



MINUTES OF THE DECEMBER 10-12, 2018
MEETING OF THE STATE OF OHIO BOARD OF PHARMACY

Monday, December 10, 2018

10:00 a.m. The State of Ohio Board of Pharmacy convened in the Hearing Room, 17th Floor, of the Vern Riffe Center for Government and the Arts, 77 South High Street, Columbus, Ohio, with the following members present:

Fred M. Weaver, RPh, Presiding; Shawn C. Wilt, RPh; Richard J. Newlon, *Public Member*; Megan E. Marchal, RPh; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Donald R. Miller, RPh; Joshua M. Cox, RPh; and Kilee S. Yarosh, RPh.

Also present were Steven Schierholt, *Executive Director*; Nicole Dehner, *Chief Legal Counsel*; Eric Griffin, *Director of Compliance and Enforcement*; Sarah Ackman, *Senior Legal Counsel*; Joe Koltak, *Senior Legal Counsel*; Justin Sheridan, *Senior Legal Counsel*; Erin Reed, *Senior Legal Counsel*; Jenni Wai, *Chief Pharmacist*; Chad Garner, *Director of OARRS*; Henry Appel, *Assistant Attorney General*; Karrie Southard, *Director of Licensing*; Cameron McNamee, *Director of Policy and Communications*; Alexandra Simon, *Public Information Officer*; Terri Ghitman, *OARRS Pharmacist*; and Kathryn Lewis, *Administrative Assistant*.

R-2019-086 After votes were taken in public session, the Board adopted the following order in the matter of **Nicholas Williams, Mansfield, Ohio.**

ORDER OF THE STATE BOARD OF PHARMACY

(Case Number 2017-1858)

In The Matter Of:

Nicholas Williams, Pharmacist

640 Five Points East Road
Mansfield, OH 44903
(License No. 03-237452)

INTRODUCTION

The Matter of Nicholas Williams came as a continuation of the hearing held on August 6, 2018, for additional information on December 9, 2018, before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, R.Ph., *Presiding*; Joshua M. Cox, R.Ph; Megan

E. Marchal, R.Ph.; Curtis L. Passafume, Jr., R.Ph.; Jennifer M. Rudell, R.Ph.; Shawn C. Wilt, R.Ph.; Donald R. Miller, R.Ph.; Richard J. Newlon, *public member*; and Kilee S. Yarosh, R.Ph.

Nicholas Williams was not represented by Counsel. The State of Ohio was represented by Henry Appel, Assistant Attorney General.

SUMMARY OF EVIDENCE

State's Witnesses:

None

Respondent's Witness:

Nicholas Williams, Respondent

State's Exhibits:

None

Respondent's Exhibits:

None

FINDINGS OF FACT

After having heard the testimony, observed the demeanor of the witness, considered the evidence, and weighed the credibility of each, the Board finds the following to be fact: By letter dated February 23, 2018, the Board ordered Nicholas Williams to submit to a mental examination pursuant to ORC 4729.16(E). The Board's determination was based upon the reasons outlined in such letter. By letter dated March 12, 2018, from Dr. Luis Ramirez, a Board-approved psychiatric evaluator, Nicholas Williams was determined to have the diagnosis of Bipolar Disorder I, in partial remission. The report further stated Nicholas Williams is capable of working if his condition is monitored with regular reports by his treating psychiatrist in order to make sure he is adhering to treatment and rehabilitation progress.

By Board Order issued August 13, 2018, the Board issued the Intern License, No. 06-016080, with certain conditions. Since the August hearing, Nicholas Williams has provided to the Board proof of passing MPJE and NAPLEX exam results, accordingly, the Board now considers the conversion of Nicholas Williams' intern license to a pharmacist license.

By letter dated December 6, 2018, from Dr. Sonal Sinha, the progress report stated Nicholas Williams has shown fair compliance with treatment and remains stable.

DECISION OF THE BOARD

The Board hereby finds Nicholas Williams to be in compliance with the Board Order dated August 13, 2018, and converts Intern License number 06-016080 to an active Ohio Pharmacist License number 03-237452, effective immediately.

As part of the conditions of Nicholas Williams receiving his Pharmacist License, he must comply with the following conditions:

1. Nicholas Williams must continue to regularly, with a frequency to be determined by his treating psychiatrist, meet with his treating psychiatrist and follow all medication and any other treatment recommendations.
2. Nicholas Williams' treating psychiatrist must provide reports to Board staff and/or the probation committee no less than quarterly from the date of this Order. The reports may be emailed to legal@pharmacy.ohio.gov. If the frequency of meetings with his treating psychiatrist changes to less than quarterly, Nicholas Williams must notify the Board legal department by email and the treating psychiatrist must make note of it in the quarterly report.
3. Nicholas Williams shall report to the board any hospitalizations and/or encounters with law enforcement within three business days of release from the hospital or contact with law enforcement.
4. Nicholas Williams' license, number 03-237452, is on probation for a minimum of three (3) years from the effective date of this Order.
 - a. For the duration of probation, Nicholas Williams must meet face-to-face with the Board's Probation Committee quarterly, unless otherwise determined by the Probation Committee. The first meeting with the probation committee will be April 1, 2018.
 - b. Should Nicholas Williams move out of state and/or attempt to obtain licensure as a pharmacist in a different state, the Probation Committee will determine the frequency and type of contact Nicholas Williams must maintain with the Ohio Board and its Probation Committee.
5. If Nicholas Williams moves out of state and/or attempts to obtain licensure as a pharmacist in a different state, he must obtain and maintain treatment by a psychiatrist in the state to which he moves. Nicholas Williams must meet with the new psychiatrist no less than monthly and the new psychiatrist must provide monthly reports to the Ohio Board, until determined otherwise by the Board or its Probation Committee.

Shawn Wilt moved for Conclusions of Law and Decision of the Board; Curtis Passafume seconded the motion. Motion passed: Aye-8/Nay-0.

SO ORDERED.

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- 10:35 a.m.** Mr. McNamee proposed changes on the Rules for Filing with JCARR: 4729:8—OARRS, 4729:5-8—Nonresident Terminal Distributors, 4729:5-3-01—Drug Destruction, 4729:1-4-01, 4729:2-4-01—Disciplinary Section (Pharmacists and Interns), and 4729:1-4-02, 4729:2-4-02—Duty to Report (Technician and Intern)—and reviewed public hearing comments with the Board.

- R-2019-087** Mr. Passafume moved that the Board adopt the proposed changes to the Rules for Filing with JCARR, with the exception of the OARRS Rule, 4729:5-8-01, in order for Board staff to further review. The Motion was seconded by Ms. Rudell and approved by the Board: Aye-8.
- 11:35 a.m.** The Board was joined by Assistant Attorney General Henry Appel to conduct an adjudication hearing in accordance with the Ohio Revised Code Chapters 119. and 4729. in the matter of **Matthew Pacanovsky, RPh, Columbus, Ohio.**
- 12:23 p.m.** Mr. Wilt moved that the Board recess in order to consider the quasi-judicial matters in accordance with Chapter 119. of the Revised Code and the case precedent of *Angerman v. State Medical Bd.* (1990) 70 Ohio App.3d 346 and *TBC Westlake Inc. v. Hamilton Cty Bd of Revision, et al.* (1998) 81 Ohio St.3d 58. The motion was seconded by Mr. Passafume and a roll-call vote was conducted by President Weaver as follows: Cox-yes; Newlon-yes; Marchal-yes; Passafume-yes; Rudell-yes; Weaver-yes; Wilt-yes and Yarosh-yes.
- 12:26 p.m.** The recess ended and the hearing was opened to the public.
- R-2019-088** After votes were taken in public session, the Board adopted the following order in the matter of **Matthew Pacanovsky, RPh, Columbus, Ohio.**
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AMENDED ORDER OF THE STATE BOARD OF PHARMACY

(Case Number 2016-2101)

In The Matter Of:

Matthew Pacanovsky, R.Ph.

1479 Teeway Drive
Columbus, OH 43220
(License No. 03-2-26483)

INTRODUCTION

The Matter of Matthew Pacanovsky came for hearing on December 10, 2018, before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Joshua M. Cox, RPh; Megan E. Marchal, RPh; Donald R. Miller, RPh; Richard J. Newlon, *Public Member*; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh and Kilee S. Yarosh, RPh.

Matthew Pacanovsky was represented by Elizabeth Collis. The State of Ohio was represented by Henry Appel, Assistant Attorney General.

SUMMARY OF EVIDENCEState's Witnesses:

None

Petitioner's Witnesses:

1. Matthew Pacanovsky—Respondent
2. Jarrod Grossman, PharmD, RPh

State's Exhibits:

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|---|------------|
| 1. Adjudication Order from 2017 | 08-21-2018 |
| 2. Request for Reinstatement (without exhibits) | 09-27-2018 |
| 3. Notice of Hearing | 10-23-2018 |

Petitioner's Exhibits:

- | | |
|--|------------|
| A. Letter from Matt Pacanovsky requesting reinstatement of license, dated December 2, 2018 | 10-2-2018 |
| B. Order Early Releasing Defendant from Deferred Adjudication State of Texas v. Pacanovsky, 450 th District Court of Travis County, Texas, Case No. D1DC15600450 | 09-11-2018 |
| B1. Order granting Motion for Discharge from Probation and Dismissal of Cause, <i>State of Texas v. Pacanovsky, 450th</i> District Court of Travis County, Texas, Cause No. D1DC15600450 | 09-11-2018 |
| C. Pharmacists Treatment Contract with the Pharmacists Rehabilitation Organization, Inc., dated September 19, 2017 | 09-19-2017 |
| C1. Letter from Jarrod Grossman, PharmD, RPh, Executive Director of Pharmacists Rehabilitation Organization, Inc., dated November 18, 2018 | 11-18-2018 |
| D. Professional Recovery Network Support Agreement, dated June 3, 2016 (for Texas State Board of Pharmacy) | 06-03-2016 |
| D1. Professional Recovery Network Support Agreement, dated March 15, 2017 (for Texas State Board of Pharmacy) | 03-15-2017 |
| E. Meeting Attendance Logs (June 2016-December 2018) | Varied |
| F. Drug Screen History Report (January 1, 2017-November 18, 2018) | Varied |
| G. Letter from Eden Males, LMSW, Professional Recovery Network, Regarding statement of treatment, dated July 19, 2018 | 07-19-2018 |
| H. Glenbeigh Discharge Plan | 12-02-2016 |
| I. Letter from Nicolas Sgobbo, MSW, LSW Therapist, Dublin Springs, Regarding graduation from program on January 13, 2017 | 01-13-2017 |
| J. Letter from Sarah Shearer, LPCC-S, The Center for Cognitive and and Behavioral Therapy, Trinity Family Counseling, regarding individual counseling, dated July 25, 2018 | 07-25-2018 |
| K. Letters of Support: Penny A. Coons, R.Ph, dated November 30, 2018; Joshua Keslar, R.Ph, dated November 27, 2018; Matthew Rini, dated November 28, 2018; and Pastor Jake McCullough, dated July 23, 2018 | Varied |

FINDINGS OF FACT

After having heard the testimony, observed the demeanor of the witnesses, considered the evidence, and weighed the credibility of each, the Board finds that Matthew Pacanovsky has substantially complied with the terms set forth in the Board Order of the State of Ohio Board of Pharmacy, Case No. 2016-2101, dated August 21, 2017.

DECISION OF THE BOARD

On the basis of the Finding of Fact set forth above, and after consideration of the record as a whole, the State of Ohio Board of Pharmacy hereby approves the reinstatement of the pharmacist identification card, No. 03-2-26483, held by Matthew Pacanovsky to practice pharmacy in Ohio subject to a period of probation for five years beginning on the effective date of this Order, with the following conditions:

1. Matthew Pacanovsky must enter into and adhere to the terms of a **new** contract, signed within thirty days after the effective date of this Order, with an approved treatment provider or an approved monitoring program for a period of not less than five years and, upon signing, submit a copy of the contract to the Board office. Failure to adhere to the terms of the treatment contract will be considered a violation of the Board's Order and subject Matthew Pacanovsky to potential sanctions up to and including revocation of license. The contract must provide that:
 - a. Random, observed urine drug screens shall be conducted at least once each month.
 - b. The urine sample must be given within twelve hours of notification. The urine drug screen must include testing for creatinine or specific gravity of the sample as the dilutional standard.
 - c. Alcohol and Ethyl Glucuronide (ETG) must be added to the standard urine drug screen.
 - d. Results of all drug screens must be negative. Refusal of a drug screen or a diluted drug screen is equivalent to a positive result. Any positive results, including those which may have resulted from ingestion of food, but excluding false positives which resulted from medication legitimately prescribed, indicates a violation of the contract.
 - e. In the event of a negative diluted screen, a hair sample test must be completed at the cost of the Matthew Pacanovsky in a timeframe consistent with the drug lab's recommended policy, but in any event no later than 12 days after the negative diluted screen.

2. The intervener/sponsor shall submit reports to the Board, in a format acceptable to the Board, indicating drug screens and their results in a timely fashion. Actual copies of drug screens shall be made available to the Board upon request.
 - a. Attendance is required a minimum of three times per calendar week (Sunday through Saturday) on separate days, at an Alcoholics Anonymous, Narcotics Anonymous, and/or similar support group meeting.
 - b. The program shall immediately report to the Board any violations of the contract and/or lack of cooperation.
3. Matthew Pacanovsky shall not refuse an employer provided drug or alcohol screen. If the Board becomes aware of any positive drug or alcohol screen results that were obtained in the course of employment or any mechanism other than via the signed contract with ODMHAS, the Board shall treat these results as a violation of the Board's Order and request Matthew Pacanovsky reappear before the Board for possible additional sanctions, including and up to revocation of license.
4. Matthew Pacanovsky shall not refuse a breathalyzer or other drug testing requested by law enforcement during the duration of probation. The Board shall treat any such refusal as a violation of the Board's Order and request Matthew Pacanovsky reappear before the Board for possible additional sanctions, including and up to revocation of license.
5. Matthew Pacanovsky must submit quarterly progress reports to the Board (due January 10, April 10, July 10, and October 10 of each year of probation) that include:
 - a. The written report and documentation provided by the treatment program pursuant to the contract, and
 - b. A written description of Matthew Pacanovsky's progress towards recovery and what Matthew Pacanovsky has been doing during the previous three months.
6. Other terms of probation are as follows:
 - a. Matthew Pacanovsky must meet at least annually with the Board's Probation Committee, the first meeting to be held December 9, 2019.
 - b. The State of Ohio Board of Pharmacy hereby declares that Matthew Pacanovsky's pharmacist identification card is not in good standing and thereby denies the privilege of being a preceptor and training pharmacy interns pursuant to paragraph (D)(1) of Rule 4729-3-01 of the Ohio Administrative Code.
 - c. Matthew Pacanovsky may not serve as a responsible pharmacist.

- d. Matthew Pacanovsky may not destroy, assist in, or witness the destruction of controlled substances.
 - e. Matthew Pacanovsky may not work in a pharmacy more than 40 hours per week or 80 hours over a two-week period.
 - f. Matthew Pacanovsky must not violate the drug laws of Ohio, any other state, or the federal government.
 - g. Matthew Pacanovsky must abide by the rules of the State of Ohio Board of Pharmacy.
 - h. Matthew Pacanovsky must comply with the terms of this Order.
 - i. Matthew Pacanovsky's license is deemed not in good standing until successful completion of the probationary period.
7. Matthew Pacanovsky must immediately report any violation of the terms of this probation to the Board by contacting legal@pharmacy.ohio.gov. Failure to self-report any violation shall be treated as a violation of this Board's Order and will subject Matthew Pacanovsky to possible additional sanctions, including and up to revocation of license. Any violation of probation or this Board's Order may result in a Board hearing to consider alternative or additional sanctions under Section 4729.16 of the Ohio Revised Code, including and up to revocation of Matthew Pacanovsky's license.
 8. At the conclusion of the probationary period, the Board will issue a notice of opportunity for hearing to Matthew Pacanovsky regarding the status of Matthew Pacanovsky's probation and whether Matthew Pacanovsky has successfully met all terms of probation and may be considered in good standing.

Megan E. Marchal moved for Findings of Fact; Curtis L. Passafume seconded the motion. Motion passed (Aye-8).

Megan E. Marchal moved for Action of the Board; Curtis L. Passafume seconded the motion. Motion passed (Aye-8).

SO ORDERED.

12:27 p.m. The Board recessed for lunch.

1:28 p.m. The meeting reconvened in the Hearing Room.

Mr. Garner introduced the new OARRS Analyst, Jonathon George.

Mr. Schierholt introduced the new Director of Information Services for the OARRS/IT Department, Blair Cathcart.

- 1:43 p.m.** The Board was joined by Assistant Attorney General Henry Appel to conduct an adjudication hearing in accordance with the Ohio Revised Code Chapters 119. and 4729. in the matter of **Delmer Parrish, RPh, Naples, FL.**
- 3:29 p.m.** Mr. Wilt moved that the Board recess in order to consider the quasi-judicial matters in accordance with Chapter 119. of the Revised Code and the case precedent of *Angerman v. State Medical Bd.* (1990) 70 Ohio App.3d 346 and *TBC Westlake Inc. v. Hamilton Cty Bd of Revision, et al.* (1998) 81 Ohio St.3d 58. The motion was seconded by Mr. Newlon and a roll-call vote was conducted by President Weaver as follows: Cox-yes; Newlon-yes; Marchal-yes; Passafume-yes; Rudell-yes; Weaver-yes; Wilt-yes and Yarosh-yes.
- 3:56 p.m.** The recess ended and the Board meeting was opened to the public. Ms. Southard presented the Licensing Report.
- 3:59 p.m.** Mr. Garner presented the OARRS Report.
- 4:05p.m.** The Board announced its decision in the previous hearing.
- R-2019-089** After votes were taken in public session, the Board adopted the following order in the matter of **Delmer Parrish, RPh, Naples, FL.**

ORDER OF THE STATE BOARD OF PHARMACY

(Case Number 2017-2026)

In The Matter Of:

Delmer Parrish, R.Ph.

390 Hawser Lane

Naples, FL 34102

(License No. 03-237448)

INTRODUCTION

The Matter of Delmer Parrish came for hearing on December 10, 2018, before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Joshua M. Cox, RPh; Megan E. Marchal, RPh; Donald R. Miller, RPh; Richard J. Newlon, *Public Member*; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh and Kilee S. Yarosh, RPh.

Delmer Parrish was represented by Walter McNamara. The State of Ohio was represented by Henry Appel, Assistant Attorney General.

SUMMARY OF EVIDENCE

State's Witnesses:

1. Delmer Parrish—Respondent

Respondent's Witnesses:

1. Delmer Parrish—Respondent

State's Exhibits:

1. Notice of Opportunity for Hearing	04-03-2018
2. Request for Hearing	04-24-2018
3. Scheduling Letters	04-26-2018
4. Application	03-30-2017
5. Statement of Delmer Parrish	10-30-2017
6. Florida Department of Health (Certified records of discipline)	09-26-2017
7. Indictment (Certified copy from United States District Court/Middle District of Florida)	05-15-2013
8. Plea Agreement Certified Copy	10-30-2013
9. Judgment Entry Certified Copy	04-01-2014
10. Amended Judgment Entry (Certified Copy)	03-25-2015

Respondent's Exhibits:

R1. Recommendation Letter from Benzer Pharmacy	07-27-2018
R2. Recommendation Letter from Family Pharmacy	08-01-2018
R3. Recommendation Letter from Gulf Med Pharmacy	No Date
R4. Recommendation Letter from Jane's Café on Third	05-09-2018
R5. Recommendation Letter from Sunshine Pharmacy	07-16-2018
R6. United States District Court Letter of Termination	01-12-2017
R7. Certificate of Termination	01-12-2017

FINDINGS OF FACT

After having heard the testimony, observed the demeanor of the witnesses, considered the evidence, and weighed the credibility of each, the Board finds the following to be fact:

1. On Delmer Parrish's application for examination to be a licensed pharmacist in the state of Ohio, received on June 19, 2017, he answered "Yes" to the legal questions of "Have you ever been charged or convicted of a felony or a misdemeanor other than a minor traffic violation" and "Have you ever been the subject of disciplinary action by any state or federal agency?"
 - a. On or about November 4, 2013, Delmer Parrish pleaded guilty in the United States District Court, Middle District of Florida, Fort Myers Division, to one count of Conspiracy to Commit Health Care Fraud, a felony offense. On or about April 1, 2014, Delmer Parrish was sentenced to twenty-four (24) months in a federal correction facility and was required to pay \$351,358.14 in restitution. Case No. 2:13-cr-68-FtM-29CM, *United States of America vs Delmer Holmes Parrish*.
 - b. On or about October 29, 2013, Delmer Parrish filed a "Voluntary Relinquishment of License" with the State of Florida Department of Health. In this filing, Delmer Parrish agreed to never reapply for licensure as a pharmacist in the State of Florida. A hearing was held before the Florida Board of Pharmacy for consideration of his tendered "Voluntary Relinquishment of License" in *Case No 2013-10756*, on or about April 2, 2014. On or about April 25, 2014, the Florida Board of Pharmacy approved and adopted in toto and incorporated by reference as the disposition Delmer Parrish's "Voluntary Relinquishment of License."

2. The Board Further finds Delmer Parrish's testimony to lack credibility.

CONCLUSIONS OF LAW

1. Such conduct as set forth in the Findings of Fact Section constitutes a violation of Section 4729.08(B) of the ORC, not of good moral character and habits.
2. Such conduct as set forth in the Findings of Fact Section constitutes a violation of the following divisions of (A) of section 4729.16 of the ORC effective as of April 6, 2017:
 - a. Has been convicted of a felony, or a crime of moral turpitude, as defined in section 4776.10 of the Revised Code, ORC Section 4729.16(A)(2)(a); and/or
 - b. Engaged in dishonesty or unprofessional conduct in the practice of pharmacy, ORC 4729.16 Section (A)(2)(b); and/or
 - c. Violated, conspired to violate, attempted to violate, or aided and abetted the violation of any of the provisions of this chapter 3715.75 to 3715.72 of the Revised Code, Chapter 2925. or 3719. of the Revised Code, or any rule adopted by the board under those provisions, ORC 4729.16(A)(2)(e).
 - d. Engaged in any conduct for which the board may impose discipline as set forth in rules adopted under section 4729.26 of the Revised Code, ORC Section 4729.16 (A)(2)(I).
3. Such conduct as set forth in the Findings of Fact Section, constitutes a violation of each of the following divisions of Rule 4729-5-04 of the OAC as effective April 28, 2016:
 - a. Violated any state or federal law or rule regardless of the jurisdiction in which the acts were committed, OAC Rule 4729-5-04(A); and/or
 - b. Violated...any of the provisions of Chapters 4729...of the Revised Code, or any rule adopted by the board under those provisions, OAC Rule 4729-5-04(B); and/or
 - c. Committed actions that constitute moral turpitude as defined in section 4776.10 of the Revised Code or gross immorality, OAC Rule 4729-5-04(C); and/or
 - d. Has been disciplined by any professional licensing board, OAC Rule 4729.5-04(F).

DECISION OF THE BOARD

Pursuant to Sections 4729.16, 4729.07, and 4729.08 of the Ohio Revised Code, Rule 4729-5-04 of the Ohio Administrative Code, and after consideration of the record as a whole, the State of Ohio Board of Pharmacy hereby finds Delmer Parrish not credible, determines Delmer Parrish is ineligible for licensure as a pharmacist in Ohio, and permanently denies the Application for Registration as a Pharmacist submitted by Delmer Parrish, received by the Board in June of 2017. Pursuant to Chapter 4729-9-01(I) of the Ohio Administrative Code, Delmer Parrish may not reapply for any State of Ohio Board of Pharmacy license. The Board further denies Delmar Parrish's ability to sit in Ohio to take either the North American Pharmacist Licensure Examination (NAPLEX) or the Multistate Pharmacy Jurisprudence (MPJE) exam.

Megan E. Marchal moved for Findings of Fact; Jennifer M. Rudell seconded the motion. Motion passed (Aye-7).

Shawn C. Wilt moved for Conclusions of Law; Megan E. Marchal seconded the motion. Motion passed (Aye-7).

Shawn C. Wilt moved for Action of the Board; Joshua M. Cox seconded the motion. Motion passed (Aye-7).

SO ORDERED.

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- 4:07 p.m.** Ms. Simon presented the Legislative Report.
- 4:14 p.m.** Ms. Dehner presented the Legal Report.
- 4:19 p.m.** Mr. Wilt moved that the Board go into Executive Session to consider the investigation of charges or complaints against a licensee, confer with Board counsel regarding a pending or imminent court action and to discuss matters required to be confidential by law pursuant to Section 121.22(G)(1), (3) & (5) of the Ohio Revised Code. The motion was seconded by Ms. Rudell and a roll-call vote was conducted by President Weaver as follows: Cox-yes; Marchal-yes; Miller-yes; Newlon-yes; Yarosh-yes; Rudell-yes; and Wilt-yes.
- 5:15 p.m.** Executive Session Concluded and the Board Recessed for the day.

Tuesday, December 11, 2018

- 9:03 a.m.** The State of Ohio Board of Pharmacy convened in the Hearing Room, 17th Floor, of the Vern Riffe Center for Government and the Arts, 77 South High Street, Columbus, Ohio, with the following members present:

Fred M. Weaver, RPh, Presiding; Shawn C. Wilt, RPh; Richard J. Newlon, *Public Member*; Megan E. Marchal, RPh; Curtis L. Passafume, Jr., RPh; Donald R. Miller, RPh; Joshua M. Cox, RPh; and Kilee S. Yarosh, RPh.

Jennifer M. Rudell, RPh, Absent

- 9:04 a.m.** Mr. Griffin Provided the Compliance Report.
- 9:09 a.m.** Ms. Ghitman presented a CE provider request for Vineyard Free Health Clinic.
- R-2019-090** Mr. Passafume moved that the Board grant Vineyard Free Health Clinic's request. The motion was seconded by Mr. Wilt and approved by the Board: Aye-7.
- 9:10 a.m.** Ms. Southard presented the Non-Physician Owner Waiver for Better Choice Recovery.
- R-2019-091** Mr. Wilt moved that the Board approve the waiver for Better Choice Recovery. The motion was seconded by Mr. Passafume and approved by the Board: Aye-7.
- 9:12 a.m.** Ms. Southard presented the Pharmacist:Technician Trainee Ratio Request on behalf of Giant Eagle Pharmacy #8417, license number 021830650. The Board reviewed the request dated November 1, 2018, for an exemption to Ohio Administrative Code Rule 4729:3-3-01(C), which permits a pharmacist to supervise only up to three (3) pharmacy technician trainees at any time.
- R-2019-092** Mr. Wilt moved that the Board approve Giant Eagle Pharmacy #8417's request of a pharmacist:pharmacy technician trainee ratio of 1:10 for one (1) year. This expanded ratio approval is specific to TDDD License number 021830650. The motion was seconded by Mr. Passafume and approved by the Board: Aye-7.
- 9:33 a.m.** The Board was joined by Assistant Attorney General Henry Appel to conduct an adjudication hearing in accordance with the Ohio Revised Code Chapters 119. and 4729. in the matter of **Eric Hammond, RPh**, Columbus, Ohio.
- 11:26 a.m.** Mr. Wilt moved that the Board recess in order to consider the quasi-judicial matters in accordance with Chapter 119. of the Revised Code and the case precedent of *Angerman v. State Medical Bd.* (1990) 70 Ohio App.3d 346 and *TBC Westlake Inc. v. Hamilton Cty Bd of Revision, et al.* (1998) 81 Ohio St.3d 58. The motion was seconded by Ms. Yarosh and a roll-call vote was conducted by President Weaver as follows: Marchal-yes; Miller-yes; Newlon-yes; Passafume-yes; Rudell-yes; and Wilt-yes; Yarosh-yes.
- 12:25 p.m.** The recess ended and the hearing was opened to the public.
- R-2019-093** After votes were taken in public session, the Board adopted the following order in the matter of **Eric Hammond, RPh, Columbus, Ohio.**

ORDER OF THE STATE BOARD OF PHARMACY

(Case Number 2017-1718)

In The Matter Of:

Eric Hammond, R.Ph.
9525 Moorgate Court
Dayton, OH 45458
(License No. 03132069)

INTRODUCTION

The Matter of Eric Hammond came for hearing on December 11, 2018, before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Joshua M. Cox, RPh; Megan E. Marchal, RPh; Donald R. Miller, RPh; Richard J. Newlon, *Public Member*; Curtis L. Passafume, Jr., RPh; Shawn C. Wilt, RPh and Kilee S. Yarosh, RPh.

Eric Hammond was represented by Michael Hochwalt. The State of Ohio was represented by Henry Appel, Assistant Attorney General.

SUMMARY OF EVIDENCE

State's Witnesses:

1. Eric Hammond—Respondent
2. Kelly Monce— Investigator, State of Ohio Board of Pharmacy

Respondent's Witnesses:

1. Eric Hammond—Respondent
2. Daniel Freeman, PharmD—Pro Advocate

State's Exhibits:

1a. Notice Letter	05-25-2017
1b. Amended Notice Letter	11-06-2017
2. Request for Hearing	06-21-2017
3a. Notice of Hearing for 12/2017	06-22-2017
3b. Notice of Hearing for 12/2018	04-10-2018
4. Credential Screen	10-23-2017
5. Bill of Information	Unknown
6. Motion Requesting ILC	11-07-2018
7. Entry Granting ILC	11-16-2017
8. Entry Terminating ILC	
9. Motion to Seal	12-06-2018
10. Statement of Respondent #1	05-22-2017
11. Statement of Respondent #2	07-18-2017
12. Internal Audit document – Oxycodone 30mg	Unknown
13. Internal Audit document—Oxycodone 10mg	Various
14. Internal Audit document—Amphetamine 30mg	Various
15. Internal Audit document—Amphetamine 20mg	Various
16. Internal Audit document—Oxycodone-APAP 7.5-325	Various
17. Internal Audit document—Oxycodone-APAP 10-325	Various
18. Internal Audit document—Hydrocodone-APAP 5-325	Various
19. Internal Audit document—Hydrocodone-APAP 10-325	Various
20. Internal Audit document—Amphetamine XR 30mg	Various
21. Internal Audit document—Amphetamine 30mg	Various
22. Internal Audit document—Oxycodone-APAP 5-325	Various

23. Internal Audit document—Oxycodone 5mg	Various
<u>Respondent's Exhibits:</u>	
A. Pharmacists Rehabilitation Organization, Inc.	06-29-2017
B1. PRO, Inc. –Client Reporting Sheet for Quarterly Report	Jan—Mar., 2018
B2. PRO, Inc. –Client Reporting Sheet for Quarterly Report	Apr.—Jun., 2018
B3. PRO, Inc. –Client Reporting Sheet for Quarterly Report	Jul.—Aug., 2018
B4. PRO, Inc. –Client Reporting Sheet for November 2018	
B5. PRO, Inc. –Client Reporting Sheet for Quarterly Report	Jun.—Sep., 2017
B6. PRO, Inc. –Client Reporting Sheet for Quarterly Report	Oct.—Dec., 2017
C1. Letter of Jarrod Grossman, PharmD, RPh—Executive Director of Pharmacists Rehabilitation Organization, Inc.	11-25-2017
C2. Letter of Daniel Freeman, PharmD, RPh—Advocate for Pharmacists Rehabilitation Organization, Inc.	12-04-2017
C3. Letter of Jarrod Grossman, PharmD, RPh—Executive Director of Pharmacists Rehabilitation Organization, Inc.	11-29-2018
C4. Letter of Dr. J. Michael Thuney	10-25-2018
D1. Northland Certificate of Completion—Aftercare Program	08-01-2018
D2. Letter of Gavin Noah, LCDCI—Confirmation of Completion Of Northland’s Aftercare Services	08-02-2018
D3. The Ridge Certificate of Completion—Adult Non-Medical Community Residential Treatment	06-23-2017
E. OHPRO, Org—Test History Report	01-01-2016- 11-26-2018
F1. Letter of Madalyn Meyer, Adult Probation Officer, Montgomery County, Ohio Common Pleas Court	09-19-2018
F2. Termination Entry for Case No. 2017-CR-03111/1—Montgomery County, Ohio Common Pleas Court	11-19-2018
G1. Letter of Support from Roger Heinisch-Sponsor	11-26-2018
G2. Letter of Support from Kathy Longwell—Support Group	11-26-2018
H1. Letter of Support from Michelle Pisut—Family	12-09-2018
H2. Letter of Support from Angela Hammond—Wife	11-13-2018
H3. Letter of Support from John Hammond—Father	No Date
H4. Letter of Support from Paula Hammond—Mother	No Date
H5. Letter of Support from Kelli Snyder—Friend	11-16-2018
I. Ohio Northern University Degree of Doctor of Pharmacy	05-13-2012
J. Certificate of Participation in Continuing Pharmacy Education 20 th Annual Conference on Chemical Dependency in the Profession of Pharmacy	04-08-2018

K. CPE Monitor Activity Transcript	05-15-2017- 04-24-2018
L1. Letter of Eric Hammond—July, 2017 Self Report	09-29-2017
L2. Letter of Eric Hammond—April 2018 Quarter Review	No Date
L3. Letter of Eric Hammond—July Quarter Review	07-01-2018
L4. Letter of Eric Hammond—July 2018 Quarter Review	No Date
L5. Letter of Eric Hammond—Quarter Review	No Date

FINDINGS OF FACT

After having heard the testimony, observed the demeanor of the witnesses, considered the evidence, and weighed the credibility of each, the Board finds the following to be fact:

1. On or about May 17, 2017, the Board began an investigation into theft at a pharmacy where Eric Hammond was previously employed, prior to his current position of employment with CVS Pharmacy #6143, located at 900 N. Broad St. in Fairborn, Ohio 45324. This led to an investigation at Eric Hammond's current CVS Pharmacy #6143 Fairborn employment where it was determined he stole opiates during each shift. He was observed on video consuming an item he had taken without authorization and without a valid prescription from the C2 safe prior to his shift on May 21, 2017.
2. Eric Hammond admitted to creating a fraudulent prescription in the CVS system under a fake patient name to cover for the medications he stole; Rx. No. 823334; for oxycodone-apap 10/325 mg; 40 tablets.
3. Further, Eric Hammond admitted to stealing from CVS Pharmacy #6143, 900 N Broad St. Fairborn, Ohio 45324, where he was employed in May of 2017, approximately:
 - a. 4 oxycodone-apap 5/325 mg tablets, on or about May 19, 2017;
 - b. 6 oxycodone-apap 5/325 mg tablets, on or about May 20, 2017;
 - c. 4 oxycodone-apap 5/325 mg tablets, on or about May 21, 2017;
 - d. 15 oxycodone-apap 10/325 mg tablets, on or about May 21, 2017;
 - e. 6 oxycodone-apap 10/325 mg tablets, on or about May 22, 2017;
 - f. 3 phentermine 37.5 mg tablets, between May 15, 2017 and May 22, 2017.
4. During Eric Hammond's May 22, 2017 interview with Board agents, he emptied his pockets and produced 23 oxycodone 10/325 mg tablets, some of which he stole that day while working, others of which had been stolen during his shift the previous day.
5. It was also established that Eric Hammond stole from his previous employer, Clark's Rx Pharmacy located at 5901 Far Hills Avenue, Centerville, Ohio where he was employed from October of 2016 until April 19, 2017. During the investigation, Eric Hammond admitted that he stole a variety of controlled substances, including, approximately:

- a. 400 tablets of oxycodone 30 mg;
 - b. 115 tablets of oxycodone 10 mg;
 - c. 94 tablets of oxycodone 5 mg;
 - d. 860 tablets of hydrocodone-apap 10/325 mg;
 - e. 860 tablets of oxycodone-apap 10/325 mg;
 - f. 94 tablets of oxycodone-apap 7.5/325 mg;
 - g. 90 tablets of oxycodone-apap 5/325 mg;
 - h. 200 tablets of amphetamine 30 mg;
 - i. 110 capsules of amphetamine XR 30 mg;
 - j. 100 capsules of amphetamine XR 20 mg;
 - k. 100 tablets of Ambien 10 mg;
 - l. 5 tablets of phentermine 37.5 mg.
6. While employed at Clark's Rx Pharmacy, Eric Hammond engaged in an inappropriate physical relationship with a technician in the pharmacy, which was caught on camera.
7. Eric Hammond further admitted that while working at CVS Pharmacy #2528 between 2014 and October of 2016, located at 2801 Far Hills Avenue, Oakwood, Ohio 45419, to stealing approximately:
- a. 60 tablets of oxycodone 5 mg;
 - b. 200 tablets of hydrocodone-apap 10/325 mg;
 - c. 60 tablets of hydrocodone-apap 7.5/325 mg;
 - d. 30 tablets of hydrocodone-apap 5/325 mg;
 - e. 20 tablets of phentermine 37.5 mg;
 - f. 10 tablets of oxycodone 10/325 mg;
 - g. 30 tablets of oxycodone-apap 7.5/325 mg;
 - h. 40 tablets of oxycodone-apap 5/325 mg.
8. In addition to the aforementioned theft admissions, Eric Hammond also admitted his largest ingestion of a quantity of non-prescribed substances while performing his duties as a pharmacist was having consumed up to 20 mg of oxycodone combined with

30 mg of amphetamine salts in various dosage forms during a shift. Further, he provided a written statement indicating his abuse of medications that had not been prescribed to him began in 2010.

9. On or about October 17, 2017, a Bill of Information was filed in Montgomery County Common Pleas Court charging Eric Hammond with Illegal Processing of Drug Documents, a felony of the fourth degree, Deception to Obtain Dangerous Drugs, a felony of the fourth degree, Aggravated Possession of Drugs, a felony of the fifth degree and Theft of Drugs, a felony of the fourth degree. Case No. 2017CR03111.

CONCLUSIONS OF LAW

1. Such conduct as set forth in paragraphs (1), (3)(a)-(f) inclusive, (4), (5)(a) – (l) inclusive, (7)(a)-(h) inclusive, and (8), of the Findings of Fact each constitutes a violation of Section 2913.02 of the ORC, theft of a controlled substance, a felony of the fourth degree, each violation punishable by a maximum fine of \$5,000.
2. Such conduct as set forth in paragraphs (1), (3)(a)-(f) inclusive, (4), (5)(a) – (l) inclusive, (7)(a)-(h) inclusive, and (8), of the Findings of Fact Section each constitutes a violation of Section 2925.11(A) of the ORC, Possession of a Schedule II controlled substance, a felony of the fifth degree, punishable by a maximum fine of \$2,500.
3. Such conduct as set forth in paragraph (2) of the Findings of Fact Section constitutes a violation of Section 2921.23(A) of the ORC, Illegal processing of drug documents, a felony of the fourth degree, punishable by a maximum fine of \$5,000.
4. Such conduct as set forth in paragraph (2) of the Findings of Fact Section constitutes a violation of Section 2925.22(A) of the ORC, Deception to obtain a dangerous drug, a felony of the fourth degree, punishable by a maximum fine of \$5,000.
5. Such conduct as set forth in paragraphs 5(a)-(l) inclusive, (6), (7)(a)-(h), (8) and (9) of the Findings of Fact Section each constitutes a violation of the following divisions of (A)(2) of section 4729.16 of the ORC, as effective July 16, 2015 and March 19, 2015, each violation constituting a minor misdemeanor, each punishable by a maximum penalty of \$150:
 - a. Guilty of a felony or gross immorality, ORC Section 4729.16(A)(1); and/or
 - b. Guilty of dishonesty or unprofessional conduct in the practice of pharmacy, ORC Section 4729.16(A)(2); and/or
 - c. Addicted to or abusing alcohol or drugs or impaired physically or mentally to such a degree as to render the pharmacist or pharmacy intern unfit to practice pharmacy, ORC 4729.16(A)(3); and/or

- d. Guilty of willfully violating...any of the provisions of this chapter, Chapter 2925. or 3719. of the Revised Code, or any rule adopted by the board under those provisions, ORC Section 4729.16(A)(5).
6. Such conduct as set forth in paragraphs (1), (2), (3)(a)-(f) inclusive, (4) and (9), of the Findings of Fact Section each constitutes a violation of the following divisions of (A) of section 4729.16 of the ORC effective as of April 6, 2017, each violation constituting a minor misdemeanor, each punishable by a maximum penalty of \$150:
 - a. Engaged in dishonesty or unprofessional conduct in the practice of pharmacy, ORC 4729.16 Section (A)(2)(b); and/or
 - b. Is addicted to or abusing alcohol or drugs or is impaired physically or mentally to such a degree as to render the pharmacist unfit to practice pharmacy, ORC Section 4729.16(A)(2)(c); and/or
 - c. Violated...any of the provisions of this chapter...Chapter 2925. or 3719. of the Revised Code, or any rule adopted by the board under those provisions, ORC 4729.16(A)(2)(e).
 - d. Engaged in any conduct for which the board may imposed discipline as set forth in rules adopted under section 4729.26 of the Revised Code, ORC Section 4729.16(A)(2)(l).
7. Such conduct as set forth in paragraphs 5(a)-(l), (6), (7)(a)-(h) inclusive, (8) and (9) of the Findings of Fact Section each constitutes a violation of each of the following divisions of Rule 4729-5-04 of the OAC as effective January 1, 2011, each violation punishable by a maximum penalty of \$500: is addicted to or abusing liquor or drugs, OAC Rule 4729-5-04(D).
8. Such conduct as set forth in paragraphs (1), (2), (3)(a)-(f) inclusive, (4), (5)(a)-(l), (6) and (9) of the Findings of Fact section each constitutes a violation of each of the following divisions of Rule 4729-5-04 of the OAC as effective April 28, 2016, each violation punishable by a maximum penalty of \$500:
 - a. Violated any state or federal law or rule regardless of the jurisdiction in which the acts were committed, OAC Rule 4729-5-04(A); and/or
 - b. Violated...any of the provisions of Chapters 4729., 3719. and 2925....of the Revised Code, or any rule adopted by the board under those provisions, OAC Rule 4729-5-04(B); and/or
 - c. Committed acts that constitute moral turpitude as defined in section 4776.10 of the Revised Code or gross immorality, OAC Rule 4729-5-04(C); and/or

- d. Is addicted to or abusing alcohol, drugs or other chemical substances or impaired physically or mentally to such a degree as to render the pharmacist or pharmacy intern unfit to practice pharmacy, OAC Rule 4729-5-04(D).

DECISION OF THE BOARD

Pursuant to Section 3719.121 of the Ohio Revised Code, the State Board of Pharmacy hereby removes the Summary Suspension Order issued to Eric Hammond on May 25, 2017.

Pursuant to Section 4729.16 of the Ohio Revised Code, and after consideration of the record as a whole, the State Board of Pharmacy hereby effective immediately reinstates the pharmacist identification card, No. 03-132069, held by Eric Hammond with the following practice restrictions:

1. Eric Hammond may not be employed by or volunteer in any facility where dangerous drugs are present.
2. Eric Hammond must appear before the Board to request modification of the practice restriction set forth above; he may appear no earlier than the Board meetings scheduled in May of 2019.

Additionally, the Board places Eric Hammond's license on probation for five years beginning on the effective date of this Order, with the following conditions:

9. Eric Hammond must maintain a current address with the Board throughout the duration of the suspension.
10. Eric Hammond must enter into and adhere to the terms of a **new** contract, signed within thirty days after the effective date of this Order, with an Ohio Department of Mental Health and Addiction Services (ODMHAS) treatment provider or a treatment provider acceptable to the Board for a period of not less than five years and, upon signing, submit a copy of the contract to the Board office. Failure to adhere to the terms of the treatment contract will be considered a violation of the Board's Order and subject Eric Hammond to potential sanctions up to and including revocation of license. The contract must provide that:
 - f. Random, observed urine drug screens shall be conducted at least once each month.
 - g. The urine sample must be given within twelve hours of notification. The urine drug screen must include testing for creatinine or specific gravity of the sample as the dilutional standard.
 - h. Alcohol and Ethyl Glucuronide (ETG) must be added to the standard urine drug screen.
 - i. Results of all drug screens must be negative. Refusal of a drug screen or a diluted drug screen is equivalent to a positive result. Any positive results, including those which may have resulted from ingestion of food,

but excluding false positives which resulted from medication legitimately prescribed, indicates a violation of the contract.

- j. In the event of a negative diluted screen, a hair sample test must be completed at the cost of the Eric Hammond in a timeframe consistent with the drug lab's recommended policy, but in any event no later than 12 days after the negative diluted screen.
 - k. The intervener/sponsor shall submit reports to the Board, in a format acceptable to the Board, indicating drug screens and their results in a timely fashion. Actual copies of drug screens shall be made available to the Board upon request.
 - l. Attendance is required a minimum of three times per calendar week (Sunday through Saturday) on separate days, at an Alcoholics Anonymous, Narcotics Anonymous, and/or similar support group meeting.
 - m. The program shall immediately report to the Board any violations of the contract and/or lack of cooperation.
11. Eric Hammond shall not refuse an employer provided drug or alcohol screen. If the Board becomes aware of any positive drug or alcohol screen results that were obtained in the course of employment or any mechanism other than via the signed contract with ODMHAS, the Board shall treat these results as a violation of the Board's Order and request Eric Hammond reappear before the Board for possible additional sanctions, including and up to revocation of license.
12. Eric Hammond shall not refuse a breathalyzer or other drug testing requested by law enforcement during the duration of suspension. The Board shall treat any such refusal as a violation of the Board's Order and request Eric Hammond reappear before the Board for possible additional sanctions, including and up to revocation of license.
13. Eric Hammond must immediately report any violation of the terms of this suspension to the Board by contacting legal@pharmacy.ohio.gov. Failure to self-report any violation shall be treated as a violation of this Board's Order and will subject Eric Hammond to possible additional sanctions, including and up to revocation of license.
14. Eric Hammond must demonstrate satisfactory proof to the Board that he is no longer addicted to or abusing liquor or drugs or impaired physically or mentally to such a degree as to render her unfit to practice pharmacy.
15. Eric Hammond must provide, in the reinstatement petition, documentation of the following:
- a. Compliance with the contract required above (e.g.-proof of giving the sample within twelve hours of notification and copies of all drug and alcohol screen reports, meeting attendance records, treatment program reports, etc.);

- b. Compliance with the continuing pharmacy education requirements set forth in Chapter 4729-7 of the Ohio Administrative Code as applicable and in effect on the date of petitioning the Board for reinstatement;
 - c. Compliance with the terms of this Order.
16. Violation of any term of suspension, including but not limited to any violation of the contract signed with the ODMHAS or other approved treatment provider may result in additional action before the Board up to and including revocation of your pharmacy license.
17. Any violation of Chapters 2925., 3715., 3719., 4729., of the Ohio Revised Code, any administrative code violation or a violation of any other state or federal law will be considered a violation of this Order resulting in a hearing before the Board and may also result in criminal and/or administrative charges.
18. If Eric Hammond's employment is related to the practice of pharmacy, he must notify employer of the terms of his suspension and this Board's Order.
19. Failure to complete the terms set forth in this Board's Order, or to petition for reinstatement within five years of the date of this Order, will result in the Board issuing a notice of opportunity for hearing to consider additional disciplinary action, including and up to revocation of Eric Hammond's license.

Megan E. Marchal moved for Findings of Fact; Joshua M. Cox seconded the motion. Motion passed (Aye-7).

Curtis L. Passafume moved for Conclusions of Law; Shawn C. Wilt seconded the motion. Motion passed (Aye-7).

Kilee S. Yarosh moved for Action of the Board; Curtis L. Passafume seconded the motion. Motion passed (Aye-5/Nay-2).

SO ORDERED.

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- 12:25 p.m.** The Board recessed for lunch.
- 1:56 p.m.** The Board reconvened in the Hearing Room.
- Mr. McNamee proposed changes to Rule 4729:5—Terminal Distributors.
- R-2019-094** Mr. Passafume moved that the Board adopt these changes to Rule 4729:5. The motion was seconded by Ms. Yarosh and approved by the Board: Aye-8.
- 2:05 p.m.** Mr. McNamee proposed changes to Rule 4729:11—Home Medical Equipment, and discussed public comments.

- R-2019-095** Mr. Passafume moved that the Board adopt the discussed changes to Rule 4729:11 and present for filing with CSI and JCARR. The motion was seconded by Ms. Yarosh and approved by the Board: Aye-8.
- 2:26 p.m.** Mr. McNamee proposed changes to Rule 4729:5-5—Outpatient Pharmacies, and discussed public comments.
- R-2019-096** Mr. Passafume moved that the Board adopt the discussed changes to Rule 4729:5-5 and present for filing with CSI and JCARR. The motion was seconded by Mr. Wilt and approved by the Board: Aye-8.
- 3:12 p.m.** The Board recessed for a short break.
- 3:21 p.m.** The Board reconvened in the Hearing Room.
- Mr. McNamee proposed changes to Rule 4729:1-3—Pharmacist Practice, and discussed public comments.
- R-2019-097** Mr. Passafume moved that the Board adopt the discussed changes to Rule 4729:5-5 and present for filing with CSI and JCARR. The motion was seconded by Mr. Miller and approved by the Board: Aye-8.
- 3:37 p.m.** Mr. McNamee proposed changes to 4729:5-9—Institutional Facilities and 4729:5-5-22—Return to Stock, and discussed public comments. The Board requested Mr. McNamee restructure Rule 4729:5-9 and that this rule be revised during the January 2019 Board Meeting.
- R-2019-098** Mr. Passafume moved that the Board adopt the discussed changes to 4729:5-5-22 and present for filing with CSI and JCARR. The motion was seconded by Ms. Yarosh and approved by the Board: Aye-8.
- 4:37 p.m.** Mr. McNamee, Ms. Simon, and Ms. Wai, discussed changes to 4729:7—Prescriber Compounding, and discussed public comments.
- R-2019-099** Mr. Passafume moved that the Board adopt the discussed changes to 4729:7 and present for filing with CSI and JCARR. The motion was seconded by Mr. Cox and approved by the Board: Aye-8.
- 5:14 p.m.** The Board recessed for the day.

Wednesday, December 12, 2018

- 9:09 a.m.** The State of Ohio Board of Pharmacy convened in the Hearing Room, 17th Floor, of the Vern Riffe Center for Government and the Arts, 77 South High Street, Columbus, Ohio, with the following members present:
- Fred M. Weaver, RPh, Presiding; Shawn C. Wilt, RPh; Richard J. Newlon, *Public Member*; Megan E. Marchal, RPh; Curtis L. Passafume, Jr., RPh; Donald R. Miller, RPh; Joshua M. Cox, RPh; Jennifer M. Rudell, RPh; and Kilee S. Yarosh, RPh.
- 9:10 a.m.** The Board heard an oral address by both parties in the Matters of Buckeye Relief, LLC. – Brian Laliberte on behalf of Buckeye Relief, LaTawnda Moore on behalf of the State.

- 9:34 a.m.** The Board heard an oral address by both parties in the Matter of Melissa Williams, – Levi Tkach on behalf of Ms. Williams, Henry Appel on behalf of the State.
- Mr. Wilt moved that the Board recess in order to consider the quasi-judicial matters in accordance with Chapter 119. of the Revised Code and the case precedent of *Angerman v. State Medical Bd.* (1990) 70 Ohio App.3d 346 and *TBC Westlake Inc. v. Hamilton Cty Bd of Revision, et al.* (1998) 81 Ohio St.3d 58. The motion was seconded by Mr. Passafume and a roll-call vote was conducted by President Weaver as follows: Marchal-yes; Miller-yes; Newlon-yes; Passafume-yes; Rudell-yes; and Wilt-yes; Yarosh-yes.
- 10:41 a.m.** The Board reconvened in public session. Ms. Simon distributed a packet titled “Proposed Classification of Kratom as a Schedule I Controlled Substance.” Mr. Schierholt requested that the Board Members review this packet before the meeting in January 2019, so that a discussion on Kratom could be held.
- 10:47 a.m.** Mr. McNamee proposed changes to Rule 4729:1-6—Pharmacist Consult Agreement.
- R-2019-100** Mr. Passafume moved that the Board adopt the discussed changes to Rule 4729:1-6 and present for filing with CSI and JCARR. The motion was seconded by Mr. Wilt and approved by the Board: Aye-8.
- 10:59 a.m.** Mr. McNamee proposed changes to 4729:5-3-12—Protocols for Medication Administration, 4729:5-01—Approved Schools of Pharmacy, 4729:9—Standard Pharmaceutical References and Ephedrine Products, and 4729:1-4-02—Duty to Report.
- R-2019-101** Mr. Cox moved that the Board adopt the discussed changes to Rules 4729:5-3-12, 4729:9, and 4729:1-4-02 and present for filing with CSI and JCARR. The motion was seconded by Mr. Passafume and approved by the Board: Aye-8.
- 11:39 a.m.** Mr. McNamee proposed changes to 4729:5-10—Drug Repositories and Donation of Cancer Drugs, and discussed public comments.
- R-2019-102** Mr. Passafume moved that the Board adopt the discussed changes to Rules 4729:5-10 and present for filing with CSI and JCARR. The motion was seconded by Ms. Marchal and approved by the Board: Aye-8.
- 12:03 p.m.** The Board recessed for lunch.
- 12:20 p.m.** The Board reconvened in the hearing room.
- Mr. Cox provided the PAPC Report.
- 12:22 p.m.** Mr. McNamee proposed changes to 4729:2-3-01—Intern Scope of Practice and 4729:3-3-04—Certified Pharmacy Technicians and discussed public comments.
- R-2019-103** Mr. Passafume moved that the Board adopt the discussed changes to Rules 4729:5-3-12, 4729:9, and 4729:1-4-02 and present for filing with JCARR. The motion was seconded by Mr. Cox and approved by the Board: Aye-8.
- 12:34 p.m.** Mr. McNamee proposed changes to 4729:5-17—Oxygen, Nitrous Oxide, Medical Gases and Dialysis Solution and discussed public comments.

- R-2019-104** Mr. Passafume moved that the Board adopt the proposed changes to Rule 4729:5-17. The motion was seconded by Mr. Miller and approved by the Board (Aye-8).
- 12:41 p.m.** Mr. McNamee lead a discussion on proposed changes to Rules 4729:5-19—Clinics and Prescriber Offices, 4729:5-13—First Aid Departments, 4729:5-18—Office-Based Opioid Treatment Clinics, and 4729:5-21—Opioid Treatment Programs, and discussed public comments. Mr. Cox departed the meeting due to a schedule conflict.
- 1:47 p.m.** The Board took a brief recess.
- 2:00 p.m.** The Board reconvened in the Hearing Room.
- Mr. McNamee resumed the discussion on proposed changes to Rules 4729:5-11—Pain Management Clinics, 4729:5-15—Animal Shelters, 4729:5-20—Veterinary Clinics, and 4729:5-16—Approved Laboratories.
- R-2019-105** Mr. Wilt moved that the Board adopt the discussed changes to Rules 4729:5-19, 4729:5-13, 4729:5-18, 4729:5-21, 4729:5-11, 4729:5-15, 4729:5-20, and 4729:5-16 and present for filing with CSI and JCARR. The motion was seconded by Mr. Passafume and approved by the Board: Aye-7.
- 2:45 p.m.** Mr. Passafume provided the MMAC Report.
- 2:49 p.m.** Mr. Schierholt led a discussion on the Board Meeting Calendar for 2019. A consensus was reached and it was decided to hold a Board Meeting on November 4, 5, and 6, 2019, and December 9, 10, and 11, 2019, removing the previously selected dates of December 2, 3, and 4, 2019.
- 2:55 p.m.** Ms. Reed provided an update on the Medical Marijuana Control Program in relation the Nasal Spray. The discussion was tabled for the topic to be opened to public comment.
- 3:34 p.m.** Pursuant to Sections 4729.96(B), the State of Ohio Board of Pharmacy was joined by Eric Griffin, *Director of Compliance and Enforcement* for the purpose of considering summary suspension as authorized by Section 3719.121 of the Ohio Revised Code.
- R-2019-106** After hearing Mr. Griffin discuss the significant facts regarding the activities of Julie Martes, Pharmacy Technician Trainee, Ms. Yarosh moved that the Board summarily suspend the pharmacy technician trainee registration belonging to Julie Martes (09-207861), Kettering, Ohio. The motion was seconded by Mr. Passafume and approved by the Board: Aye-6, Nay-0, Abstain-1.
- R-2019-107** Pursuant to Section 4729.16(E), after hearing Mr. Griffin discuss the significant facts regarding the activities of Douglas Birkhimer, Pharmacist, (03-124341), Westerville, Ohio, Mr. Passafume moved that the Board had reasonable cause to believe Douglas Birkhimer is physically or mentally impaired and to compel Douglas Birkhimer to submit a mental or physical examination, to include a drug test and chemical dependency examination. The motion was seconded by Mr. Newlon and approved by the Board: Aye-7.
- R-2019-108** Pursuant to Section 4729.571 of the Revised Code, after hearing Mr. Griffin discuss the significant facts regarding the activities of Medical Center West Pharmacy, Terminal Distributer of Dangerous Drugs, Mr. Passafume moved that the Board summarily suspend the Terminal Distributer of Dangerous Drugs registration belonging to Medical Center West Pharmacy (02-2661450),

Columbus, Ohio. The motion was seconded by Mr. Wilt and approved by the Board: Aye-7/Nay-0.

R-2019-109

Ms. Marchal moved that the Conference Call Minutes of October 31, 2018; November 7, 2018; November 14, 2018; December 5, 2018; and the Board Meeting Minutes of October 1-2, 2018 be approved as written. The motion was seconded by Mr. Wilt and approved by the Board: Aye-7/Nay-0.

R-2019-110

Mr. Weaver announced the following Settlement Agreement has been signed by all parties and is now effective:

**IN THE MATTER OF:
Case No. 2015-1719**

Eric Schirm
License No. 03-225084
333 Queen Drive
Chillicothe, OH 45601

SETTLEMENT AGREEMENT WITH THE STATE OF OHIO BOARD OF PHARMACY

This Settlement Agreement (Agreement) is entered into by the State of Ohio Board of Pharmacy (Board) and Eric Schirm, for the purpose of resolving all issues between the parties relating to the Board investigation of Medicaid fraud while working as a pharmacist at Fayette Pharmacy. Together, the Board and Eric Schirm are referred to hereinafter as “the parties.”

JURISDICTION

1. Pursuant to Section 4729.16 of the Ohio Revised Code and the rules adopted thereunder, the Board has the authority to suspend, revoke, or refuse to grant or renew any license issued pursuant to Sections 4729.07 and 4729.08 of the Ohio Revised Code to practice pharmacy in the state of Ohio.
2. Eric Schirm is an Ohio-licensed pharmacist under license number 03-225084.

FACTS

1. On or about September 4, 2015, the Board initiated an investigation of Eric Schirm, pharmacist license number 03-225084, related to Eric Schirm’s fraudulent billing of the Ohio Department of Medicaid while employed with Fayette Pharmacy.
2. On or about March 17, 2017 the Board sent a Notice of Opportunity for Hearing to Eric Schirm, which outlined the allegations and provided notice of his right to a hearing, his rights in such hearing, and his right to submit contentions in writing.

3. On or about April 21, 2017, Eric Schirm timely requested an administrative hearing, which was subsequently scheduled for October 2, 2018, after multiple continuances.

WHEREFORE, the parties desire to resolve the issues relating to the above-referenced findings without resorting to further administrative or judicial proceedings.

TERMS

NOW THEREFORE, in consideration of the mutual promises herein expressed, the parties knowingly and voluntarily agree as follows:

1. The recitals set forth above are incorporated in this Settlement Agreement as though fully set forth herein.
2. Eric Schirm neither admits nor denies the allegations stated in the Notice of Opportunity for hearing letter dated March 17, 2017; however, the Board has evidence sufficient to sustain the allegations, finds them to violate Ohio's pharmacy law as set forth in the Notice, and hereby adjudicates the same.
3. Eric Schirm's license to practice pharmacy in the State of Ohio will be placed on probation from the date of this Agreement until one year after the date he is removed from the Office of the Inspector General (OIG), U.S. Department of Health and Human Services' (HHS) Exclusion Program. Conditions of Eric Schirm's probation include:
 - j. The State of Ohio Board of Pharmacy hereby declares that Eric Schirm's pharmacist license is not in good standing and thereby denies the privilege of being a preceptor and training pharmacy interns pursuant to paragraph (D)(1) of Rule 4729-3-01 of the Ohio Administrative Code.
 - k. Eric Schirm may not serve as a responsible pharmacist.
 - l. Eric Schirm may not destroy, assist in, or witness the destruction of controlled substances.
 - m. Eric Schirm may not work in a pharmacy more than 40 hours per week or 80 hours over a two-week period.
 - n. Eric Schirm must not violate the drug laws of Ohio, any other state, or the federal government.
 - o. Eric Schirm must abide by the rules of the State of Ohio Board of Pharmacy.
 - p. Eric Schirm must comply with the terms of this Order.
 - q. Eric Schirm's license is deemed not in good standing until successful completion of the probationary period.

- r. Eric Schirm agrees to provide the Board with all paperwork related to his removal from the OIG-HHS Exclusion Program no later than three months from his removal; the Board will schedule termination of Eric Schirm's probation one year from the date of the removal.
4. Eric Schirm, while on probation, must appear before the full Board or the Board's Probation Committee upon request.
5. Erick Schirm understands the violation of any term of probation may result in additional action before the Board up to and including revocation of his pharmacy license.
6. Eric Schirm understands any violation of Chapters 2925., 3715., 3719., 3796., 4729., or 4752. of the Ohio Revised Code, any administrative code violation or a violation of any other state or federal law will be considered a violation of this Agreement resulting in a hearing before the Board and may also result in criminal and/or administrative charges.
7. Eric Schirm understands a failure to complete or abide by the terms set forth in this Board's Order will result in the Board issuing a notice of opportunity for hearing to consider additional disciplinary action, including and up to revocation of Eric Schirm's license.
8. Eric Schirm agrees to pay all reasonable costs associated with the collection of any payment, and of the prosecution of any violation of this Agreement.
9. Eric Schirm understands that he has the right to be represented by counsel for review and execution of this agreement.
10. Eric Schirm agrees and acknowledges that this Board disciplinary action must be disclosed to the proper licensing authority of any state or jurisdiction in which he currently holds a professional license, including to the Board on renewal applications or applications for a new license.
11. Eric Schirm waives an opportunity to be heard pursuant to Chapter 119. of the Ohio Revised Code and specifically withdraws his request for a hearing in this matter and waives any right to an appeal.
12. This Agreement may be executed in counterparts or facsimiles, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.
13. All parties to this Agreement understand that this document is a public record pursuant to Ohio Revised Code Section 149.43.
14. This Agreement contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies the terms of this Agreement.

15. This Agreement shall become effective upon the date of the Board President's signature below.
-

R-2019-111 Mr. Weaver announced the following Settlement Agreement has been signed by all parties and is now effective:

**IN THE MATTER OF:
Case No. 2018-1405**

Jasmin Lyons
Registration No. 09-307982
3290 Warrensville Center Road, Apt. 211
Shaker Hts., OH 44122

SETTLEMENT AGREEMENT WITH THE STATE OF OHIO BOARD OF PHARMACY

This Settlement Agreement (Agreement) is entered into by the State of Ohio Board of Pharmacy (Board) and Jasmin Lyons, for the purpose of resolving all issues between the parties relating to the Board investigation of a prior theft from a former employer. Together, the Board and Jasmin Lyons are referred to hereinafter as "the parties."

JURISDICTION

1. Pursuant to Section 4729.96 of the Ohio Revised Code and the rules adopted thereunder, the Board has the authority to suspend, revoke, or refuse to grant or renew any license issued pursuant to Sections 4729.90 or 4729.92 of the Ohio Revised Code to practice as a pharmacy technician in the state of Ohio.
2. On or about March 13, 2018, Jasmin Lyons submitted an application for registration as a certified pharmacy technician.

FACTS

1. On or about April 25, 2018, the Board initiated an investigation of Jasmin Lyons, pending certified pharmacy technician registration number 09-30798, related to Jasmin Lyons prior theft from a former employer.
2. On or about September 6, 2018 the Board sent a Notice of Opportunity for Hearing to Jasmin Lyons, which outlined the allegations and provided notice of her right to a hearing, her rights in such hearing, and her right to submit contentions in writing.

3. On or about September 18, 2018, Jasmin Lyons timely requested an administrative hearing, which was subsequently scheduled for November 27, 2018.

WHEREFORE, the parties desire to resolve the issues relating to the above-referenced findings without resorting to further administrative or judicial proceedings.

TERMS

NOW THEREFORE, in consideration of the mutual promises herein expressed, the parties knowingly and voluntarily agree as follows:

1. The recitals set forth above are incorporated in this Settlement Agreement as though fully set forth herein.
2. Jasmin Lyons neither admits nor denies the allegations stated in the Notice of Opportunity for hearing letter dated September 18, 2018; however, the Board has evidence sufficient to sustain the allegations, finds them to violate Ohio's pharmacy law as set forth in the Notice, and hereby adjudicates the same.
3. The Board agrees to issue Jasmin Lyons' certified pharmacy technician registration. Jasmin Lyons agrees she may not work in any facility that contains or possesses controlled substances without first appearing before the Board and receiving approval.
4. Jasmin Lyons agrees to pay all reasonable costs associated with the collection of any payment, and of the prosecution of any violation of this Agreement.
5. Jasmin Lyons understands that she has the right to be represented by counsel for review and execution of this agreement.
6. Jasmin Lyons agrees and acknowledges that this Board disciplinary action must be disclosed to the proper licensing authority of any state or jurisdiction in which she currently holds a professional license, including to the Board on renewal applications or applications for a new license.
7. Jasmin Lyons waives an opportunity to be heard pursuant to Chapter 119. of the Ohio Revised Code and specifically withdraws her request for a hearing in this matter and waives any right to an appeal.
8. This Agreement may be executed in counterparts or facsimiles, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.
9. All parties to this Agreement understand that this document is a public record pursuant to Ohio Revised Code Section 149.43.
10. This Agreement contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies the terms of this Agreement.

11. This Agreement shall become effective upon the date of the Board President's signature below.
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R-2019-112 Mr. Weaver announced the following Settlement Agreement has been signed by all parties and is now effective:

**IN THE MATTER OF:
Case No. 2018-2564-A**

**The Medicine Shoppe
License No. 02-0735050**
c/o Stephen Routzahn, R.Ph.
345 N. Sandusky Avenue
Bucyrus, OH 44820

SETTLEMENT AGREEMENT WITH THE STATE OF OHIO BOARD OF PHARMACY

This Settlement Agreement (Agreement) is entered into by the State of Ohio Board of Pharmacy (Board) and The Medicine Shoppe, for the purpose of resolving all issues between the parties relating to the Board investigation of errors in dispensing at the Medicine Shoppe. Together, the Board and The Medicine Shoppe are referred to hereinafter as "the parties."

JURISDICTION

1. Pursuant to Section 4729.57 of the Ohio Revised Code and the rules adopted thereunder, the Board has the authority to suspend, revoke, or refuse to grant or renew any license issued pursuant to Section 4729.54 of the Ohio Revised Code.
2. The Medicine Shoppe is a licensed Terminal Distributor of Dangerous Drugs under license number 02-0735050.

FACTS

1. On or about October of 2017, the Board initiated an investigation of The Medicine Shoppe, Terminal Distributor of Dangerous Drugs license number 02-0735050, related to The Medicine Shoppe's errors in dispensing.
2. On or about November 26, 2018, the Board sent a Notice of Opportunity for Hearing to The Medicine Shoppe, which outlined the allegations and provided notice of its right to a hearing, its rights in such hearing, and its right to submit contentions in writing.

WHEREFORE, the parties desire to resolve the issues relating to the above-referenced findings without resorting to further administrative or judicial proceedings.

TERMS

NOW THEREFORE, in consideration of the mutual promises herein expressed, the parties knowingly and voluntarily agree as follows:

1. The recitals set forth above are incorporated in this Settlement Agreement as though fully set forth herein.
2. The Medicine Shoppe neither admits nor denies the allegations stated in the Notice of Opportunity for Hearing letter dated November 26, 2018, however, the Board has evidence sufficient to sustain the allegations, finds them to violate Ohio's pharmacy law as set forth in the Notice, and hereby adjudicates the same.
3. The Medicine Shoppe agrees to pay to the Board a monetary penalty the amount of \$2,000.00. This fine will be attached to your license record and must be paid no later than 30 days from the effective date of this Order. To pay this fine you must login to www.elicense.ohio.gov and process the items in your cart.
4. The Board issues a verbal reprimand to The Medicine Shoppe.
5. The Medicine Shoppe agrees and acknowledges that this Board disciplinary action must be disclosed to the proper licensing authority of any state or jurisdiction, as required by any such state or jurisdiction, in which it currently holds a professional license, including the Board on renewal applications or applications for a new license.
6. The Medicine Shoppe agrees to comply with all federal and state requirements related to Terminal Distributors of Dangerous Drugs, including but not limited to, Ohio Revised Code Chapter 4729. and the Rules adopted thereunder, Chapter 3719. and the Rules adopted thereunder, Chapter 3715. and the Rules adopted thereunder as well as the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301 and Chapter 21, Section 360 of the United States Code, and Section 207.20 of the Code of Federal Regulations. Any violation by The Medicine Shoppe of the terms of one or more federal or state requirements may constitute sufficient grounds for further enforcement action related to any licenses granted to The Medicine Shoppe by the Board and will NOT discharge The Medicine Shoppe from any obligation under the terms of this Agreement.
7. The Medicine Shoppe agrees to pay all reasonable costs associated with the collection of any payment, and of the prosecution of any violation of this Agreement.
8. The Medicine Shoppe understands that it has the right to be represented by counsel for review and execution of this agreement.
9. This Agreement is binding upon any and all successors, assigns, affiliates, and subsidiaries of the parties or any other corporation through whom or with whom The Medicine Shoppe will operate.

10. The Medicine Shoppe waives its right to a hearing and an opportunity to be heard pursuant to Chapter 119. of the Ohio Revised Code and waives any right to an appeal.
 11. This Agreement may be executed in counterparts or facsimiles, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.
 12. All parties to this Agreement understand that this document is a public record pursuant to Ohio Revised Code Section 149.43.
 13. This Agreement contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies the terms of this Agreement.
 14. This Agreement shall become effective upon the date of the Board President's signature below.
-

3:39 p.m. Mr. Wilt moved that the Board go into Executive Session to consider the investigation of charges or complaints against a licensee, confer with Board counsel regarding a pending or imminent court action and to discuss matters required to be confidential by law pursuant to Section 121.22(G)(1), (3) & (5) of the Ohio Revised Code. The motion was seconded by Mr. Passafume and a roll-call vote was conducted by President Weaver as follows: Marchal-yes; Miller-yes; Newlon-yes; Passafume-yes; Rudell-yes; Wilt-yes; and Yarosh-yes.

4:50 p.m. The recess ended, and the hearing was opened to the public.

R-2019-113 After votes were taken in public session, the Board adopted the following order in the matter of **Pure Ohio Wellness**.

ORDER OF THE STATE OF OHIO BOARD OF PHARMACY
CONFIRMING AND APPROVING
REPORT & RECOMMENDATION OF HEARING EXAMINER
(Case Number 2018-M570)

In The Matter Of Pure Ohio Wellness, LLC:
6983 Gale Rd. S.W.
Hebron, OH 43025
Account No./Application No.: 270-570
Application District: Southwest-7
Application Dispensary Address: 920 U.S. 42 West London, OH

INTRODUCTION

The Matter of Pure Ohio Wellness, LLC (Pure Ohio) came for a paper hearing by joint agreement of the parties before Hearing Examiner Greg Trout, and for consideration by the State of Ohio Board of Pharmacy (Board) on December 12, 2019, before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Megan E. Marchal, RPh; Donald R. Miller, RPh; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh; Richard J. Newlon, *public member*; and Kilee S. Yarosh, RPh.

Respondent was represented by Gordon P. Shuler. The State of Ohio was represented by Henry G. Appel, Assistant Attorney General.

BOARD REVIEW OF THE RECORD

Prior to making its decision, the Board reviewed the entire administrative record in this matter, consisting of the following items:

- 1) Notice of Opportunity of Hearing with Attachments (Pure Ohio's Score Card and Overall Scorecard of all applicants), attached hereto as Exhibit A;
- 2) Stipulation of Facts filed October 9, 2018, which included the following Exhibits:
 1. State of Ohio Board of Pharmacy Dispensary Districts
 2. Ohio Medical Marijuana Control Program Dispensary Application Instructions
 3. Notice of Opportunity for Hearing with attachments
 4. Economically Disadvantaged Group (EDG) List
 5. Harvest of Ohio LLC Application ID 934 (*Note: missing exhibit sticker, marked as pages 1-36)
 6. Cannamed Therapeutics LLC Application ID 345
 7. Green Rx, LLC Application ID 642
 8. Quest Wellness Ohio II LLC Application ID 1011
- 3) Also filed on October 19, 2018, Supplemental Stipulations of Facts marked as Exhibit 9:
 9. Medical Marijuana Dispensary Licensing Report
- 4) Pure Ohio's Closing Argument, filed October 12, 2018;
- 5) The State's written Closing, filed October 15, 2018;
- 6) Pure Ohio's Written Reply to the State's Closing, filed October 19, 2018;
- 7) The State's Written Reply to Pure Ohio's Closing, filed October 19, 2018;
- 8) Hearing Examiner Trout's Report and Recommendation, filed November 15, 2018;
- 9) The State's Motion to Correct the Report and Recommendation, filed November 26, 2018;
- 10) Hearing Examiner Trout's Journal Entry Amendment to the Report and Recommendation, filed November 27, 2018;
- 11) Pure Ohio's Written Objections to the Report and Recommendation, filed December 7, 2018;
- 12) The State's Response to Pure Ohio's written objections, received by the Board on December 7, 2018, filed December 10, 2018.

DECISION OF THE BOARD

After thorough review of all documents related to the case, the Board hereby adopts in its entirety Hearing Examiner Trout's Report and Recommendation, attached hereto and incorporated as though fully set forth herein as Exhibit B, as it relates to the Board's June 29, 2018 Notice of Opportunity of Hearing to Pure Ohio, including the Findings of Fact and Conclusions of Law.

The Board specifically adopts the Conclusions as set forth by Hearing Examiner Trout indicating that Pure Ohio's high-scoring application in Southwest District 7 was denied by the State in compliance with the mandatory set-aside provision as set forth in Revised Code 3796.10(C). In accordance with *Danis Clarkco v. Clark County* (1995), 73 Ohio St.3d 590, the Board finds Pure Ohio LLC has not demonstrated fraud, bad faith, or an unreasonable or unconscionable attitude in the State's conduct of the Provisional Dispensary license award process with respect to the allocation of Economically Disadvantaged Groups (EDG), nor has any other legal basis been demonstrated to set aside the Board's initial denial of a Provisional Dispensary Licenses (PDL) to Pure Ohio.

The Board confirms and approves the Report and Recommendation of Hearing Examiner Trout, affirming the Board's license award process, which includes a denial of a PDL to Pure Ohio.

Mr. Wilt moved to confirm and approve the Report and Recommendation of Hearing Examiner Trout; Mr. Newlon seconded the motion. Motion passed (Aye-7/Nay-0).

SO ORDERED.

R-2019-114 After votes were taken in public session, the Board adopted the following order in the matter of **Buckeye Relief, LLC**, Case Number 2018-M133.

ORDER OF THE STATE BOARD OF PHARMACY
APPROVING IN PART, MODIFYING IN PART, & DISAPPROVING IN PART
THE REPORT & RECOMMENDATION OF HEARING EXAMINER
(Case Number 2018-M133)

In The Matter Of Applicant:
BUCKEYE RELIEF, LLC
40 East Washington Street, Suite 1
Chagrin Falls, OH 44022
Account No./Application No.: 406-133
Application District: Northeast-2
Application Dispensary Address: 1782 Coventry Road, Cleveland Heights, OH 44118

INTRODUCTION

The Matter of Buckeye Relief, LLC came for hearing before Hearing Examiner Kristin Rosan on Thursday, September 6, 2018 and Friday, September 7, 2018, and for consideration by the Board on **December 12, 2018** before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Richard Newlon, *public member*; Megan E. Marchal, RPh; Dennis R. Miller, RPh; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh; and Kilee S. Yarosh, RPh.

BOARD REVIEW OF THE RECORD

Prior to making its decision, the Board reviewed the entire administrative record in this matter, consisting of the following items:

- 1) Notice of Opportunity of Hearing for Application ID 133, marked by the Board as Exhibit I;
- 2) Applicant's Scorecard for Application ID 133, marked by the Board as Exhibit II;
- 3) Full List of Application Scores by District, marked by the Board as Exhibit III;
- 4) Transcript of September 6-7, 2018 proceedings, marked by the Board as Exhibit IV;
- 5) Oral statements presented by the State and Applicant to the Board on December 12, 2018;
- 6) The following additional filings in the administrative case record:
 - September 5, 2018, pre-hearing brief of the State, marked by the Board as Exhibit V;
 - September 5, 2018, opposition to the State's Pre-hearing Brief filed by Applicant, marked by the Board as Exhibit VI;
 - September 18, 2018, motion for extension of time to submit closing brief filed by the State, marked by the Board as Exhibit VII;
 - September 18, 2018, order granting extension of time to submit closing briefs, marked by the Board as Exhibit VIII;
 - September 28, 2018, closing brief of the State, marked by the Board as Exhibit IX;
 - September 28, 2018, closing brief of Applicant, marked by the Board as Exhibit X;
 - November 5, 2018, Hearing Examiner's Report & Recommendation for Application ID 133 (Case No. 2018-M133), marked by the Board as Exhibit XI;
 - November 7, 2018, Applicant's Notice of No Objections to Report and Recommendation (Case No. 2018-M133), marked by the Board as Exhibit XII;
 - November 13, 2018, State's request to address the Board, marked by the Board as Exhibit XIII;
 - November 13, 2018, Applicant's request to address the Board, marked by the Board as Exhibit XIV; and
 - November 27, 2018, order granting the parties' requests to address the Board, marked by the Board as Exhibit XV.

- 7) The following Joint Exhibits admitted by the Hearing Examiner:
- Exhibit A-i: Buckeye Relief Application ID 133;
 - Exhibit A-iii: Buckeye Relief Application ID 430;
 - Exhibit A-iv: GTI Ohio, LLC Application ID 493;
 - Exhibit B: June 15, 2018 Notice of Intent to Deny Application for Medical Marijuana Dispensary License for Application ID 133 and Application ID 430;
 - Exhibit C: Buckeye Relief Requests for Hearing for Application ID 133 and Application ID 430;
 - Exhibit D: Buckeye Relief Application Scorecards for Application ID 133 and Application ID 430;
 - Exhibit E-i: State of Ohio Board of Pharmacy Dispensary Districts;
 - Exhibit E-iii: Ohio Medical Marijuana Control Program Dispensary Application Instructions (The “RFA”);
 - Exhibit E-iv: Ohio Medical Marijuana Control Program Dispensary Application FAQs;
 - Exhibit E-v: Ohio Medical Marijuana Control Program Question and Answer Responses 1-257;
 - Exhibit E-vi: Ohio Medical Marijuana Control Program Question and Answer Responses 258-387;
 - Exhibit E-viii: Key Indicators;
 - Exhibit E-ix: Ohio Medical Marijuana Control Program Provisional Dispensary Licenses: Overview & Recommendations;
 - Exhibit E-x: Provisional Dispensary License Application Scores (By district);
 - Exhibit E-xi: Provisional Dispensary License Application Scores (By state);
 - Exhibit E-xii: Medical Marijuana Licensing Report;
 - Exhibit E-xiii: Gartner Consulting Report Dated May 21, 2018;
 - Exhibit E-xiv: Provisional Dispensary License Application Scores (By evaluator);
 - Exhibit F: Ohio Medical Marijuana Control Program – Model Dispensary Application;
 - Exhibit G-i: Buckeye Relief Application ID 133 Scores;
 - Exhibit G-ii: Buckeye Relief Application ID 430 Scores;
 - Exhibit G-iii: GTI Ohio, LLC Application ID 493 Scores; and
 - Exhibit H: Floor plan.
- 8) The following Buckeye Relief Exhibits admitted by the Hearing Examiner:
- Exhibit 1: Buckeye Relief Application Question C-2.1 Score Analysis by Witness Scott Halloran;
 - Exhibit 4: Buckeye Relief Application Question C-4.1 Score Analysis by Witness Scott Halloran;
 - Exhibit 5: Buckeye Relief Application Question C-5.5 Score Analysis by Witness Scott Halloran;
 - Exhibit 17: Buckeye Relief Application Question C-10.2 Score Analysis by Witness Scott Halloran; and
 - Exhibit 24: Buckeye Relief Northeast District 2 Internal Analysis of Question C-5.5 and Impact on Overall Score.

DECISION OF THE BOARD**FINDINGS OF FACT**

Upon an independent review of the testimony and evidence presented, the Board adopts the following "Findings of Fact" contained within the Hearing Examiner's Report & Recommendation:

- Paragraphs 1-82;
- Paragraph 84;
- Paragraph 86; and
- Paragraphs 89-98.

Upon an independent review of the testimony and evidence presented, the Board modifies and/or disapproves the following Findings of Fact contained within the Hearing Examiner's Report & Recommendation, along with the reasons for such modification or disapproval:

Paragraph 83:

The Board disapproves the Finding of Fact that witness Jesse Wimberly lacked knowledge that Applicant's bonds "were able to made liquid in 5 days." The pertinent exchange between counsel and Jesse Wimberly, and cited by the Hearing Examiner in support of the factual finding, provides:

Q. Do you know what a five day put is?

A. No sir.

Q. Do you know for a fact that the \$13 million reflected in the account statement is not accessible to Buckeye Relief within 30 days?

A. Do I know if it's not? No, I don't know.

Q. Did you know at the time you were reviewing this information that it was liquid within five days?

A. No.

Tr. at 153-54. Questions from counsel are not evidence, and the Hearing Examiner improperly treated the question posed to the witness as substantive evidence. Further, the testimony from witness Scott Halloran demonstrates that the liquidity of the bonds referenced in the application is speculative. Mr. Halloran testified to the following:

Q. (By Ms. Moore) We were just about to turn our attention to Section C-5.5. So when I was listening to your testimony this morning, you explained to us there are two types of bonds.

A. I did not explain that.

Q. You did not explain --

A. I never explained there were two types of bonds. There are many types of bonds.

Q. Okay. And the bonds in this case have a five day put; is that correct?

A. I don't know the specific of all the bonds listed, I don't know which ones are three, five, or seven day puts.

Q. But you think that all of these bonds, and that actually is my question. Based solely on reading this document can you tell which of these bonds have a three, five, or seven day put?

A. No.

Tr. at 284. (Emphasis added.)

The Board finds that Applicant did not prove by a preponderance of the evidence that the bonds referenced in the application could be liquidated within five days. The Board further finds as a matter of fact that Applicant's response to Question C-5.5 provided no information that the bonds were "puttable" bonds, including the terms of any "put option" associated with each bond. See Ex. A-i at p. 284-296.

Paragraph 85:

The Board disapproves the Finding of Fact that witness Jesse Wimberly "did not demonstrate an understanding that there are types of bonds that can be held in investment accounts and are immediately liquid just the same as cash." The pertinent exchange between counsel and Jesse Wimberly, and cited by the Hearing Examiner in support, provides:

Q. And so you had no personal knowledge that there are types of bonds that can be held in investment accounts that are immediately liquid just the same as cash?

A. No sir.

Tr. at 154.

As previously stated, questions from counsel are not evidence, and the Hearing examiner improperly treated the question posed to the witness as substantive evidence. Further, the testimony from witness Scott Halloran supports a finding that the bonds at issue, while liquid, cash-like securities, were not "immediately liquid just the same as cash." Mr. Halloran testified to the following:

Q. Can you describe for the record how the particular type of municipal bonds Mr. Rayburn pledged works?

A. Yes. So these bonds that are held in his MAI statement are basically the bonds that underwrite the money market in the United States. So if you have a money market account with a few thousand in it that's earning more than your standard checking or savings account interest, they're all being underwritten by these variable interest rate obligations.

* * *

And these bonds are convertible I believe with either a five or seven day put option, which means that you call your broker, say I'd like to cash in my million-dollar bond, and you'll forfeit five to seven days of interest when you do that, or you can wait until the first day of the following month and cash them in at face value with full interest paid.

So they are convertible at face value in five days or less, and they're always convertible on the first day of every month.

* * *

Q. Is a type of bond pledged here a volatile security?

A. It is not.

Q. Why not?

A. These are the safest six-income type bonds that any investor high net worth or low net worth can purchase. They are, they're meant for short-term liquidity and they're meant to hold their value and they're underwritten. * * * They're the gold standard of liquid bonds. They don't get any better than this if you're looking for, these easily convert them to cash and for them to hold their value.

Tr. at 256-58. Mr. Halloran later explained that Applicant's account "does have lots and lots of municipal bonds or these variable rate set obligations in them. But I believe it also has \$1.6 million in cash. So it was a mixture of cash and bonds." Tr. at 259.

The Board makes a finding of fact that the bonds at issue, while not "immediately liquid just the same as cash," are liquid, cash-like securities, as referenced in the "Unconditional Pledge of Liquid Assets" by Andrew K. Rayburn. See Ex. A-i at p. 285.

Paragraph 87:

The Board modifies the Hearing Examiner's Finding of Fact that witness Jesse Wimberly "could not explain the scoring discrepancies between Applicant's application for Cleveland Heights (#133) and Bedford (#430) and GTI (#493)." The Board supplements this finding of fact with the following language: "Jesse Wimberly could not explain the scoring discrepancies because several evaluators scored each application, the scores of each evaluator were not known to the other evaluators, and the evaluators' scores were averaged." See Tr. at 161-164.

Paragraph 88:

The Board disapproves the Hearing Examiner's Finding of Fact that witness Jesse Wimberly "was not competent to score question C-5.5 of Applicant's application." Upon an independent review of the testimony and evidence, the Board finds Jesse Wimberly was competent to evaluate and score question C-5.5.

Mr. Wimberly testified to the overall training he received as an evaluator (See e.g., Tr. at 46-48; 53-55; 147; 149), the development of key indicators and use of key indicators (See e.g., Tr. at 48-52; 92-96), and the process by which he evaluated and scored questions, to include consulting subject-matter experts prior to scoring. See e.g., Tr. p. 51-61. While Mr. Wimberly was not familiar with specific terms such as "demand obligations," "bond markets," or "five day put[s]," (Tr. at 153-154), Mr. Wimberly testified that he took into consideration Applicant's unconditional pledge of approximately \$12 million in cash-like securities and associated financial statements as true and accurate statements. Tr. at 155. Further, as previously noted, the Board finds Applicant provided no information that the bonds were "puttable" bonds, including the terms of any "put option" associated with each bond. See Ex. A-i at p. 284-296. Mr. Wimberly also testified that Applicant's unconditional pledge and associated financial statements exceeded the \$250,000 capital requirement in Question C-5.5. Tr. at 158-159. Finally, Mr. Wimberly testified he had at

least one subject matter expert available to answer questions during the evaluation and scoring of Question C-5.5. See e.g., Tr. at 115-116.

CONCLUSIONS OF LAW

Upon an independent review of the testimony and evidence, the Board adopts the following "Conclusions of Law" contained within the Hearing Examiner's Report & Recommendation:

- Paragraphs 99-107;
- Paragraphs 109-111;
- Paragraphs 113-114;
- Paragraphs 116-117;
- Paragraph 119;
- Paragraph 127; and
- Paragraphs 131-134.

Upon an independent review of the testimony and evidence presented, the Board modifies and/or disapproves the following "Conclusions of Law" contained within the Hearing Examiner's Report & Recommendation, along with the reason(s) for such modification or disapproval:

Paragraph 108:

The Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. The appropriate standard of proof in administrative cases is a preponderance of the evidence. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81, 697 N.E.2d 655 (1998); see also *Ohio State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25, 27, 514 N.E.2d 1143 (C.P.1987); *Buckeye Bar, Inc. v. Liquor Control Comm.*, 32 Ohio App.2d 89, 91, 288 N.E.2d 318 (10th Dist.1972). Preponderance of the evidence means "more likely than not." Here, the Hearing Examiner improperly applied the standard of review upon appeal of an agency's order to a court of common pleas. See R.C. 119.12(M) ("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."); see also *Burneson v. Ohio State Racing Comm'n*, 10th Dist. Franklin No. 03AP-925, 2004-Ohio-3313, ¶ 6.

The Hearing Examiner correctly provided that "a government agency is bound to adhere to...[the] conditions and provisions it had itself set forth in the RFP." *Report & Recommendation* at ¶ 101, citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 603, 653 N.E.2d 646 (1995). The Hearing Examiner also stated correctly that "a disappointed bidder (or applicant) must show the agency either committed fraud or abused its discretion in awarding funding (or, in this case, a license) elsewhere." *Report & Recommendation* at ¶ 102, citing *Danis Clarkco Landfill Co.* at 605. To establish an abuse of discretion, the Hearing Examiner correctly noted, "the supposedly aggrieved party must demonstrate that the government agency acted in

bad faith, or with an unreasonable, arbitrary, or unconscionable attitude.” *Report & Recommendation* at ¶ 103, citing *Danis Clarkco Landfill Co.* at 605.

Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable.

Applying the appropriate standard of proof, the Board agrees with the Hearing Examiner’s conclusion that “[t]he evidence demonstrates Applicant scored above baseline on each question it challenged.” The Board concludes that Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude in the development and use of “key indicators” to assist in evaluating and scoring applications. The record reflects that the key indicators were developed as guidelines to assist evaluators in applying the criteria set forth in the request for applications, to include the Ohio Revised Code, the Ohio Administrative Code, and the scoring criteria. Tr. at 48-52.

Paragraph 112:

As detailed above, the Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable in the scoring of Question C-2.1.

Applying the appropriate standard of proof, the Board concludes that Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude, in the scoring of Question C-2.1.

Paragraph 115:

As detailed above, the Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable in the scoring of Question C-4.1.

Applying the appropriate standard of proof, the Board concludes that Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude, in the scoring of Question C-4.1.

Paragraph 118:

The Board disapproves the following Conclusion of Law: “As such Applicant was precluded from including any additional detail or descriptions that would have aided evaluators that were unfamiliar with the liquidity of bonds.” Exhibit E-iii consists of the *Ohio Medical Marijuana Control Program Dispensary Application Instructions. Section VI(B). Completing Applications* details the format each section of the application was to be completed. Question C-5.5 instructs the applicant that an attachment is mandatory; however, there is no “written response limit” (i.e., character limit), so long as the attachment does not exceed ten megabytes. Ex. E-iii, p. 20-21.

Question C-5.5 required the following:

C-5.5 Illustrate that the Applicant has adequate liquid assets to cover all expenses and costs for the first year of operation as indicated in the dispensary's proposed Business Startup Plan (Question C-3). The total amount of liquid assets must be no less than \$250,000. Provide **unredacted** documentation from the Applicant's financial institution to support these capital requirements. (ORC 3796:6-2-02). Ex. A-i at p. 284.

In answering to Question C-5.5, Applicant provided (1) an Unconditional Pledge of Liquid Assets of Andrew K. Rayburn, CEO of Buckeye Relief, LLC, which was one page in length; (2) seven pages of financial statements from Applicant's financial institution; and (3) four pages of financial tables which were subdivided into the following tables: "Available Capital," "Anticipated Capital Expenditures," "Monthly Operating Expenses After Dispensary is Operational," "Net Income (Loss) From Operations for First Three Years of Operation," "Cash Flow for First Three Years of Operation," "Net Income (Loss) From Operations for First Three Years of Operation (No Revenue for One Year Scenario)," and "Cash Flow for First Three Years of Operation (No Revenue for One Year Scenario)." Ex. A-i at p. 285-296.

However, other than the limit of ten megabytes, the Board concludes Applicant had the opportunity to include any additional detail or descriptions related to the liquidity of bonds. Witness Scott Halloran conceded as much on cross examination:

Q. Do you agree, sir, that to make it more clear that Buckeye Relief could have said these have a three day or five day pull [sic], a seven day pull [sic]?

A. There's no space in the application to write that. That was covered by the pledge.

Q. But my question, sir, is do you agree that it would have been more clear even in this pledge, because the pledge is a three-paragraph statement, four if you count the "I further certify" language. Do you agree, sir, that as a matter of clarity he could have put that in there?

A. Yes, he could have.

Tr. at 286.

Paragraph 120:

The Board disapproves the Conclusion of Law that "[t]he Board was not able to explain the scoring discrepancy between Applicant's Cleveland Heights application, at issue here, and its Bedford application (#430), even though Applicant submitted the identical financial information in response to [Q]uestion C-5.5."

The evidence demonstrates the parties stipulated that Applicant submitted identical responses to Question C-5.5 in Application #133 and Application #430. Tr. at 85; 98. The same seven evaluators individually scored each question, and their scores were averaged. See Ex. E-xiv at p. 855; p. 862; Tr. at 161. Applicant received a score of 7.85714 in Application #133 and a score of 8.00 in Application #430. Tr. at 97. When confronted about the discrepancy in scores of Question C-5.5., Mr. Wimberly could not explain why the average scores for each application differed, because he

was one of seven evaluators whose individual scores were averaged. Mr. Wimberly could not “speak for other scorers” as he was “not involved in how they scored.” Tr. at 162.

The Board concludes Applicant did not carry its burden in showing the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude in the scoring of Question C-5.5. While the record demonstrates Applicant submitted identical responses to Question C-5.5 in application #133 and application #430, but received a score of 7.85714 in application #133 and a score of 8.00 in application #430, these facts are not dispositive evidence of an “abuse of discretion.” For example, the disparity in scores could have resulted from a simple error in judgment or honest mistake from an evaluator tasked with evaluating and scoring hundreds of applications. *See* Ex. E-xiv (a 1,209-page document showing the scores of each evaluator for all applications).

The meaning of the term “abuse of discretion” connotes more than an error of judgment. *EOP-BP Tower, L.L.C. v. Cuyahoga County Bd. Of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096, 829 N.E.2d 686, ¶ 15; *State ex rel. Shafer v. Ohio Turnpike Com.*, 159 Ohio St. 581, 591, 113 N.E.2d 14 (1953); *Aetna Better Health, Inc. v. Colbert*, 10th Dist. Franklin No. 12AP-720, 2012-Ohio-6206, ¶ 21. The exercise of an honest judgment, however erroneous it may seem to be, is not an abuse of discretion. *State ex rel. Shafter* at 590-91; *City of Cleveland ex rel. Industrial Pollution Control*, 8th Dist. Cuyahoga No. 49446, 49495, 49777, 1985 Ohio App. LEXIS 9570, *5 (Nov. 27, 1985). The term “abuse of discretion” implies “perversity of will, passion, prejudice, partiality, or moral delinquency.” *State ex rel. Shafer* at 590-91. “Error of judgment does not invalidate discretion, exercised in good faith.” *Id.* at 593.

Here, Applicant failed to establish by a preponderance of the evidence any bad faith or that the scoring discrepancies in Question C-5.5 were motivated by any unreasonable, improper, or arbitrary consideration of the evaluators. Conversely, Mr. Wimberly testified that the scoring criteria included in the request for applications was intended to promote uniformed and consistent scoring across applications. Tr. at 110-112. Mr. Wimberly testified at length about the training the evaluators received (*See e.g.*, Tr. at 46-48; 53-55; 147; 149), the development and use key indicators to assist in applying the criteria set forth in the request for applications (*See e.g.*, Tr. at 48-52; 92-96), and the ability of evaluators to seek clarification from subject-matter experts during the evaluation and scoring of applications. *See e.g.*, Tr. at 52-61; 115-116.

The Board also disapproves the Conclusion of Law that “[t]he Board also was unable to explain the discrepancy between Applicant’s score and GTI’s higher score, with the latter demonstrating One Million Dollars less financial commitment per license.” The evidence and testimony demonstrates the differences between GTI’s and Applicant’s applications that could reasonably justify a difference in scores. *Compare* Ex. A-iv at p. 294-307 *with* Ex. A-i at 284-296 and Ex. A-iii at p. 272-284; *see also* Tr. at 94-105; 172-175 (explaining differences between GTI’s application with Applicant’s applications).

Paragraphs 121, 122, 123, and 124:

The Board disapproves the Conclusion of Law that “Mr. Wimberly did not know at the time that he was evaluating the application that Applicant’s bonds were able to be made liquid within 5 days.” As previously stated, questions from counsel are not evidence, and the Hearing Examiner improperly treated the following question posed to the witness as substantive evidence:

Q. Do you know what a five day put is?

A. No, sir.

Q. Do you know for a fact that the \$13 million reflected in the account statement is not accessible to Buckeye Relief within 30 days?

A. Do I know if it's not? No, I don't know.

Q. Did you know at the time you were reviewing this information that it was liquid within five days?

A. No.

Tr. 153-54. (Emphasis added.) Further, the testimony from witness Scott Halloran demonstrates that the liquidity of the bonds referenced in the application is speculative. Mr. Halloran testified to the following on direct examination:

Q. Do you have experience with the type of securities Mr. Rayburn pledged?

A. I'm very familiar with them. I'm not a CPA but I know about municipal bonds.

Q. Can you describe for the record how the particular type of municipal bonds Mr. Rayburn pledged works?

A. Yes. So these bonds that are held in his MAI statement are basically the bonds that underwrite the money market in the United States. So if you have a money market account with a few thousand in it that's earning more than your standard checking or savings account interest, they're all being underwritten by these variable interest rate obligations.

So because Andy is a high net worth individual, he has access to the direct underlying bonds as opposed to just putting it into a money market fund.

And these bonds are convertible I believe with either a five or seven day put option, which means that you call your broker, say I'd like to cash in my million-dollar bond, and you'll forfeit five to seven days of interest when you do that, or you can wait until the first day of the following month and cash them in at face value with full interest paid.

So they are convertible at face value in five days or less, and they're always convertible on the first day of every month. These were simply held as a way of we didn't know if Pharmacy Board was going to take three months or a year to score the application.

Mr. Rayburn is a very savvy financial individual, wanted to make sure if he was going to be setting aside this kind of cash that he was generating the highest interest rate without putting money in an illiquid state or at risk.

Tr. at 256-257. (Emphasis added.) However, on cross-examination, Mr. Halloran testified to the following:

Q. (By Ms. Moore) We were just about to turn our attention to Section C-5.5. So when I was listening to your testimony this morning, you explained to us there are two types of bonds.

A. I did not explain that.

Q. You did not explain --

A. I never explained there were two types of bonds. There are many types of bonds.

Q. Okay. And the bonds in this case have a five day put; is that correct?

A. I don't know the specific of all the bonds listed, I don't know which ones are three, five, or seven day puts.

Q. But you think that all of these bonds, and that actually is my question. Based solely on reading this document can you tell which of these bonds have a three, five, or seven day put?

A. No.

Tr. at 284. (Emphasis added.)

The Board also disapproves Conclusion of Law No. 123 that “[t]he winning bid is often the one in which the evaluators make the fewest mistakes.” This Conclusion of Law is not supported by any testimony or any evidence presented at the hearing.

Further, this Conclusion of Law does not support the proposition that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude. Differences of interpretation, or even simple mistakes, are not an abuse of discretion. *Aetna Better Health, Inc.*, 2012-Ohio-6206, ¶ 31, citing *State ex rel. Shafer*, 159 Ohio St. at 590-91, 113 N.E.2d 14. Abuse of discretion implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *State ex rel. Shafer* at 50-91; *Swallow v. Industrial Comm’n of Ohio*, 36 Ohio St.3d 55, 57, 521 N.E.2d 778 (1988); *State ex rel. Brady v. Industrial Comm’n of Ohio*, 28 Ohio St.3d 241, 242, 503 N.E.2d 173 (1986). The exercise of an honest judgment, however erroneous it may seem to be, is not an abuse of discretion. *Shafter* at 590-91 (citations omitted.); *MCI Telecoms. Corp. v. Board of Franklin County Comm’rs*, 127 Ohio App.3d 127, 136, 711 N.E.2d 1050 (10th Dist.1998).

Here, Applicant failed to establish by a preponderance of the evidence any bad faith or abuse of discretion on the part of the Board as opposed to a mistake or the exercise of poor judgment.

Paragraph 125 and 126:

The Board disapproves the Conclusions of Law that “[t]he evidence propounded at the hearing leads a reasonable finder of fact to conclude that the three evaluators who scored [Question] C-5.5 a six out of ten did so because they did not understand the nature of a puttable bond. This lack of understanding as to the bond markets presents the only reasonable explanation for why some evaluators scored nine and ten on Question C-5.5, and three evaluators rendered a score of six.”

The Board is permitted to independently review the evidence, to make its own findings, and draw its own conclusions from the evidence. *Trout v. Ohio Dep’t of Educ.*, 10th Dist. Franklin No. 02AP-783, 2003-Ohio-987, ¶ 17, citing *In re Certificate of Need Application of Providence Hosp*, 67 Ohio App.3d 391, 398, 587 N.E.2d 326 (10th Dist.1990). Upon an independent review of the record, the Board finds this Conclusion of Law to be unsupported by the evidence.

Only one evaluator of Question C-5.5—Jesse Wimberly—testified during the hearing. The hearing examiner concluded that Jesse Wimberly was unfamiliar with bonds, bond markets, demand obligations, and puttable bonds. Importantly, however, Mr. Wimberly testified he could not “speak for other scorers” as he was “not involved in how they scored.” Tr. at 161-164.

The record indicates that several evaluators had a financial background, were accountants, or were otherwise experts in finance. Tr. at 57; 115-116. However, the record lacks evidence of the qualifications and/or professional backgrounds of the evaluators, or the scores each evaluator assigned to Question C-5.5. Except for Jesse Wimberly, the record lacks evidence of any evaluator's understanding of bonds, bond markets, demand obligations, or puttable bonds. The Board concludes there is insufficient evidence that these other evaluators possessed a lack of understanding of puttable bonds, and then used that lack of understanding to score Question C-5.5 a six. The Board also disapproves the conclusion that "[the lack of understanding as to the bond market] is also the only reasonable explanation of why GTI (whose bank statements showed cash) achieved nearly a point higher average score, while making a lower financial commitment per license than Applicant." The evidence and testimony demonstrates the differences between GTI's and Applicant's applications that could reasonably justify a difference in scores. *Compare* Ex. A-iv at p. 294-307 *with* Ex. A-i at 284-296 and Ex. A-iii at p. 272-284; *see also* Tr. at 94-105; 172-175 (explaining differences between GTI's application with Applicant's applications).

Paragraphs 128, 129, and 130:

The Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable in the scoring of Question C-5.5.

The Board disapproves the Conclusion of Law that Applicant "should have [received] a nine or ten on [Question] C-5.5." The Hearing Examiner determined Applicant should receive a score of nine or ten because it "exceeded all requirements," and accordingly, should "have finished at least second in the NE-2 district."

However, the issue of which application has the "best bid" is not susceptible to definition, and in such cases the matter is left to the discretion of the individuals evaluating and scoring the applications. *See MCI Telecoms. Corp.*, 127 Ohio App.3d at 140, 711 N.E.2d 1050. What is required is that the Board deal in good faith with bidders and comply with the terms of the request for applications. *Danis Clarkco Landfill Co.*, 73 Ohio St.3d at 596, 653 N.E.2d 646.

Upon review, the record contains ample evidence to establish that the Board undertook to perform its duties honestly and efficiently. The Board retained a consulting firm, North Highland, to assist in developing a fair and unbiased request for application process. Tr. at 36-37. North Highland was selected due to their procurement experience in the medical marijuana industry in other states. *Id.* North Highland worked collaboratively with the Board to develop a model application and associated materials. Tr. at 37. The evaluators hired by the Board received extensive training prior to evaluating and scoring applications. *See e.g.*, Tr. at 46-48; 53-55; 147; 149. The evaluators then reviewed and scored applications in accordance with the Ohio Revised Code, the Ohio Administrative Code, and the scoring criteria included in the request for applications. Tr. at 48-52. The evaluators, in conjunction with North Highland, also developed key indicators to assist in applying the criteria set forth in the request for applications. Tr. at 48-49. That evaluators may have had differences of interpretation in the scoring criteria and key indicators, or possessed differences of opinion, or even if an evaluator made a mistake when scoring Question C-5.5, is not an abuse of discretion. *See Aetna Better Health, Inc.*, 2012-Ohio-

6206, at ¶ 31, citing *State ex rel. Shafer*, 159 Ohio St. at 590-91, 113 N.E.2d 14. There is no evidence that the evaluators were predisposed to reject Applicant's application or acted in bad faith, or that the denial of Applicant's application for a provisional dispensary license was motivated by any unreasonable, improper, or arbitrary consideration.

The Board concludes Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude as it related to the scoring of Question C-5.5.

ORDER OF THE BOARD

Upon an independent review of the administrative record, and for the reasons outlined herein, the Board hereby rejects the recommendation of the Hearing Examiner and makes the following findings. The Board finds it substantially complied with the criteria set forth in the request for applications. The Board finds Applicant failed to prove by a preponderance of the evidence that the Board abused its discretion in the evaluation and scoring of Application #133. The Board affirms its determination to deny Applicant's application for a license as a Medical Marijuana Dispensary under authority of Section 3796.14(B) of the Ohio Revised Code and Chapter 3796:6 of the Ohio Administrative Code, because Applicant's score was not high enough to qualify Applicant to receive a provisional dispensary license in District Northeast-2.

Ms. Yarosh moved to confirm and approve the Report and Recommendation of the Hearing Examiner with the exception of the modifications as set forth herein; Mr. Wilt seconded the motion. Motion passed (Aye-7/Nay-0).

SO ORDERED.

R-2019-115 After votes were taken in public session, the Board adopted the following order in the matter of **Buckeye Relief, LLC**, Case Number 2018-M430.

ORDER OF THE STATE BOARD OF PHARMACY **APPROVING IN PART, MODIFYING IN PART, & DISAPPROVING IN PART** **THE REPORT & RECOMMENDATION OF HEARING EXAMINER**

(Case Number 2018-M430)

In The Matter Of Applicant:
BUCKEYE RELIEF, LLC
40 East Washington Street, Suite 1
Chagrin Falls, OH 44022
Account No./Application No.: 406-430
Application District: Northeast-2
Application Dispensary Address: 22771-99 Rockside Road, Bedford, OH 44146

INTRODUCTION

The Matter of Buckeye Relief, LLC came for hearing before Hearing Examiner Kristin Rosan on Thursday, September 6, 2018 and Friday, September 7, 2018, and for consideration by the Board on **December 12, 2018** before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Richard Newlon, *public member*; Megan E. Marchal, RPh; Dennis R. Miller, RPh; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh; and Kilee S. Yarosh, RPh.

BOARD REVIEW OF THE RECORD

Prior to making its decision, the Board reviewed the entire administrative record in this matter, consisting of the following items:

- 9) Notice of Opportunity of Hearing for Application ID 430, marked by the Board as Exhibit I;
- 10) Applicant's Scorecard for Application ID 430, marked by the Board as Exhibit II;
- 11) Full List of Application Scores by District, marked by the Board as Exhibit III;
- 12) Transcript of September 6-7, 2018 proceedings, marked by the Board as Exhibit IV;
- 13) Oral statements presented by the State and Applicant to the Board on December 12, 2018;
- 14) The following additional filings in the administrative case record:
 - September 5, 2018, pre-hearing brief of the State, marked by the Board as Exhibit V;
 - September 5, 2018, opposition to the State's Pre-hearing Brief filed by Applicant, marked by the Board as Exhibit VI;
 - September 18, 2018, motion for extension of time to submit closing brief filed by the State, marked by the Board as Exhibit VII;
 - September 18, 2018, order granting extension of time to submit closing briefs, marked by the Board as Exhibit VIII;
 - September 28, 2018, closing brief of the State, marked by the Board as Exhibit IX;
 - September 28, 2018, closing brief of Applicant, marked by the Board as Exhibit X;
 - November 5, 2018, Hearing Examiner's Report & Recommendation for Application ID 430 (Case No. 2018-M430), marked by the Board as Exhibit XI;
 - November 7, 2018, Applicant's Notice of No Objections to Report and Recommendation (Case No. 2018-M430), marked by the Board as Exhibit XII;
 - November 13, 2018, State's request to address the Board, marked by the Board as Exhibit XIII;
 - November 13, 2018, Applicant's request to address the Board, marked by the Board as Exhibit XIV; and
 - November 27, 2018, order granting the parties' requests to address the Board, marked by the Board as Exhibit XV.

15) The following Joint Exhibits admitted by the Hearing Examiner:

- Exhibit A-i: Buckeye Relief Application ID 133;
- Exhibit A-iii: Buckeye Relief Application ID 430;
- Exhibit A-iv: GTI Ohio, LLC Application ID 493;
- Exhibit B: June 15, 2018 Notice of Intent to Deny Application for Medical Marijuana Dispensary License for Application ID 133 and Application ID 430;
- Exhibit C: Buckeye Relief Requests for Hearing for Application ID 133 and Application ID 430;
- Exhibit D: Buckeye Relief Application Scorecards for Application ID 133 and Application ID 430;
- Exhibit E-i: State of Ohio Board of Pharmacy Dispensary Districts;
- Exhibit E-iii: Ohio Medical Marijuana Control Program Dispensary Application Instructions (The “RFA”);
- Exhibit E-iv: Ohio Medical Marijuana Control Program Dispensary Application FAQs;
- Exhibit E-v: Ohio Medical Marijuana Control Program Question and Answer Responses 1-257;
- Exhibit E-vi: Ohio Medical Marijuana Control Program Question and Answer Responses 258-387;
- Exhibit E-viii: Key Indicators;
- Exhibit E-ix: Ohio Medical Marijuana Control Program Provisional Dispensary Licenses: Overview & Recommendations;
- Exhibit E-x: Provisional Dispensary License Application Scores (By district);
- Exhibit E-xi: Provisional Dispensary License Application Scores (By state);
- Exhibit E-xii: Medical Marijuana Licensing Report;
- Exhibit E-xiii: Gartner Consulting Report Dated May 21, 2018;
- Exhibit E-xiv: Provisional Dispensary License Application Scores (By evaluator);
- Exhibit F: Ohio Medical Marijuana Control Program – Model Dispensary Application;
- Exhibit G-i: Buckeye Relief Application ID 133 Scores;
- Exhibit G-ii: Buckeye Relief Application ID 430 Scores;
- Exhibit G-iii: GTI Ohio, LLC Application ID 493 Scores; and
- Exhibit H: Floor plan.

16) The following Buckeye Relief Exhibits admitted by the Hearing Examiner:

- Exhibit 1: Buckeye Relief Application Question C-2.1 Score Analysis by Witness Scott Halloran;
- Exhibit 4: Buckeye Relief Application Question C-4.1 Score Analysis by Witness Scott Halloran;
- Exhibit 5: Buckeye Relief Application Question C-5.5 Score Analysis by Witness Scott Halloran;
- Exhibit 17: Buckeye Relief Application Question C-10.2 Score Analysis by Witness Scott Halloran; and
- Exhibit 24: Buckeye Relief Northeast District 2 Internal Analysis of Question C-5.5 and Impact on Overall Score.

DECISION OF THE BOARD**FINDINGS OF FACT**

Upon an independent review of the testimony and evidence presented, the Board adopts the following "Findings of Fact" contained within the Hearing Examiner's Report & Recommendation:

- Paragraphs 1-82;
- Paragraph 84;
- Paragraph 86; and
- Paragraphs 89-98.

Upon an independent review of the testimony and evidence presented, the Board modifies and/or disapproves the following Findings of Fact contained within the Hearing Examiner's Report & Recommendation, along with the reasons for such modification or disapproval:

Paragraph 83:

The Board disapproves the Finding of Fact that witness Jesse Wimberly lacked knowledge that Applicant's bonds "were able to made liquid in 5 days." The pertinent exchange between counsel and Jesse Wimberly, and cited by the Hearing Examiner in support of the factual finding, provides:

Q. Do you know what a five day put is?

A. No sir.

Q. Do you know for a fact that the \$13 million reflected in the account statement is not accessible to Buckeye Relief within 30 days?

A. Do I know if it's not? No, I don't know.

Q. Did you know at the time you were reviewing this information that it was liquid within five days?

A. No.

Tr. at 153-54. Questions from counsel are not evidence, and the Hearing Examiner improperly treated the question posed to the witness as substantive evidence. Further, the testimony from witness Scott Halloran demonstrates that the liquidity of the bonds referenced in the application is speculative. Mr. Halloran testified to the following:

Q. (By Ms. Moore) We were just about to turn our attention to Section C-5.5. So when I was listening to your testimony this morning, you explained to us there are two types of bonds.

A. I did not explain that.

Q. You did not explain --

A. I never explained there were two types of bonds. There are many types of bonds.

Q. Okay. And the bonds in this case have a five day put; is that correct?

A. I don't know the specific of all the bonds listed, I don't know which ones are three, five, or seven day puts.

Q. But you think that all of these bonds, and that actually is my question. Based solely on reading this document can you tell which of these bonds have a three, five, or seven day put?

A. No.

Tr. at 284. (Emphasis added.)

The Board finds that Applicant did not prove by a preponderance of the evidence that the bonds referenced in the application could be liquidated within five days. The Board further finds as a matter of fact that Applicant's response to Question C-5.5 provided no information that the bonds were "puttable" bonds, including the terms of any "put option" associated with each bond. See Ex. A-iii at p. 272-297.

Paragraph 85:

The Board disapproves the Finding of Fact that witness Jesse Wimberly "did not demonstrate an understanding that there are types of bonds that can be held in investment accounts and are immediately liquid just the same as cash." The pertinent exchange between counsel and Jesse Wimberly, and cited by the Hearing Examiner in support, provides:

Q. And so you had no personal knowledge that there are types of bonds that can be held in investment accounts that are immediately liquid just the same as cash?

A. No sir.

Tr. at 154.

As previously stated, questions from counsel are not evidence, and the Hearing examiner improperly treated the question posed to the witness as substantive evidence. Further, the testimony from witness Scott Halloran supports a finding that the bonds at issue, while liquid, cash-like securities, were not "immediately liquid just the same as cash." Mr. Halloran testified to the following:

Q. Can you describe for the record how the particular type of municipal bonds Mr. Rayburn pledged works?

A. Yes. So these bonds that are held in his MAI statement are basically the bonds that underwrite the money market in the United States. So if you have a money market account with a few thousand in it that's earning more than your standard checking or savings account interest, they're all being underwritten by these variable interest rate obligations.

* * *

And these bonds are convertible I believe with either a five or seven day put option, which means that you call your broker, say I'd like to cash in my million-dollar bond, and you'll forfeit five to seven days of interest when you do that, or you can wait until the first day of the following month and cash them in at face value with full interest paid.

So they are convertible at face value in five days or less, and they're always convertible on the first day of every month.

* * *

Q. Is a type of bond pledged here a volatile security?

A. It is not.

Q. Why not?

A. These are the safest six-income type bonds that any investor high net worth or low net worth can purchase. They are, they're meant for short-term liquidity and they're meant to hold their value and they're underwritten. * * * They're the gold standard of liquid bonds. They don't get any better than this if you're looking for, these easily convert them to cash and for them to hold their value.

Tr. at 256-58. Mr. Halloran later explained that Applicant's account "does have lots and lots of municipal bonds or these variable rate set obligations in them. But I believe it also has \$1.6 million in cash. So it was a mixture of cash and bonds." Tr. at 259.

The Board makes a finding of fact that the bonds at issue, while not "immediately liquid just the same as cash," are liquid, cash-like securities, as referenced in the "Unconditional Pledge of Liquid Assets" by Andrew K. Rayburn. See Ex. A-iii at p. 273.

Paragraph 87:

The Board modifies the Hearing Examiner's Finding of Fact that witness Jesse Wimberly "could not explain the scoring discrepancies between Applicant's application for Cleveland Heights (#133) and Bedford (#430) and GTI (#493)." The Board supplements this finding of fact with the following language: "Jesse Wimberly could not explain the scoring discrepancies because several evaluators scored each application, the scores of each evaluator were not known to the other evaluators, and the evaluators' scores were averaged." See Tr. at 161-164.

Paragraph 88:

The Board disapproves the Hearing Examiner's Finding of Fact that witness Jesse Wimberly "was not competent to score question C-5.5 of Applicant's application." Upon an independent review of the testimony and evidence, the Board finds Jesse Wimberly was competent to evaluate and score question C-5.5.

Mr. Wimberly testified to the overall training he received as an evaluator (See e.g., Tr. at 46-48; 53-55; 147; 149), the development of key indicators and use of key indicators (See e.g., Tr. at 48-52; 92-96), and the process by which he evaluated and scored questions, to include consulting subject-matter experts prior to scoring. See e.g., Tr. p. 51-61. While Mr. Wimberly was not familiar with specific terms such as "demand obligations," "bond markets," or "five day put[s]," (Tr. at 153-154), Mr. Wimberly testified that he took into consideration Applicant's unconditional pledge of approximately \$12 million in cash-like securities and associated financial statements as true and accurate statements. Tr. at 155. Further, as previously noted, the Board finds Applicant provided no information that the bonds were "puttable" bonds, including the terms of any "put option" associated with each bond. See Ex. A-iii at p. 272-297. Mr. Wimberly also testified that Applicant's unconditional pledge and associated financial statements exceeded the \$250,000 capital requirement in Question C-5.5. Tr. at 158-159. Finally, Mr. Wimberly testified he had at

least one subject matter expert available to answer questions during the evaluation and scoring of Question C-5.5. See e.g., Tr. at 115-116.

CONCLUSIONS OF LAW

Upon an independent review of the testimony and evidence, the Board adopts the following "Conclusions of Law" contained within the Hearing Examiner's Report & Recommendation:

- Paragraphs 99-107;
- Paragraphs 109-112;
- Paragraphs 114-115;
- Paragraphs 117-118;
- Paragraph 120;
- Paragraph 128; and
- Paragraphs 132-135.

Upon an independent review of the testimony and evidence presented, the Board modifies and/or disapproves the following "Conclusions of Law" contained within the Hearing Examiner's Report & Recommendation, along with the reason(s) for such modification or disapproval:

Paragraph 108:

The Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. The appropriate standard of proof in administrative cases is a preponderance of the evidence. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81, 697 N.E.2d 655 (1998); see also *Ohio State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25, 27, 514 N.E.2d 1143 (C.P.1987); *Buckeye Bar, Inc. v. Liquor Control Comm.*, 32 Ohio App.2d 89, 91, 288 N.E.2d 318 (10th Dist.1972). Preponderance of the evidence means "more likely than not." Here, the Hearing Examiner improperly applied the standard of review upon appeal of an agency's order to a court of common pleas. See R.C. 119.12(M) ("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."); see also *Burneson v. Ohio State Racing Comm'n*, 10th Dist. Franklin No. 03AP-925, 2004-Ohio-3313, ¶ 6.

The Hearing Examiner correctly provided that "a government agency is bound to adhere to...[the] conditions and provisions it had itself set forth in the RFP." *Report & Recommendation* at ¶ 101, citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 603, 653 N.E.2d 646 (1995). The Hearing Examiner also stated correctly that "a disappointed bidder (or applicant) must show the agency either committed fraud or abused its discretion in awarding funding (or, in this case, a license) elsewhere." *Report & Recommendation* at ¶ 102, citing *Danis Clarkco Landfill Co.* at 605. To establish an abuse of discretion, the Hearing Examiner correctly noted, "the supposedly aggrieved party must demonstrate that the government agency acted in

bad faith, or with an unreasonable, arbitrary, or unconscionable attitude.” *Report & Recommendation* at ¶ 103, citing *Danis Clarkco Landfill Co.* at 605.

Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable.

Applying the appropriate standard of proof, the Board agrees with the Hearing Examiner’s conclusion that “[t]he evidence demonstrates Applicant scored above baseline on each question it challenged.” The Board concludes that Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude in the development and use of “key indicators” to assist in evaluating and scoring applications. The record reflects that the key indicators were developed as guidelines to assist evaluators in applying the criteria set forth in the request for applications, to include the Ohio Revised Code, the Ohio Administrative Code, and the scoring criteria. Tr. at 48-52.

Paragraph 113:

As detailed above, the Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable in the scoring of Question C-2.1.

Applying the appropriate standard of proof, the Board concludes that Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude, in the scoring of Question C-2.1.

Paragraph 116:

As detailed above, the Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable in the scoring of Question C-4.1.

Applying the appropriate standard of proof, the Board concludes that Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude, in the scoring of Question C-4.1.

Paragraph 119:

The Board disapproves the following Conclusion of Law: “As such Applicant was precluded from including any additional detail or descriptions that would have aided evaluators that were unfamiliar with the liquidity of bonds.” Exhibit E-iii consists of the *Ohio Medical Marijuana Control Program Dispensary Application Instructions. Section VI(B). Completing Applications* details the format each section of the application was to be completed. Question C-5.5 instructs the applicant that an attachment is mandatory; however, there is no “written response limit” (i.e., character limit), so long as the attachment does not exceed ten megabytes. Ex. E-iii, p. 20-21.

Question C-5.5 required the following:

C-5.5 Illustrate that the Applicant has adequate liquid assets to cover all expenses and costs for the first year of operation as indicated in the dispensary's proposed Business Startup Plan (Question C-3). The total amount of liquid assets must be no less than \$250,000. Provide **unredacted** documentation from the Applicant's financial institution to support these capital requirements. (ORC 3796:6-2-02). Ex. A-iii at p. 272.

In answering to Question C-5.5, Applicant provided (1) an Unconditional Pledge of Liquid Assets of Andrew K. Rayburn, CEO of Buckeye Relief, LLC, which was one page in length; (2) seven pages of financial statements from Applicant's financial institution; and (3) four pages of financial tables which were subdivided into the following tables: "Available Capital," "Anticipated Capital Expenditures," "Monthly Operating Expenses After Dispensary is Operational," "Net Income (Loss) From Operations for First Three Years of Operation," "Cash Flow for First Three Years of Operation," "Net Income (Loss) From Operations for First Three Years of Operation (No Revenue for One Year Scenario)," and "Cash Flow for First Three Years of Operation (No Revenue for One Year Scenario)." Ex. A-iii at p. 273-284.

However, other than the limit of ten megabytes, the Board concludes Applicant had the opportunity to include any additional detail or descriptions related to the liquidity of bonds. Witness Scott Halloran conceded as much on cross examination:

Q. Do you agree, sir, that to make it more clear that Buckeye Relief could have said these have a three day or five day pull [*sic*], a seven day pull [*sic*]?

A. There's no space in the application to write that. That was covered by the pledge.

Q. But my question, sir, is do you agree that it would have been more clear even in this pledge, because the pledge is a three-paragraph statement, four if you count the "I further certify" language. Do you agree, sir, that as a matter of clarity he could have put that in there?

A. Yes, he could have.

Tr. at 286.

Paragraph 121:

The Board disapproves the Conclusion of Law that "[t]he Board was not able to explain the scoring discrepancy between Applicant's Cleveland Heights application (#133), and its Bedford application (#430), at issue here, even though Applicant submitted the identical financial information in response to [Q]uestion C-5.5 for both applications."

The evidence demonstrates the parties stipulated that Applicant submitted identical responses to Question C-5.5 in Application #133 and Application #430. Tr. at 85; 98. The same seven evaluators individually scored each question, and their scores were averaged. See Ex. E-xiv at p. 855; p. 862; Tr. at 161. Applicant received a score of 7.85714 in Application #133 and a score of 8.00 in Application #430. Tr. at 97. When confronted about the discrepancy in scores of Question C-5.5., Mr. Wimberly could not explain why the average scores for each application differed, because he

was one of seven evaluators whose individual scores were averaged. Mr. Wimberly could not “speak for other scorers” as he was “not involved in how they scored.” Tr. at 162.

The Board concludes Applicant did not carry its burden in showing the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude in the scoring of Question C-5.5. While the record demonstrates Applicant submitted identical responses to Question C-5.5 in application #133 and application #430, but received a score of 7.85714 in application #133 and a score of 8.00 in application #430, these facts are not dispositive evidence of an “abuse of discretion.” For example, the disparity in scores could have resulted from a simple error in judgment or honest mistake from an evaluator tasked with evaluating and scoring hundreds of applications. *See* Ex. E-xiv (a 1,209-page document showing the scores of each evaluator for all applications).

The meaning of the term “abuse of discretion” connotes more than an error of judgment. *EOP-BP Tower, L.L.C. v. Cuyahoga County Bd. Of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096, 829 N.E.2d 686, ¶ 15; *State ex rel. Shafer v. Ohio Turnpike Com.*, 159 Ohio St. 581, 591, 113 N.E.2d 14 (1953); *Aetna Better Health, Inc. v. Colbert*, 10th Dist. Franklin No. 12AP-720, 2012-Ohio-6206, ¶ 21. The exercise of an honest judgment, however erroneous it may seem to be, is not an abuse of discretion. *State ex rel. Shafter* at 590-91; *City of Cleveland ex rel. Industrial Pollution Control*, 8th Dist. Cuyahoga No. 49446, 49495, 49777, 1985 Ohio App. LEXIS 9570, *5 (Nov. 27, 1985). The term “abuse of discretion” implies “perversity of will, passion, prejudice, partiality, or moral delinquency.” *State ex rel. Shafer* at 590-91. “Error of judgment does not invalidate discretion, exercised in good faith.” *Id.* at 593.

Here, Applicant failed to establish by a preponderance of the evidence any bad faith or that the scoring discrepancies in Question C-5.5 were motivated by any unreasonable, improper, or arbitrary consideration of the evaluators. Conversely, Mr. Wimberly testified that the scoring criteria included in the request for applications was intended to promote uniformed and consistent scoring across applications. Tr. at 110-112. Mr. Wimberly testified at length about the training the evaluators received (*See e.g.*, Tr. at 46-48; 53-55; 147; 149), the development and use key indicators to assist in applying the criteria set forth in the request for applications (*See e.g.*, Tr. at 48-52; 92-96), and the ability of evaluators to seek clarification from subject-matter experts during the evaluation and scoring of applications. *See e.g.*, Tr. at 52-61; 115-116.

The Board also disapproves the Conclusion of Law that “[t]he Board also was unable to explain the discrepancy between Applicant’s score and GTI’s higher score, with the latter demonstrating One Million Dollars less financial commitment per license.” The evidence and testimony demonstrates the differences between GTI’s and Applicant’s applications that could reasonably justify a difference in scores. *Compare* Ex. A-iv at p. 294-307 *with* Ex. A-i at 284-296 and Ex. A-iii at p. 272-284; *see also* Tr. at 94-105; 172-175 (explaining differences between GTI’s application with Applicant’s applications).

Paragraphs 122, 123, 124, and 125:

The Board disapproves the Conclusion of Law that “Mr. Wimberly did not know at the time that he was evaluating the application that Applicant’s bonds were able to be made liquid within 5 days.” As previously stated, questions from counsel are not evidence, and the Hearing Examiner improperly treated the following question posed to the witness as substantive evidence:

Q. Do you know what a five day put is?

A. No, sir.

Q. Do you know for a fact that the \$13 million reflected in the account statement is not accessible to Buckeye Relief within 30 days?

A. Do I know if it's not? No, I don't know.

Q. Did you know at the time you were reviewing this information that it was liquid within five days?

A. No.

Tr. 153-54. (Emphasis added.) Further, the testimony from witness Scott Halloran demonstrates that the liquidity of the bonds referenced in the application is speculative. Mr. Halloran testified to the following on direct examination:

Q. Do you have experience with the type of securities Mr. Rayburn pledged?

A. I'm very familiar with them. I'm not a CPA but I know about municipal bonds.

Q. Can you describe for the record how the particular type of municipal bonds Mr. Rayburn pledged works?

A. Yes. So these bonds that are held in his MAI statement are basically the bonds that underwrite the money market in the United States. So if you have a money market account with a few thousand in it that's earning more than your standard checking or savings account interest, they're all being underwritten by these variable interest rate obligations.

So because Andy is a high net worth individual, he has access to the direct underlying bonds as opposed to just putting it into a money market fund.

And these bonds are convertible I believe with either a five or seven day put option, which means that you call your broker, say I'd like to cash in my million-dollar bond, and you'll forfeit five to seven days of interest when you do that, or you can wait until the first day of the following month and cash them in at face value with full interest paid.

So they are convertible at face value in five days or less, and they're always convertible on the first day of every month. These were simply held as a way of we didn't know if Pharmacy Board was going to take three months or a year to score the application.

Mr. Rayburn is a very savvy financial individual, wanted to make sure if he was going to be setting aside this kind of cash that he was generating the highest interest rate without putting money in an illiquid state or at risk.

Tr. at 256-257. (Emphasis added.) However, on cross-examination, Mr. Halloran testified to the following:

Q. (By Ms. Moore) We were just about to turn our attention to Section C-5.5. So when I was listening to your testimony this morning, you explained to us there are two types of bonds.

A. I did not explain that.

Q. You did not explain --

A. I never explained there were two types of bonds. There are many types of bonds.

Q. Okay. And the bonds in this case have a five day put; is that correct?

A. I don't know the specific of all the bonds listed, I don't know which ones are three, five, or seven day puts.

Q. But you think that all of these bonds, and that actually is my question. Based solely on reading this document can you tell which of these bonds have a three, five, or seven day put?

A. No.

Tr. at 284. (Emphasis added.)

The Board also disapproves Conclusion of Law No. 123 that “[t]he winning bid is often the one in which the evaluators make the fewest mistakes.” This Conclusion of Law is not supported by any testimony or any evidence presented at the hearing.

Further, this Conclusion of Law does not support the proposition that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude. Differences of interpretation, or even simple mistakes, are not an abuse of discretion. *Aetna Better Health, Inc.*, 2012-Ohio-6206, ¶ 31, citing *State ex rel. Shafer*, 159 Ohio St. at 590-91, 113 N.E.2d 14. Abuse of discretion implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *State ex rel. Shafer* at 50-91; *Swallow v. Industrial Comm’n of Ohio*, 36 Ohio St.3d 55, 57, 521 N.E.2d 778 (1988); *State ex rel. Brady v. Industrial Comm’n of Ohio*, 28 Ohio St.3d 241, 242, 503 N.E.2d 173 (1986). The exercise of an honest judgment, however erroneous it may seem to be, is not an abuse of discretion. *Shafter* at 590-91 (citations omitted.); *MCI Telecoms. Corp. v. Board of Franklin County Comm’rs*, 127 Ohio App.3d 127, 136, 711 N.E.2d 1050 (10th Dist.1998).

Here, Applicant failed to establish by a preponderance of the evidence any bad faith or abuse of discretion on the part of the Board as opposed to a mistake or the exercise of poor judgment.

Paragraph 126 and 127:

The Board disapproves the Conclusions of Law that “[t]he evidence propounded at the hearing leads a reasonable finder of fact to conclude that the three evaluators who scored [Question] C-5.5 a six out of ten did so because they did not understand the nature of a puttable bond. This lack of understanding as to the bond markets presents the only reasonable explanation for why some evaluators scored nine and ten on Question C-5.5, and three evaluators rendered a score of six.”

The Board is permitted to independently review the evidence, to make its own findings, and draw its own conclusions from the evidence. *Trout v. Ohio Dep’t of Educ.*, 10th Dist. Franklin No. 02AP-783, 2003-Ohio-987, ¶ 17, citing *In re Certificate of Need Application of Providence Hosp.*, 67 Ohio App.3d 391, 398, 587 N.E.2d 326 (10th Dist.1990). Upon an independent review of the record, the Board finds this Conclusion of Law to be unsupported by the evidence.

Only one evaluator of Question C-5.5—Jesse Wimberly—testified during the hearing. The hearing examiner concluded that Jesse Wimberly was unfamiliar with bonds, bond markets, demand

obligations, and puttable bonds. Importantly, however, Mr. Wimberly testified he could not “speak for other scorers” as he was “not involved in how they scored.” Tr. at 161-164.

The record indicates that several evaluators had a financial background, were accountants, or were otherwise experts in finance. Tr. at 57; 115-116. However, the record lacks evidence of the qualifications and/or professional backgrounds of the evaluators, or the scores each evaluator assigned to Question C-5.5. Except for Jesse Wimberly, the record lacks evidence of any evaluator’s understanding of bonds, bond markets, demand obligations, or puttable bonds. The Board concludes there is insufficient evidence that these other evaluators possessed a lack of understanding of puttable bonds, and then used that lack of understanding to score Question C-5.5 a six. The Board also disapproves the conclusion that “[the lack of understanding as to the bond market] is also the only reasonable explanation of why GTI (whose bank statements showed cash) achieved nearly a point higher average score, while making a lower financial commitment per license than Applicant.” The evidence and testimony demonstrates the differences between GTI’s and Applicant’s applications that could reasonably justify a difference in scores. *Compare* Ex. A-iv at p. 294-307 *with* Ex. A-i at 284-296 and Ex. A-iii at p. 272-284; *see also* Tr. at 94-105; 172-175 (explaining differences between GTI’s application with Applicant’s applications).

Paragraphs 129, 130, and 131:

The Board modifies the standard of proof to remain consistent with the law applicable to administrative cases. Thus, to prevail, Applicant was required to prove by a preponderance of the evidence that the Board abused its discretion by acting in bad faith or in a way that was unreasonable, arbitrary, or unconscionable in the scoring of Question C-5.5.

The Board disapproves the Conclusion of Law that Applicant “should have [received] a nine or ten on [Question] C-5.5.” The Hearing Examiner determined Applicant should receive a score of nine or ten because it “exceeded all requirements,” and accordingly, should “have finished third in the NE-2 district.”

However, the issue of which application has the “best bid” is not susceptible to definition, and in such cases the matter is left to the discretion of the individuals evaluating and scoring the applications. *See MCI Telecoms. Corp.*, 127 Ohio App.3d at 140, 711 N.E.2d 1050. What is required is that the Board deal in good faith with bidders and comply with the terms of the request for applications. *Danis Clarkco Landfill Co.*, 73 Ohio St.3d at 596, 653 N.E.2d 646.

Upon review, the record contains ample evidence to establish that the Board undertook to perform its duties honestly and efficiently. The Board retained a consulting firm, North Highland, to assist in developing a fair and unbiased request for application process. Tr. at 36-37. North Highland was selected due to their procurement experience in the medical marijuana industry in other states. *Id.* North Highland worked collaboratively with the Board to develop a model application and associated materials. Tr. at 37. The evaluators hired by the Board received extensive training prior to evaluating and scoring applications. *See e.g.*, Tr. at 46-48; 53-55; 147; 149. The evaluators then reviewed and scored applications in accordance with the Ohio Revised Code, the Ohio Administrative Code, and the scoring criteria included in the request for applications. Tr. at 48-52. The evaluators, in conjunction with North Highland, also developed key indicators to assist in applying the criteria set forth in the request for applications. Tr. at 48-49. That evaluators may have had differences of interpretation in the scoring criteria and key indicators, or possessed differences of opinion, or even if an evaluator made a mistake when

scoring Question C-5.5, is not an abuse of discretion. *See Aetna Better Health, Inc.*, 2012-Ohio-6206, at ¶ 31, citing *State ex rel. Shafer*, 159 Ohio St. at 590-91, 113 N.E.2d 14. There is no evidence that the evaluators were predisposed to reject Applicant's application or acted in bad faith, or that the denial of Applicant's application for a provisional dispensary license was motivated by any unreasonable, improper, or arbitrary consideration.

The Board concludes Applicant did not prove by a preponderance of the evidence that the Board acted in bad faith, or with an unreasonable, arbitrary, or unconscionable attitude as it related to the scoring of Question C-5.5.

ORDER OF THE BOARD

Upon an independent review of the administrative record, and for the reasons outlined herein, the Board hereby rejects the recommendation of the Hearing Examiner and makes the following findings. The Board finds it substantially complied with the criteria set forth in the request for applications. The Board finds Applicant failed to prove by a preponderance of the evidence that the Board abused its discretion in the evaluation and scoring of Application #133. The Board affirms its determination to deny Applicant's application for a license as a Medical Marijuana Dispensary under authority of Section 3796.14(B) of the Ohio Revised Code and Chapter 3796:6 of the Ohio Administrative Code, because Applicant's score was not high enough to qualify Applicant to receive a provisional dispensary license in District Northeast-2.

Ms. Yarosh moved to confirm and approve the Report and Recommendation of the Hearing Examiner with the exception of the modifications as set forth herein; Mr. Wilt seconded the motion. Motion passed (Aye-7/Nay-0).

SO ORDERED.

R-2019-116 After votes were taken in public session, the Board adopted the following order in the matter of **Melissa Williams, Dayton, OH.**

ORDER OF THE STATE BOARD OF PHARMACY
CONFIRMING AND APPROVING IN PART & MODIFYING IN PART
REPORT & RECOMMENDATION OF HEARING EXAMINER

(Case Number 2018-1235)

In The Matter Of Melissa Williams:

Melissa Williams, Certified Pharmacy Technician.

67 East Maplewood Ave.

Dayton, OH 45405

(License No. 09-302959)

INTRODUCTION

The Matter of Melissa Williams came for hearing before Hearing Examiner Robert C. Angell on September 25, 2018 at which time Melissa Williams was represented by Levi J. Tkach, Esq. The State of Ohio was represented by Yvonne Tertel, Assistant Attorney General. Objections to the Report and Recommendation were filed by Melissa Williams on October 25, 2018.

On December 12, 2018, the parties made an oral address to the Board, during which Ms. Williams was represented by Levi Tkach, the State was represented by Henry Appel, after which the matter came for consideration by the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Megan E. Marchal, RPh; D. Rich Miller, RPh; Richard J. Newlon, *Public Member*; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh and Kilee S. Yarosh, RPh.

BOARD REVIEW OF THE RECORD

The Board reviewed the entire administrative record in this matter prior to making its decision, which included the following items: State's Exhibits numbered one through seven, Respondent's Exhibits lettered A and B, the hearing transcript, and Hearing Examiner Angell's Report and Recommendation, the objections filed by Ms. Williams and considered the oral address of the parties.

DECISION OF THE BOARD

After thorough review of all documents related to the case, the Board hereby adopts Hearing Examiner Angell's Findings of Facts as they relate to the Board's Notice of Proposal to Deny/Notice of Opportunity of Hearing dated June 21, 2018. The Board further modifies and adopts the Conclusions of Law as set forth by Hearing Examiner Angell. The modifications refer to Hearing Examiner Angell's "Conclusions of Law, section (C)." The Board finds Melissa Williams did violate (2)(a), (b), (c), and (d) and (3)(a), (b), (c), (d), (f), (g), and (h), as they relate to the Board's Notice of Proposal to Deny/Notice of Opportunity of Hearing dated June 21, 2018, and evidence in the record supports such a finding.

Pursuant to Section 4729.96 of the Ohio Revised Code, and after consideration of the record as a whole, the State Board of Pharmacy hereby adopts the recommendation of the Hearing Examiner and issues the certified technician registration, No. 09-302959, to Melissa Williams.

The Board declines to adopt the Hearing Examiner's recommendation of probation and, in light of the lengthy history of sobriety that has been demonstrated, the positive evidence in the record submitted by Ms. Williams employer, and the lengthy period of time in which Ms. Williams has demonstrated positive contribution in her position as a technician prior to the law requiring registration, the Board Orders that for no less than one-year from the date of the Order, Ms. Williams must disclose to the Board any contact with law enforcement or positive urine screens during her employment within three business days. This disclosure may be made to the email inbox of legal@pharmacy.ohio.gov.

Mr. Wilt moved to confirm and approve the Report and Recommendation of Hearing Examiner Angell, with the exceptions of the modifications as set forth herein. Mr. Passafume seconded the motion. Motion passed (Aye 7/Nay – 0).

SO ORDERED.

R-2019-117 After votes were taken in public session, the Board adopted the following order in the matter of **Carrie Allen, Warren, OH.**

ORDER OF THE STATE BOARD OF PHARMACY
CONFIRMING AND APPROVING IN PART & MODIFYING IN PART
REPORT & RECOMMENDATION OF HEARING EXAMINER

(Case Number 2018-1381)

In The Matter Of Carrie Allen:

Carrie Allen, Pharmacy Technician Trainee

3556 Radtka Drive SW

Warren, OH 44481

(License No. 09-101749)

INTRODUCTION

The Matter of Carrie Allen came for hearing before Hearing Examiner Megan Jewett on Wednesday, June 27, 2018 and for consideration by the Board on December 12, 2019, before the following members of the State of Ohio Board of Pharmacy (Board): Fred M. Weaver, RPh, *Presiding*; Joshua M. Cox, RPh; Megan E. Marchal, RPh; Donald R. Miller, RPh; Curtis L. Passafume, Jr., RPh; Jennifer M. Rudell, RPh; Shawn C. Wilt, RPh; Richard J. Newlon, *public member*; and Kilee S. Yarosh, RPh.

Respondent did not request a hearing, was not present, and was not represented by Counsel. The State of Ohio was represented by Yvonne Tertel, Assistant Attorney General.

BOARD REVIEW OF THE RECORD

The Board reviewed the following items prior to making its decision: State's Exhibits numbered one through seven, the hearing transcript, and Hearing Examiner Jewett's Report and Recommendation. After thorough review of all documents related to the case, the Board hereby adopts Hearing Examiner Jewett's Summary of the Evidence and Findings of Facts as they relate to the Board's Summary Suspension/Notice of Opportunity of Hearing dated May 2, 2018. The Board further adopts the Conclusions of Law as set forth by Hearing Examiner Jewett, with the exception of the correction of the numerical items to eliminate duplication of Conclusion of Law Number Two. The second "Conclusion of Law 2." is accordingly renumbered "Conclusion of Law

3.” and the final Conclusion of Law labeled in the Report and Recommendation as “Conclusion of Law 3.” is accordingly renumbered “Conclusions of Law Number 4.”

DECISION OF THE BOARD

Pursuant to Section 3719.121 of the Ohio Revised Code, the State Board of Pharmacy hereby removes the Summary Suspension Order issued to Carrie Allen on May 2, 2018.

Pursuant to Section 4729.96 of the Ohio Revised Code, and after consideration of the record as a whole, the State Board of Pharmacy hereby suspends indefinitely the pharmacy technician trainee registration, No. 09-10749 held by Carrie Allen and such suspension is effective as of the date of the mailing of this Order.

The Board adopts the following terms and conditions as outlined in the Hearing Examiner Jewett’s “Discussion of Proposed Order” and “Proposed Order”:

1. Carrie Allen, pursuant to 4729-9-01(F), may not be employed by or work in a facility licensed to possess or distribute dangerous drugs during the suspension.
2. Further, after one year from the effective date of this Order, the Board will consider any petition filed by Carrie Allen for a hearing, pursuant to Ohio Revised Code Chapter 119, for reinstatement. The Board will only consider reinstatement of the pharmacy technician trainee registration if the following conditions have been met:
 - a. Carrie Allen must maintain a current address with the Board throughout the duration of the suspension.
 - b. Carrie Allen must enter into and adhere to the terms of a new contract, signed within thirty days after the effective date of this Order, with an Ohio Department of Mental Health and Addiction Services (ODMHAS) treatment provider or a treatment provider acceptable to the Board for a period of not less than five years and, upon signing, submit a copy of the contract to the Board office. Failure to adhere to the terms of the treatment contract will be considered a violation of the Board’s Order and subject Carrie Allen to potential sanctions up to and including revocation of registration. The contract must provide that:
 - i. Random, observed urine drug screens shall be conducted at least once each month.
 - ii. The urine sample must be given within twelve hours of notification. The urine drug screen must include testing for creatinine or specific gravity of the sample as the dilutional standard.
 - iii. Alcohol and Ethyl Glucuronide (ETG) must be added to the standard urine drug screen.

- iv. Results of all drug screens must be negative. Refusal of a drug screen or a diluted drug screen is equivalent to a positive result. Any positive results, including those which may have resulted from ingestion of food, but excluding false positives which resulted from medication legitimately prescribed, indicates a violation of the contract. In the event of a negative diluted screen, a hair sample test must be completed at the cost of the Carrie Allen in a timeframe consistent with the drug lab's recommended policy, but in any event no later than 12 days after the negative diluted screen.
 - v. The intervener/sponsor shall submit reports to the Board, in a format acceptable to the Board, indicating drug screens and their results in a timely fashion. Actual copies of drug screens shall be made available to the Board upon request.
 - vi. Attendance is required a minimum of three times per calendar week (Sunday through Saturday) on separate days, at an Alcoholics Anonymous, Narcotics Anonymous, and/or similar support group meeting.
 - vii. The program shall immediately report to the Board any violations of the contract and/or lack of cooperation.
 - c. Carrie Allen shall not refuse a breathalyzer or other drug testing requested by law enforcement during the duration of suspension.
 - d. Carrie Allen shall immediately report any violation of the terms of this suspension to the Board by contacting legal@pharmacy.ohio.gov.
3. Before reinstatement to her status as a registered Pharmacy Technician Trainee, Carrie Allen must demonstrate satisfactory proof to the Board that she is no longer addicted to or abusing alcohol or drugs or impaired physically or mentally to such a degree as to render her unfit to practice as a pharmacy technician trainee.
4. Carrie Allen must provide, in the reinstatement petition, documentation of the following:
 - a. Compliance with the contract required above;
 - b. Compliance with the terms of this Order.
5. Any reinstatement shall not occur until such time as any criminal intervention in lieu of conviction has been successfully completed.
6. Violation of any term of suspension, including but not limited to any violation of the contract signed with the ODMHAS or other approved treatment provider may result in additional action before the Board.

7. Any violation of Chapters 2925., 3715., 3719., 4729., of the Ohio Revised Code, any administrative code violation or a violation of any other state or federal law may result in additional action.
8. Although this Order prevents Carrie Allen from employment with or working in a facility licensed to possess or distribute dangerous drugs during the suspension, if Carrie Allen's employment is in any other way related to the practice of pharmacy, Carrie Allen must notify her employer of the terms of her suspension and this Board's Order.
9. Failure to complete the terms set forth in this Board's Order, or to petition for reinstatement within five years of the date of this Order, will result in the Board issuing a notice of opportunity for hearing to consider additional disciplinary action, including and up to revocation of Carrie Allen's Pharmacy Technician Trainee registration.

BOARD MODIFICATIONS TO HEARING EXAMINER'S PROPOSED ORDER

The Board has stricken the originally numbered paragraph two, which required Carrie Allen, pursuant to Section 4729.16(B) of the Ohio Revised Code (ORC), to return by certified mail her registration to the office of the State Board of Pharmacy within ten days after receipt of this Order as this provision of law is inapplicable to the pharmacy technician trainee; there is no parallel provision related to technicians. The Board also corrected the disciplinary code to reflect the proper statutory authority for disciplinary action from Section 4729.16 of the ORC to Section 4729.96 of the ORC, which is the proper code for technician discipline.

Further, the Board modified (in renumbered Decision Paragraph 2. above) the length of time in which Carrie Allen may petition for reinstatement from six months to one year. The Board finds the extent of Carrie Allen's diversion efforts, including her theft from filled-patient prescriptions to be significant and an aggravating factor. Additionally, Board's experience with disciplinary matters involving pharmacists and interns, and its collective knowledge of and exposure to the cycle of addiction, as well as the extent of the theft and diversion in this matter is consistent with a minimum one-year suspension for Ms. Allen to obtain the necessary treatment services and break her cycle of addiction discovered in February/March of 2018. Based on its experience, the Board does not want Ms. Allen to return to the practice as any level of pharmacy-technician within six months from the date of the Order, she will not have had enough time to properly complete the requirements contained herein. For these reasons, the Board is modifying the Hearing Examiner recommendation for a six-month suspension from the date of the Order to a one-year suspension from the date of the Order.

Mr. Wilt moved to confirm and approve the Report and Recommendation of Ms. Jewett with the exception of the modifications as set forth herein; Mr. Passafume seconded the motion. Motion passed (Aye-8/Nay-0).

SO ORDERED.

R-2019-118

Mr. Wilt moved that the meeting be adjourned. The motion was seconded by Mr. Passafume and approved by the Board: Aye-7/Nay-0.

4:53 p.m. The meeting adjourned.

Fred M. Weaver Date: 1-20-19
Fred M. Weaver, RPh, President

Steven W. Schierholt Date: 1/22/19
Steven W. Schierholt, Executive Director