

FILED
LORAIN COUNTY
2020 JUL 28 A 9:25
COURT OF COMMON PLEAS
TCM ORLANDO



To the Clerk: THIS IS A FINAL
APPEALABLE ORDER.
Please serve upon all parties not
in default for failure to appear;
Notice of the Judgment and its
date or entry upon the Journal

**LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge**

Date July 28, 2020

Case No. 20CV200188

CHRISTOPHER JAROSCAK
Appellant

Robert Noble
Plaintiff's Attorney

VS

STATE BOARD OF PHARMACY
Appellee

Henry Appel
Defendant's Attorney

This matter is before the Court on Appellant, Christopher Jaroscak's, Appeal From A Final Order of the State Board of Pharmacy, filed December 18, 2019.

THE COURT RULES THAT:

After a full and complete review of the entire record, this Court finds that the State Board of Pharmacy's conclusion that Appellant, Christopher Jaroscak, engaged in misconduct was supported by the record.

The Order of the State of Board of Pharmacy dated December 18, 2019, finding eleven counts of misconduct all resulting in the permanent revocation of Appellant's Pharmacist License is hereby AFFIRMED and Appellant's appeal to this Court is OVERRULED.

See Judgment Entry. No Record.

IT IS SO ORDERED.



JUDGE D. Chris Cook

cc: Noble, Esq.
Appel, Esq.



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OHIO STATE BOARD OF PHARMACY
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I. INTRODUCTION

This matter is before the Court on Appellant, Christopher Jaroscak's, Appeal From A Final Order of the State Board of Pharmacy, filed December 18, 2019, the Certified Record, and the parties' Motions and Briefs.

II. PROCEDURAL HISTORY

On July 25, 2019, Appellee, State of Ohio Board of Pharmacy ("The Board"), suspended Appellant, Christopher Jaroscak's ("Jaroscak"), pharmacy license and advised him of his right to a hearing.

On December 10, 2019, The Board conducted an evidentiary hearing.

On December 18, 2019, The Board issued its Order finding 11 counts of misconduct and permanently revoked Jaroscak's pharmacy license.

On January 2, 2020, Jaroscak timely appealed to this Court.

III. STATEMENT OF PERTINENT FACTS

Based upon the Certified Record, Order of the State Board of Pharmacy¹, and the briefs of the parties, the Court finds the following pertinent facts.

1. That Jaroscak is a licensed pharmacist in the State of Ohio under License No. 03-328743, MME.05200155.

¹ December 18, 2019.



2. That Jaroscak was employed at The Botanist as a medical marijuana “key employee” charged with the daily responsibility for the operation of the licensed dispensary.
3. That while employed at The Botanist, and at all times a licensed pharmacist, Jaroscak provided four employees of The Botanist with homemade edible products containing THC and/or Hashish that were manufactured at his residence.
4. That some of these products were provided for free and some were sold to the four employees.
5. That all transactions occurred at The Botanist dispensary premises.
6. That Jaroscak sold to one employee THC/Hashish vaporizer cartridges that were not lawful medical marijuana products.
7. That on or about July 17, 2019, a Board Agent confiscated a vaporizer cartridge containing Hashish in liquid form. The cartridge was found in Jaroscak’s backpack located inside The Botanist dispensary.
8. That Jaroscak admitted to a Board Agent that he provided an employee with edible THC/Hashish “gummies,” that he had a THC/Hashish vaporizer cartridge and vaporizing device in his belongings at The Botanist dispensary.
9. That Jaroscak also admitted to using marijuana despite not being a registered medical marijuana patient.
10. That Jaroscak also admitted that he manufactured THC/Hashish products at his residence.
11. That Jaroscak also admitted that he ordered manufacturing supplies from the internet.
12. That Jaroscak also admitted that he provided products containing THC/Hashish to employees of The Botanist dispensary.
13. That Board Agents confiscated marijuana and marijuana paraphernalia and materials from Jaroscak’s residence.

The Court makes further findings of fact based upon the Briefs submitted by the parties that are supported by the record;

1. Jaroscak graduated from Ohio Northern University in 2008 with a Pharmacy Degree.
2. In 2008 Jaroscak was robbed at gun-point while working for CVS Pharmacy in Findlay, Ohio.
3. This incident caused Jaroscak great anxiety.
4. From 2015 to 2019, Jaroscak worked for Discount Drug Mart and was a clinical pharmacist for Accuscripts and UH St. John Medical Center.
5. After beginning work at The Botanist, for both personal and professional reasons, Jaroscak began to use marijuana.
6. Jaroscak became increasingly dependent upon marijuana.



7. After his termination from The Botanist, Jaroscak began a recovery program and has remained "drug-free" since July, 2019.
8. Jaroscak remains under the care of Dr. Allison Flowers with the Landings Family and Psychological Center.
9. While employed at The Botanist, Jaroscak was its "designated representative" meaning he was legally responsible for the operations of the dispensary including oversight of its records, products, and compliance with the law.
10. Jaroscak was a management level employee of The Botanist and was also a "Key Employee."
11. Jaroscak worked as a pharmacist for 12 years without incident prior to his tenure at The Botanist.
12. Jaroscak was employed at The Botanist for approximately four months.

IV. STANDARD OF REVIEW

RC 119.12(M) embodies the statutory standard for review to be applied by a court of common pleas when reviewing an administrative appeal:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

In addition, the Ninth District Court of Appeals has enunciated the standard of review in a recent decision, *Eckert v. Summit County Public Health*, 9th Dist. Summit No.27844, 2016-Ohio-7076. The Court stated,

Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the "entire record" to determine whether "reliable, probative, and substantial evidence" supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110, 407 N.E.2d 1265 (1980). *Eckert*, at ¶ 11.

The common pleas court's review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court "must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence[,] and the weight [to be given it]." *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280, 131 N.E.2d 390 (1955). The



common pleas court must give “due deference to the administrative [agency’s] resolution of evidentiary conflicts,” and “when the evidence before the court consists of conflicting testimony of approximately equal weight the court should defer to the determination of the administrative body * * *.” *Conrad* at 111, 407 N.E.2d 1265. “However, the findings of the agency are by no means conclusive.” *Id.* Thus, it is clear that although a court of common pleas may not blatantly substitute its judgment for that of the administrative agency, the court must weigh evidence of record, including the credibility of witnesses. *Id.* at 110, 407 N.E.2d 1265; see *Smith v. Richfield Twp. Bd. of Zoning Appeals*, 9th Dist. Summit No. 25575, 2012–Ohio–1175, ¶ 33 (considering an administrative appeal under R.C. 2506). *Eckert*, at ¶ 12.

A court of common pleas may “reverse, vacate, or modify the administrative order” when “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 * * *.” *Conrad* at 111, 407 N.E.2d 1265. “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.” *Id.* Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.” *Id.* at 111–112, 407 N.E.2d 1265. *Eckert*, at ¶ 13.

An “appellate court’s review is even more limited than that of the trial court.” *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). Unlike the court of common pleas, this Court is not permitted to weigh the evidence. *Id.* We may not reconsider the credibility of witnesses. See *Id.* “While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court.” *Id.* On appeal, this Court determines only if the court of common pleas abused its discretion in determining whether reliable, probative, and substantial evidence supports the agency’s order. *Id.* An appellate court will not substitute its judgment for that of the court of common pleas unless the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Absent an abuse of discretion, we must affirm the trial court’s judgment, even if we would not reach the same conclusion. *Pons* at 621, 614 N.E.2d 748. *Eckert*, at ¶ 14.

V. ANALYSIS

In support of his appeal, Jaroscak advances three (3) propositions of law, to wit: (1) The Board acted in contravention of R.C. 3796.24(A) when it revoked Jaroscak’s license; (2) The Board’s revocation decision is not supported by reliable, substantive, and probative evidence because (A) he was not given proper notice, (B) the evidence was lacking that



he provided four employees with THC and/or Hashish, (C) the evidence was lacking that he sold THC/Hashish Vaporizer Cartridges to an employee, and, (D) The Board relied upon hearsay evidence; (3) The Board abused its discretion by permanently revoking Jaroscak's license.

None of these arguments (except the one the Court cannot change) are compelling.

The Court will address the assignments of error *seriatim*.

ASSIGNMENT OF ERROR I

In his first assignment of error, Jaroscak urges that R.C. 3796.24(A) provides to him immunity from discipline as a result of his employment at a medical marijuana dispensary.

This argument lacks merit.

As candidly conceded by Jaroscak, it cannot be inferred by reading the statute that the General Assembly intended the liability exception in the statute to "protect [alleged] criminal activity."

The statute provides immunity from liability to license holders when they are engaged in "professional or occupational activities related to medical marijuana."

Illegally manufacturing marijuana products and distributing them to one's fellow employees, whether for a fee or not, is hardly part and parcel to "professional or occupational" activities related to "medical marijuana." By its very definition, Jaroscak's marijuana products were not related in any way to legal medical marijuana but were clandestine, illegal products that he chose to manufacture and distribute unrelated to his professional responsibilities as a license holder employed by The Botanist.

ASSIGNMENT OF ERROR II

Jaroscak's second assignment of error is that The Board's decision to permanently revoke his license is not supported by reliable, substantive, and probative evidence. It is broken-down into five subsections.

First, Jaroscak argues that he was not given proper notice of the charges because the notice he received did not identify him as a "Key Employee" of The Botanist.

This argument is without merit.



Jaroscak states that he was prejudiced by this “error” because he was “not aware that his actions were being charged as violative of anything related to his Pharmacist License.”

The facts though, speak otherwise. As noted by The Board, the notice Jaroscak received passes constitutional muster as it cites the specific statutory violations, identified Jaroscak’s pharmacy license number and medical marijuana employee license number, was reasonably calculated to apprise him of pendency of The Board’s action, and afforded him a hearing, which he fully participated in. See: *Richmond v. Board of Nursing*, 10th Dist., Franklin No. 12AP-328, 2013-Ohio-110.

Moreover, it does not appear that Jaroscak objected to the contents of the notice before The Board. As such, he has waived any defects, if there are, in fact, any.

Second, Jaroscak argues that the evidence is lacking that he provided four employees with marijuana products.

Jaroscak does concede that he provided two employees with these products (employees #1 & #4), but urges that the record does not demonstrate that he did so for employees #2 & #3.

This Court disagrees.

Again, as pointed-out by The Board, Jaroscak’s own testimony (or lack thereof) is fatal to this argument.

Jaroscak admitted to providing the illegal products to two employees but when asked at the hearing about the other two, he invoked his Fifth Amendment right not to answer, which of course is his prerogative.

But unlike a criminal case, a Pharmacy Board hearing is a civil matter and as such, The Board, and this Court, may make inferences from Jaroscak’s silence. Clearly, Jaroscak’s invocation of his Fifth Amendment right when asked specifically about employees #2 & #3 was meant to avoid inculpation. As such, The Board was well within its prerogative to infer that Jaroscak in fact provided illegal marijuana products to all four employees.

Despite this conclusion, the Court notes, contra the argument of The Board, that it is “material” as to how many employees Jaroscak distributed the marijuana products to. After all, distributing the illegal products to four people is more serious than distributing to just two. And, while this Court is speculating, perhaps had The Board found that Jaroscak distributed to only two employees, not four, it would have been more inclined to impose the requested indefinite suspension as opposed to permanent revocation.



Third, Jaroscak argues that The Board did not demonstrate that he sold marijuana products to employee #4.

This argument is overcome by the evidence in the record that employee #4 provided a written statement acknowledging that he purchased two cartridges for "\$35 each."

Fourth, Jaroscak argues that The Board improperly relied upon hearsay evidence in rendering its order.

This Court disagrees.

First, the record does support The Board's position that Jaroscak waived any objection to the hearsay evidence by stipulating to its admission.

Second, the rules of evidence, and in particular, rules regulating the admission of hearsay, generally do not apply to administrative hearings. Both parties cite to numerous cases, which will not be repeated herein, that stand for the proposition that hearsay evidence is generally admissible in administrative hearings.

The propriety of *that* legal precept will be left for another day.

ASSIGNMENT OF ERROR III

As essentially and properly noted by both parties, Jaroscak cannot appeal the sanction ordered by an administrative agency as a common pleas court has no authority to disturb a sanction imposed by one.

In order to get around this harsh reality, in reliance on the *Horn*² matter, Jaroscak urges that this Court has the authority "to review and reverse, vacate, or modify the sanction ordered if it finds that the order is not supported by reliable, probative, and substantial evidence."

If only it were that simple.

Unfortunately, this Court is well-acquainted with *Henry's Café, Inc.*³ and its progeny, especially the *Horn*⁴ case. For decades, this counter-intuitive case (*Henry's Café*) has wreaked havoc on and emasculated the Common Pleas Courts' authority to review, and when necessary, correct the decisions of Ohio administrative agencies as to sanctions.

² *Horn v. Ohio Dept. of Insurance*, 9th Dist., Lorain No. 15CA010892, 2017-Ohio-231.

³ *Henry's Café, Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233 (1959).

⁴ This Court was Mr. Horn's trial counsel in that matter.



As this Court wrote in the *Barr*⁵ matter cited by The Board,

Henry's Café, a three-page Ohio Supreme Court decision somewhat lacking in thoughtful legal analysis has been challenged in many appellate districts and numerous common pleas courts in this state since its inception some 58 years ago. The decision stands for the proposition that a common pleas court has the authority to affirm, reverse, vacate, or modify an order of an administrative board but if the court affirms the order, it may not modify an attendant punishment. Of course, there is no cogent reason or legal rationale as to why the term "modify" is limited to modify only the decision of an agency board, but not a sanction.

Put another way, how can a common pleas court be vested with the awesome authority to completely vacate an administrative agency's order but not invoke a lesser power to uphold the order but modify the punishment?

Someday, the General Assembly will revisit this issue and broaden the power of the common pleas courts to uphold an administrative agency's findings but modify an unjust sanction, or, the Ohio Supreme Court will judicially rectify this anomaly.

Regardless, as observed by The Board, *Henry's Café* is the law in Ohio and this Court is compelled to follow it. Absent legislative correction or Supreme Court intervention, this Court will not create interstitial law where it lacks the authority to do so. Further, it appears that once again the Supreme Court has affirmed the holding mandated by *Henry's Café*⁶ though that case does not directly discuss sanctions.

That noted, this Court agrees with The Board's determination that the evidence, testimony, and exhibits that make up the record demonstrate that Jaroscak committed multiple instances of misconduct and should be sanctioned.

I also agree with Jaroscak that all things considered, especially the fact that he worked as a pharmacist without incident for 12 years; has embraced sobriety, acknowledged his misconduct, and the fact that his total (admittedly disastrous) tenure with The Botanist was for only four months, this Court would indefinitely suspend Jaroscak and give him the opportunity in the future to demonstrate his rehabilitation and return to the profession.

⁵ *Barr v. Lorain Cnty. Dept. of Job and Fam. Services*, Lorain County Court of Common Pleas, Case No. 16CV190175, 5/11/2018 & 7/12/2019. See also: Ninth Dist. Court of Appeals Case No. 18CA011334.

⁶ *Capital Care Network of Toledo v. Ohio Dept. of Health*, 153 Ohio St.3d 362, 2018-Ohio-440, at ¶ 25.



Regardless, *Henry's Café* and its progeny prohibit this Court from reviewing the propriety of the decision by The Board to permanently revoke Jaroscak's pharmacy license.

VI. CONCLUSION

After review of the pleadings and extensive briefing, the Certified Record, and the relevant case law supplied by the parties and Court, the Court rules that:

The Order of the State of Ohio Board of Pharmacy dated December 18, 2019, that permanently revoked Appellant's Pharmacy License is hereby AFFIRMED as the Order is supported by reliable, probative, and substantial evidence, is in accordance with the law, and the sanction (unfortunately) is not subject to review by this Court.

Case Dismissed. Costs to Plaintiff/Appellant.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook

TO THE CLERK: PURSUANT TO CIV.R. 58(B), THIS IS A FINAL APPEALABLE ORDER. PLEASE SERVE UPON ALL PARTIES, NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.