

FILED

FFB 2 2004

**KANSAS STATE BOARD OF
HEALING ARTS**

**BEFORE THE BOARD OF THE HEALING ARTS
OF THE STATE OF KANSAS**

In the Matter of)
)
MARK A. GERSTBERGER, D.O.)
Kansas License No.5-26485)
_____)

Docket No. 04-HA-01

CONSENT ORDER

COMES NOW the Kansas State Board of Healing Arts ("Board"), by and through Stacy L. Cook, Litigation Counsel ("Petitioner"), and Mark A. Gerstberger, D.O. ("Licensee"), and move the Board for approval of a Consent Order affecting Licensee's license to practice osteopathic medicine and surgery in the State of Kansas. The parties stipulate and agree to the following:

1. Licensee's last known mailing address to the Board is 301 E. Grant, Ulysses, Kansas 67880.
2. Licensee is or has been entitled to engage in the practice of osteopathic medicine and surgery in the State of Kansas, having been issued License No. 5-26485 on August 17, 1996. Licensee's license status is active.
3. The Board is the sole and exclusive administrative agency in the State of Kansas authorized to regulate the practice of the healing arts, specifically the practice of osteopathic medicine and surgery.
4. This Consent Order and the filing of such document are in accordance with applicable law and the Board has jurisdiction to enter into the Consent Order as provided by K.S.A. 65-2838. Upon approval, these stipulations shall constitute the findings of the Board, and this

Consent Order shall constitute the Board's Final Order.

5. The Kansas Healing Arts Act is constitutional on its face and as applied in this case.

6. Licensee agrees that, in considering this matter, the Board is not acting beyond its jurisdiction as provided by law.

7. Licensee voluntarily and knowingly waives his right to a hearing. Licensee voluntarily and knowingly waives his right to present a defense by oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct cross-examination of witnesses. Licensee voluntarily and knowingly agrees to waive all possible substantive and procedural motions and defenses that could be raised if an administrative hearing were held.

8. The terms and conditions of the Consent Order are entered into between the undersigned parties and are submitted for the purpose of allowing these terms and conditions to become an Order of the Board. This Consent Order shall not be binding on the Board until an authorized signature is affixed at the end of this document. Licensee specifically acknowledges that counsel for the Board is not authorized to sign this Consent order on behalf of the Board.

9. The Board alleges that Licensee has violated the Healing Arts Act and there are grounds for disciplinary action. The specific allegations are contained in the Petition filed on July 3, 2003, and Petitioner's Specific Statement of Charges filed on November 10, 2003. Licensee does not admit the allegations but has entered into the Consent Order due to the risks and costs associated with litigation.

10. According to K.S.A. 65-2838(b), the Board has authority to enter into this Consent Order without the necessity of proceeding to a formal hearing.

11. In lieu of the conclusion of formal proceedings and/or the making of findings by the Board, Licensee, by signature affixed to this Consent Order, hereby voluntarily agrees to the

following disciplinary action with respect to his license to engage in the practice of osteopathic medicine and surgery:

a. Licensee is publicly censured for engaging in unprofessional conduct with the nursing staff and other staff at Kearney County Hospital;

b. (Confidential)
(Confidential)

c. (Confidential)
(Confidential)

d. (Confidential)

e. (Confidential)
(Confidential)

f. Licensee agrees to inform the Board at all times of his current practice location and situation. Licensee agrees to provide a copy of the Consent Order to the office manager

of his practice and to the hospital administrator and director of nursing at all hospitals where he has privileges. **(Confidential)**

(Confidential)

12. Licensee's failure to comply with the provisions of the Consent Order may result in the Board taking further disciplinary action as the board deems appropriate according to the Kansas Administrative Procedure Act.

13. Nothing in this Consent Order shall be construed to deny the Board jurisdiction to investigate alleged violations of the Healing Arts Act, or to investigate complaints received under the Risk Management law, K.S.A. 65-4921 *et seq.*, that are known or unknown and are not covered under this Consent Order, or to initiate formal proceedings based upon known or unknown allegations of violations of the Healing Arts Act.

14. Licensee hereby releases the Board, its individual members (in their official and personal capacities), attorneys, employees and agents, hereinafter collectively referred to as ("Releasees"), from any and all claims, including but not limited to, those alleged damages, actions, liabilities, both administrative and civil, including the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* arising out of the investigation and acts leading to the execution of this Consent Order. This release shall forever discharge the Releasees of any and all claims or demands of every kind and nature that Licensee has claimed to have had at the time of this release or might have had, either known or unknown, suspected or unsuspected, and

Licensee shall not commence to prosecute, cause or permit to be prosecuted, any action or proceeding of any description against the Releasees.

15. Licensee further understands and agrees that upon signature by Licensee, this document shall be deemed a public record and shall be reported to the National Practitioner Databank, Federation of State Medical Boards, and any other reporting entities requiring disclosure of the Consent Order.

16. This Consent Order, when signed by both parties, constitutes the entire agreement between the parties and may only be modified or amended by a subsequent document executed in the same manner by the parties.

17. Licensee agrees that all information maintained by the Board pertaining to the nature and result of any complaint and/or investigation may be fully disclosed to and considered by the Board in conjunction with the presentation of any offer of settlement, even if Licensee is not present. Licensee further acknowledges that the Board may conduct further inquiry as it deems necessary before the complete or partial acceptance or rejection of any offer of settlement.

18. Licensee, by signature to this document, waives any objection to the participation of the Board members, including the Disciplinary Panel, in the consideration of this offer of settlement and agrees not to seek the disqualification or recusal of any Board member in any future proceeding on the basis that the Board member has received investigative information from any source which otherwise may not be admissible or admitted as evidence.

19. Licensee acknowledges that he has read this Consent Order and fully understands the contents.

20. Licensee acknowledges that this Consent Order has been entered into freely and voluntarily.

21. All correspondence or communication between Licensee and the Board relating to this Consent Order shall be by certified mail addressed to the Kansas State Board of Healing Arts, Attn: Stacy L. Cook, 235 S. Topeka Blvd., Topeka, Kansas 66603-3068.

22. Licensee shall obey all federal, state and local laws and rules governing the practice of osteopathic medicine and surgery in the State of Kansas that may be in place at the time of execution of the Consent Order or may become effective subsequent to the execution of this document.

23. Upon execution of this Consent Order by affixing a Board authorized signature below, the provisions of this Consent Order shall become an Order under K.S.A. 65-2838. This Consent Order shall constitute the Board's Order when filed with the Office of the Executive Director for the Board and no further Order is required.

24. The Board may consider all aspects of this Consent Order in any future matter regarding Licensee.

IT IS THEREFORE ORDERED that the Consent Order and agreement of the parties contained herein is adopted by the Board as findings of fact and conclusions of law.

IT IS FURTHER ORDERED that in lieu of the conclusion of formal proceedings and/or the making of findings by the Board, Licensee, by signature affixed to this Consent Order, hereby voluntarily agrees to the following disciplinary action with respect to his license to engage in the practice of osteopathic medicine and surgery:

a. Licensee is publicly censured for engaging in unprofessional conduct **(Confidential)**
(Confidential)

b. **(Confidential)**
(Confidential)

(Confidential)

c. **(Confidential)**

(Confidential)

d. **(Confidential)**

e. **(Confidential)**

(Confidential)

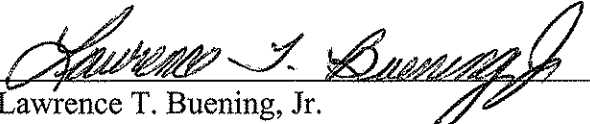
f. Licensee agrees to inform the Board at all times of his current practice location and situation. Licensee agrees to provide a copy of the Consent Order to the office manager of his practice and to the hospital administrator and director of nursing at all hospitals where he has privileges. **(Confidential)**

(Confidential)


Board, Licensee may request that the Board terminate the requirement of quarterly reports.


IT IS SO ORDERED on this 2^d day of February, 2007. ^{KS}

**FOR THE KANSAS STATE
BOARD OF HEALING ARTS:**



Lawrence T. Buening, Jr.
Executive Director

PREPARED AND APPROVED BY:


Stacy L. Cook, KS SC #16385
Litigation Counsel
Kansas State Board of Healing Arts
235 S. Topeka Boulevard
Topeka, Kansas 66603-3065
(785) 296-7413


Wesley A. Weathers, KS SC #06891
Cynthia Sheppard, KS SC #12039
WEATHERS & RILEY
4848 SW 21st Street, Suite 202
Topeka, KS 66604
(785) 273-2020
Counsel for the Respondent

AGREED TO BY:


Mark A. Gerstberger, D.O.
Licensee

CERTIFICATE OF SERVICE

I, Stacy L. Cook, do hereby certify that I served a true and correct copy of the CONSENT ORDER by United States mail, postage prepaid, on this 22 day of February, 2004 to the following:

Mark A. Gerstberger, D.O.
301 E. Grant
Ulysses, Kansas 67880

Wesley A. Weathers
Cynthia Sheppard
Weathers & Riley
4848 SW 21st
Topeka, KS 66604

and the original was hand-delivered to:

Lawrence T. Buening, Jr.
Executive Director
235 S. Topeka Boulevard
Topeka, Kansas 66603-3068



Stacy L. Cook