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COURT OF APPEALS
FRANKLIN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Faye F. Instanbooly, M.D., :

Appellant-Appellant, :

v. :

Ohio State Medical Board, :

Appellee-Appellee. :

No. 04AP-76
(C.P.C. No. 03CVF-02-2334)

(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on July 13, 2004, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed against appellant.

LAZARUS, P.J., BOWMAN & BRYANT, JJ.

By Cynthia C. Lazarus
Judge Cynthia C. Lazarus, P.J.

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SERVICES SECTION

[Cite as *Instanbooly v. Ohio State Med. Bd.*, 2004-Ohio-3696.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Faye F. Instanbooly, M.D., :
Appellant-Appellant, :
v. : No. 04AP-76
Ohio State Medical Board, : (C.P.C. No. 03CVF-02-2334)
Appellee-Appellee. : (ACCELERATED CALENDAR)

O P I N I O N

Rendered on July 13, 2004

Kevin P. Byers Co., L.P.A., and Kevin P. Byers, for appellant.

Jim Petro, Attorney General, and *Steven McGann*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

LAZARUS, P.J.

{¶1} Appellant, Faye F. Instanbooly, M.D., appeals from the December 22, 2003 judgment entry affirming in part and reversing in part the order of appellee, State Medical Board of Ohio ("the Board"), which suspended appellant's certificate to practice medicine and surgery in Ohio for 30 days. For the reasons that follow, we affirm the decision and judgment entry of the trial court.

{¶2} On July 10, 2002, appellant was notified by the secretary of the Board that the Board intended to take disciplinary action against appellant for her failure to truthfully respond to all questions in her April 10, 2000 application for certificate renewal to practice medicine and surgery in Ohio. Specifically, appellant was asked in question five of the renewal application whether or not she had been notified by any board, bureau, department, or agency, of any investigations, charges, or complaints concerning appellant that had been filed against her. Appellant answered in the negative. Appellant further certified that the information she provided on her renewal application was true and correct. The Board alleged that this act, conduct, and/or omission of appellant violated R.C. 4731.22(A) and/or 4731.22(B)(5).

{¶3} Prior to appellant applying for the renewal Ohio certificate, the Michigan Board of Medicine Disciplinary Subcommittee ("Michigan Board"), on December 23, 1998, filed an administrative complaint against appellant, alleging that appellant failed to follow proper procedures in prescribing Adderall, a controlled substance, to her patients. The complaint was amended on July 14, 1999, and appellant received a copy of the amended complaint on July 24, 1999. In a consent order entered into with the Michigan Board, appellant admitted she prescribed the controlled substance without first obtaining a waiver required under Michigan law. On January 17, 2001, after appellant applied for her Ohio renewal application, she signed the consent order and stipulation with the Michigan Board and paid a \$2,500 fine. On September 19, 2001, the Michigan Board adopted the consent order and stipulation.

{¶4} At the hearing before the Ohio Board, appellant testified that the Michigan charge was expunged from the National Practitioner Data Bank ("NPDR"). Appellant

testified that she did not report the Michigan complaint in her Ohio renewal application because she did not consider it a reportable disciplinary action, but a technical violation. (Tr. 16-18, 20.) Appellant further noted that she believed that she had no obligation to report the matter to the Ohio Board. Appellant testified that her negative response on the renewal application was "an honest misunderstanding and mistake" and that her intentions were not to mislead or misrepresent any fact. (Tr. 25.) Appellant testified that it would not happen again. (Tr. 26.)

{¶5} In the report and recommendation dated December 19, 2002, the hearing examiner concluded that the evidence was sufficient to support the conclusion that appellant intended to mislead the Board. The hearing examiner determined that question five on the renewal application was clear and unambiguous. The hearing examiner concluded, based on appellant's testimony that she wanted to maintain a clean record, that appellant had a motive to mislead the Board. The hearing officer found that appellant's conduct violated R.C. 4731.22(A) and 4731.22(B)(5), and proposed to the Board that appellant's certificate to practice medicine and surgery be suspended for a period of 30 days.

{¶6} Appellant filed objections to the hearing examiner's report and recommendations. The Board, on February 12, 2003, voted 8-0, with two abstentions, to adopt the hearing examiner's report and recommendation. On February 28, 2003, appellant, pursuant to R.C. 119.12, appealed the order of the Board. The trial court concluded that the Board's order was supported by reliable, probative, and substantial evidence. Furthermore, the 30-day suspension pursuant to R.C. 4731.22(B)(5) was in accordance with the law. However, the trial court determined that to the extent the order

sought to impose a 30-day suspension and not a revocation or refusal to grant a certificate for violating R.C. 4731.22(A), the order was not in accordance with the law, albeit harmless error on the part of the Board. The language of R.C. 4731.22(A) limits the sanction for a violation of that section to revocation or refusal to grant a certificate. However, appellant was also found to have violated R.C. 4731.22(B)(5), and a 30-day suspension is permitted under that section.

{¶7} In a judgment entry dated December 22, 2003, the trial court affirmed in part and reversed in part the order of the Board. The trial court affirmed the 30-day suspension and held that the partial reversal of the Board's order does not support remanding the appeal to the Board to consider a penalty modification. Appellant appeals from this entry, assigning the following as error:

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT FAILED TO ADMIT RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE REGARDING DR. ISTANBOOLY'S INTENT.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT FOUND THE ORDER OF THE STATE MEDICAL BOARD OF OHIO IS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT FOUND THE ORDER OF THE STATE MEDICAL BOARD OF OHIO IN ACCORDANCE WITH LAW.

{¶8} As an initial matter, we note that appellate review in this matter is limited.

The reviewing trial court is bound to uphold an order of the Board if it is supported by

reliable, probative, and substantial evidence, and is in accordance with the law. R.C. 119.12; *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. In *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, the Ohio Supreme Court defined the evidence required by R.C. 119.12 as:

(1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Fn. omitted.)

{¶9} Our review, however, is even more limited than that of the trial court. "The appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons*, at 621. Absent an abuse of discretion, we may not substitute our judgment for those of the medical board or trial court. *Id.*; see, also, *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680.

{¶10} In her first assignment of error, appellant maintains that it was error for the Board to exclude evidence that was probative of her state of mind in not intending to deceive the Board. Because of this exclusion, appellant maintains that the trial court abused its discretion in affirming the Board's order, as the order was not supported by reliable, probative, and substantial evidence and thus not in accordance with the law.

{¶11} Appellant attempted to introduce evidence, specifically a September 27, 2000 letter from her former attorney to the Michigan attorney general, which was probative to her state of mind regarding her understanding that she would not be

disciplined under the Michigan law. The trial court excluded the evidence finding that it was not relevant, it was not authenticated, and it did not support appellant's testimony regarding her state of mind in April 2000. Ohio Rules of Evidence 402 states that it is within the discretion of the trial court to exclude irrelevant evidence. After reviewing the record, we conclude that the trial court did not abuse its discretion in finding that the hearing examiner properly excluded the letter. As such, appellant's first assignment of error lacks merit and is not well-taken.

{¶12} Appellant's second and third assignments of error are interrelated and will be addressed together. In her appeal before the trial court, appellant maintains that there was no evidence that she had the intent to violate R.C. 4731.22(A) and 4731.22(B)(5).

{¶13} R.C. 4731.22(A) provides:

The state medial board, by an affirmative vote of not fewer than six of its members, may revoke or may refuse to grant a certificate to a person found by the board to have committed fraud during the administration of the examination for a certificate to practice or to have committed fraud, misrepresentation, or deception in applying for or securing any certificate to practice or certificate of registration issued by the board.

{¶14} R.C. 4731.22(B) states in pertinent part:

The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

* * *

(5) Making a false, fraudulent, deceptive, or misleading statement * * *.

{¶15} This court has previously concluded that, to find a violation of R.C. 4731.22(A), the Board must find that the "statements were made with an intent to mislead the medical board." *In re Wolfe* (1992), 82 Ohio App.3d 675, 687. Likewise, in *Rajan v. State Med. Bd. of Ohio* (1997), 118 Ohio App.3d 187, 194, we concluded that, "the same proof with regard to intent is required under R.C. 4731.22(B)(5) * * *." Accordingly, in order to discipline appellant for violations of R.C. 4731.22(A) or 4731.22(B)(5), the Board was required to find that appellant intentionally misled the board.

{¶16} Intent "may be inferred from the surrounding circumstances, e.g., as when a licensee clearly knows something, which he failed to disclose in response to a direct question." *Hayes v. State Med. Bd. of Ohio* (2000), 138 Ohio App.3d 762, 770, quoting *Krain v. State Med. Bd. of Ohio* (Oct. 29, 1998), Franklin App. No. 97APE08-981. Upon review of the record, we conclude substantial, probative, and reliable evidence supported the Board's finding that appellant engaged in a pattern of intentional misrepresentation in her communications with the Board.

{¶17} Question five on the Ohio renewal application specifically asked:

At any time since signing your last application for renewal of your certificate have you:

* * *

5.) [b]een notified by any board, bureau, department, agency, or other body including those in Ohio, other than this board, of any investigation concerning you, or any charges, allegations, or complaints filed against you?

{¶18} Appellant provided false information on her renewal application when she replied "No" to this question. There was ample evidence presented that appellant had been involved in a disciplinary action and that the Michigan Board had initiated action

against her license in that state. Appellant was aware of the administrative complaint filed against her one year and four months prior to her filling out the Ohio renewal application in April 2000. Nine months later, appellant signed the Consent Order and Stipulation, which was later adopted by the Michigan Board. Appellant testified that the charge was later expunged from the NPDR. However, the Ohio renewal application submitted by appellant made no provision for allowing the non-disclosure of disciplinary actions which had been "expunged." Whether or not appellant's Michigan sanction was expunged is immaterial to the issue in this case, which concerns appellant's failure to disclose to Ohio authorities, when required to do so, the fact or existence of the Michigan administrative complaint filed against her.

{¶19} While appellant testified that she is well versed in English and evidence existed that she is highly educated, she maintained that she did not understand the difference between "charges" and "discipline" and she believed she was not required to disclose the Michigan complaint because it did not result in discipline. Appellant's defense that she misunderstood question five is unpersuasive. Question five was clear and unambiguous. There was ample evidence supporting the Board's finding that appellant provided false information on her renewal applications with the intent to deceive or mislead. Appellant clearly knew of the Michigan proceeding, and failed to disclose that information in response to a direct question. See *Hayes*, at 762; *Krain*, supra.

{¶20} Finally, appellant maintains that the Board's order is not in accordance with the law because the imposition of the 30-day suspension, when compared with other discipline imposed by the Board on other physicians, violates her Equal Protection Rights

of the Ohio and United States Constitutions. As the basis of her Equal Protection Claim, appellant points to the cases of Drs. Aldrete and Polito.

{¶21} Dr. Aldrete, like appellant, also failed to truthfully complete his renewal application, in failing to list investigations, charges, and lawsuits with respect to his professional license. Dr. Aldrete entered into a consent agreement with the Board and received a 90-day license suspension to practice medicine and surgery in Ohio.

{¶22} Dr. Polito, during the course of his podiatry practice, billed Medical Mutual for a debridement procedure performed on a patient using an incorrect code. Dr. Polito pled guilty to and was found guilty of one misdemeanor count of theft, and paid restitution to Medical Mutual in the amount of \$80,000. In a consent agreement entered with the Board, Dr. Polito admitted that his conduct violated R.C. 4731.22(B)(5) and 4731.22(B)(11). Dr. Polito's certificate to practice podiatric medicine and surgery was suspended for 30 days.

{¶23} This court has noted that, "in an equal protection claim, the alleged victim has the burden of proving discriminatory intent." *Matter of Vaughn v. State Medical Bd. of Ohio* (Nov. 30, 1995), Franklin App. No. 95APE05-645, citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), 429 U.S. 252, 265, 97 S.Ct. 555. In *Vaughn*, we found that where a physician offers no evidence to support a claim of discrimination other than a list of other physicians who received lesser sanctions, no equal protection violation is shown. The "standard for determining violations of equal protection is essentially the same under the state and federal law." *Beagle v. Walden* (1997), 78 Ohio St.3d 59, citing *Beatty v. Akron City Hosp.* (1981), 67 Ohio St.2d 483, 491.

{¶24} In this case, appellant has failed to prove discriminatory intent. Appellant did not demonstrate how Drs. Aldrete and Polito's situation were similarly situated to hers. Both doctors waived their right to an evidentiary hearing before the Board and entered into consent agreements. Interestingly, appellant maintains that Dr. Aldrete's 90-day suspension for concealing information from the Board is an example of disparate treatment. We are unpersuaded by appellant's argument as appellant's certificate was only suspended for 30 days. Once reliable, probative, and substantial evidence is found to support an order by the medical board, then the reviewing court may not modify the sanction authorized by statute. *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233. See, also, *Hale v. Ohio State Veterinary Medical Bd.* (1988), 47 Ohio App.3d 167 (in considering the appropriateness of a sanction, the trial court is limited to determining whether the sanction is within the range of acceptable choices).

{¶25} Furthermore, appellant violated R.C. 4731.22(A). Pursuant to R.C. 4731.22(A), the Board had within its discretion the ability to revoke or refuse to grant appellant her certificate to practice medicine and surgery. Instead, appellant received a 30-day suspension. Appellant received a lenient sanction, seeing that the Board had the right to permanently revoke appellant's license if the circumstances warranted permanent revocation. *Bouquett v. Ohio State Med. Bd.* (1997), 123 Ohio App.3d 466, 472-473; *Roy v. Ohio State Medical Bd.* (1995), 101 Ohio App.3d 352. As such, appellant's equal protection argument lacks merit and is not well-taken.

{¶26} Having conducted a thorough review, we find that the trial court did not abuse its discretion in concluding that there was substantial, reliable, and probative evidence in the record, which supports the findings and action taken by the Board. The

evidence reveals that appellant made a false statement in connection with her Ohio renewal application. We find no abuse of discretion on behalf of the trial court in affirming the board's decision that appellant violated R.C. 4731.22(A) and 4731.22(B)(5). As such, appellant's second and third assignments of error are not well-taken and are overruled.

{¶27} For the foregoing reasons, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and BRYANT, JJ., concur.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CIVIL DIVISION
COURT OF APPEALS
FRANKLIN COUNTY, OHIO

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Faye F. Istanbooly, MD, 04 FEB -4 PM 1:54

Appellant, CLERK OF COURTS

CASE NO. 03CVF02-2334

v.

State Medical Board of Ohio,

JUDGE REECE

Appellee.

STATE MEDICAL BOARD
OF OHIO

2004 APR 15 A 10:12

ENTRY

On March 11, 2003, this court journalized a stay order in this case. On December 22, 2003, this court journalized a final appealable order which affirmed the Medical Board order. Appellant, Faye F, Istanbooly, MD, has now filed for continuation of the March 11, 2003, stay pending further appeal which must be filed by January 21, 2004.

IT IS HEREBY ORDERED that the March 11, 2003, stay order shall remain in full force and effect for the duration of any further appeal, provided that such appeal is perfected no later than January 21, 2004. Should appellant fail to timely appeal this case, the March 11, 2003, stay order shall be dissolved as of 5:00 PM on January 21, 2004, with no further notice or order from this court.

[Handwritten Signature]
GUY L. REECE, JUDGE

CLERK OF COURTS

2004 JAN 28 PM 2:39

COURT

Copies:
Kevin P. Byers for appellant
AAG Gregory A. Perry for appellee

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Faye F. Istanbooly, MD,
474 North Lake Shore Dr., Apt. 5708
Chicago, Illinois 60611

Appellant-Appellant

HEALTH & HUMAN SERVICES SECTION

CASE NO.

CLERK OF COURTS

2004 JAN 21 AM 9:25

COURT OF APPEALS
FRANKLIN CO. OHIO

FILED

v.

JAN 26 2004

State Medical Board of Ohio
77 South High Street, 17th Floor
Columbus, Ohio 43215

(Accelerated Calendar)

SERVICES SECTION

CPC No. 03CVF02-2334

Appellee-Appellee.

Appeal from the Common Pleas Court of Franklin County, Ohio

NOTICE OF APPEAL

Notice is given that appellant, Faye F. Istanbooly, MD, hereby appeals to the Court of Appeals of Ohio, Tenth Appellate District for Franklin County, from the judgment entry and decision (attached hereto) filed in this action by the lower court on December 22, 2003.

Respectfully submitted,

KEVIN P. BYERS CO., L.P.A.

KPBYERS

Kevin P. Byers 0040253
Fifth Third Center
21 East State Street, Suite 20
Columbus, Ohio 43215
614.228.6283 Fax 228.6422

CLERK OF COURTS

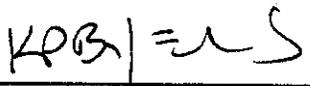
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COMMON PLEAS COURT
FRANKLIN CO. OHIO

Attorney for Appellant,
Faye F. Istanbooly, MD

Certificate of Service

I certify that a true copy of the foregoing document was deposited in first class US Mail this 21st day of January, 2004, addressed to Assistant Attorney General Gregory A. Perry, Health & Human Services Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3428.



Kevin P. Byers

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

FAYE F. INSTANBOOLY, MD :
Appellant :
v. : Case No. 03CVF-02-2334
STATE MEDICAL BOARD OF OHIO : JUDGE REECE
Appellee :

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
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CLERK OF COURTS

JUDGMENT ENTRY

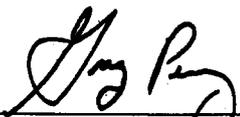
This case, pursuant to R.C. 119.12, is before the Court on appeal of the February 12, 2003 order of the State Medical Board suspending the license of Faye F. Instanbooly, M.D., to practice medicine in Ohio for a period of thirty (30) days. For the reasons stated in the Court's December 4, 2003 decision, which reasons are incorporated as if fully rewritten herein, it is hereby

ORDERED, ADJUDGED and DECREED that the February 12, 2003 order of the State Medical Board in the above-referenced matter is hereby AFFIRMED IN PART AND REVERSED IN PART. It is further ORDERED, ADJUDGED and DECREED that the partial reversal of the Board's Order does not support remanding the appeal back to the Board for further consideration of any modification of penalty. The thirty-day suspension is AFFIRMED. It is further ORDERED, ADJUDGED and DECREED that the stay order of the suspension imposed by Judge Sadler on March 11, 2003 is hereby lifted. The Costs shall be taxed to Appellant.

IT IS SO ORDERED.

Date

JUDGE GUY L. REECE

Kevin P. Byers by 
Kevin P. Byers, Esq. per telephone
Counsel for Appellant authorization
2/10/03

JIM PETRO (0021451)
Attorney General


Gregory A. Perry (0065251)
Assistant Attorney General
Counsel for Appellee

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

FAYE F. INSTANBOOLY, MD,
Appellant,
vs.
STATE MEDICAL BOARD OF OHIO,
Appellee.

CASE NO. 03CVF-022334
JUDGE REECE

FILED COURT
COMMON PLEAS, OHIO
FRANKLIN COUNTY, OHIO
2003 DEC -5 PM 12:53
CLERK OF COURTS

**DECISION AFFIRMING IN PART AND REVERSING IN PART THE
ORDER OF THE STATE MEDICAL BOARD OF OHIO**

Rendered this 4th day of December, 2003.

REECE, J.

Faye F. Istanbooly, M.D., appeals, pursuant to R.C. 119.12, a February 12, 2003 order of the Appellee State Medical Board of Ohio ("Board"), which suspended Dr. Istanbooly's certificate to practice medicine and surgery in Ohio for thirty (30) days.

I. Procedural and Factual Background.

On July 10, 2002, Anand G. Garag, secretary of the Board, notified Dr. Istanbooly that the Board intended to determine whether to take disciplinary action against her because of her failure to truthfully respond to all questions in an April 10, 2000 application for renewal of her Ohio certificate to practice medicine and surgery. Specifically, Dr. Istanbooly answered the following question in the negative:

"At any time since signing your last application for renewal of your certificate have you ***

Been notified by any board, bureau, department, agency, or other body including those in Ohio,

HEALTH & HUMAN

DEC 08 2003
SERVICES SECTION

other than this board, of any investigation concerning you, or any charges, allegations or complaints filed against you?"

The letter alleged that Dr. Istanbuly failed to disclose administrative complaints filed against her by the Michigan Board of Medicine Disciplinary Subcommittee (hereinafter the "Michigan Board") and a September 19, 2001 Consent Order arising therefrom. The letter alleged that Dr. Istanbuly violated R.C. 4731.22 (A) and R.C. 4731.22 (B)(5).

Dr. Istanbuly requested a hearing in a letter dated July 24, 2002.

A hearing was held in the matter on November 19, 2002 before Hearing Examiner Gregory Porter.

At the hearing, the state introduced certified copies of the Michigan Board consent order and the corresponding complaint and amended complaint. (Exhibit 3.) Dr. Istanbuly testified that she was born in Syria, which she left at age 24 or 25, after receiving her medical education. She received additional training in Chicago, Cleveland, and Texas. Dr. Istanbuly obtained medical licenses in Texas, Michigan, Pennsylvania, and Ohio. (Transcript 12-16.)

Evidence at the hearing established that Dr. Istanbuly was the subject of a December 23, 1998 administrative complaint in Michigan that alleged she failed to follow proper procedures in prescribing controlled substances for patients. The administrative complaint was amended on July 14, 1999. In a Consent Order Dr. Istanbuly entered into with the Michigan Board, she admitted she prescribed controlled substances without first obtaining a waiver required under Michigan law. She agreed to pay a

\$2,500.00 fine. Dr. Istanbuly signed the Consent Order in January 2001 and the Michigan Board adopted it on September 19, 2001. (Exhibit 3.)

Dr. Istanbuly stated that the Michigan charge was eventually expunged from the National Practitioner Data Bank. (Tr. 21-23.) She stated that she did not report the Michigan allegations in her 2000 Ohio renewal application because she did not consider it a disciplinary action.

On cross-examination, Dr. Istanbuly stated that her knowledge of the English language is good. (Tr. 29.) She acknowledged that the Michigan charges were brought against her more than a year before she signed the April 2000 Ohio renewal application. Dr. Istanbuly further acknowledged that the settlement agreement in Michigan was not official until it was signed.

The hearing officer issued a Report and Recommendation ("R & R") to the Board. He found the evidence sufficient to establish that Dr. Istanbuly intended to mislead the Board. The hearing officer found Dr. Istanbuly in violation of both R.C. 4731.22 (A) and R.C. 4731.22 (B)(5), and recommended that she be suspended for thirty days.

Dr. Istanbuly filed timely objections to the R & R. Her matter came before the Board as its February 12, 2003 meeting. Dr. Istanbuly appeared at the meeting, and her attorney spoke on her behalf. Following a discussion about the matter, the Board voted 8-0, with two abstentions, to adopt the Report and Recommendation. The Board issued a written order to that effect on February 12, 2003.

On February 28, 2003, Dr. Istanbuly filed the present Notice of Appeal to this Court. On the same date, Dr. Istanbuly filed a motion to

suspend the Board's order. On March 11, 2003, Judge Sadler, who was previously assigned to this case, granted the motion and stated that the stay of the suspension order was to remain in effect until the final adjudication of the merits of the appeal.

II. Law.

This court must affirm the order of the Board if it is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. This standard of proof was defined by the Supreme Court of Ohio in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571:

"(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value." (Internal citations omitted.)

The Board's charges against Dr. Istanbuly were made pursuant to R.C. 4731.22 (A) and R.C. 4731.22 (B)(5), which provided as follows in April 2000:

"(A) The state medical board, by an affirmative vote of not fewer than six of its members, may revoke or may refuse to grant a certificate to a person found by the board to have committed fraud during the administration of the examination for a certificate to practice or to have committed fraud, misrepresentation, or deception in applying for or securing any certificate to practice or certificate of registration issued by the board."

(B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(5) Making a false, fraudulent, deceptive, or misleading statement *** in securing or attempting to secure any certificate to practice or certificate of registration issued by the board.

As used in this division, 'false, fraudulent, deceptive, or misleading statement' means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived."

A violation under R.C. 4731.22 (A) and 4731.22 (B) (5) must be supported by findings that the statement or application in question was made with intent to mislead the Board. *Webb v. State Medical Bd.* (2001), 146 Ohio App.3d 621, *Rajan v. State Medical Bd.* (1997), 118 Ohio App.3d 187, 194.

III. Findings of the Court and Conclusion.

Upon thorough review of the entire record, the Court finds that the Board's Order was supported by reliable, probative, and substantial evidence.

Dr. Istanbuly does not argue that the statement in question was not false or misleading. Rather, she argues that there was no evidence that she had the requisite intent to violate R.C. 4731.22 (A) and R.C. 4731.22 (B)(5). Dr. Istanbuly testified that she was not trying to hide anything from the Board in her April 2000 renewal application; that she did not understand the difference between charges and discipline; and that she was not required to answer in the affirmative to a question asking whether a complaint had been filed against her if such complaint did not result in discipline. Dr. Istanbuly further testified that she knew in April 2000 that the Michigan charges would not result in discipline, even though the consent order was not executed until nearly one and one-half years later.

The state, however, proved through circumstantial evidence that Dr. Istanbuly made the statements on the April 2000 form with the intent to mislead the Board. Intent to mislead another into relying on a misrepresentation or concealment often must be inferred from the totality of the circumstances, because it is rarely provable by direct evidence. *Leal v. Holtvogt* (1998), 123 Ohio App.3d 51, 76. In the present circumstances, the language on the April 2000 renewal application was not even arguably vague or ambiguous. The question specifically asked Dr. Istanbuly about "any investigation *** or any charges, allegations, or complaints" filed against her. Dr. Istanbuly testified she is well versed in the English language. The record establishes that she is highly educated. Moreover, Dr. Istanbuly was in the midst of an ongoing proceeding in Michigan in which her defense was that she was not familiar with the applicable rules. Assuming for her benefit

that there was any ambiguity about what was being asked of her in the renewal application, a person in her position seeking to answer the question properly would have, at minimum, sought clarification instead of simply answering "No."

Dr. Istanbuly testified at one point in the hearing that she thought the question asked her about malpractice-type complaints. At another point in the hearing, she testified that she believed she did not have to answer "yes" to the question because she thought it dealt with reportable discipline. Given this equivocation and other circumstances discussed above, it is understandable why the hearing officer discredited her arguments that she had no intent to mislead the Board.

Dr. Istanbuly next argues that the Board's action is not in accordance with the law because it violates the Equal Protection Clause of the United States Constitution. Dr. Istanbuly argues that the Board's imposition of a 30-day suspension upon her, when compared with other discipline imposed by the Board, does not bear a rational relationship to legitimate government interest.

The Tenth District Court of Appeals entertained and rejected a similar Equal Protection argument in *Vaughn v. State Medical Bd. of Ohio* (Nov. 30, 1995), Franklin App. No. 95APE05-645, unreported. In *Vaughn*, the Board revoked a doctor's certificate to practice medicine. The doctor appealed, arguing, among other things, that she was subjected to disparate treatment in violation of the Equal Protection Clause. The Court of Appeals noted that, "[I]n an equal protection claim, the alleged victim has the burden of proving

discriminatory intent." *Id.*, citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), 429 U.S. 252, 265. A mere listing of other doctors who received different discipline for similar offenses is insufficient to sustain an Equal Protection claim. *Id.*

As in *Vaughn*, Dr. Istanbuly supported her Equal Protection claim with two examples of other doctors who received different discipline. Per *Vaughn*, such comparisons, without more, cannot prove a violation of the Equal Protection Clause.

Moreover, with an Equal Protection claim, even when intent to discriminate is established, a plaintiff must show that she was treated differently from an individual who was similarly situated in all relevant aspects, without "differentiating or mitigating circumstances that would distinguish their conduct ***." *Clark v. City of Dublin*, Franklin App. No. 01AP-458, 2002-Ohio-1440. Drs. Aldrete and Polito, information about whose cases was attached to Appellee's Brief, were not similarly situated to Dr. Istanbuly. Most notably, the discipline in the other doctors' cases was imposed pursuant to consent agreements, under which the doctors waived their rights to evidentiary hearings before the Board. Thus, Dr. Istanbuly has not shown that the discipline imposed upon her violated the Equal Protection Clause.

The Board's order was not in accordance with the law, however, to the extent that it imposed a 30-day suspension upon Dr. Istanbuly pursuant to R.C. 4731.22 (A). The plain language of R.C. 4731.22 (A) limits the sanctions for a violation thereof to revocation or refusal to grant a certificate.

However, the Board's error was harmless. The Board also found Dr. Istanbuly violated R.C. 4731.22 (B)(5). For violations of this subsection, the Board is authorized to impose various levels of discipline, up to and including revocation. The Board is authorized to impose a suspension pursuant to subsection (B)(5). Thus, the 30-day suspension was in accordance with the law.

In conclusion, insofar as the Board's order found that Dr. Istanbuly violated R.C. 4731.22 (A) and 4731.22 (B)(5), the order was supported by reliable, probative, and substantial evidence. Insofar as the Board imposed a 30-day suspension upon Dr. Istanbuly pursuant to R.C. 4731.22 (B)(5), the order was in accordance with the law. To the extent that the order sought to impose discipline other than a revocation or refusal to grant a certificate for the R.C. 4731.22 (A) violation, the order was not in accordance with law.

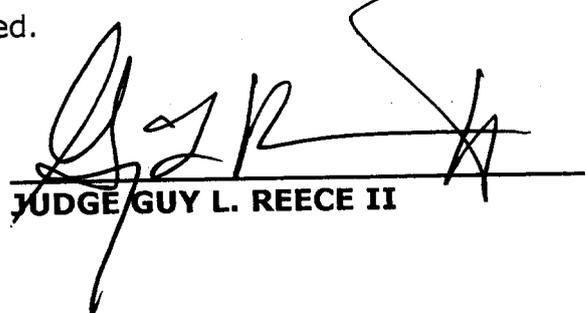
Lastly, in her Reply Brief, Dr. Istanbuly asks this Court to reverse the hearing examiner's decision to exclude Respondent's proffered Exhibit B from evidence. The exhibit is a September 27, 2000 letter from the doctor's former attorney, Scott L. Mandel, to Jack Blumenkopf, who is identified as an assistant Michigan attorney general. Dr. Istanbuly argues that the letter supports her testimony that she knew in April 2000 that the \$2,500.00 fine that was adopted in 2001 would not be considered discipline under Michigan law.

Mandel states in the letter that, "A fine is not disciplinary action under the Michigan Public Health Code and, as such it is not reportable to the National Data Bank." However, the letter was not authenticated. There was

no testimony as to how, if at all, the recipient of the letter responded to it. And the letter is dated five months after Dr. Istanbuly completed the April 2000 Ohio renewal application. Thus, the letter does nothing to support the doctor's testimony about her state of mind in April 2000. For all of these reasons, Respondent's proffered Exhibit B is not relevant and the hearing officer properly excluded it.

The Board's order is AFFIRMED IN PART AND REVERSED IN PART. The 30-day suspension is AFFIRMED.

Counsel for Appellee shall prepare and submit an appropriate Judgment Entry reflecting this Decision pursuant to Local Rule 25.01. The judgment entry shall specifically provide that the stay order imposed by Judge Sadler on March 11, 2003 is lifted.



JUDGE GUY L. REECE II

Copies to:

Kevin P. Byers, Esq.
Counsel for Appellant

Mark Michael, Esq.
Assistant Attorney General
Counsel for Appellee

IN THE COURT OF COMMON PLEAS HEALTH & HUMAN SERVICES DIVISION
STATE MEDICAL BOARD OF OHIO

Faye F. Istanbooly, M.D.,
2003 MAR 31 P 4:36
Appellant,

MAR 12 2003

2003 CV 02 2334
SERVICES SECTION

FILED
CLERK OF COURTS
2003 MAR 11 AM 8:55
COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

-v-

The State Medical Board of Ohio, : Judge L. Sadler
Appellee. :

DECISION AND ENTRY SUSTAINING MOTION FOR SUSPENSION OF AGENCY ORDER

Rendered this 10th day of March, 2003.

SADLER, JUDGE

This matter is before the Court upon the above-referenced motion filed February 28, 2003, by Appellant, Faye F. Istanbooly, M.D. (hereinafter, "Appellant"). Appellant filed her motion, seeking a stay of execution of the February 12, 2003 Order (hereinafter, "Order") of Appellee, The State Medical Board of Ohio (hereinafter, "Appellant") on the same day upon which she filed the instant appeal. In her motion, Appellant sought an immediate, interlocutory stay of Appellant's Order suspending her license to practice medicine for a period of thirty (30) days, subject to further review of her motion for a stay and the full briefing of same.

The Court chose to require expedited briefing of Appellant's motion and to render a final decision thereon, rather than to issue an ex parte stay and then later revisit the same issue. Accordingly, the parties have fully briefed the issues raised by Appellant's motion, and after a thorough review of the arguments of the parties, the evidence before it and the applicable law, the Court finds that Appellee's Order should be stayed pending the final determination of the merits of the instant appeal by this Court.

STATE MEDICAL BOARD OF OHIO
2003 MAR 31 P 4:36

The following undisputed facts are pertinent to Appellant's motion. Appellant is a physician licensed to practice medicine in Ohio, Michigan, Texas and Pennsylvania. Currently, she does not practice in Ohio. On January 17, 2001, Appellant signed a Consent Order and Stipulation to resolve a complaint that had been filed against her on December 23, 1998, by Appellee's Michigan counterpart agency. The Consent Order contained a stipulation that Appellant had prescribed a certain drug to a psychiatric patient for which Appellant had not first obtained the waiver required by Michigan law. Appellant was fined for this violation but no other action was taken and the matter was concluded.

During the pendency of the Michigan matter Appellant completed and signed her Ohio license renewal application on April 10, 2000. Thereon, she answered in the negative Question Number 5, which asked whether she had been notified of any investigation, charges, allegations or complaints filed against her by any board, bureau, department, agency or other body. After notice and a hearing at which Appellant was represented by counsel, Appellee concluded that Appellant had violated R.C. 4731.22(A) ("fraud, misrepresentation, or deception in applying for or securing any certificate to practice or certificate of registration issued by the board") and R.C. 4731.22(B)(5) ("[m]aking a false, fraudulent, deceptive, or misleading statement * * * in securing or attempting to secure any certificate to practice or certificate of registration issued by the board"). By Order dated February 12, 2003, Appellee imposed a suspension of Appellant's license to practice medicine of thirty (30) days in duration.

It is from this Order that Appellant appeals to this Court. In her Motion for Suspension of Agency Order, Appellant argues that she meets the two-part test for issuing a stay of an order of an administrative agency contained in R.C. 119.12. That

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section states, in pertinent part, "[i]n the case of an appeal from the state medical board or state chiropractic board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order." This Court must determine (1) whether Appellant has demonstrated that "undue hardship" will result from the execution of the agency's order; and (2) whether the welfare of the public will be threatened by suspension of the order during the pendency of Appellant's appeal.

In support of her motion, Appellant argues that, given the short duration of the suspension imposed by Appellee, if Appellant ultimately demonstrates that she is entitled to a reversal of Appellee's Order, she will already have suffered the punishment of the suspension because she will have long since served the entire suspension by the time the merits of her appeal are determined. She argues that the imposition of an actual term of suspension of her Ohio license – even if she is later vindicated – is an event which she will have to report to the other states in which she is licensed to practice medicine, to national regulators, and to insurers and health care payors. She argues that this will cause irreparable harm to her credentials, reputation and financial stability. She states that she may face being removed from provider networks in the other states in which she is licensed, including Michigan, the state in which she

currently practices exclusively. Arguing that "the bell cannot be unrung" she asks the Court to stay Appellee's Order to keep Appellant from being in the "unenviable position of pursuing an appeal which offers no meaningful relief because her 'sentence' of a thirty-day suspension from practice will have been long-satisfied by the time the merits of the appeal are decided." Motion, page 3.

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Appellant further argues that an order staying Appellee's Order will not threaten the public health, safety and welfare because there is no evidence in the record, even with respect to the transgression that formed the basis for the original Michigan action, that Appellant poses any risk to patients or that she has ever committed any act or omission that fell below the applicable standard of care.

In its memorandum in opposition to Appellant's motion Appellee argues that Appellant has not demonstrated "unusual hardship" sufficient to justify an order staying its suspension. It argues that many Ohio courts have held that financial hardship, though presumed in all cases of professional licensure suspension, is not sufficient to rise to the level of "unusual hardship." It further points out that Appellant does not rely upon her Ohio license for any of her income. It also argues that the possibility of an adverse chain reaction affecting Appellant's other licenses or relationships with providers, that might flow from a 30-day suspension of her Ohio license, does not constitute sufficient evidence of undue hardship.

Finally, Appellee applies to this case the factors used by the Tenth District Court of Appeals in *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.* (2001), 141 Ohio App. 3d 777, 753 N.E.2d 864. In that case, the Court of Appeals used the factors previously used by the United States Court of Appeals for the Sixth Circuit in

determining the appropriateness of a stay of an administrative order pending judicial review. These factors correspond to those used in evaluating the merits of a temporary restraining order. Appellee argues that these factors, when applied to the facts of this case, militate in favor of a denial of a stay.

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In her reply memorandum, Appellant again points out the irreversibility of the harm she will suffer if she is forced to serve her suspension during her appeal, and also argues that the *Bob Krihwan* factors are inapplicable in appeals from decisions of the Medical Board because R.C. 119.02 provides guidance on the proper factors to determine whether to grant a stay in such cases – whether the appellant faces unusual hardship and whether the health, welfare and safety of the public will be adversely affected by a stay.

Upon a thorough review of the arguments and the law, the Court finds that Appellant will suffer undue hardship absent a stay of the Order pending judicial review of same. The suspension imposed by the Order is brief in comparison to the time required for the judicial determination of the merits of Appellant's appeal; thus, even if she is ultimately vindicated, she will have already served a punishment of a thirty-day suspension. On the other hand, if the Order is stayed until the resolution of the instant appeal, and the Order is affirmed, Appellant can still serve her thirty-day suspension and Appellee will be in no worse a position than it would have been if its Order had not been stayed.

Additionally, there is no evidence in the record before the Court that Appellee's Order arises from any conduct on the part of Appellant that fell below the standard of care, or that any patient's health, safety or welfare has ever been compromised by the

practice of medicine by Appellant, either here in Ohio or in any other state. Therefore, the Court finds that the issuance of a stay will not adversely affect the health, safety and welfare of any patients. To not issue a stay, however, might greatly adversely affect Appellant's reputation and future earning ability.

In reaching this decision, the Court has not taken into account the ordinary financial hardship Appellant may experience as a result of the suspension of her Ohio license during the pendency of her appeal; rather, the Court's decision is based upon the practical impossibility of resolving the merits of Appellant's appeal before the expiration of the entire suspension period, and the fact that the record fails to demonstrate that a stay will in any way endanger the health, safety and welfare of the public.

For the foregoing reasons, the Court finds Appellant's Motion for Suspension of Agency Order to be well-taken and the same is hereby **SUSTAINED**.

IT IS HEREBY ORDERED that Appellee's Order suspending Appellant's license to practice medicine be **STAYED**. This stay will remain in effect until the final adjudication of the merits of the instant appeal.

IT IS SO ORDERED.



Lisa L. Sadler, Judge

Copies to:

Kevin P. Byers
Kevin P. Byers Co., LPA
21 East State Street, Suite 220
Columbus, Ohio 43215
Attorney for Appellant

Case No. 03CVF02-2334

STATE MEDICAL BOARD
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Mark A. Michael
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Attorney for Appellee

STATE MEDICAL BOARD
OF OHIO

2003 MAR 31 P 4: 37

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

STATE MEDICAL BOARD
OF OHIO
2003 MAR 14 P 1:20

Faye F. Istanbooly, MD,
1974 Dickinson Road
St. Joseph, Michigan 49085
Appellant,

v.

State Medical Board of Ohio,
77 South High St., 17th Floor
Columbus, Ohio 43266-0315
Appellee.

*
CASE NO. 03CVF02 02334
*
JUDGE Sadler
*

Appeal from the State Medical Board of Ohio

APPELLANT'S NOTICE OF APPEAL

Pursuant to RC 119.12, notice is hereby given that Appellant, Faye F. Istanbooly, MD, appeals the order of the State Medical Board dated February 12, 2003, and mailed February 13, 2003, (copy attached as Exhibit A.) The Medical Board order is not supported by the necessary quantum of reliable, probative and substantial evidence nor is it in accordance with law.

Respectfully submitted,

KEVIN P. BYERS CO., L.P.A.

KPBYS

Kevin P. Byers 0040253
Fifth Third Center
21 East State Street, Suite 220
Columbus, Ohio 43215
614.228.6283 Fax 228.6425

Attorney for Faye F. Istanbooly, MD

CPC original

Certificate of Service

I certify that an original of the foregoing document was hand delivered this 28th day of February, 2003, to the State Medical Board, 77 South High Street, 17th Floor, Columbus, Ohio 43266-0315 and also a copy was placed in first class U.S. Mail this same date addressed to Assistant Attorney General Mark A. Michael, Health & Human Services Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3428.

KP Byers

Kevin P. Byers

STATE MEDICAL BOARD
OF OHIO
2003 MAR 14 P 1:20



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.state.oh.us/med/

February 12, 2003

Faye F. Istanbooly, M.D.
401 Escandon Avenue
Rancho Viego, TX 78575

Dear Doctor Istanbooly:

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 February 12, 2003, including motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board of Ohio.

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

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. Any such appeal must be filed 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. 7000 0600 0024 5151 0308
RETURN RECEIPT REQUESTED

Cc: Amy L. Woodhall, Esq.
CERTIFIED MAIL RECEIPT NO. 7000 0600 0024 5151 0292
RETURN RECEIPT REQUESTED

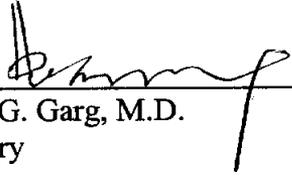
Mailed 2-13-03

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 February 12, 2003, including motions approving and confirming the Findings of Fact, Conclusions and Proposed Order of the Hearing Examiner as the Findings and Order of the State Medical Board of Ohio; constitute a true and complete copy of the Findings and Order of the State Medical Board in the Matter of Faye F. Istanbooly, M.D., as it appears in the Journal of the State Medical Board of Ohio.

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

(SEAL)



Anand G. Garg, M.D.
Secretary

February 12, 2003

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

FAYE F. ISTANBOOLY, M.D.

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on February 12, 2003.

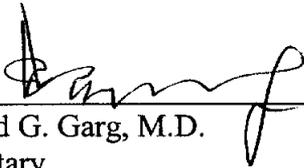
Upon the Report and Recommendation of R. Gregory Porter, State Medical Board Attorney Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the approval and confirmation by vote of the 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:

SUSPENSION OF CERTIFICATE: The certificate of Faye F. Istanbuly, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for a period of thirty days.

EFFECTIVE DATE OF ORDER: This Order shall become effective immediately upon the mailing of notification of approval by the Board.

(SEAL)



Anand G. Garg, M.D.
Secretary

February 12, 2003

Date

2002 DEC 19 P 12: 13

**REPORT AND RECOMMENDATION
IN THE MATTER OF FAYE F. ISTANBOOLY, M.D.**

The Matter of Faye F. Istanbuly, M.D., was heard by R. Gregory Porter, Attorney Hearing Examiner for the State Medical Board of Ohio, on November 19, 2002.

INTRODUCTION

I. Basis for Hearing

- A. By letter dated July 10, 2002, the State Medical Board of Ohio [Board] notified Faye F. Istanbuly, M.D., that it had proposed to take disciplinary action against her certificate to practice medicine and surgery in Ohio. The Board alleged that Dr. Istanbuly had inappropriately answered "No" to a question on her April 10, 2002, application for renewal of her Ohio certificate.

The Board alleged that the acts, conduct, and/or omissions of Dr. Istanbuly constitute "'fraud, misrepresentation, or deception in applying for or securing any certificate to practice or certificate of registration issued by the board,' as that clause is used in R.C. 4731.22(A)[; and/or] '[m]aking a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatry or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,' as that clause is used in R.C. 4731.22(B)(5), as in effect prior to April 10, 2001." Accordingly, the Board advised Dr. Istanbuly of her right to request a hearing in this matter. (State's Exhibit 1A)

- B. By document received by the Board on July 29, 2002, Dr. Istanbuly requested a hearing. (State's Exhibit 1B)

II. Appearances

- A. On behalf of the State of Ohio: Betty D. Montgomery, Attorney General, by Mark A. Michael, Assistant Attorney General.
- B. On behalf of the Respondent: Amy L. Woodhall, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

Faye F. Istanbooly, M.D.

II. Exhibits Examined

A. Presented by the State

1. State's Exhibits 1A through 1L: Procedural exhibits.
2. State's Exhibit 2: Certified copies of Dr. Istanbooly's applications for renewal of her Ohio certificate dated April 10, 2000, and April 12, 2002.
3. State's Exhibit 3: Copies of documents maintained by the State of Michigan Department of Consumer and Industry Services, Bureau of Health Services, Board of Medicine [Michigan Board], concerning Dr. Istanbooly.

B. Presented by the Respondent

1. Respondent's Exhibit A: Dr. Istanbooly's Curriculum Vitae.
2. Respondent's Exhibit C: Copy of a document entitled "Summary Statement."
3. Respondent's Exhibits E and F: Copies of letters of support for Dr. Istanbooly. [Note that one sentence was redacted from Respondent's Exhibit F with the agreement of the parties.]
4. Respondent's Exhibit G: Copy of Dr. Istanbooly's closing brief.

PROFFERED EXHIBIT

The following exhibit was neither admitted to the hearing record nor considered, but is being sealed and held as proffered material for the Respondent:

Respondent's Exhibit B: Copy of a September 27, 2000, letter from Scott L. Mandel, Esq., to Jack Blumenkopf, Esq., concerning Dr. Istanbooly.

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.

1. Faye F. Istanbooly, M.D., obtained her medical degree in 1980 from the Aleppo University School of Medicine in Aleppo, Syria. From 1984 through 1986, Dr. Istanbooly participated in the first and second years of an adult psychiatry residency at Loyola University Affiliated Hospitals in Maywood, Illinois. From 1986 through 1987, Dr. Istanbooly participated in the third year of an adult psychiatry residency at Case Western Reserve University Hospitals in Cleveland, Ohio. From 1987 through 1988, Dr. Istanbooly participated in the fourth year of an adult psychiatry residency at the University of Texas Southwestern Medical Center in Dallas Texas. Finally, from 1990 through 1992, Dr. Istanbooly participated in a two year fellowship in child and adolescent psychiatry at Case Western Reserve University Hospitals. (Respondent's Exhibit [Resp. Ex.] A)

Dr. Istanbooly is licensed to practice medicine in Ohio, Michigan, Texas, Illinois, and Pennsylvania. (Resp. Ex. A)

Dr. Istanbooly testified that she had intended to complete her third and fourth years of residency at Case Western Reserve Hospitals, but her husband, a radiologist, moved to Houston, Texas, to participate in a fellowship on MRI. Dr. Istanbooly testified that she had completed her residency at the University of Texas Southwestern Medical Center so that she and her husband could live together. (Hearing Transcript [Tr.] at 12-14)

2. Dr. Istanbooly testified that, after she had completed her fellowship, she moved to Saginaw, Michigan and opened a private practice in nearby Midland, Michigan. Dr. Istanbooly further testified that, after about two years, she came to believe that, as a child psychiatrist, she needed to be in a bigger city to obtain sufficient referrals: "In the [geographical] area I was in, people were generally going to their family doctors and pediatricians for behavioral problems." Accordingly, Dr. Istanbooly testified that she closed her office in Midland and moved to Pennsylvania. (Tr. at 14-15)

Dr. Istanbooly testified that, in Pennsylvania, she had first worked at a clinic and then in a hospital's child and adolescent psychiatry unit. Dr. Istanbooly further testified that she had become exhausted commuting among Erie, Pennsylvania; Cleveland; and Saginaw, where her husband continued to live. Dr. Istanbooly testified that she then returned to Saginaw, and that she and her husband tried to find a solution that would allow both of them to work and to live together. (Tr. at 15)

Dr. Istanbooly testified that, in the meantime, she began doing locum tenens work all over the country. (Tr. at 15)

3. On December 23, 1998, the State of Michigan Department of Consumer and Industry Services, Bureau of Health Services, Board of Medicine [Michigan Board] filed an Administrative Complaint against Dr. Istanbooly in the matter of Complaint Number 43-97-1524-00. A Proof of Service indicates that Dr. Istanbooly received this complaint on January 7, 1999. (State's Exhibit [St. Ex.] 3 at 15-22)
4. On July 14, 1999, the Michigan Board filed a First Amended Administrative Complaint against Dr. Istanbooly in that same matter. Dr. Istanbooly received this amended complaint on July 24, 1999. (St. Ex. 3 at 8-14)
5. On April 10, 2000, Dr. Istanbooly signed and submitted to the Board an application for renewal of her certificate to practice medicine and surgery in Ohio. By signing that application, Dr. Istanbooly certified, "under penalty of loss of [her] right to practice in the State of Ohio, * * * that the information provided on this application for renewal is true and correct in every respect." Nevertheless, on her renewal application, Dr. Istanbooly responded, "No," to the question,

At any time since signing your last application for renewal of your certificate have you:

* * *

5.) [b]een notified by any board, bureau, department, agency, or other body including those in Ohio, other than this board, of any investigation concerning you, or any charges, allegations, or complaints filed against you?

(St. Ex. 2)

6. On January 17, 2001, Dr. Istanbooly signed a Consent Order and Stipulation with the Michigan Board concerning Complaint Number 43-97-1524-00. On September 19, 2001, the Chairperson of the Disciplinary Subcommittee for the Michigan Board signed the Consent Order and Stipulation, and it became effective on that date. (St. Ex. 3 at 2-7)

In the Consent Order and Stipulation, the parties stipulated that Dr. Istanbooly had prescribed Adderall without first securing a waiver from the Michigan Board, which constituted a violation of Michigan law. Dr. Istanbooly was fined \$2,500.00 for that violation. Further, the parties stipulated concerning the factors that were taken into consideration in determining the sanction:

Adderall is a Dextroamphetamine for which [Michigan] Board of Medicine R 338.2303(5) requires a physician to secure a waiver from the [Michigan Board] before writing a prescription for the patient. Respondent does not contest that she originally did not secure such a waiver.

At the time, Respondent was unaware of Board of Medicine R 338.2303(5), requiring a physician to secure a waiver. Immediately after that Rule was brought to Respondent's attention, she requested such a waiver from the [Michigan Board] and that waiver was granted.

Respondent's lack of knowledge of R 338.2303(5) * * * is in line with a lack of knowledge of other physicians with respect to that Rule as evidenced by the testimony of Elizabeth Cox, M.D., who surveyed a number of highly respected psychiatrists in clinical practice and on the faculty of medical schools who were unaware of this requirement.

(St. Ex. 3 at 2-7)

Dr. Istanbooly testified that she has paid the \$2,500.00 fine. (Tr. 17)

7. Dr. Istanbooly testified that the violation was technical in nature, and that the action was not a disciplinary action and was not reportable. Dr. Istanbooly further testified that when she, her attorney, and the Michigan Board "were working through all the proceedings, it was becoming clear that all the allegations [would] be dismissed because they were inaccurate or inaccurately presented." (Tr. at 16-18, 20)

Dr. Istanbooly testified that it had been approximately one year after the filing of the Michigan Board Administrative Complaint that she became aware that she was going to reach a settlement with the Michigan Board. Dr. Istanbooly testified that there had been numerous delays in the proceedings, which had included a hearing. Dr. Istanbooly testified that she believes that the hearing had occurred after April 2000. (Tr. at 32-34)

Dr. Istanbooly acknowledged that she had understood that the case would not be definitively settled until a consent agreement was signed. Nevertheless, Dr. Istanbooly stated that this had been her first encounter with any medical licensing authority, that she had been "legally naïve" and had not known when to report or not report the matter. She further stated that it had been very important to her that she maintain a clean record, and that she had been assured by her Michigan attorney that she would. (Tr. at 32-34)

Dr. Istanbooly testified that she had been very concerned about the reportability of the Michigan Board action, not just to the Ohio Board, but to data banks and other authorities. (Tr. at 34)

8. Dr. Istanbooly testified that she had answered, "No," to question 5 on her April 10, 2000, application for renewal of her Ohio certificate because "[a]t that time the things were—the case was going in the same direction that it settled in eventually. And I was aware that all the allegations will be dismissed against me and there will be only the technical violation of the Adderall waiver." Dr. Istanbooly further testified that her understanding today is

different. Moreover, Dr. Istanbuly testified that she now knows that she should report any “procedures” that occur, regardless of whether they are reportable to a data bank, and regardless of whether they are disciplinary in nature. Finally, Dr. Istanbuly testified that, if she were completing her renewal application today, she would answer, “Yes,” to the question and attach a letter of explanation to her renewal application. (Tr. at 24-25)

9. Dr. Istanbuly testified that she understands the English language well. (Tr. at 29)
10. Dr. Istanbuly was asked on cross-examination what her understanding of question 5 had been at the time she signed her April 10, 2000, renewal application. Dr. Istanbuly first testified that she had believed that the question applied only to malpractice actions. Later, Dr. Istanbuly testified that she had believed that the question applied only to violation of a code section. (Tr. at 29-32)
11. Dr. Istanbuly testified that her inappropriate response on the renewal card had been “an honest misunderstanding and mistake,” and that she “did not mean it at all to mislead or to misrepresent the facts or what happened.” Finally, Dr. Istanbuly testified, “I would like to apologize to the Board and it will never happen again.” (Tr. at 25-26)
12. Dr. Istanbuly presented two letters of support, one from a physician and one from her Michigan attorney. The letters state that Dr. Istanbuly is a knowledgeable and dedicated physician, and a person of integrity and high ethical standards. (Resp. Exs. E and F) [Note that the State did not have an opportunity to cross-examine the authors of these letters.]

FINDINGS OF FACT

1. On April 10, 2000, Faye F. Istanbuly, M.D., signed and submitted to the Board an application for renewal of her certificate to practice medicine and surgery in Ohio. Dr. Istanbuly certified, under penalty of loss of her right to practice in Ohio, that the information provided on that application was true and correct in every respect.

Dr. Istanbuly responded, “No,” to the question,

“At any time since signing your last application for renewal of your certificate have you:

* * *

“5.) [b]een notified by any board, bureau, department, agency, or other body including those in Ohio, other than this board, of any investigation concerning you, or any charges, allegations, or complaints filed against you?”

- a. In fact, on December 23, 1998, the State of Michigan Department of Consumer and Industry Services, Bureau of Health Services, Board of Medicine [Michigan Board] had filed an Administrative Complaint against Dr. Istanbooly in the matter of Complaint No. 43-97-1524-00.
 - b. Further, on July 14, 1999, the Michigan Board had filed a First Amended Complaint against Dr. Istanbooly in the Matter of Complaint No. 43-97-1524-00, which amended the above Complaint.
2. The Michigan Board resolved Complaint No. 43-97-1524-00 in a Consent Order and Stipulation dated September 19, 2001.

CONCLUSIONS OF LAW

1. In her closing brief, Dr. Istanbooly argued that, at the time that she signed her renewal application, she had believed that the Michigan Board action would be resolved without action being taken against her that would be reportable to the NPDB. Dr. Istanbooly further argued that she had erroneously believed that there had been no obligation to report the matter to Ohio. Moreover, Dr. Istanbooly argued that her inaccurate answer to a question on her Ohio renewal application had resulted from a misunderstanding, and that she had had no intent to mislead or deceive the Board.

Finally, Dr. Istanbooly argued that, in order for the Board to discipline her for violation of Section 4731.22(A), Ohio Revised Code, or 4731.22(B)(5), Ohio Revised Code, the Board must first conclude that she had intentionally misled the Board. Accordingly, Dr. Istanbooly argued that her lack of intent to mislead the Board requires that the Board dismiss its action against her.

Dr. Istanbooly's arguments are not persuasive, because the evidence is sufficient to support a conclusion that she intended to mislead the Board. First, the question on the renewal application that is at issue in this matter is clear and unambiguous. It made no reference to the NPDB, nor did it ask the applicant to predict whether pending action would resolve in the applicant's favor. The Consent Order and Stipulation, which Dr. Istanbooly signed several months later in January 2001, was not adopted by the Michigan Board until September 19, 2001—over one year after she signed her April 10, 2000, renewal application.

Second, Dr. Istanbooly's testimony at hearing indicates that she had been very concerned about maintaining a clean record, and about the reportability of the Michigan Board action to the NPDB and other authorities. This would indicate that Dr. Istanbooly had had a motive to mislead the Board. Further, it indicates that Dr. Istanbooly had probably considered the matter carefully before answering—incorrectly—the clear and unambiguous question at issue.

Accordingly, the conduct of Faye F. Istanbooly, M.D., as set forth in Findings of Fact 1, constitutes “fraud, misrepresentation, or deception in applying for or securing any certificate to practice or certificate of registration issued by the board,” as that clause is used in Section 4731.22(A), Ohio Revised Code.

2. The conduct of Dr. Istanbooly, as set forth in Findings of Fact 1, and as discussed in Conclusions of Law 1, constitutes “[m]aking a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatry or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board,” as that clause is used in Section 4731.22(B)(5), Ohio Revised Code, as in effect prior to April 10, 2001.

* * * * *

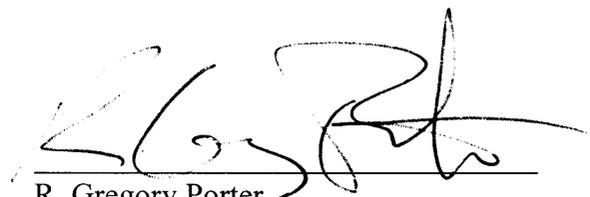
Dr. Istanbooly’s conduct was unfortunate, because the Michigan Board action that Dr. Istanbooly failed to report to the Board concerned a technical violation of a Michigan Board rule that has no analogue in Ohio. Had Dr. Istanbooly reported the matter as required, it is possible that this Board would have taken no action against her. Nevertheless, the failure of a licensee to honestly and completely answer questions on the Board’s renewal applications impedes this Board’s ability to protect the public, and merits sanction.

PROPOSED ORDER

It is hereby ORDERED that:

SUSPENSION OF CERTIFICATE: The certificate of Faye F. Istanbooly, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for a period of thirty days.

EFFECTIVE DATE OF ORDER: This Order shall become effective immediately upon the mailing of notification of approval by the Board.



R. Gregory Porter
Attorney Hearing Examiner



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.state.oh.us/med/

EXCERPT FROM THE DRAFT MINUTES OF FEBRUARY 12, 2003

REPORTS AND RECOMMENDATIONS

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

Mr. Browning noted that Board members were notified by e-mail the previous day that the Matter of Charles Vernon Porter, M.D., has been tabled for this month.

Mr. Browning 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: Robert Alan Graor, M.D.; Faye F. Istanbooly, M.D.; Richard C. Juang, M.D.; and Alex Y. Tseng, D.O. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Bhati	- aye
	Dr. Buchan	- aye
	Ms. Sloan	- aye
	Dr. Davidson	- aye
	Dr. Garg	- aye
	Dr. Steinbergh	- aye
	Mr. Browning	- aye

Mr. Browning 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. Egner	- aye
	Dr. Talmage	- aye
	Dr. Bhati	- aye
	Dr. Buchan	- aye

Ms. Sloan - aye
Dr. Davidson - aye
Dr. Garg - aye
Dr. Steinbergh - aye
Mr. Browning - aye

Mr. Browning noted that, in accordance with the provision in Section 4731.22(F)(2), 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.

Mr. Browning 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.

FAYE F. ISTANBOOLY, M.D.

.....

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MR. PORTER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF FAYE F. ISTANBOOLY, M.D. DR. BHATI SECONDED THE MOTION.

.....

Dr. Somani joined the meeting at this time.

.....

Mr. Browning asked Dr. Somani whether he had received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of: Robert Alan Graor, M.D.; Faye F. Istanbuly, M.D.; Richard C. Juang, M.D.; and Alex Y. Tseng, D.O. Dr. Somani advised that he had.

Mr. Browning askd Dr. Somani whether he 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. Dr. Somani indicated that he does understand.

.....

EXCERPT FROM THE DRAFT MINUTES OF FEBRUARY 12, 2003
IN THE MATTER OF ROBERT FAYE F. ISTANBOOLY, M.D.

A vote was taken on Dr. Steinbergh's motion to approve and confirm:

Vote:	Mr. Albert	- abstain
	Dr. Egner	- aye
	Dr. Talmage	- aye
	Dr. Bhati	- aye
	Dr. Buchan	- aye
	Dr. Somani	- aye
	Ms. Sloan	- aye
	Dr. Davidson	- aye
	Dr. Garg	- abstain
	Dr. Steinbergh	- aye

The motion carried.



State Medical Board of Ohio

77 S. High St., 17th Floor • Columbus, OH 43215-6127 • (614) 466-3934 • Website: www.state.oh.us/med/

July 10, 2002

Faye F. Istanbooly, M.D.
401 Escandon Avenue
Rancho Viego, Texas 78575

Dear Doctor Istanbooly:

In accordance with R. C. Chapter 119., you are hereby notified that the State Medical Board of Ohio intends to determine whether or not to limit, revoke, permanently 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 10, 2000, you signed and submitted to the State Medical Board of Ohio your application for renewal of your Ohio certificate to practice medicine and surgery. You certified, under penalty of loss of your right to practice in the State of Ohio, that the information provided on that application for renewal was true and correct in every respect.

You responded "No" to the question "At any time since signing your last application for renewal of your certificate have you:

5.) [b]een notified by any board, bureau, department, agency, or other body including those in Ohio, other than this board, of any investigation concerning you, or any charges, allegations or complaints filed against you?"

- (a) In fact, on or about the December 23, 1998, the Michigan Board of Medicine Disciplinary Subcommittee (hereinafter the "Michigan Board") filed an Administrative Complaint against you in the matter of Complaint No. 43-97-1524-00.
 - (b) Further, on or about July 14, 1999, the Michigan Board filed a First Amended Complaint against you in the Matter of Complaint No. 43-97-1524-00, which amended the above Complaint.
- (2) The Michigan Board addressed the above matter of Complaint No. 43-97-1524-00 in a Consent Order and Stipulation dated September 19, 2001.

Your acts, conduct, and/or omissions as alleged in paragraph one (1) above, individually and/or collectively, constitute "fraud, misrepresentation, or deception in applying for or securing any certificate to practice or certificate of registration issued by the board," as that clause is used in R.C. 4731.22(A).

Mailed 7.11.02

Further, your acts, conduct, and/or omissions as alleged in paragraph one (1) above, individually and/or collectively, constitute "[m]aking a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatry or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board," as that clause is used in R.C. 4731.22(B)(5), as in effect prior to April 10, 2001.

Pursuant to R. C. Chapter 119., 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.

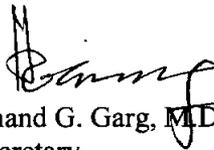
You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at 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, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand or place you on probation.

Please note that, whether or not you request a hearing, R. C. 4731.22(L), effective March 9, 1999, provides that "[w]hen the board refuses to grant a certificate to an applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Anand G. Garg, M.D.
Secretary

AGG/jag
Enclosures

CERTIFIED MAIL # 7000 0600 0024 5139 9439
RETURN RECEIPT REQUESTED