THE SOUTH CAROLINA COURT of APPEALS

Cyril J. Okadigwe, Appellant,

v.

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

Appellate Case No.: 2017-001339

The Honorable S. Phillip Lenski
Trial Court Case No.: 2016ALJ110230AP

BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Administrative Law Court erred in finding that the Board did not abuse it's discretion, when the Board's decision was irrational, unwarranted, excessive, arbitrary and capricious, and an abuse of discretion.
2. Whether the Administrative Law Court erred in excluding relevant evidence from the Record on Appeal which clearly demonstrated that the Board acted arbitrarily and capriciously and denied Appellant equal protection of the law.
3. Whether the Appellant was denied due process and equal protection of the law.
4. Whether the Appellant was denied substantive due process and the Board Action was arbitrary and capricious.

STATEMENT OF THE CASE

Cyril J. Okadigwe has held a Pharmacist license from the South Carolina State Board of Pharmacy continuously from 1994 until his license was indefinitely suspended by the Board of Pharmacy on April 21, 2014. Mr. Okadigwe received his Bachelor of Science degree in Pharmacy in 1994 from the University of South Carolina and successfully completed the NAPLEX Examination (North American Pharmacist Licensure Examination) in 1995 soon after graduation. He received a Doctor of Pharmacy degree from the University of South Carolina in 1999. The Appellant received a Doctor of Medicine degree from Xavier School of Medicine in 2009. The Appellant is currently a Lieutenant Colonel in the United States Army now on reserve duty status. He was employed as a Pharmacist while on active duty and now is employed by the Veterans Administration facility in Asheville, North Carolina (R. p.55 - p.57).

Appellant appealed the indefinite suspension of his license by the Board of Pharmacy to this Court in Cyril J. Okadigwe v South Carolina Department of Labor, Licensing and Regulation, State Board of Pharmacy, Docket No, 14-ALJ-11-0521-AP. (hereinafter Okadigwe I) On April 21, 2014 the Board had indefinitely suspended Appellant's license to practice pharmacy for an indefinite period of time without prescribing any conditions to be met during the indefinite suspension, or providing any pathway by which Appellant could hope to reinstate his license: This Court found that the Board's imposition of an indefinite suspension, absent the setting of conditions, was an abuse of discretion, and the case was remanded to the Board to review its decision, and to prescribe conditions to be met by the Appellant during the indefinite suspension.

The essential underlying facts therefore have not changed.

Appellant was employed at CVS Pharmacy as a licensed Pharmacist from 2001 until 2010. On April 20, 2010, Appellant was arrested and charged with Grand Larceny, Value of Five Thousand and 00/100 ($5,000.00) or more. This charge involved the misappropriation of prescription (non-controlled) drugs from CVS Pharmacy which Appellant donated to mission charities in Honduras. This criminal charge was nolle prosequi on August 19, 2011. The Appellant completed the Solicitor's Pretrial Intervention Program; paid restitution of $14,000.00 to CVS Pharmacy, and an Order for the Destruction of Arrest Records was filed on September 11, 2011 in the Court of General Sessions expunging the entire record in the case.

Following hearings held by the Board on March 20, 2014 and June 19, 2014, the Board issued a Final Order on July 18, 2014 reaffirming its Final Order of April 21, 2014 and indefinitely suspending the Appellant's pharmacy license by Final Order. The Final Order contained no conditions to be met in order for Appellant to seek reinstatement of his license.

This Court issued its decision in Okadigwe I, on February 4, 2016, finding that the Board had abused its discretion by not providing conditions to be met by Mr. Okadigwe prior to the reinstatement of his license.

The Board of Pharmacy thereafter met on March 16, 2016, to reconsider Appellant's indefinite suspension, and to consider this Court's Order on Remand almost two (2) years after it had originally indefinitely suspended Appellant's license.

On June 3, 2016 the Board issued two (2) Orders: An Order on Remand (Public), and an Order on Remand (Private). The Board concluded that Appellant's license would be indefinitely suspended until such time as Respondent:

1. Retakes, and successfully completes, the North American Pharmacist Licensure Examination ('NAPLEX") and Multistate Pharmacy Jurisprudence Examination ("MPJE");

2. Successfully completes the Medication Safety Course offered by the University of Oregon;

3. Demonstrates that he 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 (i.e., the 30 hours described herein shall not count towards the CE hours required for the maintenance of licensure);

4. Provides 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;

5. Complies with other conditions known to the Board and Respondent; and

6. Reappears before the Board to demonstrate that he is qualified to safely and competently practice pharmacy in South Carolina.

The Order on Remand (Private) imposed essentially the same conditions upon the Appellant. However, the Board made an additional finding that an LLR Investigator observed Respondent crying during an interview, and therefore the Board added an additional condition that Appellant undergo a psychometric evaluation by a board-approved psychiatrist or psychologist and provide a written report from the evaluators demonstrating that he is qualified to safely practice Pharmacy in South Carolina.

Appellant timely filed his Notice of Appeal on July 5, 2016.

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 & Envt'l Control*, 287 S.C. 265, 267, 692 S.E. 2d 894, 895 (2010). The State Board of Pharmacy 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). Section 1-23-380(5) (2005) (Supp. 2016) of the South Carolina Code of Laws of 1976, as amended, provides the standard used by appellate bodies to review agency decisions. *See* § 1-23-600(D). Pursuant to the APA, the Court of Appeals may affirm the agency's decision, or remand the matter for further proceedings. This Court may also reverse or modify the decision 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).

Accordingly, the Administrative Law Court's decision should not be overturned unless it is unsupported by substantial evidence, or controlled by some error of law. Original Blue Ribbon Taxi Corp. v. S.C. Department of Motor Vehicles, 670 S.E. 2d 674 (Ct. App. 2005). Engaging and Guarding Laurens Cty's Env't v. S.C. DHEC, 755 S.E. 2d 444 (2014). Substantial evidence is relevant evidence that, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a mere scintilla of evidence. Trimmier v. S.C. Department of Labor, Licensing, and Regulation, 746 S.E. 2d 491 (Ct. App. 2013).

Appellant submits that the Board of Pharmacy's Final Orders, and the findings and conclusions of the Administrative Law Court were unsupported by substantial evidence, controlled by error of law, and were in violation by Appellant's constitutionally protected rights to due process and equal protection of the law.

ARGUMENT

I. THE BOARD IMPOSED CONDITIONS FOR REINSTATEMENT WHICH WERE NOT RATIONAL, UNWARRANTED, EXCESSIVE, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION.

It is clear from the Record that J. Addison Livingston, a current board member, who had been Chairman of the Board on April 21, 2014 and July 18, 2014, when the original Final Orders were issued indefinitely suspending the Appellant's license without conditions, and without providing a pathway to reinstatement, was quite displeased that the case had been remanded.

> Mr. Livingston: I will tell you there was another alternative that I strongly considered and voiced my opinion for on the deliberation of this case and it would not have brought us back to this point and it's called revocation and unfortunately today we can't change that decision that we made. So I think that the unfortunate part is that my opinion never carried forward back when we heard this case originally or it would not be a need for this case. You can count that just as a little bounce of the ball in your favor that you do have this opportunity that the administrative law judge has remanded to us to put some parameters around the possibility of retaining a license here in South Carolina again. (R. p.50, Line 5)

Since Mr. Livingston failed in his initial attempts to revoke the Appellant's license, and could not change the penalty on remand, he convinced the Board to continue the indefinite suspension, and impose excessive and extreme conditions for reinstatement which would accomplish the same result as a revocation of the license. It was Mr. Livingston's Motion which was adopted in Executive Session.

(Executive Session)

> MR. LIVINGSTON: Mr. Chairman, I think we have one item that we have not taken care of and that was in the matter of Mr. Cyril Okadigwe, item O on our

agenda. Because the court mandated that we give him a pathway to get his license out of indefinite suspension status, I make a motion for Mr. Okadigwe to reinstate his license he will need to retake and successfully pass the NAPLEX and the MPJE, he'll need to complete University of Oregon medication safety course, he'll need to keep up with his required hours of continuing education to meet South Carolina licensure and in addition he will need to complete 30 additional hours of ACPE continuing education, he will need to show proof of restitution being made to CVS, he'll need to show verification of completion of the PTI program that he mentioned in his testimony, and he will also need to have a psychometric evaluation to show that he is competent to practice the profession of pharmacy.

MR. HYATT: I second.

MR. RUSSELL: Come before the board after the completion?

MR. LIVINGS'ION: Once he has completed these requirements, he will need to reappear before the Board of Pharmacy before that license is granted.

MR. HUBBARD: Motion and a second. Any further discussion? All in favor of the motion aye?

BOARD MEMBERS: Aye

MR. HUBBARD: Opposed? The motion is carried.

(R. p.56, Line 22 - R. P.57, Line 24)

On Remand to the Board of Pharmacy, the Board imposed conditions upon the Appellant's indefinite suspension which were clearly meted out as punishment for his successful Appeal, (Okadigwe I), and were meant to ensure that it would be extremely difficult, if not impossible, for him to ever reinstate his license.

The determination by the Board to condition the reinstatement of Appellant's license upon successfully completion of the NAPLEX Examination and the Multistate Pharmacy Jurisprudence Exam (MPJE) does not rationally relate to the protection of public's interests. The NAPLEX is supposed to measure a candidate's knowledge of the practice of Pharmacy, and focuses on the topics

of Pharmacotherapy, health outcomes and preparation, compounding, dispensing and administration of medications and provisions of healthcare products. The MPJE focuses on State and Federal Pharmacy law and concentrates on pharmacy practice, licensure, registration, and general regulatory process. The Board presented no evidence or complaints that the Appellant had ever misfilled prescriptions; ever had taken or stolen narcotic drugs; or had a drug or alcohol addiction; or demonstrated any issue related to a lack of knowledge of the practice of Pharmacy. Appellant successfully completed both the NAPLEX Examination and the MPJE Exam in 1995 over twenty two (22) years ago. The Board had no evidence before it that called into question the Appellant's competence or knowledge of the practice of Pharmacy. To the contrary the Board was aware the Appellant was a Lieutenant Colonel in the United States Army Reserves and practiced Pharmacy in the Military while on active duty overseas, and that the Appellant was currently employed as a Pharmacist at the Veterans Administrative facility in Asheville, North Carolina (R.p.54, Line 6 - p.56) and that he was a licensed pharmacist in the State of Georgia. In these circumstances, his work as a pharmacist has been reviewed, supervised and approved by the United Stated Army and the Veterans Administration without complaint.

Upon careful analysis by Dr. John C. Ruoff, Ph.D of all Public Orders of the Board of Pharmacy for the period 2009 through August 22, 2016 provided in response to a Freedom of Information Act request by Appellant, it is clear that the conditions imposed by the Board are more severe than those conditions imposed by the Board on any other licensee during a seven (7) year period. (R. p.60 - p.64)

After a review of over One Hundred Sixty Six (166) of the Public Orders of the Board of Pharmacy, Dr. John C. Ruoff, Ph.D. concluded:

> Clearly, the requirements for lifting the suspension for Mr. Okadigwe are very different from the requirements for any other licensee. (R. p.61, Line 11)

The Board indefinitely suspended Appellant's license without prescribing conditions to be met for reinstatement on April 21, 2014 and again on July 18, 2014. That decision was an abuse of discretion as previously found by the Administrative Law Court. (Okadigwe I). It was also clearly meant to be punishment. The Board had indefinitely suspended other licensees in the past, and the Public Orders of the Board indicate that in other cases of indefinite suspension, the Board had prescribed conditions and requirements to be met prior to reinstatement. The Board was fully aware of the consequences of its Final Orders of April 21, 2014, and July 18, 2014 that by not prescribing conditions, or courses to be completed, it knew Appellant was not going to be reinstated except by Court Order, or in the Board's absolute unfettered discretion.

The decision by the Board on Remand of June 3, 2016 to impose the requirements outlined in the Final Orders in this case (Public and Private) is also clearly punishment (R. p.9 - p.14). The nexus between the requirements imposed by the Board for reinstatement, and the Appellant's offense is highly doubtful. There is no rational basis for the Board to require that the Appellant retake the North American Pharmacist Licensure Exam (NAPLEX). The examination which measures a candidate's knowledge of the practice of pharmacy (https.//Nabp) is usually taken upon the completion of an undergraduate degree in pharmacy. How does retaking this whole pharmacy exam somehow cure either misappropriation of medicine or distributing non-scheduled medicine to mission charities in Honduras?

The Board also required that the Appellant complete 30 hours of ACPE accredited continuing education courses, with at least 12 hours to be obtained through attendance at lectures, seminars, or

workshops and at least 15 hours to be obtained in drug therapy or patient management, in addition to the regular continuing education courses required for licensure in South Carolina (i.e. the 30 hours described herein shall not count towards the CE hours necessary for maintenance of licensure. (R. p.9 - p.11)

The Accreditation Council for Pharmacy Education (ACPE) (info@ACPE-accredit.org) provides continuing pharmacist education programs. Requiring the Appellant to take 30 hours of ACPE continuing education courses cannot be interpreted as other than punishment for successfully appealing his original indefinite suspension without conditions to be met for reinstatement (Okadigwe I). There is no rational basis for imposition of the ACPE continuing education courses. There has been no conduct or allegations which would justify a need for continuing education in drug therapy or patient management or the requirement that attendance occur only at live programs.

The Public and Private Orders of the Board are replete with Orders where the conduct of other licensees was much more egregious, involving diversion and consumption of large numbers of narcotic controlled-drugs, and in these cases the conditions for reinstatement were far less severe than that received by Appellant. How does the completion of 30 hours of ACPE continuing education relate to the conduct of the Appellant other than to serve as punishment for challenging the Board's Final Orders.

The Multistate Pharmacy Jurisprudence Exam (MPJE) measures the examinee's knowledge of the legal aspects of Pharmacy practice licensure, registration and regulatory structure. Appellant successfully completed this exam in 1995. There is no rational basis for requiring him to retake this examination, and it is clearly meant to serve as punishment. Appellant is currently employed as a pharmacist with the Veterans Administration where he is continuously supervised, and evaluated as

a professional pharmacist.

The Board has also required that the Appellant complete the Medication Safety Course offered by the University of Oregon. It is crystal clear from the analysis of Public Orders of the Board conducted by Dr. Ruoff, Ph.D., that the Board has never required any other licensee to complete this Medication Safety Course offered by the University of Oregon. The reason that this is also clear is that there is no such course and as the public record would show, the University of Oregon does not even have a pharmacy school. In its rush to impose excessive and unwarranted impediments and barriers to Appellant's efforts to regain his license and to ensure that his 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. This action of the Board is arbitrary and capricious and an abuse of discretion.

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 judgement, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Deese v S.C. State Bd. Of Dentistry, 286 S.C. 182, §85, 322 S.E.2d 539, 541 (Ct.App.1985).

The Board's Final Orders are unwarranted and excessive under the facts of this case, and the requirements imposed by the Board as a predicate for Appellant's relicensure are not rationally related to the conduct of the Appellant, and are meted out solely as punishment rather than any interest in protecting the safety of the public. The Board's Final Orders of June 3, 2016 are therefore arbitrary and capricious, and an abuse of discretion. The Board has essentially revoked the Appellant's license by imposing conditions which are excessive, unwarranted under the facts, and not rationally related to the offense committed, and make it extremely difficult, if not, impossible,

for Appellant to comply and be relicensed.

II. THE EXCLUSION OF RELEVANT EVIDENCE FROM THE RECORD IS AN ERROR OF LAW WHICH MUST BE REVERSED.

The exclusion of evidence from the Record on Appeal was an error of law which requires the reversal of the Administrative Law Court. The Administrative Law Court granted the Board"s Motion to Dismiss the testimony of Dr. John C. Ruoff, Phd. from the Record on Appeal.

Dr. Ruoff's Affidavit was submitted to the Administrative Law Court as an Exhibit to Appellant's Brief. Dr. Ruoff reviewed and examined all Public Orders of the Board of Pharmacy from 2009 through August 22, 2016. A review of these one hundred sixty six (166) Public Orders revealed that:

> Upon remand, the Appellant's license (R.Ph. 8738) was indefinitely suspended without a stay, an accompanying probationary period or a time to reapply. Since there is no drug or alcohol abuse involved, he was not required to enter into a contract with RPP, abstain from mood altering substances or submit to drug testing. Appellant's conditions for lifting his suspension include that he retake and successfully complete the North American Pharmacist Licensure Exam and Multistate Pharmacy Jurisprudence Examination. No other licensee in this study was required to retake the North American Pharmacist Licensure Exam, although successful completion of the Multistate Pharmacy Jurisprudence Examination is not infrequently required. Unlike any other licensee, he is required to successfully complete the Medication Safety Course offered by the University of Oregon. Unlike any other licensee, Appellant is required to take 30 hours of ACPE (Accreditation Council for Pharmacy Education) continuing education credits rather than CME (Continuing Medical Education) in addition to his normally required continuing education courses. Clearly, the requirements for lifting the suspension for Mr. Okadigwe are very different from the requirements for any other licensee. (R. p.60, Line 26 - p.65, Line 11).

The Appellant's hearing on Remand before the Board from the first Order of Judge Lenski which held that the Board had abused its discretion in indefinitely suspending Appellant's license without providing conditions to be met for his reinstatement was held on March 16, 2017. The Appellant argued that the Board should reinstate his license without further conditions since his

license had already been indefinitely suspended for twenty three (23) months.

Counsel for the Board urged that the Appellant be required to undergo further education, rehabilitation, evaluation, and substantial fine. The Board issued it's Order on June 3, 2016.

In order to have presented Dr. Ruoff's testimony that the Board's decision was arbitrary and capricious, and an abuse of discretion, Appellant would have been required to know the Board's decision at the time of his hearing. Any evidence or comparison of the Public Orders of the Board would have been premature, and not relevant evidence at that point. Appellant would have had to present evidence that the Board was treating him in an unequal, arbitrary, and capricious manner before he had even received the Board's final decision. The Appellant would have had to have been omniscient to foresee the Board's action and the need for Dr. Ruoff's expert opinion. Evidence of the Board's decisions in other cases of similarly situated licensees would not have been relevant at the Board's hearing on March 16, 2016, and only became relevant evidence after the Board made it's decision.

Dr. Ruoff's analysis is relevant to the Appeal both in the Administrative Law Court, and in this Court, and there was no other procedure by which Appellant could have included the Affidavit of Dr. John C. Ruoff, Phd. in the Record on Appeal.

The testimony of experts has long been recognized by our Courts. South Carolina Rule of Civil Procedure 43(m)(2). South Carolina Rule of Evidence 702. The expert may testify as to his opinion on the ultimate issue to be decided by the trier of fact. South Carolina Rules of Evidence 704. The underlying facts or data utilized by the expert witness do not need to be admissible in evidence. South Carolina Rules of Evidence 704.

In Henning v Kaye, 415 SE2d 794 (1992) the Court of Appeals held that it may correct errors

of law on appeal. Threatt-Michael Const. Co., Inc. v C&G Electric, 406 S.E.2d 374 (Ct. App. 1991). See Also, Ramage v Ramage, 322 S.E.2d 22 (Ct. App. 1984).

In Hook v Rothstein, 316 S.E.2d 690 (Ct. App. 1984) the Court of Appeals declared that it preferred not to dispose of cases on technical grounds, and in Hodge v Shea, 168 S.E.2d 82 (1969), the Court held that meritorious appeal would not be dismissed for departures from rules which were entirely inadvertent, were more of form that substance and did not prejudice the Court or Counsel.

Pursuant to Appellate Court Rule 212, the Appellant intends to move the Court of Appeals for leave to supplement the Record on Appeal to include the Affidavit of Dr. John C. Ruoff, Ph. D.

III. APPELLANT HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Fairness, a fundamental goal of due process, dictates that an agency act in accordance with known standards that are impartially applied through revealed procedures. Aman and Mayton, Administrative Law 173(West 1993). Known standards allow an individual to understand what the agency expects and limits the agency's allocation of choices based upon principle rather than preference. Id. Well-defined criteria provide persons with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated parties. *Dixon v. Love,* 431 U.S. 105 (1972). The standards should be written with sufficient precision to give fair warning as to what the agency will consider in making its decision. *Commission on Gen. Educ. v. Union Township of Fulton County*, 410 N.E.2d 1358 (Ind.App. 1980).

In this case, an administrative decision reached without reasoned judgment, lacking adequate determining principles or rational basis, or governed by no fixed rules or standards, is arbitrary. *Deese v. State Board of Dentistry*, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985).

As the analysis of Dr. John C. Ruoff, Ph.D demonstrates, the Board has imposed conditions upon Appellant's indefinite suspension which are much more severe than those imposed upon any other licensee (R. p.60 - p.64). The decision of the Board was reached without reasoned judgement or rational basis, and is therefore arbitrary.

The equal protection guarantee that no person shall be denied equal protection of the law applies to the Appellant and requires that he be treated in a manner similar to others disciplined by the Board. These rights are guaranteed by the Fourteenth Amendment as well as Article I, Section 3 of the South Carolina Constitution.

Equal protection in the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same. The discipline meted out by the Board should be similar to that levied upon other persons in similar circumstances and not subject them to different treatment. The acts of the Board must apply equally to all persons within the Appellants class of licenses.

As the South Carolina Supreme Court stated in Thompson v. South Carolina Commission on Alcohol and Drug Abuse, 229 S.E. 2d 718 (1976) in declaring the Alcohol and Intoxication Treatment Act unconstitutional

> 'Equal protection of the laws.' as referred to in both constitutions, is difficult to define and not susceptible of exact delimitation, nor can the boundaries of the protection afforded be automatically or rigidly fixed.
>
> 'The guiding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in liabilities imposed. In some cases the principle is stated a little more fully so as to include also within its purview of equality exemptions from liabilities. The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated. Protection is not protection unless it accomplishes this.

> Immunity granted to a class however limited, having the effect to deprive another class, however limited, of a personal or [267 S.C. 473] property right is just clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted to be worked against a larger class.' 16 Am.Jur. (2d) Constitutional Law, § 488.
>
> Discrimination, as it related to criminal punishment, is discussed in 21 Am.Jur. (2d), Criminal Law–Punishment, § 582, where we find the following:
>
> '§ 582.–Equal protection of laws requirement.
>
> The Fourteenth Amendment to the Federal Constitution guarantees to everyone within the jurisdiction of a state the equal protection of the laws. Among other things, this requires that in the administration of criminal justice no person be subjected to a greater or different punishment for an offense than that to which others of the same class are subjected....
>
> 'In the exercise for its police power a state may establish various classifications in prescribing the punishment for crime, provided the classifications are reasonable and not arbitrary...
>
> 'Punishments based on arbitrary or unreasonable classifications, such as race or color, are invalid. And 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.' (Emphasis added) 229 S.E. 2d 718

The punishment, or the conditions precedent imposed by the Board upon Appellants' License bear no rational relationship to the conditions placed on similarly situated pharmacists disciplined by the Board. It is clear that the Appellant has been treated differently and more severely than other pharmacists since at least 2009. There is no justification which constitutes a rational basis for differential treatment.

In Daniel v. Cruz, 231 S.E. 2d 293 (1977) the South Carolina Supreme Court declared a fortuneteller licensing statute unconstitutional as it violated the equal protection guarantees of the South Carolina Constitution, Article I, Section 3, and the Fourteenth Amendment to the U.S.

Constitution:

> As the Court noted such a classification is repugnant to the guarantee of equal protection of the laws, because there is no rational basis upon which to establish such a classification: 'If there is no real difference between localities, persons, occupations, or property, the State cannot make one.' 16 Am.Jur. (2d), Constitutional Law § 500 (1964) 231 S.E. 2d at 295.

Equal Protection also requires that members of the statutory class be treated alike under similar circumstances and conditions. Equal treatment must extend to both the privileges conferred and liabilities imposed. Marley v. Kirby, 245 S.E. 2d 604 (1978).

In this case, Appellant's conditions for the reinstatement of his license are a denial of equal protection and are not reasonable and are plainly arbitrary.

IV. THE APPELLANT WAS DENIED SUBSTANTIVE DUE PROCESS OF LAW.

The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them. *In re Treatment and Care of Luckabaugh,* 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause of the Fourteenth Amendment. The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment. *Brown v. S.C. State Bd. Of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959)); *Baird v. Charleston County*, 333 S.C. 519, 537, 511 S.E.2d 69, 79 (1999); *Ezell v. Ritholz*, 188 S.C. 39, 46-49, 198 S.E. 419, 422-23 (1938). "It cannot be doubted that a man's trade or profession is his property." *Byrnes's Adminstrs v. Stewart's Adminstrs.*, 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812). Likewise, the practice of Pharmacy

by properly licensed individuals undoubtedly are cognizable property interests rooted in state law. *Dantzler v. Callison*, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956) (stating "[t]here 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.). Substantive due process prevents the individual from being deprived of life, liberty or property for arbitrary reasons. *Worsley Co. Inc., v. Town of Mt. Pleasant*, 359 S.C. 51, 528 S.E.2d 657 (2000). Appellant submits that the actions of the South Carolina Board of Pharmacy in imposing excessive, unwarranted and arbitrary and capricious conditions on the reinstatement of his licensure are violative of his rights to substantive due process as guaranteed by the United States Constitution and the South Carolina Constitution and are arbitrary and capricious. "Due Process is violated when a party is denied fundamental fairness..." Hipp v SCDMV 673 S.E.2d 416, 417 (2009).

There is no rational relationship between the facts and the punishment meted out by the Board. The Board has once again deprived the Appellant of his license for arbitrary reasons. The Board unlawfully punished the Appellant by indefinitely suspending his license in July 2014, and intentionally failed to provide a pathway to reinstatement. Upon Remand, the Board has now further punished the Appellant by imposing conditions on the reinstatement of his license which were more severe than have been imposed on any other licensee disciplined in the Public Orders of the Board in the last seven (7) years. (Affidavit of John C. Ruoff, PhD.) (R. p.60 - p.64)

The Board has continued the indefinite suspension of the Appellant's license and imposed extreme conditions and requirements which must be completed prior to his next appearance before the Board. There is no rational basis for this list of conditions and requirements. The Orders on Remand are punishment and are not rationally related to any stated goal of public safety. The Board

has, in essence, revoked the Appellant's license by imposing severe restrictions and requirements which the Board knows will be extremely difficult, if not, impossible for the Appellant to satisfy.

Under the mandate of the Court (Okadigwe I), the Board could not change the Appellant's indefinite suspension to a revocation so they did the next best thing, in their view, which was to continue the indefinite suspension and impose unwarranted and excessive conditions so the result would be the same: the Appellant would never be able to regain his license.

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully requests that the Administrative Law Court decision be reversed, that the Appellant's indefinite suspension be reversed, that his license to practice pharmacy be fully reinstated without conditions or qualifications, that any adverse action be deleted from the Board records, and for such other relief as the Court may deem just and proper.

Columbia, South Carolina

December 1, 2017

Respectfully Submitted,

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Cyril J. Okadigwe, Appellant, v. South Carolina Department of Labor, Licensing and Regulation, State Board of Pharmacy, Respondent.	)	Docket No. 14-ALJ-11-0521-AP **ORDER OF REMAND**

APPEARANCES: For the Appellant: Herbert E. Buhl, III, Esquire
For the Respondent: Patrick D. Hanks, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or court) pursuant to Section 40-1-160, which 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). This Appellant seeks review of the Final Order of the South Carolina Department of Labor, Licensing and Regulation (Department) State Board of Pharmacy (Board). The court held oral argument in this matter on January 14, 2016, due to the unique issues in this case involving the Board's imposition of an indefinite suspension of the Appellant's license to practice pharmacy in the State of South Carolina, as well as jurisdictional issues.

The Board issued a Final Order on April 21, 2014, suspending the Appellant's license to practice pharmacy for an indefinite period, without prescribing any conditions to be met during the indefinite suspension. The Appellant did not appear at the hearing, held on March 20, 2014, and the Appellant's counsel presented his case before the Board, after the Board denied a request for a continuance.

On May 5, 2014, the Appellant's attorney timely filed an appeal of this final action of the

agency with the South Carolina Court of Appeals. On May 8, 2015, the Court of Appeals issued a Deficiency Letter, informing the Appellant's counsel that he had ten (10) days to file the lower court's final order and to indicate the respondent party. On May 16, 2014, the Appellant's attorney filed a Motion to be Relieved as Counsel, and on October 2, 2014, the Court of Appeals granted the motion and gave the Appellant thirty (30) days to obtain new counsel. On November 4, 2014, the Court of Appeals transferred the file and remitted the case to the Administrative Law Court, citing Rule 204(a), SCACR. This court issues an Order Governing Procedure on December 4, 2014. The Record on Appeal was filed on March 13, 2015, and the Appellant filed a brief on May 14, 2015, and the Respondent filed a brief on June 15, 2015.

Meanwhile, in late March 2014, the Appellant returned from active duty, shortly after the first Board hearing, and requested the Board reconsider its Final Order, and allow him to personally appear. The Board granted the Appellant's request, and allowed the Appellant to appear at a hearing for reconsideration on June 19, 2014. The Appellant appeared *pro se*, and requested re-instatement of his license, arguing that he had been on military orders that prevented him from appearing at the first Board hearing, held on March 20, 2014. The Board considered the Appellant's testimony, and denied his request for reinstatement of his license in an Order, dated July 18, 2014. The Board issued a Corrected Final Order on July 18, 2014, and listed an effective date for that Order of April 21, 2014. In the Corrected Final Order, the Board deleted one Finding of Fact, but the Corrected Final Order otherwise was identical to the original Final Order. (R. at 2 and 8-10).

Background

The Appellant has been licensed with the South Carolina Board of Pharmacy continuously since 1998 until the State Board of Pharmacy indefinitely suspended his license on April 21, 2014. The Appellant was employed at CVS Pharmacy in South Carolina, from 2001 until 2010. On April 20, 2010, he was arrested on a charge involving misappropriation of prescription drugs from CVS Pharmacy.

On March 24, 2011, the Board filed a formal accusation alleging that the Appellant diverted non-controlled prescription drugs from his employer. The drugs he diverted included Plavix, Lipitor, Nexium, and Crestor. The approximate value of the drugs was $14,536.00. The Appellant allegedly diverted the drugs to Honduras and dispensed them without proper authorization from a

practitioner. The Appellant admitted he kept no record of who received the drugs.

Though the Board issued an initial Notice of Hearing to the Appellant on March 29, 2011, the Appellant obtained at least three (3) continuances because of his military service as a mobilized reservist in the United States Army. The Board ultimately held a hearing on March 20, 2014, nearly three (3) years after it issued its formal accusation. On that date, the Appellant's counsel requested yet another continuance and informed the Board that he could not locate his client, and that the Appellant had not communicated with him for at least six (6) months. The Board denied this request, and held the hearing without the Appellant, over counsel's objection.[1]

On April 21, 2014, the Board issued a Final Order, indefinitely suspending the Appellant's license under the provisions of S.C. Code Ann. § 40-1-120, but did not prescribe any conditions for the Appellant to meet during the suspension. S.C. Code Ann. § 40-1-120 (2011). The Appellant's counsel then timely filed a Notice of Appeal in the incorrect court. The Appellant received notice of the Final Order, and, after relieving his counsel, requested the Board reconsider the matter and reinstate his license.

The Appellant appeared pro se before the Board on June 19, 2014, and testified extensively about his military status, to include explaining that he was mobilized on military orders and out of the United States at the time of the hearing on March 20, 2014, and that he did not return to the United States until March 25, 2014. The Appellant testified that he sent all of his military orders to his former attorney. The Board received and took notice of the Appellant's military orders and testimony. The Appellant admitted to the wrongdoing that formed the basis for the suspension, but requested that the Board reinstate his license.

The Board reviewed the evidence and denied the Appellant's request for reinstatement of his license in an Order dated July 18, 2014. The Board issued a Corrected Final Order, dated July

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[1] The Appellant is a reservist in the U.S. Army Reserves. The Appellant apparently failed to inform his attorney of his whereabouts when he returned from his mobilization. The Board's attorney noted that the only evidence of the Appellant's active duty would have been August 2011, for a period of only eighty-eight (88) days. (R. at 87). The Appellant's attorney, Mr. Warder, told the Board that the Appellant may have had another mobilization, but the Appellant told his attorney he was returning and would be looking for employment. (R. at 48).

At the March 2014 hearing, an investigator for the Department testified that the Appellant admitted that he had stolen prescription drugs from his employer that included Lipitor, Plavix, and Crestor, and also admitted that there was no physician involved in the dispensing of the drugs.

18, 2014, but provided that the effective date of the Corrected Final Order was April 21, 2014, the date of the original Final Order from the first hearing. (R. at 10).

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 & Envt'l 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). Section 1-23-380(5) of the South Carolina Code (Supp. 2014) provides the standard used by appellate bodies to review agency decisions. *See* § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). That section 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:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (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). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.,* 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). 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.

Conclusions of Law

The Respondent posited in the opening paragraph of its brief that "[t]he procedural history of this case is not readily apparent to Respondent at this time." While the court agrees that the procedural history of this case is somewhat convoluted, the above recitation appears to capture the relevant moments. The court is confused by the Department's decision to back date the effective date of its Corrected Final Order to the April 21, 2014. The Final Order and the Corrected Final Order are identical, except for a single deleted Finding of Fact. Though the Department, in its brief, claims that the Appellant "informed counsel for the Board that [the Appellant] informed his counsel, Richard Warder, to drop all appeals so the Board would have jurisdiction to rehear the matter in June of 2014...." there is no evidence in the Record to support this assertion. Therefore, though the Appellant's original counsel filed the appeal of the Final Order in the incorrect court where the appeal resided for approximately six (6) months until the Court of Appeals transferred jurisdiction to this court under Rule 204(a), it appears that this court has jurisdiction in this matter with regard to the Final Order of April 21, 2014, as well as the Corrected Final Order. The ultimate outcome of both of those orders was that the Board suspended the Appellant's license indefinitely, and did not set forth any conditions to be met in order for the Appellant to regain his license.

Due Process

"When the State seeks to revoke a professional license, procedural due process rights must be met." *South Carolina Department of Labor, Licensing and Regulation v. Girgis,* 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998) (quoting *Zaman v. South Carolina Bd. of Medical Examiners*, 305 S.C. 281, 284, 408 S.E.3d 213, 215 (1991)). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id* (quoting *South Carolina Dep't of Soc. Servs. V. Holden,* 319 S.C. 72,78, 459 S.E.2d 846,849 (1986). No particular form of procedure is required to satisfy due process. *Id.* However, the following minimum elements must be present to satisfy due process: (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross examine witnesses.

In this case, the Appellant had over 900 days to prepare for this matter, but he now argues on appeal that he was denied a full and fair hearing, and that the Board abused its discretion in denying his Motion for Continuance on March 20, 2014. This court finds that this argument is without merit. At the hearing on March 20, 2014, counsel for the Appellant admitted that it had been three (3) years since the initial notification to his client, and that his client had made at least three (3) prior requests for continuances, which the Board had granted. Furthermore, counsel was unable to establish that his client had been on continuous active duty during the three years, and at that time did not know the whereabouts of his client. The Board allowed the Appellant's counsel a full opportunity to argue and present a case before the Board on March 20, 2014, and subsequently, the Board allowed the Appellant to request reconsideration shortly thereafter, and to appear, albeit *pro se*, and present his case before the Board on June 19, 2014. The Board permitted the Appellant to add to the record evidence of his prior military service and explain why he could not be present at the previous hearing, and allowed the Appellant to testify at length concerning his conduct that was the subject of the disciplinary action and his rationale for his behavior. Even after considering this additional evidence, however, the Board reaffirmed its findings[2] and disciplinary sanction in its Corrected Final Order of July 18, 2014 (dated with an effective date of April 21, 2014).

[2] The Board deleted a single finding of fact of fact in its Corrected Final Order.

Substantial Evidence

In this case, the record revealed that the Appellant never denied the underlying misconduct, and admitted to the Department investigator that he stole drugs from his employer, valued at $14,535, and diverted those drugs without authorization from a practitioner. When the Appellant appeared at his hearing for reconsideration in June, 2014, he also testified and admitted to the underlying misconduct. Based on the foregoing, this court finds that there is substantial evidence in the record to support the Board's findings of facts in both of its Final Orders, which are dated April 21, 2014. In applying the substantial evidence rule, this court "will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). 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).

Sanctions Imposed

In this case, though the Board chose to issue an indefinite suspension of the Appellant's license, it did not prescribe conditions to be met during the period of suspension in order for the Appellant to regain the license. 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 conditions 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. (Emphasis Added).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the

legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

Section 40-1-120(A)(3) provides that the Board may place the licensee on probation, or restrict or suspend the individual's license for either a definite or an indefinite period, but if the Board chooses to do so, the statute is clear that the board must also prescribe conditions to be met during that probation, restriction or suspension. The statute then provides a non-exhaustive list of conditions the Board may impose, such as providing for a supervisory period of observation, continuing education, or additional education. Here, the statute is clear and unambiguous. The Board's issuance of an indefinite suspension without providing the individual a way to ever lift the sanction is equivalent to a permanent revocation. Though a permanent revocation is a permissible sanction for the Board under the statute, in this case, the Board chose to impose the lesser sanction of indefinite suspension. A suspension, unlike a permanent revocation, contemplates that the licensee may, at some time in the future, be permitted to gain reinstatement of his license. Therefore, it follows that if a professional licensing board decides to suspend the license of an individual, either indefinitely or for a given period, the Board must provide conditions the individual must comply with in order to seek reinstatement of his license. Section 40-1-120(A)(3) mandates this. Therefore, because the Board elected to indefinitely suspend the Appellant's license, it was required to impose conditions for the Appellant to meet if he desires to gain reinstatement of his license at some future time. In sum, the Board's imposition of such a sanction, absent the setting of conditions, was an abuse of discretion, and warrants a remand of this case on this very narrow issue.

Conclusion

This court finds that the Board acted within its scope of authority in disciplining the Appellant for his violation of S.C. Code Ann. §§ 40-43-86 and 40-1-110(1)(f), in that he committed

misconduct by wrongfully taking over $14,000 of prescription drugs from his employer. This court also finds that the Board's findings were supported by substantial evidence in the record. However, this court finds that the Board abused its discretion by imposing an indefinite suspension of the Appellant's license without prescribing conditions to be met during the suspension, as required under Section 40-1-120(A)(3). S.C. Code Ann. § 40-1-120(A)(2011). ACCORDINGLY,

IT IS ORDERED that this matter is **REMANDED** to the Board, so that it may review its decision and prescribe conditions to be met during the indefinite suspension in accordance with S.C. Code Ann. § 40-1-129(A)(3).

AND IT IS SO ORDERED.

February 4, 2016
Columbia, South Carolina

S. Phillip Lenski
Administrative Law Judge

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 4th day of Feb 2016

By: _____
Judicial Law Clerk

THE SOUTH CAROLINA COURT of APPEALS

Cyril J. Okadigwe, Appellant,

v.

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

Appellate Case No.: 2017-001339

The Honorable S. Phillip Lenski
Trial Court Case No.: 2016ALJ110230AP

CERTIFICATE OF COUNSEL

I, Herbert E. Buhl, III, attorney for Appellant, do certify that the Final Brief complies with Appellate Rule 211(b).

Columbia, South Carolina

December 1, 2017

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