[Cite as *Rhodes v. Ohio Counselor, Social Worker & Marriage & Family Therapist Bd.*, 2009-Ohio-5666.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MERLE J. RHODES	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
OHIO COUNSELOR, SOCIAL	:	Case No. CT2009-0011
WORKER AND MARRIGE AND	:	
FAMILY THERAPIST BOARD	:	O P I N I O N
	:	
Appellee	:	

CHARACTER OF PROCEEDING:	On Appeal from the Muskingum County Court of Common Pleas, Case No. CF2008-30
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 23, 2009

APPEARANCES:

For Appellant:

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For Appellee:

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Delaney, J.

{¶1} Appellant Merle J. Rhodes appeals the January 26, 2009 judgment entry of the Muskingum County Court of Common Pleas that affirmed the decision of Appellee, Ohio Counselor, Social Worker, and Marriage and Family Therapist Board, to suspend Appellant's license to practice counseling for one year. For the reasons that follow, we affirm.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant is a licensed professional clinical counselor and was employed in that capacity by the Hocking Valley Community Residential Center ("HVCRC"). HVCRC is a juvenile residential treatment facility located in Athens County for young people who have been adjudicated for crimes that would be felonies if they were adults. HVCRC is an "unlocked" facility where the goal is to rehabilitate the youth offenders and to reduce the likelihood of recidivism. The residents stay at the facility for approximately six months and they gradually gain more privileges as they near their release dates. Residents in the final stage of their rehabilitation reside in Zone 4, where they receive the least amount of supervision and the most privileges, such as going home on the weekends.

{¶3} Brian Wik was employed as a Youth Specialist for HVCRC in November, 2005. On November 27, 2005, Wik was working his shift from 1:00 p.m. to 11:00 p.m. supervising the residents as they got ready for bed. One of the residents in Zone 4 asked if he could speak with Wik. Another Youth Specialist, Melissa Vance, was present. Wik asked what the resident wanted to talk about and the resident eventually gave Wik a DVD the resident had in his room. Wik took the DVD to another room and

played a portion of it. Wik saw that the title on the screen was "Top 25 Porn Stars of All Time" and he could see scenes "flipping" in the background. Wik did not watch the entire DVD. Wik locked the DVD in his vehicle and returned to speak with the resident. Wik and Vance coaxed the resident into telling them where he obtained the DVD. The resident told them he had gotten it from Appellant. Wik reported the incident to Barb Woodson, the Youth Specialist Supervisor.

{¶4} The next day, Wik turned the DVD into Sally Barr, HVCRC's Executive Director. Wik, Vance and Woodson took a written statement from the resident as to how he came to obtain the DVD. While the resident had come to HVCRC for the commission of a felony, possibly a theft offense, the resident had moved to Zone 4 where he had privileges such as working as a busboy at a local restaurant. When the resident returned from his job, he may or may not have been searched.

{¶5} At the request of Barr, Woodson notified the Department of Youth Services, the Ross County Juvenile Court and the Ross County Children Services of the incident.[1] At the time of the incident, the resident was under the age of eighteen and Children Services is required to be notified and investigate the incident if there is a possibility of child abuse. Barr placed Appellant on paid administrative leave pending an investigation.

{¶6} Athens County Children Services conducted an investigation into the incident between November 30, 2005, and December 12, 2005. Ross County notified Barr that the Athens County investigation determined that abuse was substantiated. The HVCRC Executive Board, made up of the juvenile judges from the twelve counties

[1] The resident's home county is Ross County.

in Southeastern Ohio that utilized HVCRC services, authorized Barr to discipline Appellant, up to and including termination.

{¶7} Barr met with Appellant on December 22, 2005, to discuss the incident. During that meeting, Barr stated that Appellant admitted to having two adult DVD's in his possession on the work premises, "Sex Vixens" and "Top 20 Porno Stars." He had borrowed the movies from a co-worker and had brought them to work to return them. Appellant surmised that the resident had stolen the DVD from his office.[2] Frank Woodgerd, an employee of HVCRC, was present at the meeting. Woodgerd stated that Appellant described the DVDs as "adult" videos. Woodgerd further testified that HVCRC did permit residents to watch "R" rated movies provided by HVCRC staff members.

{¶8} On December 23, 2005, Barr sent Appellant written notification of his termination from HVCRC. Appellant appealed his termination to the State Personnel Board of Review, but the appeal was dismissed. Barr notified Appellee of Appellant's termination.

{¶9} On May 19, 2007, Appellee sent Appellant its Notice of Opportunity for Hearing which notified Appellant that Appellee proposed to take disciplinary action against Appellant's license to practice as a licensed professional clinical counselor under the authority of R.C. 4757.36(A)(1) and Ohio Administrative Code Section 4757-11-01(C)(20), which allow Appellee to suspend, revoke, reprimand, or restrict a license if the counselor has committed any violation of the laws or administrative rules governing the profession. The Notice stated the reason for the proposed order was that

[2] There has never been any allegation in the matter before Appellee that Appellant intentionally gave the DVD to the resident.

based upon an investigation, it was alleged that Appellant brought pornographic materials to his place of employment and did not secure the material in such a manner that a minor was able to obtain possession of the material. Appellee alleged the conduct was in violation of O.A.C. 4757-5-01(B)(1)(b), which requires the Appellee's licensees to maintain appropriate standards of care, and defines the standard as "what an ordinary, reasonable professional with similar training would have done in a similar circumstance."

{¶10} Appellant requested a hearing, which was held before the Hearing Examiner on November 26, 2007. Employees from HVCRC involved in the incident and the resulting investigation testified at the hearing. Appellant also testified on a limited basis, invoking his Fifth Amendment right against self-incrimination. Charles Campbell, a licensed professional clinical counselor, testified as Appellee's expert to establish whether a counselor's choice to bring pornographic material to the workplace when the counselor was employed at a youth treatment center fell below the standard of care. Campbell testified that in his opinion, that what a counselor does at home is his or her business, but that it is below the standard of care to bring a pornographic DVD to work and to keep it in an unsecured location such that a juvenile resident could gain access to it.

{¶11} In a facility such as HVCRC, Campbell stated the expectation is that youth are present and any materials on the premise are at risk of being viewed by the residents. Because pornography can negatively impact youths due to its skewed view of relationships, it can be detrimental to juveniles who have impulse issues, are sex offenders or victims of sexual offenses.

{¶12} On February 11, 2008, the Hearing Examiner issued her Report and Recommendation. The Hearing Officer found Appellee established by a preponderance of the evidence supported Appellee's "allegation that Appellant brought a pornographic DVD to work with him, and that he did not secure it adequately enough to prevent a youth who resided at the facility from obtaining it." The Hearing Examiner concluded that this conduct fell below the standard of care and was a violation of O.A.C. 4757-5-01(B)(1)(b) and 4757-11-01(C)(20). The Hearing Examiner recommended that Appellee suspend Appellant's license for six months, followed by a period of minimal supervision of his practice.

{¶13} Appellant filed objections to the Hearing Examiner's Report and Recommendation on March 10, 2008. On March 21, 2008, the Counselor, Social Worker and Marriage and Family Therapist Board issued its Adjudication Order. The Adjudication Order stated that the Counselor Professional Standards Committee reviewed the Hearing Examiner Report and Recommendation and accepted the Findings of Fact and Conclusions of Law in their entirety. The Committee modified the Recommendation of the Hearing Examiner and ordered that Appellant's license be suspended for one year and when Appellant returned to work as a counselor, he must receiving face-to-face supervision for one hour, every week, for two years.

{¶14} Appellant filed a timely appeal of the Adjudication Order on April 1, 2008, with the Muskingum County Court of Common Pleas.

{¶15} On January 26, 2009, the trial court issued its judgment entry, finding the decision of Appellee was supported by reliable, probative, and substantial evidence. It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶16} Appellant raises three Assignments of Error:

{¶17} "I. THE COURT BELOW ERRED TO RHODES' PREJUDICE WHEN IT FAILED TO FIND THAT THE BOARD DID NOT TIMELY PREPARE AND CERTIFY A COMPLETE RECORD OF THE PROCEEDINGS, BECAUSE THE BOARD DID NOT INCLUDE THEIR MEETING MINUTES AND THOSE MINUTES WERE NEEDED TO DETERMINE THE MERITS OF THE APPEAL.

{¶18} "II. THE COURT BELOW ERRED TO RHODES' PREJUDICE WHEN IT FOUND THAT THE ADMINISTRATIVE DECISION WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE THAT RHODES HAD VIOLATED A STANDARD OF CARE BY NEGLIGENTLY ENABLING A YOUTH TO GAIN ACCESS TO PORNOGRAPHY ON A SPECIFIC DVD EVEN THOUGH THE BOARD DECLINED TO ENTER THE DISC INTO EVIDENCE AND OFFERED NO EVIDENCE SHOWING IT CONTAINED PORNOGRAPHY OR THAT THE YOUTH COULD VIEW IT.

{¶19} "III. THE COURT BELOW ERRED TO RHODES' PREJUDICE WHEN IT FAILED TO FIND THAT THE BOARD DENIED RHODES' DUE PROCESS AT ITS ADJUDICATION WHEN IT QUESTIONED RHODES AND BASED ITS FINDINGS ON CONCLUSIONS DRAWN FROM MATTERS BEYOND THAT WHICH IT GAVE PRIOR NOTICE."

I.

{¶20} Appellant argues in his first Assignment of Error that the trial court erred when it entered judgment in favor of Appellee because Appellee had failed to certify to the trial court a complete record of the proceedings. We disagree.

{¶21} R.C. 119.12 states in regards to the "record of the proceedings" required to be filed with the trial court in an administrative appeal:

{¶22} "Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record."

{¶23} Appellant argues that Appellee did not meet the requirements of R.C. 119.12 because the record of the proceedings did not include the meeting minutes of the Counselor Professional Standards Committee, which reviewed the Hearing Examiner's Report and Recommendation and issued the Adjudication Order. Appellant argues such meeting minutes are relevant to the within administrative appeal and are part of the record of proceedings. He states that the meeting minutes are the only means to show that the proper committee was involved, that a quorum of the proper officers gathered and the motion to discipline Appellant was passed by the required majority vote.

{¶24} R.C. 119.09 discusses adjudication hearings and the record created at the adjudication hearing for the basis of an appeal to the court:

{¶25} "At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. * * *."

{¶26} In *Jenneman v. Ohio State Bd. of Chiropractic Examiners* (1985), 21 Ohio App.3d 225, 486 N.E.2d 1272, paragraph one of the syllabus, the First District held:

{¶27} "Under R.C. 119.12, if an administrative agency, in an appeal to common pleas court, fails to file any record whatsoever within the thirty-day period, the common pleas court must, on motion, enter a finding in favor of the party adversely affected. If, on the other hand, the administrative record is timely filed but not complete because parts of it are missing, then the appellant must show that he or she was prejudiced by the omission."

{¶28} Appellee filed the administrative record in this case within the thirty-day period. Appellant argues that Appellee timely filed the administrative record, but it is not complete because parts of it were missing. While we are not convinced that the Counselor Professional Standards Committee meeting minutes are part of the administrative record pursuant to R.C. 119.09 and R.C. 119.12, we find that if they were to be considered a part of the administrative record, Appellant has failed to show he was prejudiced by the omission.

{¶29} Appellant argues that the incorrect committee reviewed the Hearing Officer's Report and Recommendation because the Adjudication Order issued by Appellee on March 21, 2008, states near the end, "Motion carried by order of the Social Worker Professional Standards Committee." We find this argument to be unpersuasive as the Adjudication Order states at the very beginning of the body of the Order that the "Counselor Professional Standards Committee has reviewed the Hearing Officer Report and Recommendation prepared in this case following the administrative hearing." Thus, we find sufficient evidence to demonstrate the appropriate committee reviewed the Hearing Officer's Report and Recommendation and issued the Adjudication Order.

{¶30} We further find the omission of the Counselor Professional Standards Committee meeting minutes were not prejudicial to Appellant based upon our ruling upon Appellant's second Assignment of Error.

{¶31} Accordingly, Appellant's first Assignment of Error is overruled.

II.

{¶32} Appellant argues in his second Assignment of Error that the trial court abused its discretion in finding the Adjudication Order was supported by reliable, probative and substantial evidence. We disagree.

{¶33} R.C. 119.12 governs an appeal from the decision of Appellee. In an administrative appeal 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 law. Reliable, probative and substantial evidence has been defined as: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2)

"Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value." *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.

{¶34} In determining evidentiary conflicts, the Ohio Supreme Court in *University of Cincinnati v. Conrad* (1980), 63 Ohio State 2d 108, 407 N.E.2d 1265, directed courts of common pleas to give deference to the administrative resolution of such conflicts. The Supreme Court noted when the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265.

{¶35} On appeal to this Court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. In reviewing the trial court's determination that Appellee's order was supported by reliable, probative and substantial evidence, this Court's role is limited to determining whether the trial court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680, 610 N.E.2d 562. 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* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶36} Appellant's second Assignment of Error hinges on the characterization of the nature of the content of the DVD in question – whether it portrayed "adult" or "pornographic" material. The Notice for Opportunity for Hearing alleges that Appellant "brought pornographic materials to his place of employment and did not secure the material…" Appellant argues that Appellee had the burden of proof to establish that Appellant possessed pornographic materials and Appellee failed to meet its burden.

{¶37} As stated above, this Court's review of the administrative appeal is through a much smaller window than that of the trial court. We only determine whether the trial court abused its discretion in considering whether the decision of the administrative body was supported by a preponderance of the evidence. The trial court is required to defer to the administrative body in the resolution of evidentiary conflicts.

{¶38} In the Hearing Officer's lengthy Report and Recommendation, she reviewed the standard for which Appellee must prove its allegations. "[I]t is well-established that the agency need only meet the 'preponderance of the evidence' standard. In other words, the Board must prove that it is more likely than not that Mr. Rhodes committed the infraction alleged in the Notice of Opportunity for Hearing." (Report and Recommendation, p. 17). The Hearing Officer determined that Appellee met its burden in proving that the video in question was a pornographic one:

{¶39} "* * * Brian Wik testified that, although he did not actually watch the video, he saw the title screen with the tile 'Top 25 Porn Stars of All Time' and scenes 'flipping' in the background. (Tr. Pp. 24, 42) Sally Barr's testimony demonstrates that Mr. Rhodes acknowledged at the time he was fired that the video found in the resident's possession was an 'adult' video that was not appropriate for residents of HVCRC. Ms.

Barr's testimony that Mr. Rhodes told her two names of videos that he had in his possession at work: *Sex Vixens* and *20 Top Porn Stars* also lends weight to the conclusion that the video in question is, more likely than not, pornographic. * * *" (Report and Recommendation, p. 21).

{¶40} The Hearing Officer also addressed Appellant's argument regarding the distinction between an "adult" or "pornographic" video:

{¶41} "Although Mr. Rhodes is now attempting to draw a vast distinction between an 'adult' video and a 'pornographic' one, Mr. Rhodes's appeal letter at State's Exhibit 12 clearly indicates his own belief that whatever video the young man had gained possession of, it was one that was inappropriate for him. He writes, '…I immediately secured the video and talked to [the youth] about the inappropriateness of his viewing such material.' This contradicts his suggestion that it was merely one of the 'R' rated movies that, according to one witness, the residents of HVCRC are permitted to watch." (Report and Recommendation, p. 18).

{¶42} Regardless of the distinction as to whether the DVD contained "adult" or "pornographic" material, Appellant admitted that he possessed the material, the resident came into possession of the material, and it was inappropriate for the resident to watch such material. Exhibit 12 is the letter Appellant wrote in regards to an appeal of his termination. It states in pertinent part:

{¶43} "* * * I had caught this resident with an adult video he had taken without my knowledge that was in my possession. As soon as I was aware of his action, I immediately secured the video and talked to him about the inappropriateness of his viewing such material. I openly admitted I had an adult video in my possession at the

Center. It was never clarified where the other video came from, although I don't preclude the possibility that there was another video I was unaware of that he may have stolen from me."

{¶44} Appellant writes further, "[a]s noted before I admitted to having an adult video which a resident took from me without my knowledge."

{¶45} Upon our limited review of the administrative record, we find the trial court did not abuse its discretion in finding the Adjudication Order was supported by a preponderance of the substantial, reliable, and probative evidence. The trial court deferred to the Hearing Officer's resolution of the evidentiary conflicts and we cannot find that the decisions of Appellee or the trial court were not supported by the administrative record.

{¶46} Appellant's second Assignment of Error is overruled.

III.

{¶47} Appellant argues in his third Assignment of Error that the trial court abused its discretion when it failed to find Appellee denied Appellant his due process rights. Appellant argues his due process rights were violated when Appellee questioned Appellant regarding other DVDs containing adult or pornographic material that Appellant may have brought to his place of employment, rather than the specific DVD that was referred to in the Notice of Opportunity for Hearing. We disagree.

{¶48} R.C. 119.07 states in pertinent part, "[n]otice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time

of mailing the notice." Under R.C. 119.07, the administrative agency is required to give Appellants notice of the charges or other reasons for the proposed action. "The purpose of such notice is to give the party charged with a violation adequate notice to enable the party to prepare a defense to the charges." *Sohi v. Ohio State Dental Board* (May 20, 1997), Franklin App. No. 96APD05-687 citing *Geroc v. Ohio Veterinary Medical Bd.* (1987), 37 Ohio App.3d 192, 199, 525 N.E.2d 501, quoting *Keaton v. State* (1981), 2 Ohio App.3d 480, 483, 442 N.E.2d 1315. "In addition, the due process clause of the Fourteenth Amendment to the United States Constitution, to some extent, is applicable to hearings before administrative agencies, and such procedural due process includes reasonable notice of the subject matter of the hearing. *State ex rel. LTV Steel Co. v. Indus. Comm.* (1995), 102 Ohio App.3d 100, 103-104, 656 N.E.2d 1016 (citations omitted). Hence, if relator was not given proper notice as required under R.C. 119.07 and as dictated under procedural due process principles, the [trial court] may reverse the board's order." Id.

{¶49} The Notice of Opportunity for Hearing sent May 19, 2007, stated, "[i]t is alleged that RHODES brought pornographic materials to his place of employment and did not secure the material in such a manner that a minor was able to obtain possession of the material." During the adjudicatory hearing before the Hearing Officer, testimony was presented regarding the pornographic and/or adult materials Appellant allegedly brought to his place of employment. Wik testified that the DVD he viewed was entitled "25 Top Porn Stars of All Time." Barr testified that Appellant told her he brought "Sex Vixens" and "Top 20 Porn Stars" to his place of employment. Appellant testified that he thought the video he brought to work was entitled, "Girls Gone Wild."

{¶50} Appellant argues that he did bring an adult video to work, but it was not the one the resident possessed. The Hearing Officer addressed Appellant's argument in her Report and Recommendation and noted that in Exhibit 12, Appellant admitted to "having an adult video which a resident took from me without my knowledge."

{¶51} Based upon the evidence presented, the Hearing Officer resolved that the evidence demonstrated that Appellant's conduct fell below the standard of care when he brought pornographic material to work and did not secure it properly, allowing a minor to obtain it. We do not find that upon a review of the record that the testimony went beyond Appellant's notification of the allegations against him.

{¶52} Appellant's third Assignment of Error is overruled.

{¶53} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By Delaney, J.

Farmer, P. J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD/kgb

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MERLE J. RHODES	:	
Appellant	:	
-vs-	:	JUDGMENT ENTRY
OHIO COUNSELOR, SOCIAL WORKER AND MARRIGE AND FAMILY THERAPIST BOARD	:	
Appellee	:	Case No. CT2009-0011

For the reasons stated in our accompanying Memorandum-Opinion, the decision of the Muskingum County Court of Common Pleas is affirmed.

Costs to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE