

IN THE SUPREME COURT OF OHIO

Beverly Clayton, C.N.P., R.N.,	:	Case No. 2014-1092
	:	
Appellant,	:	On Appeal from the Franklin County
	:	Court of Appeals,
v.	:	Tenth Appellate District
	:	
Ohio Board of Nursing	:	Court of Appeals
	:	Case No. 13-AP-726
Appellee.	:	

APPELLANT'S MOTION FOR RECONSIDERATION

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ORC §119.09 mandates the issuance of *any* hearing subpoena requested by a Respondent. It is an absolute, unqualified mandate which cannot be altered by administrative rule. The requested subpoena was quashed by the Hearing Examiner. This is tantamount to the exclusion of relevant evidence, particularly on the issues of mitigation. See *Natoli v. Ohio State Dental Board*, 177 Ohio App. 3d 645 (10th Dist., Franklin Cty., 2008 (refusal to admit evidence relevant to mitigation is a violation of Due Process of Law, notwithstanding the fact that some *violations* by Dr. Natoli had been established).

In our case at bar, Appellant Clayton was deprived of an opportunity to present for consideration the admission of the evidence sought by Appellant's requested hearing subpoena. As this Supreme Court's majority opinion stated, the Hearing Examiner's decision to quash the subpoena was not "so irrational that it was an abuse of discretion". (Supreme Court Opinion, par. 38) The majority Opinion acknowledged that Clayton's interest "in a *complete* defense" (emphasis added) was outweighed by countervailing considerations. (*id.* at par. 38) The clear implication is that the majority agreed that the evidence subpoenaed by Clayton had, at minimum, some probative value, i.e. relevance. In fact, it appears that this Supreme Court was *unanimous* in this regard.

The standards of admissibility in an administrative hearing are more liberal than the Ohio Rules of Evidence. For example, administrative hearings do not exclude the admission of hearsay evidence which would be inadmissible in a common pleas court trial.

Our Motion for Reconsideration is based upon the fact that the abuse of discretion standard for determining the propriety of a Hearing Examiner's decision to quash a requested subpoena was never argued, analyzed or briefed before the Court of Appeals, nor was this issue discussed by that Court in its Opinion in this case. Nor was this issue the focus of any arguments,

briefs or propositions of law accepted for merits review by this Supreme Court in this case. While the broad standard of abuse of discretion is often applied to aspects of appellate reviews of administrative proceedings, its application to this case is highly questionable in light of the mandatory statutory language *requiring* (without limitation) the issuance of a subpoena as clearly stated in ORC §119.09. *Since the Legislature enacted a law that mandates (without exception) the Board's issuance of a subpoena requested by Respondent, we submit that placing the burden upon the requesting party to establish that the Hearing Examiner abused his discretion in quashing it gives far more leeway to the Hearing Examiner than the Legislature obviously intended.* (See the separate dissenting opinion of Justice Kennedy and recall in oral argument the question posed to Appellant's counsel by Justice O'Neill regarding the absoluteness of the unqualified mandate in ORC §119.09.) Appellant's counsel agreed that the Board and the Hearing Examiner was, per the statutory language, without *any* discretion to quash *any* requested subpoena; and Appellant's counsel certainly suggested that the Hearing Examiner probably had the inherent authority to quash patently frivolous subpoenas. These would be subpoenas which require witness testimony or records productions which seek transparently irrelevant documents or testimony lacking any probative value or which are manifestly irrational or patently prejudicial to the opposing party. However, there is no basis to conclude that the records of a few other patients during the single shift in question was frivolous, irrelevant or prejudicial to the Board on the issue of mitigation in this case. Appellant's subpoena request was narrowly tailored as to volume and production burden and was certainly not prejudicial to Appellee State/Board.

A decision on the standard to be applied to a review of subpoena requests based upon an issue not presented, briefed or argued in the Court of Appeals or in this Supreme Court should be

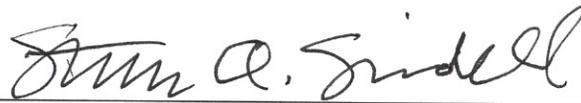
reargued and reconsidered by this Supreme Court before it becomes precedential law. *The impact and scope of this decision is much too great and far-reaching to be decided without being squarely presented to and considered by this Supreme Court.*

There are substantial policy issues which ought to be carefully considered before imposing upon a Respondent (or upon any party requesting issuance of a subpoena) the burden of establishing the high standard of abuse of discretion to overturn a Hearing Examiner's almost unlimited discretion accorded by that standard to quash the subpoena requested by Appellant Clayton in this case. The preclusion of relevant evidence of mitigation by quashing subpoenas deprives both the public and the Respondent nurse from presentation of mitigating evidence based upon the shared if not primary responsibility for systemic failings of a medical facility. These systemic deficiencies endanger patients, in this case in an ICU. Understaffing of nurses, use of inexperienced and incompetent nurses, failure to provide a separate night shift charge nurse, failure to provide a unit secretary, failure to enter physician orders in the Emergency Room in the computer to be available to the ICU nurses *are serious shortcomings which create considerable risks for all patients.* Applying the abuse of discretion standard for challenging a decision by a Hearing Examiner to quash a requested subpoena will virtually guarantee in many cases the complete exclusion of important and relevant evidence. It will not motivate medical facilities to upgrade and remediate serious deficiencies and will deprive the public and other agencies of important information regarding the administration of medical care to the public. It will also invite the continued narrow focus of the various nursing and medical boards to consider only the failures of omission and commission by nurses or physicians without carefully considering the context provided by the systems in which they work which should properly have an impact on the issues of both exoneration and mitigation. This Supreme Court should take into

account that a Respondent in an administrative hearing has no opportunity whatsoever to engage in any civil discovery prior to a hearing. There is no opportunity for depositions, requests for admissions, production of documents, interrogatories, et cetera. *The only opportunity to require production of anything by way of evidence which a Respondent cannot otherwise obtain except by subpoena is through the hearing subpoena process itself.* Only those exhibits which each party intends to introduce during the hearing are shared with the opposing party shortly before the evidentiary hearing itself. However, while the Board/State has the opportunity to secretly investigate a case and issue subpoenas for testimony and records without the knowledge of Respondent or his or her counsel, there is no rule requiring the sharing of exculpatory or mitigating evidence in the possession of the State/Board in an exchange of exhibits. With these kinds of limitations, a standard of review for quashing subpoenas which makes it almost impossible to obtain exculpatory or mitigating evidence *even for an evidentiary hearing* is extremely dangerous and unfair and may (and often does) result in excessive sanctions or wrong-headed decisions by Hearing Examiners and Boards. It is also incongruous for a Board to have virtually unlimited access to any and all documents or testimony the Board may desire without a similar avenue for a Respondent to have the same access. There is very little constraint, if any, as a practical matter, on the ability of a Board to subpoena almost anything it wants.

For the foregoing reasons, the decision in this case should be reconsidered and reargued and, accordingly, Appellant's Motion for Reconsideration herein should be granted.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, reading "Steven A. Sindell". The signature is written in a cursive style with a horizontal line underneath it.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing Appellant's Motion for Reconsideration was served on March 4, 2016 upon the following by

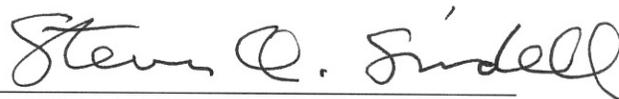
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