STATE OF OHIO
THE STATE MEDICAL BOARD OF OHIO
77 SOUTH HIGH STREET
17TH FLOOR
COLUMBUS, OHIO 43215

(614)466-3934

September 16, 1988

David B. Gilbert, M.D.
1004 West Gold Nugget Lane
Payson, Arizona 85541

Dear Doctor Gilbert:

Please find enclosed copies of the Entry of Order; the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of the Minutes of the State Medical Board, meeting in regular session on September 14, 1988, including Motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Such an appeal may be taken to the Franklin County Court of Common Pleas only.

Such an appeal setting forth the Order appealed from and the grounds of the appeal must be commenced by the filing of a Notice of Appeal with the State Medical Board of Ohio and the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of this notice and in accordance with the requirements of Section 119.12 of the Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO

Henry G. Cramblett, M.D.
Secretary

HGC:em
Enclosures

CERTIFIED MAIL NO. P 746 510 445
RETURN RECEIPT REQUESTED

STATE OF OHIO
STATE MEDICAL BOARD

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; attached copy of the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, State Medical Board; and attached excerpt of Minutes of the State Medical Board, meeting in regular session on September 14, 1988, including Motions approving and confirming said Report and Recommendation as the Findings and Order of the State Medical Board, constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of David B. Gilbert, M.D., as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

(SEAL)

Henry G. Cramblett, M.D.
Secretary

9/16/88
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

*

DAVID B. GILBERT, M.D. *

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio the 14th day of September, 1988.

Upon the Report and Recommendation of Wanita J. Sage, Attorney Hearing Examiner, Medical Board, in this matter designated pursuant to R.C. 4731.23, a true copy of which is attached hereto and incorporated herein, and upon approval and confirmation by vote of the Board on September 14, 1988, the following Order is hereby entered on the Journal of the State Medical Board for the 14th day of September, 1988.

It is hereby ORDERED:

> That the license of David Bruce Gilbert, M.D., to practice medicine and surgery in the State of Ohio shall be and is hereby REVOKED.

This Order shall become effective immediately upon the mailing of notification of approval by the State Medical Board of Ohio.

(SEAL)

Henry G. Cramblett, M.D.
Secretary

9/16/88
Date

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REPORT AND RECOMMENDATION
IN THE MATTER OF DAVID BRUCE GILBERT, M.D.

The Matter of David Bruce Gilbert, M.D., came on for hearing before me, Wanita J. Sage, Esq., Hearing Examiner for the State Medical Board of Ohio, on July 7, 1988.

I. Basis for Hearing

A. By letter of December 8, 1982 (State's Exhibit #1), the State Medical Board advised Dr. Gilbert that it proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio based upon both the revocation of his Arizona medical license and the basis for the Arizona disciplinary action. The Ohio Board alleged that the fact of and the basis for the Arizona action constituted violations of:

1. Section 4731.22(B)(6), Ohio Revised Code: "A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;" and

2. Section 4731.22(B)(18), Ohio Revised Code, as in effect from August 27, 1982, to March 17, 1987 (and corresponding provisions in effect thereafter): "The revocation or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that state for an action that would have also been a violation of this chapter except for nonpayment of fees."

B. By letter dated January 7, 1983 (State's Exhibit #3), Jack J. Rappeport, Esq., requested a hearing on behalf of Dr. Gilbert.

II. Appearances

A. On behalf of the State of Ohio: Anthony J. Celebrezze, Jr., Attorney General, by Rachel L. Belenker, Assistant Attorney General.

B. Dr. Gilbert, having been duly advised of his right to representation, appeared on his own behalf without counsel.

III. Testimony Heard

Dr. Gilbert was the sole witness at hearing.

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IV. Exhibits Examined

In addition to those listed above, the following exhibits were identified and admitted into evidence in this matter:

A. Presented by the State

1. State's Exhibit #2: January 17, 1983, letter to Jack J. Rappeport, Esq., from the State Medical Board advising that Dr. Gilbert's hearing was initially scheduled for January 20, 1983, but was postponed pursuant to Section 119.09, Ohio Revised Code.

2. State's Exhibit #4: January 31, 1983, letter to Jack J. Rappeport, Esq., from the State Medical Board granting Dr. Gilbert's request for postponement of hearing until the resolution of his appeal of the Arizona Board of Medical Examiners' decision and setting conditions for such postponement.

3. State's Exhibit #5: August 13, 1985, letter to Jack J. Rappeport, Esq., from the State Medical Board scheduling the hearing for October 9, 1985.

4. State's Exhibit #6: October 15, 1985, letter to Attorney Rappeport from the State Medical Board continuing the October 9, 1985, hearing for review of the status of previous possible agreements.

5. State's Exhibit #7: May 25, 1988, Entry of this Hearing Examiner denying Dr. Gilbert's request for indefinite continuance; scheduling the hearing for July 7, 1988; and setting forth reasons for those actions.

6. State's Exhibit #8: June 16, 1988, letter to the State Medical Board from Dr. Gilbert stating his intention to be present at the July 7, 1988, hearing.

7. State's Exhibti #9: Arizona Board of Medical Examiners' September 10, 1981, Order of Summary Suspension in the Matter of David Bruce Gilbert, M.D.

8. State's Exhibit #10: Arizona Board of Medical Examiners' March 13, 1980, Complaint in the Matter of David Bruce Gilbert, M.D.

9. State's Exhibit #11: Arizona Board of Medical Examiners' March 13, 1980, Summons in the Matter of David Bruce Gilbert, M.D.

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10. State's Exhibit #12: Arizona Board of Medical Examiners' June 3, 1982, Order of Revocation; April 23, 1981, Findings, Conclusions, and Recommendation of C.E. Singer, Jr., Administrative Law Judge; and April 3, 1982, Opinion and Recommendation of John J. Irwin, Jr., Administrative Judge.

11. State's Exhibit #13: May 2, 1986, Memorandum of the United States District Court for Arizona in Case No. CIV 84-284 PHX PGR, Gilbert v. Babbit, et al.

B. Presented by the Respondent

1. Respondent's Exhibit #1: Excerpt from Section 32-1451, Arizona Revised Statutes, admitted specifically with reference to provision (C) of that Section.

2. Respondent's Exhibit #2: Excerpt from the Arizona Board of Medical Examiners' budget justification for fiscal year 1988, admitted with specific reference to Paragraph 2.

3. Respondent's Exhibit #6: October 29, 1979, letter to David Bruce Gilbert, M.D., from the American Board of Family Practice with regard to Dr. Gilbert's recertification as a diplomate of that Board for the period 1979-86.

4. Respondent's Exhibit #8: 11 affidavits, sworn to in 1980, from patients or parents of patients; three letters of appreciation from patients and/or colleagues, dated 1972, 1978, and 1980.

5. Respondent's Exhibit #9: February 7, 1980, investigation report by W. Albert Brewer, M.D., with regard to his December 18, 1979, review of the hospital charts of 30 of Dr. Gilbert's patients.

IV. Other Matters

A. Respondent's Exhibit #1 was admitted into evidence in this matter, subject to verification that this 1986 version of Section 32-1451(C), Arizona Revised Statutes, was substantially the same as that in effect at the time of Dr. Gilbert's 1982 Arizona disciplinary action. This Hearing Examiner has verified that provision (C) was not affected by the 1983, 1984, or 1986 amendments to this Section, though other provisions of this Section were affected.

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B. In addition to those Respondent's exhibits listed above as having been admitted into evidence, Dr. Gilbert proffered exhibits identified as #3, #4, #5, #7, #10, #11, #12, #13, #14, #15, #16, #17, #18, and #19. These proffered exhibits were not admitted into evidence in this Matter.

FINDINGS OF FACT

1. On March 8, 1980, the Arizona Board of Medical Examiners summarily suspended the Arizona medical license of David Bruce Gilbert, M.D., but stayed the suspension with regard to matters not involving major surgery. By Complaint issued on March 13, 1980, the Arizona Board of Medical Examiners alleged that Dr. Gilbert was lacking in sufficient medical knowledge and skill and that his continued practice of medicine and surgery endangered the health of patients and the public.

   Thereafter, on February 2 and February 3, 1981, hearings were held on the Arizona Board's allegations. By agreement of the parties, those hearings were presided over by C.E. Singer, Jr., an Administrative Law Judge for the Industrial Commission of Arizona. Mr. Singer's Findings, Conclusions, and Recommendation were filed with the Arizona Board on April 23, 1981. Based upon the testimony and evidence presented in that matter with regard to approximately 20 surgical patients of Dr. Gilbert, Mr. Singer concluded that Dr. Gilbert was competent to perform surgery, but that he demonstrated "a marked deficiency in ability to diagnose and properly prepare patients for surgery." He further concluded that the conduct and practice of Dr. Gilbert constituted medical incompetency and unprofessional conduct, as defined by Arizona law. At that time, Arizona law defined "medically incompetent" to mean "lacking in sufficient medical knowledge or skills or both, in that field of practice in which the physician concerned engages, to a degree likely to endanger the health of his patients." It defined "unprofessional conduct" as including "any conduct or practice contrary to recognized standards of ethics of the medical profession or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public, or any conduct, practice or condition which does or might impair the ability safely and skillfully to practice medicine." Mr. Singer recommended that the Board place Dr. Gilbert on probation under such conditions as the Board deemed appropriate for the protection of the public.

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After the February, 1981, hearings, in June, 1981, a Supplemented Complaint was issued by the Arizona Board of Medical Examiners. On September 10, 1981, after a review of medical records of patients Dr. Gilbert had attended at Lewis R. Pyle Memorial Hospital since the time of the March, 1980, summary suspension, the Arizona Board of Medical Examiners vacated its previous stay of suspension with regard to matters not involving major surgery and fully suspended Dr. Gilbert from the practice of medicine and surgery in Arizona, pending further disciplinary proceedings.

Thereafter, on September 26, 1981, hearing was held before John J. Irwin, Jr., Administrative Judge, with regard to the Supplemented Complaint. Mr. Irwin's Opinion and Recommendation was issued on April 3, 1982. With regard to the Arizona Board's charge in connection with a seven-year-old misdemeanor conviction for failure to file an income tax return, Mr. Irwin was of the opinion that the offense was a misdemeanor not involving moral turpitude. With regard to charges in connection with the care of three patients, Mr. Irwin found Dr. Gilbert's conduct and practice to constitute medical incompetence and unprofessional conduct, as defined by Arizona law. Mr. Irwin recommended that the Arizona Board place Dr. Gilbert on probation under such conditions as the Board deemed appropriate for the protection of the public.

On June 3, 1982, the Board of Medical Examiners of the State of Arizona adopted both hearing officers' findings of fact and conclusions of law and ordered that the license of David Bruce Gilbert, M.D., to practice medicine in the State of Arizona be revoked. In further support of its Order of Revocation, that Board cited its previous attempts to correct deficiencies in Dr. Gilbert's medical competence and professional conduct, including letters of concern, letters of reprimand, censure, probation, additional medical education, and limitations on his practice of medicine.

These facts are established by State's Exhibits #9 through #12 and by the admissions of Dr. Gilbert (Tr. at 19).

2. The Findings and Conclusions of the two Arizona hearing officers, as included in State's Exhibit #12, are fully incorporated herein by reference as findings of this Hearing Examiner.

At hearing, in this Matter, Dr. Gilbert offered the patient (and/or guardian) affidavits included in Respondent's Exhibit #8 in rebuttal. In addition, he offered Respondent's Exhibit #9, the investigational report of Dr. W. Albert Brewer, the Arizona Board's expert witness, to show error and/or bias on Dr. Brewer's part, specifically with reference to Dr. Brewer's interpretations of pathology test results contrary to the diagnoses which had been recorded by the pathologist who had examined the surgical specimens.

These facts are established by State's Exhibit #12, by the testimony of Dr. Gilbert (Tr. at 45-56), and by Respondent's Exhibits #8 and #9.

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3. Before the issuance of the Arizona Board's March 8, 1980, Order of Summary Suspension and its March 13, 1980, Summons and Complaint, both an investigative review of certain surgical cases of Dr. Gilbert's and an informal interview between that Board and Dr. Gilbert were conducted.

   These facts are established by State's Exhibit #12 (pg. 2 of Administrative Judge Singer's Findings, Conclusions, and Recommendation) and by the testimony of Dr. Gilbert (Tr. at 81-84).

4. Although Dr. Gilbert has various collateral civil rights actions pending in the United States District Court for the District of Arizona, he did not timely appeal the Arizona Board of Medical Examiner's June 3, 1982, Order of Revocation.

   This fact is established by State's Exhibit #13 and by the admission of Dr. Gilbert (Tr. at 19).

CONCLUSIONS

1. The acts, conduct, and/or omissions of David Bruce Gilbert, M.D., as set forth in Findings of Fact #1 and #2, above, constitute "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established", as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

   The Findings and Conclusions of Arizona Administrative Law Judge Singer (hereinafter referred to as the Singer Report) thorouhgly details five cases which were the subject of the Arizona Hearing, providing excerpts from the testimony of Dr. Brewer (the Arizona Board's expert witness), Dr. Murphy (Dr. Gilbert's expert witness), and Dr. Gilbert. The Opinion of Arizona Administrative Judge Irwin (hereinafter referred to as the Irwin Report) provides a detailed account of three additional cases, including excerpts from the testimony of the witnesses. The detailed accounts with regard to the care of five subject patients included in the Singer Report constitute substantial, probative, and reliable evidence to support this Hearing Examiner's concurrence with the conclusion of Mr. Singer that Dr. Gilbert "demonstrates a marked deficiency in ability to diagnose and properly prepare patients for surgery." Further, the detailed accounts included in the Irwin Report constitute substantial, probative, and reliable evidence to support this Hearing Examiner's conclusion that Dr. Gilbert committed significant errors in judgment with regard to the care of the three subject patients which constitute "a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances."

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Although the patient affidavits offered by Dr. Gilbert show that some of the patients, or their guardians, whose cases were the subject of the Arizona action were pleased with the end results of their surgery at Dr. Gilbert's hands, this fact is not relevant to the conclusions in this matter. Dr. Gilbert's diagnostic skills and medical judgment, rather than his surgical skills, were at issue in the Arizona action. This is well illustrated by the case of a patient identified as DF (see pages 4-5 of the Singer Report) who was admitted with an acute surgical abdomen, but whom Dr. Gilbert held in the hospital for workup for six days before performing surgery. Dr. Brewer testified with regard to this patient: "I think he had the indications for surgery on admission and I think to delay, this was the grace of God that he didn't rupture his appendix and that he finally came to proper treatment. . . ." In another case, Dr. Gilbert performed an appendectomy on a 75-year-old man identified as HJ (see pages 7-9 of the Singer Report) when, in Dr. Brewer's opinion, the preoperative workup did not suggest a surgical abdomen, but rather disease of the urinary tract. The pathologist's report showed the appendix to be normal. This patient was, according to Dr. Gilbert's own testimony, "already on marginal cardiopulmonary status" at the time and, after surgery, developed cardiac arrhythmia and had to be transferred to another hospital for cardioversion of his heart rate.

Dr. Gilbert's defense with regard to Dr. Brewer's disagreement with the pathologist's diagnoses is also not persuasive. In several instances, Dr. Murphy, Dr. Gilbert's own expert witness, found fault with aspects of Dr. Gilbert's patient care, as evidenced by Dr. Murphy's testimony with regard to patient BS (see the Singer Report at page 6) and patient EG (see Singer Report at page 12). In none of the eight cases detailed in the Singer and Irwin Reports was Dr. Brewer's disagreement with the pathologist's finding as to whether or not the patient had a diseased appendix, a determinative issue.

2. The revocation of Dr. Gilbert's Arizona license by the Board of Medical Examiners of the State of Arizona constitutes "the revocation or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that state for an action that would have also been a violation of this chapter except for nonpayment of fees", as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, as in effect from August 27, 1982, to March 17, 1987 (and corresponding provisions of law in effect thereafter). The Arizona Board's Order of Revocation, which was not timely appealed by Dr. Gilbert, is still in full force and effect. Dr. Gilbert's arguments based upon his interpretation ~~and~~ Section 32-1451(C), Arizona Revised Statutes, are neither persuasive nor relevant to this conclusion. However, as set forth in Finding of Fact #3, above, it appears that Dr. Gilbert had an investigational interview with members of the Arizona Board, clearly "representatives of the Board", and that that Board reviewed his patient records and took reasonable measures to inform itself with regard to its allegations.

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PROPOSED ORDER

It is hereby ORDERED that the license of David Bruce Gilbert, M.D., to practice medicine and surgery in the State of Ohio shall be and is hereby REVOKED. This Order shall become effective immediately upon the mailing of notification of approval by the State Medical Board of Ohio.

Wanita J. Sage
Wanita J. Sage
Attorney Hearing Examiner

EXCERPT FROM THE MINUTES OF SEPTEMBER 14, 1988

REPORTS AND RECOMMENDATIONS

Ms. Nester, Mr. Costantini, Ms. Thompson and Mr. Dilling left the meeting at this time.

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Dr. Stephens asked if each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of James H. Barry, M.D., Joel Ashenbaum, P.A. Applicant, Bruce Brost, M.D., Thomas Jones, M.D., Adolfas Kuzas, M.D., David Turner, M.D., and David Gilbert, M.D. A roll call was taken:

A roll call was taken:

ROLL CALL:	Dr. Cramblett	- aye
	Dr. Barnes	- aye
	Dr. Kaplansky	- aye
	Dr. Agresta	- aye
	Dr. Rothman	- aye
	Dr. Rauch	- aye
	Mr. Albert	- aye
	Dr. O'Day	- aye
	Ms. Rolfes	- aye
	Mr. Jost	- aye
	Dr. Stephens	- aye

.....

REPORT AND RECOMMENDATION IN THE MATTER OF DAVID B. GILBERT, M.D.

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DR. O'DAY MOVED TO APPROVE AND CONFIRM MS. SAGE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF DAVID B. GILBERT, M.D. DR. AGRESTA SECONDED THE MOTION.

.....

A roll call vote was taken on Dr. O'Day's motion:

ROLL CALL VOTE:	Dr. Cramblett	- abstain
	Dr. Kaplansky	- aye
	Dr. Agresta	- aye
	Dr. Rothman	- aye
	Dr. Rauch	- abstain

Mr. Albert	- aye
Dr. O'Day	- aye
Ms. Rolfes	- aye
Mr. Jost	- aye

The motion carried.

STATE OF OHIO
THE STATE MEDICAL BOARD
Suite 510
65 South Front Street
Columbus, Ohio 43215

December 8, 1982

David Bruce Gilbert, M.D.
Box 1030
Payson, AZ 85541

Dear Doctor Gilbert:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio intends to determine under the provisions of Section 4731.22, Ohio Revised Code, whether or not to limit, reprimand, revoke, suspend, place on probation, refuse to register, or reinstate your certificate to practice medicine or surgery for one (1) or more of the following reasons:

1. On March 8, 1980, the Board of Medical Examiners of the State of Arizona issued an Order of Summary Suspension to you. Thereafter, on March 13, 1980, said Board of Medical Examiners issued a Summons and Complaint to you which alleged that you lacked sufficient medical knowledge and skill and that your continued practice of medicine endangered the health of patients and the public. A formal hearing was subsequently conducted. As a result of the hearing, a Findings, Conclusions, and Recommendation was issued to you on April 3, 1982. Based upon said Findings, Conclusions, and Recommendation, said Board of Medical Examiners ordered that your license to practice medicine or surgery in Arizona be revoked. Said Findings, Conclusions, and Recommendation, and Order of Revocation are attached hereto and incorporated herein.

The fact of and basis for the disciplinary action taken against you in the State of Arizona are hereby alleged to constitute "A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," pursuant to Section 4731.22(B)(6), Ohio Revised Code.

Further, the fact of and basis for the disciplinary action taken against you in the State of Arizona are hereby alleged to constitute "The revocation or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that State for an action that would have also been a violation of this chapter except for nonpayment of fees," pursuant to Section 4731.22(B)(18), Ohio Revised Code, effective August 27, 1982.

Pursuant to Chapter 119., Ohio Revised Code, please be advised that you may request a hearing on this matter. If you wish to request such a hearing, that request must be made within thirty (30) days of the time of mailing of this notice.

December 8, 1982

You are further advised that you are entitled to appear at such a hearing in person, or by your attorney, or you may present your position, arguments, or contentions in writing, or that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event there is no request for such a hearing made within thirty (30) days of the time of mailing of this notice, the State Medical Board of Ohio, may, in your absence and upon consideration of this matter, determine whether or not to limit, reprimand, revoke, suspend, place on probation, refuse to register, or reinstate your certificate to practice medicine or surgery in the State of Ohio.

A copy of the appropriate versions of Section 4731.22, Ohio Revised Code, is enclosed for your review.

Very truly yours,

Anthony Ruppersberg, Jr., M.D.
Secretary

AR:ls

Enclosures

CERTIFIED MAIL NO. P349 642 040
RETURN RECEIPT REQUESTED