

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

KURT W. FROEHLICH, M.D.,	:	
	:	
Appellant	:	CASE NO. 15CV-1349
	:	
vs.	:	JUDGE BEATTY
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
Appellee	:	

**DECISION AND JUDGMENT ENTRY AFFIRMING THE ORDER OF THE STATE MEDICAL BOARD AND NOTICE OF FINAL APPEALABLE ORDER**

**BEATTY, JUDGE**

This is an appeal pursuant to R.C. 119.12 from a January 14, 2015 Order of the State Medical Board of Ohio (the “Board”).

**I. HISTORY OF THIS MATTER**

On December 11, 2013, the Board notified Appellant Kurt W. Froehlich, M.D., that it proposed to take disciplinary action against his certificate to practice medicine and surgery in Ohio. The Board alleged that Appellant engaged in inappropriate sexual contact with two patients in violation of R.C. 4731.22(B)(20) and Ohio Admin. Code 4731-26-02(A) and was found guilty of a misdemeanor in the course of practice in violation of R.C. 4731.22(B)(11). (R. 9-11).

Appellant requested a hearing, which was held on June 23, June 24, and July 15, 2014. The evidence at the hearing included the following.

Appellant is a physician who practices obstetrics and gynecology as a solo practitioner.

Patient 1 came to Dr. Froehlich's office on June 17, 2010, for an annual checkup and Pap smear. (T. 27-30). Dr. Froehlich testified that after the examination had concluded and the chaperone had left the room, but while Patient 1 was still in a gown on the exam table, she asked him a question about sexual arousal and the location of the "G-spot." (T. 32-33). He testified that he then used his fingers to physically locate her G-spot. (T. 33). Neither the patient's question nor Dr. Froehlich's actions were documented in the patient's record. (T. 38).

Dr. Froehlich testified that he subsequently encountered Patient 1 while they were both working at the hospital. He testified that in a call room at the hospital, he again demonstrated the location of her G spot and stimulated her to orgasm. (T. 36-37).

Dr. Froehlich testified that approximately one week later, he had a "sexual relationship" with Patient 1 and they engaged in sexual intercourse at the hospital. (T. 38-39).

Dr. Froehlich acknowledged that he was aware at the time of his sexual encounters with Patient 1 that they were "problematic." He further acknowledged that since Patient 1 worked in the delivery area of the hospital, he was in a position of authority over her. (T. 41).

Patient 2 had been a gynecological patient of Dr. Froehlich's since 2007. (T. 52-57). In a written statement for a Board investigator, Dr. Froehlich stated that "There was also a girl [Patient 2] who was a patient who I showed where her g-spot was, I also saw her at the hospital and stimulated her to orgasm." (St. Ex. 7, p. 3). Dr. Froehlich testified that the sexual activity occurred in an administrative room of the hospital in 2012. (T. 59-63).

Sara Folck testified that she worked in Dr. Froehlich's office as a medical assistant. (T. 107-113). She testified that on July 30, 2012, she was preparing to leave work and stopped in Dr. Froehlich's office to say goodbye. (T. 123-125; 165-167). She stated that "he stood up and started walking towards me—and said something about how he had wanted me since I started working there." (T. 126-127). She stated that he put his hand on her side and started "rubbing up and down from probably about the breast area down to the hips." She stated that she started to push away and back away from him, but that he "reached around and went up my shirt and he got up under my bra and had a hand completely on my right breast." She stated that she pushed his hand out and tried to leave, but that he "took his right hand and went under my pants," an inch or two under her underwear. She stated that after she pushed his hand away and tried again to leave, he turned her around, got close to her face, and told her "You know, I think it's best that you don't work here anymore." (T. 126-128).

Dr. Froehlich testified that the July 30, 2012 incident occurred when he was in his office, entering information into the computer. (T.93). He stated that he and Ms Folck talked about how her employment was working out. (T. 94). He stated that Ms. Folck was flirtatious during this encounter. (T. 93-95). He admitted that he put a hand on her hip and a hand on her shoulder, and stated that she leaned back and said "'I can't,' and/or 'We can't,' one of the two. And she said 'You're a bad boy.' And then she walked out of the office." (T. 95).

Ms. Folck reported the incident to the police and provided a written statement. (T. 143).

On February 28, 2013, Dr. Froehlich pled no contest to, and was found guilty of, Assault, in violation of R.C. 2903.13, a misdemeanor in the first degree, relating to the incident with Ms. Folck. (St. Ex. 3).

On November 25, 2014, the Hearing Examiner issued a Report and Recommendation. The Hearing Examiner found that Dr. Froehlich's sexual conduct with Patients 1 and 2 violated Ohio Adm. Code 4731-26-02 and R.C. 4731.22(B)(20). (R&R, p. 29). He found that Dr. Froehlich had been found guilty of a misdemeanor in the course of practice, in violation of R.C. 4731.22(B)(11). He recommended a one-year suspension, but noted that "[g]iven Dr. Froehlich's sexual misconduct with two patients and criminal behavior toward an employee, the Board would be well-justified in permanently revoking Dr. Froehlich's certificate." (R&R, p. 30).

This matter came before the Board at its meeting on January 14, 2015. Dr. Froehlich and his counsel addressed the Board. (R. 101). After a discussion of the nature of Dr. Froehlich's behavior and the appropriate disciplinary action, the Board voted to modify the Proposed Order and permanently revoke Dr. Froehlich's license to practice medicine and surgery in Ohio. (R. 102-104).

Dr. Froehlich's counsel then made a motion for reconsideration, asserting that there had not been a proper motion to amend the Proposed Order and raising a question about whether a 30-day wind-down period had been included in the Amended Order. (R. 105). The Board voted to reconsider the matter. (*Id.*).

The Board's minutes then state as follows:

Mr. McGovern [Dr. Froehlich's counsel] rose and began addressing the Board. Not having been recognized, Mr. Kenney ruled that Mr. McGovern was out of order. Mr. McGovern continued to attempt

addressing the Board. At Mr. Kenney's direction, the Ohio State Highway Patrolman present escorted Mr. McGovern from the meeting. (R. 106).

A motion to amend the Proposed Order was made. The Board voted to include a 30-day wind-down period in the Amended Order. The Board voted that Dr. Froehlich's objections would not be addressed as part of the reconsideration. (R. 106). With the addition of the 30-day wind-down period, the Amended Order was approved. (R. 108).

On February 16, 2015, Appellant filed this appeal from the Board's Order.

## II. LAW

When considering an appeal from an order of the Medical Board, a common pleas court must uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. R.C. 119.12. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

The Ohio Supreme Court has recognized that the General Assembly granted the Medical Board a broad measure of discretion. *Arlen v. State*, 61 Ohio St.2d 168, 174 (1980). In *Farrand v. State Med. Bd.*, 151 Ohio St. 222, 224 (1949), the court stated:

The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of men equipped with the necessary knowledge and experience pertaining to a particular field. ...

"Accordingly, when courts review a medical board order, they are obligated to accord due deference to the board's interpretation of the technical and ethical requirements of the medical profession." *Landefeld v. State Med. Bd.*, 10<sup>th</sup> Dist. No. 99AP-612, 2000 Ohio App. LEXIS, pg. 9.

### III. THE COURT'S FINDINGS AND CONCLUSIONS

Dr. Froehlich argues that the Board's Order is invalid because the Board made procedural errors during its January 14, 2015 meeting. Specifically, Appellant argues that the Board failed to follow proper parliamentary procedures in its deliberations in that there was no formal motion to amend the Proposed Order. Appellant argues that while the Board tried to correct this alleged error by reconsidering the matter, the Board then erred by excluding Appellant's counsel from the subsequent discussion.

Appellant asserts that while the Board's minutes reflect that Board member Dr. Sethi moved to amend the Proposed Order to impose permanent revocation (at R. 103), the audio recording shows that Dr. Sethi did not use those words and said that "I would vote for permanent revocation." (Appellant's brief, p. 5). Appellant asserts that while Board member Dr. Steinberg then stated that "I second the amendment," this was improper because no formal motion had been made. Appellant argues that without a formal motion being made, the Board's deliberations violated the Board's policy of following The Standard Code of Parliamentary Procedures.

Appellant has cited no legal authority supporting his argument that a Board Order becomes invalid if the Board fails to strictly adhere to rules of parliamentary procedure.

In *Nalluri v. State Medical Board of Ohio*, 10<sup>th</sup> Dist. No. 14AP-530, 2014-Ohio-5530, the appellant argued that the Board's Order was invalid because it failed to follow proper parliamentary procedures. (*Id.*, ¶15). The Court stated that "parliamentary rules, even when adopted as board policy, are intended merely to assist the board in the orderly conduct of its business, and cannot operate to invalidate otherwise lawful actions of a duly elected board." (*Id.*, ¶21). The Court held: "Therefore, even if we were to find that

the board's voting procedure, in the present case, was in contravention of the standard code, we would not find persuasive appellant's unsupported argument that the board's order should be void or otherwise invalid." (*Id.*).

Thus, Appellant has not shown that any failure to follow parliamentary procedure was a procedural error by the Board that necessitated correction through reconsideration of the matter. The Board's minutes reflect that it voted to approve the Amended Order.

Appellant further argues that in the Board's reconsideration of the matter, it violated the open meeting requirements set forth in R.C. 121.22 by excluding Appellant's counsel.

While R.C. 121.22 requires public meetings, the statute does not require public bodies to permit individuals to speak at such meetings. *Wyse v. Rupp*, 6<sup>th</sup> Dist. No. F-94-19, 1995 Ohio App. LEXIS 4008, p. 11-12. Moreover, a public body has the right to conduct an orderly hearing and remove persons if necessary to conduct the hearing. *Kalk v. Woodmere*, 27 Ohio App.3d 145, 148 (8<sup>th</sup> Dist. 1985).

The Board's minutes reflect that counsel was ruled out of order after rising and addressing the Board without being recognized. The minutes state that counsel was then excluded after continuing to attempt to address the Board. (R. 106). Thus, the only evidence in the record is that counsel was excluded after repeatedly failing to comply with the Board's hearing procedure. The Court has no basis to conclude that the Board's actions were improper.

Moreover, Appellant has not shown any prejudice from the Board's alleged procedural error in excluding counsel. In *Korn v. Ohio Medical Bd.*, 61 Ohio App.3d 677, 686, (10<sup>th</sup> Dist. 1988), the Court held that "In order to support reversal of a

judgment, the record must show affirmatively not only that error intervened, but that such error was to the prejudice of the party seeking such a reversal.” Appellant and his counsel had already had the opportunity to, and did, address the Board regarding this matter. Appellant has not shown that counsel was entitled to a second opportunity to address the Board. In addition, the only modification to the Proposed Order that took place after counsel was excluded was addition of the thirty-day wind-down period requested by Appellant. (R. 106-108).

Appellant next argues that his misdemeanor assault conviction did not occur “in the course of practice” as required by R.C. 4731.22(B)(11).

Appellant asserts that there was no connection between the assault and the practice of medicine, in that the incident occurred after normal business hours and after all of the patients had left.

The evidence is that the assault occurred in Dr. Froehlich’s office, as Ms. Folck was preparing to leave work. (T. 123-125). Dr. Froehlich testified that at the time Ms. Folck came to his office, he was entering information into the computer. (T. 93). Ms. Folck was there as an employee of the practice, and Dr. Froehlich testified that he and Ms. Folck also talked about how her employment was going. (T. 94). The assault occurred during the course of this discussion. Ms. Folck further testified that after the assault, and after she tried to back away and leave, Dr. Froehlich told her that “I think it’s best that you don’t work here anymore.” (T. 128).

This Court’s scope of review of an agency’s decision in an administrative appeal is limited. The Court is to “give due deference to the administrative resolution of evidentiary conflicts.” *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

The Court “will not substitute its judgment for the Board’s where there is some evidence supporting the board’s order.” *Harris v. Lewis*, 69 Ohio St. 2d 577, 579 (1982). *See also In re Frank and Glenda Miller* (1976), 10<sup>th</sup> Dist. No. 76AP-348, 1976 Ohio App. LEXIS 6408, p. 8 (“The inference made by the commission should not be altered by the Common Pleas Court or this court merely because we would come to a different conclusion”).

After reviewing the record, the Court finds that there is reliable, probative and substantial evidence supporting the Board’s conclusion that the assault occurred “in the course of practice” as required by R.C. 4731.22(B)(11).

Appellant further argues that the Board erred by considering two incidents that were not referenced in the Notice of Opportunity for Hearing, one in which Dr. Froehlich walked in on Ms. Folck while she was pumping breast milk and one in which Ms. Folck administered a testosterone injection to Dr. Froehlich.

These two incidents were brought up by Dr. Froehlich during the hearing as examples of how he believed Ms. Folck had been flirtatious with him prior to the assault. (T. 87-88). This information was volunteered by Dr. Froehlich in mitigation or explanation of his actions during the assault. Appellant has not cited to any objection in the transcript to testimony about the two incidents.

The Board’s finding of violations by Appellant involved the sexual conduct with Patients 1 and 2 and the assault conviction. Thus, the charges were not based on the two incidents raised by Appellant. The Board may consider uncharged misconduct in determining the appropriate sanction for violations alleged and proven. *Macheret v. State Med. Bd.*, 188 Ohio App.3d 469, 477, 2010-Ohio-3483, (10<sup>th</sup> Dist.).

For the foregoing reasons, the Court finds that the Board's Order is supported by reliable, probative and substantial evidence and is in accordance with law.

The Board's Order is **AFFIRMED**. This is a final, appealable Order. Costs to Appellant. Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

Franklin County Court of Common Pleas

**Date:** 06-09-2015  
**Case Title:** KURT W FROEHLICH MD -VS- OHIO STATE MEDICAL BOARD  
**Case Number:** 15CV001349  
**Type:** DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Laurel Beatty". The signature is written over a circular blue seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom. The seal also features a central emblem with a sunburst design.

/s/ Judge Laurel A. Beatty

Court Disposition

Case Number: 15CV001349

Case Style: KURT W FROEHLICH MD -VS- OHIO STATE MEDICAL  
BOARD

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes