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

LAWRENCE ROTHENBERG, M.D.	:	
	:	
APPELLANT,	:	**CASE NO. 15CVF-09-8487**
	:	
vs.	:	**JUDGE DAVID YOUNG**
	:	
STATE MEDICAL BOARD OF OHIO,	:	
	:	
APPELLEE.	:	

DECISION AND ENTRY
AFFIRMING THE SEPTEMBER 9, 2015 ENTRY OF ORDER OF THE STATE MEDICAL BOARD OF OHIO

YOUNG, J.

This matter is before this Court pursuant to the appeal filed by Lawrence Rothenberg, M.D. (Appellant) from a September 9, 2015 Entry of Order of the State Medical Board of Ohio ("Board"). The Board's Entry of Order permanently denied Appellant's application for restoration of his prior Ohio medical license.

Appellant timely filed an appeal with this Court. For the reasons that follow this Court **AFFIRMS** the Entry of Order dated September 9, 2015.

I. STATEMENT OF THE CASE

Appellant appealed the September 9, 2015 Entry of Order that permanently denied his application for restoration of his prior Ohio medical license. Appellant asserted that the Order is not supported by reliable, probative, and substantial evidence and was not in accordance with law.

II. FACTS RELEVANT TO THE APPEAL

Appellant at one time held a license in Ohio to practice medicine. That license expired in April of 2010 due to non-renewal by the Appellant. In 2012 the Appellant had another work

opportunity in Ohio and therefore, on September 13, 2012 the Appellant submitted an Application for License Restoration – Medicine or Osteopathic Medicine. (Application) While that Application was pending, on or about November 28, 2012 the State of Florida issued an emergency order restricting the Appellant's ability to prescribe controlled substances. (See, State's Exhibit 3) Eventually, Florida issued two separate complaints against the Appellant – one in December 2012 and another in April of 2013. The Appellant went through the Florida administrative process. The Florida investigation concluded when the Appellant entered into a settlement agreement with Florida in October of 2014. (See, State's Exhibit 4)

The settlement agreement was accepted by the Florida Board of Medicine in December of 2014. (See, State's Exhibit 4) As a result of the agreement the Florida Board suspended the Appellant for six months and permanently restricted the Appellant from owning or practicing in a pain management clinic. The Appellant was also fined $30,000.00. (See, State's Exhibit 4)

During Appellant's troubles in Florida, his Application remained pending in Ohio. In fact he never attempted to withdraw the application. The Board issued a letter to the Appellant dated March 11, 2015 that spelled out the issues that the Board had with the pending Application. (See, State's Exhibit 1) The March 11, 2015 letter contained the following:[1]

> **(1)** **In or around September 2012, you caused to be filed with the Board an Application for License Restoration Medicine or Osteopathic Medicine [Application for Restoration] Shortly after you submitted your Application for Restoration, the Florida Department of Health, via the State Surgeon General and Secretary of Health, issued an Order of Emergency Restriction of License on or about November 28, 2012, which prohibited you from prescribing controlled substances appearing in Schedules II through IV.**
>
> **(2)** **On or about December 29, 2014, the Florida Board of Medicine issued a Final Order [December 2014 Florida Board Order] that approved and adopted a Settlement Agreement with certain amendments. The December 2014 Florida Board Order reprimanded your Florida license, suspended your license for six months and imposed certain probationary requirements upon reinstatement, imposed a permanent restriction on your practice that permanently restricted you from owning, operating or practicing**

[1] The darker text is a 'copy image' from the Certified Record filed with this court at page 9.

> in a pain management clinic, and further restricted your practice regarding the prescribing of controlled substances which restriction could be lifted by the Probation Committee A copy of the December 2014 Florida Board Order and the accompanying documents are attached hereto and incorporated herein.

The March 11, 2015 letter also stated that the Florida Board's Order was being addressed by Ohio's Board. Please note the following language from the letter sent to the Appellant:

> The December 2014 Florida Board Order as alleged in paragraph (2) above, constitutes "[a]ny of the following actions taken by an agency responsible for authorizing, certifying, or regulating an individual to practice a health care occupation or provide health care services in this state or another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license, refusal to renew or reinstate a license, imposition of probation; or issuance of an order of censure or other reprimand," as that clause is used in Section 4731 22(B)(22), Ohio Revised Code.

The Appellant requested a hearing to address the issues.

A hearing was conducted on July 13, 2015. The Appellant elected not to appear at the hearing in person but responded to the allegations in writing. (See, Respondent's Exhibit A) Within his written response, the Appellant did address the issues that led to his Florida sanctions. In his writing to the Board, he claimed that the patients that made up the Florida complaint were unusual cases that did not fairly represent his normal course of practice. Appellant did not deny the allegations he only attempted to minimize their impact.

The Hearing Examiner was presented with evidence from Florida that established that the Appellant had clearly over prescribed medication to patients while he was working for the Luxor Clinic. (R & R at page 29 – 45 of the certified record) Not being present at the hearing, the Appellant obviously did not object to the submission of that evidence. The Hearing Examiner issued her Report and Recommendation on August 11, 2015. The Hearing Examiner held that the Appellant had violated R.C. §4731.22(B)(22) and recommended to the Board that the Appellant's Application be permanently denied. The Board agreed with the recommendation and adopted same with its Entry of Order dated September 9, 2015.

The Appellant filed his appeal to this Court on September 25, 2015. The Appellant filed his Brief on December 4, 2015. The Board requested and received additional time to file its Brief. The Board filed its Brief on January 7, 2015. The Appellant filed his Reply Brief on January 15, 2016. The matter is now ready for review.

III. STANDARD OF REVIEW

R.C. § 119.12 sets forth the standard of review a common pleas court must follow when reviewing an administrative appeal. R.C. §119.12 provides in pertinent part:

> 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 ad0mitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

In *Our Place* the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

> (1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value.
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> *Our Place, Inc. v. Ohio Liquor Comm.* (1992), 63 Ohio St. 3d 570, 571.

However, this Court must review the record to determine if the evidence relied upon by the Agency is/was internally inconsistent. Please note the following:

> An agency's findings of fact will be presumed to be correct and deferred to by the reviewing court unless the court determines that "the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." Ohio Historical Society v. State Employment Relations Bd., 66 Ohio St.3d 466, 471 (1993).

Hence, when supported by reliable, probative and substantial evidence this Court will not substitute its judgment for that of the trier of fact.

This appeal also turns on the issue of statutory construction. Please note the following relevant case law:

> Moreover, in Lorain City Bd. of Edn. v. State Emp. Relations Bd. (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, we held that courts must accord due deference to the State Employment Relations Board's interpretation of R.C. Chapter 4117, since the General Assembly designated it to be the proper forum to resolve public employment labor disputes. Similarly, we hold in the cause sub judice that courts must accord due deference to the State Board of Psychology in its interpretation of R.C. Chapter 4732 and the relevant provisions of the Ohio Administrative Code, given that the General Assembly has deemed it to be the proper forum to determine licensure matters concerning psychologists. *Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (Ohio 1992)

Said line of authority was followed in *Salem v. Koncelik*, 2005-Ohio-5537, 164 Ohio App.3d 597, 843 N.E.2d 799 (Ohio App. 10 Dist. 2005). Please note the following langue from *Salem*:

> We are cognizant that courts must give due deference to an administrative agency's interpretation of its own administrative rules. See Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio (1989), 46 Ohio St.3d 147, 545 N.E.2d 1260. The General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. See Pons v. Ohio State Med. Bd. (1993), 66 Ohio St.3d 619, 614 N.E.2d 748, paragraph one of the syllabus. Thus, the Ohio Supreme Court has held that unless the construction is **unreasonable or repugnant** to that statute or rule, this court should follow the construction given to it by the agency. Leon v. Ohio Bd. of Psychology (1992), 63 Ohio St.3d 683, 590 N.E.2d 1223. (Emphasis added)

The Court will now analyze the certified record and arguments of counsel within the above noted framework.

IV. LAW AND ANALYSIS

Appellant asserted three assignments of error. The following is found on page 'v' of the Appellant's Brief:

> A) The Boards' Order is not supported by reliable, probative, and substantial evidence and is contrary to law as the restoration application was not processed under R.C. §4731.222 as required by R.C. §4731.281(C).
> B) The Boards' Order is not supported by reliable, probative, and substantial evidence and is contrary to law as it bases its discipline upon unproven allegations from the Florida Board in violation of R.C. §119.07 and due process.
> C) The Boards' Order is not supported by reliable, probative, and substantial evidence and is contrary to law as the Board failed to Comply with R.C. §4731.29.

The Court will address the arguments in the order pled.

A) The Boards' Order is not supported by reliable, probative, and substantial evidence and is contrary to law as the restoration application was not processed under R.C. §4731.222 as required by R.C. §4731.281(C).

The first assertion of the Appellant is a pure legal one. Appellant asserted that the Board did not have the ability to review the Appellant's application outside of the confines of R.C.§4731.281(C). Appellant argued that the Board was limited to that type of review and was required to process the application pursuant to R.C. §4731.222. Please note the following language utilized by the Appellant from R.C. §4731. 281(C) – the section of the code dealing with continuing education:

> (C) …. Subject to section 4731.222 of the Revised Code, the board may restore a certificate to practice suspended for failure to renew upon an applicant's submission of a restoration application, the biennial renewal fee, and the applicable monetary penalty and compliance with sections 4776.01 to 4776.04 of the Revised Code. The board shall not restore to an applicant a certificate to practice unless the board, in its discretion, decides that the results of the criminal records check do not make the applicant ineligible for a certificate issued pursuant to section 4731.14, 4731.56, or 4731.57 of the Revised Code. . . .

The Appellant asserted that the Board was limited to a review based on that section of the code and the Board should have processed the application accordingly. Then the Appellant advanced two cases that he claimed supported his understanding of the code.

The Board did not agree with the Appellant's view of R.C. §4731. 281(C) nor did the Board agree with the cases. First the Board pointed to the following language as contained within R.C. §4731.281(C):

> (C) . . . . If the certificate has been suspended pursuant to this division for more than two years, **it may be restored**. Subject to section 4731.222 of the Revised Code, the board **may** restore a certificate to practice suspended for failure to renew upon an applicant's submission of a restoration application, the biennial renewal fee, and the applicable monetary penalty and compliance with sections 4776.01 to 4776.04 of the Revised Code. . . . (Emphasis added)

Because the Appellant was outside of the two year window at the time of his application request, the Board argued that the Appellant did not have any automatic right to renewal.

Instead the Board asserted that it had the right to review the Appellant's application pursuant to the language contained within R.C. §4731.22. Please note the relevant language relied upon by the Board:

> § 4731.22. Disciplinary actions
> (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 issue a certificate to an individual, **refuse to renew a certificate, refuse to reinstate a certificate**, or reprimand or place on probation the holder of a certificate for one or more of the following reasons: (Emphasis added)

This Court agrees with the Board's understanding of *Smith v. State Med. Bd. Of Ohio*, 2002-Ohio-1322 (10th Dist.) and *McCarthy v. Ohio State Medical Bd*., 63 Ohio App.3d 543, 579 N.E.2d 517 (10 Dist. 1989). The following language contained in *Smith* is extremely informative concerning the precedential value of *Smith* and *McCarthy*:

> The holding in McCarthy is not limited to a particular subsection of R.C. 4731.22. See McCarthy, supra, at 548. Instead, in McCarthy, the pertinent question was whether the initial suspension of the certificate and the subsequent disciplinary measure were based upon "the same infraction," or the same underlying conduct.

Smith and *McCarthy* looked at the nature of the alleged infraction in relationship to the duty to maintain a license. Hence, *Smith* and *McCarthy* have no application to this case were the Appellant is faced with discipline that is separate from his licensing status.

If the Appellant's argument is to be accepted, his application should have been granted and any sanction should have been limited to: 'the biennial renewal fee, and the applicable monetary penalty and compliance with sections 4776.01 to 4776.04 of the Revised Code.' (R.C. §4731.281(C)) But even if that was so, once the Board became aware of the Appellant's troubles in Florida, the Board would have been well within its authority to investigate that issue and act upon the Appellant's reactivated license. Potentially leading to the same result.

The Appellant also asserted that some of the language in the statue mandated the renewal without any right of investigation. Clearly, it would be against the policy behind the existence of the Board, if the statutes of this state would mandate a license be reissued to a doctor who might be a threat to the public safety.[2]

In any event, the Board's interpretation of the controlling statutes is not unreasonable or repugnant and the Board had the right to act on the application as it did. The Board's Entry of Order, dated September 9, 2015 is supported by reliable, probative, and substantial evidence and is not contrary to law.

B) The Boards' Order is not supported by reliable, probative, and substantial evidence and is contrary to law as it bases its discipline upon unproven allegations from the Florida Board in violation of R.C. §119.07 and due process.

First this Court will address the due process issue raised by this assignment of error followed by the 'unproven allegations' aspect of the assignment.

[2] Though not relevant to this Court's ultimate determination, it appears that the timeframes advanced by the Appellant in support of his argument are merely directory as to the time for performance and exist for the convenience of an orderly procedure.

1) Due Process:

The concept of procedural due process is not new to the law. Please note the following from *Sims v. Nissan North America, Inc*., 2015-Ohio-5367 (10th Dist.) at ¶14:

> "The fundamental requirement of procedural due process is notice and hearing, that is, an opportunity to be heard." Korn v. Ohio State Med. Bd., 61 Ohio App.3d 677, 684 (10th Dist.1988), citing Luff v. State, 117 Ohio St.2d 102 (1927). " 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " Althof v. Ohio State Bd. of Psychology, 10th Dist. No. 05AP-1169, 2007-Ohio-1010, ¶ 19, quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The Appellant claimed that he was denied due process because he was not given notice of the Board's intended review as required by R.C. §119.07. Please note the following language from said statute:

> § 119.07. Notice of hearing - contents - notice of order of suspension of license - publication of notice - effect of failure to give notice
>
> Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing the party of the party's right to a hearing. Notice shall be given by registered mail, return receipt requested, and **shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time of mailing the notice**. The notice shall also inform the party that at the hearing the party may appear in person, by the party's attorney, or by such other representative as is permitted to practice before the agency, or may present the party's position, arguments, or contentions in writing and that at the hearing the party may present evidence and examine witnesses appearing for and against the party. A copy of the notice shall be mailed to attorneys or other representatives of record representing the party. This paragraph does not apply to situations in which such section provides for a hearing only when it is requested by the party.
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> * * * * *
>
> The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing. (Emphasis added)

There is no issue in this case concerning service. The Appellant did receive the March 11, 2015 citation letter. But now the Appellant has asserted that the notice was deficient. Appellant's Brief asserted that he was not given sufficient notice that his conduct in working at a pill mill in Florida would be the subject of Ohio's review of his application.

This Court has reviewed the March 11, 2015 citation letter. Said letter outlined the Florida action and pointed to R.C. §4731.22(B)(22). That code section reads as follows:

> (22) Any of the following actions taken by an agency responsible for authorizing, certifying, or regulating an individual to practice a health care occupation or provide health care services in this state or another jurisdiction, for any reason other than the nonpayment of fees: **the limitation**, revocation, or suspension **of an individual's license to practice**; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; **imposition of probation; or issuance of an order of censure or other reprimand**; (Emphasis added)

The letter clearly provided the Appellant with notice.

Furthermore, the Appellant's prior actions belie his current statement. The Appellant timely requested a hearing and then, opted to submit a written statement. Within his written statement the Appellant laid out his position concerning the action of the Florida board. He did not deny the conduct but instead attempted to minimize it and or mitigate it. Hence, during the administrative process the Appellant acted as if he was aware of the issues that he faced in Ohio concerning his conduct in Florida while he now claims that he was not on notice of those charges. Appellant's current argument is inconsistent with his prior conduct.

This Court finds no merit in the Appellant's assertion that he was denied due process. Appellant was given notice as to why the Board was acting on his renewal application and he was given the opportunity to be heard. There is no merit in Appellant's due process argument.

2) Decision on Unproven Allegations:

Next, the Appellant asserted that it was error for the Board to accept the allegations in the Florida complaints because he never admitted too those facts during the Florida investigation. Appellant based that argument on the case of *Voorhis v. State Medical Board*, Case No. 02CVF-08-9459. That case dealt with Florida's order to sanction Dr. Voorhis. In that case the Hearing Examiner was not presented with any evidence that substantiated the Florida allegations against Dr. Voorhis. Furthermore, the Florida order did not contain any admissions by Dr. Voorhis or findings of fact. Judge Cain concluded that the Board violated Dr. Voorhis' due process rights when it relied on the unsubstantiated allegations in the Florida complaint as the bases of the Board's sanction. Other than both cases dealing with a Florida order, there is no material similarity between them.

First as already noted, the Appellant acknowledged his prior conduct within his statement submitted to the Board in support of his Application. That fact alone distinguishes the *Voorhis* decision. Hence, pursuant to the language of R.C. 4731.22 the Board was able to sanction the Appellant based on the Florida investigations.

> R.C. 4731.22(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 issue a certificate to an individual, refuse to renew a certificate, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:
> (22): Any of the following actions taken by an agency responsible for authorizing, certifying, or regulating an individual to practice a health care occupation or provide health care services in this state or another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand;

The Board was well within its authority to sanction the Appellant. The certified record and the admissions of the Appellant support the sanction.

C) The Boards' Order is not supported by reliable, probative, and substantial evidence and is contrary to law as the Board failed to Comply with R.C. §4731.29.

The final assertion raised by the Appellant is that the Board failed to follow the law as outlined within R.C. §4731.29. That statute reads as follows:

> § 4731.29. Reciprocity
>
> (A) When a person licensed to practice medicine and surgery or osteopathic medicine and surgery by the licensing department of another state, a diplomate of the national board of medical examiners or the national board of examiners for osteopathic physicians and surgeons, or a licentiate of the medical council of Canada wishes to remove to this state to practice, the person shall file an application with the state medical board. The board may, in its discretion, by an affirmative vote of not less than six of its members, issue its certificate to practice medicine and surgery or osteopathic medicine and surgery without requiring the applicant to submit to examination, provided the **applicant submits evidence satisfactory to the board of meeting the same age, moral character, and educational requirements individuals must meet under sections 4731.08, 4731.09, 4731.091, and 4731.14** of the Revised Code and, if applicable, demonstrates proficiency in spoken English in accordance with division (E) of this section.

The Court need not address the Appellant's argument concerning the wording of R.C. §4731.29. A review of the administrative action clearly establishes that the Appellant never requested reciprocity. Furthermore, the section dealing with Reciprocity address how a duly licensed individual can seek to secure a license in Ohio. The facts of this case established that the Appellant had already secured an Ohio license.

This Court holds that R.C. §4731.29 does not apply.

Having held that the Appellant's claims of error are incorrect, the Court holds that the Entry of Order is **AFFIRMED**.

V. DECISION

This Court holds that the September 9, 2015 Entry of Order of the State Medical Board of Ohio is supported by reliable, probative and substantial evidence and is in accordance with law and is **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER.

Judge David Young

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Franklin County Court of Common Pleas

Date: 02-01-2016

Case Title: LAWRENCE ROTHENBERG MD -VS- OHIO STATE MEDICAL BOARD

Case Number: 15CV008487

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge David C. Young

Court Disposition

Case Number: 15CV008487

Case Style: LAWRENCE ROTHENBERG MD -VS- OHIO STATE MEDICAL BOARD

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes