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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
2011 JUN 29 PM 12: 54
CLERK OF COURTS

Jack D. Bennett, M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-833 (C.P C. No. 09CVF-07-10885)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 28, 2011, appellant's four assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, BROWN, and KLATT, JJ.

By Judith French
Judge Judith L. French

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(Bender)

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FRANKLIN CO. OHIO
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State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 28, 2011

Dinsmore & Shohl, LLP, and *Eric J. Plinke*, for appellant.

Michael DeWine, Attorney General, and *Kyle C. Wilcox*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellant, Jack D. Bennett, M.D. ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the order of appellee, the State Medical Board of Ohio (the "Board"), indefinitely suspending appellant's license to practice medicine and surgery in Ohio, with conditions for reinstatement or restoration. For the following reasons, we affirm.

{¶2} The General Assembly has authorized the Board to enforce the provisions of R.C. Chapter 4731, investigate violations, conduct disciplinary proceedings, and discipline persons within the Board's licensing authority. *Ridgeway v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-446, 2008-Ohio-1373, citing *State ex rel. Gelesh v. State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328, ¶26. As relevant here, R.C. 4731.22 provides as follows:

> (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 * * * for one or more of the following reasons:
>
> * * *
>
> (26) Impairment 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.

Under Ohio Adm.Code 4731-16-01(A), "[i]mpairment includes inability to practice in accordance with such standards, and inability to practice in accordance with such standards without appropriate treatment, monitoring or supervision."

{¶3} By letter dated June 18, 2008, the Board notified appellant, a doctor licensed to practice medicine in Ohio, that it had reason to believe he was in violation of R.C. 4731.22(B)(26) as a result of the following: (1) appellant's December 26, 2007 arrest and charges of operating a motor vehicle while under the influence ("OMVI"), leaving the scene of an accident, and failure to control his vehicle; (2) a report that appellant was intoxicated and behaving erratically on December 25, 2007; and (3) an indication that a urine specimen provided by appellant upon request by a Board investigator had been diluted. Pursuant to R.C. 4731.22(B)(26), the Board ordered

appellant to undergo a 72-hour inpatient examination at Glenbeigh Hospital ("Glenbeigh"), a Board-approved treatment facility.

{¶4} Appellant completed his Board-ordered evaluation from July 1 through 4, 2008. As part of that evaluation, Christopher Adelman, M.D. ("Dr. Adelman"), a member of the Glenbeigh medical staff, and Michael Primc, M.D., a Glenbeigh staff psychiatrist, evaluated appellant. Roy Nichols, a licensed social worker and licensed independent chemical dependency counselor, served as the primary counselor for appellant's evaluation. By letter dated July 11, 2008, Dr. Adelman notified the Board of the Glenbeigh team's determination that appellant was impaired in his ability to practice according to acceptable and prevailing standards of care and its recommendation that appellant undergo 28 days of inpatient treatment for alcohol abuse. Appellant denied that he was impaired and did not comply with the Glenbeigh recommendation.

{¶5} A letter dated September 10, 2008, notified appellant that the Board intended to determine whether to limit, revoke, permanently revoke, suspend, refuse to register or reinstate his certificate to practice medicine and surgery, or to reprimand him or place him on probation for violation of R.C. 4731.22(B)(26). In addition to the reasons stated in its prior letter, the Board noted Dr. Adelman's report, as well as the Board's understanding that appellant was unemployed and had not actively practiced medicine for approximately two years.

{¶6} Appellant requested an evidentiary hearing, at which he testified on his own behalf, but called no additional witnesses. The state presented the testimony of Board investigator Curtis Fortner, Nichols, Dr. Adelman, and appellant, as if upon cross-examination.

{¶7} The hearing examiner issued a thorough 19-page Report and Recommendation ("Report") on May 11, 2009, and recommended that the Board dismiss the allegations against appellant. The Report included the hearing examiner's findings of fact, conclusion of law, analysis of the evidence, and recommendation for Board action. The hearing examiner stated that appellant convincingly demonstrated that his Glenbeigh evaluation "was not perfect," and she concluded that the Glenbeigh evidence, including the opinions of Nichols and Dr. Adelman, did not constitute reliable, probative, and substantial evidence to support a finding of impairment under R.C. 4731.22(B)(26). She stated, "although [appellant] has been intoxicated, the evidence presented is not sufficiently reliable, probative, and substantial in order to find that [appellant] is impaired in his ability to practice medicine and surgery as set forth in [R.C. 4731.22(B)(26)]".

{¶8} The Board considered this matter upon the state's objections to the hearing examiner's Report at its June 10, 2009 meeting. After brief presentations by appellant, his attorney, and the assistant attorney general, and a short discussion, the Board voted unanimously (with two abstentions) to adopt the hearing examiner's findings of fact but to modify the hearing examiner's conclusion of law and proposed order. The Board amended the hearing examiner's conclusion of law to state as follows:

> THE ACTS, CONDUCT, AND/OR OMISSIONS OF [APPELLANT], AS SET FORTH IN FINDINGS OF FACT 1 THROUGH 4, CONSTITUTE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE TO ESTABLISH THAT [APPELLANT] IS IMPAIRED IN HIS "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 SET FORTH IN [R.C. 4731.22(B)(26)].

The Board amended the hearing examiner's proposed order to provide for an indefinite suspension of appellant's certificate to practice medicine, with conditions for reinstatement or restoration. The Board then voted to approve and confirm the hearing examiner's findings of fact, conclusion of law, and proposed order, as amended.

{¶9} Appellant appealed to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12, and that court affirmed the Board's order on August 3, 2010. The trial court concluded that Dr. Adelman's testimony constituted reliable, probative, and substantial evidence that appellant was impaired and that the Board was entitled to use its own expertise to conclude that appellant was impaired. The trial court rejected appellant's argument that the Board violated R.C. 119.09 by failing to include its reasons for modifying or disapproving the hearing examiner's recommendation in the record of proceedings.

{¶10} Appellant has now appealed to this court, and he asserts the following assignments of error:

> [I.] The trial court's decision is in error because the trial court applied the incorrect standard of review.
>
> [II.] The trial court abused its discretion in finding that [the] Board's Order was supported by substantial, probative, and reliable evidence based on Dr. Adelman's testimony.
>
> [III.] The trial court erred in affirming the Board's Order where the finding of impairment failed to conform to R.C. § 4731.22(B)(26) and/or O.A.C. Ch. 4731-16.
>
> [IV.] The trial court erred in affirming the Board's Order [because it] fails to conform to R.C. Ch. 119 and due

> process for failing to identify the reasons for the Board amendment.

{¶11} Appellant's first assignment of error asserts that the trial court applied an incorrect standard of review in determining his appeal, and we exercise plenary review over that question. See *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶43.

{¶12} In an administrative appeal, the court of common pleas reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

> (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.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571 (footnotes omitted). R.C. 119.12 requires a court of common pleas to conduct both "a hybrid factual/legal inquiry and a purely legal inquiry." *Bartchy* at ¶37. As to the first inquiry, the court " 'must give deference to the agency's resolution of evidentiary conflicts,' " even though the agency's findings are not conclusive. Id., quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470-71, 1993-Ohio-182. In this regard, the Supreme Court has explained, as follows:

> Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse,

> vacate, or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

Univ. of Cincinnati v. Conrad (1980), 63 Ohio St.2d 108, 111-12; *Bartchy* at ¶37. As to the second inquiry, the court must construe the law on its own. Id. at ¶38, citing *Ohio Historical Soc.* at 471.

{¶13} Here, the trial court quoted R.C. 119.12, stated that a reviewing court must affirm an agency order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law, and cited the Supreme Court of Ohio's definitions of reliable, probative, and substantial evidence. The trial court then quoted *Harris v. Lewis* (1982), 69 Ohio St.2d 577, for the proposition that "[a] reviewing court 'will not substitute its judgment for the Board's where there is some evidence supporting the Board's Order.' "

{¶14} Appellant argues that the trial court erred by citing and applying the "some evidence" standard from *Harris*. In *Harris*, at 578, the Supreme Court stated as follows: "According to [R.C. 119.12], a court may affirm the board's order if it is supported by reliable, probative and substantial evidence. This court will not substitute its judgment for the board's where there is some evidence supporting the board's order." (Footnote omitted.) In context, we must read "some evidence" to relate to the immediately preceding reference to "reliable, probative and substantial evidence." Indeed, the Supreme Court implicitly acknowledged the limited weighing of the evidence a reviewing

court must employ by stating, "there is evidence supporting the board's conclusion and the contrary evidence is not sufficient to invalidate the board's findings." Id. at 578-79 (footnote omitted). The Supreme Court has more recently clarified that its statement in *Harris* did not alter the well-established standards of review applicable under R.C. 119.12. See *Pushay v. Walter* (1985), 18 Ohio St.3d 315. There, while repeating that "[it] will not substitute [its] judgment for that made by the state board if there is some evidence supporting the board's resolution," the Court continued, "[t]herefore, the issue presented is whether the state board's order * * * was supported by reliable, probative, and substantial evidence." Id. at 316.

{¶15} The trial court's citation to *Harris* does not demonstrate that the trial court employed an incorrect standard of review. See *Perry v. Ohio State Liquor Control Comm.* (June 8, 2000), 10th Dist. No. 99AP-976 (rejecting a similar challenge where the trial court used the words "some evidence" in reference to the reliable, probative, and substantial evidence required by R.C. 119.12 and expressly concluded that reliable, probative, and substantial evidence supported the administrative order). In its analysis, the trial court here stated as follows:

> Dr. Adelman's testimony constitutes reliable, probative, and substantial evidence that Appellant is impaired in his ability to practice according to acceptable and prevailing standards of care because of Appellant's habitual and excessive abuse of alcohol. The Court "will not substitute its judgment for the board's where there is some evidence supporting the board's order." *Harris v. Lewis, supra.*

The court's reference to "some evidence" relates to Dr. Adelman's testimony, evidence that the court found reliable, probative, and substantial. Beyond correctly stating the applicable standard of law, the court expressly concluded that the Board's order must

be affirmed because it "is supported by reliable, probative, and substantial evidence and is in accordance with law." Because the trial court not only stated, but also applied, the correct standard of review, we overrule appellant's first assignment of error.

{¶16} We next consider appellant's fourth assignment of error, by which he contends that the trial court erred by affirming the Board's order because the Board failed to identify the reasons for its modification of the hearing examiner's recommendation. Appellant bases this argument on R.C. 119.09, which requires a hearing examiner to submit to the Board a report, setting forth findings of fact, conclusions of law, and a recommendation of action to be taken by the Board, and states that, if the Board modifies or disapproves its hearing examiner's recommendation, "it shall include in the record of its proceedings the reasons for such modification or disapproval." This court has acknowledged case law holding that the R.C. 119.09 requirement of stating reasons for modifying or disapproving a hearing examiner's recommendation is mandatory. See *In re Lima Mem. Hosp.* (Aug. 24, 1993), 10th Dist. No. 93AP-580, citing *Wheat v. State Bd. of Chiropractic Examiners* (Nov. 30, 1988), 9th Dist. No. 13538; but see *Conners v. Ohio Dept. of Commerce, Div. of Real Estate* (1982), 7 Ohio App.3d 237 (holding that the requirement is directory with respect to a commission's increase of a recommended penalty, where the increased penalty is within the scope of the commission's authority, because a court lacks authority to reverse, vacate or modify it).

{¶17} The minutes of the Board's June 10, 2009 meeting include the following comments from Board members:

Dr. Stephens stated that, although nothing has been reported since 2007, when she looks at this case and she looks at physicians with whom she deals on a regular basis, the police have not been to their houses. They have not been caught in altercations with alcohol on their breath or anything like that. She stated that, to her, this looks like impairment.

Dr. Steinbergh stated that she also thinks that this looks like impairment. She stated that, over the years, when the Board takes a look at the behavior of physicians who are ultimately diagnosed as impaired, they demonstrate the same type of behavior as [appellant]; i.e., very risky behavior. This is risky behavior on the part of any person, but especially in terms of a professional. Drinking and driving is absolutely inappropriate. If physicians don't know the difference, the impairment that it causes in your mind, the lack of neurologic control and so forth, if you don't understand that as a physician, she doesn't know who else should.

Dr. Steinbergh stated that she appreciates [appellant's] coming before the Board today, because she thinks that he makes an appropriate presentation. However, from reading the record, she thinks that he abused alcohol. She doesn't know if he continues to use alcohol.

Dr. Steinbergh also noted that [appellant] hasn't worked for over two years now, and it's a huge concern for her. She advised that it would not be appropriate to dismiss this case. [Appellant] is someone who could go out tomorrow, get a job and care for patients. He could get in his car, he could drink, he could kill someone. Dr. Steinbergh stated that she sees him as being a risky individual and someone she could not dismiss today.

Dr. Steinbergh added that she agrees with the State's objections. She thinks that [the Assistant Attorney General] outlined it very appropriately. Common sense tells her, after all of these years of service on the Board, that [appellant] is impaired. There's some degree of impairment. She doesn't know the answer to the questions as to whether he's as bad as somebody else, or [at as] much risk as somebody else. She does know that dismissal is inappropriate.

Dr. Steinbergh then moved to amend the hearing examiner's conclusion of law and proposed order. Dr. Amato seconded the motion and "commented that if it walks like a duck, quacks like a duck, swims like a duck, it's probably a duck." With the exception of two abstaining members, the Board unanimously voted to amend the hearing examiner's conclusion of law, to conclude that appellant was impaired under R.C. 4731.22(B)(26), and to amend the hearing examiner's recommendation so as to impose an indefinite suspension with conditions for reinstatement or restoration.

{¶18} Whereas appellant contends that the record does not contain reasons for the Board's modification of the hearing examiner's recommendation, the trial court concluded that the meeting minutes demonstrate that the Board "articulated, in detail, the reasons for [its] action and thereby fulfilled [its] obligations under R.C. 119.09." While we might characterize the minutes differently, we nevertheless agree that those minutes, together with the Board's action, are sufficient to comply with the Board's obligation under R.C. 119.09.

{¶19} In *Lima Mem. Hosp.*, this court rejected a similar challenge by concluding that the Board's amendment and deletion of certain findings of fact and conclusions of law, and its addition of others, sufficiently set forth the Board's reasons for disapproving the hearing officer's recommendations. See also *Hill v. State Med. Bd. of Ohio* (Dec. 5, 1996), 10th Dist. No. 96APE05-656 (rejecting a claimed violation of R.C. 119.09 where the Board extended the hearing officer's recommended suspension because meeting minutes reflected the Board's belief that the proposed suspension was too lenient). Here, the member comments reveal the members' review of the record and the state's objections to the Report. Coupled with the member comments and the absence of any

comments supporting the hearing examiner's legal conclusion, the Board's vote to modify the hearing examiner's conclusion to state that appellant was impaired sufficiently states the Board's reasons for disapproving the hearing examiner's recommendation to dismiss the allegations against appellant. Because we conclude that the Board complied with its obligations under R.C. 119.09, we overrule appellant's fourth assignment of error.

{¶20} Appellant's remaining assignments of error concern the substance of the trial court's judgment, and, because those assignments of error are interrelated, we discuss them together. Appellant's second assignment of error contends that the trial court abused its discretion in finding that the Board's order was supported by reliable, probative, and substantial evidence based on Dr. Adelman's testimony. Appellant's third assignment of error contends that the trial court erred because the Board's finding of impairment did not conform with the requirements of R.C. 4731.22(B)(26) and Ohio Adm.Code Chapter 4731-16. In that regard, appellant argues that the record does not contain evidence of "habitual or excessive use or abuse" of alcohol or evidence that appellant's use or abuse of alcohol impairs his ability to practice medicine. Appellant generally argues under both assignments that the trial court abused its discretion by determining that the Board's order was supported by reliable, probative, and substantial evidence.

{¶21} This court's standard of review is more limited than that of the trial court. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination

that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680.

{¶22} The trial court's decision includes a thorough discussion of the testimony and evidence presented to the hearing examiner, including evidence of several encounters between appellant and the police. First, on August 5, 2006, a Waverly police officer noticed a strong odor of alcohol after stopping appellant, and appellant admitted that he had consumed alcohol prior to driving. Although appellant was transported to the Waverly Police Department, a breathalyzer test revealed a blood alcohol level below the legal limit, and he was not charged with any offense. Next, on October 31, 2007, the police were twice summoned to appellant's apartment building, first when appellant's neighbor complained that appellant was intoxicated and making noise, and again, approximately one-half hour later, when appellant made a similar complaint about his neighbor. The responding officer observed that appellant was under the influence of alcohol and warned both appellant and his neighbor; no charges were filed.

{¶23} The final encounter occurred in December 2007. On December 25, 2007,[1] appellant had been drinking alcohol with Heather Cochran and Angie Zornes at Ms. Cochran's apartment in Jackson, Ohio. Appellant left the apartment after a disagreement, and, at approximately 1:10 a.m. on December 26, 2007, a Jackson police officer stopped appellant after receiving a report of a hit-and-run collision with a

[1] The trial court refers to these events as occurring on December 24-25, 2007.

parked vehicle. The officer observed that appellant had red eyes, slow and slightly slurred speech, disorientation, and unsmooth movement. Appellant admitted that he had been drinking and failed field sobriety tests. He was arrested and charged with OMVI, leaving the scene of an accident, and failure to control his vehicle. A breathalyzer test administered at the Jackson Police Department registered a blood alcohol level of 0.068, below the legal limit. Appellant told the arresting officer that Ms. Cochran and Ms. Zornes had stolen his wallet and eyeglasses and had drugged him with Klonopin, a benzodiazepine, but a urine analysis tested negative for benzodiazepines. The women denied stealing from appellant or drugging him, and they claimed he had been intoxicated when he arrived at Ms. Cochran's apartment.[2] Appellant's charges for OMVI and leaving the scene of an accident were ultimately dismissed, and he pleaded guilty of failure to control.

{¶24} On January 14, 2008, Fortner, a Board investigator, interviewed appellant, who stated that he probably did not have a problem with alcohol and blamed the events of December 2007 on Ms. Cochran and Ms. Zornes. Fortner requested a urine sample from appellant. According to Fortner, appellant then proceeded to drink four large glasses of water and stated he would contact his attorney before deciding whether to provide a sample. After Fortner left, appellant agreed to provide a urine sample. Appellant's sample tested negative for 11 drugs or classes of drugs, but the toxicology

[2] Appellant subsequently submitted signed, notarized statements from Ms. Zornes and Vance Markham Ms. Zornes stated that Ms. Cochran attempted to drug appellant and took his wallet and eyeglasses. She also stated that appellant was not intoxicated when he arrived at the apartment. Mr Markham stated that Ms. Cochran admitted drugging appellant by putting something in his beer and admitted stealing appellant's belongings, including his wallet.

report noted a low creatinine level and specific gravity outside the normal range, indicative of dilution of the sample.

{¶25} Appellant's arguments under his second and third assignments of error center around the testimony of Nichols and Dr. Adelman, as well as documentary evidence concerning appellant's evaluation at Glenbeigh. We review that testimony and evidence now.

{¶26} Nichols interviewed appellant over approximately seven hours during his evaluation at Glenbeigh and contacted appellant's acquaintances, former employers, physician, and police officers to corroborate information provided by appellant. Nichols also completed a 12-page Biopsychosocial Assessment ("Assessment") in which he diagnosed appellant with alcohol abuse. Attached to the Assessment are Nichols' chart notes and notes of Nichols' conversations with corroborating sources. Nichols observed that appellant "is in denial of his abuse of alcohol. He is in denial of the harmful and negative consequences of his use. He is in denial of his alcohol-related friendships and his alcohol-related lifestyle. He is extremely highly defensed through minimization, rationalization, intellectualization, and diversion." Nichols noted that appellant did not accept his diagnosis and recommendation of inpatient treatment.

{¶27} Nichols relied on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV"), to diagnose appellant with alcohol abuse. The DSM-IV lists the following criteria for substance abuse:

> A. A maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

(1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)

(2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)

(3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)

(4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)

B. The symptoms have never met the criteria for Substance Dependence for this class of substance.

{¶28} Nichols testified about each of appellant's alcohol-related encounters with the police. He considered the three instances of substance-related legal problems and stated that, "although there are no arrests – when the police are called and there's a police report, that constitutes a problem. And these diagnostic criteria refer to problems with the police." (Tr. 125.) As appellant identifies in his appellate brief, Nichols did misstate that the December 2007 incident involved three arrests, rather than a single arrest with three charges, resulting in one conviction. That statement, however, does not undermine Nichols' assessment because, with respect to the third DSM-IV criterion for alcohol abuse, Nichols explained that appellant had "recurrent problems," not "recurrent arrests." (Tr. 155.) Nichols stated that appellant met three of the four DSM-IV criteria for alcohol abuse if consideration was limited to a 12-month period and met

all four criteria if consideration extended to a 16-month period. After reaching his final conclusion on July 9, 2008, Nichols reviewed his work with Dr. Adelman, and Nichols fully concurred with the final diagnosis of alcohol abuse.

{¶29} Dr. Adelman testified that he saw appellant for approximately 20-30 minutes during his evaluation to review appellant's history and physical, to explain the evaluation process, and to answer questions. As to the process, Dr. Adelman testified that, after an evaluation, he confers with the counselor who does the assessment and the counselor's supervisors, and the team comes up with a final diagnosis and recommendation. Dr. Adelman stated that he would normally have the assessment before making a final diagnosis. Here, although Dr. Adelman initially testified that he read and relied on Nichols' Assessment in reaching his final diagnosis, he later could not be certain he had read the Assessment itself prior to making a final diagnosis and that he may have, instead, relied on Nichols' oral report of his findings. Dr. Adelman expressly testified that his "opinion is that [appellant is] impaired because of his abuse of alcohol and he is not able to practice within * * * acceptable standards of care." (Tr. 245.) Dr. Adelman also testified that appellant "will need treatment in order to practice according to prevailing standards of care." (Tr. 249.)

{¶30} Like Nichols, Dr. Adelman used the DSM-IV as a basis for diagnosing appellant. Dr. Adelman relied specifically on DSM-IV criterion (A)(3). When explaining the facts that lead him to conclude that the (A)(3) criterion was satisfied, Dr. Adelman mentioned the October 2007 incident, where the police were called to appellant's apartment building and found appellant intoxicated. Dr. Adelman testified, "I would say getting to talk to the police twice in one night when they report that you're intoxicated is

a problem." (Tr. 277-78.) Dr. Adelman also cited appellant's December 2007 arrest, when appellant had been driving after admittedly drinking. While Dr. Adelman also noted appellant's 2006 stop, at which time appellant again admitted he had been drinking, Dr. Adelman agreed that it did not occur within 12 months of the other incidents. Dr. Adelman cited a statement by a Waverly police officer that the police department had dealt with appellant a couple times, and Dr. Adelman testified that these run-ins with the police, when appellant had been drinking, constitute "substance-related legal problems" under DSM-IV criterion (A)(3). In his July 11, 2008 letter, Dr. Adelman informed the Board of his finding that appellant "is not qualified, by impairment due to chemical abuse, to perform his duties as a physician in accordance to acceptable standards of care because of habitual and excessive abuse of alcohol that has impaired his ability to practice his profession of medicine."

{¶31} Based on the record and Board members' own experience, the Board concluded that appellant was impaired under R.C. 4731.22(B)(26), in contrast to the conclusion of its hearing examiner, and voted, 9-0, to amend the hearing examiner's conclusion to reflect that appellant was impaired. Although appellant correctly states that an administrative agency should accord due deference to a hearing examiner's findings and recommendations, especially where evidentiary conflicts exist, the standards of review do not change because an agency rejects its hearing examiner's recommendation. *Freeman v. Ohio Dept. of Human Servs.* (Dec. 14, 1995), 10th Dist. No. 95APE03-359, citing *Brown v. Ohio Bur. of Emp. Servs.*, 70 Ohio St.3d 1, 2, 1994-Ohio-156, and *T. Marzetti Co. v. Doyle* (1987), 37 Ohio App.3d 25. The trial court was, therefore, tasked with determining whether the Board's order was supported by reliable,

probative, and substantial evidence and was in accordance with law. This court's duty remains to determine whether the trial court abused its discretion in so concluding.

{¶32} Appellant argues that the trial court failed to engage in a weighing of the evidence and essentially maintains that the Board and the trial court should have discounted the testimony of Nichols and Dr. Adelman for the reasons expressed in the hearing examiner's report. To the contrary, the Board argues that it was entitled to use its own expertise to arrive at a decision in this matter and that the trial court did not abuse its discretion in affirming that decision.

{¶33} The General Assembly's purpose for providing administrative hearings in particular fields " 'was to facilitate such matters by placing the decision on facts with boards or commissions composed of [people] equipped with the necessary knowledge and experience pertaining to a particular field.' " *Arlen v. State* (1980), 61 Ohio St.2d 168, 173, quoting *Farrand v. State Med. Bd.* (1949), 151 Ohio St. 222, 224. The power delegated to the Board includes the authority to rely on its own knowledge when making a decision. *Walker v. State Med. Bd. of Ohio*, 10th Dist. No. 01AP-791, 2002-Ohio-682. Thus, the Board "may rely on its own expertise to determine whether a physician failed to conform to minimum standards of care." *Arlen* at 172; see also *Pons v. Ohio State Med. Bd.,* 66 Ohio St.3d 619, 623, 1993-Ohio-122. This court has, therefore, squarely rejected an argument that the Board may not rely on its own expertise to determine issues of alcohol abuse and physician impairment. See *Ridgeway*. There, we held that the trial court's recognition of the Board's "special expertise and knowledge" with respect to the issue of physician impairment under R.C. 4731.22(B)(26) was "consistent with the Ohio Supreme Court's admonition that 'courts must accord due deference to

the [Board's] interpretation of the technical and ethical requirements of its profession.' " Id. at ¶47, quoting *Pons* at 621; see also *Singh v. State Med. Bd. of Ohio* (May 14, 1998), 10th Dist. No. 97APE09-1245. ("The question of whether or not appellant was able to competently and safely practice medicine in light of his addiction, is a determination uniquely within the province of the Board.")

{¶34} The hearing examiner determined that Dr. Adelman's testimony was not reliable based on alleged deficiencies in appellant's Glenbeigh evaluation. She noted Dr. Adelman's inability to recall details of the Glenbeigh team's meeting to reach its final diagnosis and to recall what information he reviewed prior to the final diagnosis. She stated, "Dr. Adelman may have only had Mr. Nichols' oral summary of the information gathered and * * * Mr. Nichols' assessment has been found to be not reliable." The hearing examiner stated that Nichols misinterpreted or misapplied significant facts in the diagnostic process, including the number of times appellant was arrested, and concluded that Nichols' finding that appellant's alcohol use resulted in a failure to fulfill major obligations at work, school or home was unsupported by the record. Finally, she concluded that Nichols modified the DSM-IV criteria by not confining his analysis to a 12-month period.

{¶35} The Board had before it, not only the Glenbeigh witness' diagnosis of alcohol abuse, but the complete records of the Glenbeigh assessment, the hearing testimony, including the cross-examination of the Glenbeigh witnesses regarding their application of the DSM-IV criteria, and the hearing examiner's analysis of the evidence. The Board was not required to accept the hearing examiner's opinions regarding the reliability of the submitted evidence, but was entitled to use its own expertise to make a

conclusion of impairment based on the evidence presented at the hearing. Notably, the Board was entitled to independently determine the reliability of Nichols' assessment and testimony and to credit Dr. Adelman's impairment opinion, despite the hearing examiner's perception of factual error in the Assessment. For example, while the hearing examiner found that Nichols modified the DSM-IV criteria by considering events occurring over a period longer than 12 months, the Board could have determined Nichols' testimony reliable with respect to the issue of appellant's impairment because, even if the DSM-IV limited consideration for purposes of a substance abuse diagnosis, which we need not decide here, consideration of impairment under R.C. 4731.22(B)(26) is not likewise limited. Similarly, as stated above, Nichols' misstatement of the number of appellant's arrests does not undermine his credibility where he explained that the DSM-IV criteria speak of legal problems, not arrests. Based on the record before it, the Board made its own determination as to whether appellant was impaired and, despite the hearing examiner's analysis of the evidence, voted, 9-0, to amend the hearing examiner's conclusion of law to conclude that appellant is impaired under R.C. 4731.22(B)(26). As long as reliable, probative, and substantial evidence supports the Board's determination, the trial court was required to affirm.

{¶36} Upon review, we conclude that the trial court did not abuse its discretion in concluding that reliable, probative, and substantial evidence supported the Board's determination that appellant was impaired. In particular, we reject appellant's argument that the evidence in the record does not establish either habitual or excessive use or abuse of alcohol or impairment of appellant's ability to practice as a result thereof. With respect to habitual or excessive use or abuse of alcohol, the Board had evidence of

three incidents in which the police stopped or contacted appellant after he had been drinking. Two of those incidents involved suspicions that appellant was driving while under the influence of alcohol. Although appellant tested under the legal limit on both occasions, that fact does not undermine the reliability and probative nature of that evidence as to the question of appellant's habitual or excessive use of alcohol. The Assessment reflects appellant's statements that, prior to Christmas 2007, he drank wine with dinner several days a week at home, drank at various friends' homes, and drank at two bars. Additionally, Nichols' conversations with Vance Markham and Mandy Swingle included reports of appellant's social drinking. Finally, nothing in R.C. 4731.22(B)(26) requires that consideration of a physician's substance use or abuse be limited to a 12-month period. In light of the record, we agree with the trial court that reliable, probative, and substantial evidence supports a finding of habitual or excessive use or abuse of alcohol by appellant.

{¶37} While appellant argues that no witness testified as to how appellant's use of alcohol actually impaired his practice, the absence of such specific testimony does not require reversal. Dr. Adelman opined that appellant was impaired because of his abuse of alcohol and that appellant is not able to practice within acceptable standards of care. He also opined that appellant required treatment to be able to practice according to acceptable and prevailing standards of care, an opinion that equates to the definition of impairment under Ohio Adm.Code 4731-16-01(A). Dr. Adelman further testified that a clinical finding of alcohol abuse generally satisfies the definition of impairment under the Board's and statutory rules. Moreover, in *Ridgeway*, this court expressly rejected the appellant's contention that evidence of patient harm was required before the Board

was permitted to take disciplinary action against a physician. Instead, it is within the Board's province to consider the issue of impairment even in the absence of a specific incident of patient harm. Id. at ¶25. For these reasons, we conclude that the trial court did not abuse its discretion in determining that reliable, probative, and substantial evidence supported the Board's determination that appellant is impaired under R.C. 4731.22(B)(26). Accordingly, we overrule appellant's second and third assignments of error.

{¶38} Having overruled each of appellant's assignments of error and having concluded that the trial court did not abuse its discretion in affirming the Board's order, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

JACK D. BENNETT, M.D.,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 09CVF-07-10885
STATE MEDICAL BOARD OF OHIO,	:	JUDGE BENDER
Defendant-Appellee.	:	

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CLERK OF COURTS

NOTICE OF APPEAL OF APPELLANT JACK D. BENNETT, M.D.

Appellant Jack D. Bennett, by and through the undersigned counsel, hereby gives this Notice of Appeal of this matter to the Tenth District Court of Appeals from the decision and final judgment of the Court of Common Pleas, Franklin County, Ohio, filed on August 3, 2010, which affirmed the Order of the State Medical Board of Ohio. The judgment entry was issued as a final and appealable order on August 3, 2010.

Respectfully submitted,

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CLERK OF COURTS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served by regular U.S. mail this 2nd day of September, 2010 upon the following

Kyle Wilcox
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

Eric J. Plinke

HEALTH & HUMAN
SEP 7 2010
SERVICES SECTION

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

JACK D. BENNETT, M.D.,	]	CASE NO. 09CVF07-10885
Appellant,	]	JUDGE BENDER
vs.	]	
STATE MED. BD. OF OHIO,	]	
Appellee.	]	

TERMINATION NO: 10
BY: MK
FINAL APPEALABLE ORDER

DECISION AND ENTRY ON MERITS OF REVISED CODE 119.12 ADMINISTRATIVE APPEAL, AFFIRMING ORDER ISSUED JULY 7, 2009 BY STATE MEDICAL BOARD OF OHIO, INDEFINITELY SUSPENDING APPELLANT'S CERTIFICATE TO PRACTICE MEDICINE AND SURGERY IN OHIO, WITH CONDITIONS FOR REINSTATEMENT OR RESTORATION

Issued this 2ND day of August 2010.

BENDER, J.

This case is a Revised Code 119.12 administrative appeal, by Jack David Bennett, M.D. (Appellant), from an Order that the State Medical Board of Ohio issued on July 7, 2009, indefinitely suspending Appellant's certificate to practice medicine and surgery in Ohio, with conditions for reinstatement or restoration. The record that the Board has certified to the Court reflects the following facts and procedural history.

I. Facts

Appellant is a 49-year-old pediatrician who resides in Waverly, Ohio. He graduated from Miami University, in Oxford, Ohio, in 1984, and from the Medical College of Ohio, in Toledo, in 1991. Appellant completed a four-year pediatric residency at the Medical College of Ohio and was a chief resident during his final year. In 1994,

Appellant received his certificate to practice medicine and surgery in Ohio. He is not licensed to practice in any other state.

After Appellant completed his pediatric residency at the Medical College of Ohio, he worked in a pediatric emergency room in Youngstown, Ohio. From there, he accepted a position with Tri-State Physicians Medical Group in southern Ohio, operating a medical practice that closed in mid-2004. For the next one and one-half years, Appellant worked part-time, performing *locum tenens* work. Appellant has not practiced medicine since September 2006.

In the early morning hours of August 5, 2006, Appellant was driving his car in Waverly when he was stopped by a police officer, who smelled "a strong odor of an intoxicating beverage coming from his person." *State's Ex. 5.* Appellant admitted to the officer that he had consumed alcohol prior to driving his car. The officer conducted one field sobriety test, but Appellant declined to perform additional tests due to leg and weight problems. Appellant was transported to the Waverly Police Department, where he was given a breathalyzer test. Appellant tested 0.037 grams of alcohol per 210 liters of breath, below the legal limit. He was not charged with any offenses, and he was returned to his car.

On October 31, 2007, at approximately 11:15 p.m., one of Appellant's neighbors in his apartment building complained to the Waverly Police Department that Appellant was intoxicated and causing a disturbance by banging on the walls of his apartment. When the police responded to the scene, they questioned Appellant, who denied making any noise and complained that the neighbor had been making noise. In the incident report, the police officer noted that Appellant was "clearly under the influence of an intoxicating beverage." *State's Ex. 5.* Appellant was advised of his neighbor's

complaint, and both Appellant and the neighbor were given a warning by the police. No arrests were made or charges filed.

Later that evening, at 11:47 p.m., Appellant called the Waverly Police Department to complain about the neighbor who had complained earlier in the evening about Appellant's noise. When the police responded to the scene, they spoke with Appellant. In the incident report, the police officer noted that, although Appellant denied drinking, the officer "could smell an odor of an intoxicating beverage coming from his person." *State's Ex. 5*. The police determined that Appellant's complaint about his neighbor was unfounded.

On Christmas Eve, December 24, 2007, Appellant visited Heather Cochran and Angie Zornes at Ms. Cochran's apartment in Jackson, Ohio, approximately a half-hour drive from Appellant's apartment. Shortly after arriving at Ms. Cochran's apartment, Appellant left to buy alcohol. When he returned to the apartment, he drank alcohol with the women. Following a disagreement with the women, Appellant left the apartment and drove away.

At approximately 1 a.m. on Christmas Day, December 25, 2007, the Jackson Police Department received a report of a parked car being struck by another car. Based on the description of the car being driven, the police stopped Appellant, who was driving the car that had hit the parked car. The officer who made the stop "could smell the odor of an alcoholic beverage on his person." *State's Ex. 6*. The officer observed that Appellant's "eyes were red, his speech was slow and slightly slurred, he seemed disoriented, and his motions were not smooth." *Id.* When the officer asked Appellant if he had consumed alcohol, Appellant admitted that he had drunk "a few." *Id.* Appellant failed three field sobriety tests and was arrested.

Appellant told the arresting officer that he had been driving to the police department because Ms. Cochran and Ms. Zornes had stolen his wallet and eyeglasses and had drugged him with Klonopin, a benzodiazepine. When questioned by the police, the women denied stealing from Appellant or drugging him. They reported that Appellant was intoxicated when he arrived at Ms. Cochran's apartment, and that he was "messed up" and caused problems, which caused Ms. Cochran to ask him to leave her apartment. *State's Ex. 6.*

Appellant was taken to the Jackson Police Department. At approximately 2 a.m. on December 25, 2007, he took a breathalyzer test and tested 0.068 grams of alcohol per 210 liters of breath. At approximately 3 a.m., Appellant provided a urine specimen, which tested negative for eleven different drugs or drug classes, including benzodiazepines. Appellant spent the night of December 25, 2007 at the police station. He was charged with failure to control his vehicle, leaving the scene of an accident, and operating a motor vehicle while intoxicated.

On January 14, 2008, a few weeks after the Christmas Day 2007 arrest, Curtis Fortner, an investigator for the Medical Board, interviewed Appellant and requested that Appellant provide a urine sample. Appellant provided a urine sample, but only after drinking copious amounts of water, and when the sample was tested, it was determined to be low in creatinine and specific gravity, indicating that the specimen had been diluted.

On February 26, 2008, in the Jackson County Municipal Court, two of the charges arising out of Appellant's arrest on December 25, 2007 ((leaving the scene of an accident and operating a motor vehicle while intoxicated) were dismissed. Appellant

pled guilty to failure to control his vehicle and was sentenced to pay a fine and court costs totaling $230.

II. Proceedings before the Medical Board

Revised Code 4731.22(B)(26) provides:

> § 4731.22. Grounds for discipline ***
>
> ***
>
> (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, *** or reprimand or place on probation the holder of a certificate for one or more of the following reasons:
>
> ***
>
> (26) Impairment 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.

By letter dated June 18, 2008, the Board notified Appellant that the Board had reason to believe that Appellant was in violation of R.C. 4731.22(B)(26), and ordered him to undergo a 72-hour inpatient evaluation beginning on July 1, 2008, to determine if he was, in fact, in violation of the statute.

On July 1, 2008, Appellant reported to Glenbeigh Hospital, a Board-approved alcohol-and-drug-addiction treatment provider in Rock Creek, Ohio, for the Board-ordered 72-hour inpatient evaluation. The evaluation included a physical examination and interviews with Glenbeigh Hospital's counselors and physicians.

By letter dated July 11, 2008, Christopher Adelman, M.D., of Glenbeigh Hospital, reported to the Board:

> Dr. Jack Bennett, M.D. was referred to Glenbeigh by the State Medical Board of Ohio for an evaluation for chemical dependency.

> While at Glenbeigh, I saw him on 7-2-08, 2008 [*sic*] for a complete history and physical examination. That was followed by a comprehensive biopsychosocial assessment which included a thorough chemical use history. He also saw our psychiatrist, Dr. Michael Primc, on 7-3-08. As a result of my review of this information, **my findings are that Dr. Jack Bennett, M.D. is not qualified, by impairment due to chemical abuse, to perform his duties as a physician in accordance to acceptable standards of care because of habitual and excessive abuse of alcohol that has impaired his ability to practice his profession of medicine.**
>
> We, therefore, recommend inpatient treatment of twenty-eight days duration at a facility acceptable to the State Medical Board of Ohio. (Emphasis added.) *State's Ex. 2.*

Appellant did not enter an inpatient treatment program after his July 2008 evaluation at Glenbeigh Hospital.

By letter dated September 10, 2008, the Board notified Appellant:

> 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, permanently revoke, suspend, *** or to reprimand you or place you on probation for one or more of the following reasons:
>
> (1) By letter dated June 18, 2008, the Board notified you of its determination that it had reason to believe that you are in violation of Section 4731.22(B)(26), Ohio Revised Code, and ordered you to undergo a seventy-two hour inpatient examination beginning Tuesday July 1, 2008, to determine if you are in violation of Section 4731.22(B)(26), Ohio Revised Code. The Board's determination was based upon one or more of the reasons outlined in such letter, including an alcohol-related traffic arrest; reports that you acted in an intoxicated and erratic fashion at a holiday party; and a urine sample you provided to a Board Investigator that was tested and determined to be low in creatinine and specific gravity, indicative that the specimen had been diluted.
>
> (2)(a) By letter dated July 11, 2008, from Christopher Adelman, M.D., of Glenbeigh Hospital, a Board-approved treatment provider, the Board was notified that following the Board-ordered evaluation, you were determined to be impaired in your ability to practice according to acceptable and prevailing standards of care and to require residential treatment. Further, the Board has not received information that you have entered inpatient treatment.

(b) The Board has received information that you are unemployed and have not actively practiced medicine since in or about September 2006.

Your acts, conduct, and/or omissions 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. ***

On February 9 and 10, 2009, at Appellant's request, a Hearing Examiner conducted an evidentiary hearing on the Board's proposed action against Appellant's medical license. The State presented the testimony of its investigator, Mr. Fortner, Dr. Adelman, Roy Nichols (a certified addiction counselor employed by Glenbeigh Hospital), and Appellant, the last as if upon cross-examination. Appellant testified in his case-in-chief but called no witnesses. Numerous exhibits were admitted into evidence.

On May 11, 2009, the Hearing Examiner issued a Report and Recommendation, in which she recommended that the Board dismiss the allegations against Appellant. The Hearing Officer concluded that Appellant's acts, conduct, and/or omissions did not constitute reliable, probative, and substantial evidence to establish that Appellant was impaired in his "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 set forth in R.C. 4731.22(B)(26).

On May 19, 2009, the State filed objections to the Hearing Examiner's Report and Recommendation.

The members of the Board reviewed the record and then considered the matter at the Board's June 10, 2009 meeting. At that time, the comments of the participants included the following:

> Dr. [Dalsukh] Madia directed the Board's attention to the matter of Jack David Bennett, M.D. ***
>
> ***
>
> Dr. Bennett was accompanied by his attorney, Eric J. Plinke, Esq. ***
>
> ***
>
> Dr. Bennett *** stated that he would like to say that he's not an impaired physician. He added that he's feeling a little bit nervous because he's not used to speaking in public. He again stated that he would like to assure the Board that he's not an impaired physician and he's not a danger to the public.
>
> Dr. Bennett stated that this is the first time in his life that he's ever been questioned about any of these matters. Since Christmas 2007, he has not had the slightest problem with any person and he has been much more careful about those with whom he associates. Dr. Bennett stated that he can assure the Board that he will never have any problem like this again in the future.
>
> Dr. Bennett asked that the Board approve the Hearing Examiner's Report and Recommendation. He stated that he feels that the Glenbeigh evaluation was unfair on many levels. For example, the counselor, Roy Nichols, put things into his chart that he never said. Dr. Bennett stated that he doesn't know if Mr. Nichols was confusing him with other patients with whom he talked, but Mr. Nichols put completely false things into his medical record. Dr. Bennett stated that he even sent a letter to Glenbeigh asking them to address this, and they completely ignored him. Dr. Bennett stated that he also feels that the diagnosis at Glenbeigh was based almost entirely on hearsay.
>
> ***
>
> Dr. Bennett stated that Dr. Adelman spent less than two minutes with him and only asked him one question, which was where he went to medical school.
>
> Dr. Bennett stated that he believes that the Hearing Examiner brought common sense to this whole situation.

***

[Assistant Attorney General] Pfeiffer stated that she, respectfully but strongly, disagrees with the Proposed Order of dismissal in this case. While this particular case may not be the most obvious case of impairment that has come before the Board, it is clear from the record that there was sufficient evidence for the Board to find by a preponderance of evidence that Dr. Bennett is, in fact, an impaired practitioner. The record in this case reveals a repetitive series of episodes of markedly aberrant behavior on the part of Dr. Bennett over an extensive period of time, with each episode involving the use of alcohol or drugs. From his multiple run-ins with law enforcement, including two arrests for suspected DUI, to his rather bizarre story leading up to his arrest on Christmas day of 2007, there is sufficient evidence for the Board to conclude that Dr. Bennett is, in fact, impaired in his ability to practice.

Ms. Pfeiffer stated that that was the conclusion that was reached by Dr. Adelman of the Board-approved treatment provider, Glenbeigh Hospital. Dr. Adelman's opinion is the opinion of the only addiction medicine expert who testified in this case, and his testimony should be given great weight. Instead of focusing on the Respondent's attacks on Dr. Adelman and the counselor, Roy Nichols, she would urge the Board to focus on Dr. Bennett, his actions, and the expert opinion provided at hearing, under oath, by an addiction medicine physician.

Ms. Pfeiffer stated that, with all due respect to the Hearing Examiner, it is her position that the Hearing Examiner's conclusions are erroneous and should be modified, as outlined in the objections that were filed. Her reasons are as follows:

1. An unsworn written statement, purportedly issued by Dr. Edna Jones, was allowed into the record, over the State's objections, without any chance by the Assistant Attorney General to question Dr. Jones on the basis of her opinion. The Hearing Examiner's reliance upon the written statement of Dr. Jones, in her conclusion that Dr. Bennett is not impaired, is not proper. Ms. Pfeiffer stated that the witness statement of Dr. Jones should be given little or no weight by the Board for the reasons that it was not authenticated, it was not sworn to, it was not under oath, and it was not subject to cross-examination. Ms. Pfeiffer stated that the heart and soul of the issue for this case was one of impairment. To allow that unsworn statement to come in and to be relied upon as heavily as she did was erroneous.

2. The Hearing Examiner placed such heavy emphasis on the DSM [Diagnostic and Statistical Manual of Mental Disorders]-IV criteria that she essentially ignored, discounted and disregarded the expert

opinion of Dr. Adelman. Ms. Pfeiffer stated that the DSM-IV is a useful tool and it's used to assist in the diagnosis of psychiatric conditions; however, meeting exact specific criteria of a DSM-IV is not the sole, dispositive mechanism used by a physician to make a diagnosis. A clinical evaluation is crucial. In this case, Dr. Adelman used his professional judgment and training to find and conclude that Dr. Bennett meets the clinical criteria for his diagnosis.

Ms. Pfeiffer urged the Board to adopt the diagnosis and recommendation of Dr. Adelman, make a finding that Dr. Bennett is, in fact, impaired in his ability to practice medicine and surgery, and order that he undergo the 28 days of impairment treatment as required by the Board's rules.

***

Dr. [Susan] Stephens stated that, although nothing has been reported since 2007, when she looks at this case and she looks at physicians with whom she deals on a regular basis, the police have not been to their houses. They have not been caught in altercations with alcohol on their breath or anything like that. She stated that, to her, this looks like impairment.

Dr. [Anita] Steinbergh stated that she also thinks that this looks like impairment. She stated that, over the years, when the Board takes a look at the behavior of physicians who are ultimately diagnosed as impaired, they demonstrate the same type of behavior as Dr. Bennett; i.e., very risky behavior. This is risky behavior on the part of any person, but especially in terms of a professional. Drinking and driving is absolutely inappropriate. If physicians don't know the difference, the impairment that it causes in your mind, the lack of neurologic control and so forth, if you don't understand that as a physician, she doesn't know who else should.

Dr. Steinbergh stated that she appreciates Dr. Bennett's coming before the Board today, because she thinks that he makes an appropriate presentation. However, from reading the record, she thinks that he abused alcohol. She doesn't know if he continues to use alcohol.

Dr. Steinbergh also noted that Dr. Bennett hasn't worked for over two years now, and it's a huge concern for her. She advised that it would not be appropriate to dismiss this case. Dr. Bennett is someone who could go out tomorrow, get a job and care for patients. He could get in his car, he could drink, he could kill someone. Dr. Steinbergh stated that she sees him as being a risky individual and someone she could not dismiss today.

Dr. Steinbergh added that she agrees with the State's objections. She thinks that [Assistant Attorney General] Wilcox outlined it very appropriately. Common sense tells her, after all of these years of service

> on the Board, that Dr. Bennett is impaired. There's some degree of impairment. She doesn't know the answer to the questions as to whether he's as bad as somebody else, or as at much risk as somebody else. She does know that dismissal is inappropriate. *Board Minutes, June 10, 2009, pp. 18525 - 18538.*

Following discussion on June 10, 2009, the Board unanimously voted to modify the Hearing Examiner's Report and Recommendation. The Board adopted the Hearing Examiner's Findings of Fact but concluded that Appellant's acts, conduct, and/or omissions constituted reliable, probative, and substantial evidence to establish that Appellant was impaired in his "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 set forth in R.C. 4731.22(B)(26). The Board suspended Appellant's medical license for an indefinite period of time, with conditions for reinstatement or restoration.

On July 7, 2009, the Board mailed a copy of its Order to Appellant. The Order became effective on July 7, 2009.

On July 21, 2009, Appellant appealed the Board's July 7, 2009 Order to this Court pursuant to R.C. 119.12. Appellant did not move the Court to suspend the execution of that Order pending the determination of this appeal, pursuant to R.C. 119.12.

III. Standards of Appellate Review

Revised Code 119.12, which governs this appeal, provides:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

When considering an appeal from an order of the Medical Board, a reviewing court must uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621.

In *Our Place, Inc. v. Ohio Liquor Comm.* (1992), 63 Ohio St. 3d 570, 571, the Ohio Supreme Court provided the following definitions:

> The evidence required by R.C. 119.12 can be defined as follows: (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.

In *Farrand v. State Med. Bd. of Ohio* (1949), 151 Ohio St. 222, 224, the Ohio Supreme Court observed:

> *** The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of [persons] equipped with the necessary knowledge and experience pertaining to a particular field. In providing for an appeal from the decision of such a board or commission, the General Assembly did not intend that a court should substitute its judgment for that of the specially created board or commission but did intend to confer a revisory jurisdiction on the court. Otherwise, the section would not have contained the provision, "in the hearing of the appeal the court shall be confined to the record as certified to it by the agency, provided, however, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency."

The Ohio Supreme Court has recognized that the General Assembly has granted to the Medical Board a broad measure of discretion. "When reviewing a medical board's order, courts must accord due deference to the board's interpretation of the technical and ethical requirements of its profession." *Pons, supra*, at the syllabus. A reviewing

court "will not substitute its judgment for the Board's where there is some evidence supporting the Board's Order." *Harris v. Lewis* (1982), 69 Ohio St. 2d 577, 579.

IV. Analysis

The salient facts of this case are not in dispute. On several occasions in 2006 and 2007, Appellant engaged in behavior that a Medical Board member has accurately characterized as "risky" and that was clearly alcohol-related. Moreover, Dr. Christopher Adelman, a certified addiction medicine specialist testified below:

> [By the Assistant Attorney General.]
>
> Q. Okay. Dr. Adelman, I have a lengthy question here. I want you to bear with me, and I'll try to ask it as succinctly and clearly as possible. Based upon the assessment and evaluation of Dr. Bennett that took place at Glenbeigh from July 4th - - or, excuse me - - July 1st through July 4th of 2008, do you have an opinion within a reasonable degree of medical certainty whether or not Dr. Bennett is impaired in his ability to practice medicine and surgery to acceptable and prevailing standards of care because of habitual or excessive use or abuse of alcohol?
>
> A. Yes.
>
> Q. And what is your opinion?
>
> A. I - - **my opinion is that he's impaired because of his abuse of alcohol and he is not able to practice within expectable - - acceptable standards of care.**
>
> Q. And just to follow up on that, that's based on your definition under the DSMV - - or your diagnosis of alcohol abuse; is that correct?
>
> A. That's correct.
>
> Q. Okay. And is that different from alcohol dependence?
>
> A. Yes.
>
> Q. Okay. Can you explain what - - how that's different?
>
> A. Well, there's - - the criteria for alcohol dependence is they're - - you have to meet more criteria, such as one of the criteria is alcohol

withdrawal, and we did not have evidence that he had withdrawal. Another one is that - - you know, that it interferes with his work, which we didn't have evidence that that was the case.

Q. Okay.

A. Tolerance is another one. And with him, we didn't have evidence that he had tolerance. So the standard is higher for alcohol dependence. You have to meet three of the nine - - seven or eight or nine criteria. With the diagnosis of alcohol abuse, you meet one of four criteria.

Q. And could you just explain for us how you made the findings that Dr. Bennett met the criteria for alcohol abuse?

A. Well, he had - - one of the criterias [*sic*] is real problems related to alcohol, and he had at least three or more encounters with policemen when he was identified by the policemen as having been drinking or being intoxicated.

He had - - one of the criteria is social or interpersonal problems due to alcohol. And if you look at the report from - - and the assessment of the conversations that Roy Nichols had with the policeman in Waverly, the police chief had said - - pointed out that they had had several encounters with Dr. Bennett and that he had been intoxicated. And then the - - Tim South, the policeman - - another policeman there indicated that they had had encounters with Dr. Bennett more than once.

So it was problems that involved drinking and causing commotion or causing problems at his - - the apartments where he lives. So that's a pattern, repeated problems. The police were involved. Then there were the other two episodes when he was arrested and another time stopped by the police. Both times he had been drinking. The one time when he was actually arrested and went to the police station - - let's see. Let me just check my notes here.

***

Q. Doctor, if you can, tell us without looking at your notes. Or if you want to refer to one of our exhibits that we've identified.

A. Okay. This is in one of your exhibits. But anyway, there was one encounter where he was in an accident and he left the scene. He was eventually taken to the police station, and eventually he had a breathalyzer test. Now, he was picked up by the policeman at 1:10

a.m. His breathalyzer was at 2:17 a.m. and his blood/alcohol level was .68.

Now, based on the physiology and metabolism of alcohol, if he had had his last drink at 1:09 a.m., then - - and his blood/alcohol was .68 at 2:17, then his blood/alcohol at 1:10 would have been .88, which, of course, is over the legal limits. It's not likely that he had his last drink at 1:09 a.m.

***

So it's likely that his blood/alcohol was even higher. So even though he wasn't convicted of DUI, it's likely that he was - - he did meet the criteria.

Q. And do the criteria - - do they require convictions?

A. No, no. Just encounters - - it's called problems. Legal problems. So he had had several episodes, more than the three - -

Q. Okay.

A. - - identified that involved drinking with the authorities.

Q. Is it your opinion that in order for Dr. Bennett to practice according to accepting [*sic*] and prevailing standards of care he will need treatment?

A. **It is my opinion that he will need treatment in order to practice according to prevailing standards of care.** (Emphasis added.) *Tr., pp. 244-249.*

The Medical Board is authorized to take action against a medical license if the licensee is impaired in his "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." R.C. 4731.22(B)(26). Dr. Adelman's testimony constitutes reliable, probative, and substantial evidence that Appellant is impaired in his ability to practice according to acceptable and prevailing standards of care because of Appellant's habitual and excessive abuse of alcohol. The Court "will not

substitute its judgment for the board's where there is some evidence supporting the board's order." *Harris v. Lewis, supra.*

In addition, the members of the Board were entitled to use their own expertise to conclude that Appellant was in violation of R.C. 4731.22(B)(26). *Pons, supra,* at the syllabus. The Court will therefore defer to the expertise of the collective Board members in reaching their conclusion that Appellant was impaired.

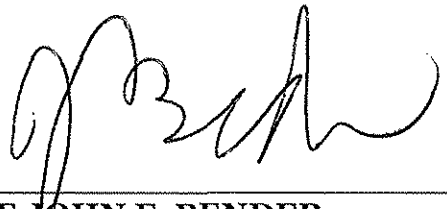
V. <u>Revised Code 119.09</u>

Revised Code R.C. 119.09 provides, "[I]f the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval." Appellant contends that the Medical Board failed to state the reasons for its modification of the Hearing Examiner's Report and Recommendation, and thereby violated R.C. 119.09. This argument is not well taken, however.

Revised Code 119.09 is complied with when the Board's minutes reveal its reasons for modifying a hearing examiner's recommendation. *Slingluff v. State Med. Bd.*, Franklin App. No. 05AP-918, 2006-Ohio-3614, at ¶14, discretionary appeal not allowed, 112 Ohio St. 3d 1406, 2006-Ohio-6447. At the Board's meeting on June 10, 2009, the Board members engaged in a lengthy discussion, quoted above, at the conclusion of which the Board voted to modify the Hearing Examiner's May 11, 2009 Report and Recommendation. As demonstrated by the meeting minutes, the Board members articulated, in detail, the reasons for the Board's action and thereby fulfilled the Board's obligations under R.C. 119.09.

VI. Conclusion

Upon consideration of the entire record on appeal, as well as the parties' arguments as set forth in their briefs, the Court finds that the July 7, 2009 Order of the State Medical Board of Ohio, indefinitely suspending the certificate of Jack David Bennett to practice medicine and surgery in Ohio, with conditions for reinstatement or restoration, is supported by reliable, probative, and substantial evidence and is in accordance with law. The Order is therefore **AFFIRMED**.



JUDGE JOHN F. BENDER

Copies mailed to:

ERIC J. PLINKE, ESQ. (0059463), Counsel for Appellant, 191 W. Nationwide Blvd., Ste. 300, Columbus, OH 43215-8120

KYLE C. WILCOX, AAG (0038034), Counsel for Appellee, 30 E. Broad St., Fl. 26, Columbus, OH 43215-3428

BEFORE THE STATE MEDICAL BOARD OF OHIO

JACK D. BENNETT, M.D.
617 South Market Street, Apt. 2
Waverly, OH 45690,

Appellant,

vs.

STATE MEDICAL BOARD OF OHIO
30 East Broad Street, 3rd Floor
Columbus, Ohio 43215

Appellee,

Case No. 09CVF 7 10885

Judge _____

APPEAL FROM THE ENTRY OF ORDER OF JUNE 10, 2009 MAILED JULY 7, 2009

STATE MEDICAL BOARD OF OHIO
2009 JUL 21 PM 4:32

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 JUL 21 PM 4:54
CLERK OF COURTS

APPELLANT'S NOTICE OF APPEAL

Now comes Appellant, Jack D. Bennett, M.D., by and through counsel, and pursuant to Ohio Revised Code Section 119.12, hereby gives notice of his appeal of the Entry of Order of the Appellee, State Medical Board of Ohio ("Board"), which suspended Appellant's license to practice medicine in the State of Ohio. The Board's Entry of Order was dated June 10, 2009, and mailed on July 7, 2009. The Board's Entry of Order is not supported by substantial, probative, and reliable evidence nor is it in accordance with law. Appellant appeals based on the following grounds:

1. The Board lacked sufficient basis for ordering Appellant to an examination.
2. The Board's finding that Appellant violated R.C. 4731.22(B)(26) was not supported by the preponderance of the evidence.
3. The Board's finding that Appellant violated R.C. 4731.22(B)(26) was not supported by substantial, probative, and reliable evidence.
4. The Board acted contrary to law and violated the United States and Ohio Constitutions in finding that Appellant violated R.C. 4731.22(B)(26).
5. The Board acted contrary to law and violated the United States and Ohio Constitutions in amending and modifying the Hearing Examiner Report and Recommendation including her "Analysis of the Evidence and Rationale for the Proposed Order" which explained in precise detail why the Board's evidence was insufficient to support the allegations.

STATE MEDICAL BOARD OF OHIO
2009 JUL 23 PM 3:00

6. The Board's Order is contrary to established case law from *In the Matter of Mark L. Allen, M.D.*, Case No. 04-CVF-0201214 (January 25, 2005, Franklin County Court of Common Pleas).

7. The Board's Order is contrary to the Diagnostic and Statistical Manual standards.

8. The Board acted contrary to R.C. Ch. 119 and violated the United States and Ohio Constitutions in amending and modifying the Hearing Examiner Report and Recommendation without setting forth the grounds for such amendment and modification.

9. The Board's reliance on the opinion of Dr. Adelman, of Glenbeigh, is contrary to Board's administrative rules.

10. The Board's assertion that Appellant's behavior was aggravated because it occurred on Christmas Day is contrary to law and violated the United States and Ohio Constitutions.

A copy of the Board's Entry of Order is attached hereto as Exhibit A.

Respectfully submitted,

DINSMORE & SHOHL, LLP

By: _____

Eric J. Plinke (0059463)
191 West Nationwide Blvd., Suite 300
Columbus, Ohio 43215-8120
Telephone: (614) 227-4213
e-mail: eric.plinke@dinslaw.com

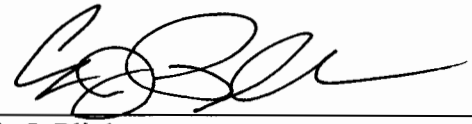
Attorneys for Appellant, Jack D. Bennett, M.D.

2009 JUL 23 PM 3:00
STATE MEDICAL BOARD OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2009, the foregoing Notice of Appeal was filed via hand delivery with the State Medical Board of Ohio, was filed via hand delivery with the Court of Common Pleas of Franklin County, Ohio, and that a copy was served by regular U.S. mail upon the following:

Kyle C. Wilcox
Assistant Attorney General
Ohio Attorney General's Office
Health and Human Services
30 East Broad Street, 26th Floor
Columbus, Ohio 43215



Eric J. Plinke

STATE MEDICAL BOARD
OF OHIO
2009 JUL 23 PM 3:00

506944_1
50925-1

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

June 10, 2009

Jack David Bennett, M.D.
617 South Market Street, Apt. 2
Waverly, OH 45690

Case No. 08-CRF-113

Dear Doctor Bennett:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Gretchen L. Petrucci, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on June 10, 2009, including motions modifying the Findings of Fact and Conclusions of the Hearing Examiner and Order, and adopting the Findings of Fact, Conclusions of Law and Order, as amended.

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 an original Notice of Appeal with the State Medical Board of Ohio and a copy of the Notice of Appeal with 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

Lance A. Talmage MD

Lance A. Talmage, M.D.
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 91 7108 2133 3936 3160 5724
RETURN RECEIPT REQUESTED

Cc: Eric J. Plinke, Esq.
CERTIFIED MAIL NO. 91 7108 2133 3936 3160 5731
RETURN RECEIPT REQUESTED

Mailed 7-7-09

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Gretchen L. Petrucci, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on June 10, 2009, including motions modifying the Findings of Fact and Conclusions of the Hearing Examiner and Order, as amended; constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Jack David Bennett, M.D., Case No. 08-CRF-113, 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.

Lance A. Talmage MD

Lance A. Talmage, M.D.
Secretary

(SEAL)

June 10, 2009
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF	*	
	*	CASE NO. 08-CRF-113
JACK DAVID BENNETT, M.D.	*	

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on June 10, 2009.

Upon the Report and Recommendation of Gretchen L. Petrucci, 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:

A. **SUSPENSION:** The certificate of Jack David Bennett, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time.

B. **CONDITIONS FOR REINSTATEMENT OR RESTORATION**: The Board shall not consider reinstatement or restoration of Dr. Bennett's certificate to practice medicine and surgery until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration**: Dr. Bennett shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.

2. **Completion of Inpatient Treatment**: Dr. Bennett shall complete a minimum of twenty-eight days of inpatient or residential treatment, or a combination thereof, for his substance abuse. Such inpatient or residential treatment shall be completed without interruption. Further, such inpatient or residential treatment shall be provided in accordance with Rule 4731-16-08(A)(13), Ohio Administrative Code, by a treatment provider approved under Section 4731.25, Ohio Revised Code.

   In addition, upon discharge from treatment, Dr. Bennett shall enter into, and thereafter maintain compliance with, a post-discharge aftercare contract which

complies with Rule 4731-16-10, Ohio Administrative Code, with a treatment provider approved under Section 4731.25, Ohio Revised Code, who has access to Dr. Bennett's treatment records.

3. **Demonstration of Ability to Resume Practice**: Dr. Bennett 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:

   a. Certification from a treatment provider approved under Section 4731.25 of the Revised Code that Dr. Bennett has successfully completed any required inpatient treatment.

   b. Evidence of continuing full compliance with a post-discharge aftercare contract with a treatment provider approved under Section 4731.25 of the Revised Code. Such evidence shall include, but not be limited to, a copy of the signed aftercare contract. The aftercare contract must comply with rule 4731-16-10 of the Administrative Code.

   c. Two written reports indicating that Dr.Bennett'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 physicians knowledgeable in the area of addictionology and who are either affiliated with a current Board-approved treatment provider or otherwise have been approved in advance by the Board to provide an assessment of Dr. Bennett. Further, the two aforementioned physicians shall not be affiliated with the same treatment provider or medical group practice. Prior to the assessments, Dr. Bennett shall provide the evaluators with copies of patient records from any evaluations and/or treatment that he has received, and a copy of this Board Order. The reports from the evaluators shall include any recommendations for treatment, monitoring, or supervision of Dr. Bennett, and any conditions, restrictions, or limitations that should be imposed on Dr. Bennett's practice. The reports shall also describe the basis for the evaluator's determinations.

   All reports required pursuant to this paragraph shall be based upon examinations occurring within the three months immediately preceding any application for reinstatement. Further, at the discretion of the Secretary and Supervising Member of the Board, the Board may request an updated assessment and report if the Secretary and Supervising Member determine that such updated assessment and report is warranted for any reason.

4. **Additional Evidence of Fitness To Resume Practice**: Dr. Bennett shall present documentation satisfactory to the Board of successful completion of the Special Purpose Examination offered by the Federation of State Medical Boards or of the certification or recertification examination of the American Board of Pediatrics as additional evidence of his fitness to resume practice.

C. **PROBATION**: Upon reinstatement or restoration, Dr. Bennett's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five years:

1. **Obey the Law**: Dr. Bennett shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.

2. **Personal Appearances**: Dr. Bennett shall appear in person for interviews before the Board or its designated representative. The first such appearance shall take place during the third month following the month in which Dr. Bennett's certificate is restored or reinstated. Subsequent personal appearances must occur every three months thereafter, and/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.

3. **Quarterly Declarations**: Dr. Bennett shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which Dr. Bennett's certificate is restored or reinstated. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.

4. **Abstention from Drugs**: Dr. Bennett shall abstain completely from the personal use or personal possession of drugs, except those prescribed, dispensed or administered to him by another so authorized by law who has full knowledge of Dr. Bennett's history of substance abuse. Further, in the event that Dr. Bennett is so prescribed, dispensed or administered any controlled substance, carisoprodol, or tramadol, Dr. Bennett shall notify the Board in writing within seven days, providing the Board with the identity of the prescriber; the name of the drug Dr. Bennett received; the medical purpose for which he received said drug; the date such drug was initially received; and the dosage, amount, number of refills, and directions for use. Further, within thirty days of the date said drug is so prescribed, dispensed, or administered to him, Dr. Bennett shall provide the Board with either a copy of the written prescription or other written verification from the prescriber, including the dosage, amount, number of refills, and directions for use.

5. **Abstention from Alcohol**: Dr. Bennett shall abstain completely from the use of alcohol.

6. **Drug & Alcohol Screens; Drug Testing Facility and Collection Site**: Dr. Bennett shall submit to random urine screenings for drugs and alcohol at least four times per month, or as otherwise directed by the Board. Dr. Bennett 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, and shall include Dr. Bennett's drug(s) of choice.

Dr. Bennett shall abstain from the use of any substance and the consumption of poppy seeds or any other food or liquid that may produce a low level positive result in a toxicology screen. Dr. Bennett acknowledges that he understands that the consumption or use of such substances, including but not limited to substances such as mouthwash or hand cleaning gel, may cause a positive drug screen that may not be able to be differentiated from intentional ingestion, and therefore such consumption or use is prohibited.

All such urine screenings for drugs and alcohol shall be conducted through a Board-approved drug testing facility and collection site, except as provided in Paragraph 7 below, and the screening process shall require a daily call-in procedure.

Dr. Bennett shall submit, at his expense and on the day selected, urine specimens for drug and/or alcohol analysis. All specimens submitted by Dr. Bennett shall be negative, except for those substances prescribed, administered, or dispensed to him in conformance with the terms, conditions and limitations set forth in this Board Order. Refusal to submit such specimen, or failure to submit such specimen on the day he is selected or in such manner as the Board may request, shall constitute a violation of this Board Order.

Further, within thirty days of the effective date of this Board Order, Dr. Bennett shall enter into the necessary financial and/or contractual arrangements with the Board-approved drug testing facility and/or collection site in order to facilitate the urine screening process in the manner required by this Board Order. Further, Dr. Bennett shall promptly provide to the Board written documentation of completion of such arrangements, including a copy of any contract entered into between Dr. Bennett and the Board-approved drug testing facility and/or collection site. Dr. Bennett's failure to timely complete such arrangements, or failure to timely provide written documentation to the Board of completion of such arrangements, shall constitute a violation of this Board Order.

Dr. Bennett shall ensure that the urine screening process performed through the Board-approved drug testing facility and/or collection site requires a daily call-in procedure; that the urine specimens are obtained on a random basis; and that the giving of the specimen is witnessed by a reliable person. In addition, Dr. Bennett and the Board-approved drug testing facility and collection site shall assure that appropriate control over the specimen is maintained and shall immediately inform the Board of any positive screening results.

Dr. Bennett shall ensure that the Board-approved drug testing facility and/or collection site provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Board Order, and whether all urine screens have been negative.

In the event that the Board-approved drug testing facility and/or collection site becomes unable or unwilling to serve as required by this Board Order, Dr. Bennett must immediately notify the Board in writing, and make arrangements acceptable to the Board, pursuant to Paragraph 7 below, as soon as practicable. Dr. Bennett shall further ensure that the Board-approved drug testing facility and/or collection site also notifies the Board directly of its inability to continue to serve and the reasons therefore.

Dr. Bennett acknowledges that the Board expressly reserves the right to withdraw its approval of any drug testing facility and/or collection site in the event that the Secretary and Supervising Member of the Board determine that the drug testing facility and/or collection site has demonstrated a lack of cooperation in providing information to the Board or for any other reason.

7. In the event that utilizing the Board-approved drug testing facility and/or collection site as set forth in Paragraph 6 above creates an extraordinary hardship upon Dr. Bennett, as determined in the sole discretion of the Board, then subject to the following requirements, the Board may approve an alternate drug testing facility and/or collection site, or a supervising physician, to facilitate the urine screening process for Dr. Bennett:

   a. Within thirty days of the date upon which Dr. Bennett is notified of the Board's determination that utilizing the Board-approved drug testing facility and/or collection site constitutes an extraordinary hardship upon Dr. Bennett, he shall submit to the Board in writing for its prior approval the identity of either an alternate drug testing facility and collection site, or the name of a proposed supervising physician, to whom Dr. Bennett shall submit the required urine specimens. In approving a facility, entity, or an individual to serve in this capacity, the Board will give preference to a facility located near Dr. Bennett's residence or employment location, or to a physician who practices in the same locale as Dr. Bennett. Dr. Bennett shall ensure that the urine screening process performed through the alternate drug testing facility and/or collection site, or through the supervising physician, requires a daily call-in procedure; that the urine specimens are obtained on a random basis; and that the giving of the specimen is witnessed by a reliable person. In addition, Dr. Bennett acknowledges that the alternate drug testing facility and collection site, or the supervising physician, shall assure that appropriate control over the specimen is maintained and shall immediately inform the Board of any positive screening results.

   b. Dr. Bennett shall ensure that the alternate drug testing facility and/or collection site, or the supervising physician, provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Board Order, and whether all urine screens have been negative.

c. In the event that the designated alternate drug testing facility and/or collection site, or the supervising physician, becomes unable or unwilling to so serve, Dr. Bennett must immediately notify the Board in writing. Dr. Bennett shall further ensure that the previously designated alternate drug testing facility and collection site, or the supervising physician, also notifies the Board directly of the inability to continue to serve and the reasons therefore. Further, in order to ensure that there will be no interruption in his urine screening process, upon the previously approved alternate drug testing facility, collection site, or supervising physician becoming unable to serve, Dr. Bennett shall immediately commence urine screening at the Board-approved drug testing facility and collection site chosen by the Board, until such time, if any, that the Board approves a subsequent alternate drug testing facility, collection site, or supervising physician, if requested by Dr. Bennett.

d. The Board expressly reserves the right to disapprove any entity or facility proposed to serve as Dr. Bennett's designated alternate drug testing facility and/or collection site, or any person proposed to serve as his supervising physician, or to withdraw approval of any entity, facility or person previously approved to so serve in the event that the Secretary and Supervising Member of the Board determine that any such entity, facility or person has demonstrated a lack of cooperation in providing information to the Board or for any other reason.

8. All screening reports required under this Board Order from the Board-approved drug testing facility and/or collection site, or from the alternate drug testing facility and/or collection site or supervising physician, must be received in the Board's offices no later than the due date for Dr. Bennett's quarterly declaration. It is Dr. Bennett's responsibility to ensure that reports are timely submitted.

9. **Submission of Blood or Urine Specimens upon Request**: The Board retains the right to require, and Dr. Bennett agrees to submit, blood, urine, breath, saliva and/or hair specimens for screening for drugs and alcohol, for analysis of therapeutic levels of medications that may be prescribed for Dr. Bennett, or for any other purpose, at Dr. Bennett's expense upon the Board's request and without prior notice. Dr. Bennett's refusal to submit a specimen upon request of the Board shall result in a minimum of one year of actual license suspension. Further, the collection of such specimens shall be witnessed by a representative of the Board, or another person acceptable to the Secretary or Supervising Member of the Board.

10. **Rehabilitation Program**: Dr. Bennett shall maintain participation in an alcohol and drug rehabilitation program, such as A.A., N.A., C.A., or Caduceus, no less than three times per week, unless otherwise determined by the Board. Substitution of any other specific program must receive prior Board approval. Dr. Bennett shall submit acceptable documentary evidence of continuing

compliance with this program, which must be received in the Board's offices no later than the due date for Dr. Bennett's quarterly declarations.

11. **Aftercare**: Dr. Bennett shall maintain continued compliance with the terms of the aftercare contract entered into with a Board-approved treatment provider, provided that, where terms of the aftercare contract conflict with terms of this Board Order, the terms of this Board Order shall control.

12. **Absence from Ohio**: Dr. Bennett shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed. Further, the Secretary and Supervising Member of the Board shall have the discretion to grant a waiver of part or all of the probationary terms set forth in this Board Order for occasional periods of absence of fourteen days or less. In the event that Dr. Bennett resides and/or is employed at a location that is within fifty miles of the geographic border of Ohio and any of its contiguous states, Dr. Bennett may travel between Ohio and that contiguous state without seeking prior approval of the Secretary or Supervising Member provided that Dr. Bennett is able to otherwise maintain full compliance with all other terms, conditions and limitations set forth in this Board Order.

13. **Violation of Terms of Probation**: If Dr. Bennett 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.

14. **Required Reporting of Change of Address:** Dr. Bennett shall notify the Board in writing of any change of residence address and/or principal practice address within 30 days of the change.

D. **TERMINATION OF PROBATION**: Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Bennett's certificate will be fully restored.

E. **RELEASES**: Dr. Bennett 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. Bennett's substance abuse and/or related conditions, or for purposes of complying with this Order, whether such treatment or evaluations occurred before or after the effective date of this Order. 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. Bennett shall also provide the Board written consent permitting any treatment provider from whom Dr. Bennett obtains treatment to notify the Board in the event he fails to agree to or comply with any recommended treatment or with any treatment or aftercare contract. Failure to provide such consent, or revocation of such consent, shall constitute a violation of this Order.

F. **REQUIRED REPORTING AND DOCUMENTATION OF REPORTING:**

1. **Required Reporting to Employers and Hospitals**: Within 30 days of the effective date of this Board Order, Dr. Bennett shall provide a copy of this Board Order to all employers or entities with which he is under contract to provide health care services (including but not limited to third party payors) or is receiving training, and the Chief of Staff at each hospital where he has privileges or appointments Further, Dr. Bennett shall promptly provide a copy of this Board Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments. In the event that Dr. Bennett provides any health care services or health care direction or medical oversight to any emergency medical services organization or emergency medical services provider in Ohio, within 30 days of the effective date of this Board Order, Dr. Bennett shall provide a copy of this Board Order to the Ohio Department of Public Safety, Division of Emergency Medical Services.

   This requirement shall continue until Dr. Bennett receives from the Board written notification of his successful completion of probation as set forth in Paragraph D, above.

2. **Required Reporting to Other State Licensing Authorities**: Within 30 days of the effective date of this Board Order, Dr. Bennett shall provide a copy of this Board Order to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license, as well as any federal agency or entity, including but not limited to the Drug Enforcement Agency, through which he currently holds any license or certificate. Dr. Bennett further agrees to provide a copy of this Board Order at time of application to the proper licensing authority of any state in which he applies for any professional license or for reinstatement of any professional license.

   This requirement shall continue until Dr. Bennett receives from the Board written notification of his successful completion of probation as set forth in Paragraph D, above.

3. **Documentation that the Required Reporting Has Been Performed**: Dr. Bennett shall provide the Board with **one** of the following documents as proof of each required notification within 30 days of the date of each notification required above: (1) the return receipt of certified mail within 30 days of receiving that return receipt, (2) an acknowledgement of delivery bearing the original ink signature of the person to whom a copy of the Board Order was hand delivered,

(3) the original facsimile-generated report confirming successful transmission of a copy of the Board Order to the person or entity to whom a copy of the Board Order was faxed, or (4) an original computer-generated printout of electronic mail communication documenting the email transmission of a copy of the Board Order to the person or entity to whom a copy of the Board Order was emailed.

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

(SEAL)

Lance A. Talmage, M.D.
Secretary

June 10, 2009
Date

STATE MEDICAL BOARD
OF OHIO
2009 MAY 11 P 4: 06

BEFORE THE STATE MEDICAL BOARD OF OHIO

In the Matter of	*	**Case No. 08-CRF-113**
Jack David Bennett, M.D.,	*	**Hearing Examiner Petrucci**
Respondent.	*	

REPORT AND RECOMMENDATION

Basis for Hearing

By letter dated September 10, 2008, the State Medical Board of Ohio [Board] notified Jack David Bennett, M.D., that it intends to determine whether to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on allegations that the Board had ordered Dr. Bennett to an impairment examination in July 2008, that he was found to be impaired in his ability to practice medicine and surgery, and that the Board had received no information that he thereafter entered inpatient treatment. The Board further alleged that Dr. Bennett's acts, conduct and/or omissions constitute impairment of ability to practice according to acceptable and prevailing standards of care, as set forth in Section 4731.22(B)(26), Ohio Revised Code. Accordingly, the Board advised Dr. Bennett of his right to request a hearing in this matter. (State's Exhibit 1A)

By letter received by the Board on September 29, 2008, Dr. Bennett requested a hearing. (State's Exhibit 1B)

Appearances

Richard Cordray, Attorney General, by Kyle C. Wilcox, Assistant Attorney General, on behalf of the State of Ohio.

Eric J. Plinke, Esq., on behalf of Dr. Bennett.

Hearing Dates: February 9 and 10, 2009

PROCEDURAL MATTERS

After the hearing, the Hearing Examiner paginated Respondent's Exhibit E in order to refer to portions thereof more easily. Additionally, the record was held open to provide Respondent the opportunity to provide Respondent's Exhibit C. (Hearing Transcript [Tr.] at 431, 468) That exhibit was not presented, and the record closed on February 24, 2009.

SUMMARY OF THE EVIDENCE

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

Background

1. Jack David Bennett, M.D., obtained his undergraduate degree from Miami University in 1984, and obtained his medical degree from the Medical College of Ohio in 1991. (State's Exhibit [St. Ex.] 6 at 2, 4; St. Ex. 3 at 5; Tr. at 395; Respondent's Exhibit [Resp. Ex.] K at 18)

2. Dr. Bennett completed a four-year pediatric residency at the Medical College of Ohio. During the fourth year, he was a chief resident. Dr. Bennett has an active medical license in Ohio; he is not licensed in any other state. (Tr. at 296, 395)

3. After completing his residency, Dr. Bennett worked in a pediatric emergency room in Youngstown, Ohio. Next, Dr. Bennett took a position with Tri-State Physicians Medical Group, operating a medical practice in southern Ohio. He testified that he had been offered the ability to take over that practice as the owner but had elected not to do so, and it closed in mid-2004. For the next one and one-half years, Dr. Bennett worked part-time, doing *locum tenens* work. Dr. Bennett last worked as a physician in the fall of 2006. He currently is not employed. (Tr. at 296, 394, 397-399; St. Ex. 7 at 10, 11)

Events in Waverly, Ohio, on August 5, 2006

4. In the early morning hours of August 5, 2006, Dr. Bennett was driving his car in Waverly, Ohio. He was stopped by a police officer, who smelled a "strong odor of an intoxicating beverage coming from his person." Dr. Bennett admitted that he had consumed alcohol prior to driving. The officer conducted one field sobriety test. Dr. Bennett would not perform two other such tests due to leg and weight problems. Dr. Bennett was taken in a police car to the Waverly Police Department. He took a breathalyzer test, with a result of 0.037 grams of alcohol per 210 liters of breath. He was not criminally charged and he was returned to his automobile that same day. (St. Ex. 5 at 2-5; Tr. at 73, 300-303, 363)

Events in Waverly, Ohio, on October 31, 2007

5. In the late evening hours of October 31, 2007, one of Dr. Bennett's neighbors complained to the Waverly Police Department that Dr. Bennett was being loud. The police responded and questioned Dr. Bennett, who denied making any noise. In the incident report, the officer noted that Dr. Bennett was "clearly under the influence of an intoxicating beverage," and there was a "very strong odor of an intoxicating beverage coming from his person." Dr. Bennett was notified of his neighbor's complaint; and both Dr. Bennett and his neighbor were given a warning by the police. No arrest or charges were made. (St. Ex. 5 at 6-13; Tr. at 84)

6. Soon thereafter that same evening, Dr. Bennett called the Waverly Police Department to complain about the same neighbor who had complained earlier. The police responded and spoke with Dr. Bennett again. The incident report reflects that Dr. Bennett denied consuming any alcohol, but smelled of an intoxicating beverage. The police concluded that Dr. Bennett's complaint was unfounded. (St. Ex. 5 at 12-13)

Events in Jackson, Ohio, on December 24-25, 2007

7. On December 24, 2007, Dr. Bennett visited two women, Heather Cochran and Angie Zornes (formerly Sturgill), who lived approximately one-half hour away from his residence. Shortly after arriving at Ms. Cochran's apartment, he left to purchase alcohol. Dr. Bennett returned and consumed alcohol with the women. There was a disagreement between Dr. Bennett, Ms. Cochran, and Ms. Zornes. Dr. Bennett left Ms. Cochran's apartment and drove away. (St. Ex. 6 at 3-4; Tr. at 307-311)

   At approximately 1 a.m., on December 25, 2007, the Jackson Police Department received a report of a car hitting a parked car. Based upon the description of the vehicle, the police stopped Dr. Bennett. The officer's summary of the traffic stop includes the following: "[H]is eyes were red, his speech was slow and slightly slurred, he seemed disoriented, and his motions were not smooth. I asked him if he had drank [sic] anything tonight. He stated a few." Dr. Bennett failed several field sobriety tests and was arrested. (St. Ex. 6 at 3-4; Resp. Ex. E at 3, 6)

8. Dr. Bennett told the officer that he had been driving to the police department because his wallet and eyeglasses[1] had been stolen by Ms. Cochran and Ms. Zornes, and he believed that they had "drugged" him with Klonopin, a benzodiazepine. The police then spoke with Ms. Cochran and Ms. Zornes, who denied stealing from and drugging Dr. Bennett. They claimed that Dr. Bennett had been intoxicated when he had arrived at Ms. Cochran's apartment. Further, they stated that he was "messed up," and caused problems, which caused Ms. Cochran to make him leave. Ms. Cochran stated that Dr. Bennett had had his wallet and eyeglasses when he had left. The police searched Ms. Cochran's apartment, and the wallet and eyeglasses were not found. (St. Ex. 6 at 3-5, 19-21; Tr. at 195, 283; Resp. Ex. E at 3, 13-16, 18-21)

9. Dr. Bennett was taken to the Jackson Police Department. At approximately 2 a.m., he took a breathalyzer test, which registered his blood-alcohol level as below the legal limit, at 0.068 grams of alcohol per 210 liters of breath. At approximately 3 a.m., Dr. Bennett provided a urine specimen, which was negative for eleven different drugs or drug classes, including benzodiazepines. Dr. Bennett spent the night at the police station. He was charged with three offenses in violation of several City of Jackson ordinances, including Failure to Control. (St. Ex. 6 at 2, 12-14; St. Ex. 9; Tr. at 354, 409; Resp. Ex. E at 22-23)

[1]Dr. Bennett testified that he is nearsighted. (Tr. at 401)

Subsequent Activities Related to the December 2007 Incident

10. On December 26, 2007, Dr. Bennett and another friend, Mandy Swingle, gave written statements to the police, explaining that, on December 25, Ms. Cochran had given Dr. Bennett's eyeglasses to Ms. Swingle. (St. Ex. 6 at 22, 24; Resp. Ex. E at 10, 11)

11. Later in December 2007, Dr. Bennett took efforts to replace several items in his wallet. He completed an affidavit to the Board requesting a new "wallet card." He canceled the credit card in his wallet and obtained a new credit card. He also canceled an automatic teller machine card and applied for a new social security card. Furthermore, he replaced his driver's license. (Tr. at 89, 324, 411-412; Resp. Ex. J)

12. In February 2008, two of the three criminal charges related to the December 2007 incident were dismissed, and Dr. Bennett pled guilty to Failure to Control. He was required to pay a fine and court costs, totaling $230. (Tr. at 356; St. Ex. 8 at 6-7)

Board Investigation, 2008

13. Curtis Fortner is a Board Investigator. He was assigned to investigate Dr. Bennett, and began that investigation in January 2008. Mr. Fortner obtained documents regarding the three above-described incidents. With regard to the December 2007 incident, Mr. Fortner spoke with officers from the Jackson Police Department, and Mr. Fortner interviewed Ms. Cochran, Ms. Zornes, and Dr. Bennett in January 2008. Mr. Fortner noted that the Jackson police were familiar with Ms. Cochran and Ms. Zornes because they were known in the local bars and known to be involved with drugs. (Tr. at 13, 15-17, 24-26, 46-48, 57-58, 69, 73-74, 83-84; St. Ex. 5)

14. Mr. Fortner noted that Ms. Cochran had provided a written statement and had spoken freely about the December 2007 incident, while Ms. Zornes only briefly spoke with Mr. Fortner. Ms. Cochran reported that Dr. Bennett had admitted to consuming alcohol before his arrival that evening. She also reported that: (a) while at her apartment, Dr. Bennett noticed a pill dissolving in his drink and poured the drink out; (b) while preparing a second drink, he used a spoon that had "pop rock candy" on it; and (c) when he saw something in that drink, he stopped drinking from a cup and starting drinking bottled beer. Ms. Cochran also claimed that, later, Dr. Bennett stumbled and partially disrobed. (Tr. at 17-20, 23, 40)

    Ms. Zornes acknowledged that she had been taking Klonopin and drinking alcohol that evening. Ms. Zornes indicated that she did not remember much from that evening. Mr. Fortner was not aware whether Ms. Zornes had the Klonopin with her that evening. (Tr. at 56-57)

15. Mr. Fortner stated that he had spoken with Ms. Cochran on another occasion in January 2008, and she had reported that Dr. Bennett had been telling her that she needed to admit that she had stolen his wallet and that he had been drugged on December 24. Mr. Fortner stated that Ms. Cochran maintained her "position" that she did not drug Dr. Bennett or steal his wallet that evening. In addition, Ms. Cochran sent a photograph of Dr. Bennett to Mr. Fortner and

indicated that she had taken it that evening. The photograph depicts Dr. Bennett without a shirt or pants. (Tr. at 53-54, 131-132, 320-321; St. Ex. 4)

16. Mr. Fortner met with Dr. Bennett on January 14, 2008. (Tr. at 26) Mr. Fortner recalled Dr. Bennett's statements regarding the December 2007 incident:

> [Dr. Bennett] said that everything that happened that night was these two girls' fault; they drugged [him], took [his] wallet, and that lead up to everything that happened. * * * He said the reason that he had struck that parked car was that they had taken his glasses. * * *
>
> He stated that they had taken his wallet, taken his glasses, and that he was going to leave to contact law enforcement, is why he left the residence. I asked him how they got his wallet and glasses from him, and he made the comment that one of them had pulled his pants a third of the way down, and that's when they had got his glasses and his wallet.
>
> I asked if he was wearing his glasses or if he had them in a pocket, and he didn't recall. That's when I had asked him if he was ever disrobed or in an unclothed state in the apartment, and he told me no, but that they had simply pulled his pants down, horsing around, as he had put it, and then he pulled them back up and he left.
>
> * * *
>
> He stated that he left the residence, didn't have his glasses on, so he couldn't see real well, struck a parked car, and then continued on to find the police department. And he was later stopped by the Jackson Police Department coming back toward the scene on one of the side streets in Jackson.

(Tr. at 28-31; see also Tr. at 88-89)

17. Mr. Fortner also spoke with Dr. Bennett about his general consumption of alcohol, medications, and drugs. Mr. Fortner described Dr. Bennett's answers, noting that he had said he probably did not have a problem with alcohol, and that he did not take medications except Ambien and Benadryl for a sleep disorder. (Tr. at 31, 80)

18. Mr. Fortner described Dr. Bennett as "very nervous" when he had asked for a urine sample, stating that he began "fidgeting in his seat like he was very uncomfortable, got pale, [and] kind of wringing his hands." Mr. Fortner pointed out that Dr. Bennett then drank four large glasses of water, and he said that he would contact his attorney to help him decide whether to provide a urine sample. Thereafter, Mr. Fortner left. Subsequently, Dr. Bennett agreed to provide the urine sample, and Mr. Fortner testified that, at approximately 2:30 p.m. that day, he collected the sample. (Tr. at 32-37, 68; St. Exs. 10, 11)

The urine sample was tested for 11 drugs/drug classes. The toxicology results of the urine test were negative, but the report noted that the creatinine level of the sample was low (at 10.7 milligrams/deciliter, with a normal range being between 20 and 300 milligrams/deciliter). The specific gravity was also outside the normal range (at 1.0019, with a normal range being between 1.0030 and 1.0300). (St. Ex. 11)

19. Mr. Fortner stated that Dr. Bennett did not appear to be under the influence or impaired when he met with him. (Tr. at 78)

Mr. Bennett's Impairment Examination, July 2008

20. On June 18, 2008, the Board ordered Dr. Bennett to submit to an examination pursuant to Section 4731.22(B)(26), Ohio Revised Code, and cited the following as its basis:

- The December 25, 2007, arrest and charges, and the subsequent disposition of those charges. (St. Ex. 12; St. Ex. 6 at 2-5, 9-24; St. Ex. 8)

- Dr. Bennett's reported behavior on December 24, 2007, prior to the above arrest. (St. Ex. 12)

- Dr. Bennett's behavior on January 14, 2008, when interviewed by Mr. Fortner and the toxicology results from the urine sample provided that day. (St. Exs.10-12)

21. The Board ordered Dr. Bennett to enter Glenbeigh Hospital [Glenbeigh] on July 1, 2008, for a 72-hour examination. Glenbeigh is a Board-approved, alcohol and drug addiction treatment provider in Rock Creek, Ohio. (St. Ex. 12; State Medical Board of Ohio Website, March 26, 2009, <*http://med.ohio.gov/pdf treatment_compliance/TREATMNT.pdf*>; Tr. at 92, 234).

22. Per the Board's requirement, Dr. Bennett underwent a 72-hour inpatient examination at Glenbeigh to determine if he was in violation of Section 4731.22(B)(26), Ohio Revised Code. Christopher L. Adelman, M.D., evaluated Dr. Bennett.[2] Roy Nichols is a licensed social worker and a licensed independent chemical dependency counselor at Glenbeigh. Mr. Nichols was the primary counselor involved in Dr. Bennett's examination.[3] A psychiatrist, Michael Primc, M.D., also evaluated Dr. Bennett. (Tr. at 91, 93, 104, 237, 239)

During his impairment examination, Dr. Bennett reported that, before the December 2007 incident, he usually drank two glasses of wine with dinner approximately three days each week. He further reported that he had quit drinking after the December 2007 incident. He denied impairment and reiterated that he had been drugged in December 2007. (St. Ex. 3 at 2, 8-9; Resp. Ex. K at 14, 21, 69)

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[2]Dr. Adelman holds several positions, and 80 percent of his current practice involves working with addicted or impaired patients. Further information regarding Dr. Adelman's background is set forth in the transcript. (Tr. at 232-236, 250)

[3]Further information regarding Mr. Nichols' background is set forth in the transcript. (Tr. at 93-95, 103)

23. The evaluation of Dr. Bennett was not completed until after he was discharged from Glenbeigh on July 4, 2008. A diagnosis was reached on July, 9, 2008, by collective decision between the Glenbeigh executive director, the Glenbeigh clinical director, Dr. Adelman, Mr. Nichols, and Dr. Primc. Dr. Adelman reported the conclusions to the Board by letter dated July 11, 2008. Dr. Bennett was diagnosed with substance abuse, and found to be impaired in his ability to practice medicine and surgery according to acceptable and prevailing standards of care. Furthermore, Dr. Adelman recommended that Dr. Bennett enter a 28-day inpatient treatment program. (St. Ex. 2; Tr. at 134, 140-141, 197, 218, 238-239, 241-242, 245, 249, 381; Resp. Ex. K at 3; Resp. Ex. L)

24. The Glenbeigh discharge summary states the following:

> On discharge, the evaluation was not concluded and [Dr. Bennett] was told the conclusion and recommendation would be forthcoming. * * * He presented with one legal incident with three arrests resulting in one conviction and also two other involvements with police with no arrests. All were alcohol related. He denied any prior treatment. * * * He was very highly defensive through minimalization, rationalization, intellectualization, and diversion. He argued through long story-telling in explaining events in his life. He vehemently did not agree with the conclusions and recommendations which were reached. There appeared to be minimal understanding or acceptance of the diagnosis. His relapse potential on discharge was considered high due to his distress. He was diagnosed with Alcohol Abuse with a recommendation [of] 28 days inpatient treatment. He made no commitment to follow through or any commitment to 12 step programming.

(Resp. Ex. K at 10-11)

Substance Abuse Criteria under the Diagnostic and Statistical Manual of Mental Disorders

25. Dr. Bennett's diagnosis of substance abuse was based on the Diagnostic and Statistical Manual of Mental Disorders [DSM]. It lists the following criteria for diagnosing substance abuse:

(A) A maladaptive pattern of substance use leading to clinically significant impairment or distress as manifested by one (or more) of the following occurring within a 12-month period:

(1) Recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)

(2) Recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)

(3) Recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)
(4) Continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)

(B) The symptoms have never met the criteria for Substance Dependence for this class of substance.

(Hearing Examiner Ex. 13) Hearing Examiner Exhibit 13 is an excerpt from the Fourth Edition of the DSM [DSM-IV]. After the Fourth Edition of the DSM was issued, a text revision was issued in 2000 [DSM-IV-TR]. The above-listed criteria were not modified in the text revision, and are the currently effective DSM criteria for diagnosing substance abuse. The introductory narrative language regarding substance abuse was modified in the text revision.

Testimony of Mr. Nichols

26. Mr. Nichols interviewed Dr. Bennett, conducted tests, and contacted friends, former employers, his physician, and police officers to gather further information. Mr. Nichols stated that Dr. Bennett was cooperative during the assessment. Mr. Nichols also testified regarding several factors that impacted his ultimate diagnosis of Dr. Bennett. (St. Ex. 3; Resp. Exs. K, N; Tr. at 106, 109, 110) Those factors are:

- *The August 2006 and October 2007 incidents*: Mr. Nichols stated that Dr. Bennett had informed him of the December 2007 incident only, and did not mention his involvements with the law in August 2006 and October 2007. Mr. Nichols independently learned of the other two incidents. (Tr. at 123, 178-180, 206)

- *Dr. Bennett's report of having blackouts*: Mr. Nichols reported that, during the assessment, Dr. Bennett had admitted to having blackouts. (Tr. at 176-177, 212, 373-374, 384; St. Ex. 3 at 9; Resp. Ex. K at 21)

- *The results from the Substance Abuse Subtle Screening Inventory [SASSI] questionnaire*: Dr. Bennett's SASSI scores included a high defensiveness score, and an overall score of "low probability of a substance dependence disorder." Mr. Nichols stated that Dr. Bennett's answers to four of the questions were in conflict with other information that Dr. Bennett had shared with Mr. Nichols, and therefore he concluded that Dr. Bennett was not being truthful. Mr. Nichols also explained that he had called the "SASSI hotline," and a consultant assisted him in interpreting Dr. Bennett's scores. (Tr. at 117, 120-122, 181-185, 192, 218-219, 376-377, 391; St. Ex. 3 at 11; Resp. Ex. K at 24; Resp. Ex. N)

- *The narrative language contained in the DSM-IV-TR*: Mr. Nichols stated that he had considered Dr. Bennett's history over a 16-month period because the introductory narrative in the DSM states that the substance-abuse problem must have occurred repeatedly during the same 12-month period *or been persistent*.[4] Mr. Nichols concluded that Dr. Bennett met three DSM criteria if his history is confined to just a 12-month period, or all four DSM criteria if a 16-month period is reviewed. As a result, Mr. Nichols diagnosed Dr. Bennett with substance abuse. (Tr. at 114-116, 134-135, 146-148; St. Ex. 3 at 13-14)

27. Mr. Nichols acknowledged several facts that impact the applicability of the DSM criteria:

- Relative to DSM (A)(1), no former employer had complaints about Dr. Bennett or stated that he had failed to fulfill major obligations at work due to substance-related absences or the like. Dr. Bennett is not in school, and has no children. (Tr. at 148-149)

- Relative to DSM (A)(2), the two driving-related incidents in August 2006 and December 2007 occurred more than 12 months apart; they occurred 16 months apart. Also, when Dr. Bennett's blood-alcohol content was tested during those incidents, it was at levels that were within the legal limit. (Tr. at 150-152)

- Relative to DSM (A)(3), Mr. Nichols initially testified that Dr. Bennett had three arrests on December 25, 2007, but later conceded that Dr. Bennett did not have *recurrent* arrests, as stated in the criterion. Mr. Nichols stated that the incidents in Waverly and Jackson, Ohio, nonetheless amounted to recurrent legal problems for Dr. Bennett because the police were involved on multiple occasions and police reports were generated. (Tr. at 125, 152-155, 207)

28. Mr. Nichols stated that whether Dr. Bennett had been drugged on December 24, 2007, was not relevant to his diagnosis. Mr. Nichols first explained that he had only Dr. Bennett's statement that he had been drugged, and no corroborating evidence. However, Mr. Nichols later testified that he had received: (a) a statement from a friend of Dr. Bennett, indicating that Ms. Cochran and Ms. Zornes had admitted to feeding Dr. Bennett 11 Klonopin on December 24, 2007; and (b) two affidavits in which the affiants stated that "something" or "a pill" was put into Dr. Bennett's drink on December 24.[5] Mr. Nichols testified that he had considered the affidavits to be unreliable because of the "kind of people" Dr. Bennett had been with that evening and because the urine screen from that evening was negative. (Tr. at

[4]Mr. Nichols was referring to the introductory narrative in the DSM-IV-TR.

[5]Also, the statement and affidavits stated that: Ms. Cochran had tried to drug Dr. Bennett, Ms. Cochran had stolen his wallet and eyeglasses, and Mr. Fortner had an unprofessional relationship with Ms. Cochran. (Resp. Exs. F at 4, G, H) Mr. Fortner denied that the allegations relating to him in the statement/affidavits. (Tr. at 75-76)

162-163, 166, 168-172, 197, 198-202, 213-214, 221-222; Resp. Exs. G, H) The following exchange explains Mr. Nichols' analysis further:

> Q. Can you tell me how you took that into consideration, that essentially the main thrust of why this physician is being ordered to appear in front of you is because of an incident in which he claims he was drugged? How do you – if you're – if on one hand you're discounting it because it didn't have anything to do with alcohol, but on the other hand it's the reason he's there and he's factually disputing it, how do you reconcile that?
>
> A. Getting all the information, in the assessment, getting all the corroborating reports, and in looking at the investigatory report by the investigator, I take in everything. I just go for everything I can get. I penetrate as deeply as I reasonably can in all the areas.
>
> When, however, I come to a conclusion on July 9, I have to rule out the Klonopin use. First of all, the only drug Dr. Bennett had ever told me he took was Ambien, which – okay. That may or may not be true, but I don't have verification that the Klonopin was in there in terms of a urine analysis. I have only his statement that he was drugged.
>
> In distilling all that down, I come down to the issue of alcohol, not Klonopin abuse or Ambien abuse. That's not material to my conclusion, because I can't prove any of that. I can prove the alcohol incidence and the alcohol use, the alcohol-related lifestyle.

(Tr. at 201-202; see also Tr. at 220)

29. Mr. Nichols wrote in the assessment that:

> [Dr. Bennett] is in denial of his abuse of alcohol. He is in denial of the harmful and negative consequences of his use. He is in denial of his alcohol-related friendships and his alcohol-related lifestyle. He is extremely highly defensed through minimalization, rationalization, intellectualization, and diversion. He has issues with the State Medical Board of Ohio which jeopardize his license to practice medicine. He needs a stable sober support community.

(St. Ex. 3 at 12; see also Resp. Ex. K at 12)

Testimony of Dr. Adelman

30. Dr. Adelman testified that he had spent approximately 20 to 30 minutes with Dr. Bennett during the impairment examination, "mainly to review his history and physical, to explain to him the process and allow him to ask any questions." Dr. Adelman reached his diagnosis by

relying on the DSM, and found that DSM criteria (A)(1), (2) and (4) were not met. However, Dr. Adelman found that DSM criteria (A)(3) and (B) were met. (Tr. at 238, 239, 240, 246-247, 262, 276, 273-276, 279, 285) Dr. Adelman testified regarding how Dr. Bennett's history met criterion (A)(3):

> [H]e had at least three or more encounters with policemen when he was identified by the policemen as having been drinking or being intoxicated.
>
> * * * And if you look at the report from – and the assessment of the conversations that Roy Nichols had with the policemen in Waverly, the police chief had said – pointed out that they had had several encounters with Dr. Bennett and that he had been intoxicated.[6] And then the – Tim South, the policeman – another policeman there indicated that they had had encounters with Dr. Bennett more than once.
>
> So it was problems that involved drinking and causing commotion or causing problems at his – the apartments where he lives. So that's a pattern, repeated problems. The police were involved. Then there were the other two episodes when he was once arrested and another time stopped by the police. Both times he had been drinking.
>
> * * *
>
> But anyway, there was one encounter where he was in an accident and left the scene. He was eventually taken to the police station, and eventually he had a breathalyzer test. Now, he was picked up by the policeman at 1:10 a.m. His breathalyzer was at 2:17 a.m. and his blood/alcohol level was .68.
>
> Now based on the physiology and metabolism of alcohol, if he had had his last drink at 1:09 a.m., then – and his blood/alcohol was .68 at 2:17, then his blood/alcohol at 1:10 would have been .88, which, of course, is over the legal limits. It's not likely that he had his last drink at 1:09 a.m.

(Tr. at 247-248; see also Tr. at 265-269) In addition, Dr. Adelman stated that "anytime you get to talk to the police because of your behavior and you've been drinking, that's a problem." (Tr. at 278)

31. Dr. Adelman further opined that neither Dr. Bennett's contention that he had been drugged on December 2007, nor the corroborating statements/affidavits by others, was material to the assessment. (Tr. at 262-265, 285)

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[6]Dr. Adelman later corrected this statement to reflect that the Waverly police chief had said that they had received calls regarding alcohol-related activity in the area of Dr. Bennett's apartment. (Tr. at 261-262)

32. Regarding the manner in which the Glenbeigh team reached its final diagnosis of Dr. Bennett, Dr. Adelman explained that a group discussion took place during a telephone conference call. (Tr. at 239) In the following exchange, Dr. Adelman testified regarding the team meeting:

Q. Okay. At the time of that meeting, what did you literally have in front of you that you were viewing?

A. I really don't remember. I would normally have had the assessment, but I don't really remember what I had.

Q. Do you remember when that meeting took place on the telephone?

A. I don't remember the date, no.

Q. I take it it would have had to have been July 11th or before that date.

A. Yes, I think that's correct.

Q. Have you looked at Dr. Bennett's chart from Glenbeigh?

A. I have, yes.

Q. When did you review that?

A. Well, I don't remember when I first reviewed it, but I've reviewed it several times in the last month or two.

Q. Okay. How about at the time you made – you signed the letter dated July 11th? Did you have the full chart in front of you?

A. I don't remember.

Q. What do you remember having looked at between the time you saw Dr. Bennett on July 1st or 2nd and having the conference call sometime no later than July 11th?

A. I don't remember any detail about what I had to look at. I do remember I saw – one of the things I do remember was that I think – well, I don't even know the date of that. I just don't remember exactly what I had in front of me.

Q. Earlier you had mentioned that you had reviewed Mr. Nichols' assessment, State's Exhibit 3.

A. Yes.

Q. Can you say with any certainty that you actually had that document in front of you before signing the letter dated July 11th that's State's Exhibit 2?

A. I just don't remember that.

Q. Given that, is it possible that by July 11th, at the time – around the time of that conference call and before rendering the opinion expressed in the July 11th letter, that you were merely relying upon oral reports of other persons?

A. Mr. Nichols would be the other person.

Q. But that's possible?

A. I suppose it is possible.

Q. And you actually don't have any direct recollection of the contrary?

A. That's correct.

(Tr. at 256-258)

Dr. Primc's Evaluation

33. As noted, Dr. Primc also met with Dr. Bennett during his impairment examination at Glenbeigh. Dr. Primc's impression note stated in part:

> It is difficult to determine whether Jack meets the criteria for alcohol dependency. I emphasized to him that more information will need to be gathered to determine whether his substance use has impacted his work, his family, or his health. I do have some concerns about Jacks [sic] immature behavior. I am unsure if this has any bearing whether he should receive mandatory substance abuse treatment.

(Resp. Ex. K at 81)

Dr. Bennett's Testimony at the Hearing

34. Dr. Bennett explained that he is not impaired in his ability to practice medicine and surgery due to excessive or habitual use of alcohol, stating: "I don't use alcohol excessively. I don't use any drugs. The only drug that I have ever used, you know, is Ambien, which – I used it appropriately. I used it at bedtime and only at bedtime." (Tr. at 387)

35. Furthermore, Dr. Bennett explained the three incidents involving the police. With regard to the August 2006 incident in Waverly, he testified that he had not done anything wrong, and that the only reason that he had been stopped by the police was because of the time of day in which he had been driving. With regard to the October 2007 incident in Waverly, Dr. Bennett testified that he had had one or two glasses of wine that evening, but he strongly disagreed with the police officer's statement that he was clearly under the influence of an intoxicating beverage or there was a very strong odor of an intoxicating beverage coming from his person. (Tr. at 304-307, 344)

36. Also, Dr. Bennett explained what had happened in December 2007. Dr. Bennett admitted drinking a shot of whiskey and one and one-half beers at Ms. Cochran's apartment that evening. He stated that he drank one-half of a beer from a mug, in which he found a partly-dissolved pill at the bottom. He testified that he had poured out the drink and had consumed another beer in its bottle. Dr. Bennett explained that he had thought the pill was a practical joke. (Tr. at 319-320, 325-328)

    Dr. Bennett further explained that, while at Ms. Cochran's apartment, she had given him a haircut.[7] He admitted that he had taken his shirt off for the haircut and, after that, one of the women had sprayed a hair styling product "all over" his pants. He testified that he had agreed that they could wash his pants, and they began to remove his pants. However, Dr. Bennett got angry when the women took his wallet and eyeglasses, and refused to return them. Dr. Bennett acknowledged that he had chosen not to call the police, and he had driven without his glasses with the intention of going to the Jackson Police Department. He also admitted that he did not know where the Jackson police station was located. (Tr. at 313-316, 318-319, 328-329, 331-332, 402)

37. With regard to hitting the parked car in December 2007, the following testimony was presented:

    Q. Why didn't you stop after you hit the parked truck?

    A. I didn't have my eyeglasses. I wasn't even sure what happened. I heard a sound like a light bulb break. And I was so upset, my state of mind was just basically that I was so upset and wanting to get to the police station to report my wallet being stolen. I just wasn't thinking about that. That was –

    Q. Okay. You weren't thinking about whose car you had just hit?

    A. I wasn't even sure that I had hit a car. I was not in my right state of mind, and it wasn't because of the alcohol. It was because I was just furious at these – what these two women had done.

    (Tr. at 334; see also Tr. at 355-356)

[7]Dr. Bennett did not tell Mr. Nichols or the Board investigator about receiving a haircut that evening. (Tr. at 322)

38. With regard to the Board investigation, Dr. Bennett testified that he had felt intimidated by Mr. Fortner's interview, and had felt the investigator had approached the whole matter as if Dr. Bennett was guilty of something. Dr. Bennett disagreed with parts of Mr. Fortner's description of the interview. First, Dr. Bennett stated that he had consumed one glass of water while Mr. Fortner met with him initially, and Mr. Fortner's description of four glasses was an exaggeration. Second, Dr. Bennett testified that he had called Mr. Fortner and had agreed to provide the urine sample within five or 10 minutes of Mr. Fortner leaving. (Tr. at 346-349, 359-360)

39. With regard to the Glenbeigh examination, Dr. Bennett disagreed with the substance abuse diagnosis reached, as well as many of the bases for Glenbeigh's diagnosis. First, Dr. Bennett denied that he had reported blackouts to Mr. Nichols. Second, Dr. Bennett testified that he had mentioned the August 2006 incident to Mr. Nichols, but Mr. Nichols had dismissed that incident on the ground that Dr. Bennett was not arrested. He also stated that Mr. Nichols never asked him about the involvements with the police in August 2006 and October 2007. Third, Dr. Bennett testified that Dr. Adelman only spent two minutes with him, did not examine him, and only asked him one question regarding which medical school he had attended. (Tr. at 176-177, 212, 364, 370, 373-374, 382-384, 406; St. Ex. 3 at 9; Resp. Ex. K at 21)

40. With regard to his medical career, Dr. Bennett stated that he is considering non-clinical work, such as research or teaching. Also, he stated that he is considering entering another residency program, other than primary care. (Tr. at 396)

Subsequent Impairment Examination

41. On July 24, 2008, Dr. Bennett was examined by Edna M. Jones, M.D., an addictionologist. She prepared a letter regarding that examination. The State did not have the opportunity to question Dr. Jones.

42. Dr. Jones noted that she had reviewed the Glenbeigh records, police reports, and affidavits of third persons. Dr. Jones met with Dr. Bennett for more than two hours and spoke with his parents as well. With regard to the toxicology results from December 25, 2007, Dr. Jones noted that there was a short period of time between when Dr. Bennett was allegedly drugged and when the urine sample was collected. She also opined that Klonopin may not have been included in the testing panel used because "it is not often included in the general benzodiazepine panel."[8] (Resp. Ex. D at 1)

In addition, Dr. Jones stated:

> I have talked to Dr. Bennett numerous times on the phone since our evaluation and even prior to our appointment. I have read through all the records available to me. I have been unable to contact one of the women that did give the affidavit to talk to her directly, but there are two notarized affidavits in the

[8]The toxicology report does not identify whether the "benzodiazepine panel" included Klonopin. (St. Ex. 9)

> record that [Dr. Bennett's counsel] provided me that certainly speak to the fact that the incident in December was not his fault. He was drugged and was under the influence when he made the decision to drive. There is no evidence at this time, of any history of impairment that was self induced. His history does not suggest, certainly, any repetitive abuse of any substance.
>
> * * *
>
> At this time, Dr. Bennett does not meet criteria for impairment, and does not meet criteria for substance abuse. I believe that he can practice according to acceptable and prevailing standards of care.
>
> * * *
>
> From reading Mr. Nichols' progress notes and evaluation, it appears to me that he made many assumptions that were related to his opinion about the associates that Dr. Bennett had while living in southeastern Ohio. * * * I do not believe Dr. Bennett is impaired, nor do I believe that he needs any type of intervention or treatment. I believe that if the Medical Board would act on the minimal facts that are presented in this case, that it would be a serious error on their part.

(Resp. Ex. D at 3)

FINDINGS OF FACT

1. By letter dated June 18, 2008, the Board notified Jack David Bennett, M.D., of its determination that it had reason to believe that he is in violation of Section 4731.22(B)(26), Ohio Revised Code, and ordered him to undergo a 72-hour inpatient examination beginning Tuesday, July 1, 2008, to determine if he is in violation of Section 4731.22(B)(26), Ohio Revised Code. The Board's determination was based upon one or more of the reasons outlined in the letter, including an alcohol-related traffic arrest; reports that Dr. Bennett acted in an intoxicated and erratic fashion prior to the arrest; and a urine sample Dr. Bennett provided to a Board investigator that was tested and determined to be low in creatinine and specific gravity, indicative that the specimen had been diluted.

2. By letter dated July 11, 2008, from Christopher Adelman, M.D., of Glenbeigh Hospital, a Board-approved treatment provider, the Board was notified that, following the Board-ordered evaluation, Dr. Bennett was determined to be impaired in his ability to practice according to acceptable and prevailing standards of care, and to require residential treatment.

3. The Board has received information that Dr. Bennett is unemployed and has not actively practiced medicine since September 2006.

4. No evidence establishes that Dr. Bennett entered an inpatient treatment program after his July 2008 examination at Glenbeigh.

CONCLUSIONS OF LAW

The acts, conduct, and/or omissions of Jack David Bennett, M.D., as set forth in Findings of Fact 1 through 4, do not constitute sufficiently reliable, probative and substantial evidence to establish that Dr. Bennett is impaired in his "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 set forth in Section 4731.22(B)(26), Ohio Revised Code. Nevertheless, because the Board did not previously have before it all of the information that was presented during the hearing, the Board was substantially justified in pursuing this allegation.

Analysis of the Evidence and Rationale for the Proposed Order

Dr. Bennett convincingly demonstrated at hearing that the examination conducted at Glenbeigh was not perfect. For the reasons set forth below, the Hearing Examiner concludes that the Glenbeigh report and the opinions expressed by the Glenbeigh witnesses at the hearing do not constitute reliable, probative, and substantial evidence to support a finding by the Board that Dr. Bennett is impaired in his ability to practice medicine and surgery as set forth in Section 4931.22(B)(26), Ohio Revised Code.

First, Mr. Nichols was a key participant in the impairment examination process, and he either misinterpreted or misapplied a number of significant, undisputed facts in the diagnosing process. For instance, the discharge summary authored by Mr. Nichols reflects that Dr. Bennett was arrested three times, and involved in two other incidents involving the police for which no arrest took place. That is not correct – the evidence before Mr. Nichols and the evidence presented at hearing establishes that Dr. Bennett was arrested once within a 12-month period – for the December 2007 incident. He was charged with three offenses in relation to that particular incident, but he was not arrested three times. Additionally, Mr. Nichols found that Dr. Bennett's alcohol use resulted in a failure to fulfill major role obligations at work, school or home, as set forth in DSM (A)(1). Mr. Nichols had not received, or documented, any information that such was true. Moreover, no evidence was presented at hearing to reflect that. A final example of misinterpretation/misapplication occurred when Mr. Nichols modified the DSM criteria for substance abuse. While the "or been persistent" language is contained in the introductory narrative language of the most current version of the DSM (DSM-IV-TR), the substance abuse criteria itself requires that the underlying events take place within a 12-month period only.

Second, the evidence reflects that Mr. Nichols relied on an unknown consultant with SASSI to interpret Dr. Bennett's SASSI results, and the Glenbeigh team relied upon that interpretation in diagnosing Dr. Bennett. In another Board matter, similar activity was found by the Court of Common Pleas to be one reason to disregard Mr. Nichols' testimony in that case. The Court expressly noted that reliance on "the opinions of an unidentified SASSI test consultant whose qualifications are

unknown" damaged Mr. Nichols' credibility and his testimony was disregarded as unreliable. *In the Matter of Mark L. Allen, M.D.*, Case No. 04-CVF-02-1214 (January 25, 2005).

Third, Dr. Adelman could not recall any details of the meeting during which the Glenbeigh team reached its final diagnosis of Dr. Bennett, and could not recall what information he had received or reviewed prior to the final diagnosis. Nothing in Dr. Adelman's progress notes and nothing from his testimony reflects that Dr. Adelman independently gathered any information about Dr. Bennett that contributed to the final diagnosis. Thus, at that time the final diagnosis was reached, Dr. Adelman may have only had Mr. Nichols' oral summary of the information gathered and, as noted above, Mr. Nichols' assessment has been found to be not reliable.

Fourth, Dr. Primc questioned whether Dr. Bennett met the criteria for alcohol dependency.

Fifth, Dr. Adelman's testimony and his demeanor while testifying indicated that he did not recall much of this impairment examination.

Sixth, the evidence establishes that Dr. Bennett was involved in two separate incidents in a 12-month period in which the police documented that he was under the influence of alcohol. However, the Hearing Examiner is not convinced that the first incident is a "legal problem," as suggested by Dr. Adelman. The loud-noise complaints in October 2007 resulted in the Waverly police speaking with Dr. Bennett and his neighbor, and reports were generated to document the incidents. However, no charges or arrests were made; instead, Dr. Bennett and his neighbor were given a warning. Such does not amount to a "legal problem" of the caliber reflected in DSM (A)(3), the example of which is an arrest for substance-related disorderly conduct.

Like Glenbeigh, the Hearing Examiner found Dr. Bennett to be highly defensive and blaming others for many of the negative events in his life. Moreover, the Hearing Examiner found Mr. Fortner's testimony to be credible, and the diluted urine sample from January 2008 to be damaging evidence. In addition, Dr. Bennett has exercised poor judgment in driving his car after consuming alcohol, and also exercised poor judgment in driving his car when not wearing his eyeglasses. However, none of these factors sufficiently establish, as a matter of law, that Dr. Bennett is impaired in his ability to practice medicine and surgery according to acceptable and prevailing standards of care. Moreover, Dr. Jones, an addictionologist upon whom the Board has relied in the past, found that Dr. Bennett does not meet the criteria for impairment, and can practice according to acceptable and prevailing standards of care.

With regard to Dr. Bennett's story of the alleged drugging on December 24, 2007, the Hearing Examiner found it unconvincing. More importantly, however, that story is not relevant to determine whether Dr. Bennett is impaired because no evidence suggests that Dr. Bennett is impaired due to habitual or excessive use or abuse of substances other than alcohol. Thus, any accidental or intentional drugging that may have occurred on December 24 is not relevant to an analysis of Dr. Bennett's use or abuse of alcohol.

In summary, although Dr. Bennett has been intoxicated, the evidence presented is not sufficiently reliable, probative, and substantial in order to find that Dr. Bennett is impaired in his ability to

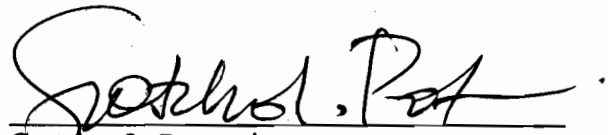
practice medicine and surgery as set forth in Section 4931.22(B)(26), Ohio Revised Code. Moreover, the Board was substantially justified in pursuing this allegation because the Board did not previously have before it all of the information that was presented during the hearing.

PROPOSED ORDER

It is hereby ORDERED, that:

> The allegations against Jack David Bennett, M.D., as set forth in the September 10, 2008, notice of opportunity for hearing in Case No. 08-CRFR-113, are DISMISSED.

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



Gretchen L. Petrucci
Hearing Examiner

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EXCERPT FROM THE DRAFT MINUTES OF JUNE 10, 2009

REPORTS AND RECOMMENDATIONS, MOTIONS FOR RECONSIDERATION & PROPOSED FINDINGS AND PROPOSED ORDERS

Dr. Madia announced that the Board would now consider the Reports and Recommendations, the Motion for Reconsideration and the Proposed Findings and Proposed Order appearing on its agenda. The matter of Muhammad Z. Shrayyef, M.D., will not be considered this month, as the Board has not been able to verify Dr. Shrayyef's receipt of the Report and Recommendation.

Dr. Madia asked whether each member of the Board had received, read and considered the hearing record; the Findings of Fact, Conclusions of Law and Proposed Orders, and any objections filed in the matters of Gary Charles Gelesh, D.O.; David Miles Barrere, M.D.; Jack David Bennett, M.D.; Shannon Lin Boyer; Heather Victoria Downey; Abby R. Uridel, M.T.; and David Wei Wang, M.D.; the Motion for Reconsideration in the Matter of Jeffrey E. White, M.D.; and the Proposed Findings and Proposed Order in the matter of Andrew Beistel, D.O. A roll call was taken:

ROLL CALL:	Mr. Albert	- aye
	Dr. Talmage	- aye
	Dr. Suppan	- aye
	Dr. Varyani	- aye
	Mr. Hairston	- aye
	Dr. Amato	- aye
	Dr. Stephens	- aye
	Dr. Mahajan	- aye
	Dr. Steinbergh	- aye
	Dr. Madia	- aye

Dr. Madia 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. Talmage	- aye
	Dr. Suppan	- aye
	Dr. Varyani	- aye
	Mr. Hairston	- aye
	Dr. Amato	- aye
	Dr. Stephens	- aye
	Dr. Mahajan	- aye

Dr. Steinbergh - aye
Dr. Madia - aye

Dr. Madia 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. In the matters before the Board today, Dr. Talmage served as Secretary and Mr. Albert served as Supervising Member.;

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

.....

Mr. Jacobson joined the meeting during the previous discussion.

Dr. Varyani asked Mr. Jacobson whether he had received, read and considered the hearing record; the Findings of Fact, Conclusions of Law and Proposed Orders, and any objections filed in the matters of Gary Charles Gelesh, D.O.; David Miles Barrere, M.D.; Jack David Bennett, M.D.; Shannon Lin Boyer; Heather Victoria Downey; Abby R. Uridel, M.T.; and David Wei Wang, M.D.; the Motion for Reconsideration in the Matter of Jeffrey E. White, M.D.; and the Proposed Findings and Proposed Order in the matter of Andrew Beistel, D.O., and 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. Mr. Jacobson responded "yes" to both questions.

.....

JACK DAVID BENNETT, M.D.

Dr. Madia directed the Board's attention to the matter of Jack David Bennett, M.D. He advised that objections were filed by the State to Hearing Examiner Petrucci's Report and Recommendation and were previously distributed to Board members.

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

Dr. Bennett was accompanied by his attorney, Eric J. Plinke, Esq. Mr. Plinke advised that objections weren't filed because they agreed with the Hearing Examiner's Findings of Facts, Conclusions of Law and Summary of Evidence. In particular, he thinks that her analysis and explanation of the Proposed Order is an excellent legal summary supporting the Proposed Order. He notes that it really details witness testimony that was not sufficient, probative or reliable under the legal standard before the Board. Additionally, the testimony was very similar to testimony that was previously found to be unreliable by the

Franklin County Court of Common Pleas in the *Matter of Mark Allen*, involving the very same witness engaging in similar conduct.

Mr. Plinke addressed the objections filed by the State's Attorney, stating that if the Board compares this rationale and analysis for the Order and Summary of the Evidence, the objections can be disregarded.

Dr. Bennett thanked the Board for letting him address it. He stated that he would like to say that he's not an impaired physician. He added that he's feeling a little bit nervous because he's not used to speaking in public. He again stated that he would like to assure the Board that he's not an impaired physician and he's not a danger to the public.

Dr. Bennett stated that this is the first time in his life that he's ever been questioned about any of these matters. Since Christmas of 2007, he has not had the slightest problem with any person and he has been much more careful about those with whom he associates. Dr. Bennett stated that he can assure the Board that he will never have any problem like this again in the future.

Dr. Bennett asked that the Board approve the Hearing Examiner's Report and Recommendation. He stated that he feels that the Glenbeigh evaluation was unfair on many levels. For example, the counselor, Roy Nichols, put things into his chart that he never said. Dr. Bennett stated that he doesn't know if Mr. Nichols was confusing him with other patients with whom he talked, but Mr. Nichols put completely false things into his medical record. Dr. Bennett stated that he even sent a letter to Glenbeigh asking them to address this, and they completely ignored him. Dr. Bennett stated that he also feels that the diagnosis at Glenbeigh was based almost entirely on hearsay.

Dr. Madia advised Dr. Bennett that he has one more minute to conclude his address.

Dr. Bennett stated that Dr. Adelman spent less than two minutes with him and only asked him one question, which was where he went to medical school.

Dr. Bennett stated that he believes that the Hearing Examiner brought common sense to this whole situation.

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

Ms. Pfeiffer addressed the Board, stating that she was not the Assistant Attorney General who tried this case; however, she's entered an appearance as co-counsel in order to address the Board today.

Ms. Pfeiffer stated that she, respectfully but strongly, disagrees with the Proposed Order of dismissal in this case. While this particular case may not be the most obvious case of impairment that has come before the Board, it is clear from the record that there was sufficient evidence for the Board to find by a preponderance of evidence that Dr. Bennett is, in fact, an impaired practitioner. The record in this case reveals a repetitive series of episodes of markedly aberrant behavior on the part of Dr. Bennett over an

extensive period of time, with each episode involving the use of alcohol or drugs. From his multiple run-ins with law enforcement, including two arrests for suspected DUI, to his rather bizarre story leading up to his arrest on Christmas day of 2007, there is sufficient evidence for the Board to conclude that Dr. Bennett is, in fact, impaired in his ability to practice.

Ms. Pfeiffer stated that that was the conclusion that was reached by Dr. Adelman of the Board-approved treatment provider, Glenbeigh Hospital. Dr. Adelman's opinion is the opinion of the only addiction medicine expert who testified in this case, and his testimony should be given great weight. Instead of focusing on the Respondent's attacks on Dr. Adelman and the counselor, Roy Nichols, she would urge the Board to focus on Dr. Bennett, his actions, and the expert opinion provided at hearing, under oath, by an addiction medicine physician.

Ms. Pfeiffer stated that, with all due respect to the Hearing Examiner, it is her position that the Hearing Examiner's conclusions are erroneous and should be modified, as outlined in the objections that were filed. Her reasons are as follows:

1. An unsworn written statement, purportedly issued by Dr. Edna Jones, was allowed into the record, over the State's objections, without any chance by the Assistant Attorney General to question Dr. Jones on the basis of her opinion. The Hearing Examiner's reliance upon the written statement of Dr. Jones, in her conclusion that Dr. Bennett is not impaired, is not proper. Ms. Pfeiffer stated that the witness statement of Dr. Jones should be given little or no weight by the Board for the reasons that it was not authenticated, it was not sworn to, it was not under oath, and it was not subject to cross-examination. Ms. Pfeiffer stated that the heart and soul of the issue for this case was one of impairment. To allow that unsworn statement to come in and to be relied upon as heavily as she did was erroneous.

2. The Hearing Examiner placed such heavy emphasis on the DSM-IV criteria that she essentially ignored, discounted and disregarded the expert opinion of Dr. Adelman. Ms. Pfeiffer stated that the DSM-IV is a useful tool and it's used to assist in the diagnosis of psychiatric conditions; however, meeting exact specific criteria of a DSM-IV is not the sole, dispositive mechanism used by a physician to make a diagnosis. A clinical evaluation is crucial. In this case, Dr. Adelman used his professional judgment and training to find and conclude that Dr. Bennett meets the clinical criteria for his diagnosis.

Ms. Pfeiffer urged the Board to adopt the diagnosis and recommendation of Dr. Adelman, make a finding that Dr. Bennett is, in fact, impaired in his ability to practice medicine and surgery, and order that he undergo the 28 days of impairment treatment as required by the Board's rules.

DR. VARYANI MOVED TO APPROVE AND CONFIRM MS. PETRUCCI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER IN THE MATTER OF JACK DAVID BENNETT, M.D. DR. STEINBERGH SECONDED THE MOTION.

Dr. Madia stated that he would now entertain discussion in the above matter.

Dr. Stephens stated that, although nothing has been reported since 2007, when she looks at this case and she looks at physicians with whom she deals on a regular basis, the police have not been to their houses. They have not been caught in altercations with alcohol on their breath or anything like that. She stated that, to her, this looks like impairment.

Dr. Steinbergh stated that she also thinks that this looks like impairment. She stated that, over the years, when the Board takes a look at the behavior of physicians who are ultimately diagnosed as impaired, they demonstrate the same type of behavior as Dr. Bennett; i.e., very risky behavior. This is risky behavior on the part of any person, but especially in terms of a professional. Drinking and driving is absolutely inappropriate. If physicians don't know the difference, the impairment that it causes in your mind, the lack of neurologic control and so forth, if you don't understand that as a physician, she doesn't know who else should.

Dr. Steinbergh stated that she appreciates Dr. Bennett's coming before the Board today, because she thinks that he makes an appropriate presentation. However, from reading the record, she thinks that he abused alcohol. She doesn't know if he continues to use alcohol.

Dr. Steinbergh also noted that Dr. Bennett hasn't worked for over two years now, and it's a huge concern for her. She advised that it would not be appropriate to dismiss this case. Dr. Bennett is someone who could go out tomorrow, get a job and care for patients. He could get in his car, he could drink, he could kill someone. Dr. Steinbergh stated that she sees him as being a risky individual and someone she could not dismiss today.

Dr. Steinbergh added that she agrees with the State's objections. She thinks that Mr. Wilcox outlined it very appropriately. Common sense tells her, after all of these years of service on the Board, that Dr. Bennett is impaired. There's some degree of impairment. She doesn't know the answer to the questions as to whether he's as bad as somebody else, or as at much risk as somebody else. She does know that dismissal is inappropriate.

DR. STEINBERGH MOVED TO AMEND THE CONCLUSION OF LAW TO STATE: THE ACTS, CONDUCT, AND/OR OMISSIONS OF JACK DAVID BENNETT, M.D., AS SET FORTH IN FINDINGS OF FACT 1 THROUGH 4, CONSTITUTE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE TO ESTABLISH THAT DR. BENNETT IS IMPAIRED IN HIS "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 SET FORTH IN SECTION 4731.22(B)(26), OHIO REVISED CODE.

AND TO AMEND THE PROPOSED ORDER TO THE FOLLOWING:

It is hereby ORDERED that:

A. **SUSPENSION:** The certificate of Jack David Bennett, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time.

B. **CONDITIONS FOR REINSTATEMENT OR RESTORATION**: The Board shall not consider reinstatement or restoration of Dr. Bennett's certificate to practice medicine and surgery until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration**: Dr. Bennett shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.

2. **Completion of Inpatient Treatment**: Dr. Bennett shall complete a minimum of twenty-eight days of inpatient or residential treatment, or a combination thereof, for his substance abuse. Such inpatient or residential treatment shall be completed without interruption. Further, such inpatient or residential treatment shall be provided in accordance with Rule 4731-16-08(A)(13), Ohio Administrative Code, by a treatment provider approved under Section 4731.25, Ohio Revised Code.

   In addition, upon discharge from treatment, Dr. Bennett shall enter into, and thereafter maintain compliance with, a post-discharge aftercare contract which complies with Rule 4731-16-10, Ohio Administrative Code, with a treatment provider approved under Section 4731.25, Ohio Revised Code, who has access to Dr. Bennett's treatment records.

3. **Demonstration of Ability to Resume Practice**: Dr. Bennett 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:

   a. Certification from a treatment provider approved under Section 4731.25 of the Revised Code that Dr. Bennett has successfully completed any required inpatient treatment.

   b. Evidence of continuing full compliance with a post-discharge aftercare contract with a treatment provider approved under Section 4731.25 of the Revised Code. Such evidence shall include, but not be limited to, a copy of the signed aftercare contract. The aftercare contract must comply with

rule 4731-16-10 of the Administrative Code.

c. Two written reports indicating that Dr. Bennett'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 physicians knowledgeable in the area of addictionology and who are either affiliated with a current Board-approved treatment provider or otherwise have been approved in advance by the Board to provide an assessment of Dr. Bennett. Further, the two aforementioned physicians shall not be affiliated with the same treatment provider or medical group practice. Prior to the assessments, Dr. Bennett shall provide the evaluators with copies of patient records from any evaluations and/or treatment that he has received, and a copy of this Board Order. The reports from the evaluators shall include any recommendations for treatment, monitoring, or supervision of Dr. Bennett, and any conditions, restrictions, or limitations that should be imposed on Dr. Bennett's practice. The reports shall also describe the basis for the evaluator's determinations.

All reports required pursuant to this paragraph shall be based upon examinations occurring within the three months immediately preceding any application for reinstatement. Further, at the discretion of the Secretary and Supervising Member of the Board, the Board may request an updated assessment and report if the Secretary and Supervising Member determine that such updated assessment and report is warranted for any reason.

4. **Additional Evidence of Fitness To Resume Practice**: Dr. Bennett shall present documentation satisfactory to the Board of successful completion of the Special Purpose Examination offered by the Federation of State Medical Boards or of the certification or recertification examination of the American Board of Pediatrics as additional evidence of his fitness to resume practice.

C. **PROBATION**: Upon reinstatement or restoration, Dr. Bennett's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five years:

1. **Obey the Law**: Dr. Bennett shall obey all federal, state, and local laws, and all rules governing the practice of medicine and surgery in Ohio.

2. **Personal Appearances**: Dr. Bennett shall appear in person for interviews before the Board or its designated representative. The first such appearance

shall take place during the third month following the month in which Dr. Bennett's certificate is restored or reinstated. Subsequent personal appearances must occur every three months thereafter, and/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.

3. **Quarterly Declarations**: Dr. Bennett shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which Dr. Bennett's certificate is restored or reinstated. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.

4. **Abstention from Drugs**: Dr. Bennett shall abstain completely from the personal use or personal possession of drugs, except those prescribed, dispensed or administered to him by another so authorized by law who has full knowledge of Dr. Bennett's history of substance abuse. Further, in the event that Dr. Bennett is so prescribed, dispensed or administered any controlled substance, carisoprodol, or tramadol, Dr. Bennett shall notify the Board in writing within seven days, providing the Board with the identity of the prescriber; the name of the drug Dr. Bennett received; the medical purpose for which he received said drug; the date such drug was initially received; and the dosage, amount, number of refills, and directions for use. Further, within thirty days of the date said drug is so prescribed, dispensed, or administered to him, Dr. Bennett shall provide the Board with either a copy of the written prescription or other written verification from the prescriber, including the dosage, amount, number of refills, and directions for use.

5. **Abstention from Alcohol**: Dr. Bennett shall abstain completely from the use of alcohol.

6. **Drug & Alcohol Screens; Drug Testing Facility and Collection Site**: Dr. Bennett shall submit to random urine screenings for drugs and alcohol at least four times per month, or as otherwise directed by the Board. Dr. Bennett 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, and shall include Dr. Bennett's drug(s) of choice.

   Dr. Bennett shall abstain from the use of any substance and the consumption of poppy seeds or any other food or liquid that may produce a low level positive

result in a toxicology screen. Dr. Bennett acknowledges that he understands that the consumption or use of such substances, including but not limited to substances such as mouthwash or hand-cleaning gel, may cause a positive drug screen that may not be able to be differentiated from intentional ingestion, and therefore such consumption or use is prohibited.

All such urine screenings for drugs and alcohol shall be conducted through a Board-approved drug testing facility and collection site, except as provided in Paragraph 7 below, and the screening process shall require a daily call-in procedure.

Dr. Bennett shall submit, at his expense and on the day selected, urine specimens for drug and/or alcohol analysis. All specimens submitted by Dr. Bennett shall be negative, except for those substances prescribed, administered, or dispensed to him in conformance with the terms, conditions and limitations set forth in this Board Order. Refusal to submit such specimen, or failure to submit such specimen on the day he is selected or in such manner as the Board may request, shall constitute a violation of this Board Order.

Further, within thirty days of the effective date of this Board Order, Dr. Bennett shall enter into the necessary financial and/or contractual arrangements with the Board-approved drug testing facility and/or collection site in order to facilitate the urine screening process in the manner required by this Board Order. Further, Dr. Bennett shall promptly provide to the Board written documentation of completion of such arrangements, including a copy of any contract entered into between Dr. Bennett and the Board-approved drug testing facility and/or collection site. Dr. Bennett's failure to timely complete such arrangements, or failure to timely provide written documentation to the Board of completion of such arrangements, shall constitute a violation of this Board Order.

Dr. Bennett shall ensure that the urine screening process performed through the Board-approved drug testing facility and/or collection site requires a daily call-in procedure; that the urine specimens are obtained on a random basis; and that the giving of the specimen is witnessed by a reliable person. In addition, Dr. Bennett and the Board-approved drug testing facility and collection site shall assure that appropriate control over the specimen is maintained and shall immediately inform the Board of any positive screening results.

Dr. Bennett shall ensure that the Board-approved drug testing facility and/or collection site provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Board Order, and whether all urine screens have been

negative.

In the event that the Board-approved drug testing facility and/or collection site becomes unable or unwilling to serve as required by this Board Order, Dr. Bennett must immediately notify the Board in writing, and make arrangements acceptable to the Board, pursuant to Paragraph 7 below, as soon as practicable. Dr. Bennett shall further ensure that the Board-approved drug testing facility and/or collection site also notifies the Board directly of its inability to continue to serve and the reasons therefore.

Dr. Bennett acknowledges that the Board expressly reserves the right to withdraw its approval of any drug testing facility and/or collection site in the event that the Secretary and Supervising Member of the Board determine that the drug testing facility and/or collection site has demonstrated a lack of cooperation in providing information to the Board or for any other reason.

7. In the event that utilizing the Board-approved drug testing facility and/or collection site as set forth in Paragraph 6 above creates an extraordinary hardship upon Dr. Bennett, as determined in the sole discretion of the Board, then subject to the following requirements, the Board may approve an alternate drug testing facility and/or collection site, or a supervising physician, to facilitate the urine screening process for Dr. Bennett:

   a. Within thirty days of the date upon which Dr. Bennett is notified of the Board's determination that utilizing the Board-approved drug testing facility and/or collection site constitutes an extraordinary hardship upon Dr. Bennett, he shall submit to the Board in writing for its prior approval the identity of either an alternate drug testing facility and collection site, or the name of a proposed supervising physician, to whom Dr. Bennett shall submit the required urine specimens. In approving a facility, entity, or an individual to serve in this capacity, the Board will give preference to a facility located near Dr. Bennett's residence or employment location, or to a physician who practices in the same locale as Dr. Bennett. Dr. Bennett shall ensure that the urine screening process performed through the alternate drug testing facility and/or collection site, or through the supervising physician, requires a daily call-in procedure; that the urine specimens are obtained on a random basis; and that the giving of the specimen is witnessed by a reliable person. In addition, Dr. Bennett acknowledges that the alternate drug testing facility and collection site, or the supervising physician, shall assure that appropriate control over the specimen is maintained and shall immediately inform the Board of any positive screening results.

b. Dr. Bennett shall ensure that the alternate drug testing facility and/or collection site, or the supervising physician, provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Board Order, and whether all urine screens have been negative.

c. In the event that the designated alternate drug testing facility and/or collection site, or the supervising physician, becomes unable or unwilling to so serve, Dr. Bennett must immediately notify the Board in writing. Dr. Bennett shall further ensure that the previously designated alternate drug testing facility and collection site, or the supervising physician, also notifies the Board directly of the inability to continue to serve and the reasons therefore. Further, in order to ensure that there will be no interruption in his urine screening process, upon the previously approved alternate drug testing facility, collection site, or supervising physician becoming unable to serve, Dr. Bennett shall immediately commence urine screening at the Board-approved drug testing facility and collection site chosen by the Board, until such time, if any, that the Board approves a subsequent alternate drug testing facility, collection site, or supervising physician, if requested by Dr. Bennett.

d. The Board expressly reserves the right to disapprove any entity or facility proposed to serve as Dr. Bennett's designated alternate drug testing facility and/or collection site, or any person proposed to serve as his supervising physician, or to withdraw approval of any entity, facility or person previously approved to so serve in the event that the Secretary and Supervising Member of the Board determine that any such entity, facility or person has demonstrated a lack of cooperation in providing information to the Board or for any other reason.

8. All screening reports required under this Board Order from the Board-approved drug testing facility and/or collection site, or from the alternate drug testing facility and/or collection site or supervising physician, must be received in the Board's offices no later than the due date for Dr. Bennett's quarterly declaration. It is Dr. Bennett's responsibility to ensure that reports are timely submitted.

9. **Submission of Blood or Urine Specimens upon Request**: The Board retains the right to require, and Dr. Bennett agrees to submit, blood, urine, breath, saliva and/or hair specimens for screening for drugs and alcohol, for analysis of therapeutic levels of medications that may be prescribed for Dr. Bennett, or for

any other purpose, at Dr. Bennett's expense upon the Board's request and without prior notice. Dr. Bennett's refusal to submit a specimen upon request of the Board shall result in a minimum of one year of actual license suspension. Further, the collection of such specimens shall be witnessed by a representative of the Board, or another person acceptable to the Secretary or Supervising Member of the Board.

10. **Rehabilitation Program**: Dr. Bennett shall maintain participation in an alcohol and drug rehabilitation program, such as A.A., N.A., C.A., or Caduceus, no less than three times per week, unless otherwise determined by the Board. Substitution of any other specific program must receive prior Board approval. Dr. Bennett shall submit acceptable documentary evidence of continuing compliance with this program, which must be received in the Board's offices no later than the due date for Dr. Bennett's quarterly declarations.

11. **Aftercare**: Dr. Bennett shall maintain continued compliance with the terms of the aftercare contract entered into with a Board-approved treatment provider, provided that, where terms of the aftercare contract conflict with terms of this Board Order, the terms of this Board Order shall control.

12. **Absence from Ohio**: Dr. Bennett shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed. Further, the Secretary and Supervising Member of the Board shall have the discretion to grant a waiver of part or all of the probationary terms set forth in this Board Order for occasional periods of absence of fourteen days or less. In the event that Dr. Bennett resides and/or is employed at a location that is within fifty miles of the geographic border of Ohio and any of its contiguous states, Dr. Bennett may travel between Ohio and that contiguous state without seeking prior approval of the Secretary or Supervising Member provided that Dr. Bennett is able to otherwise maintain full compliance with all other terms, conditions and limitations set forth in this Board Order.

13. **Violation of Terms of Probation**: If Dr. Bennett 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.

14. **Required Reporting of Change of Address:** Dr. Bennett shall notify the

Board in writing of any change of residence address and/or principal practice address within 30 days of the change.

D. **TERMINATION OF PROBATION**: Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Bennett's certificate will be fully restored.

E. **RELEASES**: Dr. Bennett 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. Bennett's substance abuse and/or related conditions, or for purposes of complying with this Order, whether such treatment or evaluations occurred before or after the effective date of this Order. 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. Bennett shall also provide the Board written consent permitting any treatment provider from whom Dr. Bennett obtains treatment to notify the Board in the event he fails to agree to or comply with any recommended treatment or with any treatment or aftercare contract. Failure to provide such consent, or revocation of such consent, shall constitute a violation of this Order.

F. **REQUIRED REPORTING AND DOCUMENTATION OF REPORTING**:

1. **Required Reporting to Employers and Hospitals**: Within 30 days of the effective date of this Board Order, Dr. Bennett shall provide a copy of this Board Order to all employers or entities with which he is under contract to provide health care services (including but not limited to third party payors) or is receiving training, and the Chief of Staff at each hospital where he has privileges or appointments Further, Dr. Bennett shall promptly provide a copy of this Board Order to all employers or entities with which he contracts to provide health care services, or applies for or receives training, and the Chief of Staff at each hospital where he applies for or obtains privileges or appointments. In the event that Dr. Bennett provides any health care services or health care direction or medical oversight to any emergency medical services organization or emergency medical services provider in Ohio, within 30 days of the effective date of this Board Order, Dr. Bennett shall provide a copy of this Board Order to the Ohio Department of Public Safety, Division of Emergency Medical Services.

This requirement shall continue until Dr. Bennett receives from the Board

written notification of his successful completion of probation as set forth in Paragraph D, above.

2. **Required Reporting to Other State Licensing Authorities**: Within 30 days of the effective date of this Board Order, Dr. Bennett shall provide a copy of this Board Order to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license, as well as any federal agency or entity, including but not limited to the Drug Enforcement Agency, through which he currently holds any license or certificate. Dr. Bennett further agrees to provide a copy of this Board Order at time of application to the proper licensing authority of any state in which he applies for any professional license or for reinstatement of any professional license.

   This requirement shall continue until Dr. Bennett receives from the Board written notification of his successful completion of probation as set forth in Paragraph D, above.

3. **Documentation that the Required Reporting Has Been Performed**: Dr. Bennett shall provide the Board with **one** of the following documents as proof of each required notification within 30 days of the date of each notification required above: (1) the return receipt of certified mail within 30 days of receiving that return receipt, (2) an acknowledgement of delivery bearing the original ink signature of the person to whom a copy of the Board Order was hand delivered, (3) the original facsimile-generated report confirming successful transmission of a copy of the Board Order to the person or entity to whom a copy of the Board Order was faxed, or (4) an original computer-generated printout of electronic mail communication documenting the email transmission of a copy of the Board Order to the person or entity to whom a copy of the Board Order was emailed.

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

Dr. Steinbergh stated that she hopes that Dr. Bennett has the time to wait to hear some of the stories of those probationers who will be making personal appearances today. He will see some people who are just beginning this process, and some who are finishing the process. Overwhelmingly, the doctors who finish this process, the doctors who have been impaired and have demonstrated the problems that Dr. Bennett has demonstrated, are pleased. They're never pleased at the beginning, but at the end they are. They've changed their behavior and recognized the difference in themselves. They go on to be, the Board hopes, very appropriate physicians.

DR. AMATO SECONDED THE MOTION.

Dr. Amato commented that if it walks like a duck, quacks like a duck, swims like a duck, it's probably a duck.

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

ROLL CALL:	Mr. Albert	- abstain
	Dr. Talmage	- abstain
	Dr. Suppan	- aye
	Dr. Varyani	- aye
	Mr. Jacobson	- aye
	Mr. Hairston	- aye
	Dr. Amato	- aye
	Dr. Stephens	- aye
	Dr. Mahajan	- aye
	Dr. Steinbergh	- aye
	Dr. Madia	- aye

The motion carried.

DR. STEINBERGH MOVED TO APPROVE AND CONFIRM MS. PETRUCCI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER, AS AMENDED, IN THE MATTER OF JACK DAVID BENNETT, M.D. DR. VARYANI SECONDED THE MOTION. A vote was taken:

ROLL CALL:	Mr. Albert	- abstain
	Dr. Talmage	- abstain
	Dr. Suppan	- aye
	Dr. Varyani	- aye
	Mr. Jacobson	- aye
	Mr. Hairston	- aye
	Dr. Amato	- aye
	Dr. Stephens	- aye
	Dr. Mahajan	- aye
	Dr. Steinbergh	- aye
	Dr. Madia	- aye

The motion carried.

State Medical Board of Ohio

30 E. Broad Street, 3rd Floor, Columbus, OH 43215-6127

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

September 10, 2008

Case number: 08-CRF- 113

Jack David Bennett, M.D.
617 S. Market Street
Apt. G2
Waverly, Ohio 45690

Dear Doctor Bennett:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] 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 you or place you on probation for one or more of the following reasons:

(1) By letter dated June 18, 2008, the Board notified you of its determination that it had reason to believe that you are in violation of Section 4731.22(B)(26), Ohio Revised Code, and ordered you to undergo a seventy-two hour inpatient examination beginning Tuesday, July 1, 2008, to determine if you are in violation of Section 4731.22(B)(26), Ohio Revised Code. The Board's determination was based upon one or more of the reasons outlined in such letter, including an alcohol-related traffic arrest; reports that you acted in an intoxicated and erratic fashion at a holiday party; and a urine sample you provided to a Board Investigator that was tested and determined to be low in creatinine and specific gravity, indicative that the specimen had been diluted.

(2)(a) By letter dated July 11, 2008, from Christopher Adelman, M.D., of Glenbeigh Hospital, a Board-approved treatment provider, the Board was notified that following the Board-ordered evaluation, you were determined to be impaired in your ability to practice according to acceptable and prevailing standards of care and to require residential treatment. Further, the Board has not received information that you have entered inpatient treatment.

(b) The Board has received information that you are unemployed and have not actively practiced medicine since in or about September 2006.

Your acts, conduct, and/or omissions 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.

Mailed 9-11-08

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 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 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 you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, 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,

Lance A. Talmage, M.D.
Secretary

LAT/DSZ/flb
Enclosures

CERTIFIED MAIL #91 7108 2133 3934 3688 1125
RETURN RECEIPT REQUESTED

cc: Eric J. Plinke, Esq.
Dinsmore & Shohl, LLP
191 W. Nationwide Blvd., Suite 300
Columbus, Ohio 43215

CERTIFIED MAIL #91 7108 2133 3934 3688 1217
RETURN RECEIPT REQUESTED