UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2607

September Term, 2014

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PAUL J. MACKOUL

v.

MARYLAND STATE BOARD
OF PHYSICIANS

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Wright,
Arthur,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

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Opinion by Wright, J.

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Filed: January 20, 2016

This appeal arises from the decision of the Circuit Court for Montgomery County to affirm the Final Decision and Order of the Maryland State Board of Physicians ("the Board"). On February 17, 2009, Patient A[1] filed a complaint with the Board, alleging improper conduct by appellant, Paul J. MacKoul, M.D. ("Dr. MacKoul"). On January 17, 2012, the Board charged Dr. MacKoul with unprofessional conduct in the practice of medicine, in violation of § 14-404(a)(3)(ii) of the Md. Code (1981, 2014 Repl. Vol.), Health Occupations Article ("HO").[2]

The Administrative Law Judge ("ALJ") at the Office of Administrative Hearings ("OAH") issued a proposed decision on March 12, 2013, after a two-day hearing, concluding that Dr. MacKoul was guilty of unprofessional conduct with respect to Patient A. After an Exceptions Hearing before the Board on July 24, 2013, the Board issued a Final Decision and Order on June 3, 2014, imposing a reprimand requiring Dr. MacKoul to complete a Board-approved intensive course on physician-patient interactions.

Dr. MacKoul presents the following questions on appeal:

I. Whether the Board exceeded the proper scope of the charges[.]
II. Whether the Court should substitute its judgment for that of the Board's on the only issue properly before the Board – timely cancellation of Patient A's surgery after the patient's arrival to the hospital on October 20, 2008[.]
III. Whether the factual findings supportive of the sole issue properly before the Board pass the substantial evidence test[.]

[1] Patient A's name is not identified for confidentiality purposes.

[2] Dr. MacKoul was also charged under the same statutory provision for alleged misconduct towards a Patient B. In that case, however, the State "failed to prove that [Dr. MacKoul] was responsible for unprofessional conduct . . . ."

We answer Dr. MacKoul's questions in the negative and, for the reasons outlined below, hold that the Board did not exceed the proper scope of the charge and substantial evidence existed to support the Board's decision.

**Facts**

In October 2008, Patient A was an 89-year-old woman who, among other complex issues, had a uterine prolapse that was no longer managed by the use of pessaries, which are medical devices used to provide support to the uterus. Dr. Carolyn Harrington, Patient A's long-time gynecologist, had inserted her pessaries and recommended that Patient A undergo a transvaginal hysterectomy. Dr. Harrington referred Patient A to Dr. MacKoul for a surgical consultation.[3]

The consultation took place on September 13, 2008, when Patient A and her son met with Dr. MacKoul, with her daughter and son-in-law participating by speakerphone. During this consultation, it is undisputed that Dr. MacKoul gave Patient A the name and number of Dr. Jonathan White, a urologist, for her to see before her surgery. Patient A and her family testified that Dr. MacKoul "advised Patient A that she could see a urologist for further evaluation of her bladder, as a second opinion, and to put her mind at ease if she had any concerns regarding potential incontinence." Dr. MacKoul, however, claimed that during this initial consultation, he "instructed Patient A to obtain a

[3] Dr. MacKoul is a laparoscopic surgeon specializing in gynecological surgery and is Board-certified in obstetrics and gynecology.

[necessary] preoperative urological consultation." Dr. Harrington had also recommended that Patient A to see Dr. White before her surgery.

On October 20, 2008, the day of her scheduled surgery, Patient A arrived at the hospital at approximately 2:00 p.m. and was ready for surgery at approximately 3:55 p.m. Patient A's surgery was scheduled for 5:00 p.m., and she was evaluated by an anesthesiologist shortly before 5:00 p.m. During this time, Dr. MacKoul was involved with two other surgical procedures. After starting the first surgery and then leaving, Dr. MacKoul took on his second surgery at 5:45 p.m., "elect[ing] to perform [this patient's surgery] at that time because it was a quicker, more routine procedure than Patient A's." He then returned to the first patient's surgery, remaining there until 8:00 p.m.[4]

Around 8:30 p.m., Dr. Harrington paged and reached Dr. MacKoul, who at that time reviewed Patient A's chart and learned that Patient A had not obtanied the urological evaluation. Because the urological evaluation was an important step in determining whether surgery would be safe, Dr. MacKoul cancelled the surgery.[5]

Several days later, Patient A met with Dr. White and obtained a urological clearance. Subsequently, Dr. Harrington and another surgeon performed the surgery on

[4] Patient A's family testified that Dr. MacKoul told them, when he eventually met with them, that he had been "at another hospital saving another woman's life and asked Patient A's family if they wanted to be responsible for someone bleeding to death."

[5] The ALJ was not critical of Dr. MacKoul's decision to cancel the surgery without the clearance: "On this record, I find no fault in [Dr. MacKoul's] decision not to perform surgery on Patient A once he learned that a pre-surgical clearance from an urologist had not been obtained."

Patient A; Dr. MacKoul was not involved. Thereafter, Patient A's daughter, on Patient A's behalf, filed a complaint against Dr. MacKoul with the Board. The Board charged Dr. MacKoul with "unprofessional conduct in the practice of medicine" under § 14-404(a) of the Maryland Medical Practice Act based on the following allegation:

> On or about February 17, 2009, the Board received a complaint from the daughter of a former patient of the Respondent [Dr. MacKoul] ("Patient A") in which it was alleged, *inter alia*, that the Respondent failed to notify the elderly patient, who had been prepared for surgery for several hours, that he had cancelled the surgical procedure he was scheduled to perform on her.

(Footnote omitted). The Board ultimately found that Dr. MacKoul engaged in unprofessional conduct and required that he attend a course on doctor-patient relations. Dr. MacKoul petitioned for judicial review, and the circuit court affirmed the Board's order, prompting Dr. MacKoul to file a timely appeal.

Additional facts will be included in our discussion as they become relevant.

**Standard of Review**

An appellate court reviews the decision of an administrative agency "under the same statutory standards as the Circuit Court," meaning "we reevaluate the decision of the agency, not the decision of the lower court." *Gigeous v. E. Corr. Inst.*, 363 Md. 481, 495-96 (2001)(citation and footnote omitted). In *People's Counsel for Baltimore County v. Elm Street Development, Inc.*, 172 Md. App. 690, 700 (2007), we said:

> In reviewing the decision of an agency, our role "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 577

> (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Md. State Police v. Warwick Supply & Equip. Co., Inc.*, 330 Md. 474, 494 (1993).

We further acknowledged that we "may not substitute our judgment for that of the Board" in making such a determination "unless the agency's conclusions were not supported by substantial evidence or were premised on an error of law." *Id*. at 700-01 (citation omitted).

**Discussion**

Dr. MacKoul was charged on January 17, 2012 by the Board for unprofessional conduct pursuant to HO §14-404(a)(3), which in pertinent part read[6]:

> (a) Subject to the hearing provisions of § 14-405 of this subtitle, the Board, on the affirmative vote of a majority of the quorum, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:
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> * * *
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> (3) Is guilty of:
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> (i) Immoral conduct in the practice of medicine; or
>
> (ii) *Unprofessional conduct in the practice of medicine*[.]

(Emphasis added). "Unprofessional conduct," while not defined by statute, "refers to conduct which breaches the rules of ethical code of a profession, or conduct which is unbecoming of a member in good standing of a profession." *Finucan v. Md. Bd. Of Physicians Quality Assurance*, 380 Md. 577, 593 (2004) (citations omitted). The Board has the responsibility of interpreting the meaning of such terms by looking to the "common judgment" of the profession. *Id*.

[6] This section of HO §14-404(a)(3) has since been slightly modified.

In the instant case, Dr. MacKoul was charged with unprofessional conduct because of his failure to communicate effectively and professionally with Patient A and her family. Dr. MacKoul points out that "[n]ever in Maryland has mere miscommunication between physician and patient resulted in a finding of 'unprofessional conduct,'" comparing the instant case with previous examples of 'unprofessional conduct' such as sex with patients, false statements, on an application for license or before peer review proceedings, sexual harassment of co-employees, or extreme incompetence. While Dr. MacKoul may accurately assert that failure to communicate is not quite in the same vein as sexual relations with patients or dishonest conduct, the Board, which is made up of individuals in the medical profession, has the task and responsibility of what is or is not "unprofessional conduct" within the field, and the "expertise of the agency in its own field of endeavor is entitled to judicial respect." *Finucan*, 380 Md. at 590-91, 593 (citations omitted). In that regard, we are limited to review only whether substantial evidence supports the Board's decision. *Elm St. Dev.*, 172 Md. App. at 700. We conclude that it does.

## I. The Board's conclusions of law did not exceed the scope of the charges framed by the pre-hearing order, and thereby did not violate Dr. MacKoul's due process rights.

HO § 14-405(b)(1) requires that the hearing officer "give notice and hold the hearing in accordance with the Administrative Procedure Act." To satisfy due process, notice must be "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Reed v. Baltimore*,

323 Md. 175, 183-84 (1991) (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)).

The Board concluded, as a matter of law, that Dr. MacKoul engaged in unprofessional conduct because he: (1) "fail[ed] to inform Patient A of the necessity of a urology consult as a prerequisite for surgery;" (2) "fail[ed] to review Patient A's chart for pre-surgical clearance or communicate with Patient A or her family about the delay of her surgery before 8:35 p.m. on the day of the surgery;" and (3) made "accusatory, combative, and false statements to Patient A and her family." Dr. MacKoul claims, however, that two of these conclusions, namely the first and third, "exceed[ed] the scope of the issues as defined" by the ALJ in the Pre-Hearing Conference Report and Scheduling Order. Dr. MacKoul claims that this Pre-Hearing Conference Report "narrowed in scope" the preliminary charging document to only a single "charge" as it pertained to Patient A: the failure to provide her proper notice before cancelling her surgery after she had been prepared for surgery. Thus, Dr. MacKoul reasons, he had no notice of the "charge" of failing to inform Patient A of the urological consultation or of the false and combative language directed at Patient A and her family. Without such notice, he argues, his due process rights were violated.

Dr. MacKoul maintains that he was deprived of this "opportunity to present [his] objections" because there was only one issue for him to respond to, and it is his duty to respond to the issues as framed. Specifically to the allegations about his interactions with Patient A's family, Dr. MacKoul claims that had he been put on notice of this allegation,

he would "have defended himself differently," such as calling eye witnesses to rebut Patient A's family's testimony.

We disagree with Dr. MacKoul that the Board's conclusions went beyond what he was able to defend for failure of notification. The January 17, 2012 charging document provided Dr. MacKoul with adequate "notice" of all allegations. In the Allegations of Fact, the charging document states:

> 15. When interviewed by Board staff, Patient A, her son, daughter and son-in-law confirmed that the Respondent [Dr. MacKoul] clearly explained the benefits and risks of the laparoscopic procedure. During the consultation, Patient A became nervous at the prospect of undergoing general anesthesia. According to Patient A and her family members, the Respondent stated that she could seek a second opinion from a urologist as an alternative to the planned surgery and provided the name of a urologist for that purpose.
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> * * *
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> 33. At approximately 9:00 p.m., Patient A's family demanded to see the Respondent. Patient A was able to reach him by telephone at that time. Patient A heard [Dr. Harrington] reading to the Respondent his initial consultation report, apparently at his request. Patient A's family, who had not previously seen the report, was surprised to learn that the Respondent's consultation report indicated that Patient A was to have been cleared by a urologist prior to surgery.
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> * * *
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> 35. Patient A, who still had an IV inserted, and her daughter approached the Respondent and questioned why he had not performed the surgery. The Respondent stated that he had been called to emergency surgery at another hospital and questioned whether they would want to be responsible for someone bleeding to death. The Respondent then stated that he could not have performed the surgery at any rate because Patient A had not been cleared by a urologist and that even if he had called to advise Patient A that he had cancelled the surgery, they would have been upset, so it really did not make a difference. The Respondent further stated that he was not going

> to perform the surgery because it may cause Patient A to become incontinent and asked if the family wanted that to happen.

The charging document detailed the allegations from Patient A's family regarding both the necessary urological consultation and his unprofessional communication with Patient A and her family the day of the surgery. [7] There is nothing in the record to indicate that the parties agreed that the charge would be limited by the Pre-Hearing Conference Report and Scheduling Order to just one issue rather than what was outlined in the "Allegations of Fact" in the charging document. We also find nothing in the COMAR regulations governing Pre-Hearing Conference that provides the authority for the ALJ to unilaterally restrict the charging document. *See generally* COMAR 10.32.02.03 (dictating the Prehearing Proceedings for Hearings Before the Board of Physicians); COMAR 28.02.01 (outlining the Rules of Procedure for the Office of Administrative Hearings).

[7] By contrast, Dr. MacKoul notes that the only forms of notice he received were:

> (1) the charging document under the Maryland Medical Practice Act, stating with regard to Patient A only that Dr. MacKoul "failed to notify the elderly patient, who had been prepared for surgery for several hours, that he had cancelled the surgical procedure he was scheduled to perform on her;"
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> (2) the subsequent Pre-Hearing Conference Report and Scheduling Order identifying the issue as Dr. MacKoul's failure to "provide notice to Patient A before cancelling her scheduled surgery on October 20, 2012, after she had been prepared for surgery on that date and had been waiting for several hours;" and
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> (3) the issue was defined in the March 12, 2013 Proposed Decision by the ALJ "identically to the aforementioned Pre-Hearing Conference Report and Scheduling Order."

Nevertheless, Dr. MacKoul claims that if he had notice of more than one charge, he would "have defended himself differently." This is belied by what occurred at the hearing because Dr. MacKoul had the opportunity to and did, in fact, defend himself against all three of the Board's allegations. He testified before the Board at length about whether he advised Patient A to see a urologist, noting, "We had sent her to Dr. White. That was our intention so that she could see him for this urological evaluation . . . and get pre tested before surgery." Dr. MacKoul also directly responded to Patient A's family's allegations in his testimony, stating that "having done this for a long time, it's nonsensical. I don't understand how the urologist becomes an alternative to a surgical procedure [as Patient A's family claims]." He then testified as to his version of the verbal exchange with Patient A's family after he cancelled the surgery: "But what I was trying to explain to her [Patient A's daughter] is that, yes, it was a difficult case. Yes, it was an emergent case. There was bleeding. I was in another operating room . . . it would not have made sense to say I was at another hospital."

More telling, Dr. MacKoul had the opportunity to request that the circuit court order the presiding officer to take "additional material evidence." Md. Code (1984, 2014 Repl. Vol.), State Government Article ("SG") § 10-222(f)(2) allows for the circuit court to order the presiding officer's "additional evidence on terms that the court considers proper if . . . (ii) the court is satisfied that: . . . 2. there were good reasons for the failure to offer the evidence in the proceeding before the presiding officer." If Dr. MacKoul had not expected the Board's first and third allegations of unprofessional conduct, as he now

claims, he would have to make such a request. "On the basis of the additional evidence, the final decision maker is authorized to modify the finding and decision." SG § 10-222(f)(3). As explicated by the above, Dr. MacKoul had sufficient notice and his due process rights were not violated. *See Md. State Bd. of Nursing v. Sesay*, 224 Md. App. 432, 447 (2015) (explaining that due process "is flexible and calls only for such procedural protections as the particular situation demands." Thus, notice is constitutionally sufficient if it was "reasonably calculated to provide notice")*; see also Golden Sands Club Condo., Inc. v. Waller*, 313 Md. 484, 487-88 (1988) (noting that notice and "the guarantee of an opportunity to be heard" is "[a]t the core of the procedural due process right"); *accord Griffin v. Bierman*, 403 Md. 186 (2008).

## II. The Court will not substitute its judgment for that of the Board's on factual determinations.

Dr. MacKoul urges us to substitute our judgment for that of the Board's regarding the Board's determination that Dr. MacKoul's communication with Patient A about the cancellation of her surgery amounts to unprofessional conduct.[8] Absent insubstantial evidence or an error in law, we "may not substitute our judgment for that of the Board." *Elm St. Dev.*, 172 Md. App. at 700 (citations omitted). As the reviewing court, we "defer to the agency's fact-finding and drawing of inferences if they are supported by the record." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (citations omitted).

[8] Dr. MacKoul fails to assert error as to other charges on the due process argument.

The Board made its judgment by accepting the credibility determinations made by the ALJ, who found Patient A's family to be credible and thereby concluded that Dr. MacKoul failed to inform Patient A about the required consultation. The ALJ was in a position as the fact-finder to determine the credibility of the various individuals providing testimony. As we have previously noted, "[a]dministrative credibility findings [] are entitled to great deference on judicial review. Credibility findings of hearing officers who themselves have personally observed witnesses 'have almost conclusive force.'" *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 431 (2015) (quoting *Kim v. Md. State Bd. of Physicians*, 196 Md. App. 362, 370 (2010), *aff'd*, 423 Md. 523 (2011)). In this case, there were conflicts between Dr. MacKoul and Patient A's family's testimony, and the ALJ found Patient A's family "more worthy of belief." The Board reviewed the testimony before the ALJ as well as heard from Dr. MacKoul who testified directly before it, and determined that Dr. MacKoul could have spoken to Patient A, reviewed her chart, and previously determined that the surgery should not go forward before 8:35p.m., after he was paged by Dr. Harrington.

The record contains ample testimony from Patient A's family supporting the Board's finding of Dr. MacKoul's "unprofessional conduct." Patient A's son, daughter, and son-in-law all testified that while Dr. MacKoul did give Patient A the contact information for Dr. White, a urologist, he did so to provide her with "the option of seeing a urologist to obtain another opinion and/or put her mind at ease regarding any potential

incontinence," not as a prerequisite to surgery.[9] Patient A's daughter further testified that she followed up with Dr. MacKoul's office twice to confirm prerequisites for the surgery and was told only "bowel prep, blood tests, and clearance from a cardiologist." The "Pre-Operative Instruction" sheet that Dr. MacKoul's office sent to Patient A also failed to list a urology consultation as a prerequisite for the surgery.

We are constrained by our standard of review. "Whether we would have reached the same conclusion based on those facts is not the issue. The question is whether there is legally sufficient evidence to support the Board's conclusion." *People's Counsel for Balti. Cty. v. Prosser Co.*, 119 Md. App. 150, 179 (1998). The substantial evidence test "requires us to affirm an agency decision, if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Geier*, 223 Md. App. at 431(citations omitted). Based on the testimony from Patient A's family and the Board finding them credible, we hold that there was substantial evidence sufficient for the Board to make its findings. A "reasoning mind reasonably" could conclude from this testimony that Patient A and her family were never communicated the need for this urology consultation, *Geier*, 223 Md. App. at 430, and, therefore, Dr. MacKoul's conduct was "unprofessional," as determined

[9] The Board also determined that Dr. Harrington failed to tell Patient A that a urology consultation was required before surgery. Dr. Harrington "discussed with the patient that not all her urinary problems are related to her prolapsed [uterus]. [Dr. Harrington] advised that [Patient A] seek the care of Dr. Jonathan White who did make an appointment with her before surgery."

by the Board, when he cancelled Patient A's surgery after she had been prepared for several hours.

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