

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jose Vargas, M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 11AP-872 (C.P.C. No. 11CVF-01-1077)
State Medical Board of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 19, 2012

Dinsmore & Shohl, LLP, Eric J. Plinke and Gregory P. Mathews, for appellant.

Michael DeWine, Attorney General, and Kyle C. Wilcox, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Appellant-appellant, Jose Vargas, M.D. ("Dr. Vargas"), appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee-appellee, the State Medical Board of Ohio ("the Board"), denying Dr. Vargas's application for a certificate to practice medicine and surgery in Ohio. This appeal presents the question of whether the administrative rule that formed the basis of the Board's denial is valid. Because we find that the rule is valid, we affirm.

{¶ 2} Dr. Vargas received his medical degree from Universidad Autonoma De Ciudad Juarez in Juarez, Mexico, in 1983. Following graduation from medical school, he participated in residency programs in pediatrics in Michigan and New York. In 1984, Dr. Vargas took the three-day Federation Licensing Examination ("FLEX") in Michigan and received a weighted average score of 74. A score of 75 was required for passage. When Dr. Vargas sought to re-take the FLEX in New York, he was informed that he had the

option of only re-taking portions of the test to obtain the necessary score. In 1986, Dr. Vargas re-took the first and third days of the FLEX. His composite score from taking the FLEX in 1984 and 1986 was sufficient to meet the requirements of the state of New York. In 1988, New York granted Dr. Vargas a license to practice medicine. Since 1989, Dr. Vargas has been in private practice in New York, specializing in pediatrics.

{¶ 3} In March 2010, Dr. Vargas applied for a certificate to practice medicine and surgery in Ohio. The Board notified Dr. Vargas that it intended to deny his application for failure to comply with Ohio Adm.Code 4731-6-16(C)(2) and informed him that he was entitled to request a hearing on the matter. Dr. Vargas requested a hearing, which was conducted in November 2010. Following the hearing, the hearing examiner issued a report and recommendation proposing that Dr. Vargas's application be denied due to failure to meet the requirements contained in Ohio Adm.Code 4731-6-16(C)(2). On January 12, 2011, the Board adopted the hearing examiner's report and recommendation and denied Dr. Vargas's application for a certificate to practice medicine and surgery in Ohio.

{¶ 4} Pursuant to R.C. 119.12, Dr. Vargas appealed the Board's order to the Franklin County Court of Common Pleas. In the appeal, Dr. Vargas challenged the validity of Ohio Adm.Code 4731-6-16(C). The common pleas court concluded that the rule was valid and affirmed the Board's order denying Dr. Vargas's application.

{¶ 5} Dr. Vargas appeals from the common pleas court's judgment, assigning three errors for this court's review:

First Assignment of Error: The court of common pleas erred in finding that the order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence and was in accordance with law because O.A.C. 4731-6-16(C) exceeds the Board's rulemaking authority by directly conflicting with R.C. 4731.29(A).

Second Assignment of Error: The court of common pleas erred in finding that the order of the State Medical Board of Ohio was supported by reliable, probative, and substantial evidence and was in accordance with law because O.A.C. 4731-6-16(C) exceeds the Board's rulemaking authority by unlawfully declaring new policy.

Third Assignment of Error: The court of common pleas erred in finding that the order of the State Medical Board of Ohio

was supported by reliable, probative, and substantial evidence and was in accordance with law because O.A.C. 4731-6-16(C) exceeds the Board's rulemaking authority by unreasonably and arbitrarily excluding highly qualified out-of-state physicians.

{¶ 6} We approach this appeal mindful of the admonition that " 'it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.' " *United States v. Clark*, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting), quoting *E. India Co. v. Paul*, 13 Eng. Rep. 811, 821 (P.C. 1849). The evidence contained in the administrative record indicates that Dr. Vargas appears to be a qualified, competent physician, who has won multiple awards and received favorable recommendations from his colleagues. Further, Dr. Vargas appears to have an admirable reason for seeking to practice medicine in Ohio, testifying that he was moving to Ohio in order to provide medical care to underserved Latino communities. The Board's Own hearing examiner concluded that, except for the failure to meet the requirements of Ohio Adm.Code 4731-6-16(C), Dr. Vargas would have been an "excellent applicant" for a license to practice medicine. (Report and Recommendation at 6.)

{¶ 7} However, in this appeal we are not called on to determine Dr. Vargas's medical qualifications. The parties agree that Dr. Vargas does not meet the prerequisite set forth in Ohio Adm.Code 4731-6-16(C) for a physician seeking to obtain a certificate to practice medicine in Ohio based on possessing a medical license from another state. This appeal turns on the legal question of whether Ohio Adm.Code 4731-6-16(C) is a valid exercise of the Board's rule-making authority.

{¶ 8} In an administrative appeal under R.C. 119.12, a common pleas court reviews the entire record and determines whether an agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170, ¶ 43, (10th Dist.), citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-11 (1980). On appeal from a determination by the common pleas court that an agency's order was supported by reliable, probative, and substantial evidence, this court reviews the lower court's decision for abuse of discretion. *Leslie* at ¶ 44. "However, on the question of whether the agency's order was in accordance with law, this court's review is plenary." *Id.*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343

(1992). In this case, the common pleas court concluded that Ohio Adm.Code 4731-6-16 was a proper exercise of the Board's rule-making authority. This appeal presents a question of law and, therefore, we exercise plenary review.

{¶ 9} In his first assignment of error, Dr. Vargas argues that the lower court erred in affirming the Board's order because Ohio Adm.Code 4731-6-16(C) exceeds the Board's rule-making authority by directly conflicting with R.C. 4731.29(A).

{¶ 10} Under R.C. 4731.13, the Board is required to conduct an examination of each individual who desires to practice medicine and surgery in Ohio. The Board specifies the format of the examination by administrative rule. *See* Ohio Adm.Code 4731-6-05. R.C. 4731.13 also provides exceptions to the general examination requirement. One of these exceptions, R.C. 4731.29(A), provides that a physician who is licensed to practice medicine and surgery in another state may obtain a certificate to practice medicine and surgery in Ohio without taking an examination, upon certain conditions:

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.

{¶ 11} Pursuant to its rule-making authority, the Board enacted Ohio Adm.Code 4731-6-16, which provides conditions for eligibility for admission to practice medicine and surgery in Ohio for an applicant who holds a medical license from another state, also referred to as "licensure by endorsement." The rule states, in part, that a physician licensed in another state may receive an Ohio license without taking an examination if the physician previously passed one of eight specified examinations. Ohio Adm.Code 4731-6-

16(C). Under Ohio Adm.Code 4731-6-16(C)(2), an applicant is required to have passed a single three-day FLEX with a weighted average score of 75 or above. The hearing examiner concluded that Dr. Vargas did not meet this requirement and did not satisfy any of the other examination requirements contained in the rule. This formed the basis of the hearing examiner's recommendation that Dr. Vargas's application be denied, which the Board adopted.

{¶ 12} Dr. Vargas concedes that he does not meet the requirements of Ohio Adm.Code 4731-6-16(C) but argues that the rule is invalid because it exceeds the Board's rule-making authority and conflicts with R.C. 4731.29(A). Specifically, Dr. Vargas argues that the rule conflicts with the statute because it both adds to and subtracts from the legislative enactment.

{¶ 13} "The General Assembly has given the medical board the duty to safeguard the public's interest in having competent, properly trained and educated, and experienced doctors." *Midwestern College of Massotherapy v. Ohio Med. Bd.*, 102 Ohio App.3d 17, 23 (10th Dist.1995). Under R.C. 4731.05, the Board is vested with power to adopt rules to carry out the purposes of R.C. Chapter 4731. *Id.* The purpose of such rule-making authority is "to facilitate the administrative agency's placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency." *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App.3d 108, 110 (10th Dist.1983). However, administrative rules may not add to or subtract from a legislative enactment. *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Ohio Bur. of Emp. Servs.*, 21 Ohio St.3d 5, 10 (1986). *See also Amoco Oil Co. v. Petroleum Underground Storage Tank Release Comp. Bd.*, 89 Ohio St.3d 477, 484 (2000); *Midwestern College* at 23; *Carroll* at 110.

{¶ 14} Dr. Vargas first argues that Ohio Adm.Code 4731-6-16(C) is invalid because it adds to the requirements for licensure of an out-of-state physician by endorsement that are set forth in R.C. 4731.29. He contends that the Board may only require an applicant to demonstrate that he meets the age, moral character, educational, and English-language proficiency requirements referred to in the statute, and then must consider each applicant who meets those requirements on a case-by-case basis. Dr. Vargas argues that Ohio Adm.Code 4731-6-16(C) adds to the legislative enactment by imposing an additional eligibility requirement that an applicant must have received a passing score on one of the examinations set forth in the rule.

{¶ 15} The Supreme Court of Ohio found an administrative rule to be invalid because it added to a legislative enactment in *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261. The case involved a complaint filed with the Ohio Civil Rights Commission ("OCRC") alleging sexual harassment and retaliation. *Id.* at ¶ 2. During the investigation phase, the employer requested that the OCRC issue a subpoena compelling the former employee's parole officer to meet with the employer's representatives and provide certain documents. *Id.* at ¶ 4. The OCRC declined to issue the subpoena based on an administrative rule requiring a respondent to include the case caption and complaint number in a request for a subpoena. On appeal, the OCRC argued that, because no complaint number was assigned until after the investigation and conciliation phases, the employer was not permitted to request a subpoena until after a formal complaint had been issued. *Id.* at ¶ 13. The relevant statute provided that, upon written application by a respondent, the OCRC "shall issue" a subpoena. *Id.* at ¶ 12, citing R.C. 4112.04(B)(3)(b). The Supreme Court concluded that the administrative rule conflicted with the statute because it required a respondent to wait for a complaint to be issued before requesting a subpoena, a condition that was not included in the underlying statute. *Id.* at ¶ 15. Because the rule improperly added to the statute, the court held that the rule was invalid. *Id.*

{¶ 16} Similarly, the Second District Court of Appeals held an administrative rule to be invalid because it added a legislative enactment in *Franklin Iron & Metal Corp. v. Ohio Petroleum Underground Storage Tank Release Comp. Bd.*, 117 Ohio App.3d 509 (2d Dist.1996). The relevant statute in that case provided that the Ohio Petroleum Underground Storage Tank Release Compensation Board ("Compensation Board") "shall issue" a certificate of coverage under the Ohio Petroleum Underground Storage Tank Release Financial Assistance Fund ("Assistance Fund") when the applicant met two conditions: paying a fee assessed under the statute and demonstrating financial responsibility. *Id.* at 511. The statutes governing the Assistance Fund and the Compensation Board also authorized the Compensation Board to adopt administrative rules. *Id.* at 512. Pursuant to that authority, the Compensation Board adopted a rule requiring storage tanks to be certified as assurable before a certificate of coverage would be issued and providing that failure to take certain steps would result in non-issuance or revocation of a certificate of coverage. *Id.* Franklin Iron submitted the required fee and

affidavit of financial responsibility but was denied a certificate of coverage because it did not complete a certification of assurability form for its storage tanks. *Id.* at 513. Franklin Iron appealed the denial of the certificate of coverage. Ultimately, the court of appeals affirmed the common pleas court's conclusion that the Compensation Board exceeded its authority by adding additional conditions for obtaining a certificate of coverage. *Id.* at 514-15. These additional conditions created a conflict between the statute and the rule, and, therefore, the rule was invalid. *Id.*

{¶ 17} Although Ohio Adm.Code 4731-6-16(C) imposes a prerequisite for licensure by endorsement that is not included in R.C. 4731.29, it is distinguishable from the rules struck down in *Am. Legion* and *Franklin Iron* because of the nature of the agencies' statutory authority in each case. The statutes implicated in *Am. Legion* and *Franklin Iron* both involved mandatory duties by the administrative agencies. Once certain conditions were met, the statutes provided that the agencies "shall" take certain action. By contrast, R.C. 4731.29 gives the Board discretionary authority to license out-of-state physicians without requiring an additional examination. Although R.C. 4731.29 provides certain criteria that the out-of-state physician must meet in order to be eligible for licensure by endorsement, it does not require that, once those conditions are met, the Board "shall" issue a license to the applicant. Rather, it provides that the Board "may, in its discretion" issue a license to an out-of-state physician who meets those statutory criteria. The statute does not prohibit the Board from exercising its discretion by adopting rules to ensure that applicants for licensure by endorsement have appropriate education, experience, and training. Thus, although Ohio Adm.Code 4731-6-16(C) requires an out-of-state physician to demonstrate additional prerequisites that are not set forth in the statute, this does not create a conflict between the rule and the statute in the same way that arose in *Am. Legion* and *Franklin Iron*. Unlike the mandatory duties imposed by the statutes in those cases, R.C. 4731.29 defines the minimum requirements for licensure by endorsement and grants the Board discretionary power to consider applications further. Thus, the rule does not improperly add to the statute because it is an exercise of the Board's discretionary authority.

{¶ 18} Dr. Vargas also asserts that Ohio Adm.Code 4731-6-16(C) is invalid because it subtracts from the legislative enactment by limiting the Board's discretion. He argues that, by adding qualifications that are not included in the statute, the Board reduces its

own discretion and alters the case-by-case analysis of applicants for licensure by endorsement that the General Assembly required under the statute.

{¶ 19} The Supreme Court of Ohio found an administrative rule to be invalid to the extent that the rule was applied in a way that would subtract from a statute in the *Cent. Ohio* decision. *Cent. Ohio* at paragraph one of the syllabus. The relevant statute in that case created a one-year vocational teaching certificate and provided that it could be renewed up to three times for secondary program teachers. *Id.* at 6. The Supreme Court noted that there was an administrative rule addressing renewal of the one-year vocational certificate, which provided that the first renewal would be issued upon completion of certain educational requirements. *Id.* at 9. The court held that, to the extent the rule was construed to only permit one renewal of a vocational certificate, it would be invalid because it subtracted from the statutory provision permitting up to three renewals. *Id.* at 10.

{¶ 20} Additionally, the Supreme Court of Ohio struck down a rule promulgated by the Board because it subtracted from a legislative enactment in *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 2007-Ohio-2201. The statute at issue, R.C. 4760.09, provided that anesthesiologist assistants could "assist" a supervising anesthesiologist with certain procedures, including epidural anesthetic procedures and spinal anesthetic procedures. *Id.* at ¶ 6-15. However, the Board adopted an administrative rule prohibiting anesthesiologist assistants from performing epidural and spinal anesthetic procedures. *Id.* at ¶ 16. An anesthesiologist assistant challenged the rule, arguing that he was permitted under the statute to perform those procedures. *Id.* at ¶ 4. The Supreme Court concluded that, in the field of anesthesiology, the term "assist" had a technical meaning that the General Assembly intended to apply to the statute. *Id.* at ¶ 26. Read in this light, the statute permitted anesthesiologist assistants to perform epidural and spinal anesthetic procedures under the direct supervision of an anesthesiologist. *Id.* at ¶ 33. Because the challenged rule prohibited anesthesiologist assistants from performing procedures that were permitted under the statute, it subtracted from the statute and the court held that the rule was invalid. *Id.* at ¶ 35-36.

{¶ 21} Once again, Ohio Adm.Code 4731-6-16(C) differs from the rules struck down in *Cent. Ohio* and *Hoffman* because of the discretionary power granted to the Board under R.C. 4731.29. As explained above, R.C. 4731.29 sets out certain minimum

requirements that an applicant for licensure by endorsement must demonstrate but then grants the Board broad discretionary authority as to whether to issue that applicant a license. By contrast, the statute at issue in the *Cent. Ohio* decision expressly provided that a vocational teaching certificate could be renewed up to three times, and the statute in *Hoffman* stated that anesthesiologist assistants were allowed to assist with certain procedures. Neither of those statutes involved the exercise of agency discretion, and in each case the administrative rule clearly narrowed the scope of the statutory enactment. However, even with Ohio Adm.Code 4731-6-16(C) in place, the Board still must exercise its discretionary power under the statute in reviewing the applications that meet the eligibility requirements set forth in the statute and the rule. Therefore, the rule does not conflict with R.C. 4731.29 by subtracting from the statute.

{¶ 22} Dr. Vargas also argues that R.C. 4731.29 requires the Board to undertake a case-by-case analysis of each applicant who meets the requirement set forth in the statute, and that Ohio Adm.Code 4731-6-16 is invalid because it eliminates that case-by-case analysis for out-of-state physicians who meet the statutory requirements but have not passed one of the specified examinations. In support of this argument, he cites the Supreme Court of Ohio's decision in *Brost v. State Med. Bd. of Ohio*, 62 Ohio St.3d 218 (1991). *Brost* involved a disciplinary case against a physician, alleging that he had improperly prescribed controlled substances for his wife. A majority of the Board concluded that, under its disciplinary guidelines, the actions warranted permanent revocation of the doctor's license. *Id.* at 219. On appeal, the Supreme Court noted that the Board had not adopted the disciplinary guidelines as properly promulgated rules. *Id.* at 220. The court stated that it could not determine from the record whether the Board's members felt compelled to abide by the disciplinary guidelines without considering other sanctions, but that, if they had, their action was not in accordance with the law. The court explained that the disciplinary statute provided that the Board " 'shall, to the extent permitted by law, limit, revoke, or suspend a certificate * * * or reprimand or place on probation the holder of a certificate * * *.' " (Omissions sic.) *Id.* at 221. Thus, the court concluded, the General Assembly intended that, when a violation was established, the Board would consider the full spectrum of available sanctions and select the one proportionate to the violation committed by the physician. *Id.* The Supreme Court remanded the case with instructions for the Board to consider all available sanctions. *Id.*

{¶ 23} *Brost* is distinguishable from the present appeal because the disciplinary statute gave the Board a different type of discretionary authority than R.C. 4731.29 does. The disciplinary statute provides that the Board "shall" impose one of the disciplinary sanctions and gives the Board discretionary authority to select the appropriate sanction. Thus, in *Brost*, the Supreme Court found that the Board could not limit its own discretion by treating its disciplinary guidelines as binding. By contrast, under R.C. 4731.29, the Board has discretionary authority as to whether it issues a license to an out-of-state physician. An out-of-state physician could meet the minimum requirements set forth in the statute, and the Board would still have discretionary authority to deny that physician a license to practice medicine. Thus, the Board has greater discretion under R.C. 4731.29 than under the disciplinary statute to set additional prerequisites for licensure by endorsement, as it has under Ohio Adm.Code 4731-6-16(C).¹ The precedent in *Brost* does not prohibit the Board from exercising its discretion in this manner.

{¶ 24} The history of R.C. 4731.29 further demonstrates the breadth of the Board's discretion in ensuring the qualifications of an out-of-state physician. As originally enacted in 1908, the predecessor version of R.C. 4731.29 stated that the Board could dispense with the examination for an out-of-state physician upon several conditions, including that "the laws of [the out-of-state physician's licensing state] require of physicians and surgeons practicing therein qualifications of a grade equal to those required of physicians and surgeons practicing in Ohio." R.S. 4403c; H.B. No. 1268, Section 39, 99 Ohio Laws 492, 500. The statute permitted the Board to license an out-of-state physician without requiring him to take an examination but also required the Board to ensure that the applicant's qualifications were commensurate with Ohio's requirements. R.S. 4403c; H.B. No. 1268, Section 39, 99 Ohio Laws 492, 500. Although the statute has been amended multiple times in the intervening years, this underlying intent remains in the current version, which requires the applicant for licensure by endorsement to establish that he meets the same age, moral character, and educational requirements as applicants for licensure by examination. Thus, while the statute permits

¹ As noted above, we find that this appeal differs from *Hoffman* because the Board's rules have not precluded out-of-state physicians from obtaining a license by endorsement. The rule that was struck down in *Hoffman* had the effect of prohibiting certain acts that were allowed under the statute. Although Ohio Adm. Code 4731-6-16(C) creates an additional prerequisite for licensure by endorsement, it does not have the effect of prohibiting an out-of-state physician from receiving a license by endorsement.

the Board to license an out-of-state physician without requiring a new examination to obtain admission in Ohio, it does not prohibit the Board from requiring the applicant to demonstrate that he has previously passed a licensure examination.

{¶ 25} That the Board may require an out-of-state physician to prove that he has previously passed a licensure examination is further demonstrated by one statute providing another exemption from the examination requirement. Under R.C. 4731.291, an individual seeking to pursue an internship, residency, or clinical fellowship program in Ohio, but who is not licensed to practice medicine and surgery in Ohio, may apply for a training certificate. The statute expressly provides that "the [B]oard shall not require an examination as a condition of receiving a training certificate." R.C. 4731.291(B). This language clearly expresses the General Assembly's intent to prohibit the Board from requiring an examination as a condition of one form of a medical license. The General Assembly could have, but did not, include a similar prohibition in R.C. 4731.29. Rather, the statute sets forth certain minimum qualifications for an out-of-state physician seeking licensure by endorsement and grants the Board discretionary authority to determine whether the license should be granted. The Board exercised its discretion by promulgating Ohio Adm.Code 4731-6-16, which reiterates the conditions imposed in the statute and imposes an additional requirement that the applicant establish that he has previously passed one of the specified examinations. As explained above, this rule does not conflict with R.C. 4731.29(A) by adding to or subtracting from it.

{¶ 26} Accordingly, Dr. Vargas's first assignment of error is without merit and is overruled.

{¶ 27} In his second assignment of error, Dr. Vargas asserts that Ohio Adm.Code 4731-6-16(C) exceeds the Board's rule-making authority by unlawfully declaring new policy. Dr. Vargas argues that the rule creates a new policy by creating a more restrictive path to licensure for out-of-state physicians than the General Assembly intended. Dr. Vargas cites *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App.3d 108 (10th Dist.1983), in support of this argument.

{¶ 28} *Carroll* involved a challenge to an administrative rule that permitted a state agency to require an employee to take a medical examination to determine the employee's physical or mental condition to perform the duties of her position. *Id.* at 109. *Carroll*, who was terminated after failing to appear for an examination following two notices from

her employer, the Ohio Bureau of Employment Services, challenged her termination. *Id.* The State Personnel Board of Review and the Franklin County Court of Common Pleas affirmed the termination. On appeal to this court, the Director of Administrative Services argued that authority for the administrative rule arose from the portion of R.C. 124.38 requiring an employee seeking to use sick leave to provide a certificate from a physician. *Id.* We found that the medical examination allowed under the rule had "no relationship" to an employee's use of sick leave as provided under the statute. We noted that the purpose of administrative rule-making is to facilitate an agency's placing into effect the policy declared by the General Assembly by statute. *Id.* at 110. The challenged rule, however, bore "no reasonable relationship to the legislative purpose stated in the statute," and, therefore, we concluded that it "declare[d] policy rather than dealing with administrative detail." *Id.* Absent clear legislative authorization, this type of policy declaration was a power reserved to the General Assembly, rather than an administrative agency. *Id.* We concluded that the rule exceeded the agency's authority and that the termination order should not have been affirmed. *Id.*

{¶ 29} The administrative rule in the present appeal is distinguishable from the rule that was appealed in *Carroll*. As noted above, the Board has the duty to safeguard the public's interest in having competent, educated, experienced physicians, and has authority to adopt rules to carry out the purposes of R.C. Chapter 4731. Under R.C. 4731.29, the General Assembly has granted the Board discretionary authority to license out-of-state physicians without requiring them to take the examination that would otherwise be required for someone seeking a medical license in Ohio. Ohio Adm.Code 4731-6-16 governs the application of the Board's discretion by setting forth eligibility standards for out-of-state physicians seeking a license by endorsement. The policy set forth in the statute is that out-of-state physicians may be eligible for a license to practice medicine in Ohio without taking an additional examination. Unlike the rule in *Carroll*, which had no reasonable relationship to the purpose stated in the statute, Ohio Adm.Code 4731-6-16 is directly related to the purpose of R.C. 4731.29. The rule facilitates the Board's implementation of the statutory policy and is consistent with the Board's duty to safeguard the public's interest in having competent, educated, and experienced physicians. Thus, Ohio Adm.Code 4731-6-16(C) does not exceed the Board's rule-making authority by declaring new policy.

{¶ 30} Accordingly, Dr. Vargas's second assignment of error is without merit and is overruled.

{¶ 31} In Dr. Vargas's third assignment of error, he argues that Ohio Adm.Code 4731-6-16(C) exceeds the Board's rule-making authority because it unreasonably and arbitrarily excludes highly qualified out-of-state physicians. Dr. Vargas argues that the rule is unreasonable and arbitrary because he satisfied all the other requirements for licensure of an out-of-state physician without examination and because his composite average score taking the FLEX in 1984 and 1986 constituted a passing score.

{¶ 32} "A rule which is unreasonable, arbitrary, discriminatory, or in conflict with law is invalid and unconstitutional because it surpasses administrative powers and constitutes a legislative function." *Midwestern College* at 23. In determining whether a rule is reasonable, "deference is given to the agency's expertise in evaluating the reasonableness and lawfulness of the rule." *Id.* at 24. An administrative rule is presumed to be reasonable and the party challenging the rule must rebut this presumption by a preponderance of substantial, probative, and reliable evidence. *Id.*

{¶ 33} Ohio Adm.Code 4731-6-16(C) provides that an out-of-state physician seeking a license by endorsement must have passed one of eight examinations. The alternatives contained in the rule reflect various medical licensure examinations or components of different licensure examinations that have been offered in recent decades. Thus, the rule appears to be responsive to changes in the examinations that an out-of-state physician would have taken to obtain a license from another state. This supports a finding that the rule is reasonable by avoiding a scenario where an out-of-state physician would be denied an Ohio license by endorsement based on a failure to pass an examination that was not offered when he obtained his original license in another state. *Compare In re Parma Community Gen. Hosp.*, 10th Dist. No. 96AP-422, 1996 WL 648367, *3 (Nov. 7, 1996) (finding administrative code provisions relating to radiation therapy services to be invalid and unreasonable because they failed to account for new and improved methods of treatment).

{¶ 34} As explained above, the purpose of R.C. 4731.29 is to permit the Board to license out-of-state physicians without requiring them to take the examination that would otherwise be required to obtain a license to practice medicine in Ohio. The statute was not intended to allow an individual to be licensed to practice medicine without ever taking

any licensure examination. Accordingly, it is reasonable for the Board to require an applicant for licensure by endorsement to demonstrate that he received a passing score on a prior licensure examination to avoid taking an examination to receive a license in Ohio. Under Ohio Adm.Code 4731-6-16(C)(2), Dr. Vargas was required to establish that he had passed a single three-day FLEX with a weighted average score of 75 or above. The evidence presented at the administrative hearing demonstrates that Federation of State Medical Boards recommended that state medical boards use a weighted average of 75 as the minimum passing score on the FLEX. Some state medical boards required that the passing score be achieved in a single FLEX, while others permitted applicants to combine their scores from multiple administrations of the FLEX to reach a weighted average score of 75. In light of this evidence, it was neither unreasonable nor arbitrary for the Board to require Dr. Vargas and other similarly situated out-of-state physicians to demonstrate that they passed the FLEX in a single sitting with a weighted average score of 75 or above. Dr. Vargas has failed to rebut the presumption that the rule is reasonable and has failed to demonstrate that the rule is arbitrary.

{¶ 35} Accordingly, Dr. Vargas's third assignment of error is without merit and is overruled.

{¶ 36} Finally, we note that, although Dr. Vargas is precluded from obtaining an Ohio license by endorsement, it does not appear that he is completely foreclosed from obtaining a license to practice medicine in Ohio. He retains the option to take the licensure examination that would otherwise be required of an applicant for a medical license in Ohio under R.C. 4731.13.

{¶ 37} For the foregoing reasons, Dr. Vargas's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
