

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Arthur H. Smith, M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 11AP-1005
State Medical Board of Ohio,	:	(C.P.C. No. 11CVF-01-6060)
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 5, 2012

Kevin P. Byers Co., L.P.A., and Kevin P. Byers; Collis, Smiles & Collis, LLC, and Elizabeth Y. Collis, for appellant.

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

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Appellant, Arthur H. Smith, M.D., appeals the decision of the Franklin County Court of Common Pleas which affirmed the order of the State Medical Board of Ohio ("the Board") suspending his medical license and imposing monitoring, probation, and other conditions for reinstatement. For the following reasons, we affirm the trial court's decision.

{¶ 2} Dr. Smith brings the following assignments of error:

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT FOUND THE ORDER OF THE STATE MEDICAL BOARD OF OHIO

IS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.

II. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT FOUND THE ORDER OF THE STATE MEDICAL BOARD OF OHIO IN ACCORDANCE WITH LAW.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT MISSTATED OR MISUNDERSTOOD DR. SMITH'S TREATMENT HISTORY.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT EQUATED DR. SMITH'S TREATMENT FOR ANXIETY AND DEPRESSION WITH A RISK OF RELAPSE.

V. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT APPLIED THE WRONG TEST TO THE BOARD RULE WHICH IMPROPERLY EXPANDS AUTHORITY UNDER STATUTE.

VI. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO APPELLANT'S PREJUDICE WHEN IT FAILED TO CONSIDER THE TOTALITY OF THE RECORD.

{¶ 3} Most of the facts of this case are not in dispute. Dr. Smith is an emergency-medicine physician. He received his medical license in Ohio in 2004. The Board mailed a notice of opportunity to Dr. Smith on July 14, 2010. The notice stated that the Board intended to determine whether to discipline Dr. Smith based on his self-reported actions when he applied for license renewal in September 2009. These actions included alcohol use and four instances of cocaine use between May 2008 and January 2009 while Dr. Smith was in a residency program in New York.

{¶ 4} The Board looked at the totality of circumstances surrounding Dr. Smith's cocaine use, including the fact that he self-reported to his New York employer and received both in-patient and out-patient treatment while in New York. Dr. Smith later reported his prior cocaine use to his employer in Ohio who required Dr. Smith to submit to urine sample tests, attend AA meetings, and be monitored by colleagues at the hospital where he was working.

{¶ 5} Dr. Smith was ordered by the Board to undergo a 72-hour in-patient evaluation. Dr. Whitney of Shepherd Hill, a Board approved treatment provider, diagnosed Dr. Smith with cocaine abuse and determined that he was impaired in his ability to practice medicine. Such a finding led the Board to believe that Dr. Smith was in violation of R.C. 4731.22(B)(19) and (B)(26).

{¶ 6} Dr. Smith disagreed with Dr. Whitney's determinations and requested an evidentiary hearing. He was then evaluated by Gregory B. Collins, M.D., of the Cleveland Clinic, also a Board approved evaluator, who concluded that Dr. Smith was not impaired. Evidence was presented and testimony was given by both the state and Dr. Smith at a March 1, 2011 hearing. The hearing examiner recommended that the Board find Dr. Smith to be impaired and impose a suspension of his license. The hearing examiner also recommended that the Board order a 28-day period of in-patient treatment, urine, drug, and alcohol screening tests, a 5-year probationary period, as well as other conditions for reinstatement of Dr. Smith's license. Apparently these conditions have been met while the administrative appeals have been processed and Dr. Smith is again licensed in Ohio.

{¶ 7} The Board approved the hearing examiner's recommendations on May 11, 2011 finding Dr. Smith to be impaired in violation of R.C. 4731.22(B)(26). Dr. Smith appealed to Franklin County Court of Common Pleas under R.C. 119. The trial court entered a decision affirming the Board's order on October 5, 2011. Dr. Smith timely appealed once again.

{¶ 8} Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of an administrative agency if it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). "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. "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. "Substantial" evidence is evidence with some weight; it must have importance and value. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶ 9} If a preponderance of reliable, probative, and substantial evidence exists, the common pleas court must affirm the administrative agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979).

{¶ 10} In undertaking this hybrid form of review, the common pleas court must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are, by no means, conclusive.

{¶ 11} Considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer. Further, an administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377 (1994).

{¶ 12} In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a common pleas court reviewing the same order. It is incumbent on the common pleas court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the common pleas court has abused its discretion. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988).

{¶ 13} Dr. Smith's first assignment of error asserts that the trial court abused its discretion when it found that the order of the Board is supported by reliable, probative, and substantial evidence.

{¶ 14} The Board adopted the hearing examiner's conclusions of law finding that Dr. Smith's acts and conduct constitute "[i]mpairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice," as set forth in R.C. 4731.22(B)(26).

{¶ 15} The hearing examiner, in her report and recommendation, adopted the interpretation of Dr. Whitney's medical diagnosis of cocaine abuse for Dr. Smith and

found that he is impaired. The hearing examiner found this diagnosis more credible than Dr. Collin's diagnosis of reactive depression and stress and finding that Dr. Smith is not impaired. The hearing examiner cited two key differences between their evaluations. First, Dr. Whitney reviewed all of Dr. Smith's treatment and hospitalization records from 2008 and 2009 when he was in New York, Dr. Collins did not. Second, Dr. Whitney's examination occurred one and one-half years after Dr. Smith's drug use, while Dr. Collin's evaluation occurred two years after the drug use. The hearing examiner said that the New York records were crucial to understanding Dr. Smith's behavior and thought process, and to making a diagnosis.

{¶ 16} The Board was able to examine both Dr. Whitney's and Dr. Collin's diagnoses. Both experts are highly experienced practitioners in the areas of chemical dependency and addiction. The Board ultimately found Dr. Whitney's diagnosis to be more credible. It should be noted that the Board is very familiar with impairment as it is understood under R.C. 4731.22(B)(26). There is nothing to indicate that Dr. Whitney's diagnosis is not reliable, probative, and substantial evidence.

{¶ 17} Dr. Smith presents arguments that generally attack the credibility of Dr. Whitney's diagnosis, assessment methods, and medical theory. These arguments were already taken into account at the March 1, 2011 hearing. They were evaluated by the Board and weighed by the trial court. It is not the place of the appellate court to re-examine the evidence, but only to determine if the trial court abused its discretion in doing so.

{¶ 18} Dr. Smith also argues that to find him impaired is improper. He asserts that impairment must be current, and that he had been sober for 28 months at the time of the Board meeting. Dr. Smith argues that there is no evidence that he was impaired and could not perform his job as a physician. Dr. Smith argues that lacking this evidence, there is not the required quantum of reliable, probative, and substantial evidence.

{¶ 19} The Board is not required to show evidence of patient harm, or deficient work performance in order to take disciplinary action. *Ridgeway v. State Med. Bd.*, 10th Dist. No. 07AP-446, 2008-Ohio-1373, ¶ 20. One aspect of the Board's function is to care for the safety of the public. It therefore is entirely appropriate to take prophylactic steps when a licensed physician is impaired.

{¶ 20} The time lapse between Dr. Smith's cocaine use and when the Board issued its order need not be given the weight Dr. Smith suggests. Dr. Smith used cocaine on four separate occasions over a nine-month period. Dr. Smith, by his own admission, is still being treated for depression—a factor he says contributed to the cocaine use in New York. Dr. Smith continued to use cocaine after going through in-patient treatment periods of three and five days and while undergoing intensive out-patient treatment. In light of this history, there was a reasonable concern that relapse may occur. The 28-day treatment program was partly a prophylactic against such a relapse, not just a physical drying out for Dr. Smith.

{¶ 21} The trial court did not abuse its discretion in finding that the Board's decision is supported by reliable, probative, and substantial evidence. The trial court noted that it was the hearing examiner who heard the evidence and evaluated the credibility and it was the Board with its considerable expertise who adopted the examiner's conclusions.

{¶ 22} The first assignment of error is overruled.

{¶ 23} Dr. Smith's second assignment of error asserts that the Board's order is not in accordance with the law. First, Dr. Smith argues that Ohio Adm.Code 4731-16-02(B)(3)(a)(i) is an improper expansion by the Board of the statutory authority granted by R.C. 4731.22.

{¶ 24} The purpose of administrative rule-making is to facilitate the administrative agency's placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency. In other words, administrative agency rules are an administrative means for the accomplishment of a legislative end. *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App.3d 108, 110 (10th Dist.1983). It is well-established that where by statutory authority an administrative agency promulgates rules and regulations governing its activities and procedures, such rules are valid and enforceable unless they are unreasonable or in conflict with statutory enactments covering the same subject matter. *State ex rel. De Boe v. Indus. Comm.*, 161 Ohio St. 67 (1954). An administrative rule cannot add or subtract from the legislative enactment. *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Ohio Bur. of Emp. Servs.*, 21 Ohio St.3d 5, 10 (1986). Nor can

an administrative rule exceed the rule-making authority delegated by the General Assembly. *Sterling Drug, Inc. v. Wickham*, 63 Ohio St.2d 16, 19 (1980).

{¶ 25} R.C. 4731.22(B) allows the Board to suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate. R.C. 4731.22(B) provides, in pertinent part, as follows:

(19) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including, but not limited to, physical deterioration that adversely affects cognitive, motor, or perceptive skills.

* * *

(26) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice.

{¶ 26} Under this authority, the Board promulgated Ohio Adm.Code 4731-16-12 for out-of-state impairment cases. Section (C) provides:

A certificate holder who neither resides nor practices in Ohio who is diagnosed or treated for chemical abuse or chemical dependency outside Ohio must report that diagnosis or treatment in renewing his or her certificate.

Section (E) states:

A certificate holder who neither resides nor practices in Ohio who relocates to Ohio after being diagnosed or treated for chemical abuse or chemical dependency must submit to an evaluation by a treatment provider approved under section 4731.25 of the Revised Code and this chapter of the Administrative Code.

Subsection (E)(1) states:

If the certificate holder has less than one year documented sobriety at the time of relocation to Ohio, he or she must submit to an evaluation that meets all the requirements of rule 4731-16-05 of the Administrative Code, and must complete two years of aftercare and the applicable treatment

as required by paragraph (B)(3) of rule 4731-16-02 of the Administrative Code.

{¶ 27} The Board also promulgated Ohio Adm.Code 4731-16-02; general procedures in impairment cases under the authority of R.C. 4731.22. Ohio Adm.Code 4731-16-02(B) states:

In cases where the only disciplinary action initiated against the individual is for violation of * * * (B)(26) of section 4731.22 of the Revised Code * * * the following general pattern of action shall be followed:

Before being eligible to apply for reinstatement of a license suspended under this paragraph the impaired individual must demonstrate to the board that the individual can resume practice in compliance with acceptable and prevailing standards of care under the provisions of the individual's certificate. Such demonstrations shall include but shall not be limited to the following:

(a) Certification from a treatment provider approved under section 4731.25 of the Revised Code that the individual has successfully completed all required treatment, as follows:

(i) Except as provided in paragraph (B)(3)(a)(ii) of this rule, the required treatment **shall include inpatient or residential treatment that extends a minimum of twenty-eight days** with the following exception: If the individual has previously completed an inpatient or residential treatment program of at least twenty-eight days and maintained sobriety for at least one year following completion of that inpatient or residential treatment, the treatment required shall be determined by the treatment provider.

(Emphasis added.)

{¶ 28} Dr. Smith argues that Ohio Adm.Code 4731-16-02(B)(3)(a)(i) improperly expands upon R.C. 4731.22(B)(26)(a) in mandating at least four weeks of in-patient treatment in every single instance of a licensee returning to Ohio.

{¶ 29} R.C. 4731.22 allows for the suspension of a medical license when a physician is impaired due to drug, alcohol, or other substances. The Board has set up rules and procedures to generally deal with impairment cases. Dr. Smith is incorrect in saying that

the rules mandate that he or any physician receive 28 days of in-patient treatment for failing to document one year of sobriety before returning to Ohio. Such treatment is only required for a licensee who is found to be impaired. Ohio Adm.Code 4731-16-02(B)(3)(a)(i) is not unreasonable and is not an improper expansion of the statute.

{¶ 30} Second, Dr. Smith argues that the Board unlawfully infringed upon his right to due process. Dr. Smith argues that it was pre-determined that he be required to undergo 28 days of in-patient treatment no matter what the evidence indicated. Dr. Smith argues that the Board's rules fail the rational basis test and do not pass constitutional muster. He asserts that it is both unreasonable and arbitrary for the Board to declare that a whole class of licensees and applicants must undergo at least 28 days of in-patient treatment because of a history of drug use, no matter how remote in time the conduct was and notwithstanding interim treatment. This assertion again overlooks the fact the licensees or applicants must be found to be impaired before the 28-day treatment is mandated.

{¶ 31} When reviewing a statute on due process grounds, we apply a rational basis test unless the statute restricts the exercise of fundamental rights. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 49. A statute will be found valid under the rational basis test if it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and if it is not unreasonable or arbitrary. *Benjamin v. City of Columbus*, 167 Ohio St. 103, 110 (1957). When considering the reasonableness of a rule, deference is given to the agency's expertise in evaluating the reasonableness and lawfulness of the rule. *Midwestern College of Massotherapy v. Ohio Med. Bd.*, 102 Ohio App.3d 17, 24 (10th Dist.1995).

{¶ 32} The Medical Practices Act (R.C. 4731) is a valid exercise of the state's police power to regulate the public health and welfare and is constitutional. *Id.* at 23. The powers which the General Assembly has bestowed upon the State Medical Board are administrative in character. *Id.* The Board is charged under R.C. 4731.22 by the legislature to create and enforce rules that promote the public health and welfare by ensuring that those who are licensed to practice medicine are in no way impaired.

{¶ 33} Dr. Smith's characterization of the rules does not accurately reflect the content of the rules. There is nothing automatic about requiring 28 days of in-patient

treatment for those licensees returning to Ohio. First there must be a finding of impairment, which is evaluated by a Board-approved physician and later reviewed by the Board itself. Then the rules further divide the licensees returning to Ohio into smaller categories: (1) those who have less than one year of sobriety; (2) those who have greater than one but less than five years of sobriety; and (3) those with greater than five years of sobriety. Ohio Adm.Code 4731-16-12(E). Finally Ohio Adm.Code 4731-16-12(D) allows:

If a certificate holder self-reports diagnosis or treatment as required by paragraph (C) of this rule, the board may forgo disciplinary action if it determines that the certificate holder:

- (1) Has not been subject to discipline in any other jurisdiction;
- (2) Is receiving or has completed treatment with a treatment provider acceptable to the medical licensing authority of the jurisdiction in which he or she resides;
- (3) Has not relapsed;
- (4) Is participating in or has successfully completed participation in a monitoring program or diversion program acceptable to the medical licensing authority of the jurisdiction in which he or she resides.

Section (D) clearly addresses the question of whether a licensee has already experienced or currently is experiencing acceptable treatment. Licensees returning to Ohio who have used drugs sometime in the past are not pre-determined to undergo treatment. Ohio Adm.Code 4731-16-12 is reasonable in addressing the need to properly ensure that the licensees are not currently impaired. Ohio Adm.Code 4731-16-12 is not applied arbitrarily, but reasonably considers the length of sobriety and what treatment has been applied. We have already found that Ohio Adm.Code 4731-16-02(B)(3)(a)(i) is reasonable. Dr. Smith's due process rights have not been infringed by requiring him to undergo 28 days of in-patient treatment.

{¶ 34} Third, Dr. Smith argues that there is no mechanism to challenge the treatment mandated by the Board's rules, and that the absoluteness of the rule turns the Board's administrative hearing process into a sham, in violation of his equal protection rights. This argument is not well-taken. The procedural and administrative rules that the

Board applies are reasonable and afford licensees multiple opportunities to argue their position.

{¶ 35} Fourth, Dr. Smith argues that his equal protection rights were violated when a similarly-situated licensee, Paul Lopreato, was not required to go through the 28 day in-patient treatment while the Board was required to place Dr. Smith in treatment if it found him impaired.

{¶ 36} These two cases are readily distinguishable. *See In re Paul Dominic Lopreato*, State Medical Board No. 10-CRF-104 (Apr. 13, 2011). Lopreato used prescription pain killers as well as alcohol and cocaine. He had already entered into an agreement with the Kentucky Medical Board before coming before the Ohio Board. He was in a 28 day in-patient treatment program in 2004-2005. After Lopreato relapsed, he went through a 12 week in-patient treatment program. Lopreato also had over two and one-half years of documented sobriety when he came before the Ohio Board. *Id.* The hearing examiner in Lopreato's case specifically highlighted a part of the Ohio Adm.Code 4731-16-02(B)(3)(a)(i):

If the individual has previously completed an inpatient or residential treatment program of at least twenty-eight days and maintained sobriety for at least one year following completion of that inpatient or residential treatment, the treatment required shall be determined by the treatment provider.

(Emphasis sic.) (Report and Recommendation, at 11.) Dr. Smith is not similarly situated to Lopreato. The Board rules clearly separate them into two different categories. As such, Dr. Smith's right to equal protection was not violated.

{¶ 37} Having found that the Board's rules do not violate due process and that Dr. Smith's equal protection rights have not been violated, the second assignment of error is overruled.

{¶ 38} Dr. Smith's third assignment of error asserts that the trial court abused its discretion when it misstated his treatment history in an apparent contradiction in its decision. The trial court observed that "[a]ppellant underwent a five day inpatient treatment in 2008 and after his use in January 2009, a three day detoxification." (Trial court decision, at 4.) The trial court also stated that "[a]ppellant has never undergone an

in-patient regimen. * * * Had Appellant completed such in-patient programs, the issue of disparate treatment might have greater persuasive value." (Trial court decision, at 10.) Dr. Smith is mistaken. The trial court, on page 10, is plainly referring to the extended 28 day in-patient treatment programs that Dr. Smith is opposed to taking. There is no contradiction in the trial court's decision.

{¶ 39} The third assignment of error is overruled.

{¶ 40} Dr. Smith's fourth assignment of error asserts that the trial court abused its discretion when it observed that he is still being treated for anxiety and depression. Dr. Smith believes the trial court is implying that he is "damaged goods" anyway and if the Board required additional treatment then "no harm, no foul." The trial court stated "[t]he Court need only note that Appellant still is treat[ed] for the anxiety and depression that was noted as a cause for his substance abuse. It is within the discretion of the Board to assure that any likelihood of a relapse is addressed." (Trial court decision, at 8.) There is nothing improper in noting that, according to Dr. Smith's own interpretation, his anxiety and depression contributed to his cocaine use and that he is still being treated for those conditions. This is a relevant factor to consider when evaluating Dr. Smith's chances of relapse.

{¶ 41} The fourth assignment of error is overruled.

{¶ 42} Dr. Smith's fifth assignment of error asserts that the trial court abused its discretion in applying the wrong test to determine if the Board's rules were improperly expanded beyond their statutory authority.

{¶ 43} Dr. Smith argues that the trial court did not evaluate whether the Board's rules, particularly Ohio Adm.Code 4731-16-02(B)(3)(a)(i), were unreasonable. An administrative rule that is issued pursuant to statutory authority must not be unreasonable or conflicting with a statute covering the same subject matter. *Celebrezze*, 68 Ohio St.3d 377. There is no evidence that the trial court applied a different test other than whether the rule is unreasonable. The court simply disagreed with Dr. Smith's analysis.

{¶ 44} The fifth assignment of error is overruled.

{¶ 45} Dr. Smith's sixth assignment of error asserts that the trial court abused its discretion when it failed to consider the totality of the record. Dr. Smith bases this

argument on a sentence in the trial court's decision where the court is referring to the record in the *Lopreato* case, not in the case at bar. The trial court denied a motion by Dr. Smith to introduce additional evidence, but did allow the record to be supplemented with the public record of the *Lopreato* case. The *Lopreato* case was not available until after the Board suspended Dr. Smith's license. The trial court's statement that "[t]he Court is not privy to the entire record upon which the Hearing Examiner based the recommendation," is in reference to the hearing examiner in the *Lopreato* case who would have conducted a hearing and taken evidence, not the hearing examiner in Dr. Smith's case. (Trial court decision, at 10.)

{¶ 46} The trial court did have the public record of the *Lopreato* case and all of the evidence properly submitted for the case at bar. There is nothing to indicate that the trial court did not read and consider all the evidence in this case.

{¶ 47} The sixth assignment of error is overruled.

{¶ 48} Having overruled all six assignments of error, we affirm the decision of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN, J., concurs.
BRYANT, J., concurs separately.

BRYANT, J., concurring separately.

{¶ 49} Although I agree with the majority's disposition of the assignments of error, I write separately to clarify the reasons for disposing of Dr. Smith's arguments regarding the Board's alleged improper administrative rule making and due process violations. Dr. Smith's arguments re-package in various ways Dr. Smith's belief that he should not be subject to the 28-day in-patient requirement in Ohio Adm.Code 4731-16-02(B)(3)(a)(i). Dr. Smith's arguments fail, however, as the 28-day requirement in Ohio Adm.Code 4731-16-02(B)(3)(a)(i) is a reasonable, validly enacted administrative rule, which Dr. Smith is subject to as a result of his license to practice medicine in Ohio.

{¶ 50} Dr. Smith alleges that the 28-day in-patient requirement in Ohio Adm.Code 4731-16-02(B)(3)(a)(i) unlawfully expands upon R.C. 4731.22(B)(26)(a)'s requirement

that an impaired physician seeking reinstatement complete "any 'required' inpatient treatment." (Appellant's brief, 16.) While administrative rules must be reasonable, and not in conflict with statutory enactments covering the same subject, an administrative agency may " 'fill[] a gap or define[] a term in a reasonable way in light of the Legislature's design controls.' " *Cosby v. Franklin Cty. Dept. of Job and Family Servs.*, 10th Dist. No. 07AP-41, 2007-Ohio-6641, ¶ 38, quoting *Regions Hosp. v. Shalala*, 522 U.S. 448, 449-450 (1998), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Pursuant to its rule-making authority in R.C. 4731.05(A), the Board validly promulgated Ohio Adm.Code 4731-16-02(B)(3)(a)(i) to effectuate R.C. 4731.22(B)(26)(a)'s treatment requirement. The rule fills in the statute's gap regarding the length of time an impaired physician must spend in in-patient treatment before the physician is eligible for license reinstatement: 28 days. The rule does not conflict with the statute, helps to effectuate the General Assembly's policy regarding impaired physicians, and is a reasonable exercise of the Board's rule-making authority.

{¶ 51} Regarding due process, Dr. Smith alleges that the "mechanical application of [Ohio Adm.Code 4731-16-02(B)(3)(a)(i)] denied Dr. Smith the opportunity to be heard." (Appellant's brief, 18.) Dr. Smith was not denied the opportunity to be heard: he enjoyed a lengthy hearing before the hearing examiner, was able to present witnesses, and cross-examine the Board's witnesses. Dr. Smith's due process argument, however, truly revolves around Dr. Smith's belief that the Board should engage in a case-by-case analysis regarding an impaired physician's fitness to return to practice, rather than mandating evidence of 28-days of in-patient treatment. (Appellant's brief, 18-19.)

{¶ 52} A state may regulate a business pursuant to its police powers, and due process demands " ' only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.' " *Midwestern College of Massotherapy v. Ohio Med. Bd.*, 102 Ohio App.3d 17, 26 (10th Dist.1995), citing *State ex rel. Clark v. Brown*, 1 Ohio St.2d 121 (1965), quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934). The 28-day requirement in Ohio Adm.Code 4731-16-02(B)(3)(a)(i) properly forwards the public welfare and health, by creating an easily ascertainable standard for the Board to determine whether an impaired physician is ready to have their license reinstated. The requirement is not

unreasonable, arbitrary, or capricious. Accordingly, the application of the rule to Dr. Smith did not violate Dr. Smith's due process rights.
