

State Medical Board of Ohio

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

Richard A. Whitehouse, Esq.
Executive Director

(614) 466-3934
med.ohio.gov

August 11, 2010

Thomas Michael Bender
4966 Royalwood Road
N. Royalton, OH 44133

RE: Case No. 09-CRF-053

Dear Mr. Bender:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Patricia A. Davidson, Esq., Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on August 11, 2010, including motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board of Ohio.

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

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

THE STATE MEDICAL BOARD OF OHIO



Lance A. Talmage, M.D.
Secretary

LAT:jam
Enclosures

CERTIFIED MAIL NO. 91 7108 2133 3936 3070 7122
RETURN RECEIPT REQUESTED

Cc: Eric J. Plinke, Esq.
CERTIFIED MAIL NO. 91 7108 2133 3936 3124 7139
RETURN RECEIPT REQUESTED

Mailed 8-13-10

Dr. Amato noted that, in accordance with the provision in Section 4731.22(F)(2), Revised Code, specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of these matters. In the matters before the Board today, Dr. Talmage served as Secretary and Mr. Albert served as Supervising Member. Additionally, in the case of Robert Edward Barkett, Jr., M.D., Dr. Amato served as Acting Supervising Member.

Dr. Amato reminded all parties that no oral motions may be made during these proceedings.

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

.....
THOMAS MICHAEL BENDER
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Dr. Steinbergh moved to approve and confirm Ms. Davidson’s Findings of Fact, Conclusions of Law, and Proposed Order in the matter of Thomas Michael Bender. Dr. Madia seconded the motion.

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

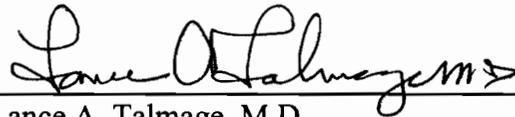
ROLL CALL:	Dr. Strafford	- aye
	Mr. Hairston	- aye
	Dr. Stephens	- aye
	Dr. Mahajan	- aye
	Dr. Steinbergh	- aye
	Dr. Amato	- aye
	Mr. Albert	- abstain
	Dr. Madia	- aye
	Dr. Talmage	- abstain
	Dr. Suppan	- abstain
	Mr. Morris	- aye
	Dr. Ramprasad	- aye

The motion carried.

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Patricia A. Davidson, State Medical Board Attorney Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on August 11, 2010, 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 Thomas Michael Bender, Case No. 09-CRF-053, as it appears in the Journal of the State Medical Board of Ohio.

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



Lance A. Talmage, M.D.
Secretary

(SEAL)

August 11, 2010
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF

*

*

CASE NO. 09-CRF-053

THOMAS MICHAEL BENDER

*

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on August 11, 2010.

Upon the Report and Recommendation of Patricia A. Davidson, 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.

- A. **GRANT OF ANESTHESIOLOGIST ASSISTANT CERTIFICATE; SUSPENSION OF CERTIFICATE:** The application of Thomas Michael Bender for a certificate to practice as an anesthesiologist assistant in the State of Ohio shall be GRANTED, provided that he otherwise meets all statutory and regulatory requirements. The certificate shall be immediately SUSPENDED for an indefinite period of time.
- B. **INTERIM MONITORING:** During the period that Mr. Bender's certificate to practice as an anesthesiologist assistant in Ohio is suspended, Mr. Bender shall comply with the following terms, conditions, and limitations:
1. **Obey the Law:** Mr. Bender shall obey all federal, state, and local laws, and all rules governing the practice of an anesthesiologist assistant in Ohio.
 2. **Declarations of Compliance:** Mr. Bender shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which this Order becomes effective. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.

3. **Personal Appearances**: Mr. Bender shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which this Order becomes effective, or as otherwise directed by the Board. Subsequent personal appearances shall occur every **three** months thereafter, and/or as otherwise directed by the Board. If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.

4. **Sobriety**

- a. **Abstention from Drugs**: Mr. Bender shall abstain completely from the personal use or personal possession of drugs, except those prescribed, dispensed, or administered to him by another so authorized by law who has full knowledge of Mr. Bender's history of substance abuse and who may lawfully prescribe for him (for example, a physician who is not a family member).

Further, in the event that Mr. Bender is so prescribed, dispensed, or administered any controlled substance, carisoprodol, or tramadol, Mr. Bender shall notify the Board in writing within seven days, providing the Board with the identity of the prescriber, the name of the drug Mr. Bender received, the medical purpose for which he received the drug, the date the drug was initially received, and the dosage, amount, number of refills, and directions for use.

Further, within 30 days of the date said drug is so prescribed, dispensed, or administered to him, Mr. Bender shall provide the Board with either a copy of the written prescription or other written verification from the prescriber, including the dosage, amount, number of refills, and directions for use.

- b. **Abstention from Alcohol**: Mr. Bender shall abstain completely from the use of alcohol.

5. **Drug and Alcohol Screens; Drug-Testing Facility and Collection Site**

- a. Mr. Bender shall submit to random urine screenings for drugs and alcohol at least four times per month, or as otherwise directed by the Board. Mr. Bender shall ensure that all screening reports are forwarded directly to the Board on a quarterly basis. The drug-testing panel utilized must be acceptable to the Secretary of the Board, and shall include Mr. Bender's drug(s) of choice.
- b. Mr. Bender shall submit, at his expense and on the day selected, urine specimens for drug and/or alcohol analysis. (The term "toxicology screen" is also be used herein for "urine screen" and/or "drug screen.")

All specimens submitted by Mr. Bender shall be negative, except for those substances prescribed, administered, or dispensed to him in conformance with the terms, conditions and limitations set forth in this Order.

Refusal to submit such specimen, or failure to submit such specimen on the day he is selected or in such manner as the Board may request, shall constitute a violation of this Order.

- c. Mr. Bender shall abstain from the use of any substance that may produce a positive result on a toxicology screen, including the consumption of poppy seeds or other food or liquid that may produce a positive result on a toxicology screen.

Mr. Bender shall be held to an understanding and knowledge that the consumption or use of various substances, including but not limited to mouthwashes, hand-cleaning gels, and cough syrups, may cause a positive toxicology screen, and that unintentional ingestion of a substance is not distinguishable from intentional ingestion on a toxicology screen, and that, therefore, consumption or use of substances that may produce a positive result on a toxicology screen is prohibited under this Order.

- d. All urine screenings for drugs and alcohol shall be conducted through a Board-approved drug-testing facility and Board-approved collection site pursuant to the global contract between the approved facility and the Board, which provides for the Board to maintain ultimate control over the urine-screening process and to preserve the confidentiality of positive screening results in accordance with Section 4731.22(F)(5), Ohio Revised Code. The screening process for random testing shall require a daily call-in procedure. Further, in the event that the Board exercises its discretion, as provided in Paragraph B.6, below, to approve urine screenings to be conducted at an alternative drug-testing facility, collection site, and/or supervising physician, such approval shall be expressly contingent upon the Board's retaining ultimate control over the urine-screening process in a manner that preserves the confidentiality of positive screening results.
- e. Within 30 days of the effective date of this Order, Mr. Bender shall enter into the necessary financial and/or contractual arrangements with the Board-approved drug-testing facility and/or collection site ("DFCS") in order to facilitate the screening process in the manner required by this Order.

Further, within 30 days of making such arrangements, Mr. Bender shall provide to the Board written documentation of completion of such arrangements, including a copy of any contract entered into between Mr. Bender and the Board-approved DFCS. Mr. Bender's failure to timely

complete such arrangements, or failure to timely provide written documentation to the Board of completion of such arrangements, shall constitute a violation of this Order.

- f. Mr. Bender shall ensure that the urine-screening process performed through the Board-approved DFCS requires a daily call-in procedure, that the urine specimens are obtained on a random basis, and that the giving of the specimen is witnessed by a reliable person.

In addition, Mr. Bender and the Board-approved DFCS shall ensure that appropriate control over the specimen is maintained and shall immediately inform the Board of any positive screening result.

- g. Mr. Bender shall ensure that the Board-approved DFCS provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Order, and whether all urine screens have been negative.
 - h. In the event that the Board-approved DFCS becomes unable or unwilling to serve as required by this Order, Mr. Bender shall immediately notify the Board in writing, and make arrangements acceptable to the Board, pursuant to Paragraph B.6, below, as soon as practicable. Mr. Bender shall further ensure that the Board-approved DFCS also notifies the Board directly of its inability to continue to serve and the reasons therefor.
 - i. The Board, in its sole discretion, may withdraw its approval of any DFCS in the event that the Secretary and Supervising Member of the Board determine that the DFCS has demonstrated a lack of cooperation in providing information to the Board or for any other reason.
6. **Alternative Drug-testing Facility and/or Collection Site:** It is the intent of this Order that Mr. Bender shall submit urine specimens to the Board-approved DFCS chosen by the Board. However, in the event that using the Board-approved DFCS creates an extraordinary hardship on Mr. Bender, as determined in the sole discretion of the Board, then, subject to the following requirements, the Board may approve an alternative DFCS or a supervising physician to facilitate the urine-screening process for him.
- a. Within 30 days of the date on which Mr. Bender is notified of the Board's determination that utilizing the Board-approved DFCS constitutes an extraordinary hardship on Mr. Bender, he shall submit to the Board in writing for its prior approval the identity of either an alternative DFCS or the name of a proposed supervising physician to whom Mr. Bender shall submit the required urine specimens.

In approving a facility, entity, or an individual to serve in this capacity, the Board will give preference to a facility located near Mr. Bender's residence or employment location, or to a physician who practices in the same locale as Mr. Bender. Mr. Bender shall ensure that the urine-screening process performed through the alternative DFCS or through the supervising physician requires a daily call-in procedure, that the urine specimens are obtained on a random basis, and that the giving of the specimen is witnessed by a reliable person. In addition, Mr. Bender shall ensure that the alternative DFCS or the supervising physician maintains appropriate control over the specimen and immediately informs the Board of any positive screening result.

- b. Mr. Bender shall ensure that the alternative DFCS or the supervising physician provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Order, and whether all urine screens have been negative.
 - c. In the event that the designated alternative DFCS or the supervising physician becomes unable or unwilling to so serve, Mr. Bender shall immediately notify the Board in writing. Mr. Bender shall further ensure that the previously designated alternative DFCS or the supervising physician also notifies the Board directly of the inability to continue to serve and the reasons therefor. Further, in the event that the approved alternative DFCS or supervising physician becomes unable to serve, Mr. Bender shall, in order to ensure that there will be no interruption in his urine-screening process, immediately commence urine screening at the Board-approved DFCS chosen by the Board, until such time, if any, that the Board approves a different DFCS or supervising physician, if requested by Mr. Bender.
 - d. The Board, in its sole discretion, may disapprove any entity or facility proposed to serve as Mr. Bender's designated alternative DFCS or any person proposed to serve as his supervising physician, or may withdraw its approval of any entity, facility or person previously approved to so serve in the event that the Secretary and Supervising Member of the Board determine that any such entity, facility or person has demonstrated a lack of cooperation in providing information to the Board or for any other reason.
 - e. For purposes of this Order, the "supervising physician" specified in this paragraph is not necessarily a physician identified in the utilization plan(s) under whose supervision Mr. Bender practices as an anesthesiologist assistant.
7. **Reports Regarding Drug and Alcohol Screens:** All screening reports required under this Order from the Board-approved DFCS, the alternative DFCS and/or supervising physician must be received in the Board's offices no later than the due

date for Mr. Bender's declarations of compliance. It is Mr. Bender's responsibility to ensure that reports are timely submitted.

8. **Additional Screening Without Prior Notice**: Upon the Board's request and without prior notice, Mr. Bender shall provide a specimen of his blood, breath, saliva, urine, and/or hair for screening for drugs and alcohol, for analysis of therapeutic levels of medications that may be prescribed for Mr. Bender, or for any other purpose, at Mr. Bender's expense. Mr. Bender's refusal to submit a specimen upon the request of the Board shall result in a minimum of one year of actual license suspension. Further, the collection of such specimens shall be witnessed by a representative of the Board, or another person acceptable to the Secretary and Supervising Member of the Board.
9. **Rehabilitation Program**: Mr. Bender shall undertake and maintain participation in an alcohol and drug rehabilitation program, such as A.A., N.A.A., or C.A., no less than three times per week, or as otherwise ordered by the Board. Substitution of any other specific program must receive prior Board approval.

Mr. Bender shall submit acceptable documentary evidence of continuing compliance with this program, including submission to the Board of meeting attendance logs, which must be received in the Board's offices no later than the due date for Mr. Bender's declarations of compliance.

10. **Comply with the Terms of Aftercare Contract**: Mr. Bender shall maintain continued compliance with the terms of the aftercare contract(s) entered into with his treatment provider(s), provided that, where terms of an aftercare contract conflict with terms of this Order, the terms of this Order shall control.
11. **Releases**: Mr. Bender shall provide authorization, through appropriate written consent forms, for disclosure of evaluative reports, summaries, and records, of whatever nature, by any and all parties that provide treatment or evaluation for Mr. Bender's substance abuse and/or related conditions, or for purposes of complying with this Order, whether such treatment or evaluation occurred before or after the effective date of this Order. To the extent permitted by law, the above-mentioned evaluative reports, summaries, and records are considered medical records for purposes of Section 149.43, Ohio Revised Code, and are confidential pursuant to statute.

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

12. **Absences from Ohio:** Mr. Bender shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the suspension/probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed. Further, the Secretary and Supervising Member of the Board shall have discretion to waive part or all of the monitoring terms set forth in this Order for occasional periods of absence of 14 days or less.

In the event that Mr. Bender resides and/or is employed at a location that is within 50 miles of the geographic border of Ohio and a contiguous state, Mr. Bender may travel between Ohio and that contiguous state without seeking prior approval of the Secretary or Supervising Member provided that Mr. Bender is otherwise able to maintain full compliance with all other terms, conditions and limitations set forth in this Order.

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

C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Mr. Bender's certificate to practice as an anesthesiologist assistant until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration:** Mr. Bender shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
2. **Compliance with Interim Conditions:** Mr. Bender shall have maintained compliance with all the terms and conditions set forth in Paragraph B of this Order.
3. **Demonstration of Ability to Resume Practice:** Mr. Bender shall demonstrate to the satisfaction of the Board that he can practice in compliance with acceptable and prevailing standards of care. Such demonstration shall include but shall not be limited to the following:
 - a. Certification from a treatment provider approved under Section 4731.25, Ohio Revised Code, that Mr. Bender has successfully completed a minimum of 28 days of inpatient/residential treatment for substance abuse at a treatment provider approved by the Board.
 - b. Evidence of continuing full compliance with an aftercare contract with a treatment provider approved under Section 4731.25, Ohio Revised Code.

Such evidence shall include, but shall not be limited to, a copy of the signed aftercare contract. The aftercare contract must comply with Rule 4731-16-10, Ohio Administrative Code.

- c. Evidence of continuing full compliance with this Order.
- d. Two written reports indicating that Mr. Bender's ability to practice has been assessed and that he has been found capable of practicing according to acceptable and prevailing standards of care, with respect to substance abuse.

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

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

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

1. **Terms, Conditions, and Limitations Continued from Suspension Period:** Mr. Bender shall continue to be subject to the terms, conditions, and limitations specified in Paragraph B of this Order.
2. **Tolling of Probationary Period While Out of Compliance:** In the event Mr. Bender is found by the Secretary of the Board to have failed to comply with any provision of this Order, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period under this Order.

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

F. **VIOLATION OF THE TERMS OF THIS ORDER:** If Mr. Bender violates the terms of this Order in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.

G. **REQUIRED REPORTING WITHIN 30 DAYS OF THE EFFECTIVE DATE OF THIS ORDER:**

1. **Required Reporting to Employers and Others:** Within 30 days of the effective date of this Order, Mr. Bender shall provide a copy of this Order to all employers or entities with which he is under contract to provide healthcare services (including but not limited to third-party payors) or is receiving training; and the Chief of Staff at each hospital or healthcare center where he has privileges or appointments. Further, Mr. Bender shall promptly provide a copy of this Order to all employers or entities with which he contracts in the future to provide healthcare services (including but not limited to third-party payors), or applies for or receives training, and the Chief of Staff at each hospital or healthcare center where he applies for or obtains privileges or appointments. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.

In the event that Mr. Bender provides any healthcare services or healthcare direction or medical oversight to any emergency medical services organization or emergency medical services provider in Ohio, within 30 days of the effective date of this Order, he shall provide a copy of this Order to the Ohio Department of Public Safety, Division of Emergency Medical Services. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.

2. **Required Reporting to Other State Licensing Authorities:** Within 30 days of the effective date of this Order, Mr. Bender shall provide a copy of this Order to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license, as well as any federal agency or entity through which he currently holds any professional license or certificate. Also, Mr. Bender shall provide a copy of this Order at the time of application to the proper licensing authority of any state or jurisdiction in which he applies for any professional license or reinstatement/restoration of any professional license. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.

3. **Required Reporting to Treatment Providers/Monitors:** Within 30 days of the effective date of this Order, Mr. Bender shall provide a copy of this Order to all persons and entities that provide substance-abuse treatment to or monitoring of Mr. Bender. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.

4. **Required Documentation of the Reporting Required by Paragraph G:** Mr. Bender shall provide this Board with **one** of the following documents as proof of each required notification within 30 days of the date of each such notification: (a) the return receipt of certified mail within 30 days of receiving that return receipt, (b) an acknowledgement of delivery bearing the original ink signature of the person to whom a copy of the Order was hand delivered, (c) the original facsimile-generated report confirming successful transmission of a copy of the Order to the person or entity to whom a copy of the Order was faxed, or (d) an original computer-generated printout of electronic mail communication documenting the e-mail transmission of a copy of the Order to the person or entity to whom a copy of the Order was e-mailed.

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

(SEAL)



Lance A. Talmage, M.D.
Secretary

August 11, 2010

Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

In the Matter of	*	
Thomas Michael Bender,	*	Case No. 09-CRF-053
Respondent.	*	Hearing Examiner Davidson

REPORT AND RECOMMENDATION

Basis for Hearing

In a notice of opportunity for hearing dated May 13, 2009, the State Medical Board of Ohio notified Thomas Michael Bender that the Board intended to determine whether to grant or deny his application for a certificate to practice as an anesthesiologist assistant in Ohio and whether to impose discipline if the license is granted. The Board set forth factual allegations including the following: Mr. Bender made a false statement on his licensure application, in that he failed to disclose a criminal conviction for operating a vehicle under the influence of alcohol; he participated in a 72-hour impairment evaluation at Glenbeigh Hospital, where it was determined that he requires inpatient treatment due to the impairment of his ability to practice according to acceptable and prevailing standards of care; and he has not entered inpatient treatment. (St. Ex. 1)

The Board charged that the alleged facts establish “[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 language is used in Ohio Revised Code Section [R.C.] 4760.13(B)(6). The Board further charged that Mr. Bender made “a false, fraudulent, deceptive, or misleading statement in securing or attempting to secure a certificate of registration to practice as an anesthesiologist assistant,” as that language is used in R.C. 4760.13(B)(8). (St. Ex. 1)

The Board received Mr. Bender’s request for hearing on May 21, 2009. (St. Ex. 1)

Appearances

Richard Cordray, Attorney General, and Karen A. Unver, Assistant Attorney General, for the State. Eric J. Plinke, Esq., for the Respondent.

Hearing Dates: October 1 and 20, and November 3, 2009

SUMMARY OF THE EVIDENCE

All evidence admitted in this matter, even if not specifically mentioned, was thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

December 2006 Arrest & Criminal Conviction in May 2007

1. On December 9, 2006, Thomas Michael Bender was arrested by police in North Royalton, Ohio, and charged with several offenses, including operating a vehicle under the influence of alcohol [OVI] in violation of Section 434.01(A)(1), North Royalton Ordinances. (St. Ex. 10) The arresting officer filed a narrative report including the following:

On 12/09/2006 at 0246 hours I * * * observed a silver Audi stopped at the light. The vehicle was stopped about two car lengths from the stop bar, and no other vehicles were around. I noticed that the driver had his head down with his chin to his chest. * * * While the light was still red the driver slowly moved up the two car lengths to the light.

When the light turned green the driver continued south, but was in the left turn lane for N/B traffic. I noticed that the vehicle never drove straight in its lane, weaving from edge line to center line. I also observed the vehicle drive left of the center line two more times about the width of one tire. The vehicle also drove over the white edge line one time. * * * I activated my emergency lights and siren to stop the vehicle. The driver slowed but continued south bound past York Road fields then stopped.

I approached the vehicle and spoke to the driver, Thomas M. Bender. Thomas had glassy eyes, slurred speech, and moved very slowly. Thomas repeated every question I asked him. Thomas had a strong odor of an alcoholic beverage on his person. I asked Bender how much alcohol he consumed and he stated a few beers with friends.

I asked Thomas to exit the vehicle and attempted field tests as per Ohio v Homan, see alcohol influence report. Thomas could not complete the walk and turn or one leg stand. Thomas lost his balance attempting the walk and turn, and fell into me. We stopped the test at that point. I arrested Thomas for OVI and transported him to NRPD jail, where I read him a statement of rights and the BMV 2255. Thomas attempted to take a breath test three times, but each gave an invalid reading. The BAC showing on the machine before the invalid reading was .217.

In the jail Thomas stated to me that he really messed up, and said he is mad at himself. Thomas also said "I knew I should not have driven, I should have called a cab." He went on to say he thought he could make it home because it was not too far. Thomas said over and over how he made a mistake tonight. Thomas vomited while in the jail, between the second and third attempt at the breath test.

(St. Ex. 10)

2. The documents from the North Royalton Police Department include an incident report noting among other things that Mr. Bender was booked and placed into a cell. Further, on the date of Mr. Bender's arrest, his driver's license was placed under an administrative license suspension pursuant to R.C. 4511.191. (St. Ex. 10)

3. The charges against Mr. Bender were transferred from the North Royalton Mayor's Court to the Municipal Court in Parma, Ohio. Mr. Bender was represented by counsel, and court documents show numerous motions, entries, conferences, waivers, and other proceedings from mid-December 2006 through May 2007. (St. Ex. 10)
4. On May 29, 2007, in Parma Municipal Court in *State v. Thomas M. Bender*, Case No. 06-TRC-08306, Mr. Bender pleaded no contest to OVI. The court found him guilty of OVI, a misdemeanor of the first degree. (St. Ex. 10)

The court imposed sentence as follows: a \$750 fine with suspension of \$350, ten days of jail time with suspension of seven days, probation for ten months (six months of "active" probation and four months of "inactive"), and payment of costs. Mr. Bender's driver's license had been suspended since December 9, 2006, and it appears that the court ordered this suspension to remain in effect through June 7, 2007, for a total suspension of six months. Two other charges were dismissed.

5. Mr. Bender testified that he spent one night in jail and received six points on his driver's license. He explained that, in lieu of the three days in jail, he spent three days in a driver-intervention program. Documents from this intervention program reflect that Mr. Bender completed a 72-hour residential program in June 2007. (Tr. at 21-22; St. Ex. 9 at 30) A counselor for the program reported in part:

Testing and screening are not suggesting risk factors of an alcohol related problem. He did receive a moderately elevated Mast score of 9, but this does appear to be related to this arrest only. He reported his use of alcohol prior to this arrest to be x2/week, 3-4 beers or 7-8 beers each session. His present use of alcohol was reported to be x2/week, 1-2 beers or 3-4 beers each session. In the past he reported a history of blackouts[;] however, for the last several years there does not appear to be any other high risk factors other than this consequence.

(St. Ex. 9 at 30)

6. Mr. Bender testified that, during the driver-intervention program in June 2007, he was made "well aware" that OVI is a criminal act, constituting a misdemeanor. He testified that, during this court-ordered program, he became aware of the seriousness of an OVI offense. (Tr. at 411, 429-430, 440)

September 2008 - Application for Licensure

7. On September 5, 2008, Mr. Bender submitted to the Board an Application for Certificate of Registration, Anesthesiologist Assistant. On his application, Mr. Bender provided information including the following: he was born in 1978, received his bachelor's degree in 2001 from the College of the Holy Cross in Worcester, Massachusetts, received a master's degree in anesthesia in 2008 from Case Western Reserve University in Cleveland, Ohio, and he passed the examination administered by the National Commission for Certification of Anesthesiologist Assistants in June 2008. (St. Ex. 2)

8. As part of his application, Mr. Bender signed an affidavit dated August 21, 2008, certifying under oath that all the statements he had made or would make with respect to his application are true. He also certified: "I further understand that consideration of this application is based on the truth of the statements and documents made or furnished in connection with it. If any of the statements are false, I may be permanently denied registration as an Anesthesiologist Assistant in Ohio." (St. Ex. 2)
9. Under the heading Additional Information, Mr. Bender answered "NO" when asked the following question on the application:
 9. Have you ever been convicted or found guilty of a violation of any law, regardless of the legal jurisdiction in which the act was committed, other than a minor traffic violation? Please be advised that you are required to submit copies of all relevant documentation, such as police reports, *certified* court records and any institutional correspondence and orders. * * *

(St. Ex. 2) (emphasis in original)

Mr. Bender's Answers to the Board's Interrogatories

10. In December 2008, the Board directed a set of interrogatories to Mr. Bender. On December 31, 2008, the Board received his answers and accompanying documents. (St. Ex. 9) With regard to arrests, Mr. Bender identified two. He included the December 2006 arrest described above that resulted in his OVI conviction in 2007. (St. Ex. 9 at 8) In addition, he described an earlier arrest that had taken place on November 21, 1994:

I was in a friend's car. I took a small marijuana cigarette from the car and put it in my pocket. Later, the police came and I told them I had a small marijuana cigarette in my pocket. As a result, they escorted me to the North Royalton Police Department. * * *

(St. Ex. 9 at 8) Mr. Bender explained that the police "talked with me for probably less than 30 minutes, and then I went home." He stated that, as far as he knew, no charges had been filed against him. He provided documentation from the juvenile court system indicating that there were no charges against him. (St. Ex. 9 at 8)

11. In the Board's interrogatories, Mr. Bender was asked to describe his use of illegal drugs within the past five years. He answered as follows:

On my birthday on 8/5/06, I was at a birthday party and I consumed a small amount of marijuana. Other than that, nothing in the last five (5) years. * * *¹

(St. Ex. 9 at 18)

¹ Mr. Bender was 28 years old at the time of this use of an illegal drug.

12. When asked whether he had ever been charged with any crime in any jurisdiction, Mr. Bender first noted his previous answers. He then set forth the following statements:

Nothing else other than minor and routine traffic offenses. I think my last speeding ticket was in 2002 in Pennsylvania. I think that was my last minor and routine traffic offense.

If you would like me to sign an authorization form that will empower you to obtain my official records from the FBI, BCI or other agency, please let me know. I would be happy to cooperate in this regard.

(St. Ex. 9 at 10) On a subsequent page, Mr. Bender again offered that, if the Board would like him “to sign an authorization form that will empower [the Board] to obtain any and all court records that exist, and any and all reports and records of the North Royalton Police Department that exist,” the Board should let him know, and he “would be happy to cooperate in this regard.”² (St. Ex. 9 at 12)

13. In the interrogatories, the Board also asked about Mr. Bender’s participation in driver-intervention programs and any other evaluation, diagnosis and/or treatment for alcohol abuse or dependency. Mr. Bender stated that, in addition to the 72-hour alcohol program required by the court as a consequence of his OVI conviction, he also had participated in a program at the McIntyre Center in Parma Heights, Ohio, on December 23, 2008 [a few days before he submitted his answers to the Board’s interrogatories]. Mr. Bender asserted that his attendance at this program was not associated with any substance abuse or misuse. (St. Ex. 9 at 15, 17)
14. Mr. Bender also provided a one-page opinion report from the McIntyre Center. The heading indicates that this center provides, among other things, 72-hour weekend driver-intervention programs, alcohol and drug treatment counseling, and “assessments.”³ The report, which was issued by a Licensed Clinical Dependency Counselor III whose name is not discernible, lists a brief diagnosis and recommendation, with little description of the clinical foundation. The counselor stated that test scores showed “no addiction at this time” and that no treatment was recommended. The diagnosis is “305.00 Alcohol Abuse.” (St. Ex. 9 at 31)

Board-Ordered Evaluation at Glenbeigh Hospital

15. By letter dated January 20, 2009, the Board notified Mr. Bender that he was required to submit to a 72-hour inpatient evaluation to determine whether he was impaired under R.C. 4760.13(B)(6):

The State Medical Board of Ohio [Board] has determined that it has reason to believe that you are in violation of Section 4760.13(B)(6), Ohio Revised Code,

²Mr. Bender had already provided authorization to the Board for criminal background checks and had paid for reports from the BCI and FBI, as part of his application submitted in September 2008. (St. Ex. 2 at 8, Resp. Ex. C)

³ The record does not include evidence that the McIntyre Center is a Board-approved assessor of substance dependency/abuse.

to wit: “[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.”

This determination is based upon one or more of the following reasons:

- (1) On or about September 5, 2008, you caused to be submitted to the Board an Application for Certificate of Registration – Anesthesiologist Assistant [2008 Application], which remains pending at this time. Although you were asked in your 2008 Application whether you had ever been convicted or found guilty of a crime, you failed to disclose that on or about May 29, 2007, in Parma Municipal Court, Parma, Ohio, you entered a plea of no contest to and were found guilty of Operating a Vehicle under the Influence of Alcohol or Drugs [OVI].
- (2) On or about December 9, 2006, you were arrested by North Royalton [Ohio] Police and charged with OVI * * *. On the above date, at approximately 2:45 a.m., you were observed by law enforcement * * *. You were stopped, and after noticing a strong odor of alcohol, you were asked to perform various field sobriety tests, which you failed, even falling into the officer while you attempted the walk and turn. Subsequent to being taken into custody, you attempted three times to take a breath test, but each gave an invalid reading. Further, you vomited between the second and third attempts at the breath test.

By the authority vested in the State Medical Board of Ohio by Section 4760.13(B)(6), Ohio Revised Code, you are ordered to submit to an examination. * * * You are to report to Glenbeigh Hospital, on **Monday, February 16, 2009, at 10 a.m.** for a 72-hour in-patient evaluation.

* * *

Copies of the applicable statute sections are enclosed for your information.

(St. Ex. 3) (Emphasis in original)

16. Mr. Bender subsequently made arrangements with the Board to begin his evaluation two weeks earlier, on Monday, February 2, 2009. (St. Ex. 3)

Monday, February 2, 2009

17. On February 2, 2009, Mr. Bender appeared at Glenbeigh at about 10 a.m. for his evaluation. He testified that, when he arrived at Glenbeigh, he knew that the question for evaluation was “whether or not I have an alcohol problem that was interfering with my ability to practice.” He was “anxious to get the evaluation, to prove” that he did not have “a problem with alcohol.” He was concerned about obtaining his Anesthesiologist Assistant license in order to start a job at Parma Hospital. He testified that, when he walked into Glenbeigh, he believed that he had no impairment issue. (St. Exs. 6, 81; Tr. at 39, 69, 72, 335)

18. At about 11:00 a.m., a nurse at Glenbeigh wrote the following note regarding Mr. Bender's statements and other matters:

I am here for a three-day evaluation from the Ohio Medical Board. I am nervous because I have invested in getting my license but I am happy to cooperate. The last time I drank was about January 12 of this year. I only drink occasionally on special occasions. I only drink a few times a year. I did get an OVI in December of 2006.

BAC 0.000, drug screen all negative. Good eye contact. 3 day evaluation.

Pt. does not seem to abuse alcohol and he denies any other substance use.
Dr. Merkin notified orders received. Will cont. to monitor.⁴

(St. Ex. 8 at 2; see, also, Resp. Ex. E at 27-31)

19. Mr. Bender then met for about two hours with Rose Mason, a Licensed Independent Chemical Dependency Counselor, and she interviewed him to gather data for a Biopsychosocial Assessment.⁵ In her report, Ms. Mason set forth Mr. Bender's responses to questions regarding his history of alcohol use and drug use, personal relationships, spirituality, current emotional/behavioral status, and other matters. (St. Ex. 6 at 7-17, Tr. at 45, 93-94, 170-171)
20. Ms. Mason testified that she typed Mr. Bender's answers into a file on her computer as he gave the answers, while he was sitting in her office. She stated that she types the answer exactly as the individual says it, and there is "no way" she could have done it improperly. "I mean I have been doing it for so many years, I would know if I screwed up, and I did not screw up." She testified that she looks at the answer before going on to the next question. With respect to quotations, Ms. Mason testified that, although she places the information in quotation marks as received from the individual, she did paraphrase Mr. Bender "in parts of it." She noted that she paraphrases especially when entering information from phone conversations with collateral sources, because it is difficult to type while using the telephone. She stated that she takes notes when talking with collateral sources and then enters the information into the computer following the conversation. (Tr. at 176-179, 188-189)
21. The Biopsychosocial Assessment includes the following information from Mr. Bender as entered by Ms. Mason:

Describe siblings' pattern of usage of mood-altering chemicals:

"One [sibling] might have had an alcohol problem, but quit drinking after [his/her] children were born. The others are social drinkers."

⁴ Mr. Bender explained that, while Dr. Merkin was officially the admitting physician, he did not meet with Dr. Merkin but was interviewed by Dr. Adelman, who sent the letter to the Board regarding the results of the evaluation. (Tr. at 98, 100, 393, 417)

⁵ Ms. Mason often identified herself on the documents in the hearing record as "Rose Litzinger-Mason." See, e.g., St. Ex. 6 at 17. However, during the hearing, witnesses consistently referred to her as "Rose Mason," so that name is used in this report.

Describe how patient's usage of mood-altering chemicals has affected relationship with siblings:

"I worry that it has influenced my brother as far as me being a role model. Hasn't affected my relationship with my sisters."

Describe upbringing and family unit:

"It was normal, loving and caring, no abuse and no alcoholism. It was very good."

Describe role in the family:

"I had the role of taking care of the younger children and being a role model."

First confronted about usage of mood-altering chemicals:

"My ex-girlfriend thought she had to stop drinking after she realized it may have been an issue for her. She has voiced her worries about my drinking and the friends I have who are heavy drinkers."

Describe when the use of mood-altering chemicals first became an issue with family members:

"I don't think it has eve[r] been an issue with family except when I got the DUI two years ago.⁶

* * *

How did patient fit in their social environment while using mood-altering chemicals?

"I drink with friends in bars and I fit in okay. I also drink at family gatherings but that has never been a problem for me either."

(St. Ex. 6 at 9; see, also, Resp. Ex. B at 1, Tr. at 180)⁷

22. In regard to the discussion about his ex-girlfriend, Mr. Bender acknowledged that "what's written" in Ms. Mason's report is essentially what he had discussed. In addition, he agreed specifically that he had told Ms. Mason that "My ex-girlfriend thought she had to stop drinking after she realized that it had been an issue for her."⁸ (Tr. at 47-49, 400)

⁶During the hearing, most of the witnesses used the abbreviation "DUI" (driving under the influence) instead of "OVI" (operating a vehicle, etc.). In this report, the abbreviation "DUI" is used interchangeably with "OVI."

⁷After her interview with Mr. Bender, Ms. Mason printed a draft of the Biopsychosocial Assessment on February 3. (Resp. Ex. B) In the February 3rd draft, the answers are shown without the questions and without subject headings. (*Compare* Resp. Ex. B and St. Ex. 6 at 7-17) Ms. Mason printed and signed a final copy of the Biopsychosocial Assessment on Thursday, February 5, 2009. The final version on February 5 reflects that revisions were made to punctuation, spacing and spelling. (St. Ex. 6 at 7-17; Resp. Ex. B at 1; see, also, Resp. Ex. E at 14-26; Tr. at 238-239)

⁸ However, at a later point during his testimony, Mr. Bender testified:

Q. Did anybody at Glenbeigh ask you about your relationship with Sheryl Zubal [his former girlfriend]?
A. (Mr. Bender) No.

(Tr. at 399)

23. According to Ms. Mason's report, Mr. Bender also provided the following answers:

What problems do you anticipate while remaining sober in your social environment?

"I have quit before so I don't think it will be a problem. Most of my friends are drinkers, but that won't be an issue with them. They will respect my issues."

(St. Ex. 6 at 9; see, also, Resp. Ex. B at 3)

24. When asked during the hearing whether he had told Ms. Mason that most of his friends were drinkers, Mr. Bender answered: "I may have said that, yes." (Tr. at 50-51)

25. In addition, Ms. Mason reported Mr. Bender's response regarding legal history:

"DUI two years ago * * *. I was pulled over for weaving. I did not do the field breathalyzer, but blew at the station. They told me it was invalid three times. I threw up shortly after I got there. I drank about two beers and three to four shots of Tequila."

(St. Ex. 6 at 12; see, also, Resp. Ex. B at 9)

26. During the hearing, Mr. Bender acknowledged that, when questioned by the police at the time of his arrest, he had not mentioned the tequila shots. When asked why he had not mentioned the tequila, he answered: "I don't know that they specifically asked what type of drinks at the time. I didn't feel the need to embellish." (Tr. at 55-56)

27. The following answers by Mr. Bender were also reported on the Biopsychosocial Assessment:

CHEMICAL HISTORY AS RELATED BY THE PATIENT

ALCOHOL HISTORY:

Patient reports having the first drink at the age of 14.

Patient reports having the first intoxication at the age of 16.

At what age did alcohol become a problem? none

Drinking pattern prior to admission: Type, amount, frequency/pattern, duration of use:

"I had my last drink on 1/12/09. That night I drank one beer and one glass of sak[e] wine at a Japanese restaurant. Prior to that I shared two 22-ounce bottles of beer with my father. He had brewed it himself, and that was right before Christmas of 2008."⁹

⁹ With regard to questions regarding the extent of people's use of alcohol, Chris Adelman, M.D., an expert in addiction medicine, testified that "Most people minimize their drinking." Dr. Adelman further testified that, despite Mr. Bender's assertion that he currently drinks infrequently, "I suspect he drinks more than that, and he's been drinking significantly since he was 16." (Tr. at 111, 151)

Describe heaviest period of alcohol use and consequences.

“When I was in college I drank as most of the kids there drank regularly. I was drinking from four to eight drinks once to twice per week at a party.”

Have you ever experienced a blackout? Yes

(St. Ex. 6 at 13; see, also, Resp. Ex. B at 9, Tr. at 181-182)

How do you behave differently when you drink alcohol?

“If anything I talk more and am more social.”

Do you consider yourself an alcoholic? Yes

(St. Ex. 6 at 13; see, also, Resp. Ex. B at 11)

28. With regard to Mr. Bender’s answer that he considers himself to be “an alcoholic,” Ms. Mason testified that they talked about the meaning of “alcoholic,” and she explained symptoms such as blackouts and certain changes in behavior. Ms. Mason, when pressed as to whether Mr. Bender, on the very first day of his evaluation, had said he was an alcoholic, Ms. Mason answered: “Definitely yes.” When further asked if she was “sure” about the answer that he had given, Ms. Mason answered: “I am positive.” (Tr. at 182-183, 204)
29. She agreed, however, that an individual’s view that he is an alcoholic is not a DSM-IV criteria for diagnosing alcohol dependence or abuse. (Tr. at 204, 228)
30. Ms. Mason reported the following answers with regard to drug history, and any previous treatment relating to substance use/abuse:

DRUG HISTORY:

Reports first drug use at the age of 16

At what age did drugs become a problem? none

Drug History:

Name of Drug; First Use/Age/Date; Last Use/Age/Date; Frequency/Pattern:

“In my life I used marijuana, off and on, in my 16th year. I tried to hide a joint after the police pulled up right beside us in the car that my friend was driving. * * * [T]he policeman came up behind his car to see if we had car problems. They saw the pot paraphernalia in the back seat. I did not want them to see the joint so I hid it and was charged with possession of marijuana, but was never arrested for it, and it is not on my record.

Describe the heaviest period of drug use and other pertinent information related to drug usage:

“That was it.”

(St. Ex. 6 at 13; see, also, Resp. Ex. B at 11)

* * *

Describe behavior and attitude changes when using mood-altering chemicals:
“When I smoked pot I got paranoid and less social and more nervous.”

Do you consider yourself drug addicted? No

Have you experienced loss of control over chemicals? No

Give example: “I feel that I was able to stop using marijuana without problems.”

* * *

PREVIOUS TREATMENT

Previous treatment for alcoholism/chemical dependency: * * *

“I did go to the three day intervention after the DUI. I was told that I did not have an alcohol problem and there was no need for A.A. or further treatment.”

Recommendations following previous treatment(s) & patient’s response: None reported

(St. Ex. 6 at 14; see, also, Resp. Ex. B at 11)

31. With regard to strengths identified by Mr. Bender, Ms. Mason reported his answer as follows:

“I see that I am intelligent and am book smart. I am able to take tests well and I have a good sense of humor. I just try to stay positive and upbeat. I have courage.”

(St. Ex. 6 at 14; see, also, Resp. Ex. B at 13)

32. With regard to Mr. Bender’s vocational and socioeconomic status, Ms. Mason noted that he had reported that he was currently not employed but had entered into a contract with a hospital, pending licensure.¹⁰ (St. Ex. 6 at 12) The report includes the following regarding his vocational status:

“Patient has been employed by contract with Parma Community Hospital, but have not worked there yet for the past 2 1/2 years, as an Assistant Anesthiologist at varied facilities. [sic]¹¹

Effect of use of mood-altering chemicals on quality of work:
None reported

¹⁰At the hearing, Mr. Bender testified that he was babysitting his sister’s children while she worked, which was essentially a full-time job. (Tr. at 98-99)

¹¹This passage regarding employment and PA training is obviously garbled and does not make sense. Although the passage does not set forth intelligible information, the Hearing Examiner is not convinced that Ms. Mason actually misunderstood the facts. Rather, the Hearing Examiner believes the passage more likely involves a typing error. In that respect, the passage may be viewed as demonstrating that Ms. Mason’s reporting included at least one typing error of significance, and a finder of fact could infer that she made other errors as well.

Describe any disciplinary action at work/is continued employment in jeopardy?

“Still waiting to get my Ohio Medical License due to this DUI. They have not filled my position yet so I assume it will be waiting for me.”

(St. Ex. 6 at 12; see, also, Resp. Ex. B at 7)

33. As part of her assessment, Ms. Mason administered the Substance Abuse Subtle Screening Inventory (SASSI) to Mr. Bender on February 2, 2009. (St. Ex. 7; Tr. at 94) With regard to the results of the SASSI, Ms. Mason opined that the results were indicative of a “high probability of a substance dependence disorder.” (Tr. at 6 at 16)

34. Mr. Bender testified regarding certain answers he had written on the SASSI questionnaire:

- Mr. Bender agreed that, when asked on the questionnaire whether he had problems in relationships because of his drinking, i.e., loss of friends, separation, or divorce, etc., he had circled the number 2 to indicate “several times.” (Tr. at 59)

However, Mr. Bender testified that he does not feel that way now and is “surprised” that he had given that answer in February 2009. He stated that, at present, he “can’t even come up with several times that I had problems with relationships.” However, Mr. Bender acknowledged that the answers shown on the questionnaire are the answers that he gave, and that he had no reason to dispute that the answers reflect what he was thinking at that time. (Tr. at 59-60)

- Mr. Bender agreed that, when asked on the questionnaire whether he had taken a drink or drinks to relieve a tired feeling or give him energy to keep going, he had circled a 2 to indicate “several times.” (Tr. at 60)

However, he testified that, if asked today, he would not give that same answer. (Tr. at 60-61)

- Mr. Bender agreed that, when asked whether he had experienced physical problems after drinking, such as nausea, seeing/hearing problems, dizziness, etc., he had circled a 2 to indicate “several times.” He testified that he still agrees with that answer today. (Tr. at 61)
- Mr. Bender agreed that, when asked on the SASSI whether it was true or false that his drinking or other drug use “causes problems between me and my family,” he had initially answered “false” but had then changed the final answer to “true.” (Tr. at 62)

He testified at the hearing that he is certain that, if asked today, he would mark this statement “false.” (Tr. at 62)

- Mr. Bender agreed that he had answered “True” when asked to respond to this statement: “I have sometimes drunk too much.” (Tr. at 62-63)

When asked whether he would agree with that statement today, Mr. Bender responded that “it depends on your definition of ‘sometimes.’” He explained that he could not say “false” because he cannot say it has never happened, but he would not say that it happens “regularly.” (Tr. at 63)

- Mr. Bender agreed that he had answered “True” with respect to this statement: “Sometimes I wish I could control myself better.” (Tr. at 62-63)

He testified at the hearing that he still feels that way and that he wishes that he could “always have control over [him]self.” (Tr. at 63-64)

- Mr. Bender agreed that he had answered “True” with respect to this statement: “I usually go along and do what others are doing.” (Tr. at 64)

He testified at the hearing that he still agrees with that statement today. He said that he tends to “not go against the grain.” (Tr. at 64)

- Mr. Bender agreed that he had answered “True” with respect to this statement: “I have used alcohol or pot too much or too often.” (Tr. at 64)

At the hearing, he testified that the statement is still true today. He stated: “Again, going back to the idea of I used alcohol to the point where I had a blackout.¹² So, yeah, that’s too much.” (Tr. at 64)

35. As part of her Biopsychosocial Assessment, Ms. Mason also provided her observation of Mr. Bender’s current emotional/behavioral status. Among other things, she found that his ability and willingness to participate in the program were good, and that he was friendly, open, and cooperative. With regard to Mr. Bender’s mood, she reported his comments: “I am feeling a little more relieved than I did yesterday. I did not know what to expect. I feel welcomed here.” (St. Ex. 6 at 15-16)

36. In addition, Ms. Mason’s Biopsychosocial Assessment includes a section entitled “Collateral Data,” which provides information gathered from collateral sources such as Mr. Bender’s family and friends. Mr. Bender testified that he had provided the names of the persons to be contacted. (Tr. at 185, 381) Ms. Mason conducted the interviews by telephone and reported as follows:

COLLATERAL DATA

ex-girlfriend Sheryl. “I know on occasion he has drank [*sic*] too much. I have told him that it may be a problem. I no longer drink. When I first met him we did go out and drink, but when I stopped drinking I did not want to be with his friends anymore. They really do drink hard. He comes from a

¹² During the hearing, Mr. Bender was asked whether it was true that the counselor at the driver-intervention program in 2007 had reported that Mr. Bender admitted to “blackouts,” in the plural. He responded: “It certainly appears that way. Yes.” When asked whether he had any reason to dispute the report of the court-ordered intervention assessment, he responded: “I don’t recall telling them events of multiple blackouts.” (Tr. at 439-440)

very good family and went to good schools. That is why I was worried about his drinking when he got the DUI. I can't believe this happened to him. He is the nicest and smartest man I know so this may be a blessing for him and open his eyes. Thanks for the call.”¹³

Person(s) contacted: Left voicemail
father, Thomas. “He hasn't lived with us yet. He has had his own place and he had a house that he shared with friends in the past. I know he drinks, but I am not sure it is a problem. When we watch a game or something he drinks. I know about the DUI too. Again, I don't see his alcohol use as a problem, but if it is, then you are right, it is better that he take care of it now and not allow it to get farther. Thanks for the call.”

Person(s) contacted: Left voicemail
Brother Dan. “I have never been worried about his drinking. He has never put his alcohol use ahead of anything else. He has some friends that he goes out with, but don't think they are heavy drinkers either. They are cops and other professionals. I think the DUI woke him up. Thanks for the call.”¹⁴

(St. Ex. 6 at 16; see, also, Resp. Ex. B at 15)

37. In her Biopsychosocial Assessment, Ms. Mason further stated:

DIAGNOSTIC SUMMARY AND RECOMMENDATIONS¹⁵

1. Based on the clinical interview, testing, collateral data and a review of the medical record, the following criteria for a diagnosis of a psychoactive substance use disorder are met:

√ Increased tolerance for the mood-altering chemical. Tolerance may be exhibited as:

1. A need for markedly increased amounts of the chemical to achieve intoxication or the desired effect.
2. Markedly diminished effect with continued use of the same amount of the chemical.

¹³ At the hearing, Sheryl Zubal testified as a witness for Mr. Bender, and her testimony is described below.

¹⁴ Mr. Bender later informed Glenbeigh that all three of these people felt they had been “misrepresented in some fashion.” (Resp. Ex. B at 16) His disagreements with Ms. Mason's assessment are set forth below.

¹⁵ The reasons for quoting portions of the body of the questions and answers in the Biopsychosocial Assessment, and not limiting the presentation to Ms. Mason's summary and conclusions, include that, during the hearing, Mr. Bender focused frequently on the specific answers reported by Ms. Mason. In addition, Ms. Mason's assessment was a significant part of the Glenbeigh evaluation on which others at relied, and the Hearing Examiner deemed it important to provide a sense of the types of questions and the nature of Mr. Bender's responses.

- √ The chemical is often taken in larger amounts or over a longer period than intended.
- √ Important social, occupational or recreational activities are given up or reduced because of chemical use.

Since the symptoms related to these criteria have been observed or reported as having occurred in the same 12-month period, it is the counselors' diagnostic impression that the patient's diagnosis is: Chemical dependency.¹⁶

This patient meets the criteria for the diagnosis of Psychoactive Substance Dependence and Inpatient treatment is recommended. Patient self admitted that he believes he is an alcoholic. He reports that he did not disclose the DUI on his application for the Medical License and he has continued to drink since the DUI.

The patient's progress will be monitored closely to determine the appropriateness of transfer to a lower level of care.

The treatment is recommended because of the following:
High relapse potential

The patient has the following coexisting disorder that requires stabilization to increase the effectiveness of treatment for chemical dependency. None reported.

The following family members are recommended to attend the family program:
His parents and ex-girlfriend would benefit.

Problems to be addressed during treatment include:
He lacks knowledge of the disease concept; shame and guilt issues and low self esteem issues; denial of the severity and the consequences of his drinking; all indicated by self admission.

Patient's strengths (as assessed by the counselor)
He was cooperative and friendly, he appeared to be intelligent. He has a strong belief in God and a very good sense of humor. He reports his family is very supportive of him.

Tentative Continuing Care recommendations include:

- √ Participation in Continuing Care groups
- √ Attendance at AA/NA/CA meetings
- √ Selection of a 12 step recovery program, home group and sponsor
- √ Participation in the social/recreational activities offered by the 12 step recovering community
- √ Individual counseling
- √ Psychiatric follow-up/Psychological consultation

¹⁶ The Hearing Examiner notes that Dr. Chris Adelman at Glenbeigh did not share Ms. Mason's opinion. He rendered the final determination, diagnosing Alcohol Abuse. (Tr. at 120, 132-134)

Other Continuing Care Recommendations:
[left blank]

Client's Response to Recommendations:

"I am feeling a little relieved now as I did not know what to expect once I got here. I have to honestly say I am an alcoholic so I guess this stay can't hurt me."

(St. Ex. 6 at 13; Resp. Ex. B at 15, 17) With respect to Mr. Bender's response to "recommendations," Ms. Mason testified that she was referring to her own findings and recommendations at that point. (Tr. at 115-116, 227)

38. Ms. Mason prepared a memorandum stating as follows:

THOMAS BENDER 00138110

ASSESSMENT COMPLETED

2/2/2009

His drug of choice is alcohol. The diagnosis is chemical dependency and Inpatient treatment is recommended.

Tentative Continuing Care recommendations are: attend 90 meetings in 90 days, get a sponsor and a home group and a sober social support group to get involved in the recreational and social activities offered by the Twelve Step Recovery Program.

S "I am an alcoholic and I know that. I will prepare myself for the possibility or probability of having to be here for 28 days. If that is what the Medical Board says I have to do then I will do it. O Good direct eye contact, teary at times. A Seemed to be friendly, and cooperative. P Recommended treatment.

(St. Ex. 8 at 3)

39. Ms. Mason testified that the third paragraph of her memorandum reflects that she had discussed her findings with Mr. Bender and tried to prepare him for the potential that 28 days of inpatient treatment would be required. (Tr. at 204-205)
40. Initially Ms. Mason testified that she would have prepared the memorandum "shortly after" the 72-hour evaluation because "it takes a couple of days." However, when her attention was directed to the date at the top of the memorandum, she agreed that the date as listed shows the day on which she prepared the memorandum: "You're right, on this one it was pretty clear, and I did date it 2-2. I believe he was still in Glenbeigh. I mean it seemed very clear to me. So, yes, I did that." (Tr. at 174-175)
41. Ms. Mason testified that she had subsequently conferred with Beth Layman, the primary counselor for Mr. Bender, and with Dr. Adelman, the addictionology physician, regarding the data she had collected. (Tr. at 190-193)

Tuesday, February 3, 2009

42. On the morning of February 3, Mr. Bender met with Beth L. Layman, MEd, LSW, LCDC III, who would serve as his primary counselor during the evaluation. Ms. Layman testified that she is a Licensed Clinical Dependency Counselor III. She observed Mr. Bender during three group-therapy sessions and during individual sessions with him. In addition, she reviewed the written comments and reflections that he submitted each day. Further, Ms. Layman noted that Mr. Bender had come to her office with questions a few times. (St. Ex. 8 at 7; Tr. at 249-253, 259, 272, 276)
43. Ms. Layman testified that, before meeting Mr. Bender, she had spoken with Dan Zinsmaster, the Board attorney coordinating the Glenbeigh evaluation. Her notes regarding the conversation include the following: that Mr. Bender had applied for licensure and had not been forthright regarding a DUI charge, that he had entered Glenbeigh for a 72-hour “observation and a complete assessment and psychiatric consult” to provide the Board with information regarding whether Mr. Bender met the criteria for a diagnosis of chemical abuse or chemical dependency, and that the Board “would await results and letter” from the Glenbeigh physician. (Resp. Ex. B at 31; Tr. at 295)
44. Ms. Layman testified that, during her introductory meeting with Mr. Bender, she believed that he was being honest with her about why he had been ordered to the evaluation, because he told her the same reason that Mr. Zinsmaster at the Board had already told her, that Mr. Bender had not disclosed a prior DUI conviction. Ms. Layman testified that, when she asked him why he had not disclosed the DUI on his application, he told her that he had not believed that it was a criminal charge. At the hearing, when it was suggested to Ms. Layman that perhaps Mr. Bender had said something about thinking his DUI was a minor misdemeanor, she answered: “I remember him saying it wasn’t a criminal charge.” (Tr. at 295-296)
45. Ms. Layman commented that Mr. Bender had initially seemed uncertain, and not interested in a recovery program. However, she stated that, during his time at Glenbeigh, she observed that his attitude changed and he was becoming amenable to treatment. (Tr. at 259-262, 281; St. Ex. 8 at 7)
46. She explained that, at the beginning of the 72-hour evaluation, Mr. Bender was very nervous, and she believed that he was “struggling with some internal issues himself if drinking was a problem or not.” However, during the last group session, “he was very relaxed.” He shared that “his drinking had caused him problems in the past” and that his conduct in minimizing the DUI and not reporting it to the Board had caused him some issues. (Tr. at 276-277; St. Ex. 8 at 17)
47. Ms. Layman testified that, in her group-therapy sessions, Mr. Bender introduced himself as an alcoholic. She explained that each member of the group introduced himself, and Mr. Bender said: “My name is Tom. I’m an alcoholic.” She testified that she heard him introduce himself in this manner on two occasions. (Tr. at 267, 280-281)

48. During the hearing, Mr. Bender acknowledged that he had introduced himself as an alcoholic during group settings at Glenbeigh. However, Mr. Bender testified that he had not acknowledged to Ms. Layman that he felt he was an alcoholic. (Tr. at 394)
49. Ms. Layman agreed that “alcoholism” is not a diagnosis and that the diagnoses at issue would be referred to as “alcohol abuse” or “alcohol dependence.” (Tr. at 286)
50. Nonetheless, Ms. Layman found that Mr. Bender’s statements of being an alcoholic had significance. She explained, however, that the significance of such statements “depends on the patient.” When asked whether “patients have the ability to diagnose themselves,” she responded:

I believe patients know if they’re out of control. I believe patients know if their drugs and alcohol have caused problems or not. * * * Stating that “I’m an alcoholic” isn’t a diagnosis. * * * The way that it is used in the group therapy, it’s their acceptance of their disease.

(Tr. at 284-285)

51. In the afternoon, Mr. Bender participated in a group session involving art therapy. Afterward, he wrote his reflections, including the following (with his handwriting shown in italics):

What are two specific things I learned in this session related to my treatment plan assignments and recovery?

1) *lying to cover up drug/alcohol use can consume you and pervade all aspects of life*

2) *saying good bye to my drinking buddies is necessary but may be easier than I think.*

(St. Ex. 8 at 8) The art-therapy counselor noted that Mr. Bender had “discussed relationships w/ many friends who drink” and that the group had given him feedback about how these relationships will change once he is sober. (St. Ex. 8 at 8)

52. A physical examination of Mr. Bender was performed on February 3 by George Livingston, P.A. Under the heading Chief Complaint, Mr. Livingston wrote: “Remote Alcohol abuse – State Medical Board Evaluation.” (St. Ex. 6 at 18-21) Mr. Livingston set forth the history from Mr. Bender as follows:

30 y/o white male started alcohol @ 15 – sporadic use through high school – Heavier use in college 1-2 days week – Never every day use – Lesser use since college – Got a DUI 12/06 – Now occasional use only special occasions.

(St. Ex. 6 at 18)

53. According to the written report, the physical examination revealed no abnormalities. A number of "Addiction Signs and Symptoms" are listed on the form, but none of the items are circled to show a present sign or symptom. Similarly, a list of "Addiction Consequences" is provided, and an "x" is marked next to the items "Financial" and "Legal."¹⁷ An "x" was also marked next to "Work related," but that mark appears to have been crossed out. (St. Ex. 6 at 18-21)

54. Under the heading for Assessment, Plan and Diagnoses, Mr. Livingston stated:

Axis I Remote Alcohol Abuse (State Medical Board Eval)

[An entry then appears in different handwriting, shown in italics:]

*Alcohol Abuse/Impairment
per Dr. Adelman evaluating
See letter of 2-4-09 C Adelman*¹⁸

Axis II Deferred

Axis III Normal Exam
PMH (✓) PSH (✓)

Axis IV Occupational problems

Axis V GAF (current) 39 GAF (best in past year) 39

(St. Ex. 6 at 21)

55. Mr. Bender next attended a group session led by Ms. Layman. On a response form¹⁹ for that session, Mr. Bender wrote the following statements by Mr. Bender, shown in italics:

What are two specific things I learned in this session related to my treatment plan assignments and recovery?

1) *"to thine own self be true." if you are here just BSing yourself and those around you, you will see Beth again soon after discharge.*

2) *I will need to fill the void when I used before - the trick will be to find healthy alternatives (meetings, etc.)*

(St. Ex. 8 at 9; Resp. Ex. E at 72) (emphasis added)

¹⁷ Mr. Bender opined that these consequences were due solely to the DUI, which was an isolated incident "caused by drinking, not necessarily addiction." (Resp. Ex. B at 30)

¹⁸ Ms. Layman identified the signature as Dr. Adelman's, although she testified that the notation had not been there when she reviewed the P.A.'s report. (Tr. at 312-313)

¹⁹ Forms were given to participants at the end of group-therapy sessions, and were completed and submitted to the counselor. Mr. Bender testified that no one suggested what he should write. He explained that, other than providing the questions, "nobody said anything" about what he should write. Accordingly, he wrote his thoughts each day on various forms, and some were to be placed under Ms. Layman's door by the end of the day, whereas others were completed immediately after the group session, taking as much time as the individual needed. (Tr. at 71, 263, 272, 276, 278)

56. In the evening on February 3, a psychiatric evaluation was performed by Khoa Tran, M.D., who submitted the following report:

REASON FOR CONSULTATION: Requested by Dr. Merkin for a psychiatric evaluation for the State Medical Board of Ohio.

* * *

HISTORY OF PRESENT ILLNESS: This is a thirty-year-old, single, Caucasian male from North Royalton, Ohio. He is single and has no children. He has been attending school for quite some time. Eventually Thomas has turned his life around by going back to school in the anesthesiology assistant program, from which he graduated in May 2008. In August, he decided to apply for work. He recently applied at the State Medical Board for the anesthesiologist assistant licensure. *On the question, "Have you ever been convicted of a felony?"* he answered no.²⁰ However, it was discovered that in 2006, he had an OVI and that he was convicted with a misdemeanor. *He states that he had thought that there was a difference between a misdemeanor and an actual felony.* Thomas, however, was summoned and has been cooperative as far as obtaining a 72-hour evaluation at Glenbeigh. He arrived on 02/02/09 at Glenbeigh. He states he has been attending meetings, and this has opened his eyes to a lot of different things.

He states he has a long history of drinking, since about the age of fourteen and started more heavily at the age of sixteen. He has over the years experimented with marijuana, as well. He has been arrested by the police for paraphernalia; however, he was released to his parents without any charge. He stated he started drinking more heavily in college, and he was doing so without any significant sequela. He reports in 2006, he was drinking with a few of his friends. He was supposed to stay overnight with one of his friends, but he changed his mind as his friend's girlfriend was going to be there, so he was not comfortable with this and wanted to go home. He was found swerving on the road and eventually was pulled over; he failed the sobriety on the field.

He has continued to use alcohol since then. He reported no other DUI's pending. He indicated no significant mental health issues or stressors, except for a student loan and financially is not employed. He denies any depression or anxiety problems. He has no psychotic episodes, mood symptoms or manic behavior. He reports no suicide attempts in the past. He states he has no hopelessness, no active suicidal ideation. He has been sleeping, eating, functioning, has energy and has a good amount [of] focus.

He was questioned whether or not he was ready to quit alcohol and how he was going to overcome his alcohol use. His statement was that he feels he cannot eliminate it from his life forever, although he stated that he is attending meetings *and wants to get control of his drinking behavior.*

²⁰As set forth above on page 4, the question on the application was whether Mr. Bender had "ever been convicted or found guilty of a violation of any law, regardless of the legal jurisdiction in which the act was committed, other than a minor traffic violation."

PAST PSYCHIATRIC HISTORY: None. No family psychiatric history or alcoholism.

* * *

PSYCHOSOCIAL HISTORY: Thomas is single and has no children. He has applied to Parma General Hospital for an anesthesiology assistant job. He is waiting for licensure from the State Medical Board.

MENTAL STATUS EXAM: This is a thirty-year-old, Caucasian male, who appears of stated age. He is cooperative, has good eye contact, fair energy and grooming. There is no psychomotor agitation or retardation. Speech is of normal tone and volume. His demeanor is calm, no significant fidgeting or agitation. There is no delusion or paranoia. He has been forthcoming with information. There is no active auditory or visual hallucination, no active delusion, paranoia or psychosis. His cognition is intact. Affect is pleasant, mood is good. His thought process is logical, no tangentiality.

DIAGNOSIS:

Axis I: Alcohol dependence.
Axis II: No diagnosis.
Axis III: No diagnosis.
Axis IV: Mild psychosocial stress.
Axis V: 45

(St. Ex. 6 at 22-23; Resp. Ex. E at 63; emphasis added. See, also, St. Ex. 8 at 2)

57. Dr. Tran set forth a number of treatment recommendations, including attendance at AA meetings, individual counseling, abstention from alcohol and periodic testing. (St. Ex. 6 at 22-23; Resp. Ex. E at 63)
58. With regard to a workshop on grief with Roy Nichols, MEd, LSW, LICDC, Mr. Bender wrote a number of reflections and responses. (St. Ex. 8 at 10) When asked to identify a “behavior or thinking change” that he was “going to do in the future” to assist his recovery, Mr. Bender wrote:

change my assumption world before my addiction forces me to do so

(St. Ex. 8 at 10)(emphasis added)²¹

Wednesday, February 4, 2009

59. In a progress note on February 4, Ms. Layman noted that, after a group discussion regarding the process of addiction in the brain, Mr. Bender reported that he had gained an

²¹The Hearing Examiner notes that the word in front of “addiction” was overwritten: that is, the words “my” and “the” are both visible, but it is not clear which word was written last.

understanding in relation to alcohol and its effects on the night of his DUI, stating that he would have never thought he would be arrested. (St. Ex. at 12)

60. Mr. Bender wrote, in his responses on February 4:

What are two specific things I learned in this session related to my treatment plan assignments and recovery?

1) *start working now, before I get out, "cause alcohol is out in the parking lot doing push-ups"*

2) *Pray - ask God for help – this disease is as much spiritual as physical & psychological*

What am I going to do differently as a result of what I learned directly related to my treatment planning assignment?

Pray more often, thank God for sobriety and feel free to ask him for more help.

(St. Ex. 8 at 13)

61. On another form completed that day, Mr. Bender stated, among other things:

One new thing I learned about myself in the last 24 hours was:

my disease is the same as anyone else's in here

* * *

What am I grateful for today?

that my disease has not caused irreparable damage in my life

(St. Ex. 8 at 15-16, Resp. Ex. E at 68; emphasis added)

62. Ms. Layman testified that, during his stay at Glenbeigh, Mr. Bender did not tell her that he believed he did not have a problem with alcohol. (Tr. at 260-261)

63. On February 4, 2009, Mr. Bender met with Chris L. Adelman, M.D., a specialist in addiction medicine at Glenbeigh.²² (Tr. at 100)

64. Dr. Adelman's recollection of the meeting was that Mr. Bender "accepted that he had a drinking problem" and "was open to addressing it." (Tr. at 142-143, 145-147)

²² At the hearing, Dr. Adelman was accepted as an expert in addiction medicine. His testimony and curriculum vitae provide numerous details regarding his medical training, certification as a specialist in addiction medicine, publications, current and past employment, and other information. (Tr. at 107-113; St. Ex. 4)

65. Dr. Adelman testified that he asked for Mr. Bender's "side of the story on how he got here, why he was here * * *." Dr. Adelman testified that the purpose of his meeting with individuals such as Mr. Bender is to discuss what brought them to Glenbeigh, the nature of the assessment process, and the Board's expectations and rules as he understands them. He discusses the person's medical history and physical examination, reviewing any pertinent issues that appear on the report. He asks if the individual has any questions and answers them. Dr. Adelman stated that he does not perform his own separate assessment of the individual but assimilates all the data from the assessment team. (Tr. at 113-116, 142-146)
66. During this meeting, Dr. Adelman did not advise Mr. Bender of any diagnosis. Mr. Bender noted that Dr. Adelman did not mention the conclusions reached by the physician assistant or Ms. Mason. (Tr. at 100, 128)
67. Dr. Adelman testified that the assessment team exchanges information before a diagnosis is made, and that this exchange of information usually occurs in a meeting after the individual has left Glenbeigh following the 72-hour evaluation. However, he stated that the exchange of information may not necessarily happen in a group meeting but may take place in separate, individual discussions in which he gathers the data. He also testified that the typical process is that, after the team has met to discuss the diagnosis and recommendation, the counselors prepare the report letter, and he then reviews and signs it. Dr. Adelman acknowledged that different members of the assessment team may reach different conclusions during the assessment process. (Tr. at 112-118, 128)
68. In a letter to the Board dated February 4, 2009, Dr. Adelman set forth the results of the Glenbeigh evaluation:²³

Thomas Bender was admitted on 02/02/09 to Glenbeigh Hospital by the State Medical Board of Ohio for a 72-hour chemical dependency evaluation.

While at Glenbeigh, he received a complete history and physical examination and a comprehensive biopsychosocial assessment which included a thorough chemical usage history. He was seen by psychiatrist, Dr. Tran, on 02/03/0[9] and was given a diagnosis of alcohol dependence.

In review of the information, *my findings* are that Thomas is impaired, as the result of *using and abusing alcohol*. Because of his impairment, he is not qualified, at this time, to perform his duties as an anesthesiologist assistant in accordance to acceptable standards of care.

²³ According to a notation on the letter, Glenbeigh transmitted the letter to the Board by facsimile transmission, and then sent the signed original by regular mail. The mailed copy was stamped as being received by the Board on February 12, 2009. (St. Ex. 5) The faxed copy, which would typically show the date and time of transmission, was not offered into evidence. However, it appears that the faxed copy was probably received by the Board, because its Enforcement Attorney was described as having knowledge of the letter's contents on February 6. (Tr. at 391) No testimony was presented as to why the mailed letter was not received by the Board until February 12.

Therefore, in accordance with State Medical Board of Ohio rules, we are recommending inpatient treatment. Details of our findings are available for the Board's review upon request, with proper authorization.

(St. Ex. 5, emphasis added)

69. At the hearing, Dr. Adelman testified that, although he had noted Dr. Tran's diagnosis of alcohol dependence, his own findings ultimately supported a diagnosis of alcohol abuse, which was the final Glenbeigh diagnosis.²⁴ (Tr. at 120, 132-134)
70. With respect to Dr. Tran's diagnosis, Dr. Adelman stated that there can be different opinions among physicians, and that the psychiatrist at Glenbeigh may evaluate the individual early in the process and that additional data may be developed later. (Tr. at 124-125)
71. Dr. Adelman acknowledged that Mr. Livingston had diagnosed "remote alcohol abuse," which was different from his own diagnosis of "alcohol abuse." Dr. Adelman commented that Mr. Livingston is a full-time emergency room P.A. with no training in addiction, and that Mr. Livingston's role is to evaluate the residents for problems such as diabetes and hypertension. Dr. Adelman testified that he himself works full-time with issues of chemical dependency, and his opinion is that, when Mr. Bender applied for licensure in September 2008, his drunk-driving conduct in December 2006 was not a "remote" event. (Tr. at 154, 157)
72. Dr. Adelman acknowledged that his conclusion was different from that reached by the psychiatrist, the physician assistant, and Ms. Mason, but he stated that he must make the final decision based on his interpretation of the data, and he does not reach a diagnosis of dependence simply because others have done so. He stated that, in reaching impairment determinations in a Board-ordered evaluation, Glenbeigh uses the DSM-IV criteria, which are guidelines for diagnosis. Dr. Adelman further explained that the term "impairment" is not a diagnostic medical term but is a term used by the Board. He agreed that, for purposes of a Board evaluation, a diagnosis of either substance abuse or substance dependence results in a conclusion that the individual suffers from a substance-related "impairment" as that term is used by the Board. (Tr. at 118-120, 128, 134-136, 154-155, 165-167)
73. Dr. Adelman testified regarding the criteria for a diagnosis of alcohol abuse and how Mr. Bender met the criteria. Among other things, he pointed to Mr. Bender's DUI conviction, Mr. Bender's answers to certain questions on the SASSI, his ex-girlfriend's concern about his drinking and his heavy-drinking friends, and his continued drinking despite adverse consequences. Dr. Adelman noted that Mr. Bender had reported being able to drink more than he used to, and that Mr. Bender had said he did not anticipate problems with remaining sober because he had "quit before." However, although there was some data suggesting chemical dependence, Dr. Adelman felt that Glenbeigh did not have the level of evidence he would want to see in order to establish a diagnosis of chemical dependence, especially with regard to the frequency of drinking, increased tolerance, and consuming larger amounts of alcohol over

²⁴ Alcohol Abuse was also the diagnosis by the McIntyre Center. (St. Ex. 9 at 31)

longer periods. Furthermore, Dr. Adelman opined that, although Mr. Bender had become more careful about drinking after the DUI conviction and had reportedly decreased his use, that data did not rule out a diagnosis of alcohol abuse in February 2009. (Tr. at 120-121, 137-140, 149-157, 160-161)

74. Dr. Adelman further explained that, based on the diagnosis of alcohol abuse and the Board's rules, 28 days of treatment was required. (Tr. at 128)

Thursday, February 5, 2009: Ongoing Stay After 72 Hours

75. The 72 hours of evaluation ended at about 10:00 a.m. on February 5, 2009. However, Mr. Bender stayed at Glenbeigh and attended group-therapy sessions. (St. Ex. 8 at 17-20)
76. Ms. Layman stated that, when the individual does not meet criteria for admission or does not accept the recommendation for inpatient treatment, her usual procedure is to prepare a discharge summary at the end of the 72-hour assessment, which is signed by the medical director at Glenbeigh, Dr. Merkin. (Tr. at 265-266, 286-288) She did not prepare a discharge summary for Mr. Bender on February 5, 2009. (St. Exs. 6-8)
77. On February 5, 2009, Mr. Bender attended a morning group session conducted by Ms. Layman. He wrote that he had learned the following during the morning session:

my disease is the same as anyone else's – just different symptoms.

(St. Ex. 8 at 17, emphasis added)

78. Mr. Bender stated that he wrote his responses and reflections after the session had ended. He further stated with regard to the response forms in general that no one told him that he had to write any specific information. When asked whether anybody had told him what to write in response to the questions, he answered, "No." (Tr. at 65, 71)
79. In her progress notes for that session, Ms. Layman stated in part:

O: Pt. processed with peers his viewing of films * * *. He disclosed that he could relate his drinking to that of Diabetes II as was discussed in the Disease Concept film. He stated that [h]is drinking began with being fun, to going to bars with his friends and he would be able to have one or two and stop. But when he reflects, he was able to identify that his drinking was growing to the point it started to cause him problems as evident with the DUI, he even stated that he would drink and if he was starting to feel sick he would stop, but he had stopped getting sick and could drink more.

A: Pt. appeared open honest and forthcoming.

P: Pt. is to complete his treatment plan addressing lack of knowledge of the disease concept and the severity of his alcoholism.

(St. Ex. 8 at 17)

80. Mr. Bender testified that Ms. Layman's progress note was not entirely accurate. He remembered relating alcoholism to diabetes generally and disclosing some of his history of drinking, but felt that other statements were not correct. For example, he testified that he did not recall making a "conclusive jump" to saying that he himself had "become an alcoholic just like a Type II diabetic." (Tr. at 76, 389-390) He further testified:

What isn't here I remember saying on that day was – well, this part about "drinking began with being fun." Before that point I had said that the same group of friends that I had, we would just go to coffee shops and it was just the social nature of being together. We would do that a lot of nights and then as we all became 21, the same group just moved to bars instead. So I think that's where that one comes from.

* * *

As far as having "one or two and stop," that was a conversation after the – relating to my time after the DUI. I believe a patient asked me, you know, if I was able to do that or, you know, what would I do if I would go out drinking now. I said, "I've been able to just go out and not have any and go out and have one or two and not have any more." I reflected that. So that's reflected in this conversation.

* * *

This part about "starting to feel sick" and would stop actually related to back when I was in high school. I remember – I don't recall saying this in this group setting, but I do recall saying it to the counselors that in high school I would feel sick, or you know, if I would drink and I would feel sick, I would stop, and then in college I wouldn't feel sick as often. I would be able to drink more without feeling – getting that same level of sickness. But that was it. At no time did I say – did I relate the idea of feeling sick after college at any time. I mean I hope I'm explaining this clearly. But any conversation that had to do with me feeling sick and drinking pertained to high school to college. At no time after college, to put it more simply-- [A new question was interjected.]

(Tr. at 389-390)

81. Ms. Layman testified regarding her assessment of Mr. Bender's statements about his drinking history during the session:

* * * The last sentence where it's bulleted "O" says, "But when he reflects, he was able to identify that his drinking was growing to the point that it started to cause problems as evidence with the DUI. He even stated that he would drink and if he was starting to feel sick, he would stop, but he had stopped getting sick and could drink more." For a therapist, that's a red flag. It means that the tolerance pattern of a person is changing. Again, I need to say that this was one session. However, it's a red flag that I would have pursued.

(Tr. at 278; St. Ex. 8 at 17)

82. Ms. Layman testified that, when Mr. Bender described his use of alcohol after the DUI conviction, she had understood that his drinking was “sporadic” but included episodes of “binge” drinking. She stated that Mr. Bender reported this to her and the group. (Tr. at 314-319)
83. Ms. Layman acknowledged that her reporting of Mr. Bender’s description of post-DUI drinking is not the same as reported by others at Glenbeigh. Nonetheless, she insisted that he had reported binge drinking after the DUI. When she was asked whether she was certain, sitting in the hearing room in October 2009, that Mr. Bender had described binge drinking in regard to “current usage, meaning after the DUI,” Ms. Layman responded with a firm “Yes.” With regard to the timing of this conversation, Ms. Layman testified that she believes that he made the statement about binge drinking in her last group session with him on February 5. She stated that, after that session, she had documented in her progress note that Mr. Bender reported being able to drink more without getting sick during the period after the DUI; however, she acknowledged that she had not specifically noted “binge” drinking. However, she did recall that, when she met with other members of the Glenbeigh staff that same day, she told them about the disclosure of binge-drinking by Mr. Bender and discussed it with them, including Dr. Adelman. At one point, Ms. Layman acknowledged that Mr. Bender’s disclosure to her regarding binge drinking could have occurred at the end of the group session when there were only the two of them still left in the room rather than when the whole group was present. (Tr. at 314-320, 322-323, 329, 336-340)
84. At the hearing, Mr. Bender testified: “My recollection is that conversation never took place. I never said anything about binge drinking after the DUI, you know, any time after the DUI. * * * I do recall briefly speaking with her after the meeting, but the conversation had nothing to do with any of my behaviors after the DUI.” (Tr. at 387-388)
85. On February 5, 2009, Mr. Bender wrote the following statement when asked to list actions that he needs to take to demonstrate progress in treatment:

*do not be lulled into a false sense of security if I can be sober for years,
because you never know what could trigger a relapse.*

(St. Ex. 8 at 18)

86. On a form dated February 5, 2009, Mr. Bender made the following statements:

The worst thing that happened to me in the last 24 hours was:

coming to the realization that I will likely lose my drinking buddies

One new thing I learned about myself in the last 24 hours was:

that if I embrace my recovery, losing those buddies will be easier than I think

(St. Ex. 8 at 20; Resp. Ex. E at 67; emphasis added. See, also, Tr. at 70-71)

87. At the hearing, Mr. Bender explained that he wrote these answers of his own accord. He stated that he had tried to be honest with himself throughout the entire process at Glenbeigh. (Tr. at 71-72)
88. Ms. Layman testified that it was her opinion that Mr. Bender should stay for 28 days of inpatient treatment under a finding of impairment. She testified that her diagnosis was alcohol abuse, and she described the factors she had considered in reaching her opinion. For example, she thought that Mr. Bender's behavior in choosing to drive an automobile after he had been drinking alcohol was important, together with his statement that it had not occurred to him that he could be arrested for his conduct. (Tr. at 254, 279-282, 288-290, 304, 328-334)
89. With regard to his staying at Glenbeigh on Thursday, February 5, after he had completed the required 72 hours of evaluation, Mr. Bender asserted that, on Thursday morning, he had gone to the nursing department and explained that his 72 hours were finished and that he wanted to know "the next step." He said he was directed to Ms. Layman, who told him she did not know whether they would be recommending 28 days of inpatient treatment and did not know his diagnosis. Mr. Bender asserted that she said he should wait until the following day and "talk to people tomorrow." (Tr. at 102, 386)
90. Ms. Layman was not asked whether she agreed or disagreed that Mr. Bender had approached her, when the 72 hours ended, about leaving Glenbeigh. She did testify, however, that she knew that Mr. Bender was at Glenbeigh "for his 72 hours observation." When asked whether she had discussed her findings and recommendation with Mr. Bender prior to his leaving Glenbeigh, she stated that she did not remember because he had gone to other group sessions during the day, and she did not see him later that day when she was leaving for her weekend. However, she stated that it was her understanding from other people at that time (when she was leaving at the end of her work week on February 5) that Mr. Bender "would be staying for the 28 days." Ms. Layman stated that, when she left Glenbeigh, there was no question that Mr. Bender had started his 28 days of inpatient treatment. (Tr. at 260, 269, 280, 304-309)

The Staff's Discussion Following the End of the Evaluation Period

91. Ms. Layman testified that, at the end of an evaluation period, she typically meets with the overseeing physician and the assessment counselor, and that the Glenbeigh CEO, Pat Weston-Hall, also attends. Ms. Layman stated that it is a collaborative process during which each person reports his or her information and views, although Dr. Adelman has the final summarizing of all the information. (Tr. at 279-280)
92. At the hearing, neither Dr. Adelman or Ms. Mason specifically recalled the team meeting to discuss Mr. Bender, but Ms. Layman testified that a meeting took place on the morning of Thursday, February 5. She testified that she met with Dr. Adelman and other staff members that morning, and Mr. Bender's diagnosis was discussed. She explained that there was discussion regarding whether the DSM criteria had been met for alcohol dependence versus alcohol abuse. Ms. Layman commented that, although both diagnoses would result in a

recommendation for 28 days of inpatient treatment, she believes that the distinction is important. For example, a person who is not chemically dependent but who has been abusing alcohol may experience specific circumstances that trigger the abuse, and the person can be helped to deal with specific problems so that he does not continue to abuse alcohol and develop an alcohol dependency. She noted that issues may be different with dependency, such as the effect of the dependency on family members and the people they serve professionally. (Tr. at 166, 290-293, 303-307, 310)

93. Ms. Layman described the tenor of the team meeting. She stated that Dr. Adelman did not insist that the topic of diagnosis was closed. She felt that Dr. Adelman was open to the discussion and “wanted to be accurate with the diagnosis.” She stated that the team went through the DSM-IV criteria for alcohol abuse versus alcohol dependency. (Tr. at 280, 307-310)
94. With regard to Dr. Adelman’s letter, Ms. Layman testified that she was aware on the morning of February 5 that his letter had been sent to the Board on February 4. She could not recall whether there was a discussion of the letter during the team meeting, but she confirmed that the letter was sent to the Board before the team meeting on February 5. (Tr. at 310-311)
95. Ms. Layman testified that it had been her opinion was that the correct diagnosis would be alcohol abuse, but others disagreed. She stated that the first time she had spoken to Dr. Adelman about her analysis was February 5. (Tr. at 281-282, 288-290, 305-307)
96. Ms. Layman testified that she could not recall a discussion during the meeting on February 5 whether Mr. Bender did not fit the criteria for either alcohol abuse or substance abuse. She did not recall any discussion of a diagnosis of remote alcohol abuse. However, she testified that she had brought to the attention of Dr. Adelman and Ms. Weston-Hall that the nurse upon admission had thought the patient did not seem to abuse alcohol and that the PA had noted remote alcohol abuse, and that the group had discussed those opinions. Further, Ms. Layman reported the statements that Mr. Bender had made regarding binge drinking. It was her opinion that the binge drinking would fall under the criteria for a diagnosis of alcohol abuse. She recalled that Dr. Adelman, however, had relied on the DUI and the lack of disclosure on the license application, which led to occupational problems. (Tr. at 311-313, 319-321)

Friday, February 6, 2009: Attendance at a Group Session & Obtaining a 24-Hour Pass

97. On February 6, Mr. Bender began his fifth day at Glenbeigh. He attended a group session led by William Miller, MEd, LICDC. Mr. Miller reported among other things that the group had discussed how people may use alcohol or drugs to medicate emotional discomfort. With respect to Mr. Bender, Mr. Miller reported that he “personalized his own behaviors that he feels he needs to modify to support his recovery.” (St. Ex. 8 at 22)

98. In his own written notes, Mr. Bender stated that he was going to do the following things differently as a result of what he had learned in that session: "Relax, get myself healthy, let God sort out the rest." (St. Ex. 8 at 22)
99. On February 6, 2009, Mr. Bender obtained a pass to leave Glenbeigh for 24 hours.²⁵ (St. Ex. 6 at 5; St. Ex. 8 at 23)
100. Ms. Layman testified that the 24-hour pass for Mr. Bender was arranged by Ms. Weston-Hall and Roy Nichols, the primary counselor on Ms. Layman's days off. (Tr. at 268-269; St. Ex. 6)
101. Mr. Bender testified that, on that day, he had received a note from the business office at Glenbeigh inquiring how he planned to pay for his 28-day inpatient treatment. He testified that it had been discussed "numerous times" that he might stay at Glenbeigh for 28 days but that he had been unaware that he would "definitely" be recommended for 28 days of inpatient treatment, and was still wondering what his diagnosis was. Mr. Bender stated that both Ms. Layman and Ms. Mason were not at Glenbeigh that day, so he met with Roy Nichols during the afternoon. (Tr. at 102, 383-386)
102. Mr. Bender testified that Mr. Nichols pulled up his medical record and informed him that the diagnosis was chemical dependence. Mr. Nichols also telephoned Mr. Zinsmaster at the Board, who described the Glenbeigh determination that Mr. Bender was impaired. They then discussed the requirement of 28 days of inpatient treatment, which would be counted as having begun on February 2, the date of admission for the evaluation. Mr. Bender testified that, at his request, Mr. Nichols arranged for the 24-hour pass. In addition, Mr. Nichols completed a form entitled Discharge Plan and gave a copy to Mr. Bender. (Tr. at 78-82, 384-386, 391, 447-448; St. Ex. 6 at 3-4)
103. On the discharge plan, Mr. Nichols indicated that Mr. Bender was to follow up with treatment following his discharge. With regard to the potential for relapse/use by Mr. Bender, Mr. Nichols marked "guarded." Among other things, he wrote: "Work very closely with Dan Zinsmaster of the Ohio Medical Board on establishing your one [year] of sobriety & your treatment options." Mr. Nichols noted Mr. Zinsmaster's contact information and the Board's website address where Mr. Bender could obtain a current list of treatment providers. (St. Ex. 6 at 3-4)
104. Mr. Bender testified that he was concerned regarding the cost of the inpatient treatment, but that the CEO offered him a grant to receive his 28 days of inpatient treatment free of charge at Glenbeigh if he continued at that time. (Tr. at 82, 395)

Saturday, February 7, 2009

105. On February 7, Mr. Bender returned to Glenbeigh within 24 hours of having left. He testified that, during the time he was away from Glenbeigh, he had talked with his parents,

²⁵ Ms. Layman explained that, when an individual is deemed appropriate for inpatient admission following a Board-ordered evaluation, the individual is given an opportunity to go home and collect personal items he may need for his continued stay at Glenbeigh and to take care of necessary financial matters. (Tr. at 258, 268-269, 435)

his former girlfriend, Sheryl Zubal, and with his attorney at that time, William Mann. Upon his return to Glenbeigh, he asked to be discharged without further treatment. (Tr. at 84, 397, 436; St. Ex. 6 at 1, 5)

106. Mr. Bender testified that, upon arriving at Glenbeigh, he submitted a urine specimen and was advised him that he would have to speak with a counselor in order to be discharged. Mr. Bender stated that neither Ms. Layman, Mr. Nichols or Ms. Mason was at Glenbeigh that day, so he found another counselor, whose name he does not recall. Mr. Bender explained that this other counselor saw that Mr. Nichols had written a discharge plan on Friday as part of the 24-hour pass, which the counselor viewed as a conditional discharge, and the counselor informed Mr. Bender that he could leave with staff approval. (Tr. at 387-398)
107. On February 7, various Glenbeigh staff members documented Mr. Bender's discharge. On one form (in which the signer's name cannot be discerned), it was noted that Mr. Bender had been discharged WSA because "he is undecided where he will follow up."²⁶ (Resp. Ex. E at 2, 34) A nurse's progress note dated February 7 states that Mr. Bender had returned from a leave of absence after his three-day evaluation, and that he had decided not to follow up at Glenbeigh for his 28-day treatment and was "undecided where he will follow up." (St. Ex. 8 at 23)

Sunday, February 8, 2009

108. Ms. Layman testified that she was surprised when she returned to work on Sunday and learned that Mr. Bender had been discharged. (Tr. at 257-258)
109. She testified that, from a therapeutic standpoint, she was "taken back" because she had been "led to believe that he was willing to come back for treatment." She testified that, when she heard reports of his demeanor upon his return, "it was not the same person that I had had in group." (Tr. at 283)
110. Ms. Layman prepared a discharge summary for Mr. Bender includes the following:

Admission Date: 2-2-09
Discharge Date/Type: 2-7-09 WSA

Degree of Severity on Admission

Moderate - Acute intoxication/withdrawal

None - Biomedical conditions/complications

Moderate - Emotional/Behavioral/Cognitive Conditions/Complications

Moderate - Treatment acceptance –

Moderate - Relapse Potential

High - Recovery Environment

²⁶ The Hearing Examiner believes that "WSA" likely means "with staff approval."

Degree of Severity on Discharge

None - Acute intoxication/withdrawal

None - Biomedical conditions/complications

Moderate - Emotional/Behavioral/Cognitive Conditions/Complications

Low - Treatment acceptance

Moderate - Relapse Potential

High - Recovery Environment

(St. Ex. 6 at 11 Tr. at 264-265)

111. The discharge summary also states:

Thomas was referred by the Ohio State Medical Board for a 72 hour inpatient assessment as a result of not disclosing a DUI on his record when applying for licensure as an Anesthesiology Assistant. The inpatient assessment found he met criteria for Alcohol Dependence. During the assessment process, he participated in daily group therapy, introduced himself as an alcoholic, and presented his treatment plan assignments related to the disease concept of alcoholism. Also during group sessions, Thomas shared his alcohol use history and resulting negative consequences of his drinking. On 2-6-09, after completing the assessment, Thomas discussed the need for continued treatment with Pat Weston-Hall, CEO, reporting he did not have the funds to pay for 28 days of treatment. Mrs. Weston-Hall offered scholarship funds to Thomas who agreed to return to treatment after a 24 hour pass. Mr. Thomas went on the pass[;] however he did not return for treatment. The medical board was notified.

(St. Ex. 6 at 1) Under the heading "Final Diagnosis," the discharge summary includes the following:

Axis I: Alcohol dependence
Axis II: No diagnosis.
Axis III: No diagnosis.
Axis IV: Problems related to occupation.
Axis V: Current GAF 49/overall yearly 39.

(St. Ex. 6 at 2)

112. In addition, the discharge summary set forth recommendations including a 28-day program of inpatient treatment, three AA/NA meetings per week, and selecting a home group and sponsor. (St. Ex. 6 at 2)

113. Ms. Layman testified that, although she prepared the discharge summary, it was Dr. Merkin, the medical director, "who put the final diagnosis on this." She agreed that she had signed the discharge summary, but she stated that she had signed only with regard to her own therapeutic piece, which was the "Client's Response to Treatment," the "Level of Care," and the "Recommendations." She testified that the medical director is the one who signs off on the

final diagnosis in the discharge summary, and that she believes that Dr. Merkin should have signed Mr. Bender's discharge summary. (Tr. at 264-266, Tr. at 286-288; Tr. at 264-266)²⁷

114. The Board was notified in writing that Mr. Bender had left Glenbeigh on February 6 on a 24-hour pass, had then returned and been discharged on February 7, and had been advised to follow the recommendation of Mr. Zinsmaster. (St. Ex. 6 at 5)

March 2009 - Mr. Bender's Meeting At Glenbeigh and His Comments on the Evaluation

115. On February 13, 2009, Mr. Bender obtained a copy of his medical records from Glenbeigh. (Tr. at 78) Within a few weeks, he telephoned Dr. Adelman, requesting a meeting to discuss the assessment. Dr. Adelman agreed. (Tr. at 128-129)
116. Mr. Bender explained that he had requested the meeting because he disagreed with the diagnosis and wanted to bring several matters to Dr. Adelman's attention. Mr. Bender felt that, when he had talked with Dr. Adelman on February 4, Dr. Adelman had seemed to be an advocate who did not view Mr. Bender as an alcoholic. Mr. Bender testified that he wanted to see if Dr. Adelman would still feel the same way when given all the information that Mr. Bender had at his disposal. (Tr. at 84-85)
117. On March 18, 2009, Mr. Bender met with Dr. Adelman and Ms. Mason at Glenbeigh. He testified that he did not recall giving them any materials. However, he brought with him the extensive written comments and notes that he had made with regard to certain Glenbeigh records. (Tr. at 85, Resp. Ex. A)
118. Mr. Bender stated that he had prepared the written comments (Respondent's Exhibit A) in preparation for the March meeting with Dr. Adelman and Ms. Mason. (Tr. at 395) His written comments regarding the Glenbeigh evaluation include the following:

I was here (2 weeks early) on 2/2 for a Board mandated 72 hour evaluation. I was not aware of my diagnosis until 2/6. Was granted a 24 hour pass, after careful consideration, did not want to consent to diagnosis. Returned from pass, submitted a clean urine screen, respectfully requested discharge, was granted 2/7, 120+ hrs later. Trying to make some sense of diagnosis, requested a copy of my medical records. Here are my thoughts, observations in loose chronological order:

Biopsychosocial Assessment

DSM diagnosis: Chemical dependency

Tolerance – only physical not neurological

Often taken in larger amounts than expected

- admittedly blackout in college, none since

Social, occp., rec. activities reduced because of alcohol

- No evidence in assessment

²⁷Ms. Layman testified that she did not know why Dr. Merkin did not sign the discharge summary (Tr. at 287). Dr. Merkin was not presented as a hearing witness.

Misrepresentation

Several examples of quotes taken out of context, or misquoted
All three contacts [collateral sources] felt misrepresented
Self admitted low self esteem and alcoholic?
Denies severity yet quoted three different times

History & Physical Examination

No physical signs – withdrawal, meds needed, etc.
Came in clean two weeks early
Remote Alcohol Abuse?

Psychiatric Evaluation

Some mistakes – “turned his life around”, felony/misdemeanor
No criteria listed – very important, I would like to know why
During interview, was told my response was “the wrong answer”

Primary Counselor

After 72 hrs, spoke with counselor about going home told to wait til tomorrow
28 days inpatient discussed regularly, but not diagnosis
Called Board lawyer with short history, told to wait for Dr. Adelman
Relayed conversation regarding my case in group without consent
Recounted arguing with doctor over the phone, undermining authority

Based on this evidence, I fail to understand how I am alcohol dependent. Just as I would not want to be treated for cancer if I did not have it, I do not want to be unnecessarily treated for alcoholism. This is a serious diagnosis with life altering consequences, while my livelihood hangs in the balance. The recommended treatment of 28 days inpatient + 1 year demonstrated sobriety carries a heavy financial burden, to the point where I have to seriously consider giving up on practicing anesthesia for years, if not altogether, while I attempt to get back on my feet. I am begging you to reconsider.

(Resp. Ex. A)

119. Mr. Bender had also prepared numerous comments regarding the Biopsychosocial Assessment by Ms. Mason. With regard to page 3 of the Biopsychosocial Assessment (St. Ex. 6 at 9, Resp. Ex. B at 1), Mr. Bender wrote:

1. I never said that [specific sibling] might have had a drinking problem. I did hesitate at first because I could not recall whether [my sibling] currently drinks, which may have caused the confusion.
2. I remember discussing this topic at length. While I did say at first that I took care of my younger brother and sister, I attempted to modify that as I don't believe it to be true. I spend a good deal of time elaborating on my role as a baby-sitter, which I saw more like a chore than as a role within the family.

3. I remember making these statements, but their order is reversed.

At face value, I do not feel that these examples have much impact with regard to my diagnosis. But they are examples of misrepresentations, and demonstrate the commonality with which they occur throughout this report.

(Resp. Ex. B at 2)

120. With regard to page 4 of the Biopsychosocial Assessment (St. Ex. 6 at 10; Resp. Ex. B at 3), Mr. Bender noted:

1. No school related problems reported, which runs contrary to one of the DSM criteria I was listed as meeting for dependency.
2. I went on at length about how long I had worked and gone to school at the same time, how draining it was, and while I would not rule out further education, I was not interested in additional schooling at this time. Somehow that translated into a disinterest in readiness for learning, giving the impression I was somewhat uncooperative.

(Resp. Ex. B at 4)

121. With regard to his answers regarding religion and spirituality on page 5 of the Biopsychosocial Assessment (St. Ex. 6 at 11, Resp. Ex. B at 5), Mr. Bender wrote:

Another example of a topic I elaborated upon at some length, only to have it taken out of context. I do not deny making these statements, but as they appear they seem to convey feelings of shame and guilt. I went on to say that drinking is not considered a sin, and that drinking does not hurt my relationship to God, either. I also said that it was the DUI that I confessed, not drinking, but was not reflected by this report.

(Resp. Ex. B at 6)

122. With regard the Biopsychosocial Assessment at page 6 (St. Ex. 6 at 12, Resp. Ex. B at 7), Mr. Bender wrote:

1. No social or recreational related problems reported, which runs contrary to one of the DSM criteria I was listed as meeting for dependency.
2. This states that I have been working as an Anesthesiologist Assistant for 2.5 years, which is untrue and illegal. I'm not sure how this one was confused, but I have been in clinical training to be an Anesthesiologist Assistant for 2 years, and I was working as an Administrative Assistant for roughly 3.5 years. In any case, another example of misrepresentation.

3. No employment or work performance problems reported, which runs contrary to one of the DSM criteria I was listed as meeting for dependency.²⁸

(Resp. Ex. B at 8)

123. With regard to page 7 of the Biopsychosocial Assessment (St. Ex. 6 at 13, Resp. Ex. B at 9), Mr. Bender noted:

The story is accurate up until this point. While I did throw up at the station, it was not shortly after I got there, but after attempting the breathalyzer multiple times. I went on at length about this as well, about how throwing up was the result of the stress and fear created by the situation and the officers, and the fact that I was trying as hard as I could to blow, over exerting myself and squeezing my abdominal muscles. I did not feel sick before or after.²⁹

(Resp. Ex. B at 10)

124. With regard to page 8 of the Biopsychosocial Assessment (St. Ex. 6 at 14, Resp. Ex. B at 11), Mr. Bender provided the following comments:

I did not consider myself an alcoholic at the time of the interview, and I do not consider myself an alcoholic now. At the bottom of the page we see that the assessment performed by the driver intervention program did not find me dependent or in need of treatment, why would I say in this initial meeting that I was?

(Resp. Ex. B at 12)

125. With regard to page 9 of the Biopsychosocial Assessment (St. Ex. 6 at 15, Resp. Ex. B at 13), Mr. Bender provided the following comments:

I identified all of these strengths, including courage, and yet I self admittedly have low self-esteem?

(Resp. Ex. B at 14)

²⁸ Although Mr. Bender denied that his drinking had caused problems with employment, it was clear to the Hearing Examiner that Mr. Bender's OVI conviction and his nondisclosure on the application had caused a Board investigation and a Board-ordered inpatient evaluation, and that he was concerned about the delay in licensure and in starting a job that he had contracted to perform. Ms. Mason had noted vocational consequences in her report (page 12 above).

²⁹ In this passage, Mr. Bender insists that his vomiting was caused only by overexertion and abdominal pressure, and he sets forth several details to support his argument. In addition, he states that he "went on at length" about this with the counselor at Glenbeigh. However, his reasons for arguing this matter so strongly are not clear. It appeared to be important to him to establish that he had not been drinking heavily enough to cause vomiting, although at the time of this statement he had already been convicted of DUI.

In any event, the Board is *not* required to accept Mr. Bender's report regarding the amount of alcohol he consumed that night, and may believe that he under-reported it. Similarly, the Board is not required to believe that Mr. Bender tried his best to blow into the breathalyzer, and may conclude that he did not want the test to be complete and valid.

126. With regard to page 11 of the Biopsychosocial Assessment (St. Ex. 6 at 17, Resp. Ex. B at 15), Mr. Bender provided the following comments:

1. All three of the contacts I granted permission to talk to feel misrepresented in some fashion. My ex-girlfriend, who is also a social worker, knows the importance of directly quoting people in an assessment. She says she did not say this may be a blessing, and did not say thank you for the call.
2. My father and brother, though contacted separately, both felt that the questions were leading, working under the assumption that I was an alcoholic. My father didn't feel he was given the opportunity to say otherwise, and my brother recounted that the counselor did not seem interested in hearing anything that didn't pertain to my alleged alcohol problem.
3. While I may have admitted being able to drink more from high school to college without feeling sick, I did not express or experience a tolerance to the neurological effects of alcohol, which is the essence of this criteria. I did not require an additional amount of alcohol to feel drunk, I merely did not throw up when doing so.
4. I did admit to experiencing a blackout in college, but was an isolated incident that I elaborated upon which was not written here. I assume that qualifies for taking in a larger amount than intended, but I certainly did not do so often.
5. I have already highlighted the areas that demonstrate no evidence to support this criteria.
6. Again, I am listed as admitting that I am alcoholic. If I do not believe it now, did not believe it two days after this interview, why would I believe it then?

(Resp. Ex. B at 16)

127. With regard to page 12 of the Biopsychosocial Assessment (Resp. Ex. B at 17)³⁰ Mr. Bender provided the following comments:

How can I deny the severity and consequences of my drinking in one breath, then honestly say I am an alcoholic in the next? Again, I cannot see how it can be both ways. Seeing as how I don't believe it currently, did not believe it during my three subsequent interviews, why would I admit it then?

³⁰The pagination of the Biopsychosocial Assessment varies with different exhibits. A copy dated February 5, 2009, in which the header indicates that it is a 12-page report, includes only 11 of the 12 pages. (St. Ex. 6 at 7-17) An earlier draft dated February 3 indicates that it is a 13-page report, but there are only 12 of 13 pages provided (Resp. Ex. B at 1-17); the material on page 12 of this draft is located on page 11 of the February 5 version. However, another copy includes page 13. (Resp. Ex. E at 26)

Furthermore, I directly rejected feelings of shame or guilt, have courage yet low-self esteem, all of which are not translated but indicated by self-admission?

(Resp. Ex. B at 18)

128. With regard to the summary in the Biopsychosocial Assessment, in which Ms. Mason identified problems to be addressed based on self admission by Mr. Bender (*i.e.*, lack of knowledge of disease concept, shame and guilt issues, low self esteem, denial of severity of drinking, and denial of consequences of drinking), Mr. Bender commented as follows:

1. Shame and Guilt – in fact, I clearly remember saying that I do not feel guilty about drinking. After some prompting, I did come to the conclusion that I felt guilt about the DUI, and really felt like that was forced to meet criteria.
2. Low Self Esteem – this was mentioned earlier in the assessment, and that it was self-admitted. I found no evidence to support this, the closest I came was to admit that I would like to be more assertive, but didn't think I lacked the courage to do so. Further more, the assessment has several examples of my positive qualities and positive support.
3. Denial of Severity – If I had already declared myself an alcoholic, how could I possibly be considered in denial? I seems to me only one or the other can be true.

(Resp. Ex. B at 36)

129. With regard to Ms. Mason's formal memorandum regarding her assessment (the single-page document dated February 2, 2009), Mr. Bender objected as follows:

1. First off, this implies the assessment was completed on 2/2, the day I arrived. However, each staff member I interviewed with said that they had not yet read the report yet, as it was not yet included in my medical record.
2. Once again directly quoted as saying I am an alcoholic, and once again phrased a little bit differently, even though it is in quotation marks and should be verbatim. At face value, it appears that I self-admitted to being an alcoholic three different times during this one interview, as it is the only time Rose and I talked throughout my entire stay. That is impossible.
3. Though I don't recall, my eyes may have appeared watery at times, but to use the work "teary" suggests I may have been crying or emotional, which was not the case.

(Resp. Ex. B at 34)

130. Mr. Bender also took issue with the psychiatric assessment by Dr. Tran, who, according to Mr. Bender, had misinterpreted a number of comments made during the interview. For example, Mr. Bender took issue with Dr. Tran's description of him as having "turned his life around." Mr. Bender disagreed because he had been working full time and had successfully participated in the Anesthesiologist Assistant program. Mr. Bender also took issue with Dr. Tran's description of the reason given by Mr. Bender for not disclosing the DUI conviction on the application. Mr. Bender stated that "there is a difference between misdemeanors and felonies, even in the eyes of the Board." He further asserted that the Board's question on the application left room for interpretation of the phrase "minor traffic violations." Further, Mr. Bender stated that, as part of the application, he had submitted to a criminal background check, which meant that he knew very well that the Board was going to learn about his DUI conviction. (Resp. Ex. B at 24)
131. In his comments on Dr. Tran's report, Mr. Bender also asserted that Dr. Tran had seemed surprised when Mr. Bender stated that he intended to drink alcohol in the future. Mr. Bender stated that it would not make sense to admit he was an alcoholic and then tell Dr. Tran that he would drink again in the future. Mr. Bender asserted that he knew, "long before" he arrived at Glenbeigh, that "the cure for alcoholism is abstinence." (Resp. Ex. B at 24)

Mr. Bender also wrote that he had been "drinking casually since the DUI without problems" and saw no need to abstain. He further asserted that his statement to Dr. Tran regarding his intention to drink alcohol in the future demonstrates that (a) at the time of this examination, he did not feel he was an alcoholic, and (b) he was being honest and open throughout the interview. (Resp. Ex. B at 24)
132. Mr. Bender testified that, during his meeting with Dr. Adelman and Ms. Mason on March 18, 2009, he was given the opportunity to say the things that he wanted to say and was "able to read through the entire sheet" and give his "entire presentation" before they made a response. He testified that he expressed to them his concerns regarding certain items in the Biopsychosocial Assessment and the examination by the psychiatrist, as well as some of his dealings with Ms. Layman, and he also discussed his conversation with the physician assistant. Mr. Bender testified that he felt "good" that he "was able to say the things [he] wanted to say." However, he was surprised that Dr. Adelman was not more receptive to the items that he brought to Dr. Adelman's attention during the meeting. (Tr. at 88-89, 413)
133. Mr. Bender testified that, during the March 2009 meeting at Glenbeigh, he discussed that Ms. Mason had quoted him as saying that he was an alcoholic, but he insisted to her that "I know that I didn't say that one time throughout the conversation." He testified that they did not reach agreement on that point during the meeting, and he said to Dr. Adelman or Ms. Mason, "It's going to be your word against mine at the hearing." (Tr. at 90, 129-130; see, also, 195-196)
134. Dr. Adelman recalled that Mr. Bender had wanted him to change the diagnosis and write another letter to the Board stating that he was not impaired. Ms. Mason noted that

Mr. Bender had not agreed with the diagnosis and had particularly wanted a change in the treatment recommendation. Dr. Adelman and Ms. Mason testified that they had told Mr. Bender that they would not change the recommendation. (Tr. at 129-130, 195)

Additional Testimony by Ms. Layman

135. Ms. Layman testified that she knew, from having looked at Ms. Mason's assessment on February 3, that Ms. Mason had diagnosed alcohol dependence and recommended inpatient treatment. Ms. Layman noted that she had discussed with Ms. Mason their difference of opinion regarding the appropriate diagnosis. (Tr. at 281-282, 288-290, 304)
136. Ms. Layman was questioned about Mr. Bender's nondisclosure of his DUI on his licensure application, and whether he was really hiding his DUI if at the same time he is signing a release for the Board to obtain a criminal background check. She responded: "I still believe he is, yes. I'm very confused with a man that is in the profession of an assistant anesthesiologist, highly intelligent, not disclosing that information, knowing he will have a background check. That, to me, is an issue." (Tr. at 298-299)
137. Ms. Layman was asked to explain her testimony that Mr. Bender had been minimizing his drinking and that he had also realized that he had a problem with alcohol. She answered that he would disclose some information and then pull back. She remembered he had talked about having to give up his friends and about fighting with his girlfriend, but that he was "back and forth" with minimizing his conduct. (Tr. at 298-299)
138. When Ms. Layman was questioned further about her recollection of Mr. Bender's disclosure of fighting with his girlfriend, she responded as follows:
- Q. * * * What information did Mr. Bender provide to you regarding a girlfriend?
- A. That it was his ex-girlfriend. She did not like when he would go out with his friends and drink and – and most of their fighting was regarding to that.
- (Tr. at 330)
139. However, Ms. Layman agreed that she had not made a written notation regarding Mr. Bender's statements of this problem with his girlfriend. (Tr. at 299)
140. Ms. Layman agreed that she had not documented in writing all of Mr. Bender's different statements about his post-DUI drinking, in her notes regarding the group-therapy session on February 5. (St. Ex. 8 at 17) She commented that it is not possible to write down everything that every person says during a group session. She explained that there is "a lot of interactive dialogue" and that the sessions are not structured so that one person speaks and then another person is allowed to speak. There is "feedback from peers to peers" and supporting statements back and forth, with everyone talking and sharing in an unstructured manner. She stated that, during group sessions, she does not make written notations but mentally notes

participants' comments and prepares her written notes when she returns to her office after the session. (Tr. at 336-337)³¹

141. Ms. Layman testified that the first group discussion at Glenbeigh regarding Mr. Bender's diagnosis took place on February 5 as far as she knew, and that there were subsequently three additional discussions, but she could not remember the dates. (Tr. at 291)
142. Ms. Layman agreed that an individual can have a history of alcohol abuse but not currently meet the criteria for a diagnosis of alcohol abuse. (Tr. at 286, 311-312)

Additional Testimony by Dr. Adelman

143. With respect to Mr. Bender's denials that he had made certain statements, Dr. Adelman commented: " * * * [C]ertainly after these assessments are over, then anyone can sort of change their story. But we just use the information that we have available at that time." (Tr. at 131-132)
144. With regard to the differing diagnostic opinions of different members of the Glenbeigh staff, Dr. Adelman acknowledged that different members of the assessment team may reach different conclusions during the assessment process. (Tr. at 112-118, 128, 131)
145. Dr. Adelman acknowledged that binge drinking in college is not uncommon. He testified that the college culture is a separate culture in which a lot of drinking is done that looks very much like alcoholism, but that students who drink excessively during college will often stop that conduct when they leave the college culture, and go on with their lives without a drinking problem. (Tr. at 162-164)
146. Dr. Adelman testified that the counselors' reports in which Mr. Bender "would identify himself as an alcoholic" constituted data on which he relied, although he also relied on other data such as the psychiatric evaluation and the biopsychosocial assessment. Dr. Adelman agreed, however, that a person's self-identification as being an alcoholic does not establish

³¹ In her typewritten notes regarding the group session on February 5, Ms. Layman described Mr. Bender's responses regarding the films and also described his disclosures regarding his drinking history. In addition, she described his demeanor and treatment plan. With respect to his drinking and how it had changed over time, she provided a variety of details in her written notes, but she did *not* make a specific note that the post-DUI drinking involved "sporadic" or "binge" drinking. Both Ms. Layman and Mr. Bender agreed that his drinking history was discussed at this session, but they differed as to what exactly was said.

The Hearing Examiner agrees that Ms. Layman's method of taking mental notes during a group session with multiple individuals, and then making written notations later, presents a risk of omitting some of the significant comments that were made by a participant and also presents a risk of misremembering which participant made which statement. In the circumstances presented here, involving a counselor's notations describing a group-therapy session, the Hearing Examiner concludes that the lack of a specific note regarding problems with a girlfriend, or sporadic or binge drinking, does not conclusively establish that the statement was not made by Mr. Bender. Nonetheless, the Hearing Examiner believes that a finder of fact, in assessing Ms. Layman's testimony regarding what Mr. Bender said during group sessions, may find that the lack of a written note lessens the credibility and persuasiveness of the testimony. In other words, in the circumstances presented here, a finder of fact may reject Ms. Layman's testimony based on the lack of written corroboration, but is not required to do so.

that the person is chemically dependent, and that such an admission is not a criteria in the DSM-IV. (Tr. at 167)

147. Dr. Adelman stated that his meeting with the individual being evaluated may occur on any of the three days of the person's stay. Depending on when he sees the person, Dr. Adelman may or may not have seen the data from the other members of the team when he meets with the person being assessed. For example, when Dr. Adelman meets with a person on Wednesday who has been at Glenbeigh since Monday, the counselors and/or the psychiatrist may have given him some data before he sees the person. (Tr. at 115, 117)
148. Dr. Adelman was questioned about Mr. Bender's testimony that, during their meeting at the time of the evaluation, Mr. Bender had specifically told Dr. Adelman that he did not think he was an alcoholic. Dr. Adelman responded that he did not have that impression of their conversation. In fact, Dr. Adelman testified that he had "the opposite impression" of what Mr. Bender had said to him during the interview. (Tr. at 146-147)
149. Dr. Adelman testified that, when he met with Mr. Bender, he was unaware of Ms. Mason's opinion regarding alcohol dependency. (Tr. at 142-143, 145-147)
150. Dr. Adelman was asked about the apparent contradiction in Mr. Bender's answers on the biopsychosocial assessment, in which it is reported that Mr. Bender admitted that he was an alcoholic but also gave the answer "none" when asked at what age alcohol had become a problem. Dr. Adelman responded that "getting a DUI is a problem" and that Mr. Bender had either "misrepresented" the facts or had not understood the question. (Tr. at 164)

With regard to this issue, Ms. Mason acknowledged that the answers were internally inconsistent, but she thought that perhaps he had answered "none" with regard to the age it became a "problem" because a lot of people have a problem with alcohol long before they realize it and that he had answered "yes" about being an alcoholic after she had discussed specific signs and symptoms with him. (Tr. at 221)

151. When asked if he had found Mr. Bender to be honest, Dr. Adelman responded that his impression was that Mr. Bender had been "genuine." When asked whether Mr. Bender had been defensive, Dr. Adelman answered, "Not particularly, no." (Tr. at 146)

Testimony of Sheryl Zubal

152. Sheryl Zubal testified that she has known Tom Bender since she was 23 or 24 years old, and that she is now 31. She stated that she and Mr. Bender had dated from about mid-2001 through the end of 2005 and that they remain very good friends. Ms. Zubal testified that she still sees Mr. Bender often, varying from twice a week to twice a month. In addition, Ms. Zubal noted that she is a social worker licensed in Ohio. (Tr. at 347-348, 360-361, 365)
153. Ms. Zubal remembered being contacted in 2009 by a woman at Glenbeigh regarding Mr. Bender. She had expected that Glenbeigh was going to call her, because Mr. Bender had told her that he needed to have a drug assessment "because somebody thought he might have

an alcohol problem.” Ms. Zubal stated that she was at work when she received the call from a woman at Glenbeigh, but she did not catch the woman’s name. At the hearing, she testified regarding the written description by Ms. Mason regarding their telephone conversation. (Tr. at 349-357, 362-363)

154. With respect to Ms. Mason’s report, Ms. Zubal confirmed that she had in fact said that “I know on occasion he has drank [*sic*] too much.” With respect to whether Ms. Mason had accurately reported that she (Ms. Zubal) had told Mr. Bender that “it may be a problem,” Ms. Zubal testified that what she had actually said was that she was “concerned with him getting a DUI.” Next, she confirmed that she had advised the caller, “I no longer drink.” (Tr. at 350)
155. Ms. Zubal testified that, when Ms. Mason had asked about Mr. Bender’s drinking friends, she (Ms. Zubal) had responded that, yes, she had said that Mr. Bender’s friends drink “often,” but that she had not said that they drink “hard.” Ms. Zubal explained that these friends of Mr. Bender are “you know, blue collar people” who “like to go out after work and have a drink.” (Tr. at 351) Ms. Zubal stated that, when the caller asked “how much does he drink with his friends,” she had answered that she does not know how much Mr. Bender drinks with his friends because she no longer goes out with them to bars. (Tr. at 350-351, 355-356)
156. She asserted that Mr. Bender’s drinking had “never” caused “any” difficulties in her relationship with him. (Tr. at 357)
157. Ms. Zubal confirmed she had stated that Mr. Bender comes from a very good family and went to good schools. With regard to the next statement reported by Ms. Mason, “That is why I was worried about his drinking when he got his DUI,” Ms. Zubal asserted that what she had actually said was that “I was worried because he got a DUI.” She testified that she had been worried about the DUI because, in the past, when they went out and drank together, they wouldn’t drive, so she was concerned about his having a DUI offense. She further testified that she had told the caller that she was not concerned about Mr. Bender’s drinking but “just can’t believe that he got this DUI.” (Tr. at 351, 364)
158. In addition, Ms. Zubal confirmed that she had said, “I can’t believe this happened to him,” and that “He is the nicest and smartest man I know.” However, with regard to the statement that “it” could be a “blessing” to him, Ms. Zubal testified that she would never have used the word “blessing” because she is not religious and does not use that word. She testified that, to the contrary, this has ruined Mr. Bender’s life and would not be a blessing. (Tr. at 352)
159. With regard to the reported statement about “Thanks for the call,” Ms. Zubal testified that she did not say that. She testified that she had been talking on her cell phone in a location with poor reception and that, after she had described Mr. Bender as the nicest and smartest man she knew, she had advised the caller that the phone was “going to die.” She stated that the call was in fact subsequently dropped. Ms. Zubal testified that she then telephoned Glenbeigh and tried to reach the person who had called her, but she didn’t know the person’s name, and the operator said they would try to get a message to the person who had telephoned her. Ms. Zubal said she

subsequently called a second time and left the same message, but did not receive a return call. The point, she explained, was that she had never said “good-bye” to the caller from Glenbeigh or thanked the caller. (Tr. at 352-353)

160. Ms. Zubal further testified that, when she had told the caller that she did not drink anymore and did not go to bars, the caller had not asked why. Ms. Zubal stated that, if she had been asked, she would have explained that she takes large doses of cholesterol-lowering medication and no longer drinks alcohol because it would be bad for her liver. (Tr. at 356-357)

Testimony by the Respondent’s Father

161. Thomas R. Bender (referred to hereinafter as “Mr. Bender Senior”) is the father of the Respondent in this matter. Mr. Bender Senior testified regarding his telephone conversation with Rose Mason. He said he remembered making some of the statements that she reported but that her description is not complete. He testified that Ms. Mason had asked him when he had first observed that his son had a problem with alcohol, and that his answer is not included in Ms. Mason’s written summary of the conversation. Mr. Bender Senior testified that he had told Ms. Mason that he did not think that his son had an alcohol problem. He explained that he knew his son drinks while watching various sporting events, or at a wedding “or something like that,” but that he had never seen him inebriated at an event like that. He testified that his conversation with Ms. Mason had ended with a question that was “close to what she had written here,” about whether, if he thought that his son did have an alcohol problem, it would be better to take care of it now. Mr. Bender Senior testified that the point of his answer was that, if he thought his son had an alcohol problem, he (the father) would be the first one in line to want his son to get help, but that he did not believe that his son had an alcohol problem. In addition, Mr. Bender Senior testified that he had not seen his son “drink to excess,” although he had seen his son “inebriated” once. (Tr. at 372-375)

Additional Testimony by Ms. Mason

162. In regard to interviewing the collateral sources, Ms. Mason testified that she is “definitely” careful to ask open-ended questions. In regard to her statements that the person thanked her for the call, Ms. Mason was asked whether that is something that the person specifically says or whether that is paraphrased, and she answered: “I write what I hear.” (Tr. at 187-189)
163. With respect to her contact with Mr. Bender’s former girlfriend, Ms. Mason testified in part:

I spoke with his girlfriend Sheryl. She told me that on occasion he drank too much and she thought that he may have a problem. She quit drinking. She didn’t want to be with him and friends anymore. They really do drink hard.

* * *

I tell her the reason I’m calling and that I’m trying to collect some collateral data and we want to complete the assessment and I would like her

input. Can you tell me what you know about his drinking, how often, how much? Has it caused any problems? I believe that's probably about it. That's enough to ask where someone – I mean, if there really is an issue, they will talk more about that.

(Tr. at 185-186)

Additional Testimony by Mr. Bender

Why he told others at Glenbeigh that he was an alcoholic

164. Mr. Bender testified that he viewed the three-day inpatient evaluation at Glenbeigh as “a chance to prove that I didn’t have an alcoholic problem and that I’m in no way impaired ***,” and that he understood the purpose, to determine whether or not he is impaired in his ability to practice as an anesthesiologist assistant. (Tr. at 22-23)
165. Mr. Bender testified that he wanted to be cooperative and had tried to “assimilate” himself as best as he could, especially with the other patients. He testified that he had introduced himself as an alcoholic “at mealtimes,” in order to avoid belittling the struggles that others were going through with alcohol and drugs, and to avoid giving the impression that he thought he was better than the others at Glenbeigh. (Tr. at 40-41)
166. Also, Mr. Bender agreed that he had identified himself as an alcoholic during group sessions. However, he stated that he did this because others in the group were suffering from very difficult addictions and were disclosing personal things about their lives, and he “didn’t want to detract at all from that by creating an attitude that I was better than anybody.” (Tr. at 67-68)
- Mr. Bender emphasized that he was “very concerned” about not “upsetting the group balance” and that there were some “very sick people” at Glenbeigh who were dealing with “real problems,” and he didn’t want to belittle their experiences or create an aura that he was better in any way. Mr. Bender asserted that he had felt that, if he did not identify himself as a drug addict or alcoholic, he would be creating a persona that he was superior and that he didn’t have a problem. Nonetheless, he acknowledged that he knew he was not at Glenbeigh to please the other residents and had been admitted for a Board-ordered evaluation. (Tr. at 67-69, 393-394)
167. Mr. Bender asserted at the hearing that he had “wanted” to talk with a counselor about whether it was “worse if I betray myself and say I’m an alcoholic or is it worse to not acknowledge having an alcohol problem amongst the other patients and belittling their struggle.” (Tr. at 431-432)
168. Mr. Bender was asked if the reason he had not vocalized to anyone at Glenbeigh his belief that he had no problem with alcohol, was because he had not believed he *could* vocalize that to the Glenbeigh staff until after he was given his diagnosis. He answered as follows:

* * * I mean in terms of what you asked, I guess I didn't feel that I wasn't able to dispute any -- well, at least discuss it with a counselor while I was there.

As I said, I never knew what my diagnosis was until I left. So I was granted discharge. So I never had the opportunity to even discuss it. Well, as far as whether or not I would have had the opportunity to discuss it. Yeah, I suppose I would have had the opportunity to discuss with either my counselors or someone who had taken my history. As I said, I even told Dr. Adelman that I did not feel I was an alcoholic. I felt open to discussion. I felt at least they would listen to the aspect discussion of it if it had been discussed.

(Tr. at 449-450)

Testimony regarding his written statements at Glenbeigh regarding his "addiction" and his "disease"

169. Mr. Bender provided the following explanation with regard to his written statements including that his disease was the same as anyone else's at Glenbeigh, that his recovery would probably cause him to lose his "drinking buddies," and that he was grateful that his disease had not caused irreparable damage in his life:

A. *** On Wednesday I had done a group. There's another patient that said, you know, these friends that you spend time with in bars, you call them your drinking buddies. He said that from his own experience that, yeah, you would have to lose those friends if you wanted to -- if you go on to recovery, you want to avoid having future problems. So I did kind of adopt that term I think in some of my writings at Glenbeigh after that point.

Q. The term "drinking buddies"?

A. Correct. Yeah, the term "drinking buddies".

Q. There are other comments * * * where you use the term "my disease" or "disease." Did you think you had a disease when you were at Glenbeigh?

A. No. No. I did find the disease -- the disease concept in treating, especially with regard to or comparing it to diabetes and the -- and the idea that you can acquire the disease without having been genetically predisposed to it. But I did not feel that I had achieved that level that I was an alcoholic.

Q. Okay. There's also a reference to symptoms of the disease. Do you recall making reference to that?

A. Yeah, I do recall using the term "symptoms." I'm trying to think how that would relate, you know, or how the -- my understanding of it now, if it's changed at all, uh, to my understanding when I was at Glenbeigh. I do recall comparing myself to a particularly sickly patient that came in after I had been admitted and seeing the eventual symptoms, just physical symptoms, just ravages his body, and then hearing his testimony how it deeply affected his life. So I'm aware that there are symptoms to alcoholism, but yet I did not feel at that time or do I feel now that I have those type of symptoms.

(Tr. at 402-403)

Staying at Glenbeigh more than 72 hours and then obtaining the 24-hour pass

170. Mr. Bender testified that he had believed that Glenbeigh was supposed to give him the diagnosis prior to the end of his evaluation. (Tr. at 70) He testified that he believed that, when Ms. Layman told him on Thursday morning that she did not know the diagnosis, she was not being truthful. (Tr. at 447)
171. When asked about his intentions in obtaining a 24-hour pass to leave Glenbeigh, Mr. Bender responded as follows:

I wanted to demonstrate that I didn't – Well, I didn't want to leave under – How do I say this? I mean I left with the understanding that I would be back within 24 hours. I didn't want to violate that agreement. Then, also, I knew I would be taking a urine screen upon return and I wanted to demonstrate that I wasn't going home just to, you know, just to drink or anything like that.

(Tr. at 83)

172. Mr. Bender testified that, when he had met with Mr. Nichols, he knew that he was not obliged to receive his treatment at Glenbeigh, and that Mr. Nichols had telephoned the Board to obtain a list of other providers for Mr. Bender. (Tr. at 79, 83)

His opinion regarding the assessment at Glenbeigh

173. Mr. Bender testified that all four professionals at Glenbeigh “got it wrong.” He believes that there were mistakes by Dr. Tran and Ms. Mason. He feels that Beth Layman did not have “enough to make a determination at that time,” and that Dr. Adelman’s finding of impairment is incorrect because he (Mr. Bender) is convinced that he is “in no way” an impaired practitioner. (Tr. at 22, 90, 420)
174. Mr. Bender stated that he believes that “certain portions” of the information on which Glenbeigh’s determination of impairment were based was “misinformation,” and that there were mistakes. (Tr. at 90, 450)
175. Mr. Bender testified, however, that the physician assistant, Mr. Livingston, “got it right.” (Tr. at 97)

His statements to Ms. Mason, Ms. Layman, and Dr. Adelman during his evaluation

176. With regard to the Biopsychosocial Assessment, Mr. Bender acknowledged that he had met with Ms. Mason and that she asked questions and appeared to be listening to his answers and writing them down. (Tr. at 45-46, 379-380) However, he denied that he had said to Ms. Mason that one of his siblings might have an alcohol problem. He stated that he did recall saying that he worried that mood-altering chemicals may have influenced his younger brother because he (Mr. Bender) was the brother’s role model. (Tr. at 47, 401)

177. With respect to Ms. Mason's report that he had told her that he had "quit before" and didn't think it would be a problem to quit drinking again, Mr. Bender commented as follows:

Q. And you've actually quit alcohol before in the past; is that correct?

A. I've stopped drinking before, not for a specific reason. I know prior -- Yeah, I started around 16. And prior to my run-in with the law, I didn't consume anything until -- essentially until college. But the motivation at that time was more I was busy, you know, doing school and I was working on the weekends doing pizza delivery and other odd jobs.

Q. Why is it that you remember that you stopped drinking back then?

A. At the time you mean when I had the conversation with Rose?

Q. How is it that you remember now that there's a period of time when you didn't drink alcohol? Why would that fact stick in your mind?

A. Just seemed interesting to me upon reflection.

(Tr. at 50)

178. He further testified that it was true that, when Ms. Zubal was his girlfriend, she was not very fond of his friends who drank with him. However, he further testified that her attitude was not based solely on their use of alcohol:

Q. Did you also tell Ms. Mason that your ex-girlfriend voiced her worries about your drinking patterns and that the friends that you hang out with as heavy drinkers?

A. My recollection of it was that she was not very fond of my friends but not solely based on alcohol.

Q. So was alcohol one issue?

A. Potentially, yes.

(Tr. at 48-49)³²

179. Mr. Bender acknowledged that, in his interview with Ms. Mason, she had asked whether anyone had concerns about his drinking, and that he had responded that his ex-girlfriend had told him she was concerned. However, he insisted that Ms. Zubal had expressed this concern "around the time of the DUI." (Tr. at 400)

180. Mr. Bender emphatically denied that he had told Rose Mason that he was an alcoholic. However, he testified that he had not said anything to Ms. Mason about not being an

³²The Hearing Examiner notes that, during the quoted testimony, Mr. Bender's tone of voice and demeanor reflected evasiveness.

alcoholic. He also denied that he had told Beth Layman he was an alcoholic. Further, he denied that he had told Dr. Adelman that he was an alcoholic, and stated that he had specifically informed Dr. Adelman that he believed that he not was an alcoholic. (Tr. at 41-42, 433-434)

181. Mr. Bender testified that, when he entered Glenbeigh for the evaluation, he did not believe that he had a drinking problem, because he had previously undergone a 72-hour evaluation (at the driver-intervention program) and had also obtained an assessment from the McIntyre Center, and neither of those facilities had concluded that he had “a problem with alcohol that would interfere” with his ability to practice as an anesthesiologist assistant.³³ (Tr. at 40-41)
182. However, Mr. Bender acknowledged that he had not communicated to the professionals at Glenbeigh that he believed he was not an alcoholic. (Tr. at 40-41)
183. During the hearing, Mr. Bender commented on Ms. Layman’s notations regarding her conversation with Mr. Zinsmaster on February 3, 2009 (discussed above at page 17):

* * * I am unsure as to why my counselor took it upon herself to have a conference with the Board lawyer. I had only met her that morning, spoke directly with her no more than 30 minutes, and less than 30 minutes of group time. However, it appears she felt compelled to call the Board lawyer and discuss my case with him. The final sentence suggests to me that she may have even tried to convince him that I was an alcoholic over the phone, but that he would await results and letter from the doctor prior to making any decisions. While this is just speculation, it appears that she overstepped her bounds with little factual history of my case to go on.

(Resp. Ex. B at 32)³⁴

Use of alcohol following his DUI arrest

184. Mr. Bender acknowledged that, during the driver-intervention program in June 2007 (about six months after the DUI arrest), he had reported his current use of alcohol to be twice per week, with up to four beers per session. (St. Ex. 9 at 30, Tr. at 440)
185. Mr. Bender reported to Glenbeigh staff upon arriving for his evaluation: “The last time I drank was about January 12 of this year. I only drink occasionally on special occasions. I only drink a few times a year.” He also reported only “occasional” drinking on “special” occasions during the history taken by Mr. Livingston. (St. Ex. 8 at 2; Tr. at 440-441)

³³In the McIntyre report, the counselor set forth a diagnosis of Alcohol Abuse but rendered no opinion as to whether that diagnosis would affect Mr. Bender’s practice as an anesthesiologist assistant. (St. Ex. 9 at 31)

³⁴ However, Ms. Layman made clear at the hearing that she had made the call to the Board attorney *before* her first meeting with Mr. Bender, rather than afterwards (Tr. at 295-296), and her testimony was credible.

186. Mr. Bender testified that, before the DUI, he drank alcohol on “more of a weekly basis or maybe every other week,” having four to eight drinks each time. He testified that, after the DUI, his drinking became “much less frequent.” Mr. Bender reaffirmed his interrogatory answers that he now uses alcohol on an “occasional” basis, with extended periods of nonuse, and that he does not consume “any alcohol during the typical week” and usually does not consume “any alcohol during the typical month.” (Tr. at 37-38; St. Ex. 9)
187. He also testified as follows regarding his drinking since the DUI: “It’s been occasional use. It’s been severely – not severely, but certainly reduced since then and no level of binge drinking, so to speak. It would just be occasional beers or occasional times with one or two beers.” (Tr. at 391)
188. When questioned about the different answers he had given about his post-DUI drinking (during the court-ordered program in 2007, and during the Board-ordered evaluation in 2009), Mr. Bender testified that, after the driver-intervention program, he had further reduced his use of alcohol. (Tr. at 440-441)
189. Mr. Bender testified that, as a result of the driver-intervention program in June 2007 ordered by the court, he came to understand “the seriousness, the consequences, and how potentially dangerous that the DUI was.” He agreed that he had “put people’s lives at stake,” including his own life. (Tr. at 429-430)

The March 2009 meeting at Glenbeigh with Dr. Adelman and Ms. Mason

190. Mr. Bender stated that he does not recall whether or not Dr. Adelman and Ms. Mason told him during the March 2009 meeting that his diagnosis was alcohol abuse, and that he had operated under the assumption that the diagnosis was alcohol dependence. He also stated that he did not know that Dr. Adelman’s diagnosis was alcohol abuse until he heard Dr. Adelman testify at the hearing. (Tr. at 404-405)

Plans for future employment

191. Mr. Bender testified that he had signed a contract with Anesthesia Associates in Chesterland, Ohio, to work at Parma Community Hospital as an anesthesiologist assistant, but he did not know whether he would be able to keep the position due to the proceedings before the Board. With regard to whether positions for anesthesiologist assistants are reasonably plentiful, he agreed that there are “certainly positions available” in Ohio. (Tr. at 91-92; see, also, St. Ex. 9 at 20)
192. Mr. Bender agreed that, as a licensed anesthesiologist assistant, he would have patients’ lives in his hands and would have to make decisions in a clear and intelligent manner. He further acknowledged that working in the field of anesthesia has its moments of high pressure. He commented that his job would involve “one percent true terror,” in that there can be “untoward events, as they say.” (Tr. at 427)

Why he did not disclose his criminal conviction on his application

193. During the hearing, Mr. Bender was asked about his conversation with a Board investigator, Michael Giar, in late 2008. Mr. Bender testified that Mr. Giar had asked him point-blank why he answered “no” when asked about criminal convictions on his application. Mr. Bender testified that he had informed Mr. Giar that his “understanding of the Board’s interest was only felonies, not misdemeanors.”³⁵ (Tr. at 408)
194. At another point in the hearing, Mr. Bender stated that, when he read the instructions in the application [stating that he could omit disclosure of a “minor traffic violation”], he had thought that the Board meant he could omit “any misdemeanor offense.” (Tr. at 21) However, he conceded that there is no language about “misdemeanors” in Question 9 on the application. (Tr. at 444)
195. Mr. Bender was questioned as to whether he had believed that an arrest and conviction that involved time in jail, three days at a driver-intervention program, ten months of probation, and six points on his driver’s license was a minor offense that he could omit from disclosure, and he responded that it *was* minor “as compared to a felony, yes.” (Tr. at 22)
196. When asked whether, when applying for licensure, he was concerned that the DUI conviction would possibly cause problems with getting his license, Mr. Bender answered: “Yeah. Well, before that point I did, or as I was going through it. Before I found out that it was a misdemeanor, I was concerned that it would – could affect my ability to get a license to practice as an anesthesiologist assistant.” (Tr. at 445)
197. Mr. Bender testified that, since his 2007 conviction, he has learned about the varying degrees and levels of misdemeanors. He explained that he was concerned about the conviction until he learned during the driver-intervention program that his conviction was only a misdemeanor. He stated that, if he were answering a question today about criminal convictions, he would fully disclose the DUI. (Tr. at 99-100, 408, 419, 446)
198. Mr. Bender stated that, when he finished his anesthesia training in 2008, he had not realized until late August 2008 that there was an application he needed to submit to the Board to obtain an Ohio license to practice as an anesthesiologist assistant. He testified that, in putting together his application materials, he had obtained electronic fingerprints and had paid for criminal background reports from the BCI and FBI. (St. Ex. 2 at 8; Tr. at 409-410)
199. Mr. Bender summed up his explanations and arguments regarding his nondisclosure of the DUI conviction and the Glenbeigh finding of impairment:

³⁵ On the application, the Board did not ask whether Mr. Bender had been convicted of any violation other than “a misdemeanor” or a “minor crime.” Rather, the Board asked in Question 9 as follows: “Have you ever been convicted or found guilty of a violation of any law, regardless of the legal jurisdiction in which the act was committed, *other than a minor traffic violation?*” (St. Ex. 2, emphasis added)

Well, as far as the nondisclosure, I can't offer any excuse. The only explanation is just sheer ignorance. I'm very embarrassed about the fact that I filled it out the way I did. I can understand how it would appear that having been trained, uh, that I would have known better. Really, the responsibility is on me. I do not blame the Board in any way for wording the question the way they did. The responsibility is on me. If I was unclear as to what the question was asking, I should have done the research and figured it out for myself. Unfortunately I did not do that. I'm sorry and willing to accept whatever the Board deems necessary to rectify that.

Then as far as the impairment, I respect the Board's stance on impairment. I've read over previous Board cases as this has gone on. I've really been impressed by the Board's compassion for those that are dealing with issues of impairment, issues of -- with regards to chemical dependency. I think it's admirable. I just -- really believe that I do not suffer from chemical dependency and am in no way an impaired physician -- not a physician, excuse me, practitioner.

(Tr. at 419-420)

CREDIBILITY AND RELIABILITY OF EVIDENCE

In this case, witnesses gave conflicting testimony in several important areas. As a result, the testimonial evidence and documentary evidence are susceptible to varying interpretations. Therefore, the credibility of the witnesses and the interpretation of their testimony was central to making factual determinations.

The Hearing Examiner considered a number of factors when judging the credibility and reliability of witnesses' testimony and the accompanying documentary evidence: the witnesses' tone and demeanor, factors relating to motive and bias, factors relating to memory strength/deficits, consistency with other evidence, and a weighing of the totality of the evidence.

The Hearing Examiner reached a number of determinations regarding credibility and reliability of evidence, including the following:

1. Mr. Bender's oral admissions at Glenbeigh in group settings. During mealtimes and group sessions while at Glenbeigh, Mr. Bender repeatedly admitted to being an alcoholic. However, he was not believable when he claimed that the reason he did this was to avoid offending the other residents or affecting their recovery efforts. However, at the time Mr. Bender made these open acknowledgements of a problem with alcohol, it is clear that he knew very well that
 - he was being observed and evaluated for a potential problem with alcohol, and that
 - the evaluation had been ordered by the Board with respect to his licensure as an anesthesiologist assistant, a goal that was important to him.

It would have been incredibly foolish, even irrational, to make false admissions of having a serious alcohol problem just to be nice to other residents at the facility. Mr. Bender is an

intelligent, highly educated person. He was thirty years old at the time of the evaluation, and he wanted his license application to be granted. He was either telling falsehoods when he admitted to being an alcoholic at Glenbeigh, or he was telling falsehoods during the hearing.

The Hearing Examiner believes that his testimony at the hearing was unreliable. The Hearing Examiner rejects Mr. Bender's testimony that his open admissions of being an alcoholic, during an evaluation for alcohol-related impairment, were made by him without believing them to be true.

The reliable evidence supports the conclusion that, when Mr. Bender made these admissions at mealtimes and during group therapy, he believed them to be true. The Hearing Examiner notes that his oral admissions at Glenbeigh were consistent with his written admissions, which were not shared with other residents but were submitted to his counselor.

2. Written statements during the Glenbeigh evaluation. In written comments and responses on various documents at Glenbeigh, Mr. Bender repeatedly acknowledged that he had a "disease" or "addiction," and he discussed actions he would take to help his "recovery." The Hearing Examiner finds that these written statements and similar writings during the evaluation were truthful. Mr. Bender admitted that no one suggested what he should write. These written statements were submitted to his counselor, so there was little or no potential for pleasing or offending other residents.

More importantly, if these written statements were false, there was no logical reason for Mr. Bender to make them. If Mr. Bender truly thought that he did *not* have an alcohol-related problem or disease and did *not* need to make changes as part of a recovery, then his written statements to that effect were against his interests, in the sense that such statements would be more likely to lead to a diagnosis of an alcohol-related problem and resulting difficulties with his licensure.

In contrast, if the written statements were true, then there were logical reasons for sharing these truths with his counselor. When an individual truly wants optimum health, he provides accurate information to his healthcare providers, as honestly as possible. In addition, it is a well known principle of human nature that telling the truth, even when one views the truth as unpleasant or even shameful, can bring a sense of relief and unburdening. At the time Mr. Bender made the written statements during his evaluation, he had nothing to gain by writing the statements unless they were true.

The Hearing Examiner is convinced that, during his evaluation at Glenbeigh, Mr. Bender wrote his responses and comments truthfully. The testimony at the hearing, seeking to minimize the effect of these statements, was not credible.

3. Identifying himself as an alcoholic. The Hearing Examiner accepts that Mr. Bender's acknowledgements of his "disease" and that he is "an alcoholic" do not, in and of themselves, establish that he suffers from alcohol dependence. Further, the Hearing Examiner notes that these admissions were not accepted by Dr. Adelman at face value or given conclusive effect, because the final diagnosis by Glenbeigh was not alcohol dependence.

Nonetheless, Mr. Bender's admissions of his alcoholism and disease should not be ignored. They have relevance. First, Ms. Layman testified persuasively that an individual's open acknowledgement of his alcoholism is significant during the evaluation process because it shows a lack of denial and a readiness for treatment.

Moreover, as a matter of common sense, the Hearing Examiner is convinced that, when a person's behavior and statements are being scrutinized during an evaluation for alcohol-related impairment, and when that person firmly believes that he *does not* have a drinking problem, then he says so, very clearly. In such a setting, the person would not openly admit that he is an alcoholic during group therapy sessions with a staff counselor present. Similarly, during such an evaluation, the person would *not* submit written statements to the counselor that he has a disease the same as anyone else at the facility. He would *not* write about his gratitude that his disease had not had an irreparable effect on his life and would not set forth the actions he would take toward recovery, such as having to "fill the void" when he is no longer using and needing to find healthy alternatives such as meetings. Mr. Bender, however, did those things: he repeatedly said in group settings that he is an alcoholic, and he privately wrote that he has a disease or addiction that will necessitate changes in his life during his recovery.

4. Whether Mr. Bender communicated to Ms. Layman that he considered himself to be an alcoholic. During the hearing, Mr. Bender denied that he had told Beth Layman that he considered himself to be an alcoholic. The Hearing Examiner found Ms. Layman's testimony to be more credible.

Mr. Bender did not dispute that he had openly acknowledged during group therapy sessions that he considered himself an alcoholic, and the evidence demonstrates that some of these sessions were conducted by Ms. Layman. Further, she reviewed his written reflections after the sessions, in which he also admitted his disease, as discussed above.

5. Whether Mr. Bender communicated to Ms. Mason that he considered himself to be an alcoholic. During the hearing, Mr. Bender denied that he had told Rose Mason that he considered himself to be an alcoholic. The Hearing Examiner found Ms. Mason's testimony to be more credible. While there were discrepancies in her testimony and documentation, the Hearing Examiner weighed these against the significant inconsistencies in Mr. Bender's testimony. Although at certain times he was a believable witness, he was evasive and equivocal too often, not only in his words but in his tone and demeanor. His explanations with regard to crucial matters did not ring true. In addition, his self-identification as an alcoholic during his interview with Ms. Mason is consistent with other items of evidence, including his identification of himself as an alcoholic in therapy sessions, at mealtimes, and in his written reflections.
6. Whether Mr. Bender communicated to Dr. Adelman that he considered himself to be an alcoholic. The Hearing Examiner accepts that Mr. Bender did not make an explicit statement to Dr. Adelman along the lines of "Yes, I know that I'm an alcoholic." However, the Hearing Examiner found that Dr. Adelman's testimony was trustworthy when he stated

that, during their February 4 interview, Mr. Bender essentially communicated that he had “accepted that he had a drinking problem” and was open to treatment.

7. Alleged misinterpretation/misrepresentation by Dr. Tran, Ms. Layman, Ms. Mason and Dr. Adelman. Mr. Bender disputed the findings set forth by Dr. Tran, Ms. Layman, Ms. Mason, and Dr. Adelman, asserting that all of them misinterpreted his statements. The Hearing Examiner does not believe that all of these specialists misunderstood what Mr. Bender said and what he meant.

Dr. Tran did not testify at the hearing, and the record includes only his written report; however, his recitations of Mr. Bender’s communications are clear and detailed, and his descriptions of Mr. Bender’s statements are consistent with other evidence in the record. The Hearing Examiner found Dr. Tran’s report of Mr. Bender’s statements more reliable than Mr. Bender’s description.

Mr. Bender testified that he felt Beth Layman was untruthful when she spoke to him during the morning of February 5 and told him she did not know his diagnosis. However, the evidence is not clear as to the time that she allegedly made the statement, and the time she learned that Dr. Adelman had sent his letter. Both were said to have occurred during the morning, and the Hearing Examiner sees no reason why Ms. Layman would intentionally withhold definite information if she had it. It is more likely that her knowledge of Dr. Adelman’s diagnosis came after Mr. Bender had asked.

As for Ms. Layman’s testimony about “binge” drinking after the DUI, the Hearing Examiner is willing to accept that Mr. Bender probably did not use that specific term to describe his use of alcohol after the DUI. However, Mr. Bender referred several times to drinking on an “occasional” basis after the DUI, which justifies her description of his drinking as “sporadic,” and she testified credibly that, during the group session, he disclosed a few “episodes” of binge drinking. Ms. Layman was simply a very convincing witness, whereas Mr. Bender was not believable when he testified regarding the amount of his alcohol consumption. The Hearing Examiner believes it is more likely than not that Mr. Bender described some episodes of heavier drinking, which Ms. Layman viewed as a binge.

8. Collateral data gathered by Ms. Mason. The dispute on collateral data focuses primarily on Ms. Mason’s description of her conversation with Ms. Zubal, which she reported as follows:

I know on occasion he has dr[u]nk too much. I have told him that it may be a problem. I no longer drink. When I first met him we did go out and drink, but when I stopped drinking I did not want to be with his friends anymore. They really do drink hard. He comes from a very good family and went to good schools. That is why I was worried about his drinking when he got the DUI. I can’t believe this happened to him. He is the nicest and smartest man I know so this may be a blessing for him and open his eyes. Thanks for the call.

However, most of this information was corroborated during the hearing. Ms. Zubal confirmed that she had told Ms. Mason that she knew Mr. Bender drank too much on occasion. Ms. Zubal confirmed that she had said she herself no longer drinks. She confirmed that she had said Mr. Bender is from a good family and had gone to good schools. She confirmed she had said she was concerned about his driving under the influence of alcohol and concerned about the DUI offense. She also confirmed that she had described Mr. Bender as the nicest and smartest man she knew and couldn't believe he had gotten the DUI.

In addition, Mr. Bender provided testimony that corroborated many of Ms. Zubal's views as reported by Ms. Mason. For example, he testified that he had told Ms. Mason that his "ex-girlfriend thought she had to stop drinking after she realized that it had been an issue for her."³⁶ Also, Mr. Bender himself admitted that his girlfriend had not been fond of his friends and that her attitude toward them was based partly on their use of alcohol.

In addition, during the hearing Mr. Bender confirmed that what he had discussed with Ms. Mason about his ex-girlfriend was essentially what was written in Ms. Mason's report; and one of the things in that report is that Mr. Bender stated that the first person who confronted him about his use of mood-altering chemicals was his ex-girlfriend, who had "voiced her worries about his drinking and his friends who were heavy drinkers."

The Hearing Examiner accepts that Ms. Zubal probably did not use the word "hard" to describe the friends' drinking and did not use the word "blessing." Nonetheless, the Hearing Examiner believes that these concepts were discussed along the lines described by Ms. Mason. Although Ms. Zubal came across as a very honest person, it was clear to the Hearing Examiner that she is a very close friend of Mr. Bender and cares a great deal for him, and could not help but be somewhat biased and to give testimony at the hearing, in front of him, that was more favorable to him. The Hearing Examiner believes that the "spin" she put on her collateral-source conversation when describing it during the hearing was somewhat different than when she talked with Ms. Mason. For example, Ms. Zubal asserted that, when she said it was a problem, she had not been expressing a concern about Mr. Bender's *drinking*, but only about his drinking *and driving*. However, the Hearing Examiner was not convinced that this version of the conversation, as presented at the hearing, must be accepted.

In sum, the Hearing Examiner concludes that the essential portions of Ms. Mason's description are reliable. The last part of the paragraph, in which Ms. Mason reported a "good-bye" and closing remarks, is indeed at odds with Ms. Zubal's testimony. But Ms. Zubal did testify that she had cautioned Ms. Mason that her cell-phone connection was going to be lost, and that the connection was indeed then lost. At the hearing, Ms. Zubal's testimony suggested that, because the call was dropped and she had not explicitly said "good-bye" or thanked Ms. Mason at the end of the call, Ms. Mason is an unreliable reporter generally. However, the Hearing Examiner is willing to infer that, when Ms. Zubal warned that the

³⁶While it is true that Ms. Mason did not pursue the reason for Ms. Zubal's decision to stop drinking, when speaking to either of them, Ms. Mason's report is nonetheless correct in what it says as to her decision to stop drinking alcohol.

phone was going to die, Ms. Mason felt that she had enough information and that their conversation had concluded in a friendly, polite manner. The Hearing Examiner accepts that Ms. Mason, in describing cordial terminations of interviews, tended to use the same phrases to describe the end of the call. Overall, however, Ms. Mason's descriptions of her phone calls are deemed to be sufficiently reliable.

9. Mr. Bender's conduct in staying at Glenbeigh beyond the 72 hours required. It is undisputed that Mr. Bender stayed beyond the 72 hours required for the Board-ordered evaluation. The 72 hours ended on the morning of Thursday, February 5, but Mr. Bender stayed until some time during the afternoon on Friday, February 6.

At the hearing, Mr. Bender asserted that he had asked about leaving but was told to wait. The Hearing Examiner does not believe that Mr. Bender stayed because he was told to wait or that he stayed involuntarily in any respect.

The Hearing Examiner believes that, if Mr. Bender had wanted to leave at the end of the 72-hour period, he could easily have found someone to process his discharge. He was a 30-year-old adult with advanced education, seeking to perform work in anesthesia that requires an ability to take decisive action in serious situations. If he had wanted to leave, he could have made clear that he had completed the mandatory evaluation and expected to leave.

10. Process at Glenbeigh. Nonetheless, the Hearing Examiner accepts that Glenbeigh's documentation in certain areas was not as clear and meticulous as one would like to see. For example, the lack of clarity regarding the discharge diagnosis suggests that the usual procedures at the end of the 72-hour evaluation were not carefully followed.

In addition, Dr. Adelman sent his report letter to the Board after he had interviewed Mr. Bender on February 4, but then he and the team met on February 5 to engage in discussion of the appropriate diagnosis *after* the letter had been sent, according to Ms. Layman, who was a convincing witness.

However, the lack of the usual process does not require a conclusion that the process was so flawed that the Board cannot rely on Dr. Adelman's opinion.

The Hearing Examiner accepts that Dr. Adelman gathered information from the team members prior to making his diagnosis and recommendation. It was not essential that he convene a team meeting for a joint discussion prior to rendering his opinion.

Further, the Hearing Examiner is convinced that, by the time Dr. Adelman sent the letter before the group meeting on February 5, it had become clear to Ms. Layman, Ms. Mason, and Dr. Adelman not only that Mr. Bender suffered from an alcohol-related condition, but also that Mr. Bender himself knew and accepted that he suffered from an alcohol-related condition *and* was ready and willing to engage in treatment.³⁷ The lack

³⁷ Dr. Tran had also reported his diagnosis of alcohol dependence, but did not express the same understanding that Mr. Bender had accepted his disorder and was amenable to treatment.

of a formal communication with Mr. Bender regarding the final diagnosis of an alcohol-related condition and the need for treatment is explained and understood as a result of the reasonable belief by the assessment team that Mr. Bender had already decided to stay at Glenbeigh for inpatient treatment. Because Mr. Bender had led them to believe that he was already in agreement with inpatient treatment at Glenbeigh, it makes sense that they did not sit down with him on February 5 to present the diagnosis and their recommendation for treatment.

The evidence shows that Mr. Bender had shown his acceptance of an alcohol-related condition and the need for treatment. First, as already discussed above, Mr. Bender repeatedly submitted written statements that he knew he had a disease and planned to pursue recovery efforts. He described how he would “need to fill the void” created when he stopped using, and how he would have to find healthy alternatives such as meetings. On February 3, he wrote that it was necessary to say good-bye to his drinking buddies but that it might be easier than he thought.

Second, he admittedly never told his counselors that he believed he didn’t have a drinking problem and didn’t need treatment. On the contrary, he expressed to them a belief that he did have a drinking problem. Further, Dr. Adelman testified credibly that Mr. Bender had expressed acceptance of his drinking problem and a willingness to address it.

Third, Mr. Bender’s conduct showed his intention to stay for treatment, because he did in fact stay at Glenbeigh and attend treatment sessions after the 72 hours had ended. As stated above, Mr. Bender’s explanation of why he stayed beyond 72 hours was not credible.

Fourth, the conduct of Dr. Adelman and Ms. Layman shows that they had no doubt that Mr. Bender had accepted that he had an alcohol-related condition and planned to stay at Glenbeigh for treatment. Ms. Layman testified that she prepares a discharge summary after 72 hours when the individual does not accept the treatment recommendation or there is no diagnosis requiring treatment. In this case, however, Ms. Layman did not prepare a discharge summary on February 5, before leaving for her weekend, which demonstrates she did not believe that a discharge would take place before her return. On the contrary, she testified persuasively that Mr. Bender had led the staff to believe he planned to stay for treatment. Indeed, the business office had been informed that Mr. Bender was staying for treatment. The Hearing Examiner believes that Mr. Bender did indicate that he planned to stay at Glenbeigh for treatment.

Further, the timing of Dr. Adelman’s letter, prior to a formal group meeting, reflects his confidence that there was no doubt, by the assessment team *or* by Mr. Bender, that Mr. Bender suffered from an alcohol-related condition that needed treatment.

Likewise, the team meeting on February 5 may also be understood in light of these facts. In circumstances where Dr. Adelman and Ms. Layman reasonably believed that Mr. Bender had already decided to remain at Glenbeigh for 28 days of treatment, and

where a diagnosis of either alcohol abuse or alcohol dependence would require a finding of impairment and 28 days of treatment, it is not surprising that the team would meet as a group and further discuss their views on which of these diagnoses was more appropriate. In other words, because it appeared clear that Mr. Bender was “on board” with inpatient treatment at Glenbeigh for 28 days, there would be no reason to refrain from thoroughly discussing and reassessing the appropriate diagnosis on February 5, even though Dr. Adelman had sent his letter to the Board before the meeting.

11. False Statement on the Application. With regard to Mr. Bender’s statements as to why he denied on his license application that he had a criminal conviction, the Hearing Examiner found that Mr. Bender’s rationalizations were completely unconvincing. His statements to various people about not having a full understanding about misdemeanors and felonies came across as an attempt to present a plausible excuse. The Hearing Examiner did not believe that Mr. Bender actually thought that his DUI arrest and conviction—which involved being booked and placed in a cell, posting bond, obtaining legal counsel, court proceedings that stretched over several months, a fine in the hundreds of dollars, loss of driving privileges for months, and a sentence involving potential jail time—constituted a “minor traffic violation” that he could omit from disclosure.

Mr. Bender argued that he had no reason to hide the DUI conviction on his license application because he knew he had agreed to a criminal-background check and had paid for reports from the BCI and FBI. Ultimately, this argument was not persuasive. First, in his answers to interrogatories in December 2008, Mr. Bender repeatedly offered to sign authorization forms that would allow the Board to obtain official records from the FBI, BCI or other agency, which suggests that he had forgotten that he’d already authorized the Board to obtain criminal background checks from such agencies. Second, and more importantly, the finder of fact may consider that impaired individuals tend to exercise poor judgment and make poor choices. For example, they may drive vehicles on public roads after drinking multiple beers and tequila shots, hoping that they won’t get caught. They may fail to disclose information, hoping it won’t come to light, or hoping that, if it does, their excuses will be accepted. In other words, it is consistent with substance-related impairment that the impaired individual would hope to hide or minimize the consequences of a substance-related criminal conviction.

In addition, Mr. Bender’s demeanor and tone during the hearing indicated that his testimony was not reliable with regard to his reason for the nondisclosure; it was obvious that he was grasping at excuses that might work. He simply did not appear sincere and truthful when testifying on this topic. The Hearing Examiner believes that, in September 2008 when Mr. Bender submitted his application, he knew that the Board had asked him a question that required disclosure of his May 2007 criminal conviction, but he was very reluctant to do so and accordingly came up with an excuse he could assert. This does not mean that Mr. Bender committed perjury during the hearing. Rather, at the time of the application, when faced with a painful fact he wanted to avoid, he fabricated a semi-plausible excuse, and, by the time of the hearing, he had probably talked himself into believing his own story. His alleged “embarrassment” for making a mistake, during his statement taking “responsibility” for his mistake, and his apology for his mistake, were wholly unconvincing.

THE BOARD'S ROLE AS MEDICAL EXPERT

The central issue is whether Mr. Bender suffers from an impairment as that term is used in R.C. 4760.13(B)(6) and related rules. The Board may draw on its own collective medical expertise and experience, and make its own decision as to the question of impairment. Given the arguments made against the Glenbeigh evaluation process and its resulting diagnosis and recommendation, the Hearing Examiner believes that it is particularly important that the Board make its own direct analysis of the evidence, including Mr. Bender's testimony and writings. In this matter, if the Board believes upon direct review of the underlying evidence that the evidence demonstrates impairment, then the Board should expressly state its medical opinion during its deliberation, thus remedying any deficiency that may exist in the Glenbeigh opinion.

FINDINGS OF FACT

1. On September 5, 2008, Thomas Michael Bender submitted to the Board an application for a certificate of registration as an anesthesiologist assistant. The application remains pending at this time. As part of the application, he signed an Affidavit and Release of Applicant, whereby he certified under oath that all statements made with respect to his application are true.
2. In the Additional Information section of his 2008 Application, Mr. Bender answered "NO" to question number 9, which asks, in part, the following:

Have you ever been convicted or found guilty of a violation of any law, regardless of the legal jurisdiction in which the act was committed, other than a minor traffic violation?

In fact, on May 29, 2007, in Parma Municipal Court, Parma, Ohio, Mr. Bender had entered a plea of no contest to and had been found guilty of Driving or Physical Control of Vehicle while under the Influence of Alcohol or Drugs [OVI] in violation of Section 434.01(A)(1), Codified Ordinances of the City of North Royalton, Ohio.

3. By letters dated January 20 and January 30, 2009, the Board notified Mr. Bender of its determination that it had reason to believe he is in violation of R.C. 4760.13(B)(6), and ordered him to undergo a 72-hour inpatient examination beginning February 2, 2009, to determine whether he is in violation of Section 4760.13(B)(6).

The Board's determination was based on one or more of the reasons outlined in the letters, including that on December 9, 2006, he was arrested by North Royalton Police and charged with OVI in circumstances that included observation of his vehicle weaving back and forth across the road, a strong odor of alcohol about his person, his failing the field-sobriety tests, three unsuccessful attempts by the police to obtain a breath test resulting in an invalid reading each time, and Mr. Bender's vomiting between the second and third attempts at the breath test.

4. By letter dated February 4, 2009, Christopher Adelman, M.D., of Glenbeigh Hospital, a Board-approved treatment provider, notified the Board that, pursuant to the Board-ordered evaluation, Mr. Bender was found to be impaired in his ability to practice according to acceptable and prevailing standards of care and to require inpatient treatment.
5. The record includes no evidence that Mr. Bender has completed the required inpatient treatment. Accordingly, it is found that Mr. Bender has not in fact completed the required inpatient treatment.

CONCLUSIONS OF LAW

1. The acts, conduct, and/or omissions of Thomas Michael Bender as set forth above in Finding of Fact 2 through 5, individually and/or collectively, establish “[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 language is used in R.C. 4760.13(B)(6).
2. Mr. Bender’s acts, conduct, and/or omissions as set forth above in Findings of Fact 1 and 2, individually and/or collectively, constitute “[m]aking a false, fraudulent, deceptive, or misleading statement in securing or attempting to secure a certificate of registration to practice as an anesthesiologist assistant,” as that language is used in R.C. 4760.13(B)(8).

Discussion of Proposed Order

During the hearing, Mr. Bender presented as an intelligent, engaging, extremely articulate man who has a first-rate career ahead of him if he can successfully address the problem of alcohol abuse. The proposed order includes a grant of the requested certificate, suspension of the certificate until Mr. Bender completes 28 days of inpatient treatment and meets other conditions, and five years of probation, with routine monitoring requirements.

PROPOSED ORDER

- A. **GRANT OF ANESTHESIOLOGIST ASSISTANT CERTIFICATE; SUSPENSION OF CERTIFICATE:** The application of Thomas Michael Bender for a certificate to practice as an anesthesiologist assistant in the State of Ohio shall be GRANTED, provided that he otherwise meets all statutory and regulatory requirements. The certificate shall be immediately SUSPENDED for an indefinite period of time.
- B. **INTERIM MONITORING:** During the period that Mr. Bender’s certificate to practice as an anesthesiologist assistant in Ohio is suspended, Mr. Bender shall comply with the following terms, conditions, and limitations:

1. **Obey the Law**: Mr. Bender shall obey all federal, state, and local laws, and all rules governing the practice of an anesthesiologist assistant in Ohio.
2. **Declarations of Compliance**: Mr. Bender shall submit quarterly declarations under penalty of Board disciplinary action and/or criminal prosecution, stating whether there has been compliance with all the conditions of this Order. The first quarterly declaration must be received in the Board's offices on or before the first day of the third month following the month in which this Order becomes effective. Subsequent quarterly declarations must be received in the Board's offices on or before the first day of every third month.
3. **Personal Appearances**: Mr. Bender shall appear in person for an interview before the full Board or its designated representative during the third month following the month in which this Order becomes effective, or as otherwise directed by the Board. Subsequent personal appearances shall occur every **three** months thereafter, and/or as otherwise directed by the Board. If an appearance is missed or is rescheduled for any reason, ensuing appearances shall be scheduled based on the appearance date as originally scheduled.

4. **Sobriety**

- a. **Abstention from Drugs**: Mr. Bender shall abstain completely from the personal use or personal possession of drugs, except those prescribed, dispensed, or administered to him by another so authorized by law who has full knowledge of Mr. Bender's history of substance abuse and who may lawfully prescribe for him (for example, a physician who is not a family member).

Further, in the event that Mr. Bender is so prescribed, dispensed, or administered any controlled substance, carisoprodol, or tramadol, Mr. Bender shall notify the Board in writing within seven days, providing the Board with the identity of the prescriber, the name of the drug Mr. Bender received, the medical purpose for which he received the drug, the date the drug was initially received, and the dosage, amount, number of refills, and directions for use.

Further, within 30 days of the date said drug is so prescribed, dispensed, or administered to him, Mr. Bender shall provide the Board with either a copy of the written prescription or other written verification from the prescriber, including the dosage, amount, number of refills, and directions for use.

- b. **Abstention from Alcohol**: Mr. Bender shall abstain completely from the use of alcohol.

5. **Drug and Alcohol Screens; Drug-Testing Facility and Collection Site**

- a. Mr. Bender shall submit to random urine screenings for drugs and alcohol at least four times per month, or as otherwise directed by the Board. Mr. Bender shall

ensure that all screening reports are forwarded directly to the Board on a quarterly basis. The drug-testing panel utilized must be acceptable to the Secretary of the Board, and shall include Mr. Bender's drug(s) of choice.

- b. Mr. Bender shall submit, at his expense and on the day selected, urine specimens for drug and/or alcohol analysis. (The term "toxicology screen" is also be used herein for "urine screen" and/or "drug screen.")

All specimens submitted by Mr. Bender shall be negative, except for those substances prescribed, administered, or dispensed to him in conformance with the terms, conditions and limitations set forth in this Order.

Refusal to submit such specimen, or failure to submit such specimen on the day he is selected or in such manner as the Board may request, shall constitute a violation of this Order.

- c. Mr. Bender shall abstain from the use of any substance that may produce a positive result on a toxicology screen, including the consumption of poppy seeds or other food or liquid that may produce a positive result on a toxicology screen.

Mr. Bender shall be held to an understanding and knowledge that the consumption or use of various substances, including but not limited to mouthwashes, hand-cleaning gels, and cough syrups, may cause a positive toxicology screen, and that unintentional ingestion of a substance is not distinguishable from intentional ingestion on a toxicology screen, and that, therefore, consumption or use of substances that may produce a positive result on a toxicology screen is prohibited under this Order.

- d. All urine screenings for drugs and alcohol shall be conducted through a Board-approved drug-testing facility and Board-approved collection site pursuant to the global contract between the approved facility and the Board, which provides for the Board to maintain ultimate control over the urine-screening process and to preserve the confidentiality of positive screening results in accordance with Section 4731.22(F)(5), Ohio Revised Code. The screening process for random testing shall require a daily call-in procedure. Further, in the event that the Board exercises its discretion, as provided in Paragraph B.6, below, to approve urine screenings to be conducted at an alternative drug-testing facility, collection site, and/or supervising physician, such approval shall be expressly contingent upon the Board's retaining ultimate control over the urine-screening process in a manner that preserves the confidentiality of positive screening results.
- e. Within 30 days of the effective date of this Order, Mr. Bender shall enter into the necessary financial and/or contractual arrangements with the Board-approved drug-testing facility and/or collection site ("DFCS") in order to facilitate the screening process in the manner required by this Order.

Further, within 30 days of making such arrangements, Mr. Bender shall provide to the Board written documentation of completion of such arrangements, including a copy of any contract entered into between Mr. Bender and the Board-approved DFCS. Mr. Bender's failure to timely complete such arrangements, or failure to timely provide written documentation to the Board of completion of such arrangements, shall constitute a violation of this Order.

- f. Mr. Bender shall ensure that the urine-screening process performed through the Board-approved DFCS requires a daily call-in procedure, that the urine specimens are obtained on a random basis, and that the giving of the specimen is witnessed by a reliable person.

In addition, Mr. Bender and the Board-approved DFCS shall ensure that appropriate control over the specimen is maintained and shall immediately inform the Board of any positive screening result.

- g. Mr. Bender shall ensure that the Board-approved DFCS provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Order, and whether all urine screens have been negative.
 - h. In the event that the Board-approved DFCS becomes unable or unwilling to serve as required by this Order, Mr. Bender shall immediately notify the Board in writing, and make arrangements acceptable to the Board, pursuant to Paragraph B.6, below, as soon as practicable. Mr. Bender shall further ensure that the Board-approved DFCS also notifies the Board directly of its inability to continue to serve and the reasons therefor.
 - i. The Board, in its sole discretion, may withdraw its approval of any DFCS in the event that the Secretary and Supervising Member of the Board determine that the DFCS has demonstrated a lack of cooperation in providing information to the Board or for any other reason.
6. **Alternative Drug-testing Facility and/or Collection Site:** It is the intent of this Order that Mr. Bender shall submit urine specimens to the Board-approved DFCS chosen by the Board. However, in the event that using the Board-approved DFCS creates an extraordinary hardship on Mr. Bender, as determined in the sole discretion of the Board, then, subject to the following requirements, the Board may approve an alternative DFCS or a supervising physician to facilitate the urine-screening process for him.
 - a. Within 30 days of the date on which Mr. Bender is notified of the Board's determination that utilizing the Board-approved DFCS constitutes an extraordinary hardship on Mr. Bender, he shall submit to the Board in writing for its prior approval the identity of either an alternative DFCS or the name of a proposed supervising physician to whom Mr. Bender shall submit the required urine specimens.

In approving a facility, entity, or an individual to serve in this capacity, the Board will give preference to a facility located near Mr. Bender's residence or employment location, or to a physician who practices in the same locale as Mr. Bender.

Mr. Bender shall ensure that the urine-screening process performed through the alternative DFCS or through the supervising physician requires a daily call-in procedure, that the urine specimens are obtained on a random basis, and that the giving of the specimen is witnessed by a reliable person. In addition, Mr. Bender shall ensure that the alternative DFCS or the supervising physician maintains appropriate control over the specimen and immediately informs the Board of any positive screening result.

- b. Mr. Bender shall ensure that the alternative DFCS or the supervising physician provides quarterly reports to the Board, in a format acceptable to the Board, verifying whether all urine screens have been conducted in compliance with this Order, and whether all urine screens have been negative.
 - c. In the event that the designated alternative DFCS or the supervising physician becomes unable or unwilling to so serve, Mr. Bender shall immediately notify the Board in writing. Mr. Bender shall further ensure that the previously designated alternative DFCS or the supervising physician also notifies the Board directly of the inability to continue to serve and the reasons therefor. Further, in the event that the approved alternative DFCS or supervising physician becomes unable to serve, Mr. Bender shall, in order to ensure that there will be no interruption in his urine-screening process, immediately commence urine screening at the Board-approved DFCS chosen by the Board, until such time, if any, that the Board approves a different DFCS or supervising physician, if requested by Mr. Bender.
 - d. The Board, in its sole discretion, may disapprove any entity or facility proposed to serve as Mr. Bender's designated alternative DFCS or any person proposed to serve as his supervising physician, or may withdraw its approval of any entity, facility or person previously approved to so serve in the event that the Secretary and Supervising Member of the Board determine that any such entity, facility or person has demonstrated a lack of cooperation in providing information to the Board or for any other reason.
 - e. For purposes of this Order, the "supervising physician" specified in this paragraph is not necessarily a physician identified in the utilization plan(s) under whose supervision Mr. Bender practices as an anesthesiologist assistant.
7. **Reports Regarding Drug and Alcohol Screens:** All screening reports required under this Order from the Board-approved DFCS, the alternative DFCS and/or supervising physician must be received in the Board's offices no later than the due date for Mr. Bender's declarations of compliance. It is Mr. Bender's responsibility to ensure that reports are timely submitted.

8. **Additional Screening Without Prior Notice:** Upon the Board's request and without prior notice, Mr. Bender shall provide a specimen of his blood, breath, saliva, urine, and/or hair for screening for drugs and alcohol, for analysis of therapeutic levels of medications that may be prescribed for Mr. Bender, or for any other purpose, at Mr. Bender's expense. Mr. Bender's refusal to submit a specimen upon the request of the Board shall result in a minimum of one year of actual license suspension. Further, the collection of such specimens shall be witnessed by a representative of the Board, or another person acceptable to the Secretary and Supervising Member of the Board.
9. **Rehabilitation Program:** Mr. Bender shall undertake and maintain participation in an alcohol and drug rehabilitation program, such as A.A., N.A., or C.A., no less than three times per week, or as otherwise ordered by the Board. Substitution of any other specific program must receive prior Board approval.

Mr. Bender shall submit acceptable documentary evidence of continuing compliance with this program, including submission to the Board of meeting attendance logs, which must be received in the Board's offices no later than the due date for Mr. Bender's declarations of compliance.

10. **Comply with the Terms of Aftercare Contract:** Mr. Bender shall maintain continued compliance with the terms of the aftercare contract(s) entered into with his treatment provider(s), provided that, where terms of an aftercare contract conflict with terms of this Order, the terms of this Order shall control.
11. **Releases:** Mr. Bender shall provide authorization, through appropriate written consent forms, for disclosure of evaluative reports, summaries, and records, of whatever nature, by any and all parties that provide treatment or evaluation for Mr. Bender's substance abuse and/or related conditions, or for purposes of complying with this Order, whether such treatment or evaluation occurred before or after the effective date of this Order. To the extent permitted by law, the above-mentioned evaluative reports, summaries, and records are considered medical records for purposes of Section 149.43, Ohio Revised Code, and are confidential pursuant to statute.

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

12. **Absences from Ohio:** Mr. Bender shall obtain permission from the Board for departures or absences from Ohio. Such periods of absence shall not reduce the suspension/probationary term, unless otherwise determined by motion of the Board for absences of three months or longer, or by the Secretary or the Supervising Member of the Board for absences of less than three months, in instances where the Board can be assured that probationary monitoring is otherwise being performed. Further, the Secretary and Supervising Member of the Board shall have discretion to waive part or all of the

monitoring terms set forth in this Order for occasional periods of absence of 14 days or less.

In the event that Mr. Bender resides and/or is employed at a location that is within 50 miles of the geographic border of Ohio and a contiguous state, Mr. Bender may travel between Ohio and that contiguous state without seeking prior approval of the Secretary or Supervising Member provided that Mr. Bender is otherwise able to maintain full compliance with all other terms, conditions and limitations set forth in this Order.

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

C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION:** The Board shall not consider reinstatement or restoration of Mr. Bender's certificate to practice as an anesthesiologist assistant until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration:** Mr. Bender shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.
2. **Compliance with Interim Conditions:** Mr. Bender shall have maintained compliance with all the terms and conditions set forth in Paragraph B of this Order.
3. **Demonstration of Ability to Resume Practice:** Mr. Bender shall demonstrate to the satisfaction of the Board that he can practice in compliance with acceptable and prevailing standards of care. Such demonstration shall include but shall not be limited to the following:
 - a. Certification from a treatment provider approved under Section 4731.25, Ohio Revised Code, that Mr. Bender has successfully completed a minimum of 28 days of inpatient/residential treatment for substance abuse at a treatment provider approved by the Board.
 - b. Evidence of continuing full compliance with an aftercare contract with a treatment provider approved under Section 4731.25, Ohio Revised Code. Such evidence shall include, but shall not be limited to, a copy of the signed aftercare contract. The aftercare contract must comply with Rule 4731-16-10, Ohio Administrative Code.
 - c. Evidence of continuing full compliance with this Order.
 - d. Two written reports indicating that Mr. Bender's ability to practice has been assessed and that he has been found capable of practicing according to acceptable and prevailing standards of care, with respect to substance abuse.

The reports shall have been made by physicians knowledgeable in the area of addictionology and who are either affiliated with a current Board-approved

treatment provider or otherwise have been approved in advance by the Board to provide an assessment of Mr. Bender. Further, the two aforementioned physicians shall not be affiliated with the same treatment provider or medical group practice. Prior to the assessments, Mr. Bender shall provide the assessors with copies of patient records from any evaluation and/or treatment that he has received, and a copy of this Order. The reports of the assessors shall include any recommendations for treatment, monitoring, or supervision of Mr. Bender, and any conditions, restrictions, or limitations that should be imposed on Mr. Bender's practice. The reports shall also describe the basis for the assessor's determinations.

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

- D. **PROBATION:** Upon reinstatement or restoration, Mr. Bender's certificate shall be subject to the following PROBATIONARY terms, conditions, and limitations for a period of at least five years:
1. **Terms, Conditions, and Limitations Continued from Suspension Period:** Mr. Bender shall continue to be subject to the terms, conditions, and limitations specified in Paragraph B of this Order.
 2. **Tolling of Probationary Period While Out of Compliance:** In the event Mr. Bender is found by the Secretary of the Board to have failed to comply with any provision of this Order, and is so notified of that deficiency in writing, such period(s) of noncompliance will not apply to the reduction of the probationary period under this Order.
- E. **TERMINATION OF PROBATION:** Upon successful completion of probation, as evidenced by a written release from the Board, Mr. Bender's certificate will be fully restored.
- F. **VIOLATION OF THE TERMS OF THIS ORDER:** If Mr. Bender violates the terms of this Order in any respect, the Board, after giving him notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of his certificate.
- G. **REQUIRED REPORTING WITHIN 30 DAYS OF THE EFFECTIVE DATE OF THIS ORDER:**
1. **Required Reporting to Employers and Others:** Within 30 days of the effective date of this Order, Mr. Bender shall provide a copy of this Order to all employers or entities with which he is under contract to provide healthcare services (including but not limited

to third-party payors) or is receiving training; and the Chief of Staff at each hospital or healthcare center where he has privileges or appointments. Further, Mr. Bender shall promptly provide a copy of this Order to all employers or entities with which he contracts in the future to provide healthcare services (including but not limited to third-party payors), or applies for or receives training, and the Chief of Staff at each hospital or healthcare center where he applies for or obtains privileges or appointments. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.

In the event that Mr. Bender provides any healthcare services or healthcare direction or medical oversight to any emergency medical services organization or emergency medical services provider in Ohio, within 30 days of the effective date of this Order, he shall provide a copy of this Order to the Ohio Department of Public Safety, Division of Emergency Medical Services. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.

2. **Required Reporting to Other State Licensing Authorities:** Within 30 days of the effective date of this Order, Mr. Bender shall provide a copy of this Order to the proper licensing authority of any state or jurisdiction in which he currently holds any professional license, as well as any federal agency or entity through which he currently holds any professional license or certificate. Also, Mr. Bender shall provide a copy of this Order at the time of application to the proper licensing authority of any state or jurisdiction in which he applies for any professional license or reinstatement/restoration of any professional license. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.
3. **Required Reporting to Treatment Providers/Monitors:** Within 30 days of the effective date of this Order, Mr. Bender shall provide a copy of this Order to all persons and entities that provide substance-abuse treatment to or monitoring of Mr. Bender. This requirement shall continue until Mr. Bender receives from the Board written notification of the successful completion of his probation.
4. **Required Documentation of the Reporting Required by Paragraph G:** Mr. Bender shall provide this Board with **one** of the following documents as proof of each required notification within 30 days of the date of each such notification: (a) the return receipt of certified mail within 30 days of receiving that return receipt, (b) an acknowledgement of delivery bearing the original ink signature of the person to whom a copy of the Order was hand delivered, (c) the original facsimile-generated report confirming successful transmission of a copy of the Order to the person or entity to whom a copy of the Order was faxed, or (d) an original computer-generated printout of electronic mail communication documenting the e-mail transmission of a copy of the Order to the person or entity to whom a copy of the Order was e-mailed.

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



Patricia A. Davidson
Hearing Examiner

State Medical Board of Ohio

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

Richard A. Whitehouse, Esq.
Executive Director

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EXCERPT FROM THE DRAFT MINUTES OF AUGUST 11, 2010

REPORTS AND RECOMMENDATIONS AND PROPOSED FINDINGS AND PROPOSED ORDERS

Dr. Amato announced that the Board would now consider the Reports and Recommendations, and the Proposed Findings and Proposed Order appearing on its agenda.

Dr. Amato asked whether each member of the Board had received, read and considered the hearing records; the Findings of Fact, Conclusions of Law, Proposed Orders, and any objections filed in the matters of: Constance E. Ange, D.O.; Robert Edward Barkett, Jr., M.D.; Thomas Michael Bender; James A. Handley, L.M.T.; Roy William Harris, D.O.; Harold M. Jones, D.P.M.; Sarah Ann Lewis, M.D.; Christopher Allan Rice, M.D.; and Richard Joseph Sievers, II, D.O. A roll call was taken:

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

Dr. Amato 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:	Dr. Strafford	- aye
	Mr. Hairston	- aye
	Dr. Stephens	- aye
	Dr. Mahajan	- aye
	Dr. Steinbergh	- aye
	Dr. Amato	- aye
	Mr. Albert	- aye
	Dr. Madia	- aye
	Dr. Talmage	- aye
	Dr. Suppan	- aye
	Mr. Morris	- aye
	Dr. Ramprasad	- aye

State Medical Board of Ohio

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

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May 13, 2009

Case number: 09-CRF- 053

Thomas Michael Bender
4966 Royalwood Road
North Royalton, Ohio 44133

Dear Mr. Bender:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] intends to determine whether or not to limit, revoke, permanently revoke, or suspend your certificate to practice as an anesthesiologist assistant, refuse to issue or reinstate your certificate, or to reprimand you or place you on probation for one or more of the following reasons:

(1) On or about September 5, 2008, you caused to be submitted to the Board an Application for Certificate of Registration – Anesthesiologist Assistant [2008 Application], which remains pending at this time. As part of your 2008 Application, you signed an Affidavit and Release of Applicant, whereby you certified under oath that all statements made with respect to your 2008 Application are true.

(2) In the Additional Information section of your 2008 Application, you answered "NO" to question number 9, which asks, in part, the following:

Have you ever been convicted or found guilty of a violation of any law, regardless of the legal jurisdiction in which the act was committed, other than a minor traffic violation?

In fact, on or about May 29, 2007, in Parma Municipal Court, Parma, Ohio, you entered a plea of no contest to and were found guilty of Driving or Physical Control of Vehicle while under the Influence of Alcohol or Drugs in violation of Section 434.01(A)(1), Codified Ordinances of the City of North Royalton, Ohio.

(3) By letters dated January 20, 2009, and January 30, 2009, the Board notified you of its determination that it had reason to believe that you are in violation of Section

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4760.13(B)(6), Ohio Revised Code, and ordered you to undergo a 72-hour inpatient examination beginning Monday, February 2, 2009, to determine if you are in violation of Section 4760.13(B)(6), Ohio Revised Code. The Board's determination was based upon one or more of the reasons outlined in the letters, including that on or about December 9, 2006, you were arrested by North Royalton Police and charged with OVI, Driving Left of Center Line and Weaving after you were observed by law enforcement to be nearly asleep at the wheel while waiting at a red light, then subsequently weaving all over the road after the light turned green; that you had a strong odor of alcohol and failed various field sobriety tests at the time of your arrest, including falling into the officer while you attempted the walk and turn; and that after being taken into custody, you attempted three times to take a breath test, causing an invalid reading each time, and you vomited between the second and third attempts at the breath test.

By letter dated February 4, 2009, from Christopher Adelman, M.D., of Glenbeigh Hospital, a Board-approved treatment provider, the Board was notified that following the Board-ordered evaluation, you were determined to be impaired in your ability to practice according to acceptable and prevailing standards of care and to require inpatient treatment. Further, the Board has not received information that you have entered inpatient treatment.

Your acts, conduct, and/or omissions as alleged in paragraphs (2) through (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 4760.13(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraphs (1) and (2) above, individually and/or collectively, constitute "[m]aking a false, fraudulent, deceptive, or misleading statement in securing or attempting to secure a certificate of registration to practice as an anesthesiologist assistant," as that clause is used in Section 4760.13(B)(8), 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 days of the time of mailing of this notice.

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

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

Please note that, whether or not you request a hearing, Section 4760.13(L), Ohio Revised Code, provides that "[w]hen the board refuses to grant a certificate of registration as an anesthesiologist assistant to an applicant, revokes an individual's certificate of registration, refuses to renew a certificate of registration, or refuses to reinstate an individual's certificate of registration, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate of registration as an anesthesiologist assistant and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,



Lance A. Talmage, M.D.
Secretary

LAT/DSZ/flb
Enclosures

CERTIFIED MAIL #91 7108 2133 3936 3125 4151
RETURN RECEIPT REQUESTED