

No. A06-1365

STATE OF MINNESOTA

IN COURT OF APPEALS

Fatih M. Uckun, M.D.,

Appellant,

vs.

Minnesota State Board of Medical Practice,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Did the Board violate procedural due process by not using clear and convincing evidence as the standard of proof in its order of January 27, 2006, that temporarily suspended Dr. Uckun's medical license until the Board issues a final decision on discipline after a contested case hearing?

The district court held that the Board complied with due process by using the preponderance of the evidence standard in its temporary suspension order.

In re Friedenson, 574 N.W.2d 463 (Minn. Ct. App. 1998),
rev. denied (Minn. Apr. 30, 1998)

In re Wang, 441 N.W.2d 488 (Minn. 1989)

State v. Alpine Air Prods., Inc., 500 N.W.2d 788 (Minn. 1993)

Barry v. Barachi, 443 U.S. 55, 99 S. Ct. 2642 (1979)

Minn. Stat. § 147.091, subd. 4 (2004)

- II. Did the district court err by dismissing Dr. Uckun's claim that procedural due process requires the Board to use clear and convincing evidence as the standard of proof in the ongoing contested case proceeding for a final decision on discipline regarding his medical license?

The district court did not address the threshold questions of exhaustion of administrative remedies and jurisdiction, and held that the preponderance of the evidence standard applies in any Board disciplinary proceedings regarding Dr. Uckun's license.

Thomas v. Ramberg, 240 Minn. 1, 60 N.W.2d 18 (1953)

Southern Minnesota Constr. Co. v. Minnesota Dep't of Transp., 637 N.W.2d 339 (Minn. Ct. App. 2002), *rev. denied* (Minn. Mar. 19, 2002)

Ellingson & Assocs., Inc. v. Keefe, 410 N.W.2d 857 (Minn. Ct. App. 1987)

In re Friedenson, 574 N.W.2d 463 (Minn. Ct. App. 1998),
rev. denied (Minn. Apr. 30, 1998)

Minn. R. 1400.7300, subp. 5 (2005)

- III. Did the Board release nonpublic information in the public version of its January 27, 2006 order temporarily suspending Dr. Uckun's license, in violation of Minn. Stat. § 147.01, subd. 4 (2004), and provisions of Minn. Stat. ch. 13 (2004)?

The district court held that the Board's public version of the temporary suspension order -- which released Dr. Uckun's name and business address, the nature of the misconduct, and the action taken by the Board -- did not violate any provision of Minn. Stat. ch. 147 or Minn. Stat. ch. 13.

Hyatt v. Anoka Police Dep't, 691 N.W.2d 824 (Minn. 2005)

Galbreath v. Gulf Oil Corp., 294 F. Supp. 817 (N.D. Ga. 1968),
aff'd, 413 F.2d 941 (5th Cir. 1969)

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Minneapolis Star & Tribune Co., 282 Minn. 86, 163 N.W.2d 46 (1968)

Minn. Stat. § 147.01, subd. 4(b) (2004)

Minn. Stat. § 147.02, subd. 6 (2004)

Minn. Stat. § 13.03, subd. 1 (2004)

STATEMENT OF THE CASE AND FACTS

On November 23, 2005, the Complaint Review Committee of the Minnesota Board of Medical Practice filed a petition seeking to have the Board temporarily suspend the license of Fatih M. Uckun, M.D. Appellant's Appendix ("App.") A4, ¶ 13. The Board held a hearing on the petition on January 21, 2006. *Id.* at ¶ 14.

On January 27, 2006, the Board issued an order temporarily suspending Dr. Uckun's license to practice medicine and surgery until the Board issues a final decision on discipline after a contested case hearing under the Administrative Procedure Act. App. A31. The Board took this action under Minn. Stat. § 147.091, subd. 4 (2004). App. A31. This statute provides as follows:

In addition to any other remedy provided by law, the board may, without a hearing, temporarily suspend the license of a physician if the board finds that the physician has violated a statute or rule which the board is empowered to enforce and continued practice by the physician would create a serious risk of harm to the public. The suspension shall take effect upon written notice to the physician, specifying the statute or rule violated. The suspension shall remain in effect until the board issues a final order in the matter after a hearing. At the time it issues the suspension notice, the board shall schedule a disciplinary hearing to be held pursuant to the Administrative Procedure Act. The physician shall be provided with at least 20 days' notice of any hearing held pursuant to this subdivision. The hearing shall be scheduled to begin no later than 30 days after the issuance of the suspension order.

Minn. Stat. § 147.091, subd. 4 (2004) (emphasis added).

In its order temporarily suspending Dr. Uckun's license, the Board used a probable cause standard and then the higher standard of preponderance of the evidence. App. A29-A31. The Board concluded that the evidence on the elements for a temporary

suspension satisfied the preponderance standard and also met the “evidence with heft” preponderance standard articulated by *In re Wang*, 441 N.W.2d 488, 492 (Minn. 1989). App. A30-A31. The Board rejected Dr. Uckun’s argument that the even higher standard of clear and convincing evidence applies for a temporary suspension. *Id.* at A29-A30.

The Board released limited information from its order temporarily suspending Dr. Uckun’s license, in the form of a public version of the order posted on the Board’s website. App. A5, ¶ 16; A32-A33; Respondent’s Appendix (“R. App.”) R7-R8. The public version of the order does not include the Board’s findings of fact and other information regarding the allegations and record in the matter. *See* App. A32-A33; R. App. R7-R8; Garry Aff. Exh. F (copy of “Order for Temporary Suspension [Non-Public Document]” filed under seal). The limited information that the Board released regarding the temporary suspension of Dr. Uckun’s license consists of his name and business address, the nature of the misconduct, and the action taken by the Board. App. A32-A33; R. App. R7-R8. The Board publicly released this information pursuant to Minn. Stat. §§ 147.01, subd. 4(b), and 147.02, subd. 6 (2004). R. App. R7.

The contested case proceeding for a final decision on discipline regarding Dr. Uckun’s license was commenced on February 3, 2006. Appellant’s Brief at 3. The contested case proceeding is currently ongoing before Administrative Law Judge George Beck, with hearings scheduled for September and October 2006. *Id.* Although Dr. Uckun complains in his brief about this hearing schedule, *see* Appellant’s Brief at 3-4, by statute and the terms of the Board’s temporary suspension order, Dr. Uckun could have chosen to have the contested case hearing begin within thirty days after the

January 27, 2006 issuance of the Board's temporary suspension order. *See* Minn. Stat. § 147.091, subd. 4 (2004); App. A31, ¶ 3.

Dr. Uckun commenced this lawsuit against the Board in Ramsey County District Court on February 3, 2006, raising three claims in his complaint. App. A1-A10 (Complaint). First, Dr. Uckun sought declaratory and injunctive relief to rescind the Board's temporary suspension order on the ground that procedural due process required the Board to use clear and convincing evidence as the standard of proof for the temporary suspension. *See* Complaint ¶¶ 4-6, 20, 23. Second, Dr. Uckun sought declaratory and injunctive relief requiring the Board to use the clear and convincing standard in the ongoing contested case proceeding for a final decision on discipline regarding his medical license, on the ground that procedural due process requires this heightened standard of proof in that proceeding. *See id.* at ¶¶ 5-6, 20, 23.¹ Third, Dr. Uckun claimed that release of the Board's public version of the temporary suspension order violated Minn. Stat. § 147.01, subd. 4 (2004), and sections of the Data Practices Act, Minn. Stat. ch. 13 (2004), and sought declaratory and injunctive relief and damages on this claim. *See* Complaint ¶¶ 4-7, 16, 26, 29, 32, 37.

¹ Contrary to Dr. Uckun's characterizations of the temporary suspension proceeding, the only due process violation he has claimed concerns the standard of proof used by the Board, not that he was denied sufficient notice and opportunity to be heard in the temporary suspension proceeding. *See* Garry Aff. Exh. F at 2-3. Dr. Uckun's due process claims regarding the standard of proof are asserted under both the Fourteenth Amendment of the United States Constitution and Article 1, § 7, of the Minnesota Constitution, Complaint ¶ 19, but he acknowledges that the scope of procedural due process is the same under both constitutions. *See* Appellant's Brief at 6.

In the ongoing contested case proceeding, Dr. Uckun brought a motion before the Administrative Law Judge on February 23, 2006, for an order declaring that clear and convincing evidence is the standard of proof applicable to that proceeding. R. App. R22. The Board's Complaint Review Committee opposed the motion. *Id.* On March 16, 2006, the ALJ issued an order denying Dr. Uckun's motion and ruling that the preponderance standard applies in the contested case proceeding. *Id.* at R22-R25.²

In the state court action, the Board moved to dismiss Dr. Uckun's complaint for failure to state a claim and lack of subject matter jurisdiction. R. App. R1. Dr. Uckun brought a motion for summary judgment on all his claims except for damages on his claim under the Data Practices Act. *Id.* at R3-R4. The district court, the Honorable Steven D. Wheeler, heard the cross-motions on May 9, 2006. App. A93.

In its order and memorandum dated June 30, 2006, the district court granted the Board's motion to dismiss and, based on the granting of this motion, denied Dr. Uckun's motion for summary judgment. App. A93-A98. The district court concluded that the Board complied with procedural due process by using preponderance of the evidence as the standard of proof in its temporary suspension order, rather than the higher standard of clear and convincing evidence. *Id.* at A95-A96. As to Dr. Uckun's claim that the clear

² The ALJ's order was filed under seal in the district court because the contested case proceeding is confidential pursuant to Minn. Stat. § 147.01, subd. 4 (2004). Dr. Uckun publicly released the ALJ's order by including it in the appendix to his petition for accelerated review. He also has disclosed when the contested case proceeding commenced and when scheduled hearings in that proceeding are being held. *See* Appellant's Brief at 3.

and convincing standard is required in the ongoing contested case proceeding for a final Board decision on discipline, the district court did not address the threshold questions of exhaustion of administrative remedies and jurisdiction raised in the Board's motion, and concluded that the preponderance of the evidence standard applies in any Board disciplinary proceedings regarding Dr Uckun's license. *Id.* at A96. With respect to Dr. Uckun's claim that the Board released nonpublic information regarding the temporary suspension of his license, the district court concluded that the Board's public version of its temporary suspension order did not release nonpublic information because Board statute requires release of the licensee's name and business address, the nature of the misconduct, and the action taken by the Board for a temporary license suspension. *Id.* at A96-A97. Judgment of dismissal on the district court's order was entered on July 17, 2006. *Id.* at A98.

Dr. Uckun filed his notice of appeal from the judgment on July 24, 2006. App. A99-A100. On August 10, 2006, the Board filed a notice of review on the issues of exhaustion of administrative remedies and jurisdiction. R. App. R36. The Minnesota Supreme Court denied Dr. Uckun's petition for accelerated review on August 23, 2006.

STANDARD OF REVIEW

The dismissal of a complaint for failure to state a claim is reviewed de novo. *See, e.g., Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). A motion to dismiss under Minn. R. Civ. P. 12.02 for failure to state a claim is properly granted if the complaint "does not state a cognizable claim or cause of action under the substantive law." 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 12.9,

at 310 (4th ed. 2002). The issue is whether the complaint sets forth a legally sufficient claim for relief, which is a question of law. *See, e.g., Bodah*, 663 N.W.2d at 553; *see also Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832 (1989) (stating that federal counterpart to Rule 12.02 “authorizes a court to dismiss a claim on the basis of a dispositive issue of law”).

Relevant facts alleged in the complaint are taken as true for purposes of determining whether the complaint states a claim, but legal assertions in the complaint need not be accepted as true. *See, e.g., Bodah*, 663 N.W.2d at 553; *see also Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986) (stating that on a motion to dismiss, the court is “not bound to accept as true a legal conclusion couched as a factual allegation”).

Statutory and constitutional interpretation are legal questions reviewed de novo. *See, e.g., State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006); *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993).

Whether the Court has subject matter jurisdiction over a claim is also a question of law. *See, e.g., World Championship Fighting, Inc. v. Janos*, 609 N.W.2d 263, 264 (Minn. Ct. App. 2000), *rev. denied* (Minn. July 25, 2000). A claim must be dismissed if the Court lacks subject matter jurisdiction to decide the claim. *See* Minn. R. Civ. P. 12.08(c) (stating that if the court lacks subject matter jurisdiction, “the court shall dismiss the action”). It likewise is a question of law whether the futility exception to the requirement of exhaustion of administrative remedies applies. *See, e.g., Leason v. Washington County*, 397 N.W.2d 867, 874 (Minn. 1986).

The public and nonpublic versions of the Board's temporary suspension order, submitted as exhibits by the Board, were properly considered by the district court on the motion to dismiss because they are referenced in the complaint and are central to Dr. Uckun's claims. *See, e.g., Brown v. State*, 617 N.W.2d 421, 424 (Minn. Ct. App. 2000) (recognizing that court may consider such documents on motion to dismiss), *rev. denied* (Minn. Nov. 21, 2000), *cert. denied*, 532 U.S. 995 (2001); Herr & Haydock, *supra*, § 12.9, at 312 (same). The district court's consideration of these documents did not convert the Board's motion to dismiss to a motion for summary judgment. *See In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995).

ARGUMENT

I. DR. UCKUN'S CHALLENGE TO THE BOARD ORDER TEMPORARILY SUSPENDING HIS LICENSE FAILS BECAUSE, UNDER BINDING PRECEDENT, DUE PROCESS DID NOT REQUIRE THE BOARD TO USE THE CLEAR AND CONVINCING STANDARD OF PROOF.

In its order temporarily suspending Dr. Uckun's medical license under Minn. Stat. § 147.091, subd. 4 (2004), the Board used a probable cause standard and then the higher standard of preponderance of the evidence in concluding that the required elements for a temporary suspension had been shown. App. A29-A31. The first claim in Dr. Uckun's complaint seeks declaratory and injunctive relief rescinding the Board's temporary suspension order on the ground that procedural due process required the Board to use the even higher standard of clear and convincing evidence. *See* Complaint ¶¶ 4-6, 20, 23 (App. A2, A5-A6). Thus, the sole issue on this first claim is whether procedural due process required the Board to use the highest civil standard of clear and convincing

evidence as the standard of proof, rather than the preponderance standard, in temporarily suspending Dr. Uckun's license pending a final decision by the Board after a contested case hearing.

A. Dr. Uckun's Argument Regarding Use Of A Probable Cause Standard Is Irrelevant.

Dr. Uckun argues that due process prohibits the Board from using a probable cause standard of proof to temporarily suspend a physician's license under section 147.091, subd. 4. *See* Appellant's Brief at 20-23. This argument is irrelevant in this case and, as such, should not be addressed by the Court, just as the district court properly declined to address it.

As Dr. Uckun acknowledges, in the order temporarily suspending his license, the Board ultimately concluded that the evidence on the required elements for a temporary suspension was sufficient to meet the preponderance of the evidence standard. *See* Appellant's Brief at 3. This necessarily means that the Board's order could not violate due process as to the standard of proof unless a standard beyond preponderance of the evidence were required. Thus, Dr. Uckun's challenge to the Board's temporary suspension order can succeed only if due process required the Board to apply the even higher standard of clear and convincing evidence, which Dr. Uckun claims is constitutionally required in any Board disciplinary proceeding against a physician.

Dr. Uckun incorrectly contends that the Court nevertheless should address the constitutionality of the Board using a probable cause standard based on his complaint's allegation that the Board will use the probable cause standard "in subsequent

administrative proceedings regarding the [January 27, 2006] Suspension Order.” Appellant’s Brief at 26 (quoting complaint at ¶ 18). The probable cause standard will not be used in the subsequent, ongoing contested case proceeding for a final decision in Dr. Uckun’s case because the ALJ has ordered that the preponderance standard applies in the proceeding. R. App. R22-R25. Nor did the Complaint Review Committee of the Board argue otherwise. *See id.*

Dr. Uckun’s complaint does not allege that the Board will use a probable cause standard in other temporary license suspension cases under section 147.091, subd. 4. Nonetheless, on appeal Dr. Uckun incorrectly suggests that the Board frequently orders temporary license suspensions, such that the Court should reach out and decide whether a probable cause standard would be constitutional for these suspensions. *See* Appellant’s Brief at 24-25. The Board’s most recent biennial report, on which Dr. Uckun relies for this erroneous suggestion, states that the Board issued no temporary suspension orders in fiscal years 2003 and 2004. App. A116.

In short, like the district court, this Court need not and should not decide whether the Board’s use of a probable cause standard for the temporary suspension of Dr. Uckun’s license would have sufficed to satisfy due process, because the Board ultimately concluded that the evidence on the required elements for a temporary suspension was sufficient to meet the higher standard of preponderance of the evidence.³

³ Moreover, if use of a probable cause standard for a temporary suspension under section 147.091, subd. 4, were reviewed, the initial issue would not be due process, but whether the statute permits that standard, so as to decide a constitutional issue only if necessary.

B. Dr. Uckun's Due Process Challenge To The Temporary Suspension Order Is Foreclosed By Binding Precedent.

Dr. Uckun's claim that procedural due process required the Board to use the clear and convincing standard of proof is foreclosed by binding precedent. This precedent establishes that the clear and convincing standard does not apply to temporary suspension or other disciplinary proceedings before the Board. Accordingly, the district court properly dismissed Dr. Uckun's claim challenging the temporary suspension order.

In the case of *In re Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998), *rev. denied* (Minn. Apr. 30, 1998), this Court held that the preponderance of the evidence standard applies in proceedings for a final disciplinary decision by the Board. *Friedenson* expressly rejected the physician's claim that "constitutional strictures" require the Board to use the "clear and convincing" standard of proof, rather than the preponderance standard, in such proceedings. *Id.* As confirmed by the appellate briefs in *Friedenson*, the only constitutional claim, indeed the only argument of any kind, that the physician in *Friedenson* made for the clear and convincing standard was procedural due process. R. App. R9-R21 (copies of excerpts of these briefs). Thus, in *Friedenson* this Court necessarily rejected the same due process claim that Dr. Uckun makes here in challenging the Board's temporary suspension order. *See also* Order and Memorandum of ALJ, OAH Docket No. 1-0903-17095-2 (March 16, 2006) (R. App. R24-R25) (recognizing and adhering to *Friedenson's* holding that due process does not require the Board to use the clear and convincing standard, rather than the preponderance standard, in contested case proceeding for a final decision). Therefore, the district court correctly

rejected Dr. Učkun's due process claim because, like this Court, it is bound by the holding in *Friedenson*. See *Percy v. Hofius*, 370 N.W.2d 490, 491 (Minn. Ct. App. 1985) (stating that "a trial court must follow controlling case law").

Moreover, *Friedenson* addressed a final disciplinary decision by the Board to revoke a physician's license after a contested case hearing. 574 N.W.2d at 465-68. The required standard of proof in a summary proceeding for a temporary suspension cannot be higher than the standard of proof for a final decision on discipline after an evidentiary hearing. See *Barry v. Barachi*, 443 U.S. 55, 64-66, 99 S. Ct. 2642, 2649-50 (1979) (holding that use of probable cause standard for temporary suspension of harness racing trainer's license, pending an adversarial evidentiary hearing, did not violate due process); *Friedenson*, 574 N.W.2d at 465-66 (recognizing that the requirements of due process are no greater for the Board's temporary suspension of a physician's license than for a final decision after a contested case hearing). Thus, given *Friedenson's* holding that due process does not require a standard higher than preponderance of the evidence for a final Board decision on discipline after a contested case hearing, the Board necessarily did not violate due process by basing its temporary suspension of Dr. Uckun's license on the preponderance standard.

In Minnesota, the only professional disciplinary proceedings in which the clear and convincing standard applies are attorney discipline cases. *In re Wang*, 441 N.W.2d 488, 492 n.5 (Minn. 1989). "Attorney discipline proceedings, under the supervision and control of the judiciary, are sui generis." *Id.* In other professional disciplinary

proceedings, the most that is required is a preponderance of the evidence “with heft.” *Id.* at 492 (holding that preponderance standard applies in dentist disciplinary proceedings).

Based on *Wang*, this Court has rejected the argument that equal protection requires use of the clear and convincing standard in disciplinary proceedings involving professionals other than attorneys, because there is “a rational basis for employing the clear and convincing standard in attorney licensing proceedings and the preponderance of the evidence standard in other licensing proceedings.” *In re Kane*, 473 N.W.2d 869, 874 (Minn. Ct. App. 1991) (holding that preponderance standard applies in disciplinary proceedings regarding insurance licenses), *rev. denied* (Minn. Sept. 25, 1991); *see also In re Gammell*, No. C4-97-320, 1997 WL 561269, at *1 (Minn. Ct. App. Sept. 9, 1997) (concluding same as to physician licenses based on *Wang*) (R. App. R26), *rev. denied* (Minn. Nov. 13, 1997); *In re Andre*, No. C2-91-223, 1991 WL 166018, at *1 (Minn. Ct. App. Sept. 3, 1991) (same) (R. App. R29), *rev. denied* (Minn. Oct. 31, 1991).

The decisions in *Friedenson* and *Wang* are in accord with the United States Supreme Court, which “has read the Due Process Clause to require the higher [clear and convincing] standard of proof in a small class of cases involving particularly important individual interests.” *State v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791 (Minn. 1993); *see also id.* at 791-93 (holding that due process does not require use of the clear and convincing standard in consumer fraud cases, but rather use of the preponderance standard in such cases comports with due process). The United States Supreme Court has required the clear and convincing standard in proceedings for permanent termination of parental rights, indefinite involuntary commitment for mental illness, deportation, and

revocation of citizenship. *Id.* at 791 (collecting cases); *see also Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 280-84, 110 S. Ct. 2841, 2852-54 (1990) (upholding use of the clear and convincing standard in proceedings for withdrawal of life-sustaining treatment).

This “small class of cases” in which the United States Supreme Court has required the clear and convincing standard does not include administrative proceedings to suspend or revoke a professional license. As in *Friedenson* and *Wang*, the United States Supreme Court has not required the clear and convincing standard in such proceedings, even where the disciplinary action can result in the loss of one’s profession. *See Steadman v. Securities & Exchange Comm’n*, 450 U.S. 91, 92-95, 103-04, 101 S. Ct. 999, 1003-04, 1009 (1981); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390, 103 S. Ct. 683, 691 (1983) (stating that in *Steadman* “we upheld use of the preponderance standard in SEC administrative proceedings concerning alleged violations of the antifraud provisions” where “[t]he sanctions imposed in the proceedings included an order permanently barring an individual from practicing his profession”).

Moreover, in consistently applying the preponderance standard in medical and other professional disciplinary proceedings, this Court has cited *In re Polk*, 449 A.2d 7 (N.J. 1982), where the New Jersey Supreme Court rejected the claim that due process requires use of the clear and convincing standard in medical disciplinary cases. *Id.* at 12-17; *Kane*, 473 N.W.2d at 874 (citing *Polk*); *In re Schultz*, 375 N.W.2d 509, 514 (Minn. Ct. App. 1985) (same). The majority of other states do not require use of the clear and convincing standard in medical disciplinary proceedings. *See Nguyen v. State*,

29 P.3d 689, 707 n.10 (Wash. 2001) (dissenting opinion) (listing jurisdictions), *cert. denied*, 535 U.S. 904 (2002); *see also Granek v. Texas State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. Ct. App. 2005) (rejecting request to hold that due process requires clear and convincing standard in medical disciplinary cases based on asserted “trend” in other states).

In any event, in holding that due process does not require the clear and convincing standard in disciplinary proceedings before the Board, *Friedenson* rejected the physician’s reliance on contrary decisions from other states. *See Friedenson* 574 N.W.2d at 466; R. App. R9-R15 (physician’s brief in *Friedenson*).⁴ As noted, this Court is bound by its holding in *Friedenson* that due process does not require the Board to use the clear and convincing standard for a final decision on discipline of a physician’s license, which necessarily means this higher standard is not required for a temporary suspension order.

C. Apart From Binding Precedent, Dr. Uckun’s Due Process Challenge To The Temporary Suspension Order Fails To State A Claim.

Moreover, aside from *Friedenson*, Dr. Uckun’s challenge to the Board’s temporary suspension order fails because he has not shown that a balancing of due process interests requires the clear and convincing standard in a Board temporary suspension proceeding. Dr. Uckun’s argument focuses on such interests with respect to a contested case proceeding for a final decision to suspend or revoke a physician’s license,

⁴ Dr. Uckun’s brief relies on some of the same cases from other states that were cited by the physician in *Friedenson* and rejected by this Court. *See* Appellant’s Brief at 9, 17 (citing cases from Mississippi and Nebraska); R. App. R13 (physician’s brief in *Friedenson*) (citing same).

not as to a temporary suspension proceeding. *See* Appellant's Brief at 9, 12-13, 15. Under the temporary suspension statute, a physician has the right, unless waived, to a contested case hearing under the Administrative Procedure Act to begin "no later than 30 days after the issuance of the suspension order." Minn. Stat. § 147.091, subd. 4. Thus, the effect on the physician's license and the weight of the interest in avoiding an erroneous license deprivation are less in this context, as compared to a proceeding for a final decision on license suspension or revocation, because the inability to practice medicine is temporary and subject to correction by a full evidentiary hearing available to be held within thirty days, with all the rights and protections provided by the APA. Furthermore, the statute permits a temporary suspension only if the Boards finds that "continued practice by the physician would create a serious risk of harm to the public." *Id.* Thus, the already strong governmental interest in protecting the public is heightened in a temporary suspension case. *See also* Minn. Stat. § 147.001 (2004) (stating that "[t]he primary responsibility and obligation of the Board of Medical Practice is to protect the public" in particular "from the unprofessional, improper, incompetent and unlawful practice of medicine"). In short, apart from being foreclosed by *Friedenson*, Dr. Uckun's due process challenge to the Board's temporary suspension order fails because he has not shown that a balancing of interests with respect to a temporary license suspension requires use of the clear and convincing evidence standard.

Indeed, Dr. Uckun cites no case, from any jurisdiction, that has held due process requires the clear and convincing standard in proceedings for temporary suspension of a physician's license. This is because it is well established that due process does not

require the highest civil standard of clear and convincing evidence as the standard of proof in a summary proceeding for a temporary suspension. *See Barry*, 443 U.S. at 64-66, 99 S. Ct. at 2649-50.

In sum, based on binding precedent, the Court should reject Dr. Uckun's due process challenge to the temporary suspension of his medical license. Accordingly, the Court should affirm the dismissal of Dr. Uckun's claim for declaratory and injunctive relief to rescind the Board's temporary suspension order.

II. DR. UCKUN HAS NOT EXHAUSTED ADMINISTRATIVE REMEDIES, AND JURISDICTION IS LACKING, FOR HIS CLAIM THAT DUE PROCESS REQUIRES THE BOARD TO USE THE CLEAR AND CONVINCING STANDARD OF PROOF FOR A FINAL DECISION ON DISCIPLINE AND, IF THE MERITS OF THIS CLAIM ARE REACHED, IT LIKEWISE FAILS UNDER BINDING PRECEDENT.

The second claim in Dr. Uckun's complaint seeks declaratory and injunctive relief requiring the Board to use the clear and convincing standard in the ongoing contested case proceeding for a final decision on discipline regarding his medical license, on the ground that procedural due process requires this heightened standard of proof in such proceedings. *See* Complaint ¶¶ 5-6, 20, 23 (App. A2, A5-A6). This claim fails on the merits because of the binding precedent of *Friedenson* and the other authorities discussed above. The Court need not, however, reach the merits of Dr. Uckun's request for relief as to the standard of proof in the ongoing contested case proceeding, because this claim fails from the outset based on the doctrine of exhaustion of administrative remedies and also for lack of jurisdiction due to being premature. The proper manner for Dr. Uckun to seek judicial review of this claim is on appeal from the Board's final decision on discipline after the contested case hearing, if the decision is adverse to Dr. Uckun.

A. This Claim By Dr. Uckun Fails From The Outset Based On The Exhaustion Doctrine And Lack Of Jurisdiction.

It is settled law that a party to agency administrative proceedings may not seek judicial relief against the threatened or actual acts of the agency until the party has exhausted available administrative remedies, unless the party will suffer irreparable harm from pursuit of the administrative remedies. *Thomas v. Ramberg*, 240 Minn. 1, 4-7, 60 N.W.2d 18, 20-22 (1953); *State ex rel. Sheehan v. District Court*, 253 Minn. 462, 466-68, 93 N.W.2d 1, 4-6 (1958), *cert. denied*, 359 U.S. 909 (1959). The expense of pursuing an issue in the administrative proceedings, or apprehension that the issue will be decided adversely by the agency, does not constitute irreparable harm warranting judicial review of the issue before completion of the administrative proceedings. *Id.*

In addition, the courts do not have jurisdiction under the Declaratory Judgment Act to decide an issue in an ongoing contested case proceeding before the agency has issued any final order or decision. *Southern Minnesota Constr. Co. v. Minnesota Dep't of Transp.*, 637 N.W.2d 339, 343-44 (Minn. Ct. App. 2002) (noting that the Act “does not provide for declaratory judgment of rights before the agency has made its determinations”) (footnote omitted), *rev. denied* (Minn. Mar. 19, 2002). Thus, the Court lacks jurisdiction to decide Dr. Uckun’s claim as to the required standard of proof for a final Board decision on discipline because the claim is premature.

Under these established principles, Dr. Uckun may not seek judicial review now of the required standard of proof in the ongoing contested case proceeding. Rather, he must seek that review in this Court after the contested case proceeding is completed by

appealing the Board's final decision on discipline if the decision is adverse. Contested case proceedings are conducted under the Administrative Procedure Act. They provide for an evidentiary hearing before an administrative law judge, a decision by the Board after receiving the ALJ's written report and any exceptions to the report and hearing argument, and then review as of right in this Court if the licensee is aggrieved by the Board's decision. Minn. Stat. §§ 14.48-.69 (2004 & Supp. 2005); Minn. R. 1400.5010-.8400 (2005); *Friedenson*, 547 N.W.2d at 465. As to the standard of proof for a final disciplinary decision, the licensee can bring a motion to have this issue decided by the ALJ and/or the Board before the contested case evidentiary hearing begins or have it decided by the Board, if necessary, after the hearing is completed and the ALJ's report is submitted. See Minn. R. 1400.6600, 1400.7600 (2005); see also, *X.Y.Z., M.D. v. Minnesota Bd. of Med. Prac.*, Order, Nos. C5-96-784, C7-96-785, at 2 (Minn. Ct. App. May 15, 1996) (denying physician's petition for writ of prohibition and stating that physician's argument regarding "the standard of proof [is] more appropriately raised during the contested case proceeding before the administrative law judge") (App. A129).

There is no question that the ALJ and the Board have the power to decide this standard of proof issue raised by Dr. Uckun, as he is not challenging the constitutionality of an agency statute or rule. See 21 William J. Keppel, *Minnesota Practice* § 13.02.2, at 403 (1998) (noting that exhaustion of administrative remedies might not be required when "the basic statute or regulation under which the agency purports to act is challenged as unconstitutional," but exhaustion is required for a claim of "an unconstitutional application of a statute or regulation"); *McKee v. County of Ramsey*, 310 Minn. 192, 196,

245 N.W.2d 460, 463 (1976) (recognizing this distinction and that exhaustion is required as to “the issue of whether an administrative agency constitutionality applied its governing statutes”); *see also Thomas*, 240 Minn. at 6, 60 N.W.2d at 21 (“Minnesota cases uniformly hold that administrative action which has not reached a stage causing plaintiff irreparable injury cannot be enjoined even though the anticipated decision of the administrative agency is questioned on constitutional grounds.”) (footnote omitted).⁵ In particular, Dr. Uckun does not challenge the constitutionality of Minn. R. 1400.7300, subp. 5 (2005), which requires that preponderance of the evidence is the standard of proof in contested case hearings “unless the substantive law provides a different burden or standard.” *Id.* Rather, he argues that this rule should be read as requiring use of the clear and convincing standard for a final Board disciplinary decision because due process, as substantive law, mandates that higher standard. *See Appellant’s Brief* at 19.

Thus, like the physician in *Friedenson*, Dr. Uckun can argue this standard of proof issue to the ALJ and then to the Board. Indeed, he has already argued this issue to the ALJ in a pre-hearing motion, thereby acknowledging the power of the ALJ and the Board to decide the issue. R. App. R22-R24. If the Board’s final decision imposes no

⁵ Dr. Uckun is incorrect to the extent he now suggests, on page 27 of Appellant’s Brief, that *Connor v. Township of Chanhassen*, 249 Minn. 205, 208-09, 81 N.W.2d 789, 793-94 (1957), holds exhaustion is not required in a case such as this simply because his claim raises a constitutional issue. *Connor* is consistent with other Minnesota case law because it held only that exhaustion was not required for a constitutional challenge to a city ordinance. Likewise, neither of the two federal cases cited on page 27 of Appellant’s Brief holds that a Minnesota state agency lacks the power to decide constitutional issues which do not challenge the validity of an agency statute or rule.

discipline, judicial review of the standard of proof for that decision would be unnecessary. If Dr. Uckun receives an adverse final decision on discipline from the Board, he can obtain judicial review as of right in this Court, where he can argue the standard of proof issue on a full evidentiary record. If this Court's decision is adverse, Dr. Uckun may then petition the Minnesota Supreme Court for further review.

Dr. Uckun identifies no harm to him, much less any irreparable harm, by having this standard of proof issue decided in the ongoing contested case proceeding and then reviewed on appeal in the event of an adverse final Board decision. Instead, he is in effect seeking an impermissible direct and premature judicial review by this Court of the ALJ's order that the preponderance standard applies in the contested case proceeding, before the contested case hearing is completed and the Board makes a final decision.

In the district court, Dr. Uckun erroneously argued that the exhaustion requirement does not apply to his claim that due process requires the Board to use the clear and convincing standard for a final decision on discipline, based on the futility exception to the exhaustion doctrine. He asserted that it would be futile for him to argue this due process issue to the Board because the Board applied the preponderance standard in its temporary suspension order. *See* Pl.'s Resp. Mem. (Apr. 28, 2006) at 4-5.⁶

Dr. Uckun's futility argument fails because where, as here, it is based on an assertion that the administrative body has predetermined an issue, the futility exception

⁶ On appeal, Dr. Uckun inexplicably argues the exhaustion issue as to his due process claim regarding the standard of proof for the Board's temporary suspension order. *See* Appellant's Brief at 26-27. The Board never argued that exhaustion of administrative remedies applies to that claim.

applies when the administrative body has “unequivocally committed” itself to a position on the issue. *Ellingson & Assocs., Inc. v. Keefe*, 410 N.W.2d 857, 860 (Minn. Ct. App. 1987); see also *In re Board Order, Kells (BWSR)*, 597 N.W.2d 332, 339 (Minn. Ct. App. 1999) (recognizing that a party’s belief he would be unsuccessful if he pursued an issue before the administrative body does not meet the futility exception). The Board’s application of the preponderance standard in its temporary suspension order does not commit the Board to rejecting a higher standard of proof for a final decision on discipline in the pending contested case proceeding. Thus, this is not a case where the Board has unequivocally committed itself to a determination of the issue such that the futility exception applies. Compare *State Bd. of Med. Exam’rs v. Olson*, 295 Minn. 379, 387, 206 N.W.2d 12, 17 (1973) (holding that futility exception applied because, in lawsuit brought by the Board, it and the Chiropractic Board had unequivocally committed themselves to their differing positions).

Indeed, Dr. Uckun’s futility argument is refuted by the fact that he brought a motion to the ALJ for a decision on the standard of proof in the ongoing contested case proceeding, knowing that the ALJ’s ruling is subject to review by the Board. Dr. Uckun would not have brought this motion if it actually were futile to argue to the Board that it should apply the clear and convincing standard for its final decision on discipline.

If asking the ALJ and the Board to decide the due process issue of the standard of proof for a final disciplinary decision is futile, that is only because the issue is foreclosed by *Friedenson*, in which case this claim by Dr. Uckun necessarily fails on the merits. If the issue is not foreclosed by Minnesota case law, then it is as open for the Board to

decide as for the courts, in which case the exhaustion doctrine clearly bars Dr. Uckun's claim for relief as to the standard of proof for a final Board disciplinary decision.

As to the lack of jurisdiction for this claim, Dr. Uckun missed the point by arguing that jurisdiction exists because his asserted rights have been affected by the Board's temporary suspension of his license under what he contends is an improper standard of proof for that action. *See* Pl.'s Resp. Mem. (Apr. 28, 2006) at 6. With respect to the subsequent issue of the standard of proof for a final disciplinary decision, there is no effect on Dr. Uckun unless and until the Board's final decision imposes discipline on him, in which case he can obtain judicial review as of right in this Court. Thus, jurisdiction is lacking because judicial review of this second standard of proof issue is premature at this point. Indeed, Dr. Uckun cites no case that has permitted a party to an ongoing contested case proceeding for a final agency decision to obtain a judicial ruling on the applicable standard of proof before the agency makes its final decision.

For these reasons, Dr. Uckun's second due process claim, seeking an order on the standard of proof for a final Board decision in the pending contested case proceeding, fails from the beginning as a matter of law because he has not exhausted administrative remedies and, in addition, because jurisdiction is lacking for this premature claim.

B. If The Merits Are Reached, Binding Precedent Forecloses Dr. Uckun's Due Process Claim That The Board Must Use The Clear And Convincing Standard For A Final Decision On Discipline.

If the Court reaches the merits, *Friedenson* forecloses Dr. Uckun's claim that due process requires the Board to use clear and convincing evidence as the standard of proof in the ongoing contested case proceeding for a final disciplinary decision. As previously

discussed, *supra* pp. 12-13, this Court held in *Friedenson*, 574 N.W.2d at 466, that the preponderance of the evidence standard applies in proceedings for a final disciplinary decision by the Board and rejected the physician's argument that the constitutional strictures of due process require the clear and convincing evidence standard to be used in such proceedings. Thus, as to the merits, the district court correctly rejected Dr. Uckun's claim for declaratory and injunctive relief that would require the Board to use the clear and convincing standard for a final decision on discipline regarding his license.

Dr. Uckun mistakenly argued in the district court that *Friedenson* is not precedent on this due process issue, *see* Pl.'s S.J. Mem. (Mar. 28, 2006) at 25-27, and he appears to take the same position on appeal. *See* Appellant's Brief at 18 & n.3. Dr. Uckun's argument requires the untenable conclusion that, in rejecting the physician's claim that the clear and convincing evidence standard is constitutionally required, this Court decided nothing in *Friedenson*. The only possible constitutional grounds for arguing that this standard is required in professional disciplinary cases are equal protection, based on comparison to attorney discipline cases, and due process, based on a protected interest in the professional license. The equal protection argument was rejected in Minnesota before the *Friedenson* decision, by *In re Kane*, 473 N.W.2d 869, 874 (Minn. Ct. App. 1991), *rev. denied* (Minn. Sept. 25, 1991). The only constitutional argument made in *Friedenson* was due process, based on the protected interest in a medical license. *See* R. App. R9-R21. Therefore, to have any meaning, *Friedenson's* rejection of the claim that "constitutional strictures on the proceeding" require the clear and convincing standard, 574 N.W.2d at 466, can only be understood as rejecting the claim that

procedural due process requires this heightened standard of proof in a physician disciplinary proceeding.

In the district court, Dr. Uckun relied on inapposite cases to assert that *Friedenson* does not constitute precedent foreclosing his due process claim. He cited *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 149 (1925), and other cases which apply the principle that an appellate decision is not precedent on an issue that was not briefed and discussed in the opinion or the principle that the authority of an appellate decision does not extend beyond its controlling facts. See Pl.'s S.J. Mem. (Mar. 28, 2006) at 26. Neither of these principles applies to prevent *Friedenson* from constituting precedent on the issue of whether due process requires the Board to use the clear and convincing standard of proof in physician disciplinary proceedings. As already noted, the physician in *Friedenson* briefed this due process issue on appeal, as his sole claim for the clear and convincing standard, and this Court rejected that claim in its opinion. It also is clear that *Friedenson* addressed the factual situation of a final disciplinary decision by the Board to revoke a physician's license after a contested case hearing. *Friedenson*, 574 N.W.2d at 465-68. Thus, the principles for non-precedence cited by Dr. Uckun simply do not apply here. See, e.g., *Bingham v. United States*, 296 U.S. 211, 218-19, 56 S. Ct. 180, 181 (1935) (distinguishing *Webster v. Fall* on the basis that the issue in question was briefed in a prior case and addressed by the opinion in the prior case under a fair reading of the opinion); *Nadeau v. Melin*, 260 Minn. 369, 375, 110 N.W.2d 29, 34 (1961) ("A decision must be construed in the light of the issue before the court.").

The principle of *stare decisis* binds this Court to follow its own decisions. See *State v. DeShay*, 645 N.W.2d 185, 189 (Minn. Ct. App. 2002), *aff'd*, 669 N.W.2d 878 (Minn. 2003). Dr. Uckun's contentions amount to asking this Court to violate that principle by concluding that it incorrectly rejected the due process claim in *Friedenson*. There is no reason here, much less a compelling one, for the Court to overrule its decision in *Friedenson*. As discussed *supra* pp. 13-15, the holding in *Friedenson* follows and is in accord with *In re Wang*, 441 N.W.2d 488, 492 & n.5 (Minn. 1989), and other Minnesota decisions, which have consistently applied the preponderance standard in medical and other professional disciplinary proceedings. Moreover, as was noted above, if this due process claim by Dr. Uckun is not foreclosed by Minnesota case law, then it is as open for the Board to decide as for this Court, in which case Dr. Uckun's claim for relief as to the standard for a final disciplinary decision is plainly barred by the exhaustion doctrine.

In sum, if the merits of Dr. Uckun's due process claim as to the standard of proof for a final decision on discipline are reached, the claim fails based on the controlling precedent of *Friedenson*, supported by the longstanding Minnesota and United States Supreme Court case law with which *Friedenson* is in accord.

C. If The Court Reaches The Merits And This Due Process Claim By Dr. Uckun Is Not Foreclosed By Precedent, The Court Should Reject The Claim As Based On Unpersuasive Decisions From Other States.

If the Court nevertheless concludes that it can and should decide Dr. Uckun's due process claim for the standard of proof in the ongoing contested case proceeding for a final disciplinary decision, as presenting an open question which is not barred by the exhaustion doctrine and lack of jurisdiction, it should reject Dr. Uckun's reliance on

selected cases from other states. Dr. Uckun's argument ultimately rests on such cases because no Minnesota or United States Supreme Court decision has ever held that due process requires the clear and convincing standard for a final decision in physician disciplinary proceedings.

In essence, Dr. Uckun's argument asks the Court to adopt the reasoning of the courts in Washington, Wyoming, and Oklahoma to conclude that, under a balancing of interests, due process requires the clear and convincing standard for a final decision in medical disciplinary proceedings.⁷ The results in these cases are inconsistent with the established law of Minnesota and the decisions of the United States Supreme Court discussed above. *See supra* pp. 13-15; *see also* Minn. R. 1400.7300, subp. 5 (2005) (requiring that preponderance of the evidence is the standard of proof in contested case hearings unless the substantive law provides a different standard).

The decisions from other states that are consistent with Minnesota and United States Supreme Court case law have concluded that the preponderance standard satisfies due process for a final decision in physician disciplinary proceedings, and in so doing recognize that: (1) a physician's interest in his license is at most a property interest and does not rise to a fundamental right; (2) this interest of the physician is subordinate to the strong interest and obligation of the State to protect the public; and (3) ample safeguards are provided by contested case procedures and the expertise of the medical board in such

⁷ *See* Appellant's Brief at 9-17 (relying on *Nguyen v. State*, 29 P.3d 689 (Wash. 2001), *cert. denied*, 535 U.S. 904 (2002); *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000); and *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339 (Okla. 1996)).

matters. See *In re Polk*, 449 A.2d 7, 12-17 (N.J. 1982); *Gandhi v. State Med. Exam'ing Bd.*, 483 N.W.2d 295, 298-300 (Wis. Ct. App. 1992), *rev. denied* (Wis. June 8, 1992). In addressing procedural due process, this Court has otherwise stressed that a physician's "right to practice medicine is not absolute," is "subject to strict regulation under the state's police power," and "must yield to the state's power to prescribe reasonable rules and regulations in order to protect the state's people from incompetent and unfit practitioners." *Humenansky v. Minnesota Bd. of Med. Exam'rs.*, 525 N.W.2d 559, 566-67 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 14, 1995). Thus, if it reaches the issue, the Court should reject Dr. Uckun's argument that Minnesota should now follow the reasoning of certain contrary decisions from other states that have adopted the clear and convincing standard for final decisions in physician disciplinary proceedings.

In sum, the Court should reject Dr. Uckun's claim for declaratory and injunctive relief requiring the Board to use the clear and convincing standard of proof for a final decision on discipline in the ongoing contested case proceeding. This claim fails from the outset because Dr. Uckun has not exhausted administrative remedies and, in addition, because jurisdiction is lacking due to the claim being premature. If the Court nevertheless reaches the merits, the claim fails under *Friedenson's* holding that the preponderance standard satisfies due process for a final Board disciplinary decision after a contested case hearing, a holding that is supported by established Minnesota case law and the decisions of the United States Supreme Court, as well as the better reasoned decisions from other states. Accordingly, the Court should also affirm the dismissal of the second due process claim asserted in Dr. Uckun's complaint.

III. THE BOARD DID NOT VIOLATE ITS STATUTES OR THE DATA PRACTICES ACT BY RELEASING DR. UCKUN'S NAME AND BUSINESS ADDRESS, THE NATURE OF THE MISCONDUCT, AND THE ACTION TAKEN BY THE BOARD FOR THE TEMPORARY SUSPENSION OF HIS LICENSE.

Dr. Uckun's final claim is that the Board's public release of information that his license has been temporarily suspended was unlawful, entitling him to declaratory and injunctive relief and damages. *See* Complaint ¶¶ 5-7, 29, 32, 37 (App. A2-A3, A6-A8). The limited information that the Board released from its temporary suspension order, in the form of a public version of the order, consists of Dr. Uckun's name and business address, the nature of the misconduct, and the action taken by the Board. App. A32-A33; R. App. R7-R8. Dr. Uckun claims that the release of this information regarding his temporary suspension violated sections of the Data Practices Act, Minn. Stat. ch. 13 (2004), and Minn. Stat. § 147.01, subd. 4 (2004) of the Board statutes, on the ground that these provisions prohibit the Board from releasing any information regarding an interim disciplinary decision of the Board. *See* Complaint ¶¶ 4, 16, 26 (App. A2, A5-A6).

Dr. Uckun's claim fails because the limited information released by the Board regarding the temporary suspension of his license is classified as public data by Minn. Stat. § 147.01, subd. 4(b) (2004), and affirmatively required to be published by Minn. Stat. § 147.02, subd. 6 (2004). Because the information is made public by these controlling Board statutes, its release also does not violate the Data Practices Act. *See* Minn. Stat. § 13.03, subd. 1 (2004) (providing that government data is public unless classified as nonpublic by state statute or federal law). To conclude otherwise would lead to absurd results that prevent the public from being informed that a physician's license

has been temporarily suspended, even though the Board has found that the physician's continued practice creates a serious risk of harm. Thus, the Court should affirm the district court's dismissal of Dr. Uckun's claim that the Board released nonpublic information regarding his temporary suspension, and with it Dr. Uckun's summary judgment motion for declaratory and injunctive relief on this claim.

A. Dr. Uckun's Claim That The Board Released Nonpublic Information Disregards The Plain Statutory Language, Violates Principles Of Statutory Construction, And Leads To Absurd Results.

Section 147.01, subd. 4, states that "all communications or information received by or disclosed to the [B]oard [of Medical Practice] relating to any person or matter subject to its regulatory jurisdiction are confidential and privileged and any disciplinary hearing shall be closed to the public," subject to the exceptions listed in the subdivision. Minn. Stat. § 147.01, subd. 4 (2004). The exception in subdivision 4(b) of the statute provides as follows:

If the board imposes disciplinary measures of any kind, whether by contested case or by settlement agreement, the name and business address of the licensee, the nature of the misconduct, and the action taken by the board are public data. If disciplinary action is taken by settlement agreement, the entire agreement is public data. The board shall decide disciplinary matters, whether by settlement or by contested case, by roll call vote. The votes are public data.

Minn. Stat. § 147.01, subd. 4(b) (2004) (emphasis added).

The plain language of subdivision 4(b) classifies as public data the licensee's name and business address, the nature of the misconduct, and the action taken for a temporary license suspension ordered by the Board. A temporary license suspension is certainly a kind of disciplinary measure. *See* Minn. Stat. § 147.091, subd. 4 (2004)

(including temporary license suspension in statute setting forth “grounds for disciplinary action”); Minn. Stat. § 147.141 (2004) (including license suspension as one of the “forms of disciplinary action”). The phrase “disciplinary measures of any kind” clearly means all disciplinary measures, which includes temporary license suspensions. *See Hyatt v. Anoka Police Dep’t*, 691 N.W.2d 824, 826 (Minn. 2005) (stating that “[t]he word ‘any’ is given broad application in statutes”); *see also, e.g., United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1011 (9th Cir. 2001) (“The term ‘any’ is generally used to indicate lack of restrictions or limitations on the term modified.”).

The clause “whether by contested case or by settlement agreement” in subdivision 4(b) is plainly not a limitation on the kinds of disciplinary measures for which the listed information is public data. Rather, the clause emphasizes the breadth of disciplinary measures encompassed by the preceding term “any kind” and makes clear that settlement agreements are included. Words in a statute are construed “according to their common and approved usage.” Minn. Stat. § 645.08(1) (2004). It has long been recognized that “the word whether, neither in common parlance, nor in legal phraseology, has ever had the force of a videlicet,” which means it is not “used for the purpose of restraining the generality of the preceding term, or of qualifying it.” *State ex rel. Berra v. Sestric*, 159 S.W.2d 786, 788-89 (Mo. 1942) (citing and quoting *Board of Supervisors v. Vicksburg Hosp., Inc.*, 163 So. 382, 385-86 (Miss. 1935) and *Voegtly v. School Dirs.*, 1 Pa. 330, 1845 WL 5098, at *1-2 (Pa. 1845)). In particular, a “whether” clause is not a limitation on a broad preceding phrase that uses the term “any” or “all,” such as in subdivision 4(b). *See, e.g., Berra*, 159 S.W.2d at 788-89; *Spencer Kellog & Sons, Inc. v.*

United States, 20 F.2d 459, 461 (2d Cir. 1927), *cert. denied*, 275 U.S. 566 (1927); *Worthington v. California Unemployment Ins. Bd.*, 134 Cal. Rptr. 507, 509 (Cal. Ct. App. 1976).⁸

In short, “[t]he cases hold without exception that words following ‘whether’ do not restrict the [statute’s] meaning to any following terms.” *Galbreath v. Gulf Oil Corp.*, 294 F. Supp. 817, 824 (N.D. Ga. 1968), *aff’d*, 413 F.2d 941 (5th Cir. 1969). Rather, as the cases show, a “whether” clause is used in statutes to emphasize, make clear or illustrate that certain things or actions are included in broad preceding language, such as the phrase “disciplinary measures of any kind” in subdivision 4(b) of section 147.01.

For his opposing contention that the word “whether” is used as a limitation in statutes, Dr. Uckun relies on *State v. Wilson*, 524 N.W.2d 271 (Minn. Ct. App. 1994). *See* Appellant’s Brief at 35. This case does not support Dr. Uckun’s position. *Wilson* concerned a criminal statute that prohibits incest and includes the clause “whether of the half or the whole blood.” 524 N.W.2d at 273. This Court did not read the “whether” clause as limiting the terms that preceded it, but rather read the clause as expanding the scope of the criminal statute. *See id.* at 273-74. This is consistent with established case law, noted above, which holds “without exception that words following ‘whether’ do not restrict the meaning to any following terms; rather, they enlarge upon it.” *Galbreath*, 294 F. Supp. at 824; *see also, e.g., Avery v. Campbell*, 279 Minn. 383, 387-88,

⁸ As the court in *Voegtly* stated by way of example: “[I]n construing a statute, enacting that ‘horses of all descriptions, whether black or white, should be taxed six cents a head,’ . . . a judge would be considered captiously astute, who would say that the legislature meant to tax only black and white horses.” *Voegtly*, 1845 WL 5098, at *2.

157 N.W.2d 42, 45-46 (1968) (holding that “whether” clause in Minnesota court rule on intervention did not limit the rule’s scope).⁹

The Board’s position does not ignore or eliminate the “whether” clause in section 147.01, subd. 4(b), as Dr. Uckun contends. *See* Appellant’s Brief at 36. Rather, as noted, under the Board’s plain-meaning reading of the statute, which applies the common and approved usage of words, the “whether” clause in subdivision 4(b) emphasizes the breadth of disciplinary measures encompassed by the preceding phrase “disciplinary measures of any kind” and makes clear that settlement agreements are included.

This plain-meaning reading of the “whether” clause in subdivision 4(b), rather than construing it as a limitation, is underscored by its absence from the companion statute, section 147.02, subd. 6, which requires the Board to publicly release the same information for all kinds of disciplinary measures.

Subdivision 6 of section 147.02 provides as follows:

Subd. 6. Disciplinary actions must be published. At least annually, the board *shall* publish and release to the public a description of *all disciplinary measures* taken by the board. The publication *must* include, *for each disciplinary measure taken, the name and business address of the licensee, the nature of the misconduct, and the disciplinary measure taken by the board.*

Minn. Stat. § 147.02, subd. 6 (2004) (emphasis added).

This provision plainly mandates that the Board publicly release the licensee’s name and business address, the nature of the misconduct, and the action taken by the

⁹ Dr. Uckun’s reliance on *Showell v. Horn*, 167 A.2d 832 (N.J. Super. Ct. Law Div. 1961), is also misplaced. *See* Appellant’s Brief at 40-41. In the portion of the quoted passage he omits, this case reiterates that the word “whether” is not restrictive. *Id.* at 837.

Board for every type of disciplinary measure, including temporary license suspensions. The terms “shall” and “must” are both “mandatory” not permissive. Minn. Stat. § 645.44, subds. 15a, 16 (2004). Further, the word “all” is not ambiguous and clearly means every disciplinary measure, particularly since the statute goes on to provide that it applies to “each disciplinary measure taken.” *See, e.g., Bakke v. Keller*, 220 Minn. 383, 393, 19 N.W.2d 803, 808 (1945) (stating that “[t]here is no ambiguity or doubt about the meaning of the term ‘all’”).¹⁰

The only exception to this publication requirement is disciplinary measures “based exclusively upon grounds listed in section 147.091, subdivision 1, clause (l) or (r).” Minn. Stat § 147.02, subd. 6a. (2004). These grounds are drug or alcohol addiction and inability to practice with reasonable skill and safety due to illness or a mental or physical condition. Minn. Stat. § 147.091, subd. 1(l), (r) (2004).¹¹ This express, limited exception further shows that there is no other exception to the publication requirement for disciplinary measures taken by the Board, including no exception for disciplinary measures taken without a contested case hearing. Minn. Stat. § 645.19 (2004) (stating

¹⁰ The Board website page on which the public version of the temporary suspension order was posted states that, to implement the publication requirement of section 147.02, subd. 6, the Board releases such information on its website for disciplinary actions that were taken at or occurred since the most recent meeting of the Board. R. App. R7.

¹¹ The exception for addiction, illness, and mental and physical conditions does not mean that the listed information under section 147.01, subd. 4(b), is not public data for disciplinary measures based on these grounds, but only that in such cases the Board is not affirmatively required to publicly release the information without a request. This exception to the publication requirement does not apply to Dr. Uckun’s temporary suspension. *See* R. App. R7.

rule of statutory construction that “[e]xceptions expressed in a law shall be construed to exclude all others.”). Thus, in concert with section 147.01, subd. 4(b), the publication requirement of section 147.02, subd. 6, mandates that the Board release to the public the information regarding the temporary suspension of Dr. Uckun’s license set forth in the public version of the Board’s temporary suspension order.

Dr. Uckun’s claim that section 147.01, subd. 4, prohibits the Board from releasing any information regarding temporary suspensions, or other interim disciplinary actions, necessarily requires the clause “whether by contested case or by settlement agreement” in subdivision 4(b) to be read as a limitation. As discussed above, such a reading fails because it is contrary to the plain meaning of the statutory language. *See Hyatt*, 691 N.W.2d at 827-28 (adhering to rule that courts may not disregard the plain meaning of the words of a statute). Moreover, accepting Dr. Uckun’s claim and his corresponding interpretation of section 147.01, subd. 4(b), would make all information regarding Board disciplinary actions nonpublic except for (1) settlement agreements and (2) the listed information (licensee’s name and business address, nature of misconduct, and action taken) for final decisions after a contested case hearing. In addition to disregarding the plain statutory language, Dr. Uckun’s interpretation leads to absurd results and otherwise contravenes basic principles of statutory construction, for the reasons discussed below. *See Minn. Stat. 645.17(1)* (2004) (stating rule of construction that “the legislature does not intend a result that is absurd”); *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 73-74, 93 N.W.2d 690, 698 (1958) (recognizing “fundamental rule” that “a statute is to be read and construed as a whole so as to harmonize and give effect to all its parts”).

First, Dr. Uckun's interpretation would prevent the Board from complying with the statutory mandate in section 147.02, subd. 6, that requires publication and public release of the listed information (licensee's name and business address, nature of misconduct, and action taken) for all disciplinary measures other than those excepted by section 147.02, subd. 6a. This statutory mandate could be limited to final Board disciplinary actions taken after a contested case hearing or in a settlement agreement only by impermissibly inserting the "whether" clause as a limitation into the statute. Courts are "prohibited from adding words to a statute." *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393, 395 (Minn. Ct. App. 1998).

Second, Dr. Uckun's interpretation would render subdivision 4(b) of section 147.01 a nullity as to all Board disciplinary actions except settlement agreements. The entirety of a final Board decision after a contested case hearing, including the Board's findings of fact, is already made public data under Minn. Stat. § 13.41, subd. 5 (2004), except for information relating to dismissed charges. *Doe v. Minnesota State Bd. of Med Exam'rs*, 435 N.W.2d 45, 49-51 (Minn. 1989). Under Dr. Uckun's interpretation, subdivision 4(b) of section 147.01 permits the Board to release only the licensee's name and business address, the nature of the misconduct, and the action taken for such a final Board decision. This renders subdivision 4(b) superfluous, given that these limited items of information are part of the larger set of information, including findings of fact, that already are public data in final Board decisions after a contested case hearing.

In contrast to Dr. Uckun's interpretation, which nullifies section 147.01, subd. 4(b), by construing it as trumped by Minn. Stat. § 13.41, subds. 2, 5 (2004), the

Board's plain-meaning interpretation gives effect to both statutes. *Compare* Appellant's Brief at 37-38, 41. Under the Board's interpretation, section 13.41, in conjunction with section 147.01, subd. 4, prohibits release of information regarding a Board temporary suspension decision except for the limited information listed in subdivision 4(b), and makes public the entirety of a final Board decision after a contested case hearing, including the Board's findings of fact, except for information from the closed disciplinary hearing relating to dismissed charges.

Third, accepting Dr. Uckun's interpretation of section 147.01, subd. 4, would mean the Board not only is prohibited from releasing any information regarding temporary license suspensions, but also is prohibited from releasing any information regarding the other types of Board disciplinary actions taken without a contested case hearing. The Board statutes expressly provide for the automatic suspension or revocation of physician licenses, without a contested case hearing, in certain cases. *See* Minn. Stat. § 147.091, subds. 1(j), 1a, 2 (2004). These include automatic license revocation if a physician is convicted of a felony-level criminal sexual conduct offense, automatic license suspension if a physician is convicted of a felony reasonably related to the practice of patient care, and automatic license suspension if a physician is civilly committed by court order. *Id.* at subds. 1a(b)-(d), 2(a)-(c). Clearly, it is absurd to adopt a construction of the "whether" clause in section 147.01, subd. 4(b), that prohibits the Board from informing the public when it has revoked or suspended a physician's license in such cases.

Fourth, Dr. Uckun's interpretation would prevent the Board from complying with the statutory mandates to provide persons information about actions taken by the Board relating to complaints made to the Board about physicians. Under Minn. Stat. § 214.103, subd. 9 (2004), the Board "shall furnish to a person who made a complaint a description of the actions of the board relating to the complaint." *Id.* In addition, as to complaints regarding a physician's sexual conduct with a patient, the Board is required upon request to provide the complainant or the alleged victim "a description of the activities and actions of the board relating to that complaint, a summary of the results of an investigation of that complaint, and the reasons for actions taken by the board." Minn. Stat. § 147.01, subd. 4(d) (2004). Under Dr. Uckun's interpretation, the Board could not comply with these statutory mandates to provide information to complainants or alleged victims when a physician is disciplined other than by a settlement agreement or a decision after a contested case hearing, even if the physician's license is temporarily suspended for sexually abusing patients or is automatically revoked or suspended based on a felony.

Most importantly, if the Court accepted Dr. Uckun's position that section 147.01, subd. 4, prohibits the release of any information regarding physician disciplinary actions except for settlement agreements or final Board decisions after a contested case hearing, the Board would be prohibited from informing the public of the status of the medical license of a physician whose license has been temporarily suspended or otherwise involuntarily suspended or revoked without a contested case hearing. This is an absurd result that is contrary to longstanding law and the legislative policy of protecting the

public from harmful and unlicensed medical practice. The status of any state license is public under the Data Practices Act's presumption of openness, because the Act does not classify the status of licenses as nonpublic data. Minn. Stat. § 13.03, subd. 1 (2004) (providing that all government data "shall be public" unless classified as nonpublic by state statute or federal law). There is no basis to conclude that the legislature intended the Board statutes to create an exception making the status of medical licenses nonpublic. As the Minnesota Supreme Court recognized almost forty years ago, "the public generally may obtain upon inquiry all relevant information concerning the status of members of the medical profession within the jurisdiction of the Board" and thus "a member of the public is entitled to know whether any official disciplinary action has been taken against a particular doctor and, if so, the reasons for such action." *Minneapolis Star & Tribune Co.*, 282 Minn. 86, 89-90, 163 N.W.2d 46, 48 (1968) (applying the official records statute, Minn. Stat. § 15.17 (1967), the predecessor to the Data Practices Act) (footnote omitted).

The public's entitlement to know that a physician's license has been suspended is no less important in the case of a temporary suspension, because such a suspension necessarily means the Board has found that "continued practice by the physician would create a serious risk of harm to the public." Minn. Stat. § 147.091, subd. 4 (2004). Moreover, it is unlawful to practice medicine without a currently valid license. See Minn. Stat. §§ 147.081, 147.091, subd. 1(f), (i), (x) (2004). Under Dr. Uckun's interpretation of the Board statutes, however, the Board would be prohibited from informing the public, whether affirmatively or in response to requests, that a physician's

license has been temporarily suspended, even though the Board has found a serious risk of harm to the public and practicing medicine without a valid license is unlawful. This also would impede Board oversight and enforcement because it would be less able to depend on receiving reports or complaints by the public that a temporarily suspended physician is practicing medicine. All of these results from accepting Dr. Uckun's interpretation are contrary to the purpose of the Board statutes. As stated by the legislature: "The primary responsibility and obligation of the Board of Medical Practice is to protect the public." Minn. Stat. § 147.001 (2004); *see also Padilla v. Minnesota State Bd. of Med. Exam'rs*, 382 N.W.2d 876, 887 (Minn. Ct. App. 1986), ("There is no other profession in which one passes so completely within the power and control of another as does the medical patient."), *rev. denied* (Minn. Apr. 24, 1986).

Thus, Dr. Uckun's claim fails because the plain language of sections 147.01, subd. 4(b), and 147.02, subd. 6, make public the limited information that the Board released regarding his temporary license suspension. To conclude otherwise would disregard the plain language of the statutes, contravene basic principles of statutory construction, and lead to absurd results that undermine the legislative policy of informing the public of the status of physician licenses as part of protecting the public.

B. Contrary To Dr. Uckun's Alternative Argument, The Public Version Of The Board's Temporary Suspension Order Does Not Disclose More Than The Nature Of The Misconduct.

As he did in the district court in response to the Board's motion to dismiss, Dr. Uckun now concedes that the status of his license is public. *See Appellant's Brief* at 42; *Pl.'s Resp. Mem.* (Apr. 28, 2006) at 17. Dr. Uckun also conceded in his district court

response that the Board may release the information listed in section 147.01, subd. 4(b), for the other types of Board disciplinary action taken without a contested case hearing. *See* Pl.'s Resp. Mem. (Apr. 28, 2006) at 16. These concessions by Dr. Uckun effectively acknowledge that, contrary to the claim expressed in his complaint, the "whether" clause in section 147.01, subd. 4(b), cannot be read as a limitation to prohibit the Board from disclosing that his license has been temporarily suspended. This leaves Dr. Uckun to resort to an alternative argument that the public version of the Board's temporary suspension order violated the Board's interpretation of section 147.01, subd. 4(b), by disclosing more than the nature of the misconduct. *See* Appellant's Brief at 42-44.¹²

Dr. Uckun points to the first three numbered paragraphs of the public version of the Board's temporary suspension order for his unfounded argument that the document discloses more than the nature of the misconduct. *See* Pl.'s Resp. Mem. (Apr. 28, 2006) at 18. This part of the document simply recites the language of the statutes that the Board found were violated by Dr. Uckun and the language of the temporary suspension statute requiring that the Board find his continued practice would create a serious risk of harm. *Compare* R. App. R8 and Minn. Stat. § 147.091, subd. 1(e), (g), (k), subd. 4 (2004).

¹² As part of this alternative argument, Dr. Uckun no longer asserts, as he did in the district court, that the public version of the order also discloses more than the action taken by the Board. *See* Pl.'s Resp. Mem. (Apr. 28, 2006) at 17-18. The last four numbered paragraphs of the public version of the order simply state that Dr. Uckun's license is temporarily suspended, provide the date this action was taken, and otherwise recite the temporary suspension statute's requirements as to the effective period of a temporary suspension and the scheduling, noticing and beginning of a contested case hearing. R. App. R8; Minn. Stat. § 147.091, subd. 4. This certainly does not go beyond stating the action taken by the Board.

Clearly, reciting the language of these statutes does not go beyond stating the nature of the misconduct. The document does not disclose the Board's findings of fact and other information regarding the allegations and record set forth in the nonpublic version of the temporary suspension order. *Compare* R. App. R7-R8 and Garry Aff. Exh. F. The Board's previous releases of limited public information under section 147.01, subd. 4(b), regarding temporary suspensions have likewise described the nature of the misconduct by reciting the language of the statutes that the Board found were violated by the licensee. *Compare* R. App. R31-R35 and Minn. Stat. § 147.091, subd. 1(c), (g), (k), (l), (o), (q), (r), (t); *see also* App. A91, ¶ 2, A92; Minn. Stat. § 147.091, subd. 7 (2004) (providing that failure to satisfy tax delinquency is a violation and grounds for discipline).

Dr. Uckun makes the untenable proposal that the term "nature of the misconduct" should be construed as not allowing the Board to use the actual language of the statutes that the Board found were violated, but rather the Board should release a statement describing the physician's actions that constitute the statutory violations found by the Board, such as "operating on the wrong organ" and the like. Appellant's Brief at 44.¹³ Dr. Uckun's proposed construction would require the Board to decide which parts of its confidential findings of fact to disclose from the nonpublic temporary suspension order, undoubtedly exposing the Board in each case to a significant risk of being sued for

¹³ Dr. Uckun is mistaken in relying on *People v. Margelis*, 224 N.W. 605 (Mich. 1929), for this proposed construction. This case held that a state constitutional requirement for a criminal defendant to be informed of "the nature of the accusation" was satisfied by an information which "charged the [alleged crime] in the language of the statute" rather than a "bill of particulars" setting forth "what acts of his are claimed to constitute the crime." *Id.* at 606.

releasing too much factual information in violation of section 147.01, subd. 4, and provisions of the Data Practices Act. There is no reason to believe that the legislature intended this precarious result by using the term “nature of the misconduct.” The more reasonable interpretation is that the Board, as it has done in previous cases, may use the legislature’s own statutory language to state the nature of the misconduct for a temporary license suspension, without fear of being sued for releasing confidential information. Simply put, the Court should not construe section 147.01, subd. 4(b), as prohibiting the Board from describing the nature of the misconduct in the very same words that the legislature has used in the statutes that define the violations found by the Board in its temporary suspension order.

Lastly, Dr. Uckun incorrectly asserts that the Board violated the publication requirement of section 147.02, subd. 6, based on his misreading of the statute as permitting release of only “a description of [the] disciplinary measures taken by the board,” and not the “nature of the misconduct” as provided in section 147.01, subd. 4(b). *See* Appellant’s Brief at 42-43. As already discussed, the publication statute uses the same list of information as section 147.01, subd. 4(b), and expressly provides that the Board publication “must include” the “nature of the misconduct” for “each disciplinary measure taken.” Minn. Stat. § 147.02, subd. 6. Thus, the district court correctly concluded that the public version of the Board’s temporary suspension order “fully complies with the requirements of Minn. Stat. § 147.02, subd. 6.” App. A97.

In sum, the information that the Board released regarding the temporary suspension of Dr. Uckun’s medical license is public data under sections 147.01,

subd. 4(b), and 147.02, subd. 6, and therefore its release also necessarily does not violate the Data Practices Act. Accordingly, the Court should affirm the dismissal of Dr. Uckun's claim that the release of the public version of the Board's temporary suspension order violated the Board statutes and the Data Practices Act.

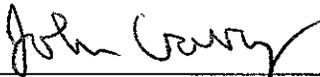
CONCLUSION

For the reasons stated, the Court should affirm the judgment of the district court.

Dated: September 25, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).