

on February 4, 2016.

On remand, the Board held a hearing on March 16, 2016, and a quorum of the Board membership was present. The Appellant appeared and was represented by his attorney, and the Department counsel appeared for the Department. By way of background, the Board's previous order found that on multiple occasions, the Appellant diverted non-controlled drugs from his employer valued at \$14,535.54. The Board further found that the Appellant transported the drugs to Honduras, where he dispensed the drugs without proper authorization. Finally, the Board found the Appellant admitted that there was no physician involved in distributing the stolen drugs in Honduras. The Appellant's counsel argued that the Board should consider the Appellant had already been suspended for a significant period of time, and that while he was charged criminally, he enrolled in pre-trial intervention, paid full restitution to his former employer, and that the charges had been expunged. The Department argued that the Appellant engaged in very serious misconduct, and that the Board should consider that when determining conditions.

The Appellant also testified that he is currently a pharmacist at the Veterans Administration (VA) in Asheville, North Carolina. He testified his original pharmacy license is with South Carolina, and that he has reciprocated in no other state besides Georgia. (R. at 178).² He testified that he did not have a federal license, and that in order to be a practicing pharmacist in the military (the Appellant is a reservist in the U.S. Army) or at the VA he is required to have one state license in good standing. He testified that he "presented the facts" surrounding his indefinite suspension in South Carolina to Georgia and "they renewed my license." (R. at 177). The Appellant testified that his reciprocal license was still in good standing in the state of Georgia as of the hearing date on March 16, 2016. (R. at 178).

The Board considered the arguments of counsel and the Appellant's statements, and had grave concerns about the serious nature of the Appellant's misconduct. The Board concluded that "in order to ensure that the public interest is protected, [the Appellant's] license shall remain suspended for an indefinite period until such time as he complied with the following conditions:

- 1) Retake and successfully complete the North American Pharmacist Licensure Examination (NAPLX) and Multistate Pharmacy Jurisprudence Examination (MPJE).

²The Appellant testified that he tried to reciprocate in another state, but that he was not allowed to because of South Carolina. (R. at 179).

- 2) Successfully complete the Medication Safety Course offered by the University of Oregon;
- 3) Demonstrate completion of thirty (30) hours of ACPE (not CME) accredited continuing education courses, with at least twelve (12) hours to be obtained through attendance at lectures, seminars, or workshops, and at least fifteen (15) hours in drug therapy or patient management, in addition to regular courses necessary for licensure in South Carolina;
- 4) Provide documentation that he has paid restitution to his former employer for the diverted drugs and that he has successfully completed the pre-trial intervention program, which resulted in the dismissal of the underlying charges;
- 5) Undergo a psychometric evaluation by a Board-approved psychiatrist or psychologist and provide a written report from the evaluator demonstrating that he is qualified to safely practice pharmacy in South Carolina, and
- 6) Reappear at the Board to demonstrate that he is qualified to safely and competently practice pharmacy in South Carolina.

On June 3, 2016, the Board issued its written Order on Remand that provided for the above-listed conditions. On July 11, 2016, the Appellant filed a Notice of Appeal with this court.

STANDARD OF REVIEW

Section 40-1-150 allows a “person aggrieved by a final action of a board” to “appeal the decision to the Administrative Law Court in accordance with the Administrative Procedures Act and the rules of the Administrative Law Court.” See S.C. Code Ann. § 40-1-160 (2011). A final action “disposes of the whole subject matter of the action or terminates the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.” See *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health & Env’t Control*, 287 S.C. 265, 267, 692 S.E. 2d 894, 895 (2010). The Department is an “agency” under the Administrative Procedures Act (APA). Accordingly, the APA’s standard of review governs appeals from decisions of the Department. See S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2012); *McEachern v. S.C. Employment Sec. Comm’n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006).

Under the APA the reviewing court may not substitute its judgment for that to the agency

on questions of fact, but may reverse the agency's decision if the decision is clearly erroneous in view of the substantial evidence. Section 1-23-380(5) states:

The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5).

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Co.*, 320 S.C. 515, 466 S.E.2d 357 (1996). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. *Waters*, 467 S.E.2d at 917.

If substantial evidence exists for a certain agency decision, that decision may not be disturbed unless there is an abuse of discretion evidenced by a showing that the action of the agency was arbitrary or unlawful. S.C. Code Ann. § 1-23-600(A) (Supp. 2015). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of

reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. South Carolina State Bd. Of Dentistry*, 286 S.C. 182, 184-5, 332, S.E.2d 539, 541 (Ct.App. 1985).

DISCUSSION

The Appellant was a pharmacist licensed by the Board of Pharmacy to practice pharmacy in South Carolina. The Board is tasked with regulating the practice of pharmacy in order to protect the public's health, safety, and welfare. As part of these duties, the Board has the authority to regulate pharmacists in this state for the public's protection and to impose sanctions for misconduct. Section 40-1-120(A) states that:

- (A) Upon a determination by a board that one or more of the grounds for discipline exists, in addition to the actions the board is authorized to take...the board **may**:
- (1) issue a public reprimand;
 - (2) impose a fine not to exceed five hundred dollars unless otherwise specified by statute or regulation of the board;
 - (3) place a licensee on probation or restrict or suspend the individual's license for a definite or indefinite time and prescribe condition to be met during probation, restriction, or suspension including, but not limited to, satisfactory completion of additional education, or a supervisory period, or of continuing education programs;
 - (4) permanently revoke the license.

On remand, the Board complied with this court's Order, and ultimately listed specific conditions for the Appellant to meet, under the provisions of S.C. Code Ann. § 40-1-120(A)(3). The conditions were based upon the admitted actions of the Appellant. The Appellant admitted that he used "poor judgment" when he decided to steal over \$14,000 worth of legend drugs from his employer and dispense those drugs without prescriptions to individuals in Honduras. As part of his mitigation evidence, the Appellant stated that some of the drugs he took were generic drugs, and that he "had already obtained the prescriptions for those patients from [a] Honduran doctor. When I got back to CVS...it was an effort to satisfy those prescriptions that I took those medications. Again, I admit looking at everything now, it was a poor judgment." (R. at 174). The Appellant testified that he was able to get the drugs through US Customs because he had the prescriptions for the drugs from a "doctor in Honduras." (R. at 175).

The Appellant now argues that the Board's action was arbitrary and capricious and an abuse of discretion because the conditions were "clearly meted out as punishment" rather than an

appropriate exercise of the Board's discretion. He also argues that he was denied substantive due process and equal protection because there "was no rational relationship between the facts and the punishment meted out by the Board."

The Appellant has submitted to this court, along with his brief, an affidavit (and curriculum vitae or CV) from Dr. John C. Rouff. Dr. Rouff holds advanced degrees in history, and wrote that he examined "all public orders of the Board of Pharmacy...for the period of 2009 through August 22, 2016...." and he concluded that the conditions the Board imposed in the Appellant's case "were more severe than have been imposed on any other licensee disciplined in the Public Orders of the Board." Neither this court nor the Appellant can presume to know all the facts involving each of the pharmacist's cases involved in those Board orders, and it is absurd to suggest this. Additionally, for this court to begin to delve into the innumerable files and individual cases of each disciplined pharmacist would be both improper and impossible, considering that this court cannot substitute its judgment that of the agency. Lastly, not only is this information irrelevant, it is also not part of the Record on Appeal in this case, as defined in SCALC Rule 36.³

Likewise, the Appellant's argument that the sanctions imposed upon him are much different from those imposed on others is of no import and is not a basis for reversal of the Board's sanctions. "[A]n agency need not exercise its discretion identically in every case and a penalty within statutory authority is not unwarranted simply because it is more severe than sanctions imposed in other cases." *See Osman v. South Carolina Dept. of Labor*, 382 S.C. 244, 676 S.E. 2d 672 (2009). Additionally, as stated already, this court may not consider the affidavit of Dr. Rouff, because it is not properly part of the Record on Appeal in this case.

This court finds a review of the record reveals that the Board's conditions are supported by the evidence and are within the scope of the Board's conferred authority. The Board's conditions very closely follow the Legislature's list of suggested conditions it provided in S.C. Code Ann. § 40-1-120, and include, but are not limited to, additional education, a supervisory period, and continuing education programs. *See State v. Allen*, 370 S.C. 88, 94, 634 S.E. 2d 653, 656 (2006) (a decision may potentially be arbitrary and capricious if it "does not fall within the range of

³ The Respondent filed a Motion to Strike Appellant's Exhibit from Appellant's Brief on December 30, 2016. The Respondent argued that SCALC Rule 36, which provides that an Administrative Law Judge "will not consider any fact which does not appear in the Record." The Record on Appeal is defined in SCALC Rule 36B, and this court agrees with the Respondent and finds that Dr. Rouff's affidavit is not properly before this court.

permissible decisions applicable in a particular case.”). In order to be deemed safe to practice pharmacy in this State, the Board also included the condition that the Appellant retake the NAPLEX and the MPJE. While the Appellant did pass both tests over twenty (20) years ago, evidence in the record indicates the Board had serious questions about the Appellant’s competency and training, based upon the Appellant’s statements before the Board during his hearing, and based upon the Board’s findings that the Appellant engaged in conduct that demonstrates either a lack of knowledge of rules governing his profession or a wholesale disregard of such rules (the Appellant diverted non-controlled drugs without proper authorization from a physician and without certainty of a long-term supply). (R. at 15).

As stated previously, “[w]hile this court may not necessarily agree with the Board’s sanctions, it may not substitute its judgment for that of the Board...” *Id.* at 184. Section 40-1-120(A) of the South Carolina Code of Laws clearly authorizes the Board to revoke or suspend the Appellant’s pharmacy license, reprimand him, or take any other lesser reasonable action. Since the conditions the Board imposed were within those established by law, the Appellant’s contention that they were arbitrary and capricious is without merit. The record also reveals that the Board’s decision was rationally based on the evidence presented and the seriousness of the Appellant’s misconduct, and was therefore not arbitrary or capricious or an abuse of discretion. Given that the purpose of the Board “is to protect the people of South Carolina” and its “purpose is monitoring and regulating the practice of pharmacy in a way that [it] can provide healthcare services and protect the people of South Carolina” this court finds that the Board had authority to prescribe the conditions for reinstatement of the license.⁴

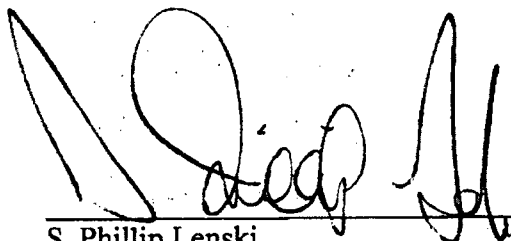
⁴ This court finds that the Appellant’s arguments concerning alleged violations of his substantive due process rights and equal protection rights were issues that he did not properly preserve, since they were not raised and ruled upon before the Board. *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E. 2d 427, 429 (1995). Even if these issues were properly preserved, however, the Board has not denied the Appellant his due process or equal protection rights. A license to practice pharmacy by properly licensed individuals is a property interest founded in state law. Once a license is issued, however, the continued possession of that license is not an absolute right. “A state may...under its police power, regulate, within reasonable bounds, for the protection of the public health...by defining the qualifications which one must possess before being permitted to practice....” *See Dantzler v. Callison*, 230 S.C. 75, 92-93, S.E. 2d 177, 186-187 (1956).

The Appellant indicated at the Board hearing that he currently practices as a pharmacist at the VA in Asheville, North Carolina, using his Georgia pharmacy license, which he obtained based upon his license in South Carolina. Despite his assertions that he has already been punished enough by having his State license suspended for the past two (2) years, it appears (curiously) that the Board’s decision has in no way prevented the Appellant from practicing his profession in North Carolina.

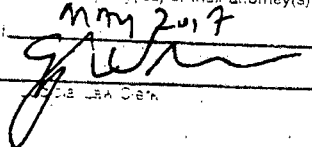
THEREFORE, IT IS HEREBY ORDERED that the decision of the Board appealed from is **AFFIRMED** and the Respondent's Motion to Strike Appellant's Exhibit From Appellant's Brief is **GRANTED**.

AND IT IS SO ORDERED.

May 12, 2017
Columbia, South Carolina



S. Phillip Lenski
Administrative Law Judge

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this notice order in the above entitled action upon all
parties to this cause by depositing a copy hereof,
by the United States mail, postage paid, or in the interagency
mail service addressed to the party(ies) or their attorney(s).
The date of service is 12th day of May, 2017
By: 
Clerk

With regard to allegation that his equal protection rights have been violated, it is "well settled than an agency need not exercise discretion identically in every case." See *Deese* at 185.