

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Anamika Jain, M.D., :
Appellant-Appellant, :
v. : No. 09AP-1180
Ohio State Medical Board, : (C.P.C. No. 09CVF07-11053)
Appellee-Appellee. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on June 22, 2010

Dinsmore & Shohl, LLP, Eric J. Plinke, and Gregory P. Mathews, for appellant.

Richard Cordray, Attorney General, and Karen A. Unver, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Anamika Jain, M.D., appellant, appeals a November 9, 2009 judgment of the Franklin County Court of Common Pleas, in which the court denied her motion to admit additional evidence and granted the motion to dismiss filed by the State Medical Board of Ohio ("board"), appellee.

{¶2} For reasons related to the nature of the legal issues at hand, many of the underlying facts in this case are not contained in the record. On May 13, 2009, the board issued appellant a notice that the board intended to determine whether to limit, revoke,

suspend, refuse to register or reinstate appellant's certificate to practice medicine and surgery. A copy of the notice was also delivered via certified mail to appellant's Nevada attorney. The notice alleged that, on or about February 3, 2009, the Medical Board of California issued a notice of out-of-state suspension order to appellant, notifying her that her California medical license had been suspended on the basis that her Nevada medical license had been suspended on November 14, 2008. The suspension of appellant's Nevada license stemmed from the allegations of patients at Valley Eye Center, which appellant co-owned. Numerous patients reported damage to their vision after receiving LASIK treatment at the eye center. In the notice, the board indicated that the California notice of suspension order constituted a violation of R.C. 4731.22(B)(22), which allows the board to take action on appellant's Ohio medical license if any action is taken on the medical license issued by another jurisdiction. The notice also indicated that:

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. 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.

* * *

In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to register or reinstate your certificate to practice medicine and surgery or to reprimand you or place you on probation.

{¶3} The record before us includes a letter from appellant's Nevada attorney, dated May 21, 2009, and received by the board on May 26, 2009. In the letter, appellant's

Nevada attorney indicated she was "writing on behalf of our client, Dr. Anamika Jain, in response to your correspondence of May 13, 2009, which Dr. Jain received on or about May 18, 2009." The letter went on to summarize the recent actions taken by the California medical board and the status of the actions previously taken by the Nevada medical board. The final three paragraphs of the letter indicated:

Please note that at the time of Dr. Jain's hearing, the Ohio Medical Board had been the only state that had not taken action against Dr. Jain. We find it curious that the Ohio Medical Board has now opened an investigation. Dr. Jain contends she did nothing wrong; in fact, her husband, Vikas Jain, was performing the same duties in Nevada as he had been performing in Ohio after his license revocation.

With regard to a request for a hearing, Dr. Jain is in the process of obtaining Ohio counsel.

If you have any questions or require further information, please do not hesitate to contact me.

{¶4} Apparently, an administrator for the board, Barbara Jacobs, reviewed the May 21, 2009 letter and determined it was not a request for hearing, and the full board did not review the letter to determine whether it constituted a request for hearing. On July 8, 2009, the matter came before the board, and the board voted to non-permanently revoke appellant's license to practice medicine. On July 8, 2009, the board mailed appellant its findings, order, and adjudication entry.

{¶5} On July 23, 2009, appellant filed an appeal of the board's order with the Franklin County Court of Common Pleas. On August 28, 2009, the board filed a motion to dismiss appellant's appeal for failure to exhaust administrative remedies. On September 30, 2009, appellant filed a motion to admit additional evidence, which sought to include the following evidence that was not in the board's certified record: (1) the

minutes from the board's July 8, 2009 meeting regarding the board's deliberations; (2) the audiotape of the board's July 8, 2009 meeting; (3) the transcript of the audiotape of the board's July 8, 2009 meeting; (4) the memorandum from Jacobs to the board members, dated June 25, 2009; (5) the affidavit of Jacobs that contains Jacobs' testimony regarding the board's process of determining whether a timely hearing request has been filed in response to a notice of opportunity for hearing; and (6) the affidavit of appellant's Nevada counsel. On November 9, 2009, the trial court issued its decision denying appellant's motion to admit additional evidence and granting the board's motion to dismiss. Appellant appeals the court's judgment, asserting the following assignments of error:

[I.] The court of common pleas erred in dismissing Dr. Jain's appeal for failure to exhaust administrative remedies.

[II.] The court of common pleas erred in denying Dr. Jain's Motion to Admit Additional Evidence.

{¶6} Appellant argues in her first assignment of error that the trial court erred in dismissing her appeal due to her failure to exhaust administrative remedies. In an appeal from a board order, a reviewing trial court is bound to uphold the order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122; R.C. 119.12. On questions of law, however, the common pleas court does not exercise discretion and this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, paragraph one of the syllabus.

{¶7} In the present case, appellant argues that the board's order violated her due process rights by failing to construe her May 21, 2009 letter as a request for hearing and revoking her license without a hearing. "The fundamental requirement of procedural due

process is notice and hearing, that is, an opportunity to be heard." *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677, 684. Due process requires that an individual be given an opportunity for a hearing before being deprived of a significant property interest. *Id.* The type of hearing necessary is determined by balancing the government interest against the private interest. *Id.*

{¶8} R.C. 119.07 provides:

[T]he agency shall give notice to the party informing the party of the party's right to a hearing. Notice 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.

{¶9} R.C. 4731.22(J) provides:

If the [medical] board is required by Chapter 119. of the Revised Code to give notice of an opportunity for a hearing and if the individual subject to the notice does not timely request a hearing in accordance with section 119.07 of the Revised Code, 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. In that final order, the board may order any of the sanctions identified under division (A) or (B) of this section.

{¶10} In the present case, the trial court concluded that, because appellant failed to file a request for hearing, appellant failed to exhaust her administrative remedies, and she was not entitled to review by the court of common pleas. A party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings. *MacConnell v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-433, 2005-Ohio-1960, ¶21. The doctrine of exhaustion requires a person to exhaust administrative remedies before seeking redress from the judicial system. *Basic Distrib. Corp. v. Ohio*

Dept. of Taxation, 94 Ohio St.3d 287, 290, 2002-Ohio-794, citing *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26. The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111; *Prairie Twp. Bd. of Trustees v. Hay*, 10th Dist. No. 01AP-1198, 2002-Ohio-4765, ¶26. Allowing 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. *Carmack v. Caltrider*, 164 Ohio App.3d 76, 2005-Ohio-5575, ¶6, quoting *Kaltenbach v. Mayfield* (Apr. 27, 1990), 4th Dist. No. 89-CA-10. The failure to exhaust administrative remedies is not a jurisdictional defect, but is rather an affirmative defense if timely asserted and maintained. *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, syllabus.

{¶11} Here, under appellant's first assignment of error, appellant presents several arguments: (1) the doctrine of exhaustion of administrative remedies does not apply because appellant was challenging the board's internal determination that her timely response to the board's citation did not constitute a request for a hearing under R.C. 119.07; (2) application of the doctrine of exhaustion of administrative remedies violated appellant's due process rights; and (3) appellant made a timely and adequate request for hearing and properly presented her position, arguments, and contentions in writing under R.C. 119.07.

{¶12} With regard to appellant's first argument, appellant maintains that the doctrine of exhaustion of administrative remedies should not apply here because the threshold issue was whether the procedures used by the board violated appellant's due

process rights. In essence, what appellant contends is that the trial court should not have applied the doctrine of exhaustion of administrative remedies because the board improperly denied her the opportunity to exhaust her administrative remedies based upon unconstitutional procedures. However, the trial court did not merely apply the doctrine of exhaustion of administrative remedies without any consideration of appellant's due process arguments. Before proceeding to the issue of whether appellant failed to exhaust her administrative remedies, the trial court first addressed the board's procedures. Specifically, the trial court concluded (1) appellant failed to cite any legal authority to support her contention that the full board was required to consider the issue of whether the May 21, 2009 letter constituted a hearing request; and (2) appellant cited no authority to support her argument that, if a hearing is not required under R.C. 4731.22(J), the board must conduct an objective review of the evidence to determine whether appellant requested a hearing. In effect, the trial court was finding that appellant failed to demonstrate that the board's procedures violated her due process rights. We concur with these conclusions and find appellant fails to direct us to any authority that demands that she or other like-positioned individuals be afforded any additional procedural safeguards. The procedure implemented by the board afforded appellant notice and an opportunity to be heard, but appellant failed to invoke such opportunity, as discussed in detail *infra*. Therefore, this argument is without merit.

{¶13} With regard to appellant's second argument, that the trial court violated her due process rights by applying the doctrine of exhaustion of administrative remedies, we disagree. Appellant argues that, in dismissing her appeal, the court violated her due process rights by ignoring the primary issues raised in the appeal, which were that she

made an adequate request for a hearing in a timely manner and the procedures used by the board were inadequate. However, the trial court addressed both of these issues before applying the doctrine of exhaustion of administrative remedies. As discussed above, the trial court found appellant failed to demonstrate that the procedure used by the board was improper or that the board was required to perform any additional duties. Importantly, it found that, even if it were to consider the May 21, 2009 letter, the contents of the letter did not constitute a request for hearing. Thus, the trial court did, in fact, address the essential issues in appellant's appeal even though it ultimately decided the matter must be dismissed based upon the failure to exhaust administrative remedies.

{¶14} With regard to appellant's third argument, that the May 21, 2009 letter constituted a timely and adequate request for hearing, we agree with the trial court that the letter did not constitute a request for hearing. To support her claim that the board should have construed her letter as a request for hearing, appellant terms her duty variously as one to "respond to" the board's notice of opportunity for hearing, to submit a "timely written response" to the board, to show that she "fully intends" to request a hearing, and to make an "effort to challenge" the board's order. However, her duty was greater than any of these she urges. Appellant's duty is embodied by R.C. 119, which provides that a "party is entitled to a hearing if the party requests it," and R.C. 4731.22(J), which provides that the individual must "timely request a hearing." Thus, appellant was required to specifically request a hearing and not just "respond to" the order, "intend" to request a hearing, or make "an effort" to challenge the order.

{¶15} Although appellant maintains it was fundamentally unfair for the administrator to strictly construe her May 21, 2009 letter as not being a request for

hearing, we find that, even construing it liberally, the letter did not constitute a request for hearing. A plain reading of the letter fails to reveal any request for a hearing therein. In the only passage of the letter that mentions a request for a hearing, appellant's Nevada counsel clearly does not request a hearing and, in fact, leaves any request open for a yet-to-be-obtained Ohio attorney to pursue at a later time. Specifically, the relevant portion of the letter indicates, "With regard to a request for a hearing, Dr. Jain is in the process of obtaining Ohio counsel." This court envisions no way that a reasonable reader of this passage could construe it as a present request for a hearing. The only reasonable interpretation is that any request for hearing would be pursued by an unnamed Ohio attorney at a later date. Thus, we find the trial court did not err when it found appellant's May 21, 2009 letter did not constitute a request for hearing. For all the above reasons, the trial court properly dismissed appellant's appeal for failure to exhaust administrative remedies. Appellant's first assignment of error is overruled.

{¶16} Appellant argues in her second assignment of error that the trial court erred when it denied her motion to admit additional evidence. As indicated in the summary of facts above, appellant filed a motion with the common pleas court to admit the following additional evidence, which was not in the board's certified record: (1) the minutes from the board's July 8, 2009 meeting regarding the board's deliberations ("item 1"); (2) the audiotape of the board's July 8, 2009 meeting ("item 2"); (3) the transcript of the audiotape of the board's July 8, 2009 meeting ("item 3"); (4) the memorandum from Jacobs to the board members ("item 4"), dated June 25, 2009; (5) an affidavit of Jacobs that contains Jacobs' testimony regarding the board's process of determining whether a timely hearing request has been filed in response to a notice of opportunity for hearing

("item 5"); and (6) the affidavit of appellant's Nevada counsel ("item 6"). Appellant asserts that, after she appealed the board's decision to the common pleas court, she discovered that the board was not aware of several items that should have been made part of the record.

{¶17} The trial court denied appellant's motion to submit additional evidence, citing R.C. 119.12, which provides, in pertinent part:

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

Thus, in an R.C. 119.12 proceeding, " 'a common pleas court may exercise its discretion to admit additional evidence into the record in an appeal from an administrative proceeding only if it has first determined that the additional evidence is both newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.' " *Chong Hadaway, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-302, 2003-Ohio-5584, ¶17, quoting *Daniels Buick Co. v. Gen. Motors Corp.* (Oct. 13, 1998), 10th Dist. No. 97APE12-1701. Newly discovered evidence is evidence that was in existence at the time of the administrative hearing. *Cincinnati City School Dist. v. State Bd. of Edn.* (1996), 113 Ohio App.3d 305, 317. Newly discovered evidence does not refer to newly created evidence. *Golden Christian Academy v. Zelman* (2001), 144 Ohio App.3d 513, 517.

{¶18} This court reviews a trial court's decision regarding whether to admit additional evidence, pursuant to R.C. 119.12, under an abuse-of-discretion standard.

See *Northfield Park Assn. v. Ohio State Racing Comm.*, 10th Dist. No. 05AP-749, 2006-Ohio-3446, ¶57. An 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.

{¶19} Here, none of the items appellant sought to add to the trial court's record met the requirements for newly discovered evidence as set forth in R.C. 119.12. Initially, item 1, the board's minutes from the July 8, 2009 meeting, was already included as part of the board's record. As to items 2, 3, and 6, these were not in existence at the time of the board's hearing and cannot be deemed newly discovered evidence. See *Cincinnati City School Dist.* at 317. Items 2, 3, and 6 were also newly created since the board's hearing, which does not fit within the definition of newly discovered evidence. See *Golden Christian Academy* at 517. With regard to item 4, Jacobs' June 25, 2009 memorandum to the board, although appellant apparently argued to the trial court that it was in existence, but unavailable to her due to the board's confidentiality statute, appellant fails to present such an argument on appeal, and, regardless, she presents no authority to support that this type of unavailability would fit within the requirements of R.C. 119.12. Furthermore, item 5 is an affidavit prepared by Jacobs for purposes of another case; thus, it was not newly discovered and could have been ascertained at the time of the board hearing.

{¶20} Notwithstanding the failure of the additional evidence to meet the requirements of R.C. 119.12, appellant maintains that the requirements in R.C. 119.12 presuppose that the licensee was given an opportunity to respond to and participate in the administrative hearing, and they have no application here, where the licensee contends that the procedures used by the board systematically excluded material

documents from the record. However, we have already determined that appellant was given a proper opportunity consistent with due process to request and participate in an administrative hearing, but failed to do so. If appellant had wanted to ensure certain evidence would be included in the record both before the board and the trial court, she should have taken the proper steps to procure a hearing. Furthermore, items 5 and 6 clearly do not fit within the purview of appellant's argument that the board systematically excludes these documents from the record, as item 5 was an affidavit prepared by Jacobs for the purposes of another case, and item 6 was created by appellant's Nevada counsel after the hearing. For these reasons, we find the trial court did not abuse its discretion when it denied appellant's motion to admit additional evidence. Therefore, appellant's second assignment of error is overruled.

{¶21} Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
