



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE DELAWARE BOARD OF NURSING'S
ANSWERING BRIEF

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DATED: November 27, 2017

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NATURE OF THE PROCEEDINGS

The General Assembly has charged the Appellee Delaware Board of Nursing with administering and enforcing Title 24, Chapter 19 of the Delaware Code (“Chapter 19” or “practice act”). 24 *Del. C.* § 1901. Pursuant to Chapter 19:

The General Assembly hereby declares the practice of nursing by competent persons is necessary for the *protection of the public health*, safety and welfare and further finds that the levels of practice within the profession of nursing should be *regulated and controlled in the public interest*. In order to safeguard life and health, the general administration and supervision of the education, examination, licensing and regulation of professional and practical nursing is declared essential, and *such general administration and supervision is vested in the Board of Nursing*.

Id. (emphases added).

Appellant Maia Michael is a formerly Delaware licensed registered nurse and licensed practical nurse whose licenses were permanently revoked by the Board of Nursing on October 9, 2013.¹ No stranger to licensure discipline, Ms. Michael’s nursing licenses were previously suspended by the Board on May 12, 2011 after it was discovered that Ms. Michael had impersonated a physician, calling in prescriptions for a controlled substance to three separate pharmacies, for her own

¹ A10-11 Pursuant to Supreme Ct. R. 14(e), the Appellee has not created a separate, duplicative Appendix. References to the Appellant’s Appendix will be cited by bates stamp number.

use.² Ms. Michael appealed the decision suspending her licenses, but on February 16, 2012, the Superior Court affirmed the Board's order.³

In complete disregard of the May 2011 Board Order suspending her licenses, Ms. Michael continued to work as a nurse from June of 2011 until January 31, 2012.⁴ As a result, the State initiated a second disciplinary Complaint against her for practicing nursing while suspended, and on September 11, 2013 the Board voted to permanently revoke Ms. Michael's licenses, citing her repeated disregard for the law and the rules and orders of the Board.⁵ This decision was memorialized in an order dated October 9, 2013.⁶

Despite the permanent revocation of her licenses, on March 31, 2016, Ms. Michael applied for licensure as a licensed practical nurse and resident nurse by reinstatement, and on June 10, 2016, she also applied for licensure by endorsement and examination.⁷ The Board reviewed Ms. Michael's applications for reinstatement on May 11, 2016 and proposed to deny them in light of the fact that Ms. Michael's RN and LPN licenses had been previously permanently revoked.⁸ That is, the Board

² A1-9.

³ Opening Br., 1.

⁴ A128.

⁵ A10-11.

⁶ *Id.*

⁷ A136-139 and A142-150.

⁸ *See* A140-141 and A151.

found that Ms. Michael did not currently possess any Delaware license that qualified for “reinstatement.”⁹ The Board reviewed Ms. Michael’s applications for licensure by examination and endorsement on July 13, 2016 and proposed to deny these applications as well, noting that insofar as the Board is only authorized to permanently revoke licenses under 24 *Del. C.* § 1922(b)(1), Ms. Michael is not eligible to be granted a new Delaware nursing license by endorsement or examination.¹⁰

Ms. Michael was notified of the Board’s proposals to deny her applications for licensure in Delaware by letters dated May 23, 2016 and July 19, 2016. Ms. Michael timely requested a hearing before the Board, and pursuant to due notice, a hearing was held on November 14, 2016 in Dover, Delaware, before the Board.¹¹ On January 11, 2017, the Board issued an Order denying Ms. Michael’s applications for licensure, noting that to grant a license to a nurse whose license had been previously *permanently* revoked would require the Board to ignore established Delaware law.¹²

Ms. Michael filed a timely an appeal of the Board’s Order to the Superior Court. The Superior Court affirmed the Board’s decision. Ms. Michael filed her

⁹ See 24 *Del. C.* §1918(c).

¹⁰ A151-153.

¹¹ A151 and 153-154.

¹² A12-19.

Opening Brief in support of the instant appeal with this Court on October 25, 2017.

This is the Board's timely-filed Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Board did not deny Ms. Michael due process by rejecting her argument that the Nurse Practice Act allowed for the reinstatement or re-granting of a permanently revoked license and by rejecting the argument that Ms. Michael's criminal pardon qualified her to apply for licensure. The Board need not address Ms. Michael's argument before this Court that the Superior court erred as on an appeal from an administrative agency, this Court does not review the decision of the Superior Court but rather directly examines the Board's decision. *Del. Dep't. of Health & Soc. Servs. v. Jain*, 29 A.3d 207, 211 (Del. 2011).

2. Denied. This Court's function is to review the Board's decision. *Id.* Ms. Michael's claim of disparate treatment is meritless and the "legislative policy" of the Nurse Practice Act is inapposite as the plain language of the statute mandated denial of Ms. Michael's license.

STATEMENT OF FACTS

In October of 2008, Maia Michael went onto the internet and sought out a website where she could illegally obtain a physician's DEA number.¹³ Finding a website that was offering a "sale" on DEA numbers for physicians whose last name began with the letter "A," Ms. Michael went to the phone book searching for a Delaware female physician whose last name started with "A."¹⁴ Andrea Arellano, M.D. unfortunately met these criteria, and Ms. Michael promptly, and illegally purchased Dr. Arellano's DEA number from the illicit website.¹⁵ Armed with Dr. Arellano's DEA number, Ms. Michael proceeded to call pharmacies all over Dover posing as Dr. Arellano and ordering prescriptions in her own name for Xanax, a Schedule IV Controlled Substance.¹⁶ On October 21, 2008 and November 17, 2008, Ms. Michael, impersonating the doctor, called in Xanax prescriptions on five occasions, filling four out of five prescriptions successfully.¹⁷ On December 9, 2008, Ms. Michael was arrested and charged with a felony count of obtaining a controlled substance by misrepresentation, fraud, forgery or deception.¹⁸

¹³ A3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* and 16 *Del. C. § 4720(b)(23)*.

¹⁷ *Michael v. Del. Bd. of Nursing*, 2012 WL 1413573 at *1 (Del. Super. Feb. 16, 2012).

¹⁸ *Id.*

On April 8, 2010, Ms. Michael entered the Delaware Superior Court Drug Diversion program, the successful completion of which would have resulted in no criminal conviction being placed on her record.¹⁹ However, while participating in this program, Ms. Michael's random drug screenings were positive and as a result, on September 23, 2010, Ms. Michael was criminally convicted of one count of illegally obtaining a controlled substance, a crime substantially related to the practice of nursing pursuant to Board Regulation 15.7.1.²⁰

As a result of Ms. Michael's conduct, the Department of Justice filed a complaint against Ms. Michael's nursing licenses with the Board of Nursing alleging that Ms. Michael violated provisions of 24 *Del. C.* § 1922(a)(3) in that she is unfit and incompetent to practice nursing; violated the provisions of 24 *Del. C.* § 1922(a)(2) in that she was convicted of a crime substantially related to the practice of nursing; and violated the provisions of 24 *Del. C.* § 1922(a)(8) and was guilty of unprofessional conduct in that she violated the following Regulations of the Delaware Board of Nursing: Regulation 10.4.1 in that her behavior failed to conform to the legal standards and accepted standards of the nursing profession and adversely affected the health and welfare of the public; and Regulation 10.4.2.15²¹ in that she

¹⁹ See 11 *Del. C.* § 4218 and Opening Br., 4.

²⁰ See A4.

²¹ Due to several Regulations changes since 2011, Regulation 10.4.2.15 referenced in Ms. Michael's 2011 Order is now Board Regulation 10.4.2.17.

diverted, possessed, obtained and administered prescription drugs to herself without authorization.²²

Following a hearing on February 9, 2011, which Ms. Michael did not attend, the Board voted to revoke Ms. Michael's RN and LPN licenses.²³ On March 3, 2011, Ms. Michael petitioned the Board to reopen the disciplinary matter, in light of the fact that she was not present at the initial hearing.²⁴ The Board granted Ms. Michael's request, and a second hearing was held on April 13, 2011.²⁵ At this hearing Ms. Michael admitted to all of her criminal conduct, describing "her actions with particularity."²⁶ Despite the fact that Ms. Michael admitted to criminal conduct, the Board mercifully voted not to revoke Ms. Michael's RN and LPN licenses but rather to suspend them for five years.²⁷ Moreover, the Board granted Ms. Michael the right to petition to lift the license suspensions after two years contingent upon her compliance with certain conditions.²⁸

²² See A1.

²³ See A2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Michael v. Del. Bd. of Nursing*, 2012 WL 1413573, at *2 (Del. Super. Feb. 16, 2012).

²⁷ A6-7.

²⁸ *Id.*

Ms. Michael appealed the Board's suspension of her licenses, and on February 16, 2012, the Superior Court issued an Order affirming the decision of the Board.²⁹

Undeterred by the issuance of the May 2011 Board Order suspending her licenses, Ms. Michael continued to work as a nurse for eight months, from June of 2011 until January 31, 2012 without a valid nursing license.³⁰ When her employer discovered Ms. Michael was working as a nurse while her licenses were suspended, her employer filed a complaint with the Division of Professional Regulation.³¹ Thereafter, the State initiated a separate disciplinary Complaint with the Board, and a hearing was held before a hearing officer on July 23, 2013.³² On August 20, 2013, the hearing officer issued a recommendation finding that Ms. Michael "knew that she was suspended but intentionally represented to [her employer] that she was able to lawfully practice nursing."³³ The hearing officer noted that when her employer advised her to follow up with the Board regarding her license status, Ms. Michael did not follow her employer's direction and simply never responded to her employer.³⁴ In addition, when a Division of Professional Regulation investigator explained that Ms. Michael was being investigated for working as a nurse while her

²⁹ *Michael*, 2012 WL 1413573.

³⁰ A128.

³¹ A125.

³² A123.

³³ A130.

³⁴ A125-126.

licenses were suspended, Ms. Michael “made no comment.”³⁵ In other words, despite being directly confronted with the fact that she was working on a suspended license by at least two separate individuals, Ms. Michael never once professed to believe that the suspension of her license had been stayed, as she now contends in her Opening Brief.³⁶ Ultimately, the hearing officer found that Ms. Michael disregarded the Board’s May 12, 2011 Order when she knowingly continued to practice nursing with a suspended license. *Id.* at 6. The hearing officer recommended that her license be suspended until at least May 12, 2017, six years from the date of the original suspension.³⁷

The Board deliberated on the hearing officer’s recommendation on September 11, 2013.³⁸ Ms. Michael, who had been provided a copy of the hearing officer recommendation and advised that she had the right to submit written exceptions,

³⁵ A126.

³⁶ *See* Opening Br., 6 (“Mistakenly believing that her counsel had requested a stay of the Board’s Order..., Michael continued to work until January of 2012, when she was informed by her employer that she was not licensed.”). This claim is supported only by reference to Ms. Michael’s own self-serving testimony at her Proposal to Deny hearing in 2016. *Id.*; *see also* A64 (“I’ve presented documentation from him where he has told me – he told me that it was okay.”) No such documentation was ever presented to the Board of Nursing, and no such documentation exists in this record. Moreover, Ms. Michael did not appeal the 2013 decision of the Board holding that her unlicensed practice was willing and knowing, and she may not now challenge that decision. *See 29 Del. C. § 10142(b)* (establishing a thirty day appeal period for case decisions of administrative agencies, such as the Board of Nursing).

³⁷ A131.

³⁸ A10-11.

comments, or arguments to the recommendation, did not submit anything in writing and did not attend the meeting during which the Board deliberated upon the hearing officer recommendation.³⁹ The Board voted to reject the hearing officer's recommended discipline of additional suspension, noting that Ms. Michael repeatedly disregarded Delaware law, and the regulations, and orders of the Board.⁴⁰ The Board found that the only way for it to adequately protect the public would be to permanently revoke Ms. Michael's licenses.⁴¹ On October 9, 2013, the Board issued an order reflecting this decision.⁴² Ms. Michael did not appeal the permanent revocation of her licenses.

Despite the permanent revocation of her licenses, Ms. Michael applied to have her LPN and RN licenses reinstated on March 31, 2016.⁴³ The Board reviewed this application for reinstatement on May 11, 2016 and proposed to deny it in light of the fact that Ms. Michael's RN and LPN licenses had been permanently revoked and thus could not be reinstated.⁴⁴ After the Board proposed to deny this application, Ms. Michael applied for RN and LPN licensure by endorsement and examination on

³⁹ A10-11, 132.

⁴⁰ A11.

⁴¹ *Id.*

⁴² *Id.*

⁴³ A136-139. *N.B.*, the Board reinstatement application allows an applicant to apply for two licenses (RN and LPN) with one form.

⁴⁴ A140-141, 151.

June 10, 2016.⁴⁵ The Board reviewed these applications on July 13, 2016 and proposed to deny them, noting that insofar as the Board is only authorized to *permanently* revoke licenses under 24 *Del. C.* § 1922(b)(1), Ms. Michael is not eligible to be granted a Delaware nursing license by endorsement, examination, or reinstatement.⁴⁶

Ms. Michael was notified of the Board's proposals to deny her applications for licensure in Delaware by letters dated May 23, 2016 and July 19, 2016.⁴⁷ Ms. Michael timely requested a hearing before the Board, and pursuant to due notice, a hearing was held on November 8, 2016 in Dover, Delaware.⁴⁸ At the hearing, Ms. Michael argued that prior revocation of a license is not listed as a basis to deny a nursing application under 24 *Del. C.* §§ 1910 and 1914; that the Board of Nursing is the only Title 24 Board that lists only permanent revocation under its list of permissible disciplines (citing 24 *Del. C.* § 1922(b)); and that under Delaware statutory and case law, pardoning a criminal offense restores all of the pardoned individual's civil rights.⁴⁹ Ms. Michael specifically pointed to *State v. Skinner*, 632 A. 2d 82 (Del. Super. 1993) and *Heath v. State*, 983 A. 2d 77 (Del. 2009) as support

⁴⁵ A142-150.

⁴⁶ A152-153.

⁴⁷ *Id.*

⁴⁸ A154.

⁴⁹ A162-173.

for the edict that when an individual's crime is pardoned all collateral consequences of that crime should also be eliminated.⁵⁰

At the time of the hearing, the Board considered the documentary submissions and the testimonial evidence, all of which was offered in support of Ms. Michael's application for Delaware RN and LPN licenses by reinstatement, examination, or endorsement.⁵¹ The Board found that its 2013 Board Order permanently revoked Ms. Michael's license, and the legal argument and evidence presented by Ms. Michael did not overcome the clear mandate from the Delaware General Assembly that permanent revocation indeed means permanent.⁵² On January 11, 2017, the Board issued an Order denying Ms. Michael's applications for licensure, noting that to grant a license to a nurse whose license had been *permanently* revoked would require the Board to ignore established Delaware law.⁵³ This appeal followed.

⁵⁰ A164-168.

⁵¹ A12-19.

⁵² *Id.*

⁵³ *Id.*

ARGUMENT

I. THE BOARD CORRECTLY FOUND THAT THE PERMANENT REVOCATION OF MS. MICHAEL’S NURSING LICENSES IN 2013 RENDERED HER INELIGIBLE FOR LICENSURE IN 2016.

1. Question Presented

Was Maia Michael denied due process when the Board held (1) that she was ineligible for licensure due to the permanent revocation of her prior licenses; and (2) that her gubernatorial pardon did not render her eligible? A140-148

2. Scope of Review

This Court has jurisdiction to entertain this appeal from an administrative board’s final order pursuant to the Delaware Administrative Procedures Act (“APA”). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board’s decision and the board’s ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). Moreover, “[t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.” 29 *Del. C.* § 10142(d). This Court’s limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal

error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965). Because the Superior Court reviewed no additional evidence upon review of the Board’s decision, this Court does not examine the Superior Court’s decision. *See Del. Dep’t. of Health & Soc. Servs. v. Jain*, 29 A.3d 207, 211 (Del. 2011) (citing *Stoltz Mgmt. Co.*, 616 A.2d at 1208 (Del. 1992)).

3. Merits of Argument

Ms. Michael argues in her Opening Brief that the Board denied her due process rights because it ignored “substantial evidence that there is a means under the Nurse Practice Act to allow Michael to sit for the exam” and obtain new nursing licenses.⁵⁴ The statutory requirements an applicant must meet before being permitted to sit for the registered nursing licensure exam are set forth in the Nurse Practice Act at 24 *Del. C.* § 1910.⁵⁵ Ms. Michael’s assertion seems to be that because permanent revocation is not specifically listed as a bar to licensure under Section 1910, the Board was remiss in finding her ineligible, without considering whether Ms. Michael met the qualifications for licensure spelled out in this Section.⁵⁶ Such an evaluation of her credentials under the framework of Section 1910, however,

⁵⁴ Opening Br., 18.

⁵⁵ The statutory provisions for LPNs set forth at 24 *Del. C.* § 1914 are identical to those set forth for RNs at Sec. 1910.

⁵⁶ *See* Opening Br., 18.

would have been futile. The clear language in Section 1910 requires that an applicant must have “committed no acts which are grounds for disciplinary action as set forth in § 1922(a) of this title” 24 *Del. C.* § 1910(5). Ms. Michael asserts that because § 1922(a)(2) “speaks to the present tense” (that is, the Board may impose discipline on any nurse who “is convicted of a crime substantially related to the practice of nursing”⁵⁷), she would have been found eligible for licensure because her criminal conviction occurred in the past.⁵⁸ This argument contemplates a patently absurd result.

Ms. Michael acknowledges that an applicant is not qualified for licensure under Section 1910 of the Nurse Practice Act if she has committed any disciplinable offense found in 24 *Del. C.* § 1922(a). Pursuant to 24 *Del. C.* § 1922(a)(7), a disciplinable offense includes having “had a license to practice as a registered nurse or licensed practical nurse suspended or revoked in any jurisdiction.” While the Board is empowered to waive a prior disciplinable offense found in Section 1922(a)(2) and grant an applicant a license in spite of a prior criminal conviction, the Board has no discretion to waive a prior Section 1922(a)(7) offense. 24 *Del. C.* § 1910(5) (“the Board . . . may waive § 1922(a)(2) of this title”). Undaunted

⁵⁷ On July 17, 2017, 24 *Del. C.* § 1922(a)(2) was changed to state “has been convicted of a crime....” 81 *Del. Laws*, c. 80 § 10.

⁵⁸ See Opening Br., 17.

by this statutory preclusion against waiver of a prior licensure revocation, Ms. Michael argues that Section 1922(a)(7) speaks to revocation of a license in *any jurisdiction*, and therefore her previous revocation in *this jurisdiction*, Delaware, could never have been considered by the Board when evaluating her new licensure application.⁵⁹ Ms. Michael offers no explanation for why Delaware should not be included in the all-inclusive “*any jurisdiction*”; likely because no such explanation exists.

Ms. Michael’s claim that the Board violated her due process rights by failing to undertake a futile evaluation of her application under Section 1910 ignores the proverbial elephant in the room—the permanent revocation of her licenses in 2013. Ms. Michael argues that despite the fact that the Board permanently revoked her RN and LPN licenses, the Board should have ignored this fact and evaluated her application for new RN and LPN licenses in complete disregard of her prior history. What Ms. Michael is ignoring is that the Board did not consider her qualifications for licensure or consider waiving her criminal conviction because it had already removed her privilege to practice nursing in Delaware *forever* when it permanently revoked her licenses in 2013. The plain meaning of “permanent revocation” in 24

⁵⁹ *Id.*

Del. C. § 1922(b)(1) is that Ms. Michael was, as the Board held, ineligible for licensure.

Ms. Michael next argues that the gubernatorial pardon of her prior criminal conviction rendered her eligible to apply for a nursing license under Chapter 19.⁶⁰ The basis for Ms. Michael's position is her belief that *but for* her 2009 criminal conviction, her nursing licenses would not have been suspended; she would not have knowingly practiced with a suspended license for eight months; and her licenses would never have been revoked.⁶¹ Ms. Michael's position, however, is premised upon a misstatement of fact as her nursing licenses were not permanently revoked solely as a result of her criminal conviction.

Ms. Michael contends that the discipline imposed upon her nursing licenses in 2011 and 2013 derived solely from her 2009 criminal conviction of obtaining controlled substances by false or fraudulent means.⁶² However, as the Board explained in its November 2016 Order and a review of the record reveals, this is simply not true. Ms. Michael's decision to purchase a DEA number from an illicit website, impersonate a doctor, and call in prescriptions for herself for a controlled

⁶⁰ Opening Br., 19.

⁶¹ *See Id.* and Ms. Michael's reference to the criminal conviction as the "well-spring" for all of her nursing related violations.

⁶² *See* Opening Br., 24, 27.

substance formed the basis for the decision to suspend her license in 2011.⁶³ Her knowing and willful decision to work as a nurse while her license was suspended for eight months formed the entirety of the basis for her permanent revocation in 2013.⁶⁴ Simply stated, Ms. Michael would have been disciplined by the Board of Nursing in 2011 regardless of whether she had been convicted of a crime. She would never have been permanently revoked in 2013 had she complied with the Board's 2011 Order and not worked while suspended.

In 2011, the Board found that Ms. Michael not only violated 24 *Del. C.* § 1922(a)(2) for being convicted of a crime substantially related to the practice of nursing, but also that she violated 24 *Del. C.* § 1922(a)(3) for being unfit to practice nursing by reason of negligence, habits or other causes; and 24 *Del. C.* § 1922(a)(8) for violating Board Regulation 10.4.2.1 in that her behavior failed to conform to the legal and accepted standards of the nursing profession and adversely affected the health and welfare of the public, and Board Regulation 10.4.2.15 for diverting, possessing, obtaining and administering prescriptions to herself without proper authorization.⁶⁵ Contrary to Ms. Michael's contention, her criminal conviction is not the "well-spring" from which all of her discipline arose.⁶⁶ Rather, Ms. Michael's

⁶³ See A1-9.

⁶⁴ See A12-19.

⁶⁵ *Id.*

⁶⁶ Opening Br., 19.

fraudulent impersonation of a physician in order to repeatedly obtain a controlled substance is the true “well-spring” in this matter.⁶⁷

The Board is, indeed, vested with the authority to discipline its licensees for offenses other than criminal convictions.⁶⁸ In fact, the number of times the Board has disciplined a licensee for drug diversion or substance abuse who was *never* convicted of a crime is virtually immeasurable. By way of example, in 1993 the Board suspended a nurse for two years when he: “made medication errors by giving patients double medications; failed to give medications to patients, but falsely indicated on the patients’ charts that the medications had been given; failed to document medications that he gave patients; and failed to transcribe onto patients’ charts treatment and medication orders prescribed by their physicians.” *Hicks v. State*, 1994 WL 164507 *3, (Del. Super. Apr. 22, 1994) (quoting Board’s Order). This nurse, Willie Hicks was not criminally charged and the Board disciplined him for unprofessional conduct as defined in the regulations and for being unfit or incompetent by reason of negligence, habits or other causes in violation of 24 *Del. C.* 1922(a)(4).⁶⁹ *Id.* at *3-4. In 2013 the Board suspended the license of Karen

⁶⁷ A1-9.

⁶⁸ See 24 *Del. C.* § 1922(a)(1)-(11) and Board Regulations 10.4 *et seq.*

⁶⁹ This is the exact same violation the Board found Ms. Michael committed in 2009. 24 *Del. C.* § 1922(a) was amended in 2004 and its paragraphs were renumbered. 74 *Del. Laws. C.* 262, § 36.

Decker, a nurse who diverted medications from the prison infirmary where she worked. *See Decker v. Del. Bd. Of Nursing*, 2013 WL 5952103 (Del. Super. Nov. 7, 2013). Ms. Decker was also not convicted of a crime; yet exactly like Ms. Michael, Ms. Decker was disciplined by the Board for violations of 24 *Del. C.* §1922(a)(3) in that she was “unfit or incompetent by reason of negligence, habits or other causes”; and 24 *Del. C.* §1922(a)(8) in that she was guilty of unprofessional conduct for violating four Board Regulations. *Id.* at *2. Finally, in April of 2016, the Board suspended the license of Amanda Frazer for dozens of controlled substance related medication errors. *See Frazer v. Del. Bd. Of Nursing*, 2016 WL 6610320 (Del. Super. Nov. 9, 2016). Ms. Frazer was never charged criminally; nevertheless, the Board disciplined her for committing unprofessional conduct in violation of several of its regulations. *Id.* at *3. In sum, the well-spring for Hicks, Decker, and Frazer’s license suspensions, just like Maia Michael’s, was drug related unprofessional conduct in violation of the Board’s statute and regulations, not a criminal conviction. Ms. Michael’s criminal conviction may have been “undone” by virtue of her pardon, but her unprofessional conduct has not been erased from history.

The permanent revocation of Ms. Michael’s licenses had absolutely nothing to do with her criminal conviction. Again, her licenses were permanently revoked by the Board of Nursing in 2013 after it found she practiced nursing for eight months

when she knew her licenses were suspended.⁷⁰ Had Ms. Michael merely complied with the Board’s 2011 Order suspending her licenses, she would have possessed an unrestricted, active licenses at the conclusion of that suspension. The direct cause of Ms. Michael’s revocation in 2013 was her abject failure to comply with the Board’s 2011 Order.⁷¹ No gubernatorial pardon of a criminal conviction can eradicate the blatant disregard of a Board Order.

Ms. Michael argues that because the Governor pardoned her conviction for fraudulently obtaining a controlled substance, her slate should be wiped clean in every facet of her life.⁷² Again, the revocation of Ms. Michael’s license was categorically not solely a *sequela* of her criminal conviction; nonetheless, even if it were, the pardoning of that crime did not undo the conviction. Ms. Michael argues that the language of the statute allowing for pardons—11 *Del. C.* § 4364—trumps the language of the Board’s practice act, and should have fully restored her right to pursue professional licensure.⁷³ However, the case law regarding pardons relied upon by Ms. Michael clearly indicates that the pardoning of a crime does not nullify the conviction. In *Heath v. State*, the Delaware Supreme Court reiterated that “the pardon may have forgiven [the offender’s] conviction, [but] it did not obliterate the

⁷⁰ See A10-11.

⁷¹ *Id.*

⁷² See Opening Br., 19-20 and A54-59.

⁷³ See Opening Brief p. 26.

public memory of the offense ... ***a pardon does not erase guilt.***” *Heath v. State*, 938 A.2d 77, 81 (Del. 2009) (citing *Skinner v. State*, 632 A.2d 82 (Del. 1993)) (emphasis added). Moreover, as the Board noted in its Order, the *Heath* case represents a true “but for” situation wherein the petitioner was only required to register as a sex offender because he was convicted of a sex offense. *Heath*, A.2d 77 at 79. When the Governor signed an unconditional pardon of Mr. Heath’s sex offense, there was no longer a basis “for mandating continued registration as a sex offender.” *Id.* As previously noted, “Ms. Michael . . . would have been disciplined by the Board of Nursing in both 2011 and 2013 regardless of whether she was convicted of a crime.”⁷⁴

In *Skinner*, this Court declined to allow a criminal convict to expunge a record relating to a pardoned crime. *Skinner* at 87. The *Skinner* case repeatedly points out that a pardon does not blot out the existence of guilt, noting that a “pardon ‘involves forgiveness and not forgetfulness and ***it does not ‘wipe the slate clean.’***” *Skinner*, at 84 (citing to *Stone v. Oklahoma Real Estate Comm’n*, 369 P.2d 642 (Okla. Supr. 1962)) (emphasis added). In so finding, *Skinner* points to two long standing cases from this Court, *State v. Grant*, 133 A. 790 (Del. 1926), and *State ex rel. Wier v. Peterson*, 369 A.2d 1076 (Del. 1976). In *Grant*, the Court held that a witness could

⁷⁴ A14.

be cross-examined on his criminal record despite the fact that the crimes at issue had been pardoned. *Grant*, at 791. The *Grant* Court noted “though this defendant has been pardoned, the fact remains that he has been convicted of a felony.” *Id.* Finally, in *State ex rel. Wier*, the Court held that a political candidate was disqualified from running for New Castle County Council due to convictions of “infamous crimes” even though these crimes had been pardoned by the Governor of Pennsylvania. *State ex rel. Wier*, at 1078. “It can no longer be seriously contended, for example, that a pardon erases an offender’s past, making it as if he had never committed the offense.” *State ex rel. Wier*, at 1080 (internal citations omitted).

Incredibly, Ms. Michael states in her Opening Brief that “it was *error* for the Board to allow its mandate to protect the public to influence its decision here....”⁷⁵ As Ms. Michael concedes, protection of the public, as the primary purpose of the Board, is a *mandate* not a choice. Under 24 *Del. C.* § 1901 “Declaration of legislative intent,”

The General Assembly hereby declares the practice of nursing by competent persons is necessary for the protection of the public health, safety and welfare ***In order to safeguard life and health***, the general administration and supervision of . . . professional and practical nursing is declared essential, and ***such general administration and supervision is vested in the Board of Nursing***. (emphases added).

⁷⁵ Opening Br., 26 (citing A134) (emphasis added).

The General's Assembly's sole intent when it created the Board of Nursing was for the protection of the public health, safety and welfare. This is not a responsibility the Board may set aside in order to interpret the gubernatorial pardon statute; it is the fundamental purpose for which the Board was formed. The Board did not act in error.

Finally, Ms. Michael conflates licensure with employment in noting that her criminal pardon states that it was "necessary for employment purposes..."⁷⁶ The pardon does not speak to licensure, and the two are wholly distinct, a fact to which most licensed attorneys could attest. For example, simply because someone passes the bar examination and obtains a license to practice law does not automatically entitle that person to a job as an attorney. The Board, conversely has no authority over employment decisions of hospitals, doctor's offices, nursing homes, or any other health care facility. Even though employers may be precluded from considering Ms. Michael's criminal past, the Board is certainly permitted, if not mandated, to consider its prior discipline of Ms. Michael when considering her applications for licensure.

Maia Michael would like this Court to believe that her criminal past has been erased. In her Opening Brief she avers that because she received an unconditional

⁷⁶ *Id.*

gubernatorial pardon it is “as if that conviction never occurred.”⁷⁷ Based upon a wealth of long-standing Delaware case law, it is clear that this belief is erroneous. The Governor may have forgiven Ms. Michael’s crime, but the Board is not required to forget it.⁷⁸ Even if Ms. Michael’s pardon demanded that the Board “forget” her criminal conviction, it does not require that the Board forget Ms. Michael’s unprofessional nursing conduct, disregard of a Board Order, or eight months of practice without a license. As such, the Board did not commit legal error when it held that “the pardoning of her crime [was] not sufficient to undo the permanent revocation of her nursing licenses.”⁷⁹

⁷⁷ Opening Br., 19.

⁷⁸ *See Skinner*, at 84.

⁷⁹ Opening Br., 19 (citing to A15).

II. MS. MICHAEL’S CLAIM OF DISPARATE TREATMENT AND HER ALLEGATION OF A CONSTITUTIONAL TORT ARE MERITLESS.

1. Question Presented

Was it error for the Board or Superior Court to reject Maia Michael’s claims that she was subject to disparate treatment and a constitutional tort? A148-155.

2. Scope of Review

This Court has jurisdiction to entertain this appeal from an administrative board’s final order pursuant to the Delaware Administrative Procedures Act (“APA”). 29 *Del. C.* § 10102(4). The APA and applicable case law make clear that a reviewing court must affirm an administrative board order so long as the record below provides substantial evidence to support the board’s decision and the board’s ruling is free from legal error. 29 *Del. C.* § 10142(d); *Avon Prods. v. Lamparski*, 293 A.2d 559 (Del. 1972). Moreover, “[t]he Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.” 29 *Del. C.* § 10142(d).

This Court’s limited appellate review consists of examining the administrative record to determine whether substantial evidence supports the findings of fact and decision of the board and whether the decision is free of legal error. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965) and *Stoltz Mgmt. Co. v. Consumer*

Affairs Bd., 616 A.2d 1205, 1208 (Del. 1992). As in this case, if the Superior Court reviewed no additional evidence upon review of the Board’s decision, this Court does not examine the Superior Court’s decision. *Del. Dep’t. of Health & Soc. Servs. v. Jain*, 29 A.3d 207, 211 (Del. 2011) (citing *Stoltz Mgmt. Co.*, 616 A.2d 1205, 1208 (Del. 1992)).

3. Merits of Argument

Ms. Michael asserts that because the Nurse Practice Act is the only Chapter under Title 24 that includes only permanent revocation (and not the alternative of mere “revocation”) in its list of disciplinary sanctions, Ms. Michael was aggrieved by the wording and application of this act.⁸⁰ The Board does not dispute that Chapter 19 is the only Chapter in Title 24 to include only “permanent revocation” and not “revocation” as a disciplinary sanction available for it to impose. Indeed, this reinforces the Board’s finding that it was legally precluded from granting Ms. Michael new nursing licenses.

The Delaware General Assembly promulgated over 40 practice acts under Title 24, and in so doing, allowed for permanent revocation, revocation, or both in almost all of the various professions and occupations.⁸¹ For example, the Medical Practice Act—24 *Del. C.* Chapter 17—states the following:

⁸⁰ Opening Br., 29.

⁸¹ A189-192.

(a) A person to whom a certificate to practice medicine in this State has been issued may be disciplined by the Board for unprofessional conduct, as defined in subsection (b) of this section, by means of levying a fine, or by the restriction, suspension, ***or revocation, either permanent or temporary***, of that person's certificate to practice medicine , or by other appropriate action, which may include a requirement that a person who is disciplined must complete specified continuing education courses. ***The Board shall permanently revoke*** the certificate to practice medicine in this State of a person who is convicted of a felony sexual offense. (emphases added) 24 Del. C. § 1731(a).

In addition, the Board of Cosmetology and Barbering Practice Act also allows for both revocation and permanent revocation. *See* 24 Del. C. §§ 5114(a)(5) and (6) (“The Board may impose any of the following sanctions, singly or in combination, when it finds that 1 of the conditions or violations set forth in § 5113 of this title applies to a practitioner regulated by this chapter: . . . (5) Revoke a practitioner's license; (6) Permanently revoke a practitioner's license.”).

In other words, the General Assembly demonstrated that it knows there is a clear distinction between revocation and permanent revocation and knows how to empower a board to impose either or both forms of discipline. As this Court has noted, “when provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions.” *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007). In the case of the practice of nursing, the General Assembly only granted the Board the

authority to permanently revoke a license. Under 24 *Del. C.* § 1922(b), the Board has the authority to impose the following disciplines:

(b) Disciplinary sanctions. —

(1) Permanently revoke a license to practice.
(emphasis added).

Unlike the Boards of Medical Licensure and Discipline and Cosmetology and Barbering, the Board of Nursing was not vested the right to temporarily revoke a nursing license, and it is not the role of the Board or the Court to “engraft upon a statute language which has clearly been excluded therefrom.” *Id.* (citing to *In Re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del.1993)).

It is well-settled under Delaware law that, “if the statutory language at issue is ‘unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls.’” *Jimmy’s Grille of Dewey Beach, LLC v. Town of Dewey Beach*, 2013 WL 6667377 (Del. Super. Dec. 17, 2013) (citing to *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011)); *see also Dewey Beach Enterprises, Inc. v. Bd of Adjustment of the Town of Dewey Beach*, 1 A.3d 305 (Del. 2010); *Borden, Inc. v. City of Lewes*, 1989 WL 147366, at *2 (Del. Super. Nov. 13, 1989). Statutory language is ambiguous if it is susceptible of two reasonable interpretations. *Dewey Beach Enterprises, Inc.*, at 307. Here, the term “permanent revocation” is not ambiguous as it is in no way susceptible to more than one

meaning. To that end, the Board members would have been derelict in their duties if they had defied the clear mandate from the Delaware General Assembly and reinstated or awarded a license to a nurse whose licenses had previously been permanently revoked.

Title 29, Chapter 58, Subchapter 1 of the Delaware Code is known as the “State Employees’, Officers’ and Officials’ Code of Conduct.” Board members are bound by the Code of Conduct pursuant to 24 *Del. C.* § 1903(k), which states that the “provisions set forth for “employees” in Chapter 58 of Title 29 shall apply to all members of the Board....”⁸² According to the Code of Conduct, Board members have a duty to “endeavor to pursue a course of conduct which will not raise suspicion among the public that such ... [member] is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.”⁸³ Ms. Michael argues that the Board erred when it upheld its own practice act as it was equally bound to comply with the pardon provision in Title 11.⁸⁴ Had the members of the Board voted to ignore their own practice act and instead interpreted a statute wholly unrelated to the practice of nursing, they clearly would have failed to pursue a course of conduct that does not raise suspicion among

⁸² 24 *Del. C.* § 1903(k)

⁸³ 29 *Del. C.* § 5805(a)(1).

⁸⁴ Opening Br., 25.

the public. The public cannot be assured that the Board is not simply following its own whim if it disregards its own practice act.

Ms. Michael argues that in 2011 the Delaware General Assembly “did not believe” that the Board had the authority to only permanently revoke a license when it amended the Nurse Practice Act to include mandatory permanent revocation of nurses convicted of a felony sexual offense.⁸⁵ Ms. Michael’s supposition as to the beliefs of the General Assembly are not supported by the statutory language. By specifying that any nurse convicted of a felony sexual offense will be permanently revoked, the General Assembly was not conferring a power to the Board that it did not already possess. Rather, it was removing the discretion of the Board as to these individuals, mandating that the Board impose a specific discipline in response to a specific criminal conviction. Ms. Michael’s Brief concedes that the Board “may impose any of [its enumerated disciplines] singly or in combination” *except that it shall* permanently revoke the license of a licensee convicted of a felony sexual offense.⁸⁶ The addition of mandatory disciplinary language did not demonstrate that the General Assembly did not understand that the Board of Nursing already had the authority to permanently revoke a license; it demonstrated that the General

⁸⁵ Opening Br., 33.

⁸⁶ Opening Br., 32 (citing 24 *Del. C.* 1922(a)).

Assembly did not want felony sexual offenders ever practicing nursing in Delaware no matter what the Board of Nursing should decide.

Finally, the Board did not commit a constitutional tort against Maia Michael. Ms. Michael appears to argue that by denying her licensure applications, the Board violated her constitutional rights under the Fourteenth Amendment due to the predominate gender of nurses, or possibly because she is a class of one. Insofar as these are legal arguments and were not raised at the time of any of Ms. Michael's hearings, for example at the time her licenses were actually revoked, they are now waived. *Wilmington Trust Co. v. Conner*, 415 A. 2d 777, 781 (Del. 1980) ("It is also the general rule in this State that issues not raised in the trial court shall not be heard on appeal.") (citing to *Equitable Trust Co. v. Gallagher*, 77 A.2d 548, 550 (Del. 1950); see also *Gonzalez v. Caraballo*, 2008 WL 4902686, at * 3 (Del. Super. Nov. 12, 2008) ("The failure to cite any authority in support of a legal argument constitutes a waiver of the issue on appeal."). If not waived, this argument fails as a matter of law.

It appears that Ms. Michael is arguing that the Board should have disregarded its statute because that statute somehow discriminates on the basis of gender. The only support for this argument that Ms. Michael provides is that nursing is "a

profession that has historically been female dominated.”⁸⁷ Ms. Michael provides no statistics or citations to support this contention, so arguably the same assertion could apply to cosmetologists, aestheticians, nail technicians, massage therapists, social workers, dietitians, dental hygienists, nutritionists, occupational therapists, or speech pathologists.⁸⁸ All of these professions only have “revoke” in their statutes, except for cosmetologists and aestheticians who have “revoke” and “permanently revoke.”⁸⁹ If Ms. Michael is attempting to argue that the Delaware General Assembly conferred only “permanent revocation” upon the Board of Nursing because most nurses are women, her relief lies with the General Assembly, and moreover, the time to make such an argument has passed.

Ms. Michael’s reliance on *Village of Willowbrook v. Olech* in support of her argument that she is the victim of a constitutional tort is also misplaced. In *Village of Willowbrook*, the Supreme Court of the United States upheld the Seventh Circuit’s holding that “a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a ‘spiteful effort to “get” him for reasons wholly unrelated to any legitimate state objective.’” 528 U.S. 562, 564 (2000) (citing to *Olech v. Village of Willowbrook*, 160 F.3d 386, 387 (1998) (quoting *Esmail v.*

⁸⁷ Opening Br., 29

⁸⁸ Admittedly, there is no statistical citation for these assertions either.

⁸⁹ A189-191.

Macrane, 53 F.3d 176, 180 (C.A.7 1995))). The Olechs lived in a village where *all other residents* were subject to a 15 foot easement for access to a water supply. *Village of Willowbrook* at 563. When the Olechs sought water access, the Village inexplicably conditioned the access on the Olechs granting the Village a 33-foot easement. *Id.* In other words, the Olechs were treated differently from every other resident of the Village. The Court held that the Olechs were a “class of one” under the Equal Protection Clause and could pursue such a claim based upon their allegation that the Village’s actions were “irrational and wholly arbitrary.” *Id.* at 565 (citing Plaintiff’s Complaint).

Ms. Michael states that the Superior court “misapprehended Michael’s *Village of Willowbrook* argument.”⁹⁰ That she is a “class of one” because the application of the permanent revocation statute to Ms. Michael was intentional and different from how a member of a *different profession* would have been treated.⁹¹ This argument would, perhaps, make sense if Ms. Michael were solely pursuing a claim that all nurses in Delaware are discriminated against by the State because a “predominate” number of them are female; however, that is not what she is doing. In citing to *Village of Willowbrook*, Ms. Michael appears to be asserting that she is a “party of one” against whom the Board executed a spiteful arbitrary effort to not license.

⁹⁰ Opening Br., 29.

⁹¹ Opening Br., 30.

If this is a “party of one” argument, it fails on multiple accounts. First, Ms. Michael does not identify how she is being singled out by the Board from other similarly situated individuals, particularly because the Board of Nursing has absolutely no authority over or even knowledge of the disciplines imposed upon non-nurse licensed professionals. Insofar as Ms. Michael’s argument appears to be that she is being singled out in comparison to other non-nurse licensed professionals in Delaware, she is then similarly situated to all nurses in Delaware, and clearly is not a class of one.

The Board did not execute a spiteful arbitrary effort to undermine Ms. Michael. Ms. Michael is unable to point to another nurse whose licenses were permanently revoked, who then applied for and obtained new licensure. No such individual exists. In addition, the Board cannot *sua sponte* determine that the State has discriminated against all nurses because the profession was the only one limited to permanent revocation of a license. In short, the Board has not committed a constitutional tort against Ms. Michael as either a class of one or as one individual in a class with all other Delaware nurses.

Ms. Michael’s claim that there was no rational basis for the Board’s denial of her applications for licensure also fails. Ms. Michael fraudulently obtained controlled substances for personal use on four occasions; her nursing licenses were subsequently suspended and she willfully disregarded the Board’s Order for eight

months by practicing on a suspended license; due to this abject failure to comply with a lawful order of the Board, her licenses were permanently revoked; due to the permanent revocation of her licenses, her applications for licensure anew were denied. The notion that the Board is “out to get” Ms. Michael is unfounded, and its decision to deny Ms. Michael’s applications for licensure was rationally based upon the language of its practice act.

CONCLUSION

For the reasons provided above, the Board of Nursing respectfully requests this honorable Court affirm its January 11, 2017 decision and order, denying Maia Kathryn Michael's applications for licensure.

Respectfully submitted

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DATED: November 27, 2017