State Medical Board of Ohio

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March 10, 1999

Jose A. Torres, M.D.
3050 W. 114th
Cleveland, OH 44111

Dear Doctor Torres:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Daniel Roberts, Attorney Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on March 10, 1999, including motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board of Ohio.

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

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

THE STATE MEDICAL BOARD OF OHIO

Anand G. Garg, M.D.
Secretary

AGG:jam
Enclosures

CERTIFIED MAIL RECEIPT NO. Z 233 839 154
RETURN RECEIPT REQUESTED

cc: Robert B. Trattner, Esq.
CERTIFIED MAIL RECEIPT NO. Z 233 839 155
RETURN RECEIPT REQUESTED

Mailed 3/12/99

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Daniel Roberts, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on March 10, 1999, including motions approving and confirming the Findings of Fact, Conclusions and Proposed Order of the Hearing Examiner as the Findings and Order of the State Medical Board of Ohio; constitute a true and complete copy of the Findings and Order of the State Medical Board in the Matter of Jose A. Torres, M.D., as it appears in the Journal of the State Medical Board of Ohio.

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

Anand G. Garg, M.D.
Secretary

(SEAL)

March 10, 1999
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

*

JOSE A. TORRES, M.D. *

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on March 10, 1999.

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

It is hereby ORDERED that:

1. The allegations against Jose A. Torres M.D., as specified in the Board's September 9, 1998, notice of opportunity for hearing, are dismissed.

2. This Order shall have no effect on the Board's order of June 14, 1995, which shall remain in effect.

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

Anand G. Garg, M.D.
Secretary

(SEAL)

March 10, 1999
Date

REPORT AND RECOMMENDATION
IN THE MATTER OF JOSE A. TORRES, M.D.

The Matter of Jose A. Torres, M.D., was heard by Daniel Roberts, Attorney Hearing Examiner for the State Medical Board of Ohio, on January 7, 1999.

INTRODUCTION

I. Basis for Hearing

A. By letter dated October 14, 1998, the State Medical Board of Ohio [Board] notified Jose A. Torres, M.D., that it had proposed to determine whether to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board based its proposed action on the following allegations:

1. On or about July 8, 1992, the State Medical Board of Ohio ratified a Consent Agreement with Dr. Torres in lieu of formal proceedings based upon a violation of Section 4731.22(B)(26), Ohio Revised Code.

2. On or about September 19, 1994, the Board issued to Dr. Torres a certificate to practice medicine and surgery in the State of Ohio. At that time, pursuant to its terms, the above-referenced Consent Agreement became effective.

3. On or about January 11, 1995, and April 12, 1995, the Board issued to Dr. Torres Notices of Opportunity for Hearing alleging violations of Sections 4731.22(B)(5), (B)(10), and/or (B)(14), Ohio Revised Code. Thereafter, on or about June 14, 1995, the Board entered an Order revoking Dr. Torres certificate and staying such revocation, subject to certain probationary terms, conditions, and limitations for a period of at least five (5) years.

   a. Paragraph (e) of this Order states that Dr. Torres "shall abstain completely from the personal use or possession of drugs except those prescribed, administered, or dispensed to [him] by another so authorized by law who has full knowledge of [his] history of chemical dependency."

   b. Nonetheless, Dr. Torres tested positive for cocaine, on or about June 29, 1998, although it had not been prescribed, dispensed or administered to him in accordance with this provision.

The Board alleged that Dr. Torres' "acts, conduct, and/or omissions as alleged in paragraph (3) above, individually and/or collectively, constitute a '[v]iolation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued,' as that clause is used in Section 4731.22(B)(15), Ohio Revised Code."

The Board further alleged that Dr. Torres' "acts, conduct, and/or omissions as alleged in paragraph (3) 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." (State's Exhibit 1A)

B. On October 21, 1998, Dr. Torres submitted a written hearing request. (State's Exhibit 1B)

II. Appearances

A. On behalf of the State of Ohio: Betty D. Montgomery, Attorney General, by Anne Berry Strait, Assistant Attorney General.

B. On behalf of the Respondent: Robert B. Trattner, Esq.

EVIDENCE EXAMINED

I. Testimony Heard

A. Presented by the State of Ohio.

1. Jan Sussex

B. Presented by Respondent.

1. Maria Caraballo
2. Gregory B. Collins, M.D.
3. Jose A. Torres, M.D.

II. Exhibits Examined

A. Presented by the State

1. State's Exhibits 1A-1N: Procedural exhibits.

2. State's Exhibit 2: May 29, 1992, Consent Agreement between Jose Antonio Torres, M.D. and The State Medical Board of Ohio.

3. State's Exhibit 3: Entry of Order, Report and Recommendation, and excerpt of draft minutes of the Board , meeting in regular session June 14, 1995.

4. State's Exhibit 4: August 12, 1998, fax transmission from Dr. Torres to Jan Sussex, Compliance Officer, State Medical Board of Ohio, containing a copy of immunoassay results of Dr. Torres' June 29, 1998, urine sample.

5. State's Exhibit 5: September 1998 Confidential Quarterly Report from Gregory B. Collins, M.D., to Ms. Sussex, attaching a copy of The Cleveland Clinic Foundation Urine Toxicology Screen Cumulative Report for Dr. Torres covering the period June 20 to July 13, 1998.

6. State's Exhibit 6: August 28, 1998, letter from Dr. Torres to Ms. Sussex.

7. State's Exhibit 7: October 8, 1998, letter from Dr. Collins to Ms. Sussex.

8. State's Exhibit 8: October 21, 1998, letter from Dr. Collins to Ms. Sussex.

9. State's Exhibit 9: Certified copy of the minutes of the October 1996, Board meeting concerning Dr. Torres.

B. Presented by the Respondent.

1. Respondent's Exhibit A: Affidavit of Jose Caraballo.

2. Respondent's Exhibit B: Curriculum vitae of Gregory B. Collins, M.D.

3. Respondent's Exhibit C: June 26, 1998, urine toxicology screen cumulative report.

4. Respondent's Exhibit D: October 9, 1998, urine toxicology screen cumulative report.

5. Respondent's Exhibit E: Urine screen cumulative inquiry results for Dr. Torres for the period June 1, 1998, to October 10, 1998.

6. Respondent's Exhibit F: AA/NA Attendance Logs. (Note: Exhibit sealed to protect the anonymity of other AA and NA participants.)

7. Respondent's Exhibit G: January 5, 1999, letter to the Board from Elzora Dudley.

8. Respondent's Exhibit H: December 21, 1998, affidavit of Jennifer Lasky.

SUMMARY OF THE EVIDENCE

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

1. Jose A. Torres M.D., testified that he attended The University of Puerto Rico, receiving an associate's degree in math, biology, and chemistry. He then transferred to The Ohio State University, completing a Bachelor of Science degree in 1980. Dr. Torres then returned to Puerto Rico where he graduated from Universitatis Centralis Caribensis, receiving his medical degree there in 1986. Dr. Torres completed one year of surgical internship at Fairview General Hospital, which he followed up by completing a residency in anesthesiology at Seton Hall University in 1990. Dr. Torres next completed an eighteen month fellowship in pain management followed by six months as a researcher at the Cleveland Clinic. Dr. Torres received a license to practice medicine and surgery in Ohio in 1994. Dr. Torres testified at hearing that he is presently working at Shaker Square Medical Clinic as a pain management specialist. (Hearing Transcript [Tr.] at 94-97)

2. Jan Sussex testified on behalf of the State of Ohio. Ms. Sussex is the Compliance Officer for the Board. In her testimony, Ms. Sussex gave a summary of the history of the present case and identified a number of documents. Ms. Sussex explained that:

   - On or about July 8, 1992, the State Medical Board of Ohio ratified a Consent Agreement with Dr. Torres in lieu of formal proceedings based upon a violation of Section 4731.22(B)(26), Ohio Revised Code. (Tr. 20; State's Exhibit [Sts. Ex.] 2)

   - On or about September 19, 1994, the Board issued to Dr. Torres a certificate to practice medicine and surgery in the State of Ohio. At that time, pursuant to its terms, the July 8, 1992, Consent Agreement became effective. (Tr. 20-21; Sts. Ex. 3)

- The Board issued notices of opportunity for hearing to Dr. Torres on or about January 11, 1995, and April 12, 1995, alleging violations of Sections 4731.22(B)(5), (B)(10), and/or (B)(14), Ohio Revised Code. Thereafter, on or about June 14, 1995, the Board entered an Order revoking Dr. Torres certificate and staying such revocation, subject to certain probationary terms, conditions, and limitations for a period of at least five (5) years. (Tr. 20-21; Sts. Ex. 3)

- Paragraph (e) of this Order states that Dr. Torres "shall abstain completely from the personal use or possession of drugs except those prescribed, administered, or dispensed to [him] by another so authorized by law who has full knowledge of [his] history of chemical dependency." (Tr. 20-21; Sts. Ex. 3)

3. Gregory B. Collins, M.D. was called as a witness on behalf of the Respondent. Dr. Collins is a Psychiatrist and Director of the Alcohol and Drug Recovery Center at the Cleveland Clinic Foundation. Dr. Collins is Dr. Torres' treating physician. Dr. Collins testified that he has been licensed to practice medicine in the state of Ohio for 28 years. He further testified that he had received most of his undergraduate and medical school education from The Ohio State University, receiving his undergraduate degree in 1966 and his medical degree in 1970. Dr. Collins further explained that he completed a three year residency in psychiatry in 1973 and is board certified in both psychiatry and addiction psychiatry. Dr. Collins testified as both a fact witness and as an expert witness. (Tr. 53-61; Respondent's Exhibit [Resp. Ex.] B)

4. Dr. Collins testified that he had known Dr. Torres for almost nine years. Dr. Collins believed that Dr. Torres had been referred to him by a New Jersey impaired physicians program. He stated that he had been treating Dr. Torres "fairly consistently" since that time and that Dr. Torres had been compliant with his treatment program. Dr. Collins further testified that Dr. Torres is active with the Cleveland Clinic's physician Caduceus group. This group meets weekly and is run by Joseph Janesz, a professional counselor. Dr. Collins described Mr. Janesz as "one of [his] most senior and professional counselors." (Tr. 61-62)

   Dr. Collins testified that Dr. Torres' urine is tested on a regular basis. He identified several exhibits which summarized urine screens for Dr. Torres from March 3, 1998, to July 13, 1998, and from August 4, 1998, to October 2, 1998. Dr. Collins further testified that Dr. Torres tested positive for cocaine on a June 29, 1998, screening test. (Tr. 64, 70-71; Resp. Ex. C-E)

5. Maria Caraballo testified on behalf of Dr. Torres. Ms. Caraballo testified that she lived at Dr. Torres' home in 1997 and 1998. She further testified that her son, Jose Caraballo, stayed there in the winter and spring of 1997-1998 but she did not recall which months. Ms. Caraballo appeared uncertain about dates. She further testified that she moved into her own home, and left Dr. Torres home, in September 1998. (Tr. 30-32, 49-50)

Jose Caraballo stated in an affidavit, dated January 6, 1999, that Dr. Torres is his cousin and that Dr. Torres had allowed him to reside with Dr. Torres on occasion. He further stated that Maria Caraballo is his mother and that she also resided with Mr. Caraballo and Dr. Torres on occasion. (Resp. Ex. A)

Jennifer Lasky stated in an affidavit, dated December 21, 1998, that she is a Probation Officer with the Ohio Adult Parole Authority and that she supervised Jose Caraballo. She further stated that on October 29, 1996, Jose Caraballo reported to her that he was living with his cousin, Dr. Jose Torres. [Note: The context of Ms. Lasky's affidavit and the other evidence received in this matter suggest that "1996" is a typographical error in the affidavit and that "1997" is intended.] (Resp. Ex. H)

6. Ms. Caraballo described her son's behavior as "strange" during the period that she and her son lived with Dr. Torres. She described her son as jumpy and very nervous. She complained at hearing that he had associated with people she felt were "no good". Ms. Caraballo recited that her son had been in and out of juvenile homes and prisons. (Tr. 30-33; 47-48)

7. Ms. Caraballo testified that her son, Jose Caraballo, has a drug problem and that Dr. Torres had tried to sponsor and help him. She further explained that she had found evidence of cocaine use by her son while she and her son were living with Dr. Torres She found, in a rice container, a plastic bag containing cocaine. She described this bag as a sandwich style bag that is folded over, and not one with a sealing top. Ms. Caraballo also explained that the cocaine was in powder form. When she confronted her son about the cocaine she had found in the rice tin he denied that it was his. (Tr. 33-34, 39-43)

Ms. Caraballo was unable to be specific concerning the date the rice tin incident occurred, but said that it was while she and her son were living with Dr. Torres, and it was "last year". Her testimony suggests that this incident occurred in 1997 because her son is now 23 years old and she stated that he had been 21 years old at the time of the incident. (Tr. 33-34, 39-43)

Ms. Caraballo testified that, after the incident, she told Dr. Torres about finding the cocaine in the rice. She stated that Dr. Torres spoke with her son and tried to get him help. According to Ms. Caraballo, Dr. Torres told her son that he was no longer welcome to live in Dr. Torres home if he brought cocaine there. Jennifer Lasky stated in her affidavit that on December 12, 1996, Dr. Torres reported to her that Jose Caraballo would be moving out and living elsewhere. [Note: The context of Ms. Lasky's affidavit and the other evidence received in this matter suggest that "1996" is a typographical error in the affidavit and that "1997" is intended.] According to Ms. Caraballo, Dr. Torres did allow her son to stay for a short time after that and that both she and Dr. Torres watched her son closely. During this time period she found additional empty baggies in her son's pants

pockets. She further testified that her son often stayed elsewhere during the period after the rice tin incident. (Tr. 43-45; Resp. Ex. H)

Dr. Torres testified that he does not recall if he told Jennifer Lasky that cocaine had been found in the rice but that Ms. Lasky knew that this had happened. (Tr. 134)

8. Dr. Torres testified that Jose Caraballo is his second cousin and that he has known him all of Mr. Caraballo's life. Dr. Torres further testified that Jose Caraballo had been in and out of detention facilities repeatedly and has had a lot of trouble with the law and with substance abuse. Dr. Torres testified that prior to Mr. Caraballo coming to live with him, and after he learned Jose Caraballo was to be released on initial shock probation, he spoke to Probation Officer Jennifer Lasky. Dr. Torres stated that he told Ms. Lasky about his own substance abuse history and offered to house Jose Caraballo and supervise his recovery. Dr. Torres testified that he had believed Jose Caraballo had been drug free for 18 months prior to being released. (Tr. 106-108)

Dr. Torres described his initial efforts to help Jose Caraballo with his recovery program. Dr. Torres further described how he cooperated with Ms. Lasky and kept her informed regarding Mr. Caraballo. Dr. Torres noted that Jose Caraballo's relapse was not a sudden one and that he actually did well for the first three or four months after his release on shock probation. Dr. Torres testified that after cocaine was discovered in a rice tin in his home he helped Jose Caraballo get into a rehabilitation program. Dr. Torres testified that Ms. Lasky was helpful in this process and that they sought formal medical help for Jose Caraballo within one week after the cocaine was fond, eventually getting him in to St. Michael's and St. Alexis' Rehabilitation Program [St. Alexis']. Dr. Torres testified that, while Mr. Caraballo was in rehabilitation, he visited Dr. Torres' home on weekend passes. (Tr. 108-110)

9. Dr. Torres testified that although there were efforts within a week of the rice incident to get treatment for Jose Caraballo, it was not until two or three months later that he was actually admitted to the rehabilitation center. Dr. Torres testified that Mr. Caraballo entered St. Alexis' around Christmas 1997. He testified that Mr. Caraballo left his home within two weeks after the rice incident and moved in with Mr. Caraballo's sister. (Tr. 126-127)

Jose Caraballo stated in his affidavit that he was admitted to St. Alexis' as an inpatient on December 22, 1997, to treat alcohol and cocaine addiction. Jose Caraballo stated in his affidavit that he completed the program at St. Alexis' after three months but shortly thereafter relapsed and tested positive for cocaine at his probation office. Jennifer Lasky stated in her affidavit that on December 22, 1997, Jose Caraballo entered St. Alexis' and remained there until March 13, 1998. (Resp. Ex. A, H)

Dr. Collins testified that, prior to July 1998, Dr. Torres had not told him about Dr. Torres' sponsoring Jose Caraballo in a 12 step program and allowing him to live in Dr. Torres' home. Dr. Collins does not know if Dr. Torres told Mr. Janesz, but believes that it is unlikely. Dr. Collins believes that if he or Mr. Janesz had become aware of this they would have advised Dr. Torres that it was a bad idea. Dr. Collins testified that Dr. Collins was not involved in the treatment of Jose Caraballo. (Tr. 72-73)

10. Dr. Torres testified that Jose Caraballo left St. Alexis' in April 1998. He further testified that Mr. Caraballo had frequently visited his home while on passes from St. Alexis'. Jose Caraballo stated in his affidavit that St. Alexis' granted him periodic twelve hour passes to stay at Dr. Torres' home. Dr. Torres testified that he confronted Mr. Caraballo about drinking and cross addiction about two weeks before Mr. Caraballo was removed from the rehabilitation program. Dr. Torres testified that after Jose Caraballo left the rehabilitation program Mr. Caraballo continued to visit Dr. Torres' home. Dr. Torres testified that he continued to speak to Ms. Lasky concerning Mr. Caraballo and Ms. Lasky tightened her supervision of Mr. Caraballo. Dr. Torres believes that this tightening was, in part, a result of his observations of Mr. Caraballo's behavior. Subsequently, Ms. Lasky obtained urine samples from Mr. Caraballo which tested positive and Mr. Caraballo was eventually returned to custody as result of probation violations. Dr. Torres testified that after Jose Caraballo left Dr. Torres home for good that everything in the house seemed fine. (Tr. 111-113; 131-132; Resp. Ex. A)

11. Dr. Torres testified that Dr. Defreest is a specialist in holistic medicine and addictive medicine. Dr. Torres testified that he had explained to Dr. Defreest that he was getting more colds and had lowered energy levels. As a result, Dr. Defreest recommended a protein supplement that she had been using. Based on this advice, Dr. Torres says he took a container home with him. Dr. Torres further testified that the supplement made his stomach upset and he did not use it often. (Tr. 97, 113-114)

Dr. Torres testified that he obtained the protein supplement in the spring of 1998. Later in his testimony, Dr. Torres was asked again about when he got the supplement. To the question "Back to the protein supplement for a minute. When did you say you got this? In the Spring of 1998?", Dr. Torres replied: "I got this protein supplement -- maybe -- I think so, earlier that year." (Tr. 124, 131)

Dr. Torres described the protein supplement container as being about eight inches high, like a Nestles Quick or large Slimfast container. He further described the mix itself as green , containing algae, and tasting bad. Dr. Torres stated that he would mix the powder with Dr. Pepper or a cola and that he only used it sporadically. (Tr. 123-124)

Dr. Torres testified that the container of protein supplement powder was in his house during the time Jose Caraballo was there. Dr. Torres further testified that the supplement was in the back of a cupboard because it was infrequently used. (Tr. 114-115)

12. Jose Caraballo stated in his affidavit of January 6, 1999, that, during a relapse that occurred after he left St. Alexis', he brought cocaine into Dr. Torres' home and hid it in various containers, including a container of protein mix. Jose Caraballo also stated that he believes he is directly responsible for Dr. Torres testing positive for cocaine. (Resp. Ex. A)

13. Mr. Joseph Janesz notified Jan Sussex of Dr. Torres' positive urine screen from the June 29, 1998, sample. At that time Mr. Janesz expressed some concern over the use of a new laboratory and asked that no action be taken until he had had the opportunity to verify the positive test. On August 12, 1998, Mr. Janesz advised Ms. Sussex that the positive test had been confirmed and that he no longer had any concerns about the accuracy of the test. Mr. Janesz followed up by sending a fax to Ms. Sussex which included a copy of the gas chromatography/mass spectrometry [GC/MS] confirmation of cocaine. He also noted in the September 1998 Quarterly Report to the Board the positive drug screen and relayed a portion of Dr. Torres' response. (Tr. 22-24; Sts. Exs. 4-5)

14. Dr. Collins testified that the GC/MS confirmation of Dr. Torres' June 29, 1998, urine sample as positive for cocaine was made on July 10, 1998, and would have been received by him within a couple of days after that date. Dr. Collins testified that he had confronted Dr. Torres about this and that Dr. Torres appeared shocked and stunned. Dr. Torres strongly denied that he had ingested cocaine, but offered no possible explanation for the positive test. Dr. Collins instructed Dr. Torres to make an appointment to come in and discuss the matter. (Tr. 64-65, 83-85, Sts. Ex. 4, 7)

When Dr. Torres met with Dr. Collins, Dr. Torres explained that he was not sure what had happened but theorized that it involved a cousin whom he had been housing. Dr. Torres reported to Dr. Collins that this cousin had a drug problem and had been in and out of jail. Dr. Collins further described his conversation with Dr. Torres by recalling that Dr. Torres had reported finding cocaine in a food container and theorized that he might have accidentally eaten food contaminated by cocaine. Dr. Collins' letter of October 8, 1998, further summarized this meeting with Dr. Torres. (Tr. 65-66, 85-86, Sts. Ex. 4, 7)

At hearing, Dr. Torres adamantly denied any intentional ingestion of cocaine. Dr. Torres testified that he drank some of the protein mix in June 1998 but did not know at the time it had been contaminated with cocaine. Dr. Torres further testified that his first reaction to being told of the positive urine screen was shock. Initially he thought it was a false positive as an April test had been. Dr. Torres testified that he had been asked to consider possible causes for a positive test, and that was when he considered the possibility of food contamination. That same day, Dr. Torres went home and collected food samples to be tested. (Tr. 115-116, 118-121)

15. Dr. Torres testified that the container of protein supplement was slightly less than half full when he turned it over to the laboratory for testing. Dr. Torres stated that he had used the supplement about five times. (Tr. 125)

Dr. Collins testified that additional investigation was done by the Cleveland Clinic that included testing various food products from Dr. Torres' home. All of these tests came back negative except for a protein supplement container which yielded a positive result for cocaine. Testing of a factory sealed container of the same product yielded negative results for cocaine. This led Dr. Collins to conclude that the protein supplement had been contaminated locally. (Tr. 67-68, 86-87; Sts. Ex 7-8)

On or about October 13 and again on October 22, 1998, Ms. Sussex received letters from Dr. Collins outlining Dr. Torres' status and possible explanation for the positive test. Dr. Collins further explained what additional efforts were being made to determine exactly what had happened to cause the positive result. At hearing, Dr. Collins testified that the third paragraph of State's Exhibit 7, in which he related Dr. Torres' explanation for the positive screen, is based entirely on what Dr. Torres had told him. Dr. Collins has no independent confirmation of any of this information. (Tr. 24-25, 92; Sts. Ex. 7-8)

16. Dr. Torres testified that he spoke to Mr. Caraballo while Mr. Caraballo was in jail. Dr. Torres told Mr. Caraballo about Dr. Torres' problems with the positive urine. Dr. Torres testified that Mr. Caraballo told him that Mr. Caraballo had hidden the cocaine in Dr. Torres' protein container because it was in the back of the cupboard and seldom used. Dr. Torres described Mr. Caraballo as being initially afraid of what might happen to Mr. Caraballo if he admitted hiding the cocaine in Dr. Torres' home. Dr. Torres testified that Mr. Caraballo eventually agreed to review an affidavit admitting his involvement that Dr. Torres would draft. Dr. Torres testified that Mr. Caraballo eventually acknowledged and signed the affidavit now marked as Respondent's Exhibit A. Dr. Torres believes that this change of heart by Mr. Caraballo is due in part to the progress Mr. Caraballo is making in his recovery program at the prison (Tr. 128-131; Resp. Ex. A)

17. Dr. Torres affirmed at hearing his history of substance abuse and outlined his recovery efforts. His description of his substance abuse history and treatment were consistent with information provided by Dr. Collins and recited in the May 17, 1995, Report and Recommendation Summary of the Evidence paragraphs 1-3. (Tr. 97-102; Sts. Ex. 1A)

18. Ms. Caraballo identified Respondent's Exhibit A as an affidavit signed by her son, Jose Caraballo. She testified that her son is incarcerated at the North Central Correctional Institution [NCCI]. She explained that she and Dr. Torres had traveled to NCCI the day before the hearing to have her son sign the affidavit. She further testified that Dr. Torres had prepared the affidavit for her son's signature. Ms. Caraballo testified that she met with her son in the visitation room at NCCI, that he affirmed and signed the affidavit and the signing was witnessed by two other persons whose signatures appear on the

document. Ms. Caraballo further testified that these two witnesses were Corrections Officers at NCCI. Ms. Caraballo explained that her son had previously signed and mailed a copy of the same affidavit to Dr. Torres, but that it had never arrived. She further explained that because the hearing had been set the following day, they drove down to NCCI to get a second original copy signed to have it in time for the hearing. (Tr. 37-39, 46, 50-52; Resp. Ex. A)

Jose Caraballo stated in this affidavit that he is incarcerated at NCCI and as a result could not testify in this matter. Jose Caraballo further stated that he was incarcerated on June 10, 1998, for violating the terms of his shock probation. Jennifer Lasky, in her affidavit of December 21, 1998, stated that Jose Caraballo was incarcerated for a violation of his probation on June 15, 1998. (Resp. Ex. A, H)

19. Dr. Collins explained his view of relapse and described a variety of signs that would indicate a relapse. Dr. Collins testified that, other then the June 29, 1998, test, he had not observed any evidence of relapse by Dr. Torres. He further testified that he had heard no rumors or reports of any signs of relapse by Dr. Torres. Dr. Collins testified that except for the June 29, 1998, test Dr. Torres has not had a confirmed positive urine for cocaine since entering treatment with Dr. Collins. Dr. Collins stated that in his opinion:

a. Dr. Torres had cocaine in his urine in June 1998.

b. Dr. Torres did not voluntarily use cocaine in June 1998.

c. Dr. Torres' ability to practice is not impaired.

d. Dr. Torres has continued to maintain sobriety while under the care of Dr. Collins.

Dr. Collins testified that he based his opinions on having known Dr. Torres for eight and a half years, and on urine tests, behavioral observations, Dr. Torres' performance participating in Stella Maris Rehabilitation Center and the Cleveland Clinic, Dr. Torres' attendance at Caduceous group meetings, and Dr. Torres' performance as a professional in many ways. (Tr. 60-61,64, 68-71)

Dr. Collins testified that Dr. Torres regularly attends his program and is conscientious about it. Dr. Collins further testified that he has witnessed Dr. Torres work his program with the goal of fully rehabilitating himself and maintaining his medical license. Dr. Collins described Dr. Torres as consistent in his attitude and behavior. Dr. Collins admitted that he had seen other physicians who appeared to be doing well but relapsed. However, Dr. Collins distinguished these cases from Dr. Torres' on the grounds that the physicians in those cases had shorter periods of demonstrable sobriety and shorter track records. Dr. Collins further admitted that the fact that someone has been sober for eight years does

not preclude a relapse. Dr. Collins testified that it is not always possible to predict relapse. (Tr. 74, 87-90)

In response to questioning about an unconfirmed positive test for cocaine in Dr. Torres urine in April 1998, Dr. Collins explained that the immunoassay screen had been positive but that further GC/MS testing was negative in April. Dr. Collins further explained that there have been two or three unconfirmed positives for amphetamines in Dr. Torres urine over the last couple of years. He further explained that cough and cold medications can produce positives in the screening test and that every positive screening test is retested by GC/MS. In Dr. Torres case those tests have always come back negative except for the June 29, 1998, urine screen. (Tr. 74-78, 82)

20. Dr. Collins testified that he sees Dr. Torres one to two times per month, usually informally. Dr. Collins testified that Dr. Torres had admitted ingesting a Tylenol #3 without permission in 1996 and that Dr. Collins had duly reported that to the Board at the time. (Tr. 78-82)

Dr. Collins described the summary records contained in Respondent's Exhibit C and explained that an unconfirmed positive means that the immunoassay was positive for the indicated drug but that the GC/MS follow-up was negative. This is consistently how the Cleveland Clinic program documents drug testing results. (Tr. 91-92)

Dr. Torres identified Respondent's Exhibit F as an accurate copy of his AA and NA attendance logs from May 1, 1998, through August 30, 1998. (Tr. 121-122)

Elzora Dudley, Dr. Torres' immediate supervisor at Shaker Square Medical Center, submitted a letter of support stating her belief that Dr. Torres has remained sober. (Resp. Ex. G)

FINDINGS OF FACT

1. On or about July 8, 1992, the State Medical Board of Ohio ratified a Consent Agreement with Jose A. Torres, M.D., in lieu of formal proceedings based upon a violation of Section 4731.22(B)(26), Ohio Revised Code.

2. On or about September 19, 1994, the Board issued to Dr. Torres a certificate to practice medicine and surgery in the State of Ohio. At that time, pursuant to its terms, the Consent Agreement became effective.

3. On or about January 11, 1995, and again on April 12, 1995, the Board issued to Dr. Torres notices of opportunity for hearing alleging violations of Sections 4731.22(B)(5), (B)(10), and/or (B)(14), Ohio Revised Code. Thereafter, on or about

June 14, 1995, the Board entered an Order revoking Dr. Torres certificate and staying such revocation, subject to certain probationary terms, conditions, and limitations for a period of at least five (5) years.

Paragraph (e) of this Order states that Dr. Torres "shall abstain completely from the personal use or possession of drugs except those prescribed, administered, or dispensed to [him] by another so authorized by law who has full knowledge of [his] history of chemical dependency."

4. A urine sample submitted by Dr. Torres on or about June 29, 1998, tested positive for cocaine, although cocaine had not been prescribed, dispensed or administered to him by another so authorized by law who has full knowledge of his history of chemical dependency.

5. Dr. Torres, on or before June 29, 1998, ingested cocaine. Nevertheless, the evidence is insufficient to support a finding that Dr. Torres *voluntarily* ingested cocaine.

6. The Board was substantially justified in going forward with the adjudication in this action, based on the positive June 29, 1998, urine screen.

CONCLUSIONS OF LAW

1. While the evidence supports a finding that Jose A. Torres M.D., ingested cocaine, the plain language of Section 4731.22(B)(15), Ohio Revised Code requires that Dr. Torres violate a condition or limitation placed by the Board on his certificate to practice medicine. The terms of paragraph (e) of Dr. Torres' current Board order clearly intend to prohibit a volitional act by Dr. Torres. Since a volitional act has not been proven, the evidence is insufficient to support a conclusion that Dr. Torres violated Section 4731.22(B)(15), Ohio Revised Code.

2. The evidence is insufficient to support a conclusion that Dr. Torres' suffers "[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."

* * * * *

Only Dr. Torres can say with complete certainty that he did not voluntarily ingest cocaine. It is understandable that he would have a motive to protect himself. Nevertheless, in weighing all of the evidence, and the credibility of the witnesses, it cannot be said that the State has proven that Dr. Torres violated the terms of his probation.

It would have been preferable to have had the live testimony of Jose Caraballo. This was apparently not possible. His affidavit cannot be given the same weight as live testimony because the State did not have the opportunity to cross examine him and the Attorney Hearing Examiner did not have the opportunity to observe his demeanor. However, his affidavit, taken in the context of all of the evidence presented at hearing, is credible. It is substantially consistent with the testimony of live witnesses. Moreover, it is not identical in all details, which would suggest fabrication.

Maria Caraballo testified that she personally witnessed her son acknowledge and sign the affidavit. The affidavit is a statement against penal interest of the affiant. It is unlikely, but not impossible, that the a prosecutor would file additional charges against Mr. Caraballo based on his admissions. Moreover, the prison authorities may still use these admissions against him. The natural inclination of persons in the position of Mr. Caraballo and his mother would be to deny wrong doing and protect themselves and, in Ms. Caraballo's case, her son. This of course must be balanced against the inclination to also protect their cousin, Dr. Torres. The evidence clearly indicated that Dr. Torres had gone out of his way to assist both of the Caraballos. It is the evaluation of the credibility of witnesses that is the most challenging role of the Attorney Hearing Examiner and the Board. This task must be accomplished by the application of experience, education, and common sense.

Dr. Torres poor judgment in how he handled his relationship with his cousin, Jose Caraballo and got himself into additional difficulty with the Board suggests that the Board should continue close supervision of Dr. Torres.

PROPOSED ORDER

It is hereby ORDERED that:

1. The allegations against Jose A. Torres M.D., as specified in the Board's September 9, 1998, notice of opportunity for hearing, are dismissed.

2. This Order shall have no effect on the Board's order of June 14, 1995, which shall remain in effect.

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

Daniel Roberts
Attorney Hearing Examiner

EXCERPT FROM THE DRAFT MINUTES OF MARCH 10, 1999

REPORTS AND RECOMMENDATIONS

Dr. Steinbergh announced that the Board would now consider the findings and orders appearing on the Board's agenda. She noted that Neal Ronald Glass, M.D., has requested and been granted a postponement in the Board's consideration of his case. The Report and Recommendation in the matter of Dr. Glass will be on the Board's April 1999 agenda.

Dr. Steinbergh asked whether each member of the Board had received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of Richard G. Day, M.D., Saul Finer, M.D., David H. Gillis, M.D., and José A. Torres, M.D. A roll call was taken:

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

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

ROLL CALL:	Mr. Albert	- aye
	Dr. Bhati	- aye
	Dr. Somani	- aye
	Dr. Egner	- aye
	Mr. Browning	- aye
	Ms. Noble	- aye
	Dr. Stienecker	- aye
	Dr. Agresta	- aye
	Dr. Garg	- aye
	Dr. Buchan	- aye

Dr. Steinbergh - aye

In accordance with the provision in Section 4731.22(C)(1), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of these matters.

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

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

.....

JOSÉ A. TORRES, M.D.

.....

DR. STIENECKER MOVED TO APPROVE AND CONFIRM MR. ROBERTS' PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF JOSÉ A. TORRES, M.D. DR. SOMANI SECONDED THE MOTION.

.....

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

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

The motion carried.

State Medical Board of Ohio

77 S. High Street, 17th Floor • Columbus, Ohio 43266-0315 • 614/ 466-3934 • Website: www.state.oh.us/med/

September 9, 1998

Jose A. Torres, M.D.
3050 West 114th
Cleveland, Ohio 44111

Dear Doctor Torres:

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

(1) On or about July 8, 1992, the State Medical Board of Ohio ratified a Consent Agreement with you in lieu of formal proceedings based upon your violation of Section 4731.22(B)(26), Ohio Revised Code. A copy of the Consent Agreement is attached hereto and incorporated herein.

In this Consent Agreement, you made certain admissions, including that on May 30, 1990, you were admitted to a five (5) week inpatient rehabilitation program at the Marworth Center in Waverly, Pennsylvania, and that you completed such program and were discharged on July 11, 1990, with diagnoses of alcohol dependence syndrome and cocaine dependency. Also therein, the Board agreed to issue to you a certificate to practice medicine and surgery in the State of Ohio, upon your passage of the FLEX examination, and you agreed with the Board to certain specified probationary terms, conditions, and limitations for a minimum of two (2) years following your passing the FLEX examination and receiving licensure to practice medicine and surgery in the State of Ohio.

(2) On or about September 19, 1994, following your having passed the June 1994 FLEX examination, the Board issued to you a certificate to practice medicine and surgery in the State of Ohio. At that time, pursuant to its terms, the above-referenced Consent Agreement became effective.

(3) On or about January 11, 1995, and April 12, 1995, the Board issued to you Notices of Opportunity for Hearing alleging violations of Sections 4731.22(B)(5), (B)(10), and/or (B)(14), Ohio Revised Code, relating to your responses to questions on your application for registration with the D.E.A. and

Mailed 9/10/98

your having represented to the Board at its December 1994 meeting that you had surrendered your D.E.A. registration when you had not.

Thereafter, on or about June 14, 1995, the Board entered an Order revoking your certificate and staying such revocation, subject to certain probationary terms, conditions, and limitations for a period of at least five (5) years. The stayed revocation and probationary terms were based upon the Board's findings that you violated Sections 4731.22(B)(5), (B)(10), and (B)(14), Ohio Revised Code. A copy of the Entry of Order is attached hereto and fully incorporated herein.

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

(b) Nonetheless, you tested positive for cocaine, on or about June 29, 1998, although it had not been prescribed, dispensed or administered to you in accordance with this provision.

Your acts, conduct, and/or omissions as alleged in paragraph (3) above, individually and/or collectively, constitute a "[v]iolation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued," as that clause is used in Section 4731.22(B)(15), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (3) above, individually and/or collectively, constitute "[i]mpairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice," as that clause is used in Section 4731.22(B)(26), Ohio Revised Code.

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

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

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

Copies of the applicable sections are enclosed for your information.

Very truly yours,

Anand G. Garg, M.D.
Secretary

AGG/bjs
Enclosures

CERTIFIED MAIL #Z 395 591 276
RETURN RECEIPT REQUESTED

cc: Kevin P. Byers, Esq.

CERTIFIED MAIL #Z 395 591 277
RETURN RECEIPT REQUESTED

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

June 16, 1995

Jose A. Torres, M.D.
11841 Lake Avenue, #14
Lakewood, Ohio 44107

Dear Doctor Torres:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Sharon W. Murphy, Esq., 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 14, 1995, including Motions approving and confirming the Findings of Fact of the Hearing Examiner; amending the Conclusions of Law of the Hearing Examiner and the Legal Issues portion of the Report and Recommendation, and adopting an amended Order.

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

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

THE STATE MEDICAL BOARD OF OHIO

Thomas E. Greiner, M.D.
Secretary

TEG:sm
Enclosures

CERTIFIED MAIL RECEIPT NO. P 741 124 601
RETURN RECEIPT REQUESTED

cc: Kevin P. Byers, Esq.

CERTIFIED MAIL RECEIPT No. P 741 124 598
RETURN RECEIPT REQUESTED

Mailed 7-10-95

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

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; attached copy of the Report and Recommendation of Sharon W. Murphy, Esq., Attorney Hearing Examiner, State Medical Board; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on June 14, 1995, including Motions approving and confirming the Findings of Fact of the Hearing Examiner; amending the Conclusions of Law of the Hearing Examiner and the Legal Issues portion of the Report and Recommendation; and adopting an amended Order, constitute a true and complete copy of the Findings and Order of the State Medical Board in the matter of Jose A. Torres, M.D., as it appears in the Journal of the State Medical Board of Ohio.

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

(SEAL)

Thomas E. Gretter, M.D.
Secretary

6/26/95
Date

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

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF *

*

JOSE A. TORRES, M.D. *

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on the 14th day of June, 1995.

Upon the Report and Recommendation of Sharon W. Murphy, Hearing Examiner, Medical Board, in this matter designated 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:

1. The certificate of Jose A. Torres, M.D., to practice medicine and surgery in the State of Ohio shall be REVOKED. Such revocation is stayed, subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five (5) years:

    a. Dr. Torres shall obey all federal, state, and local laws, and all rules governing the practice of medicine in Ohio.

    b. Dr. Torres shall submit quarterly declarations, under penalty of falsification pursuant to Section 2921.13, Ohio Revised Code, stating whether or not there has been compliance with all the provisions of probation.

    c. Dr. Torres shall appear in person for interviews before the full Board or its designated representative at three (3) month intervals, or as otherwise requested by the Board.

    d. Dr. Torres shall be ineligible to apply, reapply, or to hold registration with the United States Drug Enforcement Administration without prior Board approval.

    e. Dr. Torres shall abstain completely from the personal use or possession of drugs except as prescribed, administered, or dispensed to him by another so authorized by law who has full knowledge of Dr. Torres' history of chemical dependency.

    f. Dr. Torres shall abstain completely from the use of alcohol.

g. Dr. Torres shall submit to random urine screenings for drugs once a week or as otherwise directed by the Board. Dr. Torres shall ensure that all screening reports are forwarded directly to the Board on a monthly basis. Within thirty (30) days of the effective date of this Order, Dr. Torres shall submit to the Board for its prior approval the name of a supervising physician to whom Dr. Torres shall submit the required urine specimen. The supervising physician shall ensure that the urine specimens are obtained on a random basis, that the giving of the specimen is witnessed by a reliable person, and that appropriate control over the specimen is maintained. In addition, the supervising physician shall immediately inform the Board of any positive screening results. In the event that the designated supervising physician becomes unable or unwilling to so serve, Dr. Torres must immediately notify the Board in writing, and make arrangements acceptable to the Board for another supervising physician within thirty days.

h. Dr. Torres shall submit blood or urine samples for analysis without prior notice at such times as the Board may request.

i. Dr. Torres shall maintain participation in an alcohol and drug rehabilitation program, such as AA, NA, or Caduceus, approved in advance by the Board specifically for Dr. Torres, no less than twice a week, or as otherwise directed by the Board. At Dr. Torres' appearances before the Board or its designated representative, Dr. Torres shall submit acceptable documentary evidence of continuing compliance with this program.

j. Dr. Torres shall have a monitoring physician approved by the Board, who shall monitor him and provide the Board with reports on Dr. Torres' progress and status. Dr. Torres shall ensure that said reports are forwarded to the Board on a quarterly basis. In the event that the designated monitoring physician becomes unable or unwilling to serve in this capacity, Dr. Torres must immediately so notify the Board in writing, and make arrangements acceptable to the Board for another physician to monitor his progress and status as soon as practicable.

k. Dr. Torres shall provide a copy of this Order to all employers and the Chief of Staff at each hospital where he has, applies for, or obtains privileges.

l. In the event that Dr. Torres should leave Ohio for three consecutive months, or reside or practice outside the State of Ohio, Dr. Torres must notify the Board in writing of the dates of departure and return. Periods of time spent outside the State of Ohio shall not apply to the reduction of the probationary period.

2. If Dr. Torres violates probation in any respect, the Board, after giving Dr. Torres notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of Dr. Torres' certificate to practice medicine and surgery in the State of Ohio.

3. Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Torres' certificate will be fully restored.

This Order replaces the July 8, 1992, Consent Agreement and shall become effective immediately upon the mailing of notification of approval by the State Medical Board.

Thomas E. Gretter, M.D.
Secretary

(SEAL)

6/26/95
Date

STATE MEDICAL BOARD
OF OHIO

95 MAY 17 AM 11:50

REPORT AND RECOMMENDATION
IN THE MATTER OF JOSE A. TORRES, M.D.

The Matter of Jose A. Torres, M.D., was heard by Sharon W. Murphy, Esq., Hearing Examiner for the State Medical Board of Ohio, on April 27, 1995.

INTRODUCTION

I. Basis for Hearing

A. The State Medical Board notified Jose A. Torres, M.D., by letters dated January 11, 1995, (State's Exhibit 1), and April 12, 1995, (State's Exhibit 8), that it proposed to take disciplinary action against his license to practice medicine and surgery in Ohio.

The Board based its January 11, 1995, notice on the following allegations:

> On or about July 8, 1992, the Board entered into a Consent Agreement with Dr. Torres, based upon a violation of Section 4731.22(B)(26), Ohio Revised Code. The Board agreed to issue Dr. Torres a certificate to practice medicine and surgery in Ohio subject to probationary terms, conditions and limitations. The Consent Agreement was to become effective following Dr. Torres' passing the Flex examination and receiving his certificate to practice in Ohio.
>
> On August 29, 1994, the Board informed Dr. Torres that he had received a passing score on the June 1994 Flex examination. The Board issued him a certificate to practice in Ohio on September 19, 1994. Accordingly, the Consent Agreement became effective on that date. Paragraph (5) of the Consent Agreement stated that "'Doctor Torres shall be ineligible to hold, and shall not apply for, registration with the D.E.A to prescribe, dispense or administer controlled substances without prior BOARD approval.'"
>
> On or about September 28, 1994, Dr. Torres applied for and received Drug Enforcement Administration [DEA] registration. Subsequently, the Board advised Dr. Torres to cease prescribing controlled substances and to surrender his DEA registration immediately. Nevertheless, Dr. Torres failed to surrender his DEA registration until December 28, 1994. Moreover, on or about December 8, 1994, Dr. Torres made a probationary appearance before the Board. At that appearance, in response to questioning by the Board, Dr. Torres falsely represented that he had surrendered his DEA registration.
>
> The Board alleged that Dr. Torres' December 8, 1994, representation that he had surrendered his DEA certificate constitutes "'publishing

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a false, fraudulent, deceptive, or misleading statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code," and "'(c)ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude,' as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13(A)(3), Ohio Revised Code, Falsification."

The Board based its April 12, 1995, notice on the following allegations:

In the Consent Agreement which became effective September 19, 1994, Dr. Torres agreed that he would be "ineligible to hold, and shall not apply for, registration with the D.E.A. to prescribe, dispense or administer controlled substances without prior BOARD approval."

Nevertheless, in his September 21, 1994, application for registration with the DEA, Dr. Torres answered "no" to the question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?" Additionally, Dr. Torres answered "yes" to the question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State of jurisdiction in which you are operating or propose to operate."

The Board alleged that this conduct constitutes "'publishing a false, fraudulent, deceptive, or misleading statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code," and "'(c)ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude,' as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13(A)(3), Ohio Revised Code, Falsification." The Board also alleged that this conduct constitutes "'[c]ommission of an act that constitutes a felony in this State regardless of the jurisdiction in which the act was committed,' as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: 21 U.S.C. 843(a)(4), Prohibited Acts (knowingly or intentionally furnishing false or fraudulent material information in, or omitting material information from, an application required under Title 21).

In both letters, the Board advised Dr. Torres of his right to request a hearing.

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B. In response to the January 11, 1995, notice, Dr. Torres filed a written hearing request on January 24, 1995. (State's Exhibit 2). In response to the April 12, 1995, notice, Kevin P. Byers, Esq., filed a written hearing request on behalf of Dr. Torres on April 21, 1995. (State's Exhibit 10). On April 21, 1995, Mr. Byers also filed a motion to consolidate the hearings, (State's Exhibit 11), which the Hearing Examiner granted at hearing.

II. Appearances

A. On behalf of the State of Ohio: Betty D. Montgomery, Attorney General, by Anne B. Strait, Assistant Attorney General.

B. On behalf of the Respondent, Kevin P. Byers, Esq.

III. Testimony Heard

A. Presented by the State

Jan Sussex, Compliance Officer, State Medical Board of Ohio

B. Presented by the Respondent

Jose A. Torres, M.D.

IV. Exhibits Examined

In addition to State's Exhibits 1, 2, 8, 10 and 11, noted above, the following exhibits were identified and admitted into evidence:

A. Presented by the State

1. State's Exhibit 3: January 27, 1995, letter to Dr. Torres from the Board, advising that a hearing had been scheduled for February 8, 1995, but further advising that the hearing had been postponed pursuant to Section 119.09, Ohio Revised Code.

2. State's Exhibit 4: January 31, 1995, letter to Dr. Torres from the Board scheduling the hearing for March 10, 1995. (2 pp.)

3. State's Exhibit 5: Respondent's February 10, 1995, Notice of Appearance from Kevin P. Byers, Esq.

4. State's Exhibit 6: State's February 22, 1995, Motion for Continuance and Memorandum in Support stating that the State's Assistant Attorney General had been previously scheduled to appear in the Franklin County Court of Appeals on March 10, 1995. (6 pp.)

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5. State's Exhibit 7: February 23, 1995, Entry granting the State's Motion for Continuance and rescheduling the hearing for April 27, 1995.

6. State's Exhibit 9: Respondent's April 21, 1995, Notice of Appearance from Kevin P. Byers, Esq.

7. State's Exhibit 12: Copies of documents relating to Dr. Torres' applications for licensure, including: September 8, 1994, application for licensure; several applications for the Flex examination; correspondence between Dr. Torres and the Board; certificates of recommendation; and Dr. Torres' medical school diploma from the Universitatis Centralis Caribensis. (94 pp.) (Note: Pages numbered by Hearing Examiner).

8. State's Exhibit 13: February 26, 1992, letter to the Board from Gregory B. Collins, M.D., Section Head, Alcohol & Drug Recovery Center, the Cleveland Clinic Foundation, supporting Dr. Torres and reporting negative urine screens. (2 pp.)

9. State's Exhibit 14: April 7, 1992, letter to the Board from David I. Canavan, M.D., Medical Director, Physicians' Health Program, Medical Society of New Jersey, regarding Dr. Torres' recovery program from May of 1990 through July of 1991.

10. State's Exhibit 15: May 5, 1992, letter to Dr. Torres from the Board regarding a proposed consent agreement.

11. State's Exhibit 16: May 21, 1992, letter to Dr. Torres from the Board regarding a proposed consent agreement.

12. State's Exhibit 17: May 16, 1992, letter to the Board from Dr. Torres. Attached to this letter is a signed copy of a consent agreement dated May 16, 1992. (5 pp.)

13. State's Exhibit 18: April 15, 1992, letter to the Board from Jane Ross, Health Information Services. Attached are Dr. Torres' 1990 medical records from Marworth, in Waverly, Pennsylvania. (6 pp.) (Note: medical records sealed to protect confidentiality).

14. State's Exhibit 19: Copy of the June, 1992, Consent Agreement between Dr. Torres and the Board. (4 pp.)

15. State's Exhibit 20: June 23, 1992, letter to Dr. Torres from the Board.

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16. State's Exhibit 21: September 23, 1992, letter to Dr. Torres from the Board.

17. State's Exhibit 22: August 29, 1994, letter to Dr. Torres from the Board stating that Dr. Torres had passed the Flex examination and was eligible to apply for licensure.

18. State's Exhibit 23: September 19, 1994, letter to Dr. Torres from the Board informing Dr. Torres that he was licensed to practice medicine and surgery in Ohio, and authorizing him to apply for a DEA certificate.

19. State's Exhibit 24: November 1, 1994, letter to Dr. Torres from the Board advising him of a scheduled probationary appearance.

20. State's Exhibit 25: November 21, 1994, letter to Dr. Torres from the Board advising him to cease prescribing controlled substances and to surrender his DEA certificate immediately.

21. State's Exhibit 26: Certified copy of the portion of the December 8, 1994, Board meeting minutes concerning Dr. Torres. (3 pp.)

22. State's Exhibit 26A: Original telemagnetic recording of the December 8, 1994, Board meeting. (NOTE: This tape will be made available to Board members in the Board offices.)

23. State's Exhibit 27: December 19, 1994, letter to the Board from Dr. Collins, Dr. Torres' supervisory physician. Attached to this letter are: the Curriculum Vitae of Dr. Collins; a December 14, 1995, letter to the Board from Dr. Collins regarding Dr. Torres; and a list of Dr. Torres' urine toxicology results. (22 pp.)

24. State's Exhibit 28: December 20, 1994, letter to the Board from Ellen Marniella, Stella Maris Clinic, Cleveland, Ohio, supporting Dr. Torres.

25. State's Exhibit 29: December 28, 1994, letter to Al Polster, Drug Enforcement Administration, from the Board, regarding Dr. Torres. Attached to this letter is a signed Voluntary Surrender DEA Form 104 and a copy of Dr. Torres' surrendered DEA certificate. (3 pp.)

26. State's Exhibit 30: Alcoholics Anonymous [AA]/ Narcotics Anonymous [NA] Attendance Log Sheet listing AA/NA meetings attended by Dr. Torres from December 21, 1994 to January 9, 1995.

27. State's Exhibit 31: Dr. Torres' September 23, 1994, application for DEA registration. (3 pp.)

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28. State's Exhibit 32: Copy of Section 843, United States Code, Prohibited Acts. (4 pp.)

29. State's Exhibit 33: Copy of Section 2921.13, Ohio Revised Code, Falsification. (2 pp.)

B. Presented by the Respondent

1. Respondent's Exhibit A: Dr. Torres' curriculum vitae.

2. Respondent's Exhibit D: January 16, 1995, letter to Tim Monnier, Personnel Director, General Motors, Mansfield, Ohio, from Dr. Collins, supporting Dr. Torres. (2 pp.)

3. Respondent's Exhibit F: April 12, 1995, letter to Dr. Torres from Virginia Tritschler, Director of Professional Standards, ASB Meditest, denying Dr. Torres' application for employment based on the January 11, 1995, citation letter.

4. Respondent's Exhibit G: April 24, 1995, letter to Kevin Byers from Dr. Collins with attached copy of Dr. Torres' urine toxicology screens from January 4, 1995, through April 13, 1995. (2 pp.)

5. Respondent's Exhibit H: Copies of Dr. Torres AA/NA attendance logs from January 13, 1995, through April 24, 1995. (7 pp.)

6. Respondent's Exhibit J: Copies of a subpoena duces tecum issued December 8, 1994, and Respondent's Subpoena Request filed April 5, 1995. (4 pp.)

V. Post-hearing Admissions to the Record

Each party submitted exhibits after the hearing; neither party raised objections. Accordingly, the following exhibits are admitted to the record at this time:

A. Submitted by the State:

1. State's Exhibit 34: Post-Hearing Brief Regarding "Moral Turpitude."

2. State's Exhibit 35: State's Closing Argument.

B. Submitted by the Respondent:

1. Respondent's Exhibit K: Copy of Dr. Torres' urine toxicology screen for December 23, 1994, and cover letter from Mr. Byers.

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2. Respondent's Exhibit L: Respondent's Brief on "Falsification" and Moral Turpitude.

3. Respondent's Exhibit M: Respondent's Written Closing Argument.

PROCEDURAL MATTERS

The Hearing Examiner requested each party to submit a written brief on the issue of whether criminal falsification is an act of moral turpitude. The parties submitted both the briefs and written closing arguments on May 5, 1995. Accordingly, the hearing record closed at that time.

SUMMARY OF THE EVIDENCE

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

1. Dr. Torres received a doctorate in medicine from the Universitatis Centralis Caribensis, Puerto Rico, in 1986. (State's Exhibit [St. Ex.] 12 at 69, 70). After completing an internship in general surgery, Dr. Torres attended a four year residency program in anesthesiology at St. Joseph's Hospital and Medical Center, associated with Seton Hall University School of Graduate Medicine. He completed that program in June of 1991. (St. Ex. 12 at 65, 68).

2. In May of 1990, during the fourth year of his residency program in New Jersey, Dr. Torres was confronted with evidence that he had been using cocaine. Dr. Torres admitted to episodic cocaine use, approximately once a month. Because of his admitted cocaine use, Dr. Torres was placed under the care and supervision of David I. Canavan, M.D., Director of the Physicians' Health Program of the New Jersey Medical Society. (St. Ex. 12 at 90, 92; St. Ex. 13; St. Ex. 14).

   On the advice of Dr. Canavan, Dr. Torres attended a five week rehabilitation program at Marworth Center in Waverly, Pennsylvania. His discharge diagnosis was alcohol dependence syndrome and cocaine dependency. He was discharged with a good prognosis. (St. Ex. 12 at 91, 92; St. Ex. 14; St. Ex. 18). Dr. Torres continued in an aftercare program at the Van Ost Institute in New Jersey. He also consulted the staff of the Physician's Health Program, attended Alcoholics Anonymous meetings, and provided specimens bi-weekly for urine analysis. He complied with the program in New Jersey until he left for Cleveland in July of 1991. (St. Ex. 14).

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3. From July 1991 through January 1993, Dr. Torres participated in a Fellowship in Pain Management through the Department of Anesthesiology at the Cleveland Clinic Foundation. (St. Ex. 12 at 39, 79; Respondent's Exhibit [Resp. Ex.] A). After Dr. Torres completed the fellowship program, the Cleveland Clinic Foundation hired him as a research assistant for an additional period of six months. On June 30, 1993, Dr. Torres left the Cleveland Clinic in good standing with no evidence of substance abuse and no problematic behavior. (Resp. Ex. D; St. Ex. 27).

4. Dr. Torres applied for admission to the June 1992 Flex examination in Ohio. In his application, he admitted to using cocaine in the past and to his chemical dependency treatment. On June 5, 1992, Dr. Torres and the Board entered into a Consent Agreement, in lieu of formal proceedings, for a violation of Section 4731.22(B)(26), Ohio Revised Code. Terms and conditions of the Consent Agreement included:

> 2. DOCTOR TORRES shall submit quarterly declarations under penalty of perjury stating whether there has been compliance with all the conditions of this Consent Agreement;
>
> 3. DOCTOR TORRES shall appear in person for interview before the full BOARD or its designated representatives at three month intervals, or as otherwise directed by the BOARD;
>
> * * *
>
> 5. DOCTOR TORRES shall be ineligible to hold, and shall not apply for, registration with the D.E.A. to prescribe, dispense or administer controlled substances without prior BOARD approval;
>
> * * *
>
> 10. DOCTOR TORRES shall submit to random urine screenings for drugs and alcohol on a weekly basis or as otherwise directed by the BOARD. DOCTOR TORRES is to ensure that all screening reports are forwarded directly to the BOARD on a monthly basis.
>
> * * *
>
> This Consent Agreement shall become effective upon DOCTOR TORRES passing the Flex examination and receiving licensure to practice medicine and surgery in the State of Ohio.

(St. Ex. 19).

5. Dr. Torres took the Flex examination in June of 1992 and passed Component 2 with a score of 76. He failed Component I. (St. Ex. 12 at 63). He sat again for Component I in December of 1992, receiving a score of 72; in June of 1993, receiving a score of 74; and in December of 1993, receiving a score of 73. (St. Ex. 12 at 20, 31, 49). Finally, in June of 1994 he received a passing score of 75. (St. Ex. 12 at 8).

6. On August 29, 1994, the Licensure Department of the Board notified Dr. Torres that he had passed Component 1 of the Flex examination and

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invited him to submit an application for licensure. (St. Ex. 22). On September 19, 1994, the Board informed Dr. Torres that he was licensed to practice medicine in the State of Ohio. This letter also authorized him to apply to the Drug Enforcement Administration [DEA] for a certificate to administer controlled substances, and provided an address for submitting the application. (St. Ex. 23).

Jan Sussex, Compliance Officer for the Board, testified that the letter , State's Exhibit 23, is a form letter sent by the licensure department to notify a physician who passes the Flex that the physician is licensed to practice medicine. (Tr. at 24). In this case, the letter specifically authorized Dr. Torres to apply for his DEA certificate. (Tr. at 24-25). Ms. Sussex explained that the licensure department doesn't keep copies of the consent agreements, but sends these letters automatically.

Ms. Sussex admitted that, in sending the letter to Dr. Torres, a mistake was make by Board personnel. (Tr. at 25). The Board has since instituted procedural changes when granting licenses to persons with consent agreements. Board personnel discuss the case before sending a letter authorizing DEA certificate application. (Tr. at 43- 44).

7. Dr. Torres applied for a DEA certificate on September 23, 1994. On the application, Dr. Torres answered "yes" to the question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State or jurisdiction in which you are operating or propose to operate." (St. Ex. 31). Dr. Torres testified that he answered yes to this question because he had received notice from the Board which authorized him to apply for his DEA certificate. (Tr. at 98).

   Additionally, on the DEA application, Dr. Torres answered "no" to the question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?" (St. Ex. 31). Dr. Torres testified that he answered "no" to this question because he did not realize that his certificate was under probation. He did not equate Consent Agreement with probation. Moreover, he did not realize that the one mention of "probationary terms" constituted probation. (Tr. at 96). He admitted that he did not take out his Consent Agreement before filling out the DEA application. (Tr. at 100).

8. On November 1, 1994, the Board notified Dr. Torres that he had been scheduled to make a probationary appearance before the Board on December 8, 1994. The DEA certificate was not mentioned in that letter. (St. Ex. 24). In fact, no one contacted Dr. Torres between his licensure on September 19, 1994, and November 21, 1994, to inform him that an error had been made. (Tr. at 42-43).

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9. Jan Sussex testified that she calls probationers prior to Board appearances to help answer any questions they might have. She telephoned Dr. Torres on November 21, 1994. She notified him that his Consent Agreement required him to submit certain items to the Board. Ms. Sussex testified that Dr. Torres told her he was unaware of those requirements . Moreover, he told her that he did not know specifically where his copy of the Consent Agreement was. (Tr. at 27).

   At that time, Ms. Sussex had seen the letter informing Dr. Torres that he could apply for a DEA certificate. Accordingly, she asked whether he had applied for a certificate. (Tr. at 40). He answered that he had. (Tr. at 27). She informed him that the Board had made a mistake and shouldn't have authorized his application. (Tr. at 40). Ms. Sussex wrote a letter on the same date, documenting the conversation. The letter advised that Dr. Torres "cease prescribing and surrender [his] certificate." She also notified him that he could discuss the issue of the DEA certificate with the Board at the time of his probationary appearance. (St. Ex. 25; Tr. at 29). At no time, however, did she inform Dr. Torres that the Board had authorized her to demand the surrender of his DEA certificate. (Tr. at 40-41).

   Ms. Sussex testified that she believed Dr. Torres should have known the letter authorizing his DEA certificate application was a form letter and, therefore, would be overridden by the Consent Agreement. (Tr. at 150).

10. Dr. Torres testified that he didn't surrender his DEA certificate, as Ms. Sussex instructed, because he had received a letter that authorized him to apply for it. (Tr. at 72). He thought Ms. Sussex may have made a mistake. (Tr. at 124). Moreover, his specialty was anesthesiology and pain management, and he felt it was imperative he had a DEA certificate in order to find employment. (Tr. at 72-73). Finally, he wanted time to seek the advice of Dr. Collins, his monitoring physician. Dr. Collins had originally co-signed the Consent Agreement, and Dr. Torres had relied on his judgment during his dealings with the Board. (Tr. at 80, 83).

11. Dr. Torres appeared before the Board on December 8, 1994. (St. Ex. 26). Prior to the meeting, Ms. Sussex discussed Dr. Torres with Carla O'Day, M.D., a member of the Board. (Tr. at 42). Accordingly, at the Board meeting, Dr. O'Day asked Dr. Torres whether he had turned in his DEA certificate. Dr. Torres answered that he had. (St. Ex. 26). There was no further discussion of the DEA certificate.

    At hearing, when asked why he did not discuss the DEA certificate at the Board meeting, Dr. Torres testified that he had intended to do so. However, the Board members had asked him a series of questions which required him to answer only "yes" or "no." Dr. Torres testified that he felt overwhelmed, and did not feel the Board members wanted to hear anything else from him.

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Dr. Torres testified that he was scared at this point, and realized for the first time that this was a very serious matter. (Tr. at 142-143).

Dr. Torres further testified that he had been very nervous at the Board meeting. (Tr. at 84-85). Dr. Collins had told him to go before the Board and tell his story; if he did so, everything would turn out well. Dr. Torres was shocked when he heard that his records were incomplete, that the Board had no information on him, and that he was non-compliant with the Consent Agreement. When Dr. O'Day asked whether he had surrendered this DEA certificate, Dr. Torres thought she asked if he had applied for one. He believed that the Board was asking the same question that Ms. Sussex had asked. At the same time, he was very eager to talk about his past as instructed by Dr. Collins. (Tr. at 85-86).

Dr. Torres testified that he did not even recall being asked about the DEA certificate until he heard it on the tape. (Tr. at 88, 137-139).

12. Dr. Torres admits that he now knows the answer was erroneous. He testified that he did not intend to deceive the Board members. Moreover, he stated that he would not have intentionally told one thing to Ms. Sussex and another to the Board members. (Tr. at 87-89).

13. Ms. Sussex testified that she believed the Board members thought Dr. Torres did not understand what they were trying to tell him. Ms. Sussex didn't think Dr. Torres understood the importance of the Consent Agreement. (Tr. at 47-48). She stated that at the Board meeting it became apparent that Dr. Torres was not in compliance with most of the terms of the Consent Agreement. The Board scheduled him to appear at the January 1995 meeting for further evaluation.

14. Ms. Sussex spoke with Dr. Torres again on December 12, after contacting the DEA and determining that Dr. Torres had not yet surrendered his DEA certificate. (Tr. at 34). When Ms. Sussex asked Dr. Torres if he had surrendered his DEA certificate, he responded, "Do I really have to?"

    Further, when Ms. Sussex asked Dr. Torres why he told the Board that he had already surrendered his certificate, Dr. Torres denied that he had made any such representation to the Board. (Tr. at 33). He did not recall telling the Board that he had surrendered his DEA certificate. (Tr. at 46).

15. Again, after first contacting the DEA to affirm that Dr. Torres had not yet surrendered his DEA certificate, Ms. Sussex called Dr. Torres on December 19, 1994. (Tr. at 35). During that conversation, she informed him that she would send a Board investigator to confiscate his DEA certificate. (Tr. at 36). On December 28, 1994, Dr. Torres met with a Board investigator to surrender his DEA certificate. (St. Ex. 29; Tr. at 38, 50).

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16. Dr. Torres testified that Dr. Collins had promised to investigate the matter and advise Dr. Torres. (Tr. at 88-89). Nevertheless, Dr. Torres surrendered his certificate without being so advised by Dr. Collins when Ms. Sussex told him on December 19, 1994, that the Board had decided that he should surrender his certificate. (Tr. at 90). Ms. Sussex testified that Dr. Collins had not contacted her at any time regarding Dr. Torres. (Tr. at 145).

17. Ms. Sussex also testified that Dr. Torres asked her, during either the December 12 or the December 19 conversation, to send him a copy of the Consent Agreement because he was unable to find his. (Tr. at 148).

18. At the time of his January appearance before the Board, Dr. Torres was in compliance with all terms of the Consent Agreement. (Tr. at 59).

19. Since coming to Cleveland in 1991, Dr. Torres has been supervised by Gregory B. Collins, M.D., of the Cleveland Clinic Foundation On December 14, 1994, Dr. Collins reported to the Board that he had originally evaluated Dr. Torres on September 26, 1991. Over the years, Dr. Torres has attended AA meetings; participated in an impaired physicians group at the Cleveland Clinic, receiving good reports from the moderator; and provided consistently negative random urine screens. Dr. Collins also provided documentation of Dr. Torres' negative urine screens from September 29, 1991 through June 30, 1993. (St. Ex. 12 at 91, 92; St. Ex. 13, 27).

    Dr. Collins advised that on June 30, 1993, Dr. Torres ended his employment with the Cleveland Clinic which left him without medical insurance. He noted that Dr. Torres came from a poor family, and after leaving his employment, Dr. Torres was without income and applied for welfare benefits. Dr. Torres also discontinued his urine toxicology screens due to the financial pressure. Still, Dr. Torres pursued rehabilitation treatment with the aid of community resources. (St. Ex. 27).

    Dr. Collins assured the Board that he believed Dr. Torres has maintained sobriety for over five years. Moreover, he believed that Dr. Torres' lack of documentation of sobriety over the past year resulted from financial difficulties and a "degree of depression." He hopes that the Board will "look favorably" upon Dr. Torres. (St. Ex. 27).

20. On December 20, 1994, Ellen Marinella, Member of the Board of Directors, Stella Maris, Inc., wrote to the Board members on behalf of Dr. Torres. She wrote that she had personally known Dr. Torres for four years, and that he had participated regularly with the Stella Maris Drug and Rehabilitation Center during that time. She also stated that he volunteered at the facility and had regularly attended AA meetings from August 1991 through December 20, 1994. (St. Ex. 28) (See also Resp. Ex. D).

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21. At his January Board appearance, Dr. Torres presented logs of his attendance at AA meetings three times a week from December 22, 1994, through April 24, 1995. (St. Ex. 30; Resp. Ex. H). Additionally, he provided bi-weekly urines for toxicology screen, all with negative results, from January 4, 1995, through April 13, 1995. (Resp. Ex. G).

22. Dr. Torres has been unemployed since January, 1995. After receiving his certificate to practice in Ohio, Dr. Torres was employed by Physicians' Staffing, a temporary employment agency. Through Physicians' Staffing, Dr. Torres worked two days a week at the Third Street Clinic in Mansfield, Ohio, and three days a week as the Medical Director of General Motors. He also worked occasionally at a prompt care clinic in Bainbridge, Ohio. (Tr. at 68). Dr. Torres testified that Physicians' Staffing could no longer employ him after he surrendered his DEA certificate. (Tr. at 69-70). Since that time, Dr. Torres has been unable to find employment as a physician. (Tr. at 71). On April 12, 1995, he was notified by the Rocky river ASB Meditest that he was ineligible for employment due to the pending action before the Board. (Resp. Ex. F).

23. Dr. Torres submitted a number of referral forms with his applications for licensure. Evaluations generally ranged from good to excellent and superb. (St. Ex. 12 at 13-18, 44-47, 57-60, 67-68, 81-84). Two rated his medical knowledge and technique as 'adequate'. (St. Ex. 12 at 13, 67). Steven Weiner, M.D., Department of Anesthesiology, Cleveland Clinic Foundation wrote: "Dr. Torres is well regarded by both peers and patients. He practices both with skill and compassion. He is thorough and motivated to providing excellent care to his patients." (St. Ex. 12 at 44).

FINDINGS OF FACT

1. On July 8, 1992, the Board ratified a Consent Agreement with Dr. Torres based upon a violation of Section 4731.22(B)(26), Ohio Revised Code. The Board agreed to issue Dr. Torres a certificate to practice medicine and surgery in Ohio subject to probationary terms, conditions and limitations. The Consent Agreement was to become effective following Dr. Torres' passing the Flex examination and receiving his certificate to practice in Ohio.

   Paragraph (5) of the Consent Agreement stated that "DOCTOR TORRES shall be ineligible to hold, and shall not apply for, registration with the D.E.A to prescribe, dispense or administer controlled substances without prior BOARD approval."

2. As a result of Dr. Torres' passing the June 1994 Flex examination, the Board issued him a certificate to practice in Ohio which was effective September 19, 1994. The letter which notified Dr. Torres that he was licensed to practice also authorized him to apply for a DEA certificate. The Consent Agreement became effective at that time.

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3. On or about September 28, 1994, Dr. Torres applied for and received DEA registration.

   Dr. Torres answered "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?" Additionally, Dr. Torres answered "yes" to the question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State of jurisdiction in which you are operating or propose to operate."

4. On November 21, 1994, Jan Sussex, Compliance Officer of the Board, advised Dr. Torres to cease prescribing controlled substances and to surrender his DEA registration immediately.

5. On December 8, 1994, Dr. Torres made a probationary appearance before the Board. At that appearance, Dr. Torres falsely represented that he had already surrendered his DEA registration.

6. Dr. Torres did not surrender his DEA registration until December 28, 1994.

LEGAL ISSUES

In both the January and April letters, the Board alleged that certain conduct of Dr. Torres constituted a misdemeanor of moral turpitude. The Board further alleged that this misdemeanor was falsification, pursuant to Section 2921.13(A)(3), Ohio Revised Code. In considering this issue, it is necessary to determine, first, whether the conduct of Dr. Torres would have been sufficient for a court of law to convict him of the misdemeanor offense of falsification, pursuant to Section 2921.13(A)(3), Ohio Revised Code. If the Board determines that it would have been sufficient, then the Board must also determine whether falsification, without more, is an act of moral turpitude, pursuant to Section 4731.22(B)(14), Ohio Revised Code.

The Ohio Revised Code prohibits falsification. Section 2921.13(A)(3) provides that: "No person shall knowingly make a false statement . . . when . . . [t]he statement is made with purpose to mislead a public official in performing his official function." Therefore, the criminal offense of falsification requires a mental state of "knowingly."

In the present matter, Dr. Torres is alleged to have committed conduct which would have constituted the crime of falsification when he: (1) answered "yes" to the DEA application question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the

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schedules for which you are applying, under the laws of the State of jurisdiction in which you are operating or propose to operate;" (2) answered "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation"; and (3) represented at the December 8, 1994, Board meeting that he had already surrendered his DEA certificate.

In the first instance, it would be unreasonable to conclude that Dr. Torres knowingly made a false statement when he represented that the Board had authorized him to apply for a DEA certificate. Dr. Torres had ample reason to believe that he was authorized to apply for the certificate after he received a letter from the Board which explicitly authorized him to do so.

The answer is not as clear, however, when considering whether Dr. Torres knowingly provided false information by representing that he had never had a certificate to practice placed on probation. Dr. Torres testified that the single use of the term "probationary terms, conditions, and limitations" in the consent agreement did not put him on notice that his certificate was on probation. Such a misunderstanding is supported by the fact that at no other place in the four page document is the word "probation" used. Moreover, at the December 1994, it was apparent that Dr. Torres was not familiar with any of the other terms of the Consent Agreement. Therefore, it is feasible that Dr. Torres did not know that probation was a condition of the Consent Agreement when he completed the DEA application.

Similarly, it is questionable whether Dr. Torres knowingly provided false information by answering that he had already surrendered his DEA certificate. Dr. Torres testified that he did not know than anyone had even mentioned his DEA certificate until he listened to the tape at hearing. When listening to the tape itself, it is conceivable that Dr. Torres was not focused on the question, but was attempting to deliver his own story to the Board. His later question to Ms. Sussex as to whether he had to surrender his certificate further supports this possibility.

While it is tempting to conclude that Dr. Torres should have understood that his certificate was on probation pursuant to the consent agreement, or that he should have listened more carefully to Dr. O'Day's question, criminal falsification requires that the State prove Dr. Torres knew he was providing false information. What he should have known implies a lesser standard of recklessness or negligence. In this case, Dr. Torres presented a reasonable defense to the charge of falsification.

However, if the Board determines that Dr. Torres did knowingly make false statements in any of the three instances, it will be necessary to determine whether that conduct also constitutes an act of moral turpitude. Moral turpitude is defined as:

> The act of baseness, vileness, or the depravity in the private and social duties which man owes to his fellow man or to society in general,

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> contrary to the accepted and customary rule of right and duty between man and man. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita.

Black's Law Dictionary (Abridged Fifth Edition, 1983) at 522.

The State argues that "[t]here can be little question that making false statements is clearly an act constituting moral turpitude." (State's Exhibit 34 at 2). Unfortunately, the issue is not as clear as the State represents it to be. Moral turpitude is a vague concept, and interpretation will differ depending on the moral position of the interpreter. There is no law which specifically advises what conduct constitutes "moral turpitude." Few cases even discuss moral turpitude.

Of the cases that do consider the issue of moral turpitude, most involve the Code of Professional Responsibility, which outlines unacceptable behavior for attorneys. One provision of the Code of Professional Responsibility prohibits engaging "in illegal conduct involving moral turpitude." DR 1-102(A)(3). No reference is made in that subsection to the crime of falsification. However, another section precludes engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation." DR 1-102(A)(4). Even more specifically, DR 1-101(A) states that "[a] lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." Since the Ohio Supreme Court chose to enact separate and distinct provisions prohibiting acts of moral turpitude and acts of falsification, it is clear that the Court views falsification and moral turpitude as two separate acts. Therefore, it is not reasonable to conclude that an act of falsification automatically signifies an act of moral turpitude. Some element of particular "baseness, vileness, or the depravity" must be required to raise a specific act of falsification to the level of moral turpitude. None is found in the present matter.

Accordingly, even if the Board were to determine that the conduct of Dr. Torres constituted the misdemeanor crime of falsification, pursuant to Section 2921.13(A), Ohio Revised Code, the State has not presented sufficient evidence to conclude that his conduct was also an act of moral turpitude, pursuant to Section 4731.22(B)(14), Ohio Revised Code.

CONCLUSIONS

1. Dr. Torres' conduct: (1) in answering "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation," and (2) in representing at the December 8, 1994, Board meeting

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that he had already surrendered his DEA certificate constitute "'publishing a false . . . statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code." In reaching this conclusion, it is significant that the Board has

previously determined that no element of intent is required to find a violation of Section 4731.22(B)(5), Ohio Revised Code.

2. Nevertheless, as set forth in the discussion of legal issues, the evidence does not support a conclusion that: (1) Dr. Torres' December 8, 1994, representation that he had already surrendered his DEA certificate, (2) Dr. Torres' answer of "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?"; or (3) Dr. Torres' answer of "yes" to the DEA application question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State of jurisdiction in which you are operating or propose to operate," constitutes "'(c)ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude,' as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13(A)(3), Ohio Revised Code, Falsification."

3. Similarly, the evidence does not support a conclusion that: (1) in answering "yes" to the DEA application question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State or jurisdiction in which you are operating or propose to operate," or (2) in answering "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation," Dr. Torres was "knowingly or intentionally furnishing false or fraudulent material information in, or omitting material information from, an application required under Title 21." Therefore, the evidence does not support a conclusion that Dr. Torres' conduct constitutes "'[c]ommission of an act that constitutes a felony in this State regardless of the jurisdiction in which the act was committed,' as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: 21 U.S.C. 843(a)(4), Prohibited Acts."

4. Finally, because Dr. Torres had received a letter from the Board which authorized him to apply for a DEA certificate, the evidence does not support a conclusion that Dr. Torres' answer of "yes" to the DEA application question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State of jurisdiction in which you are operating or propose to operate," constitutes "'publishing a false,

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fraudulent, deceptive, or misleading statement,' as that clause is used in Section 4731.22(B)(5), Ohio Revised Code."

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Although the evidence was insufficient to support many of the allegations against Dr. Torres, the violations that were found are significant in that they demonstrate Dr. Torres' blatant disregard for the provisions of the 1992 Consent Agreement. By entering into the Consent Agreement, Dr. Torres agreed to perform certain duties in order to procure the privilege of practicing medicine in the State of Ohio. However, Dr. Torres made no effort to become familiar with the terms of that agreement at the time it became effective. A careful reading of the Consent Agreement would have, in the least, alerted him to the possibility that his certificate was on probation.

Dr. Torres' disregard for the terms of the Consent Agreement is emphasized by the fact that when he appeared before the Board on December 8, 1994, he still had not read the terms of the Consent Agreement. It was only after that meeting that he asked Ms. Sussex for a copy of the agreement because he had been unable to locate his own. Under these circumstances, his "shock" at discovering he was not in compliance with the terms of the agreement is not surprising.

Moreover, his misrepresentation that he had already surrendered his DEA certificate further emphasizes his disregard for the Board's authority. At best, Dr. Torres focused only on what he wanted to say, so that he failed to hear and understand what the Board members said to him. It is clear that he focused not on compliance with the Board's orders, but only upon making his own needs known. Therefore, it is imperative that the Board closely monitor Dr. Torres' future conduct in order to assure that Dr. Torres is capable of practicing medicine according to the rules and statutes of Ohio.

Finally, prior to January 1995, Dr. Torres provided only sporadic documentation that he has maintained sobriety. The evidence presented demonstrates that he has not been consistent with any particular treatment regime. Therefore, it is also necessary that the Board continue to monitor and supervise Dr. Torres to ensure the safety of Ohio's health care consumers.

PROPOSED ORDER

It is hereby ORDERED that:

1. The certificate of Jose A. Torres, M.D., to practice medicine and surgery in the State of Ohio shall be SUSPENDED for a period of one (1) year. Such suspension is stayed, subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five (5) years:

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a. Dr. Torres shall obey all federal, state, and local laws, and all rules governing the practice of medicine in Ohio.

b. Dr. Torres shall submit quarterly declarations, under penalty of falsification pursuant to Section 2921.13, Ohio Revised Code, stating whether or not there has been compliance with all the provisions of probation.

c. Dr. Torres shall appear in person for interviews before the full Board or its designated representative at three (3) month intervals, or as otherwise requested by the Board.

d. Dr. Torres shall be ineligible to apply, reapply, or to hold registration with the United States Drug Enforcement Administration without prior Board approval.

e. Dr. Torres shall abstain completely from the personal use or possession of drugs except as prescribed, administered, or dispensed to him by another so authorized by law who has full knowledge of Dr. Torres' history of chemical dependency.

f. Dr. Torres shall abstain completely from the use of alcohol.

g. Dr. Torres shall submit to random urine screenings for drugs once a week or as otherwise directed by the Board. Dr. Torres shall ensure that all screening reports are forwarded directly to the Board on a monthly basis. Within thirty (30) days of the effective date of this Order, Dr. Torres shall submit to the Board for its prior approval the name of a supervising physician to whom Dr. Torres shall submit the required urine specimen. The supervising physician shall ensure that the urine specimens are obtained on a random basis, that the giving of the specimen is witnessed by a reliable person, and that appropriate control over the specimen is maintained. In addition, the supervising physician shall immediately inform the Board of any positive screening results. In the event that the designated supervising physician becomes unable or unwilling to so serve, Dr. Torres must immediately notify the Board in writing, and make arrangements acceptable to the Board for another supervising physician within thirty days.

h. Dr. Torres shall submit blood or urine samples for analysis without prior notice at such times as the Board may request.

i. Dr. Torres shall maintain participation in an alcohol and drug rehabilitation program, such as AA, NA, or Caduceus, approved in advance by the Board specifically for Dr. Torres, no less than twice a week, or as otherwise directed by the Board. At Dr. Torres' appearances before the Board or its designated representative, Dr. Torres shall submit

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acceptable documentary evidence of continuing compliance with this program.

j. Dr. Torres shall have a monitoring physician approved by the Board, who shall monitor him and provide the Board with reports on Dr. Torres' progress and status. Dr. Torres shall ensure that said reports are forwarded to the Board on a quarterly basis. In the event that the designated monitoring physician becomes unable or unwilling to serve in this capacity, Dr. Torres must immediately so notify the Board in writing, and make arrangements acceptable to the Board for another physician to monitor his progress and status as soon as practicable.

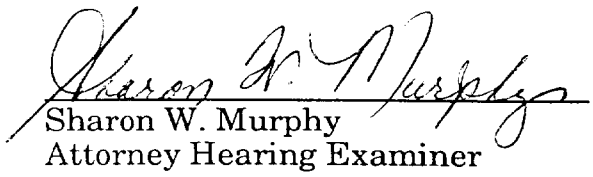
k. Dr. Torres shall provide a copy of this Order to all employers and the Chief of Staff at each hospital where he has, applies for, or obtains privileges.

l. In the event that Dr. Torres should leave Ohio for three consecutive months, or reside or practice outside the State of Ohio, Dr. Torres must notify the Board in writing of the dates of departure and return. Periods of time spent outside the State of Ohio shall not apply to the reduction of the probationary period.

2. If Dr. Torres violates probation in any respect, the Board, after giving Dr. Torres notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of Dr. Torres' certificate to practice medicine and surgery in the State of Ohio.

3. Upon successful completion of probation, as evidenced by a written release from the Board, Dr. Torres' certificate will be fully restored.

This Order replaces the July 8, 1992, Consent Agreement and shall become effective immediately upon the mailing of notification of approval by the State Medical Board.



Sharon W. Murphy
Attorney Hearing Examiner

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

EXCERPT FROM THE DRAFT MINUTES OF JUNE 14, 1995

REPORTS AND RECOMMENDATIONS

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

Dr. Garg noted that the matters of Mustafa Feroze, M.D., and James Miller, D.O., which were initially scheduled for consideration this month, would be considered at a later time. He asked that Board members retain their copies of the hearing records in these cases until such time as they are considered.

Dr. Garg asked whether each member of the Board received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of: Dewey Mays, Jr., M.D.; William G. Conrad, M.D.; Russell William Fiel, D.O.; James R. Holt, D.O.; Emil E. Pogorelec, D.O.; Jovencio L. Raneses, M.D.; James Michael Sinard, M.D; Mahendra K. Tandon, M.D.; and Jose A. Torres, M.D. A roll call was taken:

ROLL CALL:		
	Mr. Albert	- aye
	Dr. Bhati	- aye
	Dr. Stienecker	- aye
	Dr. Egner	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye
	Mr. Sinnott	- aye
	Dr. Heidt	- aye
	Dr. Steinbergh	- aye
	Dr. Garg	- aye

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

ROLL CALL:		
	Mr. Albert	- aye
	Dr. Bhati	- aye
	Dr. Stienecker	- aye

Dr. Egner	- aye
Dr. Agresta	- aye
Dr. Buchan	- aye
Ms. Noble	- aye
Mr. Sinnott	- aye
Dr. Heidt	- aye
Dr. Steinbergh	- aye
Dr. Garg	- aye

In accordance with the provision in Section 4731.22(C)(1), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of this matter. Dr. Gretter did not serve as Secretary in the above-named cases. Mr. Albert did not serve as Supervising Member in the matter of Russell William Fiel, D.O.

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

.....

Dr. Gretter joined the meeting at this time.

Dr. Garg asked whether Dr. Gretter had received, read, and considered the hearing record, the proposed findings, conclusions, and orders, and any objections filed in the matters of: Dewey Mays, Jr., M.D.; William G. Conrad, M.D.; Russell William Fiel, D.O.; James R. Holt, D.O.; Emil E. Pogorelec, D.O.; Jovencio L. Raneses, M.D.; James Michael Sinard, M.D; Mahendra K. Tandon, M.D.; and Jose A. Torres, M.D. Dr. Gretter indicated that he had.

Dr. Garg asked whether Dr. Gretter understands that the disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from dismissal to permanent revocation. Dr. Gretter stated that he does understand.

.....

REPORT AND RECOMMENDATION IN THE MATTER OF JOSE A. TORRES, M.D.

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

Dr. Garg advised that a request to address the Board has been timely filed on behalf of Dr. Torres.

Dr. Garg advised Mr. Byers that there is not a court reporter present, but instead the Board's minutes serve as the Board's official record of the meeting. Mr. Byers stated that he did not have any objection to the absence of a court reporter.

Dr. Garg reminded Mr. Byers that the Board members have read the entire hearing record, including the exhibits and any objections filed. He added that the Board will not retry the case at this time, and that pursuant to Section 4731.23(C), Revised Code, oral arguments made at this time are to address the proposed findings of fact and conclusions of the hearing examiner. Dr. Garg stated that Mr. Byers would be allotted approximately five minutes for his address.

Mr. Byers stated that Dr. Torres will also address the Board in a moment. Mr. Byers stated that it is incumbent that he highlights the fact that, as the Recommendation stands now, there are no findings or recommendations which relate to violations of the Code of Conduct, which the Board discussed in the previous case. It is critical that the Board understands that. The Hearing Examiner looked at the evidence, heard the testimony and had the chance to scrupulously go through the record, and recommended exonerating Dr. Torres on six violations. She found against Dr. Torres on two (B)(5) violations, which is fair and reasonable. The way Ohio law is written and has been interpreted by the courts, that provision of the Medical Practices Act proscribes publications by a physician which are false, fraudulent, deceptive, or misleading. There is no requirement that there is an evil or deceptive intent. The Hearing Examiner found that Dr. Torres misunderstood the import of the D.E.A. inquiry when he met with the Board in December. The Hearing Examiner recommends a fair and favorable recommendation and sanction in this matter, and Mr. Byers stated that he can personally endorse the Hearing Examiner's Report for the most part.

Dr. Torres thanked the Hearing Examiner for her timely report. He stated that he would also like to ask that the Board consider the reinstatement of his D.E.A. He humbly requested that he be given permission to apply for D.E.A. registration. He is an anesthetist and did a pain management fellowship at the Cleveland Clinic. He is required to have a D.E.A. for any job opportunities. He has sent out applications and talked with program directors, and has learned that D.E.A. registration is required. Dr. Torres indicated that he will answer any questions asked by the Board.

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

Ms. Strait stated that the Board is familiar with this case, part of which involves Dr. Torres' conduct at a previous appearance before the Board. There are several things she does want to point out. She strongly disagrees with aspects of the Hearing Examiner's Report and Recommendation. She seriously disagrees over whether the crime of falsification is a crime of moral turpitude. She feels that the Board can find that lying to one's professional licensing Board and the D.E.A. is a misdemeanor of moral turpitude.

She also disagrees with the Conclusion that Dr. Torres' responses on the D.E.A. application were not in violation of the U.S. Code. Dr. Torres did knowingly or intentionally omit information from the D.E.A.

He specifically answered "no" to a question asking whether the applicant had ever had any state professional license placed on probation. His license was granted under probation. He only got his license from this Board after entering into a consent agreement that placed his license on probation. Ms. Strait stated that she is mystified as to how the Hearing Examiner could have arrived at the Conclusion that Dr. Torres did not know his Ohio license was under probation. She doesn't understand that Conclusion, and she strongly disagrees with it.

Ms. Strait stated that she also believes that the Proposed Order is far too lenient in this case. What really happened here was that Dr. Torres several years ago wanted a license to practice medicine in Ohio. In order to get a license, he had to enter into a consent agreement with the Board. His correspondence at the time indicated that he understood the terms of the consent agreement. That correspondence was entered into the hearing record. Lo and behold, when Dr. Torres finally passes the FLEX and gets his license, he decides to completely ignore the terms of the consent agreement. He went ahead and applied for his D.E.A. Ms. Strait acknowledged that there was a question about the letter that was inappropriately sent to Dr. Torres advising that he could apply for his D.E.A., but added that the Board didn't charge him with wrongfully applying for it. What the Board charged him with was lying to the D.E.A. and lying to the Board. Ms. Sussex had several times discussed with Dr. Torres the issue of his D.E.A. registration and told him that he wasn't allowed to have it. Dr. Torres, nevertheless, in response to a direct question by Dr. O'Day, lied to the Board. His explanation for that lie at the hearing was completely without credibility. It was something he obviously came up with at the hearing.

Ms. Strait stated that, as for Dr. Torres' request today that he be given a D.E.A., she is speechless. That's what this whole case was about, and now he wants the Board to forget it and allow him to have one? Doctors in this state can practice without D.E.A.s. The Board has many doctors who are restricted from holding a D.E.A., and they are practicing.

Ms. Strait stated that she will leave to the Board's discretion what Order ought to be entered in this case. She just wants to go on record as saying that she believes that the Proposed Order in this case is far too lenient. She also strongly disagrees with Conclusions 2 and 3.

DR. GRETTER MOVED TO APPROVE AND CONFIRM MS. MURPHY'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER IN THE MATTER OF JOSE A. TORRES, M.D. DR. BUCHAN SECONDED THE MOTION.

MR. SINNOTT MOVED THAT THE REPORT AND RECOMMENDATION IN THE MATTER OF JOSE A. TORRES, M.D., BE AMENDED AS FOLLOWS:

Delete the first full paragraph on page 15 of the "Legal Issues" and all paragraphs following in that section.

Add the following to replace the deleted language above:

Although Dr. Torres had been put on notice by the terms of the Consent Agreement that he was not eligible to apply for a DEA certificate unless and until the Board gave its approval, he may well have interpreted the form letter which was sent to him with his certificate to represent such approval. Therefore, the evidence is not sufficient for this Board to conclude that Dr. Torres knowingly made a false statement when he represented to the DEA that the Board had authorized him to apply for a DEA certificate.

However, the evidence is sufficient to conclude that Dr. Torres did knowingly provide false information by representing that he had never had a certificate to practice restricted or placed on probation. He had entered into a consent agreement with the Board, which placed numerous, specific conditions on his continued ability to maintain his certificate. Even though Dr. Torres now claims not to have seen the word "probationary" in the Agreement itself, the DEA question was clear, the probationary terms, conditions and limitations of the Consent Agreement clearly placed his license on probation, and his answer to the DEA question regarding whether his license had ever been restricted or placed on probation was clearly false.

Finally, the evidence supporting the allegation that Dr. Torres represented at the December 8, 1994, Board meeting that he had already surrendered his DEA certificate, when in fact he had not, is incontrovertible. The tape recording of that portion of the Board meeting demonstrates that Dr. Torres in fact stated, in response to questions, that he had surrendered his DEA when he knew he had not. That he now comes before the Board and claims that he was unaware that his DEA certificate was even mentioned is simply not credible.

Under these facts and circumstances, the Board may conclude that Dr. Torres' false statements to federal and state agencies concerning the status of his license and DEA certificate constitutes "acts which constitute a misdemeanor involving moral turpitude."

Dr. Torres' conduct: (1) in answering "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation;" and (2) in representing at the December 8, 1994 Board meeting that he had already surrendered his DEA certificate constitute " 'publishing a false statement,' as that phrase is used in Section 4731.22(B)(5), Ohio Revised Code."

DELETE THE SECTION ENTITLED "CONCLUSIONS" IN ITS ENTIRETY, AND SUBSTITUTE THE FOLLOWING:

1. Further, the aforementioned conduct also constitutes " '(c)omission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if

the act involves moral turpitude,' as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13(A)(3), Ohio Revised Code, Falsification."

2. Similarly, the evidence supports a conclusion that, in answering "no" to the DEA application question: "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation," Dr. Torres was "knowingly or intentionally furnishing false or fraudulent material information in, or omitting material information from, an application required under Title 21." Therefore, the evidence supports a conclusion that Dr. Torres' conduct constitutes "'(c)omission of an act that constitutes a felony in this State regardless of the jurisdiction in which the act was committed,' as that clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: 21 USC 843(a)(4), Prohibited Acts."

3. Because Dr. Torres had received a form letter from the Board which indicated that he was authorized to apply for a DEA certificate, the evidence does not support a conclusion that Dr. Torres' answer of "yes" to the DEA application question: "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State of jurisdiction in which you are operating or propose to operate," constitutes any violation of the Medical Practice Act.

* * * * *

The violations as found above demonstrate Dr. Torres' blatant disregard for the provisions of the 1992 Consent Agreement. By entering into the consent Agreement, Dr. Torres agreed to perform certain duties in order to procure and maintain the privilege of practicing medicine in the State of Ohio. Moreover, his misrepresentation that he had already surrendered his DEA certificate further emphasizes his disregard for the Board's authority. It is imperative that the Board closely monitor Dr. Torres' future conduct in order to assure that Dr. Torres is capable of practicing medicine according to the rules and statutes of Ohio.

Finally, prior to January 1995, Dr. Torres provided only sporadic documentation that he has maintained sobriety. The evidence presented demonstrates that he has not been consistent with any particular treatment regime. Therefore, it is also necessary that the Board continue to monitor and supervise Dr. Torres to ensure the safety of Ohio's health care consumers.

Mr. Sinnott stated that this proposal does not alter the terms of the Proposed Order. He stated that he was mystified by the discussion of the legal issues appearing in the Report and Recommendation. He submits

that the amendment represents a far better statement of Board policy, and what the Board wants on its record.

DR. STEINBERGH SECONDED THE MOTION.

Dr. Steinbergh stated that she agrees with Mr. Sinnott's analysis, and spoke in support of the Proposed amendment.

Dr. Stienecker questioned whether a word was missing from proposed amended paragraph 2 of the Conclusions.

After review of the language, Mr. Sinnott stated that there was no typographical error in that quote from the statutes.

Dr. Steinbergh stated that she also had difficulty with language in the Proposed Order.

Dr. Garg asked that the Board first address Mr. Sinnott's proposed amendment.

Dr. Egner asked whether Dr. Torres knows where his consent agreement is now.

Dr. Torres responded that he does.

Dr. Egner stated that she recalls Dr. Torres' December appearance, and she felt it was very obvious at the time that he didn't take his Agreement with the Board seriously, and he was not familiar with its provisions. She stated that the Board does take these agreements seriously.

Dr. Heidt stated that he felt Dr. Torres was rather defiant all the way through these procedures. He spoke in support of Mr. Sinnott's proposed amendment, and is prepared to offer an amendment to the Proposed Order at the appropriate time.

A vote was taken on Mr. Sinnott's motion to amend:

VOTE:		
	Mr. Albert	- abstain
	Dr. Bhan	- aye
	Dr. Stienecker	- aye
	Dr. Gretter	- aye
	Dr. Egner	- aye
	Dr. Agresta	- aye
	Dr. Buchan	- aye
	Ms. Noble	- aye

Mr. Sinnott	- aye
Dr. Heidt	- aye
Dr. Steinbergh	- aye

The motion carried.

DR. HEIDT MOVED TO AMEND PARAGRAPH 1 OF MS. MURPHY'S PROPOSED ORDER IN THE MATTER OF JOSE A. TORRES, M.D., BY SUBSTITUTING THE FOLLOWING:

1. The certificate of Jose A. Torres, M.D., to practice medicine and surgery in the State of Ohio shall be REVOKED. Such revocation is stayed, subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five (5) years:

DR. STIENECKER SECONDED THE MOTION. A vote was taken:

VOTE:

Mr. Albert	- abstain
Dr. Bhati	- aye
Dr. Stienecker	- aye
Dr. Gretter	- aye
Dr. Egner	- aye
Dr. Agresta	- aye
Dr. Buchan	- aye
Ms. Noble	- aye
Mr. Sinnott	- aye
Dr. Heidt	- aye
Dr. Steinbergh	- aye

The motion carried.

Dr. Gretter stated that he looks at such cases from a little different perspective, having served as Board Secretary for several months. The Board needs to continue to send the message to probationers that they need to read, know, and follow the terms of their consent agreements. Dr. Gretter spoke in support of the amended Report and Recommendation.

Dr. Heidt informed Dr. Torres that, if this happens again, a revocation of his license will be the result.

DR. STIENECKER MOVED TO APPROVE AND CONFIRM MS. MURPHY'S PROPOSED FINDINGS OF FACT, CONCLUSIONS, AND ORDER, AS AMENDED, IN THE MATTER OF JOSE A. TORRES, M.D. DR. BHATI SECONDED THE MOTION. A vote was taken:

VOTE:

Mr. Albert	- abstain
Dr. Bhati	- aye
Dr. Stienecker	- aye
Dr. Gretter	- aye
Dr. Egner	- aye
Dr. Agresta	- aye
Dr. Buchan	- aye
Ms. Noble	- aye
Mr. Sinnott	- aye
Dr. Heidt	- aye
Dr. Steinbergh	- aye

The motion carried.

STATE MEDICAL BOARD OF OHIO

April 12, 1995

Jose A. Torres, M.D.
11841 Lake Avenue, #14
Lakewood, OH 44107

Dear Doctor Torres:

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

(1) In your application for registration with the D.E.A., dated September 21, 1994, you responded "No" to Question 4.(d) which asks, "Has the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted or placed on probation?" In addition, in response to Question 4.(a) which asks, "Are you currently authorized to prescribe, distribute, dispense, conduct research, or otherwise handle the controlled substances in the schedules for which you are applying, under the laws of the State or jurisdiction in which you are operating or propose to operate?" you stated, "Yes - State License No. 67581."

In fact, pursuant to the terms of a Consent Agreement into which you entered with the Board, effective September 19, 1994, your certificate to practice medicine and surgery in Ohio has been subject to certain probationary terms, conditions and limitations, including that you "shall be ineligible to hold, and shall not apply for, registration with the D.E.A. to prescribe, dispense or administer controlled substances without prior BOARD approval," since its issuance by the Board on September 19, 1994. A copy of the aforementioned Consent Agreement is attached hereto and fully incorporated herein.

Your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute "publishing a false, fraudulent, deceptive, or misleading statement," as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute "(c)ommission of an act that constitutes a felony in this state regardless of the jurisdiction in which the act was committed," as that

Mailed 4/13/95

clause is used in Section 4731.22(B)(10), Ohio Revised Code, to wit: 21 U.S.C. 843(a)(4), Prohibited Acts (knowingly or intentionally furnishing false or fraudulent material information in, or omitting material information from, an application required under Title 21).

Further, your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute "(c)ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude," as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13(A), Ohio Revised Code, Falsification.

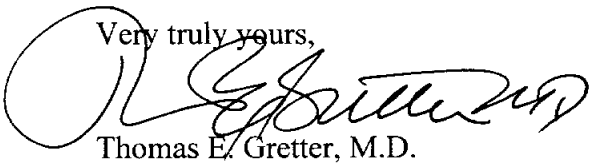
Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty (30) days of the time of mailing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

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

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

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Thomas E. Gretter, M.D.
Secretary

TEG/bjm
Enclosure
CERTIFIED MAIL # P 348 888 217
RETURN RECEIPT REQUESTED

cc: Kevin P. Byers, Esq.
CERTIFIED MAIL # P 348 885 736
RETURN RECEIPT REQUESTED

STATE MEDICAL BOARD OF OHIO

77 South High Street, 17th Floor • Columbus, Ohio 43266-0315 • (614) 466-3934

January 11, 1995

Jose A. Torres, M.D.
11841 Lake Ave., #14
Lakewood, OH 44107

Dear Doctor Torres:

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

(1) On or about July 8, 1992, the State Medical Board of Ohio ratified a Consent Agreement with you in lieu of formal proceedings based upon the violation of Section 4731.22 (B)(26), Ohio Revised Code. A copy of the above-mentioned Consent Agreement is attached hereto and fully incorporated herein.

In this Consent Agreement, the Board agreed to issue you a certificate to practice medicine and surgery in the State of Ohio subject to various probationary terms, conditions and limitations following your passing the FLEX examination.

(2) On or about August 29, 1994, the Board informed you that you received a passing score on the June 1994 FLEX examination.

(3) On or about September 19, 1994, the Board issued you a certificate to practice medicine and surgery in the State of Ohio.

(4) The Consent Agreement between you and the Board mentioned in paragraph (1) above states that the Consent Agreement became "effective upon (your) passing the FLEX examination and receiving licensure to practice medicine and surgery in the State of Ohio." Therefore, the effective date of the Consent Agreement was September 19, 1994.

Paragraph (5) of the Consent Agreement states that "Doctor Torres shall be ineligible to hold, and shall not apply for, registration with the D.E.A. to prescribe, dispense or administer controlled substances without prior BOARD approval."

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(5) On or about September 28, 1994, you applied for and received registration with the D.E.A. to prescribe and dispense controlled substances in violation of the limitation contained in paragraph (5) of your Consent Agreement with the Board.

Upon learning of your D.E.A. registration, you were notified in writing and by phone by Board staff that you were in violation of your Consent Agreement which prohibits you from applying for or possessing D.E.A. registration. You were advised to cease prescribing controlled substances and to surrender your D.E.A. registration immediately.

Nevertheless, you failed to surrender your D.E.A. registration until December 28, 1994.

(6) On or about December 8, 1994, you made a probationary appearance before the State Medical Board of Ohio pursuant to the terms of your Consent Agreement with the Board. At that appearance, in response to questioning by the Board, you represented to the Board that you had, in fact, already surrendered your D.E.A. registration when, in fact, you had not.

Your acts, conduct, and/or omissions as alleged in paragraph (6) above, individually and/or collectively, constitute "publishing a false, fraudulent, deceptive, or misleading statement," as that clause is used in Section 4731.22(B)(5), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (6) above, individually and/or collectively, constitute "(c)ommission of an act that constitutes a misdemeanor in this state regardless of the jurisdiction in which the act was committed, if the act involves moral turpitude," as that clause is used in Section 4731.22(B)(14), Ohio Revised Code, to wit: Section 2921.13(A)(3), Ohio Revised Code, Falsification.

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

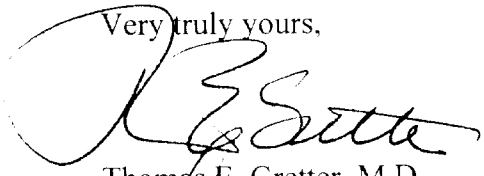
You are further advised that you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this

agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

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

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Thomas E. Gretter, M.D.
Secretary

TEG/bjm

Enclosures

CERTIFIED MAIL # P 348 888 184
RETURN RECEIPT REQUESTED

STATE MEDICAL BOARD OF OHIO
92 MAY 29 AM 11:43

CONSENT AGREEMENT
BETWEEN
JOSE ANTONIO TORRES, M.D.
AND
THE STATE MEDICAL BOARD OF OHIO

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

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

This Consent Agreement is entered into on the basis of the following stipulations, admissions and understandings:

A. THE STATE MEDICAL BOARD OF OHIO is empowered by Section 4731.22(B) (26), Ohio Revised Code, to limit, revoke, suspend a certificate, refuse to register or reinstate an applicant, or reprimand or place on probation the holder of a certificate for 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.

B. THE STATE MEDICAL BOARD OF OHIO enters into this Consent Agreement in lieu of formal proceedings based upon the violation of Section 4731.22(B) (26), Ohio Revised Code, and expressly reserves the right to institute formal proceedings based upon any other violations of Chapter 4731. of the Revised Code, whether occurring before or after the effective date of this Agreement.

C. JOSE ANTONIO TORRES, M.D. is an applicant for the June 1992 Flex Examination and for licensure to practice medicine and surgery in the State of Ohio.

D. JOSE ANTONIO TORRES, M.D. ADMITS that on May 30, 1990 he was admitted to a five (5) week inpatient rehabilitation program at the Marworth Center in Waverly, Pennsylvania. He completed this program and was discharged on July 11, 1990 with a diagnoses of alcohol dependence syndrome and cocaine dependency. Upon his discharge, DOCTOR TORRES was monitored by the Physicians' Health Program of the Medical Society of New Jersey until July of 1991 when he came to Ohio.

WHEREFORE, in consideration of the foregoing and mutual promises hereinafter set forth, and in lieu of any formal proceedings at this time, the State Medical Board of Ohio (hereinafter BOARD), agrees to issue a certificate to practice medicine and surgery in the State of Ohio, upon passage of the Flex examination, to JOSE ANTONIO TORRES, M.D. subject to the following probationary terms, conditions and limitations:

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1. DOCTOR TORRES shall obey all federal, state and local laws, and all rules governing the practice of medicine in Ohio;

2. DOCTOR TORRES shall submit quarterly declarations under penalty of perjury stating whether there has been compliance with all the conditions of this Consent Agreement;

3. DOCTOR TORRES shall appear in person for interviews before the full BOARD or its designated representatives at three month intervals, or as otherwise directed by the BOARD;

4. In the event that DOCTOR TORRES should leave Ohio for three continuous months, or reside or practice outside the State, DOCTOR TORRES, must notify the BOARD in writing of the dates of departure and return. Periods of time spent outside Ohio will not apply to the reduction of this period under the Consent Agreement;

5. DOCTOR TORRES shall be ineligible to hold, and shall not apply for, registration with the D.E.A. to prescribe, dispense or administer controlled substances without prior BOARD approval;

6. DOCTOR TORRES shall be permitted to order, write orders for, give verbal orders for, dispense or administer controlled substances as defined by State or Federal law under the Drug Enforcement Administration registration of The Cleveland Clinic Foundation during his fellowship and research program;

7. DOCTOR TORRES shall have all orders and/or prescriptions for controlled substances as defined by State or Federal law and as permitted by this Consent Agreement countersgined within twenty-four (24) hours by a physician who is fully authorized under State and Federal law to prescribe, administer and dispense controlled substances and also is employed and/or privileges in the hospital or institution in which DOCTOR TORRES is employed and/or has privileges;

8. DOCTOR TORRES shall abstain completely from the personal use or possession of drugs, except those prescribed, administered, or dispensed to him by another so authorized by law who has full knowledge of DOCTOR TORRES' history of chemical dependency;

9. DOCTOR TORRES shall abstain completely from the use of alcohol;

10. DOCTOR TORRES shall submit to random urine screenings for drugs and alcohol on a weekly basis or as otherwise directed by the BOARD. DOCTOR TORRES is to ensure that all screening reports are forwarded directly to the BOARD on a monthly basis.

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

DOCTOR TORRES hereby releases THE STATE MEDICAL BOARD OF OHIO, its Members, Employees, Agents, Officers and Representatives jointly and severally from any and all liability arising from the within matter.

This Consent Agreement shall be considered a public record as that term is used in Section 149.43, Ohio Revised Code.

Further, this information maybe reported to appropriate organizations, data banks and governmental bodies. This Consent Agreement shall become effective upon DOCTOR TORRES passing the Flex examination and receiving licensure to practice medicine and surgery in the State of Ohio.

JOSE ANTONIO TORRES, M.D.

5-28-92
DATE

CARLA S. O'DAY, M.D.
Secretary

6/5/92
DATE

TIMOTHY S. JOST, ESQ.
Supervising Member

6/3/92
DATE

ODELLA LAMPKIN, ESQ.
Assistant Attorney General

6/10/92
DATE

Rev. 10/89