

1982

Robert B. Vance v. Paul V. Fordham : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Vance v. Fordham*, No. 18176 (Utah Supreme Court, 1982).

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. VANCE, D. O.

Appellant and
Plaintiff,

vs.

Case No. 18176

PAUL T. FORDHAM, Director of
the Department of Registration,
Department of Registration and
the Osteopathic Committee,

Respondents and
Defendants.

RESPONDENTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE CHRISTINE M. DURHAM, JUDGE
AFFIRMING THE ORDER OF
THE DEPARTMENT OF REGISTRATION

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FILED

APR 19 1982

FILED

APR 22 1982

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~~Clark, Supreme Court, Utah~~

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT V. VANCE, D.O.)	
)	
Appellant and Plaintiff,)	
)	CORRECTION SHEET
v)	
)	
PAUL T. FORDHAM, Director of the)	
Department of Registration,)	Case No. 18176
Department of Registration and the)	
Osteopathic Committee,)	
)	
Respondents and Defendants.)	

Counsel for Respondent, Stephen G. Schwendiman, Assistant Utah Attorney General, has had brought to his attention two errors in his Brief before this Court which he desires to correct. These corrections are:

1. Corrected citation: State Board of Medical Examiners v. Rogers, 387 So. 2d 937 (Fla., 1980).
2. Page 14, line 3 should read: "...Dr. Greenwood, a practicing psychiatrist..."

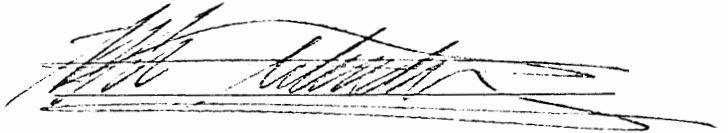
DATED this 22nd day of April, 1982.

DAVID L. WILKINSON
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Assistant Attorney General

MAILING CERTIFICATE

I certify I mailed a true and exact copy of the foregoing
Correction Sheet to the Appellant/Plaintiff's attorney, M.
Richard Walker, Walker, Hintze & Washburn, Inc., Suite 202,
4685 Highland Drive, Salt Lake City, Utah 84117, on this
22nd day of April, 1982.

A handwritten signature in dark ink, appearing to be "M. Richard Walker", written over two horizontal lines.

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT V. VANCE, D.O.)

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vs.)

PAUL T. FORDHAM, Director of)
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R = Record

T = Transcript

STATEMENT OF THE NATURE OF THE CASE

This case is before the Supreme Court as a secondary appeal of the revocation of the Appellant's license to practice medicine as an osteopathic physician and surgeon by the Department of Registration.

DISPOSITION IN THE LOWER COURT(S)

An administrative hearing was held before the Division of Registration in January 1981. After the hearing before the Osteopathic Committee, the Division, on February 6, 1981, revoked Appellant's license for conduct that was deemed unprofessional by the Committee. That Decision was appealed to the Third District Court of the State of Utah, and after a complete review of the transcript and evidence involved, the District Court upheld the findings of the Osteopathic Committee and affirmed the revocation of Appellant's license.

RELIEF SOUGHT ON APPEAL

Respondents request this Court to reject the arguments raised by Appellant as being improper before this Court and after review of all pertinent issues affirm the decision of the Division of Registration as affirmed by the Appellate (District) Court and immediately lift the stay entered by this Court which has allowed Appellant to continue practice.

STATEMENT OF FACTS

Respondents reject Appellant's "statement of facts" as anything but undisputed. Appellant's facts are nothing more than self-serving, self-laudatory statements which have little to do, if anything, with the reasons for revocation.

This matter was originally heard before the Osteopathic Committee in January of 1981 (R-170). Following that hearing and on the recommendation of the Osteopathic Committee the Division of Registration revoked Appellant's professional license to practice medicine as an osteopathic physician and surgeon for unprofessional conduct. (R-169) This involved the diagnosis, treatment, and procedures used by Appellant. Many former patients and expert witnesses testified relative to Appellant's treatments and methods. After much testimony and deliberation, a unanimous recommendation of revocation was made to the Division (R 170-2). A temporary stay of the revocation was ordered by the Third District Court February 19, 1981 pending appeal (R-8). Notice of appeal was filed February 9, 1981. (R 2-3) A temporary order of the Court modified Dr. Vance's license allowing him to practice within "accepted medical standards of an osteopathic physician and surgeon," pending appeal. In July of 1981 Appellant had not pursued the appeal. On July 8, 1981 Appellant's former counsel having withdrawn for pecuniary reasons (R-19), Respondent entered a Notice to compel Appellant to Comply with the Rules of Procedure concerning the appeal. (R-28-34)

During July, Respondent became aware that various sections of the Temporary Order were being violated. An employee of Appellant was deposed and an Order to Show Cause of Contempt was filed on the 26th day of August, 1981 (R-48). The District Court after hearing three of the State's witnesses, continued the hearing on the contempt in order to decide the merits of the appeal before her swearing in to the Supreme Court,

leaving insufficient time, otherwise. Those charges are still pending. Thereafter, Appellant's Motion to Dismiss was filed (R-79, 81) and decided (R-127). Briefs on appeal were finally filed in late November and on the 3rd day of December, 1981 the District Court issued a Memorandum Opinion on Appeal. (R-249-50). The Court found:

"Nothing in plaintiff's Memoranda on Appeal or in the record demonstrates any excursion by the Committee or the Director beyond the scope of the statutory authority . . . "

and also

"The Committee was unusually cautious in its finding: . . . the findings . . . are based upon testimony in the record, and upon professional expertise of the members of the Committee. This 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 exist here. The record suggests that the committee was conservative in its findings rather than otherwise, and those findings entirely support the recommended order entered by the director. That order is hereby affirmed." (Emphasis added)

Following a decision on appeal in favor of Respondent in the Third District Court, Appellant entered an appeal before this Court. (R-260). Appellant also obtained a stay of execution concerning revocation of his license in this Court, and is still practicing under the Order of the District Court of the 19th of February, 1981, more than 14 months after the Osteopathic Committee found that his methods were unprofessional and should not be allowed in the State of Utah.

Appellant now comes before this Court in an attempt to gain a second appeal on the matter after failing before the original, and appropriate, appellate body.

ARGUMENT

POINT I

APPELLANT IS NOT ENTITLED TO A "DE NOVO APPEAL". THIS COURT MUST REJECT ALL BUT CONSTITUTIONAL CLAIMS.

Though Respondents have never heard the term used before, it appears that the best description of what appellant is attempting is found in the term "De Novo Appeal." Appellant is petitioning this Court to reject and disregard every proceeding, brief, decision and review held in or issued by the District Court on appeal. In essence, appellant seeks this court to "start anew", or in other words, allow a "new" appeal as if the District Court did not render a decision. He desires this to be an appeal to the Supreme Court directly from the administrative body, as if the District Court was not the Appellate Court and didn't exist. Appellant is attempting to have this court invent a legal procedure for purposes of this "appeal" that is not permitted by law and is not in accordance with the Utah Constitution and statutes.

The only argument that presents a constitutional claim is Point II. All other arguments have no basis to be before this court. Two arguments (which do not allege any constitutional problems) were never raised before the administrative body or the Appellate (District) Court. Therefore, they must be rejected by this Court as this is the improper place to raise "new" issues. These two points are Points III and VI. The remainder of Appellant's arguments merely "re-argue and rehash" the evidence that was thoroughly reviewed by the Appellate (District) Court. Thus, all arguments, except the

constitutionality under Point II must be rejected and disregarded as a basis for consideration before this Court.

In supporting its position, the respondents deem it advisable to discuss briefly the definition of "de novo." Recently this court acknowledged the definition as being "anew, afresh, a second time." (See Pledger v. Cox, 626 P. 2d 415 (1981)). In Pledger, the court continued to discuss the usage of the doctrine in the context of a specifically-worded drivers license statute. There, because of the language of the statute itself, the wording was interpreted to mean that the matter was "anew" where new evidence and testimony could be taken (See U.C.A. §41-6-44.1(b), 1953 as amended).

The Colorado Court of Appeals also discussed the effect of "de novo" in the case of Turner v. Passmiller, 532 P. 2d 751 (Colo., 1975). Therein the court said:

"A trial 'de novo' is commonly understood as a trial anew of the entire evidence as though no previous action had been taken." (Emphasis added)

The statutes of the State of Utah make it clear that in this case the District Court is the Appellate Court of all issues. Any further review from a decision rendered there is extremely limited in scope. In the present matter this Court has the limited scope of reviewing constitutional issues only. It is not in a position to disregard the efforts and review of the Appellate (District) Court and treat as "insignificant rubble" that which went on before. Appellant's attempt to "reopen" the entire appeal-even to the arguing of insufficiency of evidence--is a mockery of

the statutory procedures that have been established for these licensure cases. Had the Legislature desired to allow or prescribe different procedures it would have done so.

The Michigan Supreme Court reviewed this question as it related to the lack of statutory authorization to review "anew" the decision of the lower court on appeal. In the case of Godsal v. Michigan Unemployment Compensation Committee, 302 Mich. 652, 5 N.W 2d 519 (1942) the court said:

"In this case we are limited to a review of the judgment of the circuit court. There is no procedure by which we may re-view directly any decision of the administrative tribunal." (Emphasis added)

Jurisdictions with different statutory requirements have not uniformly followed this position. But in Utah, the statutes are clear that the District Court, not the Supreme Court, is the appellate court responsible to decide the correctness of the decision of the administrative tribunal.

Utah Code Annotated, §58-12-35.1(5) states:

"Any person who shall feel aggrieved by any action of the board in denying, revoking, or suspending his license may within 30 days appeal therefrom to the district court, which court shall affirm or reverse the action of the board.

* * *

The district court shall affirm the action of the board and the director unless the court finds that the record of the proceedings reveals that the board and director acted capriciously, arbitrarily or outside the scope of their authority." (emphasis added)

Thus, appellate jurisdiction of all issues of the "record" lies with the District Court, not with the Supreme Court. As stated in the statute, above, it is the district court that

determines if the board or director acted "capriciously, arbitrarily, or outside the scope of their authority."

Furthermore, the language of the statute clearly states that the court (District Court) looks at (reviews) the record. Record of what? Record of the administrative proceedings. What proceedings? The proceedings before the particular board from which the Director has taken his action, causing the licensee to claim to be aggrieved. Certainly, there is nothing in the specific language of the legislatively mandated procedures as they relate to licensed practitioners under §58-12-35.1, U.C.A., which could justify taking a position that the proceeding before the District Court could be other than a review of the record of the hearing before the Osteopathic Committee.

While it is true that U.C.A. §58-1-36 is not entirely clear, the provision is a general provision applying to boards that do not have their own statutory procedures on appeal. The Osteopathic Committee has specific procedures to be followed when an aggrieved licensee desires to appeal the decision of the Director of the Division of Registration. U.C.A. §58-12-35.1(5) specifically delineates what appellants may do and what jurisdiction the District Court has in determining the correctness of the administrative committee. Without question, the specific language of the statute under which this action was appealed and as specifically cited by Appellant [See Notice of Appeal filed by appellant (R-2,3)] presents to the court the "record" for the court to determine that a fair hearing was held and that based on the record the action of the Committee was not arbitrary, capricious or outside the

This procedure was followed by the Appellate Court (District Court). A decision was rendered sustaining the actions of the Osteopathic Committee. The opinion issued by the court, dated December 3, 1981 and entitled "Memorandum Opinion on Appeal" (emphasis added; R-249-51) states in particularity:

"Nothing in plaintiff's Memorandum on Appeal or in the record demonstrates any excursion by the Committee or the Director beyond the scope of their statutory authority. . .

It should be noted that the transcript of the hearing before the Osteopathic Committee consists of six volumes, numbering 1189 pages. The Court has read the entire transcript, and examined all of the Exhibits described in Respondents' Filing of Record of Board Hearing, together with the extensive Memoranda filed by counsel for the parties.

* * * *

. . . While it is true that some of the testimony was in conflict, Dr. Vance denying some of the allegations made by former patients, there is an evidentiary basis for the Committee's findings, and no basis for a claim of denial of due process. The Committee was at liberty to make its own judgments on credibility.

* * * * *

. . . This 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. The record suggests that the Committee was conservative in its findings rather than otherwise, and those findings entirely support the recommended Order entered by the Director. That Order is hereby affirmed." (Emphasis added).

Respondents encourage the Court to review the entire Opinion. What is desired to be emphasized is that the Appellate Judge reviewed everything, pondered deeply and made her decision after much thought. This decision "on appeal" (R-249) was not a "fly-by-night" decision. Her Honor specifically said: "The record suggests th

conservative in its findings. . . " (emphasis added). Respondents point out that the entire record before the Court below, including Appellant's own brief (R-193) refers to the matter being before the District Court "on appeal."

Rule 81(d) of the Utah Rules of Civil Procedure specifically states that those rules apply to administrative matters (appeals, etc.) unless there is specific statutory language to the contrary. Taken literally, as it should be, and if U.C.A. §58-12-35.1(5) did not exist, then the argument could be made that the appeal would be to the Supreme Court. But this is not the case. U.C.A. §58-23-35.1(5) is clear that the District Court, not the Supreme Court, has the responsibility, obligation, and jurisdiction to make the appellate decision.

Had the Legislature intended it to be otherwise, the statute would have placed that responsibility on the Supreme Court by statute as it has done in numerous other instances. For example, Decisions of the Utah Liquor Control Commission (U.C.A. §32-1-32.6), Industrial Commission (U.C.A. §35-1-83) and the Public Service Commission (U.C.A. §54-7-16) are appealed directly to the Supreme Court. In the case of the Tax Commission, the Legislature has given two options: obtain a trial de novo in District Court or go directly to the Supreme Court (U.C.A. §54-24-2).

Thus, it is seen that the jurisdiction for appeal lies with the District Court. The appeal was heard (consisting of a review of the entire record made before the Osteopathic Committee), a decision rendered, and only issues of constitutional import can now be raised before this body. The Utah

Constitution, Article VIII, Section 9, provides that appeals from Justice courts lie to the District Court "on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." (emphasis added).

This court has ruled in numerous cases that it will not review the evidence again, but limits its review from appeals to the District Courts to constitutional issues only. In the case of State v. Robinson, 23 U.2d 78, 457 P. 2d 969 (1969) the Utah Supreme Court dismissed the appeal of a misdemeanor conviction "on its own" because the constitutionality of a statute was not challenged. That appeal, as is the case in this instant appeal, is based on everything but the challenge of a statute. The Court said:

"The appellant was convicted of a misdemeanor in a justice of the peace court. He appealed to the District Court where on a trial de novo, he was again convicted. He now attempts to appeal to this court and claims error below in that the court improperly received evidence at the trial. He makes no contention that the statute under which he is charged is invalid.

[Quotes Article VIII, Section 9]

This court on a number of occasions has held that in cases such as this the decision of the district court is final and that a further appeal would not lie except where the validity or constitutionality of a statute is invoked." (Emphasis added.)

Also, the Legislature amended U.C.A. §78-4-11 in 1977 and in 1981 as it relates to appeals to the District Court from the Circuit Court. There as well, the decision is final.

Though the constitutional provisions cited above do not expressly include administrative appeals, there is no valid reason why the procedures for cases arising in administrative agencies should be any different. To say there is a difference is a great injustice. Under the prohibition of a right to appeal to this court would be individuals who could lose their right to liberty by being placed in jail, as a result of a conviction before the Justice or Circuit Courts and yet allowing those with, for example, a day's suspension of regulatory licenses to appeal to the Supreme Court, after having a District Court affirm the decision of the regulatory body. In the present case, although it is a revocation, instead of a limited suspension, the legal rationale and issues are still the same--the appellant has no right to a "de novo appeal." It is not even allowed in other appeals from the District Court by statute and constitution as discussed above.

Based on the foregoing, respondent contends that the appellant has had his appeal and has lost. He is not entitled to a second appeal. He has not claimed the invalidity or unconstitutionality of any statute. All of the issues except two have been briefed, argued and ruled on in the Appellate (District) Court. The two issues that were not raised and argued below are points III and VI. They were never raised below, are not argued to be a denial of any constitutional rights and this court in numerous cases has established the most basic premise before it that new issues cannot be raised for the first time on appeal (and in this case for the first time on a second appeal)! These issues were also never

raised at the hearing before the Osteopathic Committee. Certainly, at this point of time, Appellant has "waived" these issues. They cannot be allowed at this point even if the Court allows other issues of this appeal to be heard.

In essence, Appellant's "appeal" is improperly before this body and should be dismissed. This court should not review again all of the evidence that has already been reviewed by the Appellate Judge and ruled on. Further, the Court should treat this case no differently than those under Article VIII, Section 9 of the Utah Constitution. There have been no challenges to the constitutionality of statutes, and, therefore, no appeal lies. Lastly, the claim of inadequate regulations has been waived on two occasions. No matter what this Court decides as to the other arguments, this issue should be rejected by this court as untimely and inappropriate.

The proper course of action for this Court is to dismiss this appeal for lack of any jurisdiction over the purported "appeal" to this body. If the Court does believe it has the right to hear some argument it should be limited only to the constitutionality of the Board proceeding as alleged in its make-up. All other arguments are inappropriate and should not be considered.

Respondents, however, not knowing the view of the court on these issues, deem it advisable to respond to all arguments even though they feel this Court should not review them. As such, they will be treated accordingly.

POINT II:

THE PARTICIPATION OF DR. GREENWOOD ON THE
OSTEOPATHIC COMMITTEE DID NOT INVALIDATE OR
MAKE VOID THE PROCEEDINGS.

Appellant begins his attack on the decision of the Osteo-
pathic Committee by adulterating both the findings of the
District Court and the actual situation that presented it-
self. By propounding that interpretation, Appellant is at-
tempting to confuse the issues before this Court--issues
that were fully briefed and ruled on earlier.

The record is void of any "admission" that Dr. Greenwood
was not qualified to sit as a member of the Committee. Ap-
pellant presents that position as one of the undisputed "facts"
of the case. (See Appellant's Brief, Page 4.) Respondents
have consistently maintained and the Court so found that Dr.
Greenwood was a "de facto officer who acted under color of
law and authority" (R-149). As such, the Court found that
as a "de facto officer" she was authorized to sit on the
Committee and rule on the issues presented to it in this
case.

The entire argument of Appellant as presented by his
Motion to Dismiss (R 79-80) and the accompanying Memorandum
(R 83-91) centered around residency and licensing require-
ments "within" the State of Utah. In essence, Appellant
cites U.C.A. §58-1-6 as the basis for some "monstrous" rea-
son which precludes Dr. Greenwood from being able to render
any opinion at all as to the propriety of Appellant's ac-
tions. This position is absurd.

Nowhere has Dr. Greenwood's competence, professional

ability, knowledge, or credentials even been questioned. In fact, Appellant hasn't even done so in this appeal. Appellant knows that Dr. Greenwood, a practicing psychologist as her specialty in Osteopathic Medicine, is eminently qualified and knowledgeable in the field of Osteopathic Medicine. She recieved her degree from the College of Osteopathic Medicine in Des Moines, Iowa, in June of 1968 and has been licensed in and practiced in Missouri, Iowa, Wisconsin and Utah continually since July of 1969. (R. 141-144.) If anything, the fact that she has had experience in Osteopathic Medicine in three other states (Missouri, Iowa and Wisconsin) before coming to Utah to live, adds credence to the position that she has a broad understanding of theory and practice in her profession.

In support of this position, Respondents refer to the leading authority in the area of a physician's care and knowledge in going from jurisdiction to jurisdiction. In Riley v. Layton, 329 F.2d 53 (1964), a San Francisco Physician was called as an expert witness regarding medical practices in Moab, Utah. Certainly, here, the discrepancies of the size and sophistication of jurisdictions are obvious. Riley held that a physician has adequate knowledge to testify as an expert witness in a case if he is a physician in the community or similar community. The San Francisco physician qualified under this definition to present expert testimony for situations in Moab, Utah.

Certainly, Dr. Greenwood had the experience and knowledge from similar communities such as Des Moines, Iowa (roughly

equivalent to the communities here) to be qualified to sit as an expert in peer review. Medical knowledge and theory are fast becoming, and in many respects have become, cosmopolitan in nature, being uniform in all areas of the country.

Respondent maintains that Dr. Greenwood was qualified in every way professionally to sit on the Board. The record substantiates this fact and Appellant himself does not dispute it.

In essence, a highly qualified physician sat "de facto" under color of authority to review the evidence in the original hearing below. Respondents deem it extremely important to point out to this Court that it wasn't just any "Tom, Dick or Harry" that was pulled off the street to "fill" the Board position. Never has Dr. Greenwood's competence or professional qualifications been questioned.

With this keenly in mind, Respondents now point out that all Appellant could do to attack the Committee's decision is cite a five year licensure rule which can well be seen as a procedural dinosaur, that has no bearing on the correctness of a decision and itself has been seen by the legislature as a requirement having no bearing on the substantive outcome of cases heard by committees. This requirement was repealed by the Utah Legislature in the 1981 Session.

The Court did find in its Order that based on the residency and licensure requirements as per Utah Code Ann. §58-1-6, she was not qualified to "be appointed." (R.-149.) Nonetheless, the Court held, as previously stated, that Dr. Greenwood sat as a "de facto" member. Her qualifications

professionally qualified her to sit "de facto" and render a fair decision with the other members of the Committee.

Appellant's brief is essentially a restatement of his memorandum accompanying the Motion to Dismiss in the Court below. Only two cases not cited in that memorandum have been added here. Nonetheless, Respondent deems it necessary to respond with basically the same argument and cases as it did below so this court can be fully advised of Respondent's position.

Counsel for Appellant himself advocated a position before the District Court that he has now changed. The Court and counsel for Appellant had a lengthy dialogue about this matter where counsel took a different position.

Appellant cites 1 Am.Jur. §69 (Appellant's Brief, Page 9) declaring before this body that the decision is void. Yet before the District Court, he maintained:

MR. WALKER: But in saying that our statement is that therefore it was not a duly constituted committee, therefore jurisdiction never vested in that committee.

THE COURT: Well, if that is true, then there was no jurisdiction to do anything that that board has done during the entire period that Dr. Greenwood has sat on it.

MR. WALKER: Your Honor, that is the whole point. The case law says that it may be voidable at the instance of an aggrieved party.

* * *

THE COURT: If I rule that that decision was void for lack of jurisdiction, then there is no more jurisdiction, every order that the board has entered is likewise void.

MR. WALKER: Your Honor, quoting the case that they cite in their brief, --

THE COURT: Let me be sure I understand

your position first. Do you claim that that the order is void for lack of jurisdiction, or do you simply claim that it is voidable on some due process grounds?

MR. WALKER: We say that it is voidable. In other words, we have no idea what the position of that committee is in dealing with anything else. We are merely saying that by the case law that this decision is voidable by the court.

THE COURT: Well, then your argument is not a jurisdictional argument? It's a due process argument. Because I don't see how you can argue where there's no jurisdiction you have only got a voidable order. If there is no jurisdiction there is no basis for proceeding.

* * *

MR. WALKER: . . . I think the other actions by that board have not aggrieved anyone. If they have licensed people, if they have passed standards, there has no one been aggrieved, and that's why the case law says that it can be raised by the person aggrieved. (R. 291-2, 298; emphasis added.)

The above establishes several things: first, Appellant maintains that Dr. Greenwood could sit and act. As he said above, the Committee could make "standards" that could affect many, many people. Then in the same breath he says it can't. Second of all, by saying the order is only voidable and not void, jurisdiction vests and the question of due process goes to the "fairness" of the hearing. In this matter, the fairness is totally substantiated. Mr. Walker maintained that the order was not "void." If the order is not void (as counsel admits) then there is no requirement that the order or any decision everbe declared void.

Appellant has not shown where there has been any denial of any right that has "tainted" the decision. Appellant cites State of Utah in re LGW, 638 P.2d 527 (Utah, 1981) claiming there was no existence of an "appropriate tribunal." By his own admissions, above, the Committee had jurisdiction. One wonders whether Appellant would claim the decision void had the Committee ruled in his favor? To declare it voidable at his choice must have some restriction. That restriction is that at no point at the hearing level was the issue ever raised. One cannot remain silent and only after an adverse decision claim there was some error which "voided" a decision not liked by the party.

The law on this entire matter is well established. Appellant has mistated both statutory and case law. The jurisdiction of the Committee is clearly established by statute. The Committee acting as a unit was acting as an arm of the State, and its actions as the record shows were competent and just. This was pointed out very clearly in United States v. Lindsley, 148 F.2d 22 (7th Cir. 1945) wherein the Court stated:

A person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned, [cites omitted] and neither his eligibility to appointment nor the validity of his official acts can be inquired into except in a proceeding brought for that purpose. (Emphasis added.)

The North Carolina Supreme Court spelled out this posi-

tion in more detail in the case of In re Wingler, 231 N.C. 530, 58 S.E.2d 372 (1950):

For all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself. His right or title to his office cannot be impeached in a habeas corpus proceeding or in any other collateral way. . . . So far as the public and third persons are concerned, a judge de facto is competent to do whatever may be done by a judge de jure. In consequence, acts done by a judge de facto in the discharge of the duties of his judicial office are as effectual so far as the rights of third persons or the public are concerned as if he were a judge de jure.

Appellant is attempting to collaterally attack actions by a "de facto" board member who acted under color of title after decisions were rendered and not directly on a prospective basis as indicated above.

Dr. Greenwood was sworn in as a board member and acted as such at the hearing. Her "color of title" is further established by the certificate issued verifying this fact. (R. 139.)

Respondent has found numerous cases from many jurisdictions sustaining the actions of public officials and/or administrative officers and members who, though not properly sitting according to law (de jure), were in fact sitting under color of authority (de facto). Such is the case here. No cases have been located "invalidating" those based on the arguments pressed by Appellant.

In Schaffield v. Hebel, 192 S.W.2d 84 (Ky, 1946), the Court of Appeals said the following:

An officer de facto is to be distinguished from a mere usurper or one not having some color of title to the office, and to be

one whose title is not good in point of law but who is in fact in the unobstructed possession of an office and is discharging those duties in full view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper.

* * *

This is in accordance with the general rule that the exercise by an officer de facto of authority which lawfully appertains to the office of which he has possession is as valid and binding as if exercised by an officer de jure, and an act by the one has the same force and effect as an act of the other so far as it is for the interest of the public or of third persons. (Emphasis added.)

In 1978, the North Carolina Court discussed this issue in the case of People v. Beach, 242 S.E.2d 796 (N.C. 1978):

A usurper in office is distinguished from a de facto officer in that a usurper takes possession of office and undertakes to act officially without any authority, either actual or apparent. Since he is not an officer at all or for any purpose, his acts are absolutely void, and they can be impeached at any time in any proceeding. [Citations omitted.] The acts of a de facto officer are, however, valid as to the public and third persons. Norfleet v. Staton, supra. Thus, "So far as the public and third persons are concerned, a judge de facto is competent to do whatever may be done by a judge de jure. In consequence, acts done by a judge de facto in the discharge of the duties of his judicial office are as effectual so far as the rights of third persons or the public are concerned as if he were a judge de jure.. (Emphasis added.)

It is exceedingly clear that Dr. Greenwood was not a usurper and therefore her acts as a sitting member of the Board cannot be challenged now. Her acts stand as they relate to Dr. Vance.

Again, the Supreme Court of Oklahoma stated in Sheldon v. Green, 77 P. 2d 114 (Okla., 1938):

Having come to the conclusion that until the filing of the opinion in *State ex rel. Williams v. Batson*, supra, he was a de facto officer, the next principle applicable is that the acts of a de facto officer are as binding as those of a de jure officer. This principle is well recognized, and applies as thoroughly to the office of judge as it does to other public offices. (Emphasis added.)

The Utah Supreme Court has also addressed this issue in the case *In re Thompson's Estate*, 269 P. 103 (Utah, 1927), where challenge was made to a District Judge sitting on the Supreme Court to temporarily "fill-in" because of the death of a Supreme Court Judge. The court soundly rejected the arguments raised against the District Judge as follows:

. . . though it be assumed that Judge McCrea was not a judge de jure, he certainly was a judge de facto. That he was qualified as a district judge to sit in the Supreme Court in some contingencies is not disputed. That he was designated by the Supreme Court to sit, and that he sat and participated in the case in pursuance thereof, is also not disputed. . . . Under such circumstances Judge McCrea was at least a judge de facto, if not a judge de jure, and the decision concurred in by him is as binding on the respondent as though Judge McCrea had been judge de jure. (Emphasis added.)

The cases are even more numerous in sustaining the decision of the Committee. Dr. Greenwood, though not acting de jure in all aspects, was indeed acting de facto, and that decision is as binding as if she had been sitting de jure with the necessary years of residency. Extended periods of residency for voting and other rights have been struck down by the courts as having no reasonable connection with those practices. Certainly, Dr. Greenwood was and always has been "competent" from her schooling and experience to sit in judgment in such a case. Appellant is really arguing an insig-

nificant point in hopes of clouding the more important position that in every way Dr. Greenwood is professionally qualified. As alluded to before, the complained of Committee member is not someone "pulled off the street."

Appellant has cited only two new authorities in support of his entire claim that were not presented below. The first is Central Bank and Trust v. Brimhall, 28 Utah 2d 14, 497 P. 2d 638 (1972) which stands for the proposition that courts will not interfere with the decisions of administrative tribunals unless it appears that they have acted in excess of their powers. Interestingly enough, the Supreme Court of the State of Utah in Brimhall stated:

"Our duty is to look on the whole evidence in the light favorable to the determination made by the bank commissioner and the trial court, and to sustain them if there is a reasonable basis in the evidence to justify doing so. In the field of administrative law the assumption is indulged that the administrator (or administrative tribunal) possesses superior knowledge and expertise because of specialized training and experience, and the focus of interest within the particular field. For this reason the well-established rule is that courts indulge him considerable latitude in the determination he makes on questions of fact and also in the exercise of his discretion with respect to the responsibilities which the law imposed upon him; and they will not interfere therewith unless it appears that he acted in excess of his powers, or that he so abused his discretion that his action was capricious or arbitrary."

This statement goes not only to the powers of the administrative body but also to the reasons an individual is made a member of such a body. The "superior knowledge and expertise because of specialized training and experience" as evidenced by Dr. Greenwood's excellent medical background

and record would be proof that she was "qualified" to serve upon the Osteopathic Committee, even though the specific - licensure time period within the State of Utah was not met.

The other new authority cited is Stahl v. Reinggold County, 187 Iowa 1324, 175 N.W. 772, (1964), which is cited along with In re Weston Benefit Assessment Special Road District, 294 S.W. 2d 353 (Mo. App. 1956) as a footnote to a statement in American Jurisprudence, §69 (p. 864). The discussion of the American jurisprudence article concerns the actions of officers specifically prohibited by statute from acting in an administrative capacity. An examination of the Stahl and the In re Weston Benefit cases will show that the intent of the Legislature in specifically prohibiting an individual from acting in an administrative capacity must be present. In In re Weston a member of the Board had a pecuniary interest in land being purchased by the county. The statutory section in question provided that "no judge or county court shall sit in any cause or proceeding in which he has a personal interest or is related to either party". That section is a clear and specific statement of the Legislature disallowing an individual for specific reasons the right to act in an administrative capacity. Also, in Stahl as annotated in the American Law Reports, a member of an administrative body held land in a drainage district which would be greatly increased in value by the action of the administrative body. It was stated in that case that

"An express statutory requirement that officials establishing a drainage district shall be disinterested was not necessary to render invalid the acts of interested offi-

Clearly the subject of the annotation in American Jurisprudence makes clear that actions of officials who have personal or pecuniary interest in the subject of the administrative body's actions, even though not specifically prohibited by statutes, are void. There is no connection between that annotation and the case at hand. Dr. Greenwood had no personal or pecuniary interest in this matter and the statute which is relied on by appellant did not specifically prohibit the actions of officials because of their residency or the period of their licensure. It merely stated a time period for which appointments should be made.

Adding to the theory that a de facto official's opinion should not be attacked on statutory grounds is the doctrine stated in Board of Medical Registration and Examination of Indiana v. Armington, 178 N.E. 2d 741 (Ind., 1962). In this case, a decision of the Board was questioned after the conclusion of the hearing, on appeal, because a member of the Board should not have participated in the hearing. The court stated:

Although the appellee was aware of the fact that Dr. Elkenberry had preferred charges against him by reason of the notice he received from the board which stated such fact appellee failed to make any prompt objection to the board member participating in the proceeding at the time of the hearing. . . it would not render the proceedings of the board in which he participated void, but . . . merely voidable. In such case disqualification may be waived. It is the general rule that unless objection is made at the earliest opportunity to the right of the person claimed to be disqualified to act it will be deemed waived. (Emphasis added.)

This position has been followed in other jurisdictions

as well. The Illinois court said in Commissioners of Union Drainage Dist. No. 1 v. Smith, 233 Ill. 417, 84 N.E. 376 (1908):

In this view of the matter, Binder was not competent to act as a commissioner in spreading the assessment. The objection which we have sustained is one which must be made before the judgment of confirmation is entered. If not so made, it is deemed waived, and will never thereafter be of any avail. If the assessment has been spread by commissioners who own land in the district and has been confirmed without any objection being filed which raises the question of their competency, the judgment of confirmation is valid and binding, precisely as it would have been had the commissioners owned no land within the district. (Emphasis added.)

(See also: Carr v. Duhme, 78 N.E. 322 (Ind., 1906).)

In a more recent case, the Oklahoma court entertained an appeal from the lower court challenging the right of a judge to conduct a preliminary hearing when, as here, the claim was made that he did not qualify. (Bennett v. State, 448 P. 2d 253 (Okla. Cir., 1968)). The court stated:

We are of the opinion, and therefore hold, in the light of Rath v. LaFon, supra, that the acts of Judge Porter in conducting the preliminary hearing on the 28th day of July, 1965, and holding the defendant bound over to the District Court, were acts of a de facto judge having the same statutes as the acts of a de jure judge. Moreover, we are of the further opinion that in order to preserve this question, the defendant should have challenged the jurisdiction of Judge Porter in the trial court, excepted to the ruling of the trial court, preserved this in his Motion for New Trial, in which event we would have the question properly before us for review on appeal, for we have repeatedly held that only those questions which were raised in the trial court and on which adverse rulings were made and exceptions taken, and which are then incorporated in a Motion for New Trial and assigned as error in the Petition in Error, will be considered on appeal. (Emphasis added.)

(See also Board of Medical Registration v. Armington (supra)).

Though some of the cases deal with judges, the applicability to the administrative field is obvious and spelled out by the courts themselves as stated in the cases cited. The record is perfectly clear that no objection was ever made at the administrative level as to the qualifications of Dr. Greenwood.

In the case at hand, Appellant knew that Dr. Greenwood had not been licensed in the State of Utah for five years preceding her appointment. Dr. Vance approved the license application, personally signing his name authorizing the issuance of the license on June 6, 1978 as chairman of the Osteopathic Committee (R 140, 144). Appellant allowed the hearing to proceed for five days with this knowledge and never objected to the make-up of the Committee. Under the cases stated above, the Appellant has clearly waived his right to object to the make-up of the Committee and subjected himself to their scrutiny by his informed silence.

The Utah Supreme Court has clearly mandated that one who remains silent, and allows a court to entertain error or approves what takes place, cannot later come forward and complain of the error he himself allowed. The court held in the case of Ludlow v. Colorado Animal By-Products Co., 104 Utah 221, 137 P. 2d 347 (1943):

A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error in procedure.

Cases on this subject are also numerous, but respondent sees

no necessity of citing more. By admitting that the order is only "voidable" and not "void", this Court requires one to protect his position by timely objection. Such objection was never raised, and appellant cannot now claim the order is "voidable" in spite of his silence.

Further, the Motion of Appellant should be denied, if for no other reason than the same Committee would hear the same testimony as it did previously. With the 1981 legislative amendment doing away with residency, Dr. Greenwood qualifies in every respect to sit on the Board and continues to sit. The three who heard the original case, in addition to two others, (Committee of five was instituted) would make the decision if remanded. For judicial and administrative economy, it would appear that the remanding of this matter to the same Board who heard the case originally would be a fruitless waste of time, energy and public funds.

Several courts, including the United States Supreme Court, have ruled that the same judges and the same administrative boards may rehear matters on remand with the claim of prejudice not being allowed to stand. In the Board of Medical Examiners v. Steward, 102 A. 2d 248 (Md., 1954), the Maryland court held:

But in the absence of a constitutional or statutory provision to the contrary, the judge who presided at the trial of a case which is reversed on appeal and remanded for a new trial is not disqualified to retry the case.

And as to the specifics of that case, the court said:

This general rule, which has always been accepted as applicable to judges in Maryland, is undoubtedly likewise applicable to members of

administrative agencies, for usually the procedure of administrative agencies is not as formal and strict as that of the courts.

The court cited a previous Washington case to sustain its statements:

Thus, in *Sutton v. City of Washington*, 4 Ga. App. 30, 60 S.E. 811, where the City Council had convicted a person of unlawfully keeping intoxicating liquors for sale, it was held that, after the case had been remanded for a second trial, the Council was not disqualified from hearing the case again.

As stated previously, the Supreme Court has already answered the question of propriety in such a situation. In the case N.L.R.B. V. Donnelly, 309 U.S. 219, 67 S.Ct. 756 (1947), the Court said:

Certainly it is not the rule of judicial administration, that, statutory requirements apart, see Judicial Code, § 21, 28 U.S.C. § 25, 28 U.S.C.A. § 25, a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.

Respondent is aware of no statute that precludes the same in the State of Utah. Once again it is pointed out that this "committee of Experts in the Field" ruled on "unprofessional conduct"--something Dr. Greenwood was admittedly qualified to decide.

The statute cited by the Appellant as the basis of his Motion has been amended and now has no requirement of "time licensed in Utah" for membership on the Committee (U.C.A., § 58-1-6, as amended, 1981). Thus, the Committee, under current law would be the same that heard the initial

five days of testimony. The witnesses would be similar and the record, which is voluminous, would have to be restated as they were before, all for the sake of making a second "record." Under current law, Dr. Greenwood is sitting "de jure" as well as "de facto" and would be sitting on the Committee at the time of rehearing.

The best interests of the public and all parties concerned would clearly not be served if a remand was made on the grounds claimed by Appellant.

POINT III

APPELLANT WAS NOT DENIED DUE PROCESS IN THE REVOCATION OF HIS LICENSE.

The requirements of an administrative body to assure an individual due process in the State of Utah, was stated in the case of State of Utah in re L.G.W., supra. In that decision the Court stated that the requirements for due process are:

"(1) the existence of an appropriate tribunal; (2) inquiry into the merits of the question presented; (3) notice of the purpose of inquiry; (4) opportunity to appear in person or by counsel; (5) fair opportunity to be heard; and (6) judgment rendered in the record thus made."

It is the position of Respondents that in fact, Appellant has been afforded every one of the appropriate measures stated above.

First, there has never been any claim by the Appellant that the matter should not have been heard by the Osteopathic Committee. In fact, there is no other committee constituted

which is capable or authorized by law to sit in matters involving osteopathic physicians and surgeons. Thus, there was an "appropriate tribunal." Appellant's entire claim of "denial of due process" centers around the question as to the propriety of Dr. Greenwood sitting "de facto" instead of "de jure." As discussed in Respondent's Point II, above, Dr. Greenwood was professionally capable and competent to render a "fair and impartial" decision, which she did. No claim is made that a more eminent osteopath in the State of Utah could or would have rendered a different decision. The mere lack of meeting "residency" requirements when otherwise qualified to render a decision that has little or no bearing on residency at all falls short of any level of constitutional import. Further analysis is found in Point II, above, and will not be repeated here.

Second, a five-day hearing with voluminous testimony and exhibits was held inquiring "into the merits of the questions presented." Third, notice was adequate and timely. Fourth, Appellant appeared both in person and through competent legal counsel during the entire hearing. Fifth, Appellant produced numerous witnesses, including himself, and cross-examined Division witnesses. As is seen by the record, Appellant was given ample opportunity and time to present his case. Finally, a judgment and decision was rendered "based on the evidence at the hearing." The Committee was very careful in its decision, finding specifically in 26 of the allegations that there was no cause of action and that in approximately 14 of the allegations the evidence sustained

a determination of unprofessional conduct (See Findings of Fact and Conclusions of Law of Osteopathic Committee, R 170-172).

There is no evidence or valid argument that the Appellant was denied any of the six requirements listed above. In fact, Appellant only claims a problem with "appropriate tribunal" which has been adequately discussed, above.

POINT IV

THE TERM UNPROFESSIONAL CONDUCT AS STATED IN THE UTAH STATUTES IS APPROPRIATE TO COMMON UNDERSTANDING BY MEMBERS OF THE PROFESSION BEING REGULATED AND PROVIDES FAIR NOTICE TO PROFESSIONALS OF THE GROUNDS UPON WHICH THEIR LICENSES MAY BE REVOKED.

Appellant relies upon the case Tuma v. The Board of Nursing, 100 Id. 74, 593 P. 2d 711 (1979) to stand for the proposition that specific acts must be listed to put the professional on notice prior to disciplinary action of said professional. Tuma is of limited scope as it relates to certain "types" of actions. Appellant failed to cite the recent leading case in this area which not only establishes the standard relative to "unprofessional conduct" as a meaningful guideline, but unequivocally distinguishes each case cited by him. This case, Chastek v. Anderson, 83 Ill. 2d 502, 416 N.E. 2d 247 (1981), involved a dentist who was charged with "unprofessional conduct" in the way he treated three patients. He claimed that this phraseology was unconstitutionally vague in that the statutes did not specifically state that the type of treatment he gave was improper.

Appellant in Chastek cited Tuma and other cases (some

cited by Appellant here) to support his argument that the term "unprofessional or dishonorable conduct" was vague and that the statute did not afford him advance notice of the type of acts that constituted "unprofessional conduct." The court said:

"None of these cases, however, found a statute allowing license revocation for unprofessional conduct to be unprofessional. . . . In none of these cases, however, did the acts reflect on the person's fitness to practice his profession. In fact, several of these cases imply that the statutes in question did place the person on notice that conduct relating to his fitness to practice would fall under the statute."

In essence, the Court distinguishes "acts" that relate to one's fitness to practice from acts that wouldn't relate to one's fitness to practice. Tuma involved a nurse discussing alternative treatments with a patient. Such discussions were not found to reflect upon her fitness as a nurse.

There is no question that the acts of Appellant (i.e., promising recovery from terminal diseases, using absurd and "quackery" procedures such as Kirlian photography, hand pressure diagnosis, taking images of thumbprints, etc.) reflect on his competence, professionalism and in essence, his fitness to practice.

The Court in Chastek cited numerous jurisdictions where the "validity of similar statutes providing for license revocation against constitutional challenges based on vagueness," was upheld. It cited cases from California, Arkansas, Florida, Texas, Oregon, Minnesota, New York, Michigan, Colorado and Illinois.

In discussing the California case of Shay v. Board of Medical Examiners, 81 Cal. App. 3rd 564, 146 Cal. Rptr 653 (1978) the court in Chastek stated:

The court held, however, that it was unnecessary for a statute to enumerate specific acts which constitute unprofessional conduct. It analyzed the statute in terms of its purpose, which was to assure the high quality of medical practice. The court then held that although unprofessional conduct should not be given an overly broad connotation, "it must relate to conduct which indicates an unfitness to practice medicine."

Respondent maintains that if every possible act like "cracking a raw egg on each patient's teeth and holding his head under water until he passes out" were codified as unprofessional conduct, there would be millions of possibilities and even then, the best minds in the profession could not think of them all. It's like posing the question, "What is the largest possible number?" Once one states what he thinks it is, someone else only needs to add one and make it larger.

The courts have realized this dilemma and have held that the Committees or Boards themselves determine the scope of the statutory language. The Oregon Supreme Court in Board of Medical Examiners v. Mintz, 233 Or. 441, 378 P. 2d 945 (1963) stated:

"The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the to the Board the function of evaluating the conduct in each case."

In commenting thereon, the Chastek court stated that the de-

fining language of the statute was not the factor that gave the physician notice that his conduct was unprofessional.

Also, the Minnesota Supreme Court in Reyburn v. Minnesota State Board of Optometry, 247 Minn. 520, 78 N.W.2d 351 (1956) held:

"Unprofessional conduct is of itself without amplification, a sufficiently definite ground upon which the Board may revoke or suspend a license."

Relying on the cases cited above and its own analysis, the court in Chastek held:

"The rationale in the cases upholding the statutes is that it is impossible to categorize all the acts constituting terms such as 'unprofessional conduct' or 'gross immorality'. Further, terms such as 'unprofessional conduct' are susceptible to common understanding by the members of the profession. When combined with the legislative purpose of protecting the public from people unfit to practice, the term 'unprofessional conduct' provides fair notice to the licensed professional and is not unconstitutionally vague.
... " (Emphasis added)

The Utah statute relied on in the hearing before the administrative body, as cited in Paragraph 5 of the petition (R 173), is U.C.A. §58-12-36(15) which includes the following as a specific definition of "unprofessional conduct."

(15) Any conduct or practice, contrary to the recognized standards of ethics of the medical profession, or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public, or any conduct, practice or condition which does or might impair the ability safely and skillfully to practice medicine.

This provision was enacted in 1969. In 1976 the act was amended to include the additional language:

(17) Violation of any rule or regulation of the physician's licensing board.

establishing a standard of professional conduct.

Appellant claims that no "regulations" were promulgated delineating what conduct was improper. The above clearly demonstrates that paragraph (15) is extremely specific and meets every test as discussed by the courts above. It is obvious that the Utah Legislature did not want to restrict the Committee and added (17). Even though there were no promulgated rules under (17), paragraph (15) is sufficient. Under the cases above, all that is needed is the term "unprofessional conduct" with no further definition necessary. Here, the Legislature was very specific.

In Chastek, the court in discussing the specifics of that case which involved only three situations said:

"Thus, the plaintiff should be on notice that he could have his license revoked for unprofessional conduct that is harmful to the health, safety and welfare of the public. We are not here faced with one alleged act of negligence. In this case plaintiff is alleged to have committed repeated negligent acts (3 specific acts); clearly repeated acts of negligence by a dental practitioner towards his patients are actions that endanger the health, safety and welfare of the public and therefore constitute unprofessional conduct. It is unreasonable to presume that a dentist is not apprised of the possibility his license could be in jeopardy for repeated acts of incompetent treatment."

The court then went on to hold that these three acts of negligence constituted "repeated acts" and upheld the revocation of the license.

It is thus perfectly clear that the Osteopathic Committee had the duty to examine the evidence and determine whether or not such action fit within the definition of "unprofessional conduct" as claimed in the petition.

In the case at hand the Committee found that Dr. Vance had, not just in three instances, but in multiple instances, acted in a manner which was unprofessional and medically unsound.

It was the statutory duty of the Committee to make those decisions, and no amount of specificity in the statute concerning unprofessional conduct could relieve the Board of that duty. As stated in Chastek, it is clearly impossible to catalogue all types of professional misconduct. Therefore, Appellant's assertion that the Committee should have established specific standards of conduct is contrary to legislative intent and without merit.

POINT V

THE FINDINGS OF THE OSTEOPATHIC COMMITTEE
WERE BASED ON PROPER EVIDENTIARY STANDARDS
AND WERE BASED UPON VALID EVIDENCE.

Point IV of Appellant's brief reflects a complete lack of understanding administrative evidentiary standards in the State of Utah. Qualified and competent professional individuals serve on administrative committees because no one better may sit in peer review to determine whether the evidence is valid and supports the allegations made. The Committee is in essence a committee of experts who determine whether conduct is professional or unprofessional. In the case at hand the administrative committee did allow hearsay testimony. This is perfectly acceptable under every jurisdiction that has entertained the question. Appellant fails, however, to acknowledge that for every situation where hear-

say evidence was allowed there was ample direct (non-hearsay) evidence to establish total credibility. The District Court so found in its "Memorandum Opinion" (R 249-51).

Appellant's allegations concerning the type of testimony received and particularly, that of Dr. Allen J. Concors is nothing but a restatement of the arguments made in the lower court (R 211). Dr. Concors' testimony was not only significant as that of an expert witness in the area but also established the general feelings of the medical community as a whole towards the practices of Appellant. Dr. Concors in his testimony did not admit he had a lack of knowledge of expertise regarding chelation therapy but stated that he had never heard or read of it, indicating that the general medical community as a whole does not allow this type of therapy, even the respect of a theoretical basis. It again should be stated that the rule of Riley v. Layton, supra, allows the testimony of a medical expert in any similar community, thereby making general medical knowledge and practice cosmopolitan in nature. Appellant's allegation that nothing in the record shows that Dr. Concors had any experience or teaching to qualify him with knowledge or standards as "taught" and as "it should be practiced in the State of Utah" was clearly made in ignorance of this standard.

All of the physicians appearing on behalf of the Appellant were from California, none of whom had the qualifications, background or training of Dr. Concors as an expert in the area. It should be noted that Appellant's "expert," Dr. Halstead, was on probation, his license to practice having been tempor-

arily revoked for aiding and abetting an unlicensed individual to practice medicine in the State of California. Yet the allegation of the Appellant that his three nondiscript, "eminently qualified physicians" who testified as "peers" of Dr. Vance's as to methodology and treatments should be given more deference than that to Dr. Allen Concors, who came to the State of Utah from Florida where he was the head of a hospital employing both M.D.'s and D. O.'s., is a weak attempt to say that the Committee had no business to decide who it would believe. Such is an absurd and meaningless position.

The record of the hearing is replete with incidents where Appellant utilized methods and mechanisms totally foreign to the practice of medical doctors or osteopaths and whose diagnostic abilities are founded upon questionable theory and not scientific knowledge. Any one of these incidents would be sufficient for disciplinary action. Yet, taken as a whole, and through the strength of testimony by witnesses presented at the hearing, there is "no question" that the Committee acted properly in protecting the public from one who had proven himself unworthy of their trust. The combined total of Dr. Vance's actions left no choice but to revoke his license and deny him the privilege of carrying on his unethical and unapproved practices any longer.

Perhaps the most potent admission of Dr. Vance that he has had a history of improper actions is found in an answer to a question by Mr. Halgren, counsel for the respondent. The question and answer are as follows:

Q. [by Mr. Halgren] I see. You are aware, are you, Dr. Vance, that there is nothing wrong with a physician utilizing a tool in this office for diagnostic purposes that may not be tested, provided he fully informs his patient of the fact and does not make any claim to his patient as to any validity it may have if he is not assured of its valid use, and as long as he doesn't make a charge for the use of that machine as a diagnostic tool?

A. [by Dr. Vance] Well, this has been a learning experience. And as I mentioned to the Board earlier this morning, procedures have changed in the last ten years, and I hope that in the process I have cleaned up my act, so to speak. But I am aware now, Leon, of those particular things. (Emphasis added, T. 919.)

The facts established that Dr. Vance had not "cleaned up his act," but was, in fact, doing procedures and promising results that were not within the scope of legitimate and accepted medical practice. Not only had Dr. Vance had problems in the past, but he was still using questionable practices at the time charges were brought against him which led to the revocation of his license.

Respondents now point out some of the many questionable practices:

(1) various patients testified that Dr. Vance used a procedure called Kirlian photography, which he described in testimony as:

Coronogram is a permanent photograph recording of a phenomenon referred to as the Kirlian phenomenon, K-I-R-L-I-A-N, which has to do with what is theorized as energy radiating from the human body. (T. 12)

(2) various patients also testified to what Dr. Vance described as an autogenous vaccine, or urine vaccine.

(T.18, 19.)

(3) Dr. Vance would diagnose allergies by applying pressure with his hand on the patient's hand while the patient was thinking of different foods. Judith Sevcik, a perfectly healthy individual who went to Dr. Vance for Channel 2 T.V. testified as to this practice as follows:

[I] did hold out my hand and he would apply pressure to it as he would call out different foods. I remember wheat was one that he said I should stay away from; milk, refined foods.

Q. Did he tell you how he made that determination based on this pressure?

A. I believe it was just my own body reaction and what he felt coming through as he applied the pressure.

Q. And then did he give you a number of papers at that time showing what you should or shouldn't eat?

A. Yes, he did.

(T. 362-3.)

This same procedure was used as well with Ilene Waters (T. 544-64) and Jan Stevens (T. 435-67).

4. Dr. Vance further treated Mrs. Sevcik for vitamin deficiency by taking an image of a thumbprint. She testified in answer to questions:

Q. He didn't perform any tests of any kind, any diagnostic tests using any machines or instruments of any kind at that time?

A. Okay. He didn't, but his nurses took an image of my thumbprint. And I'm not sure what the instrument was called, but it was to really tell what my energy level was. And it transferred the image to a negative. I believe it was probably a polaroid negative. And the result was that I had very low--a very low energy level.

Q. Now after this thumbprint supposedly showed a very low energy level, did Dr. Vance make any comment to you or statement as to what that indicated to him?

A. He mainly had indicated that I was lacking in vitamins and minerals. And this is-- at the time he set up a series of injections-- vitamins and mineral injections for me which I went in and took these injections about every-- maybe two to three weeks.

Q. Well, now was that diagnosis of low in vitamins and minerals made at that time on the basis of this thumbprint image?

A. I believe so; on the basis of the thumbprint image and als what we had talked about. (T. 361)

These procedures were only some of the many used by Dr. Vance to treat and diagnose patients that came to him. The record contains many incidents where such procedures were represented by Dr. Vance and paid for by the patient as viable and acceptable medical treatments, but none of which are accepted by the osteopathic or medical communities as being medically sound.

Of importance to note is that Dr. Vance, through using such inappropriate procedures diagnosed hypoglycemia in healthy individuals on several occasions. These individuals are as follows (Respondent will not cite the pertinent testimony, but will give a synopsis and refer the court to the transcript where testimony is found): Judy Sevcik was sent by a local television station to Dr. Vance and even took several treatments (T. 359-404); Milo Adams got sick after treatments and went to a medical doctor and was checked out as physically well (T. 272-87); Lois Carter was treated by Dr. Vance when she, in fact, had no medical problem (T.

251-70); Ilene Waters and Jan Stevens were checked by competent medical doctors before going to Dr. Vance, at the request of the Division, and were given clean "bills of health." They were diagnosed as having medical problems (T. 544-64 and T. 435-67, respectively). These lax and unprofessional practices accounting for such abuses of professional and medical judgment cannot be sanctioned.

Further, Dr. Vance breached all professional ethics by requiring, permitting, and forcing an unregistered employee to perform intravenous injections. Atha Moss, a former employee, testified that Dr. Vance not only instructed her to give "I V" injections, but threatened to fire her if she refused (T. 341). The California courts discussed this exact issue in Kolnick v. Director, Bd. of Medical Quality, 161 Cal.Rptr. 259 (1980). The court said: "When the doctor directs an unlicensed person to perform a medical act, the question is not whether the unlicensed person may be disciplined for the act, but whether the doctor's conduct is unprofessional"

The use and sale of laetrile in Dr. Vance's office referred to specifically (T.940), is clearly a breach of professional ethics.

Allowing a patient to be removed from a hospital in Wyoming and flown to Salt Lake City without consultation with the patient's physicians (T. 941), and knowingly promising to "save" the individual from what was diagnosed as Ewing's Sarcoma, as testified by Mrs. Nickeson (T.29), and allowing the callous treatment of Jim Nickeson, as stated by his

mother's testimony (T. 27, 59), was clearly in violation of professional ethics and in-and-of itself cause for the recommendation of the Committee. Even Dr. Vance reluctantly admitted in dialogue and questioning from one of the Board, Dr. Katherine Greenwood, that it would be a good practice to contact a person's physician before becoming involved if the patient was under the care of another (T. 942).

As stated as expert opinion on the record by Dr. Allen
Concours:

[I]t's not unusual for people who are in a state of desperation or who have been labeled with a terminal illness to seek extraordinary regimes for some miraculous cure, for some type of magical therapy, or some type of magical drug that is going to cure them or at least prolong their life and lessen their agony.

But as we all know, reputable, genuinely concerned physicians know better; and they don't offer false hope when there is no hope; and they don't use medical regimes that are unsound and unproven. And to do that is, in essence, to play on people's emotions and to premeditatedly extort money from patients when you know and you are trained better.
(T. 485.)

Another major unapproved and unprofessional procedure Dr. Vance used to an extensive degree and which he has been using through the stay pending the outcome of this appeal is the use of a highly questionable and unproven procedure known as chelation therapy. In essence, a great majority of Dr. Vance's patients would receive such treatments no matter what was wrong with them (see testimony of the healthy people that went to him for treatment), but would particularly be used for the treatment of arteriosclerosis or atherosclerosis. This, as found by the Baord and as found throughout the country

is another violation of the ethical standards of an osteopathic physician and surgeon, particularly where Dr. Vance has represented that chelation therapy is a "miracle" treatment for atherosclerosis. The treatment is not a recognized and accepted medical treatment for atherosclerosis and its wholesale use for this purpose is rejected by members of the medical field in general.

Appellant relied on the case of State Board of Medical Examiners v. Rogers, 387 So.2d 937 (Md., 1980), for his use of chelation therapy. However, the Rodgers case is easily distinguishable from the case at hand. The court in that case stated:

Dr. Rodgers allowed his patients to make their own choice as to whether to begin this treatment after full disclosure that this methodology has not been proven effective . . . that Dr. Rodgers never claimed it was a cure and that there was no allegation or proof of fraud, misrepresentation, coercion, or overreacting. (Emphasis added.)

This full disclosure never was given. Dr. Vance never told a patient that this methodology has "not been proven effective." In fact, the record is exceedingly clear that Dr. Vance held the procedure out as the "great miracle" of helping people. When Mrs. Nickeson asked Dr. Vance how come the doctors in Wyoming didn't know about this "miraculous procedure," all Dr. Vance could say as related by Mrs. Nickeson: "He told me that his method of treatment was different and it was new, and it was too bad that the Casper doctors didn't know anything about it." (Emphasis added, T. 30.)

The Rodgers decision, as restricted by the Supreme

Court of Florida has not been followed or cited in any other jurisdiction, and stands not as effective precedent, but as a singular and somewhat questionable interpretation of the right to practice medicine.

The Rodgers full disclosure and disclaimer standard, as stated by the Florida court, is clearly not applicable in this matter as a defense for the chelation thereapy respresented by Dr. Vance. The material and statements received by the patients in the Vance office did not contain such disclosures and disclaimers.

A theory advance by the Rodgers case is that there is some kind of inalienable right to practice medicine guaranteed to the populace. This theory has long sine been put to rest in the State of Utah. In State of Utah v. Hoffman, 558 P.2d 602 (1976), the Supreme Court stated:

The public interest requiring the regulation of healing arts and the Legislature undertaking such regulation, it necessarily follows that the profession of healing is no longer a right under Section 58-1-1.1, but should properly be labelled a "privilege" under Section 58-12-27.

In Hoffman, the Court also stated in support of the Utah Medical Practice Act:

[T]he legislature is protecting the people from the quacks who would deceive them into thinking they are receiving medical relief when, in reality, they are being deprived of their money without the remotest possibility of cure. This type of quackery also prevents people who may be or are in dire need of competent aid by their either delaying or foregoing of proper treatment. These ill people think they are being cured, when, in fact, they are receiving no real help.

The case at hand is an example of the need for competent

physicians to sit on the Osteopathic Committee, and to regulate their own profession, and when necessary, remove from practice individuals who so grossly abuse the discretion allowed physicians so as not to allow injury to patients, but the profession as a whole.

Appellant cites nothing to show or even infer that a wrong standard was followed. Why? Because the evidence dictated the correct decision. Clearly, ample direct testimony sustained the decision.

POINT VI

THE DECISION OF THE OSTEOPATHIC
COMMITTEE WAS BASED UPON EVIDENCE AND
TESTIMONY GIVEN AND SHOULD NOT BE OVER-
TURNED BY THIS COURT UNLESS IT IS FOUND
TO BE ARBITRARY OR CAPRICIOUS.

Appellant's brief for more than 25 pages is nothing but a verbatim transcription of Appellant's memoranda on appeal. (See R. 212.) It adds nothing to this appeal that was not already adjudicated in the lower court. The Appellant has the burden to establish that the decision was arbitrary, capricious or based wholly on unsubstantiated facts before this Court can act to overturn the decision. Absent such a showing the decision must be sustained. The established standard by which the Court shall judge the Committee's findings is that the Appellant must prove that the recommendation and the action of the Director was totally without basis in fact or that said actions were arbitrary and capricious in nature.

The Supreme Court of the State of Utah in Petty v. Utah State Board of Regents, 595 P.2d 1299 (1979), stated:

[I]t is appropriate to affirm our commitment to these general propositions; that an adminis-

trative agency should be allowed a comparatively wide latitude of discussion in performing its responsibilities; and that the Court should not intrude or interfere therewith unless the action is so oppressive or unreasonable that it must be deemed capricious and arbitrary or that the agency has in some way acted contrary to the law or in excess of its authority. (Emphasis added.)

This standard of review is regionally accepted and, is found in virtually every jurisdiction. Those in Utah's area that accept it are Kansas, Nebraska, Colorado, Nevada, California and Wyoming.

The terms arbitrary and capricious as used in the above-stated discussions have been qualified as "[W]ilfull and unreasonable actions without consideration and in disregard of the facts or circumstances and then but wherethere is room for two opinions action is not arbitrary and capricious when exercised honestly and upon due consideration." A review of the record will convince the Court that in fact, the Osteopathic Committee did employ the correct standard in the review of the evidence and that their findings were correct. The District Court stated in its decision (R. 250) that the Committee "[W]as unusually cautious in its findings . . . the record suggests that the Committee was conservative in its findings rather than otherwise and those findings entirely support the recommended order entered by the director." (Emphasis added.)

It should be noted that the Court below read the entire transcript numbering 1,189 pages, examined all the exhibits and extensive memoranda filed by both parties. (R 249-51.) The finding of the Court below was reflective of a complete

and thorough review of the action before the administrative body. The attempt by Appellant, at this point of the appeal process, to present a cursory and twisted set of excerpts from that voluminous transcript is nothing more than an attempt to cloud the real facts. The "complete" picture can only be seen after a complete review of the transcript as was made by the Appellate Court. As stated in Petty, supra, this court would have to find that the actions of the Committee were capricious and arbitrary or that the agency has in some way acted contrary to law or in excess of its authority. Appellant has not pointed out where this is found. The Osteopathic Committee took the matter into careful consideration and found from an exhaustive review of the evidence that Appellant was in fact guilty of unprofessional conduct and should have his license revoked.

CONCLUSION

Appellant is not entitled to an "Appeal De Novo." The issues raised in his brief have been argued and decided by the Appellate Court. This Court should not review "anew" those decisions.

The Osteopathic Committee of the State of Utah was the "appropriate tribunal" to review the evidence against Appellant. The appointment of Dr. Greenwood to sit on the Committee was made by Paul T. Fordham, Director of the Division of Registration. Through inadvertance on his part, the residency requirements were not checked. She was sworn in and acted in a highly professional manner. No objection has ever been raised as to her competence to sit on "peer review".

Dr. Greenwood acted under color of authority "de facto" and thus the decision (which had little or no relationship to residency anyway) must be upheld.

Appellant filed his appeal under Utah Code Ann. §58-12-35.1(5) and not under Utah Code Ann. §58-1-36. Counsel is confused. There is no "de novo" provided.

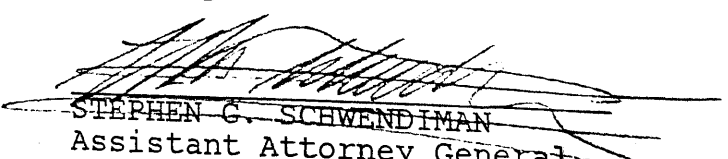
The Committee is the proper body to determine whether specific acts fall under the definition of "unprofessional conduct" as alleged and defined by the statute. No independent regulations listing the myriads of possibilities are necessary.

Appellant had a proper hearing. There was no denial of due process in any shape or form. Neither the Committee nor the Appellate (District) Court abused its discretion or acted arbitrarily. Certainly the evidence sustains the decision of the Committee.

THEREFORE, Respondents strongly urge this Court to sustain the decision of the Appellate Court upholding the revocation of Appellant's licenses and immediately lifting the stay of said Order that Appellant has been continuing under-- This for the health and safety of the public.

DATED this 12th day of April, 1982.

DAVID L. WILKINSON
Attorney General


STEPHEN C. SCHWENDIMAN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Brief to M. Richard Walker, Walker, Hintze & Washburn, Inc.. Attorneys at Law, Suite 202, 4685 Highland Drive, Salt Lake City, Utah 84117, this 12th day of April, 1982.

A handwritten signature in dark ink, appearing to be "M. Richard Walker", is written over a horizontal line.