

IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

OHIO AM. HEALTH CARE, INC.,	:		
	:	Appellant	Case No. 12CVF-9722
	:		12CVF-9723
vs.	:		
OHIO STATE BOARD OF NURSING	:	JUDGE SCHNEIDER	
	:	Appellee	

JUDGMENT ENTRY

Schneider, J.

This matter is before the court on Ohio American Health Care, Inc.'s appeal under R.C. 119.12 of administrative adjudications issued by the Ohio State Board of Nursing. This case consists of the consolidated appeals of Ohio American's registered-nursing and licensed-practical-nursing programs. Because the Board's adjudication orders are supported by reliable, probative, and substantial evidence, its factual findings are affirmed. But because the orders are not entirely in accordance with law, the court modifies the orders to remove their permanent nature – conditional approval is withdrawn and full approval is denied.

I. Background

Ohio American operates a for-profit nursing school that includes programs for students to become licensed practical nurses and registered nurses, also called LPNs and RNs. Dr. Yemi Oladimeji, commonly referred to as Dr. Yemi, is the president. The Board regulates schools that educate nursing students. In October 2009, it applied to the Board for approval of its nursing education program. In January 2010, the Board

granted conditional approval of the programs, and in May 2010, the School began admitting students.

The RN program had difficulty maintaining a constant program administrator. And in the first half of 2011, the Board conducted two survey visits; one unannounced and one announced. The Board also visited the school in September and October of 2011. During the visits, the Board identified numerous problems that led to notices of deficiencies. The Board issued these notices on July 29, 2011; November 18, 2011; and January 20, 2011. Each notice provided Ohio American the opportunity to request a hearing. And in each instance, the School provided explanations for the deficiencies and requested a hearing. At the School's request, the separate hearings were consolidated into one. By separate requests of the Board and the School, various hearing dates were continued. Originally scheduled for January 2012, the hearing took place from April 30, 2012, through May 4, 2012. The School sought a continuance because its program administrator had resigned suddenly and it retained new counsel, but its motion was denied.

The hearing examiner issued a comprehensive 87-page report and recommendation in which she recommended that the School's conditional-approval status be permanently withdrawn and full-approval status permanently denied. The School objected. The Board based its adjudication order that permanently withdrew conditional approval and denied full approval of the School on the totality of the evidence but highlighted what it felt were the most egregious deficiencies.

The PN program suffered from similar problems and underwent very similar survey visits. It also has a nearly identical procedural history, with the exception that its

hearing before the hearing examiner took place on May 29, 2012, and May 30, 2012. Later, the hearing examiner issued a comprehensive 62-page report and recommendation. Like the RN program, the hearing examiner recommended permanent withdrawal of the School's conditional-approval status and permanent denial of full approval.

The School now appeals the Board's adjudication orders for the LPN and RN programs.

II. Standard of Review

Under R.C. 119.12, when reviewing an administrative agency's order, the court must consider the entire record and determine whether the agency's order is supported by reliable, probative, and substantial evidence, and whether the order is in accordance with the law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-111, 407 N.E.2d 1265 (1980). This 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 thereof.'" *ATS Inst., of Technology, Assoc. of Applied Science in Nursing Program v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 12AP-385, 2012-Ohio-6030, ¶ 11, quoting *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207, 441 N.E.2d 584 (1st Dist.1981). "The evidence required by R.C. 119.12 can be defined 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.*, 63

Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992). The court must give deference to the Board's resolution of evidentiary conflicts, although those findings are not conclusive. *Id.* citing *Conrad* at 111.

This court reviews questions of law, however, de novo. *Id.* citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993). The court is also mindful that it should give deference to the Board's interpretation of R.C. Chapter 4723 and the corresponding portions of the Ohio Administrative Code. *See Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (1992). In particular, the court should give deference to the Board's "interpretation of the technical and ethical requirements of its profession." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.3d 748 (1993), syllabus. The rationale behind this deference is that the General Assembly purposefully placed these fact-based decisions before boards composed of people with specific knowledge and experience in their particular fields. *Id.* at 621-622, citing *Farrand v. State Med. Bd. of the State of Ohio*, 151 Ohio St. 222, 224, 85 N.E.2d 113 (1949). These principles guide the court's evaluation of the School's arguments.

III. Adjudication Order – RN Program

Ultimately, the Board permanently withdrew the School's conditional approval and permanently denied full approval. Although it based its decision on the totality of the evidence, in its adjudication order the Board identified the four violations that most concerned it:

- 1) Despite raising the issue in all three survey-visit reports, by the third notice of opportunity for hearing the School still was not providing appropriate clinical experiences. "In fact, some students received no clinical experience at all in any

course, some received no clinical experiences in Medical/Surgical (Findings of Fact #14), and with respect to the third cohort, no students were evaluated with respect to whether they could successfully perform clinical skills (Findings of Fact #16);

- 2) The School failed to follow its policies in critical areas such as admissions; student progression; and tuition, fees, and refunds. "Most significant to public safety, the Program progressed students from one course to the next without students' having completed the requirements of an earlier course (Findings of Fact #3, #4, #13), and even issued certificates of program completion for students without evidence that the students completed the necessary lab and clinical hours or final examination for the course (Findings of Fact #13);
- 3) The School did not implement its curriculum as written with respect to clinicals, and, as a result, students were poorly supervised and evaluated "in critical practice areas (Findings of Fact #7, #14, #16);
- 4) The School used unqualified instructors and administrators (Findings of Fact #12, #11).

It closed by writing that "The critical deficiencies of this Program, including but not limited to those referenced above, permeated all aspects of the Program. The Program has shown disregard for the quality of education it provided to its students and ultimately, to consumers of healthcare who expect that registered nurses in Ohio will be educated according to the standards established by the State."

IV. Discussion – The RN Program

While it reviewed the entire certified record, the court paid special attention to the four critical deficiencies identified by the Board in its adjudication order. In reviewing the Board's order, the court read the hearing examiner's comprehensive report and recommendation, read well over 1200 pages of testimony before the hearing examiner, and combed through several hundred pages of exhibits. The court paid special attention to the arguments raised by the School. The court also appraised all of the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight to be given to it. In weighing the evidence to determine if a preponderance of substantial, reliable, and probative evidence existed, the court still gave due deference to the Board's resolution of evidentiary conflicts and did not substitute its own judgment for that of the Board, particularly in areas involving administrative expertise.

A. The School's Arguments

Primarily, the School disputes the hearing examiner's conclusion that corruption and dishonesty in the administration of the School justified permanent withdrawal of approval. This argument comprises three subparts: Julia Wilson was not instructed to change grades; Susan Thomas was not terminated from her position as program administrator for refusing to sign certificates of completion for two students; and evidence regarding Rev. Harold John was irrelevant and inadmissible. The School also cites some favorable testimony and concludes that the Board's failure to offer it a consent agreement results in disparate treatment.

With respect to Julia Wilson's testimony, the hearing examiner found it credible. Additionally, the Board did not identify Ms. Wilson's testimony as critical to its order.

Nonetheless, the School contends that her testimony was "confused, contradictory and so inconsistent that no conclusion could be drawn." This contention stems from Ms. Wilson's testimony that Dr. Yemi ordered her to pass all of the students in a class so that they would stay in school, but then later ordered her to fail all the students in a class so that they would have to repeat the course. It contends that she eventually did neither because she graded the students on a curve, and, on the hiring of Susan Thomas as program administrator, retaught the class and re-graded all the students. The transcript of testimony reflects that Ms. Wilson became the program administrator immediately following Dr. Rosanna Bumgardner's termination from that position. However, the Board quickly notified the School that she was unqualified for the position. Still, she continued to serve as the on-again-off-again de facto program administrator as qualified individuals came and went. She testified that Dr. Yemi frequently interfered with the grading processes. For example, she testified that while she was acting as a program administrator, "On Several occasions if [the students] earned a failing grade in a course or on a test, mostly the coursework, he would tell me that we are not allowed to fail them, they cannot have a failing grade." RN Hearing Transcript, 475. She further testified that, "His exact words to me on several occasions about students must pass the class because the students are our customers and we have to keep them in the school." RN Hearing Transcript, 476. The assistant attorney general asked if Dr. Yemi ever mentioned revenue. She responded that, "Yes. They have to stay in the school, that they pay their money. His thinking also was if one student fails in a course, he told me this several times as well, that because we are a school of word of mouth, that they will go and tell other members of the community that they failed or we failed them and we won't get

students in our school. * * * Or, additionally to that, he would not let us fail them until the very end and then at the very end he wanted them failed so they would have to take another class. So I was not allowed to issue any failing grades on the early coursework, however, it came a point with one of the courses for the cohort 1 that he told me to make sure they all failed." RN Hearing Transcript, 476-477. He required that she make a test so hard that he could not pass. She did. The hearing examiner asked some questions for clarification. She asked if Dr. Yemi ever interfered with grading. Ms. Wilson testified that at one point he wanted her to fail the entire first cohort on mental health to make them retake the class. "It was because they would have to pay money to take the course again." RN Hearing Transcript, 573. She testified that Dr. Yemi specifically stated that that was his reasoning. "Except one student was allowed to, he wanted me to let one student pass that particular examine [sic] and that student happened to be the sister of his [business] partner in Maryland." RN Hearing Transcript, 574. On later cross-examination, she did acknowledge that she did not end up failing the entire class for the mental-health course. But the other testimony remained unchanged. The hearing examiner credited her testimony, the Board implicitly credited her testimony, and the court, likewise, finds her testimony to be credible.

Susan Thomas served as the program administrator for approximately five weeks. As cohort 1 (the first group of RN students) was finishing, she discovered that no verification existed that at least one type of clinical experience was completed (she believed it to be gerontology). Because she was unable to verify their completion, she refused to sign certificates of completion until the clinicals were completed and verified. She informed Dr. Yemi that the students' graduation would be delayed. As the School

notes, she acknowledged that Dr. Yemi never insisted that she sign anything. But she planned to resign within a week of that conversation because she would not sign certificates of completion for coursework that was not completed. However, on the day she intended to resign, she was dismissed. That took place in August 2011. She acknowledged the possibility that the clinicals could have been made up between her termination and Erin Stout's appointment as program administrator.

Dr. Yemi testified that Ms. Thomas was employed until approximately September 2011. RN Hearing Transcript, 122. Erin Stout then started as program administrator but did not serve in that capacity full-time until October 2011. RN Hearing Transcript, 123. In the interim, Ms. Wilson, serving as de facto program administrator, was unqualified to sign the certificates of completion. But Erin Stout signed them shortly after being hired. Also, as the assistant attorney general pointed out, Dr. Yemi, called on cross-examination, was unable to offer a credible alternative explanation for firing Ms. Thomas despite repeated efforts. First, he testified that she hid a survey report from the Board and failed to respond. RN Hearing Transcript, 141-142. Except that the response was filed with the Board on June 28, 2011. RN Hearing Transcript, 143. Ms. Thomas did not begin working at the School until July 2011. Second, Dr. Yemi attempted to clarify that he was talking about the notice of opportunity for hearing, not the survey reports. RN Hearing Transcript, 144. But the assistant attorney general directed him to a timely request for hearing filed with the Board. *Id.* Third, Dr. Yemi attempted to explain that the real problem was that Ms. Thomas insisted that the School's attorney respond to the notice of opportunity for hearing. Dr. Yemi's inconsistent explanations coupled with Ms. Thomas's near-immediate termination, and Ms. Stout's certification of the students'

completion shortly after being hired, provided substantial, reliable, and credible circumstantial evidence that the School wrongfully and willfully certified two students' completion of the program.

The School also complains that the admission of evidence of Rev. Harold John's federal fraud conviction was "so patently antithetical to the judicial process it compels the conclusion that this Hearing Examiner did not use reliable, probative or substantial evidence to support her conclusion." Specifically, it alleges that the evidence was inadmissible under Evid.R. 404(B). For his part, the assistant attorney general contends that the hearing examiner did not abuse her discretion in admitting the evidence. The School's citation to the Ohio Rules of Evidence is not compelling because Ohio Adm.Code 4325-16-01(E) provides that "The Ohio Rules of Evidence may be taken into consideration * * * but shall not be controlling." Moreover, the court notes that agencies have "discretion in admitting evidence, weighing it, and granting credibility to testimony" – the Rules of Evidence may serve only as a guide. *Petrilla v. Ohio State Bd. of Pharmacy*, 153 Ohio App.3d 428, 2003-Ohio-3276, 794 N.E.2d 706, ¶ 12 (7th Dist.), citing *Orange City School Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417, 659 N.E.2d 1223 (1995).

First, the Board's adjudication order made no reference to Rev. John's conviction – or even his participation in the school's management on any level. It does not, therefore, appear that the Board gave the conviction undue weight. Second, the assistant attorney general used in his presentation to the Board only one slide related to Rev. John's conviction. Third, even assuming it was an abuse of discretion to admit the evidence related to Rev. John's fraud conviction, the remaining evidence against the

School's RN program was so overwhelming as to render the error harmless under Civ.R. 61. Finally, the problems with Rev. John were not limited to his fraud conviction. Rather, as the hearing examiner found, Rev. John was not a nurse and therefore unqualified to be a program administrator, but he essentially served the School in that capacity. Ms. Learn testified that during a survey visit, questions directed to Erin Stout or Jessica Jacklin were answered by Rev. John. And the answers provided by Ms. Stout or Ms. Jacklin frequently came after Rev. John told them what to say. RN Hearing Transcript, 775-776. He also sought Ms. Learn's advice on policies that he was working on for the school. *Id.* The Hearing Examiner acknowledged that Rev. John disputed this in the School's response to the survey visit. Hearing Examiner's Report and Recommendation, 37. But that was not the extent of Rev. John's involvement. He also signed on behalf of the School most of the students' enrollment contracts, State Exhibit 51a, 5-118; signed two contracts to hire adjunct professors, State Exhibits 54, 55; and he signed faculty-orientation checklists, which verified that the faculty had in fact been oriented. State Exhibits 57, 58. Additionally, he signed on behalf of the School two employee-confidentiality agreements. State Exhibits 56, 59. Taken together, it was reasonable for the hearing examiner to recommend and for the Board to find that Rev. John essentially served as a program administrator and that he was unqualified to do so. The court also notes that although Rev. John was subpoenaed to testify before the hearing examiner, he was inexplicably absent. Additionally, although not cited by the hearing examiner, Chandra Smith, who served as the School's receptionist and, later, office manager, testified that the staff at the school came to regard Rev. John as the program

administrator because he consistently relayed Dr. Yemi's orders. RN Hearing Transcript 596, 599-600.

In response, the School cited several portions of testimony that identified problems related to Rosanna Bumgardner's time as program administrator. And in fairness, some problems related to her. Testimony suggested that she failed to change the student handbook to reflect that 75%, rather than 85%, was a passing score. She also failed to change the computer-hours requirement from 66 to 12. But the court is disinclined to hold Ms. Bumgardner solely responsible for the fact that the School charged students tuition that was approximately \$4,000 higher than the amount proposed to the Board. At the same time, the Board never alleged that the \$4,000 deviation resulted in excessive tuition – merely that it deviated from what the School told the Board it would be. The School also attempted to discredit Ms. Bumgardner's negative testimony because, during her tenure at the School, she falsely told the Board that the School was in compliance with various rules when it was not. It cited Finding of Fact #9 of the report and recommendation. However, it was not unreasonable for the hearing examiner to conclude that Ms. Bumgardner was placed in a position where she was compelled by a sense of duty to the School to cast it in the best light possible. Now that she has been terminated, she may have felt freer to answer questions about the School honestly. Also, the hearing examiner was aware of Ms. Bumgardner's termination, was able to observe her demeanor while testifying, and was able to compare the consistency of the testimony from the School's various former employees. The hearing examiner found her to be credible, too.

The School's final argument suggests that the Board's adjudication order violates equal-protection principles by treating it differently because of the hearing examiner's corruption finding than similarly situated institutions. The School apparently quotes numerous consent agreements between the Board and various nursing schools including Felbry College School of Practical Nursing, Toledo School of Practical Nursing, and Tri-Rivers Center for Adult Education School of Nursing. In doing so, it fails to cite the record. The court was similarly unable to find any evidence of these agreements in the record. Accordingly, this argument is unsupported.

B. The Board's Adjudication Order

As noted above, the Board focused four compelling deficiencies (none of which specifically involved Rev. John). The court will address them in order and notes its conclusion that this is where much of the Board's real rationale lies.

First, the Board concluded that the School employed unqualified instructors and administrators. As shown from the discussion of Rev. John's activities at the School and apparent position of authority, it was reasonable for the Board to determine that he, a non-nurse, served as the de facto program administrator. This constitutes a violation of Ohio Adm.Code 4723-5-09(B) in that Erin Stout, the named program administrator, did not have authority over all aspects of the program. The program also allowed Jessica Jacklin to serve as an associate administrator. However, Ms. Jacklin did not have two years as a faculty member in a registered nursing education program as required by Ohio Adm.Code 4723-5-10. RN Hearing Transcript, 793. Karen Tedder served as an adjunct faculty member despite the fact that she had not been licensed as a nurse for two years as required by the same section. *Id.* at 799-800; State Exhibit 68. Tracie Manning

had only a BSN degree, not a master's, but was teaching RN coursework unsupervised. RN Hearing Transcript, 802-805. Finally, it was apparent to Ms. Learn that Dr. Dennis Koroma was teaching pharmacology despite being unqualified to do so. RN Hearing Transcript, 806-808. Ms. Learn discerned this because only his name appeared as "Instructor: D.M. Koroma, M.D 6/25/11" on the grade sheet kept for the class. State Exhibit 66. The School responded to the survey-visit report stating that Dr. Koroma taught portions of the class with a qualified instructor, but the School never identified that instructor.

Based on Findings of Fact #14 and #16, the Board concluded that after repeated survey-visit reports, the School continued to provide insufficient lab and clinical experiences, and related evaluations. Finding of Fact #14 specifies there were no clinical evaluations at all for six students. Finding of Fact #16 specifies that the School failed to provide proper clinical experiences. No students in the third cohort had any clinical evaluations in *any* course. Three students in the first cohort had no clinical evaluations in *any* course. The clinical evaluations that did exist often failed to consistently identify the clinical site and the course to which it was connected. And clinicals were sometimes conducted and verified by unqualified instructors who were unsupervised. Also related to clinicals, the program did not properly implement its curriculum, including supervision and evaluation of clinical experience in critical practice areas.

The record supports this conclusion. Ms. Learn testified that student #47 did not have clinical grades for numerous crucial areas, including IV medications, tracheostomy care, and cast care. RN Hearing Transcript, 821; State Exhibit 75. That student is also missing verification that he or she attended half of the scheduled clinical weeks at

Westminster-Thurber. The same problems pervaded student #57's records. RN Hearing Transcript, 822-824; State Exhibit 76. Despite these issues, Ms. Stout issued certificates of completion of the program. State Exhibits 72-74. Westminster-Thurber had been providing a site for medical/surgical clinicals. The School did not provide evidence of completion for the medical/surgical experiences documented in State Exhibits 31-39. The pervasive absence of adequate documentation of clinical experiences is also demonstrated in State Exhibits 83 and 85. Names of students and the location of the experiences are frequently absent, as are records of attendance for approximately half of the scheduled weeks. Additionally, Ms. Learn testified that of the students in Cohort 1, the School did not have gerontology clinical evaluations at all for six of them. RN Hearing Transcript, 864-865; State Exhibit 85. The survey-visit report dated December 1, 2011, noted at page 19 that three students in Cohort 1 did not have clinical evaluations for any course. State Exhibit 49. Another student, this time in Cohort 2, also had no clinical evaluation or documentation. RN Hearing Transcript, 878-879. Worse yet, the School had no clinical evaluations for any student in Cohort 3. RN Hearing Transcript, 880. And although the School claimed that it located many evaluations and forms, Ms. Learn testified that none were ever provided to the Board. *See, e.g.*, RN Hearing Transcript, 875-878, 880. These problems constitute a failure to comply with Ohio Adm.Code 4723-5-13 and 4732-5-20.

Dovetailing with these findings, Westminster-Thurber terminated its clinical affiliation with the school after instructor Yasmine Harden was found napping while she was supposed to be supervising students. RN Hearing Transcript, 378-379. The Westminster-Thurber clinical evaluations demonstrate that the students missed at least four

weeks, which the School failed to demonstrate were ever made up. Together, these failures to provide, document, supervise, and evaluate the required clinical experiences resulted in the School's failure to implement its curriculum as written. The hearing examiner noted this in Finding of Fact #7. In particular, it failed to provide 96 hours of properly supervised clinical experience, including medical/surgical nursing. State Exhibit 8, pg. 71, 81. This constitutes a violation of Ohio Adm.Code 4723-5-20.

But the failure to implement its curriculum as written was not limited to clinicals. The School also taught a psychology course by showing the movie "A Beautiful Mind" and having the students write a paper about it, along with completing some self-study work. RN Hearing Transcript, 512-513. This constitutes a violation of Ohio Adm.Code 4723-5-13. The School also failed to follow its tuition and fees policies, charging students a total of \$18,520 despite submitting a proposal that identified total costs of \$14,028. This is a violation of Ohio Adm.Code 4723-5-12.

As a final matter, the Board wrote that "Most significant to public safety, the Program progressed students from one course to the next without students having completed the requirements of an earlier course (Findings of Fact #3, #4, #13), and even issued certificates of program completion for students without evidence that the students completed the necessary lab and clinical hours or final examination for the course (Findings of Fact #13)." These concerns involved the psychology course taught through a movie, paper, and self-study; the lack of clinical experience and supervision; two students were allowed to progress *and* received certificates of completion without actually completing the program – *i.e.*, they were missing grades in pharmacology and the com-

prehensive exit exam and had incomplete documentation of clinicals. RN Hearing Transcript, 813-818; State Exhibit 71-76.

Although the court also considered the mitigating evidence, which suggested that the new program administrator, Jean Matthews Mitchell, is doing a better job of running the school, it must conclude that she was given a nearly impossible task. The Board was faced with a nursing program producing healthcare providers who were ill-equipped to provide appropriate and safe care to the public. The hearing examiner asked Ms. Learn, "Have you ever seen a school that you visited for a survey visit that appeared to be more out of compliance than this school?" Ms. Learn answered, "No." The hearing examiner asked, "Is it a close call?" Again, Ms. Learn answered, "No." RN Hearing Transcript, 1025.

V. Conclusion – RN Program

After reviewing and weighing the evidence, the court holds that the Board's decision to permanently withdraw the School's conditional-approval status and permanently deny full-approval status is supported by substantial, reliable, and probative evidence. Whether it is fully in accordance with law will be discussed later.

VI. Adjudication Order – PN Program

With regard to the PN program, the Board also permanently withdrew the School's conditional approval and permanently denied full approval. Again it relied on the totality of the evidence presented in the case and identified the four violations that most concerned it:

- 1) The School failed to orient new faculty;

- 2) The School failed to follow its own policies as submitted to the Board with regard to student admission, student progression, and tuition/fees. Of greater concern was that the School allowed students to progress who had not completed all course requirements – especially clinical hours;
- 3) The School did not implement the curriculum as approved by the Board – the School failed to provide any clinical hours for critical courses like Medical/Surgical Nursing I and IV Therapy, failed to provide the number of clinical hours approved by the Board, and in some cases failed to provide clinical hours concurrently with related didactic/theory portions of the program. The School also failed to evaluate whether students could successfully perform the clinical skills; and
- 4) The School used unqualified teachers and administrators.

Summarizing its decision, the Board wrote that “The critical deficiencies of this Program, including but not limited to those referenced above, permeated all aspects of the Program. The Program has shown a disregard for the quality of education it provided to its students and ultimately, to consumers of healthcare who expect that licensed practical nurses in Ohio will be educated according to the standards established by the State.”

VII. Discussion – PN Program

Again, the court reviewed the entire certified record, but paid special attention to the four critical deficiencies identified by the Board in its adjudication order. The court read the hearing examiner’s comprehensive report and recommendation, read well over 500 pages of testimony before the hearing examiner, and combed through every exhibit submitted at the hearing. The court also paid special attention to the arguments raised

by the School. Additionally, the court appraised all of the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight to be given to it. In weighing the evidence to determine if a preponderance of substantial, reliable, and probative evidence existed, the court still gave due deference to the Board's resolution of evidentiary conflicts and did not substitute its own judgment for that of the Board, particularly in areas involving administrative expertise.

A. The School's Arguments

The School advanced two primary arguments in support of its position: 1) a rehash of its argument regarding evidence of Rev. John's conviction that, with the exception that the School acknowledges that no findings of fraud were made – instead, the hearing examiner described the School's actions as egregious and unprofessional; and, 2) an argument based on what it characterizes as a lack of reliable, probative, or substantial evidence. The evidence-based argument essentially suggests that the School is a victim of Dr. Bumgardner, its first program administrator, that its transgressions were merely administrative, and that its current program administrator is correcting the problems.

The court will not rehash its discussion of the admissibility of evidence regarding Rev. John's fraud conviction – the analysis is the same as that above, including the harmless nature of any error due to otherwise overwhelming evidence. Additionally, the hearing examiner did not recommend, nor did the Board find, that corruption or fraud existed in the PN program. And a preponderance of the reliable, substantial, and probative evidence supported the hearing examiner's report and recommendation, adopted by the Board, finding that Rev. John was acting as the program administrator while un-

qualified to do so. This is particularly true because the parties stipulated to the admission of the hearing transcript from the prior RN proceedings.

Ohio Adm.Code 4723-5-09(B) requires that the program administrator be an experienced nurse who has "the authority, accountability, and responsibility for all aspects of the program * * *." Jody Hostetler conducted the survey visits related to the PN program. She testified that Rev. John was on the School's board of governors and that the organizational chart submitted by the School does not show involvement by the board of governors in the School's day-to-day operations. At the PN hearing, Ms. Hostetler referred to numerous exhibits that documented Rev. John's pervasive involvement with the operation of the School. On behalf of the School, he signed an independent-contracting agreement with instructor Patricia Bennett, he signed a confidentiality agreement with Jessica Jacklin, he signed another confidentiality agreement with Michelle Martens, he signed an independent-contracting agreement with Karen Tedder, and he signed student enrollment agreements. PN Hearing Transcript, 271-276; State Exhibits 46, 47, 48, 49, 50, 57, 58, 41 at page 150. Because the RN transcript was admitted as an exhibit, the previous discussion of Rev. John's involvement as program administrator is equally relevant here. That testimony further supports that Rev. John, who was not a nurse, acted as the program administrator in violation of the administrative rules.

With respect to its evidence-based arguments, the School cited numerous findings that it blames on Dr. Bumgardner's tenure as program administrator. While the court recalls numerous instances of testimony suggesting that deficiencies started during her tenure, the School identified none through citations to the record. The absence

of citations notwithstanding, the court did not find blaming Dr. Bumgardner to be a credible tactic. To some extent, Dr. Bumgardner's attempts to comply with Board rules were hamstrung by Dr. Yemi's interference. For instance, when students failed to provide necessary documents, she wanted to keep them out of classes. PN Hearing Transcript, 136. Dr. Yemi would not allow it because he was afraid the students would not return. *Id.* Additionally, she testified that she attempted to follow the proper progression for students but that Dr. Yemi decided the students would advance despite not completing all required course elements. *Id.* at 141. She further testified that she spent a fair amount of time attempting to secure clinical sites for the School. *Id.* at 142. It was difficult to obtain clinical sites because the School was not established, the School was not NLN approved, and the sites had questions about the caliber of students they would get. *Id.* at 141-145. For the Maternal and Childhealth course alone, Dr. Bumgardner contacted 30-50 prospective clinical sites without success. *Id.* at 142. The Board found Dr. Bumgardner and the State's other witnesses to be more credible, and the court's review of the record supports that finding. Additionally, even if Dr. Yemi did not interfere with her management of the School, it appears Dr. Bumgardner faced an extremely difficult task in trying to start a School from scratch in a market already crowded with schools seeking clinical sites. And to blame Dr. Bumgardner ignores the fact that the School and its board of governors hired her – even if she was not up to the task, those parties bear some responsibility for not recognizing that sooner and taking appropriate action. Finally, the Board is not without responsibility because although its survey staff eventually found the lab to be inadequate, when the School initially started the Board did not look at the adequacy of the lab's resources. Instead, "They didn't look for that when they

made their site visit. * * * They looked to see if we did have a lab but they didn't look specifically for a number of different pieces of equipment or supplies, no." *Id.* at 167.

The School also cited to numerous portions of Ms. Matthews Mitchell's testimony as evidence that she has corrected or is in the process of correcting the problems. Essentially, she testified that new faculty are now properly oriented, students must have all necessary paperwork to be admitted, students now complete all clinical hours, the School found missing grades, clinicals are done concurrently with theory, the School implemented the missing systematic plan of evaluation, and the School hands out relevant class syllabi to students. The School also frequently submitted survey-visit responses that acknowledged a given problem existed and then baldly stated that it had been corrected – frequently without providing missing records that would verify the assertion. See State Exhibit 17, pg. 4 re the nurse now teaching with Dr. Koroma. This evidence is dependent upon an evaluation of Ms. Matthews Mitchell's credibility. It is apparent that the Board did not find her to be wholly credible. The court cannot say this finding is erroneous.

While acknowledging that its first 18 months were "substandard," the School contends that its transgressions are insufficient to warrant closure. In this hearing, it submitted two consent agreements entered into by the Board and Felbry's nursing school. However, those are not dispositive. First, the Board has significant discretion and the situations were not identical. Second, after reviewing all of the evidence, the hearing examiner wrote that the School "was a grossly inadequate program that was not professionally conducted." PN Report and Recommendation, 61. In fact, when the hearing examiner asked Ms. Hostetler how this school compared to others she has surveyed, Ms.

Hostetler answered that, "They had a lot more unmet rules." The hearing examiner then asked, "Did they appear to have more violations than any other school you had surveyed?" And Ms. Hostetler replied "Yes, other than the RN," which referred to the School's RN program. PN Hearing Transcript, 363. Finally, the court cannot agree that the Board's decision to permanently withdraw conditional approval and permanently deny full approval status is unsupported by a preponderance of the substantial, reliable, and probative evidence. In addition to the evidence previously recounted, Judy Leitenberger testified credibly that students had zero clinical hours in Medical/Surgical Nursing I and IV Therapy – two critical areas of patient care. PN Hearing Transcript, 68-72. Ms. Leitenberger did not have the students make up those hours and she is not aware that anyone else attempted to do so. *Id.* at 96-97. And the School acknowledged that these students progressed to other courses. State Exhibit 13. The Board specifically wrote that these are "critical areas" and "fundamental areas of practice." It was not unreasonable for the Board to conclude that the School showed disregard for the quality of education it was providing to its students and ultimately, to consumers of healthcare * * *." PN Adjudication Order, 2.

B. The Board's Adjudication Order

After a thorough review of the Board's adjudication order and the underlying, well-supported report and recommendation filed by the hearing examiner, the court finds that the Board's adjudication order is supported by a preponderance of the substantial, reliable, and probative evidence.

i. The Board's Findings - 1

The Board found that the School failed to implement an orientation process for new faculty. Ohio Adm.Code 4723-5-09(B)(4) requires that nursing programs, through their program administrators, implement a faculty-orientation process. The School began admitting students in May 2010. Nearly a year later, during the March 22, 2011 survey visit, Ms. Hostetler found that the files of faculty members Charlotte Caudill, Victoria McCormick, and Khadie Thomas did not contain documents verifying that they had been oriented to the program. PN Hearing Transcript, 202; State Exhibit 12, pg. 2-3. The School acknowledged this failure in its response to the survey-visit report, but blamed Dr. Bumgardner for failing to implement the policy. State Exhibit 13, pg. 1-2. During the June 22, 2011 survey visit, faculty member Elizabeth Doyle's file was also missing verification that she had been oriented. State Exhibit 12, pg. 3. The School's response indicated that Ms. Doyle was oriented at the clinical facility at which she taught. State Exhibit 13, pg. 1. This failure occurred despite the School's application to the Board in which it stated that a written "checklist or other instrument" would be used "to assure faculty are introduced fully to the expectations they are to fulfill * * *." State Exhibit 7, pg. 23. In fact, the process was initially so devoid of content that at the RN hearing, Cynthia Davis-Zimmer testified that she received no orientation, and Julia Wilson testified that, "Well, my orientation as faculty was 'Here, take this book and go teach.'" Joint Exhibit 2, pg. 579; Joint Exhibit 1, pg. 163-164. The Board's finding is accurate.

ii. The Board's Findings – 2, 3

The Board also found that the School failed to implement as written its policies in critical areas such as student admission, student progression, and student tuition/fees. And, of greatest concern with respect to public safety, the School advanced students to new courses despite the fact that they had not completed the earlier course requirements or, in some cases, without completing the related clinical hours. Ohio Adm.Code 4723-5-12(A)(1) requires nursing programs to establish and implement written policies regarding student admission. The School's proposal required that students pass an entrance exam, prove CPR certification, document their current immunization status, pass a criminal background check, and document malpractice coverage. State Exhibit 7, pg. 51-54. These requirements were also found in the student handbooks. State Exhibit 19, pg. 5-7; State Exhibit 20, pg. 16-17. During the March 22, 2011 survey visit, Ms. Hostetler randomly selected the files of 9 out of the School's 51 students to check for proper admission documents. State Exhibit 12, pg. 4-5. Six of those students were missing required documents, including three who did not have *any* documents proving the existence of prerequisites such as a health and physical fitness exam; measles, mumps, and rubella vaccination; varicella vaccination; tuberculin test or chest x-ray; Hepatitis B vaccination or waiver; and CPR certification. *Id.* And During the June 22, 2011 survey visit, Ms. Hostetler reviewed the files of all 12 students in the second LPN cohort and all 12 students in the third LPN cohort. *Id.* at 5. Four student files from the third cohort were missing documents required for admission. *Id.* at 5-6. In its response to the survey-visit report, the School acknowledged these deficiencies. State Exhibit 13, pg. 2. And while it characterized the problem as Dr. Bumgardner's responsibility, she

testified credibly that Dr. Yemi undercut her ability to keep students out of class – what she felt was her only leverage – when they failed to submit the required documents. PN Hearing Transcript, 135-137; 165-167. The survey-visit response also stated that, over a year after the School began admitting students, “Going forward, all admission records will be complete with all requirements prior to entering the program. * * * Additionally, we are in the process of writing an admission policy and forming an admission committee.” State Exhibit 13, pg. 2.

With respect to tuition and fees, the Board found that the School did not follow its own policies submitted to the Board. Ohio Adm.Code 4723-5-12(A)(6) requires nursing programs to establish and implement written policies for the payment of fees and expenses associated with the program. In its proposal to the Board, the School stated that it would charge \$9,920 for tuition and \$1,258 for fees, totaling \$11,178. State Exhibit 7, pg. 60. The student catalog/handbook was identical, until the 2010-2011 handbook, which stated that tuition was \$12,500 and fees were \$2,070, totaling \$14,570. State Exhibit 19, pg. 18; State Exhibit 20, pg. 54. The enrollment agreements for students who entered the School just months apart varied, too. On contracts entered three months apart, one student agreed to fees and tuition of \$13,616, while another agreed to fees and tuition of \$14,570. State Exhibit 41, pg. 51, 133. In any event, either figure represents a significant deviation from the amount the School informed the Board that it would charge.

The Board found the School’s deviations from its progression policies, particularly with respect to the absence of clinical experiences, to be the greatest concern to public safety. The absence of clinical experiences or failure to provide them concurrently with

the theory also form the basis for the Board's third finding. Ohio Adm.Code 4723-5-12(A)(4) provides that a nursing program must establish and implement written policies for student progression, including the "requirements for satisfactory completion of each course required in the nursing curriculum." The Board found, citing the hearing examiner's Finding of Fact #4 and pages 9-13 of her report and recommendation. Additionally, Ohio Adm.Code 4723-5-14(E)(12)(d) requires that clinical and laboratory experiences be provided *concurrently* with the related theory instruction. The hearing examiner accidentally cited Ohio Adm.Code 4723-5-13(F)(8)(d) but 4723-5-13 relates to RN curricula, not PN curricula (the substance of each is essentially identical with relation to the clinicals-concurrent-with-theory requirement). The School's proposed curriculum required that each student successfully complete each course before progressing to the next. State Exhibit 7, pg. 57. The August 9, 2011 survey-visit report, which addressed the March 22, 2011, and June 22, 2011 survey visits, noted that Julia Wilson provided documents that demonstrated students in the Maternal and Childhealth Nursing and Pediatric Nursing courses did not receive clinical instruction concurrent with the theory. State Exhibit 12, pg. 7. They completed each course on February 14, 2011, but did not begin clinicals until approximately four months later, June 13, 2011. They also failed to complete the gerontology clinicals before advancing, although they completed those clinicals approximately 10 days after starting the succeeding courses. *Id.* Of even greater concern was that the students did not get *any* clinical training for Medical Surgical Nursing I and IV Therapy. *Id.* The students were to receive 72 hours of clinical experiences in these courses. *Id.* Instead, they were advanced to medical surgical nursing II and began "engaging in clinical experiences within that more advanced course." *Id.* Ms. Leiten-

berger, the Medical Surgical Nursing I and IV Therapy instructor, confirmed the absence of clinicals for that course. At the hearing, she identified the course syllabus, which contained no clinical hours. PN Hearing Transcript, 69; State Exhibit 29. She testified that Dr. Bumgardner told her that the course did not have any clinical hours. PN Hearing Transcript, 70. "[I]f you're told by your director of nursing that you don't have any clinical hours, then they don't have any clinical hours." *Id.* Dr. Bumgardner disagreed, however, that she ever told Ms. Leitenberger that Medical Surgical Nursing I had no clinical-hours requirement. *Id.* at 151. The proposed curriculum included 72 clinical hours. PN Hearing Transcript, 69; *see also* State Exhibit 7, pg. 216. In any event, Ms. Leitenberger stated that, "They did not get any clinical hours in med/surg 1." PN Hearing Transcript, 71. She testified that she did not attempt to make up the missing hours and was unaware of any attempt by others to make up the hours. *Id.* at 72, 97.

Ms. Leitenberger also testified that PN cohort 1 completed only 16 of the 40 clinical hours for Maternal and Childhealth Nursing stated in the syllabus. PN Hearing Transcript, 58-60; State Exhibit 33. But the syllabus itself called for fewer clinical hours than the 72 listed in the School's proposal. State Exhibit 7, pg. 189. Ms. Leitenberger was under the impression that Ms. Stout had submitted a proposal to the Board to reduce the required clinical hours to 16. However, Ohio Adm.Code 4723-5-12(B) provides that a "program shall not implement changes to policies for student progression, or requirements for completion of the program, regarding students enrolled in the program at the time the changes are adopted." Accordingly, the students completed fewer hours than the syllabus called for, and the syllabus called for fewer hours than the program approved by the Board.

With respect to the Gerontology course, the proposal submitted to the Board called for 112 clinical hours. State Exhibit 7, pg. 178. But the syllabus provided for 104 clinical hours. State Exhibit 32. Charlotte Caudill, the clinical instructor for the course, testified that the students received fewer hours because the clinical sites could not be established on time. PN Hearing Transcript, 379.

Dr. Bumgardner testified that clinicals are crucial to student learning "Because it's one thing to learn it from a book and it's another thing to actually go in and do the procedure on a patient." PN Hearing Transcript, 146.

The problems were not, however, limited to the absence of clinical experiences or mistiming of those experiences. When clinicals and laboratory experiences did take place, they sometimes failed to meet course objectives. In the November 21, 2011 survey-visit report (regarding the October 12, 2011 survey visit), Ms. Hostetler wrote that the School "is not providing nursing students with the opportunity to practice technical skills related to IV therapy in the clinical setting." State Exhibit 16, pg. 11. Ms. Leitenberger testified that only *one* student had an opportunity to do an IV in a clinical setting. PN Hearing Transcript, 73. She further testified that, "IV therapy, trying to get a stick is very hard. A live stick is very hard." *Id.* at 75. Ms. Hostetler also testified that Ms. Leitenberger told her during a survey visit that the School was not providing IV therapy opportunities in clinicals. *Id.* at 287. During the visit, Ms. Stout responded that, "That is another thing we need to work on." State Exhibit 16, pg. 11. In the School's response letter, Ms. Stout explained the difficulty in finding clinical experience in hospitals – where most IVs are – and concluded, "I repeat, we do need to work on getting more IV experience for our students in the clinical setting. It is not an easy thing to obtain." State Exhibit 17,

pg. 4. But regardless of the opportunities the students did receive, the School failed to evaluate their abilities to perform clinical skills.

Ohio Adm.Code 4723-5-20(C)(6) requires nursing programs to evaluate each nursing student's "experience, achievement, and progress in relation to the clinical objectives or outcomes * * *." In the November 29, 2011 survey-visit report, Ms. Hostetler noted that she requested but did not receive documentation of student performance for any of the 57 PN students then-enrolled in the program. State Exhibit 16, pg. 12. As of the hearing date, the School had still not provided any of these evaluations. PN Hearing Transcript, pg. 290. The School responded, in a letter written by Ms. Stout, that "I spoke to the various clinical faculty and many of them had piles of clinical evaluations that they didn't know where to file. We are in the process of obtaining as many of these past evaluations as possible and filing them. These were from before my tenure as Program Administrator. We are in the process of making sure that the faculty members know that they need to do clinical and lab evaluations, sign and date them, and file them." State Exhibit 17, pg. 4. To the School's credit, it appears that Ms. Matthews Mitchell intends for instructors to properly documents things like clinical skills. PN Hearing Transcript, 467. And she introduced a few examples at the hearing. Respondent's Exhibit C. But the School also simply alleged that the previous evaluations have been completed – they just have not been filed. PN Hearing Transcript, 467. Curiously, despite the fact that the hearing did not take place until the end of May 2012, the School still did not produce any of these prior documents. And although Ms. Matthews Mitchell did not take over until shortly before the hearing, she testified that, "I know where the files are, I just,

nothing's changed in the short time I've been there, so I'm not really seeing the rush today. It's in the works." *Id.* at 516. The Board's findings are accurate.

iii. The Board's Findings – 4

In the Board's final PN-related finding, it wrote that the School employed unqualified instructors and administrators. These findings are based on Ms. Stout allowing Ms. Jacklin to serve as associate program administrator, and the School allowing Ms. Tedder and Dr. Koroma to serve as faculty members. The School's organization chart showed that all instructors reported to Ms. Jacklin, who then reported to Ms. Stout, the program administrator. State Exhibit 18, pg. 83. Additionally, she made decisions regarding the number of clinical hours needed for courses and who would teach the course, she was "the person, while [Ms. Stout] wasn't there, to make the decisions of the program." PN Hearing Transcript, 87-88. Ohio Adm.Code 4723-5-11(A)(2)(b) requires, among other things, that an associate program administrator have spent at least "two years as a faculty member in a registered or practical nursing education program * * *." Ms. Learn testified at the RN hearing that Ms. Jacklin taught at Hondros College for a very short time before the survey visit and that she only served as an adjunct clinical instructor and as a clinical instructor/laboratory assistant at two previous schools – not a faculty member as required by the rule. Joint Exhibit 3, pg. 794-796.

With respect to Ms. Tedder, her resume, introduced into evidence, demonstrated that at the time of the survey visit she did not have two years of experience as a licensed nurse. State Exhibit 55; State Exhibit 56. Ohio Adm.Code 4723-5-11(A)(3) requires "at least two years in the practice of nursing as a registered nurse * * *." The

School responded that she only worked there for a week or two after it discovered that she was unqualified. State Exhibit 17, pg. 4.

With respect to Dr. Koroma, who was teaching the pharmacology course, Ohio Adm.Code 4723-5-10 requires that a nurse teach that course. Although the court could not locate this portion of the rule, the hearing examiner cited Ohio Adm.Code 4723-5-10(A)(6)(a), which apparently permits other health care professionals to teach portions of a course if they are licensed in Ohio in their area of practice. PN Report and Recommendation. Pg. 38. The November 29, 2011 survey-visit report indicates that Dr. Koroma was not licensed in Ohio. The School responded that although only Dr. Koroma's name appears on the grade sheet for the PN students, State Exhibit 59, he was teaching with an unidentified nurse. State Exhibit 17, pg. 4. The School never identified that nurse – instead it stated that the problem had been rectified. *Id.*, PN Hearing Transcript, 282-284. The School's proposed curriculum for pharmacology had portions that required nurse-provided instruction. PN Hearing Transcript, 282-284; State Exhibit 7, pg. 144, 146, 147. The Board's findings on this subject are accurate.

Based on all of the court's analysis and a full review of the record, the court holds that the Board's adjudication orders are supported by a preponderance of the substantial, probative, and reliable evidence. From a fact-finding standpoint, they are affirmed. The court also holds, however, that the adjudication orders are not entirely in accordance with law.

VIII. Statutory Authority

After the Board grants conditional approval to a new prelicensure education program, after following the statutory survey process, it must determine whether to grant

the program full approval. R.C. 4723.06(A)(6). If it appears that the program has failed to meet the standards established by Board rules enacted under R.C. 4723.07, it must hold an adjudication to consider the program. *Id.* Based on the adjudication, it has the power to “continue or withdraw conditional approval, or grant full approval.” *Id.* This raises an issue not presented by the parties. Here, the Board held adjudications for each aspect of the School. The Board then elected to permanently withdraw both programs’ conditional-approval status *and* permanently deny full-approval status. It apparently did so in reliance on the hearing examiner’s legal conclusion that R.C. 4723.28(K) provided that authority. R.C. 4723.28(K) provides that:

When the board refuses to grant a license or certificate to an applicant, revokes a license or certificate, or refuses to reinstate a license or certificate, the board may specify that its action is permanent. An individual subject to permanent action taken by the board is forever ineligible to hold a license or certificate of the type that was refused or revoked and the board shall not accept from the individual an application for reinstatement of the license or certificate or for a new license or certificate.

By its own terms, that statutory subsection applies to licenses and certificates. It does not address nursing programs. The Board “has only those powers explicitly delegated by statute and must operate within whatever limitations are contained within its enabling statutes.” *ATS Inst. of Technology v. Ohio Board of Nursing*, 10th Dist. Franklin No. 12AP-385, 2012-Ohio-6030, ¶ 41, citing, *e.g.*, *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766, ¶ 32. In *ATS*, the trial court modified the Board’s adjudication order by striking a two-year period before the program could re-apply for approval. *Id.* at ¶ 43. The Tenth District and the trial court reasoned that the Board’s options were limited to those provided by R.C. 4723.06(A) – “the board could have continued provisional approval, withdrawn provisional approval, or granted

full approval of [the] program.” *Id.* at ¶ 42. Similar to *ATS*, this court concludes that there is no provision in R.C. 4723.06(A) that allows the Board to permanently withdraw conditional approval and permanently deny full approval. And R.C. 4723.28(K) is inapplicable. Accordingly, the court MODIFIES the Board’s adjudication orders for both programs to remove the permanent aspect – conditional approval is withdrawn and full approval is denied. In all other aspects, the order is AFFIRMED. The remainder of the court’s stay order is DISSOLVED.

IT IS SO ORDERED.

Copies to:

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John Waddy, Esq.
Counsel for Appellant

Franklin County Court of Common Pleas

Date: 11-05-2013
Case Title: OHIO AMERICAN HEALTH CARE INC -VS- OHIO STATE
BOARD NURSING
Case Number: 12CV009722
Type: JUDGMENT ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink, which appears to be 'Charles A. Schneider'. To the right of the signature is a circular official seal. The seal features a central emblem surrounded by text, likely the name of the court and the state of Ohio.

/s/ Judge Charles A. Schneider