5-1 O/A 6-6-89

IN THE SUPREME COURT OF FLORIDA

ROGER MARRERO, M.D.,

Petitioner,

vs.

DEPARTMENT OF PROFESSIONAL REGULATION, FLORIDA STATE BOARD OF MEDICINE,

Respondent.

_____/

Case Number: 73,392

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Department of Professional Regulation and the Florida State Board of Medicine, the Defendants in the trial court, will be referred to herein as Respondent or the Board. Roger Marrero, the Plaintiff in the trial court, applicant for licensure from the Board of Medicine, will be referred to herein as Petitioner or Dr. Marrero.

Citations to the record will be indicated parenthetically as "R" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case insofar as it recites the progress of the case through the judicial system as accurate, but would add that this Honorable Court granted discretionary jurisdiction and directed the filing of briefs on the merits by order dated February 23, 1989.

With regard to Petitioner's Statement of the Case insofar as it recites the progress of the case before the Board of Medicine and Petitioner's Statement of Facts, Respondent believes that it omits some facts Respondent believes the Court needs to be aware of because of their relevance and materiality to a proper consideration of this matter. Thus, Respondent believes that a coherent recitation of all of the relevant and material facts relating to actions and considerations by the Board of Medicine is necessary, rather than a disjointed pointing out of errors or omissions in Petitioner's Statement of Case and Facts.

Petitioner filed an application for licensure in Florida as a medical doctor by endorsement in January or February of 1986. (R 1) In support of his application, Dr. Marrero made a personal appearance before the Board of Medical Examiners in August of 1986. (The name of the Board has been changed to Board of Medicine.) During the course of that appearance, he was asked to comment on less-than-favorable evaluations of his medical training, one of which indicated possible "personality problems." In addition, Dr. Marrero testified that he had been given a leave

of absence from his residency training program at the University of Miami and, eventually, resigned from that program without completing it. In response to a question as to whether he was having personal problems, he stated that he was having just some family problems. At that time, the Board requested him to obtain a more current evaluation from the head of the University of Miami residency training program and suggested that Dr. Marrero return to the Board with a report of psychiatric and/or psychological testing. Dr. Marrero agreed to waive the Board's ruling on his application at that time and return with the requested information in October. (R 85-100)

When Dr. Marrero's appearance was called at the October meeting, he was not present, but was represented by counsel. His attorney explained that Dr. Marrero had gone to Pennsylvania to practice medicine and had a scheduling problem which prevented his appearance. A request by his attorney for continuance of the matter until the December meeting was granted. In additional, members of the Board indicated that the psychiatric and psychological reports which had been received were inadequate. Counsel for Dr. Marrero affirmatively stated that Dr. Marrero would appear at the December meeting. (R 103-112)

By letter dated October 24, 1986, Counsel for Dr. Marrero informed the Board that Dr. Marrero would be unable to rearrange his schedule in order to attend the December 1986 meeting and requested rescheduling his appearance for the February 1987 meeting. (R 252-253) By letter dated December 9, 1986, Board

staff informed Dr. Marrero that an extension until February 1987 for him to appear before the Board had been granted. The letter further asserted, "If you do not appear at that time your application for licensure in Florida will be denied." (R 260)

By letter dated January 30, 1987, Dr. Marrero stated that he was withdrawing his application from consideration "at this time." The reason stated for this decision was that his current obligations would not allow him the leeway to make the meeting. He expressly asserted his intent to reapply for licensure in Florida "in the near future" when he has "fewer time constraints." (R 261) This action, including Marrero's claim that "professional obligations as a physician" make him "unable to pursue his application" and Dr. Marrero's intent to reapply in the future, was reasserted by his attorney in a letter dated February 3, 1987. The attorney requested that the matter be removed from the February agenda. (R 264)

However, the matter was not removed from the agenda. At the meeting on February 8, 1987, there was a motion to deny Dr. Marrero's application for licensure. Counsel for Dr. Marrero then requested that, if the Board was insistent on acting on the application, it give Dr. Marrero one more chance to decide whether to appear, even if it meant jeopardizing his job in Pennsylvania or foregoing licensure in Florida. During the discussion, Dr. Marrero's attorney indicated that it was not a specific inability to arrange his schedule which prevented Dr. Marrero from attending a Board meeting, but Dr. Marrero's

reluctance to reveal to his supervisors in Pennsylvania that he was attempting to obtain a Florida license. Subsequently, the Board voted to deny the application, but to retain jurisdiction until the April 1987 meeting. (R 304-323)

Prior to the entry of an Order reflecting the Board's action and prior to the April meeting, the complaint for injunctive relief was filed in circuit court. (R 1-26)

SUMMARY OF THE ARGUMENT

Respondent urges that the Florida Supreme Court should uphold the decision of the First District Court of Appeal in Department of Professional Regulation, Florida State Board of Medicine vs. Marrero, 536 So.2d 1094 (Fla. 1st DCA 1988), on the basis that the appellate court was correct in ruling that the circuit court should have granted the Motion To Dismiss a Compliant for Injunction against the Florida Board of Medicine because the Petitioner, Dr. Marrero, had failed to exhaust his administrative remedies. While Petitioner and the trial court focused on the rightfulness or wrongfulness of the Board's refusal to permit Dr. Marrero to unilaterally withdraw his application, that is not the real issue in this case. A ruling in this case by the Florida Supreme Court will have great implications for the future and viability of administrative law under Chapter 120 in Florida. If this Honorable Court affirms the District Court of Appeal's decision, then it will be clear that when there is an administrative remedy and it is an adequate remedy, a party must permit the proceedings to take place in the administrative forum and cannot run to the circuit court and interrupt the administrative process.

It is Respondent's position that the District Court of Appeal used the correct test, whether the Florida Board of Medicine acted with colorable statutory authority in refusing to acknowledge Dr. Marrero's attempt to withdraw his application.

While Respondent concedes and has conceded all along that there is no explicit statutory authority for the Board's decision not to permit Dr. Marrero to unilaterally and without action of the Board terminate his application, the Board believes that it has implied authority to do so in order to carry out the statutory scheme of Chapter 458, Florida Statutes. The Rule of Civil Procedure and case law cited by Petitioner which relies on Rule 1.420, Fla.R.Civ.P., is not applicable to the Board of Medicine. There is no rule under the Board's rules or the Model Rules of Procedure which makes Rule 1.420, Fla.R.Civ.P., applicable, in contrast to the situation for some administrative entities which have adopted a rule making the Rules of Civil Procedure applicable. Absent a rule, the Board believes that there is no absolute right for one party to terminate the action and that the Board can, when there has been an action taken in the nature of a personal appearance and a hearing on the application, refuse to allow unilateral decision to withdraw, as would be permissible under the corollary Federal Rules of Procedure.

Under the statutory scheme of Chapter 458, Florida Statutes, the primary purpose of the Florida Board of Medicine is to assure that every physician practicing in Florida meet minimum requirements for safe practice and that licenses not be issued to a person that the Board deems or has deemed unqualified until the board is satisfied that the person is capable of safely engaging in the practice of medicine. In Dr. Marrero's attempt to

withdraw his application, he affirmatively asserted that he intended to apply for licensure in Florida in the future. Since the Board has notice of some possible information relating to Dr. Marrero's ability to safely engage in the practice of medicine, it believes that it is incumbent upon the Board to pursue the matter at this time while the witnesses and evidence relating to that information would be available for the purposes of a hearing. There is case law which holds that a licensee who is under investigation cannot simply relinquish his license and thereby avoid a finding of his wrongdoing. The Board believes that the reasoning of this case law is applicable to a situation where a licensee has brought himself under the jurisdiction of the Board, certain information has come to the Board's attention which indicates that the licensee may not be able to practice medicine with safety, and the licensee attempts to withdraw, but retain the right to apply in the future.

Overriding the Board's current belief that it has the authority to continue to act on Dr. Marrero's application is the belief that this matter should be resolved in the administrative forum not in the circuit court. Dr. Marrero has, as the First District Court of Appeal found, an adequate remedy under Section 120.57, Florida Statutes, to request a hearing and to have a hearing if the Board takes some action which affects his substantial interest. If it is Dr. Marrero's position that the Board has no jurisdiction over him anymore, he can raise that issue in the 120.57 proceedings. Since he has an adequate

administrative remedy, he should be restricted to the administrative forum. The Board recognizes that the District Court of Appeal has not affirmatively upheld the Board's position on the jurisdictional issue, but believes that the issue can be resolved in the administrative forum, If it is resolved adverse to Dr. Marrero, appellate review is available pursuant to Section 120.68, Florida Statutes.

Under the circumstances of this case, it was error for the trial court to grant a permanent injunction, not only for the reasons stated above and in the more thorough arguments in the brief, but also on the basis that Dr. Marrero failed to show irreparable harm. The only "irreparable" harm that Dr. Marrero can cite to is the fact that he might have to explain the license denial in Florida; however, this ignores the fact that his license has not yet been denied, and if it is denied, he can request a hearing and the Notice of Intent To Deny would not be come final unless he loses the hearing. As firmly found by the First District Court of Appeal, the harm is not irreparable because he has a chance to clear the matter up through the administrative proceeding. If Dr. Marrero prevails at the administrative level, the record would not be clouded.

Finally, Respondent respectfully requests this Honorable Court to, after review of the entire record and the briefs, discharge jurisdiction on the basis that there is no express and direct conflict between the decision of the First District Court of Appeal and the decision of the Fifth District Court of Appeal

upon which Petitioner relies on the same issue of law. The decision of the First District Court of Appeal was a decision relating to exhaustion of administrative remedies, whereas the cited decision out of the Fifth District Court of Appeal was, in fact, a review of final agency action. It did not involve a circuit court interposing itself into an administrative proceeding. Furthermore, there is not a conflict on the substantive issue of the right to withdraw an application between the two decisions on the issue of law because the Fifth District Court of Appeal decision involved an agency which had incorporated the Florida Rules of Civil Procedure, including Rule 1.420, Fla.R.Civ.P., as its operating rules.

ARGUMENT

I.

THE FIRST DCA CORRECTLY RULED THAT THE BOARD DID NOT ACT WITHOUT COLORABLE STATUTORY AUTHORITY

Petitioner phrases this first issue as, "The First DCA erred when it found that the Board of Medicine retained jurisdiction over this matter after the petitioner voluntarily withdrew his licensure application." This misstates the District Court of Appeal's opinion. The DCA clearly declined to rule on whether the Board of Medicine retained jurisdiction, but did conclude that the Board's position that it retained jurisdiction to act on the application was not without colorable statutory authority that was clearly in excess of its delegated powers. (Appendix at 11) That being so, the court found, the initial decision with regard to the scope of the Board's powers should be made in the administrative setting, not by a circuit court judge.

a. Rule 1.420, Fla.R.Civ.P. does not apply to the proceeding below.

Petitioner cites and relies on Rule 1.420(a)(1), Fla.R.Civ.P., and case law interpreting that specific promulgated rule. Were Rule 1.420 applicable to proceedings before the Board of Medicine, this case would not be before this Honorable Court. However, Rule 1.010, Fla.R.Civ.P., which sets forth the scope of the Florida Rules of Civil Procedure, clearly specifies that they apply "to all actions of a civil nature and all special statutory proceedings in the circuit courts and county court. . . ." with

some exceptions not relevant to this cause. What Petitioner apparently fails to grasp is that the Board of Medicine is not a circuit court or county court. Thus, except as specified by administrative rule, the Florida Rules of Civil Procedure are not applicable.

The administrative rules applicable to the Board of Medicine are set forth in Rule Chapter 21M and, pursuant to Section 120.54(10) Florida Statutes, in the Model Rules of Procedure, Rule Chapter 28, Florida Administrative Code. It is true that, pursuant to Rule 28-5.206, Florida Administrative Code, the Florida Rules of Civil Procedure relating to discovery are applicable to the Board of Medicine. However, Petitioner has cited to no Model Rule and no Board of Medicine rule which makes Rule 1.420, Fla.R.Civ.P., which is not a discoveryy rule, applicable. The presence of Rule 28-5.206 and the absence of a comparable rule with regard to voluntary dismissals establishes that there is no clear authority for Petitioner to withdraw his application for licensure without prejudice.

Respondent urges that absent some authority for the proposition that Rule 1.420, a state court rule, must be applied to the Board of Medicine's proceedings, it is arguable that the federal court rule, Federal Rule of Civil Procedure 41(a)(2), could as readily apply. Under that rule, the unilateral right to dismiss obtains only before a Motion for Summary Judgment or an answer has been filed. In fact, the case law supports a finding that an individual does not have the unilateral right to dismiss

without an order of the court if an issue has been joined in other ways, such as by the holding of a hearing during which the merits of the controversy have been raised. Harvey Aluminum, Inc. v. American Cynamid Co., 203 F.2d 105 (2d Cir. 1953), cert. denied, 345 U.S. 964.

The general rule in federal court is that that Plaintiff can enter a voluntary dismissal unless the Defendant will suffer legal harm and that legal harm must be some plain legal prejudice other than the mere prospect of a second lawsuit. See, Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936). In the instant case, the position of the Respondent is that it may suffer clear legal harm in that the evidence may be lost, the witnesses may disappear, and memory may be eradicated.

There is a significant factor to consider in analyzing rules of court for their applicability to the instant case. In civil lawsuits, the usual contest is between individual private interests. In state licensure proceedings, the interests to be considered are one person's individual private interest versus the public's interest. Thus, rules of court, geared to settling private disputes, must be applied in light of the different purpose they serve when considered in the context of an administrative proceeding, such as the grant or denial of a license.

The refusal to allow an applicant to withdraw an application is not without precedent in Florida. In the case of Callan v. Board of County Commissioners of Lee County, 438 So.2d 432 (Fla.

1st DCA 1983), an applicant for development approval pursuant to Chapter 380, Florida Statutes, filed a notice of withdrawal of his property from the application for development approval (ADA). The agency, the Florida Land and Water Adjudicatory Commission (FLWAC), entered an Order denying the ADA and ruled that Lee County's Motion to Strike the Notice of Withdrawal was moot. In other words, the FLWAC did not recognize the applicant's attempt to withdraw his application and proceeded to rule on the merits of the application. While it is true that in that case there had been a ruling on the merits prior to the filing of the notice of withdrawal, the ruling on the merits had been reversed and remanded to the FLWAC, leaving no ruling on the merits in existence at the time the notice of withdrawal was filed. The First District Court of Appeal, in reviewing the second FLWAC Order which ignored the notice to withdraw, upheld the amended Final Order and specifically construed it to include the lands which the applicant "has attempted to withdraw." Thus, this appellate court, in essence, upheld the authority of the agency to refuse to recognize the unilateral attempt to withdraw the application by the applicant.

In Jones v. Securities and Exchange Commission, the United States Supreme Court considered whether the Securities and Exchange Commission could refuse to let a registrant withdraw a registration statement filed with the Commission prior to the time the statement became effective. In that case, the Supreme Court used the test of whether there was any possibility of any

prejudice to the public or investors. Only upon the conclusion that abandonment of the application as of no concern to anyone other than the registrant did the court hold that the registrant's right:

> to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned. [emphasis added]

298 U.S. at 23. Respondent urges that the same test should be used in the instant case -- but a different result would obtain. Respondent contends there is a very real possibility of harm to the public and that applicant Marrero is not the only person concerned. Thus, the Board's authority to refuse to permit Marrero to withdraw his application without prejudice should be upheld.

In the Final Order from which this appeal was taken, the trial court attempted to distinguish Jones by emphasizing the United States Supreme Court's language regarding "assumption of such power on the part of an administrative body. . . ." Nevertheless, as acknowledged by the lower court, the Supreme Court did assert that there was an exception to the "the unqualified right to dismiss a complaint." And that exception is analogous to the exception urged by the Board: when a matter has proceeded so far that evidence has affirmatively appeared giving rise to concerns about the applicant's fitness to practice medicine. The Board has not asserted, and does not assert, that every application once filed may be withdrawn only with the

concurrence of the Board. What the Board asserts, however, is that once issues have been identified and the applicant has been asked to appear before the Board and, as in this case, has appeared before the Board, the Board needs to be able to deny the request to withdraw the application if it determines that the withdrawal would not be in the best interest of the public.

Finally, Petitioner acknowledges that even where the Plaintiff does have an absolute right to voluntarily dismiss without court order, that right disappears when fraud is attempted. A review of the proceedings below before the Board of Medicine will show that Dr. Marrero "strung the Board along" by agreeing to waive the Board's ruling on his application and agreeing to return with the requested information at a subsequent meeting. Then at the October meeting, counsel for Dr. Marrero again affirmatively stated that Dr. Marrero would appear at the next meeting. Then, when it came time for the December 1986 meeting, Dr. Marrero's attorney stated that Dr. Marrero could not make the December meeting and requested to reschedule for the February meeting. Dr. Marrero was then told that if he did not appear at the February meeting, his application for licensure in Florida would be denied. It was only after assuring the Board that he would appear and that he would provide certain information that Dr. Marrero attempted to withdraw his application from consideration. And this attempt was made after he was informed that if he did not appear, his application would be denied.

At the February meeting, when Dr. Marrero did not appear, a motion was made to deny the application for licensure but to retain jurisdiction until the April 1987 meeting to give Dr. Marrero one more opportunity to appear. It was at this juncture that the circuit court action was taken to enjoin the Board from entering an order reflecting its action.

It is apparent that not only did Dr. Marrero attempt to defraud the Board when he repeatedly assured the Board that he would appear at a future meeting, but it also is clear, in reviewing the reasons given for his inability to appear, that he was deceptive as to why he could not appear. He implied at one point that he was unable to arrange his schedule, but later his attorney admitted that Dr. Marrero just did not want his supervisors in Pennsylvania to know that he was attempting to obtain a Florida license.

b. The Board has implied authority to deny withdrawal of the licensure application.

The Board of Medicine concedes that there is no explicit statutory authority which authorizes it to deny an applicant's request to withdraw an application for licensure as a medical doctor in Florida. The Board contends that there is implied authority for it to do so and that the exercise of its implied authority to do so under circumstances such as those herein where an applicant has appeared before the board and concerns relating to his fitness to practice medicine with skill and safety have been identified is in furtherance of its duty to protect the

public. In Gardinier v. Florida Department of Pollution Control, 300 So.2d 75 (Fla. 1st DCA 1974), the court stated statutory agencies possess no inherent powers, but that an agency's powers are "limited to those granted, either expressly or by necessary implication, by the statute of its creation." [emphasis added] 300 So.2d at 76.

Respondent would urge that the authority to deny the unqualified right to withdraw by an applicant or the authority to govern the terms and conditions of withdrawal once action has been taken on the application is necessary by implication in order for the Board to carry out the purpose of the Medical Practice Act, Chapter 458, Florida Statutes. Section 458.301, Florida Statutes, explicitly states:

> The primary legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meet minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

It is Respondent's position that when a person has placed himself under the jurisdiction of the Board for a ruling on an application by voluntarily filing that application and action has been taken on that application, in this case his having been called for a personal appearance before the Board, the Board is not required to let that person unilaterally terminate the application process.

There are two public policy reasons to support this position, particularly in light of Section 458.301, Florida Statutes. One

is the protection of the public, viewing the public as only the citizens of Florida, and the other is the protection of the public, viewing the public as including those outside the State of Florida. In the first instance, the citizens of Florida are protected only if the applicant who wishes to unilaterally withdraw without permission of the Board is allowed to do so only upon assurance that he never intends to apply in Florida again. Otherwise, he can, as will be noted in cases cited below, simply wait until the evidence dissipates before reapplying.

As for the position that the public may include more than just the State of Florida, Respondent would first point out that Section 458.301, as it existed under the 1985 statute, stated that the sole legislative purpose was to insure that every physician practicing in this state meet minimum requirements for safe practice. That language was amended in 1986 to state that the primary purpose was to insure that every physician in this state meet minimum requirements for safe practice, evidencing an intent to be concerned with more than just whether the physicians practicing in this state meet minimum requirements for safe practice. Ch. 86-245, §26, Laws of Florida.

Over the recent years, there has been a hue and cry about malpractice and other results of unsafe practice and the fact that physicians can get in trouble in one state and then simply move to another state. Because of this, Florida takes seriously its duty to communicate to other states all disciplinary actions and denials of licensure. This duty is carried out with the view

that while the primary duty of the Board and the Department is to protect the citizens of Florida, it is not their sole duty. Along with this, Florida seeks information from every other state in which an applicant is licensed in the event that those states have information concerning the ability to safely practice of the physicians wishing to come into Florida.

In addition to the legislative intent asserted in Section 458.301, Florida Statutes, the Board looks also to Section 458.331(3), Florida Statutes (1987) in carrying out its duties with regard to applicants for licensure. That section provides, in pertinent part:

> The board shall not . . . cause a license to be issued to a person it deems or has deemed unqualified, until such time as it is satisfied . . . that such person is capable of safely engaging in the practice of medicine.

The burden of proof in the application process is upon the applicant. See Rule 28-6.008, Florida Administrative Code. However, even though the burden of proof is on Petitioner, once he makes a preliminary showing of eligibility, then the burden of persuasion will shift to the Board. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981) Dr. Marrero's unfettered control of the timing of completion of the application process would prejudice the Board in its ability to meet this burden.

There are Florida cases which, while not dealing with licensure applications, set forth principles of law and reasoning which Respondent believes are applicable to this cause.

Respondent urges that the trial court ignored or misconstrued the applicability of these cases when he characterized them as factually inapposite to the case at bar. The court appears to have failed to perceive that Respondent cited them in reliance on the principles and reasoning enunciated, while acknowledging all along the factual distinctions.

The first of these cases is Boedy vs. Department of Professional Regulation, Board of Medical Examiners, 433 So. 2d 544 (Fla. 1st DCA 1983). In Boedy, the doctor asserted that the Department of Professional Regulation and the Board could not discipline him because he had placed his medical license on inactive status. In that case, the appellate court pointed out that the licensee could reactivate his license at his own volition. Permitting him to prevail in his position that the state could not discipline him while his license was inactive would let the doctor, the licensee, indefinitely hide behind the inactive status "while evidence is lost, witnesses disappear, and memory is eradicated." This, the court asserted, serves no useful public purpose.

Boedy is applicable to the instant case particularly in light of the fact that applicant Marrero specifically states that he intends to reapply in Florida in the near future, a fact which the trial judge in the instant case apparently ignored or discounted, based on his characterization of Petitioner as an out-of-state physician who has decided not to practice in Florida. (R 327-329) Thus, the public policy issue in Boedy is

the same as the issue here. The applicant can indefinitely hide from the State of Florida while evidence is lost, witnesses disappear, and memory is eradicated and then come forth and seek licensure in this State again. Specifically, it must be noted that while all previous applications and the documents pertaining thereto could be presented to the Board if the applicant applied in the future, such documents would not necessarily be maintained in perpetuity, but would be destroyed over the normal course of business. Thus, the now-known concerns of the Board might not be of record in the Department for the then-sitting Board to consider at the time Dr. Marrero chooses to come back and reapply in Florida and, if denied, put the Board to the test of defending its action in an administrative hearing. In addition, witnesses who are aware of Appellee's "personal problems" and history of performance in his residency training program at the University of Miami might disappear or forget important facts.

Respondent would point out that under the rule for admission to the Florida Bar, an applicant may withdraw an application for admission at any time; however, the Bar may continue its investigation and adjudication. Alternatively, the applicant may withdraw with prejudice, the Bar shall dismiss its investigative adjudicative functions, and the applicant shall be permanently barred from filing a subsequent application for admission to Florida. Article 3, Rules Relating to Admissions to The Florida Bar.

A second comparable case is that of Astral Liquors, Inc. v. State Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 463 So. 2d 1130 (Fla. 1985). In that case, the Division of Alcoholic Beverages and Firearms had an administrative complaint pending against Astral Liquors. During the pendency of the complaint, Astral attempted to transfer its liquor license to another business. The Division of Alcoholic Beverages and Firearms denied the transfer and the Supreme Court, approving the decision of the District Court, upheld the denial of the transfer, stating, "If a licensee were able to sell or otherwise transfer a beverage license before final action could be taken regarding the licensee's violation of the beverage laws, the control of the licensing process could be easily circumvented." 463 So. 2d at 1132.

Also applicable is the case of Couch v. Turlington, 465 So. 2d 557 (Fla. 1st DCA 1985), wherein a teacher who had had a complaint filed against him for sexual misconduct attempted to surrender his teaching certificate, stating as reason therefor that injuries from an automobile accident would impair or foreclose his ability to perform usual teaching duties. After an administrative complaint was filed against him, he moved to dismiss on the basis that the surrender of his teaching certificate divested the Educational Practices Commission (EPC) of jurisdiction. The motion to dismiss was denied and the First District Court of Appeal denied a petition for writ of prohibition to restrain the EPC from acting. The teacher

appealed from the final administrative action, raising the issue of his surrender of his certificate. The Court held that the EPC was not required to accept a surrender, which would allow the teacher to apply for reinstatement, in lieu of permanent revocation and that the EPC had the implied power to govern the terms and conditions by which the certificate could be held or revoked.

In none of the three cases cited above was there explicit statutory authority for the administrative agency to refuse to permit a licensee to place a license on inactive status, to transfer a license, or to surrender a license. Rather, there was implied authority for the agency to do so within the ambit of the exercise of the powers to issue licenses. Respondent strenuously urges that the cases support its position that once an applicant has submitted to the jurisdiction of the Board by applying for licensure and the Board has taken some action on the application, there is implied authority to govern the terms and conditions by which an applicant can withdraw the application. Here, as in Couch v. Turlington, the individual has been placed on notice that there are problems or questions relating to his fitness to practice and the individual wants to, in the face of that knowledge, remove himself from the situation solely on his terms -- terms which imply he has simply changed his mind about wanting the license and which imply there is no existing impediment to his licensure. Such unilateral power on the part of the individual does not, to paraphrase the Boedy decision, serve the public interest.

The Board is not concerned that it would have a heavier burden at a later point in time than at the present, but only that the availability of witnesses and evidence would be less at a later point in time. It is clear from a reading of this record that the concerns about Dr. Marrero arose because of his taking a temporary leave of absence and then permanently resigning from a residency program at the University of Miami. Clearly, persons who were on the faculty and dealt with Dr. Marrero as supervisors or advisors would be people with knowledge of the circumstances surrounding Dr. Marrero's activities at the University of Miami and with informed opinions as to his capability of practicing with skill and safety. Not only might those persons not be present at whatever future point in time Dr. Marrero chooses to reapply in Florida, if ever; but even if they are available, memories will likely have faded. It is important for the protection of the citizens of the State of Florida that this issue be resolved while the witnesses' memories are fresh and the evidence is available.

Two things need to be made absolutely clear. First of all, the State of Florida Board of Medicine did not go out in search of Roger Marrero, hog tie him, and make him apply for a license in Florida and, thereby, submit himself to the jurisdiction of the Florida Board of Medicine. He voluntarily chose to apply for a license to practice medicine in Florida and, by so doing, submitted himself to the jurisdiction of the Board. Having submitted himself to the jurisdiction of the Board, it is the

Board's position that he should not be able to summarily and unilaterally terminate that jurisdiction under the circumstances presented in this case. The Board strenuously urges that the act of having submitted himself to the jurisdiction of the Board and then attempting to unilaterally terminate that jurisdiction is similar to the situation which occurred in Boedy and Couch v. Turlington. While it is true that both of those cases involved persons who were licensees, they became licensees voluntarily and then "voluntarily" attempted to escape from the jurisdiction of the Board once they perceived that there might be problems with their license. In the instant case, obviously, Dr. Marrero does not have a license, but he has submitted himself to the jurisdiction of the Board for the purpose of obtaining one and he should not, having perceived that things might not go as smoothly and as positively as he expected, be able to unilaterally withdraw from the jurisdiction of the Board.

The second thing that needs to be made absolutely clear is that while it is true that Dr. Marrero was practicing in Pennsylvania by the time of the October Board meeting, it is also true that he had obtained his Pennsylvania license in June of 1985, but had not practiced in Pennsylvania until after he made his first appearance at the August Board meeting and assured the Florida Board that he would return to answer their concerns. The timing of his desire to practice medicine in Pennsylvania is, at best, intriguing. His attempt to withdraw from consideration and to make it appear on the public record that he is doing so

because of his desire to practice medicine in Pennsylvania is similar to the intent of Mr. Couch in Couch v. Turlington to relinquish his license as a teacher and make it appear that he was doing so because of his poor physical health. Just as Mr. Couch was not permitted to leave the record apparently "clean" and ambiguous, Dr. Marrero should not be permitted to do so.

c. The one Fifth DCA case and four other First DCA cases urged to be in conflict on the issue of the applicant's ability to totally control the timing of divesting an agency of jurisdiction to proceed by withdrawing the application are distinguishable.

Petitioner's reliance on the recent Middlebrooks case, Middlebrooks v. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988) both for assertions of conflict with the instant case and on the merits is misplaced for three reasons.

First of all, the agency therein had by rule made to Florida Rules of Civil Procedure applicable to the proceedings to the extent they were not inconsistent with Chapter 120. As noted above, the Board of Medicine has no comparable rule,

Secondly, the procedural posture of Middlebrooks was that the District Court of Appeal was reviewing an agency decision relating to the agency's powers. In the instant case, the District Court of Appeal was reviewing a circuit court decision which enjoined agency decisionmaking with respect to the agency's powers.

Third, in applying Rule 1.420 to the facts of the Middlebrooks case, the court held that the attempted withdrawal came too late and was not effective. As stated by the Fifth District Court of Appeal, after the factfinder retires to deliberate the outcome, it is too late under Rule 1.420(a) to take a voluntary dismissal. In that case, as in the instant case, the party who wished to withdraw allowed the hearing to proceed far enough so that he knew that the agency's decision was. The record clearly shows in the instant case that the Board had moved and voted to deny his application and he interposed the circuit court action for an injunction to keep the Board from rendering the order reflecting the action that had already been taken. Petitioner seeks exactly the kind of unfair advantage that the Fifth DCA rejected in Middlebrooks -- even when the court was bound to apply Rule 1.420.

Petitioner's reliance on Orange County v. Debra, Inc., 451 So.2d 868 (Fla. 1st DCA 1983), is misplaced. Again, as with Middlebrooks, Debra did not procedurally involve circuit court intervention in agency proceedings; it involved appellate review of agency action. Second, in Debra the applicant withdrew the petition before the agency ruled on a staff recommendation. In the instant case, the applicant attempted to withdraw after being told of the agency's intended action and the circuit court intervened after the agency ruling in order to prevent rendition of an order reflecting that ruling.

Furthermore, Petitioner's discussion of RHPC, Inc. v. Department of Health and Rehabilitative Services, 509 So.2d 1267 (Fla. 1st DCA 1987) and Humana of Florida, Inc. v. Department of Health and Rehabilitative Services, 500 So.2d 186 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1041 (1987), makes no effort to counter the First District Court of Appeal's analysis in Marrero which explains the distinction of facts in the instant case as compared to those two cases. The court pointed out that RHPC, Inc, and Humana of Florida, Inc. both involved the agency's interpretation of its duties and responsibilities, an interpretation made in the administrative setting, not an interpretation made by a circuit judge's interposition into the policy-making operations of the agency, as in this case. Further, the two cases cited involve interpretation of duties under a statute not applicable to the Board of Medicine, Section 381.494(8), Florida Statutes (1985).

Finally, the case of Rudloe v. Department of Environmental Regulation, 517 So.2d 731 (Fla. 1st DCA 1987), is similarly distinguishable. It dealt procedurally with appellate review of an administrative agency decision with respect to the scope of its powers. Furthermore, it dealt with an intervenor's attempt to require an agency to retain jurisdiction over a case dismissed by petitioner, not the petitioner's and the agency's dispute over whether the agency could or should retain jurisdiction. Third, it did not involve an attempt by petitioner to invoke circuit court intervention after an agency's decision, but before rendition of an order recording that decision.

Petitioner's representation at page 15 of the brief that the Board had not made a factual determination as to his application misstates the record. The Board voted to deny the application. It is true that counsel for the Board has asserted that the Board has not determined that Dr. Marrero is not competent to practice medicine in Florida and that the Board has not stated that it will deny his license if he appears and presents the information as he had repeatedly assured the Board he would. However, in a licensure matter, the burden of proving qualification is on the applicant. Rule 28-6.008, Florida Administrative Code; Florida Department of Transportation v. J.W.C. Company, Inc. What the Board has clearly determined is that Dr. Marrero, by his failure to come forth as promised, has failed to establish that he is qualified for licensure. In that context, the Board has made a factual determination -- Dr. Marrero is not qualified for licensure until he meets his burden of proof.

II

THE APPELLATE COURT CORRECTLY DETERMINED THAT PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

This issue, the exhaustion of administrative remedies, or lack thereof, should be the focus of the Florida Supreme Court's attention, for it is on this issue that the First District Court of Appeal rendered the decision under review. The First DCA did not uphold the Board of Medicine's right to deny withdrawal of the application; it upheld the Board's right to make the initial determination on an issue of law. It rejected the circuit court's intervention into an administrative matter for which there was an adequate administrative remedy.

Respondent is intrigued by Petitioner's reference to Section 120.68(1), Florida Statutes (1987), on the issue of the adequacy of administrative remedies. Intrigued because Section 120.68(1) provides, in pertinent part, for appellate review of non-final agency actions. The issue in the instant case is not appellate review of agency action -- it is circuit court review of or intervention into agency action. Petitioner did not go to the DCA with a petition for review of action by the Board under Section 120.68. He went to the circuit court to enjoin rendition of an order reflecting agency action and to enjoin any further agency action.

a. **The standard for review of whether the administrative forum may be bypassed is whether the agency acted without colorable statutory authority.**

Petitioner urges, in essence, that the lack of express statutory authority is tantamount to lack of colorable statutory authority and that absent express authority, the agency is without jurisdiction. (Petitioner's Brief at 24) This is not the law. As noted above, agencies have both express and implied powers. Although Gardinier limited agency authority to necessarily implied powers, in the later case of State Board of Education v. Nelson, 372 So.2d 114 (Fla. 1st DCA 1979), the court, quoting 1 Fla. Jur.2d, Administrative Law, §21, stated:

> . . . a power which is not expressed must be reasonably implied from the express terms of the statute, or, as otherwise stated, it must be such as is by fair implication and involvement incident to and included in the authority expressly conferred. [emphasis supplied]

372 So.2d at 115.

In State of Florida, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982), the First District Court of Appeal analyzed the applicable standard for determining when a party need not exhaust administrative remedies before seeking circuit court intervention and identified that standard as whether the agency acted without colorable statutory authority. Applying that test to a contention, as exists in this case, that the agency was without jurisdiction, the court determined that administrative remedies must be pursued when the agency's jurisdictional claim has

"apparent merit" or the determination of the jurisdictional claim "depends upon factual determinations." Stated differently by the Florida Supreme Court, the judicial intervention is justified only if there is no reasonable difference of opinion as to the validity of the agency action. See, Lambert v. Rogers, 454 So.2d 672 (Fla. 5th DCA 1984).

b. Adequate administrative remedies are available.

The Board takes issue with the assertion by Petitioner that he has no adequate administrative remedy and that he would suffer the devastating effect of having to report an adverse decision on every subsequent professional application he makes. That would be true only if the Board were allowed to issued a Notice of Intent To Deny, Dr. Marrero contested that Notice of Intent To Deny (including in his case his challenge to the Board's jurisdiction), and the Board prevailed at a final hearing. The Notice of Intent To Deny would not become final unless Dr. Marrero failed to timely request a hearing or the Board prevailed in establishing that he was not entitled to licensure. Dr. Marrero would not be irreparably harmed by the issuance of the preliminary order that the Circuit Court has forbad the Board from entering. He would be harmed only in that he would have to defend the action. This is not the kind of irreparable harm that the statute contemplates.

Respondent notes that the Petitioner conceded that judicial power should be restrained in matters where there are available

adequate administrative remedies. In the case of State ex rel, Department of General Services vs. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977), the Court discussed at length the Florida precedent requiring judicial deference to administrative remedies. Even after citing the wealth of precedent, this Court pointed out that that precedent cited preceded the 1974 amendments to the Administrative Procedures Act and that, subsequent to the 1974 amendments, there should be even greater judicial deference to the legislative scheme. While, as this Court noted, there are some exceptions as to the requirement that one exhaust administrative remedies when dealing with the rulemaking provisions of Chapter 120, no such exceptions occur in Section 120.57, Florida Statutes, that section which provides for the orderly consideration of decisions which affect an individual's substantial interest.

In Johnson Service Co. v. Florida Electrical Contractors Licensing Board, 347 So. 2d 808 (Fla. 1st DCA 1977), the District Court of Appeal explicitly held that an administrative remedy is available in licensing disputes; thus, injunctive remedy ordinarily is not available. Specifically, it is available only if the agency utterly failed to examine the applicant's qualifications or otherwise acted arbitrarily or capriciously. In light of Willis and Johnson, Respondent urges, as it did in the Motion To Dismiss filed in the trial court, that the circuit court lacked jurisdiction over this cause or should have restrained from exercising jurisdiction in this cause and erred in not granting Appellant's Motion To Dismiss.

Petitioner makes the astounding assertion that the Johnson Service Co. caveat that judicial intervention was appropriate if the agency acted arbitrarily and capriciously and failed to examine the applicant's qualifications is applicable here because the Board was going to deny Dr. Marrero based on his failure to be "able" to appear. Only after he ran into a snag in obtaining his Florida license did Dr. Marrero run up to Pennsylvania to start practicing medicine and only because he did not want his current employers to find out he was pursuing licensure in Florida was he "unable" to appear, despite repeated prior assurances that he would do so. Secondly, the Board has not wholly failed to examine his qualifications. It examined them and found them lacking. It is because of the revelation of problems which reflect his inability or cast doubt on his ability to practice medicine and his failure to overcome the doubts that the Board decided to deny his application unless he came forth as he had promised he would do. Petitioner's assertion in the summary of argument that "in fact, Petitioner is a highly-qualified physician" (Brief at 7) is entirely unsupported by the record in this cause. Rather than risk a finding on that very issue, he has chosen to litigate through three levels of the judiciary his right and ability to avoid any ruling.

The claim by Dr. Marrero in his Complaint that he would not have any adequate administrative remedy is speculative at best. Dr. Marrero urges in paragraph 12 of the Complaint that there is no further administrative remedy that he can pursue and that he

would have no forum where he could contest the Board's refusal to allow him to withdraw his application. However, he cites no authority whatsoever for his apparent contention that he could not raise the jurisdictional issue in the 120.57 proceeding. To the contrary, the First DCA made it clear that the Board would have a duty to rule on the jurisdictional issue.

Applicable on this point is the case of Couch v. Turlington, cited above. There, the licensee attempted to surrender his license, the surrender was ruled upon and rejected, final action was taken in the disciplinary matter, and the issue of the attempt to surrender was considered in due course by the appellate court. See also, Fox v. State Board of Osteopathic Medical Examiners, 395 So.2d 192 (Fla. 1st DCA 1981) (D.O.A.H. hearing officer ruled on issue of D.O.A.H. jurisdiction.)

Petitioner makes much of the distinction between this case and Couch v. Turlington, noting that Couch was a disciplinary case which arose after the person "besmirched" his record. Petitioner carefully states that it would be "entirely outside the province of the Board to penalize him for having made application for a license to practice here, when he has done absolutely nothing to invoke the Board's disciplinary jurisdiction." [emphasis supplied] It is true he has done nothing to invoke the Board's disciplinary jurisdiction; however, it is not true that he has done nothing to invoke the Board's jurisdiction. He has. He applied for license in Florida and he has gone through the process far enough for the Board to be

concerned as to whether he is capable of practicing medicine safely. While he does not face any charges of misconduct, as did Mr. Couch, it is clear that there are concerns about his ability to practice medicine that the Board feels need to be answered for the protection of the citizens of the State of Florida and for the protection of the citizens of other states in which he is or might become licensed. All the Florida Board of Medicine is asking in this issue on appeal is that it be permitted to exhaust the administrative process to establish whether or not Dr. Marrero is capable of practicing medicine safely. The Board is asking that the Court reject the intervention of the Circuit Court into the licensing process with the recognition that the administrative process was initiated by Dr. Marrero himself and it was only after things did not go as smoothly and as positively as he had hoped that he attempted to withdraw and asked the Circuit Court to intervene.

Finally, the Complaint filed by Plaintiff ignores the fact that any order of denial of license issued by the Board would be only a preliminary order, a notice of intended action, from which a full hearing could be had and after which an appeal could be taken. In the Memorandum of Law served on May 11, 1987, the Petitioner urges at paragraph 8 that the Board's action in refusing to allow Plaintiff to withdraw his application was not entered into pursuant to statutory notice and the opportunity for an administrative hearing. This is true; however, it was the entry of the preliminary injunction which stopped the Board from

entering an order which gave statutory notice and an opportunity for an administrative hearing. Petitioner has not shown in any way how procedural matters which had been preserved and jurisdictional matters could not be raised in the administrative forum.

c. Respondent does not dispute Petitioner's position that a declaratory statement is not an appropriate remedy.

First of all, Respondent argues that the District Court of Appeal's reference to the availability of a declaratory statement is dicta and is not material to the decision of the DCA. The First DCA unequivocally found that Section 120.57 proceedings provided an adequate remedy. The mention of the declaratory statement availability was mentioned only as a second possible remedy. In order for the exhaustion of administrative remedies doctrine to preclude intervention by the circuit court only an adequate remedy need be available; a multiplicity of remedies is not required to exist.

While the Board denies that it has, at this point, committed any wrong against Dr. Marrero, it does not dispute Petitioner's position that the declaratory statement is not the appropriate remedy when the matter at issue has already been joined in other proceedings. However, Respondent does not agree that the declaratory remedy would be inappropriate because of the litigation in circuit court; it is, of course, Respondent's position that the litigation in circuit court was improper. Rather, it is Respondent's position that the declaratory remedy

would be inappropriate because of the pendency of the licensure proceeding.

As noted above, Petitioner has cited no authority for the position that the issue of his ability to withdraw his application cannot be resolved through the licensure proceeding under Section 120.57. To the contrary, in Fox v. State Board of Osteopathic Medical Examiners, the Court explicitly noted that the issue of the power or jurisdiction of the Division of Administrative Hearings (D.O.A.H.) was raised and resolved in a D.O.A.H. proceeding.

Since the jurisdictional issue can be resolved in the 120.57 proceeding, there is no need to require or permit Petitioner to initiate an entirely separate proceeding on an issue which has already been joined.

In fact, in Fox, the Court, citing Couch v. State Department of Health and Rehabilitative Services, 377 So.2d 32 (Fla. 1st DCA 1979), also explicitly held in pertinent part:

> . . . declaratory statement proceedings, by analogy to Chapter 86, Florida Statutes, are not properly filed on issues simultaneously litigated in judicial or other administrative proceedings . . .

395 So.2d at 193. Similarly, in Law v. Florida Parole and Probation Commission, 411 So.2d 1329 (Fla. 1st DCA 1982), the court rejected the use of petitions for declaratory statements as, essentially, collateral attacks on nonfinal agency order. While this case is not directly applicable in that the Board of Medicine was enjoined from entering to nonfinal order from which

further administrative proceedings could be had, the principle relating to the ultimate reviewability of the orders according to the statutorily presented procedure, culminating in appellate review under Section 120.68, Florida Statutes, is instructive.

III.

THE DCA PROPERLY FOUND THAT THE REFUSAL TO DISMISS THE COMPLAINT FOR INJUNCTIVE RELIEF BY THE TRIAL COURT, UNDER THE FACTS OF THIS CASE, WAS IN ERROR

Respondent agrees with Petitioner's statements of general principles relating to the issuance of an injunction and the standard for appellate review of the trial court's decision. However, Respondent firmly believes that the record demonstrates, and the District Court found, that the circuit court erred in issuing the injunction and in denying Respondent's motion to dismiss the complaint.

a. Petitioner failed to establish a likelihood of irreparable harm and the unavailability of an adequate remedy at law

Injunctive relief is a drastic remedy which should be granted only when the failure to do so subjects the Petitioner to irreparable harm. Stoner v. South Peninsular Zoning Commission, 75 So.2d 831 (Fla. 1954).

In paragraph 9 of his Response to Motion To Dismiss, the Petitioner states:

> The Plaintiff will be subject to irreparable harm in that he will forevermore have to explain to other state licensing boards, insurance carriers, hospitals, or other institutions where he might apply for staff

privileges why he has been denied a license to practice medicine in Florida.

Thus, it can be see, the irreparable harm foreseen by the Plaintiff consists of the giving of explanations. This Honorable Court should bear in mind that the giving of these explanations might not have been necessary had the Dr. Marrero appeared with the requested information to the Board of Medicine and explained to the Board's satisfaction that he could indeed practice medicine with reasonable skill and safety. Further, they might not be necessary if Dr. Marrero makes his appearance at the next meeting of the Board after dissolution of the injunction and makes a satisfactory presentation. In addition, Respondent urges, no harm whatsoever will have occurred upon the Board's issuance of a preliminary order. See, Section 120.60, Florida Statutes (1987) Dr. Marrero will have the right to seek administrative review. Only if he fails to seek review or if he loses on the merits would the Board's order of denial become a final order. Finally, the irreparability of the harm is speculative, at best. That he may have to explain is surely not irreparable harm. That his explanation "may result" in "possible" negative actions is not a basis for granting injunctive relief. Injunctions should not be granted merely to allay apprehension of injury. As stated in Coral Springs v. Florida National Properties, Inc., 340 So.2d 1271 (Fla. 4th DCA 1976),

> To be the subject of an injunction, a prospective injury must be more than a remote possibility; it must be so

imminent and probable as reasonably to demand preventive action by the court.

Finally, Respondent strenuously maintains that there is an adequate remedy at law to follow and that is pursuance of administrative remedies. Petitioner implies in Paragraph 5 of his Response (R 62) that administrative remedies are inadequate and in Paragraph 7 (R 62-63) that he has exhausted his administrative remedies because there are no such remedies. He opines that if he waited until the license was denied and then sought an administrative review, "[t]he sole issue before the hearing officer would be the denial of the license itself. The issue of the Board's refusal to allow the Plaintiff to withdraw his application would not be before that tribunal. . . ." Plaintiff fails, however, to cite any legal authority for that assertion. In Couch v. Turlington, a teacher was able, through the administrative and appellate review procedures under Chapter 120, the Administrative Procedures Act, to have the agency's refusal of his attempt to surrender his license reviewed in the course of the disciplinary proceedings against his license. Respondent contends that Petitioner could, similarly, litigate the effect of his attempt to withdraw his application through the normal administrative process. See also, Fox v. State Board of Osteopathic Medical Examiners. This being the case, this Honorable Court should not uphold the invocation of the extraordinary remedy of injunctive relief under the circumstances presented.

b. **Petitioner failed to establish a clear legal right**

A permanent injunction should not have been granted in the instant case because, for the reasons cited in Issue I of this brief, Petitioner did not have a clear legal right to withdraw his application without the concurrence of the Board. Rather, the Board had implied authority to deny his request to withdraw the application. An injunction should not have been granted where there is a substantial dispute as to the legal rights involved. City of Miami Beach v. Dor Rich, Inc., 289 So.2d 52 (Fla. 3rd DCA 1974), cert. den., 291 So.2d 586 (Fla. 1974)

c. **Petitioner failed to establish that the threatened injury to the Petitioner outweighs any possible harm to the Respondent, and that the granting of an injunction will not disserve the public interest.**

Respondent strenuously urges that, in this particular instance, possible harm to the public definitely outweighs the threat of the Petitioner's having to make "explanations" with regard to the action which may be taken by Florida. In the Memorandum of Law in Support of Injunctive Relief, Petitioner stated:

> In addition there is no possible way that the granting of this injunction could disserve the public interest. Since the withdrawal of the Plaintiff's application means that there is no chance or possibility of him practicing medicine in the State of Florida, then the public interest of the citizens of the State of Florida cannot possibly be disserved by the granting of this injunctive relief.
> [Emphasis supplied.] (R 30-31)

This assertion is contradicted by the assertions set forth in letter by Dr. Marrero and his prior counsel that Dr. Marrero

intends to reapply for licensure in Florida in the near future. If there were no possibility that Dr. Marrero would practice in the State of Florida, Respondent might agree with the above statement as to Florida. However, such is not the case so long as Dr. Marrero is permitted to withdraw his application without prejudice.

Furthermore, there is the additional possible harm to the citizens of other states in which he practies or may practice medicine if, in fact, Dr. Marrero is not able to practice medicine with safety to patients.

When it appears that the injury to the public may outweigh the individual rights of the plaintiff, the trial court may refuse to grant an injunction. Sadowski v. Shevin, 351 So.2d 44 (Fla. 3rd DCA 1976), rev'd on other grounds, 345 So.2d 330 (Fla. 1977). See also, Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975); cert. denied sub nom, Adler v. Sandstrom, 423 U.S. 1053 (1970); Florida Land Company v. Orange County, 418 So.2d 370 (Fla. 5th DCA 1982). The United States Supreme Court has also indicated that courts may go further to give or withhold injunctive relief when the public interest is at stake than it may when merely private interests compete. See, Virginia Railway v. Federation, 300 U.S. 515 (1936); Yakus v. United States, 321 U.S. 424 (1944).

IV

THIS HONORABLE COURT SHOULD DISCHARGE JURISDICTION BASED ON THE ABSENCE OF EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF ANOTHER DCA OR OF THE FLORIDA SUPREME COURT

Now that this Honorable Court has had the opportunity to review the entire record and two of the briefs on the merits of the parties, Respondent urges the Court to recognize that there is no express and direct conflict between the Marrero decision of the First District Court of Appeal and the decision of another DCA or the Florida Supreme Court on the same issue of law. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). Petitioner cites five decisions he argues are in conflict. Four of them were also First DCA decisions. Although Respondent believes, as argued above, that they are distinguishable, even if they were not, intradistrict conflict is not sufficient to invoke the conflict jurisdiction of the Florida Supreme Court. Article V, Section 4(2), Florida Constitution.

The only decision which remains, then, on which jurisdiction is arguably based is the Middlebrook decision of the Fifth District Court of Appeal. That case is, as explained on the face of the Marrero opinion and elaborated on more fully in the first issue in this brief, factually distinguishable. Furthermore, the cases did not rule on the same issue of law.

Conflict jurisdiction does not exist if the points of law settled in the two cases allegedly in conflict are not the same or if the controlling factual elements are distinguishable.

Department of Revenue v. Johnston; Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). Therefore, Dr. Marrero's reliance upon Middlebrooks for express and direct conflict is misplaced.

As stated in Kincaid v. World Insurance Company, 157 So.2d 517, 518 (Fla. 1963), the measure of this Supreme Court's conflict jurisdiction is not whether the Supreme Court agrees with the District Court ruling, but on

> whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents.

In summary, the Board contends that there is no express and direct conflict between Marrero and any other cases cited, and that there is no basis for the exercise of conflict jurisdiction by the Florida Supreme Court. Even if there were conflict, however, the Board would urge this court to use its discretion to discharge review. Dr. Marrero actually focuses on the issue of the agency's jurisdiction over an applicant who wishes to withdraw, that is, the correctness of the Board's action, not on the correctness of the District Court's decision that the circuit court erred in refusing to dismiss the complaint. As noted by the District Court, the merits of the withdrawal attempts can be litigated another day, but in the proper forum.

CONCLUSION

Respondent respectfully urges this Honorable Court to uphold the decision of the District Court of Appeal which ruled that the circuit court should have granted the motion to dismiss Petitioner's complaint for injunction filed by the Board on the basis that the circuit court should have required Petitioner to exhaust administrative remedies and that Petitioner failed to establish that he would suffer irreparable harm if required to litigate in the administrative forum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by. U.S. Mail to Michael I. Schwartz, Attorney for Petitioner, 119 North Monroe Street, Tallahassee, Florida 32301, this 6th day of April, 1989.

M. Catherine Lannon