

Circuit Court for Montgomery County
Case No. 472322-V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1465

September Term, 2020

ERIC GREENBERG

v.

MARYLAND STATE BOARD OF
PHYSICIANS

Friedman,
Ripken,
Murphy, Joseph F., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: December 1, 2021

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

Dr. Eric Greenberg (“Greenberg”) appeals from an order of the Circuit Court for Montgomery County dismissing his petition for review of a decision of the Maryland Board of Physicians (“the Board”). The Board revoked Greenberg’s medical license in 2011. Following Greenberg’s second petition for reinstatement, in 2019, the Board entered an order reinstating his license subject to six permanent conditions and placing him on probation. Greenberg filed a petition for judicial review in the circuit court to challenge the conditions. The circuit court dismissed the petition for review after determining that Greenberg did not have a statutory right to judicial review of the Board’s reinstatement order.

For the reasons set out below, we shall affirm the circuit court’s dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Greenberg earned his license to practice medicine in Maryland. In 2004, a patient filed a complaint against Greenberg.¹ After failing to appear at a Board-ordered physical examination and later testing positive for amphetamines, in 2006, Greenberg entered into a consent order with the Board. Greenberg complied with the conditions of that order, and the order was terminated. One month later, the Board received another complaint from a patient and opened a second investigation. The investigation revealed that Greenberg prescribed large quantities of controlled dangerous substances (“CDS”) without adequate documentation. In 2007, Greenberg entered into a second consent order,

¹ The facts underlying the revocation of Greenberg’s license are articulated in greater detail in our opinion affirming the Board’s revocation order. *See Greenberg v. State Bd. of Physicians*, No. 39, Sept. Term 2012 (Md. Ct. Spec. App. Apr. 9, 2013).

which, among other conditions, prohibited Greenberg from prescribing medicine to his family members and required him to abstain from mood altering substances.

In 2008, the Board received complaints from four pharmacists concerned with Greenberg’s prescribing practices. The U.S. Drug Enforcement Agency (“DEA”) and the local police department executed a search warrant on Greenberg’s home—out of which he operated his practice. The search turned up evidence of cocaine, Adderall, and Ritalin. In interviews with the police, Greenberg’s office manager “estimated that approximately one-third of Greenberg’s patients were narcotics-seeking patients who appeared to be addicts; did not have a scheduled appointment; stayed for a 15–20 minute appointment; paid cash directly to Dr. Greenberg in the examination room; and left with a prescription for Oxycontin, Vicodin, Percocet, or another narcotic.” *Greenberg v. State Bd. of Physicians*, No. 39, Sept. Term 2012 at 10 (Md. Ct. Spec. App. Apr. 9, 2013). In the course of the Board’s investigation, Greenberg tested positive for cocaine. The Board summarily suspended his license. Experts reviewed his patient records and determined that Greenberg prescribed excessive amounts of CDS and prescribed CDS for illegitimate reasons.

In December 2009, the Board charged Greenberg with violating the Maryland Medical Practice Act, Md. Code, Health Occupations Article (“HO”) § 14-404 (2021 Repl. Vol.), and the terms of the 2007 Consent Order. A two-day hearing was held before an Office of Administrative Hearings (“OAH”) Administrative Law Judge (“ALJ”). Following the hearing, the Board found that Greenberg intentionally and flagrantly violated the Medical Practice Act through engaging in unprofessional conduct; professional,

physical, or mental incompetence; and prescribing medications for illegitimate purposes. It also found that he violated the terms of the 2007 Consent Order by prescribing medications to his family members and not abstaining from certain substances. In 2011, the Board issued a Final Decision and Order revoking Greenberg's license and precluding him from applying for reinstatement for three years. Greenberg appealed the decision, which this court affirmed. *Greenberg*, No. 39, Sept. Term 2012 at 36.

In 2015, Greenberg petitioned for reinstatement. A disciplinary panel² of the Board denied the petition for reinstatement, noting that Greenberg had not addressed the willfulness of his actions and did not show that he appreciated the severity of his misconduct.

In July 2018, Greenberg again petitioned for reinstatement. The disciplinary panel requested that Greenberg submit written responses to questions concerning the case and invited Greenberg for an interview regarding his petition and his written responses. The Office of the Attorney General reviewed Greenberg's written answers and responded with a letter expressing its view that reinstatement would be premature. In December 2018, Greenberg met with the disciplinary panel. His counsel and an Assistant Attorney General were also present.³ The panel requested that Greenberg seek an independent psychiatric

² In 2013, the General Assembly determined that disciplinary matters would be decided by panels of the Board and divided the Board into two disciplinary panels. HO § 14-401 (2021 Repl. Vol.).

³ There is no transcript of the Panel proceeding in the record.

evaluation. Greenberg did so. In April 2019, the evaluator recommended reinstatement with certain conditions.⁴ On August 16, 2019, the panel issued an order finding as follows:

Dr. Greenberg has expressed greater understanding and insight as to the events that resulted in the revocation of his license and he has taken steps to address his prior conduct. Dr. Greenberg's attitude and insight seem genuine and demonstrate that he has taken responsibility for his past behavior and is sincere about preventing a recurrence. He has acknowledged the impact of his previous poor judgment, and the Panel has determined that it is safe for him to return to the practice of medicine under certain terms and conditions.

The Panel is thus reinstating Dr. Greenberg's license, but, in order to protect the public and the integrity and reputation of the profession, the Panel is placing him on probation for a minimum period of five years and ordering that he enroll in the Maryland Professional Rehabilitation Program. The Panel is also imposing permanent conditions on his return to practice.

The Board ordered that Greenberg's license be reinstated and ordered that Greenberg was permanently:

- (1) Prohibited from practicing medicine in an independent practice setting;
- (2) Prohibited from seeing or treating patients at his home;
- (3) Prohibited from prescribing or dispensing any controlled substance;[]
- (4) Prohibited from delegating to any physician assistant the prescribing or dispensing of any controlled dangerous substance;

⁴The evaluator opined that Dr. Greenberg can safely practice medicine under the following conditions:

1. Dr. Greenberg is prohibited from prescribing CDS.
2. Dr. Greenberg should work in a group practice setting under the close supervision of another internist.
3. Dr. Greenberg is prohibited from having a private practice located in his home.
4. Dr. Greenberg is to meet weekly with and be monitored by an individual therapist as he transitions to work, in order to help him cope with the transition and to address any triggers and stresses. Dr. Greenberg should be required to allow the therapist to communicate with the Maryland Professional Rehabilitation Program.
5. Dr. Greenberg should be monitored by random drug screens for three months prior to the reinstatement of license, to ensure that he is abstinent from drug use. After reinstatement of his medical license, he should continue to submit to routine and random drug screens.

- (5) Prohibited from certifying any individual for medical cannabis treatment; and
- (6) Required to immediately notify the Board in writing of any medical practice setting at which Greenberg works[.]

Greenberg filed a petition for review in the Circuit Court for Montgomery County.

He argued that the permanent conditions on his license preclude him from ever practicing medicine again. The Board moved to dismiss the petition for review, arguing that Greenberg was not entitled to judicial review of the reinstatement order. Following a hearing, the circuit court dismissed the petition for review on the basis that the reinstatement decision was not a contested case and, therefore, Greenberg did not have a statutory right to judicial review.

This timely appeal followed.

ISSUE PRESENTED FOR REVIEW

Greenberg presents two issues for our review,⁵ which we rephrase and combine into a single issue: Whether the circuit court erred in dismissing Greenberg's petition for

⁵ Greenberg's issues presented are:

- I. Whether a physician, whose license is revoked pursuant to a statute that entitled him to a hearing before action is taken upon his license, and whose license is later reinstated, is entitled to a hearing on issues relating to the reinstatement.
- II. Whether a physician has a property interest in his right to practice medicine under a reinstated physician license, such that the state physician licensing body may not, without due process of law, permanently amend the physician's license in a way that makes it impracticable for him to make use of that property interest.

review. As we explain further below, the Board’s order did not arise from a contested case, and Greenberg did not have a statutory right of review. We shall affirm the circuit court.⁶

DISCUSSION

This Court reviews a grant of a motion to dismiss *de novo*; we must determine whether the circuit court’s ruling was legally correct. *Turner v. Dept. of Health*, 245 Md. App. 248, 261–62 (2020).

Greenberg argues that HO § 14-408 pertaining to judicial review of contested case hearings authorized his appeal. He argues that the Board’s decision arose from a contested case as defined in the Administrative Procedure Act, State Government Article (“SG”) §§ 10-201 to 226 (2021 Repl. Vol.), because (1) the Health Occupations Article requires an opportunity for a hearing before reinstatement and (2) the permanent conditions deprive him of a constitutional property interest. The Board argues that HO § 14-408 does not permit Greenberg’s petition for review in the circuit court because a reinstatement proceeding is not a contested case. It argues that neither the Health Occupations Article nor constitutional due process require a hearing before an application for reinstatement is decided.

In explaining that HO § 14-408 does not confer a right of judicial review, we first

⁶ Greenberg did not advance any argument before the circuit court or before this Court on appeal that he is entitled to nonstatutory review, through an action for administrative mandamus or otherwise. *See Oltman v. State Bd. of Physicians*, 182 Md. App. 65, 79 n.6 (2008); *Crim. Injs. Comp. Bd. v. Gould*, 273 Md. 486, 507–08, 513 (1975). Accordingly, we do not have occasion to consider whether nonstatutory review was available. *Klaunberg v. State*, 355 Md. 528, 552 (1999).

review the law governing judicial review of agency actions. Second, we review the procedures for physician discipline and reinstatement of a revoked medical license. Third, we address Greenberg’s first contention by explaining that the statutory scheme does not require a hearing before a panel’s ruling on a petition for reinstatement. Last, we address Greenberg’s second contention by explaining that a reinstatement subject to conditions does not deprive a physician of a constitutional property interest.

A. The Health Occupations Article Authorizes Judicial Review of Final Decisions in Contested Cases.

The Medical Practice Act creates a limited right of review for decisions of the Board: “Any person aggrieved by a final decision of the Board or a disciplinary panel in a contested case, as defined in the Administrative Procedure Act,[] may take a direct judicial appeal as provided in the Administrative Procedure Act.” HO § 14-408(a). The Administrative Procedure Act defines a contested case as:

[A] proceeding before an agency to determine:

- (i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or
- (ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for agency hearing.

SG § 10-202(d)(1). “‘Contested case’ does not include a proceeding before an agency involving an agency hearing required only by regulations unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.”

SG § 10-202(d)(2).

B. The Procedures for Revocation and Reinstatement of a Physician’s License

The Board was established to “regulate, control, and otherwise discipline in a fair and unbiased manner the licensees” who practice medicine in Maryland. HO § 1-102. The Board is authorized to act through a disciplinary panel to “reprimand any licensee, place any licensee on probation, or suspend or revoke a license” for forty-six enumerated offenses. HO § 14-404(a). Such disciplinary actions are “[s]ubject to the hearing provisions of § 14-405[.]”⁷ Section 14-405 requires that before “a disciplinary panel takes any action under § 14-404(a) . . . it shall give the individual against whom the action is contemplated an opportunity for a hearing before a hearing officer,” and the hearing officer “shall give notice and hold the hearing in accordance with the Administrative Procedure Act.”⁸ Following the hearing, the disciplinary panel must pass an order sustaining the charges or dismissing the charges and exonerating the licensee. HO § 14-406.

A disciplinary panel may only reinstate a revoked or suspended license under certain

⁷ Another provision, HO § 14-205(b)(3), provides for a hearing under § 14-405 “if an applicant has failed to renew the applicant’s license” and the Board declines to renew or reinstate a license for the reasons listed in § 14-404. *See also Bd. of Physicians v. Elliott*, 170 Md. App. 369, 376 (2006) (contested case hearing following lapse of physician’s license where Board denied physician’s application to renew based on § 14-404 grounds). This provision is not applicable to Greenberg.

⁸ The Administrative Procedure Act sets out the process in contested cases. Among other requirements: a party to a contested case must receive notice of the proposed agency action, SG § 10-207; parties are entitled to call witnesses and cross-examine opposing witnesses, § 10-213; the agency’s findings of fact must be based exclusively on record evidence or matters noticed in that proceeding, § 10-214; and the agency must make a transcript of the proceedings upon request of a party, § 10-215.

conditions. Section 14-409 states:

[(a)(1)] [A] disciplinary panel may reinstate the license of an individual whose license has been surrendered or revoked under the title only in accordance with: (i) the terms and conditions of the order of revocation or letter of surrender; (ii) [a]n order of reinstatement issued by the disciplinary panel; or (iii) [a] final judgment in any proceeding for review.

* * *

(2) If a license is surrendered or revoked for a period of more than 1 year, the Board may reinstate the license after 1 year if the licensee: (i) [m]eets the requirements for reinstatement as established by the Board; and (ii) [c]ompletes a criminal history records check in accordance with § 14-308.1 of this title.

Following revocation or surrender of a license, the former licensee must submit an application for reinstatement. COMAR 10.32.02.06B. “The disciplinary panel shall determine in its discretion if postdisciplinary reinstatement is in the interest of the health and welfare of the general public and consistent with the best interest of the profession[.]” COMAR 10.32.02.06B(7).

The petitioner must provide written answers to questions the disciplinary panel may pose “concerning the reasons the license was revoked and the petitioner’s current fitness to practice.” COMAR 10.32.02.06B(1)(c). “The disciplinary panel that issued the order to revoke or suspend may convene a reinstatement inquiry panel[.]” whose informal inquiry may include a “personal interview with the panel[.]” “the petitioner’s history[.]” and “presentations from the petitioner and the administrative prosecutor[.]” COMAR 10.32.02.06B(5). The disciplinary panel “shall consider the application form, the petitioner’s responses to the written questions, and the supporting documentation and written arguments, if any, submitted by the petitioner and the administrative prosecutor’s

office, as well as the reinstatement inquiry panel’s recommendation[.]” COMAR 10.32.02.06B(6). The disciplinary panel “may grant postdisciplinary reinstatement subject to any terms and conditions the disciplinary panel considers appropriate for public safety and the protection of the integrity and reputation of the profession[.]” COMAR 10.32.02.06B(4).

C. The Health Occupations Article Does Not Require a Hearing Before a Postdisciplinary Reinstatement.

Greenberg argues that an order reinstating a physician’s license is a final order in a contested case because that order is part of the original HO § 14-404(a) disciplinary proceeding for which a hearing is required. Greenberg relies on HO § 14-409(a)(1)(i), which authorizes a disciplinary panel to reinstate a license in accordance with “the terms and conditions of the order of revocation.” The Board responds that no statute or regulatory provision requires an opportunity for a hearing before it rules on a petition for reinstatement.

This Court previously considered whether a statutory right to judicial review is available following a petition for reinstatement in *Oltman v. State Bd. of Physicians*, 182 Md. App. 65 (2008). There, the board denied a petition for reinstatement of a former physician assistant (“PA”). *Oltman*, 182 Md. App. at 73. The former PA, Oltman, petitioned for review in the circuit court, and the court dismissed the petition for lack of statutory authority to exercise judicial review. *Id.* at 67–68. This Court reasoned that the

scheme for PA discipline incorporated HO §§ 14-408 and 14-409. *Id.* at 75.⁹ We first noted that § 14-409 “does not explicitly provide for judicial review of a reinstatement decision.” *Id.* Recognizing that § 14-408 permits judicial review from final decisions in contested cases, we turned to determine whether any statute required the board to conduct a hearing before ruling on Oltman’s petition for reinstatement. *Id.* at 75–76. We noted that the provisions on PA discipline enumerated the actions for which a hearing was required. *Id.* at 76–77; *see* HO § 15-315 (requiring an opportunity for a hearing for any action under § 15-314). And reinstatement was not among the enumerated proceedings. *Id.* at 77. Furthermore, the statute only anticipated hearings for disciplinary actions against “certificate holders,” and Oltman was no longer a certificate holder. *Id.* We also held that a hearing was not required by due process because Oltman did not have a vested interest in the reinstatement of his certificate. *Id.* We concluded that Oltman was not entitled to a contested case hearing and affirmed the circuit court’s dismissal. *Id.* at 78.

In this case, Greenberg was not statutorily entitled to a hearing before the Board’s ruling on his petition for reinstatement. As with the nearly identical PA disciplinary scheme considered in *Oltman*, the text of HO § 14-405 does not require a hearing on a petition for reinstatement. *Compare* HO § 15-315 (requiring an opportunity for a hearing before any

⁹ The *Oltman* Court also considered whether the PA-specific provisions of the Health Occupations Article directly authorized judicial review. 182 Md. App. at 73–75. At the time, the PA-specific provision authorized judicial review for any “certificate holder who is aggrieved by a final decision of the Board.” *Id.* at 73 (quoting HO § 15-315(b)(1) (2005 Repl. Vol., 2007 Supp.)). Unlike the judicial review provision in § 14-408, nothing in § 15-315(b)(1) limits the right of review to final decisions “in a contested case.”

action under § 15-314), *with* § 14-405 (requiring an opportunity for a hearing before any action under § 14-404). Section 14-404 applies to decisions to reprimand a physician, place a physician on probation, and suspend or revoke a physician’s license. Greenberg’s attempts to distinguish *Oltman* are not persuasive: nothing about HO § 14-404’s reference to licensees, in contrast with former § 15-314’s reference to certificate holders, suggests that physician licensees are entitled to a hearing on a petition for reinstatement.

Greenberg nonetheless argues that the Board’s reinstatement order was an action under HO § 14-404(a) because it followed from the initial disciplinary proceeding. We do not agree. First, the order of suspension, revocation, or other sanction entered by a disciplinary panel is a final order that adjudicates the charges in the notice of the disciplinary action, determines the respondent’s rights, and “leave[s] nothing further for the agency to do.” *Holiday Spas v. Montgomery Cnty. Hum. Rels. Comm’n*, 315 Md. 390, 396 (1989); *see Barson v. Bd. of Physicians*, 211 Md. App. 602, 617 (2013) (explaining that anesthesiologist who settled disciplinary charges through consent order was no longer “aggrieved” and did not have a right to review of the Board’s refusal to modify the consent order). Reinstatement proceedings open a new inquiry into the petitioner’s interim conduct as well as present and future ability to meet professional standards. *See* COMAR 10.32.02.06B; *In re Murray*, 316 Md. 303, 304–05 (1989) (explaining that in an attorney reinstatement context, “[t]he fundamental inquiry is whether, in the interval following the rendering of the judgment of removal, the petitioner has become a proper person to hold such office.” (internal quotation marks omitted)). Second, Greenberg’s reliance on HO

§ 14-409(a)(i) is misplaced because the Board did not reinstate Greenberg’s license “in accordance with the terms and conditions” of the revocation order. The revocation order did not contain any definite terms for reinstatement. Rather, the Board reinstated his license through a final order under § 14-409(a)(ii). The Board’s decision on the petition for reinstatement was plainly not an action under § 14-404(a).¹⁰

Greenberg also suggests that the informal interview before the disciplinary panel, which he participated in, was a contested case hearing. This suggestion is also unavailing as the informal quality of the reinstatement interview stands in stark contrast to the procedures required in a contested case. We observe a few important differences: the Board was not required to provide notice of the conditions to be attached to the conditional reinstatement, and it was not required allow testimony or cross-examination of witnesses. *See* COMAR 10.32.02.06B(5) (noting that a disciplinary panel “may” require a personal interview); SG §§ 10-207, 10-213.

Having determined that the Health Occupations Article does not require an opportunity to be heard before the disciplinary panel rules on a petition for reinstatement, we must next consider whether such a hearing is required by due process. *See* SG § 10-202(d)(1).

¹⁰ Greenberg also suggests that the order constituted an “amendment” of his license under SG § 10-202(d)(1)(ii). But Greenberg’s license was revoked. For the reasons further explained in Part D, he did not hold a license or have any rights that could have been amended.

D. Greenberg Did Not Have a Constitutional Interest in His Revoked License.

Greenberg accepts that a physician does not have a liberty or property interest in a revoked license but suggests that his interests re-vested upon reinstatement. The Board argues that the decision to reinstate a license is discretionary, and therefore does not implicate a constitutional interest. We agree with the Board.

Constitutional due process requires a hearing before a person is “deprived of a protected property interest.” *City of Annapolis v. Rowe*, 123 Md. App. 267, 276 (1998). A professional has a liberty interest in the pursuit of their chosen profession and a property interest in the right to practice that profession. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Comm’n on Med. Discipline v. Stillman*, 291 Md. 390, 405 (1981) (Physician has property interest in right to practice medicine). When a license has been duly revoked, the professional no longer has any due process interest in that license. *Oltman*, 182 Md. App. at 77–78. A person does not have a due process interest in the grant of a benefit that is purely discretionary. *Sec. Mgmt. Corp. v. Baltimore Cnty.*, 104 Md. App. 234, 246 (1995).¹¹

The decision to reinstate Greenberg’s license is discretionary. *See* HO § 14-409(a) (“[a] disciplinary panel may reinstate . . .”); COMAR 10.32.02.06B(7) (“The disciplinary

¹¹ Greenberg relies on a case from the District of Columbia Court of Appeals, *Woods v. District of Columbia Nurses’ Examining Bd.*, 436 A.2d 369, 373 (1981), which held that the due process clause of the Fifth Amendment guarantees a petitioner former nurse a right to a hearing on her postdisciplinary application for reinstatement. That decision is at odds with *Oltman*, which held that a hearing on reinstatement is not constitutionally required. 182 Md. App. at 78.

panel shall determine in its discretion if postdisciplinary reinstatement is in the interest of the health and welfare of the general public and consistent with the best interest of the profession[.]”). The reinstatement order granted Greenberg the right to practice medicine subject to certain strict conditions. Indeed, the enumerated conditions are conditions precedent to Greenberg practicing medicine in any capacity. Following the revocation order, Greenberg did not have vested rights in any of the activities prohibited by the permanent conditions in the reinstatement order. For example, Greenberg did not have a vested right in the ability to practice without supervision or to prescribe controlled substances. *See Oltman*, 182 Md. App. at 77 (“To establish such a deprivation in the professional licensing context, Oltman must show that he has a vested interest in the reinstatement of his certificate, even after it was revoked for misconduct. This he cannot do.”). Without such a deprivation, Greenberg was not entitled to a contested case hearing. If the Board had imposed conditions on an unrestricted license, perhaps the analysis would be different. Greenberg argues that the restrictions are so severe that they entirely prohibit him from practicing medicine. Greenberg’s argument regarding the effect of the conditions is an argument on the merits, which we do not reach. We conclude that the reinstatement order did not deprive Greenberg of any vested rights.

In sum, neither statute nor constitutional due process requires a hearing on a petition for reinstatement. Therefore, the circuit court correctly determined that HO § 14-408 does not authorize judicial review of the Board's reinstatement order.

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