

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2294

September Term, 2016

WALTER E. KOZACHUK

v.

MARYLAND STATE BOARD OF
PHYSICIANS

Wright,
Graeff,
Nazarian,

JJ.

Opinion by Graeff, J.

Filed: December 13, 2017

*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.

Walter E. Kozachuk, M.D. (“Dr. Kozachuk”), appellant, challenges the decision of the State Board of Physicians (the “Board”), appellee, concluding that he was guilty of unprofessional conduct in the practice of medicine in violation of Md. Code (2014 Repl. Vol.) § 14-404(a)(3)(ii) of the Health Occupations Article (“HO”).¹ The Board ordered that Dr. Kozachuk be reprimanded, placed on a probation for a minimum of two years, during which he is prohibited from prescribing controlled dangerous substances (“CDS”), and required to complete an approved comprehensive course in medical ethics. Dr. Kozachuk sought judicial review of the Board’s decision, and the Circuit Court for Baltimore City affirmed.

On appeal, Dr. Kozachuk presents the following three questions for this Court’s review, which we have rephrased and renumbered, as follows:

1. Did the Board violate appellant’s due process rights in finding him guilty of an offense different from that charged?
2. Did the Board err in determining that Dr. Kornbluth was qualified to testify that Dr. Kozachuk acted unprofessionally?
3. Was there substantial evidence to support the Board’s findings that appellant engaged in unprofessional conduct in the practice of medicine when the State failed to provide expert testimony?

¹ The Board also found that Dr. Kozachuk failed to meet the appropriate standards for the delivery of quality medical care, in violation of Md. Code (2014 Repl. Vol.) § 14-404(a)(22) of the Health Occupations Article. Dr. Kozachuk does not challenge that finding on appeal.

For the reasons set forth below, we answer each question in the negative, and therefore, we shall affirm the judgment of the circuit court.²

FACTUAL AND PROCEDURAL BACKGROUND

I.

Background

Dr. Kozachuk, a licensed physician in the State of Maryland since August 25, 1988, worked for Maryland Physician Associates as a neurology consultant providing pain management services. He received his medical degree from the University of Saskatchewan in 1980. He studied neurology at the Cleveland Clinic for three years and medicine for one year, and completed a two year fellowship at the National Institutes of Health in Alzheimer's disease and neuroimaging. Dr. Kozachuk is not Board-certified in any medical specialty, and he does not possess hospital privileges.

In early 2012, Ms. F., a waitress at Daniels Restaurant and Open Air Bar ("Daniels") in Elkridge, Maryland, first observed Dr. Kozachuk meeting someone at the restaurant.

² The Board lists in its brief the following additional question for review:

Did substantial evidence support the Board's decision that Dr. Kozachuk violated the standard of care when Dr. Kozachuk failed to monitor his patients' compliance with opioid prescribing through toxicology screenings, failed to coordinate care with other providers, failed to require his patients to sign pain management agreements, and failed to properly document the medications he prescribed?

As indicated, Dr. Kozachuk does not challenge the Board's decision that he violated the standard of quality medical care, and therefore, we will not address this issue.

Although she did not observe “anything out of the ordinary” during that time, during Dr. Kozachuk’s next visit, in September 2012, she observed him filling out a prescription pad, and “as he filled them out, he’d tear them off and sit them in a pile on the table.” Ms. F. observed “money physically exchange hands between [Dr. Kozachuk] and the older woman of the two women that were there,” and she described the money, which Dr. Kozachuk placed in his pocket, as “a wad of cash folded in half [with] . . . a 20 on the outside.” Ms. F. reported what she observed to her manager.

The manager of Daniels, Ms. D., contacted the Howard County Police Department. She advised regarding what had been observed and provided the license plate number of Dr. Kozachuk’s vehicle. The police used the license plate number to identify Dr. Kozachuk. They then showed a picture of Dr. Kozachuk to Ms. F., who confirmed his identity. The police shared this information with Troy Yeager, a Special Agent with the Drug Enforcement Agency (“DEA”) tactical diversion squad, a federal taskforce responsible for investigating prescription drug cases.

On September 28, 2012, Agent Yeager and another agent, David Metzler, interviewed Tony Al-Amin, M.D., regarding Dr. Kozachuk and his practice. Dr. Al-Amin discussed his prior office arrangements with Dr. Kozachuk, and he advised the agents that Dr. Kozachuk previously had written prescriptions to a patient while at G.L. Shacks Grill, a local restaurant in Catonsville, Maryland.

On October 1, 2012, Ms. D. observed Dr. Kozachuk pull into Daniels’ parking lot, exit his vehicle, and walk behind a building on the property while talking on the phone.

Ms. D. called 911. The police and Agent Yeager arrived and interviewed Dr. Kozachuk, who informed them that he was meeting a patient at Daniels to discuss his upcoming testimony in a case, but he also had prescribed oxycodone. Agent Yeager saw a copy of the prescription Dr. Kozachuk had prescribed for the patient, but he did not seize it because Dr. Kozachuk stated that the patient “was addicted,” and if the police took the prescription, the patient would experience “withdrawals and die[] or something else.”

Agent Yeager asked Dr. Kozachuk if he met with “other patients in parking lots or bars and prescribe[d] them medication.” Dr. Kozachuk admitted that he met a “few patients that he prescribes medication to outside of the office setting,” but those patients saw him in the office once a month. He advised that each time he met with a patient or prescribed them medication, he made a medical note. Dr. Kozachuk then stated that the “medical note [did] not indicate that he met the patient in a parking lot or bar.” He also stated that he charged \$100 per prescription, which he considered “gas money and that he should be paid because he is providing a service.” Dr. Kozachuk confirmed that he had previously written prescriptions for another patient while at a separate restaurant, G.L. Shacks Grill, in Catonsville.

During the interview, Dr. Kozachuk voluntarily agreed to surrender his DEA Certificate of Registration, which revoked his privileges to prescribe controlled dangerous substances. He acknowledged, by signing a written document, that he was surrendering his privileges as a result of his “alleged failure to comply with the Federal requirements pertaining to controlled substances.”

On November 6, 2013, the Board wrote to Dr. Kozachuk, informing him that it was initiating a full investigation based on information from the DEA and the Howard County police regarding writing prescriptions in a restaurant. The Board's letter contained a subpoena request for ten of his patients' records, as well as a subpoena to interview him, and it requested his written response.

Dr. Kozachuk's patient files subsequently were sent to peer reviewers, Ira Kornbluth, M.D., and Mark Matsunaga, M.D., both of whom had expertise in the areas of pain management. In his peer-review submission to the Board, with regard to the unprofessional conduct charge, Dr. Kornbluth concluded that: "It is of great concern that the physician would provide CDS to patients in a non-office setting. It is absolutely not appropriate and morally reprehensible for physicians to provide CDS to patients in a bar or parking lot. His actions definitely constitute the illegitimate prescribing of CDS."

In his peer-review submission to the Board, Dr. Matsunaga opined, in pertinent part, as follows:

As a Pain Specialist, I am making comments in regards to the standards of care expected from any practitioner prescribing narcotics on a regular basis for ongoing pain management. Unprofessional conduct can be viewed as a lack of knowledge or skills evidenced by a practitioner, in carrying out their professional duties, and failing to exercise the degree of care and skill ordinarily exercised by other members of the profession in similar setting. . . . I believe any physician or practitioner will comment that this is not the standard of care, and thus "unprofessional conduct."

On October 10, 2014, the Board issued charges against Dr. Kozachuk for violating HO § 14-404(a)(3)(ii), unprofessional conduct in the practice of medicine, and § 14-404(a)(22), failing to meet the standard of quality medical care provided to patients. The

basis for the unprofessional conduct charge included the allegation that Dr. Kozachuk had prescribed medication, including oxycodone, in exchange for money at a restaurant, on several occasions.³ The charges set forth that, during the Board's interview with Dr. Kozachuk, he acknowledged that, on October 1, 2012, he met with "Patient A and Patient A's father" at Daniels for the purpose of discussing an upcoming court hearing and to notify the patient that he no longer was practicing pain management, and that he delivered a prescription for oxycodone or Percocet to "Patient A" during their meeting at Daniels. The charges also stated that, *inter alia*, Dr. Kozachuk told the DEA agents that he had written CDS prescriptions for two other patients inside Daniels during the prior year and charged them \$100 per prescription. The charges stated that this constituted unprofessional conduct in the practice of medicine.

II.

Administrative Proceedings

An Administrative Law Judge ("ALJ") for the Office of Administrative Hearings ("OAH") held a hearing on the case, beginning on August 6, 2015. The ALJ received testimony from Dr. Kozachuk and eleven additional witnesses.

³ With respect to the charge of failing to meet the standard of quality medical care, the Board presented patient specific allegations resulting from the peer-review of the patient records provided by Dr. Kozachuk. Because Dr. Kozachuk is not challenging the Board's decision in this regard, we will not address these allegations in detail, other than to note that they included the failure to monitor patients to ensure compliance with the use of opioid medication and/or to document prescriptions.

Dr. Kornbluth, one of the peer reviewers, testified on behalf of the State as an expert witness in pain management and physical medicine and rehabilitation. After medical school, Dr. Kornbluth completed a one-year internship in internal medicine, a three-year residency in physical medicine and rehabilitation, and a fellowship in pain management. He was board certified in pain management and in physical medicine and rehabilitation. Dr. Kornbluth had been in practice since 2004, and he had been qualified as an expert in pain management and physical medicine and rehabilitation in several prior administrative hearings.

Dr. Kornbluth testified regarding his opinion whether it was unprofessional conduct to prescribe medications in a restaurant-bar setting. He stated that it was “irresponsible, sloppy, [and] unconscionable to be providing medical care in a bar and restaurant, especially if it involves analgesic controlled substances.” He explained:

[T]he basis of my opinion is that physicians should be taking a thorough history, doing a thorough physical examination prior to providing medications. They should be provided in a medical setting, especially controlled dangerous substances. And it certainly appears to me, based on the records I reviewed, that that was not the case.

The State’s questioning then turned to Dr. Kozachuk’s prescribing methods at Daniels:

Q. Okay. Assuming the State meets its burden of proof, consistent with . . . the transcript of [Ms. F.’s] interview and also the DEA reports of investigations that you reviewed, that at the table in the restaurant bar there was an exchange of prescriptions for a - - a roll of cash. Would that in your opinion to a reasonable degree of medical probability constitute unprofessional conduct in the practice of medicine?

A. Absolutely.

Q. And why is that?

A. As physicians we're not supposed to be in bars and restaurant[s] providing prescriptions to patients. That's not the right venue to be providing medical care, especially if it's an exchange for - - for money at a table. I think that's - - that's highly inappropriate.

Dr. Kornbluth stated that this opinion was based on his education, training and knowledge. When asked specifically about Dr. Kozachuk's actions of prescribing oxycodone for Patient A in the parking lot, Dr. Kornbluth testified that this constituted unprofessional conduct. He explained: "The medical care was provided in a car outside of a bar and restaurant, not in a medical facility. There's no mention or nothing to support that a history or physical was done. It is a deviation from the standard of care and unprofessional conduct."

On cross-examination, Dr. Kornbluth acknowledged that he was not aware whether there was any provision within the Code of Maryland Regulations (COMAR) stating where a physician could write a prescription. He explained, however, that the standard for where a doctor could write a prescription is "based upon using the attention, care, caution and prudence that a reasonable provider in a similar circumstance would exercise," noting that, "[i]n medicine there's not necessarily a book of - of what you can and can't do. I think one has to use some prudence and medical judgment."

Special Agent Yeager testified regarding his conversation with Dr. Kozachuk, during which Dr. Kozachuk acknowledged meeting individuals outside of his practice, including at Daniels, to prescribe medication over the last year. Dr. Kozachuk admitted to

prescribing oxycodone, Xanax, and an antibiotic, charging \$100 for each prescription. Agent Yeager stated that his notes read: “[Patients C and F] paid \$200 gas money, \$100 per script, four scripts, Roxicodone, Xanax.”

Dr. Kozachuk also told Agent Yeager that he had prescribed medication to patients at G.L. Shacks Grill. When Agent Yeager asked Dr. Kozachuk why he would prescribe there rather than in his office, Dr. Kozachuk told him that, “after the office visit the patient wanted to go to buy him something, like a beer, so they would go down to G.L. Shacks and he would write the prescription at the bar as opposed to his office.”

Special Agent Yeager’s notes, which were admitted as evidence, indicated that Dr. Kozachuk stated that he was meeting Patient A at Daniels to go over testimony for an upcoming court hearing, but he also had prescribed Patient A Roxicodone, 30 milligrams, three to four times a day. Dr. Kozachuk knew that Patient A was addicted to oxycodone, but he continued prescribing it until Patient A received surgery. When Agent Yeager was asked why he did not seize the prescription from Patient A, he replied:

Well, it’s a difficult process when we go to calls like this because it was prescribed by a doctor. The doctor said he prescribed it. And he said [Patient A] was addicted, so if we were to take the prescription and he would have had withdrawals and died or something else, we would be responsible for taking his prescription.

He further testified that, following the October 1 interview, Dr. Kozachuk voluntarily surrendered his privilege to prescribe controlled dangerous substances. Dr. Kozachuk signed a form stating that he was surrendering this privilege “in view of [his]

alleged failure to comply with the federal requirements pertaining to controlled substances.”

Ms. F. testified regarding her observations of Dr. Kozachuk at Daniels on various occasions. In the summer of 2012, she saw Dr. Kozachuk meeting with a gentleman and filling out a prescription pad. He then proceeded to “tear them off and sit them in a pile on the table.” Ms. F. reported what she saw to her supervisor.

That fall, she observed Dr. Kozachuk with “two women who came in and joined him.” Dr. Kozachuk had a prescription pad and “was filling them out and making a pile on the table.” She saw the older woman give Dr. Kozachuk “a wad of cash that was folded in half,” with “a 20 on the outside.” She told her supervisor because it “didn’t seem like a legitimate practice.” Dr. Kozachuk paid for the bill, but it was not more than \$20 because Daniels’ “prices aren’t that high.”

Dr. Kozachuk testified on the third day of the hearing. With respect to the charge that he engaged in unprofessional conduct by prescribing medication in public, Dr. Kozachuk testified that the patients he saw were “complicated patients which no one else wanted partly because they didn’t have the money to pay anybody. They were usually cut off by IWIF.”⁴ He stated that he worked without pay for long periods of time with these patients. He acknowledged that he was providing chronic pain management for patients.

Dr. Kozachuk testified that he “wrote a script for penicillin to a female” known to Patient F when they all met at Daniels, and he examined her cervical lymph nodes and

⁴ Dr. Kozachuk testified that IWIF is a workers’ compensation insurance company.

looked into her throat at the restaurant. He denied receiving money for this, and if money was presented across the table, it was because they “divvied up the bill and then [he] paid for the total bill.” He explained that any other prescriptions present were merely “xeroxed scripts” that he gave to Patient F to give to Patient F’s attorney as evidence for a potential fraud lawsuit.

Regarding October 1, 2012, Dr. Kozachuk stated that he wrote the prescription before arriving at the parking lot. He stated that he did not write a prescription in the parking lot because he “was under the impression that it was illegal to write a narcotic prescription outside of an office or outside of a house call.” He believed, however, that it was different if he delivered a prescription that was written before he got there. Dr. Kozachuk agreed to see Patient A, and Patient A’s father, to give him the “script” and the papers he needed for an upcoming court hearing.

Dr. Kozachuk explained why he voluntarily surrendered his ability to prescribe, as follows:

Well, I wasn’t asked to do it. I saw [Patient A] lie to the DEA agent that I did not give him a script. And, in Canada, if you lie to the police, that’s considered a criminal offense, so I thought I was going to be entrapped in a serious problem here.

So I went to the agent because I heard him say he didn’t have it and informed that, in fact, he did have it. So they approached him again and they took it out of his pocket.

He denied seeing the document stipulating that he surrendered his privilege due to his “failure to comply with federal requirements,” stating that he did not know the document existed until a month before the hearing because, at the time, he signed an electronic pad.

Several of Dr. Kozachuk's patients testified. They stated that Dr. Kozachuk did not prescribe prescriptions outside of an office setting.

ALJ Proposed Decision

On December 10, 2015, the ALJ issued a 63-page proposed decision, concluding that the charges against Dr. Kozachuk should be upheld. As relevant to the issue on appeal, the ALJ made the following findings of fact:

68. The standard of care requires a physician to take a thorough and accurate history and physical examination before prescribing any medication. Prescriptions should be provided to a patient in an appropriate medical setting after the history and physical examination have been performed. A physician shall document in his medical records the specific medication and dosage for CDS or other medications.

69. A physician may not provide a prescription, with or without an exchange of money, to a patient in a bar, restaurant, or parking lot outside a bar or restaurant without taking a thorough history and physical examination. The failure to conduct a history or physical before prescribing medication constitutes the failure to provide proper medical care in an appropriate medical setting.

70. The standard of care for where and under what circumstances a physician may write a prescription for a patient is based on the attention, care, caution, prudence, and medical judgment that a reasonable provider in a similar circumstance would exercise.

The ALJ went on to summarize the evidence as it related to the charge of unprofessional conduct, as follows:

Dr. Kornbluth opined that a physician should not provide prescriptions to patients in a non-medical setting such as a bar or restaurant because it was not the proper setting for providing medical care, including prescriptions, to patients. He opined that it was irresponsible, sloppy, and unconscionable to provide medical care in a restaurant and bar setting, regardless of whether it involved CDS or non-CDS prescriptions. He also

indicated that it was highly inappropriate if money was exchanged for a prescription in a non-medical setting, such as at a table in a restaurant or bar.

Dr. Kornbluth expressed the same opinion in his peer review report that prescribing CDS medication to patients in a non-office setting was improper. He opined in his report that it was inappropriate and morally reprehensible to provide CDS prescriptions to patients in a bar or parking lot. Mark Matsunaga, M.D., prepared the other peer review report in this case. Although he did not testify at the hearing, he concluded in his report that writing prescriptions for individuals in a restaurant was not the standard of care and constituted unprofessional conduct.

The Respondent claimed that providing prescriptions to patients in non-medical settings, such as a bar, restaurant, or parking lot, should not be found to be unprofessional conduct in the practice of medicine because there is no statute or regulation that expressly prohibits this practice. While there may be no statute or regulation expressly prohibiting such conduct, the court in *Finucan* acknowledged that such determinations are made by the common judgment of the profession as found by the professional licensing board. Dr. Kornbluth testified that such conduct fails to meet the standard of care and constitutes unprofessional conduct in the practice of medicine, and he has explained the basis for his opinion. The Respondent offered no expert testimony to refute that opinion. I agree with the State's position and find that such conduct is below the standard of care for the reasons explained by Dr. Kornbluth, and I find that such conduct constitutes unprofessional conduct in the practice of medicine. Md. Code Ann., Health Occ. § 14-404(a)(3)(ii) (Supp. 2015).

The ALJ stated that it was undisputed that Dr. Kozachuk “met with Patient A in the parking lot at Daniels on October 1, 2012 and provided Patient A with a prescription for Roxycodone or Oxycodone.” The ALJ found credible Ms. F.’s testimony that, on two other dates, she observed Dr. Kozachuk writing prescriptions and putting them on the table, receiving money on one occasion. The ALJ noted that Agent Yeager’s reports indicated that Dr. Kozachuk admitted that he had a few patients for whom he prescribed medication outside of an office setting and had written several prescriptions to patients at Daniels and

G.L. Shacks Grill. The ALJ found these reports to be reliable and did not find credible Dr. Kozachuk's "blanket denial."

After assessing all of the evidence, the ALJ concluded:

For all the foregoing reasons, I conclude that [Dr. Kozachuk] prescribed both CDS medication and other medication to several patients in non-office settings, including Daniels, in Daniels' parking lot, and at another restaurant. Furthermore, there is no evidence that [Dr. Kozachuk] conducted a thorough and accurate history and physical examination at the time he prescribed the medications in a non-office setting. Moreover, there is no evidence in this record that [Dr. Kozachuk] documented any histories, physical examinations, prescriptions, or the rationale for writing the CDS and non-CDS prescriptions in non-office settings. To the extent [Dr. Kozachuk] claims that he briefly examined [the female friend of Patient F.] at a table in a restaurant and bar when he prescribed her an antibiotic, it was inappropriate for a physician to examine a patient in a non-office public setting, and any examination that he purportedly conducted was clearly not thorough or adequate.

As addressed above, I conclude that it was inappropriate for [Dr. Kozachuk] to prescribe medication, both CDS and non-CDS medication in a non-office setting, including at a restaurant and bar, and in a parking lot. On some occasions, I find that money changed hands. On other occasions, the evidence does not support that money changed hands. Such conduct, regardless of whether money changed hands, is inappropriate, is unbecoming of a member in good standing in the medical profession, and raises reasonable concerns that [Dr. Kozachuk] abused his status as a physician in such a way as to harm patients or diminish the standing of the medical profession in the eyes of the general public.

I conclude that [Dr. Kozachuk's] practices of prescribing in a non-office setting, including in a restaurant and bar and in the parking lot outside the restaurant and bar, was below the standard of care and constitutes unprofessional conduct in the practice of medicine in violation of section 14-404(a)(3)(ii) of the Health Occupations Article, as alleged in paragraph 33 of the Charges.

The ALJ's proposed disposition was that the charges against Dr. Kozachuk be upheld, and he be reprimanded, permanently prohibited from prescribing controlled

dangerous substances, placed on a one-year probation, and required to complete a comprehensive course in medical ethics. The ALJ also recommended that, after one year, Dr. Kozachuk be subject to chart review.

Exceptions Proceeding

Dr. Kozachuk filed exceptions to the ALJ's proposed decision. The Board subsequently held an exceptions hearing, and on April 25, 2016, the Board issued its Final Decision and Order, concluding, *inter alia*, that Dr. Kozachuk engaged in unprofessional conduct in the practice of medicine. It ordered that Dr. Kozachuk be reprimanded and placed on probation for a minimum of two years, during which Dr. Kozachuk would be prohibited from prescribing controlled dangerous substances. Dr. Kozachuk was required to complete a comprehensive course in medical ethics.

The Board adopted the ALJ's proposed Findings of Fact and Discussion. Included within the Board's summary of the facts, pertaining to the charge of unprofessional conduct, is the following:

On October 1, 2012, Dr. Kozachuk met with Patient A and his father in the Daniels parking lot and wrote a prescription for 100 tablets of Roxicodone (an opioid pain reliever), without taking a history or physical examination and without documenting the prescriptions in his medical records. The Supervisor saw Dr. Kozachuk in the parking lot and contacted the Howard County Police Department and the Special Agent. After the police and the Special Agent arrived, the Special Agent interviewed Dr. Kozachuk. During the interview, Dr. Kozachuk admitted to prescribing Roxicodone to Patient A in the parking lot, admitted to writing prescriptions for Xanax and oxycodone in exchange for \$100 per prescriptions to Patient C and F at Daniels, and admitted to writing prescriptions at G.L. Shacks. After the interview, Dr. Kozachuk agreed to surrender his DEA Certificate of Registration.

The Board rejected Dr. Kozachuk's argument that "there is no legal basis for finding unprofessional conduct because there is no statutory provision, no regulation, and no American Medical Association Ethics Opinion that specifically prohibits prescribing outside of an office setting." The Board stated that the "standard for 'unprofessional conduct' is well established under Maryland common law."⁵ It found as follows:

Dr. Kozachuk's prescribing practices, including selling prescriptions for opioids in the parking lot and in a restaurant constitutes unprofessional conduct in the practice of medicine. Seeing a patient in a public location, such as a restaurant, eliminates, or, at least, greatly reduces the privacy needed to ensure patient confidentiality. At a restaurant, individuals sitting nearby and restaurant employees are in a position to overhear details regarding the patient's medical history, medications the patient takes, and the patient's treatment options. A physician also cannot conduct a thorough physical examination in a restaurant. The option to perform a thorough medical examination must, at the very least, be available when prescribing opioids. Writing prescriptions in exchange for cash in public is a flagrant abandonment of professionalism. This is especially disturbing when the drugs prescribed possess such a high risk for diversion and abuse, such as opioids and benzodiazepines that Dr. Kozachuk prescribed. Selling prescriptions in a public space endangers the public, breaches patient confidentiality, *see Salerian*, 176 Md. App. at 249, and diminishes the standing of the medical profession in the eyes of the members of the general public.

With respect to Dr. Kozachuk's argument that Dr. Kornbluth was not qualified to testify regarding whether prescribing in a restaurant was unprofessional conduct, the Board found that Dr. Kozachuk waived this issue by failing object to Dr. Kornbluth's testimony based on his qualifications. In any event, the Board found that Dr. Kornbluth had

⁵ The Board cited to *Finucan v. Maryland Bd. of Physician Quality Assur.*, 380 Md. 577, 593 (2004), which stated that "unprofessional conduct" refers to "conduct which is unbecoming a member in good standing of a profession."

“sufficient professional experience and training” to opine on the prescribing issues presented.

Finally, the Board stated that, even if Dr. Kornbluth had not testified it “would still find Dr. Kozachuk’s conduct unprofessional,” explaining that, “[b]ased on its experience, competence and specialized knowledge the [Board] finds that selling opioid prescriptions in restaurants and parking lots is unprofessional.”

Indeed, in increasing the ALJ’s recommended probation of one year to two years, the Board stated:

The Panel has considered the mitigating factors under COMAR 10.32.02.09, specifically that Dr. Kozachuk has no prior discipline and has, for the time being, surrendered his DEA Certificate of Registration. However, Dr. Kozachuk’s violations are significant. Dr. Kozachuk’s opioid prescribing practices endanger patient and public safety. His selling prescriptions in restaurants and in a parking lot is egregious, dangerous and diminishes the standing of physicians in the eyes of the public. Dr. Kozachuk’s repeated sale of prescriptions and his standard of care violation show a pattern of disturbing and detrimental misconduct.

On May 17, 2016, Dr. Kozachuk petitioned for judicial review in the Circuit Court for Baltimore City. On December 7, 2016, the circuit court issued its decision affirming the Board’s decision. The court found the Board’s decision that Dr. Kozachuk engaged in unprofessional conduct in the practice of medicine was supported by substantial evidence.

DISCUSSION

I.

A.

Standard of Review

In *Geier v. Maryland State Bd. of Physicians*, 223 Md. App. 404 (2015), this Court set forth the proper standard of review of an administrative decision:

Judicial review of an administrative decision “generally is a ‘narrow and highly deferential inquiry.’” *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass’n, Inc.*, 192 Md. App. 719, 733 (2010) (quoting *Maryland-Nat’l Park & Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73, 83 (2009)). This Court looks “through the circuit court’s decision and evaluates the decision of the agency,” *Chesapeake Bay Foundation, Inc. v. Clickner*, 192 Md. App. 172, 181 (2010), 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.’” *Cosby v. Dep’t of Human Res.*, 425 Md. 629, 638 (2012) (quoting *Bd. of Phys. Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)).

With respect to the Board’s factual findings, we apply the substantial evidence test, which “‘requires us to affirm an agency decision, if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.’” *Miller v. City of Annapolis Historic Pres. Comm’n*, 200 Md. App. 612, 632 (2011) (quoting *Montgomery Cnty v. Longo*, 187 Md. App. 25, 49 (2009)). Administrative credibility findings likewise are entitled to great deference on judicial review. Credibility findings of hearing officers who themselves have personally observed the witnesses “‘have almost conclusive force.’” *Kim v. Maryland State Bd. of Physicians*, 196 Md. App. 362, 370 (2010), *aff’d*, 423 Md. 523 (2011) (quoting *Anderson v. Dep’t of Pub. Safety and Corr. Srvs.*, 330 Md. 187, 217 (1993)). A reviewing court “‘may not substitute its judgment for the administrative agency’s in matters where purely discretionary decisions are involved.’” *Mueller v. People’s Counsel for Baltimore Cnty.*, 177 Md. App. 43, 82-83 (2007) (quoting *People’s Counsel for Baltimore Cnty v. Surina*, 400 Md. 662, 681 (2007)), *cert. denied*, 403 Md. 307 (2008). With respect to the Board’s conclusions

of law, “a certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers.” *Employees’ Ret. Sys. of Balt. v. Dorsey*, 430 Md. 100, 111 (2013). “We are under no constraint, however, ‘to affirm an agency decision premised solely upon an erroneous conclusion of law.’” *Id.* (quoting *Thomas v. State Ret. & Pension Sys.*, 420 Md. 45, 54-55 (2011)).

Id. at 430.

B.

Adequate Notice of Charges

Dr. Kozachuk contends that the Board’s decision violated his due process rights because it “disregarded the charge as understood by the administrative law judge,” and it found him guilty of “new charges of selling prescriptions to the public and breaching confidentiality without an opportunity to defend against the new charges.” The Board contends that it “provided Dr. Kozachuk with adequate notice of the charges.”

The Fourteenth Amendment, and Article 24 of the Maryland Declaration of Rights “guarantee that a person will not be deprived of life, liberty, or property without due process of law.” *Regan v. Bd. of Chiropractic Examiners*, 120 Md. App. 494, 509 (1998), *aff’d*, 355 Md. 397 (1999). To raise a due process claim, a person must show a deprivation of such an interest. *Id.* at 510. An individual with a professional license has a property interest in the outcome of an administrative or regulatory proceeding. *See Mesbhai v. Maryland State Bd. of Physicians*, 201 Md. App. 315, 337 (2011). Therefore, “due process requires that an individual against whom proceedings are instituted be given notice and an opportunity to be heard,” and as such, “reasonable notice of the nature of the allegations must be given to the party so that it can prepare a suitable defense.” *Regan*, 120 Md. App.

at 519. Notice is sufficient as long as person charged is able to “marshal evidence and arguments in defense” of the allegations. *Reed v. Mayor of Baltimore*, 323 Md. 175, 184 (1991).⁶

Here, the charging document made clear that Dr. Kozachuk was being charged with unprofessional conduct in the practice of medicine. Following the list of charges, the Board provided the factual allegations supporting its charge of unprofessional conduct, including that Dr. Kozachuk engaged in prescribing CDS in public establishments, and in some cases money was exchanged. Specifically, the charging document stated:

20. [In an interview with the DEA on October 1, 2012, Dr. Kozachuk] stated that he was meeting with a patient (“Patient A”) to review testimony regarding an upcoming court hearing. He acknowledged that during the “meeting” he had issued a prescription to Patient A for 100 tablets of oxycodone. (footnote omitted).

21. [Dr. Kozachuk] stated that he had written CDS prescriptions for two other male patients over the prior year while inside the Bar (“Patients B and C,” respectively). He charged each of the patients \$100 per prescription.

25. On a third occasion that Employee A saw the [Dr. Kozachuk] at the Bar, Employee A stated that she witnessed “money physically exchange hands” when the Respondent issued prescriptions to the two females. Employee A estimated the number of prescriptions to be approximately ten, and that the money she saw “exchange hands” was in a roll. She alerted the Bar Owner.

⁶ Md. Code (2014 Repl. Vol.) § 10-207 of the State Government (SG) Article sets forth the notice that a state agency must give. In this instance, there is no contention that this statute was violated.

32. [Dr. Kozachuk] stated that he had been at the Bar on approximately ten occasions over the past two or three years. He recalled having written a prescription for an antibiotic for a female patient. He denied that the female patient had paid him for the prescription.

33. [Dr. Kozachuk's] conduct as outline in pertinent part above constitutes unprofessional conduct in the practice of medicine in violation of [HO] § 14-404(a)(3)(ii).

The charges were consistent with the Board's findings. As indicated, the Board found that, "Dr. Kozachuk's prescribing practices, including selling prescriptions for opioids in a parking lot and in a restaurant constitutes unprofessional conduct." Because "the gist of the charges . . . and the gist of the Board's findings" were the same, *Regan*, 355 Md. at 417, we are not persuaded by Dr. Kozachuk's allegation that he did not have sufficient notice to defend himself. Thus, there was no due process violation.

C.

Expert Testimony

Dr. Kozachuk contends that the Board erroneously concluded that Dr. Kornbluth was qualified to testifying regarding what constituted unprofessional conduct in the practice of medicine. The Board contends, initially, that this claim is waived because Dr. Kozachuk did not object to the qualification of the expert or his testimony before the ALJ. In any event, the Board asserts that Dr. Kornbluth's "training and professional experience are more than sufficient to qualify him to provide expert testimony on the issues presented in this case, which bear directly on professional standards related to prescribing practices for medications frequently used in pain management."

We agree with the Board that the issue regarding Dr. Kornbluth's expert testimony is waived. At no time during the proceeding before the ALJ did Dr. Kozachuk object to Dr. Kornbluth's qualifications to give his expert opinion. Under these circumstances, his appellate contention in this regard is not preserved for this Court's review. *See Rosov v. Maryland State Bd. of Dental Exam'rs*, 163 Md. App. 98, 112 (2005) ("If a party fails to object, 'he will not later be heard to complain that the evidence should not have been admitted.'") (quoting *Ginn v. Farley*, 43 Md. App. 229, 236-37, *cert. denied*, 286 Md. 747 (1979)); *see also* Md. Rule § 8-131(a) (an appellate court generally will not decide an issue unless it was raised or decided below).

Even if the issue was preserved for appellate review, we would conclude that it is without merit. "[A] witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether this special knowledge is based upon professional training, observation, actual experience, or any combination of these factors." *Blackwell v. Wyeth*, 408 Md. 575, 618-19 (2009) (quoting *Radman v. Harold*, 279 Md. 167, 169 (1977)).

Here, the Board found, that "Dr. Kornbluth ha[d] sufficient professional experience and training" to opine regarding appropriate prescribing methods. It stated:

Dr. Kornbluth completed medical school at Jefferson Medical College, an internship at Washington Hospital Center in Washington, D.C., a residency and then chief-residency at Thomas Jefferson University, and a fellowship at Washington Hospital Center. He is double-board-certified in pain management and physical medicine and rehabilitation. He was a partner at two pain management centers and founded SMART Pain Management in 2008. This significant medical training and experience qualified him to provide expert testimony on the prescribing issues in this case, including the

appropriateness of prescribing in certain locations. Dr. Kornbluth's testimony that Dr. Kozachuk's prescribing in a restaurant constituted unprofessional conduct was properly admitted by the ALJ.

We agree. Even if the issue was preserved for review, we would find that Dr. Kornbluth was qualified to testify that Dr. Kozachuk's prescribing practices constituted unprofessional conduct in the practice of medicine.

D.

Substantial Evidence

Dr. Kozachuk next contends that there was not substantial evidence to support the Board's finding that he engaged in unprofessional conduct. The Board disagrees, asserting that there was substantial evidence to support the Board's finding of unprofessional conduct based on Dr. Kozachuk's actions in prescribing and selling prescriptions in non-office settings, including at restaurants and in a parking lot.

In deciding whether substantial evidence supports the agency's decision, we review the evidence in the light most favorable to the agency, and look to whether a "reasoning mind reasonably could have reached the factual conclusion the agency reached." *Geier*, 223 Md. App. at 430. A reviewing court's role is not to "reevaluate the evidence presented to the administrative agency to make credibility determinations anew." *Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 547 (2011).

"Unprofessional conduct" is conduct that "breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession."

Finucan, 380 Md. at 593. It includes behavior that is “commonly understood within the medical profession” to be prohibited. *Id.* at 594.

Here, there was evidence, including Dr. Kozachuk’s admissions during the investigation, that Dr. Kozachuk sold prescriptions in public places in exchange for cash. Dr. Kornbluth testified that this conduct was “irresponsible, sloppy, [and] unconscionable to be providing medical care in a bar and restaurant, especially if it involves analgesic controlled substances.” Moreover, in relying on the well-established standard for unprofessional conduct and its expertise, the Board found that selling prescriptions for cash “in a public place is a flagrant abandonment of professionalism,” and it endangers the public and “diminishes the standing of the medical profession in the eyes of members of the general public.”⁷ Accordingly, there was substantial evidence to support the Board’s determination that Dr. Kozachuk’s prescribing practices, including selling prescriptions in a non-office setting, constituted unprofessional conduct in the practice of medicine.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**

⁷ Md. Code (2014 Repl. Vol.) § 10-213(i) of the State Government Article, provides that an agency “may use its experience, technical competence, and specialized knowledge in the evaluation of evidence.”