Supreme Court of Ohio Clerk of Court - Filed March 04, 2016 - Case No. 2014-1092

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.	:	

MEMORANDUM OF *AMICI CURIAE* OHIO NURSES ASSOCIATION AND OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

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I. STATEMENT OF INTEREST

The Ohio Nurses Association (ONA) is the recognized leader and advocate for professional nursing in Ohio. Formed in 1904, ONA is a trusted and powerful network of registered nurses who are committed to promoting nursing through education, political action and workplace advocacy. ONA represents the interests of over 190,000 licensed registered nurses in the state of Ohio. Its mission is to advance registered nursing as a profession, promote professional nursing practice, and advocate for quality health care. This mission is driven by ONA's commitment to optimal patient outcomes and the highest level of health for all Ohio citizens. ONA's core values include social responsibility, collaboration, integrity, and professionalism. In this case, ONA is greatly concerned that the majority opinion will prevent its members from defending themselves against administrative charges, particularly in situations where they are particularly vulnerable to unfair charges of incompetence due to systemic problems of understaffing, which are the principal source of medical errors.

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity. As an organization focused on protecting the interests of employees, including professional workers

who hold licenses and certifications that are required in order to pursue employment, OELA has an abiding interest in ensuring that professionals who must answer administrative charges are provided with a full and fair opportunity to defend their livelihoods—and that the standards for prosecuting such defenses are clear.

In addition, as individuals who participate in the health-care system, the members of both ONA and OELA, like all Ohioans, have an interest in ensuring that unsafe systemic practices within medical facilities are not disregarded through administrative proceedings that place exclusive responsibility for medical errors upon individual professionals. ONA and OELA file this brief to cast light on these issues and to call attention to the impact the decision in this case will have on health care and the careers of health care professionals.

II. ARGUMENT

Proposition of Law:

While hearing examiners in Board of Nursing hearings have some minimal authority to deny requests for subpoenas, the burden of demonstrating that a subpoena should be quashed must fall upon the party contesting the subpoena, and that party must show that the request is too close in time to a hearing, is irrelevant, requires the production of privileged or confidential information that cannot be redacted, or imposes an extraordinary hardship on an individual witness. Legal judgments of hearing examiners regarding the application of this standard are reviewable de novo.

ONA and OELA urge the Court to reconsider the majority opinion here for a single purpose: to establish and apply a clear standard for the denial of a requested subpoena by a Board of Nursing hearing examiner. The principal question briefed and argued to this Court was whether a hearing examiner had any power whatsoever to deny a subpoena requested by a party to a hearing. Having concluded that such power exists, the majority opinion then proceeded to extend extremely broad discretion to the examiners, upholding the examiner's decision below because it was not so "irrational" or "arbitrary" that it warranted reversal. *Clayton v. Bd. of Nursing,* Slip. Opinion No. 2016-Ohio-643, at ¶¶ 37-38.

Unfortunately, the majority opinion reached this conclusion without sufficient briefing and argument. Ms. Clayton (and, to a large extent, the 10th District panel) agreed that her appeal was about whether the hearing examiner had the authority to deny a subpoena at all, not about the appropriate limits on that authority. Ms. Clayton's counsel was not asked about the appropriate standard at argument, and even the Board's counsel simply advocated an abuse-of-discretion standard, without explaining what that would mean as a practical matter.

The majority opinion's limited holding that hearing examiners have some power to quash subpoenas does not dictate that they be provided such extremely broad, unguided discretion. That is particularly so in this statutory context, which, as the Court is well aware, does not, on its

face, provide any means at all for a Nursing Board hearing examiner to quash a subpoena. See R.C. 119.09 (stating that "the agency may, and *upon the request of any party *** shall, issue a subpoena*" (emphasis added)). The Court acknowledged this mandatory language, but carved out an exception based purely on necessity, as agencies conducting hearings "must have at least some minimal authority to control those hearings," and without the authority to quash, "a hearing examiner would be powerless to control the procedure of the adjudication hearing." Slip Op. at ¶¶ 34-35. In the absence of an affirmative statutory power to quash, the fact that "some minimal authority" is necessary to avoid unworkable hearings would seem to point to a rule that provides hearing examiners with exactly that: *minimal* authority, not unguided discretion.

Even under an abuse-of-discretion standard, and even if hearing examiners were entitled to as much discretion as trial courts, the Court need not simply defer to the judgment below. *See, e.g.*, *Petro v. N. Coast Villas Ltd.* (9th Dist. 2000), 136 Ohio App.3d 93, 96, 735 N.E.2d 985 (holding that it is appropriate for appellate court to "substitute its judgment for that of the trial court" through *de novo* review when matters of law are involved in a decision to quash (quotations omitted)). The hearing examiner's decision below involved matters of both fact and law, but it is the legal judgments he made, not the factual ones, that are most problematic, and those judgments deserved none of the deference this Court extended.

Specifically, the Court should not have deferred to the hearing examiner's legal conclusions that Ms. Clayton should be denied admittedly relevant evidence because she could not prove that the relevance of this evidence outweighed supposed patient privacy concerns, and because she could not prove the documents she requested were the only possible source of evidence on the same issue. These legal conclusions—applying an inappropriate burden of proof and relying on inappropriate and legally unauthorized considerations—should be rejected.

Instead, if hearing examiners must have "some minimal authority" to quash subpoenas, that power must be limited to circumstances in which the subpoena seeks information that is entirely irrelevant (such as, in the example provided by Justice O'Neill at oral argument, a subpoena for records of patients on the fifth floor, when the nurse worked on the first floor), is requested too close in time to the hearing for a response, requires the production of privileged information, or imposes an extraordinary hardship on a witness. As important, the Court should hold that, as a matter of law, the burden of demonstrating such irrelevance, time pressure, privilege, or hardship must fall squarely on the party seeking to quash the subpoena, not the party requesting it. Such a clear standard and burden of proof, unlike the unguided discretionary review adopted in the majority opinion, has the benefit of consistency with both general principles of administrative law and the Board's own promulgated regulation on subpoenas.

First, though no such burden was imposed by the Court here, the burden of quashing an administrative subpoena falls upon the party contesting the subpoena. *See, e.g., Ohio Elec. Comm'n v. Ohio Chamber of Commerce & Citizens for a Strong Ohio*, 158 Ohio App. 3d 557, 2004-Ohio-5253, 817 N.E.2d 447, at ¶ 22 (holding that as to subpoenas not governed by the Civil Rules, "the burden of proof rests with the party *challenging* the subpoena" (citing *Petro*, *supra*, 136 Ohio App.3d at 99)). As to what that party must prove, the same court held that "[i]t is clear under Ohio administrative law" that administrative subpoenas are valid if "(1) the inquiry is permitted by law, (2) the records sought are relevant to the matter in issue, and (3) the records' disclosure will not cause unreasonable costs and difficulty." *OEC*, 2004-Ohio-5253, at ¶ 19.

Notably, the Nursing Board's self-imposed limits on the authority of its hearing examiners to quash subpoenas are consistent with these general principles. Ohio Administrative

Code Section 4723-16-08(E)—cited, but not examined in detail, in the majority opinion, Slip Op. at ¶ 31—provides a fairly clear framework for the quashing of subpoenas, stating:

> Upon written motion, *** the board, board hearing committee or hearing examiner may order any subpoena quashed or modified for good cause shown. Good cause may be shown for reasons including but not limited to:
>
> (1) The total number of subpoenas requested by a party is unreasonable and a showing of necessity has not been made;
>
> (2) A subpoena does not provide a reasonable time to comply;
>
> (3) A subpoena requires disclosure of information that is privileged or confidential under law and no exception or waiver applies;
>
> (4) A subpoena for books, records or papers does not specify dates or time frames or specifies dates or time frames that are unreasonable or not relevant to the incidents described in the notice of opportunity for hearing; or
>
> (5) A subpoena subjects a witness to undue burden. For purposes of this rule, the board, board hearing committee or hearing examiner may approve an alternative means of obtaining a witness's testimony, including but not limited to, affidavit, deposition, or testimony by telephone or other means of telecommunication. If no reasonable means can be used to alleviate an undue burden on a witness, the board, board hearing committee or hearing examiner may quash the subpoena. A finding of an undue burden requires the showing of an extraordinary hardship that is more than the usual and expected inconvenience of attending a hearing. In considering whether a burden is undue, the board, board hearing committee or hearing examiner shall consider the magnitude of the burden on the witness and the materiality of the witness's testimony.

By limiting the power to quash a subpoena to "good cause shown," the Board's rule unquestionably imposes the burden of proof upon the party challenging the subpoena. As important, the Board's regulation does not provide hearing examiners with the unfettered discretion permitted by the majority opinion, and it does not support the reasoning used by the hearing examiner and affirmed by the Court here.

The majority opinion's analysis of the hearing examiner's conclusion was as follows: "The hearing examiner's decision shows a careful weighing of Clayton's interest in a complete defense against the confidentiality interests of patients, the administrative interests of Mercy Hospital, and the potential relevance of the information to the central issue of Clayton's care for R.B." Slip Op. at ¶ 38. But no such weighing was appropriate under the Board's rule. With the exception of considering whether to force a testimonial witness who makes a showing of "extraordinary hardship" to attend despite this burden, there is no authority in the rule for hearing examiners to weigh the importance of the evidence against the burden on the subpoenaed party. Put more simply, division (E)(4) of the rule allows the quashing of subpoenas for records that are "not relevant," but the Court empowered hearing examiners to block production of records that are "not relevant *enough*." This is a tremendous difference, with far-reaching effects.

The hearing examiner here did not find that the documents were irrelevant. In fact, he acknowledged that the issue addressed by the documents <u>was relevant</u>. He found that evidence of the flurry of other crises within the unit on the night of the incident could help Ms. Clayton demonstrate that her punishment, if any, should be mitigated. Slip Op., ¶ 20. But he quashed the subpoenas because Ms. Clayton's interest in a complete defense was outweighed by patient privacy interests, and because she could introduce similar evidence through "other sources," such as the personal recollection of other nurses. *Clayton v. Ohio Bd. of Nursing* (10th Dist.), 2014-Ohio-2077, at ¶ 29 (describing reasoning). Such a balancing of the nurse's *need* for information against the burden on the hospital has nothing to do with the administrative law principles cited above, and even less to do with the Board's regulation. It suggests that nurses defending their licenses, instead of having a right to obtain relevant, non-privileged materials, are entitled to only materials they can show are absolutely necessary to a minimally effective defense.

Such a haphazard balancing of need against burden will have a shattering effect on the ability of nurses and other professionals to defend themselves in administrative hearings. Nursing, and health care in general, is a field whose participants are notoriously vulnerable to staffing shortages. In understaffed, overburdened hospital wards, bad patient outcomes, including mistakes and oversights by doctors or nurses, are bound to be more common, and even the most competent professionals can find themselves in impossible situations.[1]

If a nurse is forced into such a situation and the worst-case scenario of a medical error occurs, how can that nurse defend herself without the ability to demonstrate, clearly and conclusively, the conditions that led to the error? What if, as is true more often than not, the only other witnesses have an incentive not to recall these conditions? What if, as is also common, the incident occurred years before the hearing, and no one can remember how many patients were being treated, how many had emergent conditions, and what their outcomes were? If hearing examiners can "streamline" hearings by denying access to records that could exonerate a nurse, lessen the degree of their responsibility, or show that an employer or supervisor should also be

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[1] *Amicus* ONA submits that studies show that understaffing is among the primary drivers of medical errors, which, in turn, are among the most prevalent causes of death in hospital settings. *See, e.g.,* Aragon Penoyer, "Nurse staffing and patient outcomes in critical care: A concise review," *Critical Care Medicine* (2010), Vol. 38, No. 7, pp. 1521-28 (reviewing published studies and concluding that "decreased nurse staffing is associated with adverse outcomes in intensive care unit patients") [full text available at: https://www.researchgate.net/publication/44602327_Nurse_staffing_and_patient_outcomes_in_critical_care_A_concise_review]; Aiken, et al., "Hospital Nurse Staffing and Patient Mortality, Nurse Burnout, and Job Dissatisfaction," *Journal of the American Medical Association* (2002), Vol. 288, No. 16, pp. 1987-1993 [full text available at: http://jama.jamanetwork.com/article.aspx?articleid=195438]; Avalere Health, LLC, "Optimal Nurse Staffing to Improve Quality of Care and Patient Outcomes" (Sept. 2015) (concluding, based on meta-review of published studies, that adequate staffing reduces medical errors and otherwise improves patient outcomes) [full text available at: http://www.indiananurses.org/wp/wp-content/uploads/2016/01/NurseStaffingWhitePaper.pdf]; It is also well-documented that despite the severe consequences of understaffing, nurses are often afraid to speak out when they observe it for fear of retaliation. *E.g.*, Robbins, Alexandra, "We Need More Nurses," *New York Times* (May 28, 2015) (describing atmosphere in understaffed hospitals and citing studies) [available at: http://www.nytimes.com/2015/05/28/opinion/we-need-more-nurses.html?_r=0].

held accountable, the Board will never consider one of the most common causes of errors: systemic failures of care. This will harm not only the nurses whose livelihoods are at stake, but the health care system as a whole (and thus the Board's true constituents: Ohio patients), as key system failures that should be exposed in licensure hearings will never be examined.

Such outcomes will be even more prevalent, and even more difficult to challenge, if "patient privacy" is permitted to be balanced against relevance, as it was here. It is no exaggeration to say that virtually every case involving a nurse's license touches in some way on medical information of a patient. If patient privacy can be used to outweigh a nurse's interest in obtaining relevant records, "abuse of discretion" will really mean "unreviewable discretion." If OAC 4723-16-08(E)(3), which permits a subpoena to be quashed if it "requires disclosure of information that is privileged or confidential," were actually intended to block the production of ordinary medical records, that would mean every subpoena for medical records could be quashed, and nurses could not even examine the charts of patients they were accused of harming.

The answer is reflected in the reality of the Board's hearing process. Patient records are produced as a matter of course; they are simply produced in a form that redacts patient identifying information. A subpoena for medical records that can be produced in such a redacted form does not "require[] the disclosure of information that is privileged or confidential." Nor could the supposed burden of redacting records possibly justify withholding relevant records. If live witnesses can oppose a subpoena only upon a showing that their appearance will pose an "extraordinary hardship," OAC 4723-16-08(E)(5), does it make sense for hospitals, which handle and redact sensitive medical records on a regular basis, to be able to resist a subpoena without even attempting to make such a showing?

Ms. Clayton's case, viewed in light of the Nursing Board's own regulation, the ordinary standards of administrative law, and the Court's stated intent to provide hearing examiners with the "minimal authority" necessary to administer orderly hearings, is not a close one. It is not a case where the Court should need to consider whether the hearing examiner engaged in "careful weighing" or whether the Court would have "struck that balance differently." Slip Op. at ¶ 38. It is a case where a nurse whose livelihood was in grave jeopardy had a right to all relevant, non-privileged documents that could assist in her defense. The hearing examiner denied her that right because he did not place the appropriate burden of proof on the party resisting the subpoena and took into account factors, such as the availability of alternative sources of records and an illusory concern over patient privacy, that he had no legal authority to consider. ONA and OELA urge this Court to reconsider its adoption of such an expansive view of hearing examiners' discretion.

III. CONCLUSION

For the reasons stated above, *amici curiae* ONA and OELA respectfully support the motion of the Appellants seeking reconsideration of the Court's holding in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing Memorandum of *Amici Curiae* in Support of Appellant's Motion for Reconsideration was served on March 4, 2016 upon the following by Regular U.S. Mail and Email to:

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