[Cite as *Edmands v. State Med. Bd. of Ohio*, 2015-Ohio-2658.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Christopher J. Edmands, D.O.,	:	
Appellant-Appellant,	:	
		No. 14AP-778
v.	:	(C.P.C. No. 14CVF05-5644)
State Medical Board of Ohio,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2015

Collis, Smiles & Collis, LLC, and *Elizabeth Y. Collis*, for appellant.

Michael DeWine, Attorney General, and *James T. Wakley*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellant-appellant, Christopher J. Edmands, D.O., appeals a judgment of the Franklin County Court of Common Pleas that dismissed his appeal of an order of the State Medical Board of Ohio ("Board"). For the following reasons, we reverse that judgment and remand this matter.

{¶ 2} On August 2, 2013, Edmands submitted to the Board an application for a license to practice osteopathic medicine and surgery in Ohio. At the time Edmands submitted his application, he was already licensed to practice osteopathic medicine and surgery in West Virginia. However, in February 2013, the West Virginia Board of Osteopathic Medicine had reprimanded Edmands and placed Edmands' license on

probation for 12 months. This disciplinary action stemmed from Edmands' practice of pre-signing blank prescription forms, verbal-order forms, and face-to-face encounter forms, and leaving them for nursing staff to complete.

{¶ 3} In a letter attached to his Ohio application, Edmands admitted that, while working as the medical director for Amedisys Hospice ("Hospice"), he pre-signed certain forms. Edmands explained that he did so to ensure that end-of-life Hospice patients would receive prompt, continuous medical care. Edmands believed that the Hospice condoned this practice, but discovered otherwise when the Hospice declined to renew his contract. Edmands acknowledged that he should not have pre-signed any forms, and he promised not to do so again.

{¶ 4} In a letter dated March 12, 2014, the Board notified Edmands that it intended to determine whether to refuse to register him because of the disciplinary action against his West Virginia license. Pursuant to R.C. 4731.22(B)(22), the Board may refuse to register a physician if another state's regulatory board has reprimanded or imposed probation on that physician. The phrase "refuse to register an individual," as used in R.C. 4731.22(B)(22), means to deny an application for a certificate to practice in Ohio. *Weiss v. State Med. Bd.*, 10th Dist. No. 13AP-281, 2013-Ohio-4215, ¶ 23.

{¶ 5} In addition to informing Edmands of the Board's intent, the March 12, 2014 letter also advised Edmands that he was entitled to a hearing. The letter stated:

> If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.
>
> You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

(R. 19.) On March 19, 2014, the Board received a reply letter from Edmands, which stated, in part, "I have no further information to present for the OH Board of Medicine's review and therefore, am not requesting a hearing." (R. 19.)

{¶ 6} At a May 14, 2014 meeting, the Board considered Edmands' licensure application and voted to permanently deny it. The Board issued an order to that effect, which Edmands appealed to the trial court pursuant to R.C. 119.12.

{¶ 7} Instead of following the briefing schedule instituted by the trial court, the Board moved to dismiss Edmands' appeal. The Board argued that Edmands waived his right to appeal the Board's order because he had affirmatively declined to request an administrative hearing from the Board. In his response, Edmands argued that the March 12, 2014 notice was so confusing, vague, and ambiguous that it denied him his due process right to a meaningful opportunity for a hearing. Edmands also challenged the evidence before the Board, contending that it was not reliable, probative, and substantial.

{¶ 8} The trial court agreed with the Board's argument. In a judgment dated September 8, 2014, the trial court rejected Edmands' due process argument. The trial court then found that Edmands' failure to request a hearing prevented the court from reviewing the Board's order, and the court dismissed Edmands' appeal "pursuant to R.C. 119.07." (R. 26, at 4.) The trial court did not address Edmands' argument that that Board's order was not supported by any reliable, probative, and substantial evidence.

{¶ 9} Edmands now appeals the September 8, 2014 judgment, and he assigns the following error:

> The Court of Common Pleas, Franklin County, Ohio erred by granting Appellee State Medical Board of Ohio's (the "Board") Motion to Dismiss.

{¶ 10} This appeal requires us to determine what effect the failure to request an administrative hearing has on a party's right to appeal an agency's adjudication order to a court of common pleas pursuant to R.C. 119.12. That question raises legal issues, which we review de novo. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶ 14.

{¶ 11} Generally, before issuing an adjudication order, an agency must afford an opportunity for a hearing to the party whose interests are at issue in the adjudication. R.C. 119.06. The agency must notify the party of its opportunity for a hearing. R.C. 119.07; *accord Cowans v. Ohio State Racing Comm.*, 10th Dist. No. 13AP-828, 2014-Ohio-1811, ¶ 29 (holding that when an agency proposes to take disciplinary action against a party, R.C. 119.07 requires the agency to give notice to the party of its right to a hearing).

The notice must include "the charges or other reasons for the proposed action [and] the law or rule directly involved." R.C. 119.07. If the party requests a hearing within thirty days of the time of the mailing of that notice, the agency must schedule and hold a hearing. R.C. 119.07; *Immke Circle Leasing, Inc. v. Ohio Bur. of Motor Vehicles*, 10th Dist. No. 05AP-1179, 2006-Ohio-4227, ¶ 8-9.

{¶ 12} R.C. Chapter 119 does not explicitly set forth the process that an agency must follow in the absence of a request for a hearing. However, R.C. 4731.22(J), which governs disciplinary proceedings before the State Medical Board of Ohio, supplies the procedure applicable to the instant case. Where the Board must provide notice of an opportunity for a hearing and a party does not timely request a hearing, "the board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the board's findings." R.C. 4731.22(J).

{¶ 13} Once the Board has issued an adjudication order, a party may appeal it to the Franklin County Court of Common Pleas. R.C. 119.12. More exactly, "[a]ny party adversely affected by any order of [the Board] issued pursuant to an adjudication" has the right to appeal the adjudication order to the Franklin County Court of Common Pleas. R.C. 119.12.

{¶ 14} Here, the trial court found that R.C. 119.07 required it to dismiss Edmands' appeal. R.C. 119.07, however, only addresses administrative hearings. A different statute—R.C. 119.12—governs the appeal of adjudication orders to courts of common pleas. Thus, application of R.C. 119.12, not R.C. 119.07, determines whether Edmands may pursue his appeal of the Board's order.

{¶ 15} As we stated above, under R.C. 119.12, "[a]ny party adversely affected" by a board order "issued pursuant to an adjudication" may appeal the board order. An "adjudication" is "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person." R.C. 119.01(D). Thus, an "adjudication" is neither a hearing nor necessarily includes a hearing. Moreover, nothing in R.C. Chapter 119 limits the broad category of "[*a*]*ny* person adversely affected" to only those persons who have requested an administrative hearing. (Emphasis added.) R.C. 119.12. Consequently, " '[a] failure to request an adjudication hearing pursuant to R.C. 119.07 when afforded the opportunity to do so [does not]

deprive[ ] a party adversely affected of his right of appeal from the eventual adjudication order pursuant to R.C. 119.12.' " *Oak Grove Manor, Inc. v. Ohio Dept. of Human Servs.*, 10th Dist. No. 01AP-71 (Oct. 23, 2001), quoting *In re Turner Nursing Home*, 10th Dist. No. 85AP-610 (Nov. 21, 1985). The trial court, therefore, erred in concluding that Edmands' failure to request a hearing required the dismissal of Edmands' R.C. 119.12 appeal. Accordingly, we sustain Edmands' assignment of error.

{¶ 16} Normally, at this point, we would remand for the trial court to review Edmands' substantive arguments and decide whether to affirm, modify, or reverse the Board's order. Here, however, our finding of error does not end our analysis. Prior to dismissing the appeal, the trial court considered the merits of one of Edmands' arguments; namely, that the Board violated Edmands' due process rights. In the interest of efficiency, we will review the trial court's rejection of that argument.

{¶ 17} The Board argues that we need not consider the merits of Edmands' due process argument because he waived that argument by not raising it before the Board. We agree with the Board that the waiver doctrine can bar a party from raising certain arguments when that party fails to request a hearing and, thus, forgoes the opportunity to raise those arguments before the Board. We disagree, however, that the waiver doctrine precludes Edmands from asserting his due process argument.

{¶ 18} While the failure to request an administrative hearing does not deprive a party of the right to appeal, it is not without consequence. An administrative hearing provides a forum for a party to raise legal and factual arguments propounding why an agency should not take the proposed action against the party. By not requesting a hearing, the party forfeits its opportunity to raise those arguments before the agency. This forfeiture impacts an appeal of the agency's order because "the failure to present an argument usually constitutes waiver of that argument" on appeal. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, ¶ 19; *accord Crosby-Edwards v. Ohio Bd. of Embalmers & Funeral Dirs.*, 175 Ohio App.3d 213, 2008-Ohio-762, ¶ 38 (10th Dist.). As a general matter, "[a]llowing a claimant to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process." *Jain v. Ohio State Med. Bd.*, 10th Dist. No. 09AP-1180, 2010-Ohio-2855, ¶ 10.

{¶ 19} Waiver, however, only provides the agency a defense to those arguments that a party could have made at an administrative hearing. The waiver doctrine does not apply if an appeal to the common pleas court presents the first opportunity for the party to raise an argument. Arguments exempt from the waiver doctrine include challenges to the content or service of a notice of opportunity that cause a party not to request a hearing. *See Chirila v. Ohio State Chiropractic Bd.*, 145 Ohio App.3d 589, 595-96 (10th Dist.2001) ("[T]he failure to timely request a hearing does not preclude a court's consideration of whether an agency's procedures comply with due process."). In that situation, no administrative hearing occurs due to possible error on the agency's part. Without that administrative hearing, the first opportunity to raise the alleged error occurs in an appeal of the agency's adjudication order. The waiver doctrine, therefore, does not preclude a party from asserting argument regarding that error.

{¶ 20} In the case at bar, Edmands initially argues that he did not waive any arguments because he did not intentionally relinquish or abandon his right to raise those arguments before the Board. This argument relies on the traditional definition of waiver, in which "waiver" means "a voluntary relinquishment of a known right." *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶ 49. Despite its name, the waiver doctrine actually applies when a party forfeits, not waives, an argument. A forfeiture occurs when a party fails to preserve error by timely advising a tribunal of that error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 23. Edmands' alleged lack of intent, therefore, does not preclude the application of the waiver doctrine.

{¶ 21} Edmands next argues that the March 12, 2014 notice of opportunity was so confusing, vague, and ambiguous that it did not communicate that the hearing would concern the possible denial of his Ohio licensure application because of the West Virginia disciplinary action. According to Edmands, the inadequacy of the notice deprived him of his right to due process.

{¶ 22} In essence, this argument asserts that a deficiency in the content of the notice of opportunity for a hearing caused Edmands to decline a hearing. As Edmands raised this argument at the first opportunity (in his R.C. 119.12 appeal to the trial court), he did not waive the argument. We, therefore, will consider Edmands' due process argument.

{¶ 23} Both the Fourteenth Amendment to the United States Constitution and Ohio Constitution, Article I, Section 16, require that administrative proceedings comport with due process. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (considering whether a federal agency accorded an individual due process before depriving him of a private interest); *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46 (1990) (considering whether a state agency complied with due process requirements).[1] "Although due process is flexible and calls for such procedural protections as the particular situation demands, the basic requirements of procedural due process are notice and an opportunity to be heard." (Citations omitted.) *Fairfield Cty. Bd. of Commrs. v. Nally*, __ Ohio St.3d __, 2015-Ohio-991, ¶ 42. The notice must be "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." (Citations omitted.) *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Consequently, procedural due process requires administrative agencies to give fair notice of the precise nature of the charges at issue in the disciplinary action. *Griffin v. State Med. Bd.*, 10th Dist. No. 11AP-174, 2011-Ohio-6089, ¶ 22; *Macheret v. State Med. Bd.*, 188 Ohio App.3d 469, 2010-Ohio-3483, ¶ 24 (10th Dist.).

{¶ 24} Here, the Board's March 12, 2014 notice to Edmands stated that the Board intended to determine whether to refuse to register him because he had submitted an application for licensure and:

> [o]n or about February 20, 2013, [he] entered into a Consent Order with the West Virginia Board of Osteopathic Medicine wherein [he] w[as] reprimanded and placed on probation for a period of twelve months. * * * The factual findings contained in the Consent Order include that [he] pre-signed prescriptions, verbal orders, and blank face-to-face visit forms for staff members to complete.

(R. 19.) The notice then stated that the consent order constituted a basis to refuse to register Edmands pursuant to R.C. 4731.22(B)(22). The notice went on to inform Edmands that he was "entitled to a hearing in this matter," and, if the Board did not

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[1] The "due course of law" aspect of Ohio Constitution, Article I, Section 16, is the equivalent of the Due Process Clause of the United States Constitution. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 41, 69.

receive a request for a hearing, the Board "may, in [his] absence and upon consideration of this matter, determine whether or not to" refuse to register him. (R. 19.)

{¶ 25} We conclude that the notice reasonably conveyed to Edmands his right to a hearing and the purpose of the hearing. In arguing to the contrary, Edmands repeatedly asserts that he believed that the notice was a response to his earlier inquiries about the status of his application. Even assuming this is true, we fail to see how Edmands' belief obscures the notice's meaning. The March 12, 2014 notice could, conceivably, constitute both a response and a notice of opportunity for hearing without causing confusion, vagueness, or ambiguity. In fact, Edmands' assumption that the notice was a response did not lead him to misinterpret the notice. Edmands replied in his March 19, 2014 letter that he was not requesting a hearing because he had no further information to supply the Board regarding the West Virginia disciplinary action. Edmands, thus, understood that he had a right to a hearing and that the hearing would focus on the effect of the West Virginia disciplinary action on his Ohio licensure application.

{¶ 26} Edmands' real complaint here is that he did not appreciate the significance of a hearing. The Board, however, has no constitutional obligation to counsel parties regarding the advisability of requesting a hearing or to ensure that a party who declines a hearing has properly weighed whether a hearing is in his or her best interest. We, therefore, reject Edmands' argument. We conclude that the March 12, 2014 notice complied with all due process requirements.

{¶ 27} Although Edmands' due process argument fails, this case is not completely resolved. Because the trial court erroneously dismissed Edmands' appeal, it did not consider or decide Edmands' argument that no reliable, probative, and substantial evidence supports the Board's order. Consequently, we remand this matter so the trial court can review that argument.

{¶ 28} For the foregoing reasons, we sustain the assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas, and we remand this cause to that court for further proceedings consistent with law and this decision.

Judgment reversed; cause remanded.

SADLER and DORRIAN, JJ., concur.