

UNREPORTED

IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1207

September Term, 2006

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GEORGE S. LAKNER

v.

MARYLAND STATE BOARD OF PHYSICIANS

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Murphy, C.J.,  
Salmon,  
Barbera,

JJ.

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Opinion by Barbera, J.

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Filed: October 15, 2007

Appellee, Maryland State Board of Physicians (the "Board"), charged appellant, Dr. George S. Lakner, with violating Maryland Code (1981, 2005 Repl. Vol.), § 14-101 et seq. of the Health Occupations Article ("HO") ("The Medical Practice Act"). Following an evidentiary hearing before the Office of Administrative Hearings, the administrative law judge ("ALJ") issued a proposed decision (the "Proposed Decision"), finding that Dr. Lakner willfully provided false answers on various medical applications. Dr. Lakner filed exceptions with the Board. The Board adopted the Proposed Decision, with some minor exceptions, and suspended Dr. Lakner's medical license. Dr. Lakner appealed to the Circuit Court for Baltimore City, which affirmed the Board's decision.

Dr. Lakner timely filed this appeal and presents seven questions for our review, which we have consolidated and reworded:

I. Did the Board correctly construe the term "willful" in finding that Dr. Lakner's answers on his medical applications were "willfully false?"

*means only  
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II. Did the Board correctly construe the term "fraudulent" in finding that Dr. Lakner violated The Medical Practice Act?

*Synonyms  
ok*

III. Did Dr. Lakner's conduct fall within the meaning of the phrase "in the practice of medicine," in the context of The Medical Malpractice Act?

*not revised*

IV. Was the Board's decision supported by substantial evidence?

*see below*

V. Was the Board's sanction arbitrary and capricious?

*liberal*

We agree with Dr. Lakner that the Board erred in tying his suspension to licensure in California, so we vacate the judgment and remand with the direction that the case be remanded to the

Board for further consideration of the conditions of suspension. In all other respects, we affirm.<sup>1</sup>

#### FACTS AND PROCEEDINGS

In 1980, Dr. Lakner, a psychiatrist, was granted a license to practice medicine in Maryland. Between 1996 and 2001, several events occurred relating to Dr. Lakner's employment at certain institutions and licensure in different states. Beginning in 1998, Dr. Lakner filled out several applications to hospitals and various medical licensing boards, including the Board. At the heart of this case are Dr. Lakner's answers to questions posed on those applications relating to prior employment and licensure.

#### Events relating to Dr. Lakner's employment and licensure

##### *Menninger Clinic*

Dr. Lakner began working at the Menninger Clinic ("Menninger"), a hospital in Kansas, on April 22, 1996. On August 26, 1996, Dr. Lakner's supervisor, Dr. Thomas H. Picard, wrote a memorandum to other Menninger staff recommending Dr. Lakner's "immediate termination" from Menninger. Dr. Picard made that recommendation because Dr. Lakner engaged in "abrasive" and "insulting" conduct, formed hasty judgments, was insubordinate, and

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<sup>1</sup> The Board has filed a Motion to Strike Extra-Record Documents Inserted Into Joint Record Extract. We grant the motion. Judicial review is limited to the record developed before the administrative agency. *Harford County People's Counsel v. Bel Air Realty Assocs. Ltd. Partnership*, 148 Md. App. 244, 258 (2002). The documents about which the Board complains were not presented at the agency level. Moreover, Dr. Lakner did not apply for leave to offer additional evidence in the circuit court, pursuant to Maryland Code (1984, 2004 Repl. Vol., 2006 Supp.), § 10-222(f) of the State Government Article.

was hostile. Menninger terminated Dr. Lakner's employment the day Dr. Picard wrote the memorandum.

#### *MidAtlantic*

Dr. Lakner was employed by MidAtlantic Permanente Medical Group ("MidAtlantic") on July 21, 1997. Shortly after Dr. Lakner became employed by MidAtlantic, he underwent major surgery and took time off from work. On December 1, 1997, MidAtlantic advised Dr. Lakner that he was to return to work by December 4, 1997, and, if he did not return to work on that date, he would be subject to termination. Dr. Lakner returned to work as scheduled.

On January 20, 1998, Dr. Timothy Sitts wrote to Dr. Lakner advising him that he was out of compliance with his employment agreement for failing to obtain privileges at Fairfax Hospital. On March 19, 1998, several doctors met with Dr. Lakner to discuss "ongoing performance problems." During that meeting, Dr. Lakner was given the choice of accepting a severance agreement instead of being placed on probation. Dr. Lakner indicated that he preferred to accept the severance agreement. On March 31, 1998, Dr. Lakner submitted a voluntary resignation letter and signed the severance agreement.

Dr. Lakner then revoked the severance agreement. But, he failed to return to work as he was required to do upon exercising the right to revoke the agreement. He also failed to respond to several messages left for him by MidAtlantic. By letter dated

April 14, 1998, Paul Hudgins, Vice President of Administration, informed Dr. Lakner that "we can only conclude that you have resigned from [MidAtlantic] without providing ninety (90) days notice. This letter is to acknowledge and confirm your resignation from [MidAtlantic]."

*Medical Board of California*

On March 8, 1999, Dr. Lakner applied for a license with the Medical Board of California (the "California Board"). On July 19, 2000, the California Board sent Dr. Lakner a letter denying his application because "[d]ocumentation and information associated with [his] application reveal[ed] that [he] faxed an altered document to officials" at a California State Prison.

Dr. Lakner appealed that decision, and, during an administrative hearing on July 22, 2001, he reached a tentative settlement with the California Board in which he agreed to undergo a psychiatric evaluation and complete a course in ethics. On July 31, 2001, Dr. Lakner entered into a stipulated agreement with the California Board that was subject to the approval of the Division of Licensing. In February 2002, the California Board approved the settlement, which provided that Dr. Lakner would be issued a license but would be placed on five years' probation. Dr. Lakner refused to accept that agreement.

The matter came before an ALJ for a hearing on December 19, 2002. Dr. Lakner was not present at the hearing, and the ALJ

recommended that Dr. Lakner's license be denied. The California Board adopted that recommendation and entered a default decision denying Dr. Lakner's license effective March 31, 2003.

*Loma Linda VA Hospital*

On July 16, 1999, Dr. Lakner completed an application for the Department of Veteran Affairs at Loma Linda Hospital ("Loma Linda") in California. He then began working at Loma Linda. On November 9, 2001, the Department of Veteran Affairs terminated Dr. Lakner's employment due to misrepresentations in his application.

*Nevada Medical Board*

On March 28, 2001, Dr. Lakner applied to renew his license with the Nevada State Board of Medical Examiners (the "Nevada Board"). On December 19, 2001, the Nevada Board revoked his license based upon misrepresentations in his application.

*Thomas B. Finan Center*

On December 10, 2001, Dr. Lakner applied to the Thomas B. Finan Center (the "Finan Center"), in Cumberland, Maryland. While Dr. Lakner was working at the Finan Center, the Finan Center discovered that he had been disciplined by several medical boards. On April 10, 2002, Dr. Lakner resigned from the Finan Center.

*New Jersey State Board of Medical Examiners*

On May 22, 2003, the New Jersey State Board of Medical Examiners suspended Dr. Lakner's license based upon the Nevada Board's revocation of his license and the California Board's denial

of his license.

*Virginia Department of Health Professionals*

On July 17, 2003, the Virginia Department of Health Professionals suspended Dr. Lakner's license based upon the Nevada Board's revocation.

Dr. Lakner's Applications

*1998 Maryland Renewal Application*

On August 3, 1998, Dr. Lakner submitted a license renewal application to the Board. Question 6.n. asked whether his employment with any hospital had been terminated for any disciplinary reason, to which he answered, "No." Question 6.o. asked whether he had voluntarily resigned from any health institution while under investigation by that institution for disciplinary reasons. Again, Dr. Lakner answered, "No." Dr. Lakner did not report to the Board his termination from Menninger or his resignation from MidAtlantic.

*Loma Linda VA Hospital Application*

On July 16, 1999, Dr. Lakner submitted an application to the Department of Veteran Affairs at Loma Linda Hospital, as discussed above. Question 17C asked if any of his staff appointments had ever been revoked or voluntarily relinquished. Dr. Lakner answered "No" to that question. Question 34 asked if he had been discharged from any position in the last five years for any reason. Dr. Lakner answered, "No." Question 35 asked: "Within the last five

years have you resigned or retired from a position after being notified you would be disciplined or discharged, or after questions about your clinical competence were raised?" Dr. Lakner answered, "No."

On August 16, 1999, Dr. Lakner completed a Declaration for Federal Employment. Question 11 asked: "During the last 5 years, were you fired from any job for any reason, did you quit after being told you would be fired, did you leave any job by mutual agreement because of specific problems . . . ?" Dr. Lakner answered, "No."

Dr. Lakner again failed to disclose his termination from Menninger and his resignation from MidAtlantic. As a consequence, Loma Linda Hospital terminated him.

#### *2000 Maryland Renewal Application*

On August 3, 2000, Dr. Lakner submitted another licensure renewal form to the Board. Question 7.a. asked whether, since July 1, 1998, any licensing Board had denied his application. He answered, "No." Dr. Lakner failed to disclose that the California Board had denied his application on July 19, 2000. He also answered "No" to the question of whether he had been terminated by any hospital for any disciplinary reason.

#### *Nevada Medical Board Application*

As we have mentioned, on March 28, 2001, Dr. Lakner submitted an application to the Nevada Board. Question 7 asked if he had

ever been denied a license in any state. Dr. Lakner answered, "No." Dr. Lakner did not disclose that the California Board had denied his license, prompting the Nevada Board to revoke his license.

#### *The Finan Center Application*

We have mentioned that Dr. Lakner submitted an application to the Finan Center. Question 15 asked if his medical staff membership had been "voluntarily or involuntarily suspended or terminated at any facility[.]" Dr. Lakner answered, "No." Question 16 asked if he had ever been denied a license or registration to practice, to which Dr. Lakner also answered, "No." Question 16 also asked if there were any "currently pending challenges to any professional licensure or registration[.]" Dr. Lakner answered, "No." Question 17 asked if he had ever been dismissed from a position or resigned from a position pending disciplinary action. Dr. Lakner answered, "No." Question 18 asked: "Have you been the object of disciplinary action or citation by a facility, professional board, licensure agency, or other professional or regulatory organization or agency?" Dr. Lakner answered, "No." Dr. Lakner attached a page to his application giving an explanation regarding the problems he had obtaining a license in California.

Dr. Lakner failed to disclose his departure from Menninger, MidAtlantic, and Loma Linda. After an investigation into his

application began, Dr. Lakner resigned from the Finan Center.

Proceedings

On June 11, 2003, the Board sent Dr. Lakner notice that it was charging him with violations of The Medical Practice Act. On November 12, 2003, the Board sent Dr. Lakner notice of amended charges.

An evidentiary hearing was held on July 23, 2004. The ALJ issued a Proposed Decision on October 29, 2004, recommending that Dr. Lakner be suspended for one year.

Dr. Lakner filed exceptions. The Board held a hearing and, on August 29, 2005, issued a Final Decision and Order. The Board adopted and incorporated the findings of the ALJ, with the exception of a minor finding not relevant to this appeal. The Board concluded that Dr. Lakner violated the following provisions of HO § 14-404(a):

(1) Fraudulently or deceptively obtains or attempts to obtain a license for the applicant or licensee or for another;

(3) Is guilty of immoral or unprofessional conduct in the practice of medicine;

(11) Willfully makes or files a false report or record in the practice of medicine;

(21) Is disciplined by a licensing or disciplinary authority or convicted or disciplined by a court of any state or country or disciplined by any branch of the United States uniformed services or the Veterans' Administration for an act that would be grounds for disciplinary action under this section;

(36) Willfully makes a false representation when seeking

or making application for licensure or any other application related the practice of medicine[.]

The Board imposed a one-year suspension of Dr. Lakner's Maryland license. The Board explained the suspension: "The one-year suspension is called for by Dr. Lakner's falsifications of applications to this Board and to the Finan Center and to the Veterans Administration Hospital at Loma Linda and to the Nevada State Board of Medical Examiners." The Board imposed a second period of suspension based on "the decision of the Medical Board of California that he falsified his application in that state," and ordered that Dr. Lakner remain suspended "until he is reinstated to full licensure, without restrictions of any kind, by the Medical Board of California."

Dr. Lakner appealed to the circuit court. The circuit court affirmed the Board's decision on July 12, 2006. Dr. Lakner timely filed this appeal.

We shall include additional facts in our discussion, as necessary.

## DISCUSSION

### Standard of Review

"[O]ur role in reviewing the decision of an administrative agency is precisely the same as that of the circuit court. We, therefore, do not evaluate the findings of fact and conclusions of law made by the circuit court; instead, we review the administrative decision itself." *Solomon v. State Bd. of Physician*

*Quality Assurance*, 155 Md. App. 687, 697 (2003), cert. denied, 381 Md. 676 (2004) (internal quotation marks and citations omitted). We must determine "whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law." *McKay v. Dep't of Pub. Safety*, 150 Md. App. 182, 193 (2003) (internal quotation marks and citations omitted).

Questions of law are reviewed de novo. See *id.* To the extent the issues on appeal turn on the correctness of an agency's findings of fact, such findings must be reviewed under the substantial evidence test. *Capital Commercial Props., Inc. v. Montgomery County Planning Bd.*, 158 Md. App. 88, 95 (2004); see also *Hayfields, Inc. v. Valleys Planning Council, Inc.*, 122 Md. App. 616, 629 (1998). The reviewing court's task is to determine "whether the agency's decision was supported by substantial evidence." *Tochterman v. Baltimore County*, 163 Md. App. 385, 407 (2005). We must accept the agency's conclusions if reasoning minds could reach the same conclusion based on the record. *Cornfeld v. State Bd. of Physicians*, 174 Md. App. 456, 469 (2007). Finally, we cannot substitute our judgment for that of the agency, but instead must exercise a "restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions." *Capital Commercial Props, Inc.*, 158 Md. App. at 95 (internal quotation marks and citations omitted).

I.

Dr. Lakner contends that the Board used the wrong legal standard to determine the meaning of "willful" in The Medical Practice Act. The Board argues to the contrary. We agree with the Board.

The Board found that Dr. Lakner violated HO § 14-404(a)(11) by willfully making or filing a false report in the practice of medicine, and violated HO § 14-404(a)(36) by willfully making "a false representation when seeking or making application for licensure or any other application related to the practice of medicine." The Board adopted the discussion of the ALJ in the Proposed Decision. The ALJ had noted in the Proposed Decision that the meaning of the word "willful" "connotes only voluntary and intentional action as contrasted with accidental." Proposed Decision citing *Stanton v. Machiz*, 183 F. Supp. 719, 725 (D.Md. 1960).

Appellant argues that the correct legal standard for determining if a representation is "willfully false" was stated in *Hawes v. Carberry*, 103 Md. App. 214 (1995), abrogated by *Deibler v. State*, 365 Md. 185 (2001). In *Hawes*, we held that the meaning of the word "willfully" in the Maryland Wiretap Act requires the violator to know what he or she is doing is illegal. *Id.* at 222. In *Deibler*, however, the Court of Appeals rejected that interpretation and held that the word "willfully" in the Maryland

Wiretap Act did not require that the violator know his conduct is unlawful. 365 Md. at 197. Rather, the Court interpreted "willfully" to mean "intentionally-purposely." *Id.* at 199. The Court explained that its interpretation "excludes interceptions arising from inadvertence or simple negligence[.]" *Id.* See also *Attorney Grievance Comm'n of Md. v. Tayback*, 378 Md. 578, 589 (2003) (noting that, in the majority of applications, the word "willful" means "that the act be committed voluntarily and intentionally, not accidentally.") The Board used the correct legal standard in determining that Dr. Lakner's answers on the various applications were willful.

Dr. Lakner argues that the Board did not make any specific findings that the violations charged were willful. That is simply untrue. Throughout both the Proposed Decision and the Board's Final Decision, which adopted and incorporated the Proposed Decision, the Board found that Dr. Lakner "deliberately deceived" the Board, and that he "knowingly," "intentionally," "deliberately", and "dishonestly" provided false information on his applications. We are satisfied that those findings meet the "willfulness," as defined in *Deibler* and *Tayback*.

II.

The Board found that Dr. Lakner violated HO § 14-404(a)(1), which authorizes the Board to take disciplinary action if the licensee "[f]raudulently or deceptively obtains or attempts to

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obtain a license for the applicant or licensee or for another." Dr. Lakner contends that the court did not apply the correct standard of fraud in finding a violation of that section. He also contends that the court was required to make a specific finding of fraud. We disagree.

Dr. Lakner would have us apply the common law elements of fraud as stated in *Gross v. Sussex Inc.*, 332 Md. 247 (1993).<sup>2</sup> That is not the correct standard.

We analyzed the fraud or deceit element of HO § 14-404(a)(1) in *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 423-24 (2006). The ALJ in that case "used the adjective 'deceptive' [in her ruling], but never expressly uttered the words 'fraud,'

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<sup>2</sup> The *Gross* Court explained the elements of fraud as follows:

To present a prima facie case of fraud, in Maryland, it must be pleaded and proved:

- (1) that a false representation was made by a party;
- (2) that its falsity was known to that party or that the misrepresentation was made with such reckless indifference to truth as to impute knowledge to the party;
- (3) that the misrepresentation was made for the purpose of defrauding some other person;
- (4) that the person not only relied on the misrepresentation but had a right to rely upon it with full belief in its truth, and that the person would not have done the thing from which the damage resulted if the misrepresentation had not been made; and
- (5) that the person suffered damage directly resulting from the misrepresentation.

*Id.* at 257 (citing *Everett v. Baltimore Gas & Elec. Co.*, 307 Md. 286, 300 (1986), overruled on other grounds by, *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108 (2002)).

'fraudulent,' or 'fraudulently.'" *Id.* at 423. The ALJ nevertheless found that Dr. Elliott acted deceptively. *Id.* We agreed with the Board that it "did not make a bit of difference" whether the ALJ used the term "fraudulently" or "deceptively," or both. *Id.* We quoted with approval the ALJ's statements that "an action for fraud or deceit . . . is predicated upon a . . . deliberate intent to deceive" and "courts use the terms 'fraud' and 'deceit' interchangeably to describe intentional false conduct[.]" *Id.* We rejected the doctor's argument that a higher level of persuasion is required than the one used by the Board. *Id.* at 437-40. We observed that the civil tort of fraud is not analogous to administrative allegations of fraudulent conduct. *Id.*

In the present case, the Board did not expressly find that Dr. Lakner committed a "fraud" upon the Board. Yet, the Board found that Dr. Lakner "deliberately deceived" it. We are satisfied that the Board's finding of deliberate deception by Dr. Lakner is sufficient to support a finding that he violated HO § 14-404(a)(1).

### III.

The Board found that Dr. Lakner violated HO § 14-404(a)(3), which prohibits "immoral or unprofessional conduct in the practice of medicine," and HO § 14-404(a)(11), which prohibits "[w]illfully mak[ing] or fil[ing] a false report or record in the practice of medicine." Dr. Lakner challenges the Board's finding that he violated HO § 14-404(a)(11). Dr. Lakner contends that the Board

did not make a finding that he made any false report in the practice of medicine. Dr. Lakner further argues that even if the Board had made such a finding, there is no evidence in the record to support it. We will not review this issue because Dr. Lakner has not preserved it.

An appellate court ordinarily will not address an issue that was not raised before the administrative agency. See *Motor Vehicle Admin. v. Weller*, 390 Md. 115, 128 (2005); *Delmarva Power & Light Co. v. Pub. Serv. Comm'n of Md.*, 370 Md. 1, 32 (2002). The only exception to that rule occurs when the issue is "an integral, and thus unavoidable, component of our determination of [a] properly raised issue." *Eng'g Mgmt. Servs., Inc. v. Maryland State Highway Admin.*, 375 Md. 211, 235 (2003). This case does not fall within that exception to the rule.

We examined the agency record and found no indication that Dr. Lakner raised before the agency the issue of whether his conduct was "in the practice of medicine." Nor did he challenge the ALJ's failure to make a specific finding that his conduct was "in the practice of medicine." Although Dr. Lakner contended before the ALJ that the charges "do not involve his duties or functions as a physician and do not involve patient care," that argument does not address whether his conduct was "in the practice of medicine." Even more telling, Dr. Lakner did not respond, at all, to the Board's argument at the hearing before the ALJ that Dr. Lakner's

conduct was "in the practice of medicine" because obtaining a license is a prerequisite to becoming a physician. Nor did he address the issue in his exceptions to the ALJ's Proposed Decision. We therefore decline to address it.

#### IV.

Dr. Lakner contends that the Board's factual findings are not supported by substantial evidence. He argues in particular that the record lacks substantial evidence that the answers on his applications were willfully false. The Board responds that its findings are supported by substantial evidence, and points out that the ALJ and the Board simply did not find Dr. Lakner's version of events credible. We agree with the Board.

The Board adopted the ALJ's findings that Dr. Lakner was terminated from Menninger and did not report the termination on various applications. Dr. Lakner challenges the findings, contending that Menninger terminated him due to downsizing and not to anything related to his job performance. He argues that there is "no evidence whatever that he was aware that anyone at Menninger took the position that they had fired him and that his departure was anything other than mutual."

That argument ignores the evidence supporting the Board's finding that Menninger terminated Dr. Lakner for disciplinary reasons. Dr. Picard's memorandum to the staff recommended Dr. Lakner's termination and he was terminated immediately; indeed, on

the very day the memorandum was written. Menninger later explained in a letter to the California Board that Dr. Lakner was terminated for reasons such as insulting interactions, judgment difficulties, and hostile behavior.

Certainly, Dr. Lakner offered evidence to refute that his termination was due to poor job performance. He offered letters of recommendation written by Menninger staff before his termination and an affidavit from Dean T. Collins, a "mentor and a guide" to Dr. Lakner at Menninger, stating that Dr. Lakner had resigned from Menninger. Dr. Lakner also contended that Dr. Picard's memorandum was manufactured two months after its purported date when Menninger was drafting false personnel records to protect it from a potential class action lawsuit.

The ALJ expressly stated that he did not find Dr. Lakner's evidence credible. Further, there was substantial evidence to support the Board's version of events. It is the ALJ's prerogative "to accord each item of testimonial and documentary evidence the weight it deserves." *Finucan v. Maryland State Bd. of Physician Quality Assurance*, 151 Md. App. 399, 422 (2003), *aff'd*, 380 Md. 577 (2004). Moreover, "the credibility findings of an agency representative who sees and hears witnesses during an administrative proceeding are entitled to great deference on judicial review." *Id.* at 421; *see also Anderson v. Dep't of Pub. Safety and Corr. Servs.*, 330 Md. 187, 217 (1993). The Board

deferred to the ALJ's credibility-based determinations. So shall we.<sup>3</sup>

Dr. Lakner also contends that there was not substantial evidence that he resigned from MidAtlantic due to disciplinary reasons. He contends that he resigned to take another position. Again, there was substantial evidence before the ALJ to support its determination that Dr. Lakner resigned for a disciplinary reason. The various letters written by MidAtlantic staff members to Dr. Lakner support the ALJ's conclusion that Dr. Lakner resigned pending disciplinary action.

With regard to the ALJ's finding, adopted by the Board, that the California Board denied his license, Dr. Lakner contends that he has "a reasonable basis to believe that there had been no final denial of his license and that his license was going to be issued." Although settlement talks were entered into between the California Board and Dr. Lakner, no settlement was reached. It remains that the California Board denied Dr. Lakner's license on July 19, 2000, and Dr. Lakner did not disclose that on his applications.

V.

Dr. Lakner's last contention is that the Board's sanction is "arbitrary and unreasonable." In support of that argument, he

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<sup>3</sup>Even if the Board had accepted Dr. Lakner's contention that he was terminated due to downsizing, that does not erase the fact that he gave false answers to many of the questions on the applications. Question 34 of the Loma Linda application, question 11 of the Declaration of Federal Employment, and question 17 of the Finan Center application all asked if he had been discharged from any position for any reason. He answered "No" to each of those questions.

argues that the Board departed from its prior decisions and failed to provided the required explanation for doing so. He also argues that the Board acted unreasonably by imposing the additional suspension (beyond the one-year suspension) until he obtains a license in California.

The Court of Appeals discussed the discretion accorded to an administrative agency's issuance of sanctions in *Maryland Transp. Auth. v. King*, 369 Md. 274, 291 (2002):

As long as an administrative sanction or decision does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless, under the facts of a particular case, the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be "arbitrary or capricious."

See also *Maryland Aviation Admin. v. Nolan*, 386 Md. 556, 575 (2005); *Oltman v. Maryland State Bd. of Physicians*, 162 Md. App. 457, 491 (2005).

Dr. Lakner argues that the Board acted arbitrarily in his case because it departed from one of its prior decisions, *In the Matter of Dora M. Mamodesene* (No. 00-0690). In that decision, the Board imposed a reprimand and the requirement that the doctor take an ethics course. The facts of Dr. Lakner's case are not identical to those in *Mamodesene*. Although Dr. Mamodesene, like Dr. Lakner, made false statements on various applications denying complaints against her and investigations, Dr. Mamodesene was found to have

violated three provisions of HO § 14-404(a), and Dr. Lakner, five. Moreover, Dr. Mamodesene did not make false statements in numerous applications in other states, as Dr. Lakner did. We are not persuaded that the Board acted arbitrarily by imposing upon Dr. Lakner a sanction different from the sanction it imposed upon Dr. Mamodesene.

We turn to Dr. Lakner's concern about the Board's imposition of an "additional period of suspension, beyond the one-year suspension." The Board explained the decision:

[The sanction] is based on the decision of the Medical Board of California that [Dr. Lakner] falsified his application in that state. Dr. Lakner will thus remain suspended beyond the one-year period and until he is reinstated to full licensure, without restrictions of any kind, by the Medical Board of California.

Dr. Lakner argues first that, because he has never had a license in California, "reinstatement" of the license is impossible. In addition, Dr. Lakner asserts that the California licensure condition is an unlawful delegation of authority to the California Board, and is arbitrary and capricious.

The Board concedes that use of the term "reinstatement" in the Order is a poor choice of words, and it argues that the Order, properly interpreted, conditions lifting of the suspension upon Dr. Lakner's obtaining full and unrestricted licensure in California. The Board further responds that the Board was within its authority to impose that condition, and its action was neither arbitrary or capricious.

We agree with Dr. Lakner that the condition represents an improper delegation to the California Board of the authority to control whether Dr. Lakner ever will be relieved of the permanent suspension of his license to practice medicine in Maryland. We disagree with the Board that HO § 14-404(a)(21), the reciprocity provision, empowers the Board to impose the condition of licensure in California. That provision authorizes the Board to sanction a physician in Maryland in response to, e.g., discipline by a licensing or disciplinary authority of another state or country, "for an act that would be grounds for disciplinary action under this section." But that subsection does not authorize the Board to impose a condition on lifting a suspension like the one the Board imposed in this case.

Moreover, we are not directed to any case law holding, or even suggesting, that the Board lawfully could condition lifting the Maryland suspension upon Dr. Lakner's receiving a license in California. We therefore hold that the Order is unlawful insofar as it orders suspension of Dr. Lakner's license until he is granted a full and unrestricted license to practice medicine in California. We shall vacate the judgment and remand this case with the direction that the case be remanded to the Board, with the direction that it vacate that portion of the Order that conditions lifting the suspension of Dr. Lakner's license on his California licensure. The Board is free to fashion a new sanction that does

not contain an unlawful delegation of authority to the licensing body of another state.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED WITH DIRECTION THAT THE CASE BE REMANDED TO THE MARYLAND STATE BOARD OF PHYSICIANS WITH THE DIRECTIONS THAT THE BOARD'S ORDER BE VACATED INSOFAR AS IT IMPOSES, AS A CONDITION OF LIFTING THE SUSPENSION OF APPELLANT'S LICENSE, THAT HE BE REINSTATED TO FULL AND UNRESTRICTED LICENSURE IN CALIFORNIA; THAT THE BOARD ISSUE A NEW ORDER THAT CONTAINS A SANCTION NOT INCONSISTENT WITH THIS OPINION; AND THAT IN ALL OTHER RESPECTS THE ORDER BE AFFIRMED.

COSTS TO BE PAID 90% BY APPELLANT AND 10% BY APPELLEE.

