

INTRODUCTION

Dr. George Griffin, III, (“Dr. Griffin”) asks this Court to impose a stay of enforcement of this case pending appeal. The court below stayed enforcement of the 30 day suspension; but the court below expressly did not stay the other terms, ordering that “the probationary, terms, conditions and limitations shall be effective immediately.” *See* Exhibit D, attached to Motion to Stay. Since the March 16, 2011, Order of the Tenth District granting a stay, the State Medical Board of Ohio (“the Board”) has maintained Dr. Griffin on probation and required him to maintain prescription logs, work with a monitoring physician, and take additional education on prescribing controlled substances.

This Court should deny Dr. Griffin’s request to stay in its entirety. The Board and both courts below found that Dr. Griffin continued to prescribe massive dosages of OxyContin to a patient even after learning of numerous red flags that she was diverting her pills: she had multiple drug felony convictions, a pharmacist reported that she was selling her pills and “snorting the rest”, and at least one drug test was negative for a pain medication that she was supposed to take.

However, if this Court believes Dr. Griffin should be permitted to continue to practice while it considers its case, it should follow the Tenth District’s lead and order that Dr. Griffin receive the additional education ordered by the Board, be monitored by the Board and maintain prescription logs as required in the Board’s April 14, 2010 Order (“the Board Order.”) – even if he is permitted to continue to practice. *See* Exhibit A, attached to Motion to Stay.

STATEMENT OF THE CASE AND FACTS

The Board does not materially dispute Dr. Griffin’s description of the procedural history of this case.

There appears to be no dispute that the stay issued by the Court below dissolved upon the decision of the Tenth District Court of Appeals on November 22, 2011. Pursuant to the terms of the Order of the State Medical Board of Ohio (“the Board”), the order (including the suspension) “shall become effective 30 days from the mailing of the notification of approval by the Board.” April 14, 2010, Board Order, p.5. By the Board’s calculation, most of these thirty days have already elapsed and, unless ordered otherwise by the Court, the Board will place Dr. Griffin on suspended status on December 8, 2011.

ARGUMENT

A. This Court should apply the standards used by the Tenth District for determining whether to grant a stay.

This Court should apply the standards applied by the Tenth District as articulated in *Bob Kriwhan Pontiac-GMC Truck, Inc. v. General Motors Corporation* (10th Dis. Ohio 2001), 141 Ohio App.3d 777, 783. The *Kriwhan* court concluded that, “when reviewing whether a trial court properly granted or denied a motion to stay an administrative order, the standard of review employed is an abuse of discretion.” *Id.* at 782 (citing *Carter Steel & Fabricating Co. v. Danis Bldg. Construction Co.* (3rd Dist. 1998), 126 Ohio App.3d 251, 254.

Kriwhan also establishes the standard for determining whether an undue hardship is present. The *Kriwhan* court adopted the federal standard articulated in *Hamlin Testing Labs, Inc. v. United States Atomic Energy Comm.*, 337 F.2d 221 (6th Cir. 1964), concluding that there were four factors to be considered:

- (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits;
- (2) whether appellant has shown that it will suffer irreparable injury;
- (3) whether the issuance of a stay will cause harm to others; and
- (4) whether the public interest would be served by granting a stay.

Id. at 783. In determining whether to issue a stay of an agency order, “courts give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme.” *Id.* at 782 (citation omitted).

The Board will demonstrate that these four factors counsel against granting a stay.

B. Dr. Griffin has failed to demonstrate a substantial likelihood of success on the merits.

Dr. Griffin has not even attempted to demonstrate that he has a substantial likelihood of success on the merits. As an initial matter, Dr. Griffin has not even demonstrated that this Court is likely to take jurisdiction of this case. He has not identified any conflicts between the Appellate Districts, any over-arching issues that will require this Court’s attention or articulated any reason to think that the Tenth District decision is anything but a simple application of fact to well-established law.

The court below found that the Board’s “finding that appellant’s conduct fell below the minimum standard of care with respect to his treatment of Patient 11 is supported by reliable probative and substantial evidence.” *Griffin v. State Medical Board of Ohio* (10th Dist.), 2011-Ohio-6089, ¶31. The court below summarized the evidence regarding Patient 11 as follows:

On the first office visit, Dr. Reddy [the Board’s expert] testified that appellant doubled Patient 11’s dosage of OxyContin from 320 milligrams to 640 milligrams, which he considered to be an “ultra high” dosage. (Tr. 90.) Further, Dr. Reddy stated that, following Patient 11’s first office visit, a urine drug test ordered on May 23, 2008 was negative for Oxycodone, the active ingredient in OxyContin. (Tr. 39, 72.) A second urine drug test ordered on June 6, 2008 showed positive for opioids and Cannabinoids. (Tr. 77.) A third urine drug test ordered on July 8, 2008 was also positive for Cannabinoids. (Tr. 78.) Finally, a fourth urine drug test ordered on August 6, 2008 was negative for Lyrica, one of Patient 11’s prescribed medications. (Tr. 79.) In addition, Dr. Reddy testified that Patient 11’s chart reflected another “red flag,” in that a pharmacist sent appellant a letter to inform him that Patient 11 “is selling the drugs,” and that Patient 11 had been convicted of three drug-related felonies. (Tr. 79, 80.)

Id. at ¶31. No judge or Board member has dissented about any of the findings – much less any of the findings related to Patient 11.

Because the court below found that the most significant violation was valid, the court concluded that the remaining challenges to specific findings were moot. *Id.* at ¶37. In other words, the court below concluded that even if there were any problems with the other violations, the Board's decision to suspend Dr. Griffin for thirty days (and impose probation and other requirements) were fully justified by Dr. Griffin's failings with Patient 11.

Dr. Griffin's failure to address his continued prescribing of OxyContin to Patient 11 after numerous "red flags" of diversion mean that he has not demonstrated a substantial likelihood of success on the merits.

C. Dr. Griffin Has Failed To Prove He Will Suffer Irreparable Injury.

The court below did not abuse its discretion in concluding that Dr. Griffin failed to prove irreparable harm, especially in light of the relatively light sanction that he is facing. The Board's order, if not stayed, will (1) place Dr. Griffin on a three-year probation, (2) suspend him for thirty days,¹ (3) require Dr. Griffin to maintain a controlled substances log, (4) require Dr. Griffin to take courses on controlled substances, pharmacology, and medical records, (5) work with a monitoring physician, and (6) provide a copy of the Board's order to other entities.

In other words, the Board has suspended Dr. Griffin for only thirty days and required him to take some classes on pharmacology, medical records and controlled substances. He will be on probation for three years and will have to work with a monitoring physician.

None of the discipline imposed will irreparably harm Dr. Griffin's medical practice. His license is not being permanently revoked and, although he suggests otherwise, Dr. Griffin is not even facing a crippling long suspension. Common sense indicates that doctors are sometimes away from their practices for a month at a time. Indeed, this suspension is shorter than the

¹ The suspension was 120 days. However, the Board stayed all but 30 days of the suspension.

maternity leaves usually taken by doctors when they have children. In other words, Dr. Griffin's medical practice will be there when he returns from a 30 day suspension.

And Dr. Griffin will have to take a few classes, maintain a controlled substances log, and work with a monitoring physician. Dr. Griffin has not shown that taking classes or consulting with an experienced monitoring physician will be unduly onerous, expensive or time-consuming. There is simply no irreparable harm here.

D. The Harm to Others and Public Interest Provisions Demonstrate Weigh Against Granting A Stay.

The experienced physicians on the Board have looked carefully at Dr. Griffin and concluded that he needs guidance. He has failed to follow the minimal standards of care when prescribing powerful pain narcotics such as OxyContin. The Board has ordered Dr. Griffin to have a monitoring physician, to maintain a log of his controlled substance prescriptions, take numerous several classes on prescribing and record keeping and remain on probation. These are all steps that will keep Dr. Griffin from improperly prescribing narcotics and minimize the danger that he is inadvertently fueling the black market with prescription narcotics. Such steps will minimize the harm to others and demonstrate that the public interest is in favor of denying Dr. Griffin's request for a stay.

CONCLUSION

For the above reasons, this Court should deny Dr. Griffin's request for a stay.

Respectfully submitted,

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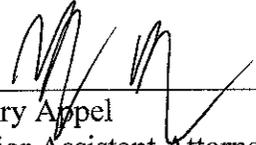
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CERTIFICATE OF SERVICE

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this 5th day of December, 2011, upon the following counsel:

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