TRACY WINKLER
HAMILTON COUNTY CLERK OF COURTS

COMMON PLEAS DIVISION

ELECTRONICALLY FILED
January 30, 2014 09:37 AM
TRACY WINKLER
Clerk of Courts
Hamilton County, Ohio
CONFIRMATION 310345

LEBANON ROAD SURGERY CENTER
vs.
STATE OF OHIO DEPARTMENT OF HEALTH

A 1400502

FILING TYPE: FILING

PAGES FILED: 37

EFR200

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

IN THE MATTER OF: Case No: A1400502

LEBANON ROAD SURGERY CENTER
P.O. Box 43100
Cincinnati, OH 45243,

Appellant,

v.

STATE OF OHIO
DEPARTMENT OF HEALTH
246 North High Street
Columbus, OH 43215,

Appellee.

MEMORANDUM CONTRA OF THE OHIO DEPARTMENT OF HEALTH TO APPELLANT'S MOTION FOR STAY OF THE ORDER OF THE OHIO DEPARTMENT OF HEALTH

Introduction:

Appellant Lebanon Road Surgery Center (LRSC or Appellant) asks this Court to stay (pending resolution of its administrative appeal) the Director of Health's adjudication order refusing to renew and revoking Appellant's license to operate. LRSC is not entitled to the emergency relief it seeks. First, it has *no* chance of succeeding on the merits. This administrative appeal presents a single issue for this Court's resolution: whether LRSC can prove that the Director of Health's licensing decision is unsupported by reliable, probative, and substantial evidence or is contrary to law. It cannot. LRSC concedes that Ohio law requires it to have either a written transfer agreement with a hospital or a variance from that requirement. And

it admits it has neither. Faced with these unchallenged facts, LRSC has no chance of prevailing on the merits of this appeal. This factor alone warrants denying the requested stay. Second, denying the stay will protect public safety without imposing unusual irreparable harm on LRSC. Therefore, the Director respectfully requests that this Court deny the request for a stay.

Background and Procedural History:

Lebanon Road Surgery Center (LRSC) applied to renew its license to operate as an ambulatory surgical facility (ASF). An ASF is a freestanding facility where outpatient surgeries are routinely performed. R.C. 3702.30(A)(1). As an ASF, LRSC must have a written transfer agreement with a hospital unless the Director of the Department of Health (Director; ODH) has granted a variance of that requirement.[1] O.A.C. 3701-83-19. As the Surgery Center *concedes,* LRSC had neither. Administrative Code § 3701-83-19(E) states: "The ASF **shall** have a written transfer agreement with a hospital for transfer of patients **in the event of medical complications, emergency situations, and for other needs** as they arise." (Emphasis added).

Because LRSC presented no evidence of a written transfer agreement, the Director, by letter dated October 19, 2012, proposed to issue an order refusing to renew LRSC's license or, alternatively, to to revoke it. LRSC sought and received two continuances of the hearing date, in June and July, 2013 (Order, p. 1). An administrative hearing was held on September 6, 2013. Following the hearing, objections briefs, and post-hearing briefs of the parties, the Hearing Officer reviewed the evidence and issued a Report and Recommendation (Exhibit 1), including Findings of Fact, Conclusions of Law, and a Recommendation that LRSC's license be revoked due to the lack of a written transfer agreement. The Director adopted the entire Report and

[1] The Director's decision whether to grant a variance is final and is not subject to review under R.C. 119. O.A.C. 3701-83-14(F). The administrative appeal before this Court and pending which Appellant seeks a stay is from the denial of the license renewal and is *not* an appeal of the variance determination.

Recommendation and issued an Adjudication Order on January 17, 2014 (Order), which refused to renew and revoked LRSC's license to operate an ASF.

Standard of Review for Administrative Appeal:

The standard of review for this appeal is **not** *de novo* review, as the full legal arguments presented in Appellant's Motion for Stay seem to represent. Instead, R.C. 119.12 vests reviewing courts with limited discretion to reverse an administrative agency's order. The sole issue presented in this appeal is whether there is reliable, probative, and substantial evidence to support the agency's judgment, and whether the agency's decision is in accordance with the law. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993); R.C. 119.12. If the agency met the requirements under R.C. 119.12, a reviewing court may not substitute its judgment for that of the agency, even if the court may have reached a different conclusion. *Henry's Café, Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233, 163 N.E.2d 678 (1959).

The court in *Our Place, Inc. v. Ohio Liquor Comm.*, 63 Ohio St.3d 570, 589 N.E.2d 1303 (1992), provided the following definitions of reliable, probative and substantial evidence:

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

Id. at 571. An agency's resolution of evidentiary conflicts is presumed to be correct, and a reviewing court must defer to the agency's resolution of evidentiary conflicts in the absence of legally significant reasons for discrediting certain evidence. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980).

Standard for Staying an Agency's Administrative Order:

The standard for staying an administrative agency's order is well-established in case law. As set forth below, appellant fails to meet that standard and its motion should be denied.

R.C. 119.12 sets forth a very specific standard that must be met before the Court may grant a request for stay:

> The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an **unusual hardship** to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms.
> ***

R.C. 119.12[2] (emphasis added).

"The filing of an administrative appeal does not automatically entitle a party to a stay of execution pending judicial review." *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC* (2001), 141 Ohio App.3d 777, 782. "If it appears to the court that an ***unusual hardship*** to the appellant will result from the execution of the agency's order pending determination of the appeal, the court ***may*** grant a suspension and fix its terms." R.C. 119.12 (emphasis added). When asked to stay an administrative order, however, courts must give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme. See *Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm.* (C.A. 6, 1964), 337 F. 2d 221.

Although R.C. 119.12 does not set forth or prescribe the factors a court may consider in determining whether to suspend operation of an administrative order, those factors have been developed by courts. Courts have repeatedly relied upon the following factors as logical

[2] R.C. 119.12 contains provisions for other stays involving specifically delineated state agencies. However, stays regarding ODH orders are not specifically delineated. Therefore, those provisions do not apply here.

considerations when determining whether it is appropriate to stay an administrative order pending judicial review. Those factors are: (1) whether the appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay. See *Bob Krihwan Pontiac-GMC Truck, supra* at 783 (citing, *inter alia*, *Gurtzweiler v. United States* (N.D. Ohio 1985), 601 F.Supp. 883; *Holden v. Heckler* (N.D. Ohio 1984), 584 F.Supp. 463; *UpJohn Co. v. Finch* (W.D. Mich. 1969), 303 F.Supp. 241; and *Friendship Materials v. Michigan Brick, Inc.* (6th Cir. 1982), 679 F.2d 100). While Appellant recited these factors as controlling, it demonstrated success with none of them.

The first factor Appellant must demonstrate is success on the merits of the appeal. Appellant cannot satisfy this requirement. Indeed, here, Appellant has *no* chance of succeeding on the merits. As previously explained, this appeals hinges on whether the Director appropriately refused to renew and revoked Appellant's application for a license. Resolution of this issue, in turn, depends solely on whether Appellant has a written transfer agreement with a hospital or a variance from that agreement. And Appellant concedes it does not. Appellant therefore cannot prevail in this appeal, and there is no justification for staying the Director's decision.

Appellant's arguments to the contrary lack merit. First, implicitly conceding its inability to satisfy this requirement Appellant argues that "likelihood of success [] is of limited importance in this case." Motion at 5. In support, Appellant cites authority for the proposition that that the likelihood of success "is not a particularly helpful factor" where the motion for a stay "comes at a time when the merits of an appeal have not been fully examined" and "the Court

cannot conclude that it is substantially unlikely" that the appellant will prevail. *Lake County Bd. of Mental Retardation (and Development Disabilities) v. SERB*, Franklin C.P. No 92CVF02-1504, 1992 WL 699882, 1 (April 14, 1992); *see also Hudson Township Trustees v. SERB*, Summit C.P. CV 86 3 0903, 1986 WL 295943, 1 (May 30, 1986) (likelihood of success factor not dispositive where "[t]he merits of the appeal have not yet been examined, and the likely result is therefore unknown"). These cases are inapposite here, where the unchallenged record conclusively forecloses *any* possibility of success on the merits.

Second, Appellant incorrectly contends that it "can show likelihood of success on the merits because it has complied with the *purpose* of the written transfer agreement in an alternative manner." Motion at 5 (emphasis added). But Appellant's "alternative manner" arguments relate to the Director's separate decision to deny the Appellant's request for a variance – a decision committed to the sole discretion of the Director and not subject to this Court's review. The only question properly before the Court in this appeal is whether Appellant satisfies the actual licensing requirements – by having a written transfer agreement or a variance from the Director – and Appellant indisputably does not.

Appellant cites no case that suggests it is entitled to a stay pending an appeal that it cannot win on the merits. Even if Appellant could overcome this likelihood of success barrier (and it cannot), the remaining factors similarly support denying the motion for a stay. The next factor Appellant must demonstrate is irreparable injury. Appellant argued irreparable harm "may" result when it is forced to stop operating leaving one other clinic to perform abortions in the Greater Cincinnati area. The loss of the clinic physicians' sole means of support was also referenced as irreparable harm. No arguments were made, however, that Appellant once closed could never re-open should Appellant unexpectedly prevail on appeal, or that the clinic

physicians would be unemployable elsewhere within a reasonable period of time. The lack of such arguments and the use of the term "may" indicates that Appellant's harm is not irreparable.

Also, R.C. 119.12 makes clear that an appellant must show far more than the financial hardship that is both inherent and expected when a facility loses a license to operate. The statute requires that the appellant prove that it will suffer hardship that is "unusual" within denial context of a denial of license renewal. As cogently explained in *State Med. Bd. v. Alsleben* (Mar. 17, 1980), Summit Co. C.P. Case No. CV80-3-0614, unreported:[3]

> There is a dearth of authority in Ohio defining what constitutes "unusual hardship." However, some reasonable analysis may be helpful. The very term itself presupposes that the legislature foresaw that there would be a hardship in every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective "unusual" was included. That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.

Id. at 1-2. See also *Williams v. State of Ohio Department of Insurance* (January 12, 1994), Franklin Co. C.P. Case No. 93CVF08-5808, unreported, p. 2 (Reece, J.) ("That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.");[4] *Douglas S. Goldman, C.T. v. State Medical Board* (June 20, 1997), Franklin Co. C.P. Case No. 97CVF06-5968, unreported, p. 3 (Fais, J.) ("[U]nusual hardship means more than financial hardship");[5] *Herman Dreskin, M.D. v. State Medical Board* (October 22, 1997), Franklin Co. C.P. No. 97CVF-09-8830, unreported (McGrath, J.) (holding that doctor's "loss of patients, ***income*** and reputation in the community" resulting from revocation of license is not sufficient to constitute unusual hardship (emphasis added)).[6]

The third and fourth factors Appellant must demonstrate is that no harm to others will

[3] Attached as Appendix A
[4] Attached as Appendix B
[5] Attached as Appendix C
[6] Attached as Appendix D

result and that the public interest will be served by the clinic remaining open until the conclusion of this appeal. Appellant insists that "ODH's non-urgent pace" in conducting administrative proceedings and reaching its decision "underscores the fact that the continued operation of LRSC poses no danger to the health of women" Motion at 10. To the contrary, however, a deliberative process supports implementation.

Appellant's arguments that its record should speak for itself, that LRSC posed no danger to the health of women, and that it had satisfied the purpose of a written transfer agreement are equally unavailing. ODH disputes that, "Dr. Haskell and the physicians who work with him have an excellent record for patient care." (Motion, p. 10). But even if true, this statement would not serve as a reason to grant Appellant a stay. Again, that statement is not the subject of this appeal. Rather, this appeal involves the failure of an ambulatory surgical facility to obtain a transfer agreement **as required** by Ohio law. The General Assembly has established Ohio's public policy on that score. LRSC concedes that they do not have a transfer agreement and cannot obtain a transfer agreement (Motion, pp. 1,3).The public interest is not served when a clinic in clear violation of law is permitted to continue to operate. Patients will be harmed because a written transfer agreement or variance, required by law, is not in place in the event of medical complications, emergencies or other needs. No record of safety in the past can ever guarantee the future.

Conclusion:

LRSC has not made the required showing under R.C. 119.12 that it will suffer an ***unusual*** hardship that would justify granting such a stay. LRSC has also failed to show that its motion meets the four-part test developed in case law (see *supra*). LRSC has not shown that it is likely to succeed on the merits. In fact, LRSC concedes that it is not likely to succeed on the

merits by dismissing likelihood of success on the merits as something that is "of limited importance in this case." LRSC concedes that they do not have a transfer agreement and cannot obtain a transfer agreement. Without a written transfer agreement, LRSC cannot meet the minimum criteria for licensure and, accordingly, they have no likelihood of success on the merits.

For the above reasons, this Court should deny LRSC's Motion for Stay of Execution.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Melissa L. Wilburn
MELISSA L. WILBURN (0041942)
LYNDSAY A. NASH (0082969)
Assistant Attorneys General
Health & Human Services Section
30 East Broad Street, 26th floor
Columbus, Ohio 43215-3428
(614) 466-8600 Telephone
(614) 466-6090 Fax
melissa.wilburn@ohioattorneygeneral.gov
lyndsay.nash@ohioattorneygeneral.gov
Counsel for Appellee, Ohio Department of Health

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Notice of Appearance of Counsel* was sent via the Court's electronic filing system and regular U.S. Mail, postage prepaid, this 30th day of January, 2014 to Jennifer L. Branch, Esq. and Alphonse A. Gerhardstein, Esq., Gerhardstein & Branch Co. LPA, 432 Walnut Street, Suite 400, Cincinnati, Ohio 45202.

/s/ Melissa L. Wilburn

MELISSA L. WILBURN (0041942)
Senior Assistant Attorney General

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

LEBANON ROAD SURGERY CENTER
LICENSE NO. 0980 AS

HEARING EXAMINER
WILLIAM J. KEPKO

HEARING DATE: SEPTEMBER 06, 2013

REPORT AND RECOMMENDATION

This matter came on for an administrative hearing as a result of a request for a hearing filed on December 03, 2012 on behalf of Lebanon Road Surgery Center ("LRSC"). The timely request for a hearing was filed in response to the Ohio Department of Health's proposed non-renewal and proposed revocation of LRSC's health care facility license to operate as an ambulatory surgical center. Appearing on behalf of LRSC were W. Martin Haskell, M.D. and Valerie Haskell. LRSC was represented by Jennifer L. Branch, Gerhardstein & Branch. Appearing on behalf of The Ohio Department of Health was Tamara Malkoff. The Ohio Department of Health was represented by Melinda Ryans Snyder and Tara L. Paciorek, Office of the Ohio Attorney General. (Hereinafter the Director of the Ohio Department of Health and the Ohio Department of Health are referred to as the "Director" and "ODH").

I. STATEMENT OF THE CASE

LRSC operates an abortion clinic in Cincinnati, Ohio. Pursuant to Ohio law, LRSC is required to be licensed by ODH. R.C.§3702.30(D). In order to be licensed, LRSC must meet certain quality standards and, pursuant to Ohio Administrative Code ("OAC") §3701-83-19(E), must have a transfer agreement. A transfer agreement is a written agreement between the facility and a hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise.

Exhibit 1

In the event a facility is unable to secure a transfer agreement, Ohio law provides for a waiver or variance of the transfer agreement requirement. OAC§3701-83-14(A). In order to obtain a waiver or variance, a facility must submit a written request with ODH and provide certain information in the request including, without limitation, the reason for the waiver, the rationale behind the request and an explanation of how the facility will meet the intent of the requirement in an alternative manner. OAC §3701-83-14(B). The decision to approve or disapprove a waiver is within the sole discretion of the Director.

LRSC was initially issued a license in 2010. (State's Exhibit 4). On October 08, 2012, LRSC applied for renewal of its license to operate as a Health Care Facility (HCF)/Ambulatory Surgical Facility (ASF). (State's Exhibit 2). On October 08, 2012 LRSC also requested a variance. (State's Exhibit 3). On November 23, 2012 the Director informed LRSC that ODH intended to revoke LRSC's license on the grounds that the Director was "no longer confident that LRSC can or will, without interruption, maintain plans to provide for the timely and effective continuity of care of its patients in the event of an emergency or for other needs as they arise as required by Ohio Law and regulations." (State's Exhibit 1, pg. 2). In addition, the Director alleged that LRSC had not met its obligation to keep ODH continually updated about any changes to the variance. (Id.).

Testifying on behalf of ODH was Tamara Malkoff, W. Martin Haskell, M.D., on cross-examination, and Shannon Richey. Tamara Malkoff is employed by ODH and is Chief of the Bureau of Information and Operational Support ("BIOS") and the Division of Quality Assurance. Shannon Richey is Assistant Chief of the Bureau of Community Health Care Facilities and Services. State's Exhibits 1-25 were also admitted into

evidence. Testifying on behalf of LRSC were Roy D. Croy and W. Martin Haskell, M.D. Croy was formerly ODH's Chief of the Bureau of Community Health Care Facilities and Services. Exhibits A through Z and Exhibits AA, CC, HH, II and JJ were admitted into evidence on behalf of LRSC.

At the conclusion of the hearing, the parties, in lieu of closing arguments, agreed to a briefing schedule. The parties filed joint stipulation of facts on September 16, 2013. The parties filed simultaneous briefs on September 23, 2013 and each party filed a reply brief on September 30, 2013.

From the testimony, the exhibits that were admitted into the record and the arguments of counsel, and after a thorough review of all of the evidence, this Report and Recommendation constitutes the Hearing Examiner's Findings of Fact and Conclusions of Law as required by Chapter 119 of the Ohio Revised Code.

II. FINDINGS OF FACT

1. LRSC is located in Sharonville, Ohio, a suburb of Cincinnati, Ohio. LRSC provides surgical abortions to women.

2. Respondent Lebanon Road Medical Building, LLC owns LRSC, located at 11250 Lebanon Road, Cincinnati, Ohio. Plaintiff, W. Martin Haskell, M.D. ("Dr. Haskell") is the Medical Director of LRSC.

3. Dr. Haskell is a physician who has been licensed to practice medicine in the state of Ohio since 1974. Dr. Haskell performs surgical abortion procedures at LRSC. Dr. Haskell currently holds an affiliate staff position at Jewish Hospital.

4. Dr. Haskell is also the medical director for an affiliate ASF, Women's Med Center of Dayton.

Exhibit 1

5. ODH is a state agency established under Ohio Revised Code §121.02(G). ODH's principal office is 246 North High Street, Columbus, Ohio 43215. Theodore E. Wymyslo, M.D. ("Director Wymyslo") is the Director of ODH. Director Wymyslo is licensed to practice medicine in the state of Ohio.

6. LRSC is an Ambulatory Surgical Facility ("ASF") as defined under Ohio Revised Code §3702.30(A)(1). Ohio Revised Code §3702.30 states:

(A) As used in this section:

(1) "Ambulatory surgical facility" means a facility, whether or not part of the same organization as a hospital, that is located in a building distinct from another in which impatient care is provided, and to which any of the following apply:

(a) Outpatient surgery is routinely performed in the facility, and the facility functions separately from a hospital's impatient surgical service and from the offices of private physicians, podiatrists, and dentists;

(b) Anesthesia is administered in the facility by an anesthesiologist or certified registered nurse anesthetist and the facility functions separately from a hospital's inpatient surgical service and from the offices of private physicians, podiatrists, and dentists;

(c) The facility applies to be certified by the United States health care financing administration as an ambulatory surgical center for purposes of reimbursement under Part B of the medicare program, Part B of Title XVIII of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 301, as amended;

(d) The facility applies to be certified by a national accrediting body approved by the health care financing administration for purposes of deemed compliance with the conditions for participating in the medicare program as an ambulatory surgical center;

(e) The facility bills or receives from any third-party payer, governmental health care program, or other person or government entity any ambulatory surgical facility fee that is billed or paid in addition to any fee for professional services;

(f) The facility is held out to any person or governmental entity as an ambulatory surgical facility or similar facility by means of signage, advertising, or other promotional efforts.
(Id.).

7. ASFs are "Health Care Facilities" as that term is defined in Ohio Revised Code

Exhibit 1

§3702.30(A)(4). The ODH regulates and licenses Ambulatory Surgical Facilities and Health Care Facilities.

8. An ASF must renew its license on an annual basis by submitting a written application to ODH. Ohio Administrative Code rule §3701-83-04(B).

9. Ohio Administrative Code Chapter 3701-83 sets forth numerous requirements governing the operation of health care facilities, which include ASFs. Specifically, Ohio Administrative Code §3701-83-19(E) states: "The ASF shall have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise."

10. Pursuant to Ohio Administrative Code §3701-83-14, the Director has the authority and discretion to grant variances from any requirement set forth in OAC Chapter 3701-83, unless the requirement is mandated by statute. A variance can be granted when the requirement is met in an alternative manner. The Director's denial of a variance, whether in whole or in part, is final and does not create the right to a hearing under Ohio Revised Code Chapter 119. Each request for a variance is considered on a case-by-case basis. O.A.C. §3701-83-14(G).

11. In June, 2010 LRSC applied for an ASF license from ODH. (State's Exhibit 4).

12. At the time of its initial application for licensure, LRSC did not have a written transfer agreement with any hospital.

13. LRSC applied for a variance to the written transfer agreement requirement in September, 2010. (State's Exhibit 5).

14. On October 21, 2010 the then Director, Dr. Jackson, granted the variance request, finding that LRSC had met the written transfer agreement requirement in an

Exhibit 1

alternative way. ODH's conditional approval was four-fold:

1. The continued association with LRSC of Haskell and Kade with admitting privileges to a Cincinnati area hospital;

2. Strict adherence to the LRSC Emergency Protocol;

3. The continued provision of timely and quality back-up emergency care;

4. The provision of the letters of courtesy staff reappointments to The Jewish Hospital and The Christ Hospital, as approved by the medical staff of the respective hospitals. (State's Exhibit 6).

15. On October 21, 2010 ODH issued LRSC an ASF license. (State's Exhibit 7).

16. In August, 2011 LRSC applied for a modification of the variance, asking to substitute backup physicians Drs. Schwartz and Bowers for Dr. Haskell. (State's Exhibit 8). Dr. Schwartz had admitting privileges in obstetrics and gynecology at The Christ Hospital, and Dr. Bowers had admitting privileges in gynecology at The Christ Hospital. These privileges were verified by ODH. (States Exhibit 8, pp.2-3 and State's Exhibit 10).

17. On September 13, 2011 Director Wymyslo granted the modification to the variance and conditioned it, in part, upon the unrestricted admitting privileges of Drs. Kade, Bowers and Schwartz. (State's Exhibit 10).

18. On November 17, 2011 ODH documented, in a written protocol, operational procedures on how to process a request seeking a variance of the written transfer agreement. (Hereinafter the "November Protocol"). (State's Exhibit 11; LRSC's Exhibit B). In December, 2011 ODH notified all ASFs, including LRSC, of the written procedure. (LRSC's Exhibit A). At all times relevant, the facilities where Dr. Haskell practiced were the only ASFs which sought a variance of the written transfer

Exhibit 1

agreement.

The November Protocol stated that any variance shall not exceed the life of the requesting facility's license and shall be requested each applicable license period.

19. On February 29, 2012 Dr. Kade's reappointment status at The Christ Hospital was transferred from Courtesy Privileges to Affiliate staff status with no clinical privileges. (State's Exhibit 13).

20. In March, 2012 ODH contacted Dr. Haskell about whether Dr. Kade's privileges at The Christ Hospital had been renewed. Dr. Haskell responded the same day with a copy of the reappointment letter. (LRSC's Exhibit L, p. 2; State's Exhibit 13).

21. ODH and LRSC engaged in a dialogue regarding the extent of Dr. Kade's admitting privileges over the next two months. (LRSC's Exhibits L, O, P; State's Exhibits 14, 15, 16, 17, 18). On May 4, 2012 ODH requested Dr. Haskell to explain how he would provide continuity of care for patients in light of the change of Dr. Kade's status. (State's Exhibit 18).

22. LRSC responded by letter dated May 24, 2012 with a plan of how LRSC would provide for patient safety and continuity of care if a patient needed to be transferred to a hospital. (State's Exhibit 19). As part of that plan, LRSC notified the Department that the Facility had contracted with Drs. Schwartz, Gravely, and Hansel to provide emergency back-up services for LRSC. Dr. Schwartz, M.D. had unrestricted admitting privileges in Obstetrics and Gynecology at the Christ Hospital. Dr. Chandra Gravely, M.D. and Dr. Cynthia Hansel, M.D. had unrestricted admitting privileges in Obstetrics and Gynecology at the Bethesda North Hospital. (State's Exhibit 3).

23. ODH's last correspondence with LRSC on this matter was July 27, 2012 and

Exhibit 1

indicated that LRSC's "variance continues at the Director's discretion, and that [the facility], not ODH, have the obligation to continually update ODH as to any changes in circumstances, and to request whether the new conditions will satisfy the Director's assessment as to whether patient safety is being protected." (State's Exhibit 20).

24. LRSC must apply to renew its ASF license annually each October.

25. In October, 2012 LRSC applied to renew its ASF license. (State's Exhibit 2).

26. LRSC did not obtain a written transfer agreement with a hospital and, therefore, also renewed its request for a variance, following ODH's written protocol. (State's Exhibit 3).

27. Pursuant to the November Protocol, paragraph 7, any variance or modification of any variance that LRSC had received from ODH in the past expired in October, 2012.

28. On October 18, 2012 Bridgette C. Smith sent an e-mail to Dr. Haskell attaching a letter stating that the renewal application was approved. (LRSC's Exhibit T).

29. The same day, Bridgette C. Smith, Licensure Program Administrator with ODH, sent an e-mail to Dr. Haskell notifying him that the letter informing him that his Facility's license had been renewed had been sent in error and that the Facility's renewal application was still under review. (State's Exhibit 23).

30. On October 18, 2012 ODH proposed to issue an order refusing to renew LRSC's ASF license. (State's Exhibit 1, pp. 7-9). The Notice stated that the proposed action was based on the Facility's lack of compliance with Ohio Administrative Code §3701-83-19(E) (State's Exhibit 1, p. 7). The Notice also stated that the Facility may request a hearing concerning this proposal and, at any such hearing, evidence regarding the variance may also be presented for consideration. (State's Exhibit 1, p. 8). This letter

was sent certified mail. (State's Exhibit 1, p. 10). LRSC timely filed a notice of hearing.

31. On November 23, 2012 ODH proposed to issue an order to revoke LRSC's license. (State's Exhibit 1, pp. 1-3). The Notice stated that Director Wymyslo's proposed action was based upon the Facility's lack of compliance with Ohio Administrative Code § 3701-83-19(E). (State's Exhibit 1, p. 1). LRSC received a copy of the aforementioned Notice on November 28, 2012. (State's Exhibit 1, p. 4). The Notice also stated that the Facility may request a hearing concerning this proposal and, at such hearing, evidence regarding the variance may also be presented for consideration. (State's Exhibit 1, p. 3). LRSC timely filed a notice of hearing. (State's Exhibit 1 p. 5).

32. As of the date of the hearing, LRSC does not have a written transfer agreement as required by OAC 3701-83-19(E).

33. As of the date of the hearing, the Director has not granted LRSC a variance from the requirement of a written transfer agreement. LRSC's request for a variance is still pending with the Director. (Transcript. pp. 28 and 46).

III. LEGAL DISCUSSION

LRSC is an Ambulatory Surgical Facility ("ASF") as defined in R.C. §3702.30(A)(1)(a) and (f). OAC Chapter 3701.83 sets forth numerous requirements for the licensing of health care facilities, including ASFs. OAC§ 3701-83-19(E) requires an ASF to have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise.

Notwithstanding the requirement for a written transfer agreement, the Director, pursuant to OAC §3701-83-14, may grant a waiver or a variance of the requirement. If

the request is for a variance, OAC §3701-83-14(B)(4) requires a statement of how the ASF will meet the intent of the requirement in an alternative manner. All variance requests are considered on a case-by-case basis. OAC §3701-83-14(G). It is solely within the Director's discretion as to whether a waiver or a variance shall be granted or denied and the Director's decision to grant or deny a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code. OAC §3701-83-14(F).

At the administrative hearing in this case, ODH raised an issue regarding the jurisdiction of the Hearing Examiner. It is ODH's position that the only issue for adjudication, and the only issue within the Hearing Examiner's jurisdiction, is whether LRSC meets the criteria for a license to operate as an ASF. According to ODH, the variance request is not an issue for adjudication in this administrative proceeding, nor does the Hearing Examiner have jurisdiction to consider the variance or to make recommendations or conclusions regarding the variance. Consequently, since LRSC does not have a written transfer agreement, it does not meet the licensing requirements to operate as an ASF, and this Hearing Examiner must so hold.

LRSC disagrees. LRSC argues that the Hearing Examiner has the authority to issue conclusions of law holding that LRSC's emergency transfer protocol and backup doctors adequately protect LRSC's patients who need transferred to a hospital. In addition, according to LRSC, the Hearing Examiner has the authority to recommend to the Director that he grant the variance because the evidence in the record supports a variance being issued.

Both parties in this case rely on *Women's Medical Professional Corporation v. J.*

Nick Baird, 438 F.3d 595 (February 17, 2006, 6th Cir.). In *WMPC*, ODH denied *WMPC*'s request for a waiver, proposed to issue an order denying its license application and issued a cease-and-desist order requiring the clinic to close immediately. Rather than filing an administrative appeal, *WMPC* filed a complaint in the United States District Court for the Southern District of Ohio seeking a temporary restraining order ("TRO") and an injunction against enforcement of the cease-and-desist order. (Id at 598). The District Court granted *WMPC*'s motion for a permanent injunction, preventing Director Baird from enforcing the written transfer agreement requirement against the Dayton clinic. (Id.).

The 6th Circuit reversed the District Court's decision with respect to its conclusions that the application of the transfer agreement requirement (and license requirement) to the Dayton clinic constituted an undue burden and that the Dayton-area hospitals had an unconstitutional third-party veto over the Dayton clinic's license. The 6th Circuit affirmed the District Court's conclusion that Director Baird violated the plaintiffs' procedural due process rights when he ordered the clinic closed before a hearing could be held on the proposed denial of the license application. (Id. at 616).

ODH relies on a discussion in the *WMPC* case wherein the 6th Circuit Court, at pg. 615, discussed the variance and opined as follows:

> Ohio law grants him (the "Director) absolute discretion when he is deciding whether to approve a waiver request. Ohio Admin. Code § 3701-83-14(D). This court has held that "a party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002). Where "an official has unconstrained discretion to deny the benefit, a prospective recipient of that benefit can establish no more than a 'unilateral expectation' to it." *Id.* at 409-10 (quoting *Roth*, 408 U.S. at 577). Thus, WMPC had no property interest in the waiver and no right to due process before the waiver was denied. The district court erred

Exhibit 1

in concluding that the denial of the waiver violated *WMPC*'s right to procedural due process.

LRSC, however, cites the following language in *WMPC* at pg. 614:

> Finally, the dissent takes the position that no hearing is required, either pre-deprivation or post-deprivation, because there is no material fact for resolution at a hearing. In my judgment, there is a fact issue for hearing, that is, whether Dr. Haskell's alternative arrangements for emergency treatment for his patients will adequately protect them. Director Baird's ability to exercise discretion in acting on a waiver means that he can deny the waiver after hearing, but it also means that he could grant the waiver--without departing from any regulation or any legal requirements. The decision is properly his, not ours.

In this case, LRSC argues that the record demonstrates that LRSC's alternate arrangements for backup emergency care will protect its patients and further demonstrates that LRSC has met its burden to show that it has met the written transfer requirement in an alternative manner. Therefore, in reliance on *WMPC*, LRSC argues that the Hearing Examiner should recommend to the Director that he approve the variance request.

In the *WMPC* case, the Court suggests that, after ODH denies a request for a waiver and proposes to deny and/or revoke an ASF's license, the ASF is entitled to a hearing where the fact issue will be whether the alternative arrangements for emergency treatment for the ASF's patients will adequately protect them. The *WMPC* case, however, can be distinguished from this case. In this case, the Director has not denied LRSC's request for a variance and, in fact, has not made a decision whether to grant or deny a variance. The Director's decision is pending. The Director has issued a proposed order to revoke or deny LRSC's operating license because of LRSC's failure to have a written transfer agreement. As such, what is presented for adjudication by the Hearing Examiner is the single issue of whether LRSC met the licensing

requirements at the time of its application. There is no dispute that LRSC does not have a written transfer agreement and, therefore, is not in compliance with OAC 3701-83-19.

The 6th Circuit has made clear that a decision by ODH to deny or grant a variance does not implicate a constitutionally protected property interest. The determination to deny or grant a waiver is within the exclusive discretion of the Director. As stated by the 6th Circuit, the decision (to deny or grant a waiver) is properly his, not ours. (*WMPC* at 614).

The Hearing Examiner and this proceeding have no jurisdiction to make a recommendation to grant or deny a variance when the Director has not. Borrowing language from the 6th Circuit, the decision is his, not mine. The Hearing Examiner's role is to apply the law and the regulations as they are written. OAC §3701-83-14(F) states that the refusal of the Director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code. In this case, the facts indicate that the Director has not decided to grant or deny a variance. Without a variance, LRSC fails to meet the licensing requirements of OAC §3701-83-19(E) because it does not have a written transfer agreement.

IV. CONCLUSIONS OF LAW

1. ODH has jurisdiction over this matter.

2. The record indicates that LRSC received notice of the date, time and place of the hearing, all in accordance with law. (State's Exhibit 1).

3. LRSC, pursuant to R.C. §3702.30, is a health care facility operating as an

ambulatory surgical facility.

4. Each ambulatory surgical facility must be licensed and meet certain quality standards established by ODH. R.C. §3702.30(D).

5. The licensing provisions for health care facilities and ambulatory surgical facilities are contained in OAC Chapter 3701-83.

6. Pursuant to OAC §3701-83-19(E), an ASF must have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise.

7. Pursuant to OAC §3701-83-14(A), the Director may grant a variance or waiver of the transfer agreement requirement.

8. Pursuant to OAC §3701-83-14(F), the refusal of the Director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code.

9. Because LRSC does not have a written transfer agreement or a variance, LRSC does not meet the licensing requirements of R.C. Chapter 3702.83.

10. Because LRSC does not meet the licensing requirements of R.C. Chapter 3702.83, the Director's decision to not renew, or to revoke the license of LRSC, is valid.

V. RECOMMENDATION

Based on the testimony, the exhibits, the briefs submitted by the parties and, for the reasons expressed herein, it is the finding of the Hearing Examiner that the Director's proposed revocation of the licensure of Lebanon Road Surgical Center is in accordance with the rules adopted under Chapter 3701.83 of the Ohio Administrative Code and it is **THEREFORE RECOMMENDED** that the Director's October 19, 2012

Exhibit 1

proposed non-renewal of Lebanon Road Surgical Center's license and the Director's November 23, 2012 proposed revocation of Lebanon Road Surgical Center's license are valid as a matter of law.

William J. Kepko (0033613)
Hearing Examiner
October 08, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing REPORT AND RECOMMENDATION was served by certified U.S. mail, postage prepaid, return receipt requested, to the Ohio Department of Health, c/o Kaye Norton, Office of Legal Services, 246 North High Street, 7th Floor, Columbus, Ohio 43215 CMRRR# 7010 1060 0000 1762 4959, on October 08, 2013.

William J. Kepko (0033613)

Exhibit 1

WILLIAM J. KEPKO CO., L.P.A.

WILLIAM J. KEPKO
ATTORNEY AT LAW

122½ EAST HIGH STREET
MT. VERNON, OHIO 43050
740-392-2900
FAX 740-392-2902

October 8, 2013

Ms. Kaye Norton
Ohio Department of Health
Legal Services
246 North High Street
Columbus, Ohio 43215
CMRRR# 7010 1060 0000 1762 4959

Re: Lebanon Road Surgery Center
License No. 0980 AS
Hearing Date: September 06, 2013

Dear Ms. Norton:

With respect to the above captioned case please find the following:

1. Report and Recommendation.

Sincerely,

William J. Kepko

WJK/sk
Enclosure

Exhibit 1

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

SUMMIT COUNTY
CLERK OF COURTS

STATE MEDICAL BOARD OF OHIO,

Appellee,

vs.

H. RUDOLPH ALSLEBEN, D.O.,

Appellant.

CASE NO. CV80-3-0614

ORDER

This cause came on to be heard on the plaintiff-appellant's Motion for Suspension of Order, filed herein on March 4, 1980. The Court granted a temporary restraining order which is effective through March 17, 1980.

The motion is brought pursuant to Section 119.12, O.R.C., claiming to the Court that an unusual hardship will be suffered by the plaintiff from the execution of the appellee's order pending the determination of the merits of the appeal herein.

There is a dearth of authority in Ohio defining what constitutes "unusual hardship." However, some reasonable analysis may be helpful. The very term itself presupposes that the legislature foresaw that there would be a hardship in practically every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective "unusual" was included. That there will be a hardship in this case is certainly true, as in

Appendix A

every case. The question is whether there has been a showing that it is an unusual one.

The appellant argues that a hardship will result to the patients of the appellant if the order is not stayed. A reading of the statute shows this to be an invalid consideration. Section 119.12, O.R.C. provides in pertinent part:

"If it appears to the Court that an unusual hardship to the appellant will result--" (Emphasis added).

Therefore, the statute is not intended to cover hardships except to the appellant.

In addition, the statements of counsel during argument reveal that the appellant is associated with at least one other doctor who can service any emergency needs of patients. For non-emergency cases, there are many other doctors available in the community for medical services.

The Court finds that there just has not been a concrete showing of an unusual hardship. There is nothing on which to judge whether the appellant will suffer a disastrous financial loss or just undergo an economic and financial readjustment. For example, there is no knowledge of what his financial arrangement may be with his associate. He may very well be entitled to some income from that arrangement. The appellant may have other sources of income which could sustain him with some adjustment in lifestyle.

While it can hardly be denied that the loss of one's

license to practice his chosen profession constitutes a hardship, it is equally clear that something more and unusual is required to satisfy the statute.

Accordingly, the motion is overruled. The appellant's companion motion to permit additional evidence, argued also on March 14, 1980, is taken under advisement by the Court until such time as the hearing transcript is filed and can be reviewed by the Court.

The temporary restraining order issued by the Court originally on March 7, 1980, is hereby ordered dissolved.

It is so ordered.

Judge John W. Reece

cc: Joseph C. Winner
Jeffrey Jurca

Appendix A

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHI

CIVIL DIVISION

WILLIAM E. WILLIAMS, :

Appellant, :

vs. : Case No. 93CVF08-58[illegible]

STATE OF OHIO DEPARTMENT OF INSURANCE, : JUDGE REECS

Appellee.

DECISION AND JUDGMENT ENTRY

Rendered this 12th day of January, 1994.

REECS, J.

This matter is before the Court upon Appellant's Motion for Suspension of Order filed on September 2, 1993. In response, Appellee filed a Memorandum in Opposition to Appellant's Request for Suspension of Order on August 20, 1993.

Pursuant to R.C. § 119.12, Appellant moves this Court for an order staying the State of Ohio Department of Insurance's order revoking all of the Appellant's licenses. Appellant asserts that execution of the Appellee's orders and suspension of his insurance licenses pending the determination of this Appeal herein would be an unusual hardship. In contrast, the Appellee argues against the suspension because it believes no unusual hardship exists for Appellant.

The authority for granting a suspension order pending appeal is found in R.C. § 119.12 which provides in pertinent part:

> The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the

Appendix B

> Court that an unusual hardship to the Appellant will result from the execution of the agency's order pending determination of the appeal , the Court may grant a suspension and fix its terms. (Emphasis added.)

As observed in the unreported opinion State Medical Board v. Asleben (March 17, 1980), Summit County Common Pleas, Case No. CV80-3-0614, there is very little case law or statutory help concerning a definition of "unusual hardship." However, some reasonable analysis may be helpful. The term itself presupposes that the legislature foresaw that there would be a hardship in practically every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective "unusual" was included.

This Court interprets that as meaning the legislature intended a more unusual consequence in order to suspend the order of removal than simply not being able to sell insurance. That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.

The Appellant explains in his Motion he has only received seven (7) complaints out of the over 900 health and accident policies he has sold. He represents he was licensed with American Service Life Insurance Company and left them in October of 1991 because of the Company's inadequacy in serving its policy. Now Appellant asserts that a regional manager of that company was very bitter over the Appellant's resignation and that several of the persons who complained to the department were encouraged to do

so by competitors or by people who have a cross- to bear inst Mr. Williams. In addition, Mr. Williams contends that h. irned commissions in excess of $11,000.00 which sums are being ld by the insurance company because the revocation of his licen is a breach of contract and as such permits the insurance com ny to keep the commission once the license is revoked.

A review of the foregoing leaves the Court with o ly one query: Where is the unusual hardship?

The Court finds that there just has not been a concrete showing of an unusual hardship. There is nothing on which to judge whether the Appellant will suffer a disastrous financial loss or just undergo an economic and financial readjustment. Regarding the holding of the $11,000.00 in earned commission, Appellant fails to not only mention which insurance company he is referring to, but also fails to clarify if whether a stay would remedy his predicament.

Accordingly, based upon the foregoing review and consideration of the submitted memoranda, the law and other relevant evidence, the Court finds the Motion not well-taken and hereby DENIES the same. All insurance licenses held by Appellant shall remain revoked during the pending of his Appeal.

IT IS SO ORDERED.

GUY L. REECE, II, JUDGE

Copies to:

David McCreary, Esq.
Ava W. Serrano, Esq.

Appendix B

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

DOUGLAS S. GOLDMAN, C.T.,	:	
Plaintiff/Appellant,	:	CASE NO. 97CVF06-3968
-vs-	:	JUDGE FAIS
STATE MEDICAL BOARD OF OHIO,	:	
Defendant/Appellee.	:	

DECISION AND ENTRY OVERRULING APPELLANT'S MOTION FOR A STAY PENDING THE APPEAL FILED JUNE 13, 1997

Rendered this 19th day of June, 1997.

FAIS, J.

This matter is before the Court upon the motion of Appellant Douglas S. Goldman for a stay pending the appeal. This motion was filed on June 13, 1997. Appellee filed a memorandum contra on June 16, 1997 and on June 20, 1997, Appellant submitted a reply memorandum.

Appellant has moved the Court for a stay pending his administrative appeal from an order of the Ohio State Medical Board indefinitely suspending his license as a cosmetic therapist. Appellant argues that he is entitled to a stay pending the appeal because his continued practice of cosmetic therapy will not threaten the health, safety or welfare of the public. Appellant also contends that if this order is not stayed during the pendency of the appeal, he will undergo unusual hardship. Appellant states that he is divorced and he is raising his son on his own. Moreover, Appellant asserts that his practice of cosmetic therapy is his sole source of income.

The State Medical Board opposes this motion because it argues that Appellant has failed to show that an unusual hardship will result if the order is not stayed. The State Medical Board argues that Appellant must show more than financial hardship and cites numerous Franklin County Court of Common Pleas decisions in support of this contention. The State Medical Board also argues that Appellant's continued unsupervised practice threatens the public health, safety and welfare. Finally, the

State Medical Board asserts that this stay should not be issued as Appellant blatantly disregarded the terms of the original Agreed Entry which granted him a stay pending his original appeal.

In reply, Appellant argues that he will suffer unusual hardship because he is 64 years old and has no other marketable employment skills, other than being a cosmetic therapist. Appellant states that he will suffer disastrous financial loss if this stay is not imposed because of his age and the receipt of very little child support from his ex-spouse. Moreover, Appellant also maintains that he has no cash or asset reserves and no other sources of income.

Appellant also replies that the health, safety and welfare of the public will not be threatened if the motion for a stay is granted. Appellant argues that he has practiced for twenty-two (22) years without any type of claim for neglect or that his services fell below the appropriate standard of care.

This motion is brought pursuant to R.C. §119.12, which states, in pertinent part:

> In the case of an appeal from the state medical board or chiropractic examining board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order, pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order.

Moreover, Judge McGrath of the Franklin County Court of Common Pleas noted the following in his analysis of the unusual hardship requirement:

> [P]revious cases have held that "unusual hardship" means more than the loss of the right to practice medicine. The removal of license to practice medicine inherently means that the person whose license is being removed will be unable to make a living practicing medicine because in order to practice medicine, a license is necessary. In the statute, "hardship" is modified with the word "unusual." This Court interprets that as meaning the legislature intended a more unusual consequence in order to suspend the order of removal than simply not being able to practice medicine. (citations omitted)

Roy v. State Medical Board of Ohio (J. McGrath, August 12, 1993), Franklin County Court of Common Pleas, Case No. 93CVF-05-3734 (unreported).

This Court has reviewed the motion and memoranda submitted by the parties, the Affidavit of

54

Appendix C

Douglas S. Goldman, C.T., and the relevant statutory and case law. Based upon this review, the Court finds Appellant's arguments in support of the motion to stay to be unpersuasive.

This Court finds that Appellant has failed to satisfy the requirement of unusual hardship. As stated above, unusual hardship means more than financial hardship. This has not been established by Appellant. This Court finds this to be especially true since Plaintiff's initial appeal was commenced in 1994. Therefore, this Court finds that Appellant has had over three years to deal with the very real possibility that his license for cosmetic therapy would be suspended.

In addition to analyzing the issue of unusual hardship, this Court must also take into consideration the health, safety and welfare of the public. Although Appellant argues that no clients have been harmed and he has never been charged with a claim alleging that he fell below the requisite standard of care, this Court finds that the health, safety and welfare of the public is jeopardized when individuals who do not have proper medical licenses hold themselves out to the public as "doctors."

Based upon the foregoing, this Court finds Appellant's motion to stay not to be well-taken and hereby OVERRULES the same.

DAVID W. FAIS, JUDGE

6-20-97

COPIES TO:

Jeffrey J. Jurca, Esq
Attorney for Plaintiff/Appellant

Anne Strait, Esq.
Assistant Attorney General
Attorney for Defendant/Appellee

55

Appendix C

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

O. Herman Dreskin, M.D., :

Appellant, :

v. : Case No. 97CVF-09-8830

State Medical Board of Ohio, : Judge McGrath

Appellee. :

ENTRY, ORDER AND DECISION DENYING APPELLANT'S MOTION FOR SUSPENSION OF AGENCY ORDER, FILED SEPTEMBER 8, 1997

Rendered this 22nd day of October 1997.

McGrath, J.

This matter is before this Court upon appellant, O. Herman Dreskin's motion for suspension of the State Medical Board of Ohio's ("Board") September 10, 1997 order permanently revoking his license to practice medicine in Ohio. After investigation, the Board concluded that appellant inappropriately prescribed narcotics, benzodiazepines, sedatives, barbiturates, muscle relaxants and other lethal drugs to 12 patients. Further, the Board found that appellant kept inadequate patient records, and prescribed dangerous drugs to these patients without adequate physical examinations or diagnostic testing. In many cases, appellant prescribed highly addictive drugs to patients who he knew were already addicted to drugs and/or alcohol, or both. In sum, the Board found that appellant failed to exercise sound medical judgment and had engaged in conduct well below the minimum standard of care required of licensed physicians in Ohio.

Appellant argues that suspension of his medical license during the pendency of his appeal, will cause unusual hardship, due to destruction of his medical practice. It is

further argued that staying the Board's order will not injure the health safety and welfare of the public, as appellant has already relinquished his DEA certificate, which allows prescription of lethal narcotics.

Appellee filed a memorandum in opposition to appellant's motion on October 2, 1997. The appellee submits that the Board's findings establish that appellant's continued practice of medicine does constitute a danger to public welfare and safety. Further, appellee points out several cases which demonstrate that "unusual hardship" requires a threshold showing greater than merely losing patients and income derived from the practice of medicine.

R.C. 119.12, provides, *inter alia*:

> The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. * * * In the case of any appeal from the state medical board, the court may grant a suspension and fix its terms if it appears to the court that an *unusual hardship* to the appellant will result from the execution of the agency's order pending the termination of the appeal, *and the health safety and welfare of the public will not be threatened by the suspension of the order* * * * (Emphasis added).

Upon review, this Court finds that appellant has failed to make the threshold showing of "unusual hardship" as required by R.C. 119.12. As this Court held in a previous decision,

> "'unusual hardship' means more than the loss of the right to practice medicine. (Citation omitted). The removal of a license to practice medicine inherently means that the person whose license is being removed will be unable to make a living practicing medicine because in order to practice medicine, a license is necessary."

Appendix D

Roy v. State Medical Bd. Of Ohio (August 9, 1993), Franklin Co. C.P. No. 93CVF05-3734, unreported, at 2. Thus, it must be expected that the loss of the right to practice medicine, will undoubtedly lead to the loss of patients, income and reputation in the community.

Further, this Court finds that allowing appellant to practice medicine during the pendency of his appeal, may injure the public health, safety and welfare. The Board found appellant had done much more than merely inappropriately prescribe dangerous narcotics. The Board also found that appellant had a habit of not keeping accurate patient records, and not performing necessary physical and diagnostic examinations. Such conduct does create a credible risk to other patients, even if they are not issued lethal narcotics.

In conclusion, this Court finds that appellant has not shown unusual hardship or that his continued practice of medicine during this appeal will not injure public health safety and welfare. Therefore, appellant's motion for suspension of agency order, filed September 24, 1997, is hereby DENIED.

PATRICK M. McGRATH, JUDGE

Copies to:

Anne Berry Strait
Assistant Attorney General
Health & Human Services Section

Kevin P. Byers
Attorney for appellant

Appendix D