Circuit Court for Montgomery County
Case No. 379753-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2618

September Term, 2014

DAVIDE HYDE

v.

MARYLAND STATE
BOARD OF DENTAL EXAMINERS

Wright,
Shaw Geter,
Thieme, Raymond G.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: January 24, 2018

This case arises from a petition for judicial review in the Circuit Court for Montgomery County of a final decision and order by the Maryland State Board of Dental Examiners. Appellant Dr. David Hyde's license to practice dentistry was revoked by the Board on July 2, 2013, after appellee, the State, charged him with violating the Dental Practice Act, Title 4, Subtitle 3 of the Health Occupations Article, by testing positive for cocaine several times and failing to file required reports on his fitness to practice and sobriety. The circuit court remanded the case to allow appellant to raise before the Board whether it had the authority to revoke his license based on his failure to comply with a consent agreement requiring quarterly reports and drug testing. Both parties appealed the circuit court's order.

We have re-ordered, combined, and reworded appellant and appellee's questions presented as follows:[1]

[1] Appellant presented the following questions for our review:

1. Is the board's decision unlawful or arbitrary or capricious because the board acted pursuant to its statutory authority to sanction a violation of a Board order when, in fact, this case involves a consent agreement?
2. Does the Board's conclusion that Dr. Hyde had a positive drug screen or "was found to have cocaine in his system" lack substantial evidence where (a) the State presented no expert witness or other competent evidence of a positive drug screen, (b) Dr. Hyde presented an expert witness who testified, unrebutted, that the alleged drug test results were unreliable and did not show a positive drug screen, and (c) there was substantial factual evidence that Dr. Hyde was not using drugs?
3. Did the board deprive Dr. Hyde of his right to due process when it revoked his license based exclusively on hearsay evidence that was never established as reliable and which prevented Dr. Hyde from cross-examining the witnesses against him?
4. Is the Board's decision arbitrary or capricious because it applied an incorrect standard, finding that Dr. Hyde 'was found to have cocaine in his system,"

1. Whether Dr. Hyde waived arguments regarding the Board's authority to sanction a violation of a consent agreement as a violation of a Board order?

2. Whether the Board had the authority to sanction a violation of a consent agreement as a violation of a Board order?

3. Whether the Board's decision to revoke Dr. Hyde's license was supported by substantial evidence, and whether the Board's decision to revoke his license, given the evidence presented, was arbitrary and capricious?

For the following reasons, we shall affirm the order of the Board.

BACKGROUND

Appellant Dr. David Hyde received his license to practice dentistry on March 7, 1983. In October of 1999, Dr. Hyde self-reported to the Dentist Well-Being Committee[2] for assistance with cocaine addiction. On November 30 of that year, Dr. Hyde entered into a consent order with the Maryland State Board of Dental Examiners (the "Board"), stemming from "unprofessional acts" towards an employee. A condition of the Well Being

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instead of the standard in the consent agreement, which was whether Dr. Hyde had "a positive drug screen"?

5. Is the Board's conclusion that Dr. Hyde violated the consent agreement because his employer failed to send several quarterly reports lacking substantial evidence or arbitrary or capricious?
6. Is the Board's conclusion that Dr. Hyde's alleged failure to send several quarterly reports warrants revocation of his license arbitrary or capricious?

Appellee presented the following questions for our review:

1. Did Dr. Hyde waive arguments contesting the Board's authority to charge him with a violation of a Board order and asserting due process failures?
2. Was the Board's decision to revoke Dr. Hyde's license supported by substantial evidence?

[2] The Dentist Well Being Committee is a "standing committee of the Maryland State Dental Association." "The Committee assists dentists and their families who may be experiencing personal problems." "The Committee has helped many dentists over the years with problems such as stress, drug dependence, alcoholism, depression, medical problems, infectious diseases, neurological disorders and other illnesses that cause impairment."

Committee consent order was for Dr. Hyde to enter the Farley Center, an inpatient residential facility for chemical dependency treatment. Dr. Hyde was admitted to the Farley Center on November 18, 1999, and a treatment plan was established.

On January 14, 2000, Dr. Hyde was discharged from the Farley Center and received a negative discharge summary based on his overall progress. He was required to engage in continuing care. Through February of 2000, Dr. Hyde failed to appear or participate in treatment, or provide urine samples. He was, thereafter, charged with a violation of the consent order on February 24, 2000, and a hearing was scheduled for March 1, 2000, on the matter. On March 7, 2000, a final order was issued, providing for a 45-day suspension and that he comply with the consent order in order for his license to be reinstated in the future.

Dr. Hyde requested his license be reinstated on January 8, 2001. An order for the reinstatement and an order of probation were issued on February 21, 2001. He received 5 years' probation and was required to continue to comply with the 1999 consent order.

Around June 17, 2004, the Board received information from appellant's individual treatment provider, Dr. John Davis, Ph.D., that when Dr. Hyde appeared for his weekly scheduled session, he was not wearing his drug detection patch. Dr. Davis advised the Board that it appeared that the patch adhesive had been tampered with. An immediate drug test proved positive for cocaine. Dr. Davis confronted appellant with the drug test, and appellant admitted to having been using cocaine again for over a week. Records obtained from Dr. Davis also revealed that appellant's compliance with his treatment program was

waning. His ultimate conclusion was that, for a variety of factors, appellant was "not able to practice dentistry safely."

Given the information from Dr. Davis, the Board, on August 17, 2005, found appellant had violated the 2001 order and suspended his license to practice for an additional year. The 2005 order required that, in order to reinstate his license, appellant was required to submit himself to "not less than three (3) urine screens per week and not less than (1) hair analysis every ninety (90) days."

On March 24, 2006, the Board received notification from the Well-Being Committee that Dr. Hyde had not submitted to hair analysis as required and had not submitted to the requisite number of weekly urinalyses. On April 12 of that year, the Board received the results of the laboratory analysis of a hair specimen taken from appellant on April 3, 2006. The specimen was positive for cocaine and benzoylecgonine, the major metabolite of cocaine. The Board scheduled a show cause hearing for May 17, 2006. The Board, thereafter, revoked appellant's license to practice on September 27, 2006.

Dr. Hyde reapplied for dental licensure on July 13, 2009. The Board met with appellant in September, and the parties developed a consent agreement, which was signed on December 11, 2009. The agreement required:

> 3. No later than ten (10) days from the effective date of this Agreement Dr. Hyde will sign a contract with the Maryland Dentist Well Being Committee (the "WBC") for a [maximum] of three (3) years in duration;
> 4. No later than ten (10) days from the effective date of the WBC Contract Dr. Hyde will present himself to a drug testing laboratory chosen by the WBC for the on site collection of hair follicle samples for testing. Said collection will be at Dr. Hyde's expense and will be conducted by laboratory personnel every ninety (90) days beginning from the date of initial collection for the

> duration of the WBC contract. Compliance will be monitored by the WBC. The WBC shall immediately notify the Board of a positive test result and of Dr. Hyde's failure to present himself for collection;
> …
> 9. Failure to comply with any of the terms of this Agreement, including a positive drug screen will result in immediate suspension of Dr. Hyde's Maryland dental license without either prior notice or an opportunity to be heard, provided that he is afforded an opportunity for a show cause hearing before the Board at the next scheduled meeting of the Board. After a notice and a hearing, and a determination of a violation, the Board may impose any other disciplinary sanctions it deems appropriate, including but not limited to revocation or suspension, said violation being proved by a preponderance of the evidence. A resulting order shall be public in nature with this Agreement incorporated there in.

Appellant thereafter signed a three year contract with the Well Being Committee which required, in addition to the drug test schedule, appellant would "submit written quarterly reports to the Board evaluating" his progress, and for him "to arrange for his supervisor at his place of employment" to do so as well. His contract reiterated that "failure to comply with the Agreement, including a positive drug screen, will result in immediate suspension" of his license.

On October 26, 2010, the Board received the first quarterly progress report from Dr. Hyde's new employer, Dr. Katherine G. Collier. On February 24, 2011, the Board informed appellant that they had not received a quarterly hair analysis, an employer's quarterly report, or a quarterly self-report, pursuant to the contract with the Well Being Committee.

On March 4, 2011, the Board received the second quarterly progress report from Dr. Hyde's employer. On March 18, the Board again notified appellant of his failure to provide a quarterly employer report or self-report.

Dr. Hyde submitted to drug testing at a non-approved testing facility on March 30, 2011. The hair sample provided tested negative, however, the facility later informed the Board that the hair sample was taken without the use of gloves, and therefore may have been contaminated.

Appellant received a third notification on April 4, 2011, of his failure to submit a quarterly hair analysis or self-report. On April 14 of that year, Dr. Hyde sent his first quarterly self-report. The second was received on July 27, 2011.

On August 9, 2011, a third progress report from Dr. Hyde's employer was sent. On August 30, 2011, the Well Being Committee notified the Board that another hair sample taken from appellant had tested positive for cocaine. The Board received a copy of the drug screen laboratory report prepared by Friends Medical Laboratory, supporting the finding of cocaine. On October 7, the Board received a Certificate of Laboratory Analysis from United States Drug Testing Laboratories, indicating another test proved positive for cocaine.

The Board received a copy of a positive urinalysis test on November 30, 2011. In December of 2011, Dr. Hyde's employer sent a fourth report, in which she stated that given "a positive test result this past summer from his hair analysis" she "recommends that Dr. Hyde be required to submit weekly urine test[s] and quarterly hair analysis indefinitely" as "a necessary safeguard for Dr. Hyde, myself, and the patients he treats."

The Well Being Committee then recommended a five-day evaluation at the Farley Center in order to determine the appropriate levels for treatment. On December 19, 2011,

the Farley Center informed the Board that they concluded "Dr. Hyde ha[d] relapsed in his cocaine addiction," despite a negative urinalysis and that a "[h]air drug screen was not able to be processed due to inability to collect an adequate sample from Dr. Hyde." The center recommended that Dr. Hyde spend 90 days in an inpatient program. Notwithstanding the Farley Center's conclusion, the Well Being Committee recommended appellant begin an intensive outpatient program three to four days a week, continued group therapy, and mandatory 12-step meetings, at least three times per week.

On August 21, 2012, the Board issued charges against Dr. Hyde. A case resolution conference was scheduled for October 3, 2012, wherein no resolution was reached. The Board thereafter scheduled a hearing for December 5, 2012. A prehearing conference was held on November 29, 2012, during which Dr. Hyde's exhibit list and appellee's, the State, Motion to Exclude were discussed. Dr. Hyde, appearing *pro se*, admitted he had received the State's list of witnesses and a copy of the documents it intended to introduce.

On December 5, appellant, represented by counsel, argued that the State had violated his due process by sending discovery documents out shortly before the hearing date. One of the drug test results was not included in the original packet of exhibits sent to Dr. Hyde, and was sent a week before the hearing. Appellant argued that the hearing be postponed, and he be allowed to present expert testimony to rebut the tests, despite not having addressed an expert witness during the prehearing conference. Over the State's objection, the Board postponed the hearing to allow appellant to obtain an expert witness and review the drug tests.

On January 2, 2013, a hearing was held on the matter before a quorum of the Board. The Board heard from two witnesses: Sharon Oliver, Case Manager for the Maryland State Board of Dental Examiners, and Clifton West, expert witness for appellant. Ms. Oliver testified she was in charge of monitoring all dental board licensees who are on probation, and detailed the Board's interactions with appellant and its attempts to get him to comply. "The Board found her testimony to be quite credible." Mr. West, who was called to refute the credibility of hair follicle testing, testified that, while he was knowledgeable in different methods of drug testing, he did not know anything about hair follicle test results because he did not agree with them. The Board found "Mr. West's testimony…credible, but the Board did not find that there was any basis to discredit Dr. Hyde's drug test results."

After reviewing the entire record, the Board voted to revoke Dr. Hyde's license on July 2, 2013, for "failing to abide by the terms of his consent order." Appellant petitioned for judicial review in the Circuit Court for Montgomery County. There, for the first time, appellant argued that the Board had exceeded their statutory authority by revoking his license for violating a consent agreement as a violation of a consent order. The court remanded the case to the Board "to afford [appellant] for an additional opportunity to raise [whether the Board had the authority to sanction him for violation of the consent agreement] before the Board." Both parties timely appealed the circuit court's order.

STANDARD OF REVIEW

"A court's role in reviewing an administrative agency adjudicatory decision is narrow." *Maryland State Bd. of Dental Exam'r v. Tabb*, 199 Md. App. 352, 372-73 (2011)

(internal citations omitted). "[I]t '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." *Motor Vehicle Admin. v. Delawter*, 403 Md. 243, 257 (2008) (internal citations omitted). "In applying the substantial evidence test, a reviewing court decides 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Id.* (internal citations omitted).

"In contrast to factual challenges, when the question before the agency involves one of statutory interpretation or an issue of law, our review is more expansive." *Maryland State Dep't of Educ. v. Shoop*, 119 Md. App. 181, 197 (1998) (citing *Liberty Nursing Ctr., Inc. v. Dep't of Health & Mental Hygiene*, 330 Md. 433 (1993)). "Under this more expansive review, we may substitute our judgment for that of the agency." *Id.* (citing *Dep't of Human Res. v. Thompson*, 103 Md. App. 175, 190 (1995) (internal citations omitted)).

DISCUSSION

I. Dr. Hyde waived arguments regarding the Board's authority to sanction violation of a consent agreement as a violation of a Board order.

On appeal, appellant contends that it was unlawful and arbitrary and capricious for the Board to revoke his license for violation of the consent agreement pursuant to the statutes addressing violations of a Board order. Appellant argues that while "the

[L]egislature has delegated authority to the Board to revoke a dentist's license for violation of an order, it has not given it such authority with respect [to] an alleged violation of a consent agreement." As such, the Board was not statutorily authorized to revoke his license. However, appellant did not present this argument before the Board; instead he raised it for the first time on petition for judicial review in the Circuit Court for Montgomery County.

"Rule 8-131(a) provides that, '[o]rdinarily,' an appellate court will not decide any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'" *Parham v. Dep't of Labor, Licens. & Regis.*, 189 Md. App. 604, 615 (2009). "This rule applies to appellate review of administrative proceedings." *Id.* (internal citations omitted). "[A] party is bound by the theory the party pursues before the administrative body, and the failure to present an argument precludes it from being heard by the reviewing court." *Patrick v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 156 Md. App. 423, 433 (2004).

At the hearing before the circuit court, upon concluding his argument regarding the propriety of charging him pursuant to statutes regarding Board orders for a violation of a consent agreement, the court asked the appellant if the issue had been preserved. The subsequent colloquy followed:

> [Appellant's counsel]: Well, I think that's a different issue because it's not an evidentiary one, Your Honor. It is preserved – I'm not sure that I can say it's preserved, because I don't think it's an issue that has to have been preserved below…Here the issue didn't arise until they issued an opinion that

said he violated an order. That's the first time the issue arose in terms of what we're arguing on appeal.

The Court: Didn't that issue arise when he was notified as to why he was being brought in front of the Board? In other words, wasn't the original for, I mean, (unintelligible), the original charge against him was violation of an order?

[Appellant's counsel]: That's correct. The charges said, "You violated an order." We're not here arguing that he was given insufficient notice…We're not saying he was misled or tricked in any way. What we're saying is – and it's admittedly a very technical argument – but the case law says that Your Honor has to look at what they decided and why they said they decided it and can only affirm it on that basis. And that simply can't be done, given the order versus agreement discrepancy here.

The Court: But if he knows going into this that he was being charged with having violated an order, because he knew that there was no order out there, why didn't he move to dismiss the case initially for that reason?

[Appellant's counsel]: I can't answer the question as to why that wasn't done, Your Honor, or why prior counsel didn't raise the issue pre-hearing. It's our position that that's simply not relevant. There's no affirmative requirement that he raise that; that he bring that to the attention of the Board…On appeal, this Court can only affirm that decision if it can be affirmed and sustained on the grounds cited by the Board. It's a very different issue from whether he could have or should have or whether it would have been appropriate for him or better had he raised it pre-hearing…

The Court: Well, what obligation did he have to preserve issues for appeal in front of the Board?

[Appellant's counsel]: Well, his requirement to preserve issues is very similar, if not the same, as would be in a trial context in this Court on appeal or the Court of Special Appeals. In fact, I believe the appellate courts have cited the same appellate rule. And the rule is that it had to have been, generally, had to have been raised in or decided by the lower court. Or in this case, raised in or decided by the agency. So there are exceptions to that, but, as a general matter, if something's not raised in or decided by the agency, then it's not preserved. Here we're talking about an issue that was decided by the agency.

The circuit court found that, "notwithstanding [appellant's] failure to raise before the Maryland State Board of Dental Examiners ("the Board") the issue of the Board's authority to sanction him for failure to comply with a Board Consent Agreement, as distinct from a Board Order, this case is REMANDED to the Board to afford [appellant] an additional opportunity to raise this issue before the Board."

Appellant was correct that he was under the same obligation as he would have been in trial to preserve issues for appeal. Despite his contention otherwise, this issue was not presented to the Board. Appellant had an obligation to preserve his issue and he failed to do so.

We also note that appellant's assertion is misleading, that the circuit court and this Court "can only affirm that decision if it can be affirmed and sustained on the grounds cited by the Board." "[W]hen the question before the agency involves one of statutory interpretation or an issue of law, our review is more expansive." *Maryland State Dep't of Educ. v. Shoop*, 119 Md. App. 181, 197 (1998) (citing *Liberty Nursing Center, Inc. v. Dep't of Health & Mental Hygiene*, 330 Md. 433 (1993)). "Under this more expansive review, we may substitute our judgment for that of the agency." *Id.* (citing *Dep't of Human Res. v. Thompson*, 103 Md. App. 175, 190 (1995)).

We will, however, address the propriety of the Board's decision below strictly on an *arguendo* basis.

II. The Board had the authority to sanction violation of a consent agreement as a violation of a Board order.

"[W]hen the question before the agency involves one of statutory interpretation or an issue of law, our review is more expansive" than review of factual determinations, *Shoop*, 119 Md. App. at 197 (citing *Liberty Nursing Center, Inc. v. Dep't of Health & Mental Hygiene*, 330 Md. 433 (1993)), and "we may substitute our judgment for that of the agency." *Id.* (citing *Thompson*, 103 Md. App. at 190). "Consequently, we are not bound by the agency's statutory or legal conclusions." *Id*. (citing *Dep't of Health & Mental Hygiene v. Reeders Memorial Home, Inc.*, 86 Md. App. 447 (1991)).

The Board in the instant case held that

> After a hearing and a review of the record, the Board finds that Dr. Hyde is in violation of the terms of his consent order. Three aspects to the Non-Public Consent Order from May 5, 2010 existed and required compliance by Dr. Hyde. First, he was required to abstain from drugs and alcohol. On three occasions he was found to have violated this aspect of the Order. Twice he was found to have cocaine in his system by hair sampling; cocaine was also found in his system through urinalysis. The second aspect required that his employer write quarterly reports regarding Dr. Hyde. Only four reports were produced in a span of over two years. After being contacted by the Board through certified mail, Dr. Hyde wrote two reports. By failing to comply with the terms of his order, the Board finds that Dr. Hyde violated Md. Code Ann., Health Occ. § 4-315(a)([33])[3].
> Dr. Hyde's license should be revoked for failing to abide by the terms of his consent order. This determination was made in accordance with the Board's sanctioning guidelines. COMAR 10.44.31. Dr. Hyde has an extensive disciplinary history with the Board and his failure to abide by the terms of the order has the potential to cause serious patient harm. *See* COMAR 10.44.31.05(C)(1)(a) & (c)[4]. Dr. Hyde has previously been unsuccessful in his attempts at rehabilitation. *See* COMAR 10.44.31.05.(C)(1)(j). These are

[3] The Board and appellant incorrectly cite to § 4-315(a)(31), dealing with displaying of a license. Section 4-315(a) (33) deals with failure to comply with a Board order.

[4] Detailing "aggravating or mitigating factors [the board may consider] in determining whether the sanction in a particular case should fall outside the range of the sanctioning guidelines." Md. Code Ann., Health Occ. § 4-318.

> the aggravating factors that the Board best fit this case. These aggravating factors trumped any of the possible mitigating factors.

Section 4-315 of the Maryland Code, Health Occupations, details the "[g]rounds for denial, suspension, or revocation of dentistry licenses." It states that "[s]ubject to the hearing provisions of § 4-318[5] of this subtitle, the Board may…revoke the license of any licensed dentist, if the applicant or licensee:…(33) fails to comply with any Board order."

COMAR 10.44.07.02.B.(11) defines a "consent agreement" as an "informal action taken by the Board consisting of a nonpublic document which has been negotiated and agreed to by both the licensee and the Board to resolve an administrative, nondisciplinary matter." By contrast, COMAR 10.44.07.02.B.(12) defines "consent order" as "a public document issued by the Board which is a final order of the Board that has been negotiated and agreed to by both the licensee and the Board to resolve a disciplinary matter." A "final order" is defined in 10.44.07.02.B.(16) as "a public document issued by the Board resolving a contested case either by consent or after an adjudication, which includes findings of fact, conclusions of law, and a disposition which:…(b) [s]anctions by reprimand, probation, civil penalty, or suspension or revocation of a license."

Appellant argues that, by definition, a consent agreement is not a Board order, and, therefore, the Board did not have the statutory authority to sanction Dr. Hyde under § 4-

[5] Section 4-318 mandates that "[e]xcept as otherwise provided in the Administrative Procedure Act, before the Board takes any action under § 4-315 of this subtitle, it shall give the individual against whom the action is contemplated an opportunity for a hearing before the Board," and lists the procedural requirements due each individual.

315. Appellee, conversely, argues that a consent agreement constitutes an order of the Board which can be enforced pursuant to § 4-315.

We first note that § 4-315 allows the Board to sanction licensees for a violation of *any* Board order, not simply final Board orders, as appellant contends. Further, while the title of the document signed by Dr. Hyde is labeled a 'consent agreement,' it does not conform to COMAR. The document in question was "nonpublic," but it was not an "informal action…to resolve an administrative, nondisciplinary matter." Just the opposite, the agreement entered into by the Board and Dr. Hyde was a formal agreement, and was clearly disciplinary in nature. It more accurately fits into the definition of a "consent order," as "a final order of the Board that has been negotiated and agreed to by both the licensee and the Board to resolve a disciplinary matter."

COMAR 10.44.07.02(B)(15) also defines a "disposition agreement" as "a formal nonpublic agreement entered into with an impaired licensee instead of [a] formal disciplinary action, in which the licensee agrees to comply with certain conditions." COMAR 10.44.31.02, provides "'[c]onditions' mea[n] requirements in a public or nonpublic order that a licensee or certificate holder must satisfy which include but are not limited to…b) [s]ubmission to drug and alcohol testing;. c) [a]bstinence from specified drugs[.]"

By definition then, COMAR contemplates the Board's ability to sanction violations of a "disposition agreement" for failure to adhere to the stipulated conditions. Otherwise, these agreements would be unenforceable and rendered useless.

Hyde's 2010 consent agreement states

> Failure to comply with any of the terms of this Agreement, including a positive drug screen will result in immediate suspension of Dr. Hyde's Maryland dental license without either prior notice or an opportunity to be heard, provided that he is afforded an opportunity for a show cause hearing before the Board at the next scheduled meeting of the board. After a notice and a hearing, and a determination of a violation, the Board may impose any other disciplinary sanctions it deems appropriate, including but not limited to revocation or suspension, said violation being provided by a preponderance of the evidence. A resulting order shall be public in nature with this agreement incorporated therein[.]

Dr. Hyde acknowledged, and agreed, that if he failed to comply with any of the conditions required of him, by either the Board or Well Being Committee, he could be subject to revocation of his license. By definition, Dr. Hyde was 'ordered' by the Board to comply with these requirements. *See* Black's Law Dictionary (10th ed. 2014) (defining "order" as a "command, direction, or instruction."). The Board, in sanctioning Dr. Hyde, was fully authorized to hold him accountable to his agreement. Otherwise, it would be a nullity.

We find, therefore, that under COMAR and § 4-315, the Board was authorized to revoke Dr. Hyde's license for violation of his consent agreement.

III. The Board's decision to revoke Dr. Hyde's license was supported by substantial evidence, and their decision to revoke his license, given the evidence presented, was not arbitrary or capricious.

Appellant argues the Board's findings of fact were ultimately not supported by substantial evidence and were arbitrary and capricious. Appellee, conversely, contends the Board's factual findings were reasonable, and that there was more than enough evidence to support them.

"To the extent that issues on appeal turn on the correctness of an agency's findings of fact, such findings must be reviewed under the substantial evidence test." *Maryland State Dep't of Educ. v. Shoop*, 119 Md. App. 181, 196 (1998) (citing *Dep't of Human Res. v. Thompson*, 103 Md. App. 175, 188 (1995) (internal citations omitted)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Shoop*, 119 Md. at 196 (internal citations omitted). "In other words, the question on appeal becomes whether a reasoning mind could reasonably have reached the agency's factual conclusion." *Id.* at 196-97 (internal citations omitted). We may not uphold the agency's decision "'unless it is sustainable on the agency's findings and for the reasons stated by the agency.'" *Id.* at 197 (citing *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 577 (1994) (internal citations omitted)).

As an initial matter, the Board, and both appellant and appellee, incorrectly state that the letter from Counseling Plus, Inc. states a positive test result. The Counseling Plus letter indicates that both the hair follicle test and urinalysis were negative. It further qualifies that the sample was conducted without the use of gloves and, therefore, they could not rule out the possibility of contamination. We find, nevertheless, that the Board's misstatement was harmless error. There was more than sufficient additional evidence, even without the Counseling Plus letter, on which the Board concluded that Dr. Hyde had violated the terms of his consent agreement, as we will address below.

Appellant first argues that the State's "limited evidence that Dr. Hyde had a positive drug screen" "was incompetent and should have been excluded." Specifically, he contends

that the State was required to present expert testimony to support the positive drug test reports under *Clarke v. State*, 97 Md. App. 425 (1993), in which we held that an expert witness was needed to present positive test results.[6] Appellee, conversely, argues that an expert was not required because Dr. Hyde had agreed to the testing, and, since appellant had "failed to provide the Board with the requisite reports to explain the test results," "the Board reasonably found Dr. Hyde's test results to be credible."

We hold that an expert was not necessary to establish the test results as positive in an administrative proceeding. In *Clarke*, we held that an expert was needed in a criminal trial in order to present the drug test results because the results indicated a "presumptive positive," and, therefore, an expert was needed to explain the meaning of that term. 97 Md. App. at 430 ("[A]ppellant sought to introduce the records, but offered no expert testimony to explain the meaning of the term 'presumptive positive,' or the actual results of the test."). *Clarke* is distinguishable for several reasons. First, the instant case is an administrative hearing, not a criminal trial. Moreover, the two reports provided in the instant case stated the test was "positive" next to "cocaine." No expert testimony was needed to understand that or the results. The certification by the United States Drug Testing Laboratories clearly states there was "[a] positive result reported."

[6] Appellant also relies on *Maryland State Bd. of Dental Examiners v. Tabb*, 199 Md. App. 352 (2011), for his assertion that an expert was needed to explain the test results. This Court, in *Tabb*, found only that an expert was needed in that case so as to not prejudice the appellant because "[w]ithout the opportunity to adduce testimony from her own experts and challenge the testimony of the prosecutor's expert witness, appellee was precluded from refuting the prosecutor's allegations," and, therefore, excluding her expert constituted a "prejudicial erro[r]." That is not applicable to the instant case.

The Court of Appeals has held that "administrative agencies are not bound to observe the 'technical common law rules of evidence,'" but "the evidence presented must be considered '*competent*.'" *Department of Public Safety & Correctional Services v. Scruggs*, 79 Md. App. 312, 321-22 (1989). Appellant argues that, without an expert, the drug test results were not proven to be sufficiently credible. He relies on *Scruggs*, in which we held that evidence of a polygraph examination was inadmissible because it was not proven to be sufficiently reliable.

Scruggs is also distinguishable. In *Scruggs* we noted that "[t]he Maryland judiciary's distrust of polygraph evidence is well documented." *Id.* at 320. "Because of their '*unreliability*,' Maryland courts exclude any evidence of polygraph tests." *Id.* (emphasis added). This is true, we found, with or without the testimony of an expert because "polygraphs fail to meet the standard required of scientific evidence in judicial proceedings; that before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as *reliable* within the expert's particular scientific field." *Id.* at 323 (internal citations omitted).

Hair follicle tests have not been found by Maryland courts as unreliable, nor do they suffer from the same mistrust as do polygraphs. It was not, therefore, unreasonable for the Board to have found the test results credible, and that an expert was not required to explain them.

Appellant, however, contests this, given his expert's testimony regarding hair follicle tests. Mr. Clifton West, a medical technologist, testified that he did not believe in

hair testing, because "as far as [he knew], because of the material itself, hair is not a good test – good thing to test for because of collection exposure and, you know, atmosphere, particles and all kinds of stuff." He stated that the FDA did not approve of hair follicle testing. Appellant argues it was unreasonable for the Board to have given Mr. West's testimony little weight. Appellee, conversely, argues the Board properly gave little weight to the testimony of Mr. West due to his unfamiliarity with hair follicle testing processes.

Mr. West testified several times that he was not familiar with hair follicle testing, did not know how the procedure worked, and had not practiced hair testing since 1999. Mr. West's concerns with hair testing, therefore, were provided only "as far as [he knew]."

When addressing the levels of cocaine found by the reports, Mr. West testified that the "30 nanograms" identified by the November 30, 2011 urinalysis report from Friends Medical Laboratory would have been "electronic noise" in his laboratory. He also testified, however, that those standards were determined individually by each manufacturer. He did not address whether 30 nanograms could or could not have been a positive set by any other manufacturer. The other report provided by Friends Medical Laboratory, showing a positive hair follicle test for cocaine at 500 mg, would have qualified for Mr. West's set "positive," but he made clear he didn't "care if it [came] out a hundred thousand," he wouldn't accept a hair follicle exam, despite the fact that "he didn't know exactly what the procedure with hair" was.

Additionally, Mr. West believed that Dr. Hyde was being targeted by the laboratories. When asked whether a test result proving positive for FPIA cocaine but

negative for EIA cocaine was "an indication of actual drug use," he responded that "it looks like the lab, and maybe the people who are ordering the test, [were] trying to get somebody because they did cocaine three times." He continued

> You know, I know a lot of clinics try to keep people in the clinic by keeping them with positive drugs. And in his case, this man has been in treatment for, I don't know, a year, two years, and he has some stuff like this here to hold him back. He might still need treatment, but I wouldn't say this man is a user definitely.

Upon questioning by the Board, he also admitted he knew Dr. Hyde personally. The Board found

> Mr. West's testimony was credible, but…did not find that there was any basis to discredit Dr. Hyde's drug test results. Mr. West provided little relevant testimony on Dr. Hyde's drug test results.
> For this reason, the Board gave little weight to his testimony.

"The opinion of an expert witness, the grounds on which it was formed and the weight to be accorded it are for the trier of facts." *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 724 (1977). It was therefore reasonable for the Board to give the weight it, as fact-finder, believed was appropriate.

Appellant further argues that the Board's "ignor[ing] factual evidence disputing the accuracy of the test results was unreasonable." He contends that for "two alleged positive hair follicle tests, there is evidence in the record that specifically suggests a risk of external contamination of the hair samples." He first points to the letter from Counseling Plus. However, as we have already addressed, that letter indicated a negative test result. He also indicates that the letter from United States Drug Laboratories, finding a "positive result…that is indicative of use or exposure of the drug" does not establish that Dr. Hyde

was using cocaine. Appellant additionally points to the fact that, around the time of these positive hair analyses, he did not have any positive urinalyses. The Well-Being Committee noted that "[a]ll other indicators are negative." He asserts his urinalysis at the Farley Center came back negative. However, they were unable to do a hair analysis. Appellee disagrees, and argues the Board's conclusion was reasonable given the entirety of the evidence presented.

"[A]ssessing the credibility of witnesses, resolving conflicts in the evidence, and determining the proper weight to assign to the facts in evidence are tasks within the province of the fact finder." *Blaker v. State Bd. of Chiropractic Exam'r*, 123 Md. App. 243, 259 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)). "[I]t is not [the] role [of the reviewing court] to reevaluate the evidence presented to the administrative agency or to make credibility determinations anew." *Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 547 (2011) (internal citations omitted).

Appellant additionally contends that the Board erred in relying "exclusively" on hearsay evidence that was not established as reliable. Appellant points to: a letter from Counseling Plus, Inc., stating that Dr. Hyde had a negative hair follicle test[7]; an email from a member of the Well-Being Committee, stating that Dr. Hyde had a positive hair follicle test; a lab report from Friends Medical Laboratory dated August 23, 2011, proving positive for cocaine; a certification from the United States Drug Testing Laboratories explaining

[7] The Board and appellant both misstated that the letter from Counseling Plus had indicated a positive drug test. That is incorrect, as addressed previously.

the results of a hair follicle test, proving positive for cocaine; a lab report from Friends Medical Laboratory dated November 30, 2011, proving positive for cocaine; and an email from a member of the Well-Being Committee stating that Dr. Hyde had a positive urinalysis.

As a general rule, hearsay testimony is admissible in an administrative proceeding. *See Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 411-12 (1997). As appellant notes, however, both the Court of Appeals and this Court have said that "to be admissible in an adjudicative proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id.* at 411. "[I]f found to be credible and probative, [hearsay statements] may form the sole basis for the agency's decision." *Id.* at 412.

Having already addressed the Counseling Plus letter, we shall address the other five items appellant takes issue with. The statements appellant complains of come from three general sources: the Well Being Committee, or one of two laboratories used by the Well-Being Committee. Nevertheless, appellant argues that, given his expert's testimony, the Board erred in finding these statements credible.

The Board's reliance on the identified documents, however, was not in error. The Board reasonably gave little weight to the testimony of appellant's expert. The Board, further, did not err in accepting the emails from members of the Well Being Committee, to the Board, as credible. The Board and Well Being Committee have a long-standing relationship, and the Board is well acquainted with the credibility of the Committee. The

Well-Being Committee was in charge of Dr. Hyde's drug testing, and as such worked closely with the Board regarding Dr. Hyde, including informing the Board of any positive test results. Moreover, the emails in question were sent directly to the Board, and were accompanied by either a copy of the report or a certificate of laboratory analysis. It was not, therefore, unreasonable for the Board to have accepted their credibility.

As to the reports from Friends Medical Laboratory and the United States Drug Testing Laboratories, these facilities are approved, and recommended for drug testing, by the Well Being Committee. Given their relationship with the Well Being Committee, and the fact that they entrust the Committee with handling the drug testing of dentists, like Dr. Hyde, who have entered into an agreement with the Board, it was not unreasonable for the Board to have accepted these reports as credible. Even if, *arguendo*, we ignored the two reports of positive hair follicle tests, neither appellant nor his expert established why the positive urinalysis would not be credible.

Moreover, the Board did not rely "exclusively" on the above reports. After detailing Dr. Hyde's history with the Board, they found: that Dr. Hyde had submitted a hair sample for testing at a non-approved facility, in violation of his agreement with the Well Being Committee; that he had failed to submit quarterly reports on his progress; had failed to assure that his employer was sending quarterly reports; and had failed to submit all quarterly hair analyses. All of the above violations were corroborated by the testimony of Ms. Oliver, Dr. Hyde's case manager. She stated:

> [The State]: Can you tell me how many times Dr. Hyde failed to provide a quarterly report?

> [Ms. Oliver]: Dr. Hyde failed to provide reports by the due dates on eight different occasions.
>
> [The State]: All right. And how many times did his employer fail to provide a quarterly report?
>
> [Ms. Oliver]: His employer failed to provide reports by the due dates on four different occasions.
>
> [The State]: And how many occasions did Dr. Hyde test positive for cocaine?
>
> [Ms. Oliver]: He tested positive on three different occasions.

There were a total of twelve violations regarding quarterly reports and a urinalysis report from Friends Medical Laboratory on November 30, 2011. Given the above, a reasonable mind could have reached the same conclusion as the Board, that Dr. Hyde had violated the consent agreement.

Appellant also argues that not presenting witnesses from the laboratories violated his right to cross-examine the witnesses. He, however, argued this for the first time before the circuit court. While he objected to the emails from the Well Being Committee as hearsay, he did not object to the introduction of the lab reports, nor to his inability to cross-examine the laboratory technicians involved. We note that this was not a criminal proceeding which implicated Dr. Hyde's Sixth Amendment right, and we have already established it was reasonable for the Board to conclude the reports were credible.[8] The issue is unpreserved, however, and we will not further address it.

[8] Appellant cites *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721 (1989), for the proposition that the State was required to present the technicians. *Kade* held that hearsay

Appellant, additionally, contends that the Board's decision was arbitrary and capricious because it applied the incorrect standard in determining a violation of the agreement, and that revocation of his license for failure to assure he and his employer sent quarterly reports was "in disregard of facts or law" and "unreasoning." He argues that by finding that Dr. Hyde "was found to have cocaine in his system," the Board "sidestepped the very issue it was to decide – whether Dr. Hyde in fact had a positive drug screen." We disagree. The Board, in its findings of fact, stated:

> 27. On or about August 30, 2011, the Board received notification of a **second positive drug screen**….
>
> …
>
> 30. On or about November 30, 2011, the board received notification of a November 16, 2011 **positive drug screen**…

As such, the Board was not "sidestep[ing] the very issue" nor was it arbitrary and capricious.

Appellant also argues that, without the positive drug screens, it was arbitrary and capricious for the Board to have revoked his license for failure to submit the quarterly reports. Appellee, conversely, maintains it was reasonable given the entirety of the record. We agree with appellee.

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evidence was admissible, even without opportunity to cross-examine, when the statements were otherwise deemed credible. He also cited *Tron v. Prince George's County*, 69 Md. App. 256 (1986), for the same proposition. In *Tron*, the appellant objected to the introduction of testimony given his inability to cross-examine the witnesses. That was not the case here.

"[T]he limitation upon the judicial review authority of courts, with regard to a lawful and authorized sanction[s], imposed by an Executive Branch administrative agency, applies broadly." *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 577 (2005). "[A]s long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts." *Maryland State Police v. Zeigler,* 330 Md. 540, 557–58 (1993). "It is only when an agency's exercise of discretion, in an adjudicatory proceeding, is 'arbitrary' or 'capricious' that courts are authorized to intervene." *Id.* "The arbitrary or capricious standard…sets a high bar for judicial intervention, meaning the agency action must be 'extreme and egregious' to warrant judicial reversal under that standard." *Bd. of Physician Quality Assurance v. Mullan,* 381 Md. 157, 171 (2004) (internal citations omitted). "A reviewing court is not authorized to overturn a lawful and authorized sanction unless the 'disproportionality [of the sanction] or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be 'arbitrary or capricious.'" *Noland*, 386 Md. at 581 (internal citations omitted).

The Board found that, including the positive drug tests, "[t]hree aspects" of the consent agreement were violated. "The second aspect required that his employer write quarterly reports regarding Dr. Hyde." "Only four reports were produced in a span of over two years." "After being contacted by the Board through certified mail, Dr. Hyde wrote two reports." "Dr. Hyde has an extensive disciplinary history with the Board and his failure to abide by the terms of the order has the potential to cause serious patient harm." "Dr.

Hyde has previously been unsuccessful in his attempts at rehabilitation." "These aggravating factors trumped any of the possible mitigating factors." The Board ultimately concluded that "Dr. Hyde's license should be revoked for failing to abide by the terms of his consent [agreement]."

Dr. Hyde's agreement states "[f]ailure to comply with *any* of the terms of this Agreement, including a positive drug screen[,] will result in immediate suspension of Dr. Hyde's Maryland dental license." "After a notice and a hearing, and a determination of a violation, the Board may impose *any* other disciplinary sanctions it deems appropriate, *including but not limited to revocation* or suspension, said violation being provided by a preponderance of the evidence." As we see it, the Board's action was not "disproportionate" or "extreme and egregious." Their decision was fully in accordance with the substantial evidence and was not an erroneous conclusion of law.

JUDGMENT OF THE MARYLAND STATE BOARD OF DENTAL EXAMINERS AFFIRMED. JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. COSTS TO BE PAID BY APPELLANT.