

ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 09-0825

STATE OF OHIO

Appellant

On Appeal From The Summit
County Court of Appeals
Ninth Appellate District
Court Of Appeals Case No. 24369

v.

SALLY A. MASSIEN

Appellee

MERIT BRIEF OF APPELLANT
STATE OF OHIO

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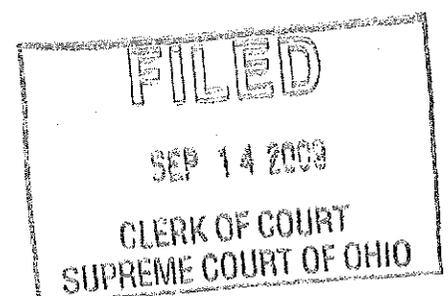
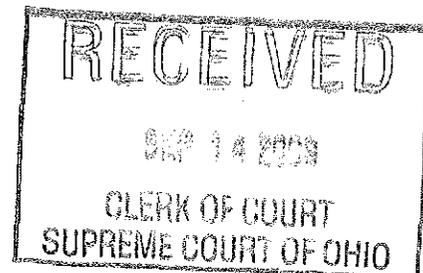


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STATEMENT OF FACTS

This is a certified conflict case presenting the question:

Whether a nurse employed by a hospital who in the course of her employment steals drugs from the hospital hold a "position of trust" under R.C. 2929.13(B)(1)(d) thus making the nurse ineligible of intervention in lieu of conviction?

The conflict case is *State v. France*, 10th Dist. App. No. 04AP-1124, 2006-Ohio-1204.

The State appealed with leave of court the Judgment dated July 14, 2008 which granted Appellee Sally Massien's request for intervention in lieu of conviction pursuant to R.C. 2951.041. With one Judge dissenting the Ninth District Court of Appeals held that Massien did not hold a position of trust under R.C. 2929.13(B)(1)(d) and was eligible for ILC.

Massien was indicted on two counts of theft of drugs, morphine, in violation of R.C. 2913.02(A)(1)/(2) felonies of the fourth degree. The offenses were alleged to have occurred on or about November 16, 2007 and January 14, 2008. Massien was a nurse working at Summa Health System at the time.

Massien filed her motion for treatment in lieu of conviction on June 2, 2008. Massien alleged that she began using drugs to treat depression. She alleged that she became addicted to drugs available from Summa's on-floor pharmacy. The motion was heard on July 10, 2008.

At the hearing the State argued that Massien was not eligible for treatment in lieu because she held a position of trust and was thus not eligible to be sentenced under R.C. 2929.13(B)(2)(b) as required by R.C. 2951.041(B)(1). T. Plea/Sentencing, 3-6. The State informed the court that Massien stole morphine and in some instances charted it on

patient's charges. The State did not know whether any patient was harmed by Massien's thefts; e.g. whether patients did not receive morphine because Massien stole the drug for her own use. Massien stole the morphine because she saw persons getting the drug and she wanted to know what it did to or for them. Massien even used morphine before her shift at the hospital began. T. Plea/Sentencing, 7-9. Massien pled guilty as charged and was placed in ILC. T. Plea/Sentencing, 13.

This Court accepted jurisdiction as a conflict case on July 1, 2009. That order was filed with the trial court on July 8, 2009. The State represents that on July 7, 2009 the trial court (a different Judge than the one who granted the motion for ILC) sealed the record finding that Massien successfully completed ILC.

The State requests this Court to adopt the rule that nurses who have access to narcotic drugs at their place of employment and steal those drugs thus committing a felony offense are ineligible for ILC since the nurse holds a position of trust towards the patients and the offense relates to the position of trust.

PROPOSITIONS OF LAW 1 AND 2

PROPOSITION OF LAW 1

A POSITION OF TRUST UNDER R.C. 2929.13 (b) (1) (d) INCLUDES PERSONS HOLDING PUBLIC OR PRIVATE POSITIONS.

PROPOSITION OF LAW 2

A NURSE WITH ACCESS TO NARCOTIC DRUGS AT HER PLACE OF EMPLOYMENT HOLDS A POSITION OF TRUST UNDER R.C. 2929.13 (B) (1) (d) AND IF IN THE COURSE OF HER EMPLOYMENT SHE STEALS THOSE DRUGS SHE IS INELIGIBLE FOR INTERVENTION IN LIEU OF CONVICTION UNDER R.C. 2951.041 (B) (1).

LAW AND ARGUMENT

I.

Even though Massien was found to have successfully completed ILC this case is not moot.

Although a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest.

Franchise Developers, Inc. v. City of Cincinnati (1987), 30 Ohio St.3d 28, 505 N.E.2d 966, paragraph one of the syllabus.

There is a question whether the trial court had jurisdiction to consider Massien's request to seal the record.

Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. The trial court retains jurisdiction over issues not inconsistent with the appellate court's jurisdiction to reverse, modify, or affirm the judgment appealed from. *Id.*; *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44.

In re S.J., 106 Ohio St.3d 11, 2005-Ohio-3215, ¶ 9.

Here the trial court acted to interpret and act upon the order placing Massien in ILC after this Court accepted jurisdiction of Massien's case. The State does not contend that either the trial court or Massien acted with knowledge of this Court's order of July 1, 2009 since the order was not filed with the trial court until July 8, 2009. Under these circumstances this appeal is not moot.

II.

The construction of a statute is reviewed de novo. *Dayton v. Fraternal Order of Police*, 2006-Ohio-3854, ¶15. Whether a defendant occupies a position of trust is a question of law. *State v. Condon*, 152 Ohio App. 3d 629, 2003-Ohio-2335, ¶104.

This Court enunciated the basic rules of statutory construction in *Portage County Board of Commissioners v. City of Akron*, 109 Ohio St.3d 106, 2006-Ohio-954:

Following a primary rule of statutory construction, we must apply a statute as it is written when its meaning is unambiguous and definite. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. See, also, *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347, 626 N.E.2d 939..

Id., ¶52.

ILC is available to persons charged with a criminal offense. R.C. 2951.041(A)(1).

R.C. 2951.041 lists factors concerning eligibility for ILC:

(B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:

(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is *charged with a felony for which the*

court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code or with a misdemeanor.

(Emphasis added.)

The above statute is clear and definite. “The legislature expressly chose to limit intervention to the class of offenders who would qualify for community control under the specific set of criteria set forth in R.C. 2929.13(B)(2)(b).” *State v. Geraci*, 10th Dist. App. No. 04AP-26, 2004-Ohio-6128, ¶10.

R.C. 2929.13(B) provides in part:

(B)(1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(d) *The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.*

(2)(a) If the court *makes a finding* described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court *does not make a finding* described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and

principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

(Emphasis added)

While the decision whether to grant ILC is generally within the discretion of the trial court the determination whether an individual could be sentenced under R.C. 2929.13(B)(2)(b) presents an issue of statutory interpretation and thus a question of law. *State v. Fritz*, 10th Dist. App. No. 04AP-63, 2004-Ohio-6129, ¶15.

If the defendant holds a position of trust and the offense relates to that position the defendant cannot be sentenced under R.C. 2929.13(B)(2)(b) and is ineligible for ILC. An offense relates to the position of trust where there is “some palpable nexus between the auspices of the position of trust and the wrongdoing ***.” *State v. Bailey* (Sept. 3, 1998), 6th Dist. App. No. OT-97-046, 1998 WL 603978, *4.

III.

The relationship between the above statutes and eligibility for treatment in lieu of conviction for a nurse who steals drugs from a hospital was examined in *State v. Wiley*, 10th Dist. App. Nos. 03AP-362, 03AP-363, 2003-Ohio-6835 and *State v. France*, 10th Dist. App. No. 04AP-1124, 2006-Ohio-1204. The defendant in *France* was indicted for felony theft of drugs.

In both cases the court of appeals determined that a nurse who stole drugs during the course of her employment was statutorily ineligible for ILC because the trial court could not sentence under R.C. 2929.13(B)(2)(b) since the defendant at the time of the offense held a position of trust. The court in *France* explained:

{¶ 10} *** The phrase 'position of trust' encompasses individuals occupying either public or private positions. *** This court has determined, on facts comparable to the case before us, that a nurse with the authority to dispense narcotics holds a position of trust falling under R.C. 2929.13(B)(1)(d), stating as follows:

Given the trust position appellant held as a nurse in our society and the access to drugs, intervention in lieu of conviction would demean the seriousness of theft of drugs from the employer. * * *

Wiley, at ¶ 9.

{¶ 11} There is no doubt in the present case that appellee's professional position facilitated her crime, and that the hospital's trust in her was breached. We acknowledge that the trial court pointed out, correctly, that this line of reasoning will inevitably make it difficult for health care professionals at all levels to benefit from intervention in narcotic-related crimes. Whether or not this is desirable, it is the logical result of the statute as written. We are also sensitive to appellee's argument on appeal that, to the extent that no patient appears to have been denied medication or suffered deficient care as a result of appellee's actions, a breach of trust did not occur in the sense of appellee neglecting her immediate duties toward her patients. Nonetheless, there was an enormous breach of trust in this case: appellee was entrusted with great discretion by her employer-hospital in the care and dispensation of highly regulated substances, and her breach of that trust naturally entails serious consequences for subsequent orderly and lawful operation of the hospital's drug dispensation activities, and, as a consequence, potential impact upon the quality of patient care.

(Internal citation omitted.)

Similarly,

The society has a strong interest in preventing persons who work in hospitals and other medical facilities from yielding to the temptation of taking possession of drugs kept for legitimate medical purposes. This activity is not a petty misdemeanor.

State v. Lewis (Tenn. Cr. App. 1982), 641 S.W.2d 517, *521 (referring to a licensed practical nurse).

The weight of authority requires the conclusion that the decision of the Ninth District Court of Appeals is incorrect. The following cases do not, however, involve the defendant's eligibility for ILC.

R.C. 2929.13(B)(1)(d) makes a distinction between persons holding a public office as opposed to a position of trust; the statute does not apply to only public positions of trust. *State v. Bolin* (Jan.12, 1998), 12th Dist. App. No. CA97-06-056, 1998 WL 8683, *2. The term position of trust includes both public and private individuals. *Id.* In *Bolin* an RPS delivery driver was held to hold a position of trust. *Id.*

The court in *State v. Boland*, 7th Dist. App. No. 00-CA-126, 2002-Ohio-1163 held that a position of trust could be occupied by both public and private persons. The court noted that R.C. 2929.13(B)(1)(d) referred to a "public office or position of trust"; use of the word "or" "suggests that the provision was intended to apply to both public and private individuals." In that case the defendant was a family friend working as a personal secretary for an attorney. *Id.* ¶2, ¶56-¶64.

In *State v. Johnson*, 3rd Dist. App. Nos. 3-2000-15, 3-2000-16, 2000-Ohio-1934 a student at a college where he was entrusted with school property was found to hold a position of trust under R.C. 2929.13(B)(1)(d). *Id.* *7. In *State v. Bailey* (Sept. 3, 1998), 6th Dist. App. No. OT-97-046, 1998 WL 603978 the defendant held a position of trust while he was a trustee at a county jail while incarcerated but the offenses did not relate to the position. *Id.* *3-*4.

In *State v. Geraci*, 10th Dist. App. No. 04AP-26, 2004-Ohio-6128 the defendant was a podiatrist who stole blank prescription forms from a former partner in order to

get drugs to satisfy his addiction. The court held that the defendant held a position of trust. The court found that professions normally occupying positions of trust are those “traditionally thought to invoke a special relationship of trust- such as a doctor, lawyer or accountant.” Id. ¶14, citing *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, ¶104.

A different interpretation of the statute was adopted in *State v. Jones* (Nov. 13, 1998), 2nd Dist. App. No. 98CA009, 1998 WL 864761. There the defendant was hired by a woman to perform general tasks for her; the defendant forged her name on one of her checks. The court held that persons holding public office or a position of trust are the same as public officials or public servants under R.C. 2921.01(A) and (B). Id. *2. Under R.C. 2921.01 public officials and public servants are elected or appointed officers, employees or agents of the State or a political subdivision; persons performing ad hoc governmental functions; or candidates for public office.

The middle position is taken by the First District Court of Appeals. In *State v. Brewer* (Nov. 24, 2000), 1st Dist. App. No. C-000148, 2000 WL 1732335 the defendant was convicted of nonsupport of his son. The court rejected a contrary holding in *State v. Hall* (May 18, 2000), 10th Dist. App. No. 99AP-1145 and held that the defendant merely as a parent did not hold a position of trust. Id. *2. The court held that a position of trust generally derives from the defendant’s public as opposed to private standing. Id.

The *Brewer* court did not foreclose the possibility that a private person could not hold a position of trust: “For example, a religious leader, though not associated with government, could occupy a position of trust *** as could a member of the staff of a private child-care center serving the public.” Id.

In *State v. Condon*, 152 Ohio App.3d 629,2003-Ohio-2335 the First District held that a private professional photographer who went into a morgue to photograph corpses sometimes placing the bodies with props for his artistic pleasure was not a public official and did not hold a position of trust. The court relied on its decision in *Brewer* but noted that doctors, lawyers or accountants could hold positions of trust; these professions are “traditionally thought to invoke a special relationship of trust***.” Id. ¶104.

IV.

Here the majority opinion purportedly adopts the approach used by the First District: a position of trust applies predominately to the defendant’s public standing but “in limited circumstances a private individual in a private setting may be found to have occupied a ‘position of trust.’” *Massien*, ¶17. The court concluded that nurses and other licensed medical professionals are eligible for ILC. Id. ¶19. In other words nurses and other licensed medical professionals never occupy a position of trust and are eligible for ILC regardless of the offense they commit.

V.

The majority opinion could not actually have adopted the approach of the First District because the First District recognizes that doctors or even staff members of a private child care center serving the public might hold positions of trust. *Brewer*, supra *2; *Condon*, supra ¶104. What the majority opinion did was adopt a rule that medical professionals are always eligible for ILC. *Massien*, ¶19.

The majority opinion recognized the goal of ILC as set out in *State v. Geraci*, Franklin App. No. 04AP-26, 2004-Ohio-6128:

Intervention reflects the legislature's determination that when drug abuse is the cause or precipitating factor in the commission of an offense, it may be more beneficial to the

individual and to the community as a whole to treat the cause rather than punish the crime. *State v. Shoaf* (2000), 140 Ohio App.3d 75, 77 * * *.

Geraci, ¶5.

The State has no quarrel with that goal. But where the majority opinion errs is first in its failure to recognize that even if a medical professional holds a position of trust, the offense, if the person is to be ineligible for ILC, must relate to that position. R.C. 2929.13(B)(1)(d). There must be “some palpable nexus between the auspices of the position of trust and the wrongdoing ***.” *State v. Bailey* (Sept. 3, 1998), 6th Dist. App. No. OT-97-046, 1998 WL 603978, *4. More specifically, the offense must be a felony and relate to the position.

As pointed out by dissenting Judge Carr nurses or other professionals can violate drug laws (or any other law) without breaching their position of trust, e.g. a nurse or any medical professional can manufacture meth in her own home or buy drugs on the street. *Massien*, ¶25. Such activity would not relate to the position of trust held by the nurse and the nurse would be eligible for ILC.

Several statutes cited by the majority do not indicate that the reference to ILC in the statute contemplates a situation where ILC is premised on an offense relating to the position held by the medical professional. See R.C. 4723.28(B)(5); R.C. 4715.30(F); R.C. 4731.22(B)(3); R.C. 4761.09(A)(1); R.C. 4762.13(B)(11); R.C. 4760.13(B)(10); R.C. 4734.31(C)(1); R.C. 4730.25(B)(11).

For example R.C. 4723.28(B)(5) applicable to nurses allows the Board of Nursing to sanction a nurse for a “judicial finding of eligibility for intervention in lieu of conviction for, violating any municipal, state, county, or federal drug law.” There is no indication that the violation must relate to the nurse’s position as a nurse.

It is true that several statutes cited by the majority contemplate ILC where the offense is committed in the course of practice. That is equivalent to the offense relating to the position held by the person. But in every case the statute specifically refers to ILC for a misdemeanor committed in the course of practice. See R.C. 4723.28(B)(7); R.C. 4730.25(B)(13); R.C. 4731.22(B)(11); R.C. 4734.31(C)(5); R.C. 4760.13(B)(12); R.C. 4762.13(B)(13).

The clear manifestation of legislative intent is that ILC can be granted to medical professionals such as Massien (nurses are covered by R.C. 4723.28(B)(7)) for offenses committed during the course of practice when the offense is a misdemeanor. That legislative intent does not bar a finding of ineligibility for ILC for a nurse who steals drugs during the course of her employment and pleads guilty to felony theft offenses.

VI.

The second error by the majority in this case is the failure to recognize that ineligibility for ILC does not preclude treatment for the person's drug problem. *Massien*, ¶18. Eligibility for ILC is controlled by R.C. 2951.041. That statute does not determine what sentence a defendant receives. For offenses such as Massien's, a fourth degree felony, the sentencing statute is R.C. 2929.13(B).

As pointed out by dissenting Judge Carr nurses and other medical professionals who steal drugs from their place of employment can receive treatment outside of prison because such persons can be put on community control and afforded the opportunity for treatment. The sentencing statute does not preclude community control even if the person holds a position of trust. The court might find that a prison term is not consistent with the purposes and principles of sentencing and that the person is amenable to community control. *Massien*, ¶26-¶27; R.C. 2929.13(B)(2)(a). See *State v.*

Espino, 6th Dist. App. No. L-06-1037, 2006-Ohio-6055, ¶11; *State v. Kitchen*, 8th Dist. App. No. 79943, 2002-Ohio-2256, ¶35 (R.C. 2929.13(B)(2)(a) requires the court to find that the defendant is not amenable to community control before imposing a prison term).

VII.

In summary, the rule cannot be that nurses and all medical professionals are always eligible for ILC. An on duty nurse with access to narcotic drugs occupies a position of trust towards the patients. If the nurse steals narcotic drugs, the offense relates to the nurse's position of trust and she is ineligible for ILC.

CONCLUSION

Based on the foregoing arguments, Appellant State of Ohio respectfully requests that the judgment of the Ninth District Court of Appeals be reversed.

Respectfully submitted,

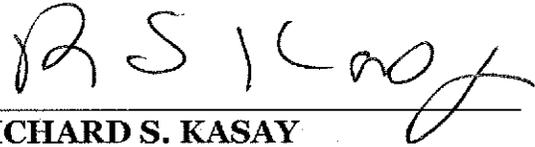
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I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Karen H. Brouse, Brouse Law Office, 1013 Portage Trail, Suite 7, Cuyahoga Falls, Ohio 44221, on the 12th day of September, 2009.

A handwritten signature in black ink, appearing to read "R S Kasay", written over a horizontal line.

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APPENDIX

IN THE OHIO SUPREME COURT

STATE OF OHIO

CASE NO. 09-0825

Appellant

ON APPEAL FROM THE
SUMMIT COUNTY COURT
OF APPEALS, NINTH
APPELLATE DISTRICT

v.

SALLY A. MASSIEN

COURT OF APPEALS
CASE NO. 24369

Appellee

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TO SUPREME COURT RULES OF PRACTICE IV

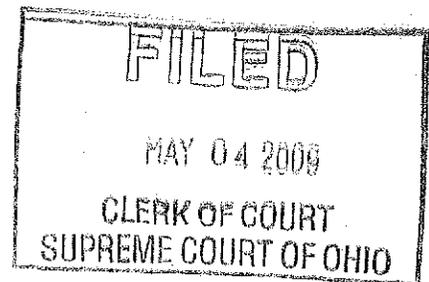
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COUNSEL FOR APPELLEE, SALLY A. MASSIEN



**NOTICE OF CERTIFIED CONFLICT PURSUANT
TO SUPREME COURT RULES OF PRACTICE IV**

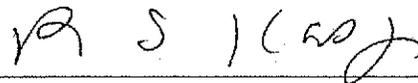
Now comes the State of Ohio and gives notice that by entry dated April 24, 2009 the Ninth District Court of Appeals in the within case certified the following issue as being in conflict with the decision in *State v. France*, 10th Dist. App. No. 04AP-1124, 2006-Ohio-1204:

Whether a nurse employed by a hospital who in the course of her employment steals drugs from the hospital hold a "position of trust" under R.C. 2929.13(B)(1)(d) thus making the nurse ineligible of intervention in lieu of conviction?

Accordingly, the State of Ohio requests that this Court determine that a conflict exists and issue its order accordingly.

Respectfully submitted,

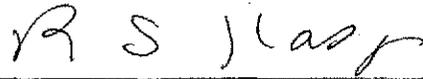
SHERRI BEVAN WALSH
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict was forwarded by regular U.S. First Class mail to Attorney Karen H. Brouse, Brouse Law Office, 1013 Portage Trail, Suite 7, Cuyahoga Falls, Ohio 44221 and to Timothy Young, Ohio Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 1st day of May, 2009.



RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24369

Appellant

v.

SALLY A. MASSIEN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 05 1492

Appellee

DECISION AND JOURNAL ENTRY

Dated: March 31, 2009

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, State of Ohio, appeals Defendant-Appellee’s sentencing pursuant to her guilty plea in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On May 16, 2008, Sally Massien was indicted on two counts of theft of drugs, in violation of R.C. 2913.02(A)(1)/(2), felonies of the fourth degree. Massien was working as a nurse at Summa Health System at the time the offenses occurred. Massien plead not guilty to the charges and subsequently filed a motion for intervention in lieu of conviction (“ILC”) pursuant to R.C. 2951.041 (“the intervention statute”). The court held a hearing on Massien’s motion and ordered her to be evaluated for participation in ILC.

{¶3} On July 10, 2008, the court held a sentencing hearing where it determined that Massien was eligible for ILC. Massien then retracted her initial plea and plead guilty to the charges pursuant to the provisions of the intervention statute. The court sentenced her to one

year of rehabilitation based on specific conditions. The State appealed and asserts one assignment of error for our review.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN GRANTING THE REQUEST OF SALLY A. MASSIEN FOR TREATMENT IN LIEU OF CONVICTION PURSUANT TO R.C. § 2951.041 SINCE SALLY A[.]MASSIEN HELD A POSITION OF TRUST AND THE OFFENSE RELATED TO THAT POSITION OF TRUST; ACCORDINGLY SHE COULD NOT BE SENTENCED PURSUANT TO R.C. § 2929.13(B)(2)(b).”

{¶4} In its sole assignment of error, the State argues that a nurse who is convicted of a drug theft in the course of her employment is statutorily ineligible for treatment in lieu of conviction under R.C. 2951.041 because that provision applies only to offenders who could be sentenced to community control under R.C. 2929.13(B)(2)(b). The State asserts that the trial court erred when it failed to find that Massien held a “position of trust” under R.C. 2929.13(B)(1)(d), which would have made her ineligible for community control sanctions. Thus, the State argues that the trial court erred in sentencing Massien to ILC because she is a nurse who held a “position of trust” and is statutorily ineligible for ILC. Massien, in turn, argues that the phrase “position of trust” is meant to refer only to those occupying a public office or role in the public, and was not meant to extend to private individuals, too.

{¶5} This Court applies a de novo standard of review to an appeal from a trial court’s interpretation and application of a statute. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, at ¶4. “[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” *State v. Knoble*, 9th Dist. No. 08CA009359, 2008-

Ohio-5004, at ¶12, quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14. “If it is ambiguous, we must then interpret the statute to determine the General Assembly’s intent. If it is not ambiguous, then we need not interpret it; we must simply apply it.” *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, at ¶13. In interpreting a statute, a court’s paramount concern is legislative intent. *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, at ¶12. To determine this intent, we read words and phrases in context and construe them in accordance with the rules of grammar and common usage. R.C. 1.42; *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, at ¶24. Additionally, if a statute is ambiguous, the legislative intent may be reflected in the objective sought by the legislature, the circumstances of the statute’s enactment, or the statute’s legislative history. R.C. 1.49.

{¶6} As a matter of first impression for this Court, it is essential to first understand the interplay between the relevant statutes at issue in order to properly analyze the State’s alleged error. The intervention statute allows an offender facing criminal charges to request ILC if drug or alcohol usage was a factor leading to the criminal offense. R.C. 2951.041(A)(1). The court may reject the offender’s request, but if the court elects to consider the request, it must then hold a hearing to determine if the offender is eligible for ILC. *Id.* The intervention statute also promulgates nine eligibility requirements that an offender must satisfy in order to receive ILC. R.C. 2951.041(B)(1) – (9). The State argues that Massien is statutorily ineligible for ILC because she fails to satisfy the following eligibility requirement set forth in the intervention statute:

“The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section

2929.13 of the Revised Code or with a misdemeanor.” (Emphasis added.) R.C. 2951.041(B)(1).

{¶7} Under R.C. 2929.13(B)(2)(b) (“the community control statute”) the court is permitted to sentence an offender to community control “if the court *does not make a finding* described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section.” (Emphasis added.) Alternatively, if the court *makes a finding* as described in R.C. 2929.13(B)(1)(a) – (i) and “the offender is not amenable to an available community control sanction, the court shall impose a prison sentence on the offender.” R.C. 2929.13(B)(2)(a).

{¶8} The State argues that the court should have made a finding under R.C. 2929.13(B)(1)(d) that Massien “held a public office or position of trust and the offense related to that office or position” which would have then made her ineligible for sentencing under the community control statute and consequently ineligible for ILC. Massien in turn argues that the phrase “position of trust” was not intended to apply to private individuals, but was meant to address those offenders who hold a public office or are employed as a public servant. She further asserts that the legislature could have easily incorporated a phrase applying to those in a position of trust in the medical community or the private sector, but did not.

{¶9} The State relies on two Tenth District cases, *State v. Wiley*, 10th Dist. Nos. 03AP-362 & 03AP-363, 2003-Ohio-6835, and *State v. France*, 10th Dist. No. 04AP-1124, 2006-Ohio-1204, in support for its argument that, as a nurse who stole drugs from her employer, Massien occupied a position of trust and that her position facilitated her crime and breached the hospital’s trust in her.

{¶10} In *Wiley*, the trial court denied the defendant’s motion for ILC based on her “two previous failed attempts at treatment”; its belief that ILC would “demean the seriousness of the offense[s]”; and the “trust position [she] held as a nurse in our society.” *Wiley* at ¶9. Wiley was

employed at a nursing home and admitted to stealing prescription drugs on over 31 occasions. Id. at ¶4. Wiley had a 20-year history of drug use, had altered physician prescriptions, and had been declared a drug dependent person based on her psychological evaluation. Id. Without much additional analysis, the Tenth District affirmed the trial court's determination that Wiley occupied a position of trust and consequently denied her motion for ILC.

{¶11} When addressing this issue for a second time in *France*, the Tenth District further explained its rationale for finding that nurses hold a "position of trust" in society. In *France*, the defendant was a registered nurse who was charged with 52 counts of narcotics theft from her employer-hospital. Id. at ¶2. France committed those thefts by taking schedule II narcotics in the name of patients who had no outstanding prescriptions ordered and by taking drugs in excess of the amount prescribed to the patient, then utilizing the excess for herself. Id. The trial court had sentenced her to ILC, but the Tenth District reversed, based on its interpretation of the legislative history of the intervention statute and the facts of France's case. Id. at ¶11-12. It concluded that France's "professional position facilitated her crime and that the hospital's trust in her was breached." Id. at ¶11. The court further acknowledged that "this line of reasoning will inevitably make it difficult for health care professionals at all levels to benefit from intervention in narcotic-related crimes [and] [w]hether or not it is desirable, it is the logical result of the statute as written." The court noted that France "was entrusted with great discretion by her employer-hospital *** and her breach of that trust naturally entails serious consequences for subsequent orderly and lawful operation of the hospital's drug dispensing activities." *France* at ¶12.

{¶12} Our research reveals that both the Seventh and Twelfth Districts have similarly held that both public and private individuals can occupy a "position of trust" under R.C.

2929.13(B)(1)(d). See *State v. Boland*, 7th Dist. No. 00-CA-126, 2002-Ohio-1163, at ¶¶66-69 (comparing the phrase found in Ohio’s felony sentencing guidelines to federal sentencing guidelines and concluding the statute applies equally to public and private individuals); *State v. Bolin* (Jan. 12, 1998), 12th Dist. No. CA97-06-056, at *2 (concluding that the statute applied to both public and private individuals based on the “or” found in the phrase “public office or position of trust” and noting that the word “public” does not modify the phrase “position of trust”).

{¶13} Other courts, however, have reached the opposite conclusion, thus limiting the scope of the phrase “position of trust” to generally include “public officials and public servants who abuse their positions of public trust.” *State v. Condon*, 1st Dist. No. C-020262, 2003-Ohio-2335, at ¶104 (reaffirming the court’s adherence to the conclusion that the language was generally not intended to include private individuals). See, also, *State v. Brewer* (Nov. 24, 2000), 1st Dist. No. C-000148, at *2 (reversing the court’s prior position and concluding that the phrase “position of trust” was meant to primarily include those in government or with public standing only); *State v. Jones*, (Nov. 13, 1998), 2nd Dist. No. 98CA0009, at *2 (concluding the phrase applies only to public servants or public officials, not private persons employed by a private employer). Massien also directs us to *State v. Cohen*, 2nd Dist. No. 07-CA-081, 2008-Ohio-4635, at ¶5-16, where the Second District reasoned that, if an offender was charged with a felony offense for which the court *could* impose community control, the offender was likewise eligible for ILC, based on its interpretation of 2929.13.

{¶14} Given the ambiguity abounding from the statute, we must analyze the legislative intent of the General Assembly when enacting the intervention statute, as well as its use of the phrase “position of trust” throughout the Revised Code.

“Intervention provides an alternative to prison if the trial court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender’s criminal behavior. Intervention reflects the legislature’s determination that when drug abuse is the cause or precipitating factor in the commission of an offense, it may be more beneficial to the individual and to the community as a whole to treat the cause rather than punish the crime. If an offender satisfies all of the statutory eligibility requirements for intervention, the trial court has discretion to determine whether a particular offender is a good candidate for intervention.” *State v. Geraci*, 2nd Dist. No. 04AP-26, 2004-Ohio-6128, at ¶5.

{¶15} With that goal in mind, we now turn to the intended meaning behind the phrase “position of trust.”

{¶16} The First District remarked that “an overall reading of R.C. 2929.13(B)(1)(d) demonstrates that the [position of trust] factor refers only to ‘positions associated with government.’” *Brewer*, at *2 (quoting Griffin and Katz, *Ohio Felony Sentencing Law* (1999 Ed.), Sect. 6.14, 458). It further noted that “unrestrained application of the phrase to every breach of ethical, moral or filial duty by a private individual may distort the purpose of the new sentencing guidelines” and will result in far too broad an application of the phrase. *Id.* However, the First District refrained from adopting an absolute rule that a private individual could never hold a position of trust which warranted imposition of a prison sentence. *Id.* The Court later clarified that it could foresee the phrase applying to private professionals that are “traditionally thought to invoke a special relationship of trust” between the professional-offender and the victim. *Condon* at ¶104.

{¶17} Were we to adopt the State’s reasoning that nurses who steal drugs from their employer are categorically barred from being eligible for ILC, we would defeat both the intent of the intervention statute and goals underlying the use of the phrase “position of trust.” That application is simply too broad and is not one this Court is willing to make. Therefore, we subscribe to the more reasoned approach espoused by the First District which recognizes that the

phrase was meant to apply predominantly to the offender's public standing, but does not foreclose the possibility that in limited circumstances, a private individual in a private setting may be found to have occupied a "position of trust."

{¶18} Massien also directs us to the provisions governing disciplinary actions that the board of nursing may take against one of its members. There, the statute specifically states that "sanctions may be imposed for *** a judicial finding of eligibility for intervention in lieu of conviction for[] violating any municipal, state, county, or federal drug law[.]" R.C. 4723.28(B)(1)(5). In light of this provision, we are convinced that legislature intended ILC to apply to offender's just like Massien; that is, medical professionals who have ready access to drugs at their place of employment, who ultimately take and use those drugs, but who would benefit more from treatment for their offense, than being subject to criminal punishment for it.

{¶19} Furthermore, it is illogical to think that the General Assembly intended that nurses be categorically ineligible for ILC because they hold a "position of trust" at their place of employment, yet simultaneously incorporate a provision that references their participation in ILC into the statute governing their licensure. Additionally, we note that the Revised Code is replete with references that contemplate licensed medical professionals receiving ILC, further supporting our belief that the legislature intended for such professionals, who commit criminal offenses against their employers, to, if appropriate, receive treatment, not punishment. See, e.g., R.C. 4715.30(F) (addressing the effect of ILC eligibility on dentists' and dental hygienists' licensing); R.C. 4730.25(B)/(C)/(H)/(I) (addressing the effect of ILC eligibility on physician assistants' licensing); R.C. 4731.22(B)/(C)/(E) (addressing the effect of ILC eligibility on physicians' licensing); R.C. 4734.31(C)/(F) (addressing the effect of ILC eligibility on chiropractors' licensing); R.C. 4760.13(B)/(C)/(H)/(I) (addressing the effect of ILC eligibility on

anesthesiologist assistants' licensing); R.C. 4761.09(A) (addressing the effect of ILC eligibility on respiratory care providers' licensing); R.C. 4762.13(B)/(E)/(H)/(I) (addressing the effect of ILC eligibility on acupuncturists' licensing). Thus, when read in the context with the rest of the Revised Code, we conclude that the legislature intended for nurses and other licensed medical professionals to be eligible for ILC. Accordingly, the State's assignment of error is not well taken because the trial court did not err in finding Massien eligible for ILC.

III

{¶20} The State's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶21} I respectfully dissent from the majority's holding that Massien is eligible for intervention in lieu of conviction ("ILC") pursuant to R.C. 2951.041.

{¶22} Massien could only be eligible for ILC if she has no prior felony convictions, has never before participated in ILC, "and is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code or with a misdemeanor." R.C. 2951.041(B)(1). The trial court may only impose sentence pursuant to R.C. 2929.13(B)(2)(b) if two conditions are met, the first being that it "does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of [R.C. 2929.13][.]" R.C. 2929.13(B)(1)(d) states: "The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others."

{¶23} The majority considers the body of law discussing whether a private individual can hold a position of trust and concludes that the legislature intended that R.C. 2929.13(B)(1)(d) "was meant to apply predominantly to the offender's public standing, but does not foreclose the

possibility that, in limited circumstances, a private individual in a private setting may be found to have occupied a ‘position of trust.’” I disagree.

{¶24} First, the plain language of the statute does not expressly limit the applicability of subsection (B)(1)(d) to public officials, while carving out an exception for private individuals under limited circumstances. Rather, on its face, the statute is applicable either to offenders who held a public office and public position of trust, or to offenders who held a public office or any position of trust, whether public or private. But there is nothing in the language of R.C. 2929.13(B)(1)(d) from which one might glean the legislature’s intent for applicability predominantly to public officials, but also to private individuals under limited, yet unidentifiable, circumstances. The statutory language does not support such indefinite applicability and offers no guidance to the courts who would so interpret it.

{¶25} Second, I disagree with the majority’s reasoning that the legislature intended for offenders like Massien, i.e., nurses who steal drugs from their health care employer, to be eligible for ILC merely because R.C. 4723.28(B)(5) allows the board of nursing to sanction a nurse for “a judicial finding of eligibility for [ILC] for[] violating any municipal, state, county, or federal drug law[.]” There are many circumstances in which a nurse can violate a drug law which does not implicate R.C. 2929.13(B)(1)(d) (or any other (B)(1) subsection), thereby remaining eligible for sentencing pursuant to R.C. 2929.13(B)(2)(b). Nurses, like any other individuals, can obtain, possess, sell, or otherwise engage in illegal drug activity outside the scope of their health care related employment. For example, a nurse could purchase illegal drugs or manufacture methamphetamine in her own home for personal use. Such activities are well beyond the scope of any position of trust or any offense related to her position and do not

implicate a finding pursuant to R.C. 2929.13(B)(1)(d). Accordingly, those circumstances do not foreclose “a judicial finding of eligibility for [ILC.]”

{¶26} Furthermore, the majority inferably concludes that “medical professionals who have ready access to drugs at their place of employment, who ultimately take and use those drugs, but who would benefit more from treatment for their offense, than being subject to criminal punishment for it[,]” can only get beneficial treatment under an ILC, and without the stigma of criminal culpability. I disagree. R.C. 2929.13(B)(2)(a) requires a trial court to sentence an offender to prison if three conditions are met: it makes a finding described in subsection (B)(1)(a) through (i), it finds a prison term is consistent with statutory purposes and principles of sentencing, and it finds the offender is not amenable to available community control sanctions. If the offender were sentenced pursuant to R.C. 2929.13(B)(2)(a) in a case where the trial court finds the offender is in fact amenable to available community control sanctions, she would likely receive treatment as part of the community control sanction. Our justice system considers such treatment for offenders to be beneficial, notwithstanding that those offenders must also accept criminal culpability.

{¶27} I believe that, as a matter of law, one who has access to drugs at work, or has responsibility for disseminating drugs to others, occupies a position of trust. Furthermore, theft of those drugs by such a person constitutes an offense directly related to that position. Due to the overriding public interest in preserving such a position of trust, I believe that the legislature intended that offenders like Massien be excluded from eligibility for ILC pursuant to R.C. 2951.041(B)(1) and remain subject to criminal sanctions, rather than avoid punishment and legal responsibility. A sentencing court must only impose a prison term pursuant to R.C. 2929.13(B)(2)(a) if, after making a finding described in subsection (B)(1)(a) through (i) and

finding that a prison term is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11, it further finds that the offender is not amenable to available community control sanctions. Because the sentencing court must apply that statutory provision to the specific facts of each case, it may yet impose community control sanctions instead of a prison term, thereby allowing the offender to receive treatment.

{¶28} I believe that public policy considerations further support ineligibility for offenders like Massien to participate in ILC. The offender's conviction serves the interest in public safety by providing notice of the offender's conduct. Completion of ILC may result in permanent or merely temporary success. In either case, however, there is no public record of the offender's criminal activity. I am concerned that an offender who later engages in similar conduct, especially in another venue, could again receive only ILC in the absence of any record that she is no longer eligible pursuant to R.C. 2951.041(B)(1) due to her prior participation in ILC.

{¶29} For the reasons above, I believe that the trial court erred by finding Massien eligible for ILC. Massien held a position of trust and her offense related to that position. Therefore, R.C. 2929.13(B)(1)(d) is applicable to her. A trial court could not, therefore, impose sentence under R.C. 2929.13(B)(2)(b), thereby making her ineligible for ILC pursuant to R.C. 2951.041(B)(1). Accordingly, I would reverse the trial court's judgment and remand the matter for resentencing in compliance with the law.

APPEARANCES:

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellant.

KAREN H. BROUSE, Attorney at Law, for Appellee.

Not Reported in N.E.2d, 2006 WL 648858 (Ohio App. 10 Dist.), 2006 -Ohio- 1204
Court of Appeals of Ohio,
Tenth District, Franklin County.
STATE of Ohio, Plaintiff-Appellant,
v.
Kristine Sue FRANCE, Defendant-Appellee.
No. 04AP-1124.
Decided March 16, 2006.

Appeal from the Franklin County Court of Common Pleas.
Ron O'Brien, Prosecuting Attorney, Laura R. Swisher, and Kimberly M. Bond, for appellant.

Kegler, Brown, Hill & Ritter, S. Michael Miller and Camille A. Miller, for appellee.
(REGULAR CALENDAR)

MCCORMAC, J.

*I {¶ 1} Plaintiff-appellant, State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas in criminal proceedings against defendant-appellee, Kristine Sue France, granting her motion for intervention in lieu of conviction pursuant to R.C. 2951.041.

{¶ 2} Appellee was indicted on November 13, 2003, on 52 counts of theft of narcotics, a fourth-degree felony under R.C. 2913 .02. Appellee allegedly committed these thefts in the course of her employment as a registered nurse at Riverside Hospital in Columbus, Ohio. Appellee later admitted that, on multiple occasions, she had stolen narcotics from the hospital's drug dispensing machine, an automated device that requires nurses to enter their own personal code, their fingerprint, and a code for the subject patient before dispensing the drug. Appellee obtained the drugs both by using codes for patients who had no standing drug orders, or ordering drugs in excess of patients' valid drug orders and diverting the surplus to herself. The drugs involved were fentanyl and morphine, both schedule II narcotics.

{¶ 3} After indictment, appellee made an oral request to the court for intervention in lieu of conviction under R.C. 2951.041. The state objected on the basis that appellee failed to meet the statutory eligibility requirements based on a prior drug conviction and the other circumstances of her current offenses. The trial court, after a hearing, overruled the state's objections and granted appellee's request for intervention in lieu of conviction, referring her to NETCARE for evaluation. After evaluation, the court, on September 16, 2004, made findings regarding the circumstances of appellee's offenses, finding that drug or alcohol use was a factor leading to the criminal offenses, that intervention in lieu of conviction would not demean the seriousness of the offense, and that intervention would substantially reduce the likelihood of future criminal activity by appellee. The trial court accordingly ordered a stay of criminal proceedings in the case, established a detailed intervention plan for appellee, and placed appellee under the control and supervision of the Franklin County Probation Department for a period of five years.

{¶ 4} The state has timely appealed and brings the following assignment of error:

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S REQUEST FOR INTERVENTION IN LIEU OF CONVICTION, AS DEFENDANT FAILED TO MEET THE ELIGIBILITY REQUIREMENTS UNDER R.C. 2951.041.

{¶ 5} The state lists three independent grounds for reversal in the present case: first, that the trial court was precluded from applying R.C. 2951.041 in the present case because appellee held a position of trust and committed an offense facilitated by that position; second, that eligibility for intervention in lieu of conviction requires that the defendant has not yet received a similar opportunity to avoid conviction on a previous occasion, and that appellee was therefore not eligible because she had availed herself of a diversion program in connection with her earlier indictment on separate prior offenses; and third, that intervention in lieu of conviction may not be applied where it demeans the seriousness of the offense, which the state argues would occur in the present matter. As the first ground is dispositive based upon prior decisions of this court, and a determination on the second two would require a decision on questions less clearly ascertainable from the record, we based our decision solely on the first ground argued.

*2 {¶ 6} This court has adopted an abuse of discretion standard for reviewing cases involving intervention in lieu of conviction under R.C. 2951.041. *State v. Wiley*, Franklin App. No. 03AP-362, 2003-Ohio-6835, at ¶ 3. The trial court's interpretation and application of the statutory eligibility requirements for intervention, however, is a matter of law to be reviewed by this court de novo. *State v. Fritz*, Franklin App. No. 04AP-63, 2004-Ohio-6129.

{¶ 7} The legislative purpose behind R.C. 2951.041 was recently addressed by this court in *State v. Geraci*, Franklin App. No. 04AP-26, 2004-Ohio-6128, at ¶ 5:

Intervention provides an alternative to prison if the trial court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior. Intervention reflects the legislature's determination that when drug abuse is the cause or precipitating factor in the commission of an offense, it may be more beneficial to the individual and to the community as a whole to treat the cause rather than punish the crime. *State v. Shoaf* (2000), 140 Ohio App.3d 75, 77 * * *. If an offender satisfies all of the statutory eligibility requirements for intervention, the trial court has discretion to determine whether a particular offender is a good candidate for intervention. * * *

{¶ 8} R.C. 2951.041(B) provides, in pertinent part, as follows:

(B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:

(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code or with a misdemeanor.

{¶ 9} The state argues that appellee would not have been sentenced under R.C. 2929.13(B)(2)(b) in the present case, as required for eligibility for intervention under R.C.

2951.041. The state points out that, although appellee was indicted under offenses that would have resulted in sentencing under R.C. 2929.13(B) generally, in order to impose sentence under R.C. 2929.13(B)(2)(b), the trial court must initially determine that none of the factors set forth in R.C. 2929.13(B)(1)(a) through (i) are present. In particular, R.C. 2929.13(B)(1)(d) enumerates the following factor as precluding sentencing under R.C. 2929.13(B)(2)(b): "The offender held a public office or position of trust and the offense related to that office or position; the offender's position * * * or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others."

{¶ 10} If the trial court makes any of the enumerated findings in R.C. 2929.13(B)(1)(a) through (i), including the above-quoted section regarding the offender's position holding a position of trust, the trial court will, after considering the factors set forth in R.C. 2929.12 in determining that a prison term is consistent with the purposes and principles of sentencing set forth in R.C. 2929.11, impose sentence pursuant to R.C. 2929.13(B)(2)(a), not 2929.13(B)(2)(b), as required by the intervention statute. *Geraci*, at ¶ 13. Whether appellee held a position of trust and whether the offense related to that position of trust is principally a question of law. *Id.* at ¶ 14; *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, at ¶ 104. The phrase "position of trust" encompasses individuals occupying either public or private positions. *State v. Boland*, 147 Ohio App.3d 151, 2002-Ohio-1163, at ¶ 55-69. This court has determined, on facts comparable to the case before us, that a nurse with the authority to dispense narcotics holds a position of trust falling under R.C. 2929.13(B)(1)(d), stating as follows:

*3 Given the trust position appellant held as a nurse in our society and the access to drugs, intervention in lieu of conviction would demean the seriousness of theft of drugs from the employer. * * *

Wiley, at ¶ 9.

{¶ 11} There is no doubt in the present case that appellee's professional position facilitated her crime, and that the hospital's trust in her was breached. We acknowledge that the trial court pointed out, correctly, that this line of reasoning will inevitably make it difficult for health care professionals at all levels to benefit from intervention in narcotic-related crimes. Whether or not this is desirable, it is the logical result of the statute as written. We are also sensitive to appellee's argument on appeal that, to the extent that no patient appears to have been denied medication or suffered deficient care as a result of appellee's actions, a breach of trust did not occur in the sense of appellee neglecting her immediate duties toward her patients. Nonetheless, there was an enormous breach of trust in this case: appellee was entrusted with great discretion by her employer-hospital in the care and dispensation of highly regulated substances, and her breach of that trust naturally entails serious consequences for subsequent orderly and lawful operation of the hospital's drug dispensation activities, and, as a consequence, potential impact upon the quality of patient care.

{¶ 12} In accordance with the foregoing, and, based upon the authority of this court previously set forth in *Wiley*, we find that, because appellee was not eligible for sentencing under R.C. 2929.13(B)(2)(b), the trial court erred in applying R.C. 2951.041 staying appellee's prosecution and ordering intervention in lieu of conviction. The state's assignment of error is

sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this opinion.

Judgment reversed and cause remanded.

BRYANT and SADLER, JJ., concur.

MCCORMAC, J., retired of the tenth appellate district, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

Ohio App. 10 Dist., 2006.

State v. France

Not Reported in N.E.2d, 2006 WL 648858 (Ohio App. 10 Dist.), 2006 -Ohio- 1204

R.C. § 2913.02

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes—Procedure (Refs & Annos)

Chapter 2913. Theft and Fraud (Refs & Annos)

Theft and Related Offenses

2913.02 Theft; aggravated theft (later effective date)

<Note: See also preceding version of this section with earlier effective date.>

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section

is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

(2006 H 347, eff. 3-14-07; 2006 H 530, eff. 6-30-06; 2004 H 536, eff. 4-15-05; 2004 H 369, eff. 11-26-04; 2004 H 12, eff. 4-8-04; 2003 H 179, eff. 3-9-04; 2003 H 7, eff. 9-16-03; 1999 H 2, eff. 11-10-99; 1998 S 66, eff. 7-22-98; 1995 S 2, eff. 7-1-96; 1995 H 4, eff. 11-9-95; 1990 S 258, eff. 11-20-90; 1990 H 347; 1986 H 49; 1984 H 632; 1982 H 269, § 4, S 199; 1980 S 191; 1972 H 511)

R.C. § 2921.01

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2921. Offenses Against Justice and Public Administration (Refs & Annos)

Definitions

2921.01 Definitions

As used in sections **2921.01** to 2921.45 of the Revised Code:

(A) "Public official" means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers.

(B) "Public servant" means any of the following:

(1) Any public official;

(2) Any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant;

(3) A person who is a candidate for public office, whether or not the person is elected or appointed to the office for which the person is a candidate. A person is a candidate for purposes of this division if the person has been nominated according to law for election or appointment to public office, or if the person has filed a petition or petitions as required by law to have the person's name placed on the ballot in a primary, general, or special election, or if the person campaigns as a write-in candidate in any primary, general, or special election.

(C) "Party official" means any person who holds an elective or appointive post in a political party in the United States or this state, by virtue of which the person directs, conducts, or participates in directing or conducting party affairs at any level of responsibility.

(D) "Official proceeding" means any proceeding before a legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, and includes any proceeding before a referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with an official proceeding.

(E) "Detention" means arrest; confinement in any vehicle subsequent to an arrest; confinement in any public or private facility for custody of persons charged with or convicted of crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States; hospitalization, institutionalization, or confinement

in any public or private facility that is ordered pursuant to or under the authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code; confinement in any vehicle for transportation to or from any facility of any of those natures; detention for extradition or deportation; except as provided in this division, supervision by any employee of any facility of any of those natures that is incidental to hospitalization, institutionalization, or confinement in the facility but that occurs outside the facility; supervision by an employee of the department of rehabilitation and correction of a person on any type of release from a state correctional institution; or confinement in any vehicle, airplane, or place while being returned from outside of this state into this state by a private person or entity pursuant to a contract entered into under division (E) of section 311.29 of the Revised Code or division (B) of section 5149.03 of the Revised Code. For a person confined in a county jail who participates in a county jail industry program pursuant to section 5147.30 of the Revised Code, "detention" includes time spent at an assigned work site and going to and from the work site.

(F) "Detention facility" means any public or private place used for the confinement of a person charged with or convicted of any crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States.

(G) "Valuable thing or valuable benefit" includes, but is not limited to, a contribution. This inclusion does not indicate or imply that a contribution was not included in those terms before September 17, 1986.

(H) "Campaign committee," "contribution," "political action committee," "legislative campaign fund," "political party," and "political contributing entity" have the same meanings as in section 3517.01 of the Revised Code.

(I) "Provider agreement" and "medical assistance program" have the same meanings as in section 2913.40 of the Revised Code.

CREDIT(S)

(2005 S 115, eff. 4-26-05; 2004 H 1 SS, eff. 3-31-05; 2000 H 661, eff. 3-15-01; 1998 S 134, eff. 7-13-98; 1998 H 293, eff. 3-17-98; 1996 S 285, eff. 7-1-97; 1996 H 154, eff. 10-4-96; 1995 S 2, eff. 7-1-96; 1995 S 8, eff. 8-23-95; 1994 H 571, eff. 10-6-94; 1993 H 42, eff. 2-9-94; 1992 S 37; 1990 H 51; 1988 H 708; 1986 H 428, H 300, H 340; 1972 H 511)

R.C. § 2929.13

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Felony Sentencing

2929.13 Sentencing guidelines for various specific offenses and degrees of offenses

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also may impose a financial sanction pursuant to section 2929.18 of the Revised Code but may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (D)(4) of section 2929.14 of the Revised Code or a community control sanction as described in division (G)(2) of this section.

(B)(1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.

(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(2)(a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

(C) Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

(D)(1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(E)(1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or (C) of this section in determining whether to impose a prison term for the offense shall be determined as specified in section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code, whichever is applicable

regarding the violation.

(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and except as specifically provided in section 2929.20 or 2967.191 of the Revised Code or when parole is authorized for the offense under section 2967.13 of the Revised Code shall not reduce the term or terms pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967, or Chapter 5120, of the Revised Code for any of the following offenses:

(1) Aggravated murder when death is not imposed or murder;

(2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been guilty of a violation of division (A)(1)(b) of section 2907.02 of the Revised Code and would be sentenced under section 2971.03 of the Revised Code;

(3) Gross sexual imposition or sexual battery, if the victim is less than thirteen years of age and if any of the following applies:

(a) Regarding gross sexual imposition, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age;

(b) Regarding gross sexual imposition, the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation.

(c) Regarding sexual battery, either of the following applies:

(i) The offense was committed prior to August 3, 2006, the offender previously was

convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(ii) The offense was committed on or after August 3, 2006.

(4) A felony violation of section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, or 2903.13 of the Revised Code if the section requires the imposition of a prison term;

(5) A first, second, or third degree felony drug offense for which section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99, or 4729.99 of the Revised Code, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;

(7) Any offense that is a third degree felony and either is a violation of section 2903.04 of the Revised Code or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under section 2907.12 of the Revised Code prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of section 2923.12 of the Revised Code, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (D)(1)(a) of section 2929.14 of the Revised Code for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of section 2929.14 of the Revised Code for wearing or carrying the body armor;

(10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of section 2921.36 of the Revised Code, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction;

(13) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, with respect to the portion of the sentence imposed pursuant to division (D)(5) of section 2929.14 of the Revised Code;

(14) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (D)(6) of section 2929.14 of the Revised Code;

(15) Kidnapping, in the circumstances specified in section 2971.03 of the Revised Code and when no other provision of division (F) of this section applies.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in section 2941.1413 of the Revised Code, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of section 4511.19 of the Revised Code. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is not subject to extension under section 2967.11 of the Revised Code, to a period of post-release control under section 2967.28 of the Revised Code, or to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of section 4511.19 of the Revised Code. In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to section 5120.033 of the Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to section 5120.033 of the Revised Code that is privately operated and managed by a contractor pursuant to a contract entered into under section 9.06 of the Revised Code, both of the following apply:

(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to section 5120.033 of the Revised Code other than the privately operated and managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child- victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to section 2901.07 of the Revised Code.

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that section, or, if required under division (A)(6) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that division.

(J)(1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of section 2923.02 of the Revised Code, the sentencing court shall consider the factors applicable to the felony category of the violation of section 2923.02 of the Revised Code instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost of compliance shall be paid by the crime victims reparations fund.

(2007 S 10, eff. 1-1-08; 2006 S 281, eff. 4-5-07; 2006 H 461, eff. 4-4-07; 2006 S 260, eff. 1-2-07; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2004 H 163, eff. 9-23-04; 2004 H 52, eff. 6-1-04; 2003 S 5, § 3, eff. 1-1-04; 2003 S 5, § 1, eff. 7-31-03; 2002 S 123, eff. 1-1-04; 2002 H 485, eff. 6-13-02; 2002 H 327, eff. 7-8-02; 2000 S 222, eff. 3-22-01; 2000 H 528, eff. 2-13-01; 1999 S 22, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1998 H 122, eff. 7-29-98; 1998 H 293, eff. 3-17-98; 1997 S 111, eff. 3-17-98; 1997 H 32, eff. 3-10-98; 1996 H 180, eff. 1-1-97; 1996 S 166, eff. 10-17-96; 1996 S 269, eff. 7-1-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96)

R.C. § 2951.041

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2951. Probation (Refs & Annos)

2951.041 Drug treatment in lieu of conviction

(A)(1) If an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. The request shall include a waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment, or arraignment has already occurred. The court may reject an offender's request without a hearing. If the court elects to consider an offender's request, the court shall conduct a hearing to determine whether the offender is eligible under this section for intervention in lieu of conviction and shall stay all criminal proceedings pending the outcome of the hearing. If the court schedules a hearing, the court shall order an assessment of the offender for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

(2) The victim notification provisions of division (C) of section 2930.08 of the Revised Code apply in relation to any hearing held under division (A)(1) of this section.

(B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:

(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code or with a misdemeanor.

(2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code, is not a violation of division (A)(1) of section 2903.08 of the Revised Code, is not a violation of division (A) of section 4511.19 of the Revised Code or a municipal ordinance that is substantially similar to that division, and is not an offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.

(3) The offender is not charged with a violation of section 2925.02, 2925.03, 2925.04, or 2925.06 of the Revised Code and is not charged with a violation of section 2925.11 of the Revised Code that is a felony of the first, second, or third degree.

(4) The offender is not charged with a violation of section 2925.11 of the Revised Code that is a felony of the fourth degree, or the offender is charged with a violation of that section that is a

felony of the fourth degree and the prosecutor in the case has recommended that the offender be classified as being eligible for intervention in lieu of conviction under this section.

(5) The offender has been assessed by an appropriately licensed provider, certified facility, or licensed and credentialed professional, including, but not limited to, a program licensed by the department of alcohol and drug addiction services pursuant to section 3793.11 of the Revised Code, a program certified by that department pursuant to section 3793.06 of the Revised Code, a public or private hospital, the United States department of veterans affairs, another appropriate agency of the government of the United States, or a licensed physician, psychiatrist, psychologist, independent social worker, professional counselor, or chemical dependency counselor for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

(6) The offender's drug or alcohol usage was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

(7) The alleged victim of the offense was not sixty-five years of age or older, permanently and totally disabled, under thirteen years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.

(8) If the offender is charged with a violation of section 2925.24 of the Revised Code, the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.

(9) The offender is willing to comply with all terms and conditions imposed by the court pursuant to division (D) of this section.

(C) At the conclusion of a hearing held pursuant to division (A) of this section, the court shall enter its determination as to whether the offender is eligible for intervention in lieu of conviction and as to whether to grant the offender's request. If the court finds under division (B) of this section that the offender is eligible for intervention in lieu of conviction and grants the offender's request, the court shall accept the offender's plea of guilty and waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment, or arraignment has already occurred. In addition, the court then may stay all criminal proceedings and order the offender to comply with all terms and conditions imposed by the court pursuant to division (D) of this section. If the court finds that the offender is not eligible or does not grant the offender's request, the criminal proceedings against the offender shall proceed as if the offender's request for intervention in lieu of conviction had not been made.

(D) If the court grants an offender's request for intervention in lieu of conviction, the court shall place the offender under the general control and supervision of the county probation department, the adult parole authority, or another appropriate local probation or court services agency, if one exists, as if the offender was subject to a community control sanction imposed under section

2929.15, 2929.18, or 2929.25 of the Revised Code. The court shall establish an intervention plan for the offender. The terms and conditions of the intervention plan shall require the offender, for at least one year from the date on which the court grants the order of intervention in lieu of conviction, to abstain from the use of illegal drugs and alcohol and to submit to regular random testing for drug and alcohol use and may include any other treatment terms and conditions, or terms and conditions similar to community control sanctions, that are ordered by the court.

(E) If the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender, including the requirement that the offender abstain from using drugs and alcohol for a period of at least one year from the date on which the court granted the order of intervention in lieu of conviction and all other terms and conditions ordered by the court, the court shall dismiss the proceedings against the offender. Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code.

(F) If the court grants an offender's request for intervention in lieu of conviction and the offender fails to comply with any term or condition imposed as part of the intervention plan for the offender, the supervising authority for the offender promptly shall advise the court of this failure, and the court shall hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court determines that the offender has failed to comply with any of those terms and conditions, it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929. of the Revised Code.

(G) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(2) "Intervention in lieu of conviction" means any court-supervised activity that complies with this section.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(2002 H 490, eff. 1-1-04; 2002 H 327, eff. 7-8-02; 1999 H 202, eff. 2-9-00; 1999 S 107, eff. 3-23-00; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1994 H 385, eff. 7-19-94; 1990 S 258, eff. 11-20-90; 1989 H 317; 1980 H 900; 1975 H 300)

R.C. § 4715.30

Baldwin's Ohio Revised Code Annotated Currentness

Title XLVII. Occupations--Professions (Refs & Annos)

Chapter 4715. Dentists; Dental Hygienists (Refs & Annos)

Disciplinary Action; Prohibitions

4715.30 Grounds for disciplinary action; alternatives; automatic suspension

(A) The holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for any of the following reasons:

- (1) Employing or cooperating in fraud or material deception in applying for or obtaining a license or certificate;
- (2) Obtaining or attempting to obtain money or anything of value by intentional misrepresentation or material deception in the course of practice;
- (3) Advertising services in a false or misleading manner or violating the board's rules governing time, place, and manner of advertising;
- (4) Conviction of a misdemeanor committed in the course of practice or of any felony;
- (5) Engaging in lewd or immoral conduct in connection with the provision of dental services;
- (6) Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes, or conviction of violating any law of this state or the federal government regulating the possession, distribution, or use of any drug;
- (7) Providing or allowing dental hygienists, expanded function dental auxiliaries, or other practitioners of auxiliary dental occupations working under the certificate or license holder's supervision, or a dentist holding a temporary limited continuing education license under division (C) of section 4715.16 of the Revised Code working under the certificate or license holder's direct supervision, to provide dental care that departs from or fails to conform to accepted standards for the profession, whether or not injury to a patient results;
- (8) Inability to practice under accepted standards of the profession because of physical or mental disability, dependence on alcohol or other drugs, or excessive use of alcohol or other drugs;
- (9) Violation of any provision of this chapter or any rule adopted thereunder;
- (10) Failure to use universal blood and body fluid precautions established by rules adopted under section 4715.03 of the Revised Code;

(11) Waiving the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers dental services, would otherwise be required to pay if the waiver is used as an enticement to a patient or group of patients to receive health care services from that provider.

(12) Advertising that the certificate or license holder will waive the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers dental services, would otherwise be required to pay.

(B) A manager, proprietor, operator, or conductor of a dental facility shall be subject to disciplinary action if any dentist, dental hygienist, expanded function dental auxiliary, or qualified personnel providing services in the facility is found to have committed a violation listed in division (A) of this section and the manager, proprietor, operator, or conductor knew of the violation and permitted it to occur on a recurring basis.

(C) Subject to Chapter 119. of the Revised Code, the board may take one or more of the following disciplinary actions if one or more of the grounds for discipline listed in divisions (A) and (B) of this section exist:

(1) Censure the license or certificate holder;

(2) Place the license or certificate on probationary status for such period of time the board determines necessary and require the holder to:

(a) Report regularly to the board upon the matters which are the basis of probation;

(b) Limit practice to those areas specified by the board;

(c) Continue or renew professional education until a satisfactory degree of knowledge or clinical competency has been attained in specified areas.

(3) Suspend the certificate or license;

(4) Revoke the certificate or license.

Where the board places a holder of a license or certificate on probationary status pursuant to division (C)(2) of this section, the board may subsequently suspend or revoke the license or certificate if it determines that the holder has not met the requirements of the probation or continues to engage in activities that constitute grounds for discipline pursuant to division (A) or (B) of this section.

Any order suspending a license or certificate shall state the conditions under which the license or certificate will be restored, which may include a conditional restoration during which time the holder is in a probationary status pursuant to division (C)(2) of this section. The board shall restore the license or certificate unconditionally when such conditions are met.

(D) If the physical or mental condition of a license or certificate holder is at issue in a disciplinary proceeding, the board may order the license or certificate holder to submit to reasonable examinations by an individual designated or approved by the board and at the board's expense. The physical examination may be conducted by any individual authorized by the Revised Code to do so, including a physician assistant, a clinical nurse specialist, a certified nurse practitioner, or a certified nurse-midwife. Any written documentation of the physical examination shall be completed by the individual who conducted the examination.

Failure to comply with an order for an examination shall be grounds for summary suspension of a license or certificate under division (E) of this section.

(E) If the board has reason to believe that the holder represents a clear and immediate danger to the public health and safety if the holder is allowed to continue to practice, or if the holder has failed to comply with an order under division (D) of this section, the board may apply to the court of common pleas of the county in which the holder resides for an order temporarily suspending the holder's license or certificate, without a prior hearing being afforded by the board, until the board conducts an adjudication hearing pursuant to Chapter 119. of the Revised Code. If the court temporarily suspends a holder's license or certificate, the board shall give written notice of the suspension personally or by certified mail to the license or certificate holder. Such notice shall include specific facts and reasons for finding a clear and immediate danger to the public health and safety and shall inform the license or certificate holder of the right to a hearing pursuant to Chapter 119. of the Revised Code.

(F) Any holder of a certificate or license issued under this chapter who has pleaded guilty to, has been convicted of, or has had a judicial finding of eligibility for intervention in lieu of conviction entered against the holder in this state for aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary, or who has pleaded guilty to, has been convicted of, or has had a judicial finding of eligibility for treatment or intervention in lieu of conviction entered against the holder in another jurisdiction for any substantially equivalent criminal offense, is automatically suspended from practice under this chapter in this state and any certificate or license issued to the holder under this chapter is automatically suspended, as of the date of the guilty plea, conviction, or judicial finding, whether the proceedings are brought in this state or another jurisdiction. Continued practice by an individual after the suspension of the individual's certificate or license under this division shall be considered practicing without a certificate or license. The board shall notify the suspended individual of the suspension of the individual's certificate or license under this division by certified mail or in person in accordance with section 119.07 of the Revised Code. If an individual whose certificate or license is suspended under this division fails to make a timely request for an adjudicatory hearing, the board shall enter a final order revoking the individual's certificate or license.

(G) Notwithstanding divisions (A)(11) and (12) of this section, sanctions shall not be imposed against any licensee who waives deductibles and copayments:

(1) In compliance with the health benefit plan that expressly allows such a practice. Waiver of the deductibles or copayments shall be made only with the full knowledge and consent of the plan purchaser, payer, and third-party administrator. Such consent shall be made available to the board upon request.

(2) For professional services rendered to any other person licensed pursuant to this chapter to the extent allowed by this chapter and the rules of the board.

CREDIT(S)

(2006 H 143, eff. 5-12-06; 2002 S 245, eff. 3-31-03; 1999 S 107, eff. 3-23-00; 1994 S 279, eff. 10-20-94; 1992 H 419, eff. 3-15-93; 1990 H 208; 1988 H 526; 1986 H 428; 1981 H 243)

R.C. § 4723.28

Baldwin's Ohio Revised Code Annotated Currentness
Title XLVII. Occupations--Professions (Refs & Annos)

^Chapter 4723. Nurses (Refs & Annos)

^Disciplinary Procedures

***4723.28 Denial, revocation, suspension, or restriction of certificate or license; fines; mental or physical examinations; investigations; criminal records check**

(A) The board of nursing, by a vote of a quorum, may revoke or may refuse to grant a nursing license, certificate of authority, or dialysis technician certificate to a person found by the board to have committed fraud in passing an examination required to obtain the license, certificate of authority, or dialysis technician certificate or to have committed fraud, misrepresentation, or deception in applying for or securing any nursing license, certificate of authority, or dialysis technician certificate issued by the board.

(B) Subject to division (N) of this section, the board of nursing, by a vote of a quorum, may impose one or more of the following sanctions: deny, revoke, suspend, or place restrictions on any nursing license, certificate of authority, or dialysis technician certificate issued by the board; reprimand or otherwise discipline a holder of a nursing license, certificate of authority, or dialysis technician certificate; or impose a fine of not more than five hundred dollars per violation. The sanctions may be imposed for any of the following:

(1) Denial, revocation, suspension, or restriction of authority to practice a health care occupation, including nursing or practice as a dialysis technician, for any reason other than a failure to renew, in Ohio or another state or jurisdiction;

(2) Engaging in the practice of nursing or engaging in practice as a dialysis technician, having failed to renew a nursing license or dialysis technician certificate issued under this chapter, or while a nursing license or dialysis technician certificate is under suspension;

(3) Conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;

(4) Conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, or a judicial finding of eligibility for intervention in lieu of conviction for, any felony or of any crime involving gross immorality or moral turpitude;

- (5) Selling, giving away, or administering drugs or therapeutic devices for other than legal and legitimate therapeutic purposes; or conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, or a judicial finding of eligibility for intervention in lieu of conviction for, violating any municipal, state, county, or federal drug law;
- (6) Conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, or a judicial finding of eligibility for intervention in lieu of conviction for, an act in another jurisdiction that would constitute a felony or a crime of moral turpitude in Ohio;
- (7) Conviction of, a plea of guilty to, a judicial finding of guilt of, a judicial finding of guilt resulting from a plea of no contest to, or a judicial finding of eligibility for intervention in lieu of conviction for, an act in the course of practice in another jurisdiction that would constitute a misdemeanor in Ohio;
- (8) Self-administering or otherwise taking into the body any dangerous drug, as defined in section 4729.01 of the Revised Code, in any way not in accordance with a legal, valid prescription issued for that individual;
- (9) Habitual indulgence in the use of controlled substances, other habit-forming drugs, or alcohol or other chemical substances to an extent that impairs ability to practice;
- (10) Impairment of the ability to practice according to acceptable and prevailing standards of safe nursing care because of habitual or excessive use of drugs, alcohol, or other chemical substances that impair the ability to practice;
- (11) Impairment of the ability to practice according to acceptable and prevailing standards of safe nursing care because of a physical or mental disability;
- (12) Assaulting or causing harm to a patient or depriving a patient of the means to summon assistance;
- (13) Obtaining or attempting to obtain money or anything of value by intentional misrepresentation or material deception in the course of practice;
- (14) Adjudication by a probate court of being mentally ill or mentally incompetent. The board may restore the person's nursing license or dialysis technician certificate upon adjudication by a probate court of the person's restoration to competency or upon submission to the board of other proof of competency.
- (15) The suspension or termination of employment by the department of defense or the veterans administration of the United States for any act that violates or would violate this chapter;
- (16) Violation of this chapter or any rules adopted under it;

- (17) Violation of any restrictions placed on a nursing license or dialysis technician certificate by the board;
- (18) Failure to use universal blood and body fluid precautions established by rules adopted under section 4723.07 of the Revised Code;
- (19) Failure to practice in accordance with acceptable and prevailing standards of safe nursing care or safe dialysis care;
- (20) In the case of a registered nurse, engaging in activities that exceed the practice of nursing as a registered nurse;
- (21) In the case of a licensed practical nurse, engaging in activities that exceed the practice of nursing as a licensed practical nurse;
- (22) In the case of a dialysis technician, engaging in activities that exceed those permitted under section 4723.72 of the Revised Code;
- (23) Aiding and abetting a person in that person's practice of nursing without a license or practice as a dialysis technician without a certificate issued under this chapter;
- (24) In the case of a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner, except as provided in division (M) of this section, either of the following:
- (a) Waiving the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers such nursing services, would otherwise be required to pay if the waiver is used as an enticement to a patient or group of patients to receive health care services from that provider;
- (b) Advertising that the nurse will waive the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers such nursing services, would otherwise be required to pay.
- (25) Failure to comply with the terms and conditions of participation in the chemical dependency monitoring program established under section 4723.35 of the Revised Code;
- (26) Failure to comply with the terms and conditions required under the practice intervention and improvement program established under section 4723.282 of the Revised Code;
- (27) In the case of a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner:

(a) Engaging in activities that exceed those permitted for the nurse's nursing specialty under section 4723.43 of the Revised Code;

(b) Failure to meet the quality assurance standards established under section 4723.07 of the Revised Code.

(28) In the case of a clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner, failure to maintain a standard care arrangement in accordance with section 4723.431 of the Revised Code or to practice in accordance with the standard care arrangement;

(29) In the case of a clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner who holds a certificate to prescribe issued under section 4723.48 of the Revised Code, failure to prescribe drugs and therapeutic devices in accordance with section 4723.481 of the Revised Code;

(30) Prescribing any drug or device to perform or induce an abortion, or otherwise performing or inducing an abortion;

(31) Failure to establish and maintain professional boundaries with a patient, as specified in rules adopted under section 4723.07 of the Revised Code;

(32) Regardless of whether the contact or verbal behavior is consensual, engaging with a patient other than the spouse of the registered nurse, licensed practical nurse, or dialysis technician in any of the following:

(a) Sexual contact, as defined in section 2907.01 of the Revised Code;

(b) Verbal behavior that is sexually demeaning to the patient or may be reasonably interpreted by the patient as sexually demeaning.

(33) Assisting suicide as defined in section 3795.01 of the Revised Code.

(C) Disciplinary actions taken by the board under divisions (A) and (B) of this section shall be taken pursuant to an adjudication conducted under Chapter 119. of the Revised Code, except that in lieu of a hearing, the board may enter into a consent agreement with an individual to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by a vote of a quorum, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the agreement shall be of no effect.

(D) The hearings of the board shall be conducted in accordance with Chapter 119. of the Revised Code, the board may appoint a hearing examiner, as provided in section 119.09 of the Revised Code, to conduct any hearing the board is authorized to hold under Chapter 119. of the Revised Code.

In any instance in which the board is required under Chapter 119. of the Revised Code to give notice of an opportunity for a hearing and the applicant or license holder does not make a timely request for a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by a vote of a quorum, a final order that contains the board's findings. In the final order, the board may order any of the sanctions listed in division (A) or (B) of this section.

(E) If a criminal action is brought against a registered nurse, licensed practical nurse, or dialysis technician for an act or crime described in divisions (B)(3) to (7) of this section and the action is dismissed by the trial court other than on the merits, the board shall conduct an adjudication to determine whether the registered nurse, licensed practical nurse, or dialysis technician committed the act on which the action was based. If the board determines on the basis of the adjudication that the registered nurse, licensed practical nurse, or dialysis technician committed the act, or if the registered nurse, licensed practical nurse, or dialysis technician fails to participate in the adjudication, the board may take action as though the registered nurse, licensed practical nurse, or dialysis technician had been convicted of the act.

If the board takes action on the basis of a conviction, plea, or a judicial finding as described in divisions (B)(3) to (7) of this section that is overturned on appeal, the registered nurse, licensed practical nurse, or dialysis technician may, on exhaustion of the appeal process, petition the board for reconsideration of its action. On receipt of the petition and supporting court documents, the board shall temporarily rescind its action. If the board determines that the decision on appeal was a decision on the merits, it shall permanently rescind its action. If the board determines that the decision on appeal was not a decision on the merits, it shall conduct an adjudication to determine whether the registered nurse, licensed practical nurse, or dialysis technician committed the act on which the original conviction, plea, or judicial finding was based. If the board determines on the basis of the adjudication that the registered nurse, licensed practical nurse, or dialysis technician committed such act, or if the registered nurse, licensed practical nurse, or dialysis technician does not request an adjudication, the board shall reinstate its action; otherwise, the board shall permanently rescind its action.

Notwithstanding the provision of division (C)(2) of section 2953.32 of the Revised Code specifying that if records pertaining to a criminal case are sealed under that section the proceedings in the case shall be deemed not to have occurred, sealing of the records of a conviction on which the board has based an action under this section shall have no effect on the board's action or any sanction imposed by the board under this section.

The board shall not be required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

(F) The board may investigate an individual's criminal background in performing its duties under this section.

(G) During the course of an investigation conducted under this section, the board may compel any registered nurse, licensed practical nurse, or dialysis technician or applicant

under this chapter to submit to a mental or physical examination, or both, as required by the board and at the expense of the individual, if the board finds reason to believe that the individual under investigation may have a physical or mental impairment that may affect the individual's ability to provide safe nursing care. Failure of any individual to submit to a mental or physical examination when directed constitutes an admission of the allegations, unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence.

If the board finds that an individual is impaired, the board shall require the individual to submit to care, counseling, or treatment approved or designated by the board, as a condition for initial, continued, reinstated, or renewed authority to practice. The individual shall be afforded an opportunity to demonstrate to the board that the individual can begin or resume the individual's occupation in compliance with acceptable and prevailing standards of care under the provisions of the individual's authority to practice.

For purposes of this division, any registered nurse, licensed practical nurse, or dialysis technician or applicant under this chapter shall be deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the board, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(H) The board shall investigate evidence that appears to show that any person has violated any provision of this chapter or any rule of the board. Any person may report to the board any information the person may have that appears to show a violation of any provision of this chapter or rule of the board. In the absence of bad faith, any person who reports such information or who testifies before the board in any adjudication conducted under Chapter 119. of the Revised Code shall not be liable for civil damages as a result of the report or testimony.

(I) All of the following apply under this chapter with respect to the confidentiality of information:

(1) Information received by the board pursuant to an investigation is confidential and not subject to discovery in any civil action, except that the board may disclose information to law enforcement officers and government entities investigating a registered nurse, licensed practical nurse, or dialysis technician or a person who may have engaged in the unauthorized practice of nursing. No law enforcement officer or government entity with knowledge of any information disclosed by the board pursuant to this division shall divulge the information to any other person or government entity except for the purpose of an adjudication by a court or licensing or registration board or officer to which the person to whom the information relates is a party.

(2) If an investigation requires a review of patient records, the investigation and proceeding shall be conducted in such a manner as to protect patient confidentiality.

(3) All adjudications and investigations of the board shall be considered civil actions for the purposes of section 2305.252 of the Revised Code.

(4) Any board activity that involves continued monitoring of an individual as part of or following any disciplinary action taken under this section shall be conducted in a manner that maintains the individual's confidentiality. Information received or maintained by the board with respect to the board's monitoring activities is confidential and not subject to discovery in any civil action.

(J) Any action taken by the board under this section resulting in a suspension from practice shall be accompanied by a written statement of the conditions under which the person may be reinstated to practice.

(K) When the board refuses to grant a license or certificate to an applicant, revokes a license or certificate, or refuses to reinstate a license or certificate, the board may specify that its action is permanent. An individual subject to permanent action taken by the board is forever ineligible to hold a license or certificate of the type that was refused or revoked and the board shall not accept from the individual an application for reinstatement of the license or certificate or for a new license or certificate.

(L) No unilateral surrender of a nursing license, certificate of authority, or dialysis technician certificate issued under this chapter shall be effective unless accepted by majority vote of the board. No application for a nursing license, certificate of authority, or dialysis technician certificate issued under this chapter may be withdrawn without a majority vote of the board. The board's jurisdiction to take disciplinary action under this section is not removed or limited when an individual has a license or certificate classified as inactive or fails to renew a license or certificate.

(M) Sanctions shall not be imposed under division (B)(24) of this section against any licensee who waives deductibles and copayments as follows:

(1) In compliance with the health benefit plan that expressly allows such a practice. Waiver of the deductibles or copayments shall be made only with the full knowledge and consent of the plan purchaser, payer, and third-party administrator. Documentation of the consent shall be made available to the board upon request.

(2) For professional services rendered to any other person licensed pursuant to this chapter to the extent allowed by this chapter and the rules of the board.

(N)(1) Any person who enters a prelicensure nursing education program on or after June 1, 2003, and who subsequently applies under division (A) of section 4723.09 of the Revised Code for licensure to practice as a registered nurse or as a licensed practical nurse and any person who applies under division (B) of that section for license by endorsement to practice nursing as a registered nurse or as a licensed practical nurse shall submit a request to the bureau of criminal identification and investigation for the bureau to conduct a criminal records check of the applicant and to send the results to the board, in accordance with section 4723.09 of the Revised Code.

The board shall refuse to grant a license to practice nursing as a registered nurse or as a licensed practical nurse under section 4723.09 of the Revised Code to a person who entered a prelicensure nursing education program on or after June 1, 2003, and applied under division (A) of section 4723.09 of the Revised Code for the license or a person who applied under division (B) of that section for the license, if the criminal records check performed in accordance with division (C) of that section indicates that the person has pleaded guilty to, been convicted of, or has had a judicial finding of guilt for violating section 2903.01, 2903.02, 2903.03, 2903.11, 2905.01, 2907.02, 2907.03, 2907.05, 2909.02, 2911.01, or 2911.11 of the Revised Code or a substantially similar law of another state, the United States, or another country.

(2) Any person who enters a dialysis training program on or after June 1, 2003, and who subsequently applies for a certificate to practice as a dialysis technician shall submit a request to the bureau of criminal identification and investigation for the bureau to conduct a criminal records check of the applicant and to send the results to the board, in accordance with section 4723.75 of the Revised Code.

The board shall refuse to issue a certificate to practice as a dialysis technician under section 4723.75 of the Revised Code to a person who entered a dialysis training program on or after June 1, 2003, and whose criminal records check performed in accordance with division (C) of that section indicates that the person has pleaded guilty to, been convicted of, or has had a judicial finding of guilt for violating section 2903.01, 2903.02, 2903.03, 2903.11, 2905.01, 2907.02, 2907.03, 2907.05, 2909.02, 2911.01, or 2911.11 of the Revised Code or a substantially similar law of another state, the United States, or another country.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 2002 S 179, eff. 4-9-03; 2002 H 474, eff. 3-24-03; 2002 H 327, eff. 7-8-02; 2000 H 511, eff. 4-10-01; 2000 S 111, eff. 12-24-00; 2000 H 241, eff. 5-17-00; 1999 H 283, eff. 9-29-99; 1998 S 66, eff. 7-22-98; 1997 H 215, eff. 6-30-97; 1996 S 154, eff. 9-10-96; 1995 H 117, eff. 6-30-95; 1994 S 279, eff. 10-20-94; 1994 H 715, eff. 7-22-94; 1993 S 21, eff. 10-29-93; 1992 H 419; 1989 S 113; 1988 H 529; 1977 H 725; 1975 H 300; 1974 H 989; 132 v H 360, H 528; 130 v Pt 2, H 5; 126 v 122)

R.C. § 4730.25

Baldwin's Ohio Revised Code Annotated Currentness
Title XLVII. Occupations--Professions (Refs & Annos)

Chapter 4730. Physician Assistants (Refs & Annos)

⇒4730.25 Disciplinary action

(A) The state medical board, by an affirmative vote of not fewer than six members, may revoke or may refuse to grant a certificate to practice as a physician assistant or a certificate to prescribe to a person found by the board to have committed fraud, misrepresentation, or deception in applying for or securing the certificate.

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

(1) Failure to practice in accordance with the conditions under which the supervising physician's supervision agreement with the physician assistant was approved, including the requirement that when practicing under a particular supervising physician, the physician assistant must practice only according to the physician supervisory plan the board approved for that physician or the policies of the health care facility in which the supervising physician and physician assistant are practicing;

(2) Failure to comply with the requirements of this chapter, Chapter 4731. of the Revised Code, or any rules adopted by the board;

(3) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this chapter, Chapter 4731. of the Revised Code, or the rules adopted by the board;

(4) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including physical deterioration that adversely affects cognitive, motor, or perceptive skills;

(5) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice;

(6) Administering drugs for purposes other than those authorized under this chapter;

(7) Willfully betraying a professional confidence;

(8) Making a false, fraudulent, deceptive, or misleading statement in soliciting or advertising for employment as a physician assistant; in connection with any solicitation

or advertisement for patients; in relation to the practice of medicine as it pertains to physician assistants; or in securing or attempting to secure a certificate to practice as a physician assistant, a certificate to prescribe, or approval of a supervision agreement.

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

(9) Representing, with the purpose of obtaining compensation or other advantage personally or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(10) The obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice;

(11) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony;

(12) Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed;

(13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;

(14) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude;

(15) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(16) Commission of an act involving moral turpitude that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(17) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for violating any state or federal law regulating the possession, distribution, or use of any drug, including trafficking in drugs;

(18) Any of the following actions taken by the state agency responsible for regulating the practice of physician assistants in another state, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand;

(19) A departure from, or failure to conform to, minimal standards of care of similar physician assistants under the same or similar circumstances, regardless of whether actual injury to a patient is established;

(20) Violation of the conditions placed by the board on a certificate to practice as a physician assistant, a certificate to prescribe, a physician supervisory plan, or supervision agreement;

(21) Failure to use universal blood and body fluid precautions established by rules adopted under section 4731.051 of the Revised Code;

(22) Failure to cooperate in an investigation conducted by the board under section 4730.26 of the Revised Code, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board at a deposition or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue;

(23) Assisting suicide as defined in section 3795.01 of the Revised Code;

(24) Prescribing any drug or device to perform or induce an abortion, or otherwise performing or inducing an abortion.

(C) Disciplinary actions taken by the board under divisions (A) and (B) of this section shall be taken pursuant to an adjudication under Chapter 119. of the Revised Code, except that in lieu of an adjudication, the board may enter into a consent agreement with a physician assistant or applicant to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by an affirmative vote of not fewer than six members of the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no force or effect.

(D) For purposes of divisions (B)(12), (15), and (16) of this section, the commission of the act may be established by a finding by the board, pursuant to an adjudication under Chapter 119. of the Revised Code, that the applicant or certificate holder committed the act in question. The board shall have no jurisdiction under these divisions in cases where the trial court renders a final judgment in the certificate holder's favor and that judgment is based upon an adjudication on the merits. The board shall have jurisdiction under these divisions in cases where the trial court issues an order of dismissal upon technical or procedural grounds.

(E) The sealing of conviction records by any court shall have no effect upon a prior board order entered under the provisions of this section or upon the board's jurisdiction to take action under the provisions of this section if, based upon a plea of guilty, a judicial finding of guilt, or a judicial finding of eligibility for intervention in lieu of

conviction, the board issued a notice of opportunity for a hearing prior to the court's order to seal the records. The board shall not be required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

(F) For purposes of this division, any individual who holds a certificate issued under this chapter, or applies for a certificate issued under this chapter, shall be deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the board and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(1) In enforcing division (B)(4) of this section, the board, upon a showing of a possible violation, may compel any individual who holds a certificate issued under this chapter or who has applied for a certificate pursuant to this chapter to submit to a mental examination, physical examination, including an HIV test, or both a mental and physical examination. The expense of the examination is the responsibility of the individual compelled to be examined. Failure to submit to a mental or physical examination or consent to an HIV test ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds a physician assistant unable to practice because of the reasons set forth in division (B)(4) of this section, the board shall require the physician assistant to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for an initial, continued, reinstated, or renewed certificate. An individual affected under this division shall be afforded an opportunity to demonstrate to the board the ability to resume practicing in compliance with acceptable and prevailing standards of care.

(2) For purposes of division (B)(5) of this section, if the board has reason to believe that any individual who holds a certificate issued under this chapter or any applicant for a certificate suffers such impairment, the board may compel the individual to submit to a mental or physical examination, or both. The expense of the examination is the responsibility of the individual compelled to be examined. Any mental or physical examination required under this division shall be undertaken by a treatment provider or physician qualified to conduct such examination and chosen by the board.

Failure to submit to a mental or physical examination ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board determines that the individual's ability to practice is impaired, the board shall suspend the individual's certificate or deny the individual's application and shall require the individual, as a condition for initial, continued, reinstated, or renewed certification to practice or prescribe, to submit to treatment.

Before being eligible to apply for reinstatement of a certificate suspended under this division, the physician assistant shall demonstrate to the board the ability to resume

practice or prescribing in compliance with acceptable and prevailing standards of care. The demonstration shall include the following:

- (a) Certification from a treatment provider approved under section 4731.25 of the Revised Code that the individual has successfully completed any required inpatient treatment;
- (b) Evidence of continuing full compliance with an aftercare contract or consent agreement;
- (c) Two written reports indicating that the individual's ability to practice has been assessed and that the individual has been found capable of practicing according to acceptable and prevailing standards of care. The reports shall be made by individuals or providers approved by the board for making such assessments and shall describe the basis for their determination.

The board may reinstate a certificate suspended under this division after such demonstration and after the individual has entered into a written consent agreement.

When the impaired physician assistant resumes practice or prescribing, the board shall require continued monitoring of the physician assistant. The monitoring shall include compliance with the written consent agreement entered into before reinstatement or with conditions imposed by board order after a hearing, and, upon termination of the consent agreement, submission to the board for at least two years of annual written progress reports made under penalty of falsification stating whether the physician assistant has maintained sobriety.

(G) If the secretary and supervising member determine that there is clear and convincing evidence that a physician assistant has violated division (B) of this section and that the individual's continued practice or prescribing presents a danger of immediate and serious harm to the public, they may recommend that the board suspend the individual's certificate to practice or prescribe without a prior hearing. Written allegations shall be prepared for consideration by the board.

The board, upon review of those allegations and by an affirmative vote of not fewer than six of its members, excluding the secretary and supervising member, may suspend a certificate without a prior hearing. A telephone conference call may be utilized for reviewing the allegations and taking the vote on the summary suspension.

The board shall issue a written order of suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. The order shall not be subject to suspension by the court during pendency of any appeal filed under section 119.12 of the Revised Code. If the physician assistant requests an adjudicatory hearing by the board, the date set for the hearing shall be within fifteen days, but not earlier than seven days, after the physician assistant requests the hearing, unless otherwise agreed to by both the board and the certificate holder.

A summary suspension imposed under this division shall remain in effect, unless reversed on appeal, until a final adjudicative order issued by the board pursuant to this section and Chapter 119. of the Revised Code becomes effective. The board shall issue its final adjudicative order within sixty days after completion of its hearing. Failure to issue the order within sixty days shall result in dissolution of the summary suspension order, but shall not invalidate any subsequent, final adjudicative order.

(H) If the board takes action under division (B)(11), (13), or (14) of this section, and the judicial finding of guilt, guilty plea, or judicial finding of eligibility for intervention in lieu of conviction is overturned on appeal, upon exhaustion of the criminal appeal, a petition for reconsideration of the order may be filed with the board along with appropriate court documents. Upon receipt of a petition and supporting court documents, the board shall reinstate the certificate to practice or prescribe. The board may then hold an adjudication under Chapter 119. of the Revised Code to determine whether the individual committed the act in question. Notice of opportunity for hearing shall be given in accordance with Chapter 119. of the Revised Code. If the board finds, pursuant to an adjudication held under this division, that the individual committed the act, or if no hearing is requested, it may order any of the sanctions identified under division (B) of this section.

(I) The certificate to practice issued to a physician assistant and the physician assistant's practice in this state are automatically suspended as of the date the physician assistant pleads guilty to, is found by a judge or jury to be guilty of, or is subject to a judicial finding of eligibility for intervention in lieu of conviction in this state or treatment or intervention in lieu of conviction in another state for any of the following criminal offenses in this state or a substantially equivalent criminal offense in another jurisdiction: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary. Continued practice after the suspension shall be considered practicing without a certificate.

The board shall notify the individual subject to the suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. If an individual whose certificate is suspended under this division fails to make a timely request for an adjudication under Chapter 119. of the Revised Code, the board shall enter a final order permanently revoking the individual's certificate to practice.

(J) In any instance in which the board is required by Chapter 119. of the Revised Code to give notice of opportunity for hearing and the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings. In that final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

(K) Any action taken by the board under division (B) of this section resulting in a suspension shall be accompanied by a written statement of the conditions under which

the physician assistant's certificate may be reinstated. The board shall adopt rules in accordance with Chapter 119. of the Revised Code governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section requires an affirmative vote of not fewer than six members of the board.

(L) When the board refuses to grant to an applicant a certificate to practice as a physician assistant or a certificate to prescribe, revokes an individual's certificate, refuses to issue a certificate, or refuses to reinstate an individual's certificate, 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 the certificate and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate.

(M) Notwithstanding any other provision of the Revised Code, all of the following apply:

(1) The surrender of a certificate issued under this chapter is not effective unless or until accepted by the board. Reinstatement of a certificate surrendered to the board requires an affirmative vote of not fewer than six members of the board.

(2) An application made under this chapter for a certificate, approval of a physician supervisory plan, or approval of a supervision agreement may not be withdrawn without approval of the board.

(3) Failure by an individual to renew a certificate in accordance with section 4730.14 or section 4730.48 of the Revised Code shall not remove or limit the board's jurisdiction to take disciplinary action under this section against the individual.

CREDIT(S)

(2006 S 154, eff. 5-17-06; 2002 H 474, eff. 3-24-03; 1999 S 107, eff. 3-23-00; 1998 H 606, eff. 3-9-99; 1996 S 259, eff. 11-6-96; 1995 S 143, eff. 3-5-96)

R.C. § 4731.22

Baldwin's Ohio Revised Code Annotated Currentness

Title XLVII. Occupations--Professions (Refs & Annos)

Chapter 4731. Physicians; Limited Practitioners (Refs & Annos)

Certificates

4731.22 Disciplinary procedures; quality intervention program (later effective date)

< Note: See also version(s) of this section with earlier effective date(s). >

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

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

(1) Permitting one's name or one's certificate to practice or certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

(2) Failure to maintain minimal standards applicable to the selection or administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease;

(3) Selling, giving away, personally furnishing, prescribing, or administering drugs for other than legal and legitimate therapeutic purposes or a plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction of, a violation of any federal or state law regulating the possession, distribution, or use of any drug;

(4) Willfully betraying a professional confidence.

For purposes of this division, "willfully betraying a professional confidence" does not include providing any information, documents, or reports to a child fatality review board under sections 307.621 to 307.629 of the Revised Code and does not include the making of a report of an employee's use of a drug of abuse, or a report of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee as described in division (B) of section 2305.33 of the Revised Code. Nothing in this division affects the immunity from civil liability conferred by that section upon a physician who makes either type of report in accordance with division (B) of that

section. As used in this division, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(5) Making a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board.

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

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;

(7) Representing, with the purpose of obtaining compensation or other advantage as personal gain or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(8) The obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice;

(9) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony;

(10) Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed;

(11) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;

(12) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude;

(14) Commission of an act involving moral turpitude that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(15) Violation of the conditions of limitation placed by the board upon a certificate to practice;

(16) Failure to pay license renewal fees specified in this chapter;

(17) Except as authorized in section 4731.31 of the Revised Code, engaging in the division of fees for referral of patients, or the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business;

(18) Subject to section 4731.226 of the Revised Code, violation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, or any other national professional organizations that the board specifies by rule. The state medical board shall obtain and keep on file current copies of the codes of ethics of the various national professional organizations. The individual whose certificate is being suspended or revoked shall not be found to have violated any provision of a code of ethics of an organization not appropriate to the individual's profession.

For purposes of this division, a "provision of a code of ethics of a national professional organization" does not include any provision that would preclude the making of a report by a physician of an employee's use of a drug of abuse, or of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee as described in division (B) of section 2305.33 of the Revised Code. Nothing in this division affects the immunity from civil liability conferred by that section upon a physician who makes either type of report in accordance with division (B) of that section. As used in this division, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(19) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills.

In enforcing this division, the board, upon a showing of a possible violation, may compel any individual authorized to practice by this chapter or who has submitted an application pursuant to this chapter to submit to a mental examination, physical examination, including an HIV test, or both a mental and a physical examination. The expense of the examination is the responsibility of the individual compelled to be examined. Failure to submit to a mental or physical examination or consent to an HIV test ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds an individual unable to practice because of the reasons set forth in this division, the board shall require the individual to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for initial, continued, reinstated, or renewed authority to practice. An individual affected under this division shall be afforded an opportunity to demonstrate to the board the ability to resume practice in compliance with acceptable and prevailing

standards under the provisions of the individual's certificate. For the purpose of this division, any individual who applies for or receives a certificate to practice under this chapter accepts the privilege of practicing in this state and, by so doing, shall be deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the board, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication."

(20) Except when civil penalties are imposed under section 4731.225 or 4731.281 of the Revised Code, and subject to section 4731.226 of the Revised Code, violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter or any rule promulgated by the board.

This division does not apply to a violation or attempted violation of, assisting in or abetting the violation of, or a conspiracy to violate, any provision of this chapter or any rule adopted by the board that would preclude the making of a report by a physician of an employee's use of a drug of abuse, or of a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee as described in division (B) of section 2305.33 of the Revised Code. Nothing in this division affects the immunity from civil liability conferred by that section upon a physician who makes either type of report in accordance with division (B) of that section. As used in this division, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(21) The violation of section 3701.79 of the Revised Code or of any abortion rule adopted by the public health council pursuant to section 3701.341 of the Revised Code;

(22) Any of the following actions taken by the agency responsible for regulating the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or the limited branches of medicine in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand;

(23) The violation of section 2919.12 of the Revised Code or the performance or inducement of an abortion upon a pregnant woman with actual knowledge that the conditions specified in division (B) of section 2317.56 of the Revised Code have not been satisfied or with a heedless indifference as to whether those conditions have been satisfied, unless an affirmative defense as specified in division (H)(2) of that section would apply in a civil action authorized by division (H)(1) of that section;

(24) The revocation, suspension, restriction, reduction, or termination of clinical privileges by the United States department of defense or department of veterans affairs or the termination or suspension of a certificate of registration to prescribe drugs by the drug enforcement administration of the United States department of justice;

(25) Termination or suspension from participation in the medicare or medicaid programs by the department of health and human services or other responsible agency for any act or acts that also would constitute a violation of division (B)(2), (3), (6), (8), or (19) of this section;

(26) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice.

For the purposes of this division, any individual authorized to practice by this chapter accepts the privilege of practicing in this state subject to supervision by the board. By filing an application for or holding a certificate to practice under this chapter, an individual shall be deemed to have given consent to submit to a mental or physical examination when ordered to do so by the board in writing, and to have waived all objections to the admissibility of testimony or examination reports that constitute privileged communications.

If it has reason to believe that any individual authorized to practice by this chapter or any applicant for certification to practice suffers such impairment, the board may compel the individual to submit to a mental or physical examination, or both. The expense of the examination is the responsibility of the individual compelled to be examined. Any mental or physical examination required under this division shall be undertaken by a treatment provider or physician who is qualified to conduct the examination and who is chosen by the board.

Failure to submit to a mental or physical examination ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board determines that the individual's ability to practice is impaired, the board shall suspend the individual's certificate or deny the individual's application and shall require the individual, as a condition for initial, continued, reinstated, or renewed certification to practice, to submit to treatment.

Before being eligible to apply for reinstatement of a certificate suspended under this division, the impaired practitioner shall demonstrate to the board the ability to resume practice in compliance with acceptable and prevailing standards of care under the provisions of the practitioner's certificate. The demonstration shall include, but shall not be limited to, the following:

(a) Certification from a treatment provider approved under section 4731.25 of the Revised Code that the individual has successfully completed any required inpatient treatment;

(b) Evidence of continuing full compliance with an aftercare contract or consent agreement;

(c) Two written reports indicating that the individual's ability to practice has been assessed and that the individual has been found capable of practicing according to acceptable and prevailing standards of care. The reports shall be made by individuals or providers approved by the board for making the assessments and shall describe the basis for their determination.

The board may reinstate a certificate suspended under this division after that demonstration and after the individual has entered into a written consent agreement.

When the impaired practitioner resumes practice, the board shall require continued monitoring of the individual. The monitoring shall include, but not be limited to, compliance with the written consent agreement entered into before reinstatement or with conditions imposed by board order after a hearing, and, upon termination of the consent agreement, submission to the board for at least two years of annual written progress reports made under penalty of perjury stating whether the individual has maintained sobriety.

(27) A second or subsequent violation of section 4731.66 or 4731.69 of the Revised Code;

(28) Except as provided in division (N) of this section:

(a) Waiving the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the individual's services, otherwise would be required to pay if the waiver is used as an enticement to a patient or group of patients to receive health care services from that individual;

(b) Advertising that the individual will waive the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the individual's services, otherwise would be required to pay.

(29) Failure to use universal blood and body fluid precautions established by rules adopted under section 4731.051 of the Revised Code;

(30) Failure to provide notice to, and receive acknowledgment of the notice from, a patient when required by section 4731.143 of the Revised Code prior to providing nonemergency professional services, or failure to maintain that notice in the patient's file;

(31) Failure of a physician supervising a physician assistant to maintain supervision in accordance with the requirements of Chapter 4730. of the Revised Code and the rules adopted under that chapter;

(32) Failure of a physician or podiatrist to enter into a standard care arrangement with a clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner with whom the physician or podiatrist is in collaboration pursuant to section 4731.27 of the

Revised Code or failure to fulfill the responsibilities of collaboration after entering into a standard care arrangement;

(33) Failure to comply with the terms of a consult agreement entered into with a pharmacist pursuant to section 4729.39 of the Revised Code;

(34) Failure to cooperate in an investigation conducted by the board under division (F) of this section, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board at a deposition or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue;

(35) Failure to supervise an acupuncturist in accordance with Chapter 4762. of the Revised Code and the board's rules for supervision of an acupuncturist;

(36) Failure to supervise an anesthesiologist assistant in accordance with Chapter 4760. of the Revised Code and the board's rules for supervision of an anesthesiologist assistant;

(37) Assisting suicide as defined in section 3795.01 of the Revised Code;

(38) Failure to comply with the requirements of section 2317.561 of the Revised Code;

(39) Failure to supervise a radiologist assistant in accordance with Chapter 4774. of the Revised Code and the board's rules for supervision of radiologist assistants;

(40) Performing or inducing an abortion at an office or facility with knowledge that the office or facility fails to post the notice required under section 3701.791 of the Revised Code.

(C) Disciplinary actions taken by the board under divisions (A) and (B) of this section shall be taken pursuant to an adjudication under Chapter 119. of the Revised Code, except that in lieu of an adjudication, the board may enter into a consent agreement with an individual to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by an affirmative vote of not fewer than six members of the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no force or effect.

If the board takes disciplinary action against an individual under division (B) of this section for a second or subsequent plea of guilty to, or judicial finding of guilt of, a violation of section 2919.123 of the Revised Code, the disciplinary action shall consist of a suspension of the individual's certificate to practice for a period of at least one year or, if determined appropriate by the board, a more serious sanction involving the

individual's certificate to practice. Any consent agreement entered into under this division with an individual that pertains to a second or subsequent plea of guilty to, or judicial finding of guilt of, a violation of that section shall provide for a suspension of the individual's certificate to practice for a period of at least one year or, if determined appropriate by the board, a more serious sanction involving the individual's certificate to practice.

(D) For purposes of divisions (B)(10), (12), and (14) of this section, the commission of the act may be established by a finding by the board, pursuant to an adjudication under Chapter 119. of the Revised Code, that the individual committed the act. The board does not have jurisdiction under those divisions if the trial court renders a final judgment in the individual's favor and that judgment is based upon an adjudication on the merits. The board has jurisdiction under those divisions if the trial court issues an order of dismissal upon technical or procedural grounds.

(E) The sealing of conviction records by any court shall have no effect upon a prior board order entered under this section or upon the board's jurisdiction to take action under this section if, based upon a plea of guilty, a judicial finding of guilt, or a judicial finding of eligibility for intervention in lieu of conviction, the board issued a notice of opportunity for a hearing prior to the court's order to seal the records. The board shall not be required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

(F)(1) The board shall investigate evidence that appears to show that a person has violated any provision of this chapter or any rule adopted under it. Any person may report to the board in a signed writing any information that the person may have that appears to show a violation of any provision of this chapter or any rule adopted under it. In the absence of bad faith, any person who reports information of that nature or who testifies before the board in any adjudication conducted under Chapter 119. of the Revised Code shall not be liable in damages in a civil action as a result of the report or testimony. Each complaint or allegation of a violation received by the board shall be assigned a case number and shall be recorded by the board.

(2) Investigations of alleged violations of this chapter or any rule adopted under it shall be supervised by the supervising member elected by the board in accordance with section 4731.02 of the Revised Code and by the secretary as provided in section 4731.39 of the Revised Code. The president may designate another member of the board to supervise the investigation in place of the supervising member. No member of the board who supervises the investigation of a case shall participate in further adjudication of the case.

(3) In investigating a possible violation of this chapter or any rule adopted under this chapter, the board may administer oaths, order the taking of depositions, issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records, documents, and testimony, except that a subpoena for patient record information shall not be issued without consultation with the attorney general's office and approval of the secretary and supervising member of the board. Before issuance of a

subpoena for patient record information, the secretary and supervising member shall determine whether there is probable cause to believe that the complaint filed alleges a violation of this chapter or any rule adopted under it and that the records sought are relevant to the alleged violation and material to the investigation. The subpoena may apply only to records that cover a reasonable period of time surrounding the alleged violation.

On failure to comply with any subpoena issued by the board and after reasonable notice to the person being subpoenaed, the board may move for an order compelling the production of persons or records pursuant to the Rules of Civil Procedure.

A subpoena issued by the board may be served by a sheriff, the sheriff's deputy, or a board employee designated by the board. Service of a subpoena issued by the board may be made by delivering a copy of the subpoena to the person named therein, reading it to the person, or leaving it at the person's usual place of residence. When the person being served is a person whose practice is authorized by this chapter, service of the subpoena may be made by certified mail, restricted delivery, return receipt requested, and the subpoena shall be deemed served on the date delivery is made or the date the person refuses to accept delivery.

A sheriff's deputy who serves a subpoena shall receive the same fees as a sheriff. Each witness who appears before the board in obedience to a subpoena shall receive the fees and mileage provided for under section 119.094 of the Revised Code.

(4) All hearings and investigations of the board shall be considered civil actions for the purposes of section 2305.252 of the Revised Code.

(5) Information received by the board pursuant to an investigation is confidential and not subject to discovery in any civil action.

The board shall conduct all investigations and proceedings in a manner that protects the confidentiality of patients and persons who file complaints with the board. The board shall not make public the names or any other identifying information about patients or complainants unless proper consent is given or, in the case of a patient, a waiver of the patient privilege exists under division (B) of section 2317.02 of the Revised Code, except that consent or a waiver of that nature is not required if the board possesses reliable and substantial evidence that no bona fide physician-patient relationship exists.

The board may share any information it receives pursuant to an investigation, including patient records and patient record information, with law enforcement agencies, other licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of statutes or administrative rules. An agency or board that receives the information shall comply with the same requirements regarding confidentiality as those with which the state medical board must comply, notwithstanding any conflicting provision of the Revised Code or procedure of the agency or board that applies when it is dealing with other information in its possession. In a judicial proceeding, the information may be admitted into evidence only in

accordance with the Rules of Evidence, but the court shall require that appropriate measures are taken to ensure that confidentiality is maintained with respect to any part of the information that contains names or other identifying information about patients or complainants whose confidentiality was protected by the state medical board when the information was in the board's possession. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(6) On a quarterly basis, the board shall prepare a report that documents the disposition of all cases during the preceding three months. The report shall contain the following information for each case with which the board has completed its activities:

- (a) The case number assigned to the complaint or alleged violation;
- (b) The type of certificate to practice, if any, held by the individual against whom the complaint is directed;
- (c) A description of the allegations contained in the complaint;
- (d) The disposition of the case.

The report shall state how many cases are still pending and shall be prepared in a manner that protects the identity of each person involved in each case. The report shall be a public record under section 149.43 of the Revised Code.

(G) If the secretary and supervising member determine that there is clear and convincing evidence that an individual has violated division (B) of this section and that the individual's continued practice presents a danger of immediate and serious harm to the public, they may recommend that the board suspend the individual's certificate to practice without a prior hearing. Written allegations shall be prepared for consideration by the board.

The board, upon review of those allegations and by an affirmative vote of not fewer than six of its members, excluding the secretary and supervising member, may suspend a certificate without a prior hearing. A telephone conference call may be utilized for reviewing the allegations and taking the vote on the summary suspension.

The board shall issue a written order of suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. The order shall not be subject to suspension by the court during pendency of any appeal filed under section 119.12 of the Revised Code. If the individual subject to the summary suspension requests an adjudicatory hearing by the board, the date set for the hearing shall be within fifteen days, but not earlier than seven days, after the individual requests the hearing, unless otherwise agreed to by both the board and the individual.

Any summary suspension imposed under this division shall remain in effect, unless reversed on appeal, until a final adjudicative order issued by the board pursuant to this

section and Chapter 119. of the Revised Code becomes effective. The board shall issue its final adjudicative order within seventy-five days after completion of its hearing. A failure to issue the order within seventy-five days shall result in dissolution of the summary suspension order but shall not invalidate any subsequent, final adjudicative order.

(H) If the board takes action under division (B)(9), (11), or (13) of this section and the judicial finding of guilt, guilty plea, or judicial finding of eligibility for intervention in lieu of conviction is overturned on appeal, upon exhaustion of the criminal appeal, a petition for reconsideration of the order may be filed with the board along with appropriate court documents. Upon receipt of a petition of that nature and supporting court documents, the board shall reinstate the individual's certificate to practice. The board may then hold an adjudication under Chapter 119. of the Revised Code to determine whether the individual committed the act in question. Notice of an opportunity for a hearing shall be given in accordance with Chapter 119. of the Revised Code. If the board finds, pursuant to an adjudication held under this division, that the individual committed the act or if no hearing is requested, the board may order any of the sanctions identified under division (B) of this section.

(I) The certificate to practice issued to an individual under this chapter and the individual's practice in this state are automatically suspended as of the date of the individual's second or subsequent plea of guilty to, or judicial finding of guilt of, a violation of section 2919.123 of the Revised Code, or the date the individual pleads guilty to, is found by a judge or jury to be guilty of, or is subject to a judicial finding of eligibility for intervention in lieu of conviction in this state or treatment or intervention in lieu of conviction in another jurisdiction for any of the following criminal offenses in this state or a substantially equivalent criminal offense in another jurisdiction: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary. Continued practice after suspension shall be considered practicing without a certificate.

The board shall notify the individual subject to the suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. If an individual whose certificate is automatically suspended under this division fails to make a timely request for an adjudication under Chapter 119. of the Revised Code, the board shall do whichever of the following is applicable:

(1) If the automatic suspension under this division is for a second or subsequent plea of guilty to, or judicial finding of guilt of, a violation of section 2919.123 of the Revised Code, the board shall enter an order suspending the individual's certificate to practice for a period of at least one year or, if determined appropriate by the board, imposing a more serious sanction involving the individual's certificate to practice.

(2) In all circumstances in which division (I)(1) of this section does not apply, enter a final order permanently revoking the individual's certificate to practice.

(J) If the board is required by Chapter 119. of the Revised Code to give notice of an opportunity for a hearing and if the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings. In that final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

(K) Any action taken by the board under division (B) of this section resulting in a suspension from practice shall be accompanied by a written statement of the conditions under which the individual's certificate to practice may be reinstated. The board shall adopt rules governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section requires an affirmative vote of not fewer than six members of the board.

(L) When the board refuses to grant a certificate to an applicant, revokes an individual's certificate to practice, refuses to register an applicant, or refuses to reinstate an individual's certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate.

(M) Notwithstanding any other provision of the Revised Code, all of the following apply:

(1) The surrender of a certificate issued under this chapter shall not be effective unless or until accepted by the board. Reinstatement of a certificate surrendered to the board requires an affirmative vote of not fewer than six members of the board.

(2) An application for a certificate made under the provisions of this chapter may not be withdrawn without approval of the board.

(3) Failure by an individual to renew a certificate of registration in accordance with this chapter shall not remove or limit the board's jurisdiction to take any disciplinary action under this section against the individual.

(N) Sanctions shall not be imposed under division (B)(28) of this section against any person who waives deductibles and copayments as follows:

(1) In compliance with the health benefit plan that expressly allows such a practice. Waiver of the deductibles or copayments shall be made only with the full knowledge and consent of the plan purchaser, payer, and third-party administrator. Documentation of the consent shall be made available to the board upon request.

(2) For professional services rendered to any other person authorized to practice pursuant to this chapter, to the extent allowed by this chapter and rules adopted by the board.

(O) Under the board's investigative duties described in this section and subject to division (F) of this section, the board shall develop and implement a quality intervention program designed to improve through remedial education the clinical and communication skills of individuals authorized under this chapter to practice medicine and surgery, osteopathic medicine and surgery, and podiatric medicine and surgery. In developing and implementing the quality intervention program, the board may do all of the following:

- (1) Offer in appropriate cases as determined by the board an educational and assessment program pursuant to an investigation the board conducts under this section;
- (2) Select providers of educational and assessment services, including a quality intervention program panel of case reviewers;
- (3) Make referrals to educational and assessment service providers and approve individual educational programs recommended by those providers. The board shall monitor the progress of each individual undertaking a recommended individual educational program.
- (4) Determine what constitutes successful completion of an individual educational program and require further monitoring of the individual who completed the program or other action that the board determines to be appropriate;
- (5) Adopt rules in accordance with Chapter 119. of the Revised Code to further implement the quality intervention program.

An individual who participates in an individual educational program pursuant to this division shall pay the financial obligations arising from that educational program.

CREDIT(S)

(2008 H 525, eff. 7-1-09; 2008 H 280, eff. 4-7-09; 2008 S 229, eff. 9-11-08; 2008 H 314, eff. 6-20-08; 2007 H 119, eff. 9-29-07; 2006 H 530, eff. 6-30-06; 2004 S 80, eff. 4-7-05; 2004 H 126, eff. 9-23-04; 2002 S 179, eff. 4-9-03; 2002 H 474, eff. 3-24-03; 2000 H 585, eff. 4-10-01; 2000 H 448, eff. 10-5-00; 2000 S 278, eff. 5-31-00; 2000 H 341, eff. 8-10-00; 2000 H 241, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 S 56, eff. 9-15-99; 1998 H 606, eff. 3-9-99; 1998 S 66, eff. 7-22-98; 1997 S 31, eff. 4-10-98; 1997 H 215, eff. 9-29-97; 1996 S 259, eff. 11-6-96; 1996 S 154, eff. 9-10-96; 1995 S 143, eff. 3-5-96; 1995 H 144, eff. 11-21-95; 1994 H 391, eff. 7-21-94; 1994 S 279, eff. 10-20-94; 1992 H 478, eff. 1-14-93; 1992 H 419; 1991 H 108; 1990 H 615, H 208; 1986 H 769, H 428; 1985 H 319; 1983 H 109; 1982 H 317; 1978 S 157; 1977 H 1, H 725; 1976 H 1426; 1975 S 75, H 682; 1974 H 989; 132 v H 418; 1953 H 1; GC 1275)

R.C. § 4734.31

Baldwin's Ohio Revised Code Annotated Currentness
Title XLVII. Occupations--Professions (Refs & Annos)

*Chapter 4734. Chiropractors (Refs & Annos)

*Disciplinary Proceedings; Enforcement

⇒**4734.31 Disciplinary proceedings**

(A) The state chiropractic board may take any of the actions specified in division (B) of this section against an individual who has applied for or holds a license to practice chiropractic in this state if any of the reasons specified in division (C) of this section for taking action against an individual are applicable. Except as provided in division (D) of this section, actions taken against an individual shall be taken in accordance with Chapter 119. of the Revised Code. The board may specify that any action it takes is a permanent action. The board's authority to take action against an individual is not removed or limited by the individual's failure to renew a license.

(B) In its imposition of sanctions against an individual, the board may do any of the following:

- (1) Refuse to issue, renew, restore, or reinstate a license to practice chiropractic or a certificate to practice acupuncture;
- (2) Reprimand or censure a license holder;
- (3) Place limits, restrictions, or probationary conditions on a license holder's practice;
- (4) Impose a civil fine of not more than five thousand dollars according to a schedule of fines specified in rules that the board shall adopt in accordance with Chapter 119. of the Revised Code.
- (5) Suspend a license to practice chiropractic or a certificate to practice acupuncture for a limited or indefinite period;
- (6) Revoke a license to practice chiropractic or a certificate to practice acupuncture.

(C) The board may take the actions specified in division (B) of this section for any of the following reasons:

- (1) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony in any jurisdiction, in which case a certified copy of the court record shall be conclusive evidence of the conviction;
- (2) Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed;

- (3) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude, as determined by the board, in which case a certified copy of the court record shall be conclusive evidence of the matter;
- (4) Commission of an act involving moral turpitude that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;
- (5) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice, in which case a certified copy of the court record shall be conclusive evidence of the matter;
- (6) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;
- (7) A violation or attempted violation of this chapter or the rules adopted under it governing the practice of chiropractic and the practice of acupuncture by a chiropractor licensed under this chapter;
- (8) Failure to cooperate in an investigation conducted by the board, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board at a deposition or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if the board or a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue;
- (9) Engaging in an ongoing professional relationship with a person or entity that violates any provision of this chapter or the rules adopted under it, unless the chiropractor makes a good faith effort to have the person or entity comply with the provisions;
- (10) Retaliating against a chiropractor for the chiropractor's reporting to the board or any other agency with jurisdiction any violation of the law or for cooperating with the board of another agency in the investigation of any violation of the law;
- (11) Aiding, abetting, assisting, counseling, or conspiring with any person in that person's violation of any provision of this chapter or the rules adopted under it, including the practice of chiropractic without a license, the practice of acupuncture without a certificate, or aiding, abetting, assisting, counseling, or conspiring with any person in that person's unlicensed practice of any other health care profession that has licensing requirements;
- (12) With respect to a report or record that is made, filed, or signed in connection with the practice of chiropractic or acupuncture, knowingly making or filing a report or record that is false, intentionally or negligently failing to file a report or record required

by federal, state, or local law or willfully impeding or obstructing the required filing, or inducing another person to engage in any such acts;

(13) Making a false, fraudulent, or deceitful statement to the board or any agent of the board during any investigation or other official proceeding conducted by the board under this chapter or in any filing that must be submitted to the board;

(14) Attempting to secure a license to practice chiropractic or certificate to practice acupuncture or to corrupt the outcome of an official board proceeding through bribery or any other improper means;

(15) Willfully obstructing or hindering the board or any agent of the board in the discharge of the board's duties;

(16) Habitually using drugs or intoxicants to the extent that the person is rendered unfit for the practice of chiropractic or acupuncture;

(17) Inability to practice chiropractic or acupuncture according to acceptable and prevailing standards of care by reason of chemical dependency, mental illness, or physical illness, including conditions in which physical deterioration has adversely affected the person's cognitive, motor, or perceptive skills and conditions in which a chiropractor's continued practice may pose a danger to the chiropractor or the public;

(18) Any act constituting gross immorality relative to the person's practice of chiropractic or acupuncture, including acts involving sexual abuse, sexual misconduct, or sexual exploitation;

(19) Exploiting a patient for personal or financial gain;

(20) Failing to maintain proper, accurate, and legible records in the English language documenting each patient's care, including, as appropriate, records of the following: dates of treatment, services rendered, examinations, tests, x-ray reports, referrals, and the diagnosis or clinical impression and clinical treatment plan provided to the patient;

(21) Except as otherwise required by the board or by law, disclosing patient information gained during the chiropractor's professional relationship with a patient without obtaining the patient's authorization for the disclosure;

(22) Commission of willful or gross malpractice, or willful or gross neglect, in the practice of chiropractic or acupuncture;

(23) Failing to perform or negligently performing an act recognized by the board as a general duty or the exercise of due care in the practice of chiropractic or acupuncture, regardless of whether injury results to a patient from the failure to perform or negligent performance of the act;

- (24) Engaging in any conduct or practice that impairs or may impair the ability to practice chiropractic or acupuncture safely and skillfully;
- (25) Practicing, or claiming to be capable of practicing, beyond the scope of the practice of chiropractic or acupuncture as established under this chapter and the rules adopted under this chapter;
- (26) Accepting and performing professional responsibilities as a chiropractor or chiropractor with a certificate to practice acupuncture when not qualified to perform those responsibilities, if the person knew or had reason to know that the person was not qualified to perform them;
- (27) Delegating any of the professional responsibilities of a chiropractor or chiropractor with a certificate to practice acupuncture to an employee or other individual when the delegating chiropractor knows or had reason to know that the employee or other individual is not qualified by training, experience, or professional licensure to perform the responsibilities;
- (28) Delegating any of the professional responsibilities of a chiropractor or chiropractor with a certificate to practice acupuncture to an employee or other individual in a negligent manner or failing to provide proper supervision of the employee or other individual to whom the responsibilities are delegated;
- (29) Failing to refer a patient to another health care practitioner for consultation or treatment when the chiropractor knows or has reason to know that the referral is in the best interest of the patient;
- (30) Obtaining or attempting to obtain any fee or other advantage by fraud or misrepresentation;
- (31) Making misleading, deceptive, false, or fraudulent representations in the practice of chiropractic or acupuncture;
- (32) Being guilty of false, fraudulent, deceptive, or misleading advertising or other solicitations for patients or knowingly having professional connection with any person that advertises or solicits for patients in such a manner;
- (33) Violation of a provision of any code of ethics established or adopted by the board under section 4734.16 of the Revised Code;
- (34) Failing to meet the examination requirements for receipt of a license specified under section 4734.20 of the Revised Code;
- (35) Actions taken for any reason, other than nonpayment of fees, by the chiropractic or acupuncture licensing authority of another state or country;

(36) Failing to maintain clean and sanitary conditions at the clinic, office, or other place in which chiropractic services or acupuncture services are provided;

(37) Except as provided in division (G) of this section:

(a) Waiving the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the chiropractor's services, otherwise would be required to pay if the waiver is used as an enticement to a patient or group of patients to receive health care services from that chiropractor;

(b) Advertising that the chiropractor will waive the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the chiropractor's services, otherwise would be required to pay.

(38) Failure to supervise an acupuncturist in accordance with the provisions of section 4762.11 of the Revised Code that are applicable to the supervising chiropractor of an acupuncturist.

(D) The adjudication requirements of Chapter 119. of the Revised Code apply to the board when taking actions against an individual under this section, except as follows:

(1) An applicant is not entitled to an adjudication for failing to meet the conditions specified under section 4734.20 of the Revised Code for receipt of a license that involve the board's examination on jurisprudence or the examinations of the national board of chiropractic examiners.

(2) A person is not entitled to an adjudication if the person fails to make a timely request for a hearing, in accordance with Chapter 119. of the Revised Code.

(3) In lieu of an adjudication, the board may accept the surrender of a license to practice chiropractic or certificate to practice acupuncture from a chiropractor.

(4) In lieu of an adjudication, the board may enter into a consent agreement with an individual to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no force or effect.

(E) This section does not require the board to hire, contract with, or retain the services of an expert witness when the board takes action against a chiropractor concerning compliance with acceptable and prevailing standards of care in the practice of chiropractic or acupuncture. As part of an action taken concerning compliance with acceptable and prevailing standards of care, the board may rely on the knowledge of its members for purposes of making a determination of compliance, notwithstanding any

expert testimony presented by the chiropractor that contradicts the knowledge and opinions of the members of the board.

(F) The sealing of conviction records by a court shall have no effect on a prior board order entered under this section or on the board's jurisdiction to take action under this section if, based on a plea of guilty, a judicial finding of guilt, or a judicial finding of eligibility for intervention in lieu of conviction, the board issued a notice of opportunity for a hearing prior to the court's order to seal the records. The board shall not be required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

(G) Actions shall not be taken pursuant to division (C)(37) of this section against any chiropractor who waives deductibles and copayments as follows:

(1) In compliance with the health benefit plan that expressly allows a practice of that nature. Waiver of the deductibles or copayments shall be made only with the full knowledge and consent of the plan purchaser, payer, and third-party administrator. Documentation of the consent shall be made available to the board upon request.

(2) For professional services rendered to any other person licensed pursuant to this chapter, to the extent allowed by this chapter and the rules of the board.

CREDIT(S)

(2007 S 33, eff. 8-22-07; 2000 H 506, eff. 4-10-01)

.C. § 4760.13

Baldwin's Ohio Revised Code Annotated Currentness

Title XLVII. Occupations--Professions (Refs & Annos)

Chapter 4760. Anesthesiologist Assistants (Refs & Annos)

4760.13 Revocation or suspension of certificate; disciplinary proceedings; consent to examination; reinstatement of certificate; permanent action by board

(A) The state medical board, by an affirmative vote of not fewer than six members, may revoke or may refuse to grant a certificate of registration as an anesthesiologist assistant to a person found by the board to have committed fraud, misrepresentation, or deception in applying for or securing the certificate.

(B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate of registration as an anesthesiologist assistant, refuse to issue a certificate to an applicant, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for any of the following reasons:

- (1) Permitting the holder's name or certificate to be used by another person;
- (2) Failure to comply with the requirements of this chapter, Chapter 4731. of the Revised Code, or any rules adopted by the board;
- (3) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this chapter, Chapter 4731. of the Revised Code, or the rules adopted by the board;
- (4) A departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established;
- (5) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including physical deterioration that adversely affects cognitive, motor, or perceptive skills;
- (6) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice;
- (7) Willfully betraying a professional confidence;
- (8) Making a false, fraudulent, deceptive, or misleading statement in securing or attempting to secure a certificate of registration to practice as an anesthesiologist assistant.

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

(9) The obtaining of, or attempting to obtain, money or a thing of value by fraudulent misrepresentations in the course of practice;

(10) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony;

(11) Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed;

(12) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;

(13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude;

(14) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(15) Commission of an act involving moral turpitude that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(16) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for violating any state or federal law regulating the possession, distribution, or use of any drug, including trafficking in drugs;

(17) Any of the following actions taken by the state agency responsible for regulating the practice of anesthesiologist assistants in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand;

(18) Violation of the conditions placed by the board on a certificate of registration;

(19) Failure to use universal blood and body fluid precautions established by rules adopted under section 4731.051 of the Revised Code;

(20) Failure to cooperate in an investigation conducted by the board under section 4760.14 of the Revised Code, including failure to comply with a subpoena or order

issued by the board or failure to answer truthfully a question presented by the board at a deposition or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue;

(21) Failure to comply with any code of ethics established by the national commission for the certification of anesthesiologist assistants;

(22) Failure to notify the state medical board of the revocation or failure to maintain certification from the national commission for certification of anesthesiologist assistants.

(C) Disciplinary actions taken by the board under divisions (A) and (B) of this section shall be taken pursuant to an adjudication under Chapter 119. of the Revised Code, except that in lieu of an adjudication, the board may enter into a consent agreement with an anesthesiologist assistant or applicant to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by an affirmative vote of not fewer than six members of the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no force or effect.

(D) For purposes of divisions (B)(11), (14), and (15) of this section, the commission of the act may be established by a finding by the board, pursuant to an adjudication under Chapter 119. of the Revised Code, that the applicant or certificate holder committed the act in question. The board shall have no jurisdiction under these divisions in cases where the trial court renders a final judgment in the certificate holder's favor and that judgment is based upon an adjudication on the merits. The board shall have jurisdiction under these divisions in cases where the trial court issues an order of dismissal on technical or procedural grounds.

(E) The sealing of conviction records by any court shall have no effect on a prior board order entered under the provisions of this section or on the board's jurisdiction to take action under the provisions of this section if, based upon a plea of guilty, a judicial finding of guilt, or a judicial finding of eligibility for intervention in lieu of conviction, the board issued a notice of opportunity for a hearing prior to the court's order to seal the records. The board shall not be required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

(F) For purposes of this division, any individual who holds a certificate of registration issued under this chapter, or applies for a certificate of registration, shall be deemed to have given consent to submit to a mental or physical examination when directed to do so in writing by the board and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(1) In enforcing division (B)(5) of this section, the board, on a showing of a possible violation, may compel any individual who holds a certificate of registration issued under this chapter or who has applied for a certificate of registration pursuant to this chapter to submit to a mental or physical examination, or both. A physical examination may include an HIV test. The expense of the examination is the responsibility of the individual compelled to be examined. Failure to submit to a mental or physical examination or consent to an HIV test ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds an anesthesiologist assistant unable to practice because of the reasons set forth in division (B)(5) of this section, the board shall require the anesthesiologist assistant to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for an initial, continued, reinstated, or renewed certificate of registration. An individual affected by this division shall be afforded an opportunity to demonstrate to the board the ability to resume practicing in compliance with acceptable and prevailing standards of care.

(2) For purposes of division (B)(6) of this section, if the board has reason to believe that any individual who holds a certificate of registration issued under this chapter or any applicant for a certificate of registration suffers such impairment, the board may compel the individual to submit to a mental or physical examination, or both. The expense of the examination is the responsibility of the individual compelled to be examined. Any mental or physical examination required under this division shall be undertaken by a treatment provider or physician qualified to conduct such examination and chosen by the board.

Failure to submit to a mental or physical examination ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board determines that the individual's ability to practice is impaired, the board shall suspend the individual's certificate or deny the individual's application and shall require the individual, as a condition for an initial, continued, reinstated, or renewed certificate of registration, to submit to treatment.

Before being eligible to apply for reinstatement of a certificate suspended under this division, the anesthesiologist assistant shall demonstrate to the board the ability to resume practice in compliance with acceptable and prevailing standards of care. The demonstration shall include the following:

(a) Certification from a treatment provider approved under section 4731.25 of the Revised Code that the individual has successfully completed any required inpatient treatment;

(b) Evidence of continuing full compliance with an aftercare contract or consent agreement;

(c) Two written reports indicating that the individual's ability to practice has been assessed and that the individual has been found capable of practicing according to acceptable and prevailing standards of care. The reports shall be made by individuals or providers approved by the board for making such assessments and shall describe the basis for their determination.

The board may reinstate a certificate suspended under this division after such demonstration and after the individual has entered into a written consent agreement.

When the impaired anesthesiologist assistant resumes practice, the board shall require continued monitoring of the anesthesiologist assistant. The monitoring shall include monitoring of compliance with the written consent agreement entered into before reinstatement or with conditions imposed by board order after a hearing, and, on termination of the consent agreement, submission to the board for at least two years of annual written progress reports made under penalty of falsification stating whether the anesthesiologist assistant has maintained sobriety.

(G) If the secretary and supervising member determine that there is clear and convincing evidence that an anesthesiologist assistant has violated division (B) of this section and that the individual's continued practice presents a danger of immediate and serious harm to the public, they may recommend that the board suspend the individual's certificate or registration without a prior hearing. Written allegations shall be prepared for consideration by the board.

The board, on review of the allegations and by an affirmative vote of not fewer than six of its members, excluding the secretary and supervising member, may suspend a certificate without a prior hearing. A telephone conference call may be utilized for reviewing the allegations and taking the vote on the summary suspension.

The board shall issue a written order of suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. The order shall not be subject to suspension by the court during pendency of any appeal filed under section 119.12 of the Revised Code. If the anesthesiologist assistant requests an adjudicatory hearing by the board, the date set for the hearing shall be within fifteen days, but not earlier than seven days, after the anesthesiologist assistant requests the hearing, unless otherwise agreed to by both the board and the certificate holder.

A summary suspension imposed under this division shall remain in effect, unless reversed on appeal, until a final adjudicative order issued by the board pursuant to this section and Chapter 119. of the Revised Code becomes effective. The board shall issue its final adjudicative order within sixty days after completion of its hearing. Failure to issue the order within sixty days shall result in dissolution of the summary suspension order, but shall not invalidate any subsequent, final adjudicative order.

(H) If the board takes action under division (B)(11), (13), or (14) of this section, and the judicial finding of guilt, guilty plea, or judicial finding of eligibility for intervention in lieu of conviction is overturned on appeal, on exhaustion of the criminal appeal, a

petition for reconsideration of the order may be filed with the board along with appropriate court documents. On receipt of a petition and supporting court documents, the board shall reinstate the certificate of registration. The board may then hold an adjudication under Chapter 119. of the Revised Code to determine whether the individual committed the act in question. Notice of opportunity for hearing shall be given in accordance with Chapter 119. of the Revised Code. If the board finds, pursuant to an adjudication held under this division, that the individual committed the act, or if no hearing is requested, it may order any of the sanctions specified in division (B) of this section.

(I) The certificate of registration of an anesthesiologist assistant and the assistant's practice in this state are automatically suspended as of the date the anesthesiologist assistant pleads guilty to, is found by a judge or jury to be guilty of, or is subject to a judicial finding of eligibility for intervention in lieu of conviction in this state or treatment of intervention in lieu of conviction in another jurisdiction for any of the following criminal offenses in this state or a substantially equivalent criminal offense in another jurisdiction: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary. Continued practice after the suspension shall be considered practicing without a certificate.

The board shall notify the individual subject to the suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. If an individual whose certificate is suspended under this division fails to make a timely request for an adjudication under Chapter 119. of the Revised Code, the board shall enter a final order permanently revoking the individual's certificate of registration.

(J) In any instance in which the board is required by Chapter 119. of the Revised Code to give notice of opportunity for hearing and the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings. In the final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

(K) Any action taken by the board under division (B) of this section resulting in a suspension shall be accompanied by a written statement of the conditions under which the anesthesiologist assistant's certificate may be reinstated. The board shall adopt rules in accordance with Chapter 119. of the Revised Code governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section requires an affirmative vote of not fewer than six members of the board.

(L) When 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.

(M) Notwithstanding any other provision of the Revised Code, all of the following apply:

(1) The surrender of a certificate of registration issued under this chapter is not effective unless or until accepted by the board. Reinstatement of a certificate surrendered to the board requires an affirmative vote of not fewer than six members of the board.

(2) An application made under this chapter for a certificate of registration may not be withdrawn without approval of the board.

(3) Failure by an individual to renew a certificate of registration in accordance with section 4760.06 of the Revised Code shall not remove or limit the board's jurisdiction to take disciplinary action under this section against the individual.

CREDIT(S)

(2000 S 278, eff. 5-31-00)

R.C. § 4761.09

Baldwin's Ohio Revised Code Annotated Currentness
Title XLVII. Occupations--Professions (Refs & Annos)

Chapter 4761. Respiratory Care (Refs & Annos)

4761.09 Disciplinary action

(A) The Ohio respiratory care board may refuse to issue or renew a license or a limited permit, may issue a reprimand, may suspend or permanently revoke a license or limited permit, or may place a license or limited permit holder on probation, on any of the following grounds:

(1) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for an offense involving moral turpitude or of a felony, in which case a certified copy of the court record shall be conclusive evidence of the matter;

(2) Violating any provision of this chapter or an order or rule of the board;

(3) Assisting another person in that person's violation of any provision of this chapter or an order or rule of the board;

(4) Obtaining a license or limited permit by means of fraud, false or misleading representation, or concealment of material facts or making any other material misrepresentation to the board;

(5) Being guilty of negligence or gross misconduct in the practice of respiratory care;

(6) Violating the standards of ethical conduct adopted by the board, in the practice of respiratory care;

(7) Engaging in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public;

(8) Using any dangerous drug, as defined in section 4729.01 of the Revised Code, or alcohol to the extent that the use impairs the ability to practice respiratory care at an acceptable level of competency;

(9) Practicing respiratory care while mentally incompetent;

(10) Accepting commissions, rebates, or other forms of remuneration for patient referrals;

(11) Practicing in an area of respiratory care for which the person is clearly untrained or incompetent or practicing in a manner that conflicts with section 4761.17 of the Revised Code;

(12) Employing, directing, or supervising a person who is not authorized to practice respiratory care under this chapter in the performance of respiratory care procedures;

(13) Misrepresenting educational attainments or authorized functions for the purpose of obtaining some benefit related to the practice of respiratory care;

(14) Assisting suicide as defined in section 3795.01 of the Revised Code.

Before the board may take any action under this section, other than issuance of a summary suspension order under division (C) of this section, the executive director of the board shall prepare and file written charges with the board. Disciplinary actions taken by the board under this section shall be taken pursuant to an adjudication under Chapter 119. of the Revised Code, except that in lieu of an adjudication, the board may enter into a consent agreement to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no effect.

(B) If the board orders a license or limited permit holder placed on probation, the order shall be accompanied by a written statement of the conditions under which the person may be restored to practice.

The person may reapply to the board for original issuance of a license after one year following the date the license was denied.

A person may apply to the board for the reinstatement of a license or limited permit after one year following the date of suspension or refusal to renew. The board may accept or refuse the application for reinstatement and may require that the applicant pass a reexamination as a condition of eligibility for reinstatement.

(C) If the president and secretary of the board determine that there is clear and convincing evidence that a license or limited permit holder has committed an act that is grounds for board action under division (A) of this section and that continued practice by the license or permit holder presents a danger of immediate and serious harm to the public, the president and secretary may recommend that the board suspend the license or limited permit without a prior hearing. The president and secretary shall submit in writing to the board the allegations causing them to recommend the suspension.

On review of the allegations, the board, by a vote of not less than seven of its members, may suspend a license or limited permit without a prior hearing. The board may review the allegations and vote on the suspension by a telephone conference call.

If the board votes to suspend a license or limited permit under this division, the board shall issue a written order of summary suspension to the license or limited permit holder in accordance with section 119.07 of the Revised Code. If the license or limited permit holder requests a hearing by the board, the board shall conduct the hearing in

accordance with Chapter 119. of the Revised Code. Notwithstanding section 119.12 of the Revised Code, a court of common pleas shall not grant a suspension of the board's order of summary suspension pending determination of an appeal filed under that section.

Any order of summary suspension issued under this division shall remain in effect until a final adjudication order issued by the board pursuant to division (A) of this section becomes effective. The board shall issue its final adjudication order regarding an order of summary suspension issued under this division not later than sixty days after completion of its hearing. Failure to issue the order within sixty days shall result in immediate dissolution of the suspension order, but shall not invalidate any subsequent, final adjudication order.

CREDIT(S)

(2004 H 105, eff. 12-15-04; 2002 H 474, eff. 3-24-03; 2000 H 505, eff. 10-27-00; 1995 S 143, eff. 3-5-96; 1991 H 322, § 5, eff. 3-2-92; 1988 S 300, § 1, 5)

R.C. § 4762.13

Baldwin's Ohio Revised Code Annotated Currentness
Title XLVII. Occupations--Professions (Refs & Annos)

Chapter 4762. Acupuncturists (Refs & Annos)

**4762.13 Revocation, refusal to grant, or suspension of certificate;
disciplinary actions; reinstatement of certificate**

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

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

- (1) Permitting the holder's name or certificate to be used by another person;
- (2) Failure to comply with the requirements of this chapter, Chapter 4731. of the Revised Code, or any rules adopted by the board;
- (3) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this chapter, Chapter 4731. of the Revised Code, or the rules adopted by the board;
- (4) A departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established;
- (5) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including physical deterioration that adversely affects cognitive, motor, or perceptive skills;
- (6) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice;
- (7) Willfully betraying a professional confidence;
- (8) Making a false, fraudulent, deceptive, or misleading statement in soliciting or advertising for patients or in securing or attempting to secure a certificate to practice as an acupuncturist.

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

(9) Representing, with the purpose of obtaining compensation or other advantage personally or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(10) The obtaining of, or attempting to obtain, money or a thing of value by fraudulent misrepresentations in the course of practice;

(11) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony;

(12) Commission of an act that constitutes a felony in this state, regardless of the jurisdiction in which the act was committed;

(13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;

(14) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude;

(15) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(16) Commission of an act involving moral turpitude that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed;

(17) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for violating any state or federal law regulating the possession, distribution, or use of any drug, including trafficking in drugs;

(18) Any of the following actions taken by the state agency responsible for regulating the practice of acupuncture in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand;

(19) Violation of the conditions placed by the board on a certificate to practice as an acupuncturist;

(20) Failure to use universal blood and body fluid precautions established by rules adopted under section 4731.051 of the Revised Code;

(21) Failure to cooperate in an investigation conducted by the board under section 4762.14 of the Revised Code, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board at a deposition or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue;

(22) Failure to comply with the standards of the national certification commission for acupuncture and oriental medicine regarding professional ethics, commitment to patients, commitment to the profession, and commitment to the public;

(23) Failure to have adequate professional liability insurance coverage in accordance with section 4762.22 of the Revised Code.

(C) Disciplinary actions taken by the board under divisions (A) and (B) of this section shall be taken pursuant to an adjudication under Chapter 119. of the Revised Code, except that in lieu of an adjudication, the board may enter into a consent agreement with an acupuncturist or applicant to resolve an allegation of a violation of this chapter or any rule adopted under it. A consent agreement, when ratified by an affirmative vote of not fewer than six members of the board, shall constitute the findings and order of the board with respect to the matter addressed in the agreement. If the board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement shall be of no force or effect.

(D) For purposes of divisions (B)(12), (15), and (16) of this section, the commission of the act may be established by a finding by the board, pursuant to an adjudication under Chapter 119. of the Revised Code, that the applicant or certificate holder committed the act in question. The board shall have no jurisdiction under these divisions in cases where the trial court renders a final judgment in the certificate holder's favor and that judgment is based upon an adjudication on the merits. The board shall have jurisdiction under these divisions in cases where the trial court issues an order of dismissal upon technical or procedural grounds.

(E) The sealing of conviction records by any court shall have no effect upon a prior board order entered under the provisions of this section or upon the board's jurisdiction to take action under the provisions of this section if, based upon a plea of guilty, a judicial finding of guilt, or a judicial finding of eligibility for intervention in lieu of conviction, the board issued a notice of opportunity for a hearing prior to the court's order to seal the records. The board shall not be required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

(F) For purposes of this division, any individual who holds a certificate to practice issued under this chapter, or applies for a certificate to practice, shall be deemed to have

given consent to submit to a mental or physical examination when directed to do so in writing by the board and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(1) In enforcing division (B)(5) of this section, the board, upon a showing of a possible violation, may compel any individual who holds a certificate to practice issued under this chapter or who has applied for a certificate pursuant to this chapter to submit to a mental examination, physical examination, including an HIV test, or both a mental and physical examination. The expense of the examination is the responsibility of the individual compelled to be examined. Failure to submit to a mental or physical examination or consent to an HIV test ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds an acupuncturist unable to practice because of the reasons set forth in division (B)(5) of this section, the board shall require the acupuncturist to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for an initial, continued, reinstated, or renewed certificate to practice. An individual affected by this division shall be afforded an opportunity to demonstrate to the board the ability to resume practicing in compliance with acceptable and prevailing standards of care.

(2) For purposes of division (B)(6) of this section, if the board has reason to believe that any individual who holds a certificate to practice issued under this chapter or any applicant for a certificate suffers such impairment, the board may compel the individual to submit to a mental or physical examination, or both. The expense of the examination is the responsibility of the individual compelled to be examined. Any mental or physical examination required under this division shall be undertaken by a treatment provider or physician qualified to conduct such examination and chosen by the board.

Failure to submit to a mental or physical examination ordered by the board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board determines that the individual's ability to practice is impaired, the board shall suspend the individual's certificate or deny the individual's application and shall require the individual, as a condition for an initial, continued, reinstated, or renewed certificate, to submit to treatment.

Before being eligible to apply for reinstatement of a certificate suspended under this division, the acupuncturist shall demonstrate to the board the ability to resume practice in compliance with acceptable and prevailing standards of care. The demonstration shall include the following:

(a) Certification from a treatment provider approved under section 4731.25 of the Revised Code that the individual has successfully completed any required inpatient treatment;

(b) Evidence of continuing full compliance with an aftercare contract or consent agreement;

(c) Two written reports indicating that the individual's ability to practice has been assessed and that the individual has been found capable of practicing according to acceptable and prevailing standards of care. The reports shall be made by individuals or providers approved by the board for making such assessments and shall describe the basis for their determination.

The board may reinstate a certificate suspended under this division after such demonstration and after the individual has entered into a written consent agreement.

When the impaired acupuncturist resumes practice, the board shall require continued monitoring of the acupuncturist. The monitoring shall include monitoring of compliance with the written consent agreement entered into before reinstatement or with conditions imposed by board order after a hearing, and, upon termination of the consent agreement, submission to the board for at least two years of annual written progress reports made under penalty of falsification stating whether the acupuncturist has maintained sobriety.

(G) If the secretary and supervising member determine that there is clear and convincing evidence that an acupuncturist has violated division (B) of this section and that the individual's continued practice presents a danger of immediate and serious harm to the public, they may recommend that the board suspend the individual's certificate to practice without a prior hearing. Written allegations shall be prepared for consideration by the board.

The board, upon review of the allegations and by an affirmative vote of not fewer than six of its members, excluding the secretary and supervising member, may suspend a certificate without a prior hearing. A telephone conference call may be utilized for reviewing the allegations and taking the vote on the summary suspension.

The board shall issue a written order of suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. The order shall not be subject to suspension by the court during pendency of any appeal filed under section 119.12 of the Revised Code. If the acupuncturist requests an adjudicatory hearing by the board, the date set for the hearing shall be within fifteen days, but not earlier than seven days, after the acupuncturist requests the hearing, unless otherwise agreed to by both the board and the certificate holder.

A summary suspension imposed under this division shall remain in effect, unless reversed on appeal, until a final adjudicative order issued by the board pursuant to this section and Chapter 119. of the Revised Code becomes effective. The board shall issue its final adjudicative order within sixty days after completion of its hearing. Failure to issue the order within sixty days shall result in dissolution of the summary suspension order, but shall not invalidate any subsequent, final adjudicative order.

(H) If the board takes action under division (B)(11), (13), or (14) of this section, and the judicial finding of guilt, guilty plea, or judicial finding of eligibility for intervention in lieu of conviction is overturned on appeal, upon exhaustion of the criminal appeal, a petition for reconsideration of the order may be filed with the board along with appropriate court documents. Upon receipt of a petition and supporting court documents, the board shall reinstate the certificate to practice. The board may then hold an adjudication under Chapter 119. of the Revised Code to determine whether the individual committed the act in question. Notice of opportunity for hearing shall be given in accordance with Chapter 119. of the Revised Code. If the board finds, pursuant to an adjudication held under this division, that the individual committed the act, or if no hearing is requested, it may order any of the sanctions specified in division (B) of this section.

(I) The certificate to practice of an acupuncturist and the acupuncturist's practice in this state are automatically suspended as of the date the acupuncturist pleads guilty to, is found by a judge or jury to be guilty of, or is subject to a judicial finding of eligibility for intervention in lieu of conviction in this state or treatment or intervention in lieu of conviction in another jurisdiction for any of the following criminal offenses in this state or a substantially equivalent criminal offense in another jurisdiction: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary. Continued practice after the suspension shall be considered practicing without a certificate.

The board shall notify the individual subject to the suspension by certified mail or in person in accordance with section 119.07 of the Revised Code. If an individual whose certificate is suspended under this division fails to make a timely request for an adjudication under Chapter 119. of the Revised Code, the board shall enter a final order permanently revoking the individual's certificate to practice.

(J) In any instance in which the board is required by Chapter 119. of the Revised Code to give notice of opportunity for hearing and the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings. In the final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

(K) Any action taken by the board under division (B) of this section resulting in a suspension shall be accompanied by a written statement of the conditions under which the acupuncturist's certificate to practice may be reinstated. The board shall adopt rules in accordance with Chapter 119. of the Revised Code governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section requires an affirmative vote of not fewer than six members of the board.

(L) When the board refuses to grant a certificate to practice as an acupuncturist to an applicant, revokes an individual's certificate, refuses to renew a certificate, or refuses to

reinstate an individual's certificate, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a certificate to practice as an acupuncturist and the board shall not accept an application for reinstatement of the certificate or for issuance of a new certificate.

(M) Notwithstanding any other provision of the Revised Code, all of the following apply:

(1) The surrender of a certificate to practice as an acupuncturist issued under this chapter is not effective unless or until accepted by the board. Reinstatement of a certificate surrendered to the board requires an affirmative vote of not fewer than six members of the board.

(2) An application made under this chapter for a certificate may not be withdrawn without approval of the board.

(3) Failure by an individual to renew a certificate in accordance with section 4762.06 of the Revised Code shall not remove or limit the board's jurisdiction to take disciplinary action under this section against the individual.

CREDIT(S)

(2008 S 245, eff. 8-22-08; 2000 H 341, eff. 8-10-00)