BEFORE THE
BOARD OF MEDICAL EXAMINERS
STATE OF OREGON

IN THE MATTER OF:	)
	)
PATRICK JOHN BERGIN, MD	) **FINAL ORDER**
License No. MD15838	)

HISTORY OF THE CASE

On July 30, 2004, the Board of Medical Examiners (Board) issued a Complaint and Notice of Proposed Disciplinary Action against Patrick John Bergin, MD, for violations of the Medical Practice Act. Dr. Bergin timely requested a hearing. On September 10, 2004, the Board referred this case to the Office of Administrative Hearings (OAH).

The hearing was held on November 3, 4, and 5, 2004, at the Board's Office in Portland, Oregon. Alison Greene Webster, from the OAH, presided as the Administrative Law Judge. The Board was represented by Warren Foote, Assistant Attorney General. Dr. Bergin was represented by Greg Veralrud, Attorney at Law.

Testifying on behalf of the Board were: Edward J. Barbieri, PhD, Michael Feldman, PhD, Norman Reynolds, MD, Gary Jacobsen, MD, Mike Hefley (Board Compliance Officer) and Dr. Bergin. Dr. Bergin also testified on his own behalf. Also testifying on Dr. Bergin's behalf were: G. Alan Marlatt, PhD, Jay H. Chappell, MD, David Ramos (clinic administrator), John Gundry, MD, Joe Chambers, MD, Vern Katz, MD, Stanton Peele, PhD, Martin Waechter, PhD, and Robert Pandina, PhD.

On November 26, 2004, the OAH received the written transcript of the proceedings.[1] The record closed on that date.

ISSUES

1. Whether Dr. Bergin willfully violated a Board order. ORS 677.190(18).

2. Whether Dr. Bergin engaged in unprofessional or dishonorable conduct. ORS 677.190(1)(a); ORS 677.188(4)(a).

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[1] The transcript was prepared in three sections. Transcript 1 (tr. 1) refers to the proceedings on November 3, 2004, transcript 2 (tr. 2) refers the proceedings on November 4, 2004, and transcript 3 (tr. 3) refers to the proceedings on November 5, 2004.

3. Whether Dr. Bergin engaged in the habitual or excessive use of intoxicants during March 2004. ORS 677.190(7).

4. Whether the sanctions proposed by the Board are warranted. ORS 677.205.

EVIDENTIARY RULINGS

Board Exhibits A1 through A25 and Dr. Bergin's Exhibits R1 through R26 (including R26A, R26B and R26C) were admitted at hearing. Copies of Dr. Bergin's random urinalysis test results for September and October 2004 were received and admitted on November 17, 2004,as Exhibit R27.

Dr. Bergin's relevancy objections to testimony regarding the scientific validity and reliability of EtG testing were overruled on the record. The challenged testimony was relevant and material, and met the reliability standard of ORS 183.450.

FINDINGS OF FACT

Dr. Bergin Chronology

1. Patrick John Bergin, MD, is a licensed physician in the state of Oregon. He is a cardiologist, and a member of the Oregon Cardiology P.C. practice group in Eugene, Oregon.

2. In the spring of 2002, Dr. Bergin separated from his wife after 26 years of marriage. In the summer of 2002, Dr. Bergin began dating and socializing with a new group of friends. He had dinner and attended parties with these friends. He hosted "tailgate" parties in connection with University of Oregon football games. (Tr. 1 at 267-69.) He would also occasionally go to Adam's Place, a drinking establishment, to meet friends and drink martinis. (Tr. 1 at 254.)

3. Dr. Bergin used cocaine in August 2002. He attended parties where cocaine was available and offered and, on a couple of occasions, decided to partake of it. (Tr. 1 at 254-55.)

4. At some point prior to October 19, 2002, one of Dr. Bergin's medical partners, Dr. Romm, received a report that Dr. Bergin was keeping late night hours and using cocaine. Dr. Bergin's partners took this report seriously and contacted Dr. Susan McCall, the Medical Director of the Oregon Diversion Program for health professionals. The partnership hoped that they could avoid Board involvement by contacting the diversion program. Based on this conversation with Dr. McCall, the partners invited her to participate in an intervention meeting they planned to have with Dr. Bergin on October 21, 2002. (Tr. 2 at 31-32; 50-52.)

5. On Saturday, October 19, 2002, Dr. Bergin rented a recreational vehicle (RV) and hosted a cookout and tailgate party before the University of Oregon football game.

The game began at 12:30 p.m. Dr. Bergin consumed a few beers at the party before the game, and may have had another beer when he returned to the rented RV. After that, Dr. Bergin returned to his home with his friend and co-worker, Dr. Joe Chambers. The two had dinner, and Dr. Chambers left Dr. Bergin's around 9 p.m. About an hour later, Dr. Bergin went to the bar at Adam's Place. While there, he ate some chicken and drank martinis. (Tr. 1 at 246-52.)

6. Dr. Bergin left Adam's Place shortly before midnight. On his way home, he was stopped by a Eugene police officer for speeding and failing to maintain a lane. Upon contact with Dr. Bergin, the officer detected the odor of alcoholic beverage and observed other indicia of intoxication. Just after midnight on October 20, 2002, the officer arrested Dr. Bergin for driving under the influence of intoxicants (DUII) in violation of ORS 813.010. Dr. Bergin told the officer that he had had "a couple" martinis at Adam's Place. Following the arrest, Dr. Bergin submitted to a breath test on an Intoxilyzer 5000, which disclosed a .13 blood alcohol content. (Ex. A11.)

7. The next day, Monday, October 21, 2002, Dr. McCall and three of Dr. Bergin's partners, Drs. Romm, Chappell, and Hahn, confronted Dr. Bergin about his alleged cocaine use.[2] They also expressed concern about his drinking and keeping late hours. Dr. Bergin's partners were aware that he was under a lot of stress as a result of his impending divorce. They perceived him to be in a "crisis" at that point. They also believed he was "burning the candle at both ends," trying to manage his medical practice while dealing with his separation, impending divorce and child care issues. (Tr. 2 at 33-49.)

8. During the October 21, 2002, meeting, Dr. Bergin denied using cocaine. He acknowledged, however, that he was under a lot of stress and that he drank too much at times. As a result of this intervention, Dr. Bergin signed an agreement with the Oregon Health Professionals Program (HPP) and agreed to undergo an in-patient evaluation at the Betty Ford Center in California. (Tr. 1 at 257-58; Tr. 2 at 50-52; Exs. A7 and A10 at 28.)

9. At Dr. McCall's behest, Dr. Bergin participated in a telephone intake interview with the Betty Ford Center prior to entering the center. During the intake interview, Dr. Bergin admitted to recent cocaine use. Dr. McCall overheard this admission. Dr. Bergin later refused to attend an in-patient evaluation at the Betty Ford Center,[3] and Dr. McCall threatened to report him to the Board. She advised that the Board would require him to attend an in-patient evaluation. (Ex. A10 at 29.)

10. Dr. Bergin subsequently agreed to undergo an out-patient evaluation with someone who was not affiliated with the Betty Ford Center. (Tr. 1 at 261.). On

[2] The partners who confronted Dr. Bergin that Monday morning were unaware of his DUII arrest over the weekend. (Tr. 2 at 54.)

[3] Dr. Bergin declined to go to the Betty Ford Center because he believed that, if he admitted to recent use of a controlled substance (cocaine), he would automatically be referred for in-patient treatment. Dr. Bergin did not believe an in-patient evaluation was necessary under the circumstances. (Tr. 1 at 259.)

November 11 and 12, 2002, Dr. Bergin underwent a "comprehensive fitness-for-duty evaluation" by Norman T. Reynolds, MD, a psychiatrist based in San Jose, California. Dr. Reynolds interviewed Dr. Bergin for more than 10 hours. He also administered psychological tests, reviewed Dr. Bergin's medical and police reports, and conducted collateral interviews regarding Dr. Bergin with Dr. McCall, Dr. Chappell and Dr. Michael D. Webb, a psychiatrist who Dr. Bergin saw in 1999. (Ex. A10; tr. 1 at 168-170.)

11. Dr. Reynolds determined that Dr. Bergin was not a reliable historian. He believed that Dr. Bergin provided distorted information by means of significant omissions, concealment and denial. Dr. Reynolds determined that, despite Dr. Bergin's belief that he could control his alcohol use, Dr. Bergin had a problem with alcohol abuse and possible dependence. And, although Dr. Bergin denied ever using cocaine, Dr. Reynolds believed (based on information from Dr. McCall) that Dr. Bergin had recent problems with cocaine and marijuana use. Dr. Reynolds found "many red flags that indicate impairment." He reported that Dr. Bergin was exhibiting problems in several areas of his life: medical stress-related symptoms, deterioration of marriage, quickly finding a new committed relationship, social life activities, and legal problems with the DUII. Dr. Reynolds diagnosed Dr. Bergin with an alcohol abuse disorder, possible substance abuse disorder, an adjustment disorder and psychological factors affecting physical condition. (Ex. A10; tr. 1 at 172-74.)

12. In a detailed report issued November 27, 2002, Dr. Reynolds concluded that Dr. Bergin was not fit for duty. He strongly recommended that Dr. Bergin be admitted to a residential treatment program to address substance abuse and psychiatric and behavioral problems. Dr. Reynolds also recommended that the treatment and recovery program "include 12-Step programs." (Ex. A10.)

13. After Dr. Reynolds' evaluation and report, Dr. Bergin agreed to attend an in-patient evaluation and treatment program at Sierra Tucson in Arizona. Dr. Bergin chose Sierra Tucson over other programs because it required a 30-day stay, whereas other programs required longer stays. Dr. Bergin realized that his continued practice of medicine was dependent upon his participation in a treatment and recovery program, and he agreed to go after the Christmas holiday. (Tr. 2 at 64-66.)

14. By letter dated January 8, 2003, the Board advised Dr. Bergin that it had opened an investigation on his practice status, his recent DUII arrest, and his fitness-to-practice evaluation. Dr. Bergin signed an Interim Stipulated Order, in which he agreed to temporarily withdraw from the practice of medicine pending the outcome of the Board's investigation. (Ex. R2.)

15. On January 16, 2003, Dr. Bergin was admitted to Sierra Tucson. During the initial psychiatric interview with Joe W. King, MD, Dr. Bergin reported that he had been "partying [his] ass off" since his marital separation in May 2002. Dr. King, who diagnosed Dr. Bergin with polysubstance abuse, currently related to alcohol and cocaine, found Dr. Bergin to be quite defensive during the interview. He reported: [A]lthough

[Dr. Bergin] is giving lip service to having accepted the significance of his alcohol and cocaine abuse, he still uses rationalization, justification, minimization and some projection in describing the events of the past several months." Dr. King also noted that although Dr. Bergin described himself as an agnostic who was raised as a Catholic, he did not identify any spiritual block to accepting a 12-Step program. (Ex. A9.)

16. Dr. Bergin was discharged from Sierra Tucson on February 15, 2003. Evaluators at the treatment program deemed him fit to return to the practice of medicine. (Ex. A9.) Following his discharge, Dr. Bergin agreed to participate in a diversion program under the auspices of HPP. (Ex. R8.)

17. On March 6, 2003, Dr. Bergin entered into a Stipulated Order with the Board. In that stipulation, Dr. Bergin conceded that he had violated ORS 677.190(7), which prohibits the habitual or excessive use of intoxicants, drugs or controlled substances. The Board terminated its interim order and reinstated Dr. Bergin's license under certain terms of probation. Among other things, Dr. Bergin stipulated that he would participate in, and maintain compliance with, the recommendations of a HPP recovery program. He also stipulated that he "shall not possess and shall completely abstain from using ethanol and any mood altering or potentially addictive substances, including controlled substances." (Ex. A4.)

18. For the next year, as part of his participation in the HPP program, Dr. Bergin was subjected to random urine testing. These tests were negative for ethanol and controlled substances. (Ex. A25.)

19. On March 11, 2004, Dr. Bergin was asked to provide a urine sample. He had last been tested about a month before, on February 6, 2004. The March 11, 2004, sample was negative for ethyl alcohol and controlled substances, but showed an unacceptably low creatinine level. The "acceptable range" for creatinine is between 20 and 400 mg/dL, and Dr. Bergin's urine test disclosed a level of 12.5 mg/dL.[4] A creatinine level of less than 20 mg/dL is evidence of dilution in the urine. The 12.5 creatinine level indicated that Dr. Bergin had consumed a substantial amount of fluid, probably a gallon or more, in the hours before he provided the sample at 4:55 p.m. on March 11th. (Ex. A25; tr. 3 at 58-60, 75, 151-52.)

20. Dr. Bergin was next called to provide a urine sample on March 24, 2004. Because of the unacceptable creatinine level in his previous sample, HPP sent Dr. Bergin's sample taken on March 24, 2004, to National Medical Services, Inc., a laboratory in Pennsylvania. National Medical Services tested the sample specifically for

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[4] Creatinine is a metabolic process of the normal body's constant tearing down and building up of muscle tissue. The production rate in humans is fairly standard, although the normal range of creatinine excretion in the urine is wide, between 20 and 400 milligrams. Creatinine levels are used to estimate dilution or concentration of the urine. Drug testing laboratories generally consider a test result below the cutoff level of 20 milligrams as evidence of an attempt to beat the drug test through dilution of the urine. (Tr. 3 at 58-60.)

the alcohol metabolite, ethyl glucuronide (EtG).[5] (Ex. A20.) Dr. Bergin was unaware that HPP intended to have his urine tested for the presence of EtG. (Tr. 3 at 164.)

21. National Medical Services tested two aliquots of Dr. Bergin's urine sample. Both were positive for EtG. The first urine screen showed 2639 nanograms per milliliter (ng/mL) EtG, which prompted the second test. The second EtG confirmation test showed 3131 ng/mL.[6] (Ex. A20, tr. 1 at 37-41.)

22. Following the positive EtG testing at National Medical Services, Dr. Bergin's March 24, 2004, urine sample was sent to Northwest Toxicology Laboratory in Utah. Northwest Toxicology also ran a screen and confirmation test on the sample, both of which came back positive for EtG. The first test showed 4141 ng/mL, and the second showed 2886 ng/mL.[7] (Ex. A21; tr. at 97-98.)

23. When Dr. Bergin was advised of the positive EtG test results, he denied consuming any alcoholic beverages and was adamant that the laboratory testing showed a false positive. (Ex. A6.) Because Dr. Bergin refused to accept the verified toxicology results and refused to acknowledge having a substance use disorder, Dr. McCall terminated him from HPP for non-compliance. Dr. McCall then referred the matter to the Board for further investigation. (Ex. A5.) By letter dated April 19, 2004, the Board notified Dr. Bergin that it had received a complaint regarding his compliance with the Stipulated Order. (Ex. R9.)

24. As part of its investigation, the Board requested that Dr. Bergin undergo another independent, multidisciplinary evaluation and continue with random substance abuse monitoring. Dr. Bergin refused to sign the Board's proffered Interim Stipulated Order. (Ex. A12.)

25. On June 3, 2004, the Board issued an Order for Evaluation, in which it ordered Dr. Bergin to undergo an in-patient multidisciplinary evaluation to assess his physical and mental capacity to safely and competently practice medicine in Oregon. The Order also required that the evaluation be done at a health care facility pre-approved by the Board's Medical Director and that Dr. Bergin enroll in and begin the evaluation within 30 days from the date of the Order. (Exs. A2, R11.)

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[5] EtG is a minor metabolite of ethyl alcohol. Because it is produced only when the human body metabolizes ethanol, it is a specific marker for recent ethyl alcohol ingestion. (Tr. 1 at 41-43; tr. 3 at 8.) Unlike ethyl alcohol itself, which is quickly eliminated from the body, EtG is detectable in urine up to three or four days after the alcohol has been consumed. (Tr. 1 at 89-91; Ex. A19.)

[6] National Medical Services uses an EtG reporting limit of 250 ng/mL. Although the lowest reporting standard is generally 100 ng/mL, National Medical Services made a policy decision to raise the cutoff level to 250 ng/mL to account for possible incidental exposure to ethyl alcohol that may result from sources such as cough syrup, mouthwash, or fermented foods. (Tr. 1 at 58-60.)

[7] Northwest Toxicology uses the standard 100 ng/mL cutoff level for measuring EtG in urine. (Ex. A21; tr. 1 at 91-98.)

26. Dr. Bergin did not begin any in-patient assessment program at a Board approved facility within 30 days of the Order for Evaluation. He did, however, undergo a diagnostic assessment by Alan Marlatt, PhD, the Director of the Addictive Behaviors Research Center at the University of Washington in Seattle. (Ex. R13.) Dr. Bergin also commissioned Stanton Peele, PhD, an addiction, psychology and legal expert in New Jersey, to review his case record and determine whether he had an alcohol or substance abuse problem in the fall of 2002. (Ex. R15.) Neither of these evaluators were approved by the Board or its Medical Director.

27. Dr. Marlatt interviewed Dr. Bergin for two hours on June 22, 2004, reviewed his prior assessment records, and had him complete a Comprehensive Drinker Profile. Dr. Marlatt considered Dr. Bergin to be cooperative and a reliable historian. Dr. Marlatt concluded that, notwithstanding Dr. Bergin's 2002 DUII arrest and occasional cocaine use, Dr. Bergin did not meet the diagnostic criteria of abuse or dependence. (Ex. R13; tr. 1 at 128-45.)

28. Dr. Peele reviewed Dr. Bergin's assessment and evaluation records and determined that Dr. Bergin did not meet to DSM-IV-TR criteria for alcohol or drug abuse or dependence. Dr. Peele questioned Dr. Reynolds' diagnosis and conclusions and the evaluations of Dr. Bergin from Sierra Tucson. Dr. Peele also identified potential legal issues if the Board required that Dr. Bergin to undergo an evaluation at a treatment facility that employs a "12-Step" approach.[8] (Ex. R15.)

29. By letter to the Board dated June 30, 2004, Dr. Bergin's attorney responded to the Order for Evaluation. The letter opened, "My client, Dr. Patrick Bergin, wishes to respond to the Order for Evaluation signed by Dr. Spokas and issued June 3, 2004, in a cooperative and complete manner." The letter asserted that Dr. Bergin had complied with the Order for Evaluation in substance by virtue of the Dr. Marlatt evaluation. The letter also stated an objection to participating in any in-patient evaluation conducted at any institution that employed a "12 Step" treatment model. In addition, Dr. Bergin's attorney maintained that Dr. Bergin never exhibited evidence of impairment or dysfunction and therefore the prior mandated evaluations and recommendations were inappropriate and erroneous. (Ex. R12.)

30. The Board determined that Dr. Bergin did not comply with the Order for Evaluation in a timely fashion. Thereafter, on July 30, 2004, it issued a Complaint and Notice of Proposed Disciplinary Action to Dr. Bergin. The Complaint alleged that Dr. Bergin consumed alcohol in violation of the March 6, 2003, Stipulated Order. The Complaint further alleged that Dr. Bergin did not comply with the Order for Evaluation because the health care professionals he consulted were not presented to the Board for

[8] The "12 Step" approach to treating alcohol and substance abuse problems dates back to the founding of Alcoholics Anonymous in 1935. It remains a popular treatment model in many in-patient treatment centers. The 12 step approach requires a person to, among other things; admit that he or she is powerless over the addiction to alcohol and to believe that God or a "higher power" can restore the person to sanity. (Tr. 1 at 118-21.)

approval and did not meet the standard of a multidisciplinary evaluation center. (Ex. A1.)

EtG As a Marker of Recent Alcohol Use

31. EtG is a urinary marker for alcohol use. Testing for the presence of EtG in urine has been widely used in Europe since 1999 as evidence of alcohol consumption. (Tr. 1 at 46-48.) The marker, and the testing for it, are now gaining use and acceptance in the United States. (A19 at 1.) National Medical Services has been performing EtG testing for two years. (Tr. 1 at 62.) Northwest Toxicology began its EtG testing program in March 2004. (Tr. 1 at 105.) Now that an assay for EtG is commercially available in this country, an increasing number of abstinence programs rely on the testing as a way to determine whether participants are abstaining from alcohol use. (Tr. 1 at 108-09.)

32. Only .02-.04 percent of ethyl alcohol ingested is metabolized to EtG. The metabolite is not detectable unless alcohol has been consumed. Because such a small fraction of consumed alcohol is metabolized to EtG, a significant amount of alcohol must be consumed for EtG to be detected in urine. (Ex. A19 at 1-3.)

33. Although it is generally accepted in the scientific community that ethyl alcohol is the only source for the production of EtG, the studies have yet to establish any clear correlation between EtG levels in the urine and the amount of alcohol consumed and/or the time of consumption. (Tr. 1 at 75, 107-08; tr. 3 at 8-12.) Consequently, while the presence of EtG in the urine demonstrates that the test subject consumed ethyl alcohol, the testing does not show when the alcohol was consumed, how much was consumed or whether the person was intoxicated as a result of the consumption.[9] (Tr. 3 at 13-14.)

34. Dr. Michael Feldman, PhD, who has a doctorate in drug metabolism and a post-doctorate degrees in analytical toxicology, is the General Manager of Northwest Toxicology Laboratory. (Tr. 1 at 79-80.) Northwest Toxicology has conducted in-house studies to determine what kind of EtG levels could be detected after incidental contact with ethanol. The laboratory's studies included the test subjects' use of Nyquil, Listerine, O'Doul's non-alcoholic beer, cooking wine, Purell hand cleaner (which is 62 percent ethanol), and communion wine. The results consistently showed EtG levels of less than 250 ng/mL from any of these exposures. The laboratory's policy, developed through its testing and consultation with experts, is that if the EtG level is above 500 nanograms, incidental alcohol exposure is extremely unlikely. (Tr. 1 at 92-97, 100.) In Dr. Feldman's opinion, a urine EtG level in excess of 2500 nanograms is indicative of beverage alcohol consumption. (Tr. 1 at 95-97.)

[9] The finding of EtG levels above cut-off values in urine simply indicates recent alcohol consumption by the test subject. In this way the results are binary, indicating the presence of alcohol use, similar to positive tests for other illicit drugs, such as cocaine and opioids. (Ex. A19 at 6.)

35. Dr. Edward Barbieri has a PhD in pharmacology and is a forensic toxicologist at National Medical Services laboratory. (Tr. 1 at 21-22.) Like Northwest Toxicology, National Medical Services has conducted small-scale studies regarding incidental contact with ethanol. All the tests showed EtG levels below 250 nanograms, except for one. A very petite pregnant woman, who repeatedly rinsed with mouthwash over the course of a day, had a level of 330 nanograms per milliliter from this exposure. (Tr. 1 at 61-64.) In Dr. Barbieri's opinion, an EtG level of 2600 to 3100 nanograms indicates that the person consumed an alcoholic beverage. (Tr. 1 at 50-51.)

36. Dr. Robert Pandina, PhD, is the director for the Center of Alcohol Studies at Rutgers University. By training, he is a developmental neuropsychologist and psychopharmacologist. (Tr. 3 at 4.) In his opinion, the "most likely source" for a positive EtG reading of 2500 to 4400 ng/mL is the voluntary consumption of beverage alcohol. Dr. Pandina noted, however, that this level is "not so extreme" so as to completely rule out the possibility of exposure to other substances. (Tr. 3 at 19.)

CONCLUSIONS OF LAW

1. Dr. Bergin willfully violated a Board order, in violation of ORS 677.190(18).

2. Dr. Bergin engaged in unprofessional or dishonorable conduct. ORS 677.190(1); ORS 677.188(4)(a).

3. Dr. Begin did not engage in habitual or excessive use of intoxicants during March 2004.

4. Sanctions are warranted for willfully violating a Board order.

OPINION

"The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." ORS 183.450(2). Here, the Board has the burden of proving its allegations, and Dr. Bergin has the burden of proving any affirmative defenses. *Gallant v. Board of Medical Examiners,* 159 Or App 175, 183 (1999). *See also, Harris v. SAIF,* 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); and *Cook v. Employment Div.,* 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence).

The Board is authorized by ORS 677.190 to suspend or revoke the license of a physician to practice medicine for any of several delineated reasons. In this case, the Board bases its action on the following statutory provisions:

(1)(a) Unprofessional or dishonorable conduct.
* * *

> (7) Habitual or excessive use of intoxicants, drugs or controlled substances.
> * * *
> (18) Willfully violating any provision of this chapter or any rule adopted by the board, board order, or failing to comply with a board request pursuant to ORS 677.320.

The Board asserts that Dr. Bergin willfully violated the March 2003 Stipulated Order by voluntarily consuming an alcoholic beverage in March 2004. The Board also asserts that Dr. Bergin violated its June 2004 Order for Evaluation because he failed to undergo an in-patient multidisciplinary evaluation at a health care facility approved by the Board's Medical Director. The Board further contends that Dr. Bergin's actions also constitute unprofessional or dishonorable conduct. Finally, the Board alleges that because Dr. Bergin agreed to abstain from using ethanol, his voluntary consumption of any alcoholic beverage in March 2004 constitutes excessive use of intoxicants under ORS 677.190(7).

Dr. Bergin, on the other hand, asserts that there is insufficient evidence to support the Board's contention that he consumed alcoholic beverages in March 2004. Dr. Bergin contends that a positive EtG test result is not a valid or reliable indicator of voluntary alcohol consumption, and therefore, the Board has not established that he violated the Stipulated Order. Dr. Bergin also contends that the June 2004 Order for Evaluation was arbitrary and capricious because the Board had no reasonable basis to believe that he used ethanol in violation of the Stipulated Order. In addition, Dr. Bergin maintains that the Board had no statutory authority to refer him to HPP in the first place and, in the absence of such authority, the March 2003 Stipulated Order is invalid. Finally, Dr. Bergin asserts that all of the health care facilities recommended by the Board employ a "12-Step" treatment model, and requiring him to undergo an in-patient evaluation at such a facility violates his First Amendment right to freedom of religion.

1. Willful violation of a Board Order

As set forth above, the Board is authorized under ORS 677.190(18) to discipline a licensed physician who willfully violates a Board order. The Board contends that Dr. Bergin willfully violated Board orders on two occasions: (1) by consuming ethanol in March 2004 in violation of the March 2003 Stipulated Order; and (2) by failing to undergo a multidisciplinary evaluation within 30 days of the June 2004 Order for Evaluation.

A. The March 2003 Stipulated Order.

The March 2003 Stipulated Order required that Dr. Bergin "completely abstain from using ethanol." The Board contends that, based on the positive EtG tests, Dr. Bergin consumed an alcoholic beverage in March 2004. Dr. Bergin denies violating the Stipulated Order. He contends that the positive EtG findings do not establish that he consumed alcoholic beverages, because the presence of EtG could be attributable to

incidental exposure to alcohol. For the reasons discussed below, the Board finds that the Board has established, by a preponderance of the evidence, that Dr. Bergin used ethanol in violation of the Stipulated Order.

The record demonstrates that although EtG and the assay for its testing are relatively new to this country, the science is sound. It is generally accepted in the scientific community that ethyl alcohol is the only source for the production of EtG. The testing is widely used in Europe as a urinary marker for alcohol use. A positive test result indicates recent alcohol consumption. The fact that the testing cannot prove when the alcohol was consumed, how much alcohol was consumed, or the extent of the person's intoxication, does not diminish EtG's value as a reliable indicator of recent ethanol consumption.

Notwithstanding the novelty of EtG testing, the Board agrees with the ALJ that it was reasonable to conclude, based on the confirmed presence of more than 2500 ng/mL of EtG in Dr. Bergin's urine, that Dr. Bergin voluntarily consumed beverage alcohol in violation of the March 2003 Stipulated Order. In that Order, Dr. Bergin agreed to abstain from using alcohol. According to the expert testimony, Dr. Bergin's EtG level indicates that he consumed an alcoholic beverage. The Board is persuaded by the testimony of Drs. Barbieri and Feldman and the scientific literature in the record that Dr. Bergin's EtG level did not result from incidental exposure to alcohol, such as through the use of a surgical scrub soap or mouthwash. In short, the evidence establishes that, more likely than not, Dr. Bergin consumed an alcoholic beverage in the days before his March 24, 2004 urine test.

Although Dr. Bergin denied consuming any alcoholic beverages in March 2004, the Board is not persuaded by that denial. Dr. Bergin has a history of denying his alcohol or drug consumption to avoid possible negative consequences stemming from that use. For example, although he acknowledged at hearing that he used cocaine in the summer of 2002, he denied that cocaine use when confronted by his medical partners and when interviewed by Dr. Reynolds in November 2002 as part of the fitness-for-duty evaluation. Dr. Bergin did not admit to this cocaine use because he did not believe he was in need of treatment and did not want to be committed to an in-patient program.

Finally, the Board rejects Dr. Bergin's collateral attack on the validity of the Stipulated Order. To the extent Dr. Bergin questioned the Board's authority to require that he participate in HPP and abstain from alcohol use, he should have raised this challenge at the time of the stipulation. He did not do so. The Board is the agency responsible for licensing, regulating and disciplining physicians in this state. Dr. Bergin holds a license to practice medicine in this state. The Board therefore had jurisdiction over Dr. Bergin and the subject matter. By signing the Stipulated Order, Dr. Bergin conceded that he violated ORS 677.190(7), the habitual or excessive use of intoxicants. Dr. Bergin also agreed to the terms of probation including his participation in the HPP

program and abstention from alcohol and controlled substances. Any challenges to the Board's authority with regard to this matter have since been waived.[10]

B. Violation of the June 2004 Order for Evaluation.

The June 3, 2004, Order for Evaluation directed Dr. Bergin to undergo an in-patient multidisciplinary evaluation within 30 days. The Board took this action in furtherance of its investigation to determine whether Dr. Bergin remained fit to practice medicine, given the evidence that he had recently tested positive for the ethanol metabolite EtG. Dr. Bergin's failure to begin the evaluation process within the 30-day time frame constitutes a willful violation of the order.

Dr. Bergin, on the other hand, asserts that the Board has no statutory authority for this action. He also contends that he should not be required to submit to an evaluation at a facility that employs a 12-Step approach to treatment. In response to Dr. Bergin's challenges, the Board's counsel argued at the hearing that because Dr. Bergin did not request judicial review of the June 3, 2004 order, he cannot now attack its validity. The ALJ agreed with the Board's position.

The Board's Order for Evaluation is an order in other than a contested case under ORS 183.310(6)[11] because it is not encompassed by the proceedings that are defined as a

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[10] Because Dr. Bergin is legally precluded from challenging the terms of the Stipulated Order, the Board need not decide whether, in the fall of 2002, he met the DSM-IV diagnostic criteria for alcohol or substance abuse.

[11] ORS 813.310(6) defines the term "Order"

> (a) "Order" means any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency. "Order" includes any agency determination or decision issued in connection with a contested case proceeding. "Order" includes:
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> (A) Agency action under ORS chapter 657 making determination for purposes of unemployment compensation of employees of the state; and
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> (B) Agency action under ORS chapter 240 which grants, denies, modifies, suspends or revokes any right or privilege of an employee of the state.
>
> (b) "Final order" means final agency action expressed in writing. "Final order" does not include any tentative or preliminary agency declaration or statement that:
>
> (A) Precedes final agency action; or

"contested case" under ORS 183.310(2)(a).[12] An agency is not required to include a notice of appeal rights in an order in other than a contested case. *See Tidewater Barge Lines, Inc v. EQC,* 159 Or App 296, 304 (1999). Pursuant to ORS 183.484(1) and (2), petitions for review of an order other than a contested case must be filed in the circuit court within 60 days of service of the challenged order. *Lazaro v. State,* 148 Or App 586, 599-600 (1997); *Clarke Electric, Inc. v. State,* 93 Or App 693 (1988).

Dr. Bergin did not request judicial review of the Order for Evaluation within 60 days of its service. Although Dr. Bergin's attorney responded to the Order in a June 30, 2004, letter to the Board, that letter did not constitute a request for judicial review under ORS 183.484 or a petition for reconsideration under OAR 137-004-0080.[13] In the

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> (B) Does not preclude further agency consideration of the subject matter of the statement or declaration.

[12] (2)(a) "Contested case" means a proceeding before an agency:

> (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard;
>
> (B) Where the agency has discretion to suspend or revoke a right or privilege of a person;
>
> (C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such hearing; or
>
> (D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415, 183.425, 183.450, 183.460 and 183.470.
>
> (b) "Contested case" does not include proceedings in which an agency decision rests solely on the result of a test.

[13] OAR 137-004-0080 provides, in pertinent part, as follows:

> (1) A person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 calendar days after the date of the order. A copy of the petition shall also be delivered or mailed to all other persons and agencies required by statute or rule to be notified.
>
> (2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.

absence of a timely appeal or reconsideration request, the Order for Evaluation became final by operation of law after 60 days.

Based on principles of collateral estoppel, Dr. Bergin is now precluded from challenging the validity of, and basis for, the order.[14] *See Clarke Electric Inc,* 93 Or App at 697 (the exclusive procedure for review of an order in other than a contested case is under the APA); *Jeld-Wen, Inc. v. Bartz,* 142 Or App 433 (1996) (employer did not seek judicial review of a Workers' Compensation Board order, but later asserted that the order was invalid due to subsequent legislation. The court held "collateral attacks on final orders of the Board are not permitted."); *LeGore v. Self-Insured Management Services,* 157 Or App 229 (1998) ("Even if the initial order was erroneous, claimant did not seek judicial review and the initial order became final and binding on the parties."); and *Skeen v. Dept. of Human Services,* 171 Or App 557 (2000) (rejecting collateral attack on a final administrative order).

The Order for Evaluation directed Dr. Bergin to begin an in-patient multidisciplinary evaluation at a health care facility approved by the Board's Medical Director within 30 days. Dr. Bergin did not do so. The two-hour diagnostic assessment by Dr. Marlatt did not satisfy the order's requirements because it was not a multidisciplinary evaluation and was not done at an approved facility. Dr. Bergin's non-compliance in this regard constitutes a willful violation of a Board order under ORS 677.190(18).

> (3) The petition may include a request for a stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).
>
> (4) The petition may be granted or denied by summary order, and, if no action is taken, shall be deemed denied as provided by ORS 183.484(2).

Although the letter challenged the Board's authority to order the evaluation of Dr. Bergin, it did not request reconsideration or a stay of the final order. Had Dr. Bergin's attorney intended that the letter serve as a petition for reconsideration under OAR 137-004-0080, he should have labeled it as such or, at a minimum, articulated a reconsideration request.

[14] Because Dr. Bergin did not seek judicial review of the June 3, 2004, order, he cannot now challenge the requirement that the evaluation be done at a facility approved by the Board's Medical Director. Furthermore, although the record contains evidence that 12-Step recovery programs include the recognition of a higher power, the record is also clear that the Board would not attempt to compel Dr. Bergin to participate in a 12-Step treatment program. And although Dr. Bergin argued at the hearing that the multidisciplinary evaluation centers recommended by the Board employ a 12 step approach in the evaluations that they conduct, the record does not support the contention. For these reasons, the Board agrees with the ALJ's decision not to further address Dr. Bergin's contention that the Order for Evaluation violates his First Amendment rights.

2. Unprofessional or dishonorable conduct

The definition of "unprofessional or dishonorable conduct" is set out at ORS 677.188(4):

> 'Unprofessional or dishonorable conduct' means conduct unbecoming a person licensed to practice medicine or podiatry, or detrimental to the best interests of the public, and includes:
>
> (a) Any conduct or practice contrary to recognized standards of ethics of the medical or podiatric profession or any conduct or practice which does or might constitute a danger to the health or safety of a patient or the public or any conduct, practice or condition which does or might impair a physician's or podiatric physician and surgeon's ability to safely and skillfully to practice medicine or podiatry;

The Board concludes that Dr. Bergin's use of alcohol in violation of the Stipulated Order and his failure to timely comply with the Order for Evaluation constitute unprofessional or dishonorable conduct. The Board considered Dr. Bergin's argument that this conduct did not pose any danger to the health or safety of his patients or the public at large. Dr. Bergin cites to the testimony of his partners and peers, as well as Drs. Marlatt and Peele, who saw no evidence of any substance abuse affecting Dr. Bergin's medical practice.

Although there is no evidence in the record that Dr. Bergin endangered the health or safety of any patient by appearing at a clinic or hospital visibly impaired, the definition of unprofessional or dishonorable conduct is not so limited. Any conduct that is "unbecoming a person licensed to practice medicine" or that is "contrary to recognized standards of ethics of the medical or podiatric profession" can be unprofessional or dishonorable.[15] In this case, Dr. Bergin acted contrary to recognized standards of ethics when he stipulated to abstain from alcohol use and then consumed alcohol. Moreover, by not complying with the Order for Evaluation, he showed a lack of respect for the Board's authority to regulate and monitor the professional conduct of licensed physicians.

The Board further finds that Dr. Bergin acted contrary to recognized standards of ethics for medical professionals when he denied using cocaine when confronted by his partners during the intervention meeting in October 2002, and when questioned by Dr. Reynolds during the fitness-for-duty evaluation in November 2002. He exhibited a lack of candor in professional interactions and a lack of respect for his colleagues and other health professionals.

[15] The American Medical Association has established principles of medical ethics to guide physicians in the medical profession. The ethical principles include standards of conduct such as: a physician shall uphold the standards of professionalism, shall be honest in all professional interactions and shall respect the law.

3. Excessive Use of Intoxicants

The Board's counsel argued at hearing that in light of Dr. Bergin's stipulation to abstain from using alcohol, his voluntary consumption of beverage alcohol in March 2004 constitutes excessive use of intoxicants under ORS 677.190(7).

The first step in construing ORS 677.190(7) is to examine both the text and context of the statute, including other provisions of the same statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (1993). An analysis of the text and context of the statute includes consideration of the rules of construction that "bear directly on the interpretation of the statutory provision in context." *Id.* at 611. The word "excessive" means "exceeding what is usual, proper, necessary or normal." It "implies an amount or degree too great to be reasonable or acceptable." *See Merriam-Webster OnLine Dictionary,* www.m-w.com.

In the context of ORS 677.190(7), the ALJ did not believe the meaning of "excessive" changes depending upon the physician at issue. The ALJ stated that the standard is objective rather than subjective. In other words, if consumption of one alcoholic beverage is not considered excessive use for the general population of licensed physicians in Oregon, then it should not be excessive use when applied to Dr. Bergin, notwithstanding his obligation to abstain from alcohol use. The Board declines to accept this analysis in its conclusions of law.

While the evidence indicates that Dr. Bergin used alcohol in the days before his urine test from March 24, 2004, the ALJ found that nothing in this record demonstrates that he consumed an excessive amount. Consequently, the ALJ found that there was insufficient evidence presented to establish a violation of ORS 677.190(7). In view of the Board's findings that Licensee violated the terms of the Stipulated Order not to consume alcohol, it is not necessary to make a conclusion of law as to this allegation, and therefore, this particular allegation is withdrawn.

4. Penalties, fines and costs

The Board's counsel proposed the following sanctions and terms of probation: to reprimand Dr. Bergin and to suspend his medical license for 30 days, that the suspension remain in effect pending his compliance with the June 3, 2004, Order for Evaluation, to impose a $5,000 fine, and to assess Dr. Bergin the costs of the hearing. The authority for this proposed discipline is found at ORS 677.205:

> (2) In disciplining a licensee as authorized by subsection (1) of this section, the board may use any or all of the following methods:

(a) Suspend judgment.
(b) Place the licensee on probation.
(c) Suspend the license.
(d) Revoke the license.
(e) Place limitations on the license.
(f) Take such other disciplinary action as the board in its discretion finds proper, including assessment of the costs of the disciplinary proceedings as a civil penalty or assessment of a civil penalty not to exceed $5,000, or both.[16]

A preponderance of the evidence establishes that Dr. Bergin voluntarily consumed alcohol in contravention of the Stipulated Order. He also violated the June 3, 2004, Order for Evaluation by failing to undergo an in-patient evaluation at a Board approved facility. The evidence further shows that Dr. Bergin engaged in unprofessional or dishonorable conduct in that he was not honest in all professional interactions and did not comply with orders of the Board. Although Dr. Bergin subjected himself to assessment by evaluators of his choice in following the June 2004 Order for Evaluation, he refused the Board's earlier request for a repeat in-patient evaluation following his positive EtG test. Dr. Bergin's conduct was willful and the proposed sanction is appropriate.

EXCEPTIONS BY DR. BERGIN

In his exceptions, counsel for Dr. Bergin identified two issues that he characterizes as most significant—the first, that even in a light most unfavorable to Dr. Bergin, there was no basis for a diagnosis of alcohol or substance abuse, and second, that the Board lacked a legitimate rationale to order that Dr. Bergin undergo a multidisciplinary evaluation. And as a corollary, Dr. Bergin continues to insist that he will only submit to a "non 12-Step multidisciplinary evaluation."

The Board notes that Dr. Bergin underwent an evaluation at a facility of his own choosing—Sierra Tucson, which provided an Axis I diagnosis of polysubstance abuse, currently to alcohol and cocaine (Exhibit A-9, at 8). And Dr. Norman Reynolds diagnosed Dr. Bergin with alcohol abuse disorder, rule out dependence (Exhibit 10, at 19.) For Dr. Bergin to now state that there was no basis for a diagnosis of substance abuse is not well founded. Dr. Bergin may disagree with the conclusions and the methodology of both evaluations, but cannot seriously contend that there is no basis for their diagnosis.

Dr. Bergin repeatedly challenges the Board's authority and rationale to order a multidisciplinary evaluation, and he attempts to link such evaluation facilities to 12-Step

[16] In *Adams v. Board of Medical Examiners*, 170 Or App 1 (2000), the court held that "costs of the disciplinary proceeding" as set forth in ORS 677.205(2)(f) properly included the cost of hearing officer, expert witness fees, cost of court reporter and cost of Board counsel.

treatment programs. The Board rejects Dr. Bergin's premise that there is a direct linkage between the nationally recognized multidisciplinary evaluation centers recommended by the Board and 12-Step treatment programs. The Board recognizes that there are a number of treatment programs available in both in patient and out patient settings, and that some are based on a 12-Step approach, while others are not. We also note that notions about what constitutes a higher power vary greatly, and that 12-Step programs and participants are not uniform in their concept of a higher power. But that is beside the point. The Board is on record that in the event treatment is recommended, that Dr. Bergin would not be required to participate in a 12-Step program.

Dr. Bergin also identified certain specific exceptions, which the Board will now address in numerical order.

1. The Board rejects Dr. Bergin's contention that the EtG test results were not relevant or reliable because it has not been previously accepted forensically as proof of voluntary alcoholic consumption in any judicial or administrative proceeding. If this were the standard, no new scientific test or medical procedure would ever be deemed acceptable, because being "first" would automatically doom a test or procedure to rejection due to the lack of forensic acceptance. The Board is satisfied from its review of the evidence that the EtG test was shown to be relevant and reliable to the proceedings. *See State v. O'Key*, 321 Or 285 (1995). We are convinced that the EtG test is based on sound science, is performed with strict quality control procedures in place at certified and nationally recognized laboratories, and that the test is recognized and accepted in the relevant scientific community, having been featured in a number of peer-reviewed medical and scientific journals.

2. Dr. Bergin points out that his practice partners testified at the hearing that they were not concerned about him abusing alcohol. But the Board also notes that his partners were concerned enough to request Dr. Susan McCall, Medical Director of the Health Professionals Program (HPP), to assist them in an intervention on October 21, 2002, regarding his alcohol abuse and reports of his cocaine use. (A9 at 9, A10 at 28).

3. Dr. Bergin asserts that during the intervention, that Dr. McCall had threatened him with Board action if he was unwilling to submit to an inpatient evaluation. Therefore, he suggests that his participation in HPP or in undergoing the evaluation by Dr. Reynolds was not voluntary. This calls to mind the parol evidence rule, and gives the Board considerable pause in accepting Dr. Bergin's account at face value. The Board has in its possession his signed agreement on both October 21, 2002, and November 4, 2002, (A7 at 1 & 2) to undergo an evaluation approved by the HPP and that he continued to be enrolled in HPP until after he tested positive in March 2004. The Board also recognizes that interventions by their very nature involve confrontation and can stir deeply felt emotions.

4. Dr. Bergin's exception to finding 15 that references the Sierra Tucson report is not valid. Specific criticisms brought by witnesses in regard to the content of

the report do not justify completely deleting any reference to this report or disregarding its content.

5. The Board rejects Dr. Bergin's exception to finding 17. The Stipulated Order speaks for itself.

6. The Board rejects Dr. Bergin's exception to finding 19. The Board is convinced by the testimony presented by Dr. Jacobsen that the creatinine levels detected in Dr. Bergin's urine on March 11, 2004, show that Dr. Bergin had diluted his urine prior to testing.

7. The Board rejects Dr. Bergin's exception to finding 31. There was compelling evidence presented by both testimony and published articles in peer-reviewed journals that there is a direct correlation between the presence of EtG and the voluntary consumption of alcohol. The Board is not aware of any case where a person has suffered sanction in an administrative or judicial setting based upon such evidence. The Board finds based upon the testimony at hearing that the EtG test has been widely used in Europe.

8. Dr. Bergin's exception to finding 33 goes to whether the EtG test reveals how the alcohol was consumed. The testimony presented by Dr. Barbieri and Dr. Feldman explained why a positive EtG test revealed the voluntary consumption of alcohol, and also described the internal studies both laboratories had conducted to address the issue of the "innocent" consumption through incidental contact. The Board is convinced that the EtG test is a reliable test to detect the voluntary consumption of alcohol.

9. Dr. Bergin's exception to finding 34 states that he had objected to the testimony of Dr. Feldman based upon a "lack of a showing of scientific acceptability, reliability, credibility and reproducibility." This objection is duly noted. Dr. Feldman's expertise was well established at the hearing.

10. Dr. Bergin makes the same exception to finding 35 in regard to Dr. Barbieri. Again, the objection is noted, Dr. Barbieri's expertise was well established at the hearing.

11. Dr. Bergin's exception to finding 36 is that the Board's finding omitted mention of Dr. Pandina's "most relevant" testimony regarding the lack of acceptability and testing necessary to permit a correlation between the presence of EtG and the voluntary consumption of alcohol in a forensic setting. The Board considered Dr. Pandina's testimony as well as Dr. Bergin's interpretation of the testimony. The Board observes that Dr. Pandina did not dispute the accuracy of the test itself to detect the alcohol metabolite, and that he acknowledged that the most likely source for Dr. Bergin's positive EtG test result was the voluntary consumption of alcohol.

12. Dr. Bergin's exception to the finding that he willfully violated the Board's Order for Evaluation is rejected. In this exception, Dr. Bergin harkens back to that requirement that Dr. Bergin undergo a multidisciplinary evaluation, and contends that the Board should accept opinions offered by the witnesses that he arranged to testify on his behalf. One of these witnesses, Dr. Marlatt, met with Dr. Bergin for two hours and then opined that Dr. Bergin did not have a diagnosis of alcohol abuse. The other, Dr. Peele, concluded that Dr. Bergin did not meet the criteria for a diagnosis of alcohol or drug abuse, based on reviewing Dr. Bergin's assessment and evaluation records. Such cursory reviews, undertaken without the Board's knowledge or prior approval, were not in compliance with the Board's Order and is not persuasive. The record is clear. The Board issued an Order for Evaluation. Dr. Bergin failed to undergo the ordered multidisciplinary evaluation at a facility pre-approved by the Medical Director. Dr. Bergin did not challenge this Order and so it stands. And the basis for this Order is based upon sound medical science. To suggest, as Dr. Bergin does, that there was no basis for a diagnosis of alcohol or substance abuse is spurious. Dr. Bergin has a record that includes an arrest for DUI with a BAC of .13 percent, admitted cocaine use, two evaluations that include a diagnosis of substance abuse and a positive test for alcohol when he was supposed to remain abstinent. Dr. Bergin needs to be evaluated with the benefit of all the information now available, to include the positive EtG test result. The Board will not continue to subject the public to the risk of being harmed by physician who may be impaired. Although Dr. Bergin's practice partners now testify that they see no evidence of impairment on the job; that provides little comfort. The workplace is often the last place where a physician will exhibit signs of impairment. It is imperative that Dr. Bergin undergo a multidisciplinary evaluation facility that has the training and experience to address the relevant medical issues and to provide this Board with an assessment it can have confidence in.

13. Dr. Bergin's exception to the conclusion that he engaged in unprofessional or dishonorable conduct is rejected. The Board has found that Dr. Bergin voluntarily consumed alcohol in March 2004 in violation of his Stipulated Order. Violating a Stipulated Order is unprofessional or dishonorable conduct. In addition, Dr. Bergin disobeyed the Board's order to undergo an evaluation. This Board does not issue such orders lightly, and expects its licensees to comply with them when issued. The Board also stands by its finding that Dr. Bergin has exhibited a lack of candor in regard to his history of consuming alcohol and controlled substances. His denial of cocaine use (that he later admitted) and now his continued denial of consuming alcohol in March 2004 exhibit this lack of candor. Nevertheless, the Board does not base any portion of its sanction upon Dr. Bergin's lack of candor.

14. The Board rejects Dr. Bergin's exception to its finding that the Board's Order for Evaluation is a final order in other than a contested case under ORS 183.310(6). This order expressed a final agency action—that Dr. Bergin undergo an evaluation. Disciplinary action does not necessarily follow such an action. Typically in such cases, a licensee complies with the order, an evaluation report is produced, and treatment may or may not follow, depending upon the diagnosis and recommendations of the evaluation center. This order was directed to Dr. Bergin and did not meet the criteria

of "contested case" as defined by ORS 677.310(2)(b). Because the order is not a contested case, the remaining option is that it is an order in other than a contested case. As such, Dr. Bergin had 60 days to seek judicial review of this order in circuit court, ORS 183.484. He failed to do so. Nevertheless, Dr. Bergin now contends in his exception that a letter he wrote the Board on June 30, 2004, should have been construed to be a petition for reconsideration.

Dr. Bergin could have petitioned the Board to reconsider its Order for Evaluation pursuant to ORS 183.484(2) and OAR 137-004-0080. But the letter of June 30, 2004, does not use the word reconsideration within the text, was not styled as a petition for reconsideration, and did not request a stay. Nevertheless, even assuming that the Board could have construed the letter as a petition for reconsideration, Dr. Bergin was on notice that if no action is taken on his petition, it would be deemed to be denied the 60th day following the date the petition was filed, ORS 183.484(2). In the meantime, the Board issued its Complaint and Notice of intent to impose discipline on July 30, 2004. This action triggered the contested case hearing process, but did not annul the order for evaluation, or preclude Dr. Bergin from seeking judicial review of the Order for Evaluation. His failure to do so now bars him from challenging the Order for Evaluation based on the principles of collateral estoppel as previously discussed in this Order.

But even assuming *arguendo* that Dr. Bergin is not barred from challenging the Board's Order for Evaluation in this proceeding, the evidence presented in this case demonstrates that the Board acted reasonably, based upon credible information that Dr. Bergin violated the terms of his Stipulated Order to remain abstinent and that he may be an impaired physician--requiring a multidisciplinary evaluation to determine whether he needs treatment in order to address issues of possible substance abuse or dependence. The Board must have assurance that Dr. Bergin health issues are addressed, because it has the duty to protect the public from the practice medicine by those who cannot or will not practice safely. The Board awaits the outcome of its ordered multidisciplinary evaluation in order to accurately assess Dr. Bergin's current diagnosis, if any, as well as evaluate his ability to safely practice medicine and whether he requires treatment or monitoring.

15. At this juncture in his exceptions, Dr. Bergin returned to his theme that the Board's order mandated an evaluation at 12-Step oriented facilities. Dr. Bergin has the burden to demonstrate that the multidisciplinary facilities offered to Dr. Bergin, to include the William J. Farley Center, Hazelden Springbrook, the Betty Ford Center, and Rush Behavioral Health, perform 12-Step evaluations. Although these evaluation facilities may offer 12-Step programs as a treatment option for their patients, it does not follow that the evaluations they perform are "12-Step evaluations." The testimony presented by Dr. Bergin's witnesses Dr. Peele and Dr. Marlatt were not persuasive. Their testimony did not establish and the Board is not persuaded that these nationally recognized evaluation facilities are biased in the evaluations they perform, or that they offer "12-Step evaluations." The Board notes that in his written statement, Dr. Marlatt jumped to the conclusion that the Board was compelling Dr. Bergin to participate in a 12-Step treatment program and attendance at Alcohol Anonymous (R15 at 1). That is not

true. The Board is persuaded by the testimony of Dr. Jacobsen that the evaluation process is separate and distinct from treatment. There are various treatment options, some involving the 12-Step approach, some not. And patient autonomy and choice is respected when considering treatment options.

17. Dr. Bergin also objects to the sanctions imposed. The Board has reviewed Dr. Bergin's stated objections to the reprimand, suspension, probation, $5,000 civil penalty and costs and finds that the sanctions to be imposed are appropriate and will be enforced.

18. Dr. Bergin also requests a stay of the suspension pending resolution of his judicial appeal. The Board may stay enforcement of an agency order upon a showing of irreparable injury to the petitioner and a colorable claim of error, ORS 183.482(3)(a). If a petitioner makes such a showing, an agency shall grant the stay unless it determines that substantial public harm will result if the order is stayed, ORS 183.482(3)(b).

Dr. Bergin states that his medical practice is his only source of income and ability to support his family. The Board notes that it is well recognized that the costs and delay caused by participating in the administrative process are not the types of harm that constitute "substantial and irreparable harm." *See Merle West Medical Center v. SHPDA*, 94 Or App 148, 152-53, (1988) and *Northwestern Title Loans, LLC v. Division of Finance and Corporate Securities, Div. of Dept. of Consumer and Business Services*, 80 Or App 1 (2002). The Board is not convinced that he will suffer irreparable harm in this case. Nevertheless, the Board will proceed to analyze the remainder of Dr. Bergin's request by assuming *arguendo* that Dr. Bergin would suffer irreparable harm by complying with the Board's Final Order.

To meet his burden that he is making a colorable claim of error, Dr. Bergin must show that there is a "seemingly valid, genuine, or plausible [claim] of error or substantial and nonfrivolous [claim] of error," *Bergerson v. Salem-Keizer School. District,* 185 Ore. App. 649, 659 (2003); and *State ex rel Juv. Dept. v. Balderas*, 172 Or App 223, 229 (2001). Dr. Bergin has made no such showing.

Nevertheless, even if this Board were convinced that Dr. Bergin would suffer irreparable injury and that he had made out a colorable claim of error, the Board would deny his request because the Board is convinced that to do otherwise would subject the public to substantial harm; *see* ORS 183.482(3)(b). The Board has in its possession two evaluations that diagnose Dr. Bergin as suffering from polysubstance abuse, and Dr. Reynolds included in his differential diagnosis the possibility of alcohol and substance dependence. Dr. Bergin admitted to using cocaine in the summer of 2002. This is unusual behavior for a physician of his years and experience. And the intervention at his clinic in 2002 occurred before his practice partners learned about the DUII. Further, the Board has concluded that Dr. Bergin violated the terms of his stipulated order to remain abstinent by voluntarily consuming alcohol in March 2004. Presented with this history, the Board observes that there is a strong possibility that Dr. Bergin may be diagnosed for substance abuse or dependence. Without treatment and adequate monitoring, Dr. Bergin

may be an impaired physician. Physicians need to be able to assess and treat patients free from impairment or clouded judgment. To do otherwise places patients at risk of harm. Dr. Bergin's self-imposed urine testing program is not satisfactory. Self-determined monitoring programs are always subject to doubt, and often reflect the effort of a licensee to control both the process and the outcome in order to avoid detection. In addition, Dr. Bergin is sophisticated enough to know that amount of time it takes to ingest alcohol, metabolize it, and be able to test negative thereafter, depending upon the amount of alcohol consumed, the conditions of consumption and the time lapse thereafter. Urine or blood tests used to detect blood alcohol levels are not effective under these conditions to ascertain whether a subject is abstinent. The Board also draws upon its long experience in dealing with thousands of licensees that have struggled with substance abuse or dependence issues. While the Board evaluates each case on its own merits, the Board has seen firsthand the devastating impact substance abuse or dependence can have upon the health and safety of the licensee and the public. This disease process is potentially fatal. Dr. Bergin will either undergo the ordered evaluation or cease practicing medicine. The choice is his.

FINAL ORDER

Accordingly, the Board issues the following order:

1. Dr. Bergin is reprimanded.

2. Dr. Bergin will remain abstinent from use of ethanol and all controlled substances not prescribed by his treating physician for a minimum of two years. Dr. Bergin will be subject to no notice testing for ethanol and controlled substances for a minimum of two years, either through random urine testing or upon demand. Dr. Bergin will pay the costs for such testing.

3. Dr. Bergin's license is suspended for a minimum of 30 days. This suspension is stayed, however, for a period of 30-days, effective the date this Order is signed by the Board Secretary. During the 30-day stay period, Licensee shall enroll in and complete a multi-disciplinary evaluation at a facility approved in advance by the Board's Medical Director. Dr. Bergin will pay the costs of the evaluation. In the event that Dr. Bergin fails to meet this condition, the 30-day suspension shall go into effect at 5:00 p.m. on March 7, 2005 and will continue indefinitely until the following terms are satisfied:

a. The Board receives and considers the complete evaluation report from the multi-disciplinary evaluation that was approved in advance by the Board's Medical Director.

b. The evaluation report concludes that Dr. Bergin is safe to practice medicine.

c. Dr. Bergin demonstrates to the satisfaction of the Board that he is in full compliance with any treatment and monitoring recommendations contained in the evaluation report.

4. Dr. Bergin is assessed a $2,000 civil penalty as well as costs of these disciplinary proceedings, to be paid in full within 90 days from the date the Bill of Costs is signed by the Board's Executive Director.

DATED this 3rd day of February, 2005.

BOARD OF MEDICAL EXAMINERS
State of Oregon

Suresht R. Bald
SURESHT BALD, PhD
BOARD SECRETARY

Right to Judicial Review

NOTICE: *You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within 60 days after the Final Order is served upon you. See ORS 183.482. If this Order was personally delivered to you, the date of service is the day it was mailed, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.*

APPENDIX A
LIST OF EXHIBITS CITED

A1	Complaint and Notice of Proposed Disciplinary Action, 7/30/04
A2	Order for Evaluation, 6/3/04
A4	Stipulated Order, 3/6/03
A5	Health Professionals Program (HPP) Notification of Termination, 4/16/04
A7	HPP Evaluation and/or Treatment Agreement, 10/21/02
A9	Sierra Tucson Evaluation, 2/15/03
A10	Evaluation Report, Norman T. Reynolds, MD, 11/17/02
A11	Eugene Police Department Report, 10/20/02
A12	Letter to Board from Dr. Bergin, 5/24/02
A19	Articles on EtG as a Biomarker to Detect Alcohol Use, 2003-2004
A20	National Medical Services, Inc. records
A21	Northwest Toxicology Laboratories records
A25	Quest Diagnostics Urine Test results
R2	Letter to Dr. Bergin from the Board, 1/8/03
R8	HPP Notification of Termination, 4/16/04
R9	Notice of Alleged Violation of Stipulated Order, 4/19/04
R12	Letter to Board from Gregory Veralrud, Attorney at Law, 6/30/04
R13	Diagnostic Assessment by G. Alan Marlatt, PhD, 8/9/04
R15	Evaluation Report, Stanton Peele, PhD, 6/15/04

BEFORE THE

BOARD OF MEDICAL EXAMINERS

STATE OF OREGON

In the Matter of:	)	
	)	
PATRICK JOHN BERGIN, MD	)	BILL OF COSTS
License No. MD15838	)	
	)	

1.

On February 3, 2005 the Board of Medical Examiners (Board) issued a Final Order in the matter of Patrick John Bergin, MD (Licensee). In this Order, Licensee was assessed the costs related to his Contested Case Hearing held on November 3-5, 2004. Licensee was also assessed a $2,000 fine. These payments are due within 90 days from the date this Bill of Costs is signed by the Board's Executive Director.

2.

The State of Oregon, by and through its Board of Medical Examiners, claims costs related to the November 3-5, 2004 Contested Case Hearing in the above-captioned case as follows:

Board Counsel - Warren Foote	$ $10,301.63
Board Consultants-	$ 8,122.50
Norman T. Reynolds, MD ($3,832.00)	
Gary Jacobsen, MD ($4,290.50)	
Administrative Law Judge - Monica Smith	$ 3,444.75
Court Reporter Appearance - Naegeli Corp	$ 3,358.75
TOTAL COSTS DUE:	**$ 25,227.63**
TOTAL FINE DUE:	**$ 2,000.00**

The above costs are certified as a correct accounting of actual costs incurred preparing for and participating in the contested case hearing in this matter.

Dated this 10th of February, 2005

BOARD OF MEDICAL EXAMINERS
State of Oregon

Kathleen Haley

KATHLEEN HALEY,
EXECUTIVE DIRECTOR