

TENTH APPELLATE DISTRICT

Ali Khan, M.D.,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 10AP-125
	:	(C.P.C. No. 09CVF-4016)
Ohio Bureau of Workers' Compensation	:	
Health Partnership Program,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on September 21, 2010

Dinsmore & Shohl, LLP, Eric J. Plinke, and Michael J. King,
for appellant.

Richard Cordray, Attorney General, and Sandra E. Pinkerton,
for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiff-appellant, Ali Khan, M.D., from a judgment of the Franklin County Court of Common Pleas, affirming an order of defendant-appellee, Ohio Bureau of Workers' Compensation ("BWC"), revoking appellant's certification to participate in the BWC's Health Partnership Program ("HPP").

{¶2} On July 6, 2006, appellant was indicted in Seneca County on one count of theft and one count of receiving stolen property. On November 27, 2006, appellant entered a guilty plea in the Seneca County Court of Common Pleas to one misdemeanor

count of theft, in violation of R.C. 2913.02(A)(1). The facts underlying the plea indicated that appellant, a licensed physician, was working in the emergency department at Tiffin Mercy Hospital on June 19, 2006. On that date, appellant picked up a credit card belonging to a co-worker; later that day, appellant used the credit card to purchase gasoline. The trial court sentenced appellant to 30 days in jail, imposed a fine, and ordered the payment of restitution.

{¶3} On April 12, 2007, the State Medical Board of Ohio ("medical board") sent appellant a letter informing him of its intent to take disciplinary action on his medical license. On December 12, 2007, the medical board issued an order revoking appellant's license based upon a finding that he had entered a guilty plea to a misdemeanor committed in the course of practice and/or a misdemeanor involving moral turpitude. The revocation was stayed, and appellant's license was suspended for 30 days, effective February 4, 2008. Appellant was also placed on probation for two years.

{¶4} On September 27, 2007, the BWC sent appellant a letter informing him of the agency's intent to revoke his re-certification in the HPP based upon Ohio Adm.Code 4123-6-02[.]2(B)(5). Specifically, the letter stated in part as follows:

BWC proposes to revoke your recertification in the Health Partnership Program (HPP) for the following reason(s): pleading guilty and convicted on one misdemeanor count of Theft in the Court of Common Pleas of Seneca [County], Ohio case #06 CR 0182 on November 27, 2006. This is in accordance with **Rule 4123-6-022(B)(5)** which states "*The provider shall: Not have a history of * * * a felony conviction for an act involving dishonesty, fraud or a misrepresentation, or a conviction for a misdemeanor committed in the course of practice[.]*"

(Emphasis sic.)

{¶5} Appellant requested an administrative hearing regarding the September 27, 2007 letter, and the BWC assigned an administrator's designee (hereafter "designee") to conduct a hearing. On February 20, 2008, appellant received a letter from the BWC informing him that the agency was immediately revoking his certification in the HPP on the basis that the medical board had suspended his license effective February 4, 2008. Appellant appealed the February 20, 2008 letter to the Franklin County Court of Common Pleas, but the parties subsequently agreed to dismiss the appeal and proceed to an administrative hearing on both the September 27, 2007 notice and the February 20, 2008 letter.

{¶6} The designee conducted a hearing on June 5, 2008. Following the hearing, the designee issued a report, including findings of fact and conclusions of law, which set forth the following recommendation:

In its initial notice to Dr. Khan concerning its intention to deny his application for re-certification in to the HPP, BWC indicated that its decision was based on the requirement that providers not have felony convictions or convictions for misdemeanors committed in the course of practice. Therefore, that will be the only basis considered. Dr. Khan's guilty plea did not involve a felony or a misdemeanor committed in the course of practice. Therefore, it would be inappropriate to revoke Dr. Khan's recertification application on this basis.

With regard to the notice sent on February 20, 2008, OAC 4123-6-022(B)(1) requires that providers have an active license with no disciplinary restrictions. BWC has no discretion when applying this requirement. Therefore, as Dr. Khan's license was under suspension, termination was appropriate at that time. Since the initial decision, Dr. Khan has served his suspension and no evidence was presented that he currently has any disciplinary restrictions on his ability to practice.

Therefore, without any consideration of additional challenges to participation arising from his guilty plea, at this time Dr. Khan's provider number should be reinstated and BWC should continue to process his application for recertification.

{¶7} On March 3, 2009, the administrator of the BWC issued a report rejecting the designee's analysis that the initial notice limited the hearing issues to a consideration of whether appellant's guilty plea involved either a felony conviction or a conviction for a misdemeanor committed in the course of practice. Specifically, the administrator found that the designee's analysis "sidesteps the fact" that appellant's misdemeanor conviction constitutes a conviction for an act involving dishonesty. Finding that the notice "did both (1) notify Dr. Khan of the conviction that was the basis of the Bureau's proposed action and, (2) give the correct citation to the specific administrative rule that was the basis of the Bureau's proposed action," the administrator determined that appellant's certification should be revoked because of a conviction for an act involving dishonesty as set forth under Ohio Adm.Code 4123-6-02.2(B)(5).

{¶8} Appellant filed an appeal with the trial court from the order of the administrator. On December 2, 2009, the trial court issued a decision affirming the order of the administrator.

{¶9} On appeal, appellant sets forth the following three assignments of error for this court's review:

First Assignment Of Error: The trial court's decision and entry affirming the BWC's March 3, 2009 Order revoking Dr. Kahn's Health Partnership Program provider recertification is contrary to law because that Order resulted from an administrative process that did not comply with the requirements of R.C. Chapter 119 and it violated Dr. Kahn's right to due process.

Second Assignment Of Error: The trial court's decision and entry affirming BWC's March 3, 2009 Order revoking Dr.

Khan's Health Partnership Program provider recertification is contrary to law because that Order was based on the erroneous legal premise that the BWC had "no choice but to revoke Dr. Kahn's recertification."

Third Assignment Of Error: The trial court's decision and entry affirming BWC's March 3, 2009 Order revoking Dr. Kahn's Health Partnership Program provider recertification is contrary to law because that Order was based on a factual conclusion that was improperly presumed and was not supported by the evidence.

{¶10} In considering an administrative appeal under R.C. 119.12, a court of common pleas determines whether an order is supported by reliable, probative, and substantial evidence, and is in accordance with law. The review of the administrative record by the court of common pleas "is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. An appellate court's standard of review in an appeal from an agency order "is more limited than that of a common pleas court." *2216 SA, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 07AP-600, 2007-Ohio-7014, ¶8. It is not the function of the appellate court to examine the evidence, but "to determine only if the trial court has abused its discretion." *Id.* An appellate court, however, does have "plenary review of purely legal questions in an administrative appeal." *Id.*

{¶11} Appellant's three assignments of error are somewhat interrelated, and will be addressed jointly. Appellant first contends that the BWC's September 27, 2007 letter failed to comply with the requirements of R.C. 119.07. Specifically, appellant argues the

BWC decided the revocation issue on the basis of a conviction for an act involving dishonesty, in accordance with Ohio Adm.Code 4123-6-02.2(B)(5), but that such an act was not alleged in the letter of notice; rather, appellant maintains, the letter only alleged that the basis for the proposed action was a felony conviction and/or a conviction for a misdemeanor committed in the course of practice. Appellant argues that the notice he was provided violated his right to due process.

{¶12} The trial court rejected this argument, noting that the "misdemeanor charge, plea and conviction as well as the applicable rule were included in the notice." The court further noted that the transcript of the administrative hearing reflected that counsel for the BWC raised the issue of a conviction for an act of dishonesty during the hearing, and that appellant did not request leave to continue the hearing, nor did appellant choose to submit a post-hearing argument on the issue of a conviction for an act involving dishonesty. While observing that the notice was "perhaps poorly drafted," the trial court held that it gave appellant and his counsel "clear indication of why the Bureau was considering denial of recertification" and, thus, no denial of due process was shown.

{¶13} R.C. 119.07 requires an agency to provide notice of an opportunity for a hearing. Pursuant to R.C. 119.07, the notice "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."

{¶14} Ohio Adm. Code 4123-6-02.2(B)(5), the administrative rule cited in the notice provided by the BWC to appellant, states in relevant part:

(B) The minimum credentials for a provider, where applicable based upon the type of provider, are as follows. The provider shall:

(1) Be currently licensed to practice, as applicable, without disciplinary restrictions * * * that affect the provider's ability to treat patients or that compromise patient care.

* * *

(5) Not have a history of a felony conviction in any jurisdiction, a conviction under a federal controlled substance act, a conviction for an act involving dishonesty, fraud, or misrepresentation, a conviction for a misdemeanor committed in the course of practice or involving moral turpitude, or court supervised intervention or treatment in lieu of conviction pursuant to section 2951.041 of the Revised Code or the equivalent law of another state.

{¶15} As found by both the administrator and the trial court, the notice provided to appellant included the misdemeanor charge and the applicable rule involved; specifically, the notice informed him that the basis for the proposed action was his guilty plea and resulting conviction with respect to "one misdemeanor count of Theft in the Court of Common Pleas of Seneca [County], Ohio * * * on November 27, 2006 * * * in accordance with **Rule 4123-6-022(B)(5)**."

{¶16} Further, a review of the transcript of the hearing supports the trial court's determination that counsel for the BWC raised, at the outset of the hearing, the argument that appellant's conviction involved "an act involving dishonesty." (HPP record at 125.) The hearing record included the admission of the certified record of proceedings before the medical board, in which the victim of the theft testified as to the events of June 2006. Following the presentation of evidence by counsel for the BWC, appellant's counsel stated: "I'm not going to present any evidence." (HPP record at 146.) During closing statements before the designee, counsel for the BWC reiterated the position that,

"[w]hether or not that conviction is a felony or not, the Rule says it's a conviction involving dishonesty." (HPP record at 165.)

{¶17} At the close of the hearing, the designee asked counsel for appellant whether he would have presented any additional witnesses and/or other evidence had he appreciated the scope of the notice, and counsel responded that he only "would probably have briefed the issue on course of practice." (HPP record at 158.) In addition, the designee made clear that counsel for appellant would be given the opportunity to submit a post hearing brief on any issues deemed relevant.

{¶18} This court has previously held that "[p]rocedural due process includes the right to a reasonable notice of hearing as well as a reasonable opportunity to be heard." *State ex rel. Finley v. Dusty Drilling Co., Inc.* (1981), 2 Ohio App.3d 323, 324-25, citing *State ex rel. Allstate Ins. Co. v. Bowen* (1936), 130 Ohio St. 347.

{¶19} Here, the record shows that the administrator's revocation decision was based upon appellant's guilty plea and conviction to one misdemeanor count of theft, the charge listed in the notice, and the notice clearly informed appellant of the applicable rule at issue. While the notice may have inaccurately paraphrased portions of the rule, a perusal of Ohio Adm.Code 4123-6-02.2(B)(5) would have put appellant and his counsel on notice that "a conviction for an act involving dishonesty" was implicated by the rule. Further, as found by the trial court, despite the fact that the BWC asserted at the hearing that appellant's conviction for theft constituted a conviction for an act involving dishonesty, appellant did not seek a continuance, nor did appellant choose to address this issue in post-hearing briefing even though afforded the opportunity. Upon review, the record

reflects that appellant was provided a fair and reasonable opportunity to be heard, and we agree with the trial court that appellant has not demonstrated a denial of due process.

{¶20} Appellant also contends, under the remaining assignments of error, that the trial court's decision was based upon a factual conclusion that was not supported by the evidence, and that the BWC erred in finding it had no discretion but to revoke his license for a conviction arising from an act of dishonesty. Appellant argues that the BWC merely presumed that the conviction was for an act involving dishonesty, and appellant maintains there is evidence to support a contrary conclusion which was not fully presented or considered due to a "flawed" notice and hearing procedure.

{¶21} To the extent appellant claims a flawed notice and hearing procedure, those issues have been addressed above and found to be without merit. Further, we have also noted our agreement with the trial court's determination that "[t]he hearing record reflects that Appellant was on notice from the beginning of the hearing and if surprised could have sought a continuance or the right to further brief the issue."

{¶22} The trial court also rejected appellant's claim that his actions were "incredibly stupid but not dishonest." Evidence relating to the theft was introduced at the BWC hearing through the admission of the certified medical board record. The report prepared by the medical board hearing examiner reflects that the victim, Lori Myers, testified she was working in the emergency department of Mercy Hospital on June 19, 2006. Myers observed appellant going in and out of her office on that date; upon arriving home that evening, she could not locate her credit card. Myers then called the credit card company, and the company reported that the card was being used "right now" at a Citgo Gasoline Station in Woodville, Ohio. Police officers later obtained a surveillance video

from the gas station, and appellant was identified as the individual who purchased gas with the credit card.

{¶23} Appellant was subsequently interviewed by police officers; appellant explained that he had found the credit card on the floor near a sink in the emergency department of the hospital. Appellant acknowledged that he knew it was not his credit card, and that he "knowingly used" the credit card to obtain gasoline, and had done so "knowing that it was wrong." (HPP Record at 91.) During the medical board proceedings, exhibits were admitted with respect to appellant's plea agreement to one misdemeanor count of theft.

{¶24} The trial court, citing evidence of appellant's failure to return the card, the use of the card to purchase gas, and "different scenarios" offered to the police and medical board, agreed with the administrator's determination that the record supported a finding of a conviction for an act involving dishonesty. Upon review, we conclude that the trial court did not abuse its discretion in finding there was reliable, probative, and substantial evidence upon which the administrator could have determined that appellant's theft of a co-worker's credit card constituted a conviction for an act involving dishonesty, and that denial for re-certification was appropriate based upon Ohio Adm.Code 4123-6-02.2(B)(5).

{¶25} Finally, we find no merit to appellant's contention that the administrator erred by finding there was "no choice" but to revoke re-certification. Appellant points to language in Ohio Adm.Code 4123-6-02.5(B) which provides that the administrator "may" refuse to certify or recertify a provider who has failed to comply with applicable rules. This court has previously construed the provisions of Ohio Adm.Code 4123-6.02.5 and

4123-6-02.2(B)(5) (i.e., providing that a provider "shall * * * not" have a conviction for an act involving dishonesty) to hold that evidence of mitigating factors is "irrelevant" to the administrator's authorization to order decertification. *Gralewski v. Bur. of Workers' Comp.*, 167 Ohio App.3d 468, 2006-Ohio-1529, ¶22 (neither the applicable statute nor rules (including Ohio Adm.Code 4123-6-02.2(B)(5)) "contain any mention of mitigating circumstances. Thus, evidence of mitigation is irrelevant to the basic issue of whether the administrator had the legal authority to decertify Dr. Gralewski"). See also *Kistler v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 04AP-1095, 2006-Ohio-3308, ¶12, citing *Gralewski* ("[t]he bureau has no discretion to certify a physician once it is demonstrated that the physician has such a conviction").

{¶26} Based upon the foregoing, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and CONNOR, J., concur.
