IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

GEORGE F. CALLOWAY, JR., M.D.,	][	**CASE NUMBER 11CVF-15468**
	[]	
	][	
APPELLANT,	[]	**JUDGE CAIN**
	][	
vs.	[]	**MAGISTRATE MCCARTHY**
	][	
STATE MEDICAL BOARD OF OHIO	[]	
	][	
	[]	
	][	
APPELLEE	[]	

DECISION TO AFFIRM

CAIN, J.

I

This matter is now before the court on the merits of this administrative appeal. By way of factual background, appellant, George F. Calloway, Jr. is a physician licensed by the State Medical Board of Ohio to practice medicine in Ohio. Dr. Calloway is a board certified ophthalmologist who has practiced with his Ohio license since 1975. In 2009, Dr. Calloway was contacted by a medical doctor, Dr. Rice, who wanted to relocate and practice in Ohio. Dr. Rice represented to appellant that he knew him when both were at medical school at Ohio State. Dr. Rice wanted Dr. Calloway to recommend him to appellee for a medical license in this state.

Uncertain as to the identity of Dr. Rice, Dr. Calloway invited him to visit with Dr. Calloway in his office. Dr. Rice accepted the invitation and met with Dr. Calloway as suggested. The two of them had a conversation of 20 – 30 minutes.

Following the conversation, Dr. Calloway filled in his responses to queries contained on appellee's preprinted recommendation form. Except for a single omission, Dr. Calloway's responses were extremely favorable toward Dr. Rice. Dr. Calloway signed and retuned the recommendation form to appellee where it was included in Dr. Rice's application packet.

Upon investigation, it was discovered that the laudatory responses provided by Dr. Calloway were largely inaccurate. Rather than possess a sufficient basis to offer his appraisal of Dr. Rice, it was believed Dr. Calloway was unfamiliar with Dr. Rice or his professional work. Consequently, a notice of opportunity for a hearing was issued to Dr. Calloway in the face of his alleged violations of controlling statutory provisions concerning the making of false, fraudulent, deceptive, or misleading statements in connection with Dr. Rice's attempt to obtain his certificate to practice medicine in Ohio.

A hearing was held before the hearing examiner on September 16, 2011, who issued her report on October 13, 2011. Upon consideration, appellee modified the hearing officer's report and found appellant to have committed two statutory violations. Namely, falsification (R.C. 4731.22(B)(12)) and making a false, fraudulent, deceptive, or misleading statement to licensing officials (R.C. 4731.22 (B)(5)). Appellee, however, decided to take no further action against appellant. From that November 9, 2011 adjudication order appellant brings the instant appeal.

II

This appeal is governed by R.C. 119.12 which in pertinent part provides:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

In considering this matter on appeal, this court is limited to determining whether appellee's adjudication order is supported by sufficient evidence in the record and whether it is lawful. A court of common pleas is bound to uphold an order of the State Medical Board if that order is supported by reliable, probative, and substantial evidence. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621, 614 N.E.2d 748; *Hayes v. State Med. Bd. of Ohio* (2000), 138 Ohio App. 3d 762, 767, 742 N.E.2d 238. A common pleas court should generally defer to administrative resolution of evidentiary conflicts. *Gen. Motors Corp. v. Joe O'Brien Chevrolet, Inc.* (1997), 118 Ohio App. 3d 470, 482, 693 N.E.2d 317. Thus, as long as there is reliable, probative, and substantial evidence that supports the board's findings, the common pleas court may not substitute its judgment as to disputed facts. *Id*. Whether any evidence supports the decision is a question of law. *Id*. at 483.

Appellee's construction and application of its regulations and requirements must be accomplished on a case-by-case basis. Due deference must be accorded to the decisions of an administrative agency. *VFW Post 8586 v. Ohio Liquor Control Comm.* (1998), 83 Ohio St. 3d 79. It has been noted that "an administrative agency's construction of a statute that the agency is empowered to enforce must be accorded due deference." *Ciriello v. Bd. of Embalmers and Funeral Directors of*

Ohio, 105 Ohio App. 3d 213, 218, citing *Leon v. Bd. of Psychology* (1992), 63 Ohio St. 3d 683 and *Chaney v. Clark Cty. Agr. Soc., Inc.* (1993), 90 Ohio App. 3d 421. However, the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-111.

In support of his appeal, appellant raises numerous arguments. Under the general rubric that the adjudication order is not supported by reliable, probative, and substantial evidence, appellant first argues that as a matter of fact, and contrary to appellee's finding, appellant did not violate R.C. 4731.22(B)(5). That subsection provides:

> (B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:
>
> (5) Making a false, fraudulent, deceptive, or misleading statement in the solicitation of or advertising for patients; in relation to the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, or a limited branch of medicine; or in securing or attempting to secure any certificate to practice or certificate of registration issued by the board.
>
> As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

The issue of the existence of a false, fraudulent, deceptive, or misleading statement lies central to a full consideration of this appeal. By way of additional

pertinent background, the violations of law described above relate to the preprinted "Certificate of Recommendation" form provided by appellee to be used by physicians who are in a position to recommend another physician who seeks admission to practice medicine in Ohio and who holds a license in another state. The form directs: "The recommending physician must have known the applicant at least SIX months." It goes on, "ALL questions must be answered."

The form continues and calls for the author for fill in blanks preprinted in the form. It appears thus (with the scripted words being filled in by appellant):

I, *George F. Calloway Jr MD* a licensed and practicing physician in the state of *Ohio* affirm that **CHRISTOPHER A RICE** has been known to me personally for _____ years and that he/she is of good moral character. Further, the photograph affixed hereto is a genuine likeness of the applicant. I offer the following in support of his/her application for licensure:

- I rate his/her medical knowledge and technique as: *excellent*
- His/her relationship with patients is: *excellent*
- I rate his/her ability to work well with peers and medical staff as: *excellent*
- His/her command of the English language is: *excellent*
- Additional comments *n / a*

I hereby recommend the applicant for a license to practice medicine or osteopathic medicine in the State of Ohio.

s/ *George F. Calloway Jr. MD*

Attention is directed to the first sentence in the above replicated form. It is seen that the form calls for a response to the inquiry relative to the length of time

the candidate has been known personally by the physician recommending licensure. The line provided for a response was left blank by appellant. It is also noted that the term "excellent" was the response to the various queries concerning the qualities of the applicant. By completing the form in the manner he did, appellant was found to have transgressed the law. Criticism was made because it was contended that although the form required the recommender to have personally known the applicant for at least six months, it appeared from other information appellant did not know Dr. Rice for six months. Further, it was believed that appellant was not in a position to offer any evaluation concerning Dr. Rice's qualities in practicing medicine.

Despite the findings made against him, appellant contends that he knew Dr. Rice for at least six months. The evidence is such that appellant had no recollection of Dr. Rice, but was called out of the blue by Dr. Rice seeking a recommendation for licensure as a physician in Ohio. Because he was unfamiliar with Dr. Rice and had no personal or professional relationship with him and had no specific memory of him, appellant asked Dr. Rice to meet with him in his office.

Even upon meeting Dr. Rice, appellant still had no recognition or memory of him. Prior to meeting, appellant did know the ethnicity of Dr. Rice. The only possible contact they had was the claim of Dr. Rice that they attended the OSU medical school at the same time. Appellant said that he knew he had known Dr. Rice, but they were not in the same graduating class and did not attend the same classes. He further testified that he did not know if perhaps Dr. Rice was a former residency student he may have taught, or even simply a med student he may have

come into contact with. Fairly put, the evidence is such that it appears appellant did not know Dr. Rice and had not a clue as to his professional competency and relationships.

Nevertheless, appellant claims he did know Dr. Rice sufficient to be competent to respond to queries concerning his capabilities and proficiencies. To testify at the hearing was Professor Dawn Bikowski, Director of English Language Improvement Program in the Linguistics Department at Ohio University. Dr. Bikowski testified that the word “know” can be used in a variety of contexts and have differing meanings. The content of her testimony is considered common knowledge and was certainly known and appreciated by appellee in arriving at its findings.

Next, appellant observes that other than knowing the applicant for at least six months, there are no objective, articulated requirements for one who elects to complete the Certificate of Recommendation form. Appellant claims that if appellee actually wanted the recommendations of those who had first-hand experience with the candidate, it would have so specified in its instructions. By not setting forth more specific requisites identifying necessary qualifications to be a recommender for a candidate, appellant postulates that he was welcome to provide his opinions on the attributes of the candidate. Appellant seemingly concludes that he was then liberated to offer with impunity any responses he chose to place on the Certificate of Recommendation by contending that they were his honest opinions. This contention is unable to be accepted by this court as explained below.

Appellant next observes that in order to prove a violation of R.C. 4731.22(B)(5), making a false, fraudulent, deceptive, or misleading statement, sufficient evidence of intent is required. With this general statement, appellee concurs but notes that direct evidence of intent is not required, but intent can be inferred from the surrounding circumstances. *Krain v. State Med. Bd. of Ohio* (Oct. 29, 1998), Franklin App. No. 97APE08-981; *Gipe v. State Med. Bd. of Ohio* (July 31, 2003), Franklin App. No. 02AP-1315; *Prinz v. State Counselor & Soc. Worker Bd*., 2000 Ohio App. LEXIS 116 (Ohio Ct. App., Hamilton County Jan. 21, 2000).

The indirect or circumstantial evidence in this case abounds on the issue of an intent to mislead or deceive. It is clear appellant did not know Dr. Rice except for having crossed paths in medical school and having a 20 – 30 minute conversation with him on a single occasion. The blank space following the query "has been known to me personally for _____" is telling.[1] It is clearly disingenuous, deceptive and misleading to purport to state under oath that Dr. Rice's medical technique is excellent, and his relationship with his patients is excellent, and his ability to work well with others and medical staff is excellent. The truth appears to be that appellant possessed no actual knowledge of these matters.

Appellant additionally contends in support of his proposition that the subject order is not supported by reliable, probative and substantial evidence that he did not commit an act in the course of practice that constitutes a misdemeanor. R.C. 2921.13(A)(5) makes it a misdemeanor to knowingly make a false statement when

[1] If appellant actually knew Dr. Rice as he now contends, it would be expected that he would have answered the query with the number of years that have passed since medical school.

made with purpose to secure the issuance of a certificate or a license, for example, to practice medicine. The culpable mental state is identified as "knowingly." That term is identified as: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

In the instant case it is clear that appellant knew and understood full well what he was doing both in submitting the bogus recommendation and in understanding the probable favorable reception it would receive by appellee. It was a glowing recommendation concerning a person whom appellant knew very little about. It was a falsity in content and deceptive in intended purpose. Appellee and appellant stood in a special professional relationship. Appellant was ethically bound to uphold the standards of professionalism, and be honest in all professional interactions.[2] The evidence supports the finding that falsification occurred in this case in violation of R.C. 2921.13.

III

Moving on, and under the category of the notion that the subject order is not in accordance with law, appellant contends that appellee exceeded its statutory authority by amending the hearing examiner's findings of fact and conclusions of law. In so urging, appellant involves the argument of statutory construction of R.C. 119.09 and seems to parse its terms too finely in the face of substantial contrary case law authority on the issue raised by appellant.

[2] Code of Medical Ethics, Principles of Medical Ethics II, American Medical Association, 2001.

For example, in *In re Lima Memorial Hosp*., 1993 Ohio App. LEXIS 4184 (Ohio Ct. App., Franklin County Aug. 24, 1993), the hearing examiner made findings of fact and conclusions of law and recommended that a certain administrative certificate be denied. The administrative board adopted several of the hearing examiner's findings of fact, amended others and adopted its own finding of fact. In addition, the board amended two of the hearing examiner's conclusions of law and deleted the hearing officer's conclusion and rejected recommendation. Except as to an unrelated issue, the appellate court held that the board's actions were proper and made accordance with law and supported by reliable, substantial and probative evidence.

In a more recent case, the Franklin County Court of Appeals approved similar readjustment to a hearing examiner's work product. In *Bennett v. State Med. Bd. of Ohio*, 2011 Ohio 3158, 2011 Ohio App. LEXIS 2662 (Ohio Ct. App., Franklin County June 28, 2011), a physician was charged with impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice. Following a hearing, the hearing examiner issued her report stating conclusions of law, conclusions of fact and her recommendation for an adjudication order. Upon consideration, the board voted to adopt the hearing examiner's findings of fact but modified the hearing examiner's conclusion of law and proposed order. The trial court found that despite the alterations made to the hearing officer's report, the board's final order was supported by reliable, probative,

and substantial evidence and thus upheld. The court of appeals found that the trial court did not abuse its discretion in so holding.

Furthermore, R.C. 119.09, by its very terms contemplates full power in the administrative agency to find as it determines appropriate based upon the evidence presented. The statute directs:

> The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency.

Upon consideration, it is found, as appellee asserts, appellee's modification of the report and recommendation complied with R.C. 119.09 and the established case law. It is further found that appellee did not exceed its statutory authority when it modified the report and recommendation.

Next appellant contends appellee did not have reliable, substantial and probative evidence to support its actions. Here, appellant focuses on the hearing officer's finding that appellant "had known" Dr. Rice for at least six months, contrasted with appellee's revision of that finding to be that appellant "had not known" Dr. Rice for at least six months. Appellant once again centers attention on the meaning of "know." Without delving into an epistemological inquiry, the facts presented clearly indicate that in the traditional, common sense construction of the word "know," it is apparent that appellant did not know Dr. Rice for six years.

It is recalled appellant testified that at the time of Dr. Rice's 2009 telephone call to request a letter of recommendation, he did not specifically remember Dr. Rice and for that reason he requested Dr. Rice to meet with him at appellant's office. When Dr. Rice appeared at the office, appellant did not recognize him. It is the case that following contact in medical school, appellant did not meet with him again or talk with him again until the telephone call in 2009. As suggested by appellee, correctly stated, appellant did not know Dr. Rice, he knew *of him* due to their paths crossing at medical school.

Appellant next goes on to raise due process and fairness issues concerning his claim that appellee never gave him detailed notice of the exact misleading or false statements he allegedly made. Of course appellant did have rights to due process with regard to notice and the provision of an administrative hearing. The fundamental requirement of procedural due process is notice and hearing, that is, an opportunity to be heard. *Luff v. State* (1927), 117 Ohio St. 102. Notice and hearing are necessary to comply with due process in an administrative proceeding that revokes an individual's license to practice a profession. *Jewell v. McCann* (1917), 95 Ohio St. 191. An acknowledged requirement of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut* (1971), 401 U.S. 371.

Here, appellant maintains appellee violated his due process rights by failing to specifically identify the false or misleading statements allegedly made by appellant. The evidence in the record, however, does not support such a contention. In appellee's May 11, 2011 letter to appellant a robust disclosure of

appellant's alleged violations is plainly made. Appellee clearly discloses the basis of believing that action could be taken against appellant's medical license. The focus of the intended inquiry was explained by appellee to be the Certificate of Recommendation completed by appellant. Specific mention was made of appellant's responses to the queries regarding Dr. Rice's moral character, his medical knowledge and technique, his relationship with patients, and his ability to work well with peers and staff.

Appellee disclosed its inquisible interest in the apparent disparity between appellant's offerings in the Certificate of Recommendation and appellant's apparent lack of knowledge about those matters upon which he opined. Disclosure was made by appellee both of the (1) stellar evaluations of Dr. Rice's abilities contrasted with Dr. Rice's abysmal professional history[3] and (2) appellant's apparent lack of personal knowledge of Dr. Rice, noting that "apart from possible exposure to each other during the course of your medical education in the 1970's, you never, in fact, observed Dr. Rice's interactions with patients, peers, and medical staff, nor could you recall observing Dr. Rice's medical technique, despite rating these attributes as excellent."

Upon a consideration of the due process issue raised by appellant, it is found that appellant was afforded a full measure of due process. The May 11, 2011 notice provided to him fully supplied appellant the necessary information and

[3] He was convicted of one felony count of grand theft of personal property in 2006; he was sued in two malpractice claims with one being settled for $750,000 and the other unknown; there were prior disciplinary actions taken against him in Illinois and in New York for impairment, gross negligence in the practice of medicine, and unprofessional handling and treatment of a patient; and he had not practiced medicine since February 2005.

the hearing held before the hearing examiner was full and proper. Appellant's arguments on the due process issue are found not to be well taken.

Next appellant contends he did not make any statement fitting the statutory definition of "false, fraudulent, deceptive, or misleading." Here, reference must be made to R.C.4731.22(B)(5):

> As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

On this issue, appellant seems to say that sanctions ought not be imposed on him for offering his opinions and recommendations expressed on the Certificate of Recommendation form. While in most circumstances involving professional recommendations that is likely true, in this circumstance appellant was found to have crossed the line into sanctionable territory.

Upon consideration, and as appellee contends, by completing the form as appellant did, indication is given that appellant knew Dr. Rice for at least six months. As observed herein, that was not the case in fact. From the necessary implication that he knew Dr. Rice for over six months, to the statements that features of Dr. Rice's professional character and abilities were excellent, appellant's actions were likely to cause misunderstanding and deception in an ordinarily prudent person. Appellant's position to the contrary is found not to be meritorious.

Appellant goes on to next challenge the board's finding that he violated the provisions of R.C. 4731.22(B)(12). That subsection provides:

> (B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons: (12) Commission of an act in the course of practice that constitutes a misdemeanor in this state, regardless of the jurisdiction in which the act was committed[.]

Here, it was alleged appellant committed the misdemeanor offense of falsification. This court has already addressed this issue on pages 8 – 9 of this decision in connection with appellant's claim that appellee's order is not supported by the requisite evidence.

Nevertheless, under appellant's arguments under the category of findings not made in accordance with law, appellant contends that the adjudication order is not in accordance with law because, inter alia, in order for appellee to find a violation of R.C. 4731.22(B)(12), as a necessary prerequisite it would also have to conclude that appellant was, at the time of the falsification, within the course of his medical practice. Appellee takes the position that appellant was within the course of his practice and, upon consideration, this court concurs.

In order to be qualified to submit a Certificate of Recommendation, one must be a fully licensed physician. As a physician practicing in Ohio, appellant was answerable to appellee, his licensing authority. In this circumstance, appellant, as a licensee, submitted the Certificate of Recommendation form to his licensing

authority and swore to the correctness of the responses given. This is a necessary and natural professional interaction. Such professional communication given by appellant several times previously can easily and correctly be described as being a part of a medical practice. Appellant's contention to the contrary is found to be meritless.

Appellant next maintains there was no evidence that he had any intent to mislead the board or that he knowingly made a false statement. The court has addressed this issue above and will again observe it is a fundamental principle that a person is presumed to intend the natural**,** reasonable and probable consequences of his voluntary acts. *State v. Johnson* (1978), 56 Ohio St.2d 35, 39, 10 O.O.3d 78, 80; *State v. Lott* (1990), 51 Ohio St.3d 160, 168; *State v. Losey* (1985), 23 Ohio App.3d 93, 23 OBR 158. Further, intent can be inferred from the surrounding circumstances. *Gipe v. State Med. Bd. of Ohio*, supra. Providing inaccurate information to another intending that the other rely on the information easily can be seen and found to be an attempt to mislead.

Last, appellant contends an injustice was done to him and a deprivation of due process resulted by appellee making findings against him when appellee "failed to provide appropriate direction and/or guidance in completing such forms." Appellant couples this contention with the contention that the Recommendation form he filled out contains vague and ambiguous requests for subjective opinions. To this, the court merely observes that appellant voluntarily elected to complete the form at the behest of Dr. Rice. If appellant did not understand the form or felt uncomfortable in filling it out, he had the opportunity to obtain clarification from

appellee, or simply refuse to participate using the form provided. It is concluded that an injustice was not imposed on appellant.

Upon a full consideration of the record and the issues presented, it is found that the subject adjudication order is supported by reliable, probative and substantial evidence and is in accordance with law.

Accordingly, judgment is entered in favor of appellee and against appellant. Costs to be paid by appellant.

Copies to:

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Counsel for Appellee

Franklin County Court of Common Pleas

Date: 06-19-2012

Case Title: GEORGE F CALLOWAY JR MD -VS- OHIO STATE MEDICAL BOARD

Case Number: 11CV015468

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge David E. Cain

Court Disposition

Case Number: 11CV015468

Case Style: GEORGE F CALLOWAY JR MD -VS- OHIO STATE MEDICAL BOARD

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes