

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

**RESPONSE OF APPELLEE OHIO BOARD OF NURSING
IN OPPOSITION TO MOTION FOR RECONSIDERATION**

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RESPONSE IN OPPOSITION

Neither Clayton nor her amici offer any new arguments in their requests that the Court reconsider its judgment affirming the Tenth District's decision. Instead, they repeat the same arguments that the Court has already thoroughly considered and rejected. Their contention that there was insufficient briefing on whether a hearing examiner's decision to quash a subpoena should be reviewed under an abuse of discretion standard is directly contradicted by the Board of Nursing's brief in this case. See Appellee Br. at 30-32 (discussing whether the hearing examiner abused his discretion). A close reading of Clayton's motion for reconsideration reveals that her real complaint is *not* the abuse of discretion standard itself but the Court's *application* of that standard. See Motion at 3 (discussing the burden imposed by the subpoena request).

Clayton's motion for reconsideration largely repeats her earlier argument that R.C. 119.09 creates an unrestricted right to compel the production of any and all evidence for use in an administrative hearing. See Motion at 1. The Court has already considered and rejected that argument. Opinion at ¶¶ 32-36. Repeating it does not make the argument any more persuasive than it was before. As the Court correctly found, R.C. 119.09's subpoena power must be read together with the limitation that it may be used only for the production of evidence at a hearing. See Opinion at ¶¶ 32-36. A party's ability to obtain a subpoena is not unrestricted; it is limited by a hearing examiner's authority to "pass upon the admissibility of evidence." See R.C. 119.09. The power to exclude evidence necessarily includes the power to quash a subpoena seeking such inadmissible evidence. See *id.*

There is also no merit to Clayton's allegation that the Court's consideration of the abuse of discretion standard was incomplete or otherwise lacking. The Board of Nursing's merit brief directly addressed the abuse of discretion standard and explained why the hearing examiner did not abuse his discretion when he prevented Clayton from obtaining the medical records of

patients whose care was not at issue in this case. *See* Appellee Br. at 30-32. And even Clayton appeared to concede that if R.C. 119.09 does not create a mandatory duty to issue all subpoenas that a party may request, then the decision to limit or quash a subpoena should be reviewed for an abuse of discretion. *See* Reply Br. at 3 (stating that if the hearing examiner had the discretion to quash a subpoena, “the granting of such a Motion to Quash this particular subpoena duces tecum was an abuse of discretion”).

Furthermore, it is well settled that appellate courts review evidentiary decisions for an abuse of discretion. *See Branch v. Cleveland Clinic Found.*, 134 Ohio St. 3d 114, 2012-Ohio-5345 ¶ 17. Clayton’s motion for reconsideration fails to cite a single decision from this Court (or any other) that applies a different standard in *any* type of proceeding—criminal, civil, or administrative. The same is true about her amici. Their discussion of which party bears the initial burden of quashing a subpoena is irrelevant, *see* Amicus Br. at 5; what matters is the standard a court should apply when reviewing a hearing examiner’s decision that a party *has carried* its burden. The remaining arguments that Clayton and her amici make are equally unpersuasive; they are grounded in policy, not law. *See* Motion at 3-5 and Amicus Br. at 7-10. Those policy arguments do not explain, however, why evidentiary decisions in administrative proceedings should be subject to greater scrutiny than those in criminal cases—where an individual’s very freedom is at stake. *See State v. Noling*, 98 Ohio St. 3d 44, 2002-Ohio-7044 ¶ 43 (“[A] reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.”).

Finally, as in her earlier briefs, Clayton offers no explanation for how she was prejudiced by the hearing examiner’s decision to limit her ability to subpoena the medical records for patients whose care was not at issue in the proceedings below. Her failure to do so is particularly

noteworthy because she chose not to present all available evidence about the conditions in the ICU. Even *without* any additional evidence, however, the hearing examiner credited Clayton's testimony that the ICU was busy on the night in question. But while he agreed that the "chaotic and overwhelming circumstances" in the ICU were a mitigating factor, the hearing examiner nevertheless concluded that such circumstances did not "relieve a registered nurse from practicing within the acceptable standard of care." See Report and Recommendation, Record of Proceedings 15, at 38. This Court agreed, concluding in its decision that "Clayton does not assert that the missing evidence would justify her decision to perform nonessential tasks with R.B. instead of taking that time to perform essential tasks such as reading the doctor's orders for R.B. and notifying doctors of R.B.'s significantly deteriorating condition." See Opinion at ¶ 38.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response of Appellee Ohio Board of Nursing in Opposition to Motion for Reconsideration was served by U.S. mail this 9th day of March, 2016, upon the following counsel:

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