



State Medical Board of Ohio

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January 13, 1999

Kevin R. Berry, M.D.
720 E. Broad Street
Columbus, OH 43215

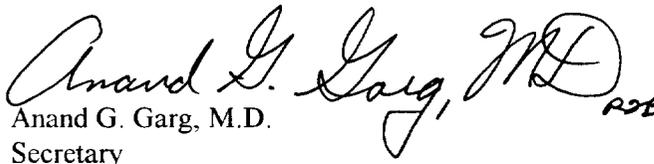
Dear Doctor Berry:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of R. Gregory Porter, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on January 13, 1999, including motions approving and confirming the Findings of Fact, modifying the Conclusions of the Hearing Examiner, and adopting an amended Order.

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, Ohio Revised Code.

THE STATE MEDICAL BOARD OF OHIO


Anand G. Garg, M.D.
Secretary

AGG:jam
Enclosures

CERTIFIED MAIL RECEIPT NO. Z 233 840 213
RETURN RECEIPT REQUESTED

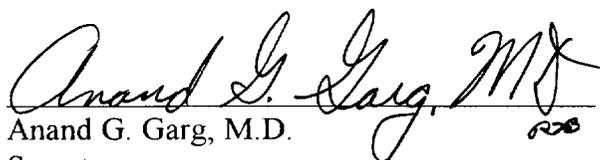
cc: Douglas E. Graff, Esq.
CERTIFIED MAIL RECEIPT NO. Z 233 840 214
RETURN RECEIPT REQUESTED

Mailed 2/11/99

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of R. Gregory Porter, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on January 13, 1999, including motions approving and confirming the Findings of Fact, modifying the Conclusions of the Hearing Examiner, and adopting an amended Order; constitute a true and complete copy of the Findings and Order of the State Medical Board in the Matter of Kevin R. Berry, 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.


Anand G. Garg, M.D.
Secretary

(SEAL)

January 13, 1999

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

KEVIN R. BERRY, M.D.

*

ENTRY OF ORDER

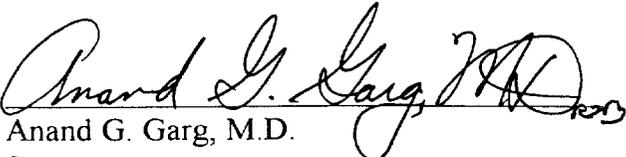
This matter came on for consideration before the State Medical Board of Ohio on January 13, 1999.

Upon the Report and Recommendation of R. Gregory Porter, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the modification, approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

It is hereby ORDERED that the allegations against Kevin R. Berry, M.D., as set forth in the May 13, 1998 Notice of Opportunity for Hearing, are hereby DISMISSED. This Order does not affect, in anyway, the June 12, 1996 Consent Agreement.

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

(SEAL)


Anand G. Garg, M.D.
Secretary

January 13, 1999
Date

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REPORT AND RECOMMENDATION IN THE MATTER OF KEVIN R. BERRY, M.D.

The Matter of Kevin R. Berry, M.D., was heard by R. Gregory Porter, Attorney Hearing Examiner for the State Medical Board of Ohio, on October 2 and 19, 1998.

INTRODUCTION

I. Basis for Hearing

A. By letter dated May 13, 1998, the State Medical Board of Ohio [Board] notified Kevin R. Berry, M.D., that it had proposed to determine whether to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on the following allegations:

1. On or about April 17, 1996, the Board issued to Dr. Berry a Notice of Immediate Suspension and Opportunity for Hearing alleging violations of Sections 4731.22(B)(10) and (B)(26), Ohio Revised Code. The alleged violations were based on Dr. Berry's pleas of guilty to three felony counts of Illegal Processing of Drug Documents for which he was granted treatment in lieu of conviction.

On or about June 12, 1996, Dr. Berry entered into a Consent Agreement with the Board in lieu of further formal proceedings. Dr. Berry's certificate was subsequently reinstated on November 13, 1996, subject to the terms and conditions of the 1996 Consent Agreement.

2. Paragraph (7)(g) of the Consent Agreement states that Dr. Berry "shall abstain completely from the personal use or possession of drugs, except those prescribed, dispensed, or administered to Dr. Berry by another so authorized by law who has full knowledge of Dr. Berry's history of chemical dependency."

On or about February 27, 1998, Dr. Berry tested positive for Butalbital.

The Board alleged that Dr. Berry's conduct, as referenced in paragraph 2, constituted a "[v]iolation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued," as that clause is used in Section 4731.22(B)(15), Ohio Revised Code."

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Accordingly, the Board advised Dr. Berry of his right to request a hearing in this matter. (State's Exhibit 1A).

- B. On May 20, 1998, Douglas E. Graff, Esq., submitted a written hearing request on behalf of Dr. Berry. (State's Exhibit 1B).

II. Appearances

- A. On behalf of the State of Ohio: Betty D. Montgomery, Attorney General, by Rebecca J. Albers, Assistant Attorney General.
- B. On behalf of the Respondent: Douglas E. Graff, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

- A. Presented by the State
 - 1. Jan Sussex
 - 2. Kevin R. Berry, M.D., as if on cross-examination
 - 3. Randy Beck
 - 4. James L. Ferguson
 - 5. Melissa Robinson
 - 6. Russell Potter
- B. Presented by Respondent
 - 1. Barron Farrier
 - 2. Jessica Flagherty
 - 3. Craig T. Pratt, M.D.
 - 4. Kevin R. Berry, M.D.

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5. Jerry D. Smucker, M.D.

II. Exhibits Examined

A. Presented by the State

1. State's Exhibits 1A-1S: Procedural exhibits.
2. State's Exhibit 2: March 19, 1998, letter to Jan Sussex from Barron Farrier with attached copy of an examination report from the Franklin County Coroner's Office, Forensic Toxicology Division.
3. State's Exhibit 3: Copy of an April 20, 1998, examination report from the Franklin County Coroner's Office concerning a positive result on a urine specimen purportedly submitted by Dr. Berry.
4. State's Exhibit 4: Certified copy of a February 27, 1998, submission form from the Franklin County Coroner's Office transferring custody of Dr. Berry's urine specimen from the Franklin County Adult Probation urinalysis lab to the Franklin County Coroner's Office. (Note: A portion of this exhibit was redacted by the Hearing Examiner to preserve the confidentiality of other individuals who are unrelated to this case.)
5. State's Exhibit 5: Copy of a March 3, 1998, examination report from the Franklin County Coroner's Office. (Note: A portion of this exhibit was redacted by the Hearing Examiner to preserve the confidentiality of other individuals who are unrelated to this case.)
6. State's Exhibit 6: Copies of computerized printouts concerning Dr. Berry's urine specimen.
7. State's Exhibit 7: April 21, 1998, handwritten statement of Dr. Berry to Randy Beck.
8. State's Exhibit 8: Copy of a May 7, 1998, Ohio Physicians Effectiveness Program [OPEP] status report.
9. State's Exhibit 9: Certified copy of patient records for Dr. Berry from Shepherd Hill Hospital covering the period March 19 to April 3, 1998. (Note: This exhibit has been sealed to protect patient confidentiality.)

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OF COUNSELORS

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10. State's Exhibit 10: Certified copy of the 1996 Consent Agreement between the Board and Dr. Berry.
11. State's Exhibit 11: Withdrawn and not admitted.
12. State's Exhibit 12: Copy of a portion of the Franklin County Adult Probation Department Urinalysis Laboratory results printout from February 20, 1998. (Note: A portion of this exhibit was redacted by the Hearing Examiner to preserve the confidentiality of other individuals who are unrelated to this case.)

B. Presented by the Respondent

1. Respondent's Exhibit A: Copy of an August 19, 1998, Report of Laboratory Examination from Cellmark Diagnostics to Douglas E. Graff, Esq., and related documents.
2. Respondent's Exhibit B: Copy of a March 3, 1998, examination report from the Franklin County Coroner's Office with handwritten notes made by Mr. Farrier.
3. Respondent's Exhibit C: Copy of AA/NA Attendance logs for Dr. Berry covering the months of December 1997 and February, March, and April 1998. (Note: This exhibit has been sealed to protect the anonymity of attendees at AA/NA meetings.)
4. Respondent's Exhibit D: Copies of Professional Health Requisition forms for OPEP urine tests conducted by Bendiner & Schlesinger, Inc.
5. Respondent's Exhibit E: Copy of a Franklin County Probation Services Drug Screen Report concerning Dr. Berry.
6. Respondent's Exhibit F: Curriculum vitae of Craig T. Pratt, M.D., with attached biographical information.
7. Respondent's Exhibit G: Copies of February 10, 1998, letters to Dr. Berry and to the Board from counselors at Shepherd Hill Hospital noting Dr. Berry's compliance with aftercare programming. (Note: This exhibit has been sealed to protect patient confidentiality.)
8. Respondent's Exhibit H: Copies of letters to the Board from J.D. Smucker, M.D., dated November 11, 1997, May 6, 1998, and July 20,

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1998, stating that he is the monitoring physician for Dr. Berry and has observed no evidence of relapse.

SUMMARY OF THE EVIDENCE

All exhibits and transcripts of testimony, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background Information

1. Kevin R. Berry, M.D., obtained his Doctor of Medicine degree from the Wright State University School of Medicine in 1981. Dr. Berry completed his internship and residency at the Ohio State University, and is an internal medicine consultant. Over the last ten years Dr. Berry has been practicing exclusively in a hospital setting. (Transcript Volume I [Tr. I] at 16-17)
2. Dr. Berry testified that his last abuse of drugs occurred in November 1995; since that time, he has not ingested any drugs other than those permitted by his consent agreement. Dr. Berry further testified that his drug of choice was Esgic, which contains butalbital, acetaminophen, and caffeine. (Tr. I at 18, 187)
3. Dr. Berry testified that, in 1996, he pled guilty to three felony counts of Illegal Processing of Drug Documents. Dr. Berry was granted treatment in lieu of conviction by the Franklin County Court of Common Pleas. As a result, Dr. Berry is subject to supervision by the Franklin County Adult Probation Department [Adult Probation]. Dr. Berry testified that this court-ordered supervision is scheduled to terminate on February 28, 1999. (Tr. I at 17-18, 150)
4. On or about April 17, 1996, the Board issued a Notice of Immediate suspension and Opportunity for Hearing to Dr. Berry. In that notice, the Board alleged that Dr. Berry had violated Sections 4731.22(B)(10) and (B)(26), Ohio Revised Code, as a consequence of his pleas of guilty to three felony counts of Illegal Processing of Drug Documents for which he had been granted treatment in lieu of conviction. (State's Exhibit [St. Ex.] 10)
5. On or about June 12, 1996, Dr. Berry entered into a Consent Agreement with the Board in lieu of further formal proceedings based upon the alleged violations of Section 4731.22, Ohio Revised Code, as had been set forth in the 1996 Notice of Opportunity for Hearing. (St. Ex. 10)

Paragraph (7)(g) of the Consent Agreement stated that "Dr. Berry shall abstain completely from the personal use or possession of drugs, except those prescribed, dispensed, or

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administered to him by another so authorized by law who has full knowledge of Dr. Berry's history of chemical dependency." Dr. Berry testified that he had understood this requirement. (St. Ex. 10; Tr. I at 18)

February 18, 1998, Urine Sample

On February 18, 1998, Dr. Berry had a routine meeting with Jessica Flaherty, the Probation Officer who supervised his court-ordered program at that time. During this visit, Dr. Berry was asked to provide a urine sample. Dr. Berry testified that he and Ms. Flaherty went to the lab area so he could give his sample, but that the area where he normally gives his samples was very busy. Dr. Berry stated that Ms. Flaherty sent him to a nearby public rest room with a specimen cup while Ms. Flaherty waited in the hall. Dr. Berry was not supervised while filling the specimen cup. After Dr. Berry finished, he observed as Ms. Flaherty checked the temperature of the specimen using a temperature strip attached to the specimen cup. Ms. Flaherty then applied security tape to seal the container. Dr. Berry testified that he signed the specimen container. Dr. Berry further testified that he then placed the sample on a receiving tray at the urinalysis lab which is located behind a half-door in the lab area. (Tr. I at 18-20, 135-136, 140-144)

[It should be noted that Ms Flaherty's testimony contradicted Dr. Berry's on the issue of which restroom Dr. Berry used to give his sample. Ms. Flaherty stated that Dr. Berry gave his specimen in the rest room in the lab complex. (Tr. I at 142). Dr. Berry was adamant that Ms. Flaherty was incorrect in her recollection. (Tr. I at 199)]

Dr. Berry testified at hearing that he observed no compromise of the chain of custody procedures at Adult Probation during the February 18, 1998, urine drop. He also stated that he did not alter the sample in any way. Dr. Berry further testified that the only deviations from normal procedure were that he had voided in a public restroom rather than in the lab rest room, and that the voiding had not been witnessed. (Tr. I at 194).

Testing by the Franklin County Adult Probation Laboratory

1. Melissa Robinson testified that she is a medical laboratory technician and certified by the American Society of Clinical Pathologists [ASCP]. Ms. Robinson further testified that she has been employed by Adult Probation since February 1998. Ms. Robinson testified that the Adult Probation lab conducts between seven and eight thousand drug screenings per month. (Transcript Volume II [Tr. II] at 5).

Ms. Robinson testified that each time urine samples are run, either she or Mr. Potter, her supervisor, will take a sample from the holding tray, transfer information about the sample into a computer, and review the paperwork to make sure the sample is the correct one. Once a sample number is assigned and the data is entered into the lab computer a load list is generated that tells the technician how to load the samples into the testing machine.

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Each sample is loaded using a new disposable pipette to avoid cross contamination. Ms. Robinson further explained that the machine which does the actual computerized testing of the samples, called an "Axsym," can be loaded with up to ninety samples at a time. After the Axsym runs the test, the results are transferred to a computer, and a staff member reviews the data; if everything looks appropriate the staff member approves the test. If a test is not approved, the lab re-tests the samples. Ms. Robinson testified that hard copies of the results are then printed out for the probation officer and for the laboratory. (Tr. II at 30)

Ms. Robinson testified that if the seal on a sample is not intact or not present then that sample is not tested. Ms. Robinson further testified that after a run of tests is concluded the laboratory discards all of the samples that tested negative, but keeps the samples that tested positive in a locked freezer. (Tr. II at 30, 50)

2. Ms. Robinson testified that she conducted the first screening test on Dr. Berry's February 18, 1998, sample using the procedure outlined above. This screening test returned a "low positive" result for barbiturates, of 284.09 nanograms per milliliter. (St. Ex. 12; Respondent's Exhibit [Resp. Ex.] E; Tr. II at 6-10, 13, 46)
3. Ms. Flaherty testified that she was notified on February 23, 1998, that the screening test had been positive for drugs. On February 24, 1998, Ms. Flaherty attempted to reach Dr. Berry by telephone to inform him of the positive results, but there was no answer at Dr. Berry's residence. Ms. Flaherty stated that on March 3, 1998, she requested that the test results be confirmed by the Forensic Toxicology Division of the Franklin County Coroner's Office [Coroner's Office]. (Tr. I at 138) [Note: State's Exhibit 4 indicated that Dr. Berry's urine sample was delivered to the Franklin County Coroner's Office on February 27, 1998.]
4. Russell Potter testified that he is a medical laboratory technician certified by the ASCP. Mr. Potter further testified that he has been employed by Adult Probation for almost five years, and that he performs drug screenings in the urinalysis laboratory. He testified that his lab follows the National Institute on Drug Abuse [NIDA] guidelines. (Tr. II at 35-37)

Mr. Potter explained that when a Probation Officer asks for confirmation by the Coroner's Office he first re-tests the sample. Mr. Potter stated that when a re-test is done the sample is placed on the Axsym machine alone, with no other samples. If the second screening test does not duplicate the results of the first screening test the sample is not forwarded to the Coroner's Office and an amended report is sent to the Probation Officer reporting the sample as negative. Mr. Potter testified that the paperwork for the re-test that he performed has since been lost. (Tr. II at 47-51, 54, 68, 71)

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Mr. Potter testified that the original Probation Department screening test revealed the presence of barbiturates; however, it did not specifically quantify butalbital. (St. Ex. 12; Tr. II at 69)

Confirmation Testing by the Franklin County Coroner's Office Forensic Toxicology Division

1. On February 27, 1998, Ms. Robinson transported Dr. Berry's February 18, 1998, sample to the Coroner's Office. Ms. Robinson testified that the specimen number she had written on Dr. Berry's sample container, and which was reflected in the toxicologist's submission form, were the same. Ms. Robinson affirmed that the appropriate chain of custody was observed for Dr. Berry's sample. (St. Ex. 4; Tr. II at 7, 10-11).
2. Mr. James L. Ferguson testified that he is the Chief Toxicologist and Director of the Forensic Toxicology Division of the Franklin County Coroner's Office. He testified that his specialty is forensic analytical toxicology. Mr. Ferguson further testified that he has over 31 years of experience in his field, and that he has appeared as an expert witness in over 300 criminal cases across Ohio. Mr. Ferguson also testified that his laboratory performs an average of 26,000 tests per year involving the analysis of concentrations of drugs and alcohol. Mr. Ferguson stated that he had obtained a bachelor's degree in biochemistry from the Ohio State University, has participated in academic research, is a member of a number of scientific societies, and has trained others in his field. (Tr. I at 42-44)
3. Mr. Ferguson testified that the Coroner's Office reviews and approves the protocols used by the Adult Probation urinalysis lab, and serves as the confirmation laboratory for the Adult Probation urinalysis lab. Mr. Ferguson stated that part of the responsibility of the Coroner's Office as a reference laboratory is to determine if the initial screening results from Adult Probation are accurate. In addition, Mr. Ferguson testified that the Coroner's Office uses procedures that are more sensitive and more specific than those performed by the Adult Probation laboratory. Mr. Ferguson stated that this is accomplished, in part, by performing an extraction of the sample and examining it using mass spectrometry. (St. Ex. 5; Tr. I at 47, 51)
4. Mr. Ferguson testified that the Coroner's Office tested Dr. Berry's urine specimen and reported its findings on March 3, 1998. Mr. Ferguson stated that Dr. Berry's specimen was found to be positive for barbiturates by immunoassay, and the presence of butalbital, specifically, was confirmed by mass spectrometry. (St. Ex. 5; Tr. I at 48) Mr. Ferguson further testified as follows:
 - The first test performed was a repeat of the immunoassay test that had been performed by Adult Probation. This test revealed 215.41 nanograms per milliliter of cross-reactive barbiturates by the immunoassay. (St. Ex. 5 at 2; Tr. I at 51)

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- The second test was performed using a mass spectrometer. The mass spectrometer produced printouts that revealed the presence of the following substances in Dr. Berry's urine sample: theophylline, theobromide, naproxen, caffeine, and butalbital. Mr. Ferguson further testified that it was his opinion, to a reasonable degree of scientific probability, that butalbital was present in Dr. Berry's urine sample. (St. Ex. 5 at 4-8; Tr. I at 52-54)

Mr. Ferguson described the various drugs found. Butalbital is a barbiturate; theophylline is a methylxanthine related to caffeine, as is theobromide; and naproxen is a nonsteroidal anti-inflammatory drug used in the treatment of various rheumatoid-type diseases. Mr. Ferguson further testified that theobromide is most commonly found in chocolate but can be produced in small amounts by the liver acting on caffeine; theophylline is present in small amounts in caffeinated beverages, such as coffee, tea, and colas. (Tr. I at 52-53, 60-61)

Mr. Ferguson testified that butalbital is a short-acting barbiturate. After ingestion, the effects are felt within 15 to 30 minutes, and persist for four to six hours. Mr. Ferguson stated that, although the effects dissipate quickly, butalbital persists in the person's system for a long time because it "has a remarkably long half-life" of 34 to 35 hours. Mr. Ferguson testified that "half-life" refers to the period of time that it takes for half of the drug to disappear from plasma. Consequently, a person would still have half of the peak level of concentration of butalbital in his or her system a day-and-a-half after ingesting the drug. (Tr. I at 60-62)

Mr. Ferguson testified that butalbital is generally found in brand-name drugs in combination with an analgesic such as acetaminophen or aspirin, although it is also available in generic form by itself. Mr. Ferguson testified that it would not be surprising that butalbital alone, without acetaminophen, would be found in urine if a combination drug had been ingested because acetaminophen "has an extremely short half-life, but butalbital has an extremely long one." Consequently, butalbital would remain detectable in urine after acetaminophen had dissipated below detectable levels. (Tr. 62-63)

5. Mr. Ferguson testified that he performed additional testing on the urine sample at the request of Board Investigator Randy Beck. Mr. Beck asked Mr. Ferguson to check for the presence of acetaminophen in the urine sample. Mr. Ferguson testified that he did so, and the results were reported on April 20, 1998. Acetaminophen was not detected, but the presence of butalbital was confirmed, as was naproxen, caffeine, and a small amount of theophylline. (St. Ex. 5; Tr. I at 54-55)

Mr. Ferguson testified that no substance other than butalbital could have caused the positive readings. Mr. Ferguson stated that "the mass spectrum is the most specific and the most sensitive analytical test used in the laboratory and it confirmed the presence of butalbital." (Tr. I at 56)

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6. Mr. Ferguson was subsequently notified that Dr. Berry was seeking to have the sample tested by an outside lab. When Mr. Ferguson learned of this request, the sample was pulled from the frozen archive, and Mr. Ferguson determined that an additional 2 cc. of the sample could be used for testing before releasing the sample to another lab. Mr. Ferguson testified that he then conducted a comprehensive analysis of urine, which he stated is the most sensitive and specific test available to the lab. This test revealed the presence of ibuprofen, theophylline, theobromide, naproxen, caffeine, and butalbital. Mr. Ferguson explained that it was not remarkable that the ibuprofen was not detected earlier because the comprehensive analysis of urine uses a cleaner extract than the earlier tests. Mr. Ferguson further stated that the comprehensive test provides a quantitative analysis rather than merely a qualitative one. (St. Ex. 6; Tr. I 57-60, 101-103)

Mr. Ferguson testified that the comprehensive test identified the concentration of butalbital as 0.08 micrograms per milliliter of urine, equal to 80 nanograms per milliliter. Noting that this figure is lower than the 215.41 nanograms per milliliter of cross-reactive barbiturates found previously by immunoassay, Mr. Ferguson testified that quantitative findings from an immunoassay cannot be directly compared with those determined by gas chromatography/mass spectrometry [GC/MS]. Mr. Ferguson stated that there are a number of different antigens that could give a positive for barbiturates in an immunoassay. (St. Ex. 6 at 7; Tr. I at 101-104).

Mr. Ferguson noted that the differences in the appearance of the chromatographs between the earlier tests and the third test result from the different type of extraction procedures used; the third test was performed on a cleaner extract with less "background crud." (Tr. I at 105).

7. Mr. Ferguson testified that the difference in amounts of cross-reactive barbiturates found by the Adult Probation lab (284.09 ng./ml.), and by the Coroner's Office (215.41 ng./ml.), was not remarkable. Moreover, Mr. Ferguson testified that those results were confirmed to be true positives rather than false positives. (St. Exs. 5 and 12; Tr. I at 108-109).
8. Mr. Ferguson testified that if Dr. Berry had had negative screening tests on urine samples taken on February 11 and 20, 1998, it would not cause him to question the results of his testing by GC/MS of the February 18 sample. (Tr. I 117).

DNA Testing of the February 18, 1998, Urine Sample

1. Dr. Berry's February 18, 1998, urine sample was submitted to Cellmark Diagnostics, Germantown, Maryland, on June 26, 1998, for DNA testing. The purpose was to determine whether DNA in the urine sample would reveal that the urine came from a donor other than Dr. Berry. However, Cellmark reported on August 19, 1998, that "[n]o conclusions can be made regarding the liquid in the vial labeled Kevin Berry." (Resp. Ex. A)

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2. Mr. Ferguson testified that, in normal healthy individuals, DNA will not be found in the urine. Mr. Ferguson further testified that the ability of Cellmark Diagnostics to find DNA in the urine sample, if any were present, would not have been adversely affected by his using an additional 2 cc. of the sample for the third test performed by his lab. Nevertheless, Mr. Ferguson testified that he had not known that the outside lab was being used to perform DNA testing. (Tr. I at 85-86, 114, 120-121)

General Information

1. Ms. Flagherty testified that the Franklin County Court of Common Pleas judge who had sentenced Dr. Berry declined to change the terms of Dr. Berry's court-ordered supervision based on the positive urine toxicology report. She further testified that Dr. Berry's probation is scheduled to end February 28, 1999. (Tr. I at 140, 150)

Mr. Flagherty testified that during the period that she supervised Dr. Berry, February 1997 to February 1998, he had appeared to be in compliance with his substance abuse treatment. Nevertheless, Ms. Flagherty indicated that Dr. Berry had failed to report to her in September 1997 and no drug test was conducted. She stated that Adult Probation conducted drug screens in most of the other eleven months Ms. Flagherty supervised Dr. Berry. On cross-examination, however, Ms. Flagherty noted that Dr. Berry failed to report properly in both January 1997 and January 1998. (Tr. I at 131-133, 146-147)

Dr. Berry denied that he had failed to report according to his understanding of Adult Probation procedures. He stated that he had been involved in emergencies at work and had telephoned Adult Probation to make arrangements when he missed specific reporting dates. He stated that his four different probation officers have all been very cooperative in accommodating the emergencies that arise in his practice. (Tr. I at 199-200)

2. On March 19, 1998, Barron Farrier, a field representative for the Ohio Physicians Effectiveness Program [OPEP], notified the Board that he had received a positive toxicology report concerning Dr. Berry from Adult Probation. Mr. Farrier also notified the Board that he had informed Dr. Berry of this positive test on March 17, 1998, and had referred Dr. Berry to Shepherd Hill for an assessment. Mr. Farrier further indicated that Dr. Berry had met with Dr. Karaffa at Shepherd Hill on March 19, 1998. Finally, Mr. Farrier noted that Dr. Berry had denied any drug usage. (St. Ex. 2)

Mr. Farrier testified that OPEP provides monitoring advocacy for impaired physicians. Mr. Farrier further stated that Dr. Berry is one of his clients, and that he is familiar with Dr. Berry's recovery program. Mr. Farrier testified that it is his responsibility to track Dr. Berry's recovery, which includes obtaining documentation concerning Dr. Berry's recovery and meeting with Dr. Berry on a periodic basis. Mr. Farrier indicated that he had known Dr. Berry since Dr. Berry enrolled in OPEP in September 1996. Finally,

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Mr. Farrier testified that he had been notified of Dr. Berry's positive urine toxicology report by Adult Probation on March 12, 1998. (Tr. I at 65-68)

Mr. Farrier testified that Dr. Berry has shown no indications of relapse other than the results of the February 18, 1998, screen. Mr. Farrier further testified that, when a person relapses, there are generally some indicators that the person may have been running into trouble. Mr. Farrier testified that he looked for red flags concerning Dr. Berry after receiving the positive urine screen result and found none. (Tr. I at 69-73)

Mr. Farrier indicated that Dr. Berry had been submitting urine screens through his monitoring physician, Dr. Smucker, in addition to those collected by Adult Probation. Mr. Farrier testified that results from urine submitted by Dr. Berry on February 11 and 20, 1998, yielded negative results. Moreover, Mr. Farrier testified that Dr. Berry has had no other positive test results. He further testified that Dr. Berry has since doubled the frequency of his urine screenings. (St. Ex. 8; Resp. Ex. D; Tr. I at 73-75, 79-80)

Mr. Farrier testified that Dr. Berry reported to Shepherd Hill following the positive test result, and that Shepherd Hill had recommended that Dr. Berry attend CORR, which is a halfway house/residential living facility. Mr. Farrier further testified that Dr. Berry did not follow that recommendation. (St. Ex. 9; Tr. I at 75-76)

3. On April 21, 1998, Dr. Berry met with Randy Beck, an Investigator for the Board. Dr. Berry's counsel, Douglas E. Graff, Esq., was present at this meeting. Dr. Berry provided Mr. Beck with a written statement. In his statement, Dr. Berry conceded that he could not "reasonably suggest that the urine specimen in question was not mine due to the facts [sic] that I followed [and] observed the chain of custody, and this medication was my former drug of choice." Nevertheless, Dr. Berry stated that he was shocked by the positive result, and denied that he had knowingly or willingly taken any mind-altering substances. He further stated that he was complying with his recovery program and was doing well in his social, home, and professional spheres. (St. Ex. 7; Tr. I at 24, 28-29)
4. Craig T. Pratt, M.D., testified that he is the Chief of Addiction Medicine at Riverside Methodist Hospital in Columbus, Ohio, and Chief of Consultation-Liaison Psychiatry at Grant Hospital. He is licensed to practice medicine in the States of Ohio, Missouri, and Wisconsin. Dr. Pratt further testified that he is board certified in psychiatry, addiction psychiatry, and addiction medicine. Dr. Pratt testified that he has practiced in those fields for 12 years. (Res. Ex. F; Tr. I at 157-160)

Dr. Pratt testified that he first met Dr. Berry as a colleague in the fall of 1996. Dr. Pratt further testified that he had no clinical involvement with Dr. Berry until around February 1998 when Dr. Pratt had been asked to evaluate Dr. Berry. Dr. Pratt testified that he subsequently interviewed Dr. Berry for approximately 90 minutes. Dr. Pratt

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testified that he has assessed other physicians who have consent agreements with the Board, and estimated the number to be over 500. (Tr. I at 160-162)

Dr. Pratt evaluated Dr. Berry at Dr. Berry's request after the February 18, 1998, urine screen tested positive. Dr. Pratt noted that had Dr. Berry not sought his assistance he would not have been aware that Dr. Berry had an impairment problem. Dr. Pratt's professional opinion of Dr. Berry's work is that it is consistent and of high quality. Dr. Pratt testified that, considering his physician-to-physician relationship with Dr. Berry and his evaluation of him in a clinical sense, he has seen no evidence of relapse other than the results of the February 18, 1998, urine screen. Dr. Pratt also commented that "some patients might get better on certain drugs that we regard as impairing only because they become more efficient based on lowering their tension, lowering their interpersonal anxiety, lowering their frustration tolerance, a lot of things that are just a natural part of medicine 1998." (Tr. I at 161-167.)

Dr. Pratt testified that theophylline is a drug which is not abused; many people who need it for medical reasons try to avoid it. Dr. Pratt testified that, to his knowledge, Dr. Berry has no medical condition that requires theophylline. Dr. Pratt further testified that when he learned of the presence of theophylline in Dr. Berry's urine it caused Dr. Pratt to suspect that there must have been contamination of the sample or a switch of some kind, particularly because Dr. Berry had exhibited no other indicia of relapse. (Tr. I at 170-174)

On cross-examination, Dr. Pratt testified that if a person had a level of 80 nanograms of butalbital per milliliter present in his urine it would not surprise Dr. Pratt that a screening test two days later would fail to detect butalbital. Dr. Pratt further testified that 343 nanograms per milliliter of theophylline, as reflected in the February 18, 1998, urine sample, would be consistent with consumption of tea and coffee. (St. Exs. 5 and 6; Tr. I at 177, 184)

5. Jerry D. Smucker, M.D., testified that he has been licensed to practice medicine in the State of Ohio for 11 years and is a partner of Dr. Berry's. In addition, Dr. Smucker testified that he is also a minister. Dr. Smucker testified that he and Dr. Berry had been in practice together for three years. Dr. Smucker further testified that he had received training in the area of substance abuse through a church sponsored program. Moreover, Dr. Smucker testified that he is the administrator of a rehabilitation program in a prison ministry and teaches two to four classes a week involving recovery from alcohol and drug abuse. (Tr. I at 202-203, 209)

Dr. Smucker testified that he has served as Dr. Berry's monitoring physician under the OPEP program since October or November 1996. Until the spring of 1998, he had been collecting urine specimens from Dr. Berry on a weekly basis; since that time, the collections have been done on a twice-weekly basis. Dr. Smucker stated that he witnesses Dr. Berry void when these samples are collected. (Tr. I at 203-204, 210-211)

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Dr. Smucker testified that he had been unaware that Dr. Berry had a substance abuse problem prior to Dr. Berry's contact with the court system. Dr. Smucker stated that he had worked with Dr. Berry for about seven months prior to that occurrence. (Tr. I at 208)

Dr. Smucker testified that he had been very surprised when he learned of Dr. Berry's positive urine screen. Dr. Smucker said that he had seen no signs that Dr. Berry was not in compliance with his recovery program. Dr. Smucker noted that he has continued to monitor Dr. Berry with increased vigilance, looking for signs of non-compliance—such as erratic behavior, reluctance to provide urine specimens, emotional changes, and/or interpersonal problems—and has found none. Dr. Smucker stated that all of his reports to the Board concerning his monitoring of Dr. Berry have been favorable. Moreover, Dr. Smucker testified that he believes that Dr. Berry can continue to be compliant in his recovery program. (Resp. Ex. H; Tr. I at 204-208)

Dr. Smucker testified that he believed that Dr. Berry's positive screen had resulted either from a problem with the chain of custody or a cross-reaction with ibuprofen. Dr. Smucker testified at hearing that there is a four-percent cross-reactivity between ibuprofen and butalbital. Dr. Smucker stated that he based this statement on a discussion that he had had with an addictionologist at his hospital. (Tr. I at 212)

6. On February 10, 1998, J.R. Abrahamson, a counselor at Shepherd Hill Hospital, wrote a letter to Dr. Berry confirming Dr. Berry's regular attendance at Caduceus meetings. In addition, on February 10, 1998, Rhonda Beard, another counselor at Shepherd Hill Hospital, wrote to the Board confirming that Dr. Berry had attended his aftercare sessions during November and December 1997 and January 1998, that Dr. Berry had been excused from three of these sessions, and that he was in compliance with his aftercare contract concerning both his attendance and negative urine screens. (Resp. Ex. G) [Note: the State did not have an opportunity to cross-examine the authors of these letters.]

7. Dr. Berry testified that he "cannot offer any possible reason for why [the February 18, 1998, urine sample] was positive." He further testified that that does not believe there is any possibility that the sample that tested positive was the one that he submitted. Dr. Berry further denied ever having taken naproxen or theophylline. (Tr. I at 189-191)

Dr. Berry testified that he has doubled his urine submissions since he learned of the positive test and that he continues to submit urine twice a week. Dr. Berry further testified that he continues to attend AA four to five times a week and a weekly Caduceus meeting. Dr. Berry's February 11 and February 20, 1998, urine submissions for OPEP indicated negative toxicology results. (Resp. Exs. C and D; Tr. I at 73, 75, 188-189)

8. Dr. Berry testified that on March 19, 1998, he met with Frederick Karaffa, M.D., at Shepherd Hill. Subsequently, Dr. Berry returned to Shepherd Hill for an assessment from

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March 30 to April 3, 1998. Dr. Berry testified that he was advised to enter treatment but that he had declined to do so. Dr. Berry stated that he declined to enter inpatient treatment because he was "not willing to be treated for something he didn't have" and that he was concerned about possible legal ramifications of entering into patient treatment, fearing that it might be construed as an admission of relapse. He wanted to consult with others before making a final decision. Dr. Berry characterized this decision as a deferral rather than a refusal. (St. Ex. 9; Tr. I at 21-22)

9. Dr. Berry testified that he is highly confident that he can maintain his program of recovery and every other aspect of his life. He further testified that he has never been in better circumstances emotionally or spiritually and that he has a strong support system. (Tr. I at 194)

FINDINGS OF FACT

1. On or about April 17, 1996, the Board issued a Notice of Immediate Suspension and Opportunity for Hearing to Kevin R. Berry, M.D. In that notice, the Board alleged that Dr. Berry had violated Sections 4731.22(B)(10) and (B)(26), Ohio Revised Code, as a consequence of his pleas of guilty to three felony counts of Illegal Processing of Drug Documents for which he had been granted treatment in lieu of conviction.

Subsequently, on or about June 12, 1996, Dr. Berry entered into a Consent Agreement with the Board in lieu of further formal proceedings based upon the violations of Section 4731.22, Ohio Revised Code, as set forth in the April 17, 1996, Notice of Opportunity for Hearing.

2. Paragraph (7)(g) of the Consent Agreement stated that "Dr. Berry shall abstain completely from the personal use or possession of drugs, except those prescribed, dispensed, or administered to him by another so authorized by law who has full knowledge of Dr. Berry's history of chemical dependency."
3. A urine sample submitted on February 18, 1998, by Dr. Berry to the Franklin County Adult Probation Department tested positive for barbiturates by immunoassay. This sample was later confirmed by mass spectrometry to test positive for butalbital at a concentration of 80 nanograms per milliliter.
4. The extensive evidence elicited concerning chain of custody and testing methods sufficiently demonstrate that the February 18, 1998, that tested positive for butalbital was the sample submitted by Dr. Berry on that date.

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CONCLUSIONS OF LAW

The acts, conduct, and/or omissions of Kevin R. Berry, M.D., as set forth in the Findings of Fact, individually, and/or collectively, constitutes “[v]iolation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued,” as that clause is used in Section 4731.22(B)(15), Ohio Revised Code.

PROPOSED ORDER

It is hereby ORDERED that:

1. The certificate of Kevin R. Berry, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time, but not less than 90 days.
2. The Board shall not consider reinstatement of Dr. Berry’s certificate to practice unless all of the following minimum requirements have been met:
 - a. Dr. Berry shall submit an application for reinstatement, accompanied by appropriate fees.

- b. Within 30 days of the effective date of this Order, Dr. Berry shall submit to the Board for its prior approval the name of a supervising physician to whom Dr. Berry shall submit the required urine specimens, as specified below.

The supervising physician so named by Dr. Berry shall be an individual with whom Dr. Berry has no professional or business affiliation outside of the scope of the supervising relationship delineated in this Order.

- c. For the duration of the suspension period, Dr. Berry shall be subject to the following terms, conditions, and limitations:
 - i. Dr. Berry shall obey all federal, state and local laws, all rules governing the practice of medicine in Ohio, and all terms of supervision imposed by the Franklin County Court of Common Pleas in criminal case number 96CR-01-349.
 - ii. Dr. Berry shall appear in person for interviews before the full Board or its designated representative within three months of the effective date of this Order and at three month intervals thereafter, or as otherwise requested by the Board.

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If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled. Although the Board will normally give him written notification of scheduled appearances, it is Dr. Berry's responsibility to know when personal appearances will occur. If he does not receive written notification from the Board by the end of the month in which the appearance should have occurred, Dr. Berry shall immediately submit to the Board a written request to be notified of his next scheduled appearance.

- iii. Dr. Berry shall submit quarterly declarations under penalty of Board disciplinary action or criminal prosecution, stating whether there has been compliance with all the terms of this Order. The first quarterly declaration must be received in the Board's offices on the first day of the third month following the month in which this Order becomes effective, provided that if the effective date is on or after the 16th day of the month, the first quarterly declaration must be received in the Board's offices on the first day of the fourth month following. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
- iv. Dr. Berry shall maintain participation in an alcohol and drug rehabilitation program, such as AA, NA, or Caduceus, no less than three times per week. Substitution of any other specific program must receive prior Board approval. In addition, at his appearances before the Board or its designated representative, Dr. Berry shall submit acceptable documentary evidence of continuing compliance with this program.
- v. Dr. Berry shall provide continuing authorization, through appropriate written consent forms, for disclosure of evaluative reports, summaries, and records, of whatever nature, by any and all parties that provide treatment or evaluation for Dr. Berry's chemical dependency and related conditions, to the Board, to treating and monitoring physicians, and to others involved in the monitoring process. Dr. Berry further agrees to provide the Board written consent permitting any treatment provider from whom he obtains treatment to notify the Board in the event he fails to agree to or comply with any treatment contract or aftercare contract. Failure to provide such consent, or revocation of such consent, shall constitute a violation of this Order.
- vi. Dr. Berry shall abstain completely from the personal use or possession of drugs, except those prescribed, administered, or dispensed to him by another so authorized by law who has full knowledge of Dr. Berry's history of chemical dependency.

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- vii. Dr. Berry shall abstain completely from the use of alcohol.
- viii. Dr. Berry shall submit to random urine screenings for drugs and alcohol on a twice-weekly basis or as otherwise directed by the Board. Dr. Berry shall ensure that all screening reports are forwarded directly to the Board on a quarterly basis. The drug testing panel utilized must be acceptable to the Secretary of the Board.

Dr. Berry shall submit the required urine specimen to the supervising physician approved by the Board. The supervising physician shall ensure that the urine specimens are obtained on a random basis, that the giving of the specimen is witnessed by a reliable person, and that appropriate control over the specimen is maintained. In addition, the supervising physician shall immediately inform the Board of any positive screening results.

Dr. Berry shall ensure that the supervising physician provides quarterly reports to the Board, on forms approved or provided by the Board, verifying whether all urine screens have been conducted in compliance with this Order, whether all urine screens have been negative, and whether the supervising physician remains willing and able to continue in his or her responsibilities.

In the event that the designated supervising physician becomes unable or unwilling to so serve, Dr. Berry must immediately notify the Board in writing, and make arrangements acceptable to the Board for another supervising physician as soon as practicable. Dr. Berry shall further ensure that the previously designated supervising physician also notifies the Board directly of the inability to continue to serve and the reasons therefor.

All screening reports and supervising physician reports required under this paragraph must be received in the Board's offices no later than the due date for Dr. Berry's quarterly declaration. It is Dr. Berry's responsibility to ensure that reports are timely submitted.

- ix. Dr. Berry shall submit blood and/or urine specimens for analysis without prior notice at such times as the Board may request, at Dr. Berry's expense.
- d. In the event that Dr. Berry has not been engaged in the active practice of medicine and surgery for a period in excess of two years prior to application for reinstatement, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of his fitness to resume practice.

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3. Upon reinstatement, Dr. Berry's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least seven years:

- a. Dr. Berry shall not request modification of the terms, conditions, or limitations of probation for at least one year after the reinstatement of Dr. Berry's certificate.
- b. Dr. Berry shall obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio, and all terms of supervision imposed by the Franklin County Court of Common Pleas in criminal case number 96CR-01-349.
- c. Dr. Berry shall appear in person for interviews before the full Board or its designated representative within three months of the date in which probation becomes effective, at three month intervals thereafter, and upon his request for termination of the probationary period, or as otherwise requested by the Board.

If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled. Although the Board will normally give him written notification of scheduled appearances, it is Dr. Berry's responsibility to know when personal appearances will occur. If he does not receive written notification from the Board by the end of the month in which the appearance should have occurred, Dr. Berry shall immediately submit to the Board a written request to be notified of his next scheduled appearance.

- d. Dr. Berry shall submit quarterly declarations under penalty of Board disciplinary action or criminal prosecution, stating whether there has been compliance with all the conditions of probation. The first quarterly declaration must be received in the Board's offices on the first day of the third month following the month in which probation becomes effective, provided that if the effective date is on or after the 16th day of the month, the first quarterly declaration must be received in the Board's offices on the first day of the fourth month following. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
- e. Within thirty days of the reinstatement of Dr. Berry's certificate to practice medicine in the State of Ohio, Dr. Berry shall provide a copy of this Order to all employers or entities with which he is under contract to provide physician services or is receiving training, and the Chief of Staff at each hospital where Dr. Berry has privileges or appointments. Further, Dr. Berry shall provide a copy of this Order to all employers or entities with which he contracts to provide physician services, or applies for or receives training, and the Chief of Staff at each hospital where Dr. Berry applies for or obtains privileges or appointments.

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- f. Within 30 days of the reinstatement of his certificate to practice medicine and surgery in the State of Ohio, Dr. Berry shall submit for the Board's prior approval the name of a monitoring physician. The monitoring physician so named by Dr. Berry shall be an individual with whom Dr. Berry has no professional or business affiliation outside of the scope of the monitoring relationship delineated in this Order.

The monitoring physician shall monitor Dr. Berry and his patient charts. The chart review may be done on a random basis, with the number of charts reviewed to be determined by the Board. The monitoring physician shall provide the Board with reports on Dr. Berry's progress and status and on the status of his patient charts on a quarterly basis. All monitoring physician reports required under this paragraph must be received in the Board's offices no later than the due date for Dr. Berry's quarterly declaration. It is Dr. Berry's responsibility to ensure that the reports are timely submitted.

Dr. Berry shall obtain the Board's prior approval for any alteration to the practice plan approved pursuant to this Order.

In the event that the approved monitoring physician becomes unable or unwilling to serve, Dr. Berry shall immediately notify the Board in writing and shall make arrangements for another monitoring physician as soon as practicable. Dr. Berry shall refrain from practicing until such supervision is in place, unless otherwise determined by the Board. Dr. Berry shall ensure that the previously designated monitoring physician also notifies the Board directly of his or her inability to continue to serve and the reasons therefor.

- g. Dr. Berry shall not prescribe, administer, dispense, order, write orders for, give verbal orders for, or possess (except as prescribed for his use by another so authorized by law) any controlled substances without prior Board approval. Moreover, Dr. Berry shall not seek the Board's approval for a change in this provision for a minimum of one year after the reinstatement of Dr. Berry's certificate.
- h. Dr. Berry shall abstain completely from the personal use or possession of drugs, except those prescribed, administered, or dispensed to him by another so authorized by law who has full knowledge of Dr. Berry's history of chemical dependency.
- i. Dr. Berry shall abstain completely from the use of alcohol.
- j. Dr. Berry shall submit to random urine screenings for drugs and alcohol on a twice-weekly basis or as otherwise directed by the Board. Dr. Berry shall ensure

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that all screening reports are forwarded directly to the Board on a quarterly basis. The drug testing panel utilized must be acceptable to the Secretary of the Board.

Dr. Berry shall submit the required urine specimens to the supervising physician approved by the Board. The supervising physician shall ensure that the urine specimens are obtained on a random basis, that the giving of the specimen is witnessed by a reliable person, and that appropriate control over the specimen is maintained. In addition, the supervising physician shall immediately inform the Board of any positive screening results.

Dr. Berry shall ensure that the supervising physician provides quarterly reports to the Board, on forms approved or provided by the Board, verifying whether all urine screens have been conducted in compliance with this Order, whether all urine screens have been negative, and whether the supervising physician remains willing and able to continue in his or her responsibilities.

In the event that the designated supervising physician becomes unable or unwilling to so serve, Dr. Berry must immediately notify the Board in writing, and make arrangements acceptable to the Board for another supervising physician as soon as practicable. Dr. Berry shall further ensure that the previously designated supervising physician also notifies the Board directly of the inability to continue to serve and the reasons therefor.

All screening reports and supervising physician reports required under this paragraph must be received in the Board's offices no later than the due date for Dr. Berry's quarterly declaration. It is Dr. Berry's responsibility to ensure that reports are timely submitted.

- k. Dr. Berry shall submit blood and/or urine specimens for analysis without prior notice at such times as the Board may request, at Dr. Berry's expense.
- l. Dr. Berry shall obtain the approval of the Board for any medical practice or employment related to the health care fields. The Board shall consider, among other factors, the adequacy and continuity of supervision and the feasibility of restricted access to controlled substances, which will ensure the protection of the public, prior to approval or disapproval of the proposed employment.
- m. Dr. Berry shall provide continuing authorization, through appropriate written consent forms, for disclosure of evaluative reports, summaries, and records, of whatever nature, by any and all parties that provide treatment or evaluation for Dr. Berry's chemical dependency or related conditions, to the Board, to treating and monitoring physicians, and to others involved in the monitoring process, of information necessary for them to fulfill their respective duties and obligations.

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Dr. Berry further agrees to provide the Board written consent permitting any treatment provider from whom he obtains treatment to notify the Board in the event he fails to agree to or comply with any treatment contract or aftercare contract. Failure to provide such consent, or revocation of such consent, shall constitute a violation of this Order.

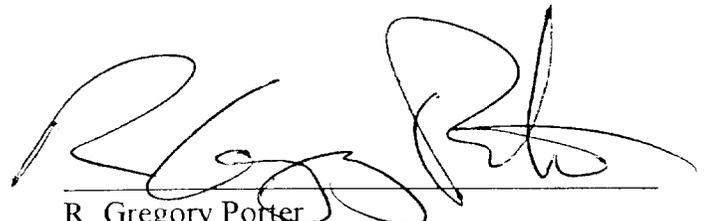
- n. Dr. Berry shall maintain participation in an alcohol and drug rehabilitation program, such as AA, NA, or Caduceus, no less than three times per week. Substitution of any other specific program must receive prior Board approval. In addition, at his appearances before the Board or its designated representative, Dr. Berry shall submit acceptable documentary evidence of continuing compliance with this program.
- o. Dr. Berry shall maintain continued compliance with the terms of the aftercare contract entered into with his treatment provider, provided that where the terms of the aftercare contract conflict with the terms of this Order, the terms of this Order shall control.
- p. If any declaration or report required by this Order is not received in the Board's offices on or before its due date, Dr. Berry shall cease practicing medicine beginning the day following Dr. Berry's receiving notice from the Board of non-receipt, either by writing, telephone, or by personal contact, until the declaration or report is received in the Board offices. Any practice during this time period shall be considered unlicensed practice of medicine in violation of Section 4731.41, Ohio Revised Code.
- q. If, without permission from the Board, Dr. Berry fails to submit to random screenings for drugs and or alcohol, at least as frequently as required by this Order, Dr. Berry shall cease practicing medicine beginning the day following Dr. Berry's receiving notice from the Board of the violation and shall refrain from practicing medicine for 30 days. Practice during this time period shall be considered unlicensed practice in violation of Section 4731.41, Ohio Revised Code.
- r. If, without permission from the Board, Dr. Berry fails to participate in an alcohol and drug rehabilitation program, at least as frequently as required by this Order, Dr. Berry shall cease practicing medicine beginning the day following Dr. Berry's receiving notice from the Board of the violation and shall refrain from practicing medicine for 15 days. Practice during this time period shall be considered unlicensed practice in violation of Section 4731.41, Ohio Revised Code.
- s. In the event that Dr. Berry should leave Ohio for three consecutive months, or reside or practice outside the State, Dr. Berry must notify the Board in writing of the dates of departure and return. Periods of time spent outside Ohio will not

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apply to the reduction of this probationary period, unless otherwise determined by motion of the Board in instances where the Board can be assured that probationary monitoring is otherwise being performed.

- t. If Dr. Berry violates probation in any respect, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period.
 - u. If Dr. Berry violates probation in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.
4. Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Berry's certificate will be fully restored.

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



R. Gregory Porter
Attorney Hearing Examiner



State Medical Board of Ohio

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EXCERPT FROM THE DRAFT MINUTES OF JANUARY 13, 1999

REPORTS AND RECOMMENDATIONS

Dr. Steinbergh announced that the Board would now consider the findings and orders appearing on the Board's agenda.

Dr. Steinbergh asked whether 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 Kevin R. Berry, M.D., and Martin W. Brueggemann, M.D. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Agresta	- aye
	Dr. Garg	- aye
	Dr. Buchan	- aye
	Dr. Steinbergh	- aye

Dr. Steinbergh asked whether each member of the Board understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Agresta	- aye
	Dr. Garg	- aye
	Dr. Buchan	- aye
	Dr. Steinbergh	- aye

In accordance with the provision in Section 4731.22(C)(1), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the

Secretary and Supervising Member must abstain from further participation in the adjudication of these matters.

Dr. Steinbergh stated that if there were no objections, the Chair would dispense with the reading of the proposed findings of fact, conclusions and orders in the above matters. No objections were voiced by Board members present.

The original Reports and Recommendations shall be maintained in the exhibits section of this Journal.

KEVIN R. BERRY, M.D.

Dr. Steinbergh directed the Board's attention to the matter of Kevin R. Berry, M.D. She advised that objections were filed to Hearing Examiner Porter's Report and Recommendation and were previously distributed to Board members.

Dr. Steinbergh continued that a request to address the Board has been timely filed on behalf of Dr. Berry. Five minutes would be allowed for that address.

Mr. Graff stated that, while he knows the Board members read the hearing transcripts and his objections, he wishes to raise one point. The Board must act on the basis of reliable, substantial and probative evidence. There is no reliable evidence of a relapse on Dr. Berry's case in the record before the Board today. There was a positive urine screen taken by the probation department in February 1998. That sample has been "unauthorizedly" tested, the test results have been different, the results have been unrecorded, the chain of custody is in question, and Dr. Berry's ability to challenge that was tainted by the reduction in the sample before it could be taken for DNA testing. There is reliable and probative evidence that there is no corroboration of a relapse in Dr. Berry's behavior or in the monitoring that has been provided to the Board. The Board needs to act to protect the public. Dr. Berry has shown himself to be able to safely practice, and they ask that he be continued under the consent agreement with the Board.

Dr. Berry thanked the Board for the opportunity to address it. He stated that he wishes that he could sit here and tell the Board definitely what happened last year, but he cannot do that. He hoped early on that he could. He asked Mr. Graff to pursue DNA testing as early as possible. Through the handling of the specimen, that proved to be impossible. He certainly wouldn't have done that had he thought it would do anything other than exonerate him.

Dr. Berry indicated that it makes no sense for him, after three years of complete abstinence, to have used a single dose of a medication—whose half life is so long that it takes a week to clear—during a week that he had two urine drops yet to make. For him to do that he would have to be stupid or extremely ill. Dr. Berry stated that he doesn't believe he has to prove that he's not stupid. The issue then is whether he is ill. Those who know him best and are in a position to gauge his behavior, based on past behavior, recovery behavior and ongoing behavior through a period of intense scrutiny in the last ten months, have been satisfied and

gratified that he has been able to continue to work successfully and to maintain successful relationships. He has embraced the program the Board placed upon him two years ago. His life has been completely changed by it. He doesn't have a life to run from anymore. He has a wonderful wife, marriage, and a great family. During the past two years the family has come together in a spiritual fashion that has led him to a sense of higher purpose that continues to guide their lives.

Dr. Berry asked the Board to look not reflexively at a single piece of paper, but to look with an open mind at the whole picture. The proof isn't in that one flawed piece of evidence. He can honestly say that he has never been, to his knowledge, healthier than he is today. He'll continue to have a good life regardless of the outcome today, but he doesn't want to stop practicing medicine. He's practicing the best medicine he ever has and is enjoying it more. He doesn't have the pressures he once did. His great concern is that a suspension of any length, because of the managed care system, will have implications far beyond the length of the suspension. He can't get privileges now, two years later, he can't get a D.E.A. certificate, and he can't get privileges without the D.E.A. If a punitive approach is what is intended, Dr. Berry asked that the Board understand how punitive a suspension would be.

Dr. Steinbergh asked whether the Assistant Attorney General wished to respond.

Ms. Albers stated that the Report and Recommendation in this matter clearly sets out the evidence adduced at the hearing. Dr. Berry himself issued a statement to the Medical Board investigator saying that he could not understand how the sample was not his because he had followed the chain of custody. It was tested at the probation department and then sent for confirmation to the coroner's office. The coroner's office confirmed that it was butalbital, Dr. Berry's former drug of choice. Contrary to the assertions made to the Board today, the chain of custody was intact. The fact that one test was run that was not requested by either of the parties does not breach the chain of custody, nor did it adulterate the specimen. Ms. Albers asked that the Board adopt the Proposed Report and Recommendation.

**DR. SOMANI MOVED TO APPROVE AND CONFIRM MR. PORTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF KEVIN R. BERRY, M.D.
DR. HEIDT SECONDED THE MOTION.**

Dr. Buchan stated that, generally, he has a very firm and narrow view on how the Board should deal with impaired physicians. His record is that of being fairly harsh. His desire to rehabilitate these physicians, as the Board sees them month after month is tempered by his responsibility to protect the citizens of this state. Dr. Buchan stated that he takes that responsibility quite seriously.

Dr. Buchan stated that Dr. Berry was suspended and granted treatment in lieu of conviction two years ago. He read the record thoroughly again and again, as well as Dr. Berry's deposition, and he believes that Dr. Berry has led a model probationary program. Dr. Buchan stated that he couldn't see where the urine screen of February 18, 1998 was grounds to suspend Dr. Berry's license. Dr. Buchan stated that he sees no evidence of relapse in the record other than that one urine screen. As many monitoring devices as are in

place, and having reviewed that record, he believes that if, indeed, Dr. Berry relapsed, the Board will see him back. Otherwise, there is not enough evidence to impose a suspension, and he will move to amend the Proposed Order to dismiss the case. Dr. Buchan added that the Board was substantially justified in bringing this case. There was a positive urine screen, and that is a severe and significant finding for the Board. However, he doesn't believe that it warrants and can be the grounds for a suspension. It should be dismissed.

DR. BUCHAN MOVED TO AMEND THE PROPOSED ORDER IN THE MATTER OF KEVIN R. BERRY, M.D., BY SUBSTITUTING AN ORDER OF DISMISSAL. DR. AGRESTA SECONDED THE MOTION.

Dr. Steinbergh stated that she would now entertain discussion in the above matter.

Dr. Somani stated that he is very much concerned about impaired physicians, as well as the possibility of relapse. As the Board has seen again and again, there are instances where physicians do relapse. Often they come up with some explanation of what went wrong. They say they didn't relapse. In looking at the issue of chain of custody, he is not sure that that argument is legitimate in this case. Dr. Berry signed and sealed the sample and everything was done in the proper manner. The only issue was that a DNA test was not performed to confirm that the sample came from Dr. Berry. That argument is not convincing because DNA may or may not be found in urine. The question is how to explain the presence of several drugs in the sample tested. Although Dr. Berry's monitoring physician was unable to discern any sign of relapse, there is no evidence to suggest that the urine sample was wrong. The Board knows from past experience that lack of evidence of relapse does not always indicate whether or not there has been a relapse.

Dr. Somani concluded by stating that he is willing to vote for Dr. Buchan's motion based on the lack of other evidence of relapse, but he does want to continue Dr. Berry under the terms of his consent agreement.

Mr. Bumgarner suggested that, if the Board is going to change the Proposed Order, it might also need to change the Proposed Conclusions of Law.

Dr. Agresta asked how often Dr. Berry's urine is tested. Dr. Berry stated that it is tested once per week. In February 1998, it was tested once per week by O.P.E.P. and once per month by his probation officer. The next urine sample collected following the positive sample was 40 hours later. That specimen tested negative.

Dr. Agresta stated that when he is presented with a case like this, he feels the same way as Dr. Buchan. His responsibility is to look at all of the evidence the board has. He cannot agree to suspend Dr. Berry's license based on this one test when everything else was normal. This doesn't mean that the Board shouldn't continue to monitor Dr. Berry.

DR. HEIDT MOVED TO TABLE THE MATTER OF KEVIN R. BERRY, M.D. DR. BUCHAN SECONDED THE MOTION. A vote was taken:

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Agresta	- aye
	Dr. Garg	- abstain
	Dr. Steinbergh	- aye
	Dr. Buchan	- aye

The motion carried.

.....

DR. BUCHAN MOVED TO REMOVE THE MATTER OF KEVIN R. BERRY, M.D., FROM THE TABLE. DR. SOMANI SECONDED THE MOTION. A vote was taken:

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Agresta	- aye
	Dr. Garg	- abstain
	Dr. Steinbergh	- aye
	Dr. Buchan	- aye

The motion carried.

.....

DR. BUCHAN MOVED THAT THE CONCLUSIONS OF LAW IN THE MATTER OF KEVIN R. BERRY, M.D., BE AMENDED AS FOLLOWS:

Although the evidence in this matter does not support a conclusion that the acts, conduct, and/or omissions of Kevin R. Berry, M.D., as set forth in the Findings of Fact,

individually, and/or collectively, constitutes a “[v]iolation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued,” as that clause is used in Section 4731.22(B)(15), Ohio Revised Code, the Board was substantially justified in issuing the Notice of Opportunity for Hearing in this matter.

* * * * *

This single positive urine screen, in absence of additional evidence of relapse and in light of the surrounding circumstances presented at hearing, does not justify suspension of Dr. Berry’s license. Moreover, the evidence does not support a finding that Dr. Berry suffered a relapse in his recovery on or about February 18, 1998.

DR. BUCHAN FURTHER MOVED THAT THE PROPOSED ORDER IN THE MATTER OF KEVIN R. BERRY, M.D., BE AMENDED BY SUBSTITUTING THE FOLLOWING:

It is hereby ORDERED that the allegations against Kevin R. Berry, M.D., as set forth in the May 13, 1998 Notice of Opportunity for Hearing, are hereby DISMISSED. This Order does not affect, in any way, the June 12, 1996 Consent Agreement.

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

DR. AGRESTA SECONDED THE MOTION.

Dr. Steinbergh stated that she would now entertain further discussion in the above matter.

Dr. Egner stated that she is hesitant to dismiss this case. She understands Dr. Buchan’s concerns and agrees that this is a difficult decision, but noted that the urine sample tested positive for Dr. Berry’s drug of choice. She does not believe that this was a false positive. Dr. Egner stated that it has been commented that there were no other problems with this probation; however, there have been four occasions when Dr. Berry has not reported for testing. One of those occasions was January 1998. The very next month the positive screen came up. Dr. Egner stated that she agrees that if Dr. Berry relapses the Board will catch him, but she’s hesitant to write this off at this time.

Dr. Agresta stated that the half-life for Dr. Berry’s drug of choice is 35 hours.

Dr. Egner stated that that would account for the screen done two days later being negative. Given the drug’s half-life, the amount present in the urine for the positive result would result in a negative screen done two days later.

Mr. Browning stated that this case reminds him of the “trust but verify” concept. He has no idea as to whether this was a false positive or not. He suggested, however, that the consent agreement be adjusted slightly, doubling the number of screens per week to two.

Dr. Bhati stated that he has reservations in going along with Dr. Egner. If someone ingested barbiturates, it should be detectable within six to seven days. Dr. Berry had two tests done prior to the date in question, and both were negative. Another test done 48 hours after this test was also negative. These circumstances tell him that this could possibly be a false positive situation. He would definitely agree with Mr. Browning that two urine tests per week should be required.

Dr. Buchan stated that if he believed that Dr. Berry suffered a relapse, he would be the first person to impose a harsh penalty. He doesn't believe that there is enough evidence aside from the positive urine screen to suggest that he relapsed. Dr. Buchan stated that the idea of patients being cared for by physicians under the influence of drugs and alcohol is intolerable. He has zero tolerance for that. He absolutely believes that for some unexplainable reason this test came back positive. There is no other supporting evidence to suspend Dr. Berry for a day, much less for a month or more.

Dr. Buchan continued that he believes that weekly urine screens are appropriate. He doesn't believe doubling up on them is necessary.

Dr. Somani stated that he is concerned by the amendment. He agrees with Dr. Egner that there are situations here that make him very uncomfortable. It is quite possible with the half-life of a drug that there can be a sample that is positive and two days later a sample would be negative because the timing for ingestion is critical. If he missed samples in the month of January, the Board doesn't know what the outcome was. He is reluctant to take a position that a single positive sample does not provide evidence of relapse. There was no explanation why there was, in this particular sample, the drug he was found to have abused in the past. This was the same combination of ingredients that he was known to ingest in the past. It is very difficult for him to accept or explain this. Dr. Somani stated that, even though Dr. Berry appears to have been following the consent agreement, the Board cannot give him the benefit of the doubt that there was something wrong with this sample. It's quite possible in the scenario that the timing of the ingestion of that drug would allow a sample to show some drug and two days later there not be a trace. That's a very good likelihood. To say the evidence is not there is not acceptable to him.

Dr. Bhati stated that it is his understanding that if you ingest barbiturates, they should show up in the urine within six to seven days. There were two negatives tests the week before and another negative 48 hours later.

Dr. Somani stated that if he ingested the drug a week before, he could test positive on the fifth day after taking the drug and negative on the seventh day.

Dr. Heidt stated that that is not necessarily true. These are half-lives. There will be a lot of stuff left after a

week in a 36-hour half-life.

Dr. Egner stated that it doesn't pick it up to zero. It picks it up to less than 200 nanograms per mil or something near that.

Dr. Buchan stated that Dr. Berry's been put on notice, and he believes that Dr. Berry understands the consequences of failing the Board by not complying with the consent agreement as written today.

Dr. Steinbergh asked whether the Board has any friendly additions to Dr. Buchan's motion.

Mr. Browning asked that Dr. Buchan include a requirement for two urine screens per week.

Dr. Buchan accepted that addition.

Ms. Strait stated that she doesn't believe that the Board can make that friendly amendment to the consent agreement. These are two different things. The amendment Dr. Buchan offers dismisses the case. In order to amend the terms of the current agreement, the Board would have to make a finding that there was a violation and enter the same terms of the consent agreement with an additional urine screen per week.

Dr. Heidt stated that the matter of the positive test is considerable speculation on the Board's part. Dr. Berry will be operating under the Board's consent agreement for two more years with weekly urines. That is enough.

A vote was taken on Dr. Buchan's motion to amend:

VOTE:	Mr. Albert	- abstain
	Dr. Bhati	- aye
	Dr. Heidt	- aye
	Dr. Somani	- nay
	Dr. Egner	- aye
	Mr. Browning	- aye
	Dr. Agresta	- aye
	Dr. Garg	- abstain
	Dr. Steinbergh	- aye
	Dr. Buchan	- aye

The motion carried.

Dr. Garg asked whether a consent agreement can be amended.

Ms. Strait advised that it has to be a mutual agreement.

Mr. Bumgarner stated that the Board is free to approach the physician to ask for agreement to amend.

Dr. Agresta stated that regularly the Board changes probationary terms such as number of urine screens and appearance schedules. He asked whether both parties had to agree to that as well.

Mr. Bumgarner stated that the physician must request the change and the Board must approve it.

Dr. Agresta commented that more often than not the requests are to decrease the amount of probationary monitoring.

Mr. Browning encouraged Dr. Berry to voluntarily submit to two urine screens per week.

Dr. Steinbergh stated that the matter will be referred to the Board's Secretary and Supervising Member.

May 13, 1998

Kevin R. Berry, M.D.
720 East Broad Street
Columbus, Ohio 43215

Dear Doctor Berry:

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

- (1) On or about April 17, 1996, the State Medical Board of Ohio issued to you a Notice of Immediate Suspension and Opportunity for Hearing (hereinafter "1996 Notice of Opportunity for Hearing") alleging violations of Sections 4731.22(B)(10) and (B)(26), Ohio Revised Code, stemming from your pleas of guilty to three (3) felony counts of Illegal Processing of Drug Documents for which you were granted treatment in lieu of conviction.

Thereafter, on or about June 12, 1996, you entered into a Consent Agreement with the Board in lieu of further formal proceedings based upon the violations of Sections 4731.22, Ohio Revised Code, as set forth in the 1996 Notice of Opportunity for Hearing. In this Consent Agreement, a copy of which is attached hereto and fully incorporated herein, you admitted to the factual allegations set forth in the 1996 Notice of Opportunity for Hearing and agreed with the Board to the continued suspension of your certificate for an indefinite period of time, but not less than six (6) months from the date of your immediate suspension. You also therein agreed to certain probationary terms, conditions, and limitations for a minimum of five (5) years following reinstatement of your certificate. Your certificate was reinstated on November 13, 1996.

- (2) Paragraph 7.g. of this Consent Agreement states that you "shall abstain completely from the personal use or possession of drugs, except those prescribed, dispensed or administered to [you] by another so authorized by law who has full knowledge of [your] history of chemical dependency."

Despite this provision, you tested positive for butalbital on or about February 27, 1998.

W. Reed 5/14/98

Your acts, conduct, and/or omissions as alleged in paragraph (2) above, individually and/or collectively, constitute a “[v]iolation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued,” as that clause is used in Section 4731.22(B)(15), Ohio Revised Code.

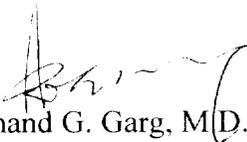
Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing of this notice.

You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

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

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Anand G. Garg, M.D.
Secretary

AGG/bjs
Enclosures

CERTIFIED MAIL #P 152 984 743
RETURN RECEIPT REQUESTED

cc: Douglas E. Graff, Esq.

CERTIFIED MAIL #P 152 984 744
RETURN RECEIPT REQUESTED

**CONSENT AGREEMENT
BETWEEN
KEVIN BERRY, M.D.
AND
THE STATE MEDICAL BOARD OF OHIO**

This CONSENT AGREEMENT is entered into by and between KEVIN BERRY, M.D., and THE STATE MEDICAL BOARD OF OHIO, a state agency charged with enforcing Chapter 4731., Ohio Revised Code.

KEVIN BERRY, M.D., voluntarily enters into this Agreement being fully informed of his rights under Chapter 119., Ohio Revised Code, including the right to representation by counsel and the right to a formal adjudicative hearing on the issues considered herein.

This CONSENT AGREEMENT contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies the terms of this CONSENT AGREEMENT.

This CONSENT AGREEMENT is entered into on the basis of the following stipulations, admissions and understandings:

- A. THE STATE MEDICAL BOARD OF OHIO is empowered by Section 4731.22(B), Ohio Revised Code, to limit, revoke, suspend a certificate, refuse to register or reinstate an applicant, or reprimand or place on probation the holder of a certificate for any of the enumerated violations.
- B. THE STATE MEDICAL BOARD OF OHIO enters into this CONSENT AGREEMENT in lieu of further formal proceedings based upon the violations of Section 4731.22, Ohio Revised Code set forth in the Notice of Opportunity for Hearing issued by the BOARD on April 17, 1996, attached hereto as Exhibit A and incorporated herein by this reference. The BOARD expressly reserves the right to institute additional formal proceedings based upon any other violations of Chapter 4731 of the Ohio Revised Code whether occurring before or after the effective date of this AGREEMENT.
- C. KEVIN BERRY, M.D., is licensed to practice medicine and surgery in the State of Ohio.
- D. KEVIN BERRY, M.D., ADMITS the factual and legal allegations set forth in the Notice of Opportunity for Hearing issued by the BOARD on April 17, 1996, attached hereto as Exhibit A and incorporated herein by reference.

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WHEREFORE, in consideration of the foregoing and mutual promises hereinafter set forth, and in lieu of any further formal proceedings at this time, KEVIN BERRY, M.D., knowingly and voluntarily agrees with THE STATE MEDICAL BOARD OF OHIO, (hereinafter BOARD), to the following terms, conditions and limitations:

1. The certificate of DR. BERRY to practice medicine and surgery in the State of Ohio shall remain **SUSPENDED** for an indefinite period of time but not less than six (6) months from the date of April 17, 1996, the date of DR. BERRY's immediate suspension;
2. DR. BERRY shall immediately surrender his United States Drug Enforcement Administration certificate. He shall be ineligible to hold, and shall not apply for, registration with the Drug Enforcement Administration to prescribe, dispense, or administer controlled substances without prior BOARD approval;
3. DR. BERRY shall abstain completely from the personal use or possession of drugs, except those prescribed, dispensed or administered to him by another so authorized by law who has full knowledge of DR. BERRY's history of chemical dependency;
4. DR. BERRY shall abstain completely from the use of alcohol;
5. DR. BERRY shall provide authorization, through appropriate written consent forms, for disclosure of evaluative reports, summaries, and records, of whatever nature, by any and all parties that provide treatment or evaluation for DR. BERRY's chemical dependency or related conditions, or for purposes of complying with the **CONSENT AGREEMENT**, whether such treatment or evaluation occurred before or after the effective date of this **CONSENT AGREEMENT**. The above-mentioned evaluative reports, summaries, and records are considered medical records for purposes of Section 149.43 of the Ohio Revised Code and are confidential pursuant to statute. DR. BERRY further agrees to provide the BOARD written consent permitting any treatment provider from whom he obtains treatment to notify the BOARD in the event he fails to agree to comply with any treatment contract or aftercare contract. Failure to provide such consent, or revocation of such consent, shall constitute a violation of this **CONSENT AGREEMENT**;

6. The BOARD shall not consider reinstatement of DR. BERRY's certificate to practice medicine and surgery unless and until all of the following conditions are met:
- a. DR. BERRY shall submit an application for reinstatement, accompanied by appropriate fees, if any;
 - b. DR. BERRY shall demonstrate to the satisfaction of the BOARD that he can resume practice in compliance with acceptable and prevailing standards of care under the provisions of his certificate. Such demonstration shall include but shall not be limited to the following:
 - i. Certification from a treatment provider approved under Section 4731.25 of the Revised Code that DR. BERRY has successfully completed any required inpatient treatment;
 - ii. Evidence of continuing full compliance with an aftercare contract or consenting agreement;
 - iii. Two written reports indicating that DR. BERRY's ability to practice has been assessed and that he has been found capable of practicing according to acceptable and prevailing standards of care. The reports shall be made by individuals or providers approved by the BOARD for making such assessments and shall describe the basis for this determination and set forth any recommended limitations upon DR. BERRY's practice.
7. Upon reinstatement, DR. BERRY's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations:
- a. DR. BERRY shall obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio, and all terms of probation imposed by the Court in criminal case number 96CR-01-349;
 - b. DR. BERRY shall submit quarterly declarations under penalty of BOARD disciplinary action or criminal prosecution stating whether there has been compliance with all the conditions of this CONSENT AGREEMENT. The first quarterly declaration must be received in the BOARD'S offices on the first day of the third month following the month in which this CONSENT AGREEMENT becomes effective, provided that if the effective

date is on or after the 16th day of the month, the first quarterly declaration must be received in the BOARD'S offices on the first day of the fourth month following. Subsequent quarterly declarations must be received in the BOARD'S offices on or before the first day of every third month;

- c. DR. BERRY shall appear in person for quarterly interviews before the BOARD or its designated representative, or as otherwise directed by the BOARD.

If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled. (Example: The first quarterly appearance is scheduled for February, but based upon the doctor's serious personal illness he is permitted to delay appearance until April. The next appearance will still be scheduled for May, three months after the appearance as originally scheduled.) Although the BOARD will normally give DR. BERRY written notification of scheduled appearances, it is DR. BERRY's responsibility to know when personal appearances will occur. If he does not receive written notification from the BOARD by the end of the month in which the appearance should have occurred, DR. BERRY shall immediately submit to the BOARD a written request to be notified of his next scheduled appearance.

- d. In the event that DR. BERRY should leave Ohio for three (3) continuous months, or reside or practice outside the State, DR. BERRY must notify the BOARD in writing of the dates of departure and return. Periods of time spent outside Ohio will not apply to the reduction of this period under the CONSENT AGREEMENT, unless otherwise determined by motion of the BOARD in instances where the BOARD can be assured that probationary monitoring is otherwise being performed.
- e. In the event DR. BERRY is found by the Secretary of the BOARD to have failed to comply with any provision of this agreement, and is so notified of that deficiency in writing, such periods of noncompliance will not apply to the reduction of the probationary period under this CONSENT AGREEMENT.
- f. DR. BERRY shall not prescribe, administer, dispense, order, write orders for, give verbal orders for, or possess (except as allowed under Paragraph 7(g) below) any controlled substances as defined by State or Federal law.

- g. DR. BERRY shall abstain completely from the personal use or possession of drugs, except those prescribed, dispensed or administered to him by another so authorized by law who has full knowledge of DR. BERRY's history of chemical dependency.
- h. DR. BERRY shall abstain completely from the use of alcohol.
- i. DR. BERRY shall submit to random urine screenings for drugs and alcohol on a weekly basis or as otherwise directed by the BOARD. DR. BERRY shall ensure that all screening reports are forwarded directly to the BOARD on a quarterly basis. The drug testing panel utilized must be acceptable to the Secretary of the Board.

Within thirty (30) days of the effective date of this Agreement, DR. BERRY shall submit to the BOARD for its prior approval the name of a supervising physician to whom DR. BERRY shall submit the required urine specimens. The supervising physician shall ensure that the urine specimens are obtained on a random basis, that the giving of the specimen is witnessed by a reliable person, and that appropriate control over the specimen is maintained. In addition, the supervising physician shall immediately inform the BOARD of any positive screening results.

DR. BERRY shall ensure that the supervising physician provides quarterly reports to the BOARD, on forms approved or provided by the BOARD, verifying whether all urine screens have been conducted in compliance with this CONSENT AGREEMENT, whether all urine screens have been negative, and whether the supervising physician remains willing and able to continue in his responsibilities.

In the event that the designated supervising physician becomes unable or unwilling to so serve, DR. BERRY must immediately notify the BOARD in writing, and make arrangements acceptable to the BOARD for another supervising physician as soon as practicable. DR. BERRY shall further ensure that the previously designated supervising physician also notifies the BOARD directly of the inability to continue to serve and the reasons therefore.

All screening reports and supervising physician reports required under this paragraph must be received in the BOARD's offices no later than the due date for DR. BERRY's quarterly declaration. It is DR. BERRY's responsibility to ensure that reports are timely submitted.

- j. The BOARD retains the right to require, and DR. BERRY agrees to submit, blood or urine specimens for analysis upon request and without prior notice. DR. BERRY's refusal to submit a blood or urine specimen upon request of the BOARD shall result in a minimum of one year of actual license suspension.
- k. Within thirty (30) days of the reinstatement of his certificate to practice medicine and surgery in the state of Ohio, DR. BERRY shall submit for the BOARD's prior approval the name of a monitoring physician, who shall review DR. BERRY's patient charts and shall submit a written report of such review to the BOARD on a quarterly basis. Such chart review may be done on a random basis, with the frequency and number of charts reviewed to be determined by the BOARD. It shall be DR. BERRY's responsibility to ensure that the monitoring physician's quarterly reports are submitted to the BOARD on a timely basis.

Further, the monitoring physician shall otherwise monitor DR. BERRY and provide the BOARD with quarterly reports on the doctor's progress and status. DR. BERRY shall ensure that such reports are forwarded to the BOARD on a quarterly basis. In the event that the designated monitoring physician becomes unable or unwilling to serve in this capacity, DR. BERRY must immediately so notify the BOARD in writing, and make arrangements acceptable to the BOARD for another monitoring physician as soon as practicable. DR. BERRY shall further ensure that the previously designated monitoring physician also notifies the BOARD directly of the inability to continue to serve and the reasons therefore.

All monitoring physician reports required under this paragraph must be received in the BOARD's offices no later than the due date for DR. BERRY's quarterly declaration. It is DR. BERRY's responsibility to ensure that reports are timely submitted.

- l. Within thirty (30) days of the reinstatement of his certificate to practice medicine and surgery in the state of Ohio, DR. BERRY shall undertake and maintain participation in an alcohol and drug

rehabilitation program, such as A.A., N.A., or Caduceus, or any other program approved in advance by the BOARD specifically for DR. BERRY, no less than three (3) times per week. Substitution of any specific program must receive prior BOARD approval.

DR. BERRY shall submit with each quarterly declaration required under Paragraph 7(b) of this CONSENT AGREEMENT acceptable documentary evidence of continuing compliance with this program;

- m. DR. BERRY shall obtain the approval of the BOARD for any medical practice or employment related to the health care fields. The BOARD shall consider, among other factors, the adequacy and continuity of supervision and the feasibility of restricted access to controlled substances, which will ensure the protection of the public, prior to approval or disapproval of the proposed employment.
- n. DR. BERRY shall contact an appropriate impaired physicians committee, approved by the BOARD, to arrange for assistance in recovery or aftercare.
- o. DR. BERRY shall maintain continued compliance with the terms of the aftercare contract entered into with his treatment provider, provided, that where terms of the aftercare contract conflict with terms of this AGREEMENT, the terms of this AGREEMENT shall control.
- p. DR. BERRY shall provide continuing authorization, through appropriate written consent forms, for disclosure by his treatment provider to the BOARD, to treating and monitoring physicians, and to others involved in the monitoring process, of information necessary for them to fulfill their respective duties and obligations.
- q. Any violation of paragraph 7(g) or paragraph 7(h) of this AGREEMENT shall constitute grounds to revoke or permanently revoke DR. BERRY's certificate. DR. BERRY agrees that the minimum discipline for such a violation shall include actual license suspension. This paragraph does not limit the Board's authority to suspend, revoke or permanently revoke DR. BERRY's certificate based on other violations of this CONSENT AGREEMENT.

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- r. DR. BERRY agrees that if any declaration or report required by this AGREEMENT is not received in the BOARD's offices on or before its due date, DR. BERRY shall cease practicing beginning the day next following receipt from the BOARD of notice of non-receipt, either by writing, by telephone or by personal contact, until the declaration or report is received in the BOARD offices. Any practice during this time period shall be considered unlicensed practice in violation of Section 4731.41 of the Revised Code.
 - s. DR. BERRY agrees that if, without prior permission from the BOARD, he fails to submit to random screenings for drugs and alcohol at least as frequently as required by Paragraph 7(i) of this CONSENT AGREEMENT, he shall cease practicing immediately upon receipt from the BOARD of notice of the violation and shall refrain from practicing for thirty (30) days for the first instance of a single missed screen. Practice during this time period shall be considered unlicensed practice in violation of Section 4731.41 of the Revised Code.
 - t. DR. BERRY agrees that if he fails to participate in an alcohol and drug rehabilitation program at least as frequently as required by Paragraph 7(l) of this CONSENT AGREEMENT, he shall cease practicing immediately upon receipt from the BOARD of notice of the violation and shall refrain from practicing for fifteen (15) days following a first missed meeting. Practice during this time period shall be considered unlicensed practice in violation of Section 4731.41 of the Revised Code.
8. Within thirty (30) days of the effective date of this AGREEMENT, DR. BERRY shall provide a copy of this CONSENT AGREEMENT to all employers or entities with which he is under contract to provide physician services or is receiving training; and the Chief of Staff at each hospital where he has privileges or appointments. Further, DR. BERRY shall provide a copy of this CONSENT AGREEMENT to all employers or entities with which he contracts to provide physician services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments.
9. Within thirty (30) days of the effective date of this AGREEMENT, DR. BERRY shall provide a copy of this CONSENT AGREEMENT by certified mail, return receipt requested, to the proper licensing authority of any state or jurisdiction in which he currently holds a license to practice. DR. BERRY further agrees to provide a copy of this CONSENT AGREEMENT by certified mail, return receipt requested, at

time of application to the proper licensing authority of any state in which he applies for licensure or reinstatement of licensure. Further, DR. BERRY shall provide this BOARD with a copy of the return receipt as proof of notification within thirty (30) days of receiving that return receipt.

This AGREEMENT shall remain in force for a minimum of five (5) years following DR. BERRY's reinstatement prior to any request for termination of said AGREEMENT. Otherwise, the above described terms, limitations and conditions may be amended or terminated in writing at any time upon the agreement of both parties.

If, in the discretion of the Secretary and Supervising Member of THE STATE MEDICAL BOARD OF OHIO, DR. BERRY appears to have violated or breached any term or condition of this Agreement, THE STATE MEDICAL BOARD OF OHIO reserves the right to institute formal disciplinary proceedings for any and all possible violations or breaches, including but not limited to, alleged violations of the laws of Ohio occurring before the effective date of this Agreement.

If the Secretary and Supervising Member of the BOARD determine that there is clear and convincing evidence that DR. BERRY has violated any term, condition or limitation of this CONSENT AGREEMENT, DR. BERRY agrees that the violation, as alleged, also constitutes clear and convincing evidence that his continued practice presents a danger of immediate and serious harm to the public for the purposes of initiating a summary suspension pursuant to Section 4731.22(D), Ohio Revised Code.

DR. BERRY acknowledges that he has had an opportunity to ask questions concerning the terms of this AGREEMENT and that all questions asked have been answered in a satisfactory manner.

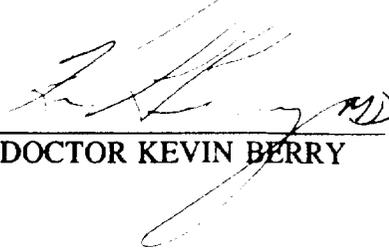
Any action initiated by the BOARD based on alleged violations of this CONSENT AGREEMENT shall comply with the Administrative Procedure Act, Chapter 119., Ohio Revised Code.

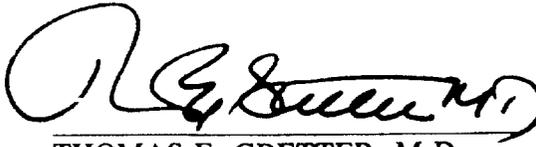
DR. BERRY hereby releases the STATE MEDICAL BOARD OF OHIO, its members, employees, agents, officers and representatives jointly and severally from any and all liability arising from the within matter.

This CONSENT AGREEMENT shall be considered a public record as that term is used in Section 149.43, Ohio Revised Code. It is expressly understood that this CONSENT AGREEMENT is subject to ratification by the BOARD prior to signature by the Secretary and Supervising Member and shall become effective upon the last date of signature below.

STATE MEDICAL BOARD
OF OHIO
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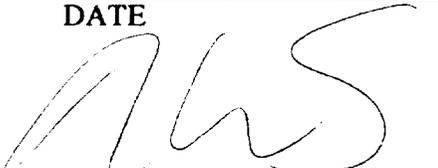
Further, this information may be reported to appropriate organizations, data banks and governmental bodies.

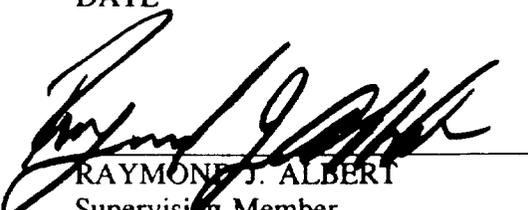

DOCTOR KEVIN BERRY


THOMAS E. GRETER, M.D.
Secretary

6/4/96
DATE

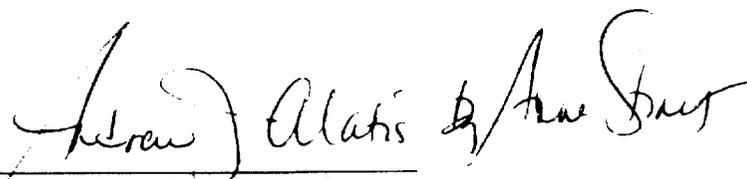
6/12/96
DATE


R. WILLIAM MEEKS, ESQ.
SAMUEL H. SHAMANSKY, ESQ.
Counsel for Doctor Berry


RAYMOND J. ALBERT
Supervising Member

6/4/96
DATE

6/12/96
DATE


ANDREW J. ALATIS, ESQ.
Assistant Attorney General

6/12/96
DATE

consent4.agr

STATE MEDICAL BOARD
OF OHIO
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STATE MEDICAL BOARD OF OHIO
77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614)466-3934

**NOTICE OF IMMEDIATE SUSPENSION
AND -
OPPORTUNITY FOR HEARING**

April 17, 1996

Kevin R. Berry, M.D.
720 E. Broad Street
Columbus, OH 43215

Dear Doctor Berry:

In accordance with Sections 2929.17 and/or 3719.12(B), Ohio Revised Code, the Office of the Prosecuting Attorney of Franklin County, Ohio, reported that on or about February 26, 1996, the Franklin County Court of Common Pleas found you Eligible for Treatment in Lieu of Conviction for violations of Section 2925.23, Ohio Revised Code, Illegal Processing of Drug Documents, pursuant to Section 2951.041 of the Ohio Revised Code.

Therefore, pursuant to Section 3719.121(C), Ohio Revised Code, you are hereby notified that your license to practice medicine and surgery in the State of Ohio is immediately suspended. Continued practice after this suspension shall be considered practicing medicine without a certificate in violation of Section 4731.41, Ohio Revised Code.

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

- (1) On or about February 29, 1996, in the Franklin County Court of Common Pleas, you pleaded guilty to three felony counts of Illegal Processing of Drug Documents in violation of Section 2925.23, Ohio Revised Code, and were granted Treatment in Lieu of Conviction pursuant to Section 2951.041, Ohio Revised Code.
- (2) Moreover, in order to grant your request for Treatment in Lieu of Conviction, the Court was required by statute to find that your "drug dependence was a factor leading to the criminal activity with which (you were) charged, and rehabilitation through treatment would substantially reduce the likelihood of additional criminal activity."

The acts, conduct, and/or omissions underlying this judicial finding of Eligibility for Treatment in Lieu of Conviction for violations of Section 2925.23, Ohio Revised Code, Illegal Processing of Drug Documents, as alleged in paragraph (1) above, individually and/or collectively, constitute "(c)ommission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed," as that clause is used in

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STATE MEDICAL BOARD
OF OHIO

Mailed 4/18/96

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Section 4731.22(B)(10), Ohio Revised Code, to wit: Section 2925.23, Ohio Revised Code, Illegal Processing of Drug Documents.

Further, the acts, conduct, and/or omissions underlying this judicial finding of Eligibility for Treatment in Lieu of Conviction for violations of Section 2925.23, Ohio Revised Code, Illegal Processing of Drug Documents, as alleged in paragraphs (1) and (2) above, individually and/or collectively, constitute "(i)mpairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice," as that clause is used in Section 4731.22(B)(26), Ohio Revised Code.

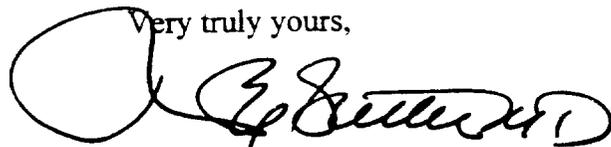
Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing of this notice.

You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

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

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Thomas E. Gretter, M.D.
Secretary

TEG/bjm
Enclosures
CERTIFIED MAIL # P 152 983 400
RETURN RECEIPT REQUESTED

cc: R. William Meeks, Esq.
CERTIFIED MAIL # P 152 983 398
RETURN RECEIPT REQUESTED

rev.2/15/95

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