[Cite as *Calloway v. Ohio State Med. Bd.*, 2013-Ohio-2069.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

George Franklin Calloway, Jr., M.D.,	:	
Appellant-Appellant,	:	
		No. 12AP-599
v.	:	(C.P.C. No. 11CV-15468)
Ohio State Medical Board,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on May 21, 2013

Vorys, Sater, Seymour and Pease LLP, Paul J. Coval and *Jonathan P. Corwin*, for appellant.

Michael DeWine, Attorney General, and *Heidi Wagner Dorn*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Appellant, George Franklin Calloway, Jr., M.D., appeals the judgment of the Franklin County Court of Common Pleas affirming the order of appellee, State Medical Board of Ohio ("the board"), which found appellant in violation of R.C. 4731.22(B)(5) and (12). For the following reasons, we reverse.

{¶ 2} In a letter dated May 11, 2011, the board notified appellant of its intent to determine whether to take disciplinary action against his license to practice medicine and surgery in Ohio arising from his completion of a Certificate of Recommendation ("recommendation form") for Christopher A. Rice, M.D., an out-of-state physician seeking medical licensure in Ohio. The notice letter stated, in pertinent part:

> (1) On or about June 4, 2009, a Certificate of Recommendation was received by the Board in conjunction with an Application for Physician Licensure submitted by Christopher Allan Rice, M.D. You completed this Certificate of Recommendation, affirmed that Dr. Rice was of good moral character; recommended Dr. Rice be licensed to practice medicine and surgery in the State of Ohio; and rated, *inter alia*, Dr. Rice's medical knowledge and technique as excellent, Dr. Rice's relationship with patients as excellent, and Dr. Rice's ability to work well with peers and medical staff as excellent. Moreover, you signed this form before a public notary.
>
> (a) On or about August 11, 2010, by Order of the Board, Dr. Rice's application was permanently denied for having been convicted of one felony count of Grand Theft of Personal Property; disciplinary actions taken in the States of Illinois and New York for impairment, gross negligence in the practice of medicine, and unprofessional handling and treatment of a patient; and because of Dr. Rice's failure to complete an acceptable examination sequence and failure to furnish satisfactory proof of good moral character as required for Ohio licensure.
>
> (b) You have subsequently acknowledged to the Board that Dr. Rice was a fellow medical student while you attended The Ohio State University, College of Medicine during in or about the 1970's. Furthermore, apart from possible exposure to each other during the course of your medical education in the 1970's, you never, in fact, observed Dr. Rice's interactions with patients, peers, and medical staff, nor could you recall observing Dr. Rice's medical technique, despite rating these attributes as excellent.

(Record of Proceedings, Vol. 1, State's exhibit No. 1-A, 1-2.)

{¶ 3} The board alleged, in pertinent part, that appellant's actions constituted: " '[m]aking a false, fraudulent, deceptive, or misleading statement * * * in securing or attempting to secure any certificate to practice or certificate of registration issued by the board' " in violation of R.C. 4731.22(B)(5); " '[c]ommission of an act in the course of practice that constitutes a misdemeanor in this state * * *' to wit: Section 2921.13, Ohio Revised Code, Falsification" in violation of R.C. 4731.22(B)(12); and " '[c]ommission of an act involving moral turpitude that constitutes a misdemeanor in this state * * *' to wit:

Section 2921.13, Ohio Revised Code, Falsification" in violation of R.C. 4731.22(B)(14). (Vol. 1, exhibit No. 1-A, 2.)

{¶ 4} Pursuant to appellant's timely request, a board-appointed hearing examiner conducted an administrative hearing. At that hearing, held September 16, 2011, the following evidence was adduced.

{¶ 5} Appellant is a licensed physician in Ohio and California and currently practices at Central Ohio Ophthalmology, Inc., in Westerville, Ohio. In 1975, appellant both received his medical degree from The Ohio State University College of Medicine ("OSUCM") and obtained his Ohio license to practice medicine. In 1979, appellant completed a three-year ophthalmology residency at OSUCM.

{¶ 6} Dr. Rice also attended medical school at OSUCM, graduating in 1978. Appellant testified that he met Dr. Rice in medical school, but could not recall the specific circumstances of their meeting. Appellant did not see or speak to Dr. Rice again until 2009, when Dr. Rice contacted appellant and asked him if he would complete a recommendation form on his behalf as part of his application for Ohio medical licensure. Because appellant did not specifically remember Dr. Rice from medical school and had no interaction with him in the past three decades, he asked Dr. Rice to meet with him in his office. Appellant informed Dr. Rice he would not recommend him for Ohio licensure absent a face-to-face meeting.

{¶ 7} On June 2, 2009, appellant met with Dr. Rice for approximately 30 minutes in appellant's Westerville office. At this meeting, Dr. Rice averred that he currently practiced ophthalmology in New York, he intended to move to Ohio, and he therefore wanted to obtain medical licensure in Ohio. The two discussed at length Dr. Rice's ophthalmology practice, including the state-of-the-art surgical techniques Dr. Rice employed in his practice and his successful interactions with his patients. Appellant admitted that he and Dr. Rice did not specifically discuss Dr. Rice's moral character or his relationship with other medical professionals, and that Dr. Rice did not inform him that he had not practiced medicine since 2005; that his Illinois and New York medical licenses had been revoked; that he had been disciplined by the Illinois Medical Board for narcotics addiction; that he was convicted of a felony in 2006; and that two malpractice actions filed against him had settled above policy limits.

{¶ 8} Following the meeting, appellant agreed to complete and submit a recommendation form on behalf of Dr. Rice. The board's recommendation form requires the recommending physician to be licensed in the state where the form is notarized; to have known the applicant for at least six months; and to not be a relative of the applicant. The format of the recommendation form is fill-in-the-blank, with spaces for responses to four questions and a space for additional comments. The recommendation form mandates that the recommending physician answer all questions. Despite this mandate, appellant left blank the question about how long appellant "has been known to me personally." Appellant did, however, affirm that Dr. Rice "is of good moral character." The recommendation form, including appellant's responses, provides as follows:

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

(Emphasis added; State's exhibit No. 2.)

{¶ 9} Dr. Rice submitted appellant's recommendation form with his application for Ohio licensure. In August 2010, the board issued an order permanently denying Dr. Rice's application on grounds that he was convicted of a felony, had been professionally disciplined in Illinois and New York, and had failed to complete an examination sequence to furnish satisfactory proof of good moral character as required for Ohio licensure. The board thereafter instituted the instant proceedings against appellant.

{¶ 10} At the September 2011 hearing, appellant acknowledged that, prior to submitting the recommendation form, he had never practiced medicine with Dr. Rice, had never personally observed his medical or surgical techniques, had never personally observed his interactions with patients, peers or medical staff, had not seen him in over three decades, and had never discussed Dr. Rice with any of his colleagues in New York or Illinois. However, appellant testified that he based his recommendation on the fact that

he attended OSUMC with Dr. Rice and, most importantly, on the fact that during their 30-minute meeting, the two engaged in an extensive discussion of Dr. Rice's ophthalmologic medical and surgical techniques, as well as Dr. Rice's positive and successful relationship with his patients. Appellant also averred that during the meeting, he observed and gauged Dr. Rice's positive professional interaction with him (both a peer and a member of a medical staff) and, based on these observations, had no reason to believe appellant would not interact well with peers and other medical staff. Appellant testified that based upon Dr. Rice's conversation, presentation, and overall demeanor during the meeting, he determined that Dr. Rice was "a solid person that would be a great addition to the [Ohio] medical community." (Tr. 199.)

{¶ 11} Acknowledging that the recommendation form is notarized, appellant testified that he "affirmed that everything in [the] document was my honest opinion" and that "[e]very opinion [in the recommendation form] was my sincere belief at the time that I made the recommendation." (Tr. 35, 199.) He further testified that none of the statements he provided in the recommendation form were false and that he did not intend to mislead the board in completing the recommendation form as he did. Indeed, appellant testified that he "cherish[ed] being a physician * * * [and] take[s] it seriously" and "would never deceive or try to mislead the Board" and "would not intentionally or knowingly make any type of statement to the Board that [he] didn't a hundred percent believe was true." (Tr. 207-08.)

{¶ 12} Appellant admitted that he voluntarily signed the recommendation form, was familiar with the recommendation process and understood the form, having completed recommendations for other applicants in the past, and understood that the board would review the form as part of Dr. Rice's application for licensure. He acknowledged his concern that Dr. Rice had failed to advise appellant of his past transgressions; however, appellant stated that, at the time he completed the recommendation form, Dr. Rice's representations and knowledge about the field of ophthalmology espoused during the meeting convinced appellant that he should recommend Dr. Rice for licensure.

{¶ 13} Upon questioning by the hearing examiner, appellant reiterated that he based his assertion in the recommendation form that he had known Dr. Rice for at least

six months on the fact that he attended OSUMC with Dr. Rice in the late 1970's. He explained that he based his "excellent" ratings of Dr. Rice on the fact that the two had a "great meeting" during which Dr. Rice answered questions appropriately and in detail, was forthcoming in his description of his surgical techniques, and came across as an "A-1" physician and person. (Tr. 223.) Appellant explained he intentionally left blank the question about how long he had known Dr. Rice because he could not recall specifically what year he met Dr. Rice, and he did not want to delineate a specific timeframe without being absolutely certain of it.

{¶ 14} Randy Beck, a board investigator, testified he interviewed appellant about his recommendation of Dr. Rice. During the interview, appellant averred he had known Dr. Rice for many years, but had not seen him in many years. Appellant also told Mr. Beck that he had never practiced medicine with Dr. Rice, had no professional interactions with him, never saw him interact with patients, had no firsthand knowledge of his medical skills, and that he based his recommendation on his 30-minute conversation with Dr. Rice. Appellant also told Mr. Beck that he would never have given Dr. Rice a recommendation had he known about his past legal problems and disciplinary actions.

{¶ 15} Kay Rieve, the board's supervisor of licensure from 2001-2011, testified that her responsibilities included reviewing licensure applications for completion prior to the board's issuance of a license. With regard to an out-of-state physician's application for Ohio licensure, Ms. Rieve examined the recommendation form to ascertain whether the recommending physician had fully completed the form in accordance with the requirements set forth in the form. She acknowledged that the only criteria for completing the form are set forth in the paragraph at the top of the form, which states, as mentioned above, that the recommending physician must be licensed in the state where the form is to be notarized, must have known the applicant for at least six months, must not be a relative of the applicant, must sign the form before a notary, and must answer all questions contained on the form.

{¶ 16} Ms. Rieve acknowledged that appellant left blank the question on the recommendation form asking how long he had personally known Dr. Rice. Although uncompleted recommendation forms are typically returned to the applicant with instructions to have the recommending physician fully complete the form, she did not

know whether the licensure department sent the recommendation form back to Dr. Rice to have appellant complete the form.

{¶ 17} Ms. Rieve admitted that the recommendation form does not explicitly state that the recommending physician must have practiced medicine with the applicant, personally observed the applicant's professional medical skills and interactions with patients, peers and medical staff, and does not require the recommending physician to justify his or her opinion of the applicant. Accordingly, Ms. Rieve admitted that the recommendation form requires only that a recommending physician evaluate the applicant based upon his or her subjective opinion, which could be derived solely from discussion of medical topics and procedures. She also acknowledged that the form does not request objective data regarding an applicant's moral character; thus, a recommending physician's assessment of an applicant's moral character is also subjective. She further stated that no statute or rule provides further instructions to the recommending physician regarding the recommendation form, and that no statute or rule provides definitions for the terms utilized on the form. Ms. Rieve also testified that the recommendation form is only "one of the tools" the board considers in granting licensure and that no instructions in the recommendation form preclude a recommending physician from making assumptions about the applicant's skills and qualifications. (Tr. 159.)

{¶ 18} Sallie Debolt, general counsel to the board since 2008, testified that, in responding to appellant's counsel's public records requests, she found no board guidelines, policies, position statements or other pronouncements that describe any duty by an Ohio medical licensee to investigate or inquire into the background or history of an applicant for Ohio medical licensure prior to submitting the recommendation form.

{¶ 19} Dawn Bikowski, Ph.D., director of the English Language Improvement Program in the Department of Linguistics at Ohio University, testified that she examined the recommendation form at appellant's behest and prepared an expert report of her findings. Dr. Bikowski opined in her report that the form "is of limited value in determining the quality of the character or knowledge of the applicant" based upon "(a) [t]he limited stated requirements needed to be met by the recommender, (b) [t]he absence of specific criteria to be used by the recommender in making the assessment, and

(c) the problems with using the Certificate of Recommendation by the State Medical Board of Ohio form as a predicate for disciplinary action against the recommender." (Record of Proceedings, Vol. 2, Respondent's exhibit D.)

{¶ 20} Dr. Bikowski elaborated on the foregoing opinion in both her report and her testimony. As to subsection (a), Dr. Bikowski averred that the form's limited stated requirements, i.e., that the recommending physician be a licensed physician in the state where the form is notarized, must have known the applicant for at least six months, and must be a non-relative, do not allow any valid assumptions to be made as to how well or under what circumstances the recommending physician knows the applicant. According to Dr. Bikowski, linguistic analysis reveals that the phrase "must have known the applicant for at least six months" is subject to several different, yet equally valid, interpretations. She further averred that the form provides no guidance as to the board's intention regarding the meaning of that phrase. Regarding subsection (b), Dr. Bikowski averred that the form does not contain clear criteria as to how the recommending physician should assess or evaluate the applicant. In particular, Dr. Bikowski noted that the form's request for the recommending physician's qualitative opinion regarding the applicant's medical knowledge and technique, relationship with patients, ability to work well with peers and medical staff, command of the English language, and moral character, is subject to many different, yet equally valid, interpretations. According to Dr. Bikowski, the absence of any specified criteria results in a recommending physician employing his or her own subjective, rather than objective, criteria to evaluate an applicant. With regard to subsection (c), Dr. Bikowski averred that use of the form by the board as a basis for disciplinary action under R.C. 4731.22 is problematic because the form does not elicit objective information or assessment, and a recommending physician cannot provide false or misleading information based upon subjective assessment. Based upon her expert analysis of the recommendation form, Dr. Bikowski opined that the board's recommendation form does not provide "any substantive value at all in determining the quality or the character and knowledge of any applicant by whom it was being completed." (Tr. 257.)

{¶ 21} Following the hearing, the hearing examiner, on October 13, 2011, issued a report and recommendation, which included a detailed summary of the evidence

presented, a recitation of relevant statutes and case law, findings of fact, conclusions of law, and a proposed order. In her findings of fact, the hearing examiner found, among other things, that appellant met the requirements set forth in the recommendation form, i.e., that he is a licensed physician in Ohio, that he had known Dr. Rice for at least six months, that he is not related to Dr. Rice, and that the recommendation form is notarized. The hearing examiner further found that appellant testified he did not intend to mislead the board, and he did not provide any false statements in the recommendation form because his answers were his "honest opinions." (Report and Recommendation, 13; Findings of Fact No. 9.)

{¶ 22} In her conclusions of law, the hearing examiner concluded, based on the findings of fact, that there was insufficient evidence to establish that appellant's actions constituted violations of R.C. 4731.22(B)(5), (12) or (14). The hearing examiner set forth her rationale for her conclusion with regard to R.C. 4731.22(B)(5) in paragraphs two through seven of Conclusion of Law No. 1. In these paragraphs, the hearing examiner averred that she found credible appellant's testimony that he did not intend to mislead the board and that his answers in the recommendation form were his honest opinions of Dr. Rice. The hearing examiner further averred that appellant met the requirements set forth in the recommendation form. She also noted Ms. Rieve's testimony that the recommendation form asks only for the recommending physician's opinion of the applicant but does not require the recommending physician to justify or explain that opinion. In addition, the hearing examiner stated that appellant had no knowledge of Dr. Rice's prior transgressions at the time he completed the recommendation form and that Dr. Rice provided misleading information to appellant by stating that he was still practicing medicine in New York.

{¶ 23} With regard to R.C. 4731.22(B)(12) and (14), the hearing examiner set forth her rationale in the second paragraphs of Conclusions of Law Nos. 2 and 3. In those identical paragraphs, appellant stated: "As discussed in Conclusion of Law 1, the evidence convincingly established that Dr. Calloway did not knowingly make false statements or affirm the truth of false statements on the Recommendation." (Report and Recommendation, 14.)

{¶ 24} In her discussion regarding the proposed order, the hearing examiner averred that although appellant may have displayed bad judgment in completing the recommendation form on behalf of Dr. Rice without having all the knowledge necessary to complete the form, such did not constitute an intent to mislead or knowingly make a false statement. Accordingly, the hearing examiner recommended that the board dismiss the case against appellant. Both parties filed objections to the hearing examiner's report and recommendation.

{¶ 25} On November 9, 2011, the board met to consider the hearing examiner's report and recommendation relative to appellant, and minutes of that meeting are included in the administrative record. Although appellant and counsel for both parties addressed the board, no additional evidence was taken. In its November 9, 2011 entry of order, the board amended Finding of Fact No. 2 to reflect that appellant did not meet all the requirements set forth in the recommendation form, to wit: he had not known Dr. Rice for six months. The board also amended the Conclusions of Law to delete the hearing examiner's rationale set forth in paragraphs two through seven of Conclusion of Law No. 1 and paragraphs two of Conclusions of Law Nos. 2 and 3. The board further amended the Conclusions of Law to reflect its conclusion that appellant's actions constituted violations of R.C. 4731.22(B)(5) and (12). The board found insufficient evidence to establish a violation of R.C. 4731.22(B)(14). The board amended the hearing examiner's proposed order to read that "NO FURTHER ACTION shall be taken in the matter of George Franklin Calloway, M.D." (Emphasis sic; Entry of Order, 2.) Accordingly, the board took no disciplinary action against appellant.

{¶ 26} Appellant appealed the board's order to the common pleas court, pursuant to R.C. 119.12. On June 19, 2012, the common pleas court affirmed the board's order, finding it to be supported by reliable, probative and substantial evidence and in accordance with law.

{¶ 27} In a timely appeal, appellant sets forth four assignments of error for review:

> [I.] The Common Pleas Court erred and improperly substituted its judgment for that of the State Medical Board of Ohio ("Board"), which failed to actually make a finding of fact that Dr. Calloway intended to mislead the Board or that he intentionally made a false statement.

> [II.] The Common Pleas Court erred in affirming the order of the Board because the Board's conclusion of law that Dr. Calloway committed acts prohibited by R.C. 4731.22(B)(5) and (12) was not in accordance with the law.
>
> [III.] The Common Pleas Court erred in affirming the order of the Board because the Board's conclusion that Dr. Calloway committed acts prohibited by R.C. 4731.22(B)(5) was not supported by reliable, probative and substantial evidence.
>
> [IV.] The Common Pleas Court erred in affirming the order of the Board because the Board's conclusion that Dr. Calloway committed acts prohibited by R.C. 4731.22(B)(12) was not supported by reliable, probative and substantial evidence.

{¶ 28} Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-11 (1980). The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993).

{¶ 29} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). An appellate court is to determine only whether the common pleas court abused its discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment; it implies an attitude on the part of the court that is unreasonable, unconscionable, or

arbitrary. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons* at 621. However, on questions of law, an appellate court's review is plenary. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15 (10th Dist.).

{¶ 30} By his first assignment of error, appellant contends the common pleas court erred and improperly substituted its judgment for that of the board. Specifically, appellant contends the common pleas court made essential findings of fact that were completely absent from the board's order, were directly contrary to the hearing examiner's findings of fact, and were not otherwise supported by the record.

{¶ 31} Pursuant to R.C. 4731.22(B)(5), the board may discipline a physician if he or she makes "a false, fraudulent, deceptive, or misleading statement * * * in securing or attempting to secure any certificate to practice [medicine or surgery]." In order to sanction a physician for a violation of R.C. 4731.22(B)(5), the board is required to find that the physician intended to mislead the board. *Coleman v. State Med. Bd. of Ohio,* 10th Dist. No. 06AP-1299, 2007-Ohio-5007, ¶ 12; *Webb v. State Med. Bd. of Ohio,* 10th Dist. No. 01AP-469 (Nov. 29, 2001).

{¶ 32} Pursuant to R.C. 4731.22(B)(12), the board may discipline a physician if he or she "commi[ts] [] an act in the course of practice that constitutes a misdemeanor in this state." Here, the board alleged that appellant violated R.C. 4731.22(B)(12) because his conduct amounted to falsification, as proscribed in R.C. 2921.13(A). In order to establish a violation of R.C. 2921.13(A), the board must find that a physician knowingly made a false statement or knowingly swore or affirmed the truth of a false statement previously made. *Oyortey v. State Med. Bd. of Ohio,* 10th Dist. No. 12AP-431, 2012-Ohio-6204, ¶ 31.

{¶ 33} Appellant maintains that the board's order is devoid of any finding that he intended to mislead the board or knowingly made false statements in completing the recommendation form. Appellant points to the hearing examiner's Finding of Fact No. 9, where she expressly found that appellant testified that he did not intend to mislead the board and did not knowingly make any false statements in the recommendation form. Appellant correctly notes that the board did not amend or otherwise modify this finding of fact; rather, the board adopted it in its order. Appellant also correctly notes that the

board's order does not include any additional findings of fact. In addition, our review of the board's minutes from the November 9, 2011 meeting reveals that the board did not find that appellant intended to mislead it or knowingly make false statements; indeed, the minutes are completely silent on the issues of intent to mislead or knowingly making false statements.

{¶ 34} Appellant contends that the common pleas court impermissibly stepped into the board's shoes and made the requisite findings of intent to mislead and knowingly making false statements.

{¶ 35} Regarding the violation of R.C. 4731.22(B)(5), the common pleas court stated:

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

(Footnote deleted; June 19, 2012 Decision, 8.)

{¶ 36} As to the violation of R.C. 4731.22(B)(12), the court stated, in relevant part:

> R.C. 2921.13(A)(5) makes it a misdemeanor to knowingly make a false statement when made with purpose to secure the issuance of a certificate or a license, for example, to practice medicine. The culpable mental state is identified as "knowingly." That term is identified as: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).
>
> In the instant case it is clear that appellant knew and understood full well what he was doing both in submitting the bogus recommendation and in understanding the probable favorable reception it would receive by appellee. It was a

> glowing recommendation concerning a person whom appellant knew very little about. It was a falsity in content and deceptive in intended purpose. * * * The evidence supports the finding that falsification occurred in this case in violation of R.C. 2921.13.

(June 19, 2012 Decision, 8-9.)

{¶ 37} The common pleas court clearly usurped the board's obligation to find that appellant intended to mislead the board and knowingly made false statements before disciplining appellant for violations of R.C. 4731.22(B)(5) and (12), respectively. On this basis, the common pleas court abused its discretion when it affirmed the board's decision that appellant violated R.C. 4731.22(B)(5) and (12). Appellant's first assignment of error is therefore sustained.

{¶ 38} In his second assignment of error, appellant asserts the common pleas court erred in affirming the board's order because it was not in accordance with law. Appellant submits several sub-arguments under this assignment of error.

{¶ 39} Appellant initially contends the common pleas court violated his due process rights in affirming the board's order because the notice provided him was insufficient under R.C. 119.07. When an administrative agency proposes to take disciplinary action against a party, R.C. 119.07 requires the agency to "give notice to the party informing the party of the party's right to a hearing." The notice "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." R.C. 119.07.

{¶ 40} "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. 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 right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.' " *Althof* at ¶ 19, quoting *Gonzales v. U.S.*, 348 U.S. 407, 414, fn. 5 (1955), quoting *Morgan v. U.S.*, 304 U.S. 1, 18 (1938).

{¶ 41} Appellant claims that the board's notice letter only generically informed him that he was being accused of intentionally submitting false and/or misleading statements in violation of R.C. 4731.22(B)(5) and (12) regarding his recommendation of Dr. Rice. Appellant maintains that the letter did not specifically indicate that he lacked the objective qualifications to complete the recommendation, i.e., that he did not satisfy the requirement that he "know" Dr. Rice for at least six months and did not sufficiently "know" him to render opinions as to his competency and relationships. Appellant contends that the board did not reveal its position that he did not sufficiently "know" Dr. Rice until well after the September 2011 hearing. Appellant maintains that had he been aware of the board's position, he would have called Dr. Rice as a witness, who would have confirmed that the two knew one another at least six months prior to the time appellant completed the recommendation form.

{¶ 42} The notice letter apprised appellant that the board would determine whether to take disciplinary action against him arising from his completion of the recommendation form on behalf of Dr. Rice. Although the letter did not specifically state that appellant lacked the objective qualifications to complete the recommendation, i.e., that he did not "know" Dr. Rice for six months, the letter did state that apart from appellant's exposure to Dr. Rice when the two attended OSUCM in the 1970's, appellant never observed Dr. Rice's medical techniques or interactions with patients, peers and medical staff. This statement is reasonably calculated to put appellant on notice that his objective qualifications to assess Dr. Rice were at issue. Further, having completed the recommendation form, appellant presumably was aware that "knowing" Dr. Rice for at least six months was one of the objective qualifications. Finally, we note that appellant's own testimony, as well as that of his expert witness, belies appellant's assertion that he did not become aware of the board's position that he did not "know" Dr. Rice until after the hearing. Appellant testified that he based his assertion in the recommendation form that he had known Dr. Rice for at least six months on the fact that he attended OSUMC

with Dr. Rice in the late 1970's. Further, Dr. Bikowski offered testimony regarding linguistic analysis of the phrase "must have known the applicant for at least six months." For these reasons, we conclude appellant received proper notice of the charges against him, including whether he met the objective qualifications to complete the recommendation form.

{¶ 43} Appellant next claims the common pleas court violated his due process rights in affirming the board's order, which, appellant argues, failed to provide him fair notice of prohibited conduct. Appellant maintains that "a fair reading" of the board's order requires that a recommending physician actually observe the applicant in his or her medical practice before offering opinions as to the applicant's qualifications for Ohio medical licensure—a requirement not clearly articulated in the recommendation form itself. Appellant notes that one of the board's own staff members, Ms. Rieve, testified that the recommendation form does not explicitly state that the recommending physician must have practiced medicine with the applicant or personally observed the applicant in medical practice, does not require the recommending physician to justify his or her opinion of the applicant, and requires only that a recommending physician evaluate the applicant's professional medical skills based upon the recommending physician's subjective opinion.

{¶ 44} We agree with appellant that the board's recommendation form invites arbitrary or discriminatory application and enforcement, which, under the circumstances in the present case, constituted a violation of appellant's due process rights. As explained by appellant's linguistics expert, the form does not permit any valid assumptions to be drawn as to how well or under what circumstances the recommending physician knows the applicant. The phrase "must have known the applicant for at least six months" is subject to several different interpretations, and the form provides no guidance as to the board's intention regarding the meaning of that phrase. The form does not contain clear criteria as to how the recommending physician should assess or evaluate the applicant's medical knowledge and technique, relationship with patients, ability to work well with peers and medical staff, command of the English language, and moral character, and the absence of any specified criteria results in a recommending physician employing his or

her own subjective, rather than objective, criteria to evaluate an applicant. Thus, use of the form by the board as a basis for disciplinary action under R.C. 4731.22 in this case constituted a deprivation of appellant's due process rights.

{¶ 45} Appellant next contends the common pleas court abused its discretion by failing to find that the board's order is not in accordance with law because it exceeded the statutory authority set forth in R.C. 119.09 by improperly amending the hearing examiner's findings of fact and conclusions of law. Appellant acknowledges case law from this court construing R.C. 119.09 to permit an administrative agency to amend a hearing examiner's findings of fact and conclusions of law. *See, e.g., Trout v. Ohio Dept. of Edn.*, 10th Dist. No. 02AP-783, 2003-Ohio-987, ¶ 17; *Bennett v. State Med. Bd. of Ohio,* 10th Dist. No. 10AP-833, 2011-Ohio-3158. Based on this case law, appellant's argument is without merit.

{¶ 46} Appellant's final argument under his second assignment of error asserts that the common pleas court abused its discretion by failing to find that the board's order is not in accordance with law because the board failed to establish that he was acting "in the course of practice," as required by R.C. 4731.22(B)(12), when he completed and submitted the recommendation form. This court recently considered and rejected this precise argument. *Oyortey* at ¶ 29-30. We agree with the reasoning set forth on this issue, and therefore find appellant's argument unpersuasive.

{¶ 47} For all the foregoing reasons, appellant's second assignment of error is sustained in part and overruled in part.

{¶ 48} In his third assignment of error, appellant claims the common pleas court abused its discretion by affirming the board's determination that his conduct violated R.C. 4731.22(B)(5). Appellant maintains that the board's conclusion that in completing the recommendation form he made false, fraudulent, deceptive or misleading statements in violation of R.C. 4731.22(B)(5), is not supported by reliable, probative and substantial evidence.

{¶ 49} As noted above, the board may discipline a physician pursuant to R.C. 4731.22(B)(5) if he or she makes "a false, fraudulent, deceptive, or misleading statement * * * in securing or attempting to secure any certificate to practice [medicine or surgery]." R.C. 4731.22(B)(5) defines a "false, fraudulent, deceptive, or misleading statement" as "a

statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived." To sanction a physician for a violation of R.C. 4731.22(B)(5), the board must find that the physician intended to mislead the board. *Coleman* at ¶ 12; *Webb* at ¶ 35. Intent to mislead may be inferred from the surrounding facts and circumstances. *Applegate v. State Med. Bd. of Ohio,* 10th Dist. No. 07AP-78, 2007-Ohio-6384, ¶ 12.

{¶ 50} We note preliminarily that we have already concluded in our discussion of the first assignment of error that the board did not make the requisite finding that appellant intended to mislead the board in completing the recommendation form. However, even if the board had expressly made such a finding, no reliable, probative or substantial evidence would support it.

{¶ 51} The only direct evidence on the issue of intent was supplied by appellant, who averred that he did not intend to mislead the board in completing the recommendation form as he did. However, the board has contended throughout these proceedings that appellant's intent to mislead may be inferred from the surrounding facts and circumstances. Specifically, the board argues that appellant intended to provide misleading information when he asserted in the recommendation form that he had known Dr. Rice for at least six months when he actually did not. The only evidence adduced as to whether appellant knew Dr. Rice for at least six months was submitted by appellant, who testified that he met Dr. Rice while the two attended OSUMC in the late 1970's. The board offered no evidence to rebut this assertion. Appellant's admitted inability to recall the precise circumstances of his meeting Dr. Rice in medical school or to specifically remember Dr. Rice from medical school does not ipso facto connote that appellant did not know Dr. Rice for at least six months. Further, appellant's linguistics expert opined that the recommendation form does not define its requirement that the recommending physician must have known the applicant for at least six months, and that such phrase is subject to various valid interpretations, including that the recommending physician knew the applicant from a prior educational setting.

{¶ 52} We are further persuaded that appellant harbored no intent to mislead the board in that he testified that he intentionally left blank the question about how long Dr. Rice "has been known to me personally" because he did not want to demarcate a particular timeframe absent absolute certainty of it. Although the board's typical practice is to return uncompleted recommendation forms to the applicant with instructions to have the recommending physician fully complete the form, no evidence establishes that the board did so in this case. Had the board followed its established practice, appellant arguably would have had the opportunity to clarify under what circumstances and how long he had known Dr. Rice.

{¶ 53} The board has also contended that appellant intended to provide misleading information when he asserted in the recommendation form that Dr. Rice's medical knowledge and technique, relationship with patients, and ability to work well with peers and medical staff were "excellent," and affirmed that Dr. Rice "is of good moral character," without sufficient knowledge to make such statements. The board has based this contention on appellant's admission that he never observed Dr. Rice in his medical practice. However, as noted above, the recommendation form does not on its face require that a recommending physician must have practiced medicine with the applicant, personally observed the applicant in practice, or had any professional relationship with the applicant. The board's own staff member, Ms. Rieve, acknowledged as much in her testimony.

{¶ 54} Ms. Rieve further acknowledged that the recommendation form requires only that a recommending physician evaluate the applicant's professional medical skills based upon the recommending physician's subjective opinions, and does not require that the recommending physician justify those opinions with objective data. Appellant testified that he based his subjective ratings of Dr. Rice on their 30-minute discussion about Dr. Rice's ophthalmology practice, including his detailed description of the state-of-the-art surgical techniques he employed in his practice and his successful interactions with patients. Appellant also testified that this 30-minute discussion provided him the opportunity to observe and gauge Dr. Rice's positive professional interaction with him. Appellant averred that Dr. Rice's representations and knowledge about the

ophthalmology field convinced him that Dr. Rice would be an asset to the Ohio medical community.

{¶ 55} Ms. Rieve also admitted that the recommendation form requires only a subjective assessment of an applicant's moral character. Appellant testified that he based his subjective affirmance of Dr. Rice's "good moral character" on Dr. Rice's conversation, presentation and overall demeanor during the 30-minute meeting. Appellant also testified that he knew nothing of Dr. Rice's prior transgressions at the time he completed and submitted the recommendation form.

{¶ 56} Because the board failed to present reliable, probative and substantial evidence to prove appellant intended to mislead the board, it was erroneous to conclude that appellant violated R.C. 4731.22(B)(5). The common pleas court thus abused its discretion in affirming the portion of the board's order finding that appellant violated R.C. 4731.22(B)(5). Accordingly, we sustain appellant's third assignment of error.

{¶ 57} In his fourth assignment of error, appellant asserts that the common pleas court abused its discretion by affirming the board's determination that his conduct violated R.C. 4731.22(B)(12). Specifically, appellant maintains that the board's conclusion that his conduct satisfied the statutory requirements of falsification, under R.C. 2921.13(A), is not supported by reliable, probative and substantial evidence.

{¶ 58} As noted above, the board alleged that appellant violated R.C. 4731.22(B)(12) because he committed the misdemeanor offense of falsification when he completed the recommendation form. R.C. 2921.13(A) defines the offense of falsification and provides, as relevant here:

> No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following applies:
>
> * * *
>
> (5) The statement is made with purpose to secure the issuance by a governmental agency of a license, permit, authorization, certificate, registration, release, or provider agreement.
>
> (6) The statement is sworn or affirmed before a notary public or another person empowered to administer oaths.

{¶ 59} Falsification requires that the accused, under one of the circumstances identified in the statute, knowingly made a false statement or knowingly swore or affirmed the truth of the false statement previously made. *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-71, 2004-Ohio-2991, ¶ 38. As appellant made his statements with purpose to secure the issuance of a medical license for Dr. Rice and affirmed his recommendation before a notary public, the question resolves to whether he knowingly made or affirmed the truth of a false statement.

{¶ 60} We note preliminarily that we have already concluded in our discussion of the first assignment of error that the board did not make the requisite finding that appellant knowingly made or affirmed the truth of a false statement in completing the recommendation form. However, even if the board had expressly made such a finding, no reliable, probative or substantial evidence would support it.

{¶ 61} As used in R.C. 2921.13, "statement" means an assertion of fact. *State v. Harmon,* 7th Dist. No 95 C.A. 184 (Feb. 11, 2000), citing *State v. Coyne,* 69 Ohio App.2d 63 (1st Dist.1980). Although we have concluded that appellant offered only his subjective opinions in the recommendation form, even assuming his recommendations qualified as false statements, no reliable, probative and substantial evidence establishes that appellant knew of its falsity.

{¶ 62} The only direct evidence on the issue of knowing falsity was provided by appellant who testified that he did not knowingly make any false statements in the recommendation form. The board has consistently argued, however, that appellant knowingly made false statements about Dr. Rice's professional qualifications and moral character because those statements were not supported by the facts regarding Dr. Rice's past. However, it is undisputed that appellant had no knowledge of Dr. Rice's past legal problems or disciplinary actions at the time he completed the recommendation form. Thus, there is no evidence in the record establishing that the statements appellant provided about Dr. Rice were, in fact, false. Accordingly, appellant's statements do not constitute knowingly false statements under R.C. 2921.13(A). As the hearing examiner explained, although appellant may have displayed bad judgment in completing the recommendation form on behalf of Dr. Rice, such did not constitute knowingly making false statements. Accordingly, we conclude that the record does not contain reliable,

probative and substantial evidence from which to conclude that appellant's conduct constituted the misdemeanor offense of falsification.

{¶ 63} Because the board failed to present reliable, probative and substantial evidence to prove that appellant committed acts in the course of practice that constituted falsification, it was erroneous to conclude that appellant violated R.C. 4731.22(B)(12). The common pleas court thus abused its discretion in affirming the portion of the board's order finding that appellant violated R.C. 4731.22(B)(12). Accordingly, we sustain appellant's fourth assignment of error.

{¶ 64} Finally, we note that the board has filed as supplemental authority this court's decision in *Oyortey*, 2012-Ohio-6204, and proposes that it creates "binding precedent" in support of its order in the present case. Although *Oyortey* also involved a physician's recommendation of Dr. Rice for Ohio medical licensure, *Oyortey* is factually distinguishable, and is thus inapposite.

{¶ 65} Dr. Oyortey met Dr. Rice in November 2008 through a mutual friend who worked at a medical clinic. She encountered Dr. Rice again in December 2008 at a social event for medical clinic staff. During her hour-long discussion with Dr. Rice, Dr. Oyortey learned only that he graduated from OSUCM, completed an ophthalmology residency, practiced medicine for many years in New York and Illinois, and engaged in various volunteer endeavors. In May 2009, Dr. Rice contacted Dr. Oyortey and asked her to complete a recommendation for him as part of his application for Ohio medical licensure. Dr. Oyortey asked to see the recommendation form before deciding whether to complete it. She ultimately completed the recommendation form, affirming Dr. Rice's "good moral character" and rating as "good" Dr. Rice's medical technique and ability to work well with peers and medical staff and as "excellent" his relationship with patients. Dr. Oyortey based her responses on the fact that, like herself, Dr. Rice graduated from OSUCM, Dr. Rice's interactions with staff at the December 2008 social event, and her interactions with Dr. Rice; she based her opinion of Dr. Rice's good moral character on his volunteer work.

{¶ 66} In affirming the common pleas court's affirmance of the board's order, which amended the hearing examiner's proposed order to dismiss the case against Dr. Oyortey to read that "no further action" be taken in the matter, this court focused on a lack of factual foundation for Dr. Oyortey's ratings of Dr. Rice. We explained that "by

completing the recommendation form and having it notarized, Dr. Oyortey conveyed to the Board that she possessed the requisite knowledge to complete the form." *Id.* at ¶ 21. We further noted that, by distinguishing her ratings of Dr. Rice's various attributes requested by the form, Dr. Oyortey conveyed to the board that she had sufficient knowledge to make those distinctions. We ultimately concluded that Dr. Oyortey lacked the "necessary knowledge" to make the requested assessments of Dr. Rice, and implicitly, that she knew she lacked this factual knowledge. *Id.* at ¶ 66.

{¶ 67} Unlike Dr. Oyortey, appellant had a substantive basis for each of the ratings he attributed to Dr. Rice. Appellant attended medical school with Dr. Rice, and the two practiced within the same specialty. Appellant insisted on meeting with Dr. Rice before he completed the recommendation form and did so for approximately 30 minutes, at which time the two engaged in a detailed discussion of Dr. Rice's medical practice, surgical procedures and techniques, and patient satisfaction. In contrast, Dr. Oyortey did not attend medical school with Dr. Rice, did not practice ophthalmology, and based her recommendation solely on two general encounters with Dr. Rice.

{¶ 68} Having sustained appellant's first, third and fourth assignments of error, and having sustained in part and overruled in part appellant's second assignment of error, we hereby reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court with instructions to remand this matter to the Ohio State Medical Board with an order to dismiss the proceedings filed against appellant.

Judgment reversed and cause remanded with instructions.

BROWN, J., concurs.
TYACK, J., dissents.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

TYACK, J., dissenting.

{¶ 69} I do not find this case sufficiently distinguishable from our earlier case of *Oyortey v. State Med. Bd. of Ohio*, 10th Dist. No. 12AP-431, 2012-Ohio-6204, to reach a different result. I especially cannot believe that a different result is appropriate given the deference we are to give to the lower court and the Ohio State Medical Board. *See Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619 (1993) which dictates that we overturn a disciplinary finding of the State Medical Board and the trial court on fact issues only when there has been an abuse of discretion.

{¶ 70} Both the *Oyortey* case and this case involve the attempt of Christopher Allen Rice, M.D., to become licensed to practice medicine in the state of Ohio. Dr. Rice had been licensed to practice medicine in the state of New York but had engaged in criminal conduct which resulted in his getting a felony conviction for theft. Dr. Rice had also engaged in questionable medical procedures resulting in two medical malpractice lawsuits which were settled.

{¶ 71} Neither Dr. Oyortey nor Dr. Calloway knew Dr. Rice well enough to know about his criminal conduct or to know about his malpractice history. Each relied upon what Dr. Rice told them to decide that Dr. Rice was of good moral character and was a capable physician. Dr. Oyortey heard Dr. Rice's pitch at a cocktail party. Dr. Calloway heard the pitch at Dr. Calloway's office for 20 to 30 minutes.

{¶ 72} Both Dr. Oyortey and Dr. Calloway filled out a form in which they claimed to have known Dr. Rice for an extended period of time and claimed to know that Dr. Rice was of good moral character. Neither recommending doctor had sufficient exposure to Dr. Rice to know his moral character or they would have known of his felony theft based upon Dr. Rice's conduct in New York related to Dr. Rice's medical practice.

{¶ 73} Neither recommending doctor had ever seen Dr. Rice interact with patients or medical staff. Yet, Dr. Calloway rated Dr. Rice's relationship with patients as "excellent" and his ability to work with peers and medical staff as "excellent."

{¶ 74} Dr. Calloway is an extremely intelligent man and had to know the purpose of the form he was filling out was to have the State Medical Board of Ohio make an informed decision on whether or not to license a physician and place the very lives of Ohio patients in the hands of such a physician based upon recommendations from physicians who had actually witnessed the applicant interact with patients and medical staff. When

Dr. Calloway swore he had known Dr. Rice for years, Dr. Calloway had to know that the medical board wanted something more than "I knew Dr. Rice in med school many years ago and I talked to him for 30 minutes or less recently." The Medical Board clearly wanted much more than "Dr. Rice talks a great game."

{¶ 75} The Ohio State Medical Board has an obligation to assure that only people of good moral character, not recently convicted felons, be licensed in Ohio. The Medical Board also has an obligation to determine if the applicant has significant ability to treat patients and work well with other medical staff, not just claim such ability. Fortunately, the Medical Board saw Dr. Rice for what he was and refused to license him.

{¶ 76} Having refused Dr. Rice a license to practice medicine in Ohio, the Medical Board was clearly correct to inquire how a doctor licensed in Ohio could honestly claim that Dr. Rice was of good moral character or that Dr. Rice was known to them personally to provide good patient care. No Ohio doctor could honestly swear to the truth of such matters. Dr. Oyortey and Dr. Calloway could not honestly do so. The decision of the State Medical Board to give Dr. Oyortey and Dr. Calloway a written reprimand for their role in trying to get Dr. Rice licensed to practice medicine in Ohio was clearly appropriate. We should not be overturning it.

{¶ 77} I respectfully dissent.