

1997

Leo N. Taylor v. Department of Commerce : Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

970030

LEO N. TAYLOR :
Petitioner, : Case No. 970030 CA
v. :
DEPARTMENT OF COMMERCE, : Priority No. 14
STATE OF UTAH, and DIVISION OF
OCCUPATIONAL AND :
PROFESSIONAL LICENSING, :
Respondent. :

BRIEF OF RESPONDENT

PETITION TO REVIEW THE FINAL ORDER OF THE DEPARTMENT
OF COMMERCE RELATIVE TO PETITIONER'S LICENSE TO PRACTICE
AS A VETERINARIAN IN THE STATE OF UTAH

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF THE PROCEEDINGS

Petitioner, Leo N. Taylor, appeals from an order issued by Douglas C. Borba, Executive Director of the Department of Commerce, affirming an order issued by the Division of Occupational and Professional Licensing following a formal adjudicative proceeding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2a-3(2)(a)(1996) and 63-46b-16 (1993).

ISSUES PRESENTED AND STANDARD OF REVIEW

The Division disagrees with how Taylor has framed the issues in his brief. Therefore, the Division submits its own version of

the issues presented on appeal and will also set forth the standard of review for each issue.

1. Has Taylor properly challenged the Department's Order on Review?

Standard of review. Utah Code Ann. § 63-46b-14(1993) gives an aggrieved party the right to judicial review of final agency action. In this matter, pursuant to Utah Admin. Code R151 46b-14(2)(1993), final agency action is the Department's Order on Review (A copy of the Order on Review is found in the Addendum).

2. Has Taylor met his burden of marshaling the evidence?

Standard of review. In order for Taylor to challenge the Division's findings he must first "'marshal the evidence in support of the findings and then demonstrate that despite the evidence, the . . . findings are so lacking in support' as to be inadequate under the applicable standard of review." Heinecke v. Department of Commerce, 810 P.2d 459, 464 (Utah App. 1991) (quoting Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989)).

3. Are the Division's findings that Taylor engaged in unprofessional conduct supported by substantial evidence?

Standard of review. The Division's finding that Taylor has engaged in unprofessional conduct constitutes a finding of fact and should be reviewed by the Court to determine whether the finding is supported by substantial evidence "when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1993); accord King v. Industrial Comm'n, 850 P.2d 1281, 1285 (Utah App. 1993).

4. Has Taylor preserved the issues of the alleged violation of his rights to due process?

Standard of review. As a general rule appellate courts will not consider an issue raised for the first time on appeal. Taylor, in seeking judicial review of an agency order, has the obligation to raise all the issues that could have been presented at the administrative level; "those issues not raised [are] waived." Pease v. Industrial Comm'n, 694 P.2d 613, 616 (Utah 1984); Barney v. Utah Dept. Of Commerce, 885 P.2d 809 (Utah App. 1994). The rationale is that by raising an issue at the administrative level, "either the administrative law judge or the Commission could have adjudicated the issue." Pease, 694 P.2d at 616.

5. Has Taylor made a prima facie case that the Division has acted contrary to its prior practices in revoking Taylor's veterinary license?

Standard of review. An appellate court reviews whether an agency's action is contrary to the agency's prior practice and whether the inconsistency has a fair and rational basis. Utah Code Ann. § 63-46b-16(4)(h)(iii); Pickett v. Utah Dep't of Commerce, 858 P.2d 187, 191 (Utah App. 1993).

In this case Taylor is required to make a prima facie case that the Division's actions are contrary to the Division's actions in prior veterinary cases involving similar conduct. Id. at 191.

STATEMENT OF THE CASE

At all times relevant to this case, until revocation by the Division, Taylor was licensed to practice as a veterinarian in the State of Utah (R. 297). On March 2, 1995, a notice of agency action was filed by the Division (R. 456-468). On March 18, 1996, a formal hearing commenced before the Veterinarian Licensing Board ("Board") which lasted for three days (R. 296).

The Board members present included three veterinarians and one member from the general public (*Id.*).¹

As a result of the evidence presented at the hearing, the Board found that Taylor repeatedly violated various generally accepted professional standards applicable to the practice of veterinary medicine (R. 306-308). The Board found that Taylor failed to properly document medical histories on each animal identified in the petition (R. 306). In addition, the Board found that Taylor violated generally accepted professional standards in the area of x-rays, and pre-operative and post-operative care of certain animals identified in the petition (R. 306-308). Moreover, the Board found that Taylor practiced veterinary medicine in a grossly incompetent manner in the treatment of Oscar, Hillary and Shakesbear (R. 311-312). Finally, the Board found that Taylor engaged in grossly negligent conduct in the treatment he provided to every animal identified in the petition (R. 312). Based upon these findings and

¹ In his brief, Taylor incorrectly states that the Board consisted of a "panel of two veterinarians and one lay person" (Br. at 6). The record indicates that four Board members were present during the three-day hearing (R. 296). By statute, the Board is made up of four veterinarians and one member of the public. Utah Code Ann. § 58-28-3(1985). Therefore, at least three veterinarians and one member of the public must have been present during the hearing. See (R. 16).

conclusions, the Board recommended that Taylor's license be revoked (R. 315).

Taylor sought agency review of the Division's order with the Department of Commerce (R. 284-285). Douglas C. Borba, Executive Director of the Department of Commerce affirmed the Division's Order in an Order on Review on December 11, 1996 (R. 62, Addendum). Petitioner then filed his petition for review of the Department's Order affirming the Division's Order.

STATEMENT OF FACTS

On July 8 through July 17, 1993, Taylor provided veterinary services to a cocker spaniel, Oscar, owned by Vicki Crocker (R. 11, 297-298). Oscar's right leg was fractured when he was hit by a dump truck (Tr. Vol. 2 at 226-228). The Board found that Taylor performed surgery on Oscar's humeral fracture on July 10, 1993 (R. 297). Taylor used an intramedullary pin that appeared to be a nail instead of a stainless steel pin for the procedure (Tr. Vol. 2 at 261-262). The Board found that the intramedullary pin in question was a galvanized rod subject to rusting and deterioration, was improperly placed, and was inadequate to stabilize the fracture (R. 15, 299). The Board also found that Taylor should have used a stainless steel pin manufactured for surgical use (R. 15-16, 299). In addition, the Board found that

Taylor failed to wrap the bone with stainless steel wire, failed to take post-operative x-rays, and failed to maintain sufficient medical records of his treatment of Oscar (R. 15-16, 299-300).

On December 23 through 27, 1993, Taylor treated a lab/chow mix, Nadia, owned by Michael and Rebecca De Guzman (R. 300). Nadia suffered from mastitis which ulcerated and ruptured (*Id.*). Taylor removed the skin surrounding the mastitis without properly shaving the area (Tr. Vol. 1 at 47; R. 300). The Board found that Taylor failed to make a proper medical record of his treatment of Nadia (R. 24, 300).

The Board found that on April 21 and 23, 1994, Taylor artificially inseminated an English bulldog, Hillary, owned by Cindy Bue (Tr. Vol 2 at 382; R. 301). On June 17, 1994, Hillary went into labor (R. 301). On the morning of June 18, 1994, Hillary passed two dead puppies prior to arriving at Taylor's clinic (*Id.*). The Board found that on June 18, 1994, Taylor examined and palpated Hillary to diagnose her condition (R. 29, 301). The Board concluded that, given the physiology of English bulldogs, Taylor could not have accurately determined through palpation whether Hillary had delivered the entire litter (*Id.*). The Board also found that Taylor failed to take an x-ray to

adequately evaluate her condition (*Id.*). In addition, the Board found that Taylor misdiagnosed the condition of the litter by telling Hillary's owner that the puppies were premature and that no surgical intervention was necessary (*Id.*). The Board found that Taylor failed to properly document his treatment of Hillary (R. 29, 303). Finally, the Board found that Taylor failed to provide adequate treatment and that he improperly released Hillary on June 19, 1994, jeopardizing her health (R. 29, 302).

The Board found that on May 24 through May 26, 1994, Taylor treated a male chow chow, Shakesbear, owned by Cheryl Devlin (R. 303-304). Shakesbear's hind quarters were paralyzed after falling from a twelve foot porch (Tr. Vol. 2 at 77, 86). Taylor took an x-ray and kept Shakesbear for observation (R. 303). Taylor advised the owner's brother that Shakesbear's spine was injured and that he would not walk again (*Id.*). On May 25, 1994, based upon a single x-ray, Taylor recommended that Shakesbear be euthanized (*Id.*). On May 26, 1994, the owner's brother took Shakesbear to another veterinarian for a second opinion (R. 303-304). The second veterinarian determined that the first x-ray was inadequate to establish a diagnosis (R. 304). Based upon a myelogram, the second veterinarian determined that Shakesbear

could recover from his injuries (*Id.*). The Board found that Shakesbear recovered his ability to walk (*Id.*). The Board also found that Shakesbear was afflicted with a severe and extensive urine scald which was the result of Taylor's lack of adequate nursing care (*Id.*). Moreover, the Board found that because Shakesbear had been left to sit in his own urine, Taylor had failed to maintain a sanitary environment (*Id.*). The Board found that Taylor failed to properly diagnosis Shakesbear's condition (R. 303). Finally, the Board found that Taylor failed to properly document the care and treatment he provided for Shakesbear (R. 37, 304).

On October 11, 1994, Taylor treated a Chinese shar pei, Char, owned by Stephanie Picklesimer (R. 305). On October 12, 1994, Taylor contacted Char's owner to advise her that Char had died (*Id.*). Taylor performed a necropsy on Char and opined that Char had died due to an irregular shaped heart and pneumonia (*Id.*). Another veterinarian performed a second necropsy that revealed no sign of an irregular heart or pneumonia (*Id.*). The Board found that Taylor misdiagnosed the cause of Char's death (*Id.*).

The Board concluded that Taylor repeatedly engaged in unprofessional conduct in the fundamental aspects of veterinary medicine (R. 313). The Board found numerous aggravating factors and multiple instances of unprofessional conduct (*Id.*). The Board concluded that the nature and severity of Taylor's conduct warranted revocation (R. 315).

SUMMARY OF ARGUMENTS

1. Challenge to Order on Review. Under Utah Code Ann. § 63-46b-16 (1993), Taylor has petitioned for judicial review of final agency action. Throughout his 62 page brief, Taylor fails to directly challenge the Order on Review (Addendum). Taylor's failure to properly challenge the Order on Review should result in this Court denying his petition.

2. Duty to marshal the evidence. Before Taylor can challenge the Department's affirmation of the Division's findings, he must marshal the evidence. In order to fulfill his duty to marshal the evidence, Taylor must pull together all competent evidence that supports the Division's findings. Once Taylor has properly marshaled the evidence, he must then set forth the fatal flaw. Taylor ignores or overlooks critical evidence that supports the Division's findings. The Department

correctly determined that the Division's findings are supported by substantial evidence.

3. Veterinary Standards. Taylor contends that the Division failed to define the terms "unprofessional conduct," "negligence," "gross negligence," and "gross incompetence." In its Order on Review, the Department correctly relied on a Utah Supreme Court case regarding statutory standards for conduct of professionals in licensing actions. Taylor has failed to challenge the Department's Order in this regard.

4. Preservation of issues. Taylor contends that the Division has violated his right to due process. Taylor has failed to make citations to the record showing that these arguments have been preserved or set forth statements or grounds allowing review of unpreserved issues.

5. The Division's prior consistency. Taylor contends that the Division has acted in an inconsistent manner in revoking his license to practice veterinary medicine. Taylor argues that in prior cases the Division has not revoked the licenses of veterinarians engaged in misconduct involving controlled substances, moral turpitude and unsanitary equipment and facilities. Taylor asks the court to compare dissimilar unprofessional conduct under Utah Code Ann. § 63-46b-

16(4)(h)(iii)(1993). The type of comparison that Taylor argues for is irrational.

ARGUMENT

I.

TAYLOR FAILS TO PROPERLY CHALLENGE THE DEPARTMENT'S ORDER ON REVIEW

In his petition, Taylor seeks judicial review of the Department's Order on Review under the Utah Administrative Procedures Act. Utah Code Ann. § 63-46b-14(1) states that "[a] party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute." The term "final agency action" is defined in Utah Admin. Code R151-46b-14(2). R151-46b-14(2) states that "[the order on review constitutes final agency action."

Taylor's brief ignores or overlooks the Department's Order on Review. Throughout his 62 page brief, there is not one direct reference to the Order on Review. Instead, he focuses his attention on challenging the Division's order without addressing whether the Department correctly affirmed the Division's order. Therefore, the Court should deny his petition.

II.

TAYLOR'S FAILURE TO MARSHAL THE EVIDENCE PRECLUDES HIM FROM CHALLENGING THE DIVISION'S FINDINGS THAT HE ENGAGED IN UNPROFESSIONAL CONDUCT

In his brief, Taylor contests the Division's findings regarding four of the five animals identified in the petition filed against him (Br. at 19-39). The Division's factual findings should be reviewed by the Court to determine whether the finding is supported by substantial evidence "when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1993); accord King, 850 P.2d 1281, 1285 (Utah App. 1993) (appellate courts review the whole record to determine whether substantial evidence supports the factual findings); Albertsons Inc. V. Dept. of Emp. Sec., 854 P.2d 570, 574 (Utah App. 1993); Grace Drilling, 776 P.2d 63, 67 (Utah App. 1989).

Taylor has the burden to marshal all evidence supporting the Division's findings. He must show that despite supporting facts and all reasonable inferences that can be drawn from those facts, the Division's findings are not supported by substantial evidence when viewed in light of the whole record before the Department. Hales Sand and Gravel, Inc. v. Audit Division, 842 P.2d 887, 893 (Utah 1992) (petitioner failed to marshal facts to show

commission's finding was not supported by substantial evidence); Heinecke, 810 P.2d 459, 464 (Utah App. 1991) (a Division case in which this Court held that appellate courts will consider evidence contrary to findings in applying the substantial evidence test; however, a petitioner is required to initially marshal evidence which supports findings); Grace Drilling, 776 P.d. 63, 68 (Utah App. 1989). Regarding the duty of marshaling the evidence, this Court in West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991), explained:

The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence.

Id. at 1315. (emphasis in original).

On agency review, the Department concluded that Taylor failed in his duty to marshal evidence (R. 11, Addendum). In spite of Taylor's failure to marshal, the Department's Executive Director did his own exhaustive review of the record. Beginning on page 11 of the Order on Review, the Director begins a review of the Division's findings and the substantial evidence that

supports those findings (R. 11-51, Addendum). The Director concluded that he was unable to state that there was not substantial evidence to support the Division's findings (R. 61, Addendum).

In his brief, Taylor continues to overlook or ignore evidence that supports the Division's findings. Specifically, the evidence is set forth in detail by the Department in pages 11-51 of the Order on Review.² Because he has failed to marshal all of the evidence that supports the Division's findings, Taylor is barred from challenging those findings. Accordingly, this Court should affirm the Division's findings that Taylor committed multiple instances of unprofessional conduct.

² As an example, the Board found that Taylor engaged in grossly incompetent practices in his treatment of Oscar, Hillary and Shakesbear (R. 311). Taylor argues that Division's finding regarding his treatment of Hillary is only supported by the testimony of Hillary's owner and a veterinarian that subsequently treated Hillary (Br. at 20). However, Taylor ignores his own testimony. After denying that he treated Hillary, Taylor testified that because of the structure of an English bulldog, palpating is not always effective and that he offers to take x-rays (Tr. Vol. 2 at 382). Moreover, after denying that he treated Hillary, Taylor testified that he would probably have performed a C-section on Hillary (Tr. Vol. 2 at 336-338). Taylor fails in his burden to marshal the evidence by not setting forth his own testimony that supports the Division's findings. Taylor's testimony is undoubtedly part of the competent evidence relied on by the Board in reaching its findings of fact.

In addition, Taylor does not point out any flaw in the evidence let alone a "fatal flaw." West Valley City, 818 p.2d at 1315. Therefore, due to Taylor's failure to marshal the evidence and his failure to point out a fatal flaw, this Court should affirm the Division's findings. Moreover, the Department correctly determined that there is substantial evidence to support the Division's findings (R. 61, Addendum).

III.

THE DEPARTMENT CORRECTLY SET FORTH THE STANDARDS AGAINST WHICH VETERINARIANS ARE MEASURED

Beginning on page 18 of his brief, Taylor introduces an argument that is mixed with issues of substantial evidence and unlawful decision making. Taylor argues that the Division's order falls short in defining the terms "unprofessional conduct," "negligence," "gross negligence," or "gross incompetence" (Br. at 15). However, Taylor's brief does not contain any citation to authority that supports his argument that the Division must define these terms.

On agency review, Taylor argued that the Division failed to properly define these terms and that they were unconstitutionally vague (R. 54-62, Addendum). The Department correctly responded to both of these arguments in its Order on Review by referring to

the standard set forth in Vance v. Fordham, 671 P.2d 124 (Utah 1983). In Vance, the Utah Supreme Court held that a general statutory standard governing professional conduct is acceptable. The Court stated:

As applied to the treatment of patients (or services to clients), a general statutory standard like 'unprofessional conduct' is acceptable for three reasons: (1) The subject of professional performance is too comprehensive to be codified in detail. (2) Members of a profession can properly be held to understand its standards of performance. (3) Standards of performance will be interpreted by members of the same profession in the process of administrative adjudication.

Id. at 129.

The Department, citing the Vance and Heinecke cases, stated that Taylor, as a licensed veterinarian for forty years, was properly charged with knowledge of what conduct is inconsistent with his responsibilities as a professional (R. 58-60, Addendum). The Department correctly held that Taylor was on notice as to what conduct was unprofessional and therefore his rights to due process were not violated.

IV.

TAYLOR HAS FAILED TO PRESERVE THE ISSUES OF VIOLATION OF DUE PROCESS BY NOT RAISING THEM AT AGENCY REVIEW

Starting on page 40 of his brief, Taylor argues issues of substantial evidence mixed with an issue of violation of due process. These issues were not raised at the administrative level. First, Taylor argues that the Division's finding of "aggravating factors" is not supported by substantial evidence and violates his rights to due process³ (Br. at 40-48). Taylor's brief omits any citations to the record showing that this issue was preserved at the administrative level or any statement of grounds for seeking review of an unpreserved issue.

Second, Taylor argues that there is no evidence that he failed to acknowledge the wrongful nature of his misconduct to the Board or the owners of the animals identified in the petition (Br. at 43). Taylor's brief omits any citations to the record

³ Taylor also argues that the rules provide for a procedure whereby the hearing process could have been bifurcated (Br. at 47). Taylor then argues that the Division never ordered a separate hearing. Taylor did not ask for one and thus he provides no citation to the record to indicate that he requested a bifurcated hearing or raised the issue at the administrative level (Br. at 47). Therefore, Taylor has failed to properly preserve this argument. Pickett, 858 P.2d 187, 190 n.5 (Utah App. 1993).

showing that this issue was preserved on the administrative level. The only citation to the record are references to the closing statement of Division's counsel (Br. at 42-44).⁴

Finally, Taylor argues that his right to due process has been violated because the Division failed to notify him that his "lack of contrition" and his "recalcitrance" would lead to the revocation of his license. Again, Taylor omits any citation to the record that this issue was preserved at the administrative level. Therefore, Taylor's brief violates rule 24(a)(5)(A), Utah Rules of Appellate Procedure.

⁴ Taylor raises two arguments in one by discussing substantial evidence and violations of due process. With respect to substantial evidence, Taylor argues that the only evidence of his failure to "acknowledge the wrongful nature of his misconduct" are the remarks made by Division's counsel during closing argument (Br. at 43). Once again, Taylor fails in his duty to marshal the evidence. During the hearing, Taylor testified that he did not treat Hillary (Tr. Vol 2 at 336-338). Taylor also testified that he did not treat Shakesbear (Tr. Vol. 2 at 339). Taylor also denied that he put the galvanized rod in Oscar's leg (Tr. Vol 2 at 326). The Board heard the testimony of the Division's witnesses, including Taylor's testimony, and concluded that Taylor was not credible and that he had engaged in the alleged conduct (R. 297, 301 and 303). Finally, the record does not indicate that Taylor objected to any of the remarks made by Division's counsel during his closing statement (Tr. Vol. 3 at 495-496, 503-505). Therefore, this Court should not consider this on appeal. State v. Cabututan, 861 P.2d 408, 413 (Utah 1993).

Taylor has failed in his obligation to raise all issues that could have been presented at the administrative level thus allowing them to be adjudicated by the administrative law judge (ALJ) or the Department⁵. If Taylor had made an objection or raised these issues at the administrative level, he would have given the ALJ or the Department the opportunity to remedy the alleged defects. However, Taylor failed to preserve these issues by not raising them below. Pease, 694 P.2d 613, 616 (Utah 1984) (petitioner had "the obligation to raise all the issues that could have been presented"); Brinkerhoof v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990); Ashcroft v. Industrial Comm'n, 855 P.2d 267, 268 (Utah App. 1993) (petitioner waived the issues of sufficiency of evidence and adequacy of findings because he failed to properly preserve them for appeal); Barney, 885 P.2d 809 (Utah App. 1994). As a result, Taylor should not be allowed to raise these issues for the first time on judicial review.

⁵ Taylor also argues that the Division failed to set forth the elements it must show in order to prove its prima facie case and that it failed to link its findings to its conclusions of law (Br. at 18). Taylor's brief omits any citation to the record showing that this issue was preserved on the administrative level on any statement of grounds for seeking review of an unpreserved issue. Therefore, Taylor has failed to preserve this issue.

V.

TAYLOR HAS FAILED TO MAKE A PRIMA FACIE CASE
THAT THE DIVISION HAS ACTED CONTRARY TO ITS
PRIOR PRACTICES

In his brief, Taylor challenges the Division's order because of an alleged inconsistency in the present case with precedent imposing more lenient penalties on six other veterinarians. Utah Code Ann. § 63-46b-16(4)(h)(iii) (1993) states:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

. . . .

(h) the agency action is:

. . . .

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency;

Taylor relies on Pickett, 858 P.2d 187 (Utah App. 1993) in attacking the Division's (but not the Department's) Order (Br. at 49-57). The Pickett case involved a pharmacist whose controlled substance license was revoked after a hearing before the Pharmacy Board. This Court considered Pickett's challenge and remanded the case back to the Division. The Pickett court pointed out that Pickett was required to establish a prima facie case that

the Division's action in his case was contrary to the Division's prior practice. The Pickett court, referring to Utah Code Ann. § 63-46b-16(4)(h)(iii), stated as follows:

[T]his section requires a petitioner to establish as a prima facie case that the administrative agency's action in his or her case was 'contrary to the agency's prior practice.' If a petitioner meets this burden, section 16(4)(h)(iii) unambiguously requires that 'the agency justif[y] the inconsistency' with prior decisions.

Id. at 191 (emphasis added).

In the present case, the Department upheld the Division's order concluding that the prior veterinary cases were not similar in conduct to the present case (R. 6-8, Addendum). In his brief, Taylor refers the Court to seven cases involving veterinarians and agency orders. Four of the seven cases involved the inappropriate use of controlled substances. The fifth case involved a veterinarian that had a criminal conviction. The sixth case involved unsanitary conditions in the use of equipment and a facility. The Department, in its Order on Review, correctly held that none of these prior cases involved issues of the technical competency of the veterinarians (R. 6, Addendum).

The one case cited by Taylor that is similar to his own case because it involves issues of technical competency, is the Dr. Gregory Johnston case. The parties settled the Johnston case

under a Stipulation and Order approved by the Division on April 25, 1996 (R. 7). The Division issued the Order in the present case on April 15, 1996 (R. 295). Therefore, the Department correctly concluded that the Johnston case cannot be considered a "prior" case (R. 7, Addendum).

Of the six prior cases cited by Taylor, he is the only veterinarian to have allegations of technical competency tried before the Board (R. 6, Addendum). None of the cases cited by Taylor involved multiple instances of either a failure to provide "minimally acceptable" veterinary care or a "callous indifference" to the condition and needs of the animals treated by Taylor (R. 313).

In other words, Taylor has failed to advise this Court about any prior case involving a veterinarian that has engaged in similar conduct and yet has received a more lenient sanction than revocation.

Taylor is asking this Court to examine the nature of his conduct as compared to the cases he has cited. However, to compare Taylor's conduct against a veterinarian that was convicted of a crime involving moral turpitude or a veterinarian that improperly prescribed controlled substances for a human would be irrational.

Taylor argues that there is no case law to support the Division's position that when comparing an agency's prior practice the cases have to be factually similar (Br. at 58-59). Taylor either misunderstands or ignores the language found in Pickett. The Pickett court, in discussing the comparison made by both Pickett and the Division, uses language like "equal" or "similar" to describe violations of the law. Id. at 191-192.

Taylor contends that the prior cases he has cited all involve unprofessional conduct (Br. at 60). The types of unprofessional conduct that a veterinarian can be disciplined for are set forth in Utah Code Ann. §§ 58-1-501(2) and 58-28-2(6). The kinds of misconduct mentioned in these provisions of title 58 are very broad. For example, under Utah Code Ann. § 58-1-501(2) (e) it is considered unprofessional for a licensee, including a veterinarian, to engage in conduct "including the use of intoxicants, drugs, narcotics, or similar chemicals, to the extent that the conduct does, or might reasonably be considered to, impair the ability of the licensee or applicant to safely engage in the occupation or profession." For veterinarians, it is also unprofessional conduct under Utah Code Ann. § 58-28-2(6)(b), to engage in "soliciting patronage by directly or indirectly employing solicitors."

Under Taylor's theory, the Court would have to compare the sanctions imposed by the Division on a drug addicted veterinarian against sanctions imposed on a veterinarian that had hired or asked someone to solicit business because they both deal with unprofessional conduct.

Because none of the prior cases cited by Taylor are factually similar in conduct to this case, it is the Division's position, upheld by the Department, that Taylor has failed to make a prima facie case (R. 8, Addendum). Therefore, under section 16(4)(h)(iii) and the Pickett case, the Executive Director of the Department was correct when he concluded that he was not required to justify the alleged inconsistency.

In sum, Taylor correctly contends that all of the prior veterinary cases he has cited involve unprofessional conduct. However, Taylor misses the mark when he argues that the Court must compare the present case to the prior veterinary cases, regardless of the specific type of misconduct that was charged as unprofessional conduct. Finally, Taylor argues that none of the prior veterinary cases resulted in revocation, therefore, the Division cannot revoke his license.

Taylor's argument for what is required under Utah Code Ann. § 63-46b-16(4)(h)(iii) and Pickett is untenable. If his theory

is taken to its logical conclusion, it would result in an all or nothing proposition. In other words, all veterinarians that are disciplined for unprofessional conduct must be revoked, regardless of the nature of their misconduct, or none of them can be revoked.


An all or nothing proposition in the area of professional disciplinary actions would take away a Board's ability to appropriately protect the public from a licensee who has demonstrated that he or she is incapable of correctly performing the fundamental aspects of their profession when compared to one that has temporally misplaced his or her moral compass.

CONCLUSION

For the reasons stated above, the Division asks that the Court affirm the Department's Order on Review.

RESPECTFULLY SUBMITTED this 14th day of July, 1997.

JAN GRAHAM
Attorney General



R. PAUL ALLRED
Assistant Attorney General

ADDENDUM A

**BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE LICENSE OF
LEO N. TAYLOR TO PRACTICE AS A
VETERINARIAN IN THE STATE OF
UTAH

:
:
:
:
:

ORDER ON REVIEW
Case No: DOPL-95-19

INTRODUCTION

This matter comes before the Executive Director on the request for agency review of the Petitioner, Leo N. Taylor (hereafter "Petitioner"), for review of the hearing held before the Utah Veterinary Board ("Board") and the order revoking Petitioner's license to practice as a veterinarian in the State of Utah by the Division of Occupational and Professional Licensing (hereafter "Division").

**STATUTES OR RULES PERMITTING OR REQUIRING
REVIEW**

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

ISSUES REVIEWED

1. Should Petitioner's motion for oral argument be granted?
2. Was the decision in Petitioner's case inconsistent with other licensing actions taken against veterinarians?
3. Are the terms "gross negligence" and "gross incompetence" unconstitutionally vague and therefore incapable of being applied in Petitioner's case.
4. a. Is there substantial evidence in the record to support the revocation of petitioner's license?
b. Are the board's conclusions of law are supported by substantial evidence in the record?

FINDINGS OF FACT

1. For the purposes of this review, and for the reason that neither party chose to submit a suggested finding of facts based on the record, the finding of facts made by the Board are incorporated as the findings of the Executive Director where not in conflict with the findings set out hereinafter.

CONCLUSIONS OF LAW

APPLICABLE LAW AND RULES

1. UTAH CODE ANN.§58-1-401 provides that:
 - (2) The division may . . . revoke, suspend, restrict, place on probation, issue a private or public reprimand to, or otherwise act upon the license of any licensee in any of the following cases:
 - (a) the . . . licensee has engaged in unprofessional conduct, as defined by statute or rule under this title . . .
2. UTAH CODE ANN.§58-1-501(2), which generally defines unprofessional conduct

for all professions and occupations regulated by the Division, provides that:

“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 . . . 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 . . .

3. UTAH CODE ANN. §58-28-2(6), the profession specific statute defining unprofessional conduct by veterinarians, provides that unprofessional conduct 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.

4. UTAH ADMIN R156-28-503 provides:

(1) A veterinarian shall compile and maintain written records on each patient to minimally include:

(a) client’s name, address and phone number, if telephone is available;

(b) patient’s identification, such as name, number, tag, species, age and gender, except for herds, flocks or other large groups of animals which may be more generally defined;

(c) veterinarian’s diagnosis or evaluation of the patient;

(d) treatments rendered including drugs used and dosages; and

(e) date of service. . .

(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. . .

(12) In those veterinary facilities where animals are retained for treatment or hospitalization, the following shall be provided:

(a) separate compartments, one for each animal, maintained in a sanitary manner as to assure comfort, and be of a design and

construction so as to facilitate sanitation procedures;

5. The *Department of Commerce Administrative Procedures Act Rules*, UTAH ADMIN R151-46b-12(7) provides that “[t]he standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings, as set forth in Subsection 63-46b-16(4).

6. UTAH CODE ANN. §63-46b-16(4) provides that

The appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute; . . .

(d) the agency has erroneously interpreted or applied the law; . . .

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is: . . .

(iii) contrary to the agency’s prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency;

7. UTAH CODE ANN. §63-46b-12(4) provides that “[t]o assist in review, the agency . . . may by order or rule permit the parties to . . . conduct oral argument.”

8. The *Department of Commerce Administrative Procedures Act Rules*, UTAH ADMIN R151-46b-12(6) provides regarding oral argument that

The request for agency review or the response thereto shall state whether oral argument is sought in conjunction with agency review. The department may order or permit oral argument if the department determines such argument is warranted to assist in conducting agency review.

STANDARD OF REVIEW

As this is an appeal on the record, the Executive Director will apply the standard utilized by the Utah Supreme Court in *Vance v. Fordham*, 671 P.2d 124, 125 (Utah 1983): “It is not the function of this Court to pass judgment on the professional qualifications or practices of appellant, or even to resolve the conflicts between his supporters and his detractors. Our function is limited to assuring the legality of and compliance with the process the law has established to regulate the professions in the public interest. (Citations omitted).”

ISSUE I

SHOULD PETITIONER BE GRANTED ORAL ARGUMENT?

1. The Petitioner has filed a request for oral argument in this matter pursuant to UTAH CODE ANN. §63-46b-12(4) and the applicable Department of Commerce rule, UTAH ADMIN R151-46b-12(6).
2. The grant of oral argument is discretionary with the Executive Director and may be granted if deemed warranted to assist in conducting the agency review.
3. The Executive Director is of the opinion that the issues and arguments in this case are clear, well briefed, and require no further elucidation, and that no legitimate purpose would be served by oral argument which is neither required nor warranted in this matter.

ISSUE II

DID THE DIVISION’S ACTION AGAINST PETITIONER’S LICENSE CONSTITUTE AN UNJUSTIFIED INCONSISTENCY WHEN COMPARED WITH PRIOR AGENCY ACTIONS IN SIMILAR CASES?

1. As Petitioner points out in his brief, he is the first veterinarian to have had his license to practice revoked. Additionally, this is a case of first impression as the first appeal of

an action taken by the Division to sanction a veterinarian's license. This is also the first adjudicated sanction imposed by the Division against a veterinarian.

2. It is clear from *Pickett v. Utah Dept. of Commerce*, 858 P.2d 187 (Utah App. 1993) that if the Petitioner is able to establish a *prima facie* showing of inconsistency between his case and the decision in other similar cases, then the burden of persuasion shifts to the Division to show that either no inconsistency exists or to explain and distinguish any apparent inconsistency.

3. A review of the records of the Division reflects that sanctions have been imposed against veterinarians on eight occasions, including the action taken against Petitioner. In at least one area Petitioner's case is immediately inconsistent and readily distinguishable from the other seven: it is the first and only case to have had a hearing before the Board. In all of the other instances the cases were resolved through stipulation and settlement.

4. Six of the other seven actions were resolved prior to the rendering of the decision in Petitioner's case. None of the six prior cases involved issues of malpractice or incompetency. Since these six cases are easily distinguishable, the synopsis contained in Petitioner's brief at pages 65-66 is accepted as an accurate representation of the facts in those six cases. Of the six cases, four revolved around the improper prescription of controlled substances. A fifth case was an action against a veterinarian who stole funds from the clinic at which he was employed.

5. The sixth action preceding Petitioner's concerned the improper physical layout of the veterinary clinic and resulted in an order being entered providing for the clinic to be brought into compliance with certain specified standards.

6. These six cases are readily distinguishable from Petitioner's case and in no manner can they provide comfort to Petitioner's position that they establish a *prima facie* case of inconsistent agency action when compared with the findings in Petitioner's case. However, the Executive Director was troubled by the apparent extreme closeness of the actions as set out by

Petitioner in his brief at page 66 regarding the Johnston case with Petitioner's case.

7. According to Petitioner, in June, 1995, the veterinarian in that case was "... **found** to have improperly performed thirteen neuterings or spayings" and additionally "... misdiagnosed at five (*sic*) animals and improperly prescribed medication in one instance." Petitioner stated that for such action the veterinarian received a penalty of "... five years on probation and further agreed not to perform ovariectomies and other similar procedures on small animals." (Petitioner's Brief at page 66).

8. Upon reviewing the Stipulation and Order in the Johnston case, the Executive Director was unsettled to find that the representation of that case by the Petitioner bears little resemblance to actuality. It is hoped and accepted that the discrepancies were inadvertent and not intended to mislead the Executive Director in consideration of this case.

9. The Executive Director cannot ascertain where Petitioner derived a date of June, 1995, which Petitioner alleges is the time when the Division made findings as to malpractice committed by Johnston, as such a date is in no way indicated by the record in that case. The **allegations** (not findings) contained in the Division's Petition filed on May 22, 1995, covered a period from 1990 through 1994. The Stipulation and Order in the Johnston case was entered on April 25, 1996, some **ten days after** the entry of the sanctions in Petitioner's case. There were no findings made as represented by Petitioner. Rather the Stipulation and Order provides that "Respondent, without admitting the truthfulness of all the allegations, agrees that cause exists for sanctions against his license".

10. The *Department of Commerce Administrative Procedures Act Rules*, UTAH ADMIN R151-46b-12(7) provides that "[t]he standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings, as set forth in Subsection 63-46b-16(4).

11. UTAH CODE ANN. §63-46b-16(4) provides that

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: .

..

(h) the agency action is: . . .

(iii) contrary to the agency's **prior** practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency . . .
(emphasis added)

12. Even allowing the Johnston case into consideration does not raise a *prima facie* case requiring justification of any inconsistencies by the Division. If it was necessary to distinguish Petitioner's from the other cases involving veterinarians, the other sanctioning actions were so dissimilar as to make such comparison a simple matter.

13. Among other things, all of the other veterinarian cases were determined upon stipulation rather than proof, while in Petitioner's case the determination was made after an exhaustive three-day hearing. In the only case remotely resembling Petitioner's in the allegations of wrongdoing, there were no specific findings against the veterinarian other than his admission that he " . . . agrees cause exists for sanctions against his license". In Petitioner's case there were specific findings of wrongdoing upon disputed allegations with proof produced at the hearing to support the allegations.

14. The Executive Director is of the opinion and finds that none of the sanctioning actions by the Division entered prior to April 15, 1996, or a cumulation of all such actions entered prior to and subsequent to such date, rises to the point of establishing a *prima facie* case of inconsistency when compared with the facts and findings in Petitioner's case.

ISSUE III-A

IS THERE SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE REVOCATION OF PETITIONER'S LICENSE?

1. The heavy burden of overturning the Division's ruling based upon the factual

determinations made at the hearing is upon the Petitioner. The test is whether the findings are supported by substantial evidence.

“This court grants great deference to an agency’s findings, and will uphold them if they are ‘supported by substantial evidence when viewed in light of the whole record before the court’”

“Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’”. . . . “In applying the substantial evidence test, we review the ‘whole record’ before the court, and consider both evidence that supports the Board’s findings and evidence that fairly detracts from them.” (Citations omitted). *Albertsons v. Dept. Of Employment Sec.*, 854 P.2d 570 (Utah App. 1993).

2. Petitioner’s primary argument, or at least most extended exposition in his brief, is to the proposition that the findings of the Board are either not founded upon substantial evidence or that the finding conflicts with evidence Petitioner deems more substantial in providing support to his contentions. The Court of Appeals in *Albertson*, supra, goes on to state the standard for resolving conflicting evidence on a record review:

We defer to the Board’s assessment of conflicting evidence. We are in no position to second guess the detailed findings of the ALJ which were adopted by the Board. It is not our role to judge the relative credibility of witnesses. “In undertaking such a review, this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review.” (Citation omitted). “It is the province of the Board, not appellate courts, to resolve conflicting evidence, **and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.** (Emphasis added).

3. The *Department of Commerce Administrative Procedures Act Rules*, UTAH ADMIN R151-46b-12(7) provides that “[t]he standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings, as set forth in Subsection 63-46b-16(4).

4. UTAH CODE ANN. §63-46b-16(4) provides that:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . . (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

5. The test on appeal is to look to the whole record to determine if there is substantial evidence to support the decision reached by the hearing body. Although the Petitioner argues that the decision of the Division to take action against Petitioner's license is not supported by substantial evidence, it appears that Petitioner is somewhat confused as to the substantial evidence test and wishes to argue the weight of the evidence, that certain findings were based upon conflicting evidence, or with attacks upon isolated alleged deficiencies rather than the whole record. Instead of showing that the evidence supporting the Division's findings are supported by insubstantial or non-existent evidence, Petitioner argues that there was other evidence more favorable to Petitioner which was rejected by the Division, and asks that the Executive Director substitute such other evidence in place of that found credible by the hearing panel.

6. It is not the office of an administrative appeal from a formal hearing for the Executive Director to substitute his judgment on credibility for that of those who heard the testimony and observed the demeanor of the witnesses. The only function of the Executive Director, in regards to findings of fact, is to determine that the findings are supported by substantial evidence in the record.

7. Petitioner's initial argument that the decision of the Division is not supported by substantial evidence take up over fifty (50) pages of his Brief and Reply Brief, and is subsequently revisited for another ten (10) pages under a slightly different premise. Petitioner's arguments go so far as to allege that the determination of the Division is arbitrary and capricious, which, if well taken, would be a basis for relief pursuant to UTAH CODE ANN. §63-46b-

8. Petitioner further argues, in reply to the Division's responsive brief challenging the same, that he did in fact meet the requirement and has

... marshaled *all* the evidence both supporting and contradicting the Panel's findings and the evidence does not substantially support those findings. Indeed, there is, in many instances, no evidence supporting the conclusions reached, to marshal. Based on the whole record, the only conclusion of fact apparent is at best that there can be differing views as to certain treatments that veterinarians may use in certain circumstances. (Reply Brief page 2)

9. The Executive Director is of the opinion that due to the breadth and depth of Petitioner's challenges and the failure of either briefing party to satisfactorily marshal the evidence adduced at the hearing, it is necessary for the Executive Director to review the record as a whole rather than piecemeal and out of context as presented by the parties. For the sake of convenience the review on this issue will be by animal rather than by violation.

A. OSCAR

1. Summary of the testimony of Vicki Crocker (owner of Oscar):

Oscar was taken to Petitioner on July 8, 1993 by Ms Crocker's father after coming up on the short end of a truck chase, and was diagnosed by Petitioner as a broken leg which would require surgery, which was performed on the evening of July 10, 1993 (Tr. 228-231). Ms. Crocker was told by Petitioner that a surgical pin had been placed down the dog's bone canal and wrapped with wire, and that its jaw had been wired (Tr. 231). Oscar was released on July 17 with instructions not to let the dog baby the injured leg (Tr. 233).

After monitoring the dog for two days and discovering a lump on the collarbone and being concerned with the dog's lethargy, Ms. Crocker took the dog to her personal veterinarian, Dr. Kallman on July 19 (Tr. 235). Ms. Crocker related the information from Petitioner - the pin in the leg and wrapped with wire - which Dr. Kallman told her was the standard procedure for

such an operation (Tr. 236). Upon taking an x-ray, Dr. Kallman informed Ms. Crocker that the fracture was not together and that the pin was not located as Petitioner had represented to her (Tr. 238-240). Ms. Crocker was informed that Oscar required surgery which he felt was beyond the scope of his expertise, and referred her to Dr. Dale Smith (Tr. 240-241).

Dr. Smith performed the second operation on Oscar and upon release gave her recovery instructions for resting the leg, opposite to the instructions from Petitioner (Tr. 244). Dr. Smith further informed Ms. Crocker that Petitioner had not only misperformed the surgery, but had used a rusty nail as a pin (Tr. 245-246).

2. Summary of the testimony of Dr. Dale Smith regarding Oscar:

Dr. Smith first saw Oscar on July 20, 1993 (Tr. 256). A review of the x-ray taken by Dr. Kallman showed a comminuted humeral fracture attempted to be repaired by a single improperly placed intramedullary pin which would have been too small and insufficient to fixate the break (Tr. 258).

Dr. Smith operated on the dog on July 21 and removed the pin from the previous repair which he noted looked like a nail rather than a standard stainless steel intramedullary pin (Tr. 261-262), and he placed the removed pin in his desk drawer where it remained until given to a Division investigator several months later (Tr. 263-264). No surgical wire was found around the bone from Petitioner's surgery (Tr. 266).

Petitioner's x-ray of Oscar was insufficient to even show all of the injury area and there should have been a second view prior to surgery being performed (Tr. 275-276).

In performing his operation, Dr. Smith found that there was no evidence of a track of a pin going all the way through the humerus bone from Petitioner's surgery, and there was no evidence that Petitioner's pin had migrated from where it was originally placed (Tr. 277-278), and there was no surgical wire or anything else present other than the pin (Tr. 266).

Dr. Smith testified that it was his professional opinion that Petitioner's treatment of

Oscar fell below the standard of practice of a veterinarian and was an extreme departure from such standard of practice (Tr. 267). Additionally, Petitioner's "Medical History Record" maintained on Oscar is more of an invoice than a medical record and would not be helpful to another veterinarian as to the treatment involved with Oscar (Tr. 268-269).

Oscar was released to Ms. Crocker on the 22nd with strict instructions from Dr. Smith to restrict the dog's use of the leg (Tr. 263).

3. Summary of the testimony of Dr. Leo N. Taylor regarding Oscar:

According to Petitioner, Oscar was brought in in shock and needing emergency treatment (Tr. 324) on July 15 and was operated on on the 17th and went home the next day (Tr. 361). Only one x-ray was taken of Oscar (Tr. 360-361). Petitioner testified that it is a standard veterinary practice to take an immediate post-operative x-ray to determine the position of the pin, but if the veterinarian feels assured that the operation was performed correctly it is okay to wait until the next day to take one, but Petitioner never took a post-op x-ray of Oscar (Tr. 388). Petitioner normally takes a post operative x-ray one or two days after the operation (Tr. 330), but he wasn't able to do so in this case because the owner took the dog from his clinic the day after the operation (Tr. 330, 364) and Petitioner did not have the opportunity to take any post-operative x-rays (Tr. 364).

Upon review of the x-ray taken July 8, Petitioner realized that the dog did not leave on the 10th as he thought (Tr. 362-363), but was in his care until the 17th (Tr. 364), a week after the operation was performed.

Dr. Taylor was unable to give specifics as to the pin he used on Oscar, but he did not use stainless steel wire in the procedure (Tr. 365-366), but rather in Oscar's case he used extra chrome catgut and pulled the bones back in line (Tr. 327). Petitioner personally prepared the pin for Oscar and inserted it (387-388). Petitioner had no special training in performing orthopedic surgery and preparing intramedullary pins but learned the techniques through

experience (Tr. 395-396). Petitioner testified that the proper procedure to repair an injury such as Oscar suffered required an intramedullary pin to be threaded up through the bone up through the proximal end and then back down through and then stabilized (Tr. 326).

Petitioner testified that the animal displayed on the x-ray taken by Dr. Kallman did not have the pin in it Petitioner inserted because he uses only stainless steel for intramedullary pins (Tr. 326, 328). Petitioner testified that he had no idea where the nail in the x-ray of Oscar came from (Tr. 326), and that the nail as shown on the x-ray would not work (Tr. 326). The pin in the Kallman x-ray wasn't up to the proximal end of the bone (Tr. 326).

Although Petitioner testified that each client is given written instructions on the care of their convalescent pet on their bill (Tr. 389) he could offer no explanation of why Oscar's bill in evidence did not contain such instructions (Tr. 394).

4. It appears from the record that Petitioner is in full accord with Dr. Smith that only stainless steel should be utilized for intramedullary pins and that the procedure as shown on the Kallman x-ray would be improper and therefore below the standards of acceptable veterinary practice. Since Petitioner adamantly denied any knowledge of the galvanized pin or the operation reflected on the Kallman x-ray, the threshold issue regarding the issue of the treatment rendered to Oscar is not whether or not the procedure was grossly incompetent, grossly negligent, and unprofessional, which appears to be the shared opinion of Petitioner and Dr. Smith, but whether Petitioner performed the procedure reflected on the x-ray.

5. Oscar's owner testified that she picked Oscar up from Petitioner's clinic on the afternoon of July 17 (Tr. 233) and kept him under close monitoring at her home until she became concerned about his condition and took Oscar to her normal veterinarian on July 19 (Tr. 235). Ms. Crocker authorized x-rays to be taken by Dr. Kallman and Oscar was out of her presence for three to five minutes while this was being done, and Ms. Crocker neither left Oscar at Dr. Kallman's nor did Dr. Kallman do any surgery (Tr. 236-237). Ms. Crocker paid for the x-ray and

took it and the dog when she left Dr. Kallman's clinic (Tr. 241). The x-ray showed that it was an x-ray taken of Oscar at Willow Creek Veterinary Clinic (Dr. Kallman's clinic) on July 19, 1993 (Tr. 2388-239). Ms. Crocker took Oscar and Dr. Kallman's x-ray to Dr. Smith's clinic the next day (Tr. 242-243).

Dr. Smith viewed the x-ray taken by Dr. Kallman on July 20, 1993 (Tr. 258) and operated on Oscar on July 21, 1993 (Tr. 261) and removed the galvanized pin (Tr. 263). The pin removed from Oscar is the same pin shown on the x-ray taken by Dr. Kallman (Tr. 265).

It is clear from the record that the only operation performed on Oscar prior to the galvanized pin being removed from him by Dr. Smith was the initial operation performed by Petitioner on July 10, 1993, and, despite Petitioner's protests to the contrary, the substantial evidence supports no finding other than that made by the Board: Petitioner performed the surgery shown on Dr. Kallman's x-ray. The issue then turns to the nature of Petitioner's treatment of Oscar and whether substantial evidence exists to support the Board's findings.

6. In regards to Petitioner's treatment of Oscar, the Board found:

a. Petitioner utilized a galvanized pin which was too small in diameter to adequately stabilize the fracture and was further not properly inserted [Findings of Fact Conclusions of Law, and Recommended Order (hereafter "Findings") page 2];

b. Petitioner failed to take a post-operative x-ray to confirm that the positioning of the rod (Findings, page 3);

c. Petitioner improperly used chromic gut to stabilize the bone, although chromic gut is only proper for use in soft tissue repair (Findings, page 3);

d. Petitioner did not provide accurate post-operative instructions to limit Oscar's mobility during the initial healing period, but rather an employee incorrectly instructed the owner to exercise the injured leg (Findings, page 3);

e. Petitioner used galvanized material for an intramedullary pin which the

Board found to be improper (Findings, page 4);

f. Petitioner was found to have not maintained sufficient records on Oscar's treatment (Findings, page 4);

g. Petitioner's pre-operative x-ray was found by the Board to have been insufficient to adequately diagnose Oscar's injury (Findings, page 4); and

h. Petitioner did not record Oscar's medical history or any physical examination of the animal, nor record any surgery report or progress notes to document his condition (Findings, page 4).

7. Petitioner urges that there was no substantial evidence that the use of galvanized material violates professional veterinary standards and therefore a finding that his use of the same cannot be construed as unprofessional conduct (Brief for Petitioner, pages 8-9).

Perhaps the best evidence of the propriety of using galvanized material for an intramedullary pin is found in the testimony of Petitioner himself. Petitioner identified the object removed from Oscar as " . . . the nail that was put in that dog", and denied that he could be responsible because "I use stainless steel" (Tr. 326) and "I've never used anything but stainless steel on any intramedullary pin" (Tr. 328, *see also* Tr. 395), although he admitted the possibility that his supplier might have put galvanized material into his purchase (Tr. 386). It is clear from this and other testimony by Petitioner that he considered stainless steel as the only appropriate material to be used for an intramedullary pin such as was placed in Oscar.

In addition to Petitioner's defense of the exclusive use of stainless steel, three of the four members of the Board hearing the case are licensed veterinarians chargeable, as is Petitioner, with knowledge of the standards of practice governing their profession. The Executive Director is not in a position to say that Petitioner and the members of the Board were manifestly wrong in determining that a galvanized nail is not a proper material for use as an intermedullary pin and that such use would be a violation of the professional standards of veterinarians.

The Executive Director has heretofore found that Petitioner placed the galvanized pin in Oscar and does hereby find that there is substantial evidence upon which to determine that the use of such material constitutes an extreme and egregious departure from generally accepted professional standards.

8. Petitioner next argues that there was no substantial evidence to support the finding of the Board that the pin used by Petitioner was too small to adequately stabilize the fracture.

Once again the Executive Director turns to Petitioner's testimony at the hearing where he testified that the pin he observed on Dr. Kallman's x-ray was in no way the proper length and "You couldn't put a small piece of that in there and just cut the head off of it." (Tr. 329). Petitioner denied that he did the operation shown on Dr. Kallman's x-ray and that the pin he used "... had been twice the length of what they showed in there (the x-ray), at minimum." (Tr. 329). Therefore it was Petitioner's testimony that the pin should have been at least twice as long as the piece removed by Dr. Smith from Oscar to have properly performed its intended function.

The Executive Director cannot locate support for the finding that the pin used was "... too small in diameter ... "(Findings, page 2), and none of the briefs cite to the record where any testimony regarding diameter is located. However there is complete agreement that the pin removed from Oscar's leg by Dr. Smith was improperly prepared and too short to accomplish its intended purpose unless used in combination with other types of fixation (Tr. 278).

Petitioner by his own admission did not use any stainless steel wire to help fixate the repair but rather used extra chrome catgut to pull the bones back in line (Tr. 327). Although Dr. Smith testified that when he removed the galvanized pin he found nothing else present, he couldn't remember if any sutures were removed (Tr. 266). The Executive Director does not find any testimony in the record regarding the *wrapping* of chrome catgut around the fracture, nor do any of the briefs point out such testimony as was found by the Board (Findings, page 3). Even if this was the case, the Board, three of whom are experienced practicing veterinarians, found that

such a use of chrome gut would be improper for stabilization of a fracture (Findings, page 3).

The Executive Director is of the opinion that there is substantial evidence in the record that the intramedullary pin used by Petitioner was far too small to accomplish the repair intended.

9. Petitioner next turns to the finding of the Board that there is no evidence in the record to substantiate that post-operative x-rays are an established standard in the veterinarian profession.

One of the veterinarians on the Board asked Petitioner if it is not a standard practice to immediately take a post-operative x-ray, to which Petitioner responded in the affirmative but allowed that sometimes it is permissible to wait until the day following surgery to take post-operative x-rays (Tr. 388). Petitioner also testified that the normal procedure after an operation is to “. . . take an x-ray one or two days afterwards to see that everything was in place.” (Tr. 330). Petitioner further testified that he didn’t take any post-operative x-rays because he was not given the opportunity because the owner took the dog the morning after the surgery (Tr. 330, 364).

As is completely clear from the record, Oscar entered Petitioner’s care on July 8, was operated on by Petitioner on July 10, and was released by Petitioner on July 17, some *seven* days after the operation.

The Executive Director is satisfied from Petitioner’s own testimony that he was aware of the proper standard of practice in his profession, and there is substantial evidence that Petitioner failed to follow this standard of taking post-operative x-rays in regard to the surgical procedure he performed on the dog named Oscar.

10. Petitioner next argues that there is no evidence in the record that chromic gut is only proper for use in soft tissue repair. As discussed hereinabove, the Executive Director was unable to find any references to chromic catgut other than Petitioner’s testimony that he utilized it to stabilize Oscar’s fracture, and Dr. Smith’s testimony that he did not find anything other than

the galvanized pin when he operated on Oscar some eleven days following Petitioner's operation on the same animal.

It is apparent from the finding that the Board accepted Petitioner's testimony that he had in fact used gut to stabilize the fracture and that the use of chromic catgut was supported by substantial evidence. Three of the four Board members hearing Petitioner's case are licensed veterinarians in the community and it was their finding that Petitioner's use of catgut in the manner he testified was improper, and the Executive Director will not attempt to substitute his lay opinion for the expert evaluation of practitioners in the profession practiced by Petitioner.

11. Petitioner next challenges the finding of the Board as to inaccurate post-operative instructions being given verbally to Oscar's owner upon its release from Petitioner's clinic.

Ms. Crocker testified that she was instructed not to baby Oscar but to make him use his leg (Tr. 233). At numerous places in the transcript Petitioner and his witnesses testified that owners are always given written instructions on their receipt when an animal is released from Petitioner's care (*among others*, Tr. 303-304, 389, 394, 415). Petitioner's explanation as to why such instructions fail to show up on any of the billings furnished pursuant to subpoena was that the billings were reprints and that the actual billings would be produced (Tr. 312-314), but no such billings were ever produced.

No evidence was produced at the hearing below to contradict or challenge the testimony of Ms. Crocker as to the instructions she was given, either through the production of the billing statement or the testimony of the person who gave Ms. Crocker Oscar's release instructions.

The record reflects that exercising a broken limb is completely wrong (*among others*, Tr. 304, 263). The Executive Director is of the opinion that substantial and uncontroverted evidence is contained in the record that Petitioner did not provide or cause to be provided accurate post-operative instructions as to the post-operative home care of Oscar.

12. Petitioner next attacks the Board's finding that the pre-operative x-ray taken of

Oscar was insufficient to adequately diagnose and treat Oscar's injury (Findings, page 4, paragraph 12).

Dr. Smith testified that Petitioner's x-ray was insufficient and did not even show all of the injured area, which required a second view (Tr. 275-276).

Petitioner was questioned by a veterinarian member of the Board as to the whether it is Petitioner's common practice to take two views of a fracture, to which Petitioner responded that this is done if necessary but not as a standard practice (Tr. 392). Petitioner further testified that he felt that the bone was so fragmented that another x-ray would not shown him anything he needed to know (Tr. 392-393).

The single x-ray taken by Petitioner was examined by the Board during the hearing, three Board members being licensed veterinarians, and they had the opportunity to determine the sufficiency of the x-ray for the purpose taken and to examine Petitioner's x-ray while Dr. Smith testified about it (Tr. 275).

The Executive Director is of the opinion that substantial evidence in the form of the actual x-ray and the testimony of Dr. Smith existed for the finding that Petitioner's x-ray was insufficient to adequately diagnose and treat the dog named Oscar.

13. The final two attacks by Petitioner upon the findings of the Board both regard the record keeping of Petitioner regarding the dog named Oscar (Findings, page 4, paragraph 12 and page 4-5, paragraph 13).

Perhaps the best illustration of the deficiency of any adequate records being maintained in the case of Oscar is that the Petitioner could not determine, from his records, when the dog was admitted, operated on, released, or how long it was in his care. Petitioner testified that Oscar was admitted on the 15th, stabilized on the 16th, and operated on on the 17th and went home after being at the hospital for two days (Tr. 361). Upon being directed to his x-ray dated July 7, 1993, Petitioner decided that Oscar had been admitted either that day or the next morning (Tr. 362).

He then testified that Oscar had been admitted on July 8th and was operated on the next day and left the following morning (Tr. 363). Upon reviewing his “Medical History Report” (Ex. 28), Petitioner then testified that Oscar must have been admitted on the 15th, and finally gave up and accused the assistant attorney general of trying to confuse him (Tr. 364).

Although Petitioner and his witnesses testified repeatedly that real records, handwritten notes, and other documents existed (*among others*, Tr. 300, 310-311, 312-314, 331, 345, 346, 352, 424-425, 429, 480), none were produced on Oscar or any other animal although the records had been subpoenaed (Ex. 32) and Petitioner was fully apprised by the Petition exhibited against him that the hearing would involve allegations of a lack of record keeping.

Petitioner complains of Dr. Smith’s characterization of Petitioner’s “Medical History Record” as being “. . . more of an invoice than a medical record.” (Tr. 269), yet Petitioner describes the same document as being “. . . mainly a billing, which doesn’t have the details” (Tr. 330).

Petitioner’s employee, Janet Gillette, testified that Petitioner’s clinic has maintained the check-in slips since at least 1991 on animals admitted to the hospital, upon which the doctors and techs write what was done, the dates done, surgeries, treatments, antibiotics, and that these records are kept even on animals treated and immediately released (Tr. 424-425). However, no meaningful records were produced on Oscar or any of the other animals either in response to the subpoena or during the course of the hearing.

Petitioner gave varying testimony regarding the keeping of records. He testified that records were kept for three years or longer (Tr. 346); three months to a year if it isn’t going to be an active case (Tr. 352); thirty days for dead animals (356-357); a year or something where an animal is deceased (Tr. 331); and only overnight on spays (Tr. 358).

Petitioner testified that the actual treatment notes on Oscar would have been kept three to four months or even a year (Tr. 352) and should have been available when the subpoena was

served (Tr. 352). No notes on Oscar were ever produced.

The importance of notes on Oscar, who was treated by Petitioner in July, 1993, is indicated by Petitioner's response to being asked about another dog which he treated in August, 1994, which was originally a part of the Division's investigation: "You're relating back probably two years ago or longer. How can I remember two years ago?" (Tr. 384). Yet Oscar was treated more than a year earlier than the dog Petitioner could not recall.

The Executive Director is of the opinion from the testimony of Petitioner and his witnesses that records were maintained, and the fact that no records were produced, that substantial evidence exists in the record to support a finding that Petitioner failed to maintain medical records on the dog Oscar.

14. The Executive Director is of the opinion that substantial evidence does in fact exist to support the findings of the Board in the matter of Petitioner's treatment of Oscar.

B. NADIA

1. Summary of the testimony of Rebecca DeGuzman (co-owner of Nadia):

Nadia was taken to Petitioner for treatment of mastitis in December, 1993 (Tr. 29). After three or four days Petitioner called and told her she could pick Nadia up (Tr. 29). Ms. DeGuzman asked why the bill did not contain a charge for anesthesia and was told by Petitioner that the tissue was dead and did not require anesthesia (Tr. 32). He did not suggest that Nadia remain in the clinic for a few more days (Tr. 35).

The next morning Ms. DeGuzman took Nadia to another clinic, All Pet Complex, after observing a four or five inch gaping wound on the dog (Tr. 32) with a discharge and odor (Tr. 38).

2. Summary of the testimony of Michael DeGuzman (co-owner of Nadia):

Testified that he heard Nadia yelp and when he turned around Petitioner was kicking her

(Tr. 40).

3. **Summary of the testimony of Dr. Jolie Brown regarding Nadia:**

Nadia was brought into Dr. Brown with a four to five inch hole around which there were long hairs surrounding the wound, and it was her interpretation that the wound had not been properly shaved and cleaned prior to surgery (Tr. 47, 48).

Dr. Brown testified that Petitioner's "Medical History Report" on Nadia was inadequate as it did not describe the surgical procedures, anesthesia used, etc. (Tr. 51). She was of the opinion that Petitioner's care was below the standard of care for veterinarians in this community (Tr. 52), and Petitioner's failure to properly prepare the site for surgery raises concerns for sanitation (Tr. 53). Even taking into consideration hypothetical monetary concerns, Dr. Brown was of the opinion that Petitioner cut corners which should not be cut (Tr. 60).

4. **Summary of the testimony of Dr. David Shupe regarding Nadia:**

Dr. Shupe admitted Nadia to All Pet Complex and was the dog's primary veterinarian during its treatment (Tr. 65). Nadia's wound had not been shaved and there was hair all the way up to the margins of the wound (Tr. 69).

Dr. Shupe was of the professional opinion that the care provided by Petitioner was minimal (Tr. 70) and the dog should have been hospitalized (Tr. 69). The care provided by Petitioner was below the standard of care required in such a case (Tr. 71).

5. **Summary of the testimony of Dr. Leo N. Taylor regarding Nadia:**

Petitioner testified that he did not kick the dog but merely stepped in front of it to keep it from running off after it bit him and jumped from the examining table (Tr. 333). Petitioner further testified that he administered either pre-anesthesia or anesthesia to Nadia (Tr. 333) and that the dog received antibiotics and probably further antibiotics (Tr. 335).

Petitioner stated that his reason for not shaving the dog and preparing it for surgery was

because the owners did not want to leave the dog longer than the three days it had been in his care (Tr. 369). Petitioner testified that he told the owners that Nadia was not ready to go home but they insisted because they couldn't afford to have it treated (Tr. 334-335).

6. In regard to the care afforded to the dog named Nadia by Petitioner, the Board found:

a. There was no substantial evidence that Petitioner physically abused Nadia (Findings, page 5, paragraph 14) or failed to administer anesthesia prior to treatment of Nadia (Findings, page 5, paragraph 15);

b. Petitioner properly left the wound unbandaged to allow drainage (Findings, page 5, paragraph 15) and provided medication for treatment of the wound (Findings, page 5, paragraph 16;

c. Petitioner failed to adequately shave the wound area on Nadia (Findings, page 5, paragraph 15);

d. Petitioner failed to record Nadia's medical history or any physical exam, and did not record any surgery report or progress notes to document the care given Nadia (Findings, page 5, paragraph 17).

7. Petitioner places great emphasis upon the fact that Dr. Brown did not see the wound until it was in the process of being cleaned by clinic technicians, and that the dog's wound had been exposed to contamination since being released by Petitioner, along with no evidence having been produced of a standard regarding the shaving of a wound prior to surgery (Brief for Petitioner, page 24-25).

However, two licensed veterinarians in the community in which Petitioner practices testified that the wound was not properly shaved and, since the surgery had already been performed by Petitioner, had not been shaved prior to the operation (Tr. 47, 48, 69). Both veterinarians testified that the wound was not properly treated and that the standard of care

afforded by Petitioner fell below the standard of care for veterinarians in the community (Tr. 52, 70-71).

In response, Petitioner testified that his reason for not shaving the dog prior to surgery was because the owners did not want to leave it in his care any longer, but fails to explain what he did with the dog during the three days it was receiving treatment under his care (Tr. 369). Dr. Brown testified that even factoring in the alleged financial concerns of the owners, Petitioner cut corners not allowed by the standards of the veterinarian profession (Tr. 60).

The Executive Director finds Petitioner's excuse for failure to properly prepare the dog for surgery more than a little questionable since Nadia had been his patient for three days prior to being released to its owners. Far from there being no evidence as alleged by Petitioner, the Executive Director is of the opinion that the evidence is both substantial and overwhelming that Petitioner failed to properly treat Nadia while in his care.

8. Petitioner next attacks the finding of the Board that Petitioner failed to maintain adequate medical records of his treatment of Nadia, alleging that the finding is completely contrary to the direct sworn testimony in the record of Petitioner, his wife, and his employee (Brief for Petitioner, page 25).

To avoid repetition *ad nauseam*, the Executive Director incorporates herein the general findings regarding Petitioner's record keeping set out in detail under Oscar, paragraph 13, *supra*.

Petitioner failed to supply any of the records he alleged were maintained and specifically testified that in October, 1994, he would "probably" not have kept notes on Nadia from December, 1993 (Tr. 353) although he had previously testified that records were maintained for at least three years (Tr. 346), and his 21 year employee testified that all records going back to at least 1991 were available (Tr. 424-425).

The Executive Director is of the opinion that while Petitioner and his witnesses testified that records were maintained, nevertheless substantial evidence exists in the record to

support a finding that Petitioner failed to maintain medical records on the dog Nadia as no such records were ever produced before or during the hearing by Petitioner.

C. HILLARY

1. Summary of the testimony of Cindy Bue (Owner of Hillary):

Ms. Bue took Hillary to Petitioner for artificial insemination on two occasions, and Petitioner personally performed the procedure both times and executed the certification that he had done so right after completing the procedure (Tr. 152, 156, 447-448, 455). Ms. Bue was positive it was Petitioner she dealt with on all occasions (Tr. 454) as she knew him from when she was younger when he was the family veterinarian and her family lived near Petitioner's clinic (Tr. 182-183). She also was able to identify the veterinarian as the Dr. Taylor sitting directly in front of her at the hearing (Tr. 186).

The dog was scheduled by Petitioner for a C-section on June 20, 1994 but went into labor on Friday night, June 17 (Tr. 157). On the morning of Saturday the 18th, she was able to contact Petitioner's wife after discovering the telephone of the other veterinarian at the clinic was disconnected, and was told to bring the dog in and she would be met by a couple of members of the clinic's staff (Tr. 159, 452). A short time after Ms. Bue got to the clinic, Janet Gillette arrived and, after trying to revive a puppy delivered in the car, placed Ms. Bue and Hillary in a room in the clinic and instructed her to wait for Petitioner to arrive (Tr. 160, 446-447, 451-452).

Petitioner arrived at the clinic at 8:30, and after palpating Hillary's stomach told Ms. Bue to leave as the remainder of the puppies would probably be born dead (Tr. 161, 454). Ms. Bue asked Petitioner to perform a C-section but Petitioner advised her against it since the remaining one or two puppies would be dead and the procedure would be a waste of money and would endanger the dog's life (Tr. 162-163). On Saturday night Petitioner informed the owner that he hadn't gotten to the flushing process yet and that Hillary probably still had a puppy inside (Tr.

166). Petitioner called Ms. Bue the next morning and told her to take Hillary home and that there were no more puppies (Tr. 167, 169). That evening Ms. Bue was unable to reach Petitioner after Hillary dropped another dead puppy and began to bleed heavily (Tr. 171-172). Ms. Bue then took Hillary to her regular veterinarian, Dr. Mayling Chinn, at Central Valley Hospital (Tr. 172) who confirmed a remaining puppy with an x-ray and delivered it by C-section (Tr. 175-177).

2. Testimony of Dr. Mayling Chinn regarding treatment of Hillary:

Dr. Chinn testified that due to the build of the English bulldog, such as Hillary, it is difficult to determine the number of puppies, or even if there are any, by feel and the only way to make such a determination is through x-rays (Tr. 193-194). The two puppies delivered at Dr. Chinn's clinic were fully formed (Tr. 203-204).

The "Medical History Report" of Petitioner's contains no details which would be of help in treating Hillary (Tr. 200).

It was Dr. Chinn's professional opinion that the standard of care provided by Petitioner to Hillary fell below the accepted standards for such treatment (Tr. 204-205).

3. Testimony of Dr. Leo N. Taylor regarding treatment of Hillary:

Petitioner testified that he had never had anything whatsoever to do with the dog named Hillary, and she had at all times been the patient of his employee, Dr. Stock, but that if he had been the treating doctor he would probably have performed a C-section (Tr. 336-338). Petitioner stated that Dr. Stock had developed amnesia and could not remember treating Hillary (Tr. 339). Petitioner did not keep any notes on Hillary because he never had anything to do with her and, although all veterinarians working in his clinic are required to keep notes, the clinic did not have any to turn over in response to the Division's subpoena (Tr. 354-355).

Petitioner testified that his name appearing as the doctor on Hillary's "Medical History Report" furnished by Petitioner's clinic was in error in showing him as the doctor who had

performed two inseminations and provided whelping assistance (Tr. 370-371). He further testified that Hillary was admitted and discharged on June 20, 1994, to the best he could remember (Tr. 474).

Petitioner first denied that he signed the artificial insemination certificate (Ex. 34, Tr. 473), but then testified that it had probably been presented to him to sign and, “not knowing that the document would come back at me like this”, he probably signed it (Tr. 475), and finally admitted that he signed it (Tr. 477).

4. Testimony of Geraldine Taylor regarding the treatment of Hillary:

Ms. Taylor is Petitioner’s wife and office manager (Tr. 298-299). She testified that Petitioner never cared for the dog named Hillary (Tr. 307), and his being shown on three occasions on the “Medical History Report” as the treating doctor was the result of wrongfully entered information into the computer system (Tr. 309-310).

She testified that there might be additional records available to show who actually treated the dog, and that such additional records had not been furnished because they were not requested, but that she could obtain them (Tr. 310-311). The Division’s subpoena had requested, among other things, “ALL DOCUMENTS, RECORDS AND X-RAYS Pertaining to . . . the artificial insemination procedure and follow up care provided to Cindy Bue’s English bulldog, Hillary, in 1994” (Ex. 32).

5. Testimony of Janet Gillette regarding the treatment of Hillary:

Ms. Gillette testified that she had been a receptionist and tech for Petitioner for 21 years (Tr. 412-414). She stated that when she arrived at the clinic on the morning Hillary was admitted the office was open and Dr. Stock was in back treating the dog and there were two dead puppies on the table (Tr. 419). Dr. Stock told her that he did not intend to perform a C-section (Tr. 420).

She testified that to her knowledge Petitioner never had anything to do with Hillary and that anything in the records indicating his involvement would be an error on the receptionist’s

part (Tr. 420-421). She also stated that she had been present on one occasion when Dr. Stock inseminated Hillary (Tr. 420).

Ms. Gillette testified that Hillary was admitted on a Monday morning and she was present from right after the clinic opened until 2:30 that afternoon (Tr. 428). She disputed Ms. Bue's testimony about her participation in the admission of Hillary, stating~~g~~ as her reason that she drives a school bus and would not have arrived at the clinic until after 9:00 on the Monday morning when Hillary was admitted (Tr. 482). She further testified that the dog couldn't have been in the clinic on Sunday because she did not work Sundays and that she was at the clinic while Hillary was present (Tr. 484).

6. The Board made the following finds regarding Hillary:

a. Petitioner artificially inseminated Hillary on April 21 and 23, 1994

(Findings, page 6, paragraph 18);

b. Petitioner examined Hillary on June 18, 1994 (Findings, page 6, paragraph

19);

c. Petitioner did not take x-rays to accurately assess Hillary's condition and

relied upon palpation which could not accurately determine whether the entire litter had been delivered, and that no surgical intervention was required (Findings, page 6, paragraph 20);

d. Without taking an x-ray, Petitioner represented that all of the pups had

been delivered and released Hillary from his care on June 19, 1996 (Findings, page 7, paragraph 21);

e. Petitioner improperly released Hillary on June 19, 1994 without taking an

x-ray to adequately diagnose the dog's condition, and this failure jeopardized the dog's health (Findings, page 7-8, paragraph 24);

f. Petitioner failed to document Hillary's medical history or his physical

exam and did not document his diagnosis and progress while in his care (Findings, page 8,

paragraph 26).

7. Petitioner first alleges that he offered a “credible and logical explanation” for signing the certification although not performing the inseminations (Brief for Petitioner, page 26).

The Executive Director finds nothing either credible or logical in Petitioner’s explanation. Petitioner either performed the inseminations as shown on his “Medical History Report” (Ex. 18) and the “Certification of Breeding by Artificial Insemination Using Fresh Semen” (Ex. 34) signed by him, or else he lied on this national certification and document upon which the integrity of the American Kennel Association registrations are based for pure bred animals.

8. Petitioner further maintains that there is no substantial evidence to support the Board’s finding that Petitioner performed the inseminations on Hillary (Brief for Petitioner, page 26).

On the side of Petitioner we have his testimony that he never had anything to do with Hillary (Tr. 336-337). However, he also did not know when the dog was in his clinic or for how long (Tr. 474), and admittedly cannot remember events involving treatment two years previously (Tr. 383-384) and has no contemporary notes to rely upon to refresh his memory (Tr. 354-355).

On the other side we have Petitioner’s signed certification that he personally extracted semen from the male dog on two occasions in the presence of Hillary, Cindy Bue, and Beverly Brown, and personally inseminated Hillary as witnessed by Ms. Bue and Ms. Brown (Ex. 34).

Also in opposition to Petitioner’s testimony that he did not perform the inseminations is the “Medical History Report” from his clinic showing that he performed inseminations on Hillary on April 21 and 23, 1994 (Ex. 22).

Ms. Bue, who has known Petitioner since she was young (Tr. 182-183) and was able to identify him at the hearing as the only doctor who treated Hillary at Petitioner’s clinic (Tr. 186, 454), and who she watched sign the insemination certification immediately following the second

insemination (Tr. 447-448, 454-455). She also testified that Janet Gillette was never present during any insemination (Tr. 455).

Petitioner's employee of 21 years, Janet Gillette, did testify to being present during one insemination which she alleged was performed by Dr. Stock (Tr. 420), but her memory is at best suspect since she misremembered the incidences surrounding Hillary's whelping, including when it occurred (Tr. 428, 482, 484), although it obviously took place at a later date than the inseminations which produced it.

The Executive Director is of the opinion that there is substantial evidence to support the finding of the Board that Petitioner performed the artificial inseminations of Hillary.

9. Petitioner next directs attention to his allegation that he had no part in any area of the treatment of Hillary (Brief for Petitioner, pages 26-31), maintaining that "the substantial evidence preponderates in favor of the conclusion that Dr. Stock saw and treated Hillary." (Brief for Petitioner, page 31).

Although the standard is not preponderance of the evidence, but rather whether there is substantial evidence to support a determination of fact, the Executive Director is of the opinion that the evidence preponderates in favor of the finding made by the Board: that Petitioner was the sole veterinarian treating the dog named Hillary.

Petitioner bases his position on his testimony and that of his wife, Geraldine Taylor, and of Janet Gillette, an employee of his for 21 years. The records furnished by Petitioner under subpoena and the insemination certificate signed twice by Petitioner are the only documents submitted in the record which show the treating physician. In both cases the only evidence other than conflicting memories shows the treating, and only, veterinarian as Petitioner.

Petitioner testified that he had absolutely nothing to do with Hillary at any stage and that only Dr. Stock treated the dog (Tr. 336-338). According to Petitioner, he spoke with Dr. Stock who had no memory of having anything to do with Hillary (Tr. 339). Petitioner's clinic, with

only intermittent assistance from another veterinarian, saw 40,306 animals in 1995 (Tr. 305).

Ms. Taylor testified that when she got to the hospital at about 8:20 Dr. Stock was already treating Hillary (Tr. 306). She explained the listing of Petitioner as the doctor was a mistake (Tr. 309). Although she testified about the existence of other records, not turned over in response to the subpoena, which were available to show the admitting doctor, such records were never submitted (Tr. 311, 313). Ms. Taylor did not absolutely deny treatment of Hillary by Petitioner, but only “not to my knowledge” (Tr. 307, 312). In one response, not finished, she testified “. . . Dr. Taylor never saw that dog until - -”, with the rest of her answer cut off (Tr. 309-310), which would indicate that Petitioner may have seen the dog at some point.

Janet Gillette testified that Hillary was admitted to the clinic on Monday morning, June 20, 1994, and was being treated by Dr. Stock when she arrived (Tr. 428). She was definite that Hillary was not in the clinic on a Sunday (Tr. 484).

The testimony of Cindy Bue, owner of Hillary, is clear and unequivocal. Petitioner is the only doctor who ever treated the dog at Petitioner’s clinic (Tr. 454), and she was absolutely certain that the person sitting in front of her at the hearing was the same Dr. Taylor who handled Hillary’s insemination and whelping (Tr. 186). The evidence is equally clear that Hillary was in another veterinarian hospital on June 19 and 20, 1994, and was having a C-section at Central Valley Veterinary Hospital to deliver the last of her dead pups (Ex. 21) at the time Petitioner and his witnesses claim Dr. Stock, the amnesiac doctor, was supposedly floundering around at Petitioner’s hospital trying to treat Hillary.

According to Petitioner’s office manager, his clinic treated 40,306 animals in 1995, or slightly less than 3350 per month, and the Executive Director will assume that the same figures would hold true for 1994 and 1996. Hillary was inseminated in April, 1994, as reflected on Petitioner’s “Medical History Record” and his insemination certification, along with the testimony, and delivered in June, 1994. Therefore Petitioner’s clinic treated approximately

77,000 animals between the insemination and the date of Petitioner's testimony, and over 70,000 between the whelping of Hillary and such testimony.

With the vast number of patients being seen combined with an apparent lack of any medical records, it is understandable that Ms. Gillette would confuse the circumstances surrounding Hillary's admission and the dates of her treatment, and that Petitioner could credibly comment: "How can I remember two years ago?" (Tr. 383-384).

Based upon the documentary evidence and the testimony of the witnesses the Executive Director is of the opinion that the Board had substantial evidence to support a finding that Petitioner was the doctor in charge of Hillary's treatment at all times and examined upon her admission on June 18, 1994.

10. Petitioner next contends that there is no substantial evidence that he treated Hillary in an unprofessional manner by relying on palpation rather than taking an x-ray for the purpose of diagnosis prior to releasing the dog.

Although denying that he was Hillary's doctor, Petitioner testified that given the facts in Hillary's case he would probably have performed a C-section which is the normal procedure in this kind of case (336-338). Petitioner also testified that because of the structure of an English bulldog palpation is not always effective to tell about pups, and that Petitioner always offers to take x-rays (Tr.382).

It would appear from Petitioner's testimony that he fully realized the need for x-rays to assist in diagnosing pregnant English bulldogs, such as Hillary, and that the standard treatment for a pregnant bulldog is a C-section. In this manner he fully agrees with the expert testimony of Dr. Mayling Chinn who treated Hillary after she was released by Petitioner.

Dr. Chinn testified that although one always palpates a dog on exam, it is difficult to determine the presence of puppies and the number, and the only way to determine this is through the use of x-rays (Tr. 193-194). In this regard the testimony of proper treatment by Dr. Chinn

and Petitioner completely meshes.

Dr. Chinn testified that in her professional opinion the standard of care provided by Petitioner for the dog named Hillary fell below the accepted standard for veterinarians (Tr. 205).

Once beyond the issue of whether Petitioner treated Hillary, which has been determined in the affirmative by both the Board and the Executive Director, it appears that there is substantial evidence that the treatment afforded Hillary fell below the standard of care required by the profession and was in fact unprofessional.

Dr. Chinn further testified that over half of all English bulldogs require a C-section to deliver and that there are established standards and procedures for the monitoring of such dogs (Tr. 191-193). Again, Dr. Chinn and Petitioner agree as to veterinarian procedures although Petitioner failed to follow through upon such knowledge.

11. The final argument raised by Petitioner on the issue of the treatment of the dog named Hillary is again the finding by the Board of a failure to adequately document Hillary's medical history (Brief for Petitioner, page 33).

Once again to avoid repetition the Executive Director adopts the general findings under the heading OSCAR, paragraph 13, *supra*. Although Petitioner and his witnesses claimed to have records, they failed to produce them either in response to the subpoena issued by the Division or during the hearing. Even though they testified at the hearing that they had and would produce records, such records were never forthcoming despite the representations.

The Executive Director does not feel it is necessary again in this instance to go into detail regarding the paucity of the records kept by Petitioner. The only record made available by Petitioner contradicts everything he and his witnesses testified to as to the treating physician. Adequate records would at least identify the proper doctor. The records on Hillary are so poor that the Petitioner and his witnesses cannot even testify correctly as to the date the dog was in his care, and the record keeping sinks to somewhere below the level of deplorable.

The Executive Director is of the opinion that based upon the testimony of Petitioner and his witnesses that records were maintained, and the fact that no records were produced, substantial evidence exists in the record to support a finding that Petitioner failed to maintain adequate medical records on the dog Hillary.

D. SHAKESBEAR

1. Summary of the testimony of Cheryl Devlin (owner of Shakesbear):

Ms. Devlin was on vacation when her dog was injured, and it had already been removed from Petitioner's clinic and placed in the care of Dr. Gary Peterson by the time she returned. She was informed by Dr. Peterson that the dog had a 50/50 chance to recover mobility, which was in fact regained within 2-4 weeks (Tr. 80-81). The injuries sustained from urine scald took about two months to heal (Tr. 82).

2. Testimony of Alvin Dean Schofield regarding Shakesbear:

Mr. Schofield is Cheryl Devlin's brother and was caring for Shakesbear when he was injured. Petitioner took an x-ray and recommended to Mr. Schofield that the dog be put to sleep because he had never seen a dog with such an injury recover in Petitioner's 30 years of practice (Tr. 87-89).

Mr. Schofield later called Petitioner and informed him that he wanted to take the dog for a second opinion and upon picking the dog up to take to Dr. Peterson it reeked of urine and was wet in the rear (Tr. 80-90).

3. Testimony of Dr. Gary L. Peterson regarding the treatment of Shakesbear:

On May 26, 1994, Shakesbear was brought to Dr. Peterson paralyzed in the rear but with pain sensation and no cranial nerve problems (Tr. 103).

The dog was soggy with urine and had a severe urine scald over the scrotum and both thighs and should have been catheterized at least intermittently while in Petitioner's care to have

prevented the scald (Tr. 103-104). The dog should have been catheterized while in Petitioner's care because the dog's bladder was just overflowing and it did not regain bladder control for 4-6 weeks after the injury (Tr. 112). Keeping the dog in a cage with a drain would not have been sufficient since it could not move at all, and bathing would not have solved the problem of urine scald (Tr. 113). The dog was catheterized the whole time it was in Dr. Peterson's care and treated with antibiotics and anti-inflammatory drugs (Tr. 115). Dr. Peterson testified that it did not appear that the dog had received any treatment for the urine scald prior to being brought to him (Tr. 104).

He further testified that the single x-ray taken by Dr. Taylor did not reflect any obvious misalignment of the spine and at least two x-rays should be taken in order to make a diagnosis and a determination of any sort (Tr. 108). The dog's thighs and scrotal area had tremendous inflammation and scalding from the urine and while the legs were paralyzed, the dog was not totally paralyzed because it had sensation in its rear legs (Tr. 110).

It was Dr. Peterson's professional opinion the care Shakesbear received from Petitioner fell below the standard of care of veterinarians (Tr. 104-105).

Dr. Peterson further testified that the "Medical History Record" prepared by Petitioner was inadequate and was basically just a billing statement (Tr. 105-106).

4. Testimony of Dr. Leo N. Taylor regarding the treatment of Shakesbear:

Petitioner testified that this dog was a patient of Dr. Stock and that he knew nothing about the dog or its treatment other than that he, Petitioner, discharged it from the clinic (Tr. 339). He then testified that he might have been the one who talked with the owners about putting the dog to sleep (Tr. 341-334) and further testified that he had consulted with Dr. Stock on the dog and did examine Shakesbear and even gave it a shot (Tr. 371-372). Petitioner stated that the dog did not require catheterization as they were successful in helping it express its bladder and a lot of times dogs like Shakesbear are kept on a grate so that the urine runs away from them and thereby

minimizes urine burn (Tr. 340). However Shakesbear was not kept on a grate or on a draining stainless steel floored cage, but rather sat on a blanket on a concrete floored kennel, which can cause scrotum scarring when the dog drags itself around (Tr. 387-379).

Petitioner further testified that all of the handwritten information on Shakesbear should have been given in response to the subpoena but wasn't, and he didn't find any notes on the dog (Tr. 355-356).

Petitioner testified that Dr. Stock also developed amnesia regarding Shakesbear and did not recall that he, Dr. Stock, treated this dog (Tr. 377). He further testified that the "Medical History Report" (Ex. 12) showing him as the treating doctor was a mistake (Tr. 371).

5. Testimony of Geraldine G. Taylor regarding the treatment of Shakesbear:

Ms. Taylor testified that all of the kennels at Petitioner's clinic have stainless steel floors (Tr. 303).

6. The Board found, in regards to the treatment of Shakesbear, the following:

a. Petitioner took only a single x-ray of Shakesbear from which he diagnosed that the spine was injured and the dog's discs were out of alignment, of which there is no evidence on Petitioner's x-ray, and upon which erroneous diagnosis he concluded the dog would never walk again and suggested that euthanasia be considered (Findings, page 8, paragraph 28);

b. Shakesbear was substantially paralyzed and unable to control its bladder while in Petitioner's care and wet and smelling strongly of urine when released by Petitioner (Findings, page 8-9, paragraph 29);

c. Petitioner did not document Shakesbear's medical history or his physical examination, and did not document his diagnosis or the dog's progress while in his care (Findings, page 9, paragraph 30);

d. Petitioner did not provide adequate nursing observation and care to provide Shakesbear with a sanitary environment, and that such inattention and unsanitary conditions

resulted in a severe urine scald (Findings, page 9, paragraph 32).

7. Petitioner first raises the argument that Shakesbear was the patient of the amnesiac Dr. Stock rather than Petitioner and that there is no evidence that Petitioner took the x-ray of Shakesbear (Brief for Petitioner, pages 33-38).

Mr. Schofield testified that he took the dog to Petitioner and was present while Petitioner personally examined Shakesbear and advised him they would have to take x-rays before being able to give a prognosis on the dog (Tr. 87).

The only records produced by Petitioner show that he was Shakesbear's doctor (Ex. 12), which Petitioner alleges is an error. However, after starting out his testimony claiming no knowledge of the treatment of the dog until its discharge (Tr. 339), Petitioner seems to have had a great deal of involvement with the dog.

According to Petitioner he consulted with Dr. Stock in making a diagnosis from the x-ray (Tr. 339, 371), which he claims was his first involvement with the dog (Tr. 372) and indicates that he discussed putting the dog to sleep with Mr. Schofield (Tr. 341-342, 373) and may have told Mr. Schofield that the x-rays showed Shakesbear's spine was injured and the disks were out of line (Tr. 342).

Petitioner further testified that he examined Shakesbear's deep pain sensation and gave him a shot "without hardly any flinching in those back legs" (Tr. 372) and consulted with Dr. Stock who "agreed with me that sometimes those (injuries) don't respond".

Even disregarding Mr. Schofield's testimony as to Petitioner being the admitting doctor, Petitioner's own testimony indicates that he was the primary on the case and Dr. Stock was, at best, merely consulted with for agreement with Petitioner's determinations.

The Executive Director is unable to locate in the record any testimony presented by Petitioner to substantiate, defend or bolster his opinion that the x-ray taken at his clinic adequately showed the injury to Shakesbear's spine and displaced discs (Tr. 342), or to otherwise

refute the opinion of Dr. Gary Peterson that no obvious misalignment is shown on the x-ray which was not an ideal view of an area which usually requires at least two views to properly diagnose (Tr. 108). This x-ray (Ex. 13) was also viewed by the Board, of which three of the four members hearing the case are experienced licensed veterinarians.

The evidence in the record is undisputed on the issue that no matter who took the x-ray at Petitioner's clinic, it was insufficient and inadequate to support the diagnosis made from it by Petitioner, whether as the primary doctor or as the consulting doctor. There is further no evidence to offset that of Dr. Peterson that at least two views should be taken for a diagnosis on a spinal injury.

Although Petitioner refers to Dr. Peterson as "a veterinarian who specializes in veterinarian neurology" (Brief for Petitioner, page 36) in an apparent attempt to explain why Dr. Peterson was unable to locate on Petitioner's x-ray something Petitioner claimed to have seen, Petitioner either overlooks or chooses to ignore Dr. Peterson's testimony that "I'm not a specialist in neurology" (Tr. 109).

In his brief at page 37 Petitioner states that "Dr. Peterson testified that, based only upon the x-ray taken at Brookside (Petitioner's clinic), a regular veterinarian could see signs appearing similar to a ruptured disc". The Executive Director is unable to find any support in the record for such a statement other than a reference to an unidentified report and a general question about diagnosing injuries from x-rays (Tr. 112). At no time does Dr. Peterson say that the x-ray taken at Petitioner's clinic, Brookside, shows any abnormality upon which a diagnosis of either a ruptured disc or hemorrhage could be based.

The Executive Director is of the opinion that substantial evidence exists in the record to support the finding of the Board that Petitioner misdiagnosed Shakesbear based upon a faulty determination from an inadequate x-ray of the injury.

8. The next finding of the Board attacked by Petitioner is that Shakesbear was not

provided adequate nursing observation and care and was not provided with a sanitary environment, with the result that he incurred a severe urine scald (Brief for Petitioner, pages 38-40).

Mr. Schofield went to Petitioner's clinic on Thursday morning, May 26, 1994 to see Shakesbear, and the only person present at the clinic was Petitioner (Tr. 373) who brought the dog out holding it up by its tail. The dog's hindquarters were wet and he reeked of urine and Mr. Schofield took him immediately to Dr. Peterson's clinic, Town and Country (Tr. 90).

When the dog arrived at Dr. Peterson's clinic, it was soggy with urine and had a severe urine scald over the scrotum and both thighs (Tr. 103, 110). The dog did not have bladder control and was just overflowing urine from a tremendously distended bladder (Tr. 112).

Dr. Peterson testified that in his professional opinion the dog should have been catheterized while in Petitioner's care (Tr. 104, 112). He further testified that it did not appear that the dog had received any treatment for the urine scald by Petitioner (Tr. 104) and that Shakesbear's treatment by Petitioner fell below the standard of care required of veterinarians (Tr. 105).

Although Petitioner's wife testified that at Petitioner's the kennel floors are "all stainless steel" (Tr. 303), she obviously has not inspected the kennels since she contradicts Petitioner who testified that Shakesbear was kept in a cement floored stall and that the damage to his scrotum might have been incurred from his dragging himself around on the concrete floor (Tr. 378).

Petitioner testified that they have a grate used to place under a dog to drain away urine that they use a lot to minimize urine burn (Tr. 340, 378), but that in Shakesbear's case he was put on blankets and towels to soak up his urine (Tr. 378-379) which was leaking out (Tr. 340), although he suffered from moist eczema, redness, and irritation from the beginning (Tr. 340).

While testifying that Petitioner employed persons who "worked from morning to night" to clean the animals (Tr. 379), he does not testify that anyone cares for the animals during the

night or explain why he was the only person present on the morning Mr. Schofield picked up Shakesbear (Tr. 373) or why he, Petitioner, thought that the dog needed to be cleaned up before being released (Tr. 341).

The issues raised by Petitioner and discussed in this heading are directed toward the facts, and the existence and weight of the evidence, and not the specific laws involved or the application of the facts to the specific law. Petitioner's arguments on the issue of maintaining a sanitary environment at Petitioner's facility are general in nature and are not related to the specific animal in question, in this case Shakesbear.

However, the law and rules are animal specific. UTAH CODE ANN. §58-28-2(6)(a) defines unprofessional conduct as "applying unsanitary methods or procedures in the treatment of any animal, contrary to rules adopted by the board and approved by the division." The applicable rule regarding sanitation provides in UTAH ADMIN R156-28-8(3) that "A veterinarian shall maintain a sanitary environment to avoid sources and transmission of infection to include the proper routine disposal of waste materials"

The Executive Director is of the opinion and finds that there is substantial evidence in the record "and the proper inferences drawn therefrom" (Findings, page 9, paragraph 32) to support a finding that Petitioner did not provide the dog named Shakesbear with adequate nursing observation and care in a sanitary environment.

9. Petitioner's final challenge to the Board findings regarding Shakesbear is to the sufficiency of the evidence to support a finding that Petitioner failed to maintain adequate records (Brief for Petitioner, pages 40-41).

To avoid unnecessary repetition, the Executive Director again incorporates the general findings regarding Petitioner's record keeping as set out in Oscar, paragraph 13, *supra*.

Petitioner testified that he was not the treating veterinarian on Shakesbear and the "Medical History Report" he furnished was in error, since the amnesiac Dr. Stock was the real

treating doctor (Ex. 12, Tr. 371, 377). Petitioner further testified that all doctors in the clinic are required to make handwritten notes (Tr. 354), and that such notes should have been on file at the clinic (Tr. 424-425) but he could not find any handwritten notes on Shakesbear (Tr. 355-356).

The only record Petitioner could produce regarding Shakesbear was the “Medical History Report” which Petitioner, in agreement with Dr. Peterson, described as mainly a billing statement (Tr. 330, 105-106). Dr. Peterson further testified that in his professional opinion the “Medical History Report” was an inadequate record which does not describe any of the medical care or the results of the x-rays (Tr. 105-106).

The Executive Director is of the opinion that based upon the testimony of Petitioner and his witnesses, and the testimony of Dr. Gary Peterson, that substantial evidence exists in the record to support a finding that Petitioner failed to maintain adequate medical records on the dog named Shakesbear.

E. CHAR

1. Testimony of Stephanie Picklesimer (owner of Char):

Ms. Picklesimer took Char to Petitioner to be spayed (Tr. 119). Petitioner called her with the news that Char died and offered to perform an autopsy, which she authorized (Tr. 119). Petitioner reported, both verbally and by letter, that he found pneumonia in both lungs, that Char had an irregularly shaped heart, and that she had fluid around her heart (Tr. 122-124, Ex. 15).

2. Testimony of Jeffrey Allen Picklesimer (co-owner of Char):

Mr. Picklesimer picked up Char from Petitioner and took it to Dr. Vande Griend for a second autopsy which resulted in a report that Char had not had pneumonia and her heart was normal (Tr. 126-129).

3. Testimony of Dr. Scott Vande Griend regarding the Char autopsy:

Mr. Picklesimer brought Char in for a necropsy (autopsy for non-humans) with a history

that the dog had died of pneumonia during surgery (Tr. 133). The necropsy was observed by Dr. Brett Neville and resulted in a finding of no abnormalities with the lungs normal, pink, healthy and the heart of normal size and shape (Tr. 133).

Dr. Vande Griend testified that in his professional opinion there was no excuse for Petitioner's conclusions as to the cause of death and Petitioner fell below the standard of care required by the profession for performing a necropsy (Tr. 136). He further testified that it is not a standard practice of veterinarians to report findings that do not exist (Tr. 136), and that there are very clear medical standards and medical practices for the simple procedure of determining the existence of pneumonia on a necropsy (Tr. 137).

4. Testimony of Dr. Brett Neville regarding the Char necropsy:

Dr. Neville testified that he helped Dr. Vande Griend evaluate the heart and lungs of Char and agreed with the conclusions reached by him (Tr. 147). He further testified that in his professional opinion there was no excuse for Petitioner to make non-existent findings of pneumonia and an irregular heart (Tr. 149-150).

5. Testimony of Dr. Leo N. Taylor regarding the Char necropsy:

Petitioner testified that although Char's records were subpoenaed in the same month as she was treated, the notes would have been put in the computer and not kept, although records on dead animals are kept for maybe 30 days (Tr. 356-357). Records of anesthetic and pre-anesthetic are not kept track of at his clinic (Tr. 356). He testified that records on a spay like Char are only kept overnight (Tr. 358).

Petitioner further testified that Dr. Stock did the physical examination and the administration of the pre-anesthesia (Tr. 375). He stated the dog initially seemed to take the anesthetic okay, but then died (Tr. 319). He testified that his autopsy found pneumonia in both lungs and it had a little round heart with quite a bit of fluid around it (Tr. 320).

5. The Board found, with regard to Char, that Petitioner misdiagnosed the cause of

death (Findings, page 10, paragraph 34).

6. Petitioner argues that the issue of the necropsy on Char merely amounts to a difference of opinion between veterinarians and that conflicting opinions cannot constitute substantial evidence upon which a finding of fact may be based (Brief for Petitioner, pages 41-44).

The Executive Director disagrees with this representation by Petitioner. The issue is whether substantial evidence exists in support of the finding made by the Board, not whether there is also contrary testimony which if accepted could lead to another conclusion. If the test truly was that a finding of fact could not be sustained upon conflicting evidence, the legal system might as well turn off the lights and lock the doors since there would be no trials or hearings if only uncontroverted evidence was admissible.

In the case at bar there is testimony from two licensed veterinarians that no abnormalities existed with Char's heart or lungs and that there was no basis for the findings made by Petitioner. Both veterinarians testified that the necropsy performed by Petitioner fell below the standards required of veterinarians.

The Executive Director is of the opinion that the unequivocal testimony of two qualified and licensed veterinarians that the findings of Petitioner on his necropsy had no basis in fact, despite incomplete and contextually misleading citations to the record by Petitioner, constitutes substantial evidence to support a finding by the Board that Petitioner, upon the most gentle interpretation, misdiagnosed the cause of death of the dog named Char.

ISSUE III-B

ARE THE BOARD'S CONCLUSIONS OF LAW SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD?

1. Petitioner argues that the Board and Division erred in making its findings of

violations of generally accepted professional standards for veterinarians without a statutorily established standard or evidence of a generally recognized standard being adduced at the hearing (Brief for Petitioner, pages 46-54).

2. In *Vance v. Fordham*, 671 P.2d 124 (Utah 1983), the Utah Supreme Court recognized that it is unnecessary to set forth specific professional standards for regulating licensed professionals. The Court stated three reasons allowing use of the general statutory standard of unprofessional conduct: the subject is too comprehensive to be codified in detail; members of a profession are charged with knowledge of the standards governing the profession; and the standards of performance will be interpreted by members of the same profession. The Court further stated that a “. . . certified professional can be held to a higher standard of awareness of the profession’s uncoded standards in the treatment of patients”

3. The case at bar involved eleven (11) licensed veterinarians: 3 of the 4 members of the Board hearing the case were licensed veterinarians; 7 veterinarians testified as to the conduct of Petitioner which they unanimously determined failed to meet the standards of the profession; and Petitioner.

4. Applying the standard set out in *Vance, supra*, the question is not are there standards and what are the standards but rather whether Petitioner violated the standards. Ten of the 11 veterinarians agreed that the treatment of the animals they examined or were familiar with from the testimony violated the standards of their profession. In some cases even Petitioner admitted violations existed while denying that he was the veterinarian who committed the violation.

5. In his Brief, Petitioner challenges the Board’s findings of violations in a number of areas to which the Executive Director will consider with another repetition of the evidence adduced at the hearing.

A. RECORD KEEPING

1. The minimal standards of record keeping required of veterinarians licensed in the State of Utah have been codified. UTAH ADMIN R156-28-503 provides:

- (1) A veterinarian shall compile and maintain written records on each patient to minimally include:
 - (a) client's name, address and phone number, if telephone is available;
 - (b) patient's identification, such as name, number, tag, species, age and gender, except for herds, flocks or other large groups of animals which may be more generally defined;
 - (c) veterinarian's diagnosis or evaluation of the patient;
 - (d) treatments rendered including drugs used and dosages;and
 - (e) date of service.

2. The only records produced on the 5 animals for which charges were brought were Petitioner's "Medical History Report" forms which contained much less than the bare minimum required by rule, lacking the requirements of subparagraphs c, d, and e. The necessity of such records became abundantly clear in the course of the hearing as the Petitioner and his witnesses were unable to identify such minimal facts as when the animal was in Petitioner's care.

3. Petitioner testified that the documents titled "Medical History Report" were mainly just a billing statement without the details of the animal's treatment (Tr. 330)

4. Dr. Jolie R. Brown testified that it is important for a veterinarian to maintain a record of what has been done and that Petitioner's "Medical History Report" on the dog named Nadia was inadequate because it did not describe the surgical procedures or anesthesia (Tr. 51).

5. Dr. Gary L. Peterson testified that the "Medical History Report" on the dog named Shakesbear was inadequate and was basically just an invoice which fails to describe any of the medical care or results of the x-rays (Tr. 105-106).

6. Dr. Mayling M. Chinn testified that Petitioner's "Medical History Report" on the dog named Hillary failed to provide any details or specifics which would be helpful in treating

the animal (Tr. 200).

7. Dr. Dale Smith testified Petitioner's "Medical History Report" on the dog named Oscar would not be helpful to another veterinarian treating the dog since it was more of an invoice than a medical record (Tr. 269).

8. Although Petitioner alleges that there was substantial evidence in the record that proper medical records were maintained by Petitioner on the animals upon whose treatments the charges were founded, the record as a whole does not bear this out. The only indication that Petitioner kept records as required is his testimony, that of his wife, and the testimony of a 21 year employee of Petitioner.

9. Petitioner gave conflicting testimony regarding the keeping of records. He testified that records were kept for at least three years (Tr. 346), a year or something (Tr. 331), 3 months to a year (Tr. 352), thirty days (Tr. 356-357), and overnight (Tr. 358).

10. Geraldine Taylor testified that the reason the records on the animals in question had not been supplied in response to the Division's subpoena was because they had not been requested (Tr. 311), although the subpoena specifically requests "ALL DOCUMENTS, RECORDS AND X-RAYS" (Ex. 32) on each animal. Mrs. Taylor further testified records could be recovered and furnished (Tr. 311), and Petitioner's attorney represented that the documents would be presented during the proceedings on the following day (Tr. 312-314), this was never done and no treatment records were produced.

11. Petitioner's receptionist, Janet Gillette, testified that the handwritten veterinarian treatment notes were available back to 1991 (Tr. 424-425) but that she had not been responsible for gathering the material requested by the subpoena (Tr. 429).

12. The Executive Director is of the opinion and finds that the Petitioner had sufficient time during the nearly 18 months between the service of the Subpoena Duces Tecum in October, 1994 and the completion of the hearing in March, 1996 to locate and produce any

records concerning the treatment of the 5 animals involved with this case.

13. The Executive Director is of the opinion and finds that the reasonable and logical inference from the failure of Petitioner to produce case notes on the various animals is that no such notes or records exist.

14. Petitioner is further of the opinion and finds that in the case of all five animals involved in this matter the Petitioner failed, pursuant to UTAH ADMIN R156-28-503(1)(c-d), to maintain the minimal required records showing his diagnoses of each animal, the treatments rendered to include all drugs and dosages, and to even maintain accurate records of when the animals were in his care, and that such failures constitute a violation of the rules governing veterinarian practice in the State of Utah as found by the Board and Division..

B. X-RAYS

1. Petitioner argues that absent an articulated and cognizable standard applicable to the practice of veterinary medicine regarding the taking of x-rays it is impossible to find that Petitioner's conduct fell below such a standard. Petitioner then proceeds at some length to attempt to establish that his x-ray procedures were adequate in the treatment of the animals in his care (Brief for Petitioner, pages 49-50) and that the Board wrongly found that his failure to take x-rays or taking minimal x-rays "violated generally accepted professional standards" which "seriously compromised the quality of subsequent veterinary care he provided to Hillary, Oscar and Shakesbear" (Findings, page 11).

2. Petitioner argues that he was not the treating veterinarian for the dog named Hillary but that the failure to take x-rays was justified in that case, arguing that palpation was a difficult but justified method of diagnosis.

3. Despite Petitioner's claims not to have been the treating veterinarian there is substantial evidence, including Petitioner's own records, that he was the treating doctor on the

dog named Hillary.

4. Although the Executive Director is confident that Petitioner did not so intend, Petitioner's argument regarding the treatment of Hillary seems to be that the procedure used was proper and justifiable but that the execution of the procedure in Hillary's case was flawed and incompetently performed.

5. Dr. Mayling Chinn, who treated Hillary after its release from Petitioner's care, testified that palpation in the case of an English bulldog such as Hillary was insufficient and the only way to determine the presence of puppies is through x-rays (Tr. 193-194). Dr. Chinn further testified that veterinary texts call for "performing at least an abdominal radiograph" (Tr. 204), and that Petitioner's failure to obtain an x-ray was below the accepted standards for a veterinarian (Tr. 205).

6. The Executive Director is of the opinion and finds from the expert testimony adduced at the hearing that Petitioner failed to meet the minimum standards of his profession in failing to properly x-ray Hillary to determine whether she was fully delivered when released from his care.

7. Petitioner asserts that the Board erred in finding that he failed to take adequate pre-operative and post-operative x-rays in the matter of the dog named Oscar (Brief for Petitioner, page 49-50).

8. Although Petitioner testified that his normal post-operative procedure is to examine the surgery by x-ray either immediately or the day following surgery (Tr. 388), he claimed in Oscar's case the dog was removed from his care prior to his being able to do the post-operative x-ray (Tr. 330). However, the record showed that Oscar was in fact in Petitioner's care for a week following surgery, a fact Petitioner was unaware of since he was relying upon his "Medical History Report" for the dates the dog was in his care.

9. The Executive Director is of the opinion and finds that Petitioner was aware of the

need to take post-operative x-rays of a surgical procedure and had more than sufficient time to perform post-operative x-rays on Oscar based upon his normal procedures, but that he failed to do so through no outside interference.

10. Petitioner next alleges that his single pre-operative x-ray was sufficient for his diagnosis of Oscar's condition prior to surgery being commenced, but he acknowledged at the hearing (Tr. 392-393) that if deemed necessary more than one pre-operative x-ray is taken. Petitioner explained that in Oscar's case the bone was so fragmented would not have shown him anything additional he needed to know prior to surgery (Tr. 392-393).

11. Dr. Dale Smith testified that Petitioner's single pre-operative x-ray of Oscar was insufficient to show if other complications existed and it did not even show the entire broken bone (Tr. 276). The pre-operative x-ray taken by Petitioner was utilized and examined by the Board during the course of the hearing (Tr. 275).

12. The Executive Director is of the opinion and finds that substantial evidence exists to support the finding of the Board, composed primarily of members of Petitioner's profession, that Petitioner was derelict in failing to take adequate and sufficient x-rays in the matter of the dog named Oscar.

13. Petitioner's allegations regarding the x-ray in the Shakesbear matter is such a gross misrepresentation of the evidence in the record as to hardly warrant discussion.

14. Dr. Peterson did not testify that he was "a specially trained neurologist" as alleged by Petitioner (Brief for Petitioner, page 50), but rather testified that "I'm not at specialist in neurology" (Tr. 109).

15. The Executive Director cannot locate any testimony of Dr. Peterson that Dr. Taylor's diagnosis was reasonable based upon his level of training, and while making such allegation the Petitioner does not cite where such testimony, if any, exists in the record. No testimony can be found in the record that the x-ray taken at Petitioner's clinic shows any

abnormality upon which a diagnosis, either accurate or inaccurate, could be based.

16. The Executive Director is of the opinion and finds that substantial evidence exists in the record to support the finding of the Board, made up primarily of licensed professional veterinarians who reviewed Petitioner's x-ray in this matter, that Petitioner failed to take an adequate x-ray upon which an accurate diagnosis of the dog named Shakesbear could have been based.

C. SURGICAL PROCEDURE ON OSCAR

1. Petitioner alleges that the Board erred in finding that the operation performed by Petitioner on Oscar was woefully deficient (Brief for Petitioner, page 51).

2. The Executive Director believes that enough trees have been killed in the previous discussion of Oscar's operation and that Petitioner raises no new issues at this juncture of his brief. As has been previously discussed, Petitioner's testimony regarding the inadequacy of the surgery and material agreed with the ultimate finding of the Board that the procedure and materials used were improper. However, Petitioner denied that he was the one who placed the undersized galvanized pin in Oscar, and this denial has previously been rejected by the Executive Director as it was by the Board and Division.

3. The Executive Director is of the opinion and finds that the record contains substantial and conclusive evidence to support the Board's finding that Oscar's surgery was woefully deficient in the extreme.

D. POST-OPERATIVE INSTRUCTIONS

1. Petitioner's next argument is that Petitioner is not responsible for the inaccurate post-operative instructions given by an employee for the home care of Oscar following his surgery (Brief for Petitioner, page 51).

2. It does not take the special expertise possessed by a veterinarian to discount an argument that an employer is not responsible for the act of an employee acting within the scope of his or her authority and responsibility.

3. Petitioner's wife testified that the standard established protocol in Petitioner's clinic was for the employees to give verbal and written instructions to the owners of animals being discharged (Tr. 303-304).

4. Petitioner testified that each owner is given written instructions on the post-operative care of their animal (Tr. 389), but neither Petitioner nor his witnesses were able to produce specific documentation that any of the animals concerned in this appeal were released with written instructions.

5. The Executive Director is of the opinion and finds that Petitioner was responsible for inaccurate post-operative instructions given by his staff.

E. SHAVING

1. Petitioner argues (Brief for Petitioner, page 52) that there is no factual basis in the record to support the Board's finding that Petitioner provided inadequate pre-operative care in failing to properly shave the dog named Nadia (Findings, page 13).

2. Petitioner testified that he did not shave Nadia, who had been in his care for three days, because the owners refused to leave her with him any longer (Tr. 369). It is immaterial to consideration of this issue that the owner testified that Petitioner initiated the release of Nadia (Tr. 29).

3. Petitioner seems to take offense that someone only 6 months out of veterinary school, rather than having 40 years of practice, would know the proper method of preparing an animal for a surgical procedure, which Petitioner did not attempt to refute or explain other than on the basis of a lack of time which the Executive Director finds less than compelling as the

animal was in his care for three days prior to its release.

4. Dr. Jolie R. Brown testified that there were long hairs all around Nadia's surgical wound which had not been properly shaved and cleaned prior to Petitioner undertaking surgery upon her (Tr. 47, 48). Dr. Brown further testified that this failure of Petitioner's placed his care below the standard of care required of veterinarians (Tr. 52).

5. Petitioner chooses to completely ignore the testimony of Nadia's treating physician after being released by Petitioner, Dr. David Shupe, who testified that the wound had not been shaved and the care provided by Petitioner was below the standard of care required of veterinarians (Tr. 69, 70-71).

6. The Executive Director is of the opinion and finds that substantial evidence exists in the record that Petitioner failed to properly prepare the dog named Nadia for surgery.

F. SANITARY ENVIRONMENT

1. Petitioner argues with the Board's finding that Petitioner failed to provide a sanitary environment for Shakesbear (Findings, page 52-53) and claims that the un rebutted testimony of Petitioner's wife proved the contrary.

2. As this is another issue that has been addressed at length earlier, it will not be addressed in depth here.

3. Petitioner alleges that his wife's testimony as to the sanitary conditions and procedures of the clinic were un rebutted, but overlooks that she testified that "all of the kennels have stainless steel floors" (Tr. 303) while Petitioner testified that Shakesbear was kept sitting on a blanket in a concrete floored kennel rather than on a draining grate in a stainless steel kennel (Tr. 378-379). It would appear that far from being "un rebutted", Mrs. Taylor's testimony was rebutted by Petitioner himself.

4. Although Shakesbear was not maintained on a grate as Petitioner testified would

have been an alternative to blankets and towels (Tr. 34), although this would have been better Dr. Gary L. Patterson testified that it would still have been insufficient (Tr. 113) and the dog should have been catheterized at all times because of a complete lack of bladder control (Tr. 112).

5. The Executive Director is of the opinion and finds that the record contains substantial evidence upon which the Board, composed primarily of individuals engaged in the profession, could make a finding that Petitioner failed to provide adequate nursing care and observation, and further failed to maintain a sanitary environment for the dog named Shakesbear.

G. PRE-OPERATIVE PROCEDURES

1. Petitioner's next argument (Brief for Petitioner, page 53) is with the finding of the Board that Petitioner failed to perform an adequate pre-operative examination of the dog named Char to determine any pneumonic condition prior to giving anesthetics, and in finding that Petitioner misdiagnosed and misrepresented the cause of the animal's death (Findings, page 13).

2. The Executive Director admits some discomfort with the finding regarding the pre-operative examination. Discounting Petitioner's testimony that the infamous amnesiac, Dr. Stock, performed the pre-operative examination and administered the pre-anesthesia. The Executive Director struggles with the finding because there was no pneumonia to discovered during its pre-operative physical examination since the Board concluded that the dog did not suffer from pneumonia, but apparently rather died of unknown causes while under anesthesia.

3. The issue is not the unfortunately not rare instance of an animal dying mysteriously while under anesthesia, but rather Petitioner's findings of the cause of death based upon either an incompetently performed necropsy or an intentional falsification, and the passing on of such clearly erroneous findings to the owners as being the result of a properly performed medical procedure.

4. As discussed under an earlier issue hereinabove, there is ample expert medical

testimony from two practicing veterinarians upon which to find that the cause of death was misdiagnosed by Petitioner, for whatever reason, and that it is not a standard veterinary practice to report findings that do not exist (Tr. 136) and that there was no excuse for Petitioner to mistakenly make such non-existent findings as was done in this case (Tr. 149-150).

5. If, as found by the Board, the diagnosis of the cause of death made by Petitioner was erroneous, it would naturally follow that any representation to the owners of the dog as to the cause of death would be a misrepresentation, whether intentional or not.

6. The Executive Director is of the opinion and finds that substantial evidence exists to support the findings of the Board that Petitioner misdiagnosed the cause of death of the dog named Char and then misrepresented the cause of death in his report to the dog's owners.

ISSUE IV

ARE THE TERMS "GROSS NEGLIGENCE" AND "GROSS INCOMPETENCE" AS USED IN THE LICENSING STATUTE UNCONSTITUTIONALLY VAGUE?

1. Petitioner challenges the finding of the Board and Division that he engaged in unprofessional conduct as being an "irrational and unreasonable application of unstated law", which sounds suspiciously to the Executive Director as a claim that the action was "otherwise arbitrary or capricious", being a ground for appellate relief pursuant to UTAH CODE ANN. §63-46b-16(4)(h)(iv).

2. Petitioner breaks his argument into three sub-propositions which will be discussed hereinafter in the order presented by Petitioner, except for the third sub-proposition which is just another variation of the lack of substantial evidence argument discussed *ad infinitum* under ISSUE III hereinabove. The questions raised by Petitioner for determination are:

a. Was the Board required to define "gross negligence" and "gross incompetence"; and

b. Are the terms “gross negligence” and “gross incompetence” unconstitutionally vague.

A. WAS THE BOARD REQUIRED TO DEFINE “GROSS NEGLIGENCE” AND “GROSS INCOMPETENCE”

1. The general definition of unprofessional conduct applicable to all professions and occupations licensed and regulated by the Division is contained in UTAH CODE ANN. §58-1-501(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: . . . (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; . . .

2. Petitioner challenges the finding that Petitioner engaged in unprofessional conduct by setting forth the proposition that the terms “gross negligence”, “gross incompetence”, and “pattern of incompetency or negligence” must be defined before they can, in turn, be used to define “unprofessional conduct”.

3. The Utah Supreme Court in *Vance v. Fordham* recognized that the determination of the meaning of “a general statutory standard like ‘unprofessional conduct’” is best left to a professional board because professional performance is too comprehensive for codification, members are chargeable with knowing the standards of performance in the profession, and the standards of performance will be interpreted by professional peers during administrative adjudication.

4. The Executive Director has heretofore determined that the Board was correct in each instance, with the possibility of one minor exception that is more semantic than factual, in determining that the findings against Petitioner were supported by substantial evidence in the

record.

5. The Board determined, among other things, that the Petitioner . . . engaged in a repeated pattern of negligence as to each of the animals in questions (*sic*). Specifically, he failed to record a medical history or his physical examinations of Oscar, Nadia, Hillary and Shakesbear. Respondent (Petitioner herein) failed to record an adequate surgery report as to Oscar and Nadia. He (Petitioner) failed to record progress notes as to Oscar, Nadia, Hillary and Shakesbear. Finally, Respondent (Petitioner) failed to record a diagnosis as to Hillary and Shakesbear. (Findings, pages 17-18)

6. Although the finding of a pattern of incompetency and negligence, unchallenged by Petitioner in his “gross” argument, would have been sufficient in and of itself to warrant sanctions against Petitioner’s license to practice veterinary medicine in the State of Utah, it is apparent from the findings of the Board and recommended order that the Board determined that the Petitioner had committed such egregious and unexcusable acts so as to make his mere negligence and incompetence pale by comparison.

7. In its application of the facts to the law, the Board draws a clear distinction between those acts of Petitioner is deemed “mere” negligence and “mere” incompetence, and therefore only constituting a statutory “pattern of incompetency or negligence”, and those so egregious as to be classified by the Board as rising to the level of “gross negligence” and “gross incompetency”.

8. Petitioner wants the Executive Director to find that the Board was under a duty to define the terms “gross negligence” and “gross incompetency”, which the Executive Director is not willing to do. The discussion of “gross negligence” and “gross incompetency” contained in the Board’s findings indicates that they were operating under a firm understanding of the parameters of the terms and their findings, both as to pattern and to singular acts constituting grossness, indicates a firms understanding of the terms as applicable to the facts in Petitioner’s case.

9. Petitioner does not cite any case in his brief to which the facts in this case could be applied which would conceivably result in an outcome at odds with that found by the Board. The Supreme Court of the State of Utah leaves the determination of what constitutes unprofessional conduct up to the professional's professional peers constituting the hearing body and, leaving the broad determination in such hands it would be inappropriate to not also leave the sub-determinations in their capable hands.

B. ARE THE TERMS “GROSS NEGLIGENCE” AND “GROSS INCOMPETENCE” UNCONSTITUTIONALLY VAGUE?

1. Petitioner next asserts that the terms “gross incompetence” and “gross negligence” are unconstitutionally vague as used in the licensing act and are therefore of no legal force or effect upon Petitioner.

2. Citing a Utah case relying upon three United States Supreme Court cases, Petitioner frames his argument on this issue in his Brief for Petitioner, page 60, as:

“The void-for-vagueness doctrine requires that a statute or ordinance define an ‘offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’ (citation omitted). More important that (*sic*) actual notice is ‘the requirement that a legislature *establish minimal guidelines* to govern law enforcement’ (citation omitted). ‘It is a basic principle of due process that an *enactment is void for vagueness if its prohibitions are not clearly defined.*’ (citation omitted).” *Greenwood v. City of North Salt Lake*, 817 P.2d 816 (Utah 1991). (Emphasis added by Petitioner).

3. The *Greenwood* case involved a variety of ‘ordinary’ citizens or, in other words, citizens upon which no special knowledge is chargeable by the special education or training held by such persons. In the case at bar an ‘ordinary citizen’ would have to be considered as a licensed veterinarian in the State of Utah who, “. . . as a result of their training, testing, and

licensure . . . are properly charged with knowledge of what conduct is inconsistent with their responsibilities as professionals” [*Heinecke v. Department of Commerce*, 810 P.2d 459 (Utah App. 1991)], in order for Petitioner’s analogy to carry its own weight.

4. The *Vance* case provides that in hearing a case against a licensed professional it is

“ . . . appropriate for the public to place great reliance on the self-governing functions and standards of the profession. . . . [a]s applied to the treatment of patients . . . a general statutory standard like ‘unprofessional conduct’ is acceptable (because) [m]embers of a profession can properly be held to understand its standards of performance (and the standards) will be interpreted by members of the same profession in the process of administrative adjudication.” *Vance v. Fordham*, 671 P.2d 124 (Utah 1983).

5. Due process requires the recognition of

“ . . . the principle that any person whose freedom to pursue his profession is seriously restricted by an official action may compel the government to afford him a hearing complying with the traditional requirements of due process All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding (citations omitted)” *D.B. v. Division of Occupational and Professional Licensing*, 779 P.2d 1145 (Utah App. 1989).

6. The due process concerns addressed by the unconstitutional vagueness doctrine apply to adequate notice being provided to the person charged to allow such person to understand the prohibited conduct and marshal any defense he might have to such charges. In this case, Petitioner was notified in great specificity by the Division’s Petition a year before the hearing as to the allegations, the applicable laws, and the sanctions sought. The facts the Division alleged, the law the Division deemed applicable to the alleged facts, and the available sanctions were all clearly set out in the Petition, affording Petitioner far more than minimal guidelines for a licensed professional veterinarian to determine the prohibited activities charged

against him.

7. Additionally, a review of the complete record reflects that Petitioner was fully advised of the charges against him, was ably represented by counsel of his choice, had the opportunity to engage in all aspects of discovery prior to the hearing, and at the hearing was able to fully cross-examine all witnesses against him and present witnesses on his behalf. The Executive Director finds that Petitioner was fully afforded his “ . . . due process right to receive a fair trial in front of a fair tribunal.” *Anderson v. Industrial Commission*, 696 P.2d 1219, 1221 (Utah 1985).

CONCLUSION

1. The Executive Director is extremely cognizant of the severity of the revocation of Petitioner’s license, which may bring to a close a 40 year largely unblemished career of dedication and service, and that this most severe of all the sanctions is not one to be taken lightly or without grave deliberation.

2. The purpose of revoking a license is not to punish the practitioner but to fulfill the legislative mandate to protect the public from potential harm and injury as required by the legislature in the enabling legislation for the Department of Commerce.

3. Twenty-two witnesses, including Petitioner, testified during the hearing below. A fair reading of the record shows that both sides were ably represented by counsel before a fair tribunal and had the opportunity to present witnesses and cross-examine the witnesses presented by the opposing party. The testimony was heard by four members of the Veterinary Board, three of whom are experts licensed and knowledgeable in the field of veterinary medicine. The hearing was presided over by a learned and experienced Administrative Law Judge and produced a transcript consisting of 507 pages of testimony and arguments plus 34 exhibits adduced and submitted over a three day hearing.

4. Although there is a difference in testimony among the witnesses, the weight and credibility to be assigned to each and the resolution of conflicting testimony lies within the province of the fact finders. Unlike a normal jury theoretically composed “of one’s peers”, the fact finders in this case were truly the professional peers of Petitioner and were in a much better position to judge the credibility of the testimony of the witnesses, including and most especially the Petitioner, and to assess his competency and knowledge of the practice of his profession.

5. The Board possessed and was certainly entitled to utilize its specific professional knowledge of what a competent, knowledgeable, non-negligent veterinary practitioner should know, or is chargeable with knowing, in judging the actions of Petitioner and the testimony by Petitioner and that offered by other witnesses about Petitioner.

6. The Utah Supreme Court has stated, and the Executive Director adopts, that “[t]his Court may not substitute its judgment on factual matters for that of the fact-finding body unless that body has clearly acted capriciously or arbitrarily, or unless its conclusions are unsupported by the evidence. Neither circumstance exists here.” *Vance v. Fordham*, 671 P.2d 124 (Utah 1983).

7. The Executive Director is not able to say that the weight of the evidence - let alone the overwhelming weight, or even the substantial evidence - was against the finding of the Board, and is not willing to attempt to substitute his lay knowledge of the profession and reading of a transcript for the judgment of experts in the field who were present and participated in the hearing.

8. Petitioner’s true peers judged his actions and found him to warrant the strongest sanction provided by law. The Executive Director has no alternative or inclination to do other than affirm their determination in this matter.

ORDER

The Executive Director of the Department of Commerce having made the above Findings of Fact and Conclusions of law, it is, therefore

ORDERED that Petitioner's Request for Oral Argument should be and is hereby denied; and it is further

ORDERED that the Order of Revocation heretofore entered against Leo N. Taylor by the Division of Occupational and Professional Licensing should be and is hereby affirmed.

SO ORDERED this the 11th day of December, 1996.


DOUGLAS C. BORBA, Executive Director

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-16, Utah Code Annotated.

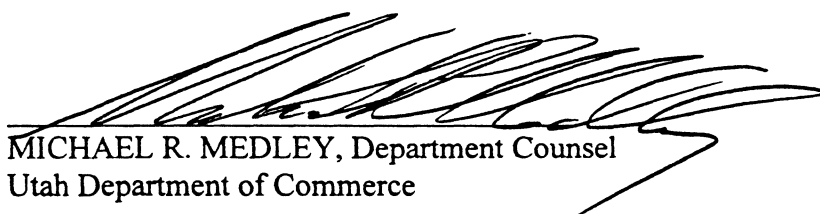
CERTIFICATE OF MAILING

I certify that on the 14 day of December, 1996, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified and mail, properly addressed, postage prepaid, to:

Benson L. Hathaway, Jr.
Stirba & Hathaway
215 South State Street, Suite 1150
Salt Lake City UT 84111
ATTORNEY FOR LEO N. TAYLOR

and caused a copy to be hand-delivered to:

R. Paul Allred
Assistant Attorney General
160 E. 300 South, 6th Floor
Salt Lake City UT 84111
ATTORNEY FOR THE DIVISION OF
OCCUPATIONAL AND PROFESSIONAL LICENSING



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

ADDENDUM B

Utah Code Ann. § 58-1-501(2) (1996):

(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:

(a) violating, or aiding or abetting any other person to violate, any statute, rule, or order regulating an occupation or profession under this title;

(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;

(c) engaging in conduct that results in conviction of, or a plea of nolo contendere to, a crime of moral turpitude or any other crime that, when considered with the functions and duties of the occupation or profession for which the license was issued or is to be issued, bears a reasonable relationship to the licensee's or applicant's ability to safely or competently practice the occupation or profession;

(d) engaging in conduct that results in disciplinary action, including reprimand, censure, diversion, probation, suspension, or revocation, by any other licensing or regulatory authority having jurisdiction over the licensee or applicant in the same occupation or profession if the conduct would, in this state, constitute grounds for denial of licensure or disciplinary proceedings under Section 58-1-401;

(e) engaging in conduct, including the use of intoxicants, drugs, narcotics, or similar chemicals, to the extent that the conduct does, or might reasonably be considered to, impair the ability of the licensee or applicant to safely engage in the occupation or profession;

(f) practicing or attempting to practice an occupation or profession regulated under this title despite being physically or mentally unfit to do so;

(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;

(h) practicing or attempting to practice an occupation or profession requiring licensure under this title by any form of action or communication which is false, misleading, deceptive, or fraudulent;

(i) practicing or attempting to practice an occupation or profession regulated under this title beyond the scope of the licensee's competency, abilities, or education;

(j) practicing or attempting to practice an occupation or profession regulated under this title beyond the scope of the licensee's license; or

(k) verbally, physically, mentally, or sexually abusing or exploiting any person through conduct connected with the licensee's practice under this title or otherwise facilitated by the licensee's license.

Utah Code Ann. § 58-28-2(6)(1996):

"Unprofessional conduct" as defined in Section 58-1-501 and as may be further defined by rule includes:

(b) soliciting patronage by directly or indirectly employing solicitors;

Utah Code Ann. § 58-28-3(1996):

(1) There is created a Veterinary Board consisting of four veterinarians who have practiced in the state for not less than five years and one member of the general public.

(2) The board shall be appointed and serve in accordance with the provisions of Section 58-1-201.

(3) The duties and responsibilities of the board shall

be in accordance with Sections 58-1-202 and 58-1-203.

Utah Code Ann. § 63-46b-14(1993):

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Utah Code Ann. § 63-46b-16 (1993):

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action

resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or *decision-making process, or has failed to follow* prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Utah Code Ann. § 78-2a-3(2)(a) (1993):

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

Utah Admin. Code R151-46b-14(2) (1993):

(2) The order on review constitutes final agency action for purposes of Subsection 63-46b-14(1).

IN THE COURT OF APPEALS, STATE OF UTAH

LEO N. TAYLOR :
Petitioner, : CERTIFICATE OF SERVICE
v. :
DEPARTMENT OF COMMERCE, : Case No. 970030 CA
STATE OF UTAH, and DIVISION OF :
OCCUPATIONAL AND : Priority No. 14
PROFESSIONAL LICENSING, :
Respondent. :

BRIEF OF RESPONDENT

CERTIFICATE OF SERVICE

I certify that on this 14th day of July, 1997, I served the foregoing **RESPONDENT'S BRIEF IN RESPONSE TO PETITION TO REVIEW THE FINAL ORDER OF THE DEPARTMENT OF COMMERCE RELATIVE TO PETITIONER'S LICENSE TO PRACTICE AS A VETERINARIAN IN THE STATE OF UTAH** upon Benson L. Hathaway, Jr., Attorney for Petitioner, by postage pre-paid to the following address:

Benson L. Hathaway, Jr.
Stirba & Hathaway
215 South State Street, Suite 1150
Salt Lake City, UT 84111

R. Paul Albrecht