fair and rational basis for it.

Hence, without exception or latitude, unless the Division provides an adequate rationale, which review is reasonable and rational, the Division's sanction in this case must be consistent with its historic practice. Because the Division has failed to demonstrate the rationality and reasonableness of its deviation, the Division's order should be reversed and remanded for an imposition of a consistent sanction.

A. Comparing The Six Prior Veterinary Formal Licensing Proceedings.

1. The Division *Dismissed* A Claim Despite Allegations That A Veterinarian Was Illegally Practicing Medicine By Administering and Prescribing Controlled Substances To Human Beings.

In 1986, R.A.K. was alleged to have treated and prescribed a Schedule II controlled substance, methylphenidate, to his son, Utah Code Ann. § 58-37-4(b)(iii)(D). R.A.K. was not licensed to practice medicine or to administer and prescribe controlled substances to human beings. Consequently, his acts constituted "violations of the Utah Controlled Substance Act, The Medical Practice Act and the Division of Occupational and Professional Licensing Act. . ." Specifically, by prescribing and treating his son with methylphenidate, R.A.K. was practicing medicine without a license which is a felony pursuant to Utah Code Ann. § 58-12-30 (1981 Supp.). In addition, by prescribing the controlled substance without a license, in violation of Utah Code Ann. § 58-37-6(7)(a)(i), R.A.K. was not only subject to license revocation, he was also committing a second degree felony offense. Further, this willful violation of the law was not a one-time occurrence. Rather, R.A.K. was alleged to have knowingly treated and prescribed the controlled substance during a continuous period from July, 1985 through May, 1986. However, despite R.A.K.'s violation of civil and criminal laws, the Department of

Professional Licensing on October 21, 1986 summarily dismissed the case with prejudice and without any hearing. (Appendix 0042-0050).

2. The Division Merely *Suspended* The Veterinarian's License for Three Months Who Was Found Guilty Of Seven Counts Of Second Degree Felony Theft, One Count Of Third Degree Felony Theft And One Class-A Misdemeanor For Embezzling Funds From A Clinic.

In 1988, D.W.K. was found guilty of eight counts of felony theft and one count of misdemeanor theft. D.W.K. was sentenced to 60 days in jail, sentenced to probation, fined and required to pay restitution. These criminal convictions were the result of stolen funds in excess of \$16,750.00 payable to the animal clinic in which he was one-half owner. Despite the severe nature of the theft convictions, D.W.K. argued his crimes did not involve moral turpitude. After a full hearing, the Division in its findings of fact and conclusions of law held that D.W.K. had engaged in unethical business practices and inappropriate judgment which are inherent and integral aspects of the veterinarian profession. Consequently, the criminal convictions "clearly constitute crimes involving moral turpitude by reason of the nature of [D.W.K.'s] conduct" However, despite the felonious and immoral nature of D.W.K.'s conduct, the Division imposed a mere three-month suspension of his veterinary license, which was later stayed in lieu of his criminal probation. (Appendix 0051-0063).

3. In A Case Involving Unprofessional Conduct Of A Veterinarian With Respect To The Unsanitary And Non-complying Nature Of His Facility, The Division Precluded A Veterinarian From Practicing Until The Facility Was In Full Compliance With Statutes And Rules.

In January, 1992, N.E.H. was found to be practicing veterinary medicine in poor clinical settings. Specifically, N.E.H. failed to maintain separate and distinct examination rooms in his veterinary practice, violative of R153-28-3(A)(2)(b). The existing room in which N.E.H. performed his examinations lacked adequate sanitation and disease control and represented "no appropriate effort whatsoever to comply with the requirements governing examination rooms." In addition, the marble surgical table used by the doctor was a semi-porous material which could not be maintained in a sanitary condition. N.E.H. also used wire, grocery-type shopping carts to house the small animals which were treated and maintained at the facility. These enclosures were outdoors and therefore could "not assure the comfort or sanitation of any animal which might occupy them." Generally, N.E.H. failed to maintain the proper physical conditions necessary for a clinic. After a full hearing, the Division found and concluded that N.E.H. had violated, at one time or another; R 153-28-3(A)(1)(a)(4), inadequate lighting in a surgery room; R 153-28-3(A)(2)(b), failure to maintain a separate and distinct examination room; R 153-28-3(A)(2)(c) and R 153-28-3(A)(3)(a), for maintaining an unsanitary surgical table and the use of unsanitary wire enclosures to house small animals.

Despite his disregard for the animals' care and conditions, and his failure to comply with the clearly established rules and regulations, N.E.H. was allowed by the Division to continue his practice of veterinary medicine but was ordered to get his facility into compliance with the specified regulations. N.E.H.'s veterinary license went unsanctioned. (Appendix 0064-0084).

4. A Veterinarian Was Practicing Medicine On Human Beings By Administering Controlled Substances In An Attempt To Treat His Sons' Attention Deficit Disorders. Despite this Unlicensed Practice, The Division Placed The Veterinarian's Controlled Substance License On One-Year's Probation But His License To Practice Veterinarian Medicine Went Unsanctioned.

In May, 1992, R.C.S. was found to have dispensed over a six month period, 274 tablets of Ritalin, a Schedule II controlled substance, to his two sons in an attempt to treat them for Attention Deficit Disorder. R.C.S. dispensed these controlled substances knowing his licensure as a veterinarian and his license to prescribe and administer controlled substances did not authorize him to do so. After a full board hearing, the Division found that R.C.S. was engaged in unprofessional conduct and, by prescribing and administering a controlled substance without a license, was in violation of Utah Code Ann. §§ 58-37-6(2)(b), 58-37-2(a) and 58-28-2(5). Notably, by dispensing controlled substances without a license, R.C.S.'s conduct violated criminal laws which could have wrought a second degree felony conviction. R.C.S.'s privileges to

practice veterinary medicine went unsanctioned. R.C.S.'s controlled substance license was placed on probation for one year and he was cautioned to prescribe and administer controlled substances only for appropriate veterinary purposes. (Appendix 0085-0102).

5. Probation For One Year Was The Penalty Imposed Upon A Veterinarian Who Allegedly Administered And Dispensed A Controlled Substance For Purposes Other Than Legitimate Veterinary Use.

In 1990, it was alleged that J.P.R. unlawfully dispensed and failed to properly account for 200 tablets of a schedule-II controlled substance. It was alleged that J.P.R. was dispensing the controlled substances to horse trainers to be administered at their discretion in training and to stimulate the horses to run faster. J.P.R.'s conduct was unprofessional in that it allegedly violated Utah Code Ann. §§ 58-28-6(m) and 58-37-8(a)(vi), for administering or dispensing a schedule-II controlled substance for non-medical conditions; § 58-17-7(1), for unlawfully engaging in the practice of pharmacy without a license; and § 58-37-8(a) for failure to make or keep records of his dispensing a schedule-II controlled substance. After a formal action was commenced, the Division entered into a stipulation with J.P.R. in which he neither admitted nor denied the allegations, and was placed on probation for a period of one year. (Appendix 0103-0121).

6. The Division Ultimately Imposed A Three-Year Probation On A Veterinarian Who Admitted Administering Demerol To Himself, A Schedule-II Controlled Substance, And Who Maintained Fictitious Records To Hide His Personal Abuse.

In 1993, by stipulation, R.A.J. admitted to administering to himself doses of Demerol, a schedule-II controlled substance, in order to medicate his neck pain. R.A.J. also admitted that he maintained fictitious records to account for the Demerol he used, including the fabrication with in patient records of the use of the drug when none was in fact administered. R.A.J. admitted to filling the depleted containers of Demerol with other liquids in an attempt to conceal the missing drug he personally used. This willful conduct violated Utah Code Ann. §§ 58-28-2(7)(b), for use of a controlled substance to an "extent to render him unfit to practice veterinary medicine, surgery or dentistry, . . ."; 58-37-8(2)(a)(i), for use of a controlled substance which was not obtained by a valid prescription; and 58-37-6(5)(b)(i), 58-37-8(4)(a)(iv) for falsely maintaining records of the disposition of his controlled substance inventory and failure to maintain required controlled substance records. Upon his stipulation the Division stayed R.A.J.'s license revocation in favor of a three-year term of

probation subject to certain terms and conditions. (Appendix 0122-0147).¹

B. The Division Has Acted In A Manner Inconsistent With Its Prior Practice.

The Division's prior actions, in every instance and as a practice, are inconsistent with the Division's order, in this case revoking Dr. Taylor's license. In *Pickett v. Utah Dept. of Commerce*, the petitioner Challenged the Division's decision to revoke his license because of the inconsistency of his penalty with Agency precedent imposing more lenient penalties for similar or more egregious misconduct. *Pickett*, 858 P.2d 187, 190. *Pickett* supported his contention by citing ten Agency decisions in which members of his profession committed allegedly equal or more significant violations of the law but received substantially lighter penalties. The penalties in the cases he cited consisted only of brief license suspensions, probation or a combination of the two, but no license revocations. *Id.* at 192. Although the

¹The sanction in this case is an aberration as compared to *any* action taken by the Division against a veterinarian. The Division has been consistent in its practice prior to, and since Dr. Taylor's license revocation. Of note, the Division filed a petition on May 24, 1995 in which it alleged that G.J. failed to meet professional standards applicable to veterinary medicine in Utah by incompetently and negligently performing 12 neuterings and/or spayings, failing to provide competent care which resulted in the deaths of several animals and for improperly soliciting patronage. In a stipulation and order entered April 23, 1996, one month after Dr. Taylor's hearing, 10 days after his Order was entered, in which G.J. does not admit the truthfulness of the allegations, and in light of evidence of the deaths of several animals and the apparent pattern of negligence, the Division stayed a license revocation in lieu of probation for a period of five years. (Appendix 0148-0172).

opinion did not describe or compare the alleged facts of each case, this Court agreed that Pickett legitimately demonstrated that the Division's penalty was inconsistent with the Division's prior penalties imposed. The Court concluded that the burden shifted onto the Agency to provide "facts and reasons that demonstrate a fair and rational basis for the inconsistency." *Id.* Ultimately, this Court concluded that Mr. Pickett's license revocation proceeding be remanded for imposition of a less onerous sanction because the Division failed to adhere to the UAPA's plain mandate that it provide a sufficient rationale for inconsistencies from prior Agency action. *Id.* at 192.

Like that of *Pickett*, any attempt by the Division to distinguish the prior veterinarian licensing proceedings by simply stating that those cases are not factually or procedurally similar to the case at hand is of no moment. This distinction, if it in fact exists, is neither accurate nor a compelling basis for the Division's extraordinary departure from its prior practice. There is no case law which requires that review of all prior Agency proceedings be factually identical. There is no case law which requires a full agency hearing before the case can be compared to subsequent Agency actions. The Administrative Procedures Act requires that the Division provide reasons that demonstrate a fair and rational basis for the inconsistency of the sanction imposed, if the sanction in the case in question is "contrary to the

agency's prior practice". Utah Code Ann. § 63-46b-16(h)(iii). Nothing in the statute limits the review of the agency's historic actions to those cases factually apposite, or which ran the full course of the administrative procedure available. In determining consistency, the rule requires that the instant action be compared to the agency's prior practice. *Id.* If the inconsistency exists, the agency must justify it.

In comparison to the other formal action taken by the Division, Dr. Taylor's conduct at best is five isolated instances of negligence in his forty year practice of his profession. Dr. Taylor's conduct does not involve actions of criminality which transcend his veterinary practice. Dr. Taylor did not steal any money from his partners. Dr. Taylor did not administer controlled substances to his children or to himself, or to others for illicit purposes. Dr. Taylor's alleged conduct did not call into question issues of moral turpitude. At its worst, Dr. Taylor's conduct involves mistakes, blunders, goof-ups, in the course of his practice. Likely as a consequence of the Division's inference from observations at the hearing of the absence of contrition on the part of Dr. Taylor, the Division has interpreted Dr. Taylor's mistakes to be so egregious as to warrant revocation of a license which has been in existence without sanction for over forty years, when historically it has only slapped the hands of convicted and alleged felons, drug abusers and a thief.

It would seem the Division's imperative to protect the public health safety and welfare, is best achieved by sanctioning criminal conduct and acts of moral turpitude rather than putting out of business long established institutions which for various reasons make a few mistakes in the course of practice. See generally, *Cannon v. Gardner*, 611 P.2d 1207, 1210 (Utah 1980); *Pickett v. Utah Dept. of Commerce*, 858 P.2d 187, 190 (Utah App. 1993).

As in *Pickett*, the licensing actions cited by Dr. Taylor involve alleged unprofessional conduct equal to or greater in significance than that alleged against the Petitioner. Allegations which include the unlicensed practice of medicine and pharmacology on human beings, the use of controlled substances and the overt acts to conceal abuse, the embezzlement of funds from a clinic and the use and maintenance of an unsanitary facility are far more egregious than Dr. Taylor's conduct. In light of the Division's historic actions, the burden then is on it to "demonstrate a fair and rational basis for the departure from precedent in the instant case." This the Division failed to do. No where in its Findings of Fact and Conclusions of Law did the Division find, based on the evidence submitted during the hearing, or otherwise conclude legally that there was a rational basis for departing from the Division's consistent practice. Nor was any explanation of the departure provided which this Court could judge based on its "reasonableness and rationality." *Pickett v. Utah Dept. of*

Commerce, 858 P.2d 187, 191 (Utah App. 1993) (citations omitted). The Division's imposition of sanction in this case must therefore fail due to its inconsistency with its historic practice, and as no explanation for the departure from the Agency's practice has been provided.

CONCLUSION

For the reasons set forth herein, Dr. Taylor respectfully requests that the Division's Findings of Fact, Conclusions of Law and Proposed Order, and the Division's Order be reversed and remanded to the Division for entry of Findings of Fact and Conclusions of Law based on the entire record, and omitting any reference to aggravating factors or general conclusions not supported by the record. Finally, this matter should be reversed and remanded for a hearing on the appropriate sanction to be imposed, if any with the instruction that the Division impose a sanction on Dr. Taylor's license consistent with its prior practices.

DATED this 5 day of May, 1997.

STIRBA & HATHAWAY

By: 

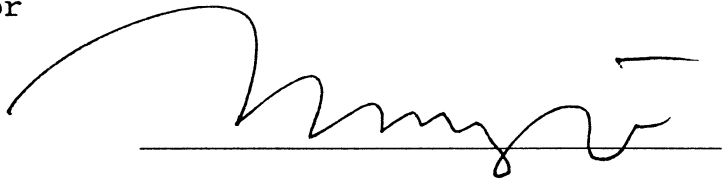
BENSON L. HATHAWAY, JR.
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of May, 1997, I caused to be served a true copy of the foregoing OPENING BRIEF OF PETITIONER, by the method indicated below, to the following:

Jan Graham
Attorney General
R. Paul Allred
Assistant Attorney General 1150
160 East 300 South, 6th Floor
Salt Lake City, UT 84111

() U.S. Mail, Postage Prepaid
(☒) Hand Delivered
() Overnight Mail
() Facsimile

A handwritten signature in black ink, appearing to be "M. J. Smith", is written over a horizontal line.