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K.B.M.L.

COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 2093

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF KENTUCKY HELD BY LONNIE R. DOUGLAS, M.D., LICENSE NO. 48849, 9913 SHELBYVILLE ROAD, SUITE 102, LOUISVILLE, KENTUCKY 40223-2902

FINAL ORDER

Pursuant to KRS 311.591(7) and KRS 13B.120, at its meeting on February 15, 2024, the Kentucky Board of Medical Licensure (hereafter "the Board"), acting by and through its Hearing Panel A, took up this matter for final action. Hearing Panel A considered the Complaint, filed March 16, 2023; the Findings of Fact, Conclusions of Law and Recommended Order, dated December 4, 2023; the Board's Exceptions, filed December 19, 2023; the licensee's Exceptions, filed December 19, 2023; and a memorandum from Board counsel, dated January 3, 2024.

Having considered all the information available and being sufficiently advised, pursuant to KRS 13B.120(2) Hearing Panel A hereby MODIFIES, IN PART, the Hearing Officer's recommended order as follows:

> **Conclusion of Law ¶4 is modified to read: "The Board has met its burden to prove that Dr. Douglas violated KRS 311.595(7). The Board has not met its burden to prove that Dr. Douglas violated KRS 311.595(4) or (8)."**

Except for the identified modification, Hearing Panel A hereby ACCEPTS AND ADOPTS all other findings of fact and conclusions of law from the hearing officer and incorporates them by reference into this Order. (Attachment)

The Panel explains the modification as follows: The Board's statute, KRS 311.595 provides,

> ...the board may ... place a license on probation for a period not to exceed five (5) years; suspend a license for a period not to exceed five (5) years; limit or restrict a license for an indefinite period; or revoke any license heretofore or hereafter issued by the board, upon proof that the licensee has:
>
> (7) Become a chronic or persistent alcoholic; ...

The term "chronic or persistent alcoholic is defined in KRS 311.550(25) to mean

> ... an individual who is suffering from a medically diagnosable disease characterized by chronic habitual, or periodic consumption of alcoholic beverages resulting in the interference with the individual's social or economic functions in the community or the loss of powers of self-control regarding the use of alcoholic beverages.

The evidence in the record, set forth in the hearing officer's findings of fact, demonstrate by a preponderance of the evidence that Dr. Douglas is a chronic or persistent alcoholic as defined by KRS 311.550(25) in violation of KRS 311.595(7).

The first part of the definition of a "chronic or persistent alcoholic" is "an individual who is suffering from a medically diagnosable disease [...]." The hearing officer erroneously concluded that the Board did not meet its burden of proving that Dr. Douglas suffered from a medically diagnosable disease solely because of a "flawed" evaluation at All Points North (APN). However, a report from Dr. Douglas' therapist, Ms. Solarz-Kutz, demonstrates that Dr. Douglas indeed suffered from a medically diagnosable disease. In fact, the hearing officer relied upon that report to find that Dr. Douglas suffered from a medically diagnosable disease in Finding of Fact ¶56, regardless of the APN evaluation:

> Based upon the information provided for the assessment, Ms. Solarz-Kutz found that under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), Dr. Douglas had an Alcohol Use Disorder ("AUD") in the mild to moderate range based upon his meeting four of the eleven criteria applicable to the condition. Exhibit 3, marked page 40.

The remainder of the definition of a "chronic or persistent alcoholic" – i.e. "[...] characterized by chronic, habitual, or periodic consumption of alcoholic beverages

resulting in the interference with the individual's social or economic functions in the community or the loss of powers of self-control regarding the use of alcoholic beverages" – was satisfied through evidence demonstrating that Dr. Douglas' consumption of alcohol interfered with his personal relationships, carried legal implications, and was punctuated by a loss of self-control. The evidence is summarized in several of the adopted findings of fact, including the following:

- Finding of Fact ¶27: [...] Dr. Tina Simpson, the Medical Director of the Foundation, received on September 6, 2022, an email expressing "concerns" about Dr. Douglas's recent arrest for operating a watercraft under the influence, [...].

- Finding of Fact ¶36: Dr. Douglas next contacted the Foundation [...] on December 3, 2021, after his second wife sought an Emergency Protective Order ("EPO") during the time period he was on federal probation as a result of the HGH guilty plea.

- Finding of Fact ¶37: His probation officer, Mr. Todd Mousty, notified Dr. Douglas that due to the filing of the EPO, the federal judge had ordered a modification of the conditions of his probation to include "assessments and/or treatment of mental health and alcohol abuse,", and therefore, Dr. Douglas contacted the Board to request "an assessment to determine the next steps."

- Finding of Fact ¶38: The staff person for the Foundation who took Dr. Douglas's telephone call wrote that he informed her that "he had been drinking more since his wife filed for divorce" and that his wife alleged "that I'm essentially a drunk."

- Finding of Fact ¶44: Under the terms of the modified federal probation order, Dr. Douglas agreed to see a therapist and to remain abstinent from alcohol during the remaining period of his probation.

- Finding of Fact ¶52: Dr. Douglas told Ms. Solarz-Kutz that his second wife claimed he had a "drinking problem" and filed for an EPO after he had "placed belongings on front steps of residence and insisted she move-out."

- Finding of Fact ¶53: In her assessment Ms. Solarz-Kutz stated Dr. Douglas "reports some history of drinking to manage the stress of work, marital problems. Reports increase in drinking since 2019 while being married to current wife, during stress of COVID/Corona virus and reduced work schedule as well as increase in drinking due to stress of recent legal charges and probation."

- Finding of Fact ¶58: Ms. Solarz-Kutz found Dr. Douglas met the criteria for "alcohol is often taken in larger amounts or over a longer period of time than intended," and the criteria for a "craving, or a strong desire or urge to use alcohol."

- Finding of Fact ¶59: In support of the latter category Ms. Solarz-Kutz stated, "AFTER WORK DRINKS, DRINKS TO MANAGE STRESS OF RELATIONSHIP, STRESS AT WORK, LEGAL ISSUES, ETC." (Emphasis in original.)

- Finding of Fact ¶ 60: In addition, Ms. Solarz-Kutz found that Dr. Douglas met the [DSM-5] criteria for "continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol" and the [DSM-5] criteria for "Tolerance."

- Finding of Fact ¶ 68: In spite of Dr. Douglas's favorable opinion of his therapy sessions with Ms. Solarz-Kutz and of her assistance in dealing with relationship and alcohol use issues, he made no effort at the administrative hearing to explain why after the expiration of his federal probation, he ignored her diagnosis of an alcohol use disorder and her recommendation that he abstain from alcohol.

- Finding of Fact ¶79: Dr. Douglas reported to Dr. Simpson that his therapy sessions with Ms. Solarz-Kutz were "very helpful in addressing his problems with the divorce," and although he had successfully stopped drinking for six months, he admitted that "when things were difficult, he wished he could have a drink."

- Finding of Fact ¶80: Dr. Douglas told Dr. Simpson that prior to his period of abstinence, he had been drinking five to six drinks per day, with scotch being his preferred liquor.

- Finding of Fact ¶90: In light of Dr. Douglas's acknowledged alcohol use and his previous assessment by Ms. Solarz-Kutz, the hearing officer finds the preponderance of the evidence does not support the assertion that Dr. Simpson projected her own alcohol related issues onto Dr. Douglas, or that she had any bias against him, or that she followed anything but the Foundation's standard protocol for addressing allegations regarding a physician's inappropriate use of alcohol.

- Finding of Fact ¶98: Dr. Douglas's [...] PETH test was positive at 536 ng/mL.

- Finding of Fact ¶103: [...] Dr. Douglas's PETH test of 536 ng/mL was "quite significantly elevated," which Dr. Simpson found surprising and unexpected based upon his reported recent alcohol use and which suggested to her that he had a problematic relationship with alcohol.

- Finding of Fact ¶111: Although Dr. Douglas objected to Dr. Simpson's recommendation for a comprehensive evaluation, the preponderance of the evidence supports the conclusion that her recommendation for a comprehensive evaluation was justified and supported by Dr. Douglas's history of alcohol use and was based on the facts and history related to his alcohol use.

Having found that the licensee violated KRS 311.595(7), having considered the nature of the violation and all statutorily available sanctions, and having considered that the licensee chose not to renew his license in 2023 such that it is now inactive, Hearing Panel A hereby **ORDERS**:

(1) Pursuant to KRS 311.591(7)(b), it **DOES NOT IMPOSE DISCIPLINE** because the Panel does not believe discipline to be necessary under the circumstances. The violation may be weighed by the Board during consideration of an application for re-registration, if the licensee should choose to apply for re-registration; and

(2) Pursuant to KRS 311.565(1)(v), the licensee **SHALL REIMBURSE** the Board the costs of the administrative proceedings in the amount of $21,261.48, prior to submitting an application for re-registration of his inactive medical license, if the licensee should choose to apply for re-registration.

SO ORDERED on this 19th day of February 2024.

W. Saleem.

WAQAR A. SALEEM, M.D.
CHAIR, HEARING PANEL A

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Final Order was delivered to Mr. Michael S. Rodman, Executive Director, Kentucky Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222; a copy was mailed, first-class postage prepaid, to Thomas J. Hellmann, Esq., Hearing Officer, 810 Hickman Hill Road, Frankfort, Kentucky 40601; and copies were mailed, certified return-receipt requested, to the licensee Lonnie Rhea Douglas, M.D., License No. 48849, 9913 Shelbyville Road, Suite 102, Louisville, Kentucky 40223-2902 and his counsel, Jennifer L. Wintergerst, Esq., Wyatt, Tarrant & Combs, LLP, 400 West Market Street, Suite 2000, Louisville, Kentucky 40202 on this 19th day of February, 2024.

Nicole King
Assistant General Counsel
Kentucky Board of Medical Licensure
310 Whittington Parkway, Suite 1B
Louisville, Kentucky 40222
Tel. (502) 764-2615

EFFECTIVE DATE AND APPEAL RIGHTS

Pursuant to KRS 311.593(1) and 13B.120, the effective date of this Order will be thirty (30) days after this Order is received by the licensee or the licensee's attorney, whichever shall occur first.

The licensee may appeal from this Order, pursuant to KRS 311.593 and 13B.140-.150, by filing a Petition for Judicial Review in Jefferson Circuit Court within thirty (30) days after this Order is mailed or delivered by personal service. Copies of the petition shall be served by the licensee upon the Board and its General Counsel or Assistant General Counsel. The Petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested, along with a copy of this Order.

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COMMONWEALTH OF KENTUCKY
BOARD OF MEDICAL LICENSURE
CASE NO. 2093

IN RE: THE LICENSE TO PRACTICE MEDICINE IN THE COMMONWEALTH OF KENTUCKY HELD BY LONNIE R. DOUGLAS, M.D., LICENSE NO. 48849, 9913 SHELBYVILLE ROAD, SUITE 102, LOUISVILLE, KY 40223-2902

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

The Kentucky Board of Medical Licensure (hereinafter, "the Board") brought this action against the license of Lonnie R. Douglas, M.D., charging him with violating several statutes governing the practice of medicine. The hearing officer conducted the administrative hearing on September 12-15, 2023. Hon. Nicole A. King represented the Board, and Hon. Jennifer L. Wintergerst and Hon. Emily H. Lineweaver represented Dr. Douglas, who also attended the hearing.

After considering the testimony of the witnesses, the exhibits admitted into evidence, and the arguments of counsel, the hearing officer finds the preponderance of the evidence does not support a violation of KRS 311.595(4). As to the alleged violations of KRS 311.595(7) and (8) set forth in the *Complaint*, the hearing officer finds that although the preponderance of the evidence supports the conclusion that Dr. Douglas has a problematic relationship with alcohol, and as a result may have an alcohol use disorder that subjects him to discipline under KRS 311.595(7) and (8), the present record, due to the shortcomings in the assessment performed by All Points North Lodge (hereinafter "APN"), does not support the conclusion he is in violation of those statutes. In addition, even if he were, it is unclear from the record whether the disorder is

appropriately classified as mild, moderate, or severe, which necessarily impacts whether he requires residential treatment or whether his condition can be effectively addressed by other treatment methods and oversight. Therefore, the hearing officer recommends the Board remand this action for Dr. Douglas to be reassessed by a different facility to determine whether he has an alcohol use disorder and is in violation of KRS 311.595(7) and (8). In support of his recommendation the hearing officer submits the following findings of fact, conclusions of law, and recommended order.

FINDINGS OF FACT

1. On March 16, 2023, the Board issued the *Complaint* charging Dr. Douglas with violating three sections of KRS 311.595.

2. The Board alleged that Dr. Douglas is subject to discipline under KRS 311.595(4) for having entered a guilty plea to a felony or misdemeanor. *Complaint*, pages 3-4 and 6.

3. Dr. Douglas had been arrested and charged with several boating violations, including operating a jet ski on the Ohio River while under the influence of alcohol, but after later pleading guilty to not having available a personal flotation device while operating the jet ski, the other charges were dismissed. *Id.*, numbered paragraphs 8-9, pages 3-4. Exhibits 18 and 19; DVD I, 9:16 a.m. (The administrative hearing was conducted over four consecutive days, and the citations to the video recordings are to the sequential day of the hearing followed by the time stamp on the video.)

4. The Board also alleged that Dr. Douglas is subject to discipline under KRS 311.595(7) because he has "become a chronic or persistent alcoholic." *Complaint*, numbered paragraph 20, page 6.

5. The Board further alleged that Dr. Douglas is subject to discipline under KRS 311.595(8) because he has "been unable or is unable to practice medicine according to acceptable and prevailing standards of care by reason of mental or physical illness or other condition . . . ." *Id.*

6. In addition to his arrest while operating the jet ski, the Board cited in support of those last two alleged violations of KRS 311.595, Dr. Douglas's interaction with and testing through the Kentucky Physicians Health Foundation (hereinafter, "the Foundation") and his assessment and evaluation performed by APN. *Id.*, numbered paragraphs 10-20, pages 4-6.

7. The Board alleges that testing ordered by the Foundation showed Dr. Douglas's PETH level to be 536 ng/mL, which generally is a measurement of blood alcohol level and which the Board asserted was "indicative of a problematic relationship with alcohol," and as a result, the Foundation directed him to undergo a comprehensive evaluation for alcohol use impairment at a facility approved by the Foundation. *Id.*, numbered paragraph 12, pages 4-5.

8. The *Complaint* alleged that after conducting the comprehensive evaluation, APN diagnosed Dr. Douglas with "Alcohol Use Disorder, Severe; Body Dysmorphic Disorder; and Attention Deficit Disorder, Predominately Inattentive." *Id.*, numbered paragraph 15, pages 5-6.

9. Based upon those diagnoses, APN determined he was unsafe to return to the practice of medicine until, among other conditions, he "enter[s] a residential treatment program for a minimum of 60 days." *Id.*

10. In response to the assessment and recommendation, Dr. Douglas denied any problem with alcohol, questioned the validity of APN's assessment, and requested "that the Board objectively look at this matter before making any decision that would restrain his practice." *Complaint*, numbered paragraph 18, page 6; Exhibit 10, page 4.

11. Thereafter, the Board issued the *Complaint* and an emergency order suspending his license to practice medicine pending the resolution of this action. *Complaint*, numbered paragraph 19, page 6.

12. At the administrative hearing the focus of the testimony was necessarily on Dr. Douglas's history of alcohol use and on APN's conclusion that he suffers from an Alcohol Use Disorder, Severe, that required him to be treated in a residential program for a minimum of sixty days to address the condition. Exhibit 9, pages 15-16.

13. During the presentation of evidence at the administrative hearing, the Board conceded that although Dr. Douglas had been arrested for operating the jet ski under the influence of alcohol, that charge was dismissed, and he pled guilty to the single charge of failing to wear a flotation device while operating a watercraft. DVD IV, 9:18-9:19 a.m.

14. Because he pled guilty to a charge classified under Kentucky law as a "violation," the Board concedes the guilty plea does not rise to the level of a

misdemeanor or felony as required for disciplinary action pursuant to KRS 311.595(4), and therefore, that allegation must be dismissed. Id.

15. Dr. Douglas obtained his undergraduate degree from Eastern Kentucky University and his medical degree from the University of Louisville medical school, performed his residency in orthopedic surgery at the University of Louisville, and has been practicing medicine since 2016. DVD I, 9:11-9:12 a.m.

16. Dr. Douglas felt his career was advancing rapidly when he accepted the offer to return to the University of Louisville to become head of the Sports Medicine Institute for University of Louisville Health, making him the youngest leader of such a program in the United States. DVD I, 11:09-11:10 a.m.

17. In that position he was able to teach, lecture, publish, and perform surgery, and one of his goals was to convince more of the university's sports programs to utilize the services of the university's own sports medicine program. DVD I, 11:10 a.m.

18. At that point in his medical career Dr. Douglas believed that he was on track for accelerated promotions at the university. DVD I, 11:10 a.m.

19. His rise at the university ended abruptly on March 3, 2021, when he was charged with, and shortly thereafter, pled guilty to one count of Conspiracy to Introduce Unapproved Human Growth Hormone into Interstate Commerce, a Class A Misdemeanor, for which he was placed on supervised probation for one year and paid a $45,000 fine. Exhibit 2.

20. Dr. Douglas admitted that the conduct which served as the basis for the charge and guilty plea included the purchase of HGH (Human Growth Hormone) on

three occasions from an internet website while using different aliases and delivery addresses each time as required by the website. Exhibit 5, unmarked pages 4-6; Exhibit 9, page 3; DVD I, 11:26 a.m.

21. While admitting he knew it was illegal to sell or transfer HGH, he asserted he wasn't suspicious of the legality of his conduct because he didn't think it was illegal to purchase HGH for personal use. DVD I, 11:18-11:19 a.m.; Exhibit 9, page 3.

22. Dr. Douglas asserted he thought the HGH "would improve my appearance and give me greater energy to do my job," and only later recognized "the potential for harm was greater still, as being associated with me caused an already embattled collegiate athletic program, eager to re-cast itself as reformed, caused them to be embroiled in the mess I created. My colleagues and partners had the same negative association in the news and in the community." Exhibit 5, unmarked page 7.

23. Dr. Douglas was terminated as the head of the Sports Medicine Institute and released from his contract's non-compete clause due to the media exposure and the negative press related to the federal charges and his guilty plea. DVD I, 10:51-10:52 a.m.

24. As a result of his guilty plea Dr. Douglas entered into an Agreed Order with the Board on June 7, 2021, that, among other requirements, placed his license on probation for five years. Exhibit 22, marked pages Douglas0031-0036.

25. His conviction was reported to the National Practitioners' Data Base, and as a result, Dr. Douglas became "unemployable" because he could no longer obtain insurance due to his federal probation being considered a restriction on his license and

since there was the belief that he was giving the HGH to patients or university athletes. DVD I, 11:19-11:21 a.m.

26. After he was released from federal probation on April 14, 2022, he requested and was released from the Board's order of probation on September 15, 2022. Exhibit 4 and Exhibit 8, marked pages 3-4.

27. In the meantime, however, Dr. Tina Simpson, the Medical Director of the Foundation, received on September 6, 2022, an email expressing "concerns" about Dr. Douglas's recent arrest for operating a watercraft under the influence, and she contacted the Board the same day about the communication. Exhibit 8, marked page 3: DVD I, 12:42 p.m.

28. The next day the Board notified Dr. Douglas that it had received a report that he "may be dealing with an impairment issue" and asked that he contact the Foundation to address the matter. Exhibit 7.

29. This was not the first instance in which Dr. Douglas had been asked to contact the Foundation.

30. While he was a fourth year orthopedic resident at the University of Louisville in July 2013, Dr. Craig Roberts, the head of the university's orthopedic surgery program contacted Dr. Doug Jones, who at the time was the executive director of the Foundation, and asked that he conduct an impairment evaluation of Dr. Douglas. Exhibit 1, first page.

31. Although he requested the evaluation, Dr. Roberts stated he didn't have "any direct concerns about impairment" or "any other tangible events" he could provide

in support of his request. Id.

32. Dr. Jones met with Dr. Douglas and reported back to Dr. Roberts that although Dr. Douglas was under a tremendous amount of stress related to work, his parents' illnesses and the death of his father, and his marriage unraveling while having two small sons, Dr. Jones had "no issue with Lonnie continuing his full clinical duties" and "didn't see him needing any formal arrangement with us." Exhibit 1, marked pages Douglas 185-188.

33. During the interview with Dr. Jones, Dr. Douglas reported drinking "a significant glass of scotch last night," which was confirmed by the urine screen collected that same day that showed an EtG of 4,510 and EtS of 747, but those results did not change Dr. Jones's initial assessment that "there is no need for Lonnie to work with the Foundation." Exhibit 1, marked pages 186 and 188.

34. EtS and EtG are alcohol metabolites found in urine, and the tests are used to measure a person's consumption of alcohol during the previous two to three days. DVD I, 1:32 p.m.

35. A PETH test measures the concentration of alcohol attached to blood cell membranes and can detect alcohol consumption two to three weeks prior to testing. DVD I, 1:33 p.m.

36. Dr. Douglas next contacted the Foundation over eight years later, on December 3, 2021, after his second wife sought an Emergency Protective Order ("EPO") during the time period he was on federal probation as a result of the HGH guilty plea. Exhibit 8, marked page 1.

37. His probation officer, Mr. Todd Mousty, notified Dr. Douglas that due to the filing of the EPO, the federal judge had ordered a modification of the conditions of his probation to include "assessments and/or treatment of mental health and alcohol abuse,", and therefore, Dr. Douglas contacted the Board to request "an assessment to determine the next steps." Exhibit 2; Exhibit 8, marked page 1 of 15; DVD 1, 9:30-9:33 a.m.

38. The staff person for the Foundation who took Dr. Douglas's telephone call wrote that he informed her that "he had been drinking more since his wife filed for divorce" and that his wife alleged "that I'm essentially a drunk." Exhibit 8, marked page 1 of 15.

39. As Medical Director of the Foundation Dr. Simpson returned Dr. Douglas's telephone call to discuss his request for an assessment. Id.

40. Dr. Simpson reported that Dr. Douglas was "absolutely blown away" when informed that depending upon the recommendation from the assessment, the Board may require him to take part in a ninety-day residential treatment program, which he feared would result in the loss of his newly opened medical practice. Id.

41. Apparently, there was confusion between Dr. Douglas and the Foundation over the type of assessment the federal court required and the type of assessment the Foundation may require after a physician is referred from the Board. DVD I, 9:33-9:34 a.m.

42. Dr. Douglas sought clarification from Mr. Mousty about the court's order, and he was notified that enrollment in a treatment program similar to that discussed

with Dr. Simpson would not be required to satisfy the federal court. DVD I, 9:31-9;34 a.m.; Exhibit 8, marked page 2 of 15.

43. Therefore, Dr. Douglas informed the Foundation that he would enroll in a program recommended by the U.S. Probation office that would satisfy the court. DVD I, 9:33-9:34 a.m.

44. Under the terms of the modified federal probation order, Dr. Douglas agreed to see a therapist and to remain abstinent from alcohol during the remaining period of his probation. DVD 9:48-9:49 a.m.

45. Choosing from a list of approved therapists provided by the federal probation office, Dr. Douglas received an assessment from Heidi Solarz-Kutz, a Licensed Clinical Social Worker in Louisville, Kentucky, for alcohol and/or drug use on December 6, 2021, and he began seeing her for counseling. DVD I, 9:39 and 9:47 a.m.; Exhibit 3.

46. Dr. Douglas informed Ms. Solarz-Kutz that he had requested the assessment "to suffice EPO and probation requirements as well as to address possible alcohol use/misuse." Exhibit 3, marked page 38.

47. He discussed with Ms. Solarz-Kutz many of the same types of marital and alcohol-use issues that he had reported to Dr. Jones at the time of their meeting eight years earlier. Exhibits 1 and 3.

48. Dr. Douglas testified at the administrative hearing, however, that very little of the sessions with Ms. Solarz-Kutz had anything to do with his use of alcohol, but instead, they dealt primarily with relationship issues. DVD I, 9:49 a.m.

49. Although Ms. Solarz-Kutz performed an assessment on his alcohol use and issued a report, she did not testify at the administrative hearing. Exhibit 3.

50. Ms. Solarz-Kutz's report does not state whether she sought or obtained from any sources other than Dr. Douglas information related to his alcohol use, his work performance, or his relationship issues . Exhibit 3.

51. Dr. Douglas informed Ms. Solarz-Kutz of two earlier arrests on alcohol related charges, one while he was in high school and another while in college. Exhibit 3, marked page 39; DVD I, 9:14-9:15 a.m.

52. Dr. Douglas told Ms. Solarz-Kutz that his second wife claimed he had a "drinking problem" and filed for an EPO after he had "placed belongings on front steps of residence and insisted she move-out." Exhibit 3, marked page 38.

53. In her assessment Ms. Solarz-Kutz stated Dr. Douglas "reports some history of drinking to manage the stress of work, marital problems. Reports increase in drinking since 2019 while being married to current wife, during stress of COVID/Corona virus and reduced work schedule as well as increase in drinking due to stress of recent legal charges and probation." Exhibit 3, marked page 39.

54. As for the specific quantity of alcohol he consumed, Dr. Douglas "report[ed] having approximately 3 drinks at times when completing work day to manage stress and sometimes exceeding 3 drinks at times" and "also report[ed] having many times lately where he feels 'once I start drinking . . . I don't really stop until I fall asleep.'" Exhibit 3, marked page 39.

55. In addition, Dr. Douglas reported "sleeping is difficult at times due to stress of marital issues and legal issues as well as financial challenges." Id.

56. Based upon the information provided for the assessment, Ms. Solarz-Kutz found that under the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5), Dr. Douglas had an Alcohol Use Disorder ("AUD") in the mild to moderate range based upon his meeting four of the eleven criteria applicable to the condition. Exhibit 3, marked page 40.

57. DSM-5 defines an AUD as "a problematic pattern of alcohol use leading to clinically significant impairment or distress, as manifested by at least two of the following [eleven categories], occurring in a 12 month period." Exhibit 3, marked pages 39-40.

58. Ms. Solarz-Kutz found Dr. Douglas met the criteria for "alcohol is often taken in larger amounts or over a longer period of time than intended," and the criteria for a "craving, or a strong desire or urge to use alcohol." Exhibit 3, marked page 40.

59. In support of the latter category Ms. Solarz-Kutz stated, "AFTER WORK DRINKS, DRINKS TO MANAGE STRESS OF RELATIONSHIP, STRESS AT WORK, LEGAL ISSUES, ETC." (Emphasis in original.) Id.

60. In addition, Ms. Solarz-Kutz found that Dr. Douglas met the criteria for "continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol" and the criteria for "Tolerance." Id.

61. Ms. Solarz-Kutz summarized her assessment by stating Dr. Douglas "has endured an exceptionally stressful time since late 2019 and early 2020. His drinking has increased during this time period. He is currently experiencing stress and symptoms of both depression and anxiety as well as alcohol abuse/misuse." Id., marked page 41.

62. Based upon those findings and her diagnosis of Dr. Douglas having a mild-moderate AUD, Ms. Solarz-Kutz recommended his "abstinence from alcohol, attendance at weekly therapy sessions to address alcohol use/misuse, anxiety and depression as well as to learn positive coping skills, random and regular alcohol and drug testing, use of 12-steps (may utilize in weekly therapy sessions and/or attend 12-step meetings), and [she] also recommends weekly and/or monthly reports." Id., marked page 40.

63. After the assessment, Dr. Douglas continued in a counseling program with Ms. Solarz-Kutz until shortly before the end of his federal probation, but he later began seeing a psychiatrist, Dr. Charles Noplis. Exhibit 3, first page; Exhibit 9, page 4; Exhibit 22, marked page Douglas0115.

64. Ms. Solarz-Kutz's findings as to Dr. Douglas's alcohol use were consistent with his reported alcohol use in his later meeting with Dr. Simpson and in his assessment by APN, but Ms. Solarz-Kutz found Dr. Douglas had an AUD in the mild to moderate range, whereas APN found he had a severe AUD. Exhibits 3, 8, and 9.

65. Since Ms. Solarz-Kutz did not testify at the administrative hearing to explain her findings and conclusions and to be subject to cross-examination about them, the hearing officer cannot give as much weight to her assessment or rely upon it as he might otherwise if she had testified.

66. Dr. Douglas testified that he found the therapy sessions with Ms. Solarz-Kutz to be helpful with his drinking and relationship issues. DVD I, 9:49-9:50 a.m.

67. Dr. Douglas remained abstinent from alcohol for the entire six month period from the time of the court's modification of the order of probation to the successful completion of his federal probation on April 22, 2022. DVD I, 9:48-9:49 and 10:57 a.m.; Exhibit 2.

68. In spite of Dr. Douglas's favorable opinion of his therapy sessions with Ms. Solarz-Kutz and of her assistance in dealing with relationship and alcohol use issues, he made no effort at the administrative hearing to explain why after the expiration of his federal probation, he ignored her diagnosis of an alcohol use disorder and her recommendation that he abstain from alcohol.

69. Dr. Simpson received a copy of Ms. Solarz-Kutz's report upon his referral to the Foundation by the Board on September 7, 2022, and she reviewed it prior to meeting with Dr. Douglas on November 10, 2022. DVD I, 9:47 and 9:50 a.m.; Exhibits 3, 7, and Exhibit 8, marked pages 7-8 of 15.

70. Dr. Douglas testified that at the meeting with Dr. Simpson she recalled their earlier telephone conversation in December 2021, when he inquired about an evaluation related to his federal probation, and he asserted Dr. Simpson stated, "I knew you'd be back." DVD I, 10:06 a.m.

71. Dr. Douglas felt her comment was "unusual," and his overall view of their conversation was that she had prejudged him as an alcoholic and that he was being "railroaded" by her. DVD I, 10:06-10:11 a.m.

72. One of the screening tools utilized by the Foundation to measure a person's alcohol use is the AUDIT-C Questionnaire, which consists of three questions regarding a person's alcohol consumption, and Dr. Douglas scored a 4, which Dr. Simpson stated was a "significant data point" that required further information and evaluation regarding the extent of his alcohol intake. DVD I, 1:34-1:35 p.m.; 1:39-1:41 p.m.; Exhibit 8, marked page 7 of 15; Exhibit 23.

73. The AUDIT-C is promoted as "a brief alcohol screen that reliably identifies patients who are hazardous drinkers or have active alcohol use disorders," and "a score of 4 or more on an AUDIT-C is "considered positive, optimal for identifying hazardous drinking or active alcohol use disorders." Exhibit 23, second page.

74. It was unclear whether Dr. Douglas knew at the time of his meeting with Dr. Simpson that she was already familiar with his earlier meeting with Dr. Jones, with the results of his Audit-C screen, and with his telephone conversations with the staff person when he called about an assessment for his federal probation.

75. He contrasted his conversation with Dr. Simpson to his earlier interaction with Dr. Jones, which Dr. Douglas described as "very reasonable" and at which Dr. Jones found no areas of concern. DVD I, 10:07 a.m.

76. Based upon his earlier encounter with the Foundation, Dr. Douglas thought Dr. Simpson would "send me for some kind of testing," which would be "my way of putting to bed" any concerns the Foundation might have regarding his alcohol use. DVD I, 10:07-10:09 a.m.

77. Dr. Simpson noted, however, several areas that Dr. Douglas addressed during the interview that raised concerns for her.

78. He reported the alcohol intoxication charges from high school and college, the difficulties with his ex-wife and the EPO, and her accusation that he was a "drunk." Exhibit 8, marked pages 7-8 of 15.

79. Dr. Douglas reported to Dr. Simpson that his therapy sessions with Ms. Solarz-Kutz were "very helpful in addressing his problems with the divorce," and although he had successfully stopped drinking for six months, he admitted that "when things were difficult, he wished he could have a drink." Id., marked page 7 of 15.

80. Dr. Douglas told Dr. Simpson that prior to his period of abstinence, he had been drinking five to six drinks per day, with scotch being his preferred liquor. Id., marked page 8 of 15.

81. He also told Dr. Simpson that he had been drinking at the time of his arrest for the boating incident, and although he stated he couldn't recall the amount he had drunk, at the administrative hearing he reported having only three to four beers the entire day. Id., marked page 7 of 15; DVD I, 10:26 a.m.

82. Dr. Douglas asserted at the administrative hearing that contrary to Dr. Simpson's notes from their meeting, he had not been in a custody battle with his ex-wife, but instead, they were having a dispute over child support payments as a result of the substantial reduction in his income with the opening of his own medical practice after his release from the University of Louisville. DVD I, 10:26-10:27 a.m. Exhibit 8, marked page 7 of 15.

83. He described for Dr. Simpson his current drinking pattern as having two drinks while out to dinner, drinking beer at football games, and having drunk alcohol during a fishing trip with friends two weeks earlier, but he asserted he did not drink on the four days per week that he was with his children. Id., marked page 8 of 15.

84. Dr. Simpson compared his circumstances with her own history with the Foundation, but when she informed him that he would have to submit to both blood and urine testing, he refused to submit to a blood test until he had the opportunity to research the need for such a test. Id.; DVD I, 10:09-10:12 a.m.

85. Dr. Douglas asserted he was scared of needles and requested a few days to conduct his own investigation and to collect more information before he agreed to submit to a blood test. Id.

86. Dr. Simpson ended the meeting after forty-five minutes when Dr. Douglas became "increasingly agitated, raising his voice, and interrupting" her over his taking a blood test and when it became clear to her that no further progress would be made regarding the issue. Exhibit 8, marked page 8 of 15.

87. She did agree to give him until the following Wednesday to gather information and to complete the blood test. Id.

88. Dr. Douglas asserted at the administrative hearing that Dr. Simpson completely misconstrued his emotional state at the end of their meeting, stating that her comments were "silly," "bombastic," and "over the top," but he admitted that otherwise Dr. Simpson's notes regarding the interview were generally accurate. DVD I, 10:29-10:31 a.m., 10:34 a.m.

89. He also admitted to having told her that he felt railroaded in the past over his legal problems, and as a result, his encounter with Dr. Simpson "seem[ed] familiar" since he "had been railroaded into all of his previous legal problems." Exhibit 8, marked page 8 of 15; DVD I, 10:31-10:32 a.m.

90. In light of Dr. Douglas's acknowledged alcohol use and his previous assessment by Ms. Solarz-Kutz, the hearing officer finds the preponderance of the evidence does not support the assertion that Dr. Simpson projected her own alcohol related issues onto Dr. Douglas, or that she had any bias against him, or that she followed anything but the Foundation's standard protocol for addressing allegations regarding a physician's inappropriate use of alcohol. Exhibit 8, marked pages 7-8 of 15; DVD I, 1:02-1:05 p.m.

91. In addition, Dr. Douglas could not have been surprised that the Foundation had concerns for a possible alcohol use disorder or that he may need testing beyond a urine test, unless he assumed the Foundation would order nothing more than the same test ordered by Dr. Jones over nine years earlier. Exhibit 1, marked page 188. and Exhibit 8, marked page 8 of 15.

92. Even assuming Dr. Douglas had a genuine and profound fear of needles, the blood test would reveal a longer history of his alcohol use, which may account, at least in part, for his agitation during his interview by Dr. Simpson. Exhibit 8, marked page 8.

93. Dr. Douglas testified that after leaving the interview, he called a provider he knew who issued an order for a separate urine drug screen ("UDS") that he could

submit to the Foundation. DVD I, 10:36 a.m.

94. In fact, Dr. Douglas completed his own order for a UDS and went to a collection site to submit the urine sample, but coincidentally, he had chosen the same site the Foundation uses for urine and blood testing. DVD III, 1:13-1;15 p.m.

95. The technician on duty told him she already had the Foundation's order for testing and was ready to collect its urine and blood samples, but he refused to submit to the Foundation's tests. DVD I, 10:35-10:39 a.m.; DVD III, 1:15-1:18 p.m.; Exhibit 8, marked page 7 of 15.

96. The Foundation would not accept the results from the urine test Dr. Douglas had ordered in place of the Foundation's blood and urine tests. Exhibit 8, marked page 9 of 15.

97. Dr. Douglas returned to the collection site the following Wednesday and submitted to the Foundation's blood and urine tests. Exhibit 8, marked page 10 of 15.

98. Dr. Douglas's UDS was positive for a prescribed amphetamine to treat his attention deficit disorder, and although the UDS was negative for alcohol, the PETH test was positive at 536 ng/mL. Exhibit 8, marked page 10 of 15; DVD I, 1:05 p.m.

99. Dr. Simpson noted that she would have expected a negative urine test if Dr. Douglas had not drunk alcohol between the time he scheduled his appointment with her and the Foundation's UDS. DVD I, 3:30 p.m.

100. Dr. Douglas had met with Dr. Simpson on November 10, 2022, and he completed the Foundations urine and blood tests on November 16, 2022. DVD I, 1:44-1:45 p.m.; Exhibit 8, marked pages 7 and 10 of 15.

101. The Foundation requires a PETH test in part to determine whether the person's stated alcohol use corresponds with the test results. DVD I, 1:04 p.m.

102. The PETH test uses a cutoff of 20 ng/mL as a negative test, and a non-alcoholic male can have two drinks per day for a two-week period of time and still have a negative PETH test of less than 20 ng/mL. Exhibit 13, first page; DVD I, 1:51-1:53 p.m.

103. Hence, Dr. Douglas's PETH test of 536 ng/mL was "quite significantly elevated," which Dr. Simpson found surprising and unexpected based upon his reported recent alcohol use and which suggested to her that he had a problematic relationship with alcohol. DVD I, 1:08 p.m. and 1:55 p.m.

104. Based on his high PETH level and his referral by the Board due to a possible impairment issue, Dr. Simpson found that Dr. Douglas needed an evaluation by an expert in the field to determine whether his PETH level indicated an alcohol use disorder that could impair his ability to safely practice medicine. Id.; Exhibit 7.

105. As further support for his need for a comprehensive evaluation Dr. Simpson considered Ms. Solarz-Kutz's diagnosis of an alcohol use disorder, his return to drinking after the six-month abstinence, and his most recent alcohol related charge while operating a jet ski. DVD I, 1:10-1:11 p.m.

106. In fact, Dr. Simpson found it "very concerning" that someone like Dr. Douglas who had a previous alcohol use disorder diagnosis "continues to drink at all." DVD I, 1:56 p.m.

107. She noted that alcohol use disorder is a "chronic, progressive, relapsing disease, and abstinence is the best established treatment for long-term sobriety." DVD I, 1:57 p.m.

108. Dr. Simpson also noted that a person with an alcohol use disorder often does not gradually return to excessive drinking after a period of abstinence but will abruptly return to the same significant use as before. DVD I, 1:02 p.m.

109. As a result, she recommended he receive a comprehensive evaluation by a facility that had experience in diagnosing and treating healthcare professionals. DVD I, 1:10 p.m.

110. In her position as Medical Director, Dr. Simpson does not make diagnoses or treat physicians but only makes recommendations on whether physicians should receive an evaluation. DVD I, 2:31 p.m.

111. Although Dr. Douglas objected to Dr. Simpson's recommendation for a comprehensive evaluation, the preponderance of the evidence supports the conclusion that her recommendation for a comprehensive evaluation was justified and supported by Dr. Douglas's history of alcohol use and was based on the facts and history related to his alcohol use.

112. Initially, Dr. Simpson recommended two facilities for Dr. Douglas's evaluation, Bradford Health Services and Florida Recovery Center, because they have a "great deal of experience and expertise in the evaluation and treatment of safety-sensitive healthcare professionals," but he requested additional options since he hoped

to use his insurance to help defray some of the cost. DVD I, 10:46-10:47 a.m., and 1:11-1:12 p.m.; Exhibit 13, second page.

113. Dr. Simpson noted that the criteria is more strict for the selection of facilities that evaluate and treat safety sensitive professionals performing highly skilled jobs because there could be dire, life-threatening consequences should the treatment fail and a relapse in substance use occurs. DVD I, 2:05-2;06 p.m., 2:12-2:15 p.m., and 2:52 p.m.

114. The individual must be evaluated not only for substance use issues but also for mental and physical impairments and for issues related to judgement and cognition that may affect a person's ability to perform in a highly skilled profession. DVD I, 2:05 p.m. and 2:15 p.m.

115. Therefore, the Foundation chooses facilities that have significant experience in the evaluation and treatment of healthcare professionals and provided Dr. Douglas with five additional approved facilities. DVD I, 2:09-2:12 p.m.; Exhibit 14.

116. He selected APN located in Edwards, Colorado, from the list provided by the Foundation, but although approved by the Foundation, Dr. Douglas was the first referral by the Foundation to APN for a comprehensive evaluation. Exhibit 14, last page; DVD II, 9:11 and 11:19 a.m.

117. Dr. Simpson receives no compensation or other incentive for a physician's choice of an evaluation or treatment facility, and the physician is not required to receive any recommended treatment from the same facility that performed the evaluation. DVD I, 1:17-1:18 p.m.

118. Dr. Simpson also noted that some individuals who receive a comprehensive evaluation are not recommended for treatment. DVD I, 1:18 p.m.

119. APN is a relatively new evaluation and treatment facility, having opened just a week before the Covid pandemic shut down many businesses. DVD II, 11:04 a.m.

120. The Foundation provided APN with its records, lab results, and notes on Dr. Douglas in anticipation of his evaluation. DVD I, 2:17 p.m. and 2:28 p.m; See Exhibit 22.

121. Dr. Simpson didn't recall discussing with APN any substantive matters related to the evaluation of Dr. Douglas. DVD I, 2:39 p.m., 2:44 p.m., and 3:17 p.m.

122. Dr. James Montgomery is the Medical Director for APN of Dallas/Ft. Worth and is the interim Medical Director for APN's lodge in Edwards, Colorado. DVD II, 9:02 a.m.

123. Dr. Montgomery began treating healthcare professionals two years after completing his residency program in psychiatry, and with his additional training in addiction medicine, he has treated substance use disorders for more than thirty years. DVD II, 9:06-9:08 a.m.

124. He has treated healthcare professionals for twenty-five years, has evaluated more than two hundred healthcare professionals, and has served as APN's Medical Director for fifteen months. DVD II, 9:05 a.m. and 9:13 a.m.

125. At the administrative hearing Dr. Montgomery was qualified as an expert in addiction medicine and in psychiatry with its neurology component. DVD II, 9:09 a.m.

126. Dr. Montgomery is a salaried employee for APN, and he does not receive any financial incentive based upon the number of evaluations he performs. DVD II, 9:14 a.m.

127. If a physician is recommended for treatment after APN's assessment, the person is not required to be treated at APN's facility. DVD II, 9:15 a.m.

128. Prior to the evaluation of Dr. Douglas, Dr. Montgomery had no interaction with the Board or the Foundation. DVD II, 11:18 a.m.

129. His primary duty for APN is patient care in the facility's healthcare professional track. DVD II, 9:02-9:03 a.m.

130. The healthcare professionals track has both behavioral health and substance abuse components and focuses on the different rules and requirements for healthcare professionals related to licensure, self-care, and monitoring. DVD II, 9:03 a.m.

131. APN's comprehensive evaluations take place over three days, and Dr. Montgomery performs between twelve and twenty evaluations per year. DVD II, 9:05 a.m.

132. APN conducted a three-day assessment of Dr. Douglas on January 10-12, 2023. Exhibit 9, page 1.

133. For the psychiatric portion of APN's report Dr. Montgomery conducted a sixty to ninety minute interview of Dr. Douglas on the first day of his evaluation. Exhibit 9, pages 2-5; DVD II, 9:16 a.m., 9:30 a.m., and 9:42 a.m.

134. Dr. Montgomery considers the information APN receives prior to the evaluation as "historical fact," but APN will attempt to verify new information it receives or information that isn't included in the referring authority's written report. DVD II, 9:24-9:25 a.m.; Exhibit 9, pages 7-10; Exhibit 22.

135. Jeannine Abbott, a forensic psychologist, performed the biopsychosocial assessment, and as part of her role with the team she makes recommendations for further testing. DVD II, 9:20 a.m.; Exhibit 9 pages 5-10.

136. Gabrielle Godin is a licensed clinical psychologist and is responsible for collecting information prior to the evaluation and for contacting collateral sources for the individual being evaluated. DVD II, 9:22-9:23 a.m.

137. Typically, APN attempts to contact a person from the workplace, a peer, a close friend, or any other person crucial to the evaluation process, but APN was unable to contact any additional collateral source for Dr. Douglas. DVD II, 9:28 a.m.; Exhibit 9, page 10.

138. Dr. Montgomery stated that the failure to contact a collateral source leaves open the question regarding what information they missed, but in this case, he felt the inability to speak with a collateral source did not change the results of the assessment for Dr. Douglas. DVD II, 9:29 a.m.

139. Henry Goetze is a neuropsychologist who has been practicing in the field for a number of years. DVD II, 9:23-9:24 a.m.

140. Mr. Goetze performs more complex psychological testing, and Dr. Montgomery relies "very much" upon his work in forming the diagnosis and

recommendations. DVD II, 9:24 a.m.; Exhibit 9, pages 10-12.

141. APN stated the "referral question" from the Foundation was a request for a "firm diagnosis, particularly related to possible SUD ["Substance Use Disorder], with recommendations for treatment." Exhibit 22, marked page Douglas00161.

142. Dr. Douglas asserts that his evaluation by APN was tainted from the beginning as a result of the information received from the Foundation prior to his arrival at APN. DVD I, 10:47-10:58 a.m.; DVD II, 11:51 a.m.; Exhibit 9, pages 7-10; Exhibit 22, marked pages Douglas0013-0025, 0048-0056, and 0160-0161.

143. APN records indicate the Foundation reported Dr. Douglas as intoxicated and "belligerent" toward the officer when arrested for the boating incident, that he "has a history of ordering testosterone [rather than HGH which is not a controlled substance] illegally/improperly in his role as orthopedic surgeon," that he was going through a "bad divorce," that he was "defensive about this referral," that he was "very slow in being forthcoming with information requested from him,"that he "was presenting as paranoid in addition to being defensive," and finally, that "none of his story seems to be adding up." Exhibit 22, marked pages Douglas0160-0161.

144. Dr. Douglas asserts that APN's assessment was influenced by the belief the Foundation thought he had a substance use disorder and sought verification from APN for such a diagnosis.

145. Dr. Montgomery's section of APN's evaluation and assessment includes information he obtained directly from Dr. Douglas and the Foundation. DVD II, 9:45 a.m.; Exhibit 9, pages 2-5.

146. Dr. Montgomery seemed to accept as true the information he obtained from the Foundation, and although he included information from Dr. Douglas in his report, there are several significant factual errors in the report. Exhibit 9, page 10.

147. Dr. Montgomery stated the Foundation's information that Dr. Douglas had become belligerent with the arresting officer would have been a "significant" fact and would have raised for him "a fair amount of concern" in evaluating Dr. Douglas because it would have been inconsistent with how a professional is expected to act. DVD II, 11:42-11:43 a.m.; Exhibit 22, marked pages Douglas0160-0161.

148. When Dr. Montgomery was informed at the administrative hearing that the arresting officer testified Dr. Douglas was cooperative during the arrest and that there's nothing in the police report suggesting he was belligerent, Dr. Montgomery clarified that he felt Dr. Douglas's conduct toward the officer had been "resistant," which Dr. Montgomery stated was consistent with what would have been expected in the circumstances. DVD II, 11:43-11:46; Exhibit 18.

149. In fact, the arresting officer testified Dr. Douglas had been "compliant" and "respectful" during the arrest. DVD I, 4:19 p.m.

150. Thus, in spite of the lack of evidence that Dr. Douglas had been belligerent, and presumably had not engaged in any aggressive or "significant" conduct to support an AUD diagnosis, Dr. Montgomery downplayed the error and suggested it had no impact on the determination that Dr. Douglas met the criteria for an AUD. DVD II, 11:43-11:46.

151. At the administrative hearing Dr. Montgomery stated he did not interpret the Foundation's report that Dr. Douglas had been "very defensive about this referral" and " very slow in being forthcoming with information requested from him" as being significant for his assessment but felt only that they reflected the short time available to get the assessment with APN scheduled. DVD II, 11:48-11:51 a.m.; Exhibit 22, marked page Douglas0161.

152. As for Dr. Douglas's referral to the Foundation in 2013 while he was in the residency program, Dr. Montgomery testified he probably did not speak with Dr. Douglas personally about the referral and assumed it was related to his use of alcohol. DVD II, 1:30-1:40 p.m. and 1:54 p.m.; Exhibit 1 and Exhibit 9, pages 2-3.

153. Dr. Montgomery asserted, however, that since the referral had been "resolved" without any action by the Foundation, it was "just a point on the time line" of Dr. Douglas's history and had no impact on APN's diagnosis of an AUD. DVD II, 1:59 p.m.

154. The 2013 referral to the Foundation, however, was specifically cited in APN's assessment as supportive of the DSM-5 criteria for "recurrent [substance] use resulting in a failure to fulfill major role obligations at work, school, or home." Exhibit 9, page 14.

155. Dr. Montgomery also testified that "physicians who have problems later with medical boards, almost always have some, whether it's overt or covert, some mention in their record and evaluations in medical school that are not typical," such as Dr. Douglas's referral to the Foundation in 2013. DVD II, 2:00 p.m.

156. Thus, irrespective of Dr. Montgomery's statement that the earlier referral to the Foundation was "just a point on the time line," the referral was used both to support the criteria for Alcohol Use Disorder and to confirm for the evaluators that he had such a disorder.

157. Although his narrative correctly states that Dr. Douglas was arrested for illegally purchasing HGH, rather than testosterone, Dr. Montgomery asserts that Dr. Douglas "was involuntarily detained for two weeks," and he "clearly" remembers Dr. Douglas telling him that he had been hospitalized or arrested as a result of the confrontation with his estranged wife. Exhibit 9, page 3; DVD II, 9:46-9:47 a.m.

158. Dr. Douglas asserted that neither of those events ever happened, and there's nothing in the exhibits to support the contention Dr. Douglas was arrested or detained for anything but a brief period of time related to the boating incident. DVD I, 9:23 a.m. and 10:53 am.

159. During his examination by Dr. Douglas's counsel at the administrative hearing, Dr. Montgomery conceded that since a court had issued a protective order, he may have misinterpreted Dr. Douglas's comment that he didn't get to see his children for two weeks to mean that he had been "involuntarily detained for two weeks." Exhibit 9, page 3; DVD II, 2:07-2:09 p.m.

160. Dr. Montgomery testified the Foundation's PETH test result of 536 ng/mL indicated an alcohol use disorder because its above the level for "regular drinking" of between 20-200 ng/mL. DVD II, 9:34 a.m.

161. The test result of 536 ng/mL also indicated to Dr. Montgomery that Dr. Douglas had ingested more alcohol over a longer period of time than he had reported and that he had acquired a tolerance for alcohol, which would also be consistent with his having an AUD. DVD II, 9:37 a.m.

162. Furthermore, Dr. Montgomery stated that Dr. Douglas's high PETH level reflected a significant episode of alcohol consumption during the prior three weeks. DVD II 1:39 p.m.

163. Dr. Montgomery makes a "provisional diagnosis" after meeting with the person being evaluated and orders lab tests for an AUD, which he referred to as a "lab diagnosis," to determine if the initial diagnosis is correct, and the team confirms the diagnosis right before its final briefing with the person at the conclusion of the three-day evaluation. DVD II, 2:57-3:01 p.m.

164. If APN orders lab tests for an AUD, the APN team has reached a "presumptive diagnosis" of an AUD, and the team builds back from the lab test results to determine if their initial diagnosis is correct. DVD II, 3:00-3:01 p.m.

165. For his assessment at APN, however, Dr. Douglas's urine screen was negative for alcohol and his PETH test level was 35 ng/mL, which the assessment report stated "is consistent with the lower third of what is considered 'social' or moderate alcohol consumption with scores >210 µgm/L typically indicative of 'excessive' alcohol consumption." Exhibit 9, page 12; DVD II 3:03 p.m.

166. Dr. Montgomery asserted, however, that a PETH test of 20-200 ng/mL without other evidence would suggest a mild to moderate AUD, which assertion is

contradicted by the language in the assessment report itself and suggests the evaluation team simply ignored the results of their own lab testing in making the diagnosis of an AUD. DVD II, 3:03-3:05 p.m.

167. Dr. Montgomery meets with the evaluation team halfway through the evaluation process to discuss their individual findings and reports, any disagreements among the evaluators, and other matters that needed further investigation. DVD II, 9:16 a.m.

168. Although Dr. Douglas provided APN with a release of information to speak with his psychiatrist, Dr. Charles Noplis, no one at APN spoke to him for Dr. Douglas's evaluation. DVD II, 2:13 p.m.; Exhibit 9, pages 4 and 10; Exhibit 22, marked pages Douglas0115-0116.

169. The only other release requested from Dr. Douglas was one for the Foundation, which he provided. Exhibit 22, marked pages Douglas0119-0120; DVD II 2:28 p.m.

170. On the third day, the team meets with the person being evaluated and presents their initial written assessment and recommendations. DVD II, 9:17 a.m.; Exhibit 9, page 1.

171. Dr. Montgomery and other representatives of the evaluation team met with Dr. Douglas on January 12, 2023, to present their initial assessment and recommendations in a session APN refers to as an "out-briefing." DVD II, 9:30 a.m.; Exhibit 15.

172. After the team received all of the results from the psychological testing and the drug tests, APN issued its comprehensive assessment and evaluation on January 17, 2023. DVD II, 9:17-9:19 a.m.; Exhibit 9.

173. At the administrative hearing Dr. Montgomery explained his approach to evaluating a physician and for making a determination as to whether the person has an AUD.

174. In spite of the requirement in DSM-5 criteria for Alcohol Use Disorder to use a twelve-month period of time in making the diagnosis of an AUD, Dr. Montgomery asserted the time frame is longer for a physician and other persons in safety sensitive positions. DVD II, 3:31-3:33 p.m.

175. He further asserted that when evaluating a physician, he errs on the side of making a diagnosis, stating "we can't afford to lose many physicians" due to a misdiagnosis. DVD II, 3:39 p.m.

176. In fact, Dr. Montgomery stated that in spite of the requirement to use a twelve-month time period for the DSM-5 criteria for AUD, there's "very clearly" a different standard for safety sensitive positions, and if he only looks back twelve months, he hasn't performed a full evaluation of whether the person has met the criteria. DVD II, 3:37 and 4:20 p.m.

177. Thus, Dr. Montgomery utilizes a higher standard in evaluating physicians than for "a regular person," stating he hopes "somebody would do that if I was having surgery" since the goal is "the protection of the public at large." DVD II, 3:39-3:41 p.m.

178. Dr. Montgomery suggested that his willingness to go outside the specific requirements of the DSM-5 diagnostic criteria for AUD is based at least in part on his preference for the DSM-3 criteria that used "alcohol abuse" and "alcohol dependence" with the distinction between the two being tolerance and withdrawal. DVD II, 10:32-10:33 a.m.

179. Thus, in spite of the fact the DSM-5 diagnostic criteria defines AUD as "a problematic pattern of alcohol use leading to clinically significant impairment or distress, as manifested by at least two of the following [eleven diagnostic criteria], within a 12-month period," Dr. Montgomery used Dr. Douglas's entire history of alcohol use in making the diagnosis. Exhibit 9, page 14; Exhibit 24, marked page 490.

180. Using the eleven criteria for Alcohol Use Disorder in the DSM-5, the APN evaluation team diagnosed Dr. Douglas with Alcohol Use Disorder, Severe; Body Dysmorphic Disorder; and Attention Deficit Disorder, Predominantly Inattentive. Exhibit 9, page 15; Exhibit 24.

181. APN found that Dr. Douglas met eight of the criteria for Alcohol Use Disorder, which put him in the severe category of the condition with six or more of symptoms for AUD. Exhibit 24, marked page 491.

182. Thus, Dr. Douglas was found to meet five more of the AUD diagnostic criteria than Ms. Solarz-Kutz found in her report thirteen months earlier. Exhibits 3 and 9.

183. APN's report includes a grid listing the eleven criteria for AUD and a brief statement for each of the eight criteria found to support APN's diagnosis of an AUD,

Severe. Exhibit 9, page 14.

184. At the administrative hearing Dr. Montgomery reviewed the eleven criteria and explained why the report found that Dr. Douglas met eight of them. DVD II, 9:39-9:42 a.m.; Exhibit 9, pages 14-15.

185. For the first criteria, "[Substance] is often taken in larger amounts or over a longer period than was intended," the report cited the "recent fishing trip wherein ½ bottle of liquor consumed in one setting." Exhibit 9, page 14.

186. At the administrative hearing Dr. Montgomery also referenced in support of that category Dr. Douglas's PETH test of 536 ng/mL. DVD II, 9:39 a.m.

187. He explained that he considered Dr. Douglas's full history of drinking when completing the AUD criteria but didn't list everything applicable because "it's a small box" on the form. DVD II, 3:28-3:29 p.m.; Exhibit 9, page 14.

188. Nevertheless, the criteria has three separate components: drinking often, in larger amounts or over a longer period, than intended, but APN found Dr. Douglas met the criteria by drinking a large amount on one fishing trip, which the evidence and circumstances suggest he intended to do.

189. For the second criteria, which states "there is a persistent desire or unsuccessful efforts to cut down or control [substance] use," the report cited "previous attempts at abstinence are short-lived." Exhibit 9, page 14.

190. Dr. Montgomery explained that in light of the previous incidents involving Dr. Douglas, presumably referring to the incident that resulted in the filing of the EPO

and the court directed abstinence and counseling, a reasonable person would stop drinking and that didn't happen. DVD II, 9:39-9:40 a.m.

191. At the same time, Dr. Montgomery agreed that the second category may not be entirely applicable to Dr. Douglas since he was not generally trying to abstain from alcohol, and the hearing officer notes, the record shows he was abstinent when required by the federal court. DVD II, 3:30-3:33 p.m.; Exhibit 2.

192. APN did not find any evidence in support of the third and fourth listed criteria. Exhibit 9, page 14.

193. For the fifth criteria for a diagnosis of an AUD, "recurrent [substance] use resulting in a failure to fulfill major role obligations at work, school, or home," the report cites "multiple concerns about suspicion of substance use by coworkers/directors dating back to 2013." Exhibit 9, page 14.

194. Dr. Montgomery cited that criteria as "one of the most sensitive for healthcare professionals." DVD II, 9:40 a.m.

195. APN's report lists as the relevant time period events dating back nine years prior to APN's evaluation and uses Dr. Jones's report that found no issues with Dr. Douglas's alcohol use as somehow supportive of "recurrent substance use" that resulted in his failure to fulfill work obligations. DVD II, 9:40 a.m. and 3:33-3:37 p.m.; Exhibit 1, marked pages 187-188.

196. At the administrative hearing Dr. Montgomery asserted that Dr. Douglas's legal troubles related to HGH also supported the fifth criteria because they impacted his obligations at work. DVD II, 3:35-3:36 p.m.

197. At the same time Dr. Montgomery acknowledged that Dr. Douglas's legal problems were unrelated to his use of alcohol, which association is required under the very wording of the criteria. Id.

198. Dr. Montgomery also asserted that based upon Dr. Douglas's drinking history, and presumably based also on Dr. Douglas's high PETH test from the Foundation, one can infer his drinking was necessarily affecting his work performance, even absent any other proof. DVD II, 3:36-3:37 p.m.

199. Although Dr. Montgomery justified the inference that Dr. Montgomery's drinking affected his work with the assertion there's "very clearly" a different standard for safety sensitive positions, nothing in the language of the fifth criteria for an AUD supports applying different standards for different individuals or professions. DVD II, 3:37 p.m.; Exhibit 9, page 14.

200. For the sixth criteria, "continued [substance] use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of [substance]," the report cites his "federal probation, DUIs, child custody concerns." Exhibit 9, page 14.

201. The hearing officer notes there was single "DUI" charge resulting from his operating the jet ski, but there was never a conviction for that offense.

202. For both criteria five and six, Dr. Montgomery testified there were multiple concerns cited by the Foundation that were also noted in the interviews with Dr. Douglas. DVD II, 9:39-9:40 a.m.

203. As discussed for previous categories, however, the federal probation was unrelated to Dr. Douglas's alcohol use, and two of his prior alcohol related charges dated well beyond the twelve month time period required under the AUD criteria.

204. In his testimony in support of the sixth criteria Dr. Montgomery again asserted that based upon Dr. Douglas's pattern and history of alcohol use, "quite frankly we have to infer things." DVD II 3:42 p.m.

205. In response to questioning about the lack of evidence supporting the sixth criteria, Dr. Montgomery asserted "the diagnostic criteria is different for licensed professionals" in spite of there being no support for such an assertion in the criteria itself or elsewhere in DSM-5. DVD II, 3:42-3:43 p.m.

206. For the seventh category, "important social, occupational, or recreational activities are given up or reduced because of [substance] use," the report cites "termination of hospital position, employment restrictions." Exhibit 9, page 14.

207. Again, Dr. Douglas's termination from his position at the university and the Board's action related to the HGH charges were unrelated to his use of alcohol.

208. For the eighth category, "recurrent [substance] use in situations in which it is physically hazardous," the report cites Dr. Douglas's "DUI on watercraft" and his alcohol intoxication and public intoxication charges from years earlier. Exhibit 9, pages 4 and 14; DVD II, 9:41 a.m.

209. Dr. Douglas's "DUI on watercraft" was also cited in support of the ninth criteria, "[substance] use is continued despite knowledge of having persistent or

recurrent physical or psychological problem that is likely to have been caused or exacerbated by [substance]." Exhibit 9, page 14.

210. Thus, "DUI" is cited in support of three of the diagnostic criteria for AUD in spite of the fact the charge of boating under the influence was dismissed.

211. Furthermore, although the arresting officer testified at the administrative hearing that Dr. Douglas was intoxicated while operating the jet ski, there's no evidence that the officer talked with anyone from the Foundation or APN to support its assertion that in spite of the charge being dismissed, and Dr. Douglas never stated he was intoxicated or guilty of boating under the influence. DVD I. 4:06-4:07 p.m.

212. Finally, in support of the tenth category, "tolerance," the report cites Dr. Douglas's "recent fishing trip wherein copious amounts of alcohol consumed without blackout." Exhibit 9, page 14.

213. Dr. Montgomery testified that the PETH test of 536 ng/mL was the most objective indicator of significant alcohol use, in addition to Dr. Douglas's alleged statement to Ms. Abbott that he had experienced blackouts as a result of his alcohol consumption. DVD II, 9:41-9:42 a.m.

214. There is nothing in Ms. Abbott's section of the report, however, about Dr. Douglas experiencing blackouts, and that assertion contradicts the explanation provided in support of the tenth category for AUD, that "copious amounts of alcohol consumed without blackout." Exhibit 9, pages 5-10 and 14.

215. The assertion that Dr. Douglas drank "copious amounts of alcohol" as shown by the Foundation's high PETH test result was central to APN's determination

that he met eight of the eleven criteria for Alcohol Use Disorder, Severe. Exhibit 9, page 14.

216. Dr. Loretta L. Jophlin testified as an expert witness on behalf of Dr. Douglas. DVD IV, 9:37 a.m.

217. Dr. Jophlin is board certified in Internal Medicine, Gastroenterology, and Transplant Hepatology and is currently an assistant professor at the University of Louisville in the Division of Gastroenterology and Hepatology. Exhibit 25, attached *Curriculum Vitae and Bibliography*.

218. She has extensive experience in the use of PETH testing and the treatment of alcohol use disorders in her liver transplant practice. DVD IV, 9:32-9:37 a.m.

219. Dr. Jophlin stated that a high PETH test is not indicative of an AUD, and the result can't be used to diagnose an AUD under the DSM-5 criteria. DVD IV, 10:01-10:03 a.m.

220. She also stated there is no correlation between a high PETH test and tolerance, and by itself, a PETH test result of 536 ng/mL does not indicate a problematic relationship with alcohol. DVD IV, 10:04-10:05 a.m.

221. In her medical practice Dr. Jophlin diagnoses patients with AUD using the DSM-5 criteria. DVD IV, 10:26 a.m.

222. Dr. Jophlin stated that it's generally understood in the field that to assess a person's current relationship with alcohol using the DSM-5 criteria, the inquiry must be limited to the individual's personal experience and events over the previous year. DVD IV, 10:28 a.m. and 10:31 a.m.

223. In her report Dr. Jophlin stated, "PETH tests with levels >200 ng/mL are most consistent with chronic heavy drinking **or** sessions of high intensity/binge drinking with periods of intermittent sobriety. However, a single PETH test positive for alcohol metabolites at a level of 536 ng/mL is not necessarily indicative of a problematic relationship with alcohol. Exhibit 25, page 12. (Emphasis in original.)

224. Dr. Jophlin concluded her report by stating that Dr. Douglas "does not meet DSM-5 criteria for AUD and demonstrates PETH testing consistent with [the Timeline Followback survey] reporting a 2 week period of heavy drinking associated with a Lake Fishing Trip/Vacation and moderate drinking occurring approximately 1 out of every 21 days." Exhibit 25, page 12.

225. Thus, Dr. Jophlin undercut the central premise of APN's report, that the PETH test of 536 ng/mL was the most objective indicator of his significant alcohol use, and she also undercut another assumption that followed from the evaluation team's interpretation of the PETH test result, that Dr. Douglas was not truthful about his alcohol intake and did not provide reliable factual information. DVD II, 9:42 a.m.

226. Based upon the information provided by the Foundation and Dr. Douglas's PETH test result of 536 ng/mL, Dr. Montgomery and the rest of the APN evaluation team seems to have started the evaluation with the determination that Dr. Douglas had an AUD, and therefore, the main issue for them was whether the condition was mild, moderate, or severe. Exhibit 24, marked page 491.

227. Dr. Jophlin's conclusion regarding Dr. Douglas having had a one-time binge drinking episode, but otherwise drinking moderately, was supported by Dr.

Douglas's colleagues.

228. Due to the frequency of their interactions with Dr. Douglas and the close proximity at which they worked in the operating room, they would know if he had been drinking before or during work and would have been aware of any concerns or suspicions that he had alcohol use issues, but no one who testified on his behalf had suspicions or knowledge of work-related alcohol use. See testimony of Sidney Mee, DVD III, 9:01-9:18 a.m.; Randall Powell, DVD III, 9:44-9:50 a.m.; Ross Schultz, DVD III, 3:08-3:35 p.m.; Trace Kelly, DVD III, 3:39-3:59 p.m.; and Dan Summers, DVD IV, 9:01-9:14 a.m.

229. In fact, every coworker or colleague who testified had nothing but praise and the highest regard for Dr. Douglas's practice of medicine and for his professionalism. Id.

230. Dr. Walter R. Butler was another expert witness called on behalf of Dr. Douglas.

231. Dr. Butler graduated from law school in 1973 but later changed careers and graduated from medical school in 1990. DVD III, 10:11 a.m.; Exhibit 21, attached exhibit A.

232. He is board certified in General Psychiatry, is currently employed by Louisville Behavioral Health Systems, PLLC, and is an Assistant Clinical Professor of Psychiatry at the University of Louisville. DVD III, 10:11-10:12 a.m.; Exhibit 21, attached exhibit A.

233. As part of his work Dr. Butler performs evaluations and assessments related to patient's psychiatric and addiction issues, and he not only has experience evaluating physicians but had performed over one hundred evaluations on behalf of the Board "back in the day" under a previous Foundation director. DVD III, 10:12-10:13 a.m.

234. He noted that the Board's current evaluation process is much more extensive, and appropriate, than when he was performing assessments that took one and a half to two hours. DVD III, 10:13 a.m.

235. Dr. Butler was qualified as an expert in medicine, psychiatry, and addiction medicine. DVD III, 10:16 a.m.

236. He reviewed APN's materials for seven to eight hours, interviewed Dr. Douglas for an hour and a half, and collaborated with Wayne J. Harper, a licensed psychologist, who reviewed APN's test data and the results from the assessment. DVD III, 11:46 a.m; Exhibit 21, first page.

237. Dr. Butler spent a total of fifteen to twenty hours on the project and three to four hours drafting his report. DVD III, 11:45-11:46 a.m.

238. He didn't know Dr. Douglas prior to interviewing him and saw him for first time at the administrative hearing. DVD III, 11:45 a.m.

239. Dr. Butler's report is best summarized by the headings of three sections of the report: "The All Points North assessment process was flawed and compromised from the outset;" "The facility's assessment and conclusions about a chronic substance related disorder were not supported by their own psychologist's report;" and "The DSM-

5 diagnostic criteria for an Alcohol Use Disorder are not met." Exhibit 21, unmarked pages 2 to 6.

240. Although his initial impression was that APN had hostile feelings toward Dr. Douglas, Dr. Butler stated the lack of fairness and the incompleteness of APN's report are the basis for his own assessment. DVD III, 12:35 p.m.

241. The hearing officer found Dr. Butler presented a compelling and credible review and critique of APN's report and of the flaws and shortcomings in its report.

242. Dr. Butler testified that in evaluating an individual and applying the DSM-5 criteria for alcohol use disorder, the evaluator must apply the same criteria in DSM-5 to every patient, and there's no distinction between those in a safety-sensitive position and other persons being evaluated. DVD III, 11:02 a.m. and 12:48-12:49 p.m.

243. That interpretation of DSM-5's criteria for Alcohol Use Disorder is consistent with the plain language of the evaluation criteria. Exhibit 24, marked pages 490-491.

244. While the assessment for persons in safety sensitive positions is no different than the assessment for other individuals, the assessment must be more thorough. DVD III, 11:45 a.m.

245. Dr. Butler asserted that since so much is at stake for the physician, including his license, his career, and his occupation, the evaluators must be "particularly careful" in drafting the report, and APN failed in that responsibility since the report needed to be "more complete." DVD III, 11:09-11:10 a.m.

246. The hearing officer did not interpret Dr. Butler's comment as suggesting that a different or higher standard applied to diagnosing a physician with a AUD, but that every individual is entitled to a rigorous evaluation in light of the potential personal and professional consequences of the assessment as illustrated by this action.

247. Dr. Butler found that APN's diagnosis of an alcohol use disorder was "not clinically valid" since the evaluation team was "just filling in the blanks" on the DSM-5 AUD form, which he described as "just a checklist." DVD III, 11:08-11:09 a.m.

248. The hearing officer also notes that Dr. Montgomery suggested the evaluation team was constrained by the size of the boxes on the form in providing a more complete explanation on how Dr. Douglas met each criteria, but the obvious solution in order to provide a thorough and comprehensive report would have been to attach a separate sheet with the full explanation. DVD II, 3:28-3:29 p.m.

249. In addition, an assessment report must be based on thorough, competent, and complete information. DVD III, 10:44 a.m.

250. Dr. Butler described "the key" for correctly and successfully performing an evaluation is for the person being evaluated to be the primary source of information and to have an active role in completing the Alcohol Use Disorder criteria form on page 14 of Exhibit 9. DVD III, 11:03-11:05 a.m.

251. Thus, the evaluator cannot just write down information provided by third-parties and assume it's true. DVD III, 11:03 a.m.

252. Instead, if there's inconsistent information, the evaluation team must confront and challenge the person being evaluated and review the information with the

party to confirm that it is true. DVD III, 11:03 a.m.

253. There's no indication in APN's report that Dr. Douglas played an active role in APN's determination of the facts or that they attempted to verify the "facts" that they included in the assessment, such as his being "detained" for two weeks, experiencing blackouts, being belligerent with the arresting officer, and having a "DUI" conviction.

254. Thus, the information provided in APN's report as "factual" included "misstatements or contained misleading or incomplete information," which necessarily had a substantial impact on the determination that he had a severe AUD. Exhibit 21, unmarked page 2.

255. Similar to criticisms raised in Dr. Jophlin's report, Dr. Butler noted that the DSM-5 criteria for AUD requires the evaluator to use data for a twelve-month period, which the evaluation team simply ignored. DVD III, 11:00 a.m.; Exhibit 21, unmarked page 2; Exhibit 24, marked pages 490-491.

256. The appropriate context for the use of historical data is in a therapeutic setting for treatment of a disorder where "you want to use everything," but for diagnostic testing under DSM-5, the evaluator must consider only one year of alcohol use. DVD III, 11:00-11:03 a.m.

257. As Dr. Butler succinctly stated at the administrative hearing, "these are the rules" required by the DSM manual, and the rules "don't change because of the person's status. DVD III, 11:00-11:02 a.m.

258. In addition, Dr. Butler noted that in using his 2013 meeting with Dr. Jones for Dr. Douglas's assessment, APN ignored the fact Dr. Jones did not find any relationship between Dr. Douglas's personal difficulties during his medical residency and his use of alcohol. Exhibit 21, unmarked page 2.

259. Therefore, APN misapplied that earlier encounter with the Foundation to support the determination that he met the criteria for an AUD in DSM-5, which is consistent with the finding that there was a presumption that Dr. Douglas had an AUD and that the AUD form was completed in a manner to confirm that presumption. Exhibit 9, page 14; Exhibit 21, unmarked page 2.

260. In addition, Dr. Butler disagreed with all of APN's other findings related to his meeting the criteria for an alcohol use disorder. Exhibit 21, unmarked page 6; DVD III, 12:34 p.m.

261. Dr. Butler also noted that the specific language and requirements of a criteria, such as the substance "is often taken in larger amounts over a longer period than was intended," cannot be ignored by using the one incident of drinking a large amount of alcohol on the fishing trip to satisfy the requirement that the person "often" drinks large amounts of alcohol. DVD III, 12:27-12:28 p.m.; Exhibit 9, page 14.

262. Other examples of APN misapplying the specific language and requirements of a criteria to arrive at the determination that Dr. Douglas met a criteria are referenced in earlier parts of this recommendation.

263. While citing the "DUI" involving the jet ski incident three times to support the determination that Dr. Douglas met the criteria for an alcohol use disorder, Dr.

Butler noted the APN's report never mentioned that the charge was ultimately dismissed. Exhibit 9, page 14; Exhibit 21, unmarked page 2.

264. Dr. Butler noted that APN used Dr. Douglas's conviction on the HGH charge to support the AUD diagnosis, but there's no evidence he continued to use HGH after his arrest or that it's a "mood altering" substance that would support a finding in the sixth criteria for AUD that he continued to use such substances in spite of his arrest. Exhibit 9, page 14; Exhibit 21, unmarked pages 2-3.

265. Another example of the misapplication of the criteria for AUD is APN's determination that Dr. Douglas met the criteria for "tolerance" of alcohol, but tolerance is not shown by drinking a large amount of alcohol on one occasion without blacking out. DVD III, 11:10-11:12 a.m.; Exhibit 9, page 14.

266. In addition, Dr. Butler stated that "tolerance" of alcohol cannot be met simply by drinking a large amount of alcohol on a fishing trip and not blacking out. DVD III, 11:10 a.m.

267. Tolerance results from years of alcohol use and implies drinking a large quantity every day in order not to slip into withdrawal. DVD III, 11:11 a.m.

268. If Dr. Douglas were alcohol tolerant, he would have been in withdrawal by the end of the second day of the assessment at APN. DVD III, 11:12 a.m.

269. In addition, if Dr. Douglas has a severe alcohol use disorder, that would have been discovered years ago due to all people in close proximity to him in the operating room who would have been able to smell alcohol and notice his trembling hands while he performed surgery. DVD III, 11:13-11:14 a.m. and 11:19 a.m.

270. In short, Dr. Butler asserted that Dr. Douglas's use of alcohol was not "impairing" or "severe," labeling such a classification as "preposterous." DVD III, 11:14 a.m.

271. Dr. Butler also noted that the APN report failed to incorporate the findings of the psychological testing, or explain why they didn't apply, in making the determination that Dr. Douglas had an alcohol use disorder. DVD III, 10:46 a.m.

272. As a licensed clinical psychologist Wayne Harper reviewed on behalf of Dr. Douglas APN's tests and results. Exhibit 21, attached exhibit C.

273. There was no objection to the psychological tests that were utilized or the way in which they were administered, but APN didn't give sufficient credence to the results, which were considered to be valid tests but did not support an alcohol use disorder. DVD III, 12:06 p.m.; Exhibit 21, attached exhibit C.

274. In fact, the psychological testing results did not suggest a substance use disorder and were more than a standard deviation below the level for the diagnosis of a substance use disorder. DVD III, 12:04 p.m.

275. While the psychological tests alone can't be used to make a diagnostic conclusion, APN did not address the negative test results in its report that found Dr. Douglas had an AUD. DVD III, 12:04-12:07. Exhibit 21, unmarked pages 3-5 and attached exhibit C.

276. There's a substantial difference between symptoms of a mild AUD and those for a severe diagnosis, and in addition, APN failed to consider a diagnosis of

"nonpathological use of alcohol" in making the assessment of Dr. Douglas. DVD III, 11:16-11:17 a.m. and 11:51 a.m.; Exhibit 24, marked page 496.

277. Under DSM-5, "drinking, even daily, in low doses and occasional intoxication do not by themselves make this diagnosis" of an alcohol use disorder. Exhibit 24, marked page 496; DVD III, 11:17 a.m.

278. Yet, there's no evidence that APN considered that diagnosis for Dr. Douglas's alcohol use. DVD III, 11:16-11:18 a.m.

279. As a summary of his views regarding APN's assessment, Butler stated that "disappointing, is the best thing I can say about this report." DVD III, 11:10 a.m. and 11:05-11:12 a.m.

280. Dr. Butler went on to state, "I spend a lot of time on these records. . . . I think Dr. Douglas deserves a good assessment. If the Board thinks he has a problem, OK, where do we get that problem assessed? It's not at this place [APN]." DVD III, 11:24 a.m.

281. Dr. Butler readily acknowledged that he did not conduct a formal assessment of Douglas, and therefore, he did not form an opinion or come to any conclusions regarding the AUD allegation against Dr. Douglas. DVD III, 11:40 a.m., 11:54 a.m. and 12:45 p.m.

282. Dr. Butler stated further, however, that "it's possible" Dr. Douglas has an alcohol use disorder but not based on APN's report, and he deserves a "full, fair, broad assessment." DVD III, 11:40 a.m. and 12:41 p.m.

283. In addition, because the appropriate level of treatment for an AUD is based upon the number of criteria met by the person being evaluated, even if Dr. Douglas were found to have an AUD, APN's report provides no reliable support for a determination that he has a severe condition requiring residential treatment. Exhibit 25, marked page 491.

284. In response to Dr. Butler's report, in his testimony at the administrative hearing Dr. Montgomery didn't change any of his opinions regarding Dr. Douglas meeting the criteria for AUD in DSM-5 or the application of the cited "facts" to a particular category, but instead, he made more general responses to Dr. Butler's specific objections, such as "I see it differently." DVD II, 10:30 a.m.

285. Dr. Montgomery stated generally that a psychiatric diagnosis is more subjective than a cancer diagnosis and that the professional disagreements show different perspectives in reviewing conduct. DVD II, 10:30 a.m., 10:33, and 10:41 a.m.; See generally, DVD II, 10:27-10:48 a.m.

286. In summary, in spite of the clear and specific requirement that a diagnosis of AUD must be based upon conduct over a twelve-month period of time, APN ignored that standard to include conduct well outside of the applicable period of time to make a diagnosis not only of an AUD but a diagnosis of a "severe" alcohol use disorder that required residential treatment.

287. In addition, APN ignored or misapplied the specific language in the criteria for AUD in finding that Dr. Douglas met nine of the eleven criteria for AUD. Exhibit 9, page 14.

288. Dr. Montgomery and the APN evaluation team made the assessment for Dr. Douglas without a clear understanding of the facts related to his alcohol use, and they placed an over-reliance on information provided by sources other than Dr. Douglas without giving adequate consideration to his perspective or, at the least, without reconciling disputed facts or explaining why one perspective was more reliable than another.

289. Furthermore, APN seemed to assume that Dr. Douglas was operating the jet ski while legally intoxicated since he was charged with that offense, in spite of the fact that charge was dismissed and in spite of the fact APN had no corroborative facts, other than Dr. Douglas's admission that he had drank alcohol, on which to base their determination that he was legally intoxicated.

290. In addition, even if Dr. Douglas were found to have an AUD and in violation of KRS 311.595(7), it is unclear based upon the present record whether the disorder is appropriately classified as mild, moderate, or severe, which necessarily impacts whether he requires residential treatment or whether his condition can be effectively addressed by other treatment methods and oversight.

291. Therefore, APN's report is not reliable evidence to support the conclusion that Dr. Douglas has an AUD, and the record does not otherwise support that conclusion.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this action pursuant to KRS 311.591 and KRS 311.595.

2. The administrative hearing was conducted in accordance with the provisions of KRS Chapter 13B and KRS 311.591.

3. Under KRS 13B.090(7), the Board had the burden to prove by a preponderance of the evidence the allegations against Dr. Douglas.

4. The Board has not met its burden to prove Dr. Douglas violated KRS 311.595(4), (7), or (8).

5. Under KRS 311.595(4), a physician is subject to discipline "upon proof that the licensee entered a guilty or nolo contendere plea, or been convicted, by any court within or without the Commonwealth of Kentucky of a crime as defined in KRS 335B.010, if in accordance with KRS Chapter 335B."

6. The term "conviction of a crime" under KRS 335B.010(4) "shall be limited to convictions of felonies or misdemeanors," and since the Board concedes that Dr. Douglas's guilty plea to failing to wear a flotation device while operating a watercraft is not a felony or misdemeanor under Kentucky law, the allegation of a violation of KRS 311.595(4) must be dismissed.

7. Under KRS 311.595(7), a licensee who has "become a chronic or persistent alcoholic" may be disciplined by the Board.

8. Pursuant to KRS 311.550(25), the term "chronic or persistent alcoholic" is defined as "an individual who is suffering from a medically diagnosable disease characterized by chronic, habitual, or periodic consumption of alcoholic beverages resulting in the interference with the individual's social or economic functions in the

community or the loss of powers of self-control regarding the use of alcoholic beverages."

9. Pursuant to KRS 311.595(8), a physician is subject to discipline "upon proof that the licensee has been unable or is unable to practice medicine according to acceptable and prevailing standards of care by reason of mental or physical illness or other condition . . . ."

10. The parties agreed that the determination as to whether Dr. Douglas is in violation of KRS 311.595(7) and (8) must be based upon the determination as to whether he meets the criteria for Alcohol Use Disorder under DSM-5.

11. In assessing whether Dr. Douglas is in violation of KRS 311.595(7), the Board must use the standard and criteria set forth in DSM-5 for Alcohol Use Disorder, and APN failed to apply the criteria in DSM-5 appropriately to Dr. Douglas. APN made several significant factual errors in its report for Dr. Douglas by considering conduct well beyond a twelve-month time period required by the criteria for AUD in DSM-5, by ignoring or misinterpreting the applicable language in the eleven criteria for AUD, by applying a time period for the assessment longer than twelve months as required by DSM-5, by applying a different standard for AUD to safety sensitive positions, and by misconstruing or misunderstanding the facts related to Dr. Douglas.

12. Because of the numerous flaws in the evaluation and assessment performed by APN, it's unclear from the record whether Dr. Douglas is in violation of KRS 311.595(7), and if he is, whether he should be placed in the "severe" category, which would necessarily impact the type of treatment he would need for the condition.

13. The preponderance of the evidence does not support a finding that Dr. Douglas is in violation of KRS 311.595(8). There has been no evidence presented that Dr. Douglas drank before or during work, that he was under the influence of alcohol at work, or that he was otherwise compromised in his work related duties or responsibilities by his use of alcohol.

14. To the extent the Board asserts that as a matter of law a physician who is found to have an AUD in violation of KRS 311.595(7) is also in violation of KRS 311.595(8), consideration of that position will have wait until after there has been a determination that he is in violation of KRS 311.595(7).

15. In spite of the flaws in the evaluation of Dr. Douglas and in APN's report, there was credible evidence presented that Dr. Douglas has a problematic relationship with alcohol and as Dr. Butler stated, Dr. Douglas "may" have an AUD.

16. Therefore, in light of the evidence presented at the administrative hearing the Board has the duty and responsibility to thoroughly investigate and assess whether Dr. Douglas has an AUD.

17. Therefore, the hearing officer recommends this action be remanded to the Board for a new evaluation and assessment of Dr. Douglas at a facility of the Board's choice, other than APN, in order to obtain a credible evaluation to determine whether he has an Alcohol Use Disorder that impacts his ability to safely practice medicine and violates KRS 311.595(7) or (8).

RECOMMENDED ORDER

Based upon the foregoing findings of fact and conclusions of law, the hearing officer recommends the Board dismiss the allegation that Dr. Douglas has violated KRS 311.595(4). The hearing officer also recommends the Board dismiss the allegation that he is in violation of KRS 311.595(7) and (8) based on APN's assessment and report. The hearing officer further recommends this action be remanded for Dr. Douglas to have another evaluation and assessment of his alcohol use to determine whether he has an alcohol use disorder and is subject to discipline under KRS 311.595(7) or (8).

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4) a party has the right to file exceptions to this recommended decision:

> A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

A party also has a right to appeal the Final Order of the agency pursuant to KRS 13B.140(1) which states:

> All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties

> to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the circuit court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean that summons must be served upon filing an appeal in circuit court.

SO RECOMMENDED this 4th day of December, 2023.

THOMAS J. HELLMANN
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CERTIFICATE OF SERVICE

4th I hereby certify that the original of this RECOMMENDATION was mailed this ____ day of December, 2023, by first-class mail, postage prepaid, to:

JILL LUN
KY BOARD OF MEDICAL LICENSURE
HURSTBOURNE OFFICE PARK STE 1B
310 WHITTINGTON PKWY
LOUISVILLE KY 40222

for filing; and a true copy was sent by first-class mail, postage prepaid, and by email to:

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