

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SCOTT A. VINCI, R.PH.	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
and	:	Patricia A. Delaney, J.
	:	
CONNIE J. CAMPBELL, R.PH	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	
	:	Case Nos. 2008 AP 08 0052 and
	:	2008 AP 08 0053
	:	
OHIO STATE BOARD OF PHARMACY	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Administrative Appeal From Tuscarawas County Court Of Common Pleas Case Nos. 2007 AA 03 0208 & 2007 AA 03 0216

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: February 10, 2010

APPEARANCES:

For Plaintiffs-Appellees

For Defendant-Appellant

DOUGLAS E. GRAFF
604 East Rich Street
Columbus, Ohio 43215-5341

NANCY H. ROGERS
Attorney General
MELISSA L. WILBURN
Assistant Attorney General
Ohio State Board of Pharmacy
77 South High Street, Room 1702
Columbus, Ohio 43215-6126

Edwards, J.

{¶1} In Case No. 2008 AP 08 0052, appellant Ohio State Board of Pharmacy appeals from the July 24, 2008, Judgment Entry of the Tuscarawas County Court of Common Pleas in Case No. 2007 AA 03 0208 reversing and vacating the Order of the Ohio State Board of Pharmacy suspending the pharmacist license of Scott Vinci for a period of five years. Appellant, Ohio State Board of Pharmacy, in Case No. 2008 AP 08 0053, appeals from the July 24, 2008 Judgment Entry of the Tuscarawas County Court of Common Pleas in Case No. 2007 AA 03 0216 reversing and vacating the Order of the Ohio State Board of Pharmacy suspending the pharmacist license of Connie Campbell for a period of three years.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee Scott Vinci is the owner of and a pharmacist at Dusini Drug, a small independent pharmacy located in New Philadelphia, Ohio. Appellee Connie Campbell is a pharmacist at Dusini Drug.

{¶3} On July 19, 2005, the Ohio State Pharmacy Board issued Notices of Opportunity for Hearing to Dusini Drug and appellees Vinci and Campbell. Each Notice was one hundred thirty-eight (138) pages long, consisting of six hundred fifty-seven (657) paragraphs. Paragraphs 2 through 331 of the Notice alleged that the specified pharmacist at Dusini Drug: did knowingly sell, conspire to sell, and/or aid and abet the sale of a controlled substance when the conduct was not in accordance with Chapter 3719., 4729., and 4731. of the Ohio Revised Code, to wit: [the pharmacist] sold controlled substances to [the listed patients] when not for a legitimate medical purpose issued by a prescriber acting in the usual course of his professional practice and in

compliance with the administrative code rules addressing pain management and violating Rule 4729-5-30 of the Ohio Administrative Code and 21 CFR 1306.04. Similar violations were alleged in Paragraphs 332 through 657 of the Notices, except the charges in these paragraphs involved dangerous drugs other than controlled substances.

{¶4} An administrative hearing before the Ohio State Board of Pharmacy commenced on January 16, 2007. The following evidence was adduced at the hearing.

{¶5} At the hearing, David Gallagher, a compliance agent with the Ohio State Board of pharmacy, testified that he was assigned to investigate Dusini Drug and appellees Campbell and Vinci. Gallagher testified that in late 2002, Dr. Edward DeHass came to New Philadelphia to open up a pain clinic known as Professional Pain Management of Ohio (“PPMO”). The clinic was near the off ramps for I-77. Prior to opening the clinic, Dr. DeHass sent out mass mailings in Kentucky, West Virginia and Ohio announcing his opening. He also visited area pharmacies to introduce himself and provided the pharmacy with a letter explaining the nature of his practice. Previously, Dr. DeHass had a pain management clinic along the Ohio River.

{¶6} Gallagher testified that between mid and late February of 2003, he started receiving telephone calls complaining about PPMO and Dr. DeHass’ prescriptions. According to Gallagher, four of the calls came from area pharmacies in New Philadelphia “indicating that they had been starting to see several of PPMO’s customers and that they were very alarmed by it and they were seeing several red flags that worried them about whether the prescribing habits of the doctor were legitimate.” Transcript at 26. As a result of his surveillance of the pain clinic, Gallagher learned that

customers of the clinic were going to Dusini Drug, which was approximately three to five miles from the clinic.

{¶7} As a result of the complaints, Gallagher began investigating PPMO in February of 2003. PPMO closed its doors in late December of 2003.

{¶8} Gallagher testified that he went to Dusini Drug on January 13, 2004 to collect the prescriptions from PPMO and discovered that Dusini had filled quite a few of the PPMO prescriptions, causing him to ask questions of the pharmacists. He testified that appellees were not under investigation at that time. Appellees Connie Campbell and Scott Vinci were both interviewed by Agent Gallagher. Gallagher testified that most of the prescriptions filled at Dusini for PPMO were for two drugs, Hydrocodone 10 and Carisoprodol 350 milligrams (also known as soma), which is a muscle relaxant. Upon reviewing the pharmacy records, he discovered that in less than four months, the pharmacy had dispensed in excess of 500,000 doses. Gallagher testified that there were a total of 1,581 PPMO customers that went to Dusini Drug. He further testified that 78% of everything Dusini Drug did from PPMO came in the last four months of 2003.

{¶9} When asked why the citation issued to appellees only contained approximately 328 patients, Gallagher responded as follows:

{¶10} "THE WITNESS: The citation was prepared by myself and other office staff with the mind set that the PPMO customer's (sic) contained in it were those who had 12 weeks of continuous therapy or more as referred to and addressed and the Medical Board's Administrative Rule, regarding intractable pain and how to handle it. In it, in creating the documents, the citation format, we put in the entire patient profiles of

these PPMO customers at Dusini Drugs as well as in the other citations. They each mirror each other.” Transcript at 39.

{¶11} Gallagher was questioned about the four different pharmacies that contacted him in February of 2003 with concerns about PPMO. When asked what concerns the pharmacists at those pharmacies expressed to him, he responded as follows:

{¶12} “A. They stated that they were starting to see customers from Professional Pain Management coming in and it was the red flags that they were talking about. They had great concerns about the way these customers were coming in, the way the prescriptions were coming in and so forth. Specifically, some of the concerns involve the fact that all of these PPMO customers were coming in getting the same two drugs, principally, Hydrocodone 10 and Carisoprodol 350, that they were coming in and they were from West Virginia and Kentucky, predominately; that they were coming in, asking for specific pill color; that they were coming in in groups, driving in in groups and in some of the pharmacies they would see four or five get out of a single car. They were predominately paying cash. It concerned one of the pharmacist (sic), Mr. Nussbaum, that when he approached the doctor with some of this information, that the doctor’s attitude was, it was the kind of drugs that they wanted and, if that’s what they wanted, that’s what he was going to give them.” Transcript at 44.

{¶13} Notarized written statements from the area pharmacists were admitted as State’s Exhibits 2, 3, 4 and 5. Ted Nussbaum with Discount Drug Mart, in his statement (Exhibit 2) stated that he had concerns over numerous patients asking for specific color or tablets Discount Drug had and stated that he “felt this was a sure sign of problems

because drug seekers or sellers usually know what they are looking for.” In his statement, he also voiced concerns over the fact that the patients were coming a long way. In his notarized statement, Nussbaum stated that he told Dr. DeHass that he would have to handwrite his prescriptions in the proper format rather than call them in and that Dr. DeHass gave him a hard time.

{¶14} Brad White, a pharmacist with the Medicine Shoppe, stated in his notarized statement (Exhibit 3) that he was concerned that all of PPMO patients were receiving the exact same drugs in the same strength and under the same directions, that they were from out of state and that he was repeatedly asked by patients for the “blues”. He, in his statement, also noted that he observed more than one patient arrive in the same car. Medicine Shop only filled fifteen (15) prescriptions before refusing to fill any more.

{¶15} PPMO was closed down on December 16, 2003, after the execution of a search warrant.

{¶16} Gallagher interviewed appellee Vinci in January of 2004 as part of his investigation into PPMO. Previously, Gallagher had visited Dusini Drug to collect prescriptions that it filled for PPMO. According to Gallagher, appellee Vinci told him that he was aware that most of the patients were cash patients and were coming in large numbers from West Virginia and Kentucky and that it seemed to be a problem that they were all getting Hydrocodone and Carisoprodol. Appellee Vinci, according to Gallagher, told him that customers were flocking to Dusini Drug because other pharmacies in the area were not filling their prescriptions and that he was concerned that customers would

ask for pills by color. Gallagher testified that appellee Vinci realized that all of the PPMO customers were receiving the same drug therapy from PPMO.

{¶17} At the hearing, Gallagher testified that he also spoke with appellee Campbell in January of 2004 and that she said that the customers started flocking to them after other pharmacies would not fill their prescriptions. Gallagher testified that appellee Campbell “indicated that she had never seen anything like this before, meaning-and talking about never seeing any doctors who prescribed the same two drugs,...she had never seen customers all getting the same drug therapy.” Transcript at 55. He testified that appellee Campbell noted that customers were coming in groups and that she spoke with another pharmacy, he believed that it was the Medicine Shop, and that they had stopped or were not filling the PPMO prescriptions. The following testimony was adduced when he was asked whether appellee Campbell talked to him about whether or not she provided counseling to each PPMO customer who came in:

{¶18} “A. She, again, indicated that there were times that she tried to talk to them, but that as they received more and more of these prescriptions as the year went on, that there was little in the way of communicating with the PPMO customer; that she actually felt that counseling was not relevant to these PPMO customers because they were pain patients and the prescriptions were, pain is pain, as she said and the prescriptions were for pain meds.” Transcript at 56.

{¶19} Gallagher further testified that appellee Campbell, during her interview, indicated that she knew that the customers were coming from out of state and were predominately paying cash and that they sometimes asked for specific pill colors.

{¶20} Testimony also was adduced during Gallagher's testimony that Dusini Drug stopped taking telephone orders and started taking faxes from PPMO because the phone calls were tying someone up on the phone too long.

{¶21} At the hearing, Gallagher testified that State's Exhibit 14, which was admitted, shows that 218,775 doses of Hydrocodone and 82,740 of Carisoprodol 350 mg were prescribed and sold through Dusini Drug to PPMO customers who were named in the citation. He also testified that Exhibit 15, which was a chart titled "Growth of all PPMO Dispensing at Dusini Drug in 2003", showed that growth really took off in October through December. Exhibit 15 showed that while, in March of 2003, Dusini had 34 PPMO dispensings, in December of 2003, it had 1,798 dispensings.

{¶22} Exhibit 13, which was admitted, showed that of all the solid dosage units dispensed at Dusini Drugs to PPMO patients in 2003, 70% (488,600) were for Hydrocodone and 28% (196,080) were for Muscle Relaxants, with all but 1,290 being for Carisoprodol. Exhibits 21-26 showed that 87% of Dusini customers came from Kentucky and another 6% from West Virginia and that out-of-state patients averaged 537 miles each trip with 10.6 hours of travel time.

{¶23} Exhibit 20, which was compiled from data from the Drug Enforcement Administration, showed that, in 2003, Dusini Drug was the second largest retail purchaser of Hydrocodone 10mg tablets in the State of Ohio.

{¶24} At the hearing, Robert Kubusak, a registered pharmacist with the State of Ohio who owns two pharmacies, testified. He testified that he has been a licensed pharmacist since 1973 and was qualified as an expert in the area of pharmacy. Kubasak testified that he was asked by the Board of Pharmacy to review records and

material involving Dusini Drug and appellees. He testified that he was given a printout of all the prescriptions for the year 2003 as well as patient profiles. He testified that the prescriptions that Dusini Drug filled for PPMO escalated every month and that there were 1358 patients who averaged 10.6 hours round trip. He further testified that 93.4% of the customers of Dusini Drug were from out-of-state and that the in-state customers traveled between two and four hours. Kubasak further testified that there were 488,855 doses of Hydrocodone and 196,080 doses of Soma dispensed throughout the year and that there were 294 prescriptions from PPMO dispensed from one physician during the period from August 1, 2003 through August 4, 2003. According to Kubasak, "there were only 33 dispensed during that time period from 22 others [physicians] combined." Transcript at 314.

{¶25} At the hearing, Kubasak further testified that there was a 50% increase in the dispensing of prescriptions during the period between July and August and appellee Vinci had dispensed 57 of them himself in July. There were 6,677 prescriptions for the whole year. The following is an excerpt from his testimony:

{¶26} "THE WITNESS: - - . . . Administrative Code 4729.511 requires that a pharmacist designate to a responsible person and a responsible person is obligated not only in the practice of pharmacy, but also to supervise and control any dangerous drugs and purchases. I think that in this situation, in my opinion, Mr. Vinci failed to exercise the control over his staff pharmacist and, obviously, over the purchase of large quantities of controlled substances. I mean, you know, when you look at this, I mean, if you even start to look at the number just roughly, that's 48 - -

{¶27} "MR. GRAFF: Objection.

{¶28} “THE WITNESS: - - bottles of a thousand Vicodin per month. That’s on a 10-month basis, but if we look again at the dispensing patterns, the dispensing patterns increased dramatically in the latter months, in September, October, November and December. So that would have been like 96 bottles of Vicodin 500. I’m talking to the pharmacists now; I’m talking to the purchasing agent. That would have been like 19 bottles of a thousand of Carisoprodol, Soma that would have been done on a monthly basis. Forty-seven, the Ohio Administrative Code 4729-5-18 requires that pharmacies maintain a patient profile system. So as far as looking for some red flags of where these people were from; was the dosaging proper, they were all there because they had to go look at it - - they had to look at it because you had the records there. 4729-5-20 requires that pharmacist and I want to get this correct, requires a pharmacist, prior to dispensing a prescription, to review the patient profile and to look for other things, for misuse, abuse and inappropriate drug action. And I think both pharmacists at that particular point weren’t following that particular law at that particular time.” Transcript at 315-316.

{¶29} When asked whether, in reviewing the materials provided to him, he noted a trend or pattern in reference to the medications that the patients of PPMO would receive, Kubasak testified in the affirmative. He testified that he noted that 99% of the patients received the same types of pain medications and the same type of dosages. Based on his own pharmacy’s experience with pain management clinics, Kubasak testified that he had never seen such similarities and that pain management was “highly individualized.” Trial Transcript at 322. He further testified that Dusini Drug and appellees should have reviewed all prescriptions that they received from PPMO to

determine if they were legitimate as soon as people were coming in from Kentucky with prescriptions for controlled substances. Based on his review, he opined that appellees did not exercise the appropriate corresponding responsibility and professional judgment. He further stated that “[h]ad they even looked at any of the surrounding circumstances or even taken that into consideration, it would have lead any reasonable pharmacist, any pharmacist with even a minimal of experience, start to question these particular prescriptions and start to question what was going on,…” Transcript at 329-330. A copy of the report that Kubasak prepared was admitted as State’s Exhibit 35.

{¶30} Kubasak also was questioned about the twenty-five faxed prescriptions that he reviewed as part of his evaluation. He testified that there were not headers on some of them, so it was unclear where they had come from, and that they did not contain the agent’s name. He further testified that the prescriptions were for multiple controlled substances when, at the time, you could only have one controlled substance on a faxed prescription.

{¶31} At the hearing, appellee Scott Vinci testified that he purchased Dusini Drug in 1994 and that, at the time, the pharmacy filled approximately 180 -200 prescriptions a day. Appellee Vinci testified that he met Dr. DeHass in December of 2003. He also testified that he received a letter from Dr. DeHass about the opening of the pain clinic, which was unusual. Dr. DeHass, in his letter, indicated that he was an expert in management, that his clinic did not do any third party billing, and that he did not prescribe any Class I or II medications.

{¶32} Prior to the opening of PPMO, Dusini did not stock Hydrocodone 10 because it was not prescribed much by doctors in the area. When appellee Vinci was

asked what he meant, when, during his interview with Agent Gallagher when asked whether he liked the fact that it was a cash business, he responded “cash is cash”, he testified that “Cash is never really a bad thing in life, let alone business...” Transcript at 437.

{¶33} Appellee Vinci testified that when PPMO patients came into the store, they were counseled and required to show identification. He testified that he did not recall telling Agent Gallagher that he started treating them like legitimate patients. He also testified that multiple prescriptions were called in at a time and that a lot of the PPMO patients paid in cash, although some of them had insurance. While he was aware that many of the people were from Kentucky, appellee Vinci was not concerned because they were on chronic medicine for pain and they did their job of counseling and making sure that what they did was legitimate.

{¶34} Appellee Vinci testified that in late 2003, PPMO began faxing prescriptions. The following testimony was adduced when he was asked if he thought the prescriptions were appropriate:

{¶35} “A. You mean the way the process went?”

{¶36} “Q. Yes.

{¶37} “A. In hindsight, no. Bad decision, bad decision on my part, simply put. To see the prescriptions was rather embarrassing really, to be quite honest with you. That’s not my style at all. Poor choice.” Transcript at 447.

{¶38} He testified that no one ever told him that other pharmacies were not filling the PPMO prescriptions. He testified that he made “a good bit” of additional money filling prescriptions for PPMO. Transcript at 452.

{¶39} On cross-examination, appellee Vinci testified that he did not have any questions until the search warrant was executed on PPMO and that he had never contacted the Pharmacy Board with concerns. He further testified that he noted that a large number of PPMO customers were from Kentucky and West Virginia and that they basically received the same drug therapy. The following testimony was adduced during cross-examination:

{¶40} “Q. Okay. But you’d never seen a situation like this with, basically, 98 – 100 percent of the patients receiving the same therapy, no matter age, sex, whatever; right?”

{¶41} “A. That is correct.

{¶42} “Q. Did that put you on alert?”

{¶43} “A. I’d have to say in hindsight, it did not.

{¶44} “Q. The fact that these patients coming from great distances, same therapy, paying cash, did not put you on such a status as to contact the doctor, the clinic or the Board of Pharmacy; correct?”

{¶45} “A. Correct.

{¶46} “Q. The majority of the patients paid for their prescriptions by cash to your knowledge.

{¶47} “A. That is correct.

{¶48} “Q. In fact, Dr. DeHass, in the letter of communication, Exhibit 44, basically said they’re going to be paying with cash, despite the fact that you said they were poor; correct?”

{¶49} “A. Correct.” Transcript at 460-461.

{¶50} Appellee Vinci denied knowing that customers were driving up to ten hours round trip to come to PPMO, but testified that he was aware that some customers asked for medication by color. When asked whether he ever had customers coming in numbers asking for a prescription or drug by color, appellee Vinci responded “No.” Transcript at 461-462. He testified that he should have asked more questions and that he noticed an increase in business once PPMO patients ceased going to Strasburg Pharmacy.

{¶51} The issue of faxed prescriptions was addressed again during cross-examination. Appellee Vinci testified that it was his idea to have the prescriptions faxed to Dusini Drug because it was taking too long to take the prescriptions over the phone. Every prescription was on an 8 inch by 11 inch piece of paper. Because more than one prescription was on the paper, the prescriptions were then cut down. When asked where on the individual prescriptions the doctors name and the clinic name appeared as required, appellee Vinci testified that “[i]t doesn’t appear like I attached that information.” Transcript at 467. He testified that when people asked for certain color pills, he handed the prescription back to them.

{¶52} Appellee Vinci further testified that PPMO asked at some point what color Hydrocodone pills that they carried. When asked whether he had exercised the appropriate corresponding responsibility in reference to PPMO customers, he testified that he should have asked more questions and checked the patients’ medical histories. Appellee Vinci further testified that he had never seen a situation like the one in this case where a physician constantly writes the same types of prescriptions for a multitude of patients.

{¶53} When appellee Vinci was asked to explain what “corresponding responsibility” meant, the follow testimony was adduced:

{¶54} “A. Well, I thought Mr. Kubasak did an excellent job of describing it. It would be, basically, taking the amount of time with the patient to take all factors into consideration before you fill a prescription for them.

{¶55} “Q. What is the corresponding responsibility of the pharmacist upon reviewing the prescription?

{¶56} “A. To make sure that it’s for a legitimate medical purpose; make sure it’s not an altered script; make sure that everything is on the script that should be on the script to make a legal document.” Transcript at 469.

{¶57} Testimony was adduced that, on average, there was a 30-35% mark up on drugs that appellee Vinci dispensed, but that the mark up on Hydrocodone was 333% and that the mark up on generic Soma was 111%. He testified that he lowered his prices after Dr. DeHass called and complained about the prices being too high.

{¶58} Gallagher’s interview of appellee Vinci was audiotaped. A written transcript of the interview was admitted as Exhibit 6 and 7. Appellee Vinci, in his interview, stated that PPMO patients flocked to Dusini Drug from Strasburg Pharmacy after Strasburg started interviewing the patients in-depth. He stated that he picked and chose what patients to counsel. When asked by Gallagher why he filled faxed prescriptions that contained multiple drug scripts, appellee Vinci stated that he got caught up in filling the prescriptions and was “ashamed of himself.” Exhibit 7 at 4-5. The following is an excerpt from his interview testimony:

{¶59} “I don’t - - I don’t have a great - - I don’t’ have a great explanation. I lost my judgment I feel. I got up in filling. I’m competitive. You know what I mean, it was always like, you got to get these done, you know what I mean. All of sudden you started maybe looking at them as if they were your legitimate patients and you just got caught up in the filling of them and I don’t - - You know, that’s the best think (sic) I can think of.” Exhibit 7 at 8-9.

{¶60} At the hearing, appellee Connie Campbell testified that she left Buehler’s, where she had worked as a pharmacist for 16 ½ years, to work for Dusini Drug in 2001 because she wanted more of a part-time position closer to home with better hours. She testified that she did not order or price drugs as part of her duties. Appellee Campbell testified that she met Dr. DeHass when he came into the pharmacy to introduce himself. She further testified that she counseled PPMO patients when they came in and that she tried to find out why they traveled so far to get their prescriptions filled. The patients told her that they got established with their physician and followed him when he moved to the New Philadelphia area. When asked whether she counseled the patients every time that they came in, appellee Campbell testified that she did not but that “an offer to counsel was always there as far as anyone having any questions,…” Transcript at 522.

{¶61} Appellee Campbell testified that she did not know that PPMO patients were paying in cash because she did not ring up transactions. She testified that as PPMO patients came in, she checked their driver’s license to make sure that they were who they said that they were. She did not recall patients asking her for a certain color of pill. While she thought that Dusini Drug was seeing a lot of patients and that the volume was high, she testified that she did not feel uncomfortable until she heard in the

beginning of December from another pharmacist, Brad White, that the pain clinic was being investigated. She immediately called the Pharmacy Board and then told appellee Vinci about her phone call. She admitted that she did not speak with any other pharmacists before learning of the investigation.

{¶62} Appellee Campbell testified that Agent Gallagher interviewed her in, she thought, June and that the interview was two and a half hours long. She testified that while she was asked if she would answer some questions about the pain clinic doctors, she realized that the compliance agents were not asking questions about the doctors. She testified that she felt that they were trying to incriminate her and that she did not feel free to leave or end the interview.

{¶63} On cross-examination, appellee Campbell testified that she should have done more checking, such as trying to find out what medical tests a patient had had and who had referred them to Dr. DeHass, and that she should have checked into Dr. DeHass' credentials. She also testified that, when the volume at the pharmacy increased, she should have checked into how many patients the pain management clinic was seeing a day. Appellee Campbell admitted that she knew that a large percentage of the PPMO patients were from out of state and that 98% were receiving the same therapy. When asked whether she had ever seen a similar in-flow of patients as she had seen from PPMO, she testified "Not until then, no." Transcript at 546. She similarly testified that she had never seen a situation like PPMO where everyone received the same prescription.

{¶64} Appellee Campbell also knew that the PPMO patients were either paying cash or using credit cards because, if they had insurance, the transactions would be

rung up at the pharmacy rather than the front register. She admitted knowing that the patients sometimes travelled in groups and that Dr. DeHass' office had requested certain colored pills. The following is an excerpt from her testimony on cross-examination:

{¶65} "Q. Now during your testimony, I had a little concern over a couple of areas. Do you recall when you told Agent Gallagher that counseling wasn't needed by PPMO customers, saying that pain drugs seems to be pretty cut and dry, just pain drugs?

{¶66} "A. In the context of that comment, which was the fourth or fifth time we went over that area - -

{¶67} "Q. The question is, do you remember making that statement?

{¶68} "A. Say it again. I'm sorry.

{¶69} "Q. Do you remember making that statement to Agent Gallagher?

{¶70} "A. Yes." Transcript at 547.

{¶71} Appellee Campbell further testified that she knew that PPMO customers were being turned away by other pharmacists and that Dusini Drug's business increased as a result during the last three or four months of 2003. When asked about the faxed prescriptions, she testified that prescriptions need to have a header from the facility when they are faxed in and that the prescriptions did have a header, but the header was cut off when the faxed prescriptions were cut down.

{¶72} When asked about what concerns she had, before she learned of the investigation, about activity taking place in the pharmacy from PPMO, appellee

Campbell testified that she was concerned with the heavy volume and that “he [Dr. DeHass] could see that many patients in a day...” Transcript at 567.

{¶73} Pursuant to an Order mailed on March 8, 2007, the Ohio State Board of Pharmacy ordered appellee Vinci’s pharmacist’s license suspended for a period of five years. Pursuant to another Order mailed on the same date, the Ohio State Board of Pharmacy ordered appellee Campbell’s pharmacist’s license suspended for a period of three years. In both Orders, the Board stated, in relevant part, as follows:

{¶74} “The Board is cognizant that both rule 4729-5-21 (formerly embodied in rule 4729-5-30) of the Ohio Administrative Code and Section 1306.04 of Title 21 of the Code of Federal Regulations state that a pharmacist has a corresponding responsibility with the prescriber to ensure that a prescription is issued for a legitimate medical purpose by a licensed prescriber in the usual course of professional practice. This is axiomatic in the pharmacy profession. This means that a pharmacist must review every prescription for legitimacy and must then make a professional judgment on whether or not to fill the prescription. Every pharmacist is accountable to this Board and to society for what he knew or should have known due to professional training, experience, licensure, and continuing pharmacy education in pharmacy law. Obviously, the dispensing pharmacist need not review the prescriber’s patient chart; rather, the required judgment to be exercised must be based upon the pharmacist’s extensive knowledge and training in drug therapy, the pharmacist’s knowledge of the patient (obtained through profile information required by rule 4729-5-18 of the Ohio Administrative Code, a review of that profile as required by rule 4729-5-20 of the Ohio Administrative Code, and other discussions with the patient pursuant to rule 4729-5-22

of the Ohio Administrative Code), and the pharmacist's knowledge of the prescriber's practice, particularly as it relates to other similar practices in the region.

{¶75} “This pharmacist shirked [his/her] responsibilities in this regard, ignoring numerous obvious indicators of illegal prescribing activity on the part of the physicians involved in this case. Some of these indicators include the large numbers of patients who drove very long distances to come to these physicians and this pharmacy and the almost identical treatment of a problem (pain) that requires individualization for treatment dosages and drugs more than any other health-related problem. Individualized treatment for pain is required in all aspects of health care and is specifically stated in rule 4731-21-02 of the Ohio Administrative Code, yet was clearly ignored by this pharmacist. Moreover, it is significant that practically all of the patients from these prescribers paid cash for their prescriptions instead of using insurance as is usually the case for the overwhelming percentage of prescriptions filled today. It is clear that this pharmacist consciously ignored [his/her] obligations to the patients simply for monetary gain.”

{¶76} Appellee Vinci (Common Pleas Court Case No. 2007 AA 03 0208) and appellee Campbell (Common Pleas Case No. 2007 AA 03 0216) then appealed to the Tuscarawas County Court of Common Pleas. Pursuant to a Decision filed on July 24, 2008 containing both case numbers, the trial court reversed and vacated appellant Ohio State Board of Pharmacy's Orders, finding that they were not supported by reliable, probative and substantial evidence. On the same date, the trial court filed separate Judgment Entries in each case.

{¶77} Appellant appealed from the July 24, 2008, Judgment Entry in Case No. 2007 AA 03 0208. Such appeal has been assigned Case No. 2008 AP 08 0052. Appellant also appealed from the July 24, 2008, Judgment Entry in Case No. 2007 AA 03 0216. Such appeal has been assigned Case No. 2008 AP 08 0053. Appellant, in both cases, raises the following assignments of error:

{¶78} “I. THE LOWER COURT ERRED WHEN IT FOUND THAT THE BOARD’S ORDER WAS NOT BASED UPON RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE. THE COURT FAILED TO GIVE DUE DEFERENCE TO THE BOARD’S FINDINGS AND CONCLUSIONS.

{¶79} “II. THE LOWER COURT ERRED IN HOLDING THAT DUE PROCESS RIGHTS WERE NOT PROVIDED TO THE APPELLANT-APPELLEE IN THE INVESTIGATIVE STAGE OF THE CASE.

{¶80} “III. THE LOWER COURT FAILED TO PROPERLY RECOGNIZE THE SCOPE OF DUTIES OF PRESIDENT OF THE BOARD OF PHARMACY IN PRESIDING OVER ADMINISTRATIVE PROCEEDINGS.

{¶81} “IV. THE LOWER COURT FAILED TO USE RULES AND STANDARDS APPLICABLE IN ADMINISTRATIVE PROCEEDINGS CONCERNING THE USE OF HEARSAY EVIDENCE.

{¶82} “V. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO FAIRLY CONSIDER THE FACTUAL AND EVIDENTIARY CONCLUSIONS OF THE BOARD, AS INDICATED BY THE LANGUAGE AND STATEMENTS USED AS THE BASES OF THE LOWER COURT’S DECISION.”

{¶83} Because the two cases involve the same facts and the same assignments of error, they shall be addressed together.

I

{¶84} Appellant, in its first assignment of error in both cases, argues that the trial court erred when it found that the Orders issued by appellant Ohio State Board of Pharmacy were not based upon reliable, probative and substantial evidence. We agree.

{¶85} In *Clay v. Licking Cty. Prosecutor*, Licking App. No. 02CA00011, 2002-Ohio-4243, we stated in relevant part as follows: “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 the 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.

{¶86} “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 [whether] the Board of Review'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." *Id.* at ¶ 9, ¶ 10. An abuse of discretion shows "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶87} Appellant, Ohio State Board of Pharmacy, in revoking appellees' licenses, concluded that appellees were guilty of gross immorality as provided in R.C. 4729.16(A)(1), of unprofessional conduct in violation of R.C. 4729.16(A)(2), and of willfully violating, conspiring to violate, attempting to violate, or aiding and abetting the violation of provisions of Chapters 2925 [Drug offense] and 3719 [controlled substances] of the Revised Code in violation of R.C. 4729.16(A)(5).

{¶88} Appellant contends that the Board of Pharmacy found that none of the prescriptions were validly issued by PPMO, but appellees argue that there is no direct evidence in the record establishing that such is the case. As noted by appellees in their respective briefs, there was no testimony that any prescription was improperly issued. Nor does appellant cite this Court to any direct evidence in the transcript that supports such finding. We note that appellant attached a Judgment Entry from a federal criminal case against Dr. DeHass to its reply brief. The Judgment Entry, which was filed November 15, 2006, in the United States District Court for the Northern District of Ohio, indicates that Dr. DeHass pleaded guilty to the illegal distribution of a controlled substance. However, such entry was never before the Board of Pharmacy at the

hearing in this case. But, notwithstanding this lack of direct evidence, we find that there was circumstantial evidence that appellees sold controlled and/or dangerous drugs when not for a legitimate medical purpose.¹

{¶89} Pursuant to Ohio Administrative Code Section 4729-5-30(A), “A prescription, to be valid, must be issued for a legitimate medical purpose by an individual prescriber acting in the usual course of his/her professional practice. The responsibility for the proper prescribing is upon the prescriber, but a corresponding responsibility rests with the pharmacist who dispenses the prescription. An order purporting to be a prescription issued not in the usual course of bona fide treatment of a patient is not a prescription and the person knowingly dispensing such a purported prescription, as well as the person issuing it, shall be subject to the penalties of law.” (Emphasis added).

{¶90} There is sparse Ohio case law regarding the scope of a pharmacist’s “corresponding responsibility” to properly dispense prescription medicine; however, federal courts have developed substantial case law in the context of criminal prosecutions under the federal Controlled Substances Act, 21 USC 841, and

¹ Courts that have addressed the issue have indicated that medical testimony is not necessary to establish a prescription is issued outside the usual course of professional treatment. See, *U.S. v. Lovern*, -- F.3d ---, 2009 WL 2871538 (10th Cir. 2009)(upholding conviction of pharmacist based upon testimony of other pharmacists and DEA investigator because, given a pharmacist’s legal duty not to knowingly fill prescriptions issued outside the usual course of medical practice under 21 C.F.R. 1306.04(A), “it does not strain the imagination to think that some pharmacists might know and be qualified to speak about what it means for a prescription to be consistent or inconsistent with the usual course of medical practice.”)

See also, *Armstrong*, supra at 388-389; *U.S. v. Hayes*, 595 F.2d 258, 261, n.6 (5th Cir. 1979) (“the facts of this case show how a pharmacist can know the prescriptions are issued for no legitimate medical purpose without his needing to know anything about medical science.”)(5th Cir. 1979); *Jones v. State* (1985), 684 S.W.2d 223, 225, citing *Hayes*; *Sloman v. Board of Pharmacy Examiners of the State of Iowa*, (1989) 440 N.W.2d 609, citing *Hayes* and *Jones*; *State of Ohio v. Moss*, 8th Dist. Nos. 623318, 62322 (May 13, 1993), citing *Hayes*.

implementing regulations, including 21 CFR 1306.04 which is virtually identical to the mandate of OAC 4729-5-30(A) and governs all pharmacists licensed in Ohio.

{¶91} In two recent cases decided by the U.S. Court of Appeals for the Fifth Circuit, the court noted that hydrocodone and carisoprodol have a high abuse potential and a high illegal street market value, and are dispensed by “pain management” clinics, some of which operate within the bounds of the law and serve a valuable medical purpose, but “others flood the streets with dangerous, addictive narcotics while preserving some trappings of lawful medical practice.” *U.S. v. Brown*, 553 F.3d 768, 773 (5th Cir. 2008); *U.S. v. Armstrong*, 550 F.3d 382, 386 (5th Cir. 2008). In both cases, the convictions of pharmacists, pharmacies and doctors for violations of the federal Controlled Substances Act were upheld when these drugs were not prescribed legitimately at pain management clinics.

{¶92} In addition, the U.S. Court of Appeals for the Sixth Circuit recently discussed the meaning of “corresponding responsibility” as set forth in 21 C.F.R. 1306.04(A), as follows: “The regulation thus requires ‘pharmacists [to] use common sense judgment,’ which includes paying attention to the ‘number of prescriptions issued, the number of dosage units prescribed, the duration and pattern of the alleged treatment,’ the number of doctors writing prescriptions and whether the drugs prescribed have a high rate of abuse. *Ralph J. Bertolino Pharmacy, Inc.*, 55 Fed.Reg. 4, 729, 4,730 (DEA Feb.9, 1990). ‘When [pharmacists] suspicions are aroused as reasonable professionals,’ they must at least verify the prescription’s propriety, and if not satisfied by the answer they must ‘refuse to dispense.’ *Id.* see also, *United States v.*

Henry, 727 F.2d 1373, 1378-79 (5th Cir. 1984).” *Medicine Shoppe-Jonesborough v. DEA*, 300 Fed. Appx. 409, 412, 2008 WL 4899525 (C.A.6).

{¶93} At issue is whether or not appellees knew or should have known that the prescriptions from PPMO were not issued for a legitimate medical purpose or in the usual course of medical practice. The evidence before the Board established that appellees ignored the “red flags” that were waving in front of them, the same “red flags” that caused other pharmacists to cease dealing with PPMO. At the hearing, newsletters from the Ohio State Board of Pharmacy were admitted as State’s Exhibit 10. The May, 1991 and November 1991 issues discussed the “corresponding responsibility” of a pharmacist and the factors to consider. Appellees testified that they received the newsletters. Among the factors to be considered by pharmacists in determining whether a prescription was legal were whether the patient resided within the area, whether significant numbers of persons appeared with prescriptions for the same drugs from the same prescribers, and whether the pharmacy’s purchases of controlled substances increased dramatically. As is discussed in detail above, there was testimony that appellees were aware that large numbers of PPMO patients were traveling long distances from as far away as Kentucky and West Virginia. Both testified that they had never seen anything quite like it. Testimony also was adduced that the patients, regardless of age, etc, primarily received the same two medications and paid in cash, which was unusual. Both appellees also admitted that PPMO patients asked for specific colors of pills. In addition, testimony was adduced at the hearing as to the dramatic increases in the number of monthly PPMO prescriptions.

{¶94} Appellee, Campbell, during her interview by Agent Gallagher, which was admitted as Exhibit 8, stated that she sometimes saw family members come in together to fill PPMO prescriptions. When asked during the interview why she really did not counsel PPMO patients about their drugs as is required by Ohio Administrative Code Section 4729-5-22, appellee Campbell stated that “with pain drugs, it seems to me pretty cut-and-dry. It’s for pain.” Exhibit 8 at 120. During his own interview, appellee Vinci stated that he picked and chose PPMO patients to counsel.

{¶95} There was also evidence that multiple prescriptions were faxed, at appellee Vinci’s request, to Dusini Drug at one time and that they had to be cut apart because multiple prescriptions might appear on one sheet. After the prescriptions were cut apart, some of them lacked headers, the prescribing doctor’s name and the signature of the authorizing agent. When asked during his interview why he filled such questionable prescriptions, appellee Vinci testified that he got “caught up” in filling the prescriptions and was “ashamed” of himself. Testimony was adduced at the hearing that the mark up of the two drugs at issue in these cases was substantially higher than the typical mark up.

{¶96} Based on the foregoing, we find that the trial court abused its discretion in reversing and vacating the Board’s Orders and Findings with respect to both appellees as to the allegations of engaging in unprofessional conduct, gross immorality and with respect to the allegations of selling controlled substances and dangerous drugs when not for legitimate medical purposes issued by a prescriber acting in the usual course of his professional practice. The trial court’s decision was arbitrary, unconscionable and unreasonable in view of the evidence.

{¶97} Appellant's first assignment of error is, therefore, sustained.

II

{¶98} Appellant, in its second assignment of error, argues that the trial court erred in holding that due process rights were not provided to appellees during the investigative stage of the case.

{¶99} Appellant initially takes issue with the trial court's implicit conclusion that appellees' constitutional rights were violated because they were not advised of their right to counsel during the investigative phase of this case. The trial court appears to have found that each of the appellees were denied due process when he or she was not advised of a right to counsel during the investigative stage of this case under R.C. 9.84.

{¶100} R.C. 9.84 provides, in relevant part, as follows: "Any person appearing as a witness before any * * * bureau, commission, * * * or representative thereof, in any administrative or executive proceeding or investigation, public or private, if he so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, * * * and the witness shall be advised of his right to counsel before he is interrogated. * * "

{¶101} In order for a statutory right to counsel provided in R.C. 9.84 to attach, a certain level of formality must exist. See *Kirch v. Ohio Bur. of Workers' Comp*, 154 Ohio App.3d 651, 2003-Ohio-5211, 798 N.E.2d 661. Appearing as a "witness" is not sufficient by itself to trigger the right to counsel under R.C. 9.84. See *State ex rel. Bonham v. Indus. Comm.*, Franklin App. No. 06AP-85, 2006-Ohio-6042. An informal interview

does not trigger the right to counsel under R.C. 9.84. See also *State ex rel Bays v. Ind. Comm.*, Franklin App. 03AP-424, 204-Ohio-2944 and *Kirch*, *supra*.

{¶102} The trial court, in its decision, cited *In re Civ. Serv. Charges & Specs Against Piper*, 88 Ohio St.3d 308, 2000-Ohio-332, 725 N.E.2d 659. In such case, the Ohio Supreme Court held that, pursuant to R.C. 9.84, a police officer who is the subject of a police department investigation and who is compelled to appear before a superior officer to answer questions during the course of the investigation is “appearing as a witness” and, therefore, “shall be permitted to be accompanied, represented, and advised by an attorney.” The police officers’ attendance was mandatory. In contrast, in the case sub judice, appellees were not compelled to appear when questioned by the agents investigating the prescriptions from PPMO.

{¶103} At the hearing before the Board, Agent Gallagher testified that he went to Dusini Drug on January 13, 2004 to collect prescriptions that had been issued by PPMO as part of his investigation of PPMO. He further testified that Dusini Drug was not under investigation at that time. Appellee Vinci testified that he talked with Agent Gallagher approximately 20 minutes that day and provided him with the information that he needed. Appellee Campbell testified that she willingly talked to agent Gallagher. There is no evidence that either appellee was required to answer Agent Gallagher’s questions or that they were not free to leave the interviews, which were conducted at the pharmacy. Based upon the information in the record, we find that the evidence is insufficient to establish the level of formality required for the application of R.C. 9.84. Appellees, therefore, were not entitled to counsel.

{¶104} Appellees argued, and the trial court agreed, that appellant Ohio State Board of Pharmacy violated their due process rights. 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, 573 N.E.2d 1100, citing *Luff v. State* (1927), 117 Ohio St. 102, 157 N.E. 388. To comply with due process in an administrative proceeding involving the potential revocation of an individual's license to practice a profession, notice and a hearing are necessary. *Id.*

{¶105} Appellees specifically contended that their due process rights were violated because the Notices of Opportunity listed thousands of prescriptions that were not filled by that particular pharmacist and because “the State did not limit its presentation of evidence, exhibits, or testimony even to the exaggerated number of patients or prescriptions in the Citation Letter.”

{¶106} In *Clayman v. State Med. Bd. of Ohio* (1999), 133 Ohio App.3d 122, 726 N.E.2d 1098, the Court stated, in relevant part, as follows: “ * * * [D]espite the board's discussion of patient care issues with which appellant was not charged, viewed globally, the administrative hearing that lead to appellant's license revocation comported with the requirements of fairness and due process. Appellant was fully apprised of the violations with which he was charged, and was given a full opportunity to respond before an impartial board, satisfying due process. *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677, 684, 573 N.E.2d 1100. While patient care issues with which appellant was not charged, and which he therefore would not have had a full opportunity to respond to, were discussed by the board, there is sufficient, reliable, probative, and substantial evidence in the record that substantiates both the charges against appellant and the

penalty imposed by the board to outweigh appellant's claims of prejudice from discussion of these patient care issues. See, e.g., *Bouquett v. State Medical Bd. of Ohio* (1997), 123 Ohio App.3d 466, 474-475, 704 N.E.2d 583. It should be pointed out that some of the observations of board members relating to patient care are directly or indirectly related to the disciplinary charges considered by the board. And while fundamental notions of due process would be offended if the appellant were penalized for matters that were not charged, the evidence of appellant's misconduct is overwhelming and the board acted within its discretion and lawful authority in imposing the severe sanction of revocation. * * * Id at 128-129.

{¶107} In the case sub judice, we find that appellees were provided with both notice of the allegations against them and an opportunity to be heard. We further find that there was sufficient reliable, probative and substantial evidence in the record substantiating the charges of engaging in unprofessional conduct, gross immorality and selling controlled and dangerous drugs when not for a legitimate medical purpose issued by a prescriber acting in the usual course of his professional practice against appellees to negate any claim of prejudice from the consideration of patients not mentioned in the citation letter. Moreover, as argued by counsel for appellant during the hearing, such information was relevant to Dusini's overall pattern of business concerning PPMO customers.

{¶108} Appellant's second assignment of error is, therefore, sustained.

III

{¶109} Appellant, in its third assignment of error, argues that the trial court failed to properly recognize the scope of duties of President of the Board of Pharmacy in presiding over administrative proceedings.

{¶110} The trial court, in its orders, made much of the fact that the President of the Board is not a lawyer. The trial court, in its July 24, 2008, Decision in both cases, noted that the President was “a non-lawyer with, apparently, no formal legal or judicial training.” The trial court further stated that the President had consistently allowed non-admissible hearsay evidence to be presented and failed to ensure that appellees’ due process rights were protected.

{¶111} R.C. 4729.02 states, in relevant part, as follows: “There shall be a state board of pharmacy, consisting of nine members, eight of whom shall be pharmacists licensed under this chapter, representing to the extent practicable various phases of the practice of pharmacy, and one of whom shall be a public member at least sixty years of age.” Pursuant to R.C. 4729.03, the President presides over the meeting and hearing before the Board.

{¶112} Clearly, the statutory scheme provided for in Chapter 4729 does not require that the President of the Board be a lawyer or have some type of legal training.

{¶113} It appears that the trial court strongly believed that the rights of the appellees had not been protected throughout the investigation and hearing and emphasized this belief by pointing out that the Board President was not a lawyer and could not possibly know how to protect the rights of the appellees. In contrast, as is discussed in this Opinion, we find that appellees’ rights were adequately protected and

that the trial court abused its discretion in holding that the entire decision of the Ohio State Board of Pharmacy was not supported by reliable, probative and substantial evidence.

{¶114} We find, therefore, that the trial court failed to recognize the duties of the president of the Board of Pharmacy.

{¶115} Appellants third assignment of error is therefore, sustained.

IV

{¶116} Appellant, in its fourth assignment of error, argues that the trial court failed to use rules and standards that are applicable in administrative proceedings concerning the use of hearsay evidence.

{¶117} As an initial matter, we note that while appellant identifies four areas of hearsay presented at the hearing, it is not clear that the trial court found the same to be non-admissible hearsay. The trial court, in its Decision, alleged that the individual presiding over the administrative hearing “consistently allowed non-admissible hearsay evidence to be presented...” The trial court, however, did not specify what it considered to be non-admissible hearsay.

{¶118} Statements that “might constitute inadmissible hearsay where stringent rules of evidence are followed must be taken into account in [administrative] proceedings * * * where relaxed rules of evidence are applied.” *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468. In other words, hearsay is permitted in administrative hearings, but the “discretion to consider hearsay evidence cannot be exercised in an arbitrary manner.’ ” *Fox v. Parma Community Gen. Hosp.*, 160 Ohio App.3d 409, 2005-Ohio-1665, 827 N.E.2d 787, at ¶ 59, quoting *Menon v.*

Stouder Mem. Hosp. (Feb. 21, 1997), Miami App. No. 96-CA-27, 1997 WL 71778. Statements that would elsewhere be excluded as hearsay will be admissible in an administrative proceeding where they are not inherently unreliable, and may constitute reliable, probative, and substantial evidence. *In re Petition for Annexation of 162.631 Acres* (1988), 52 Ohio App.3d 8, 556 N.E.2d 200.

{¶119} At the hearing in this matter, Agent Gallagher was permitted to testify as to conversations he had with other pharmacists in the New Philadelphia area. These pharmacists did not testify at the hearing. In addition, notarized written statements of area pharmacists were admitted into the record.

{¶120} We note that the statements were not objected to by appellees on the basis of hearsay at the hearing before the Commission. Hearsay challenges are waived, absent plain error, if not objected to during the subject proceedings. *State v. Keenan*, 81 Ohio St.3d 133, 142, 1998-Ohio-459, 689 N.E.2d 929. Moreover, there is no evidence that the statements of the area pharmacists were inherently unreliable. We further find that the statements constitute substantial, reliable and probative evidence. All of the pharmacists indicated that they observed “red flags” that caused them to become concerned about the prescriptions being brought in by PPMO customers. Agent Gallagher testified at the hearing that it was the calls that he received from area pharmacists in February of 2003 that started his investigation.

{¶121} The next area of alleged hearsay concerns State’s Exhibits 18 and 19 and Exhibit 20. Exhibits 18 and 19 were charts created by Agent Gallagher showing monthly Hydrocodone 10 mg and Carisoprodal 35 mg purchases at Dusini Drug from January of 2002 through December 2003. Appellees contend that the trial court did not err in

finding the same to be inadmissible hearsay because the material that Agent Gallagher used to prepare the charts was not admitted into evidence and not made available to appellees either before or during the hearing. Exhibit 20 is a chart prepared by Agent Gallagher of the top purchasers of Hydrocodone 10 products in the State of Ohio that was prepared using information obtained from the Drug Enforcement Agency. We find that such information was relevant and that the Board did not act arbitrarily in considering the same.

{¶122} The final area of hearsay concerned the testimony of Robert Kubasak, a registered pharmacist who testified as an expert witness for the State. Kubasak, who has been a licensed pharmacist since 1973, testified at the hearing that he was asked by the Board of Pharmacy to review materials and records. When asked what he was provided with by the Board, he testified, in relevant part, as follows:

{¶123} “A. The Board provided me with a set of documents, with a box of documents. Within the documents, there was a cover letter from the supervisor, asking me to look at the documents, make an objective opinion, see about the correctness for 4729 of the Ohio Revised Code, see if there were any discrepancies or what my opinion was on the practice of pharmacy at Dusini Pharmacy.

{¶124} “Q. And when were you provided with this cover letter?

{¶125} “A. That was in May.

{¶126} “Q. Of what year?

{¶127} “A. Of 2004.

{¶128} “Q. And were you provided with other things than the letter?

{¶129} “A. Yes, I was.

{¶130} “Q. And what were those other items?”

{¶131} “A. I was provided with some different attachments, with some newsletters, Board of Pharmacy Newsletters. I was also given some various graphs; I was given some inspection sheets; I was given response to the inspection sheets; I was given a printout of all the prescriptions for the year of 2003; I was given a printout of all the prescriptions of all the patients, sorted two different ways. One was just all in general and then one was by patient. I was also given, as far as charts, graphs, numbers, I was given dosages, the drug, the drug usages; I was given charts and graphs on the miles, distance traveled and information about other things. I was also given copies of 25 of the original prescriptions that were faxed concerning this particular case.” Transcript at 305-306.

{¶132} While, as appellant indicates, Kubasak’s opinion was based partially on hearsay evidence, as is stated above, hearsay is not precluded at administrative hearings. There is nothing in the record indicating that Kubasak’s testimony was inherently unreliable. Moreover, we find that Kubasak’s testimony constituted reliable, probative and substantial evidence relating to the charges filed against appellees. Thus, the Board did not abuse its discretion in admitting his testimony at the hearing. Finally, appellees had ample opportunity to cross-examine Kubasak and did so.

{¶133} Finally, assuming, arguendo, that the Board erred in admitting the alleged hearsay evidence, we find that there was overwhelming evidence that appellees engaged in unprofessional conduct in violation of R.C. 4729.16(A)(2), gross immorality and selling controlled substances and dangerous drugs when not for legitimate medical purposes issued by a prescriber acting in the usual course of his professional practice.

{¶134} Appellant's fourth assignment of error is, therefore, sustained.

V

{¶135} Appellant, in its fifth assignment of error, argues that the trial court abused its discretion in failing to "fairly consider" conclusions of the Ohio State Pharmacy Board. Appellant asserts that the language used by the trial court in its decisions show that the decisions were based upon passion, prejudice and partiality.

{¶136} Based upon our disposition of the other assignments of error, we find such assignment to be moot.

{¶137} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is reversed and we reinstate the Decisions and Orders of the Board issued against appellees.

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

JAE/d0519

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SCOTT A. VINCI, R.PH.	:	
	:	
Plaintiff-Appellee	:	
and	:	
	:	
CONNIE J. CAMPBELL, R.PH.	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
OHIO STATE BOARD OF PHARMACY	:	
	:	
	:	
Defendant-Appellant	:	CASE NOS. 2008 AP 08 0052 and 2008 AP 08 0053

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is reversed and the Board's Decisions and Orders are reinstated. Costs assessed to appellee Scott A. Vinci in Case No. 2008 AP 08 0052 and to appellee Connie J. Campbell in Case No. 2008 AP 08 0053.

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

[Cite as *Vinci v. Campbell*, 2010-Ohio-451.]