



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAIA KATHRYN MICHAEL, :
 :
 : No.: 368, 2017
 :
 Appellant Below, :
 Appellant, :
 : On Appeal from the
 : Superior Court of the
 : State of Delaware
 v. :
 : C.A. No. N17A-02-003-JRJ
 :
 DELAWARE BOARD OF NURSING, :
 :
 :
 Appellee Below, :
 Appellee. :
 :

**AMENDED OPENING BRIEF OF APPELLANT
MAIA KATHRYN MICHAEL**

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TABLE OF CONTENTS

TABLE OF CITATIONS iv

NATURE & STAGE OF PROCEEDINGS 1

SUMMARY OF ARGUMENTS 3

STATEMENT OF THE FACTS 4

ARGUMENT 15

I. MICHAEL WAS DENIED DUE PROCESS BECAUSE SHE WAS NOT GIVEN A MEANINGFUL HEARING ON THE SUBSTANTIAL EVIDENCE THAT THERE WAS A MEANS, PURSUANT TO THE NURSE PRACTICE ACT, THAT THE BOARD COULD HAVE ALLOWED MICHAEL TO SIT FOR LICENSURE EXAM; OR THAT HER UNCONDITIONAL GUBERNATORIAL PARDON MADE HER ELIGIBLE TO APPLY FOR LICENSURE PER THE ACT..... 15

 1. Question Presented 15

 2. Standard of Review 16

 3. Merits..... 16

II. IT WAS ERROR FOR THE SUPERIOR COURT TO CONCLUDE THAT MICHAEL’S CLAIM OF DISPARATE TREATMENT IS MERITLESS BECAUSE “THERE IS NO ROOM FOR JUDICIAL INTERPRETATION” OF THE LANGUAGE OF CHAPTER 19 OF TITLE 24 BECAUSE THE “PLAIN MEANING OF THE STATUTORY LANGUAGE CONTROLS.” IT WAS ALSO ERROR TO HOLD THAT MICHAEL’S CLAIM THAT WHAT WAS DONE TO HER IS IN THE NATURE OF A CONSTITUTIONAL TORT IS WITHOUT MERIT BECAUSE SHE CANNOT SHOW THAT SHE WAS TREATED DIFFERENTLY FROM OTHERS WHO ARE SIMILARLY SITUATED..... 29

1.	Question Presented	29
2.	Standard of Review	29
3.	Merits.....	30
CONCLUSION		36

TABLE OF CITATIONS

Cases

<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965).....	17
<i>Arnold v. State</i> , 49 A.3d 1180 (Del. 2012).....	21, 22, 24, 25 27
<i>Board of Adjustment of Sussex County v. Verleysen</i> , 36 A.3d 326 (Del. 2012).....	21
<i>Caminetti v. United States</i> , 242 U.S. 470 (1917).....	21
<i>Carousel Studio v. Unemployment Ins. Appeal Bd.</i> , 1990 WL 91108 (Del. Super. 1990).....	16
<i>Cohen v. State ex rel. Stewart</i> , 89 A.3d 65 (Del. 2014).....	18
<i>Cnty. Nutrition Inst. v. Block</i> , 749 F.2d 50 (D.C. Cir. 1984).....	33
<i>Dennis v. State</i> , 41 A.3d 391, 393 (Del. 2012).....	21
<i>Doroshov, Pasquale v. Nanticoke Mem. Hosp., Inc.</i> , 36 A.3d 336 (Del. 2012).....	30
<i>E.I. Du Pont de Nemours & Co. v. Clark</i> , 88 A.2d 436 (Del. Ch. 1952).....	32, 34
<i>Friends of H. Fletcher Brown Mansion v. City of Wilmington</i> , 34 A.3d 1055 (Del. 2011).....	21
<i>Giuricich v. Emtrol Corp.</i> , 449 A.2d 232 (Del. 1982).....	24
<i>Heath v. State</i> , 983 A. 2d 77 (Del. 2009).....	9-10, 22, 27
<i>Justice v. Gatchell</i> , 325 A.2d 97 (Del. 1974).....	35
<i>Kreshtool v. Delmarva Power and Light Co.</i> , 310 A.2d 649 (Del. Super. 1973)...	16
<i>Leatherbury v. Greenspun</i> , 939 A.2d 1284 (Del. 2007).....	32
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	17-18

<i>Michael v. Delaware Bd. Of Nursing</i> , 2012 WL 1413573 (Del. Super. 2012).....	4, 5
<i>Nationwide Mut. Ins. Co. v. Krongold</i> , 318 A.2d 606 (Del. 1974).....	31, 32
<i>Olney v. Cooch</i> , 425 A.2d 610 (Del. 1981).....	16, 30
<i>Opinion of the Justices</i> , 295 A.2d 718 (Del. 1972).....	32, 34
<i>Person–Gaines v. Pepco Hldgs., Inc.</i> , 981 A.2d 1159 (Del. 2009).....	16, 30
<i>Public Service Commission of the State of Delaware v. Wilmington Suburban Water Corporation</i> , 467 A.2d 446 (Del. 1983).....	33
<i>Seth v. State</i> , 592 A.2d 436 (Del. 1991).....	32
<i>State v. Culp</i> , 152 A.3d 141 (Del. 2016).....	26
<i>State v. Fletcher</i> , 974 A.2d 188 (Del. 2009).....	24
<i>State v. Skinner</i> , 632 A.2d 82 (Del. 1993).....	9, 21, 22, 23
<i>UIAB v. Duncan</i> , 337 A.2d 308 (Del. 1975).....	16, 30
<i>Villabona v. Bd. of Med. Practice of State</i> , 2004 WL 2827918 (Del. Super. 2004), <i>aff'd</i> , 858 A.2d 961 (Del. 2004).	16, 23
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000).	30
<i>Vincent v. E. Shore Markets</i> , 970 A.2d 160 (Del. 2009).....	17
<i>Watson v. Div. of Family Servs.</i> , 813 A.2d 1101 (Del. 2002).....	18
Statutes and Rules	
<i>U.S. Const.</i> Amend. XIV, § 1.....	24
<i>Del. Const.</i> , 1776, Art. 7.....	21
<i>Del. Const.</i> , Art. 1, § 7.....	24
<i>Del. Const.</i> , Art. 7, §1.....	22

11 <i>Del.C.</i> §4121.....	22
11 <i>Del.C.</i> §4364.....	20-21, 23-24, 27, 28
11 <i>Del.C.</i> §4371.....	23
24 <i>Del.C. Chp. 19</i>	1, 5, 6, 7, 9, 10, 11, 12, 13, 18, 19, 26, 29, 33, 34
24 <i>Del.C.</i> § 1901.....	26
24 <i>Del.C.</i> § 1910.....	9, 12, 18, 19
24 <i>Del.C.</i> § 1914.....	18, 19
24 <i>Del.C.</i> § 1922.....	1, 5, 6, 7, 9, 10, 11, 18, 19, 33, 34
24 <i>Del.C.</i> § 1924.....	1, 6, 7, 9
24 <i>Del.C.</i> § 1925.....	11
29 <i>Del.C. Chp. 101</i>	17
Delaware Bill Summary, 2003 Regular Session, Senate Bill 62 (2003).....	24
Delaware Bill Summary, 2011 Regular Session, House Bill 45 (2011).....	34
Board Rule 6.9.2.....	7
Board Rule 10.4.1.....	1, 7
Board Rule 10.4.20.....	11

References

<i>Black's Law Dictionary</i> 1113 (6th ed. 1990).....	23
73 <i>Am.Jur.2d Statutes</i> § 146 (1974).....	31

NATURE & STAGE OF PROCEEDINGS

Appellant Maia Michael (“Michael”) was licensed in Delaware as both a registered nurse (“RN”) and licensed practical nurse (“LPN”) when she was convicted of a single count of obtaining controlled substances by misrepresentation or fraud, forgery or deception in 2009. As a result of that conviction, the State filed a complaint with the Delaware Board of Nursing (“the Board”), and on May 12, 2011, the Board voted to suspend her licenses for a period of five years. Michael appealed that decision to Superior Court which affirmed the Board’s decision on February 16, 2012.

Mistakenly believing that her counsel had requested a stay of the Board’s Order pending a decision on her appeal, Michael continued to work until January of 2012. As a result, the State lodged another Board complaint against Michael for practicing without a license. Michael and the State entered into a Consent Agreement which the Board rejected as “too lenient,” and the matter was heard in Michael’s absence on July 23, 2013 by a Division of Professional Regulation (“DPR”) hearing officer, who found, as a matter of law, that Michael had “willfully” violated 24 *Del.C.* §§ 1922 & 1924 and Board Rule 10.4.1, and recommended that Michael’s license remain suspended until at least 2017. Upon consideration of those findings and recommendations, the Board voted to reject the disciplinary recommendation and permanently revoked both of Michael’s licenses.

On February 26, 2015, Michael appeared before the Board of Pardons. On June 26, 2015, the Governor accepted the Board's recommendation and issued Michael an unconditional Pardon for her 2010 criminal conviction. Michael then submitted an application to the Board for reinstatement of her RN and LPN licenses, which the Board voted to "propose to deny." Michael then submitted Application for Licensure by Examination and Application for Licensure by Endorsement. The Board voted to "propose to deny" those Applications as well. The Board conducted a hearing on its proposals to deny those licensure applications on November 8, 2016, and the Board issued its written Opinion and Order on January 12, 2017 in which it denied those applications.

Michael appealed that Board decision to the Superior Court on February 2, 2017. The Superior Court rendered its Opinion affirming the Board's decision on September 8, 2017.

Michael filed her Notice of Appeal with this Court on September 13, 2017, and this is her Opening Brief submitted in support of her Appeal.

SUMMARY OF ARGUMENTS

I. Michael was denied due process because she was not given a meaningful hearing on the substantial evidence that there was a means, pursuant to the Nurse Practice Act, that the Board could have allowed her to sit for licensure exam; or that her unconditional gubernatorial Pardon made her eligible to apply for licensure per the Act. The Superior Court erred when it set aside Michael's argument that professional licensure is not a "civil right" as that term is used in the Pardon statute.

II. The Superior Court erred by concluding that Michael's claim of disparate treatment was meritless. It also erred by holding that Michael's claim that what was done to her was in the nature of a Constitutional tort was without merit, because the Nurse Practice Act, as applied here, is not proper and not an otherwise valid law and its application here did not reflect legislative policy, and it is not reasonable to conclude that the General Assembly intended to give all other Boards discretion to consider something other than "permanent revocation" on the same or similar circumstances.

STATEMENT OF THE FACTS

On February 12, 2009, Michael pled guilty to a single count of obtaining controlled substances by misrepresentation or fraud, forgery or deception. She was subsequently enrolled in a drug diversion program which had she successfully completed would have resulted in no criminal conviction. Unfortunately, her conviction became effective when she failed to comply with the terms of that program.

Michael was licensed by the Board as both an RN and an LPN at the time. As a result of that conviction, the State filed a complaint with the Board seeking revocation of those licenses. Michael received notice of the February 9, 2011 hearing on that complaint but she did not appear and the hearing proceeded in her absence.¹

At that hearing, the State read the criminal complaint against Michael into evidence and presented two witnesses: Sandra Wagner, an administrative specialist with DPR, who presented documentation confirming her testimony that Michael had confirmed with DPR that she would be attending the hearing; and DSP officer Raymond Handcock who testified regarding the facts surrounding Michael's arrest and conviction. At the conclusion of the hearing, the Board voted to revoke Michael's licenses but did not prepare a written order to that effect. Instead, the

¹ *Michael v. Delaware Bd. Of Nursing*, 2012 WL 1413573 (Del. Super. 2012).

Board granted Michael's March 3, 2011 request to reopen the hearing so that she could appear and testify on her own behalf.²

At that second hearing on April 13, 2011, the Board's counsel entered Michael's letter requesting the reopening and the original complaint into evidence and summarized the previous hearing on the record before turning the matter over to the parties. The State rested on the record established at the previous hearing. Michael testified that she committed the crimes of which she was accused, described her actions with particularity, and apologized and took responsibility. She explained that she was abusing Xanax to cope with issues in her personal life and explained that she had since been improving. She also admitted to having failed to comply with the terms of her probation.³

At the conclusion of that hearing, the Board voted to suspend rather than revoke Michael's licenses, and issued a written Order to that effect on May 12, 2011, in which the Board held that as a result of Michael's conviction of a crime substantially related to nursing, she was, per 24 *Del.C.* §1922, unfit or incompetent by reason of negligence, habit or other cause, and was guilty of unprofessional conduct. Her licenses were suspended for a period of five years.⁴

² *Id.*

³ *Id.*

⁴ *Id.* See also Board of Nursing Order at A1 in the *Appendix*.

Michael appealed that decision to Superior Court on several grounds but the Court affirmed the Board's decision on February 16, 2012. Mistakenly believing that her counsel had requested a stay of the Board's Order pending a decision on her appeal to Superior Court, Michael continued to work until January of 2012, when she was informed by her employer that she was not licensed.⁵

The State then lodged another Board complaint against Michael for working without a license. Michael and the State entered into a Consent Agreement for that complaint but the Board rejected that Consent Agreement at its January 9, 2013 meeting as "too lenient"⁶ and a hearing on that Complaint commenced on July 23, 2013, in Michael's absence, before a DPR hearing officer. The State offered testimony and documentary evidence at that hearing that notice of the hearing was sent to Michael's address maintained in the Board's database of licensees but those notices were returned as not deliverable. On that proffer, the hearing officer found that "proper notice had occurred."⁷

The State also proffered testimonial evidence that Michael's employer had reported that Michael had continued to work following the suspension of her license until January of 2012, in violation of 24 *Del.C.* §§1922 & 1924 and Board

⁵ *Opening Brief* at A30; *Answering Brief* at A66.

⁶ *See Board of Nursing Meeting Minutes* at A122.

⁷ *Hearing Officer Recommendation* at A123.

Rule 10.4.1.⁸ At the conclusion of the hearing, the hearing officer found, as a matter of law, that Michael had “willfully” violated 24 *Del.C.* §1924 by disregarding the Board’s suspension Order; that Michael had violated 24 *Del.C.* §1922 and Board Rule 10.4.1 by failing to abide by legal standards and accepted standards of the nursing profession, and was therefore guilty of unprofessional conduct; and that Michael had violated Board Rule 6.9.2 by failing to update her address with the Board in a timely manner. The hearing officer recommended that Michael’s license remain suspended until at least May 12, 2017.⁹

The Board considered the hearing officer’s findings and recommendation at its September 11, 2013 meeting. In response to a question from a Board member, Board counsel reported that Michael had not requested a Stay of the suspension Order while her appeal to this Court was pending. The Board voted to reject the recommendation of the hearing officer as to discipline and instead voted to permanently revoke both of Michael’s licenses.¹⁰

The Board’s October 9, 2013 Order further elaborated that Michael’s previous disciplinary Order “arose from serious acts of deceit;” that the previous Order was clear that Michael’s licenses were suspended; that rather than comply with that Order, Michael resumed nursing practice without a license; and that

⁸ *Id.* at A124-125.

⁹ *Id.* at A131.

¹⁰ *See Board of Nursing Meeting Minutes* at A132.

because she had demonstrated that she would not comply with the Order of suspension, Michael's licenses must be permanently revoked to protect the public from her.¹¹

On February 26, 2015, Michael appeared before the Board of Pardons,¹² and on June 26, 2015, the Governor accepted the Board's recommendation and issued Michael a full Pardon for her 2010 criminal conviction.¹³ Michael then submitted an application to the Board for reinstatement of her RN and LPN licenses¹⁴ which the Board took up at its May 11, 2016 meeting, voting to "propose to deny" those applications as Michael had no license to reinstate pursuant to the 2013 permanent revocation of her licenses.

Michael then submitted application for licensure by examination and licensure by endorsement,¹⁵ which the Board voted to "propose to deny" at its July 13, 2016 meeting, because Michael was ineligible to apply for licensure by examination because she was "ineligible to sit for the NCLEX [exam]," and ineligible to apply for licensure by endorsement because she did not hold an active license in any other jurisdiction.¹⁶

¹¹ See Board of Nursing *Order* at A10.

¹² See Board of Pardons *Letter* at A133.

¹³ See *Pardon* at A134.

¹⁴ *Application for Reinstatement* at A136.

¹⁵ See A142 and A146.

¹⁶ See *Letters* and *Meeting Minutes* at A151, 152, and 153.

Michael requested a hearing on the Board's proposed licensure application denials which took place on November 8, 2016.¹⁷ Documentary evidence was placed on the record by Michael and by the State, and the Board also heard oral argument from Michael's counsel and testimony from Michael. Michael conceded that application by endorsement was not appropriate and withdrew that application at the hearing.¹⁸ However, Michael presented several arguments why the Board should approve her application for licensure by examination:

That the list of six eligibility criteria set forth in 24 *Del.C.* §1910 that the Board must consider for such applicants is an exclusive, not inclusive, list and license revocation is not on that list, even though Item #5 on that list refers to the disciplinary grounds set forth in 24 *Del.C.* §1922, the eleven grounds listed in §1922 also does not include license revocation;¹⁹

That the Board must consider the significance of a Pardon, and how her Pardon should impact the Board's consideration of her application for licensure by examination, because the Governor's power to pardon derives from the Constitution, and per *State v. Skinner*, a pardon "is an act of grace from governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense," thus to her revocations, Michael's Pardon actually restored her right to at least be considered for licensure by exam per the terms of 24 *Del.C.* §§1922 and 1924;²⁰

That because *Heath v. State* held that "the pardon statute" states that "[e]xcept as otherwise provided by the Delaware Constitution, or *expressly* by any provision of the Delaware Code or any court rule, the granting of an unconditional pardon by the Governor shall have the effect of fully restoring all civil rights to the person pardoned," meaning that a statute supersedes the

¹⁷ The Transcript of that Hearing appears at A154-188.

¹⁸ *Id.* at A162-163.

¹⁹ *Id.* at A163-164.

²⁰ *Id.* at A164-165.

pardon statute only if the later-enacted statute expressly so provides, which the Nurse Practice Act does not;²¹

That the Board consider the holding in *Heath* and how it applies to the Board's responsibility to protect the public because the Board of Pardons had already considered the issue of any threat Michael posed to society before recommending the pardon and the Attorney General had acquiesced in that decision;²²

That the Board considers the language in the Pardon itself as to the necessity of the Pardon for Michael's employment purposes;²³

That the Board compare what occurred with Michael with what happened in *Heath*, specifically as to a conditional pardon, for the proposition that Michael is entitled to a presumption that since her Pardon was unconditional and since it specifically mentioned the necessity to remove any impediment to employment, it was fair for the Board to conclude that the Pardon was intended to reverse the revocation of her license;²⁴

That the language of the Nurse Practice Act, specifically as to "permanent revocation" versus simply "revocation" was not, as has been suggested, intentional on the part of the General Assembly to prevent the Board from issuing too many revocations, but was instead probably a factor of the age of the Act versus newer enacted practice acts, proffering a list of the professions and occupations regulated by Title 24 to argue that the Board of Nursing is the only one that uses the phrase "permanently revoke" exclusively whereas three other have "revoke" or "permanently revoke," two have "revoke" or "permanently revoke for conviction of a felony sexual offense" which is language also appearing in 24 *Del.C.* §1922 which suggests redundancy in the statute, and 31 simply have "revoke;"²⁵ and finally:

²¹ *Id.* at A165-167.

²² *Id.* at A167-168.

²³ *Id.* at A168-169.

²⁴ *Id.* at A169.

²⁵ *Id.* at A169-172.

That the Board considers the dichotomy between 24 *Del.C.* §1922 and Board Rule 10.4.2.20, that address practicing without a license, and 24 *Del.C.* §1925, which specifically addresses the penalties for practicing nursing without a license with mandatory “shall” language describing that punishment.²⁶

Michael testified at that hearing that she had previously presented documentation to the Board from her former attorney, whom she no longer has, in which the attorney said it was OK to continue practicing while her appeal was pending. She also testified that she did not practice without a license willingly or knowingly.²⁷

The Board issued its written Opinion and Order on January 12, 2017, which set forth the reasons why it had denied Michael’s application.²⁸ Michael appealed that Board decision to Superior Court on February 2, 2017, arguing in her Opening Brief²⁹ that she was denied due process because she was denied a meaningful hearing before the Board on her applications for licensure, and that the Board abused its discretion by refusing to consider that Michael was denied due process and was subjected to disparate and irreversible discipline.³⁰

In its Answering Brief, the Board argued that its rejection of Michael’s argument that her Pardon qualified her for licensure did not deny Michael a

²⁶ *Id.* at A172-173.

²⁷ *Id.* at A173-176.

²⁸ Board of Nursing *Opinion and Order* at A12.

²⁹ See Michael’s Superior Court *Opening Brief* (“*Opening Brief*”) at A28, the Board’s *Answering Brief* at A64, and Michael’s *Reply Brief* at A92.

³⁰ See *Opening Brief* at A39-52.

meaningful hearing as required by due process; that Michael's position is premised upon a mistake of fact because her licenses were not permanently revoked solely as a result of her criminal conviction; that Michael's arguments regarding her qualifications for licensure are inapposite because of her permanent licensure revocations; that a Pardon does not abrogate the underlying criminal conviction; that the Board's practice act mandated that it deny Michael's licensure applications because of the earlier permanent revocation of her licenses; and that the Board did not abuse its discretion, subject Michael to disparate discipline, or commit a Constitutional tort against her.³¹

In her Reply Brief, Michael argued that it was plain error to conclude as the Board had that Michael's criminal conviction had nothing to do with the permanent revocation of her licenses; that by refusing to even consider Michael's applications because of the permanent revocation the Board validated Michael's argument that had it chosen to do so the Board could have considered those applications per 24 *Del.C.* §1910; that the State's arguments regarding the effect of Michael's Pardon were incorrect as a matter of law; and that the Board did not explain why nurses are treated disparately from all other occupations and

³¹ See *Answering Brief* at A72-89.

professions regulated by Title 24 and also did not show a rational basis for such disparate treatment.³²

The Superior Court rendered its Opinion affirming the Board's decision on September 8, 2017,³³ holding that the "core question" raised by Michael's "due process" arguments was whether the Board, considering the effect of Michael's Pardon, properly determined that it did not have the authority to either reinstate Michael's licenses or issue new ones; that Michael's contention that the effect of the pardon is "as if [the] conviction had never occurred" is an incorrect statement of Delaware law; that Michael's argument that her Pardon restored her "civil right" and that licensure is a civil right fell "far short" of establishing the Board's ability to license her; that regardless of whether a pardon could result in licensure under "other circumstances," the Board correctly determined here that it lacked the authority to license Michael because her permanent revocation was not "solely" a result of her criminal conviction, because the Board permanently revoked Michael's licenses after she practiced without a license, a circumstance that was "entirely separate" from her conviction and pardon; that Michael's claim of disparate treatment is meritless because "there is no room for judicial interpretation" of the language of Chapter 19 of Title 24 because the "plain meaning of the statutory language controls;" and that Michael's claim that what

³² See *Reply Brief* at A96-103.

³³ Superior Court *Opinion and Order* at A105-121.

was done to her is in the nature of a Constitutional tort is also without merit because she cannot show that she was treated differently from others who are similarly situated.³⁴

³⁴ *Id.*

ARGUMENT

I. MICHAEL WAS DENIED DUE PROCESS BECAUSE SHE WAS NOT GIVEN A MEANINGFUL HEARING ON THE SUBSTANTIAL EVIDENCE THAT THERE WAS A MEANS, PURSUANT TO THE NURSE PRACTICE ACT, THAT THE BOARD COULD HAVE ALLOWED MICHAEL TO SIT FOR LICENSURE EXAM; OR THAT HER UNCONDITIONAL GUBERNATORIAL PARDON MADE HER ELIGIBLE TO APPLY FOR LICENSURE PER THE ACT.

1. Question Presented

Was Michael denied due process when she was not given a meaningful hearing on the substantial evidence that there was a means, pursuant to the Nurse Practice Act, that the Board could have allowed her to sit for licensure exam or that her unconditional gubernatorial Pardon made her eligible to apply for licensure per the Act?

Michael presented argument, testimony, exhibits to the Board at its November 8, 2016 hearing. Her arguments are preserved at pp. A48-63, and A65-66; her testimony is preserved at A64-65; and the exhibits presented to the Board are preserved at A23-24, and A188-190.

Michael's arguments on appeal were presented to the Superior Court in her Opening Brief, and are preserved at A105-118; and in her Reply Brief preserved at A162-169.

2. Standard of Review

This Court reviews Board decisions to determine if the decision is supported by substantial evidence and free from legal error.³⁵ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³⁶ This Court reviews questions of law *de novo*, and absent an error of law, the Court reviews a Board's decision for abuse of discretion, which is only found where the Board's decision "exceeded the bounds of reason in view of the circumstances."³⁷ "Reversal is warranted if the administrative agency exercised its power arbitrarily or committed an error of law, or made findings of fact unsupportable by substantial evidence."³⁸

3. Merits

a. "In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process...."³⁹ And a professional license is a property interest afforded due process protection.⁴⁰

³⁵ *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981); *UIAB v. Duncan*, 337 A.2d 308, 308-09 (Del. 1975).

³⁶ *Olney*, 425 A.2d at 614.

³⁷ *Person-Gaines v. Pepco Hldgs., Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

³⁸ *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649 (Del. Super. 1973).

³⁹ *Carousel Studio v. Unemployment Ins. Appeal Bd.*, 1990 WL 91108, at *1 (Del. Super. 1990).

⁴⁰ *Villabona v. Bd. of Med. Practice of State*, 2004 WL 2827918, at *6 (Del. Super. 2004), *aff'd*, 858 A.2d 961 (Del. 2004).

The Board's proceedings are governed by both the requirements of due process and the Delaware Administrative Procedures Act; Chapter 101 of Title 29.⁴¹ And the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."⁴²

b. The holding of the Superior Court that Michael was afforded due process at the Board hearings is confusing.⁴³ Michael did not argue that she was denied due process at the April 13, 2011 hearing when her licensures were suspended. She also did not argue that she was denied due process at the September 11, 2013 hearing when the Board voted to permanently revoke both of her licenses. It appears from dicta in that Opinion that because Michael was represented by counsel and was permitted to present evidence at the hearings when the Board considered her requests for relicensure that she was afforded due process.⁴⁴

But a due process determination requires more. Delaware Courts utilize the analysis set out by the United States Supreme Court in *Mathews v. Eldridge*, which requires that courts balance:

[T]he private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and

⁴¹ *Vincent v. E. Shore Markets*, 970 A.2d 160, 163–64 (Del. 2009).

⁴² *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

⁴³ See *Order* at A114.

⁴⁴ *Id.*

the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail.⁴⁵

c. The Board's July 13, 2016 decision to propose denial of Michael's application for licensure by examination because her prior revocation rendered her "ineligible to sit for the NCLEX [exam]" ignored the substantial evidence that there is a means under the Nurse Practice Act to allow Michael to sit for the exam as raised at the hearing.⁴⁶

The Superior Court did not address this issue on appeal.

Section 1910 (for RN or § 1914 for LPN) of Title 24 states that an applicant for a license to practice shall submit to the Board written evidence, verified by oath, that the applicant has met certain of six specific requirements. The exclusive list of qualifications set forth in those Sections does not address the situation presented here: the revocation of a license. Item #5 of the §1910 list states that the applicant "[h]as committed no acts which are grounds for disciplinary action as set forth in §1922(a) of this title...." And the second item of §1922(a) states "is convicted of a crime that is substantially related to the practice of nursing...."

⁴⁵ *Cohen v. State ex rel. Stewart*, 89 A.3d 65, 87–88 (Del. 2014) (quoting *Mathews*, 424 U.S. 319 at 335). See also *Watson v. Div. of Family Servs.*, 813 A.2d 1101, 1107 (Del. 2002) ("[T]his Court's construction of the Delaware Constitution's mandate for due process 'in accordance with the right of the cause' has been consistent with the flexible standards of due process enunciated by the United States Supreme Court in *Mathews v. Eldridge*.").

⁴⁶ See Hearing Transcript at A163-164.

Thus, the Board ignored the substantial evidence that since Michael was already sanctioned for such a conviction in 2011, and since the wording of that item speaks to the present tense; her conviction could not form the basis to disqualify her as an applicant now.⁴⁷

Likewise, item #7 of §1922(a) sets forth suspension or revocation “in any jurisdiction” as grounds for discipline. Michael’s revocation, in *this* jurisdiction, was the discipline resulting from a violation of §1922(a); thus it cannot be said to form the basis of a denial of her applications per §§ 1910 or 1914.

Further, the Board did not address the argument that §1910(5) sets forth a mechanism whereby the Board could have waived Michael’s conviction. It was legal error and abuse of discretion for the Board to fail to appreciate its “clear mandate from the Delaware General Assembly”⁴⁸ to understand and correctly apply the Nurse Practice Act, and thereby offer Michael the opportunity to avail herself of the relief such a waiver would have provided under the circumstances presented here.

d. The Board ignored the substantial evidence regarding the pedigree of the Pardon or the effect of a Pardon. Further, by holding that “the Board did not revoke Ms. Michael’s licenses simply because she had been convicted of a crime substantially related to the practice of nursing” the Board ignored the fact that her

⁴⁷ *Id.*

⁴⁸ *See Order* at A14.

conviction was the well-spring for all of the violations that followed.⁴⁹ To ignore that was to ignore the substantial evidence that the effect of Michael's unconditional gubernatorial Pardon was as if that conviction had never occurred, making it an error of law for the Board to hold that "the pardoning of her crime is not sufficient to undo the permanent revocation of her nursing licenses."⁵⁰

The Board also erred by ignoring the substantial evidence that the plain language of 11 *Del.C.* §4364, *id est*, the specific reference to her ability to make a living meant that Michael's unconditional Pardon had the effect of fully restoring her "civil right" to pursue professional licensure.⁵¹

e. The Superior Court noted that Michael's "pardon" arguments had "two aspects;" the first as to what extent Michael's unconditional Pardon "erase[d] the consequences flowing from a prior criminal conviction;" the second as to whether nursing licensure is a "civil right" restored by issuance of a Pardon.⁵²

Section 4364 of Title 11 states that:

Except as otherwise provided by the Delaware Constitution, or *expressly by any provision of the Delaware Code* or any court rule, the granting of an unconditional pardon by the Governor shall have the effect of fully restoring all civil rights to the person pardoned. Such civil rights include, but are not limited to, the right to vote, the right to serve on a jury if selected, the right to purchase or possess deadly weapons and the right to seek and hold public office provided however, that this section shall not limit or affect the

⁴⁹ *Id.* at A15.

⁵⁰ *Id.*

⁵¹ *See* Hearing Transcript at A169.

⁵² *See Opinion and Order* at A114.

Governor's authority to place lawful conditions upon the granting of a pardon.... (emphasis added).

f. So the question then is one of statutory construction and the dichotomy of the Pardon statute and the Nurse Practice Act. This Court reviews questions of statutory interpretation *de novo*⁵³ and “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.”⁵⁴ If the statutory text is unambiguous, this Court's role is limited to an application of the literal meaning of the statute's words.⁵⁵ But if a statute is “reasonably susceptible to different interpretations, or if giving a literal interpretation to the words of the statute would lead to an unreasonable or absurd result that could not have been intended by the legislature, it is left to this Court to determine its meaning.”⁵⁶

Delaware’s 1776 Constitution vested the power to pardon with the President, or Chief Magistrate, of Delaware.⁵⁷ Carried forward, Article VII of Delaware’s current Constitution describes the procedures by which the Governor can deny a

⁵³ *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012).

⁵⁴ *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). See also *Board of Adjustment of Sussex County v. Verleysen*, 36 A.3d 326, 331 (Del. 2012) (citing *State v. Skinner*, 632 A.2d 82, 85 (Del. 1993)).

⁵⁵ *Dennis v. State*, 41 A.3d 391, 393 (Del. 2012).

⁵⁶ *Arnold*, 49 A.3d at 1183.

⁵⁷ *Del. Const.*, 1776, Art. 7.

pardon, or grant an unconditional or conditional pardon on the condition that the pardon has been recommended, in writing, by a majority of the Board of Pardons.⁵⁸

The Superior Court incorrectly cited *Heath v. State* at page 11 of its Opinion:

The State argues that the [sex offender] Registry statute [11 Del.C. §4121] precludes the pardon statute from superseding its underlying policy without an express, legislative limitation. In *State v. Skinner*, we held that ‘the pardon may have forgiven [the offender’s] conviction, [but] it did not obliterate the public memory of the offense ... a pardon does not erase guilt. It “does not create any factual fiction that [the] conviction had not occurred to justify expunction of his criminal record.”’⁵⁹

In so doing, it merely bootstrapped its holding that *State v. Skinner* stands for the proposition that “a pardon ‘involves forgiveness and not forgetfulness and it does not “wipe the slate clean,”’⁶⁰ and thus it was not error for the Board to deny licensure.⁶¹ Moreover, the plain language of *Heath* supports Michael’s position:

The pardon statute states that ‘[e]xcept as otherwise provided by the Delaware Constitution, or *expressly* by any provision of the Delaware Code or any court rule, the granting of an unconditional pardon by the Governor shall have the effect of fully restoring all civil rights to the person pardoned.’ Thus, a statute supersedes the pardon statute only if the later-enacted statute expressly so provides. Because the [sex offender] Registry statute does not so ‘expressly’ provide, we see no reason to distinguish between the effects of a pardon and an expunction with respect to Registry requirements.⁶²

⁵⁸ *Del. Const.*, Art. 7, §1; *Arnold*, 49 A.3d at 1183.

⁵⁹ *See Opinion and Order* at A115.

⁶⁰ 632 A.2d at 84.

⁶¹ *See Opinion and Order* at A115.

⁶² *Heath*, 983 A.2d at 82 (emphasis in the original) (internal citations omitted).

At issue in *Skinner* was Delaware's expungement statute, 11 *Del.C.* § 4371 *et seq.*, and more germane to the issue here is this passage from *Skinner*:

A pardon is '[a]n executive action that mitigates or sets aside punishment for a crime.' *Black's Law Dictionary* 1113 (6th ed. 1990). It is '[a]n act of grace from governing power which mitigates the punishment the law demands for the offense *and restores the rights and privileges forfeited on account of the offense.*' *Id.*⁶³

g. The Superior Court set aside Michael's argument that professional licensure is not a "civil right" as that term is used in the Pardon statute,⁶⁴ because nowhere in the case that Michael cited for this proposition, *Villabona v. Board of Medical Practice*,⁶⁵ did the Court

[H]old or indicate that a professional license is a 'civil right.' In *Villabona*, the Court recognizes that a professional license is a *property right* and protected accordingly under the Fourteenth Amendment. From this language, Michael reaches the conclusion, without any supporting argument or further citation, that a professional license is a 'civil right.'⁶⁶

With respect, that was a very narrow reading of the term "civil right" as it was intended here. It would seem that Michael's property interest in professional licensure is on a par with the "civil rights" delineated in §4364. Moreover, since that §4364 list is inclusive not exclusive, the Court need not decide whether a

⁶³ 632 A.2d at 84 (emphasis added).

⁶⁴ 11 Del. C. § 4364 ("Such civil rights include, but are not limited to, the right to vote, the right to serve on a jury if selected, the right to purchase or possess deadly weapons and the right to seek and hold public office provided however, that this section shall not limit or affect the Governor's authority to place lawful conditions upon the granting of a pardon").

⁶⁵ 2004 WL 2827918, at *6, *aff'd*, 858 A.2d 961 (Del. 2004).

⁶⁶ *See Opinion and Order* at A116.

property interest afforded protections by both the Delaware and United States Constitutions⁶⁷ is a “civil right” in this context; which is why that would seem to be a distinction without a difference here.

Michael submits that the Superior Court’s interpretation of §4364 in the context presented here “leads to an unreasonable or absurd result that was unintended by the General Assembly.”⁶⁸ “The role of this Court when construing a statute is to give effect to the policy intended by the General Assembly.”⁶⁹

The synopsis to the original bill provides guidance about the “intent” of the General Assembly when it enacted §4364. The synopsis states:

The Governor's authority to pardon a person convicted of a crime upon receipt of a recommendation to do so by the Board of Pardons is established in the Delaware Constitution. However, neither the Constitution nor the Delaware Code describes the effect of a pardon. This Act will resolve much of the ambiguity and uncertainty surrounding the effect of a pardon by making it clear that the Governor's decision to grant a pardon has the effect of restoring to the pardoned person his or her core civil rights as defined by the Delaware Constitution, and by enumerating *many of* those rights. The Act recognizes that Article II, Section 21 of the Delaware Constitution of 1897 prohibits persons convicted of certain crimes from holding public office, and codifies a Delaware Supreme Court decision that a pardon does not eliminate this constitutional prohibition.⁷⁰

⁶⁷ *Del. Const.*, Art. 1, § 7, *U.S. Const.* Amend. XIV, § 1.

⁶⁸ *Arnold*, 49 A.3d at 1184.

⁶⁹ *State v. Fletcher*, 974 A.2d 188, 196–97 (Del. 2009) (citing *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982)).

⁷⁰ Delaware Bill Summary, 2003 Regular Session, Senate Bill 62 (2003).

Thus, enforcing the plain language of the statute to permit the Board to consider Michael for licensure is also consistent with the public policy of the General Assembly as articulated in that Synopsis by restoring her property right.⁷¹

h. The Board erred by ignoring the substantial evidence that all that transpired after Michael's 2009 conviction was *sequelae* of that conviction and that *but for* that conviction would never have occurred; thus all of her subsequent violations were derivative of the original charge arising from her conviction. The Board found that it did not revoke Michael's licenses "simply because she had been convicted of a crime," thus "the pardoning of her crime is not sufficient to undo the permanent revocation of her nursing licenses."⁷²

i. Moreover, it was error for the Board to conclude that their duty to "endeavor to pursue a course of conduct which will not raise suspicion among the public" precluded them from allowing Michael to pursue licensure because that would have been "engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government" because they be "failing to uphold Delaware law...."⁷³ By so holding, the Board ignored the

⁷¹ *Arnold*, 49 A.3d at 1185.

⁷² *See* Board of Nursing *Opinion and Order* at A15.

⁷³ *Id.* at A16.

substantial evidence that it was just as much of a “clear violation” of their duty for the Board to disregard the clear and unambiguous language of the Pardon statute.⁷⁴

Michael conceded that she was not entitled to automatic restoration of her licenses as a result of her Pardon. Rather, she simply sought to avail herself of the procedures established by the Board to prove her competence to practice nursing through examination.

The legislative intent of the Nurse Practice Act, and thus the purpose of the Board, is to ensure “the protection of the public health, safety and welfare” by requiring that nursing only be practiced by “competent persons,” and that the practice of nursing be “regulated and controlled in the public interest” in order “to safeguard life and health,” and that the “general administration and supervision of the education, examination, licensing and regulation of professional and practical nursing ... [be] vested in the Board of Nursing.”⁷⁵

It was error for the Board to allow its mandate to protect the public to influence its decision here because in so doing, the Board disregarded the substantial evidence that Michael’s potential danger to the public had already been fully vetted by the Board of Pardons before the Governor “fully restored” her civil rights by issuing her Pardon.⁷⁶ The Governor is made aware of the applicant's

⁷⁴ See Hearing Transcript at A168.

⁷⁵ 24 *Del.C.* §1901.

⁷⁶ See *State v. Culp*, 152 A.3d 141, 147 (Del. 2016).

complete criminal history when evaluating a pardon request, since it is attached to the Pardon Petition.⁷⁷

j. The Board further erred by disregarding the substantial evidence that the language of the Pardon itself indicated it was necessary for employment purposes which Michael was attempting to pursue through licensure.⁷⁸ The Board failed to recognize that Michael's Pardon, by its specific reference to her ability to make a living, had the effect of fully restoring her right to pursue professional licensure by operation of 11 *Del.C.* §4364.

The Board further erred by holding that Michael's reliance on *Heath v. State*⁷⁹ was inapposite to this case because *Heath* was *only* required to register as a sex offender because he was convicted of a sex offense and *but for* that conviction he never would have had to register as a sex offender. In holding that *Heath* was inapposite, the Board ignored the obvious - that *but for* her 2009 conviction, Michael never would have been brought before the Board in 2011 and *but for* that 2009 conviction, Michael's license would not have been suspended and she obviously would not have been disciplined in 2013.

⁷⁷ *Arnold*, 49 A.3d at 1182.

⁷⁸ See Pardon at A24.

⁷⁹ 983 A. 2d 77 (Del. 2009).

k. The Superior Court made this same error by finding that Michael's "license was not revoked solely as a result of her conviction."⁸⁰ Michael does not dispute that the Board can, and often does, impose discipline for reasons other than criminal conviction. But again, Michael's revocation came about as a result of a chain of events that started with and was caused by her 2009 conviction for which she has now been pardoned unconditionally. Allowing this revocation to stand on the circumstances presented here renders §4364 meaningless for Michael. With respect, it was error for the Board to conclude that "the pardoning of her crime is not sufficient to undo the permanent revocation of her nursing licenses" and the Superior Court to sustain that holding.

⁸⁰ *See Opinion and Order* at A116.

II. IT WAS ERROR FOR THE SUPERIOR COURT TO CONCLUDE THAT MICHAEL’S CLAIM OF DISPARATE TREATMENT IS MERITLESS BECAUSE “THERE IS NO ROOM FOR JUDICIAL INTERPRETATION” OF THE LANGUAGE OF CHAPTER 19 OF TITLE 24 BECAUSE THE “PLAIN MEANING OF THE STATUTORY LANGUAGE CONTROLS.” IT WAS ALSO ERROR TO HOLD THAT MICHAEL’S CLAIM THAT WHAT WAS DONE TO HER IS IN THE NATURE OF A CONSTITUTIONAL TORT IS WITHOUT MERIT BECAUSE SHE CANNOT SHOW THAT SHE WAS TREATED DIFFERENTLY FROM OTHERS WHO ARE SIMILARLY SITUATED.

2. Question Presented

Was it error for the Superior Court to conclude that Michael’s claim of disparate treatment and was not in the nature of a Constitutional tort?

Michael presented argument, testimony, exhibits to the Board at its November 8, 2016 hearing. Her arguments are preserved at pp. A48-63, and A65-66; her testimony is preserved at A64-65; and the exhibits presented to the Board are preserved at A23-24, and A188-190.

Michael’s arguments on appeal were presented to the Superior Court in her Opening Brief, and are preserved at A105-118; and in her Reply Brief preserved at A162-169.

2. Standard of Review

This Court reviews a Superior Court decision that, in turn, has adjudicated a ruling of an administrative agency, by directly reviewing the agency decision to

determine if it is supported by substantial evidence and is free from legal error.⁸¹

Questions of law and statutory interpretation are reviewed *de novo*.⁸²

3. Merits

a. The Superior Court side-stepped the argument that Michael is a member of an *identifiable* class that was aggrieved by both the wording and the application of a statute and was intentionally treated differently than others similarly situated without rational basis for the differing treatment.⁸³

It was error for the Superior Court to ignore the substantial evidence that there is no explanation or bases articulated anywhere in all of Title 24 that explains or justifies why the Board of Nursing is the *only* Board that uses “permanently revoke” exclusively.⁸⁴ Absent such explanation, such language transcends beyond “wise legislative policy” and becomes discriminatory and disparate treatment of members of a profession that has historically been female-dominated.

Rather than address the issue, the Superior Court misapprehended Michael’s *Village of Willowbrook v. Olech*⁸⁵ argument and decided that Michael was a

⁸¹ *Olney*, 425 A.2d at 613; *UIAB v. Duncan*, 337 A.2d at 308–09.

⁸² *Person–Gaines*, 981 A.2d at 1161; *Doroshov, Pasquale v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 342 (Del. 2012).

⁸³ *See Opinion and Order* at A119.

⁸⁴ *See Hearing Transcript* at A169-172. Michael proffered to the Board a list of the professions and occupations regulated by Title 24 and a list of the Title 24 Professions and Occupations listed by statute, which are attached at A189-192.

⁸⁵ 528 U.S. 562 at 564 (2000).

member of an identifiable class – nurses who have had their licenses permanently revoked and then have reapplied for licensure.⁸⁶ It is unknown and mostly likely unknowable if there are any others who are similarly situated to that narrow description. However, that holding disregarded Michael’s arguments that the question of whether the wording of the statute was intentional is left to speculation. But there is no speculation that here the application of the statute was both intentional and clearly different from how a similarly-situated member of any of the other professions or vocations regulated by Title 24 would have been treated under the same or similar circumstances.

The Superior Court further erred by disregarding the substantial evidence that when there is no explanation for this disparity, the burden shifts to the State to show a rational basis for the differing treatment.

b. “In interpreting a statute, [the] primary job [of this Court] is to honor its apparent purpose based on a sensible reading of the text....”⁸⁷ That analysis is what is sought here; that a “sensible reading” of the statutes regulating professions and occupations found within Title 24 shows that this Board is the only one that uses “permanently revoke” exclusively; three have “revoke” or “permanently

⁸⁶ See *Opinion and Order* at A119-120.

⁸⁷ *Nationwide Mut. Ins. Co. v. Krongold*, 318 A.2d 606, 609 (Del.1974) (citation omitted); See also 73 Am.Jur.2d *Statutes* § 146 (1974) (“To apply a statute the fundamental rule is to ascertain and give effect to the intent of the legislature.”).

revoke;” two have “revoke” or “permanently revoke for conviction of a felony sexual offense;” and 31 have simply “revoke.”⁸⁸

There is no “sensible” reason for this, which negates the Superior Court’s citation to *Leatherbury v. Greenspun*⁸⁹ for the proposition that “when provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions.”⁹⁰ Moreover, in *Seth v. State*, this Court held that:

[W]e note that when statutory language is both clear and consistent with other provisions of the same legislation and with legislative purpose and intent, a court must give effect to that intent because it is for the legislature, and not the courts, to declare the public policy of the state.⁹¹

But “[a] statute cannot be construed to produce an absurd, meaningless or patently inane result.”⁹² And “[s]ince the primary object of statutory construction is to reach a result in conformity with legislative policy, *once that policy is determined* we need only test the construction by the rules of reasonableness and conformity with that policy.”⁹³

⁸⁸ See List of the professions and occupations regulated by Title 24 and a list of the Title 24 Professions and Occupations listed by statute at A189-192.

⁸⁹ 939 A.2d 1284, 1292 (Del. 2007).

⁹⁰ See *Opinion and Order* at fn63 at A119.

⁹¹ 592 A.2d 436, 440 (Del. 1991).

⁹² *Nationwide v. Krongold*, 318 A.2d at 608; *Opinion of the Justices*, 295 A.2d 718, 721–22 (Del. 1972).

⁹³ *E.I. Du Pont de Nemours & Co. v. Clark*, 88 A.2d 436, 439 (Del. Ch. 1952) (emphasis added).

c. Michael acknowledges that our courts do not sit as a super-legislature to eviscerate *proper* legislative enactments or that is beyond the province of courts to question the policy or wisdom of an *otherwise valid law*.⁹⁴ But there is the issue presented here: is the Nurse Practice Act proper and an otherwise valid law? Does it reflect legislative policy? Is it reasonable for this Court to conclude that the General Assembly intended to give those other Title 24 Boards authority to consider something other than “permanent revocation” but not this Board?

Michael believes, but lacks the resources to confirm, that the Nurse Practice Act contains the “permanently revoke” language as one of the oldest, if not the oldest; practice act in Title 24. However, a more recent amendment to 24 *Del.C.* §1922 offers a clue as to legislative intent on this issue.

In 2011, the General Assembly passed a slew of bills in the wake of the Earl Bradley tragedy. Section 1922 was amended to add that:

- (a) The Board may impose any of the following sanctions (subsection (b) of this section) singly or in combination when it finds a licensee or former licensee is guilty of any offense described herein, *except that the license of any licensee who is convicted of a felony sexual offense shall be permanently revoked.* (emphasis added).

With a bow to Bismarck's aphorism (and then Judge Scalia's citation to it) that “no man should see how laws or sausages are made;”⁹⁵ it is reasonable to conclude that

⁹⁴ *Public Service Commission of the State of Delaware v. Wilmington Suburban Water Corporation*, 467 A.2d 446, 451 (Del. 1983).

⁹⁵ *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984).

it is *not* the intention of the General Assembly that only nurses be subjected to this disparate form and application of discipline. If so, there would have been no need to amend §1922 as above. The Synopsis for the Bill which created that amendment supports this by stating that:

Section 2 of this bill provides that no person who has been convicted of a felony sexual offense can receive a license to practice registered nursing.

Section 4 of this bill provides that no person who has been convicted of a felony sexual offense can be licensed as a practical nurse.

Section 5 of this bill provides for permanent revocation of the license of any nurse who is convicted of a felony sexual offense.⁹⁶

Since the Board could already permanently revoke, and since the amendment did not state that such revocations would be automatic, the General Assembly apparently did not believe that the Board already had that authority without need for this amendment. “In the context of drafting ... even highly paid scribes will often fail to write with perfect clarity. That is also true of a state legislature, such as our General Assembly”⁹⁷

Because the General Assembly is not infallible, both the law and its application here is invalid. As this Court held in *Opinion of the Justices*, “[l]egislative acts should not be disturbed except in clear cases, and then only upon

⁹⁶ Delaware Bill Summary, 2011 Regular Session, House Bill 45 (2011).

⁹⁷ *Du Pont*, 88 A.2d 436, 438 (Del. Ch. 1952) (“The court must necessarily be guided by the presumption that the Legislature did not intend an unreasonable, absurd or unworkable result. If from the statute as a whole the object sought to be attained or the general intent underlying the statutory language can be ascertained, it will be given effect by the courts.”).

weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt.”⁹⁸ Michael respectfully submits that this is such a case.

⁹⁸ 425 A.2d 604, 606 (Del. 1981) (citing *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974)).

CONCLUSION

For all of the factual and legal arguments set forth herein, Appellant Maia Michael respectfully submits that the decisions be reversed and that this matter be remanded to the Board of Nursing with instructions to permit Michael to apply for licensure.

Respectfully submitted,

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