

[Cite as *Bennett v. State Med. Bd. of Ohio*, 2011-Ohio-3158.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jack D. Bennett, M.D.,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-833
State Medical Board of Ohio,	:	(C.P.C. No. 09CVF-07-10885)
Appellee-Appellee.	:	(REGULAR CALENDAR)

---

D E C I S I O N

Rendered on June 28, 2011

---

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

*Michael DeWine*, Attorney General, and *Kyle C. Wilcox*, for appellee.

---

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellant, Jack D. Bennett, M.D. ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the order of appellee, the State Medical Board of Ohio (the "Board"), indefinitely suspending appellant's license to practice medicine and surgery in Ohio, with conditions for reinstatement or restoration. For the following reasons, we affirm.

{¶2} The General Assembly has authorized the Board to enforce the provisions of R.C. Chapter 4731, investigate violations, conduct disciplinary proceedings, and discipline persons within the Board's licensing authority. *Ridgeway v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-446, 2008-Ohio-1373, citing *State ex rel. Gelesh v. State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328, ¶26. As relevant here, R.C. 4731.22 provides as follows:

(B) The board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend an individual's certificate to practice \* \* \* for one or more of the following reasons:

\* \* \*

(26) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice.

Under Ohio Adm.Code 4731-16-01(A), "[i]mpairment includes inability to practice in accordance with such standards, and inability to practice in accordance with such standards without appropriate treatment, monitoring or supervision."

{¶3} By letter dated June 18, 2008, the Board notified appellant, a doctor licensed to practice medicine in Ohio, that it had reason to believe he was in violation of R.C. 4731.22(B)(26) as a result of the following: (1) appellant's December 26, 2007 arrest and charges of operating a motor vehicle while under the influence ("OMVI"), leaving the scene of an accident, and failure to control his vehicle; (2) a report that appellant was intoxicated and behaving erratically on December 25, 2007; and (3) an indication that a urine specimen provided by appellant upon request by a Board investigator had been diluted. Pursuant to R.C. 4731.22(B)(26), the Board ordered

appellant to undergo a 72-hour inpatient examination at Glenbeigh Hospital ("Glenbeigh"), a Board-approved treatment facility.

{¶4} Appellant completed his Board-ordered evaluation from July 1 through 4, 2008. As part of that evaluation, Christopher Adelman, M.D. ("Dr. Adelman"), a member of the Glenbeigh medical staff, and Michael Primc, M.D., a Glenbeigh staff psychiatrist, evaluated appellant. Roy Nichols, a licensed social worker and licensed independent chemical dependency counselor, served as the primary counselor for appellant's evaluation. By letter dated July 11, 2008, Dr. Adelman notified the Board of the Glenbeigh team's determination that appellant was impaired in his ability to practice according to acceptable and prevailing standards of care and its recommendation that appellant undergo 28 days of inpatient treatment for alcohol abuse. Appellant denied that he was impaired and did not comply with the Glenbeigh recommendation.

{¶5} A letter dated September 10, 2008, notified appellant that the Board intended to determine whether to limit, revoke, permanently revoke, suspend, refuse to register or reinstate his certificate to practice medicine and surgery, or to reprimand him or place him on probation for violation of R.C. 4731.22(B)(26). In addition to the reasons stated in its prior letter, the Board noted Dr. Adelman's report, as well as the Board's understanding that appellant was unemployed and had not actively practiced medicine for approximately two years.

{¶6} Appellant requested an evidentiary hearing, at which he testified on his own behalf, but called no additional witnesses. The state presented the testimony of Board investigator Curtis Fortner, Nichols, Dr. Adelman, and appellant, as if upon cross-examination.

{¶7} The hearing examiner issued a thorough 19-page Report and Recommendation ("Report") on May 11, 2009, and recommended that the Board dismiss the allegations against appellant. The Report included the hearing examiner's findings of fact, conclusion of law, analysis of the evidence, and recommendation for Board action. The hearing examiner stated that appellant convincingly demonstrated that his Glenbeigh evaluation "was not perfect," and she concluded that the Glenbeigh evidence, including the opinions of Nichols and Dr. Adelman, did not constitute reliable, probative, and substantial evidence to support a finding of impairment under R.C. 4731.22(B)(26). She stated, "although [appellant] has been intoxicated, the evidence presented is not sufficiently reliable, probative, and substantial in order to find that [appellant] is impaired in his ability to practice medicine and surgery as set forth in [R.C. 4731.22(B)(26)]".

{¶8} The Board considered this matter upon the state's objections to the hearing examiner's Report at its June 10, 2009 meeting. After brief presentations by appellant, his attorney, and the assistant attorney general, and a short discussion, the Board voted unanimously (with two abstentions) to adopt the hearing examiner's findings of fact but to modify the hearing examiner's conclusion of law and proposed order. The Board amended the hearing examiner's conclusion of law to state as follows:

THE ACTS, CONDUCT, AND/OR OMISSIONS OF [APPELLANT], AS SET FORTH IN FINDINGS OF FACT 1 THROUGH 4, CONSTITUTE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE TO ESTABLISH THAT [APPELLANT] IS IMPAIRED IN HIS "ABILITY TO PRACTICE ACCORDING TO ACCEPTABLE AND PREVAILING STANDARDS OF CARE BECAUSE OF

HABITUAL OR EXCESSIVE USE OR ABUSE OF DRUGS, ALCOHOL, OR OTHER SUBSTANCES THAT IMPAIR ABILITY TO PRACTICE" AS SET FORTH IN [R.C. 4731.22(B)(26)].

The Board amended the hearing examiner's proposed order to provide for an indefinite suspension of appellant's certificate to practice medicine, with conditions for reinstatement or restoration. The Board then voted to approve and confirm the hearing examiner's findings of fact, conclusion of law, and proposed order, as amended.

{¶9} Appellant appealed to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12, and that court affirmed the Board's order on August 3, 2010. The trial court concluded that Dr. Adelman's testimony constituted reliable, probative, and substantial evidence that appellant was impaired and that the Board was entitled to use its own expertise to conclude that appellant was impaired. The trial court rejected appellant's argument that the Board violated R.C. 119.09 by failing to include its reasons for modifying or disapproving the hearing examiner's recommendation in the record of proceedings.

{¶10} Appellant has now appealed to this court, and he asserts the following assignments of error:

[I.] The trial court's decision is in error because the trial court applied the incorrect standard of review.

[II.] The trial court abused its discretion in finding that [the] Board's Order was supported by substantial, probative, and reliable evidence based on Dr. Adelman's testimony.

[III.] The trial court erred in affirming the Board's Order where the finding of impairment failed to conform to R.C. § 4731.22(B)(26) and/or O.A.C. Ch. 4731-16.

[IV.] The trial court erred in affirming the Board's Order [because it] fails to conform to R.C. Ch. 119 and due

process for failing to identify the reasons for the Board amendment.

{¶11} Appellant's first assignment of error asserts that the trial court applied an incorrect standard of review in determining his appeal, and we exercise plenary review over that question. See *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶43.

{¶12} In an administrative appeal, the court of common pleas reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

*Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571 (footnotes omitted). R.C. 119.12 requires a court of common pleas to conduct both "a hybrid factual/legal inquiry and a purely legal inquiry." *Bartchy* at ¶37. As to the first inquiry, the court " 'must give deference to the agency's resolution of evidentiary conflicts,' " even though the agency's findings are not conclusive. *Id.*, quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470-71, 1993-Ohio-182. In this regard, the Supreme Court has explained, as follows:

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse,

vacate, or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

*Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111-12; *Bartchy* at ¶37. As to the second inquiry, the court must construe the law on its own. *Id.* at ¶38, citing *Ohio Historical Soc.* at 471.

{¶13} Here, the trial court quoted R.C. 119.12, stated that a reviewing court must affirm an agency order if it is supported by reliable, probative, and substantial evidence, and is in accordance with law, and cited the Supreme Court of Ohio's definitions of reliable, probative, and substantial evidence. The trial court then quoted *Harris v. Lewis* (1982), 69 Ohio St.2d 577, for the proposition that "[a] reviewing court 'will not substitute its judgment for the Board's where there is some evidence supporting the Board's Order.' "

{¶14} Appellant argues that the trial court erred by citing and applying the "some evidence" standard from *Harris*. In *Harris*, at 578, the Supreme Court stated as follows: "According to [R.C. 119.12], a court may affirm the board's order if it is supported by reliable, probative and substantial evidence. This court will not substitute its judgment for the board's where there is some evidence supporting the board's order." (Footnote omitted.) In context, we must read "some evidence" to relate to the immediately preceding reference to "reliable, probative and substantial evidence." Indeed, the Supreme Court implicitly acknowledged the limited weighing of the evidence a reviewing

court must employ by stating, "there is evidence supporting the board's conclusion and the contrary evidence is not sufficient to invalidate the board's findings." *Id.* at 578-79 (footnote omitted). The Supreme Court has more recently clarified that its statement in *Harris* did not alter the well-established standards of review applicable under R.C. 119.12. See *Pushay v. Walter* (1985), 18 Ohio St.3d 315. There, while repeating that "[it] will not substitute [its] judgment for that made by the state board if there is some evidence supporting the board's resolution," the Court continued, "[t]herefore, the issue presented is whether the state board's order \* \* \* was supported by reliable, probative, and substantial evidence." *Id.* at 316.

{¶15} The trial court's citation to *Harris* does not demonstrate that the trial court employed an incorrect standard of review. See *Perry v. Ohio State Liquor Control Comm.* (June 8, 2000), 10th Dist. No. 99AP-976 (rejecting a similar challenge where the trial court used the words "some evidence" in reference to the reliable, probative, and substantial evidence required by R.C. 119.12 and expressly concluded that reliable, probative, and substantial evidence supported the administrative order). In its analysis, the trial court here stated as follows:

Dr. Adelman's testimony constitutes reliable, probative, and substantial evidence that Appellant is impaired in his ability to practice according to acceptable and prevailing standards of care because of Appellant's habitual and excessive abuse of alcohol. The Court "will not substitute its judgment for the board's where there is some evidence supporting the board's order." *Harris v. Lewis, supra.*

The court's reference to "some evidence" relates to Dr. Adelman's testimony, evidence that the court found reliable, probative, and substantial. Beyond correctly stating the applicable standard of law, the court expressly concluded that the Board's order must

be affirmed because it "is supported by reliable, probative, and substantial evidence and is in accordance with law." Because the trial court not only stated, but also applied, the correct standard of review, we overrule appellant's first assignment of error.

{¶16} We next consider appellant's fourth assignment of error, by which he contends that the trial court erred by affirming the Board's order because the Board failed to identify the reasons for its modification of the hearing examiner's recommendation. Appellant bases this argument on R.C. 119.09, which requires a hearing examiner to submit to the Board a report, setting forth findings of fact, conclusions of law, and a recommendation of action to be taken by the Board, and states that, if the Board modifies or disapproves its hearing examiner's recommendation, "it shall include in the record of its proceedings the reasons for such modification or disapproval." This court has acknowledged case law holding that the R.C. 119.09 requirement of stating reasons for modifying or disapproving a hearing examiner's recommendation is mandatory. See *In re Lima Mem. Hosp.* (Aug. 24, 1993), 10th Dist. No. 93AP-580, citing *Wheat v. State Bd. of Chiropractic Examiners* (Nov. 30, 1988), 9th Dist. No. 13538; but see *Connors v. Ohio Dept. of Commerce, Div. of Real Estate* (1982), 7 Ohio App.3d 237 (holding that the requirement is directory with respect to a commission's increase of a recommended penalty, where the increased penalty is within the scope of the commission's authority, because a court lacks authority to reverse, vacate or modify it).

{¶17} The minutes of the Board's June 10, 2009 meeting include the following comments from Board members:

Dr. Stephens stated that, although nothing has been reported since 2007, when she looks at this case and she looks at physicians with whom she deals on a regular basis, the police have not been to their houses. They have not been caught in altercations with alcohol on their breath or anything like that. She stated that, to her, this looks like impairment.

Dr. Steinbergh stated that she also thinks that this looks like impairment. She stated that, over the years, when the Board takes a look at the behavior of physicians who are ultimately diagnosed as impaired, they demonstrate the same type of behavior as [appellant]; i.e., very risky behavior. This is risky behavior on the part of any person, but especially in terms of a professional. Drinking and driving is absolutely inappropriate. If physicians don't know the difference, the impairment that it causes in your mind, the lack of neurologic control and so forth, if you don't understand that as a physician, she doesn't know who else should.

Dr. Steinbergh stated that she appreciates [appellant's] coming before the Board today, because she thinks that he makes an appropriate presentation. However, from reading the record, she thinks that he abused alcohol. She doesn't know if he continues to use alcohol.

Dr. Steinbergh also noted that [appellant] hasn't worked for over two years now, and it's a huge concern for her. She advised that it would not be appropriate to dismiss this case. [Appellant] is someone who could go out tomorrow, get a job and care for patients. He could get in his car, he could drink, he could kill someone. Dr. Steinbergh stated that she sees him as being a risky individual and someone she could not dismiss today.

Dr. Steinbergh added that she agrees with the State's objections. She thinks that [the Assistant Attorney General] outlined it very appropriately. Common sense tells her, after all of these years of service on the Board, that [appellant] is impaired. There's some degree of impairment. She doesn't know the answer to the questions as to whether he's as bad as somebody else, or [at as] much risk as somebody else. She does know that dismissal is inappropriate.

Dr. Steinbergh then moved to amend the hearing examiner's conclusion of law and proposed order. Dr. Amato seconded the motion and "commented that if it walks like a duck, quacks like a duck, swims like a duck, it's probably a duck." With the exception of two abstaining members, the Board unanimously voted to amend the hearing examiner's conclusion of law, to conclude that appellant was impaired under R.C. 4731.22(B)(26), and to amend the hearing examiner's recommendation so as to impose an indefinite suspension with conditions for reinstatement or restoration.

{¶18} Whereas appellant contends that the record does not contain reasons for the Board's modification of the hearing examiner's recommendation, the trial court concluded that the meeting minutes demonstrate that the Board "articulated, in detail, the reasons for [its] action and thereby fulfilled [its] obligations under R.C. 119.09." While we might characterize the minutes differently, we nevertheless agree that those minutes, together with the Board's action, are sufficient to comply with the Board's obligation under R.C. 119.09.

{¶19} In *Lima Mem. Hosp.*, this court rejected a similar challenge by concluding that the Board's amendment and deletion of certain findings of fact and conclusions of law, and its addition of others, sufficiently set forth the Board's reasons for disapproving the hearing officer's recommendations. See also *Hill v. State Med. Bd. of Ohio* (Dec. 5, 1996), 10th Dist. No. 96APE05-656 (rejecting a claimed violation of R.C. 119.09 where the Board extended the hearing officer's recommended suspension because meeting minutes reflected the Board's belief that the proposed suspension was too lenient). Here, the member comments reveal the members' review of the record and the state's objections to the Report. Coupled with the member comments and the absence of any

comments supporting the hearing examiner's legal conclusion, the Board's vote to modify the hearing examiner's conclusion to state that appellant was impaired sufficiently states the Board's reasons for disapproving the hearing examiner's recommendation to dismiss the allegations against appellant. Because we conclude that the Board complied with its obligations under R.C. 119.09, we overrule appellant's fourth assignment of error.

{¶20} Appellant's remaining assignments of error concern the substance of the trial court's judgment, and, because those assignments of error are interrelated, we discuss them together. Appellant's second assignment of error contends that the trial court abused its discretion in finding that the Board's order was supported by reliable, probative, and substantial evidence based on Dr. Adelman's testimony. Appellant's third assignment of error contends that the trial court erred because the Board's finding of impairment did not conform with the requirements of R.C. 4731.22(B)(26) and Ohio Adm.Code Chapter 4731-16. In that regard, appellant argues that the record does not contain evidence of "habitual or excessive use or abuse" of alcohol or evidence that appellant's use or abuse of alcohol impairs his ability to practice medicine. Appellant generally argues under both assignments that the trial court abused its discretion by determining that the Board's order was supported by reliable, probative, and substantial evidence.

{¶21} This court's standard of review is more limited than that of the trial court. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination

that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680.

{¶22} The trial court's decision includes a thorough discussion of the testimony and evidence presented to the hearing examiner, including evidence of several encounters between appellant and the police. First, on August 5, 2006, a Waverly police officer noticed a strong odor of alcohol after stopping appellant, and appellant admitted that he had consumed alcohol prior to driving. Although appellant was transported to the Waverly Police Department, a breathalyzer test revealed a blood alcohol level below the legal limit, and he was not charged with any offense. Next, on October 31, 2007, the police were twice summoned to appellant's apartment building, first when appellant's neighbor complained that appellant was intoxicated and making noise, and again, approximately one-half hour later, when appellant made a similar complaint about his neighbor. The responding officer observed that appellant was under the influence of alcohol and warned both appellant and his neighbor; no charges were filed.

{¶23} The final encounter occurred in December 2007. On December 25, 2007,<sup>1</sup> appellant had been drinking alcohol with Heather Cochran and Angie Zornes at Ms. Cochran's apartment in Jackson, Ohio. Appellant left the apartment after a disagreement, and, at approximately 1:10 a.m. on December 26, 2007, a Jackson police officer stopped appellant after receiving a report of a hit-and-run collision with a

---

<sup>1</sup> The trial court refers to these events as occurring on December 24-25, 2007.

parked vehicle. The officer observed that appellant had red eyes, slow and slightly slurred speech, disorientation, and unsmooth movement. Appellant admitted that he had been drinking and failed field sobriety tests. He was arrested and charged with OMVI, leaving the scene of an accident, and failure to control his vehicle. A breathalyzer test administered at the Jackson Police Department registered a blood alcohol level of 0.068, below the legal limit. Appellant told the arresting officer that Ms. Cochran and Ms. Zornes had stolen his wallet and eyeglasses and had drugged him with Klonopin, a benzodiazepine, but a urine analysis tested negative for benzodiazepines. The women denied stealing from appellant or drugging him, and they claimed he had been intoxicated when he arrived at Ms. Cochran's apartment.<sup>2</sup> Appellant's charges for OMVI and leaving the scene of an accident were ultimately dismissed, and he pleaded guilty of failure to control.

{¶24} On January 14, 2008, Fortner, a Board investigator, interviewed appellant, who stated that he probably did not have a problem with alcohol and blamed the events of December 2007 on Ms. Cochran and Ms. Zornes. Fortner requested a urine sample from appellant. According to Fortner, appellant then proceeded to drink four large glasses of water and stated he would contact his attorney before deciding whether to provide a sample. After Fortner left, appellant agreed to provide a urine sample. Appellant's sample tested negative for 11 drugs or classes of drugs, but the toxicology

---

<sup>2</sup> Appellant subsequently submitted signed, notarized statements from Ms. Zornes and Vance Markham. Ms. Zornes stated that Ms. Cochran attempted to drug appellant and took his wallet and eyeglasses. She also stated that appellant was not intoxicated when he arrived at the apartment. Mr. Markham stated that Ms. Cochran admitted drugging appellant by putting something in his beer and admitted stealing appellant's belongings, including his wallet.

report noted a low creatinine level and specific gravity outside the normal range, indicative of dilution of the sample.

{¶25} Appellant's arguments under his second and third assignments of error center around the testimony of Nichols and Dr. Adelman, as well as documentary evidence concerning appellant's evaluation at Glenbeigh. We review that testimony and evidence now.

{¶26} Nichols interviewed appellant over approximately seven hours during his evaluation at Glenbeigh and contacted appellant's acquaintances, former employers, physician, and police officers to corroborate information provided by appellant. Nichols also completed a 12-page Biopsychosocial Assessment ("Assessment") in which he diagnosed appellant with alcohol abuse. Attached to the Assessment are Nichols' chart notes and notes of Nichols' conversations with corroborating sources. Nichols observed that appellant "is in denial of his abuse of alcohol. He is in denial of the harmful and negative consequences of his use. He is in denial of his alcohol-related friendships and his alcohol-related lifestyle. He is extremely highly defended through minimization, rationalization, intellectualization, and diversion." Nichols noted that appellant did not accept his diagnosis and recommendation of inpatient treatment.

{¶27} Nichols relied on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV"), to diagnose appellant with alcohol abuse. The DSM-IV lists the following criteria for substance abuse:

- A. A maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

- (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)
- (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)
- (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)
- (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)

B. The symptoms have never met the criteria for Substance Dependence for this class of substance.

{¶28} Nichols testified about each of appellant's alcohol-related encounters with the police. He considered the three instances of substance-related legal problems and stated that, "although there are no arrests – when the police are called and there's a police report, that constitutes a problem. And these diagnostic criteria refer to problems with the police." (Tr. 125.) As appellant identifies in his appellate brief, Nichols did misstate that the December 2007 incident involved three arrests, rather than a single arrest with three charges, resulting in one conviction. That statement, however, does not undermine Nichols' assessment because, with respect to the third DSM-IV criterion for alcohol abuse, Nichols explained that appellant had "recurrent problems," not "recurrent arrests." (Tr. 155.) Nichols stated that appellant met three of the four DSM-IV criteria for alcohol abuse if consideration was limited to a 12-month period and met

all four criteria if consideration extended to a 16-month period. After reaching his final conclusion on July 9, 2008, Nichols reviewed his work with Dr. Adelman, and Nichols fully concurred with the final diagnosis of alcohol abuse.

{¶29} Dr. Adelman testified that he saw appellant for approximately 20-30 minutes during his evaluation to review appellant's history and physical, to explain the evaluation process, and to answer questions. As to the process, Dr. Adelman testified that, after an evaluation, he confers with the counselor who does the assessment and the counselor's supervisors, and the team comes up with a final diagnosis and recommendation. Dr. Adelman stated that he would normally have the assessment before making a final diagnosis. Here, although Dr. Adelman initially testified that he read and relied on Nichols' Assessment in reaching his final diagnosis, he later could not be certain he had read the Assessment itself prior to making a final diagnosis and that he may have, instead, relied on Nichols' oral report of his findings. Dr. Adelman expressly testified that his "opinion is that [appellant is] impaired because of his abuse of alcohol and he is not able to practice within \* \* \* acceptable standards of care." (Tr. 245.) Dr. Adelman also testified that appellant "will need treatment in order to practice according to prevailing standards of care." (Tr. 249.)

{¶30} Like Nichols, Dr. Adelman used the DSM-IV as a basis for diagnosing appellant. Dr. Adelman relied specifically on DSM-IV criterion (A)(3). When explaining the facts that lead him to conclude that the (A)(3) criterion was satisfied, Dr. Adelman mentioned the October 2007 incident, where the police were called to appellant's apartment building and found appellant intoxicated. Dr. Adelman testified, "I would say getting to talk to the police twice in one night when they report that you're intoxicated is

a problem." (Tr. 277-78.) Dr. Adelman also cited appellant's December 2007 arrest, when appellant had been driving after admittedly drinking. While Dr. Adelman also noted appellant's 2006 stop, at which time appellant again admitted he had been drinking, Dr. Adelman agreed that it did not occur within 12 months of the other incidents. Dr. Adelman cited a statement by a Waverly police officer that the police department had dealt with appellant a couple times, and Dr. Adelman testified that these run-ins with the police, when appellant had been drinking, constitute "substance-related legal problems" under DSM-IV criterion (A)(3). In his July 11, 2008 letter, Dr. Adelman informed the Board of his finding that appellant "is not qualified, by impairment due to chemical abuse, to perform his duties as a physician in accordance to acceptable standards of care because of habitual and excessive abuse of alcohol that has impaired his ability to practice his profession of medicine."

{¶31} Based on the record and Board members' own experience, the Board concluded that appellant was impaired under R.C. 4731.22(B)(26), in contrast to the conclusion of its hearing examiner, and voted, 9-0, to amend the hearing examiner's conclusion to reflect that appellant was impaired. Although appellant correctly states that an administrative agency should accord due deference to a hearing examiner's findings and recommendations, especially where evidentiary conflicts exist, the standards of review do not change because an agency rejects its hearing examiner's recommendation. *Freeman v. Ohio Dept. of Human Servs.* (Dec. 14, 1995), 10th Dist. No. 95APE03-359, citing *Brown v. Ohio Bur. of Emp. Servs.*, 70 Ohio St.3d 1, 2, 1994-Ohio-156, and *T. Marzetti Co. v. Doyle* (1987), 37 Ohio App.3d 25. The trial court was, therefore, tasked with determining whether the Board's order was supported by reliable,

probative, and substantial evidence and was in accordance with law. This court's duty remains to determine whether the trial court abused its discretion in so concluding.

{¶32} Appellant argues that the trial court failed to engage in a weighing of the evidence and essentially maintains that the Board and the trial court should have discounted the testimony of Nichols and Dr. Adelman for the reasons expressed in the hearing examiner's report. To the contrary, the Board argues that it was entitled to use its own expertise to arrive at a decision in this matter and that the trial court did not abuse its discretion in affirming that decision.

{¶33} The General Assembly's purpose for providing administrative hearings in particular fields " 'was to facilitate such matters by placing the decision on facts with boards or commissions composed of [people] equipped with the necessary knowledge and experience pertaining to a particular field.' " *Arlen v. State* (1980), 61 Ohio St.2d 168, 173, quoting *Farrand v. State Med. Bd.* (1949), 151 Ohio St. 222, 224. The power delegated to the Board includes the authority to rely on its own knowledge when making a decision. *Walker v. State Med. Bd. of Ohio*, 10th Dist. No. 01AP-791, 2002-Ohio-682. Thus, the Board "may rely on its own expertise to determine whether a physician failed to conform to minimum standards of care." *Arlen* at 172; see also *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 623, 1993-Ohio-122. This court has, therefore, squarely rejected an argument that the Board may not rely on its own expertise to determine issues of alcohol abuse and physician impairment. See *Ridgeway*. There, we held that the trial court's recognition of the Board's "special expertise and knowledge" with respect to the issue of physician impairment under R.C. 4731.22(B)(26) was "consistent with the Ohio Supreme Court's admonition that 'courts must accord due deference to

the [Board's] interpretation of the technical and ethical requirements of its profession.' " Id. at ¶47, quoting *Pons* at 621; see also *Singh v. State Med. Bd. of Ohio* (May 14, 1998), 10th Dist. No. 97APE09-1245. ("The question of whether or not appellant was able to competently and safely practice medicine in light of his addiction, is a determination uniquely within the province of the Board.")

{¶34} The hearing examiner determined that Dr. Adelman's testimony was not reliable based on alleged deficiencies in appellant's Glenbeigh evaluation. She noted Dr. Adelman's inability to recall details of the Glenbeigh team's meeting to reach its final diagnosis and to recall what information he reviewed prior to the final diagnosis. She stated, "Dr. Adelman may have only had Mr. Nichols' oral summary of the information gathered and \* \* \* Mr. Nichols' assessment has been found to be not reliable." The hearing examiner stated that Nichols misinterpreted or misapplied significant facts in the diagnostic process, including the number of times appellant was arrested, and concluded that Nichols' finding that appellant's alcohol use resulted in a failure to fulfill major obligations at work, school or home was unsupported by the record. Finally, she concluded that Nichols modified the DSM-IV criteria by not confining his analysis to a 12-month period.

{¶35} The Board had before it, not only the Glenbeigh witness' diagnosis of alcohol abuse, but the complete records of the Glenbeigh assessment, the hearing testimony, including the cross-examination of the Glenbeigh witnesses regarding their application of the DSM-IV criteria, and the hearing examiner's analysis of the evidence. The Board was not required to accept the hearing examiner's opinions regarding the reliability of the submitted evidence, but was entitled to use its own expertise to make a

conclusion of impairment based on the evidence presented at the hearing. Notably, the Board was entitled to independently determine the reliability of Nichols' assessment and testimony and to credit Dr. Adelman's impairment opinion, despite the hearing examiner's perception of factual error in the Assessment. For example, while the hearing examiner found that Nichols modified the DSM-IV criteria by considering events occurring over a period longer than 12 months, the Board could have determined Nichols' testimony reliable with respect to the issue of appellant's impairment because, even if the DSM-IV limited consideration for purposes of a substance abuse diagnosis, which we need not decide here, consideration of impairment under R.C. 4731.22(B)(26) is not likewise limited. Similarly, as stated above, Nichols' misstatement of the number of appellant's arrests does not undermine his credibility where he explained that the DSM-IV criteria speak of legal problems, not arrests. Based on the record before it, the Board made its own determination as to whether appellant was impaired and, despite the hearing examiner's analysis of the evidence, voted, 9-0, to amend the hearing examiner's conclusion of law to conclude that appellant is impaired under R.C. 4731.22(B)(26). As long as reliable, probative, and substantial evidence supports the Board's determination, the trial court was required to affirm.

{¶36} Upon review, we conclude that the trial court did not abuse its discretion in concluding that reliable, probative, and substantial evidence supported the Board's determination that appellant was impaired. In particular, we reject appellant's argument that the evidence in the record does not establish either habitual or excessive use or abuse of alcohol or impairment of appellant's ability to practice as a result thereof. With respect to habitual or excessive use or abuse of alcohol, the Board had evidence of

three incidents in which the police stopped or contacted appellant after he had been drinking. Two of those incidents involved suspicions that appellant was driving while under the influence of alcohol. Although appellant tested under the legal limit on both occasions, that fact does not undermine the reliability and probative nature of that evidence as to the question of appellant's habitual or excessive use of alcohol. The Assessment reflects appellant's statements that, prior to Christmas 2007, he drank wine with dinner several days a week at home, drank at various friends' homes, and drank at two bars. Additionally, Nichols' conversations with Vance Markham and Mandy Swingle included reports of appellant's social drinking. Finally, nothing in R.C. 4731.22(B)(26) requires that consideration of a physician's substance use or abuse be limited to a 12-month period. In light of the record, we agree with the trial court that reliable, probative, and substantial evidence supports a finding of habitual or excessive use or abuse of alcohol by appellant.

{¶37} While appellant argues that no witness testified as to how appellant's use of alcohol actually impaired his practice, the absence of such specific testimony does not require reversal. Dr. Adelman opined that appellant was impaired because of his abuse of alcohol and that appellant is not able to practice within acceptable standards of care. He also opined that appellant required treatment to be able to practice according to acceptable and prevailing standards of care, an opinion that equates to the definition of impairment under Ohio Adm.Code 4731-16-01(A). Dr. Adelman further testified that a clinical finding of alcohol abuse generally satisfies the definition of impairment under the Board's and statutory rules. Moreover, in *Ridgeway*, this court expressly rejected the appellant's contention that evidence of patient harm was required before the Board

was permitted to take disciplinary action against a physician. Instead, it is within the Board's province to consider the issue of impairment even in the absence of a specific incident of patient harm. *Id.* at ¶25. For these reasons, we conclude that the trial court did not abuse its discretion in determining that reliable, probative, and substantial evidence supported the Board's determination that appellant is impaired under R.C. 4731.22(B)(26). Accordingly, we overrule appellant's second and third assignments of error.

{¶38} Having overruled each of appellant's assignments of error and having concluded that the trial court did not abuse its discretion in affirming the Board's order, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and KLATT, JJ., concur.

---