

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Case No. 2017-001339

Cyril J. Okadigwe, Appellant,

v.

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SC Court of Appeals

South Carolina Department of Labor, Licensing and Regulation,
State Board of Pharmacy, Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Administrative Law Court correctly find that the Board's conditions were supported by the evidence and were not arbitrary, capricious, or an abuse of discretion?
- II. Did the Administrative Law Court properly exclude evidence that was not introduced before the Board, that was not properly before the Court, and that was not part of the Record on Appeal?
- III. Was Appellant denied his due process and equal protection rights?

STATEMENT OF THE CASE

This appeal stems from an Order issued by the Honorable S. Phillip Lenski of the Administrative Law Court (“ALC”) affirming the Board’s imposition of conditions Appellant must satisfy in order to lift the indefinite suspension of his pharmacist license. The present appeal concerns whether the ALC erred in affirming the Board-imposed conditions Appellant must satisfy in order to lift the suspension on his pharmacist license and return to practice in South Carolina.

By way of background, Cyril J. Okadigwe (“Appellant”) is a pharmacist licensed by the South Carolina Department of Labor, Licensing and Regulation (“LLR”), State Board of Pharmacy (“the Board”). An initial disciplinary hearing was held on March 20, 2014. At the conclusion of the initial disciplinary hearing and as provided in its April 21, 2014 Final Order, the Board found that Appellant violated S.C. Code Ann. §§ 40-43-86(DD)(5) and 40-1-110(1)(f) by diverting over \$14,000.00 worth of drugs from his employer. The Board ordered Appellant’s South Carolina license to be indefinitely suspended. (2014 Board Order pp. 1–3).

On June 19, 2014, the Board held a hearing pursuant to Appellant’s request for reinstatement. At the conclusion of this hearing and as provided in the Board’s July 18, 2014 Corrected Final Order, the Board denied Appellant’s request for reinstatement. (2014 Corrected Final Board Order pp. 1–3).

Appellant then appealed the Board’s decision to the ALC. On February 4, 2016, the Court issued its Order of Remand. (ALC Order of Remand pp. 1–9). In the Order of Remand, the ALC found that the Board acted within its scope of authority in disciplining Appellant for violating S.C. Code Ann. §§ 40-43-86 and 40-1-110(1)(f) based on Appellant’s misconduct of wrongfully taking over \$14,000 of prescription drugs from his employer. (*Id.* at pp. 7–9). The ALC also found that the Board’s findings were supported by substantial evidence in the record.

(*Id.*). However, the ALC found that the Board abused its discretion by indefinitely suspending Appellant's license without prescribing conditions to be met during the indefinite suspension, in violation of S.C. Code Ann. § 40-1-120(A)(3)(1976, as amended). (*Id.*). Accordingly, the ALC remanded the underlying case to the Board to prescribe conditions for Appellant to meet during the indefinite suspension of his license in order to return to practice in South Carolina. (*Id.* at p. 9).

Following the ALC's February 4, 2016 Order of Remand, a hearing before the Board was held on March 16, 2016. (Transcript pp. 1–23). Appellant was present and was represented by Herbert E. Buhl, Esquire. Patrick Hanks, Chief Disciplinary Counsel for LLR, represented the State.

The record reflects that during the remand hearing, both Appellant and his attorney answered numerous questions presented by the Board members. (Transcript pp. 9–14). When asked when the last time he practiced pharmacy was, Appellant testified that he still practices pharmacy by using his Georgia license at the VA in Asheville, North Carolina. (Transcript pp. 14, 18, 20). At the conclusion of the March 16, 2016 hearing, the Board, in accordance with the ALC's Order of Remand and as required by S.C. Code Ann. § 40-1-120(A)(3) (1976, as amended), prescribed conditions on Appellant's indefinite suspension. The Board provided that Appellant's license would remain indefinitely suspended until he complies with the following conditions:

- a. Retake, and successfully complete, the North American Pharmacist Licensure Examination ("NAPLEX") and Multistate Pharmacy Jurisprudence Examination ("MPJE");

- b. Successfully complete the Medication Safety Course offered by the University of Oregon;
- c. Demonstrate that Appellant has completed 30 hours of ACPE (not CME) accredited continuing education courses, with at least 12 hours to be obtained through attendance at lectures, seminars, or workshops, and at least 15 hours in drug therapy or patient management, in addition to the regular continuing education courses necessary for licensure in South Carolina;
- d. Provide documentation that he has paid restitution to his former employer for the diverted drugs and that he successfully completed the pre-trial intervention program, which resulted in the dismissal of the underlying criminal charges;
- e. 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 Carolina¹; and
- f. Reappear before the Board to demonstrate that Appellant is qualified to safely and competently practice pharmacy in South Carolina.

(Transcript p. 22; 2016 Board Order on Remand p. 3).

On June 3, 2016, the Board issued its written Order on Remand that provided for the aforementioned conditions. (2016 Board Order on Remand pp. 1–3).

Appellant filed his Notice of Appeal with the ALC on July 11, 2016, and filed his brief on or about October 31, 2016. Attached to Appellant's Brief submitted to the ALC was an

¹ This requirement was provided in the Board's Private Order on Remand, which is more detailed than the Board's Public Order on Remand. (2016 Private Board Order on Remand pp. 1–3). In contrast, the Board's Public Order of Remand provided that Appellant was to comply "with other conditions known to the Board and [Appellant]." (2016 Board Order on Remand, p. 3).

exhibit, which included an affidavit of John C. Ruoff, Ph.D., as well as Ruoff's curriculum vitae.²

Respondent filed its brief on or about December 30, 2016. Additionally, Respondent filed a Motion to Strike the aforementioned exhibit that same day.

On May 12, 2017, the ALC issued its Order affirming the Board's Order on Remand and granting Respondent's Motion to Strike. (2017 ALC Order pp. 1–8). In affirming the Board's Order on Remand, the ALC found that the Board's conditions were supported by the evidence, were within the Board's authority, and were rationally based on the evidence presented and the seriousness of Appellant's misconduct, thereby making them not arbitrary or capricious or an abuse of discretion.

Appellant now appeals.

ARGUMENTS

I. The ALC correctly found that the Board's conditions were supported by the evidence and were not arbitrary, capricious, or an abuse of discretion.

Because the Board's conditions were supported by the evidence and were within the scope of the Board's conferred authority, the ALC committed no error.

Pursuant to S.C. Code Ann. § 40-43-10 *et seq.* (1976, as amended) ("Pharmacy Practice Act"), the Board is charged with regulating the practice of pharmacy in order to protect the public's health, safety, and welfare. This legislative directive is expressly provided for in S.C. Code Ann. § 40-43-10 (1998), which provides, in pertinent part, the following:

The purpose of [the Pharmacy Practice Act] is to promote, preserve, and protect the public health, safety, and welfare by and through the effective control and regulation of the practice of pharmacy; the licensure of pharmacists; the licensure,

² Appellant has again included references to this exhibit in his Brief to this Court. Respondent has addressed this issue in Section II, *infra*, and has concurrently filed with this Court a separate Motion to Strike with Respondent's Brief.

permitting, control, and regulation of all sites or persons, in or out of this State, that distribute, manufacture, possess, or sell drugs or devices within this State, as may be used in the diagnosis, treatment, and prevention of injury, illness, and disease of a patient or other individual.

Based on the plain language of the Pharmacy Practice Act, the Legislature has charged the Board with protecting the public through the regulation of the practice of pharmacy in South Carolina. Accordingly, the Board has been delegated the authority to regulate pharmacists, along with other licensees also under the purview of the Pharmacy Practice Act, for the public's protection and to sanction those licensees under its purview for misconduct. The Board is not required by either S.C. Code Ann. §§ 40-1-110, 40-1-120, or 40-43-60(D)(1) and (4) to invoke particular sanctions for certain violations. *See Gale v. State Bd. of Med. Exam'rs of S.C.*, 282 S.C. 474, 479, 320 S.E.2d 35, 38 (Ct. App. 1984).

As the Board explained and included in its Order on Remand, the purpose of imposing conditions on Appellant's indefinite suspension was to protect the public by ensuring that Appellant "is qualified to safely and competently practice pharmacy in South Carolina." (2016 Board Order on Remand p. 2). As the ALC confirmed in its Order of Remand, the Board's decision to suspend Appellant's license was properly supported by substantial evidence on the record. (ALC Order of Remand p. 7). As expressed by disciplinary counsel at the March 16, 2016 hearing, "there is a need to educate, to rehabilitate and to deter this individual." (Transcript p. 6). Despite Appellant's assertion that Board Member J. Addison Livingston imposed conditions on Appellant's indefinite license suspension to punish Appellant, that is simply not the case. (Appellant's Br. pp. 7-8). As explained and expressed by Mr. Livingston at the hearing, the Board is "here to protect the public of South Carolina, the citizens of South Carolina, and not necessarily ensure someone has a job and the choices, bad choices they make is [sic] you have to suffer the consequences." (Transcript p. 14). The imposition of conditions on

Appellant's indefinite suspension was done to protect the public by ensuring he can safely and competently practice pharmacy.

Appellant argues that the Board's June 3, 2016 Final Orders were "arbitrary and capricious, and an abuse of discretion." (Appellant's Br. p. 12). The South Carolina Supreme Court has shed light on when an administrative decision is arbitrary and capricious. *See Deese v. S.C State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (S.C. App. 1985).

In *Deese*, the court ruled that since the sanctions imposed against the dentist were within those established by law, the dentist's contention that they were arbitrary and capricious was without merit. *Id.* at 185, 332 S.E.2d at 541. Moreover, in deciding whether the Dental Board acted arbitrarily because of an alleged disparity between the dentist's sanctions and others — including the dentist's co-accused colleagues — sanctioned by the Board, the Court of Appeals reasoned that an agency need not exercise its discretion identically in every case. *Id.* In *Deese*, the Court of Appeals provided that "[i]t appears settled . . . that the alleged disparate treatment affords no basis for reversal of the Board's sanctions" and that a "penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases and mere unevenness in the application of the sanction does not render its application in a particular case unwarranted in law." (internal quotations omitted). *Id.*

In reviewing the various conditions discussed in detail in Sections I.a–I.c, *infra*, the ALC found that "[t]he 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." (2017 ALC Order p. 6). "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”, the ALC appropriately found that the Board had authority to prescribe the following conditions Appellant must satisfy to reinstate his license. (2017 ALC Order p. 7). Despite Appellant’s assertion that the conditions imposed “were clearly meted out as punishment” and were done “to ensure that it would be extremely difficult, if not, impossible for him to ever reinstate his license,” a review of the record makes clear that that is not the case. (Appellant’s Br. p. 8). As detailed below, the ALC committed no error when it affirmed the Board’s decision to impose appropriate conditions Appellant must satisfy in order to safely return to practice in South Carolina.

a. Retaking and successfully completing the North American Pharmacist Licensure Examination and the Multistate Pharmacy Jurisprudence Examination

In order to be deemed safe to practice pharmacy in South Carolina, the Board required Appellant to retake, and successfully complete the NAPLEX and the MPJE. As provided by S.C. Code Ann. § 40-43-80(4) (1976, as amended), in order to obtain a license to practice pharmacy in South Carolina, an applicant must, among other requirements, successfully pass both the NAPLEX and the MPJE.

The NAPLEX measures a candidate’s knowledge of the practice of pharmacy and is used by many state boards of pharmacy in their assessments of pharmacist candidates’ competency to practice the profession.³ The NAPLEX focuses on the following topics: pharmacotherapy and health outcomes and preparation, compounding, dispensing, and administration of medications and provision of health care products. The MPJE covers both federal and state-specific questions regarding pharmacy law and is used by many jurisdictions to

³National Association of Boards of Pharmacy – NAPLEX, <https://nabp.pharmacy/programs/naplex/>.

test candidates' knowledge and mastery of pharmacy law.⁴ The MPJE focuses on three content areas: pharmacy practice; licensure, registration, certification, and operational requirements; and general regulatory processes.

Appellant argues that there is no rational basis for the Board to require Appellant to take both the NAPLEX and MPJE again, as he passed both the NAPLEX and MPJE in 1995. (Appellant's Br. p. 9). While Appellant did pass both tests over twenty years ago, substantial evidence on the record supports the Board requiring Appellant to retake both tests in order to ensure he safely and competently practices pharmacy in this state. The Board found that, on more than one occasion, Appellant diverted various prescription drugs from his employer to the effect of over fourteen thousand dollars. Specifically, Appellant diverted the following non-controlled drugs: Plavix 75 mg, Lipitor 10 mg, Lipitor 20 mg, Nexium 40 mg, and Crestor 10 mg. (2016 Board Order on Remand p. 1). These drugs are name-brand maintenance drugs commonly used to treat chronic or long-term conditions and typically require regular, daily use of the aforementioned medications by a patient once a physician determines the patient's long-term treatment plan. Without proper authorization from a physician and without certainty of a long-term supply, the efficacy of the aforementioned drugs in treating long-term conditions is questionable.

The Board also found that Appellant then took those diverted drugs and transported them to Honduras, where he dispensed said drugs without proper authorization. Further, there was no physician involved when Appellant distributed the diverted drugs in Honduras. Appellant also did not keep a record of who received the aforementioned drugs. (*Id.* at 1–2). Because of Appellant's serious and pervasive misconduct during his aforementioned drug diversion scheme,

⁴ National Association of Boards of Pharmacy – MPJE, <https://nabp.pharmacy/programs/mpje>.

the Board saw fit to rehabilitate Appellant by requiring him to satisfactorily complete the two tests that are required to be passed before a license is issued to a pharmacist in South Carolina. While Appellant may have learned how to properly, safely, and legally dispense medications in compliance with the standards of pharmacy back in 1995 when initially licensed, serious questions of Appellant's competency have since arisen, based on Appellant's elaborate scheme to divert drugs to a foreign country from his employer and then dispense said drugs without proper authorization or a supervising physician. On this issue, the ALC found that evidence in the record indicated the Board had serious questions about Appellant's competency and training, based on both Appellant's own statements as well as the Board's findings that he engaged in conduct that demonstrated "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)." (2017 ALC Order p. 7).

The statutory language of S.C. Code Ann. § 40-1-120(A)(3) (1976, as amended) includes conditions that a Board may impose on a licensee upon a determination that the licensee has engaged in conduct for which grounds for discipline exist. While S.C. Code Ann. § 40-1-120(A)(3) does not provide an exhaustive list of conditions a board may prescribe for licensees that violate their respective practice acts, it does include the following: "satisfactory completion of additional education, of a supervisory period, or of continuing education programs."

The Supreme Court of South Carolina has directly addressed S.C. Code Ann. § 40-1-120(A)(3) and a licensing board requiring a licensee to reestablish competency before he or she is allowed to return to practice in South Carolina. See *Osman v. S.C. Dep't of Labor, Licensing & Regulation*, 382 S.C. 244, 676 S.E.2d 672 (2009). In *Osman*, following an evidentiary hearing

regarding Dr. Osman's deviation from the standard of care while performing a Caesarean section, the State Board of Medical Examiners ("Medical Board") ordered that Dr. Osman be publicly reprimanded, be required to pay the costs associated with adjudicating the case, and be restricted from practicing surgical obstetrics until she proved that she had the appropriate education and training. On appeal, the ALC affirmed the public reprimand and assessment of costs, but deleted the competency provision. *Id.* at 247, 676 S.E.2d at 674. Following certification to the South Carolina Supreme Court, the Supreme Court affirmed the imposition of a public reprimand and assessment of costs, but reversed the ALC regarding its deletion of the competency provision.

In finding that the Medical Board did not exceed its authority in requiring Osman to prove that she had the appropriate education and training, the Supreme Court found that the competency reestablishment "sanction fits squarely within the parameters of the Board's statutory authority." *Id.* at 247-48, 676 S.E.2d at 674-75. The Court also explained that were Osman to provide the Board with proof that she was competent, the Board's decision to find this proof "to be satisfactory should be made objectively and reasonably" and "[a]pproval cannot be unreasonably withheld." *Id.* at 248, 676 S.E.2d at 675.

Here, the Board has arguably provided more guidance than the licensee received in *Osman*, as the Board has provided clear directives on how Appellant can reestablish competency and safely return to practice in South Carolina.

b. Successfully completing the Medication Safety Course offered by the University of Oregon

The Board also required Appellant to successfully complete the Medication Safety Course offered by the University of Oregon. (2016 Board Order on Remand p. 3). Here, Appellant argues that "the Board has never required any other licensee to complete this

Medication Safety Course offered by the University of Oregon” and that there is “no such course.” (Appellant’s Br. p. 12). Appellant is correct on both accounts; the Board has not required any other licensee to complete the *University of Oregon* Medication Safety Course because the Medication Safety Course is instead offered by *Oregon State University*. However, Appellant is incorrect in its assumption that the Board, in order to “ensure that [Appellant’s] indefinite suspension remained indefinitely in place, or served as a revocation, the Board has imposed conditions and requirements for reinstatement which can never be satisfied by Appellant.” (Appellant’s Br. p. 12).

Respondent appreciates Appellant bringing this misstatement to the attention of Respondent and the ALC; the Board had no intention to subvert the ALC’s directives by asking Appellant to comply with a requirement that cannot be fulfilled. In fact, at the March 2016 hearing following the Court’s Order of Remand, Mr. Livingston succinctly summarized the Board’s role as follows:

It’s just to give parameters around how this Respondent could potentially get his license back, because it’s an indefinite suspension without parameters. So we need to give those parameters. It’s not changing the ruling that we have already issued, because the [ALC] upheld that ruling. So it’s just simply we need to put some conditions on how he could potentially at some point go through certain steps that we lay out to get his license back.

(Transcript pp. 10–11).

With a firm understanding of the ALC’s Order of Remand, it is unlikely that the Board intended to flout the clear directives of both the ALC and the statutes governing the agency. The Board simply made a misstatement on the record as to which university in Oregon provides the medication safety course, which unfortunately went uncorrected in the Board’s Order on Remand. (2016 Board Order on Remand p. 3). The use of “University of Oregon” instead of the correct “Oregon State University” amounts to, at most, a scrivener’s error that should have been

corrected.⁵ Correcting this error involves no exercise of judgment or discretion on the merits of the action. *See Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986).

c. 30 CE Hours

Finally, the Board required that Appellant demonstrate that he complete 30 hours of ACPE-accredited continuing education courses, in addition to the regularly required continuing education courses required of all licensees in the state. (2016 board Order on Remand p. 3). Appellant was to obtain at least 12 of those hours by attending seminars, lectures, or workshops, and at least 15 hours were to be focused on drug therapy or patient management. (*Id.*)

As previously discussed, S.C. Code Ann. § 40-1-120(A)(3) (1976, as amended) expressly includes requiring licensees to complete continuing education programs as one of many possible conditions a board may impose on a licensee, like Appellant, upon a determination that the licensee has engaged in conduct for which grounds for discipline exist. *See Osman*, 382 S.C. 244, 248, 676 S.E.2d 672, 675 (2009).

Despite Appellant's assertion that there is "no rational basis for imposition of the ACPE continuing education courses," the Board appropriately found that there is a serious need to rehabilitate and educate Appellant on correct pharmaceutical practice to ensure the public's safety. (Appellant's Br. p. 11). Through his extensive misconduct, it is clear that there is a need for Appellant to review his knowledge of the applicable statutes, regulations, best practices, and policies that relate to the practice of pharmacy, for the benefit and protection of the public. Considering that Appellant engaged in such serious misconduct while presumably maintaining his continuing education hours with the Board since 1995, more extensive education in addition to the continuing education requirements that exist for all licensees seems more than appropriate.

⁵ The medication safety course is an online course that can be taken at any time, costs a total of \$350, and is ACPE-accredited. Patient Safety and Medication Error Prevention for Pharmacy, <https://pace.oregonstate.edu/catalog/patient-safety-and-medication-error-prevention-pharmacy>.

On the issue of the imposition of conditions, Appellant’s attorney provided that “[i]f you look at your own decisions that – cases involving controlled narcotic drugs, all of those people have been referred to legal refresher, quality assurance, RPP.⁶ Those kinds of programs you have ongoing. I think that plus a fine would be appropriate.” (Transcript p. 12). Despite Appellant’s counsel’s earlier willingness to provide conditions that were amenable to Appellant, later during the hearing, the following exchange took place between Mr. Livingston and Appellant’s counsel:

Mr. Livingston: I think just to be fair here since I read that, and correct me if I’m wrong, you’re basically suggesting that since he’s been out of practice for two years that’s been punishment enough and we should –

Mr. Buhl: That’s our position. If the [B]oard wants to impose a fine or other conditions, we will have to take a look at it to see if we can comply.

(Transcript p. 17).

In contrast to his earlier suggested conditions on Appellant’s licensure, Appellant’s above-quoted response appears to suggest that the imposition of *any* conditions on Appellant’s indefinite suspension, as required by the Court’s Order of Remand and S.C. Code Ann. § 40-1-120(A)(3), may prove too difficult to comply with.

Based on the plain language of the governing statutes, the Board’s conditions very closely follow the Legislature’s list of suggested conditions it provided in S.C. Code Ann. § 40-1-120. Thus, the conditions imposed clearly fall within the range of permissible decisions

⁶ During the remand hearing before the Board, Appellant’s counsel suggests that having Appellant enroll in the South Carolina Recovering Professional Program (“RPP”) would be appropriate. RPP describes itself as “a confidential referral and monitoring program designed for physicians, nurses, pharmacists, dentists and other licensed health professionals in South Carolina with alcohol or substance use disorders or dual diagnosis of addiction and mental illness. The program offers an effective way to ensure that impaired professionals receive the help they need as quickly as possible.” A typical RPP enrollment agreement requires 5 years of participation after the initial assessments are made, with ongoing monitoring being required for all participants. SCRPP—About Us, <https://scrpp.org/about-us/>.

applicable in this case and appear well-reasoned. *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 permissible decisions applicable in a particular case.”)

In light of the settled law and the evidence in the record, this Court should affirm the ALC Decision and find that the Board’s conditions were supported by substantial evidence on the record and were not arbitrary, capricious, or an abuse of discretion.

II. The ALC properly excluded after-created evidence that was not introduced before the Board, was not properly before the ALC, and was not part of the Record on Appeal.⁷

In Appellant’s Brief to the ALC, Appellant attempted to unilaterally add after-created evidence to the Record by attaching as an exhibit the affidavit of John C. Ruoff, Ph.D., as well as Ruoff’s curriculum vitae. To briefly summarize these documents, in his affidavit Ruoff provides a summary of his review of the Board of Pharmacy’s public orders from 2009 through August 2016 to argue 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.’” (2017 ALC Order p. 6). In response to Appellant’s inclusion of Ruoff’s affidavit and CV, Respondent filed a Motion to Strike Appellant’s Exhibit from Appellant’s Brief with the ALC, which was granted. In granting Respondent’s Motion to Strike, the ALC agreed with Respondent that, pursuant to SCALC Rule 36, an Administrative Law Judge “will not consider any fact which does not appear in the Record” and that Ruoff’s affidavit was not properly before the ALC. (2017 ALC Order p. 6, n. 3).

Despite having this after-created evidence stricken from his brief by the ALC, Appellant has again discussed this matter and included excerpts from the affidavit into his brief to this

⁷ Respondent has also filed with this Court a Motion to Strike After-Created Evidence with respect to this issue.

Court. Appellant now argues that the exclusion of this evidence from the Record on Appeal was an error of law. As detailed below, the ALC's decision not to include this after-created evidence was not an error of law.

The Administrative Procedures Act ("APA") establishes that, in appellate matters, the Court's review is limited to the record established during the agency's contested proceeding. See S.C. Code Ann. § 1-23-380(4) (2008) ("The review must be conducted by the court and must be confined to the record.")

The SCALC Rules also address this issue. Specifically, SCALC Rule 36(G) provides that "[t]he Administrative Law Judge will not consider any fact which does not appear in the Record." Additionally, SCALC Rule 68 provides that "[t]he South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." Following, Rule 210(c), SCACR, provides, in pertinent part, that "[t]he Record shall not . . . include matter which was not presented to the lower court or tribunal." See also Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.")

In addition to the SCALC Rules, the Appellate Court Rules, and the APA, case law also supports the ALC's decision to strike Ruoff's affidavit and CV from Appellant's Brief.

In Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg Cnty. Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006), the South Carolina Supreme Court found that it was improper for the Court of Appeals' majority in the underlying case to rest its decision, in large part, not on evidence in the record, but rather on an affidavit that was attached to a

party's petition for rehearing after the first Court of Appeals' decision. ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record. We review . . . using only the evidence presented to the trial court and included in the Record on Appeal.") See also *S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.")

In *Gale v. State Bd. of Med. Exam'rs of S.C.*, 282 S.C. 474, 479, 320 S.E.2d 35, 38 (Ct. App. 1984), the South Carolina Court of Appeals also reached a similar conclusion, finding that the argument of alleged disparate treatment for similar violations in the context of licensee discipline proceedings could not be addressed since the record did not contain evidence of prior Board actions in other cases.

In his brief, Appellant argues that Ruoff's analysis is relevant evidence for both the ALC and this Court and that there was no other procedure by which Appellant could have included the affidavit to the lower court. (Appellant's Br. pp. 14–15). Appellant then cites to South Carolina Rule 43(m)(2), SCRCP, and Rules 702 and 704, SCRE, to argue that "[t]he testimony of experts has long been recognized by our Courts," that the "expert may testify as to his opinion on the ultimate issue to be decided by the trier of fact," and that the "underlying facts or data utilized by the expert witness do not need to be admissible in evidence." (Appellant's Br. p. 14). Next, Appellant cites two cases to argue that courts prefer not to dispose of cases on technical grounds. Finally, Appellant provides that, pursuant to Rule 212, SCACR, he "intends to move the Court of Appeals for leave to supplement the Record on Appeal to include the Affidavit of Dr. John C. Ruoff, Phd." (Appellant's Br. p. 15).

Appellant's scattered arguments are without merit. First, Appellant argues that the affidavit is relevant because it allegedly reveals that the sanctions imposed on Appellant are much different than those imposed on others. Here, the ALC correctly found that argument was "of no import" and was "not a basis for reversal of the Board's sanctions," as it is well settled that an agency does not need to exercise its discretion identically in every case. (2017 ALC Order pp. 6, 8).

Second, Appellant's citations to Rule 43(m)(2), SCRCP, and Rules 702 and 704, SCRE, are wholly irrelevant to the issue of adding and referencing after-created evidence into the record and into Appellant's Brief. Rule 43(m)(2), SCRCP, has been deleted since Rule 43 was amended in 1995, with those matters now governed by the South Carolina Rules of Evidence. The South Carolina Rules of Evidence Appellant has cited do not support his argument. Rule 704, SCRE, provides that opinion testimony that is "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As the ALC properly found, this information was irrelevant, as alleged disparate treatment affords no basis for the reversal of the Board's sanctions. (2017 ALC Order pp. 6, 8). *See Deese*, 286 S.C. 182, 185, 332 S.E.2d 539, 541 (Ct. App. 1985). Pursuant to Rule 402, SCRE, irrelevant evidence is inadmissible. Rule 702, SCRE, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In the present case, Ruoff, Appellant's supposed "expert", was never qualified as an expert. Rather, his CV was attached along with his summary of his review of the Board's prior orders. Ruoff's supposed examination of these final orders required no scientific, technical, or other specialized knowledge, and the trier of fact — here the

Board — did not need assistance to understand this irrelevant evidence. To this point, the ALC found that .

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 [for] 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.

Importantly, Ruoff *never* testified before the trier of fact, was *never* subject to cross-examination by opposing counsel, and was *never* asked questions by the Board. Rather, Appellant, after the Board hearings, first added Ruoff's summary and CV to his brief to the ALC and again has added it here. *See Creed v. City of Columbia*, 310 S.C. 342, 344–45, 426 S.E.2d 785, 786 (1993) (“The admission of evidence is a matter addressed to the sound discretion of the trial judge . . . The qualification of a witness as an expert and admissibility of his testimony are matters largely within the discretion of the trial judge.”) To allow Appellant to unilaterally add after-created evidence would run contrary to the proper trial and appellate processes in place in this state.

Finally, Appellant's argument that there was no other procedure by which Appellant could have included the affidavit to the lower court ignores the plain language of S.C. Code Ann. § 1-23-380(3) of the APA, which provides the following process to parties seeking to present additional evidence:

If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

In the present case, no timely application was ever made to present additional evidence. Rather, Appellant just added the irrelevant after-created evidence into the Briefs he submitted to the ALC and this Court. Appellant simply attached Ruoff's affidavit and CV to his brief to the ALC, and discussed the affidavit at length in both his briefs to the ALC and to this Court. As of this date, Appellant also has not moved to supplement the record on appeal, as required by Rule 212(b), SCACR. Appellant has never showed that the additional evidence was material and why he failed to present it before the agency. As the Supreme Court in *Williamsburg* succinctly provided, nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record, as Appellant has twice done here.

Like *Williamsburg* and *Gale*, the factual allegations of sanctions imposed upon allegedly similarly situated pharmacists in Ruoff's affidavit were not received or considered by the Board below. Thus, they do not form a part of the Record on Appeal and should not be considered. Accordingly, because Ruoff's affidavit and accompanying CV were not included as part of the record before the Board, this Court should affirm the ALC's decision to strike this irrelevant after-created evidence, and any references, quotations, or excerpts from those documents, from Appellant's Brief.

III. Appellant's due process rights and equal protection rights were preserved, and the Board's actions were not arbitrary and capricious.⁸

Pursuant to the aforementioned legislative mandate as well as the ALC's Order of Remand, the Board properly imposed conditions on Appellant and in no way violated Appellant's due process or equal protection rights.

⁸ Respondent has addressed Appellant's two related arguments (*see* Appellant's Br. pp. 15-20) in this one section for clarity and brevity.

“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). “Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.” *Nicholson v. Nicholson*, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008). “It is well settled that . . . an appellate court cannot address an issue *unless it was raised to, and ruled upon by*, the trial court.” *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (emphasis added).

The ALC correctly found that Appellant’s arguments concerning violations of his substantive due process rights and equal protection rights were not properly preserved, since they were not raised and ruled upon before the Board. (ALC Decision p. 7, n. 4). *See also Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995).

Even if these issues were properly preserved, the Board has not denied Appellant his due process or equal protection rights. Appellant avers that the imposition of conditions to lift the indefinite suspension of his pharmacist license is in conflict with his rights under the Constitution of the United States. Appellant is correct in that the Fourteenth Amendment prohibits any state from depriving “any person of life, liberty, or property, without due process of law....” U.S. Const. amend. XIV, § 1. Appellant argues that “[t]he liberty interest at stake is the individual’s freedom to practice his or her chosen profession; the property interest is the specific employment.” (Appellant’s Br. p. 18). To this point, Appellant currently practices as a pharmacist at the VA in Asheville, North Carolina, using his Georgia pharmacist license. Despite Appellant’s assertions, the Board’s decision does not prohibit and has not prohibited him from practicing his chosen profession. Rather, the Board’s decision has suspended him from

being able to practice as a pharmacist in South Carolina until he has satisfied the aforementioned conditions and has proven he is safe to practice in this state.

Respondent agrees with Appellant's argument that a license to practice pharmacy by properly licensed individuals is a property interest founded in state law. Once licenses are issued, the continued possession of said licenses may become essential in the pursuit of a licensee's livelihood. *See Dantzler v. Callison*, 230 S.C. 75, 92–93, 94 S.E.2d 177, 186–87 (1956) (“There is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection.”) However, the right to practice a profession in this state is not absolute, as explained by the Supreme Court in *Dantzler*:

However, it may be observed that no person has a natural or absolute right to practice medicine, surgery, naturopathy or any of the various healing arts. It is a right granted upon condition. A state may not prohibit the practice of medicine or surgery, yet it is very generally held that a state, under its police power, may regulate, within reasonable bounds, for the protection of the public health the practice of either by defining the qualifications which one must possess before being permitted to practice the same.

Id. (internal citations omitted).

Accordingly, like the professions identified in *Dantzler*, the practice of pharmacy in South Carolina is reasonably regulated by the Board for the protection of the public.

S.C. Code Ann. § 40-1-10(A) provides that both the U.S. Constitution and the Constitution of the State of South Carolina protect the “[t]he right of a person to engage in a lawful profession, trade, or occupation of choice,” and the State can only abridge this right as a “reasonable exercise of its police powers when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public.” Based on the foregoing, the Legislature granted the Board the ability to reasonably exercise its police powers in order to preserve the public's health, safety, and welfare by allowing the Board to regulate the

pharmaceutical profession in this state. See S.C. Code Ann. § 40-43-10 (1976, as amended). Of course, in regulating the practice of pharmacy, the Board cannot deprive a licensee of his or her substantive due process rights. See *Worsley Cos., Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) (“Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons.”)

While Appellant argues that the Board has acted arbitrarily in requiring Appellant to re-acclimate himself to the proper practice of pharmacy, the Board was following the language of the governing statutes and did not act arbitrarily in requiring Appellant to satisfy conditions before returning to practice. The Board is simply requiring that Appellant re-establish competency in the practice of pharmacy — by successfully satisfying the Board’s conditions — before returning to practice in this state.

Finally, Appellant argues that his equal protection rights have been violated because “[i]t is clear that the Appellant has been treated differently and more severely than other pharmacists since at least 2009.” (Appellant’s Br. p. 17). With respect to Appellant’s mention of his equal protection rights being violated, it is well-settled that an agency need not exercise discretion identically in every case. See *Deese*, 286 S.C. at 185, 332 S.E.2d at 541 (Ct. App. 1985) (“A penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases and mere unevenness in the application of the sanction does not render its application in a particular case unwarranted in law.”) (internal quotations omitted); see also *Gale v. State Bd. of Med. Exam’rs*, 282 S.C. 474, 479, 320 S.E.2d 35, 38 (Ct. App. 1984).

In making his equal protection argument, Appellant quotes two cases, *Thompson v. S. C. Comm’n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976), and *Daniel v. Cruz*,

268 S.C. 11, 231 S.E.2d 293 (1977), to support his argument. (Appellant's Br. pp. 16–18). These cases are easily distinguishable from the present case and simply do not support Appellant's argument. Both *Thompson* and *Daniel* involve declaratory judgment actions regarding laws brought by parties to determine whether certain laws were constitutional.

In *Thompson*, the statutes at issue were provisions of the Uniform Alcoholism and Intoxication Treatment Act. In essence, these provisions — in counties or municipalities that had adopted the law — required law enforcement officers to take intoxicated persons into protective custody and deliver them to treatment facilities, shelters, or hospitals, rather than arresting them or prosecuting them for public drunkenness. See *Thompson*, 267 S.C. at 469, 229 S.E.2d at 720. In those counties or municipalities that did not adopt the provisions, the traditional public drunkenness laws would be enforced, resulting in fines or imprisonment upon conviction. *Id.* at 469, 229 S.E.2d at 721. The South Carolina Supreme Court in *Thompson* found that such provisions were unconstitutional and violated equal protection, as they varied the punishment for an offense according to the county or district the offense was committed in, as intoxicated persons would be treated as patients in one county or municipality, and criminals in others. *Id.* at 470–73, 229 S.E.2d at 721–22 (stating “a statute that varies the punishment for an offense according to the county or district in which it is committed has been held unconstitutional as an unjust discrimination and a deprivation of the equal protection of the laws.”)

In *Daniel*, the law at issue was a requirement that fortunetellers be licensed in the county in which they practice their trade. However, the law provided that it would not “be effective in any county until the county board of commissioners. . . authorize, by resolution, the collection of such tax.” *Daniel*, 268 S.C. 11, 13, 231 S.E.2d 293, 294 (1977). In turn, Greenwood County

Council did not adopt the provisions for granting the license, thereby making fortunetelling illegal in the county. In contrast, neighboring counties issued licenses for fortunetelling without issue. The South Carolina Supreme Court held that the provision “operates in such a manner that a fortuneteller may practice his trade in one county but not in another, depending upon the predilection of the governing body of the county. This type of provision is violative of equal protection . . .” *Id.* at 14–15, 231 S.E.2d at 294.

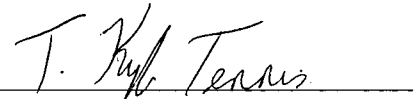
Unlike the situations in *Thompson* and *Daniel*, the present case involves no law that treats individuals differently based on geographic location. Rather, the present case involves a licensing board imposing conditions on a licensee’s return to practice after evaluating the particular facts and circumstances of that licensee’s disciplinary case. As provided by S.C. Code Ann. § 40-1-120, the Legislature has given the Board discretion when imposing conditions on licensure upon finding that grounds for discipline exists. As this Court found in *Deese*, an agency is not required to exercise discretion identically in every case. To do so would effectively strip the Board of its legislatively-authorized discretion. Putting Appellant’s argument in another context, Appellant’s position would require that every individual convicted of the same offense receive the exact same sentence, regardless of the unique facts and circumstances of that individual’s case, stripping a judge of all discretion with respect to sentencing. Thankfully the Board’s authority is not as rigid as Appellant desires, as the Board is charged with exercising its discretion in light of each case’s particular facts and circumstances. Such discretion was appropriately exercised in this case.

CONCLUSION

The ALC appropriately found that the conditions the Board imposed were squarely within those established by law, were rationally based on the evidence presented and the

seriousness of Appellant's misconduct, and did not violate Appellant's due process or equal protection rights. Finally, following South Carolina Supreme Court precedent, the ALC appropriately excluded from the record after-created evidence that Appellant attempted to unilaterally add to the record. Accordingly, the ALC committed no error and this Court should affirm the 2017 ALC Order.

Respectfully submitted,



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Columbia, South Carolina
November 7, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Case No. 2017-001339

Cyril J. Okadigwe, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
State Board of Pharmacy, Respondent.

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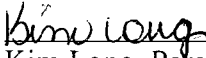
CERTIFICATE OF SERVICE BY MAILING

I hereby certify that I have this day served Respondent's Initial Brief, Designation of Matter, and Motion to Strike, by depositing same in an envelope, securely wrapped in the United States mail, properly addressed to the following addresses:

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November 7, 2017

The Honorable Jenny Abbott Kitchings
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RE: Cyril J. Okadigwe, Appellant v. South Carolina Department of Labor, Licensing and Regulation, South Carolina State Board of Pharmacy, Respondent
Appellate Case No. 2017-001339

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Respondent's Initial Brief and Designation of Matter. Additionally, please also find enclosed the original and six copies of Respondent's Motion to Strike. Copies of Respondent's Initial Brief, Designation of Matter, and Motion to Strike were mailed to Counsel for Appellant today.

Sincerely,

T. Kyle Tennis, Esq.
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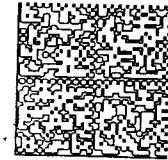
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SC Court of Appeals

Cc: Herbert E. Buhl, Esq., Counsel for Appellant



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