

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ronika Lee Richmond, L.P.N.,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-328 (C.P.C. No. 11CVF-10-12978)
Ohio Board of Nursing,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on January 17, 2013

Graff & McGovern, and *James M. McGovern*, for appellant.

Michael DeWine, Attorney General, and *Henry G. Appel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Ronika Lee Richmond, L.P.N., appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee, Ohio Board of Nursing ("the board"), permanently revoking appellant's license to practice as a licensed practical nurse ("LPN"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On March 18, 2011, the board mailed appellant a notice of opportunity for hearing, which notified appellant that the board would consider disciplinary action. The notice alleged that appellant's "license to practice nursing as a registered nurse" ("RN") was under suspension for an indefinite period of time with conditions for reinstatement

pursuant to a consent agreement, which appellant had entered into with the board. (R. 28.) According to the notice, the consent agreement (which was attached to and incorporated in the notice) required appellant to refrain from the use of alcohol and drugs except as specified and to submit to blood or urine samples.

{¶ 3} In the notice, the board alleged that appellant tested positive for cocaine in July 2008 and failed to provide requested urine specimens on 12 different dates between the months of August 2008 and December 2010. Additionally, the board stated that appellant tested positive for Ethyl Glucuronide on March 31 and June 14, 2010, and tested positive for Barbiturates and Butabital on December 10, 2010. The board informed appellant that it was authorized to take disciplinary action pursuant to R.C. 4723.28(B), including permanent revocation of her license.

{¶ 4} Appellant signed for certified mail service of the notice on March 24, 2011, but did not request a hearing. In a letter dated August 15, 2011, the board notified appellant that her case would be considered at the board's meeting in September 2011. The board's letter further informed appellant that, because she did not request a hearing, she would not be allowed to present evidence. Appellant did not appear at the meeting, and on September 23, 2011, the board ordered that appellant's license to practice nursing as an LPN be permanently revoked.

{¶ 5} Appellant timely appealed the board's order to the trial court pursuant to R.C. 119.12. Appellant argued, inter alia, that the board violated her right to procedural due process by permanently revoking her LPN license without sufficient notice. In a decision and entry filed on March 15, 2012, the trial court affirmed the board's order.

II. DISCUSSION

{¶ 6} In a timely appeal, appellant now presents the following three assignments of error for our consideration:

1. The lower court Decision and Entry affirming the Ohio Board of Nursing Order was an abuse of discretion and not in accordance with law, because the Board erred by failing to notify Ms. Richmond that it intended to take any action against her LPN license – let alone that it may permanently revoke her LPN license.

2. The lower court Decision and Entry affirming the Ohio Board of Nursing Order was an abuse of discretion and not in accordance with law, because the Board erred by concluding, without any factual or legal basis, that Ms. Richmond failed to timely request an administrative hearing to defend her LPN license.

3. The lower court Decision and Entry affirming the Ohio Board of Nursing Order was an abuse of discretion and not in accordance with law, because the court erred in failing to recognize its ability, under *Henry's Cafe v. Board of Liquor Control* (1959), 170 Ohio St. 233, to modify the sanction imposed by the Board when the Board's Order is not supported by the requisite evidence and/or not in accordance with law.

{¶ 7} In an administrative appeal filed pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. *Levine v. State Med. Bd.*, 10th Dist. No. 10AP-962, 2011-Ohio-3653, ¶ 12; *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87 (1985). The Supreme Court of Ohio has defined the concepts of reliable, probative, and substantial evidence as follows:

- (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.

Our Place, Inc. v. Ohio Liquor Control Comm., 63 Ohio St.3d 570, 571 (1992).

{¶ 8} The standard of review is more limited on appeal to this court. Unlike the trial court, this court does not determine the weight of the evidence. *Levine* at ¶ 13. In reviewing the court of common pleas' determination that the commission's order was supported by reliable, probative, and substantial evidence, this court's role is confined to determining whether the court of common pleas abused its discretion. *Id.* The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). However, on the question of whether the board's order was in

accordance with the law, this court's review is plenary. *Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

A. First Assignment of Error

{¶ 9} In her first assignment of error, appellant argues that the board violated her right to procedural due process by permanently revoking her LPN license without adequate notice of her right to request a hearing. She claims that the board's notice did not inform her of the pendency of an action against her LPN license because it twice referred to her as an RN, which she was not. The board concedes that the notice erroneously references the wrong licensure in two separate paragraphs, but maintains that the notice was sufficient based on references to appellant's LPN license in the consent agreement attached to and incorporated in the notice and based on other indicia in the notice itself.

{¶ 10} Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution require that administrative proceedings comport with due process. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46 (1990). "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." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Procedural due process requires administrative agencies to provide an individual with fair notice of the precise nature of the charges that the agency will pursue at a disciplinary hearing." *Macheret v. State Med. Bd.*, 188 Ohio App.3d 469, 2010-Ohio-3483, ¶ 24 (10th Dist.). Due process is "flexible and calls for such procedural protections as the particular situation demands." *Mathews* at 334, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

{¶ 11} "R.C. 119.07 satisfies these procedural due process requirements because it sets forth a process reasonably calculated to apprise the party of the charges against him and the opportunity to request a hearing." *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. No. 10AP-419, 2011-Ohio-431, ¶ 36. R.C. 119.07 states that the required "[n]otice 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." Where the board of nursing is required to provide notice of an opportunity for a hearing and the applicant or license holder does not timely request a hearing, R.C. 4723.28(D) provides that "the board is not required to hold a hearing, but may adopt, by a vote of a quorum, a final order that contains the board's findings."

{¶ 12} Here, appellant does not dispute receiving the notice mailed by the board. Instead, she claims that the notice was deficient because it erroneously referred to her as an RN rather than an LPN. Based on this deficiency, appellant asserts that the board "failed to notify [her] that it intended to take any action against her LPN license – let alone that it may permanently revoke her LPN license." (Appellant's Brief, 3-4.) We disagree. Despite the two incorrect references to appellant as an RN rather than an LPN, the notice expressly incorporates the terms of the attached "Consent Agreement Between Ronika Lee Richmond, *L.P.N.* and Ohio Board of Nursing," which contains several references to appellant's LPN license. (Emphasis added.) (R. 31.) Moreover, the notice plainly informed appellant of the board's intent to impose one or more of the sanctions listed in R.C. 4723.28(B), which authorizes the board to take certain disciplinary actions, including permanent license revocation, "on *any* nursing license * * * issued by the board." (Emphasis added.) The notice cited R.C. 4723.28(B)(8), which authorizes the board to discipline a licensee for self-administering or otherwise taking a dangerous drug without a legal, valid prescription, and R.C. 4723.28(B)(17), which permits disciplinary action for the violation of any restrictions placed on "a nursing license" by the board. Finally, the notice unambiguously advised appellant of her right to a hearing and notified her that she was required to request such a hearing within 30 days from the date the notice was mailed.

{¶ 13} Appellant argues that any reliance on the attached consent agreement only strengthens her argument that the notice was defective because it confirms that the board was aware of her LPN license, but chose not to take action against that license. According to appellant, "logic dictates that the Board's failure to reference any intention to sanction [her] LPN license in the body of the Notice fully supports the reasonableness of [her] failure to request a hearing to address the Board's announced intention to sanction her

RN license." (Appellant's Brief, 4.) We find this argument unpersuasive for several reasons. First, the body of the notice did reference appellant's LPN license because it specifically incorporated the terms of the consent agreement. Second, it was unreasonable for appellant to assume that the board intended to revoke her RN license when, as she concedes, appellant did not have an RN license. Regardless, even in the absence of the consent agreement, the allegations and statutory references in the notice plainly informed appellant of the nature of the charges and of appellant's right to request a hearing.

{¶ 14} For the reasons stated above, we find that the trial court correctly found no due process violation because the board's notice was reasonably calculated to apprise appellant of pendency of the board's action and to afford appellant with an opportunity for a hearing. Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 15} Our resolution of the first assignment of error is dispositive of appellant's second assignment of error, which challenges the board's conclusion that she failed to request an administrative hearing as required by R.C. 4723.28 and 119.07. Appellant claims that she was not required to request an administrative hearing because she never received notice that the board intended to take disciplinary action against her LPN license. However, as explained above, we find this argument to be without merit. Appellant was adequately notified of her right to request a hearing within 30 days, and, as the board correctly noted in its order revoking her license, appellant failed to request such a hearing. Therefore, appellant's second assignment of error is overruled.

C. Third Assignment of Error

{¶ 16} Appellant's third assignment of error argues that the trial court abused its discretion by refusing to modify the board's sanction of permanent revocation. We disagree. "When the board's order is supported by reliable, probative, and substantial evidence and is in accordance with law, a reviewing court may not modify a sanction authorized by statute." *Schechter v. State Med. Bd.*, 10th Dist. No. 04AP-1115, 2005-Ohio-4062, ¶ 78, citing *Henry's Cafe, Inc. v. Ohio Bd. of Liquor Control*, 170 Ohio St. 233 (1959), paragraph three of the syllabus; *Merritt v. Ohio Liquor Control Comm.*, 10th Dist. No. 02AP-709, 2003-Ohio-822, ¶ 34. As stated previously, R.C. 4723.28(B) authorizes

the board to permanently revoke any nursing license for the unauthorized use of drugs without a valid prescription and for the violation of restrictions placed on a nursing license by the board. R.C. 4723.28(B)(8) and (17). Therefore, "[b]ecause the board's sanction was authorized by statute, the trial court could not interfere with or modify the penalty imposed." *Ross v. State Med. Bd.*, 10th Dist. No. 03AP-971, 2004-Ohio-2130, ¶ 13, citing *Henry's Cafe*; see also *Schechter* at ¶ 78.

{¶ 17} Accordingly, appellant's third assignment of error is overruled.

III. CONCLUSION

{¶ 18} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.
