Circuit Court for Washington County
Case No. C-21-CV-22-000309

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 480

September Term, 2023

IN THE MATTER OF LUCKRICIA OLIVACCE

Ripken,
Albright,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.
Dissenting Opinion by Ripken, J.

Filed: August 2, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises from an investigation conducted by the Maryland State Board of Physicians ("the Board") of a complaint filed against Luckricia Olivacce, PA-C, a certified physician assistant, alleging that she overprescribed opioid medication. As part of its investigation, the Board issued a subpoena *duces tecum* to Ms. Olivacce, directing her to produce certain patient files. In ostensible compliance with the subpoena, Ms. Olivacce submitted over 2,000 pages of responsive records. Following a peer review of those pages, the Board charged Ms. Olivacce, under the Maryland Physician Assistants Act, Maryland Code (1981, 2021 Repl. Vol.), §§ 15-101 *et seq.* of the Health Occupations Article ("Health Occ."), with violating the appropriate standards for the delivery of medical care and failing to keep adequate medical records. After learning of the charges, Ms. Olivacce produced over 1,000 pages of additional records that had been omitted from her initial submission. The Board subsequently amended the charges to include failure to cooperate with a lawful investigation conducted by it or a disciplinary panel.

Following an administrative hearing, the Board reprimanded and fined Ms. Olivacce for failing to cooperate with the investigation and dismissed the remaining charges. On judicial review, the Circuit Court for Washington County reversed the failure-to-cooperate sanctions. The Board filed a timely appeal from that judgment and presents the following question for our review:

> Does substantial evidence support the Board's finding that Ms. Olivacce failed to cooperate with the Board's lawful investigation when she failed to make a careful, reasonable effort to review the documents and failed to produce a significant volume of medical records required to be produced in response to a Board subpoena?

For the reasons that follow, we will reverse the judgment of the circuit court.

BACKGROUND

On or around September 10, 2018, the Board received a written complaint against Ms. Olivacce, who was then employed by the National Spine and Pain Center ("NSPC") as a pain management physician assistant. The complaint alleged that Ms. Olivacce had overprescribed oxycodone and morphine to a particular patient. In a letter dated November 29, 2018, Troy Garland, a compliance officer with the Board, advised Ms. Olivacce as follows: "[T]he Board is in receipt of a complaint alleging your prescribing of [sic] controlled dangerous substance (CDS) contributed to a patient's death. Based on this information, the Board has initiated a full investigation." Mr. Garland's letter was accompanied by a subpoena *duces tecum* directing Ms. Olivacce to "produce . . . **a <u>COMPLETE COPY</u> of any and all medical records**" for ten of her patients—including the individual identified in the complaint. (Emphasis retained.) The subpoena further required that "[s]uch documents or objects . . . be delivered [to Mr. Garland] within **<u>ten (10) business days</u>** from the date of this subpoena[.]" (Emphasis retained.) The subpoena also warned Ms. Olivacce of the potential consequences for failing to comply:

> *For failure to comply with this subpoena*, on petition of the Board, a court of competent jurisdiction may punish the person for contempt of court, Health Occ. 14-206(b), and *a disciplinary panel of the Board may charge the person with failure to cooperate with a lawful investigation conducted by the Board*, Health Occ. § 15-314(a)(33).

(Emphasis added.)

At the administrative hearing, Alicia Keels, NSPC's Regional Director of Operations, described the organization's standard procedure for responding to Board-issued subpoenas for medical records. Ms. Keels testified that such subpoenas are initially received by NSPC's inside counsel before being forwarded to the "center manager," who, in turn, would retrieve the requested records from NSPC's electronic medical record system ("EMRS"). According to Ms. Keels, health care providers such as Ms. Olivacce never participate in the administrative process of "actual[ly] pulling . . . the records" from the EMRS.[1]

After Ms. Olivacce received the subpoena, Amy Dillcher, NSPC's vice president and general counsel, requested and obtained a ten-day extension on her behalf. In advance of the revised deadline, NSPC sent Ms. Olivacce's personal attorney medical records for the ten patients named in the subpoena. Ms. Olivacce "did not go through every single paper[,]" but she "browsed through" the records and, based on that review, concluded that she "was looking at a complete file of those records."

On December 21, 2018, Ms. Olivacce, through counsel, submitted to the Board over 2,000 pages of responsive medical records, as well as several signed certifications stating:

> I[,] Luckricia Olivacce, PA-C[,] do hereby certify and solemnly affirm under the penalties of perjury, that to the best of my knowledge, information and belief, the enclosed medical records in response to the attached subpoena are an accurate reproduction of any and all records in my possession or constructive possession and are in compliance with the attached subpoena.

[1] Ms. Olivacce averred that she did not even "know . . . how to get the EMR[S] records on [her] own[.]"

> I have personally reviewed the entire medical record and further certify to the best of my knowledge, information and belief, that I have provided the Maryland Board of Physicians (Board) with the **COMPLETE MEDICAL RECORDS** which include all records pertaining to the care and treatment of the patient [PATIENT NAME] in my possession or constructive possession and control, including all materials generated by me, or other health care providers, all laboratory reports, all jacket entries and all other entries as kept in the regular course of business for each patient in my medical practice.
>
> I understand that my failure to provide the complete medical records to the Board may constitute failure to cooperate with the Board's lawful investigation and may result in disciplinary action by the Board under the Maryland Medical Practice Act.

(Emphasis retained.)

During its investigation, the Board submitted the medical records it received from Ms. Olivacce to Monica Thomas, PA-C, who is also a certified physician assistant specializing in pain management, for peer review. Based upon her examination of those records, Ms. Thomas drafted a detailed, twenty-seven-page report. In that report, dated July 5, 2019, Ms. Thomas concluded that Ms. Olivacce had not met the appropriate standards of care in six of the ten cases and had failed to maintain adequate medical records in seven.[2] Among the apparent inadequacies in Ms. Olivacce's medical recordkeeping, Ms. Thomas noted that seven of her patient charts did not contain signed controlled substance

[2] According to Ms. Thomas, she spent "at least two weeks" reviewing Ms. Olivacce's patient records. She testified that she "pretty much devoted [her] entire [first] week" to reviewing the records, "and then the second week was every night[.]"

agreements.[3] The Board adopted Ms. Thomas's report and, on January 16, 2020, charged Ms. Olivacce with failing to meet appropriate standards for the delivery of quality medical care, in violation of Health Occ. § 15-314(a)(22), and failing to keep adequate medical records, in violation of Health Occ. § 15-314(a)(40).

The peer review report and notification of charges led Ms. Olivacce to suspect that her submission to the Board was incomplete. She conveyed that concern to counsel, who later advised her that he had "engaged with people at [NSPC] . . . to try to have an audit done of the entire record to see if there were records missing." As a result, counsel obtained 1,182 pages of additional medical records from NSPC, which included both the previously omitted controlled substance agreements and missing "SOAPP test results[.]"[4] On April 29, 2020, counsel forwarded those records to the Board. In the accompanying letter, he explained the belated submission:

> [W]ith the filing of the Board charges, it became apparent that the original production of records by [NSPC] did not include the entire . . . record for each of the patients . . . . For example, the Board reviewer stated that the NSPC record[s] referenced but did not include numerous documents, including opioid agreements . . . . As a result of conferences with NSPC administrative and IT staff, it became apparent that the original or initial record production to the Board did not contain all of the documents or data in the EMR[S] . . . at NSPC for the patients at issue. As the Board is probably aware, the data contained within an EMR[S] sometimes requires a more sophisticated interrogation to obtain all of the data or information on a

[3] As described therein, the purpose of such agreements is "to set forth the parameters that will govern the physician-patient relationship concerning narcotics, alcohol, and other potentially mind-altering substances."

[4] "SOAPP" is an acronym for "Screener and Opioid Assessment for Patient with Pain[,]" "an empirically tested measure" that "represents an assessment of [the] risk of prescription opiate abuse by a pain patient."

> particular patient. What apparently occurred in this case is that through the software for the NSPC EMR[S] there is a basic print mechanism in the EMR[S] that was utilized to produce the records to the Board initially. It has been determined that this basic print mechanism does not generate the entire record.

Ms. Keels's later testimony tended to corroborate counsel's account. According to Ms. Keels, in early 2019 (after Ms. Olivacce had received hard copies of the subpoenaed records from NSPC, but before her attorney requested an audit), NSPC learned of a problem with the EMRS. She further explained that when a user "click[ed] the [']all['] button" in attempting to print an entire patient file, the EMRS only printed the office notes, but not any of the attachments.[5]

When the Board received the newly produced documents, it forwarded them to Ms. Thomas, who, after another two-week-long review of the records, filed an amended report on or around July 14, 2020. In the amended report, Ms. Thomas retracted five of her seven initial findings that Ms. Olivacce had failed to maintain adequate medical records. As a result, the Board amended the charges against Ms. Olivacce on August 31, 2020. The amendment included an allegation that she had failed to cooperate with a lawful Board investigation in violation of Health Occ. § 15-314(a)(33).

Following a five-day hearing, the presiding administrative law judge ("ALJ") issued a proposed decision on September 2, 2021, recommending that the Board dismiss all charges against Ms. Olivacce. The State filed exceptions to that recommendation, and the

[5] Ms. Keels explained that "attachments" refer to "[a]nything . . . other than the office visit notes[,]" including radiology reports and "any documents that the patient brought in or were sent over by their previous provider that we scan into the system."

Board held a hearing on those exceptions. Although it otherwise adopted the ALJ's proposed decisions, the Board rejected the recommended dismissal of the failure-to-cooperate charge.

In the Final Decision and Order, the Board found "it inconceivable that Ms. Olivacce carefully reviewed the records but failed to notice that key elements that are integral parts of pain prescribing such as physical examinations, checking the [Prescription Drug Monitoring Program,] and opioid use agreements were missing." It concluded that her "failure to review her records in sufficient detail to notice these significant omissions constitute[d] a failure to cooperate" in violation of Health Occ. § 15-314(a)(33). Accordingly, the Board issued a public reprimand and imposed a fine of $2,500.

Ms. Olivacce sought judicial review of the Board's decision in the circuit court pursuant to Health Occ. § 15-315(b).[6] Following a hearing, the circuit court entered an order reversing the failure-to-cooperate sanctions.[7] The Board appealed from that judgment.

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[6] Health Occ. § 15-315(b) provides:

> (b) *Appeals*. — (1) Any licensee who is aggrieved by a final decision of the Board or a disciplinary panel under this subtitle may take a direct judicial appeal.
>
> (2) The appeal shall be as provided for judicial review of the final decision in Title 10, Subtitle 2 of the State Government Article.

[7] In so doing, the court determined that "there was insufficient evidence in this record from which the Board could have concluded that [Ms. Olivacce]'s review of the medical records as they were presented to her was inadequate." In context, and although (continued…)

STANDARD OF REVIEW

"The Maryland Board of Physicians is an adjudicative administrative body in the Executive Branch of the Maryland state government[.]" *Burke v. Md. Bd. of Physicians*, 250 Md. App. 334, 343, *cert. denied*, 475 Md. 705 (2021). As such, "'its decisions are subject to the same standards of judicial review as adjudicatory decisions of other administrative agencies.'" *Id.* (quoting *NIHC, Inc. v. Comptroller of Treasury*, 439 Md. 668, 683 (2014)).

"In an appeal arising from judicial review of an agency's decision, we review the agency's decision directly, not the decision of the circuit court[.]" *In re Smart Energy Holdings, LLC*, 486 Md. 502, 547 (2024). In other words, when reviewing the final decision of an administrative agency, we "'look[] through the circuit court's . . . decisions, although applying the same standards of review, and evaluate[] the decision of the agency.'" *Montgomery Park, LLC v. Md. Dep't of Gen. Servs.*, 482 Md. 706, 724 (2023) (quoting *Anne Arundel Cnty. v. 808 Bestgate Realty, LLC*, 479 Md. 404, 419 (2022)).

When reviewing an administrative decision, appellate courts are "restricted to the record made before the administrative agency[.]" *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001). Accordingly, we can neither "pass upon issues presented . . . for the first time on judicial review[,]" *id.*, nor "uphold or reverse the decision of the Board on any grounds 'other than the findings and reasons set forth by the [Board].'"

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the court used the phrase "arbitrary and capricious," we understand the court's reversal to rest on its determination that there was no sanctionable conduct.

Burke, 250 Md. App. at 344 (quoting *Gore Enter. Holdings, Inc. v. Comptroller of Treasury*, 437 Md. 492, 503 (2014)). *See also Green v. Church of Jesus Christ of Latter-Day Saints*, 430 Md. 119, 132 (2013) ("'[W]e may not uphold the final decision of an administrative agency on grounds other than the findings and reasons set forth by the agency.'" (quoting *Frey v. Comptroller of Treasury*, 422 Md. 111, 137 (2011))).

"A court's role in reviewing an administrative agency adjudicatory decision . . . 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. Usan*, 486 Md. 352, 363 (2024) (quotation marks and citation omitted). The Supreme Court of Maryland has consistently defined "substantial evidence" as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Mayor & City Council of Baltimore v. Proven Mgmt., Inc.*, 472 Md. 642, 667 (2021) (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512 (1978)).

In applying the substantial evidence test to an agency's findings of fact, "we ask, after reviewing the evidence in a light most favorable to the administrative agency, 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115, 128 (2008) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68 (1999)). When reviewing such factual findings, moreover, "[w]e defer to the agency's (i) assessment of witness credibility, (ii) resolution of conflicting evidence, and (iii) inferences drawn from

the evidence." *Richardson v. Md. Dep't of Health*, 247 Md. App. 563, 570 (2020), *cert. denied*, 472 Md. 17 (2021). *See also Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 211 ("'[N]ot only is [it] the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.'" (quoting *Pollock v. Patuxent Inst. Bd. of Rev.*, 374 Md. 463, 477 (2003))), *cert. denied*, 460 Md. 21 (2018).

We review the agency's decisions on matters of law *de novo*, but we "ordinarily give considerable weight to the administrative agency's interpretation and application of the statute that the agency administers." *Finucan v. Md. Bd. of Physician Quality Assurance*, 380 Md. 577, 590 (2004). *See also Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005) ("We frequently give weight to an agency's experience in interpretation of a statute that it administers[.]"); *Mesbahi v. Md. State Bd. of Physicians*, 201 Md. App. 315, 334-35 (2011) ("Although we review questions of law de novo, we give considerable weight to the Board's interpretation of its own statute, and we generally will not disturb the Board's ruling as long as its interpretation of the statute is reasonable."). It is, however, "always within our prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong." *Schwartz*, 385 Md. at 554.

When the questions under review are mixed questions of law and fact, we again apply the substantial evidence test. *See, e.g.*, *Crawford v. Cnty. Council of Prince George's Cnty.*, 482 Md. 680, 695 (2023). Mixed questions "arise when an agency has correctly stated the law, its fact-finding is supported by the record, and the remaining question is

whether the agency has correctly *applied* the law to the facts." *Id.* (emphasis retained). To such questions, "our task is merely to evaluate whether the evidence before the agency was fairly debatable." *Id.* (cleaned up).

DISCUSSION

The Board contends that the circuit court erred by reversing the sanctions against Ms. Olivacce, claiming that the record contains substantial evidence to support its conclusion that her "failure to comply with the Board's subpoena constitute[d] a failure to cooperate." To support that contention, it argues that "the quantity and significance of the missing records[,]" coupled with Ms. Olivacce's admission "that she merely 'browsed through' the records[,]" demonstrated a "careless and cursory" review.

Ms. Olivacce responds that the Board "appl[ied] the wrong legal standard for 'failure to cooperate' charges under [Health Occ.] § 15-314(a)(33)[.]" (Capitalization omitted.) She rejects the Board's premise that "'failure to comply with [its] subpoena constitutes failure to cooperate[,]'" arguing that "[s]uch a [d]raconian [strict liability] standard . . . would empower the Board to sanction a medical provider [who,] in good faith, . . . 'missed' a single page in response to a subpoena[.]"

Because the parties' respective positions rest, at least in part, on divergent interpretations of "cooperate" in Health Occ. § 15-314(a), we begin our review with the plain language of that subsection. *See Blackstone v. Sharma*, 461 Md. 87, 113 (2018) ("When conducting a statutory construction analysis, we begin with the plain language of

the statute[.]" (quotation marks and citations omitted)). Health Occ. § 15-314(a) provides, in pertinent part:

> (a) *Grounds*. — Subject to the hearing provisions of § 15-315 of this subtitle, a disciplinary panel, on the affirmative vote of a majority of the quorum, may reprimand any physician assistant, place any physician assistant on probation, or suspend or revoke a license if the physician assistant:
>
> * * *
>
> (33) Fails to cooperate with a lawful investigation conducted by the Board or a disciplinary panel[.][8]

As neither Health Occ. § 15-314 nor any other section of the Health Occupations Article appears to define the term "cooperate," our starting point "[t]o ascertain the natural and ordinary meaning of the term" is the dictionary. *Bottini v. Dep't of Fin.*, 450 Md. 177, 195 (2016). *See also State v. Wilson*, 471 Md. 136, 160 (2020) ("[W]here a term is not defined by statute, we may refer to the dictionary and give the words their ordinary meaning."); *Couret-Rios v. Fire & Police Emps. Ret. Sys. of City of Baltimore*, 468 Md. 508, 530 n.8

[8] Health Occ. § 15-101(i-1) defines "[d]isciplinary panel" as "a disciplinary panel of the Board established under § 14-401 of this title." Health Occ. § 14-401(a), in turn, establishes "two disciplinary panels through which allegations of grounds for disciplinary action against . . . an allied health professional"—including physician assistants—"shall be resolved." *Compare* Health Occ. § 14-101(a)(1) ("'Allied health professional' means an individual licensed by the Board under . . . Title 15 of this article."), *with* Health Occ. § 15-101(o) ("'Physician assistant' means an individual who is licensed under this title to practice medicine with physician supervision."). The chair of the Board is required to assign each Board member to one of the two disciplinary panel, Health Occ. § 14-401(a), such that each panel "consist[s] of 11 Board members." Health Occ. § 14-401(b). While there are certainly reasons for distinguishing between the Board and disciplinary panels in some cases, none of them are applicable in this case. For the sake of simplicity, therefore, we will use "the Board" to refer to either or both bodies.

(2020) ("[D]ictionaries . . . provide a useful starting point for determining what statutory terms mean, at least in the abstract, by suggesting what the legislature could have meant by using particular terms." (quotation marks and citation omitted)).

The Oxford English Dictionary definesthe intransitive verb "cooperate," in pertinent part, as follows: "Of a person: to work with another or others towards the same end, purpose, or effect; to collaborate. Also (esp. in later use): to assist, help, or comply, esp. with an authority, order, request, etc." *Cooperate*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/cooperate_v?tab=meaning_and_use#8321359 (last visited July 1, 2024). *See also Cooperate*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2022), https://www.ahdictionary.com/word/search.html?q =Cooperate (last visited July 1, 2024) (defining "cooperate," *inter alia*, as either "[t]o work or act together toward a common end or purpose" or "[t]o acquiesce willingly; be compliant").

Relying on the second shade of meaning, the Board views "cooperate" in this context as synonymous with "comply," such that "failure to comply with a subpoena by failing to produce all the records requested constitutes a failure to cooperate." Ms. Olivacce, in turn, claims that, because the "overriding focus" of the word's definition "is working with others, a team, or to join together to do something[,]" "cooperate" in Health Occ. § 15-314(a)(33) refers to "a collaborative team process of acting or responding." As she sees it, Ms. Olivacce cooperated with the Board's investigation by working with her attorney and NSPC personnel in a "team cooperative effort" to respond to the subpoena.

As is clear from the above-quoted definitions, while "cooperate" could imply active and voluntary collaboration with others in pursuit of a common goal, it may also suggest more passive and obligatory compliance, as with a request, requirement, or directive. Which meaning applies depends, of course, upon the context in which the verb is used. Here, only the compliance aspect squares with the hierarchical dynamic inherent in the Board-conducted investigations to which Health Occ. § 15-314(a)(33) relates.

The General Assembly has vested the Board—and by extension disciplinary panels—with broad authority both "to take disciplinary action against health care providers" and "to investigate allegations of conduct warranting disciplinary action[.]" *Md. State Bd. of Physicians v. Eist*, 417 Md. 545, 562 (2011). *See also* Health Occ. § 15-205(c)(3)(ii) ("The Board may . . . [i]nvestigate any conduct that may be cause for disciplinary action under this title."); *Solomon v. Bd. of Physician Quality Assurance*, 132 Md. App. 447, 453 ("There is no dispute that the Board has a right to investigate an alleged violation of the Act upon the receipt of a written complaint[.]"), *cert. denied*, 360 Md. 275 (2000). Incidental to its authority to conduct such investigations, the Board possesses the power to subpoena medical records in furtherance thereof. *See* Health Occ. § 14-206(a) ("[T]he Board may issue subpoenas and administer oaths in connection with . . . any hearings or proceedings before it."). *See also Solomon*, 132 Md. App. at 454 ("Nor is there any dispute that the Board has the authority to issue subpoenas in furtherance of an investigation."). When issued a subpoena for medical records by a health professional licensing board or disciplinary panel for purposes of a disciplinary investigation, moreover,

health care providers are statutorily required to *comply* therewith. *See* Md. Code (1982, 2023 Repl. Vol.), § 4-306(b) of the Health-General Article ("HG").[9] *See also Eist*, 417 Md. at 564 ("[W]hen the Board is investigating a complaint against a health care provider and subpoenas certain medical records in his or her possession, the health care provider is required to provide the medical records to the Board[.]").

The plain language of the phrase "to cooperate with a[n] . . . investigation conducted by the Board" implies "cooperating" with the Board, itself, as such an investigation is performed under its authority and direction.[10] As the Board is statutorily assigned the active and authoritative role in undertaking such an investigation, it follows that the person

[9] HG § 4-306(b) provides, in pertinent part:

> (b) A health care provider shall disclose a medical record without the authorization of a person in interest:
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> *   *   *
>
> (2) . . . to health professional licensing and disciplinary boards, in accordance with a subpoena for medical records for the sole purpose of an investigation regarding:
>
> (i) Licensure, certification, or discipline of a health professional[.]

[10] The participial clause "conducted by the Board" modifies the preceding noun "investigation" by limiting the investigations with which physician assistants must "cooperate" to those directed, managed, and performed by the Board. *See Conduct*, MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/conduct (last visited July 1, 2024) (defining the transitive verb "conduct" in the phrase "*conduct* an investigation" as "to direct or take part in the operation or management of"); *Conduct*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/conduct_v?tab=meaning_and_use#8699354 (last visited July 1, 2024) (defining "conduct," in pertinent part, as "[t]o direct, manage, carry on (a transaction, process, business, institution, legal case, etc.)").

subject to such an investigation occupies a subordinate role in it. Thus, we agree with the Board that the term "cooperate," as used in Health Occ. § 15-314, entails reasonable best efforts and compliance with express directives of the Board and does not simply denote collaborating with others. *See Eist*, 417 Md. at 562-64 (holding that the respondent's refusal to timely comply with a Board-issued subpoena *duces tecum* constituted a failure to cooperate with an investigation conducted by the Board).

In further support of her interpretation of the term "cooperate," Ms. Olivacce contends that any proper "legal standard to determine if a provider 'failed to cooperate' includes [his or her] intent[.]" In other words, she argues the imposition of sanctions under Health Occ. § 15-314(a)(33) requires a finding of the provider's intentional failure to cooperate with the Board's investigation by refusing, for example, (i) "to produce records," (ii) "to participate in a Board interview," or (iii) "to attend an administrative hearing or trial."

The Board responds that "intent is not an element of a failure to cooperate[,]" and if it were, Health Occ. § 15-314(a)(33) would expressly so provide. In support of this position, the Board directs us to other paragraphs of § 15-314(a), which expressly require that sanctionable conduct be "willful," as well as Health Occ. § 4-315(a)(34), which authorizes the Board to sanction a licensed dentist who "*[w]illfully and without legal justification*, fails to cooperate with a lawful investigation conducted by the Board[.]" (Emphasis added.) Based on such provisions, the Board is essentially asserting that if the General Assembly had intended for "fails" to be interpreted as "refuses," it would have

either used the latter term (*i.e.*, "*refuses* to cooperate with an investigation . . . ") or prefaced the former with the word "willful" (*i.e.*, "*willfully* fails to comply with an investigation . . . ").

To be sure, some grounds for discipline set out in Health Occ. § 15-314(a) do expressly require an act or omission (*i.e.*, *actus reus*) with an accompanying culpable mental state (*i.e.*, *mens rea*). Some set forth a specific intent element. *See, e.g.*, Health Occ. § 15-314(a)(10) (authorizing the imposition of sanctions against a physician assistant who "[p]romotes the sale of drugs, devices, appliances, or goods to a patient *so as to exploit the patient for financial gain*" (emphasis added)). Others require that a physician assistant act (or fail to act) either "knowingly" or "willfully." For example, and as is particularly pertinent here, § 15-314(a) permits a disciplinary panel to sanction a physician assistant who:

> (12) *Willfully fails* to file or record any medical report as required under law, willfully impedes or obstructs the filing or recording of the report, or induces another to fail to file or record the report;
>
> * * *
>
> (25) *Knowingly fails* to report suspected child abuse in violation of § 5-704 of the Family Law Article[.][11]

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[11] Health Occ. § 15-314(a) also authorizes a disciplinary panel to impose sanctions if a physician assistant:

> (11) *Willfully* makes or files a false report or record in the practice of medicine;

(continued…)

Health Occ. § 15-314(a) (emphasis added). As is evident from its use of "willfully" and "knowingly" in these paragraphs, the General Assembly knows how to limit the Board's sanctions only to intentional or deliberate failures to act. *See Kim v. Md. State Bd. of Physicians*, 423 Md. 523, 546 (2011) (holding that '"[w]illful,' for purposes of [Health Occ.] § 14-404, requires proof that the conduct at issue was done intentionally"). That the General Assembly used such language in reference to failures to act elsewhere within the same subsection but did not do so in § 15-314(a)(33) supports, by negative implication, that the latter omission was intentional. *See Miller v. Miller*, 142 Md. App. 239, 251 (explaining that under the "negative implication" canon of statutory construction, "when Congress included particular language in one section of a statute, but omitted it in another section of the same act, it could be presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion"), *aff'd sub nom. Goldberg v. Miller*, 371 Md. 591 (2002); *In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 565 (2015)

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* * *

> (17) Makes a *willful* misrepresentation in treatment;
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> * * *
>
> (23) *Willfully* submits false statements to collect fees for which services are not provided;
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> * * *
>
> (36) *Willfully* makes a false representation when seeking or making application for licensure or any other application related to the practice of medicine[.]

("Because [Family Law Article] § 5-324(b)(1)(ii) includes language in subsubparagraphs (2) and (3) limiting the juvenile court's order to [the Department of Social Services], but does not contain such language in subsubparagraph (7), such an omission is presumed to be intentional.").

We find further support for this interpretation of Health Occ. § 15-314(a)(33) when we consider the provision in the historical context of related enactments addressing similar subject matters and employing identical language. Health Occ. § 15-314 is among thirty sections in the Health Occupations Article that authorize a health occupations board to sanction the professionals whom it regulates for failing to cooperate with its investigations.[12] Of those provisions, only two include an explicit *mens rea* element. Specifically, Health Occ. §§ 4-315 and 13-316 authorize the imposition of sanctions against dentists and physical therapists, respectively, who "[w]illfully and without legal

[12] *See* Health Occ. §§ 1A-309(15) (acupuncturists); 2-4A-14(18) (musical therapists); 4-315(a)(34) (dentists); 5-311(18) (licensed dietician-nutritionists); 6-308(a)(19) (massage therapists); 8-316(a)(20) (nurses); 8-6A-10(a)(24) (nursing assistants and medical technicians); 8-6B-18(a)(27) (electrologists); 8-6C-20(a)(18) (direct-entry midwives); 8-6D-10(a)(18) (licensed certified midwives); 9-3A-12(b)(13) (assisted living managers); 12-313(b)(29) (pharmacists); 12-6B-09(29) (registered pharmacy technicians); 12-6D-11(22) (registered pharmacy interns); 13-316(24) (physical therapists); 14-404(a)(33) (physicians); 14-5A-17(a)(26) (respiratory care practitioners); 14-5B-14(a)(26) (nuclear medicine technologists, radiation therapists, radiographers, and radiologist assistants); 14-5C-17(a)(27) (polysomnographic technologists); 14-5D-14(a)(26) (athletic trainers); 14-5E-16(a)(27) (perfusionists); 14-5F-18(a)(24) (naturopathic doctors); 14-5G-18(a)(27) (genetic counselors); 15-314(a)(33) (physician assistants); 16-311(a)(27) (podiatrists); 17-509(18) (professional counselors and therapists); 17-6A-19(18) (behavior analysts); 18-313(19) (psychologists); 19-311(16) (social workers); 21-312(b)(16) (environmental health specialists).

justification, fail[] to cooperate with a lawful investigation conducted by the Board[.]" Health Occ. §§ 4-315(a)(34) and 13-316(24) (emphasis added). The twenty-eight others do not.

In 1993, the General Assembly amended Health Occ. § 8-316 to prohibit nurses from "[f]ail[ing] to cooperate with a lawful investigation conducted by the Board [of Nursing.]" 1993 Md. Laws, ch. 422, § 1 (S.B. 273). It was the first statute to include failing to cooperate as among the grounds for which a health care professional could be disciplined.[13] By 1997, the General Assembly had added verbatim provisions to Health Occ. §§ 14-404 and 12-313, which identify the bases for disciplinary actions against physicians and pharmacists, respectively. *See* 1996 Md. Laws, ch. 348, § 1 (H.B. 264); 1997 Md. Laws, ch. 615, § 1 (S.B. 664).

In 1998, the General Assembly amended Health Occ. § 13-316 to include "failure to cooperate" with a lawful investigation conducted by the Board as a ground for sanctioning physical therapists. In doing so, it authorized disciplinary actions against physical therapists who "*willfully and without legal justification*" fail to cooperate with such an investigation. 1998 Md. Laws, chs. 767, § 1 (S.B. 364) and 768, § 1 (H.B. 454) (emphasis added). That same year, the General Assembly promulgated Health Occ. § 8-

[13] The Bill Analysis of the Senate Economic and Environmental Affairs Committee described the amendment as permitting the Board of Nursing "to deny, suspend, or revoke a license . . . if the licensee . . . fails to *comply* with a lawful investigation conducted by the Board[.]" S. Econ. and Env't Affs. Comm., S.B. 273, Bill Analysis, at 1 (1993 Session) (emphasis added). The Committee's use of "comply" as synonymous with "cooperate" lends support to our interpretation of the latter term as used in the identically phrased paragraph of Health Occ. § 15-314.

6A-10, which also included a provision permitting the Board of Nursing to discipline nursing assistants for failure to cooperate. 1998 Md. Laws, ch. 393, § 1 (S.B. 445). Notably, however, the General Assembly omitted from Health Occ. § 8-6A-10 the "willfully and without legal justification" language that it included in the amendment to Health Occ. § 13-316. *Id.*

The General Assembly's effort to compel compliance with various health board investigations continued into 1999, when it passed House Bill 1006. Among other things, the bill amended Health Occ. §§ 1A-309, 16-311, and 19-311, adding failure to cooperate to the grounds for disciplinary actions against acupuncturists, podiatrists, and social workers, respectively.[14] *See* 1999 Md. Laws, ch. 114, § 1 (H.B. 1006). Conspicuously absent from those amendments, however, was the *mens rea* language that the General Assembly had incorporated in Health Occ. § 13-316 the year prior.[15] Throughout the ensuing ten years, failure to cooperate was either added by an amendment to or included in the enactment of another six sections of the Health Occupations Article, each of which set forth the grounds for disciplining different health care professionals. *See* 2003 Md. Laws, ch. 422, § 2 (H.B. 376); 2006 Md. Laws, ch. 523, § 3 (S.B. 371); 2006 Md. Laws, ch. 382, § 1 (H.B. 1145); 2008 Md. Laws, ch. 328, § 1 (H.B. 1517); 2008 Md. Laws, ch.

[14] In 2003, the General Assembly renumbered Health Occ. § 16-311 as Health Occ. § 16-312. *See* 2003 Md. Laws, ch. 134, § 1 (H.B. 257).

[15] In 1999, the General Assembly also added failure to cooperate—again with no express *mens rea* requirement—to the grounds for which psychologists could be disciplined pursuant to Health Occ. § 18-313. *See* 1999 Md. Laws, ch. 112, § 1 (H.B. 989).

505, § 2 (H.B. 459); 2009 Md. Laws, ch. 529, § 2 (S.B. 247). Again, in none did the General Assembly expressly require that such failure be either willful or without legal justification.[16]

During the 2010 Legislative Session, the General Assembly amended Health Occ. § 4-315 by Senate Bill 325 ("S.B. 325"), adding failure to cooperate as a ground for disciplinary actions against dentists. In so doing, however, it broke with a twelve-year trend of omitting an express *mens rea* requirement. *See* 2010 Md. Laws, ch. 542, § 1 (S.B. 325). Incorporating precisely the same prefatory language that it had used in its 1998 amendment to Health Occ. § 13-316, the General Assembly authorized the Board of Dental Examiners to reprimand, to place on probation, or to suspend or revoke the license of dentists who "*[w]illfully and without legal justification*, fail[] to cooperate with a lawful investigation conducted by the Board." 2010 Md. Laws, ch. 542, § 1 (S.B. 325) (emphasis added).

The examination of the relevant legislative bill file reveals that S.B. 325 did not originally include the foregoing *mens rea* requirement. Rather, as initially introduced, the bill simply authorized disciplinary actions against dentists who "fail[] to comply with an investigation of the Board [of Dental Examiners]." S.B. 325, Legislative Bill File, at 29 (2010 Session). The Maryland State Dental Association ("MSDA"), citing concerns that it would permit the Board of Dental Examiners to suspend or revoke the license of a dentist who withheld subpoenaed records in good faith reliance on the advice of counsel, opposed

[16] The General Assembly has since amended each of these statutes, without adding an express *mens rea* requirement to the failure to cooperate offenses enumerated therein.

the use of the language.[17] *Id.* at 16, 24. In an amendment to S.B. 325, the General Assembly adopted the MSDA's recommendation, replacing the proposed language with the phrase "[w]illfully and without legal justification, fails to cooperate with a lawful investigation conducted by the Board." *Id.* at 35. In its Floor Report to S.B. 325, the Senate Education, Health, and Environmental Affairs Committee explained:[18]

> The amendment clarifies that the Board [of Dental Examiners] may only sanction a licensee if the licensee's failure to cooperate with a lawful investigation of the Board was on a willful basis that is without legal justification.
>
> * * *
>
> The language of the amendment was proposed by the [MSDA] in order to more closely track language used by other health occupations boards in this instance (specifically the Board of Physical Therapy).

Id. at 16. *See also Hayden v. Md. Dep't of Nat. Res.*, 242 Md. App. 505, 530 (2019) ("[F]loor reports . . . are 'key legislative history document[s].'" (quoting *Blackstone*, 461 Md. at 130)). This Floor Report thus reinforces the presumption that the General Assembly was aware that Health Occ. § 13-316 differed from its sister statutes by only authorizing the imposition of sanctions against health care providers (in that case, physical therapists)

[17] The Supreme Court of Maryland resolved an analogous challenge to the constitutionality of Health Occ. § 14-404(a)(33) in *Eist, supra*, holding that under such circumstances, the appropriate remedy is for the subpoenaed health care provider to "file a motion to quash the subpoena or a motion for a protective order pursuant to Maryland Rules 2-403 or 2-510." 417 Md. at 564-65.

[18] The Senate Education, Health, and Environmental Affairs Committee has since been renamed "the Senate Committee on Education, Energy, and the Environment." *See, e.g.*, 2023 Md. Laws, ch. 113, § 1 (S.B. 959); 2023 Md. Laws, ch. 415, § 1 (S.B. 429).

for *willfully* failing to cooperate and intentionally adopted that *mens rea* requirement in its amendment to Health Occ. § 4-315. *See Burch v. United Cable Television of Baltimore Ltd. P'ship*, 391 Md. 687, 702 (2006) ("The Legislature is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law[.]" (quotation marks and citation omitted)); *Cicoria v. State*, 332 Md. 21, 43 (1993) (The Supreme Court of Maryland "must presume that, when it enacted the later of the two [statutes], the Legislature was aware of all other relevant enactments.").

The General Assembly repealed and reenacted Health Occ. § 15-314 with amendments during the same 2010 legislative session in which it enacted the above amendment to Health Occ. § 4-315. *See* 2010 Md. Laws, ch. 273, § 1 (S.B. 308). Among the amendments to Health Occ. § 15-314, the General Assembly added failure to cooperate as an offense for which physician assistants could be sanctioned. It did not, however, include an express *mens rea* requirement, as it did in adding the offense to Health Occ. § 4-315.[19] The General Assembly's decision to include the phrase "willfully and without legal justification" in the amendment to Health Occ. § 4-315 suggests that it deliberately omitted such language from Health Occ. § 15-314(a)(33), as the new paragraphs are otherwise identical, were added during the same legislative session, and address substantially similar subject matter.

[19] Nor has the General Assembly added such language in any of the amendments to Health Occ. § 15-314 that have followed. *See* 2013 Md. Laws, ch. 401, § 1 (H.B. 1096); 2015 Md. Laws, ch. 34, § 1 (S.B. 449); 2020 Md. Laws, ch. 290, § 1 (H.B. 663); 2020 Md. Laws, ch. 612, § 1 (H.B. 560); 2020 Md. Laws, ch. 613, § 1 (S.B. 395).

In sum, we hold that willfulness is not an element of failure to cooperate under Health Occ. § 15-314(a)(33). It is instead an aggravating factor the Board may consider in determining the appropriate sanction to impose for a Health Occ. § 15-314(a)(33) violation. *See* COMAR 10.32.03.17(B)(5)(b) (identifying whether "[t]he offense was committed deliberately" is a factor the Board may consider in determining whether a sanction should exceed those listed in the applicable guidelines).

The dissent does not dispute that the General Assembly omitted a *mens rea* requirement from Health Occ. § 15-314(a)(33), and even acknowledges that it may have intentionally declined to include one. *See In the Matter of Olivacce*, No. 480, Sept. Term, 2023, slip op. at 1 (Ripken, J, dissenting) ("[T]he Majority is correct that the General Assembly could properly have declined to include a specific *mens rea* requirement in section 15-314(a)(33) of the Health Occupations Article."). The dissent asserts, however, that the imposition of sanctions in this case was "'irrationally inconsistent with previous agency decisions'" and is therefore arbitrary and capricious. *Id.*, slip op. at 2 (quoting *Harvey v. Marshall*, 389 Md. 243, 303 (2005)). More specifically, the dissent argues that the Board's decision in this case was "wholly inconsistent with [its] prior applications" of Health Occ. § 14-404(a)(33) in both *Eist*, *supra*, and *Solomon*, *supra*. *Olivacce*, slip op. at 6-7 (Ripken, J., dissenting).

Here, the Board was confronted with a different set of facts from those in the prior cases, and it does not follow, as the dissent concludes, that its conclusion was *inconsistent* with prior agency decisions—much less "irrationally" so. As the dissent correctly observes,

the licensees in *Eist* and *Solomon* were sanctioned for failure to cooperate after they expressly refused to produce any of the medical records subpoenaed by the Board. In both cases, the sanctions were affirmed on appeal. Because the failure to cooperate in those cases was clearly and uncontrovertibly deliberate, however, neither the Board nor the reviewing courts needed to consider whether one can violate Health Occ. § 15-314(a)(33) without harboring such an intent. As we see it, therefore, the agency decisions in *Eist* and *Solomon* are inapposite to—rather than inconsistent with—the Board's decision in this case. In short, we do not agree that the Board's decision was arbitrary and capricious.

Turning now to Ms. Olivacce's assertion that "[t]he legal standard to determine if a provider 'failed to cooperate' includes" his or her "good faith efforts[.]" In support of that position, Ms. Olivacce relies on the language of "the subpoena compliance certificate that the Board drafted and sent [her] to sign[,]" which she construes as having elicited confirmation that she "used [her] best efforts to comply with [the] record requests, i.e.[,] good faith." Ms. Olivacce also argues that if the General Assembly "ha[d] intended to impose on providers a strict unyielding duty to comply with a Board request or subpoena[,]" it would have "specif[ied] in the Health Occupations Articles that 'failure to cooperate' does <u>not</u> factor in a provider[']s good faith efforts." (Emphasis retained.)[20]

[20] In support of her final sub-contention, Ms. Olivacce relies heavily upon the factual findings and ultimate determinations of the ALJ and circuit court. Her reliance is misplaced. On appeal, "we look through the circuit court's decision . . . and evaluate the decision of the agency" rather than that of the ALJ. *Piney Orchard Cmty. Ass'n v. Md. Dep't of the Env't*, 231 Md. App. 80, 91 (2016) (cleaned up). *See also Md. Bd. of Physicians v. Elliott*, 170 Md. App. 369, 400-02, *cert. denied*, 396 Md. 12 (2006).

Without conceding that a physician assistant's good faith effort to cooperate with an investigation is relevant to determining whether he or she did so, the Board argues that its Final Decision shows that it considered and analyzed Ms. Olivacce's efforts but found them insufficient. That finding, the Board maintains, is supported by substantial evidence in the administrative record.

The record does not support Ms. Olivacce's assertion and the dissent's conclusion that the Board applied a strict liability standard without considering her efforts to comply with its subpoena. To the contrary, the Board's decision was based upon its evaluation of Ms. Olivacce's thoroughness in reviewing the records at issue. In its Final Decision, the Board determined that Ms. Olivacce's examination of the documents submitted "was careless and insufficient[,]" because it was "inconceivable that [she] carefully reviewed the records, but failed to notice that key elements that are integral parts of pain prescribing such as physical examinations, checking the [Prescription Drug Monitoring Program ("PDMP"),] and opioid use agreements were missing."[21] Thus, the Board effectively concluded that Ms. Olivacce's admitted cursory review of the documents first given to her was not a reasonable good faith effort to comply with the subpoena *duces tecum* and thus

[21] The Maryland PDMP "monitor[s] the prescribing and dispensing of all Schedule II, Schedule III, Schedule IV, and Schedule V controlled dangerous substances and the dispensing of naloxone medication by all prescribers and dispensers in the State." HG § 21-2A-02(c). Ms. Thomas testified that Maryland's PDMP requires that prescribers document their first time prescribing "an opioid . . . or a controlled drug" to a particular patient and continue to document prescribing that medication to the same patient every three months thereafter.

a failure to cooperate with its investigation. That, in our view, was a mixed question of law and fact that was supported by substantial evidence.

Ms. Thomas, in her initial peer review report, noted that in seven of the ten patient files Ms. Olivacce originally produced, signed controlled substance agreements for the patients were missing. At the administrative hearing, Ms. Olivacce, acknowledging that such agreements "are pretty important in a pain management specialty," admitted that she did not notice their absence when she reviewed the records. Ms. Thomas's report also indicated that eight of the patient files contained either insufficient or no documentation of Ms. Olivacce's physical examinations. The remaining omissions of which Ms. Thomas took note included SOAPP documents, diagnostic imaging results, and, in one patient file, eleven urine drug screening results and corresponding office notes for an approximately three-year period.

Ms. Olivacce does not dispute the accuracy of Ms. Thomas's initial report and, mindful of the Board's expertise, we credit its evaluation that the records omitted in the initial submission are "key elements that are integral parts of pain prescribing[.]" *See* Md. Code (1984, 2021 Repl. Vol.), § 10-213(i) of the State Gov't Article ("The agency . . . may use its experience, technical competence, and specialized knowledge in the evaluation of evidence."). *See also Banks*, 354 Md. at 69 ("[T]he expertise of the agency in its own field should be respected."). Finally, the significance and volume of the originally omitted records, coupled with Ms. Olivacce's testimony that she merely "browsed through" the records she initially received, supported a reasonable inference that her review was cursory

and careless and resulted in a substantial second peer review. *See State Admin. Bd. of Election L. v. Billhimer*, 314 Md. 46, 62 (1988) ("[T]he drawing of inferences . . . is committed to the agency, and the court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness."). Accordingly, we conclude that the administrative record contains substantial evidence to support the Board's determination that, her certifications to the contrary notwithstanding, Ms. Olivacce did not use reasonable best efforts to comply with the record request and therefore failed to cooperate with the Board's investigation. In sum, omissions/deficiencies in Ms. Olivacce's submission exceeded the mere absence of a few missing pages or documents.

We recognize that electronic medical record systems have many benefits. Those benefits, however, come at the cost of potentially limiting individual medical providers' direct personal control over and constructive access to patient records. Here, the Board requested "a complete copy of any and all medical records" and in Ms. Olivacce's first submission, she indicated that the records submitted were "to the best of [her] knowledge, information and belief . . . an accurate reproduction of any and all records in [her] possession or constructive possession[.]" (Emphasis retained.) They were not.

In the end, medical providers remain responsible for providing the requested records under the statute as written. Relying on technology to assemble those records and merely browsing through the records assembled may not be sufficient. Whether and the extent to which medical providers may be entitled to some relief from the current standard is a matter

of public policy for the General Assembly. *Rausch v. Allstate Ins. Co*., 388 Md. 690, 715 n.13 (2005) ("It is, after all, the General Assembly that sets the public policy of the State[.]"); *Harrison v. Montgomery Cnty. Bd. of Educ.*, 295 Md. 442, 460 (1983) ("[W]e have always recognized that declaration of the public policy of Maryland is normally the function of the General Assembly[.]").

For the foregoing reasons, we hold that the circuit court erred in reversing the Board's decision and remand to the circuit court with instructions to affirm the Board's final order.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED WITH INSTRUCTIONS TO AFFIRM THE FINAL ORDER OF THE MARYLAND STATE BOARD OF PHYSICIANS. COSTS TO BE PAID BY THE APPELLEE.

Circuit Court for Washington County
Case No. C-21-CV-22-000309

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 480

September Term, 2023

IN THE MATTER OF LUCKRICIA OLIVACCE

Ripken,
Albright,
Kenney, James A. III
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Ripken, J.

Filed: August 2, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

I respectfully dissent. In my view, the decision of the Maryland State Board of Physicians ("the Board") in this case is a singular departure from its past administrative practices. The matter now before us appears to represent the only time the Board has sanctioned a licensee for failing to cooperate with an investigation in the absence of an attendant finding that the licensee had done so intentionally or in bad faith. Although the Majority is correct that the General Assembly could properly have declined to include a specific *mens rea* requirement in section 15-314(a)(33) of the Health Occupations Article, I remain skeptical that the legislature intended to make "[f]ail[ing] to cooperate with a lawful investigation conducted by the Board" a strict liability offense. *Id*. Nevertheless, in light of the uniformly consistent prior *application* of the statute, which previously has been used solely to sanction practitioners who have intentionally failed to cooperate with Board investigations, I am convinced that the circuit court was correct in concluding the Board's decision in this matter was arbitrary and capricious. Hence, I would affirm the circuit court, remanding with instructions to reverse the Board's decision.

The Majority has provided an accurate and thorough analysis of the standard of review in administrative matters, which I incorporate here, and lightly supplement. To be sure, we must "defer to the agency's fact-finding and drawing of inferences if they are supported by the record." *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005). An agency final decision is entitled to a presumption of validity, and our task is not to substitute our own judgment for that of the administrative agency. *See Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998). I, likewise, acknowledge that "judicial

review of a lawful and authorized administrative disciplinary decision or sanction, ordinarily within the discretion of the administrative agency, is more limited than judicial review of either factual findings or legal conclusions[.]" *Noland*, 386 Md. at 575. Nevertheless, when an agency makes a conclusion of law or imposes a sanction pursuant to a valid adjudicatory proceeding, it may still be invalid if made in an arbitrary or capricious manner.[1] Md. Code State Gov't § 10-222(h)(3)(vii); *see also Spencer v. Bd. of Pharmacy*, 380 Md. 515, 529 (2004).

Our inquiry into whether an agency action was arbitrary or capricious, while highly deferential, is also "highly contextual[,]" and generally involves considering whether the agency "exercised its discretion 'unreasonably or without a rational basis.'" *Matter of Featherfall Restoration LLC,* 261 Md. App. 105, 129 (2024) (quoting *Md. Dep't of the Environment v. Cnty. Comm'rs of Carroll Cnty.*, 465 Md. 169, 203–04 (2019)). Further, an agency action may be arbitrary and capricious if it is "irrationally inconsistent with previous agency decisions." *Harvey v. Marshall*, 389 Md. 243, 303 (2005).

The Majority has also provided an accurate and succinct recitation of the facts of the case, which I likewise incorporate. I will, however, take this opportunity to provide an overview of the facts which have particularly influenced my assessment of this case. This matter was precipitated by a single complaint where Luckricia Olivacce ("Ms. Olivacce") was alleged to have improperly prescribed medicine to a single patient. Subsequently, the

[1] As noted above, I remain unconvinced that any sanction predicated on a strict liability interpretation of section 15-314(a)(33) of the Health Occupations Article is appropriate.

Board requested all medical records for ten of Ms. Olivacce's patients; this request required the production of a voluminous medical record, ultimately in excess of 3,000 pages. Upon receipt of the Board's subpoena, Ms. Olivacce promptly followed the standard practice put into place by NSPC, her employer. That practice was to forward all requests for patient records to in-house counsel. The request was then provided to the "center manager" of the department who had the ability to access such records in the electronic medical record system ("EMRS"). The EMRS was then used by the employer to generate copies of the requested records, compiled into a single report.

At NSPC, records were produced solely via the EMRS, and an individual practitioner did not, and indeed could not, have any role in gathering the records using the EMRS. However, on this occasion, due to a search error in the EMRS, although some records for each of the ten patients were produced, some categories of records or specific records were missing. Ms. Olivacce and her counsel were provided and reviewed over 2,000 pages of records which the EMRS report represented to be the entirety of the requested records. Ms. Olivacce then certified that "to the best of [her] knowledge, information and belief" the medical records were complete. As not all patient records were provided to Ms. Olivacce and her attorney, not all patient records were initially transmitted to the Board for review. Subsequently, having received a report from the Board's hired peer-reviewer, Ms. Olivacce concluded that some records must be missing and requested an audit of the records, leading to the discovery of the search error. She promptly provided the Board with the missing medical records along with a detailed explanation. Notably,

some of the late-provided records were "significantly exculpatory[.]"After receiving and reviewing the amended records, the peer reviewer retracted several of their initial findings; nevertheless, the Board declined to dismiss any of the charges and amended the charging document to include an additional allegation accusing Ms. Olivacce of failing to cooperate with the investigation.

After a five-day merits hearing, an administrative law judge ("ALJ") concluded that Ms. Olivacce "cooperated with the State's investigation to the best of her ability" and found that no violation of section 15-314(a)(33), or indeed, any other violation, had occurred. Although the Board agreed with the ALJ that the charges against Ms. Olivacce for failing to keep accurate records and for providing improper care could not be sustained, it declined to follow the ALJ's recommendation to dismiss the charge for failure to cooperate. In my view, the Board provided minimal explanation for why it did not accept the ALJ's recommendation. Nor did the Board conclude that Ms. Olivacce had intentionally withheld records. Instead, the Board merely asserted that Ms. Olivacce's review process had been insufficiently thorough.

Subsequently, Ms. Olivacce sought review in the Circuit Court for Washington County. The circuit court, in a thorough 25-page opinion, concluded that "[t]here is absolutely no evidence that [Ms. Olivacce] knew that the initial record production was deficient[,]" and that late-provided record in fact resulted in both the ALJ and the Board concluding that the other charges against her should be dismissed. The court found that Ms. Olivacce conducted a good faith review of the medical records provided to her by her

employer's EMRS, and that there was insufficient evidence for the Board to conclude that Ms. Olivacce's certification that to the best of her "knowledge, information, and belief[,]" the records were complete was an untrue representation. In the court's view, permanently sanctioning Ms. Olivacce for an EMRS search error she herself was the victim of would not serve to fix that past error, improve future EMRS functionality, or redress the Board for the increased expenditure required due to reviewing late-received records. The court concluded that the Board's decision was arbitrary and capricious.

Prior to this case, the Board appears to have only found a violation of section 15-314(a)(33) when the sanctioned practitioner had *intentionally* failed to cooperate with an investigation initiated by the Board. Only two reported opinions exist which discuss the failure to cooperate with an investigation, pursuant to section 15-314(a)(33), as a result of a failure to turn over medical records to the Board; these are *Solomon v. State Bd. of Physician Quality Assur.*, 155 Md. App. 687 (2003) and *Md. State Bd. of Physicians v. Eist*, 417 Md. 545 (2011).

In *Solomon*, the Board found a violation following a physician intentionally "[r]efusing to surrender the records requested" by the Board. 155 Md. App. at 694. Even following an unsuccessful attempt to quash the Board's subpoena in the circuit court, the physician testified she did not intend to comply with the Board's subpoena. *Id.* at 695–96. The Board's final order, which imposed a sanction, noted that the physician "ha[d] outright

refused to cooperate." *Id.* at 708.[2]

Similarly, in *Eist*, a physician explicitly informed the Board that he would not comply with a subpoena seeking patient medical records and was subsequently sanctioned by the Board. 417 Md. at 552–53. In upholding the Board's conclusion that the physician failed to cooperate with an investigation, the Supreme Court of Maryland noted that "the undisputed evidence showing [the physician's] *deliberate refusal* to comply with the subpoena in a timely manner clearly supported the Board's decision." *Id*. at 562 (emphasis added).[3]

Here, in direct contrast to its prior applications of the statute, the Board determined that Ms. Olivacce did not cooperate with the investigation, although it did not find that she acted deliberately or in bad faith in failing to provide all requested documents. Instead, the Board found that "Ms. Olivacce's review was careless and insufficient" and that it was not "persuaded that Ms. Olivacce, reviewed the records 'to the best of her knowledge.'" In my view, a licensee's good faith review coupled with misplaced reliance on the representation that the records were complete resulting in some necessary information not immediately

[2] In *Solomon*, this Court cited approvingly to an out-of-state case in which an appellate court upheld a physician's sanction under a similar statute due to the physician actively "refusing to attend an 'informal interview' conducted by the board." 155 Md. App. at 708 (citing *Anderson v. Bd. of Med. Exam'rs*, 95 Or. App. 676, 681 (1989)).

[3] Notably, Justice Raker, in a dissent joined by two other members of the Court, asserted that although the physician had intentionally refused to comply with the Board's investigation, his good faith reliance on the advice of counsel should have precluded the Board from sanctioning him for failing to cooperate with an investigation. *Id.* at 569–70 (Raker, J., dissenting).

being provided to the Board is a far cry from a licensee intentionally withholding documents from the Board.[4] As such, a failure to cooperate charge where the record indicates cooperation in every other aspect with the exception of a records review that was at most negligent or lacking some level of diligence is wholly inconsistent with the Board's prior applications of the statute found in *Solomon* and *Eist*, wherein the parties intentionally acted to withhold documents from the Board. *See Solomon,* 155 Md. App. at 694; *Eist*, 417 Md. at 552.

The Board's determination appears particularly lacking in merit when one notes that in the other failure to cooperate cases, unlike the present case, neither party turned over *any* of the requested medical records, and affirmatively refused to do so. *See Solomon,* 155 Md. App. at 697; *Eist*, 417 Md. at 552–53. By contrast, here, Ms. Olivacce, upon receipt of the subpoena, timely followed her employer's standard process such that copies of the relevant medical records could be generated, reviewed by Ms. Olivacce and her attorney, and shared with the Board within the deadline. Ms. Olivacce provided over 2,000 pages of records to the Board, and although her review process failed to uncover that additional and necessary records were missing, at no point has the Board intimated that this failure was anything more than an unintentional oversight, albeit one that could have been avoided by

[4] The Board argues that "[r]ecipients of subpoenas could easily derail a Board investigation by providing the [medical] records when they find them useful to their defense strategy or by producing documents in a piecemeal manner." To be sure, every case is fact specific, and a party may act intentionally or in bad faith to delay or prevent the disclosure of medical records. In those cases, as it has done before, the Board may properly rely on the evidence to find a violation and subsequently sanction the party.

a more diligent review.[5]

Thus, in contrast to *Soloman* or *Eist*, Ms. Olivacce's actions evinced an intent to comply with the request for records, although due to an unintentional error by the producer of the records, she failed to provide a "complete" record. Further, upon receipt of the original peer report and recommended charges, Ms. Olivacce for the first time became aware of the missing documents and immediately rectified the error by requesting an audit of the records which led to the discovery of the missing records, and then immediately provided the missing documents to the Board with an explanation.

In its Final Decision and Order, the Board attempts to rebut the claim that it "has not sanctioned any licensee for 'failure to cooperate' unless there has been a refusal to cooperate or an intentional component to failing to cooperate" with a citation to *In The Matter of Carol Posner, M.D.*, Case No. 2220-0115B (2021). The Board argues that in *Posner* it "pursued similar charges for a physician who produced records for nine patients and then, a year later, produced an additional approximately 3,000 pages for five of those patients." I am not persuaded that *Posner* is analogous to the instant case and find it to further support the premise that the Board has never previously adjudicated a Failure to Cooperate charge using a strict liability standard.

In *Posner,* a doctor was alleged to have committed three statutory violations, failure to meet appropriate standards for the delivery of quality medical care, failure to cooperate

[5] Additionally, as Ms. Olivacce did not have independent access to the EMRS database, she was unable to compare the records generated by the EMRS report with the complete list of medical records retained by her employer.

with a lawful investigation, and failure to keep adequate medical records. *See* Health Occ. §§ 14-405(a)(22), (33), and (40). Charges Under the Maryland Medical Practice Act, *Posner*, No. 2220-0115B, 1–2 (2021). Posner was issued a subpoena *duces tecum*, which included the same directives as Ms. Olivacce's subpoena, directing Posner to share "a complete copy of any and all medical records" and a certification that the medical records were complete. *Id*. at 3.

After receipt and review of the medical records, the Board shared its peer review findings and then Posner, "through counsel, transmitted to the Board a detailed eleven page response, as well as, over 3,000 pages of medical records . . . , many of which [Posner] had not previously provided." *Id*. at 5. Upon submitting the additional medical records for review, the peer reviewers concluded that, while the new "information did have an impact on some of their opinions," they "concurred that [Posner] still failed to meet appropriate standards for the delivery of quality medical care" for four patients and "still failed to keep adequate medical records" for one patient. *Id*. at 6. Thus, unlike in Ms. Olivacce's case, where the additional documents resulted in a finding that the other charges lacked sufficient evidence, Posner's late-provided documents instead corroborated the other serious charges against her. *Id.* at 1, 5. Prior to an administrative hearing, Posner chose to surrender her license to avoid further investigation and prosecution of the charges. Letter of Surrender, *Posner*, No. 2220-0115B, 1 (2021).

The distinction herein is that the Board never made an adjudicatory finding that Posner failed to cooperate with the investigation by negligently complying with the

subpoena *duces tecum*. Rather, Posner elected not to contest *any* of the charges and voluntarily surrendered her medical license.

Ultimately, the differences between the other failure to cooperate cases, *Posner*, and the case at issue, lead me to conclude that the Board acted arbitrarily and capriciously in this matter. Here, the Board found that Ms. Olivacce failed to comply with the investigation, despite the conclusions by both the ALJ and the Board, made with the benefit of the full record *provided by Ms. Olivacce*, that no other violations had occurred. In apparent contrast to every other case before the Board involving a failure to cooperate, rather than finding that Ms. Olivacce had failed to comply intentionally or in bad faith, the Final Order found that Ms. Olivacce's review "was careless and insufficient" and further referenced the additional time and resources the Board was required to take for review and adjudication. That Ms. Olivacce's lack of care necessitated the expenditure of additional investigatory resources by the Board similarly arose in the brief filed by Appellant in this Court.

Although the Board itself concluded that no violations impacting patient care or record keeping occurred, and that Ms. Olivacce at no point intentionally acted to stymie the Board's investigatory process, it has nevertheless doggedly pursued this violation and subsequent sanctions against her pursuant to an error that she herself was the victim of, discovered, and corrected. In so doing, the Board acted contrary to past adjudications involving the failure to cooperate charge. In my view, it is difficult to see this inconsistent and sustained action as furthering the laudable goal of ensuring the safeguarding of

Maryland healthcare providers and recipients.

Here, the uncontroverted evidence shows that Ms. Olivacce acted in good faith in relying upon her employer's EMRS to generate a complete set of patient records. Although her reliance on the accuracy of the EMRS was in error, misplaced reliance does not equal a failure to cooperate. I part ways with the Majority's conclusion that "the record does not support Ms. Olivacce's assertion that the Board applied a strict liability standard without considering her efforts to comply with its subpoena." My reading of the record suggests that the Board did apply a strict liability standard. Accordingly, in the absence of a finding that Ms. Olivacce intentionally failed to comply with the Board's investigation, and because it concluded that Ms. Olivacce violated section 15-314(a)(33) for what appears to be an error made in good faith, I would conclude the Board's decision was "irrationally inconsistent with previous agency decisions[,]" *Harvey*, 389 Md. at 303, making it arbitrary and capricious such that the decision of the circuit court should be affirmed. I respectfully dissent.