[Cite as *Dean v. Ohio Dept. of Mental Health & Addiction*, 2018-Ohio-3149.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
BRENDA L. DEAN	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2017CA00233
OHIO DEPARTMENT OF MENTAL HEALTH & ADDICTION	:	
	:	
	:	OPINION
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2017CV01278
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 6, 2018

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
S. DAVID WORHATCH 4920 Darrow Road Stow, OH 44224-1406	MICHAEL DEWINE MATTHEW KARAM JOSEPH N. ROSENTHAL 30 East Broad Street, 23rd Floor Columbus, OH 43215

Gwin, P.J.

{¶1} Appellant appeals the November 30, 2017 judgment entry of the Stark County Court of Common Pleas affirming the decision of the State Personnel Board of Review.

Facts & Procedural History

{¶2} Appellant Brenda Dean was a Clinical Nurse Manger/Central Nursing Office Supervisor on Duty at Heartland Behavioral Healthcare ("Heartland"). On March 12, 2014, appellant signed a "Last Chance Agreement" ("LCA"). The agreement provides, in pertinent part, "It is agreed by all of the parties that if the employee violates the Last Chance Agreement or if there is a violation of any OhioMHAS policy, procedure, or rule; the appropriate discipline shall be removal from state employment. The Department need only prove that the employee, Brenda Dean, violated the above Agreement/Rule(s)."

{¶3} Appellant was terminated, effective August 1, 2016, from her employment at Heartland by appellee the Ohio Department of Mental Health and Addiction Services ("MHAS"), based upon conduct occurring on November 8, 2015. The removal order states the following for her termination:

> Brenda Dean violated R.C. 124.34 and HR-22 Code of conduct and general work rules; Specifically, rule number 3.23 Failure to enforce rules (Failure to properly supervise or enforce policies, procedures, and work rules); 4.1 Failure to follow policies and procedures (specifically HBH Policy 3.40, Patient, Room and Unit searches and 4.12 violation of ORC 124.34) by and through her actions on November 8, 2015. These actions included being present and participating in an unauthorized strip search of a client in

> conjunction with a room and clothing search for contraband. During the unauthorized strip search, Dean instructed the client to lift her breasts in an attempt to look for contraband. Dean also told the client a code would be called and that the client would be placed in restraints if she did not comply with the search. Dean failed to protect the client's rights by not stopping the unauthorized behavior of another MHAS employee from ordering the client to "squat" and "cough" during the unauthorized strip search. Dean's rules violations were in breach of the terms of her Last Chance Agreement signed by Brenda Dean on March 12, 2014 and in effect on November 8, 2015 when the rule violation occurred.

{¶4} Appellant appealed her removal to the State Personnel Board of Review ("SPBR") on July 28, 2016. Prior to the hearing before the Administrative Law Judge ("ALJ"), appellant filed motions in limine seeking to prohibit appellee from calling any witnesses contained in their December 20, 2016 witness list. The ALJ denied appellant's motions. Additionally, the ALJ instructed the parties to submit pre-hearing briefs as to whether the LCA referenced in the removal order was enforceable. The ALJ found the LCA was enforceable. The ALJ conducted a hearing beginning on January 17, 2017.

{¶5} The ALJ issued a report and recommendation on January 23, 2017. The ALJ found Dean had no chance to stop the other MHAS employee from ordering the client to "squat" and "cough" during the search. Further, that Lila Jenkins ("Jenkins") and appellant had reasonable suspicion for the search. The ALJ stated that while appellant spent "considerable time at the hearing arguing that she did not authorize a search and that her 'skin assessment' of the Patient did not trigger Policy 3.40," that argument is

"specious." The ALJ found the lifting of the breast was reasonably calculated to uncover contraband and falls within Policy 3.40. Further, that Dean knew of Policy 3.40 and was bound by it.

{¶6} The ALJ determined appellant failed to report her authorization of the search to the CEO/designee and found unpersuasive her arguments that Policy 3.40 was not triggered or that Heartland did not give her advance notice that it would discipline her for her failure to report. The ALJ stated appellant had a full and fair opportunity to defend at the hearing the allegation that she failed to report the incident pursuant to Policy 3.40 and noted the pre-disciplinary notice expressly cites her alleged failure to follow Policy 3.40. Further, that the attachments to the pre-disciplinary notice contain the investigator's conclusion that "there is no evidence that Brenda Dean * * * notified the [CEO] as required." Finally, the ALJ noted the R.C. 124.34 order specifically references violations of Policy 3.40 "by and through Dean's actions on November 8, 2015," which encompasses her failure to report the incident to the CEO.

{¶7} The ALJ concluded appellant violated her LCA when she violated Policy 3.40. The ALJ found appellee demonstrated it timely served a R.C. 124.34 order for a demonstrated violation of the active LCA. The ALJ concluded appellant violated her LCA and Policy 3.40 when she failed to report the search of the patient to the CEO, which also constituted a violation of R.C. 124.34. The ALJ recommended appellant's removal be affirmed pursuant to R.C. 124.03 and R.C. 124.34.

{¶8} On February 17, 2017, appellant filed numerous objections to the report and recommendation of the ALJ. Relevant to this appeal, appellant argued the ALJ improperly allowed appellee to present testimony from witnesses disqualified by the operation of

Ohio Adm.Code 124-13-01(B) and that the ALJ misapplied the law in holding appellee's decision to dismiss her can be affirmed on grounds not cited in the removal order as reasons justifying such action.

{¶9} The SPBR issued a final decision on June 8, 2017, adopting the report and recommendations of the ALJ and affirming the decision of appellee to terminate appellant. The Board found Rule 3.40 applied to appellant under the circumstances. The Board overruled appellant's argument that her R.C. 124.34 removal order does not contain the reason for which the ALJ recommended sustaining her termination. The Board found the R.C. 124.34 removal order does incorporate the failure to report and the mention of other specific factual assertions does not dilute the other language contained in the order. Further, that the order is reasonably calculated to fairly apprise appellant. The Board found appellant was adequately apprised that her total conduct with respect to the search on that date was being questioned.

{¶10} The Board also overruled appellant's argument as to the exclusion of witnesses, finding the rule permits, but does not require, the Board to exclude the witnesses and finding appellee only called three witnesses to testify at the hearing. Further, that the rule is not designed to benefit a party, but is a tool for administrative efficiency. The Board overruled appellant's objections, adopted the report and recommendation of the ALJ, and affirmed the order terminating appellant pursuant to R.C. 124.03 and R.C. 124.34.

{¶11} Appellant filed an administrative appeal with the Stark County Court of Common Pleas from the final decision of the SPBR. The trial court issued an opinion on November 30, 2017 affirming and finding the decision of the SPBR was supported by

reliable, probative, and substantial evidence, and is in accordance with the law. Appellant appeals the November 30, 2017 judgment entry of the Stark County Court of Common Pleas and assigns the following as error:

{¶12} "I. THE COURT BELOW ERRED IN AFFIRMING THE SPBR'S RATIFICATION OF ITS ADMINISTRATIVE LAW JUDGE'S DECISIONS OVERRULING DEAN'S MOTIONS SEEKING DISQUALIFICATION OF ALL OF THE APPOINTING AUTHORITY'S WITNESSES FOR FAILURE TO COMPLY WITH THE MANDATORY PRE-HEARING REQUIREMENTS OF O.A.C. 124-13-01(B).

{¶13} "II. THE COURT BELOW ERRED AS A MATTER OF LAW IN AFFIRMING THE SPBR'S DECISION TO AFFIRM THE APPOINTING AUTHORITY'S JULY 14, 2016 REMOVAL ORDER UPON GROUNDS NOT LISTED OR OTHERWISE SPECIFICALLY ENDORSED BY THE APPOINTING AUTHORITY IN THE EXPRESS TERMS OF SUCH ORDER."

Standard of Review

{¶14} When reviewing an order of an administrative agency pursuant to a Chapter 119 appeal, the court of common pleas applies the limited standard of review set forth in R.C. 119.12 and determines whether the order is supported by reliable, probative, and substantial evidence and is in accordance with the law. R.C. 119.12; *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 407 N.E.2d 1265 (1980).

{¶15} An appellate court's review is more limited than that of the common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993). In reviewing whether the common pleas court's determination concerning reliable, probative, and substantial evidence does or does not support SPBR's order, the appellate

court's role is limited to determining whether the common pleas court abused its discretion. *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988). On the question of whether SPBR's order is in accordance with the law, the appellate court's review is plenary. *Bartschy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096. If the common pleas court abused its discretion or committed legal error, the appellate court may reverse, vacate, or modify the judgment of the common pleas court. R.C. 119.12.

I.

{¶16} In her first assignment of error, appellant argues that because appellee failed to comply with the mandatory pre-hearing requirements, the trial court erred in affirming the SPBR's decision overruling her motions to disqualify witnesses. We disagree.

{¶17} During the administrative proceeding, appellant filed motions seeking to disqualify all of appellee's witnesses and argued the ALJ should disqualify all of appellee's witnesses because appellee failed to provide a short summary of the expected testimony of each of the witnesses in accordance with Ohio Adm.Code 124-13-01(B).

{¶18} Ohio Adm.Code 124-13-01(B) provides as follows:

> * * * if a party deems it necessary to call more than five witnesses to testify at the hearing, the party shall file with the board at least seven calendar days prior to the first scheduled record hearing date a list of witnesses to be called and a short summary of the expected testimony of each of these witnesses. If a party fails, without good cause, to comply with this

requirement, the board may exclude the testimony of witnesses whose names would have appeared on the witness list reference in this paragraph.

{¶19} First, the rule to provide summaries is limited to circumstances in which, "a party deems it necessary to call more than five witnesses to testify at the hearing." In this case, appellee called only four witnesses in their case-in-chief. Therefore, pursuant to the plain language of the rule, no summary was required.

{¶20} Further, Ohio Adm. Code 124-13-01(B) provides that the summaries must be filed with the Board, as opposed to the other party, unlike the requirement in Ohio Adm.Code 124-13-01(A), in which the party must provide a list of documents to the opposing party. Thus, as noted by the SPBR in its opinion, the rule is not designed to benefit the opposing party, but is a tool for the Board to maintain administrative efficiency. Courts "should give due deference to the administrative interpretation of rules and regulations" because the "General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise." *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, 10th Dist. Franklin No. 04AP-1338, 2005-Ohio-3146.

{¶21} Third, appellant can show no prejudice by the testimony of the witnesses in appellee's case-in-chief, as she received a short summary of the testimony of Lila Jenkins, Lisa Conley, and Stephen Pessefall well in advance of the hearing. On August 15, 2016, in appellee's memo contra to appellant's motion for procedural order in which appellant sought to take discovery depositions of several of appellee's witnesses, appellee provided a brief summary of the testimony to be provided by Conley (she would

provide eyewitness testimony of the November 8th events); Jenkins (she would testify to knowledge of the events of November 8, 2015); and Pessefall (he would testify as to his knowledge of Heartland's policies as to searches conducted by the nursing staff).

{¶22} Finally, even if appellee did fail to provide the required summaries, the code section clearly provides the Board with the discretion to exclude the testimony, as the language provides the board "may exclude the testimony." While the world "shall" is usually interpreted to make the provision in which it is contained mandatory, the word "may" is "generally construed to make the provision in which it is contained optional, permissive, or discretionary." *State v. Edwards*, 5th Dist. Perry No. 2012-CA-12, 2012-Ohio-5142, citing *Dorrian v. Scioto Conservancy District*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971).

{¶23} Accordingly, appellant's first assignment of error is overruled.

II.

{¶24} In her second assignment of error, appellant contends the trial court erred in affirming the SPBR's decision because the removal order did not specifically list the failure to report to the CEO as a ground to justify her removal. Appellant argues that because of this lack of due process, she did not have the opportunity to present her side of the story to respond to such charges. We disagree.

{¶25} In civil proceedings, due process requires notice and a meaningful opportunity to be heard. *State v. Hayden*, 96 Ohio St.3d 211, 773 N.E.2d 502 (2002); *Shell v. Shell*, 5th Dist. Stark No. 2010CA00026, 2010-Ohio-5813, citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). In the due process context, reasonable notice means "notice reasonably calculated, under all circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections." *PHH Mtge. Corp. v. Prater*, 133 Ohio St.3d 91, 2012-Ohio-3931, 975 N.E.2d 1008, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950).

{¶26} In this case, in the removal order, appellant was informed of the general rule she allegedly violated (HR-22, Code of Conduct), the sub-section of the rule she allegedly violated (Rule Numbers 3.23 and 4.1) and the specific subsection of the rule she allegedly violated (Policy 3.40, Patient, Room and Unit searches). The order stated she violated these rules "by and through her actions on November 8, 2015." The removal order specifically cites appellant's alleged failure to follow Policy 3.40. Policy 3.40, Heartland's search policy on Patient, Room and Unit searches, provides, in pertinent part, "The [CNO] may authorize a search of the patient's person * * * if there is reasonable cause to suspect * * * the patient possesses (contraband) (e.g. drugs) * * * The CNO Supervisor will notify the Chief Executive Officer/Designee of any authorization of a search of a patient's person, room or possessions as soon as possible." The removal order also provides that her "rules violations were in breach of the terms of her Last Chance Agreement signed by Brenda Dean on March 12, 2014 and in effect on November 8, 2015 when the rule violation occurred."

{¶27} Further, appellant had a meaningful opportunity to be heard as to whether she failed to report the search of the patient's room to the CEO pursuant to Policy 3.40 and was able to present her objections to the allegation. In appellant's supplemental witness list on January 10, 2017, appellant indicates she will testify "regarding her understanding of HBH policy when it comes to her duties to report the discovery of

contraband in the possession, custody, or control of a resident * * * and her duties if no contraband is discovered." Appellant was aware from the beginning of the hearing in front of the ALJ that appellee intended to argue appellant failed to report the search of the patient's room to the CEO pursuant to Policy 3.40. In their opening statement, appellee stated, in pertinent part,

> So again, the basis of our argument is two prongs. One, there's no reasonable cause because there was insufficient information showing that she had anything on her person * * * Secondly, even if we were to assume there was reasonable cause and it was – the search was ordered by Ms. Dean, she failed to notify the CEO/Designee, and an incident report was never filed, which is required by the policy. And for these reasons we would ask that an R&R be issued affirming her termination, and that the Board further affirm her termination.

(T., p. 10). Appellant responded to this argument during her opening statement, saying, "You will hear the testimony that she in fact did not send any kind of report in because the rule said you only report if there's contraband." (T., p. 18).

{¶28} Appellant offered her testimony as to why she did not violate 3.40 by failing to report. On direct examination, appellant testified she was not informed in her order of removal that she violated 3.40 by failing to report (T., p. 593), testified about when she would be required to report (T., p. 658), and testified she did not report in this case because there was no contraband found (T., pgs. 659-661). On cross-examination, she stated she did not file a report because there was nothing to file a report on since she was not searching a patient, but was doing a skin assessment (T., pgs. 61, 67, 71). She

again stated she was not required to file a report because no contraband was found and no search occurred (T., pgs. 662, 663, 684-686).

{¶29} Additionally, appellant was able to question multiple witnesses about reporting and reporting policy throughout the hearing and did not request the ALJ keep the record open for any additional testimony. Appellant's counsel asked Jenkins if she had a duty to report and argued such questioning was permitted because "the question is under the policy who is responsible for making any kind of report at all. It's the person who initiated the search." (T., pgs. 162, 163). The ALJ and appellant's counsel had a discussion as to whether any reporting by Jenkins obviated the need for appellant to make a report pursuant to Policy 3.40 (T., p. 164). The ALJ permitted the question and Jenkins testified she did not make a report (T., p. 168).

{¶30} Appellee questioned Pessefall about the reporting requirements. Pessefall testified appellant was required to notify the CEO of the search pursuant to Policy 3.40 and she did not comply with this reporting requirement (T., pgs. 223, 224). Appellant cross-examined Pessefall regarding the reporting requirements, including: what triggers the duty to report under 3.40 (T., pgs. 245, 246); whether there is a difference in the duty to report when one authorizes a search as opposed to participates in a search (T., pgs. 246-248); where in the policy appellant would know merely participating in a search would trigger her obligation to report to the CEO (T., pgs. 249-255); the job requirements of the Administrator on Duty as it pertains to the reporting requirement (T., pgs. 275-277); where the order of removal states appellant violated the duty to report (T., p. 279); and whether there is a discrepancy in the reporting policy (T., pgs 306, 327-329, 337-339).

{¶31} Appellant also questioned the police officers as to whether they had a duty to report to the CEO. She asked Officer Scott Stoney whether he reported the incident to the CEO and whether he had a duty to report (T., pgs. 426-429). She asked Officer Brian Michaels if he made a report to the CEO and whether he had a duty to report (T., pgs. 460-462). She asked Chief Yoder whether he had a duty to report (T., pgs. 495-504). She asked Officer Lisa Conley whether she reported and whether she had a duty to report (T., pgs. 573-582).

{¶32} Appellant was able to develop, through her own testimony, the testimony of her other witnesses, and the cross-examination of appellee's witnesses, her argument or defense to allegation that she violated Policy 3.40's duty to report. She consistently maintained that she did not violate the duty to report because she did not perform a search of the patient and because no contraband was found.

{¶33} Appellant cites a federal case, *Lizzio v. Dept. of the Army*, 534 F.3d 1376 (Fed. Cir. 2008) in support of her position. We find the *Lizzio* case distinguishable from the instant case. First, the *Lizzio* case is a federal case interpreting a federal law. Second, in *Lizzio*, the Court found the Board erred in its reliance on a ground for breach different from the one found by the ALJ to have been asserted by agency in the notice of breach, a finding not disturbed by the Board. In this case, both the ALJ and the Board found appellant breached the terms of her last chance agreement due to the failure to report to the CEO/Designee, a violation of Policy 3.40. The Board in this case did not rely on a ground for breach different from the one found by the ALJ to have been asserted by the agency in the notice of breach. In this case, the last chance agreement cited in her

removal order was the one argued and briefed before the ALJ. Further, Policy 3.40 was cited as grounds for removal in the order of removal.

{¶34} Considering all circumstances, including the language in the removal order, the fact that appellant knew at the outset of the hearing the allegation of the failure to report would be an issue, and the fact that appellant was able to present her witnesses and defenses to such allegation and did not request the ALJ keep the record open for any additional testimony, we find appellant received notice and a meaningful opportunity to be heard. Accordingly, appellant's second assignment of error is overruled.

{¶35} Based on the foregoing, appellant's assignments of error are overruled. The November 30, 2017 judgment entry of the Stark County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur