



In an Ohio state of mind



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The Americans with Disabilities Act (ADA), enacted into law in 1990, provides civil rights such as protection to persons with disabilities. The ADA applies to both private and public sectors and is designed to provide qualifying individuals with equal opportunities in employment, accessibility, and government benefits. Relative to the regulatory community, the ADA affects social work boards in many ways, including the phrasing of questions on applications and renewals for licensure, accommodations on examination administrations, licensure eligibility decisions, and enforcement. As public protectors, regulatory boards are created and empowered to enforce the practice act in the interest of the consuming public. Some practice acts provide for a continuing assessment of a practitioner's mental health through the attestation on applications and renewals of the physical and mental capabilities to safely and effectively practice the profession.

The existence of the ADA is not, however, intended to interfere with licensure eligibility determinations and enforcement rights of the regulatory board. Rather, the public protection elements of licensure and enforcement are balanced with the rights of the applicant/licensee, including applicants and licensees otherwise qualified under the ADA. Consider the following.

In October 2011, a nurse (Licensee) was involved in a single-car accident in a grocery store parking lot. Apparently her car traveled at a high rate of speed and crashed into a sign. She left her car, screaming, and proceeded into the store where she continued to scream at an employee of the grocery store pharmacy.

Counsel's Column

The employee described her as "acting incoherently." Eventually the police were called and the responding officer described the Licensee as "hysterical." The police walked the Licensee outside as she continued to yell and asked to perform a sobriety test. She refused and was arrested.

In December 2011, the Licensee pled guilty to disorderly conduct. The court, as part of her probation, ordered the Licensee to undergo a mental health and substance abuse evaluation by a court-approved provider. She was evaluated in April 2012 with a finding that further treatment was not necessary due to "lack of criteria for substance abuse treatment."

In September 2012, the Ohio Board of Nursing (Board) ordered the Licensee to undergo another mental health evaluation after determining that there was reason to believe she had a "physical or mental impairment that may affect [her] ability to provide safe

nursing care.” The Board order required the Licensee to submit to the evaluation at a hospital and included a requirement that the Licensee contact the hospital within 10 days and complete the evaluation within 90 days. As authorized under Ohio law, the order also required the evaluation to be undertaken at the expense of the Licensee. Believing that the court-ordered evaluation would satisfy the Board-ordered evaluation, the Licensee did not contact the hospital and was not evaluated by hospital personnel. Although she claimed to have requested in April 2012 that her court-ordered evaluation be forwarded to the Board, such record was not received by the Board until February 2013, well after the expiration of the 90-day deadline.

On January 25, 2013, the Board issued a default order against the Licensee noting her failure to submit to the evaluation. The default order also identified that the Board had not received the requested information and that there was no notice that such failure was beyond the control of the Licensee. Accordingly, the Board indefinitely suspended her license to practice nursing and set forth the conditions to be met for any future reinstatement. The Licensee requested a hearing. The Hearing Officer found that the failure to comply with the Board order was not due to circumstances beyond her control and recommended upholding the suspension. The Board accepted the Hearing Officer’s recommendation and entered an order indefinitely suspending the license. On appeal, the trial court affirmed the Board decision. The Licensee appealed the matter to the appellate court.

In her appeal, the Licensee propounded multiple arguments related to the September 2012 Board order and the alleged inaccuracies of the police report that the Board relied upon in making its determinations. She further argued that her failure to comply with the hospital evaluation was, in fact, outside her control due to her financial status. The appellate court outlined its standard of review as limited to determining whether the lower court abused its discretion. An abuse of discretion has been defined as a decision by the lower court that is unreasonable, arbitrary, or unconscionable. Absent an abuse of discretion, the court of appeals may not substitute its judgment for that of the Board.

Citing the nurse practice act, the appellate court noted that the Board has the authority to compel submission to an evaluation if there is reason to believe that a practitioner’s mental state may affect the ability to provide “safe nursing care.” The statute also provides that the failure to comply with the ordered evaluation when there is no valid justification “constitutes an admission of the allegations unless the failure is due to circumstances beyond the individual’s control.” The Licensee argued that her failure to schedule her evaluation was based on her inability to pay due to her financial circumstances and her belief that her court-ordered evaluation satisfied the Board requirement. Both these arguments were rejected by the Hearing Officer, resulting in a recommended sanction that was accepted by the Board. The lower court agreed with the Board and held that reliable, probative, and substantial evidence supported the decision.

The appellate court noted the difference between the criminal court order for an evaluation and the Board order. As a result of her conviction for disorderly conduct, the criminal court required the Licensee to undergo a court-ordered assessment, which was completed with a conclusion of no further treatment due to “lack of criteria for substance abuse treatment.” However, the Board ordered an evaluation specifically “addressing [Licensee’s] ability to safely function in a clinical nursing capacity.” The Hearing Officer held that the court-ordered assessment did not satisfy the Board-ordered criteria addressing nursing practice. Under the standard of review, the appellate court held that the trial court did not abuse its discretion in finding that reliable, probative, and substantial evidence supported the findings of the Board.

In her testimony about her financial status, the Licensee indicated she was unemployed during part of the relevant time period. The record reflects her full-time employment as of November 2012, a full two months before the default order. Accordingly, the appellate court found reliable, probative, and substantial evidence supported the Board’s findings that the Licensee had the means to pay for the Board-ordered evaluation. As a result, her failure to comply was not due to circumstances beyond her control.

Finally, regarding the Licensee’s argument that the administrative actions by the Board were based upon misstatements in the police report, the appellate court noted that the issue before the Hearing Officer and ultimately the Board was limited to whether the Licensee’s failure to submit

to the evaluation was due to circumstances beyond her control, not whether the Board had a good faith reason to order such an evaluation. Thus, this argument was rejected by the appellate court. As a result of the findings, the appellate court determined that the trial court did not abuse its discretion and the appellate court affirmed the decision of the Board.

This case illustrates how differing orders for mental health assessments may require different evaluations. The Board-ordered evaluation clearly was specific to the Licensee's abilities regarding the safe practice of nursing. A criminal court-ordered evaluation likely will not contain such specificity.

Weigel v. Ohio Board of Nursing,
2014 Ohio App. LEXIS 3976