

In the
Supreme Court of Ohio

BEVERLY CLAYTON, C.N.P., R.N.,	:	Case No. 2014-1092
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
OHIO BOARD OF NURSING,	:	
	:	Court of Appeals Case
Appellee.	:	No. 13AP-726

BRIEF OF APPELLEE OHIO BOARD OF NURSING

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INTRODUCTION

The Ohio Board of Nursing (“the Board”) temporarily suspended Beverly Clayton’s nursing license because she did not follow a most basic nursing rule while treating a patient during an overnight shift in a hospital’s Intensive Care Unit: As even Clayton’s expert acknowledged, Tr. at 586-89, a registered nurse must either follow physician orders for a patient or contact a physician for new orders if something is unclear with the orders. Ohio Adm. Code 4723-4-03(E). Clayton does not directly challenge the Board’s suspension order or the administrative proceedings that led to it. She instead takes issue with the pre-hearing process. Clayton had defended against the charges on the ground that the hospital was too busy on the night in question. The hearing officer rejected her request to subpoena other patients’ records from that night on typical grounds—they were confidential and duplicative of what Clayton could attempt to establish with her own testimony and the testimony of her fellow nurses. Not only that, the hearing officer *credited* Clayton’s account of the night, but found that, no matter how busy, it could not excuse a violation of the fundamental duty to follow a doctor’s orders. Yet Clayton still presses for an alleged right to subpoena that, if sustained, would upend the way that Ohio’s agencies conduct administrative proceedings, and that could even disrupt settled questions about civil and criminal procedure in judicial proceedings.

Revised Code Chapter 119 outlines the procedures that administrative agencies should follow when conducting adjudication hearings. Those procedures do not permit parties to conduct pre-hearing discovery, *see Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St. 3d 143, syl. ¶ 1 (1990), and they give hearing examiners discretion to determine the evidence that should be admitted at a hearing, R.C. 119.09. Although Clayton’s proposition of law is expansive and her brief is vague, she appears to challenge both principles as a matter of statutory law,

constitutional law, or both. However her arguments are framed, there is no constitutional or statutory basis for this Court to grant her requested discovery-like relief.

Pre-Hearing Discovery. To begin with, Clayton is mistaken to suggest that due process requires some right to pre-hearing discovery in administrative proceedings. Even in criminal proceedings, “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). If there is no due-process right to discovery in *criminal* proceedings when a defendant’s liberty is at stake, it would make no sense to recognize a right to pre-hearing discovery in *administrative* proceedings “wherein procedural due process does not and cannot require strict application of the judicial model.” *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 51 (1990) (citing *Dixon v. Love*, 431 U.S. 105, 115 (1977)). Unsurprisingly, therefore, countless courts have held that “parties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of constitutional right.” *Nat’l Labor Relations Bd. v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir. 1976). Clayton offers no compelling reason for this Court to recognize a due-process right to prehearing discovery, and thereby to create a conflict with the significant weight of contrary authority.

Scope of Subpoena. Clayton is also mistaken in suggesting that parties in administrative hearings have an unrestricted statutory or constitutional right to subpoena and introduce evidence in those hearings. Like a civil or criminal judge, a hearing examiner may, consistent with due process, limit a subpoena that is overly burdensome or that seeks to compel the production of privileged material for use as evidence in an administrative hearing. *See E.B. Mueller & Co. v. Fed. Trade Comm’n*, 142 F.2d 511, 520 (6th Cir. 1944). The power to issue subpoenas only for *admissible evidence* is specifically provided for in R.C. 119.09, which permits hearing examiners

to “pass upon the admissibility of evidence.” There would be no reason to issue a subpoena—requiring the subpoenaed party to appear at trial with the requested documents—if the agency has already determined that the evidence would be excluded. This case provides a perfect example of why such authority is necessary: The medical records that Clayton seeks were confidential. *See Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973 ¶ 46.

Prejudice. Regardless, the Court need not reach any of these issues. Both due process and R.C. 119.12 have long required a party to show harm from an alleged lack of discovery. Here, the unanimous Tenth District correctly found that Clayton could not do so. Even without the medical records at issue, Clayton was still able to make her case that the ICU was “chaotic” and “overwhelming” on the night in question. The hearing examiner *acknowledged* those conditions and treated them as mitigating factors. Report and Recommendation, Record of Proceedings 15 at 38-39, 45, and 48-49. He determined however that, *even considering* the circumstances in the ICU, Clayton had failed to practice in accordance with acceptable and prevailing standards of safe nursing care. *Id.* at 45. Indeed, it is noteworthy that Clayton did not even use all the evidence that she subpoenaed for this point. She was able to establish that the ICU was chaotic on the basis of her testimony and that of her expert. Although the hearing examiner issued a subpoena for the other nurses working with her in the ICU, Clayton chose *not* to call any of them to testify at the administrative hearing. It was her choice—and her choice alone—not to introduce all of the potential evidence about the conditions in the ICU.

For the foregoing reasons, and for the reasons that follow, the Court should affirm the judgment of the Tenth District Court of Appeals.

STATEMENT OF THE CASE AND FACTS

A. While working in the Intensive Care Unit one shift, Beverly Clayton failed to read or follow the physician's orders that established Patient 1's course of care.

Beverly Clayton is a registered nurse who, on the night of August 27, 2009, was working a twelve-hour overnight shift in the Intensive Care Unit of Mercy Hospital Western Hills in Cincinnati. Tr. at 77-79. Before Clayton's shift began, a new patient—known for the purpose of these proceedings as "Patient 1"—was transferred to the ICU. Tr. at 78-79. When Clayton began her shift, she assumed responsibility for that patient. Tr. at 225.

Patient 1 had arrived in the Emergency Room earlier in the day with a variety of serious health problems. Tr. at 662-66. Among other things, he had congestive heart failure (his heart was not pumping properly and fluid was backing up into his lungs) and was in rapid atrial fibrillation (he had a rapid and irregular heartbeat). *Id.* Given the nature and extent of these problems, he was considered to be "in extremis," meaning that without additional medical care it was likely that he would die within a short period of time. Tr. at 681.

While Patient 1 was still in the Emergency Room, he was seen by Dr. Janelle Bowers, the hospital's lead internal medicine physician or hospitalist. Tr. at 661-62. Dr. Bowers developed a treatment plan for Patient 1; she ordered that he receive certain medications and instructed that he be seen by both a pulmonologist and a cardiologist. Tr. at 666-67. The treatment plan was outlined in a set of physician's orders that were added to Patient 1's chart. Tr. at 675.

Clayton did not read or follow Dr. Bowers's orders. *See* Tr. at 80-84 and 669-75. Although she administered certain medications, Clayton did so based on information that appeared in the hospital's computer system, not in Dr. Bowers's orders. Tr. at 93-95. Those orders had been entered into the computer incorrectly, and did not accurately describe the

medication that Dr. Bowers prescribed for Patient 1. Tr. at 98-99 and 140; *see also* Tr. at 473-74. Furthermore, Clayton did not arrange for Patient 1 to be seen by either a pulmonologist or a cardiologist. Tr. at 139-40.

During her shift, Clayton undertook a variety of non-critical activities with respect to Patient 1. Clayton performed an educational assessment for Patient 1, Tr. at 88-89 and 183, and conducted range of motion exercises every two hours, Tr. at 592. She reviewed Patient 1's nursing home records, Tr. at 89-90 and 591, and documented a variety of other information, including the status of Patient 1's call lights, Tr. at 89, his permitted alcohol intake, Tr. at 90 and 590, his comfort level, Tr. at 91, and, on at least six occasions, the status of the side rails on Patient 1's bed, Tr. at 93.

Patient 1's health continued to deteriorate after he was admitted to the ICU. He did not respond to the medication that he was given at 10 p.m., Tr. at 193-94, and at 1 a.m. his blood pressure began dropping rapidly, Tr. at 195-198; *see also id.* at 754-57. Yet Clayton did not call for a physician until around 4 a.m., several hours after Patient 1 had first begun to show signs of decline. Tr. 195-99.

When Dr. Bowers returned to the hospital the following morning, she observed that her orders had not been carried out. Tr. at 669. Patient 1's prospects for recovery were never good, and it was quite possible that he would die even if he received the best care and all of her orders had been followed to the letter. Tr. at 749-52. But those orders had not been followed and Patient 1 was near death. Tr. at 672. At that point there was little that could be done to save him. *Id.* He died a short time thereafter. *See* Tr. at 750-52.

B. For the hearing, Clayton requested that the hearing examiner issue a subpoena ducas tecum for the medical records of all patients in the ICU during her shift. The hearing examiner narrowed her subpoena request.

Following Patient 1's death, the Board of Nursing notified Clayton that it intended to revoke, suspend, or place restrictions on her nursing license. *See* State's Hearing Ex. 1, Record of Proceedings 19. The Board informed Clayton that she was entitled to a hearing, *id.*, and Clayton requested that one be held. State's Hearing Ex. 2, Record of Proceedings 20. Before the hearing, the Board voluntarily provided Clayton with copies of the evidence that it planned to rely on at the hearing. Clayton received Patient 1's medical records and the hospital provided her with the names and addresses of various witnesses that she requested. *See* Hearing Examiner Order, Record of Proceedings 113 at 2-3. Pursuant to the hearing examiner's scheduling order, counsel for the Board disclosed the names of witnesses that would be called at the hearing, copies of the exhibits that would be used, and a written copy of the report prepared by the Board's expert witness. *See* Scheduling Order, Record of Proceedings 132 at 1-2.

Clayton also asked that the hearing examiner issue twenty-four subpoenas. She initially requested subpoenas for twenty-three individuals, Request for Subpoenas, Record of Proceedings 109, but later withdrew eight of those requests, Opposition to Motion to Limit Subpoena Request, Record of Proceedings 100 at 1-2. Clayton also requested a subpoena ducas tecum to the hospital for the medical records of all of the patients who were in the ICU on the night in question in addition to Patient 1. Request for Subpoenas, Record of Proceedings 109 at 3. Clayton asked that the records be subpoenaed "for the adjudication hearing itself," Opposition to Motion to Limit Subpoena, Record of Proceedings 100 at 7, arguing that she needed the records to establish the conditions in the ICU for purposes of "exoneration," "mitigation," and to determine "the degree of reasonable and justifiable discipline," *id.* at 14.

Counsel for the hospital and the Board of Nursing both opposed Clayton's request. The hospital argued that, pursuant to R.C. 2317.02, the requested records were confidential, privileged, and protected from disclosure in the administrative proceeding. Mercy Hospital Objections and Motion to Quash, Record of Proceedings 95 at 7. The hospital also argued that the medical records of patients whose care was not at issue were irrelevant and that any benefits of disclosure were outweighed by the patients' privacy interests. *Id.* In similar fashion, the Board's counsel argued that the request for medical records raised confidentiality concerns and was by itself excessive. Motion to Limit Subpoena Request, Record of Proceedings 111 at 1-2. Neither the Board nor the hospital opposed the request to subpoena Patient 1's records.

The hearing examiner granted Clayton's subpoena request in part and denied it in part. He issued most of the subpoenas that Clayton requested, including subpoenas for the nursing supervisor from the night in question and the other employees who were working in the ICU. *See* Hearing Examiner Order, Record of Proceedings 97 at 3. But he found that the medical records of the patients in the ICU were "either likely irrelevant," "beyond the scope of the charges against [Clayton]," or "outweighed by the privacy and confidentiality protections afforded to others." *Id.* at 4. He also concluded that the information sought—the conditions in the ICU—could "be obtained through other witnesses under subpoena." *Id.* He lastly quashed a subpoena that had been issued for Rebecca Green, a Board of Nursing supervising attorney. *See id.* at 4-5.

Treating his October 28 order as a ruling on the admissibility of the other patients' medical records, the hearing examiner concluded in a separate order that the hospital's objections to some of Clayton's subpoena requests were rendered moot when he "granted the Board's

motion to exclude as evidence at the hearing the medical records of all other ICU patients.”
Hearing Examiner Order, Record of Proceedings 94 at 3.

C. After a hearing, the examiner concluded that Clayton had violated the applicable standards of care and recommended that she be disciplined. The Board of Nursing adopted the hearing examiner’s report and recommendation but reduced the recommended discipline.

At the hearing, the events surrounding the physician’s orders for Patient 1 and the ICU conditions on the night in question were heavily litigated. Dr. Bowers testified that her orders were in Patient 1’s chart and that she “easily” found them when she returned to the hospital the next morning. Tr. at 675. Another witness testified that Clayton had previously stated that she simply had not looked at the orders, not that they were not in Patient 1’s chart. Tr. at 467-69. Further testimony established that physician’s orders are “the crux of everything you have to do for [a] patient.” Tr. at 392. Even in chaotic or stressful circumstances, “knowing the physician plan and care for [a] patient” should be a nurse’s “top priority.” Tr. at 183 and 243-44. The Board’s witnesses also addressed staffing levels in the ICU, Tr. 330-62, and the procedures that were in place to increase the number of nurses if extra help was needed, Tr. at 294-97 and 306-07. On the night in question, the number of nurses working in the ICU was increased: An additional nurse was added to the ICU staff at approximately 11 p.m. Tr. at 594; *see also* Expert Report, Respondent Exhibit J, Record of Proceedings 53 at 3.

Clayton also testified about the circumstances in the ICU on the night in question and whether Patient 1’s chart contained the physician’s orders outlining his course of care. She maintained that the physician’s orders for Patient 1 were not in his chart, Tr. at 82, and that she did not have time to look for them, Tr. at 82-85. Clayton’s expert witness acknowledged that failure to read a physician’s orders is generally a significant error, Tr. at 586-89, but opined that Clayton’s failure to do so in this case was mitigated by the fact that there had been a “systemic

breakdown” in the ICU on the night in question, Tr. at 584; *see also* Tr. at 559-65. Clayton did not call as witnesses any of the other nurses who were working in the ICU that night.

The hearing examiner issued a Report and Recommendation that found that Clayton had failed to practice “in accordance with acceptable and prevailing standards of safe nursing care in Ohio.” Report and Recommendation, Record of Proceedings 15 at 44. The examiner concluded that the physician’s orders for Patient 1 were in his chart and that Clayton’s contrary testimony was not “credible.” *Id.* at 35-36 and 41. Even if the orders were not part of Patient 1’s chart, however, the hearing examiner found that Clayton would have still violated prevailing standards of care by not attempting to obtain the orders. *Id.* at 36-37. The hearing examiner acknowledged the “chaotic” and “overwhelming” circumstances in the ICU on the night in question and treated them as a mitigating factor. *Id.* at 38-39, 45, and 48-49. He concluded that, even considering those circumstances, Clayton had failed to practice in accordance with acceptable and prevailing standards of safe nursing care. *Id.* at 45.

The hearing examiner recommended that Clayton’s license be suspended for a minimum of one year, that she complete nursing education courses as a condition for reinstatement, that she be placed on probation for three years following her reinstatement, and that she receive permanent practice restrictions. *Id.* at 50-51.

The Board adopted the hearing examiner’s findings of fact and conclusions of law, but imposed a lesser sanction. Adjudication Order, Record of Proceedings 4 at 1. The Board ordered that Clayton’s license be suspended for a minimum of one year and established conditions for her reinstatement. *Id.* The Board reduced the probationary period recommended by the hearing examiner to two years and imposed temporary—rather than permanent—practice restrictions. *Id.*

D. Clayton appealed to the Franklin County Court of Common Pleas and the court found that the Board of Nursing’s decision was supported by reliable, probative, and substantial evidence.

Clayton appealed the Board’s order to the Franklin County Court of Common Pleas. As relevant here, she argued that the hearing examiner erred when he “adamantly denied every pre-hearing [m]otion” to obtain the medical records of other patients who were in the ICU on the night in question. Clayton Common Pleas Br. at 5 and 8 n.1. She also argued that the hearing examiner erred by prohibiting her from introducing those medical records as evidence at the hearing. *Id.* at 8, 12, and 16.

The common pleas court upheld the Board’s order, finding that it was supported by reliable, probative, and substantial evidence and that it was in accordance with law. Common Pleas Op. at 11. The court did not address the issue of pre-hearing discovery as it related to the other patients’ medical records, but it upheld the hearing examiner’s decision to exclude as evidence the medical records of the other patients whose care was not at issue in the hearing. Relying on the fact that “the hearing examiner is granted some discretion in the way the hearings are conducted and the evidence presented,” the common pleas court found that he did not abuse his discretion in excluding the other patients’ medical records. *Id.* at 4. The court further noted that “[i]t is not clear how it can be contended that the patients’ records were of paramount importance to [Clayton]” when she made no attempt to call other witnesses who could have testified “about the conditions in the ICU at the relevant times.” *Id.*

E. Clayton appealed to the Tenth District Court of Appeals and the court of appeals affirmed the trial court’s judgment. This Court granted jurisdiction on Clayton’s Motion for Reconsideration.

Clayton appealed to the Tenth District Court of Appeals. As in the common pleas court, she argued that the hearing examiner “adamantly denied every pre-hearing motion” to obtain other patients’ medical records, Clayton Tenth Dist. Br. at 7, and asked how an expert could be

expected to prepare a report without pre-hearing access to such records, *id.* at 12. And she again contended that the hearing examiner erred by refusing to permit her to introduce those records into evidence. *See id.* at 6-14 and 21-22.

The Tenth District overruled Clayton's assignments of error and affirmed the judgment of the common pleas court. App. Op at 16. With respect to her challenge to the hearing examiner's decision denying her access to third-party medical records, the court noted that, under R.C. 119.09, "if, requested . . . an administrative agency must issue a subpoena to compel the attendance of a witness or the production of documents at the hearing." *Id.* ¶ 28 (citing cases). But the court nevertheless held that to secure a reversal based on the failure to issue a subpoena, Clayton needed to show that she was prejudiced by that decision. *Id.*

The court found that Clayton could not establish this prejudice. *Id.* ¶ 31. It concluded that "the hearing examiner denied Clayton's subpoena request to avoid infringing on the privacy and confidentiality protections afforded to the other patients and because the information Clayton sought could be obtained through other sources." *Id.* at ¶ 29. And it held that the hearing examiner afforded her other opportunities to present evidence about the needs of other patients in the ICU. *Id.* at ¶ 30. Clayton herself testified about "the care she provided to other patients," *id.*, and, although Clayton was permitted to subpoena other nurses who were working with her on the ICU that night, she chose not to call any of them to testify, *id.*

Clayton appealed to this Court and the Court denied discretionary review. *Clayton v. Ohio Bd. of Nursing*, 140 Ohio St. 3d 1441, 2014-Ohio-4160. Clayton then filed a Motion for Reconsideration, arguing that this Court's review was called for to address whether due process requires discovery in administrative adjudication proceedings. *See* Motion for

Reconsideration at 3-6. The Court granted reconsideration and accepted Clayton's first Proposition of Law. *Clayton v. Ohio Bd. of Nursing*, 140 Ohio St. 3d 1508, 2014-Ohio-5098.

ARGUMENT

Although vague, Beverly Clayton's merit brief seems to suggest that there are two reasons why the hearing examiner erred when preventing her from obtaining subpoenas for the medical records of patients whose care was not at issue in the administrative hearing. Clayton initially appears to assert that her due process rights were violated when she was denied *pre-hearing* discovery because she needed the records for her expert to prepare and write a report before the hearing. *See* Appellant Br. at 10 (criticizing the "'no discovery' rule governing an administrative evidentiary hearing"). Clayton then falls back on the argument that her rights (whether statutory or constitutional) were violated when she was prevented from subpoenaing certain patient records for the purpose of admitting those records into evidence at her disciplinary hearing. *See* Appellant Br. at 14 (arguing that third-party medical records should have "been obtained and admitted in evidence").

In her brief, Clayton also notes that her license had not yet been reinstated at the time of filing. *See* Appellant Br. at 18. The Board's order imposed educational requirements that Clayton must complete as a condition for reinstatement; she has not completed those requirements. There is nothing about the Board's order, or these proceedings, that prevent Clayton from completing the requirements and requesting reinstatement immediately.

Clayton's arguments seeking reversal and challenging the hearing examiner's refusal to permit her to subpoena the third-party medical records are mistaken. *First*, due process does not create a right to pre-hearing discovery in administrative proceedings. *Second*, a hearing examiner "shall pass" on the admissibility of evidence and may limit or quash a subpoena that seeks to compel the production of inadmissible evidence. *Third*, with respect to both of

Clayton’s arguments, she was not prejudiced by her inability to discover or introduce the medical records of patients whose care was not at issue in the administrative hearing. The Board will address these arguments in turn.

Ohio Board of Nursing’s Proposition of Law 1:

Due process does not require pre-hearing discovery in Chapter 119 administrative hearings.

Clayton criticizes the “‘no discovery rule’ governing . . . administrative evidentiary hearing[s].” Appellant Br. at 10. There cannot be a *statutory* dispute on this issue. This Court has long held that Revised Code Chapter 119 does not create a right to pre-hearing discovery in administrative adjudication hearings. *See Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St. 3d 143, syl. ¶ 1 (1990). Clayton neither challenges this Court’s decision in *Frantz*, nor alleges that any other statutory provision authorized pre-hearing discovery.

Clayton instead raises only a due process claim under the Fourteenth Amendment of the U.S. Constitution and Section 16, Article I, of the Ohio Constitution. *See* Appellant Br. at 9-13 (challenging the fairness of the “‘no discovery’ rule governing . . . administrative evidentiary hearing[s]”). As countless courts have held, however, there is no constitutional due process right to pre-hearing discovery. If the Court holds that such a right exists, that holding would affect every aspect of the State’s legal system. The right to discovery would not just apply here, or to Board of Nursing proceedings in general; it would extend to every judicial or quasi-judicial proceeding—it would apply in civil proceedings, criminal trials, and administrative hearings alike.

A. There is no constitutional due process right to pre-hearing discovery under the Fourteenth Amendment of the U.S. Constitution or under Section 16, Article I, of the Ohio Constitution.

Administrative proceedings must comply with the due process requirements of the Fourteenth Amendment of the United States Constitution and Section 16, Article I, of the Ohio Constitution. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46 (1990); see *Arbino v. Johnson and Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶ 48 (Section 16, Article I, of the Ohio Constitution is “the equivalent of the ‘due process of law’ protections in the United States Constitution.”); *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 53 (same). And while due process requires an “opportunity to be heard at a meaningful time and in a meaningful manner,” *Mathews*, 424 U.S. at 333 (internal quotations omitted), “no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause,” *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982). A meaningful opportunity to be heard does not include a right to conduct discovery before a hearing. This is true as a matter of precedent, as a matter of history, and as a matter of fairness.

Precedent. Courts have long recognized that “it has never been held that the Constitution of the United States requires that discovery procedure be adopted by any court.” *Starr v. Comm’r of Internal Revenue*, 226 F.2d 721, 722 (7th Cir. 1955). Even in criminal prosecutions, where due process concerns are at their peak, the U.S. Supreme Court has held “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.” See *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)); see also *Weatherford v. Bursey*, 429 U.S. 545, 559-60 (1977) (same).

If due process does not require discovery in civil *or* criminal proceedings, there cannot be a constitutional right to pre-hearing discovery in an administrative setting “wherein procedural

due process does not and cannot require strict application of the judicial model.” *Doyle*, 51 Ohio St. 3d at 51 (citing *Dixon v. Love*, 431 U.S. 105, 115 (1977)). This conclusion is borne out by numerous federal decisions. Like Revised Code Chapter 119, the federal Administrative Procedure Act does not authorize parties to conduct discovery before an administrative hearing. *See Kelly v. United States E.P.A.*, 203 F.3d 519, 523 (7th Cir 2000); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 350 (1st Cir. 2004). Federal courts have consistently held that the lack of discovery does not violate due process. *See Nat’l Labor Relations Bd. v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2nd Cir. 1970) (“It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right.”); *see also Nat’l Labor Relations Bd. v. Valley Mold Co. Inc.*, 530 F.2d 693, 695 (6th Cir. 1976); *Silverman v. Commodity Futures Trading Comm’n*, 549 F.2d 28, 33 (7th Cir. 1977); *Kenrich Petrochemicals Inc. v. Nat’l Labor Relations Bd.*, 893 F.2d 1468, 1484-85 (3rd Cir. 1990); *but see McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (requiring disclosure of “uniquely relevant” document in the possession of the agency).

Both the District Court for the Southern District of Ohio and the Tenth District Court of Appeals have specifically rejected due process challenges to the absence of pre-hearing discovery in Chapter 119 proceedings. Applying well-established federal precedent, the Southern District of Ohio held that the denial of pre-hearing discovery does not violate due process. *See DiMichaelangelo v. Ohio State Dental Bd.*, No. C2-00-044, 2000 WL 294826, *5 (S.D. Ohio Feb. 15, 2000) (citing *Valley Mold Co., Inc.*, 530 F.2d at 695). The Tenth District has done the same. *LTV Steel Co. v. Indus. Comm’n*, 140 Ohio App. 3d 680, 688-90 (10th Dist. 2000); *see also Froug v. Ohio Bd. of Nursing*, No. 00AP-523, 2001 WL 82926, *3-4 (Feb. 1,

2001). Noting that “the majority of jurisdictions to consider the due process issue have concluded that there is no constitutional due process right to depositions in administrative proceedings,” *LTV Steel Co.*, 140 Ohio App. 3d at 689, the Tenth District independently considered whether pre-hearing discovery was required pursuant to the balancing test set forth in the U.S. Supreme Court’s decision in *Mathews*, *id.* at 690. Concluding that it was not, the Tenth District held that, among other things, the burdens of pre-hearing discovery would outweigh any additional procedural benefits. *Id.*

History. History confirms what the cases hold. Discovery as now commonly practiced in civil courts in Ohio is a relative newcomer to the stage. History matters because a practice “that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets” the standard of fair play and substantial justice. *Burnham v. Superior Court of California, Cnty. of Marin*, 495 U.S. 604, 622 (1990) (plurality op.); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) (“[I]t is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is ‘due’ process, nor do I believe such a rootless analysis to be dictated by our precedents.”); *Bland v. Graves*, 99 Ohio App. 3d 123, 135 (9th Dist. 1994) (process question was “a matter of state legislative discretion” where “traditional common-law rule” did not require a right “recognized only more recently as the modern trend”).

Pre-hearing discovery is simply not a historical practice, even in civil and criminal trials. The absence of a constitutional right to discovery is confirmed by the fact that “until Rule 26 of the Federal Rules of Civil Procedure . . . became effective in 1938, pre-trial discovery was not available in the federal courts.” See *Interboro Contractors Inc.*, 432 F.2d at 858. It is

inconceivable to suggest that the federal courts had been violating due process for a large portion of this Nation's history.

Fairness. The requirements of due process are satisfied “when the party concerned is provided an opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute.” *Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 717 (7th Cir. 2000) (quotation omitted); *see also State v. Hochhausler*, 76 Ohio St. 3d 455, 459 (1996). Determining whether a given set of procedures provide a party with an adequate opportunity to be heard “requires analysis of the governmental and private interests that are affected.” *Mathews*, 424 U.S. at 334. A court must consider three factors when conducting such an analysis. *First*, it must consider the private interest that is at stake. *Id.* at 334-35. *Second*, it must consider the risk of erroneous deprivation of that interest and the “value, if any, of additional or substitute procedural safeguards.” *Id.* *Third*, it must consider “the Government’s interest, including . . . the burdens” posed by the additional procedures. *Id.*

The private interest at stake here—while significant—is not on par with the interest at stake in other proceedings. Take criminal trials. There, a defendant’s freedom itself is at issue; “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause.” *Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). But even in criminal proceedings, “the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.” *Wardius*, 412 U.S. at 474. The due process clause does not require *greater* process in administrative proceedings where a *lesser* interest is at stake.

Existing Chapter 119 procedures adequately protect parties to an administrative hearing from “an erroneous deprivation” of their protected interest. *See Mathews*, 424 U.S. at 335.

Parties may introduce evidence and may, to the extent the evidence is admissible (see Proposition of Law 2), obtain subpoenas compelling its production for use at hearing. *See* R.C. 119.09. In many cases, the parties themselves may be the best source of that evidence, and they are permitted to testify on their own behalf—as Clayton did here. Additionally, the absence of pre-hearing discovery does not mean that parties are left in the dark about the evidence that may be used against them at a hearing; there is a difference between pre-hearing discovery and pre-hearing disclosure. This case provides an example: The hearing examiner prohibited Clayton from conducting pre-hearing discovery, but ordered counsel for the Board to provide Clayton with the exhibits he planned to introduce at the hearing and a list of the witnesses he intended to call. *See* Scheduling Order, Record of Proceedings 132 at 1-2.

Pre-hearing discovery is also unlikely to reduce the risk of error and result in any systemic benefit to parties or administrative agencies. The primary benefit from pre-hearing discovery that Clayton identifies is the ability to better prepare for a hearing. *See* Appellant Br. at 10-11 (arguing that discovery would have aided her expert witness in addressing “the degree of chaos” in the ICU and the pressure Clayton faced on the night in question). But due process guarantees only an “opportunity to be heard at a meaningful time and in a meaningful manner,” *Mathews*, 424 U.S. at 333 (internal quotations omitted); it does not guarantee a perfect hearing or the *most* effective means of preparation. *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 52-52 (1987) (The Sixth Amendment does not create a “constitutionally compelled rule of pretrial discovery” simply because it would lead to more effective cross-examination.).

Finally, Clayton’s proposed rule would create a significant burden both for the State and for parties to administrative and judicial proceedings. It would not only “require strict application of the judicial model” in administrative proceedings, a position that this Court has

already rejected, *Doyle*, 51 Ohio St.3d at 51, but could transform every aspect of the State’s legal system. Every proceeding under R.C. Chapter 119—whether a proceeding before the liquor commission, the medical board, the dental board or any other administrative body—would now include a right to pre-hearing discovery. And discovery disputes in civil and criminal cases, until now governed only by the relevant rules of procedure, would be constitutionalized. “It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse,” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984), and these additional discovery procedures would impose significant costs, in both time and treasure, on parties faced for the first time with the need to engage in protracted pre-hearing discovery.

B. Clayton’s conclusory contrary arguments lack merit.

Clayton offers no compelling reasons for the Court to create a conflict with the many contrary cases holding that there is no due process right to discovery. She does not acknowledge—let alone distinguish—the countless cases that reject her proposed discovery right. Instead, Clayton offers only two arguments in favor of her position. *First*, she suggests that discovery was required to give her the time and opportunity to prepare for the hearing. She asks: “[H]ow was our expert supposed to write a report or testify to an opinion” without the benefit of discovery? Appellant Br. at 8. *Second*, she suggests that the Board’s power to investigate an alleged violation gives it an unfair advantage at a later hearing. *See* Appellant Br. at 11. Neither argument is persuasive.

With respect to Clayton’s preparation argument, both she *and* her expert were prepared for the hearing. Clayton had first-hand knowledge of the circumstances in the ICU, and she testified extensively about how those circumstances affected the care she gave to Patient 1, Tr. at 81-95. Her expert also opined on what the ICU was like on the night in question, calling it “chaotic” and “insane.” *See* Tr. at 559-71, 584-85, 623-24; *see also* Expert Report, Respondent

Exhibit J, Record of Proceedings 53. Tellingly, Clayton also proved her point: The hearing examiner accepted Clayton and her expert's testimony and he acknowledged that the circumstances in the ICU were "chaotic and overwhelming." Report and Recommendation, Record of Proceedings 15 at 38.

Clayton's second argument fares no better. The Board's investigatory power does not give it an unfair advantage when preparing for a hearing. In this case, Clayton had first-hand knowledge of what occurred in the ICU. She was therefore in an equal—if not superior—position to the Board with respect to the events on the night in question. Counsel for the Board also provided Clayton with copies of the exhibits it intended to introduce and the witnesses it planned to call. *See* Scheduling Order, Record of Proceedings 132 at 1-2; *see also* Appellant Br. at 11 (acknowledging the disclosure of records to be used as exhibits at hearing).

Clayton's insinuation, *see* Appellant Br. at 12, that the Board might have concealed favorable evidence is entirely speculative and unsupported. If Clayton believed that additional evidence about the conditions in the ICU would have been exculpatory, then she could have called any of the other nurses working with her in the ICU and they might have corroborated her testimony or at least indicated whether any exculpatory evidence existed. She did not. "[Her] own failure to avail herself of the opportunity to prepare and present her defense to the charges levied by the board does not result in a lack of due process but, rather, a lack of diligence on her part." *Cf. Froug*, 2001 WL 82926 at *4; *see also Richardson v. Perales*, 402 U.S. 389, 405 (1971) (a party's own inaction cannot be the basis for finding a constitutional violation).

Accordingly, to the extent that Clayton can be understood as raising a due process challenge to the absence of prehearing discovery in Revised Code Chapter 119 administrative hearings, the Court should reject her argument and should affirm the judgment of the Tenth

District below. To do otherwise would revolutionize how administrative hearings are conducted under Revised Code Chapter 119.

Ohio Board of Nursing's Proposition of Law 2:

An administrative hearing examiner may determine the admissibility of evidence in an administrative hearing and may limit or quash a subpoena that has been issued if it imposes an undue burden or when it is necessary to protect a privilege.

Clayton also argues that she should have been permitted to “obtain[] and admit[] in evidence” the medical records of patients whose care was not at issue in the administrative hearing. *See* Appellant Br. at 14 and 18. And she challenges the “exclusion of the evidence of the needs, conditions and emergencies of all ICU patients” during her shift. *Id.* at 21. She leaves it ambiguous whether her argument rests on due-process grounds alone or also on statutory grounds. But that ultimately does not matter. On either basis, her challenge to the hearing examiner’s decision preventing her from both subpoenaing and introducing into evidence the medical records of other patients during the administrative hearing must fail.

A. R.C. 119.09 permits an administrative hearing examiner to limit or quash a subpoena that seeks information that the examiner would not admit into evidence

A party does not have an unrestricted *statutory* right under R.C. 119.09 to obtain subpoenas compelling the production of any and all evidence for use in an administrative hearing. To the contrary, R.C. 119.09 grants hearing examiners the authority to control the nature and scope of an administrative hearing, and gives them the ability to “pass upon the admissibility of evidence.” That authority necessarily includes the power to limit a party’s use of subpoenas for the purpose of compelling evidence for a hearing that would not be admitted. In that respect, R.C. 119.09 codifies a tribunal’s inherent authority to ensure efficient and orderly proceedings. The general subpoena power found in R.C. 119.09 is further limited by other, more specific, privilege statutes found elsewhere in the Revised Code.

1. Like any quasi-judicial officer, hearing examiners have the power to limit or quash subpoenas that have been issued.

An agency has the power to limit or quash subpoenas that a licensee requests from the agency. Hearing examiners need issue only those subpoenas that seek to compel the production of admissible evidence. That conclusion flows from the text and history of R.C. 119.09.

The text gives an agency the power to “issue” a subpoena for one of three purposes, securing live witness testimony at a hearing, securing documents at a hearing, or securing a witness (or a witness and documents) at a deposition to be used at a hearing. *See* R.C. 119.09; *Frantz*, 51 Ohio St. 3d at 145 (all three scenarios are for the “purpose of conducting an adjudication hearing”); *State Med. Bd. of Ohio v. Murray*, 66 Ohio St.3d 527, 535 (1993) (deposition must be for hearing, not discovery or pre-hearing).

The statute says that depositions shall be conducted “in the same manner as is prescribed by law for the taking of depositions in civil actions.” R.C. 119.09. A subpoena to a non-party (like here) may compel a deposition and the production of documents. Civ.R. 45(A)(1)(b)(iii). A deposition conducted in the manner prescribed for civil action would include the right of the non-party to object and seek an order quashing or modifying the subpoena. Civ.R. 45(C)(2)(b) and (C)(3). It would do violence to the statute to construe it as prohibiting motions to quash or limit subpoenas for in-person testimony at a hearing, but allow them as to subpoenas for depositions. *See* R.C. 1.49(E) (“consequences of a particular construction” bear on meaning); *State v. White*, ___ Ohio St. 3d ___, 2015-Ohio-492 ¶ 74 (rejecting application of statute that would lead to “absurd result”) (O’Connor, C.J., concurring). The Board’s actions limiting certain subpoenas conformed to the statute.

The text discloses a limit to the statutory subpoena power in a second way as well. A hearing examiner’s authority to “pass upon the admissibility of evidence,” R.C. 119.09,

translates to a power to limit subpoenas. This Court, and other lower courts, have regularly upheld decisions limiting or quashing subpoenas that sought inadmissible evidence. In *Murray*, for example, the Court upheld a hearing examiner’s decision not to issue a subpoena that sought to compel production of confidential documents. 66 Ohio St. 3d at 535-36. Several lower courts have done the same. See *Zak v. Ohio State Dental Bd.*, 2004-Ohio-2981 ¶¶ 87-91 (8th Dist.) (upholding decision to quash subpoenas that sought inadmissible evidence); *Gipe v. State Med. Bd. of Ohio*, 2003-Ohio-4061 ¶¶ 36-41 (10th Dist.) (same); *Swigart v. Kent State Univ.*, 2005-Ohio-2258 ¶¶ 39-40 (11th Dist.) (same). At least one court of appeals has explicitly recognized that an “agency must have a duty to issue a subpoena only if it is relevant.” *In re Suitability of Whitmer*, 8th Dist. Cuyahoga No. 52822, 1987 WL 18269, *4 (Oct. 8, 1987). “Otherwise, if any request had to be honored and no motion to prevent a subpoena was allowed a party could abuse the process and harass witnesses.” *Id.* The reference to the civil practice and the explicit link to admissibility show that R.C. 119.09 gives administrative agencies the power to limit or quash subpoenas.

The history behind R.C. 119.09 confirms this reading. See R.C. 1.49(B) (“circumstances under which the statute was enacted” bear on meaning); *State v. Massien*, 125 Ohio St. 3d 204, 2010-Ohio-1864 ¶ 18 (considering “circumstances under which the statute was enacted”). The language of R.C. 119.09 was modeled after existing court practices and has changed little since it was enacted in 1943. See 120 Ohio Laws 358, 363 (former G.C. 154-70 (1943)). At the time, general statutes directed that “the clerk of any court . . . on application of a person having a cause . . . pending in court shall issue a subpoena.” *E.g.*, G.C. 11501 (1938). Those subpoenas could “direct the person it names to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence.” *E.g.*, G.C. 11503 (1938).

Even then, however, courts retained the inherent power to limit or quash subpoenas that sought inadmissible evidence or that were unduly burdensome. One court concluded that the statutes in place at the time were “clear that. . . under a subpoenae [sic] duces tecum the person subpoenaed [sic] is required to bring with him only such [documents that] . . . constitute evidence pertinent to an issue in the cause . . . and that a subpoenae [sic] duces tecum . . . [not] particularly describing such [such documents] is *wholly void*.” *Sharp v. Kimmell*, 30 Ohio Law Abs. 336, 339-40 (3rd Dist. 1939) (emphasis added). Another reasoned that a subpoena could not be enforced where it was “entirely too broad to be considered within the provisions of relevancy or materiality or competency.” *Solanics v. Republic Steel Corp.*, 5 Ohio Supp. 152, 154, 1940 WL 3007 (C.P. 1940). Both of these cases linked the reach of the subpoena to the ultimate admissibility of evidence. The hearing examiner did the same thing when he limited subpoenas for reasons of patient privacy and cumulative evidence.

An administrative agency’s power to limit subpoenas that are unduly burdensome is consistent with well-established precedent. It has long been recognized that courts have the “inherent power to refuse to issue subpoenas . . . to avoid abuse of judicial process.” *State ex rel. Cranford v. Bishop*, 640 P.2d 1271, 1273 (Kan. 1982); *see also Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605, 606 (D.D.C. 1969); *Charvat v. Travel Services*, No. 12-CV-5746, 2015 WL 76901, *1- (N.D. Ill. Jan. 5, 2015) (recognizing courts’ “inherent power to protect persons subject to subpoena from undue burden” and quashing subpoena on court’s “own motion”). That authority extends to administrative tribunals that, in similar fashion, have “quasi-judicial discretion” to deny requests for unreasonably broad or burdensome subpoenas. *See E.B. Mueller & Co. v. Fed. Trade Comm’n*, 142 F.2d 511, 520 (6th Cir. 1944).

The power to quash or limit subpoenas applies with particular force to medical records—such as the ones at issue here. The Court has held that “medical records are confidential and not subject to disclosure.” *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, ¶ 46. And it has emphasized that “[r]edaction of personal, identifying information does not remove the privileged status of the records.” *Id.* at ¶ 53. Instead, “[r]edaction is merely a tool that a court may use to safeguard the personal, identifying information within confidential records that have become subject to disclosure either by waiver or by an exception.” *Id.* at ¶ 49. Without the ability to limit or quash a subpoena for confidential medical records, hearing examiners would be powerless to police and protect patients’ privacy.

The power to limit or quash a subpoena is consistent with other statutory limits on the disclosure of confidential medical information. The General Assembly has explicitly granted the Board of Nursing the power to subpoena patient records as part of an investigation, but it has conditioned exercise of that power, “upon approval of the executive director of the board, and the president or another member of the board designated by the president, in consultation with the office of the attorney general.” *See* R.C. 4723.29. The records sought must also be “relevant to the alleged violation,” “material to the investigation,” and “cover a reasonable period of time surrounding the alleged violation.” *Id.* And while a licensing agency has the authority to obtain and rely on confidential records as part of an investigation or disciplinary proceeding, *see State Med. Bd. v. Miller*, 44 Ohio St. 3d 136, 141 (1989), “the investigation and proceeding shall be conducted in such a manner as to protect patient confidentiality.” R.C. 4723.28(I)(2). These other statutory provisions reinforce that the subpoena power under R.C. 119.09 should be interpreted to *protect*, not to *abrogate*, patients’ interest in the privacy of their medical information.

2. Any argument that R.C. 119.09 creates an unrestricted right to prevent the quashing of subpoenas is not persuasive.

At least some lower courts have held that R.C. 119.09 creates a non-discretionary duty to issue any and all subpoenas that a party may request. *See Ohio St. Bd. of Pharmacy v. Poppe*, 48 Ohio App. 3d 222, 228-29 (12th Dist. 1988); *Carratola v. Ohio St. Dental Bd.*, 9th Dist. Summit No. 18658, 1998 WL 225033, *5 (May 6, 1998); *Walters v. Ohio State Dept. of Adm. Servs.*, 2006-Ohio-6739, ¶ 29 (10th Dist.). Those decisions are unpersuasive and ignore other provisions of R.C. 119.09.

The courts that have concluded that R.C. 119.09 creates an unrestricted subpoena power have engaged in no detailed statutory analysis. *See id.* It at least appears from their conclusory statements however that they focused on the word “shall” in isolation. *See id.* (each decision assuming that the duty to issue requested subpoenas is mandatory). While it is true that there is a settled presumption that “the word ‘shall’ shall be construed as mandatory,” that presumption may be overcome if “there appears a clear and unequivocal legislative intent that” it receive a different construction. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, syl. ¶ 1 (1971). Identifying legislative intent pursuant to *Dorrian* requires courts to examine statutes as a whole. *Cf. In re Adoption of M.B.*, 131 Ohio St. 3d 186, 2012-Ohio-236, ¶ 19; *see also* R.C. 1.47(B). They cannot treat the mere presence of the word “shall” as the be-all end-all of the analysis.

As discussed in detail above, when read as a whole, the other provisions of R.C. 119.09 demonstrate that the General Assembly did not intend to create an unrestricted right to subpoenas in administrative hearings. The statute is concerned only with the production of evidence for hearing, *see Frantz*, 51 Ohio St. 3d 143 at syl. ¶ 1, and it gives hearing examiners the power to determine what evidence will be admitted, *see* R.C. 119.09. It would make no sense to require

hearing examiners to issue subpoenas if they would not admit the evidence acquired pursuant to those subpoenas.

It would also make little sense to require them to issue a subpoena as a procedural matter only to turn around and quash it immediately thereafter. That is, even if it creates a mandatory duty, R.C. 119.09 addresses only the ministerial act of *issuing* a subpoena; it is silent about the power to *quash* one. *See State v. Warner*, 55 Ohio St. 3d 31, 45 (1990) (“Issuing subpoenas is a ministerial, not a judicial function.”). At most, R.C. 119.09 is similar to the civil and criminal rules of procedure where there is *no* judicial preclearance of subpoenas. In both criminal and civil proceedings the parties themselves control what subpoenas are issued. *See* Civ.R. 45(A)(2) (clerk shall issue “signed, but otherwise . . . blank” subpoena “to a party requesting it”); Crim.R. 17(A) (“clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it”).

Even though they do not require preclearance of subpoenas, both the Rules of Civil Procedure and the Rules of Criminal Procedure nevertheless permit courts to quash subpoenas under circumstances similar to the ones here. Under the applicable rules of procedure, courts may quash subpoenas that “[r]equire[] disclosure of privileged or otherwise protected matter,” “subject[] a person to undue burden,” or when “compliance would be unreasonable or oppressive.” *See respectively* Civ.R. 45(C)(3)(b), (d) and Crim.R. 17(C). Particularly in light of the fact that even *due process* considerations are less pressing in administrative proceedings it would be odd if the General Assembly had intended to deny administrative agencies that same power. *See* R.C. 1.49(D) and (E) (in determining legislative intent courts may consider “laws upon . . . similar subjects” and “[t]he consequences of a particular construction.”). But an unrestricted subpoena power would provide just that.

B. A party has no due process right to request and obtain unrestricted or unlimited subpoenas in an administrative proceeding.

Just as Clayton has no unrestricted *statutory* right to obtain any subpoena that she requests, she also has no *constitutional* due process right to do so either. The same *Mathews* factors discussed above apply here. The requirements of due process are measured by: 1) the nature of the private interest, 2) the nature of the government interest, and 3) the benefits and burdens of additional procedures weighed against those of the existing procedures. *See Mathews*, 424 U.S. at 334-35.

Relying in part on *Mathews*, numerous courts have concluded that, in the context of administrative hearings, the Due Process Clause does not provide parties with an unlimited or unrestricted subpoena power. They have held that “in the administrative hearing context, the ability to subpoena witnesses is not an absolute right.” *Amundsen*, 218 F.3d at 717. Instead, the due process clause permits “reasonable limitations [to] be placed on the number and scope of witnesses that may be compelled to testify at an administrative hearing.” *Foxy Lady, Inc. v. City of Atlanta, Ga.*, 347 F.3d 1232, 1237 (11th Cir. 2003). The reasoning underlying those decisions applies with equal force in the context of Chapter 119 adjudication hearings.

In Chapter 119 proceedings, such as the one at issue here, due process does not prevent an administrative hearing examiner from limiting or quashing a subpoena that imposes an undue burden or that seeks to obtain privileged information. With respect to the first *Mathews* factor, the Board of Nursing does not dispute that the private interest at stake in this case is significant. The U.S. Supreme Court has “repeatedly recognized the severity of depriving someone of his or her livelihood.” *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 243 (1988). Questions of private interest, though, are the beginning, not the end, of the *Mathews* analysis.

An administrative tribunal's countervailing interest in an orderly presentation of evidence is likewise significant. An unrestricted due process right to subpoena witnesses would undermine that interest by creating an opportunity for harassment and delay. *See Foxy Lady, Inc.*, 347 F.3d at 1238. Without the ability to place reasonable limits on the number and scope of witnesses that may be called to testify, every administrative hearing runs the risk of becoming "cumbersome and potentially unmanageable." *Id.*

Granting parties to an administrative hearing an unrestricted subpoena power would not create additional procedural safeguards, nor would it reduce the risk of an erroneous deprivation of private interests. As it is, a hearing examiner's decision to limit or quash a subpoena is subject to review under an abuse of discretion standard. *Cf. State ex rel. Crescent Metal Prod., Inc. v. Indus. Comm'n*, 61 Ohio St. 2d 280, 282 (1980) (applying abuse of discretion standard to hearing examiner's refusal to admit evidence). That standard is by itself sufficient to prevent the erroneous deprivation of private interests in Chapter 119 proceedings. This case provides a perfect example of how that standard applies: As discussed below, the hearing examiner did not abuse his discretion when he refused to permit Clayton to subpoena the medical records of numerous patients whose care was not at issue in the Board of Nursing proceeding. And two reviewing courts concluded that the sanction imposed rested on reliable, probative, and substantial evidence.

A hearing examiner's power to quash or limit a subpoena is similar to the discretionary power to quash subpoenas in civil proceedings. The Rules of Civil Procedure permit judges to quash subpoenas that "[r]equire[] disclosure of privileged or otherwise protected matter" or "subject[] a person to undue burden." *See* Civ. R. 45(C)(3). But if principles of due process prevent a hearing examiner from quashing a subpoena that imposes an undue burden or seeks

privileged materials, then those same principles would prevent judges from doing the same under Civ.R. 45. That is not—and cannot be—the case.

C. The hearing examiner did not abuse his discretion when he limited Clayton’s request to subpoena third-party medical records.

A hearing examiner’s decision to limit or quash a subpoena is reviewed for an abuse of discretion. This standard of review applies to both constitutional and statutory challenges. *See respectively Flatford v. Charter*, 93 F.3d 1296, 1307 (6th Cir. 1996) (reviewing due process challenge to the denial of a subpoena for abuse of discretion) and *State ex rel. Crescent Metal Prod., Inc.*, 61 Ohio St. 2d at 282 (applying abuse of discretion standard to hearing examiner’s refusal to admit evidence). The hearing examiner did not abuse his discretion when he denied Clayton a subpoena for the medical records of patients whose care was not at issue in the Board of Nursing proceeding.

This case provides an example of how the power to control evidence at an administrative hearing necessarily includes the power to deny, limit, or quash subpoena requests. Here, the hearing examiner prohibited Clayton from subpoenaing third-party medical records in part because the records were privileged and would not be admissible at hearing. He first determined that the records in question were “either likely irrelevant, beyond the scope of the charges against [Clayton] outweighed by the privacy and confidentiality protections afforded to others, or can be obtained through other witnesses under subpoena.” Hearing Examiner Order, Record of Proceedings 97 at 4. In a separate order, the hearing examiner elaborated on that decision, noting that he had “granted the Board’s motion to *exclude as evidence at the hearing* the medical records of all other ICU patients.” Hearing Examiner Order, Record of Proceedings 94 at 3 (emphasis added). On that basis, his second order determined that, because of his earlier evidentiary ruling, the hospital’s objections to Clayton’s subpoena requests were now moot. *Id.*

His evidentiary ruling was also correct. The care of the other patients whose records Clayton sought was not at issue; “[t]his case [was] about [Clayton]’s alleged violation of duties as to [Patient 1] only.” *Cf. Roe*, 122 Ohio St. 3d 399 at ¶ 51. And the Court has already rejected Clayton’s suggestion, *see* Appellant Br. at 13, that third-party medical records may be subpoenaed if they have been properly redacted or if they are filed under seal. *Roe*, 122 Ohio St. 3d 399 at ¶ 53 (“Redaction of personal, identifying information does not remove the privileged status of the records.”). Because the other patients had an interest in maintaining the confidentiality of their medical information, *see Roe*, 122 Ohio St. 3d 399 at ¶ 50, and because their care was not at issue in the administrative hearing, it could have been error for the hearing examiner to order the disclosure of their records or to admit them into evidence, *see Moore v. Grandview Hosp.*, 25 Ohio St. 3d 194, 198 (1986) (trial court erred in admitting physician’s privileged testimony). By the same token, it was not an abuse of discretion for the hearing examiner to deny Clayton’s request to subpoena the records. *Cf. In re Heath*, 80 Ohio App. 3d 605, 612 (10th Dist. 1992) (Medical Board did not err by refusing to compel privileged testimony).

The hearing examiner’s decision is confirmed by the fact that the Board of Nursing did not overrule it. “The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of [men and women] equipped with the necessary knowledge and experience pertaining to a particular field.” *Farrand v. State Med. Bd.*, 151 Ohio St. 222, 224 (1949). If, based on their own experiences and expertise, the members of the Board felt that the documents Clayton sought were necessary to determine what the ICU was like on the night in question, then they had the power to “order additional testimony to be taken or [to] permit the

introduction of further documentary evidence.” R.C. 119.09. That they did not shows that the hearing examiner properly exercised his discretion when he prevented the records from being introduced as evidence at the hearing.

Ohio Board of Nursing’s Proposition of Law 3:

A litigant must show that an alleged due process or statutory violation concerning an evidentiary issue prejudiced the litigant.

Even if the hearing examiner erred in limiting Clayton’s subpoena request, that error does not by itself warrant reversal of the Board’s order. She must first show she was prejudiced by the hearing examiner’s evidentiary decision. She cannot.

A. Reversal of an administrative order is warranted only in the case of prejudicial error.

The question here is whether, even assuming error in the hearing, that error affected the outcome by changing the answer to the question of whether “reliable, probative, and substantial evidence in the record proves” the violation that the agency alleges. *Abunku v. State Med. Bd. of Ohio*, 2012-Ohio-2734, ¶ 20 (10th Dist.). A court’s judgment affirming an administrative final order cannot be reversed absent prejudicial error. That requirement is embedded in the text of Revised Code Chapter 119 and is a consistent theme in Ohio cases reviewing administrative action, including alleged errors in issuing subpoenas.

Start with the statute. R.C. 119.12 directs a court to affirm if the “entire record” reveals that the administrative order is “supported by reliable, probative, and substantial evidence” and reverse if the order is not so supported. R.C. 119.12. That command to consider the entire record prohibits courts from reversing administrative orders for non-prejudicial error. *See, e.g., Korn v. Ohio State Med. Bd.*, 61 Ohio App. 3d 677, 686 (10th Dist. 1988) (the “record must show affirmatively . . . [that] error was to the prejudice of the party seeking” reversal); *Frantz*, 51 Ohio St.3d at 145 (absence of prejudice supported affirming administrative award); *Lorms v.*

State Dept. of Commerce, Div. of Real Estate, 48 Ohio St. 2d 153, syl. (1976) (error did not “require” reversing under 119.12 absent prejudice); *Burneson v. Ohio State Racing Comm’n.*, 2009-Ohio-1103, ¶¶ 21-24 (10th Dist.) (rejecting argument that a “trial court erred in interpreting R.C. 119.09 to require” showing of prejudice in “failure to comply with R.C. 119.09”); *Toledo Hosp. v. State Certificate of Need Rev. Bd.*, No. 94APH07-1043, 1995 WL 46188, *4 (10th Dist. Jan. 31, 1995) (“no prejudicial error since [error was] . . . not determinative of the case”).

The statute compels a prejudice examination in a second way. An appeal from an administrative order “shall proceed as in the trial of a civil action.” R.C. 119.12. A trial of a civil action must “disregard any error” that does not “affect the substantial rights of the parties.” Civ.R. 61; see *Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St. 3d 238, 2014-Ohio-1913 ¶ 24 (applying Civ.R. 61). Like other civil litigation, a court may not reverse an administrative order absent prejudicial error. See, e.g., *Cappelletti v. Dept. of Commerce*, 10th Dist. Franklin No. 86AP-391, 1986 WL 14867, *5 (Dec. 24, 1986) (affirming because “because reliable, probative and substantial evidence” supported order (citing Civil Rule 61)).

For decades, Ohio courts have applied the prejudicial-error standards in the statute to administrative orders, including alleged errors related to discovery and subpoenas. Appellate courts routinely affirm administrative orders when they conclude that “no prejudice” resulted in denying requested discovery. E.g., *The Career Plaza, Inc. v. State, Dep’t of Commerce*, 11th Dist. Lake No. 7-186, 1980 WL 352179, *1 (June 30, 1980); *Carratola*, 1998 WL 225033 at *4 (affirming because licensee did not show “that he was prejudiced by the failure of the Board to provide greater discovery”). Courts likewise affirm administrative orders when a failure to issue [a] subpoena resulted in no prejudice. *Korn*, 61 Ohio App. 3d at 686; see also *Ohio State Bd. of Pharmacy v. Poppe*, 48 Ohio App. 3d 222, 228-29 (12th Dist. 1988) (finding

“no prejudice” from a board’s “failure to issue [a] subpoena duces tecum”); *Burneson*, 2009-Ohio-1103 at ¶ 24 (same). As in those cases, the lack of prejudice here means affirming the judgment below.

B. Clayton was not prejudiced by the absence of pre-hearing discovery or by her inability to introduce third-party medical records as evidence.

For at least two reasons, Clayton was not prejudiced by her inability to discover or introduce third-party medical records. *First*, there was ample other evidence—including her own testimony and the testimony of her expert—about the circumstances in the ICU. *Second*, the outcome of the hearing would have been the same. Even without the records, the hearing examiner credited Clayton’s claims that the ICU was “chaotic,” but concluded that she had violated the applicable standards of care anyway.

Other evidence. Clayton presented other evidence about what the ICU was like when she was working on the night in question; the patient records she sought would have merely duplicated that evidence. According to Clayton, the records in question were needed to prove that the ICU was busy and chaotic. Appellant Br. at 14. Even without those records, however, her expert witness still opined that it “was total chaos” and “absolutely insane” in the ICU that night. Tr. at 560. What more could the expert have said? The same was true for Clayton; she too testified that she was busy and “involved in emergencies throughout the evening.” Tr. 81-85 and 94.

Clayton also chose not to present all available evidence about the conditions in the ICU. The hearing examiner issued subpoenas for the nursing supervisor and the other nurses who were working with Clayton in the ICU. And although those nurses could have corroborated Clayton’s testimony, she chose not to call any of them as witnesses. Therefore, Clayton’s claim that

without the medical records of other patients she could not introduce evidence about the conditions in the ICU, Appellant Br. at 18, is simply mistaken.

Same outcome. Even if Clayton had been permitted to obtain and introduce third-party medical records, the outcome of the administrative hearing would have been the same. As it was, the hearing examiner credited Clayton's testimony that the ICU was busy on the night in question. While he treated the "chaotic and overwhelming circumstances" in the ICU as a mitigating factor, the hearing examiner nevertheless concluded that such circumstances "do not relieve a registered nurse from practicing within the acceptable standard of care." *See* Report and Recommendation, Record of Proceedings 15 at 38. The records in question would not have changed that conclusion.

Many of the hearing examiner's other conclusions would also be unaffected by the third-party medical records that Clayton sought. The hearing examiner found that the prevailing standard of care required Ms. Clayton to review the physician orders. He determined Clayton's testimony that the orders were not in the chart was not "credible," Report and Recommendation, Record of Proceedings at 36, and concluded that the orders "were part of Patient 1's chart . . . and remained part of his chart for the entire time he remained in the ICU," *id.* at 41. He found that even if the orders were not in the chart, Clayton's "failure to attempt to obtain [the orders] or to seek out clarification" was itself "a failure to practice within acceptable and prevailing standards." *Id.* at 36-37. This conclusion was reinforced by the fact that while she claimed to be too busy to locate the orders, the circumstances in the ICU did not prevent Clayton from performing a variety of non-essential tasks related to Patient 1. She performed an educational assessment, conducted range of motion exercises every two-hours, and documented his permitted alcohol consumption. *See id.* at 42; *see also* Tr. at 88-93, 183, and 589-93.

C. Clayton’s speculative harms are not persuasive and are unsupported by the record below.

Clayton rejects the idea that the testimony of her co-workers would have been a suitable substitute for the medical records she sought. She argues that production of the confidential records would have been more convenient, Appellant Br. at 8, and suggests that the other nurses working in the ICU that night might have been forgetful and that their testimony therefore would not have been reliable, *id.* at 9. But her argument is primarily based on speculation, and is undermined by Clayton’s own ability to recall with specificity the care she provided to other patients that night. *See* Tr. at 81 and 83.

At the very least, Clayton should be required to affirmatively demonstrate that the other nurses were unable to remember what the ICU was like on the night in question. She does not explain why, if she could remember the care she provided to other patients, the other nurses working that night would not have been able to do the same. And what she asks for—a due process right to the disclosure of privileged third-party medical records—is unprecedented. Before claiming that she was prejudiced by her inability to obtain those records, Clayton should at the very least be required establish that disclosure was absolutely necessary, not that it was merely more convenient. Here, as the Tenth District properly concluded, she failed to do so. *See* App. Op. at ¶ 31.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Tenth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee Ohio Board of Nursing was served by U.S. mail this 12th day of March, 2015, upon the following counsel:

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