

**BEFORE THE  
RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues  
Against:

JAMESON ABERIN  
1820 Seabreeze Street  
Thousand Oaks, CA 91320

Case No.: 1H 2011 082

OAH No.: 2011110885

**EFFECTIVE DATE OF DECISION AND ORDER**

Having met all licensure requirements, the attached Decision and Order adopted by the Respiratory Care Board of California, Department of Consumer Affairs, on October 2, 2012 shall become effective on October 15, 2012.

Original signed by: \_\_\_\_\_

MURRAY L. OLSON, RCP, RRT-NPS, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

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RESPIRATORY CARE BOARD  
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In the Matter of the Statement of Issues  
Against:

JAMESON S. ABERIN,

Respondent.

Board No. 1H 2011 082

OAH No. 2011110885

**PROPOSED DECISION**

This matter came on regularly for hearing on May 31, 2012 at Los Angeles, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Respondent Jameson S. Aberin was present and was represented by Scott J. Harris, attorney at law. Complainant Stephanie Nuñez was represented by Deputy Attorney General Randall Murphy.

Oral and documentary evidence was presented and the matter was submitted for decision on May 31, 2012.

**FACTUAL FINDINGS**

The Administrative Law Judge finds the following facts:

1. Respondent submitted an application to the Respiratory Care Board (Board) dated February 7, 2011, for the issuance of a Respiratory Care Practitioner license.
2. Stephanie Nuñez (Complainant), in her official capacity as the Board's Executive Officer, filed the Statement of Issues, which alleges grounds to deny the application based on Respondent's convictions described below. Respondent filed a Notice of Defense, which requested the hearing that ensued.
3. On November 9, 2004, in the Superior Court of Los Angeles County, State of California, in case number 4PN06430, Respondent was convicted, on his plea of guilty, of violating Health and Safety Code section 11550, subdivision (a), being under the influence of a controlled substance, a misdemeanor.

4. The Court ordered a deferred entry of judgment for Respondent to enter a diversion program. Respondent later violated his probation terms and the diversion was terminated on February 7, 2005, at which time imposition of sentence was suspended and Respondent was placed on two years of informal probation under terms and conditions including that he serve 90 days in county jail.

5. The facts underlying this crime, as established by a police report and Respondent's testimony, are that on November 5, 2004, he was outside a home when police served a search warrant. Respondent admitted to police that he had smoked methamphetamine earlier that evening.

6. On February 3, 2005, in the Superior Court of Los Angeles County, State of California, in case number 5SF00588, Respondent was convicted, on his plea of nolo contendere, of violating Penal Code section 484, subdivision (a), petty theft, a misdemeanor.

7. Imposition of sentence was suspended and Respondent was placed on two years of informal probation under terms and conditions including that he serve three days in county jail.

8. The facts underlying this crime, as established by a police report and Respondent's testimony, are that on February 2, 2005, he shoplifted several items from a home improvement store.

9. On November 22, 2005, in the Superior Court of Los Angeles County, State of California, in case number 5SF04734, Respondent was convicted, on his plea of nolo contendere, of violating Penal Code section 415, disturbing the peace/fighting, noise or offensive words, a misdemeanor.

10. Respondent was sentenced to pay fines and penalties in the amount of \$310.

11. The facts underlying this crime, as established by a police report and Respondent's testimony, are that on August 9, 2005, Respondent and another man were in a parked car when a police officer observed what the officer believed was a drug transaction. After getting permission to search, the officer found drug paraphernalia in a backpack in the car trunk that Respondent said was his. At the hearing, Respondent stated the backpack belonged to his friend that Respondent was trying to help by claiming possession. The conviction was the result of a plea bargain.

12. On May 11, 2010, in the Superior Court of Los Angeles County, State of California, in case number PA065572, Respondent was convicted, on his pleas of guilty, of violating Penal Code sections 12280, subdivision (b), possession of an assault weapon, and 496, subdivision (a), possession of stolen property, both felonies. Respondent was ordered to perform 15 days of service to CalTRANS and report for sentencing on January 27, 2011.

13. Complainant alleges that sentencing took place on January 27, 2011 and that, among other things, Respondent was placed on two years of probation. (Exhibit 1, Statement of Issues, p. 7, ll. 9-19.) However, the court records relating to this conviction (Exhibit 12) end as of May 11, 2010. There was no evidence to support this allegation.

14. The facts underlying these crimes, as established by a police report and Respondent's testimony, are that he and his brother Bryan were living together when police arrived after an informant told them of guns at the apartment. The assault weapon was owned by and registered to Respondent; however, while cleaning it he left it only partially assembled and without a component part installed that would render the gun legal. Without the part, the gun was an illegal assault weapon. Respondent had also purchased a gun from a friend, which he had not yet registered and which he did not know had been stolen. Respondent had several other registered guns in his apartment at that time. Respondent, who was not present at the apartment at that time, responded to a phone call from the police and agreed to turn himself in.

15. Respondent admitted his crimes and accepts responsibility for them. As might be expected, his defense of this matter consisted of evidence of his rehabilitation. He presented his own testimony and that of his mother and two friends of many years. Respondent also submitted 41 character reference letters from family, friends, classmates, co-workers, trainers, preceptors, managers and supervisors (Exhibit A).

16. In summary, Respondent's mother, a registered nurse, described how Respondent was very bright and a good student, but several family events changed him. At about age twelve, his parents were divorced, and thereafter while Respondent and his siblings were with his father there was little supervision, structure or discipline. Respondent's father attempted suicide at some point. Respondent did not always have a reliable place to stay. He and his mother were somewhat estranged. Respondent's mother let him know that if he became more stable and responsible he would be welcome. In late 2005 she was moved when he called to say he had a job and wanted to visit her. In 2006 and 2007 she noticed that Respondent was no longer disrespectful towards her, would ask her for advice, and gave her a Mother's Day card thanking her for kicking him out. Respondent slowly rebuilt a strong relationship with his mother. He does not associate with the friends that were involved in his criminal activities. She testified that Respondent and his father would go target shooting and that gun safety was stressed to him.

17. Respondent has family and friends who are respiratory therapists who support his application and believe he would perform well in practice. Several letters are from respiratory therapists and supervisors when Respondent worked in clinical rotations at Kaiser Permanente and Pacific Alliance Medical Center and attest to the high quality of Respondent's skills and professionalism, initiative and cooperation with others.

18. Respondent also submitted letters from those with whom he has worked outside of the clinical rotations. They support Respondent's testimony of his willingness to take on duties and his promotions to positions of increased responsibility. Respondent volunteers at a local food bank. He no longer owns guns.

19. Respondent began coursework in 2009 in the respiratory care program at Concorde Career College and performed well, except for a finals test he missed when he turned himself in to police on the guns charges. He received his Associate of Science degree in January 2011. Respondent passed the examination by the National Board for Respiratory Care and in February 2011 became a Certified Respiratory Therapist. (Exhibits B and C.)

20. Respondent submitted a report from Susan Scalzo, Licensed Clinical Social Worker, dated May 26, 2012 (Exhibit E), of her psychological evaluation. The report indicates that Respondent was forthcoming in describing his past, including convictions. Ms. Scalzo reported the following strengths in Respondent: prior poor impulse control replaced by more mature thought process including consequences; seven years of self support showing responsibility with job duties and financial obligations; eliminating negative friendships; development of empathy to include family, friends, clinical fieldwork and beyond; and better regulation of emotions, with increased ability to avoid confrontation.

21. Respondent states a strong desire to work in the profession of respiratory care. When asked why he wouldn't wait when informed his application was denied, Respondent answered that he has worked hard to change and overcome his past, and to finish school, and is anxious to begin his career. He was sincere in these statements and is remorseful for not only his crimes but for his actions and decisions that resulted in his estrangement from his mother. Respondent is willing to accept probationary terms in order to be licensed.

22. Complainant submitted evidence of the costs of prosecuting this matter.

## LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Under Business and Professions Code<sup>a</sup> section 3750, the Board may deny the application for a license of someone convicted of a crime "that substantially relates to the qualifications, functions, or duties of a respiratory care practitioner" (subdivision (d)) or of someone who has committed "any fraudulent, dishonest, or corrupt act which is substantially related to the qualifications, functions, or duties of a respiratory care practitioner" (subdivision (j)).

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<sup>a</sup> All statutory references are to the Business and Professions Code, except where indicated.

2. Criteria to determine if a crime or act is “substantially related,” as required above, are found in California Code of Regulations, title 16 (Regulations), section 1399.370, under which there is a substantial relationship if the crime or act “evidences present or potential unfitness of a licensee” to perform the licensed functions “in a manner inconsistent with the public health, safety, or welfare,” including crimes involving theft.

3. Under Code section 3750.5, a licensee may be disciplined or applicant may be denied for improperly obtaining, possessing or using any controlled substance or dangerous drug.

4. Cause exists to deny Respondent’s application for a respiratory therapist license pursuant to section 3750, based upon Respondent’s convictions as set forth in Factual Findings 3-14. The convictions are “substantially related” as follows. The conviction for being under the influence was based upon Respondent’s drug use. The conviction for disturbing the peace is minor; even though the underlying act was possession of paraphernalia, the court only imposed a fine. A licensee can be disciplined for improper use of drugs. The convictions for petty theft and possession of stolen property relate to crimes involving theft under the Regulation.

5. Cause exists to deny Respondent’s application for a respiratory therapist license pursuant to section 3750.5, based upon Respondent’s conviction for being under the influence as set forth in Factual Findings 3-5.

6. Cause does not exist to deny Respondent’s application for a respiratory therapist license pursuant to section 3750, for commission of fraudulent, dishonest or corrupt acts. Respondent’s convictions for possession, petty theft and disturbing the peace do not rise to the level of “fraudulent, dishonest or corrupt acts.” On its face, the conviction for possession of an assault rifle may seem to involve dishonesty or corruption. However, under Code section 493, the Board may inquire into the underlying facts and circumstances of a crime to determine if there is a “substantial relationship.” Under the circumstances as described (see Factual Findings 12-14), no substantial relationship is found between this crime and the qualifications, functions, or duties of a respiratory care practitioner.

7. Under Regulation section 1399.372. when considering the denial of a license, the Board is to consider the following criteria of rehabilitation:

“(a) The nature and severity of the act(s) or offense(s).

“(b) The total criminal record.

“(c) The time that has elapsed since the commission of the act(s) or offense(s).

“(d) Compliance with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against such person.

“(e) Evidence of any subsequent act(s) or crime(s) committed.

“(f) Any other evidence of rehabilitation submitted that is acceptable to the board, including:

(1) Successful completion of respiratory care courses with a “C” or better, as determined by the institution;

(2) Active continued attendance or successful completion or rehabilitative programs such as 12-step recovery programs or psychotherapy counseling;

(3) Letters relating to the quality of practice signed under penalty of perjury from licensed health care providers responsible for the supervision of his/her work.

“(g) Statements, letters, attestations of good moral character, or references relating to character, reputation, personality, marital/family status, or habits shall not be considered rehabilitation unless they relate to quality of practice as listed in section (f).”

8. Applying these criteria to Respondent, and considering his 2010 conviction for possession of stolen property but not the 2010 conviction for possession of an assault rifle, as it is not substantially related, his convictions fall into the range of severity from minor to moderate, and he has several convictions. The last act was committed in 2010. He is in compliance with all terms of probation. Respondent has submitted strong evidence of his rehabilitation, including completion of coursework and obtaining certification, and letters. Many of the letters fit the Board’s criterion as relating to Respondent’s quality of practice. Further, there is some hesitancy by this Administrative Law Judge to strictly apply rehabilitation criterion (g) so as to essentially ignore character references that don’t apply to an applicant’s quality of practice as the criterion is too narrow and, potentially, a denial of due process. By definition, applicants do not have as much opportunity to “practice” as would a licensee whose rehabilitation is being considered. Further, rehabilitation takes place in the world at large, not just in a practice setting, and is measured by reviewing an applicant’s activities within that sphere. By reviewing the way that an applicant operates within the broadest set of situations and interactions one may get a much more rounded picture of the person, and the nature of their rehabilitation, than by focusing solely on “quality of practice.” Respondent presented both testimony and documents in this regard. In any case, in establishing that he is substantially rehabilitated Respondent has met the more narrow definition suggested by the Regulation as well as the broader approach suggested by the Administrative Law Judge.

9. Costs will not be awarded, for several reasons. Under Government Code section 11504, a statement of issues shall specify the statutes that apply. The Statement of Issues in this matter does not comply. Further, the statute under which the Board can request an award of costs is Code section 3753.5, allows such awards “in resolution of a disciplinary proceeding” before the Board. A disciplinary proceeding is one in which a licensee is subject to discipline against an existing license, not a statement of issues based on denial of an

application for a license. There is no authority cited in this matter that would support an award of costs to the Board. Further, such an award would chill applicants from applying or from requesting a hearing after denial.

10. The Board has adopted Disciplinary Guidelines under Regulation section 1399.374. These Guidelines were considered in determining whether to issue or refuse to issue a respiratory care practitioner's license to Respondent in light of his convictions. Under all of the circumstances of this matter, the public health, safety and welfare will be adequately protected by granting a license to Respondent and imposing probationary terms and conditions. The Guidelines suggest three probationary terms when there has been a drug related conviction. Two of these three will be included, but not biological fluid testing. Respondent's drug related conviction was based on an act in November 2004. Since then Respondent has held several jobs, received good evaluations and promotions, and there has been no behavior indicating that drugs have played a part in his life since then. As there is no evidence of present or recent drug use or addiction, to impose biological fluid testing would be punitive under these circumstances, given the costs of testing, the passage of time since Respondent's drug use, and the length of probation. The provision in Condition 4 stating that the "filing of bankruptcy by the Respondent shall not relieve the Respondent of his/her responsibility to reimburse the Board for costs incurred" is deleted as contrary to law. The Federal courts have concluded that the costs imposed by the California State Bar in a disciplinary proceeding are dischargeable under 11 U.S.C. 523 (a)(7), in that they are not a fine, but in compensation of actual pecuniary loss. (*In Re Taggart* (9th Cir. 2001) 249 F.3d 987.) It is plain that cost recovery is designed to compensate licensing agencies for the pecuniary loss suffered when they must pursue a disciplinary action. (See *Oranen v. State Bd. of Chiropractic Examiners* (1999) 77 Cal.App.4th 258, 262, describing Code section 125.3 as a cost "reimbursement" statute.) The same is true for recovery of probation costs. Hence, it must be concluded that such costs are dischargeable in bankruptcy. Other appropriate conditions will be included.

#### ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

A Respiratory Care Practitioners License shall be issued to Respondent Jameson S. Aberin and that license shall be immediately revoked. However, the revocation is stayed and Respondent's license is placed on probation for four years on the following conditions.

1. OBEY ALL LAWS: Respondent shall obey all laws, whether federal, state, or local. Respondent shall also obey all regulations governing the practice of respiratory care in California.

Respondent shall notify the Board in writing within 14 days of any incident resulting in his/her arrest, or charges filed against, or a citation issued against, Respondent.

2. **QUARTERLY REPORTS:** Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided, to the probation monitor assigned by the Board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Quarterly report forms will be provided by the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows:

For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.

For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.

For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.

For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

3. **PROBATION MONITORING PROGRAM:** Respondent shall comply with requirements of the Board appointed probation monitoring program, and shall, upon reasonable request, report to or appear to a local venue as directed.

Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Annual Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative. Respondent is encouraged to contact the Board's Probation Program at any time he/she has a question or concern regarding his/her terms and conditions of probation.

Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and will result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

4. **PROBATION MONITORING COSTS:** All costs incurred for probation monitoring during the entire probation shall be paid by the Respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased.

All payments for costs are to be sent directly to the Respiratory Care Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

If Respondent is unable to submit costs for any month, he/she shall be required, instead to submit an explanation of why he/she is unable to submit the costs, and the date(s) he/she will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, Respondent understands that by providing evidence and supporting documentation of financial hardship it may delay further disciplinary action.

In addition to any other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the respiratory care practitioner license will not be renewed, until such time all probation monitoring costs have been paid.

5. EMPLOYMENT REQUIREMENT: Respondent shall be employed a minimum of 24 hours per week as a respiratory care practitioner for a minimum of 2/3 of his/her probation period.

Respondent may substitute successful completion of a minimum of thirty (30) additional continuing education hours, beyond that which is required for license renewal, for each 8 months of employment required. Respondent shall submit proof to the Board of successful completion of all continuing education requirements. Respondent is responsible for paying all costs associated with fulfilling this term and condition of probation.

6. NOTICE TO EMPLOYER: Respondent shall be required to inform his/her employer, and each subsequent employer during the probation period, of the discipline imposed by this decision by providing his/her supervisor and director and all subsequent supervisors and directors with a copy of the decision and order, and the Statement(s) of Issues or Accusation(s) in this matter prior to the beginning of or returning to employment or within 14 days from each change in a supervisor or director.

If Respondent is employed by or through a registry [and is not restricted from working for a registry], Respondent shall make each hospital or establishment to which he/she is sent aware of the discipline imposed by this decision by providing his/her direct supervisor and administrator at each hospital or establishment with a copy of this decision, and the Statement(s) of Issues or Accusation(s) in this matter prior to the

beginning of employment. This must be done each time there is a change in supervisors or administrators.

The employer will then inform the Board, in writing, that he/she is aware of the discipline, on forms to be provided to the Respondent. Respondent is responsible for contacting the Board to obtain additional forms if needed. All reports completed by the employer must be submitted from the employer directly to the Board.

Respondent shall execute a release authorizing the Board or any of its representatives to review and obtain copies of all employment records and discuss and inquire of the probationary status with any of Respondent's supervisors or directors.

7. CHANGES OF EMPLOYMENT OR RESIDENCE: Respondent shall notify the Board, and appointed probation monitor, in writing, of any and all changes of employment, location, and address within 14 days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, change in supervisors, administrators or directors.

Respondent shall also notify his/her probation monitor AND the Board IN WRITING of any changes of residence or mailing address within 14 days. P.O. Boxes are accepted for mailing purposes, however the Respondent must also provide his/her physical residence address as well.

8. TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE: Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the probation monitoring costs incurred. Travel out of California for more than 30 days must be reported to the Board in writing prior to departure. Respondent shall notify the Board, in writing, within 14 days, upon his/her return to California and prior to the commencement of any employment where representation as a respiratory care practitioner is/was provided.

9. VALID LICENSE STATUS: Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet CE requirements prior to his/her license expiration date shall constitute a violation of probation.

10. VIOLATION OF PROBATION: If Respondent violates any term of the probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation or other penalty pending against Respondent.

11. COMPLETION OF PROBATION: Upon successful completion of probation, Respondent's license shall be fully restored.

12. WORK SCHEDULES: Respondent shall be required to submit to the probation monitor work schedules on a monthly basis for the length of probation. Respondent shall ensure the Board has a copy of her/his current work schedule at all times for each place of employment.

Failure to submit current work schedules on a continuous basis shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

13. ABSTENTION FROM USE OF MOOD ALTERING SUBSTANCES: Respondent shall completely abstain from the possession or use of alcohol, any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health medical records. Respondent shall also provide information of treating physicians, counselors or any other treating professional as requested by the Board.

Respondent shall ensure that he/she is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s).

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of Respondent's employers.

14. SUPERVISOR QUARTERLY REPORTS: Supervisor Quarterly Reports of Performance are due for each year of probation and the entire length of probation from each employer, as follows:

For the period covering January 1<sup>st</sup> through March 31<sup>st</sup>, reports are to be completed and submitted between April 1<sup>st</sup> and April 7<sup>th</sup>.

For the period covering April 1<sup>st</sup> through June 30<sup>th</sup>, reports are to be completed and submitted between July 1<sup>st</sup> and July 7<sup>th</sup>.

14. SUPERVISOR QUARTERLY REPORTS: Supervisor Quarterly Reports of Performance are due for each year of probation and the entire length of probation from each employer, as follows:

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For the period covering April 1<sup>st</sup> through June 30<sup>th</sup>, reports are to be completed and submitted between July 1<sup>st</sup> and July 7<sup>th</sup>.

For the period covering July 1<sup>st</sup> through September 30<sup>th</sup>, reports are to be completed and submitted between October 1<sup>st</sup> and October 7<sup>th</sup>.

For the period covering October 1<sup>st</sup> through December 31<sup>st</sup>, reports are to be completed and submitted between January 1<sup>st</sup> and January 7<sup>th</sup>.

Respondent is ultimately responsible for ensuring his/her employer(s) submits complete and timely reports. Failure to ensure each employer submits complete and timely reports shall constitute a violation of probation.

DATED: July 5, 2012.



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DAVID B. ROSENMAN  
Administrative Law Judge  
Office of Administrative Hearings