

Circuit Court for Montgomery County
Case No. 482711V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1295

September Term, 2020

MARYLAND STATE BOARD OF PHYSICIANS

v.

KAYVON MODJARRAD, M.D.

Kehoe,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 6, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A distinguished research physician made an inadvertent error in responding to a confusing question on an application to renew his license to practice medicine. Although the physician corrected the error as soon as he had actual knowledge that it had occurred, the Maryland State Board of Physicians pursued disciplinary charges against him.

An administrative law judge found that the physician had mistakenly violated a strict-liability statute, but recommended that the Board impose no sanction, in part because even the most minimal sanction might jeopardize the secret security clearance that the physician needs in order to perform vital medical research. The Board, however, rejected the recommendation and imposed the sanction of a reprimand and a \$500 fine.

The physician sought judicial review in the Circuit Court for Montgomery County, which reversed the Board's decision. The Board appealed.

We shall affirm the judgment of the circuit court, because the Board abused its discretion and acted arbitrarily by failing to exercise discretion in imposing a sanction.

BACKGROUND

The pertinent facts, as disclosed by the administrative record, are as follows:

Appellee Kayvon Modjarrad, M.D., is currently the Director of the Emerging Infectious Diseases Branch at the Walter Reed Army Institute of Research in Silver Spring, Maryland. He is responsible for leading the United States Army's Zika vaccine program and is the principal investigator of the first clinical trial of a vaccine for Middle East Respiratory Syndrome or MERS. His duties involve developing and deploying vaccines to protect the members of the armed services of the United States from exposure

to deadly viruses. He has a secret security clearance, which he must retain in order to keep his job.

Dr. Modjarrad has a distinguished academic and professional career. He earned a Bachelor of Science degree in biology, *magna cum laude*, from Duke University in 1998. He earned a Master of Science degree in Public Health (Epidemiology) from the University of Alabama at Birmingham in 2004. Also in 2004, he earned a Ph.D., with distinction, in Epidemiology from the University of Alabama at Birmingham. He graduated from medical school at the University of Alabama at Birmingham in 2006. He completed an internship in internal medicine at the Yale University School of Medicine in 2007, a residency in internal medicine at the Vanderbilt University School of Medicine in 2009, and a fellowship in the field of infectious diseases at the Vanderbilt University School of Medicine and the National Institute of Allergy and Infectious Diseases in 2012. He is board-certified in the fields of internal medicine and infectious diseases.

Dr. Modjarrad was initially licensed to practice medicine in Maryland in 2016. At that time, the Board of Physicians did not require applicants to submit to a Criminal History Records Check (“CHRC”). Later that year, however, Maryland law began to require a CHRC for all Board licensees who were renewing their licenses. 2015 Md. Laws ch. 34; Maryland Code (1981, 2021 Repl. Vol.), § 14-308.1 of the Health Occupations Article (“HO”).

On September 13, 2017, Dr. Modjarrad submitted an online application with the Board of Physicians to renew his license for the first time.¹ At the beginning of the application, Dr. Modjarrad saw a pop-up screen titled “STOP Criminal History Background Check.” The pop-up screen asked whether Dr. Modjarrad had submitted fingerprints for a criminal background check:

Have you submitted your fingerprints for a Criminal Background Check?

Pursuant to Health Occupations, the Board may not renew a license if the criminal history record check information has not been received. By completing this renewal, you are attesting that you have completed your Criminal History Records Check. Failure to submit to a criminal history check is a violation of the Medical Practice Act and may result in disciplinary action.

Dr. Modjarrad clicked a box to acknowledge that he had “submitted [his] fingerprints to CJIS^[2] BEFORE attempting to complete [his] renewal application.” Dr. Modjarrad, who has no criminal record, mistakenly believed that he had satisfied that requirement because he had submitted his fingerprints to an agent of the United States government in connection with a federal background investigation.

At the end of the application, Dr. Modjarrad made the following certification:

Pursuant to Health Occupations § 14-316, the Board may not renew a license if the criminal history record check information has not been received. By completing this renewal, **you are attesting that you have**

¹ At oral argument, we were told that Dr. Modjarrad was in Africa, addressing an outbreak of the Ebola virus, when he submitted the online application.

² “CJIS,” an acronym for the Criminal Justice Information System, is not a term commonly used in the lay community or the medical profession. Dr. Modjarrad did not know what “CJIS” meant.

completed your Criminal History Records Check. Failure to submit to a criminal history check is a violation of § 14-404(a)(42) and may result in disciplinary action.

(Emphasis in original.)

Dr. Modjarrad was not alone in incorrectly certifying that he had completed a CHRC. Of the 13,044 physicians who renewed their licenses during fiscal year 2018, approximately 1500 – or more than 10 percent – incorrectly checked the box indicating that they had completed a background check.

On November 1, 2017, the Board sent a mass email to Dr. Modjarrad and the approximately 1500 other physicians who had incorrectly checked the box indicating that they had completed a background check. The email was addressed to “Dear Licensee” and did not contain Dr. Modjarrad’s name or email address. The email stated that recipients would be subject to discipline if they did not complete the CHRC within 10 days.

Dr. Modjarrad, who conducts all of his financial transactions online and receives as many as 300 emails a day, uses the most restrictive spam filter possible on his email account. He did not receive the Board’s email. Thus, he did not respond to it.

Dr. Modjarrad was not alone in not responding to the Board’s mass email. Of the 1500 other physicians to whom the Board sent the email, only about 800 responded.

More than two months later, on January 6, 2018, the Board sent a letter to Dr. Modjarrad at his home address by first-class mail, without a return receipt request. The

letter directed Dr. Modjarrad to supply documentation that he had completed the CHRC. The postal service did not return the letter to the Board as undeliverable.

Dr. Modjarrad travels extensively in connection with his work, and he was travelling at the time when the Board sent the letter. Most of the mail that Dr. Modjarrad receives at home is junk mail. Dr. Modjarrad did not read the Board's letter; hence, he did not respond to it. It appears that Dr. Modjarrad may have misplaced the letter in the pile of junk mail that he would have found when he returned from his business trip.

More than 10 months later, on November 28, 2018, the Board sent a letter to Dr. Modjarrad at his work address. The letter informed Dr. Modjarrad that a disciplinary panel of the Board had issued a notice alleging that he had violated State law governing the practice of medicine and that his medical license could be revoked. The notice charged Dr. Modjarrad with the following violations of the Medical Practice Act:

- fraudulently or deceptively obtaining a medical license in violation of HO § 14-404(a)(1);
- engaging in unprofessional conduct in the practice of medicine in violation of HO § 14-404(a)(3)(ii);
- failing to cooperate with a lawful investigation conducted by the Board or a disciplinary panel in violation of HO § 14-404(a)(33);
- willfully making a false representation when submitting an application for licensure in violation of HO § 14-404(a)(36); and
- failing to submit to a criminal history records check in violation of HO § 14-404(a)(42).

Dr. Modjarrad received the Board's letter at his work address and responded promptly. On December 11, 2018, Dr. Modjarrad submitted his fingerprints and an

application for a CHRC to an authorized vendor. On the following day, the Board received the results of the CHRC, which showed that Dr. Modjarrad has no criminal history.

Although Dr. Modjarrad submitted his fingerprints and submitted to a CHRC, the disciplinary charges did not abate. A disciplinary panel of the Board delegated the case to the Office of Administrative Hearings for the issuance of proposed findings of fact and conclusions of law and a proposed disposition.

After an evidentiary hearing, an administrative law judge (“ALJ”) submitted proposed findings of fact and conclusions of law. On the basis of the facts outlined above, the ALJ concluded that Dr. Modjarrad had violated HO § 14-404(a)(42), a strict liability statute that requires no proof of specific intent, by failing to submit to a CHRC until the Board had issued charges against him. The ALJ also concluded, however, that the Board had failed to prove any of the other charges against Dr. Modjarrad.

In particular, the ALJ found that the Board had failed to prove that Dr. Modjarrad fraudulently or deceptively obtained a medical license in violation of HO § 14-404(a)(1). In reaching her decision, the ALJ began by observing that the statute requires proof of fraud or deceit. Based on her evaluation of Dr. Modjarrad, whom she found to be “very credible,” the ALJ concluded that he had made an “honest mistake.” Dr. Modjarrad, the ALJ found, “was not trying to hide a criminal record from the Board or evade compliance with the law.” He had no criminal record and thus “had nothing to conceal.” Moreover, the ALJ found that Dr. Modjarrad’s “error was reasonable” because he had recently

submitted his fingerprints for a CHRC in connection with his federal employment and because he had a secret security clearance. Finally, the ALJ noted that “many other physicians were,” like Dr. Modjarrad, “confused” about the new requirement to submit a CHRC. “Either there are hundreds of physicians who are also careless in completing important license renewal applications or the Board’s warning was insufficient to warn physicians of the new requirement,” the ALJ wrote.

For similar reasons, the ALJ found that the Board had failed to prove that Dr. Modjarrad willfully made a false representation when submitting an application for licensure in violation of HO § 14-404(a)(36). Based on her evaluation of Dr. Modjarrad’s explanation, which she found to be “reasonable and credible,” the ALJ concluded that Dr. Modjarrad “misunderstood the question in the renewal application” and that “he had a reasonable basis” for his mistaken understanding of what the question meant. According to the ALJ, only two terms in the application might have alerted Dr. Modjarrad to the difference between the fingerprints that he had submitted for his federal security clearance and the CHRC: “Health Occupations” and “CJIS.” The application, however, did not define those terms. Nor, the ALJ found, are they medical terms or terms commonly used by laypersons. Thus, the ALJ found that “[a] reasonable person untrained in State law might have given the same answer under those circumstances.” Furthermore, the ALJ found that Dr. Modjarrad “had no motive to lie,” because he had no criminal record and had obtained a federal security clearance.

The ALJ went on to find that the Board had not proved that Dr. Modjarrad failed to cooperate with a lawful investigation conducted by the Board or a disciplinary panel in violation of HO § 14-404(a)(33). The Board had based that charge on Dr. Modjarrad's failure to respond to the mass email of November 1, 2017, and the first-class letter that the Board sent to his home address on January 16, 2018. According to the Board's own witness, however, the Board did not open an investigation until after Dr. Modjarrad had failed to respond to those communications. The ALJ found that Dr. Modjarrad could not have failed to cooperate with an investigation that had yet to begin.

The ALJ also found that the Board had not proved that Dr. Modjarrad engaged in unprofessional conduct in the practice of medicine in violation of HO § 14-404(a)(3)(ii). The Board based that charge on the allegation that Dr. Modjarrad had fraudulently or deceptively obtained the renewal of his license and had failed to cooperate with an investigation. Because the Board had failed to prove either of those allegations, the ALJ found no basis to conclude that Dr. Modjarrad had engaged in unprofessional conduct.

The ALJ proceeded to consider the appropriate sanction for the single violation that she found – Dr. Modjarrad's "honest mistake" in failing to submit to a CHRC until the Board had issued charges against him.

The ALJ recognized that the Board has adopted guidelines to govern the imposition of sanctions. Those guidelines are contained in the Code of Maryland Regulations (COMAR) 10.32.02.09 and 10.32.02.10. If a disciplinary panel elects to impose a sanction, a reprimand is the least severe sanction enumerated in the guidelines.

Based on mitigating factors, however, a panel, in its discretion, may determine that the sanction in a particular case should fall outside the range of sanctions listed in the guidelines. COMAR 10.32.02.09(B). The guidelines dictate no minimum sanction for failing to complete a CHRC in violation of § 14-404(a)(42).³

The ALJ found that Dr. Modjarrad “has no prior disciplinary history, is engaged in important work implicating national security, and enjoys a distinguished career in the medical profession.” She recommended that the Board impose no fine, because Dr. Modjarrad, she found, had committed an “honest mistake” that led to a violation of a strict-liability statute.

The ALJ turned to the question of whether the Board should issue a reprimand. She cited Dr. Modjarrad’s concern that a reprimand might jeopardize his security clearance. She found that Dr. Modjarrad’s concern “is not unfounded.” She cited the testimony of the Director of the Center for Infectious Diseases at Walter Reed, who stated that “a security clearance is essential for [Dr. Modjarrad] to perform his duties”

³ The guidelines do state that the minimum sanction for a violation of § 14-404(a)(42) is a reprimand. COMAR 10.32.02.10(B). That sanction correlates with an earlier version of § 14-404(a)(42), which concerned the failure to comply with the provisions of HO § 14-504, regarding acupuncture. The subsection concerning acupuncture appears to have been removed from § 14-404, but the Board has not updated its guidelines. The ALJ seems not to have recognized that the guidelines address the earlier version of § 14-404(a)(42) that concerned acupuncture and do not address the failure to complete a CHRC, as she incorrectly stated that the minimum sanction for Dr. Modjarrad’s offense is a reprimand.

and that a reprimand ““would cause doubts”” regarding his security clearance.⁴ The ALJ also cited the testimony of the Commander of the Walter Reed Army Institute of Research, who confirmed that Dr. Modjarrad was required to have a security clearance in order to perform his medical research.

The ALJ quoted the Board’s guidelines, which state that a disciplinary panel “may consider the aggravating and mitigating factors set out” therein and that, based on those factors, the panel may, in its discretion, “determine that an exception should be made” and that the sanction “should fall outside the range of sanctions” listed in the guidelines.

After considering the Board’s guidelines, the ALJ found no aggravating factors.⁵

⁴ The witness also testified that Dr. Modjarrad “is ‘one of the most brilliant infectious disease physicians-scientists minds of his generation.’” Dr. Modjarrad, the witness testified, often works seven days a week.

⁵ The guidelines set out the following, nonexclusive list of aggravating factors:

- (a) The offender has a previous criminal or administrative disciplinary history;
- (b) The offense was committed deliberately or with gross negligence or recklessness;
- (c) The offense had the potential for or actually did cause patient harm;
- (d) The offense was part of a pattern of detrimental conduct;
- (e) The offender committed a combination of factually discrete offenses adjudicated in a single action;
- (f) The offender pursued his or her financial gain over the patient’s welfare;
- (g) The patient was especially vulnerable;

On the other hand, the ALJ found several mitigating factors.⁶ Dr. Modjarrad “has no prior disciplinary record,” his “error was not premeditated,” and the “mistake was isolated and

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- (h) The offender attempted to hide the error or misconduct from patients or others;
 - (i) The offender concealed, falsified or destroyed evidence, or presented false testimony or evidence;
 - (j) The offender did not cooperate with the investigation; or
 - (k) Previous attempts to rehabilitate the offender were unsuccessful.

COMAR 10.32.02.09(B)(6).

⁶ The guidelines set out the following nonexclusive list mitigating factors:

- (a) The absence of a prior disciplinary record;
- (b) The offender self-reported the incident;
- (c) The offender voluntarily admitted the misconduct, made full disclosure to the disciplinary panel and was cooperative during the disciplinary panel proceedings;
- (d) The offender implemented remedial measures to correct or mitigate the harm arising from the misconduct;
- (e) The offender made good faith efforts to make restitution or to rectify the consequences of the misconduct;
- (f) The offender has been rehabilitated or exhibits rehabilitative potential;
- (g) The misconduct was not premeditated;
- (h) There was no potential harm to patients or the public or other adverse impact; or
- (i) The incident was isolated and is not likely to recur.

not likely to recur.” “Under the unique circumstances in [this] case,” the ALJ wrote, “where the CHRC requirement was new, the pop-up alert in the renewal application was confusing or was misread by hundreds of other physicians, [Dr. Modjarrad] had no motive to falsify his application, and the violation upheld is based on strict liability for failure to submit to the CHRC, a departure from the minimum sanction of reprimand is warranted.” Because a reprimand “might jeopardize” Dr. Modjarrad’s security clearance, the ALJ recommended that the Board not impose a reprimand. She noted that the decision would remain a matter of public record.

The State filed exceptions to the ALJ’s proposed decision. The State specifically objected to the ALJ’s findings that Dr. Modjarrad did not violate HO § 14-404(a)(1) (fraudulently or deceptively obtaining a medical license); HO § 14-404(a)(3)(ii) (engaging in unprofessional conduct in the practice of medicine); HO § 14-404(a)(33) (failing to cooperate with a lawful investigation conducted by the Board or a disciplinary panel); and HO § 14-404(a)(36) (willfully making a false representation when submitting an application for licensure).

After a hearing, a disciplinary panel of the Board adopted a narrow set of findings pertaining to Dr. Modjarrad’s violation of HO § 14-404(a)(42): it found that Dr. Modjarrad was licensed in Maryland, that he incorrectly completed the online application, that he did not respond to the email and to the letter that the Board sent to his

COMAR 10.32.02.09(B)(5).

home address, that the Board issued a letter delivered to Dr. Modjarrad's business address, and that the Board received a completed CHRC shortly after the Dr. Modjarrad received the charges. The panel did not explain why it declined to adopt the ALJ's remaining findings, almost all of which were supported by undisputed evidence, including the testimony of the Board's own witness.

The panel rejected the State's exceptions to the ALJ's finding that Dr. Modjarrad had not violated HO § 14-404(a)(1), HO § 14-404(a)(3)(ii), HO § 14-404(a)(33), and HO § 14-404(a)(36). In rejecting the exceptions, the panel volunteered that it disagreed with the ALJ's reasoning, but it did not disclose the basis for the disagreement or the reasoning on which it relied.

The panel went on to agree with the ALJ's conclusion that Dr. Modjarrad had failed to submit to a CHRC at the time of his license renewal, in violation of HO § 14-404(a)(42). The panel, however, rejected the ALJ's recommendation that, in view of the unique circumstances of this case, it should impose no sanction. Instead, the panel adopted the State's contention that the threat to Dr. Modjarrad's vital security clearance was merely "speculative." In the panel's words, "[I]t is inappropriate to take into consideration any speculative or hypothetical collateral effects of the sanction imposed."

The panel made a passing reference to Dr. Modjarrad's "esteemed reputation and work history," but it made no mention of the other factors that influenced the ALJ's recommendation: the absence of any prior disciplinary record, of premeditation, or of any motive to falsify; the isolated nature of the error and the unlikelihood that it would ever

recur; the strict-liability nature of the statute; and the fact that Board’s own website was confusing and was misread by more than 10 percent of the physicians who used it.

The panel recognized that Dr. Modjarrad eventually submitted to a CHRC, but it complained that he did not do so until “over a year” after he submitted the erroneous application. The panel did not note that much of the delay is attributable to the Board’s inaction in the 10 months between January 16, 2018, when it sent a letter to his home address (which Dr. Modjarrad misplaced and did not read) and November 28, 2018, when it mailed the charges to his business address.

The panel imposed the sanction of a reprimand and a \$500 fine.

Dr. Modjarrad petitioned for judicial review in the Circuit Court for Montgomery County. After a hearing, the circuit court reversed the panel’s decision and ordered the Board to vacate the reprimand and the fine. Among other things, the court reasoned that, although the panel had the discretion not to impose any sanction at all as a result of Dr. Modjarrad’s violation, the panel refused to exercise its discretion. The court criticized the panel for imposing sanctions on Dr. Modjarrad “in cookie-cutter fashion.” In addition, the court rejected the panel’s assertion that it was “speculative” or “hypothetical” that a reprimand would endanger Dr. Modjarrad’s security clearance. In the court’s view, the panel’s characterization of that evidence was “without a rational basis.”

The Board appealed to this Court. It presents one question:

Was the Board’s sanction of a reprimand and a \$500 fine for failure to submit to a Criminal History Records Check authorized by law and within

the discretion of the Board, rather than an extreme and egregious abuse of discretion as required under the applicable standard of review?

We agree with the circuit court that the disciplinary panel failed to exercise any discretion, but instead applied an inflexible rule that requires the imposition of some sanction whenever a violation is found, regardless of the surrounding circumstances. Consequently, we shall affirm the judgment of the circuit court.

DISCUSSION

In cases involving judicial review of actions by a State administrative agency, an appellate court reviews the action of the agency, rather than the decision of the circuit court. *See, e.g., Maryland Ins. Comm’r v. Central Acceptance Corp.*, 424 Md. 1, 14 (2011) (citing *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 160 (2005)). In an action for judicial review of an administrative sanction, “the burden . . . is upon the party challenging the sanction to persuade the reviewing court that the agency abused [its] discretion and that the decision was ‘so extreme and egregious’ that it constituted ‘arbitrary or capricious’ agency action.” *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 581 (2005) (quoting *Maryland Transp. Auth. v. King*, 369 Md. 274, 291 (2002)). Nonetheless, “[a] proper exercise of discretion involves consideration of the particular circumstances of each case.” *Gunning v. State*, 347 Md. 332, 352 (1997); *accord 101 Geneva LLC v. Wynn*, 435 Md. 233, 241 (2013). The failure to exercise discretion is itself an abuse of discretion, which ordinarily requires reversal. *See, e.g., 101 Geneva LLC v. Wynn*, 435 Md. at 241.

At oral argument, the Board acknowledged, correctly, that a disciplinary panel may exercise its discretion not to impose any sanction at all even if it has found a violation of HO § 14-404. The Board’s acknowledgment is consistent with the Board’s regulatory guidelines, which state:

Depending on the facts and circumstances of each case, and to the extent that the facts and circumstances apply, *the disciplinary panel* may consider the aggravating and mitigating factors set out in [COMAR 10.32.02.09(B)(5) and (6)] and *may in its discretion determine*, based on those factors, that an exception should be made and that *the sanction in a particular case should fall outside the range of sanctions listed in the sanctioning guidelines*.

COMAR 10.32.02.09(B)(1) (emphasis added).

At oral argument, the Board also acknowledged that the governing statutes do not require a disciplinary panel to impose a sanction even if it has found a violation of HO § 14-404.

According to the Board, however, its panels have never refrained from imposing a sanction when they find a violation—even an inadvertent violation of a strict-liability statute. Instead, in each case in which a panel has found a violation of the statute, the panel has imposed at least the minimum sanction authorized by law, without regard to the facts of the individual case. In other words, the Board has adopted an inflexible rule under which its panels uniformly impose some sanction, regardless of the circumstances, if they find a violation. By the Board’s admission, therefore, it refuses to exercise its discretion, which is an error of law that requires reversal. Maryland Code (1984, 2021 Repl. Vol.), § 10-222(h)(iv) of the State Government Article.

All cases require the exercise of discretion, but the need for discretion is especially urgent in this case. In a language that puts a premium on understatement, one would say that Dr. Modjarrad is a highly distinguished research physician. He has no prior disciplinary record. In mistakenly certifying that he had submitted to a CHRC, he did not intend to conceal a criminal record, because he has no criminal record to conceal. His inadvertent error is virtually certain never to recur. Moreover, his error was almost certainly the result of the Board’s own misleading website, because more than 10 percent of the other applicants made the same mistake as he. He did not respond to the Board’s initial inquiries because he did not receive them, but he responded promptly as soon as he had actual knowledge of the problem. In these circumstances, the Board’s Javert-like rigidity epitomizes an abuse of discretion through the failure to exercise discretion.⁷

Not only did the Board commit legal error by failing to exercise discretion, but its decision was arbitrary. The term “arbitrary” includes “willful and unreasoning action, without consideration and regard for facts and circumstances presented[.]” *Hurl v. Board of Educ. of Howard County*, 107 Md. App. 286, 306 (1995) (quoting BLACK’S LAW DICTIONARY (6th ed. 1990)); accord *Homes Oil Co., Inc. v. Maryland Dep’t of the Env’t*, 135 Md. App. 442, 462 (2000). To reflexively impose a sanction whenever a panel finds a violation of § 14-404 is to engage in “willful and unreasoning action, without consideration and regard for facts and circumstances presented[.]” *Hurl v.*

⁷ It appears that the Board may sometimes opt to dismiss charges rather than pursue them. If a violation is established, however, the Board imposes a sanction whenever it finds a violation.

Board of Educ. of Howard County, 107 Md. App. at 306. The Board’s arbitrary action requires reversal as well. *See* § 10-222(h)(vii) of the State Government Article.

An additional comment is necessary on the issue of the effect of a reprimand on Dr. Modjarrad’s security clearance. In its brief, the Board asserts that the disciplinary panel “specifically recognized and acknowledged the concerns Dr. Modjarrad had regarding his security clearance.” This assertion is incorrect. In fact, the disciplinary panel wrote that it was “inappropriate to take into consideration” the potential effects of the sanction imposed.

The Board dismissed the prospect that Dr. Modjarrad would lose his security clearance, calling it “speculative” and “hypothetical.” It was not. Dr. Modjarrad introduced uncontroverted evidence, from a witness with personal knowledge of the matter at hand, about the impact of a reprimand on the security clearance that he must have to do his research. The witness’s testimony was not “speculative” and “hypothetical” merely because he was testifying from personal knowledge about events that will or may occur, rather than about events that have occurred. Indeed, at oral argument, we were informed that the Department of Defense sought to revoke Dr. Modjarrad’s security clearance after the Board’s decision and that he has retained his security clearance only because the circuit court reversed the Board’s decision. The Board erred in discounting the witness’s testimony as “speculative” and “hypothetical” and abused its discretion in refusing to consider the effect of a reprimand on Dr. Modjarrad’s security clearance.

The Board contends that if it does not impose the same sanction on every physician who has committed the same violation, it will be accused of acting arbitrarily and capriciously. It argues that if it declined to reprimand Dr. Modjarrad, other physicians, who had committed the same violation, would demand identical treatment. The Board's argument betrays a fundamental misapprehension of the nature of discretion.

The essence of discretion is the consideration of the specific facts and circumstances of each particular case. Although other physicians may have committed the same violation as Dr. Modjarrad, the Board is not required to treat them in exactly the same way as it treats Dr. Modjarrad if the facts of their cases are in some other way materially different from the facts of his.

Had the disciplinary panel actually exercised any discretion in fashioning the sanction in Dr. Modjarrad's case, it might have been appropriate to decide this case on the terms posed by the Board, by asking whether the sanction was "extreme and outrageous." The panel, however, exercised no discretion. Because the failure to exercise discretion is itself an abuse of discretion and amounts to arbitrary agency action, we affirm the circuit court's decision to reverse the panel's decision and to order the Board to vacate the reprimand and the fine against Dr. Modjarrad.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**