

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph M. Marchese, R.PH.,	:	
Petitioner	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of State, Bureau of	:	
Professional and Occupational	:	
Affairs, State Board of Pharmacy,	:	No. 1613 C.D. 2010
Respondent	:	Submitted: May 11, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: September 21, 2011

Joseph M. Marchese, R.PH. (Marchese) petitions this Court for review of the July 22, 2010 final adjudication and order of the State Board of Pharmacy (Board) placing testing and probationary conditions upon the reinstatement of his pharmacy license. The issues before this Court are: (1) whether the Board erred by concluding that Marchese must retake and pass the pharmacy licensure entrance examinations; (2) whether the Board abused its discretion by imposing three years of probation; and, (3) whether the Board's imposition of these requirements as prerequisites for unrestricted practice violated Marchese's due process rights,

rendering the reinstatement provisions of the Pharmacy Act¹ and the Board's regulations unconstitutionally vague. For the reasons that follow, we affirm the Board's order.

The facts of this case are not in dispute. Marchese was licensed to practice pharmacy in the Commonwealth of Pennsylvania in 1984. In 1990, he purchased a pharmacy and served as its pharmacy manager. On October 5, 1999, Marchese pled guilty to a felony violation of Section 13(a)(14) of The Controlled Substance, Drug, Device and Cosmetic Act (Controlled Substance Act),² for delivering a controlled substance, in his capacity as pharmacist, without a legitimate prescription or order of a licensed physician or practitioner.³ As a result of his conviction, on February 9, 2000, Marchese's pharmacy license was automatically suspended pursuant to Section 7(d.2) of the Pharmacy Act, 63 P.S. § 390-7(d.2). He sold his pharmacy to his sister and became its general store manager for non-pharmacy matters. During the time of his suspension, Marchese met all of his continuing education requirements and kept up with changes in pharmacy practice.

On August 19, 2009, Marchese filed a petition for reinstatement of his pharmacy license with the Board pursuant to Section 5(d) of the Pharmacy Act, 63 P.S. § 390-5(d). In follow-up to a request by the Board, on February 11, 2010, Marchese provided an executed verification of compliance and a criminal record check reflecting that he had no criminal record after his 1999 conviction. A hearing was held before the full Board on May 18, 2010. During the hearing, Marchese

¹ Act of September 27, 1961, P.L. 1700, *as amended*, 63 P.S. §§ 390-1 – 390-13.

² Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. § 780-113(a)(14).

³ According to the charge, Marchese sold Vicodin to an undercover officer on September 14, 1998. He was sentenced to five years probation by the Court of Common Pleas of Lackawanna County. He was released from probation on April 2, 2002, after only 2½ years, due to his compliance with the conditions of his sentence.

presented unrefuted documentary evidence in support of his fitness to return to unrestricted pharmacy practice, as well as his testimony, his sister's testimony, and that of a pharmacy colleague. On July 22, 2010, the Board issued an adjudication and order reinstating Marchese on the basis that he had proven his rehabilitation and fitness to resume practice, but under the conditions that he retake and pass the pharmacy licensure examinations (i.e., the North American Pharmacist Licensure Examination and the Multistate Pharmacy Jurisprudence Examination), and that he remain under probation for three years, after which he must again demonstrate his fitness to resume unrestricted practice. Marchese appealed the Board's imposition of the reinstatement conditions to this Court.⁴

On appeal, Marchese argues that after having determined that he proved his fitness to resume active practice, the Board exceeded its authority by requiring that he retake and pass the pharmacy licensure entrance examinations and by imposing a three-year probationary period. We disagree.

This Court has held that, “[t]he interpretation of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it is clear that such interpretation is erroneous.” *Menoyo v. State Bd. of Med.*, 629 A.2d 295, 299 (Pa. Cmwlth. 1993). “An agency’s adjudication is not in accordance with law if it represents a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency’s duties or functions.” *Connecticut Gen. Life Ins. Co. v. Pennsylvania Life & Health Ins. Guar. Ass’n*, 866 A.2d 465, 467 (Pa. Cmwlth. 2005) (quoting

⁴ This Court’s scope of review of an order of the Board “is limited to determining whether constitutional rights have been violated, an error of law committed, or necessary findings of fact were supported by substantial evidence.” *Brown v. State Bd. of Pharmacy*, 566 A.2d 913, 915 n.5 (Pa. Cmwlth. 1989).

Prudential Prop. & Cas. Ins. Co. v. Dep't of Ins., 595 A.2d 649, 653 (Pa. Cmwlth. 1991)). Applying these principles to the facts of this case, we cannot conclude that the Board's interpretation of its disciplinary statutes was clearly erroneous or constituted a manifest or flagrant abuse of its discretion.

Marchese committed a felony violation of Section 13(a)(14) of the Controlled Substance Act, which prohibits a pharmacist from dispensing or delivering controlled substances “unless done (i) in good faith in the course of his professional practice; (ii) within the scope of the patient relationship; [and] (iii) in accordance with treatment principles accepted by a responsible segment of the medical profession.”⁵ Section 7(d.2) of the Pharmacy Act mandates that the Board automatically suspend the license of a pharmacist convicted of a felony pursuant to the Controlled Substance Act. Pursuant to Section 5(a) of the Pharmacy Act, 63 P.S. § 390-5(a), however, the Board was authorized to go beyond the automatic suspension and revoke Marchese's license on the basis that he, *inter alia*, pled guilty to an offense in connection with the practice of pharmacy, violated the Pharmacy Act, acted in such a manner as to present a danger to the public health or safety, and/or is guilty of incompetence, malpractice or failure to conform to standards of acceptable pharmacy practice. 63 P.S. § 390-5(a)(2), (6), (11)-(12). In addition, Section 5(c) of the Pharmacy Act, 63 P.S. § 390-5(c), provides, in pertinent part:

When the board finds that the license of any pharmacist may be refused, revoked or suspended under the terms of subsection (a), the board may:

⁵ According to the Pharmacy Board, Vicodin is designated a Schedule III narcotic under Section 4(3)(iii)(4) of the Controlled Substance Act, 35 P.S. § 780-104(3)(iii)(4). Reproduced Record at 166a-167a. Pursuant to Section 13(f) of the Controlled Substance Act, 35 P.S. § 780-113(f), a violation of Section 113(a)(14) of the Controlled Substance Act relative to a Schedule III narcotic constitutes a felony.

- (1) Deny the application for a license.
- (2) Administer a public reprimand.
- (3) Revoke, suspend, limit or otherwise restrict a license as determined by the board.
- (4) Require a licensee to submit to the care, counseling or treatment of a physician or a psychologist designated by the board.
- (5) Suspend enforcement of its finding thereof and place a licensee on probation with the right to vacate the probationary order for noncompliance.

The Pharmacy Act also grants the Board discretion to reinstate pharmacy licenses that have been suspended or revoked due to violations of the Controlled Substance Act. Section 7(d.2) provides that “[r]estoration of such license shall be made as hereinafter provided in the case of revocation or suspension of such license.” In addition, Section 5(d) of the Pharmacy Act states:

Any person whose license, certificate or registration has been suspended or revoked because of a felony conviction under the [Controlled Substance Act] . . . may apply for reinstatement after a period of at least ten years has elapsed from the date of conviction. The board may reinstate the license if the board is satisfied that the person has made significant progress in personal rehabilitation since the conviction such that his reinstatement should not be expected to create a substantial risk of harm to the health and safety of his patients or the public or a substantial risk of further criminal violations and if the person meets all other licensing qualifications of this act.^[6]

⁶ The pharmacist licensing qualifications are set forth in Section 3 of the Pharmacy Act, 63 P.S. § 390-3, which likewise states, in pertinent part:

- (a) The State Board of Pharmacy may license as a pharmacist any person who has filed an application therefor, subscribed by the person under oath or affirmation, containing such information as the board may by regulation require, and who--

Finally, Section 5(c)(6) of the Pharmacy Act, 63 P.S. § 390-5(c)(6), provides that the Board “may . . . [r]estore or reissue, in its discretion, a suspended license to practice pharmacy and impose any disciplinary or corrective measure which it might originally have imposed.”

Following Marchese’s reinstatement hearing, the Board concluded that:

[Marchese] satisfied the Board that he has made significant progress in personal rehabilitation since his conviction such that his reinstatement should not be expected to create a substantial risk of harm to the health and safety of his patients or the public or a substantial risk of further criminal violations.

Marchese Br., App. A at 4. The Board also stated that “[Marchese] has demonstrated to the Board that he is fit to have his license reinstated.” Marchese Br., App. A at 5. Under Section 5(d), his license may be reinstated if he is not a risk to the public, and he meets all of the Pharmacy Act’s licensing requirements. According to Section 3(h) of the Pharmacy Act, 63 P.S. § 390-3(h), “passing the required examinations and complying with all the rules and regulations of the [B]oard and the provisions of this [Pharmacy] Act” is expressly required before the Board may grant a license to

....

(6) Has not been convicted of a felonious act prohibited by [the Controlled Substance Act] . . . unless:

- (i) at least ten years have elapsed from the date of conviction;
- (ii) the applicant satisfactorily demonstrates to the board that he has made significant progress in personal rehabilitation since the conviction such that licensure of the applicant should not be expected to create a substantial risk of harm to the health and safety of patients or the public or a substantial risk of further criminal violations; and
- (iii) the applicant otherwise satisfies the qualifications contained in or authorized by this act.

practice pharmacy. Moreover, the Board had the discretion pursuant to Section 5(a) of the Pharmacy Act to initially revoke or suspend Marchese's license and impose the conditions set forth in Section 5(c). Section 7(d.2) expressly allows the Board to base its reinstatement upon those same conditions. Since Sections 5(c)(3) and 5(c)(5) of the Pharmacy Act, 63 P.S. § 390-5(c)(3), (5), authorize the Board to "limit or otherwise restrict a license as determined by the [B]oard," and to "place a licensee on probation," the Board did not commit an error of law or abuse its discretion by requiring Marchese to retake the pharmacy examinations, and to remain under probation for three years, after which he must again demonstrate his fitness to resume unrestricted practice.

Marchese also argues on appeal that the Board's imposition of the probationary requirement as prerequisite for unrestricted practice violated his due process rights. Specifically, Marchese argues that the conditions were not clearly articulated in the statute; there were no charges listed against him for which the conditions could be based; the imposition of the probation condition renders the reinstatement provisions of Section 5(d) of the Pharmacy Act void for vagueness; and, the probation condition providing for immediate suspension of his license without a hearing violated the law.

The United States and Pennsylvania Constitutions prohibit the deprivation of any person's property without due process of law. U.S. Const. amend. XIV, § 1; Pa. Const. art. 1, § 1. Due process relative to an administrative proceeding requires adequate notice and an opportunity to be heard on the matters at issue. *Gow v. Dep't of Educ.*, 763 A.2d 528 (Pa. Cmwlth. 2000). "[T]he holder of a valid and existing professional license has a property interest in such license." *Brown v. State Bd. of Pharmacy*, 566 A.2d 913, 915 (Pa. Cmwlth. 1989). And, because a suspended

pharmacy license is susceptible to revival, it is still a property right entitled to due process protection. *Id.* “The due process requirements of the constitution are fulfilled so long as the accused is made sufficiently aware of the charges against him so that he may have an adequate opportunity to prepare a defense.” *Goldberg v. State Bd. of Pharmacy*, 410 A.2d 413, 416 (Pa. Cmwlth. 1980).

Since we have already found that the conditions imposed by the Board on Marchese were articulated in the Pharmacy Act, and the Board had the discretion to impose them under the circumstances, we will not further address Marchese’s arguments on those points. However, as to his next claim of error, Marchese argues that Section 5(d) of the Pharmacy Act is the exclusive provision governing reinstatement after suspension for a drug felony, and that since it does not expressly authorize the Board to impose probation as a condition, the Board’s determination that it is nonetheless permissible renders Section 5(d) void for vagueness. We disagree.

[T]here is a strong presumption in the law that legislative enactments do not violate the constitution. Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. As a matter of statutory construction, we presume the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth. A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution; all doubts are to be resolved in favor of a finding of constitutionality.

Commonwealth v. Mayfield, 574 Pa. 460, 465-66, 832 A.2d 418, 421 (2003) (citations and quotation marks omitted). More specifically:

A statute or regulation that is vague is unconstitutional because it either traps the innocent by failing to give a person of ordinary intelligence reasonable opportunity to know what is prohibited so that he may act accordingly or

result in arbitrary and discriminatory enforcement in the absence of explicit guidelines for its application. To not be unconstitutionally vague, terms of the statute or regulation must be sufficiently specific to inform those who are subject to it what conduct on their part will render the[m] liable to its penalties.

Watkins v. State Bd. of Dentistry, 740 A.2d 760, 763-64 (Pa. Cmwlth. 1999) (citation and footnote omitted).

Section 5(d) of the Pharmacy Act expressly provides that the Board may reinstate a license suspended due to a drug felony if the pharmacist made such progress in his rehabilitation that he is no longer a risk to the public and if he meets the other licensing requirements. Section 5(d)'s use of the term "may" renders that section clearly discretionary, and affords the Board great deference in deciding when and whether to reinstate a license. Further, while Section 7(d.2) of the Pharmacy Act states that restoration of a license suspended due to a violation of the Controlled Substance Act "shall be made as hereinafter provided in the case of revocation or suspension of such license[,]" Section 5(c)(6) of the Pharmacy Act specifically provides that the Board "may . . . impose any disciplinary or corrective measure which it might originally have imposed" in restoring a suspended license. Since Section 5(c)(5) expressly provides that placing a pharmacist on probation is one of the actions the Board may originally have taken against Marchese, pursuant to Section 5(c)(6), the Board cannot be said to have abused its discretion by making probation a condition of his license restoration. Therefore, although Section 5(d) does not expressly list probation as a condition upon which the Board may base reinstatement, the provisions of the Pharmacy Act that address reinstatement are sufficiently specific to inform Marchese of the potential consequences of his actions and do not violate the United States or Pennsylvania Constitutions.

Marchese's final claim of error is that his due process rights were violated because the probation condition in the Board's reinstatement order, in effect, immediately suspended his license without notice and an opportunity to be heard. We disagree. The automatic suspension of Marchese's license pursuant to Section 7(d.2) of the Pharmacy Act was effectuated in 2000. "A suspension of right is defined as: '[t]he act by which a party is deprived of the exercise of his right for a time. A temporary stop of a right, a partial extinguishment for a time'" *Brown*, 566 A.2d at 915 (quoting *Black's Law Dictionary* 1297 (5th ed. 1979)). According to the Board's Final Order, Marchese's probation condition permits him to resume practice as a pharmacist, but requires that he practice subject to close monitoring and supervision for a period of three years before he may be released to unrestricted practice. *Marchese Br.*, App. A Final Order. Because the Board's probation restriction on Marchese's pharmacy license does not rise to the level of a suspension, his due process rights were not violated, and this claim of error is without merit.

Based upon the foregoing, the order of the State Board of Pharmacy is affirmed.

JOHNNY J. BUTLER, Judge

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Commonwealth of Pennsylvania,	:	
Department of State, Bureau of	:	
Professional and Occupational	:	
Affairs, State Board of Pharmacy,	:	No. 1613 C.D. 2010
Respondent	:	

ORDER

AND NOW, this 21st day of September, 2011, the July 22, 2010 order of the State Board of Pharmacy is affirmed.

JOHNNY J. BUTLER, Judge

accordance with Section 7(d.2) of the Pharmacy Act, Act of September 27, 1961, P.L. 1700, *as amended*, which provides, in relevant part, as follows:

A license issued under this act shall automatically be suspended upon the . . . conviction of a felony under the act of April, 14, 1972 (P.L. 233, No. 64), known as “The Controlled Substance, Drug, Device and Cosmetic Act,” or conviction of an offense under the laws of another jurisdiction, which if committed in Pennsylvania, would be a felony under “The Controlled Substance, Drug, Device and Cosmetic Act.” As used in this section the term “conviction” shall include a judgment, an admission of guilt or a plea of nolo contendere. Automatic suspension under this subsection shall not be stayed pending any appeal of a conviction. Restoration of such license shall be made as hereinafter provided in the case of revocation or suspension of such license.

63 P.S. §390-7(d.2) (emphasis added). A person whose license has been suspended for a drug conviction “may apply for reinstatement after a period of at least ten years has elapsed from the date of conviction.” Section 5(d) of the Pharmacy Act, 63 P.S. §390-5(d). Thus, the automatic suspension for a drug conviction lasts ten years.

The Board also had the option to initiate an enforcement action under two statutes to revoke Marchese’s license for his drug conviction. Section 23(b) of The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, *as amended*, provides:

The appropriate licensing boards in the Department of State are hereby authorized to *revoke or suspend* the registration or license of any practitioner *when such person has pleaded guilty* or nolo contendere or has been convicted *of a felony under this act* or any similar State or Federal law. Before any such revocation or suspension, the licensee or registrant shall be given a hearing before the appropriate board. At such hearing the accused may be represented by counsel and shall be entitled to compulsory attendance of witnesses.

35 P.S. §780-123(b) (emphasis added). In addition, Section 5(c)(3) of the Pharmacy Act, 63 P.S. §390-5(c)(3), provides that the Board may “[r]evoke, suspend, limit or otherwise restrict” a license where it finds that the licensed pharmacist has violated one of the proscriptions listed in Section 5(a) of the Pharmacy Act. One such proscription is the commission of a felony, such as that committed by Marchese. Section 5(a)(2) of the Pharmacy Act, 63 P.S. §390-5(a)(2). The Board did not pursue a revocation but, rather, chose to go with the automatic suspension for Marchese.

At the completion of his ten year license suspension, Marchese requested a reinstatement of his license.¹ The Board conducted a hearing on Marchese’s request at which evidence was presented on his rehabilitation and readiness to resume his profession as a pharmacist. Specifically, Marchese presented evidence that during his suspension he had earned all the continuing education credits required of all licensed pharmacists; kept current on issues relating to the profession; and maintained an active affiliation with the Lackawanna County Pharmaceutical Association. The Board granted Marchese’s request for reinstatement, subject to (1) a three-year period of probation and (2) taking and passing the national and state pharmacy license examinations required of a pharmacist seeking a license for the first time. Marchese

¹ Section 5(d) of the Pharmacy Act provides:

Any person whose license, certificate or registration has been suspended or revoked because of a felony conviction under the act of April 14, 1972 (P.L. 233, No. 64), know as “The Controlled Substance, Drug, Device and Cosmetic Act,” or similar law of another jurisdiction, may apply for reinstatement after a period of at least ten years has elapsed from the date of conviction. The board may reinstate the license *if the board is satisfied that the person has made significant progress in personal rehabilitation since the conviction such that his reinstatement should not be expected to create a substantial risk of harm to the health and safety of his patients or the public or a substantial risk of further criminal violations and if the person meets all other licensing qualifications of this act.*

63 P.S. §390-5(d) (emphasis added).

petitioned for our review of the Board’s adjudication, challenging the examination requirement.

When reinstating a suspended license, the Board may “limit or otherwise restrict a license as determined by the [B]oard” and “impose any disciplinary or corrective measure which it might originally have imposed.” Sections 5(c)(3), (6) of the Pharmacy Act, 63 P.S. §390-5(c)(3), (6).² The majority reasons that these two provisions in the Pharmacy Act provide the Board sufficient authority to condition the reinstatement of Marchese’s license as it did. I disagree. The Board’s condition to reinstatement must be a condition that could have been imposed in a suspension order. Section 5(c)(6) of the Pharmacy Act, 63 P.S. §390-5(c)(6). That is not the case here.

When a license has been automatically suspended for a drug conviction, Section 7(d.2) of the Pharmacy Act provides that the restoration of the license will “be made as *hereinafter* provided in the case of revocation or suspension of such license.” 63 P.S. §390-7(d.2) (emphasis added). The only relevant “hereinafter” provision is Section 7.1, and it provides that a reinstatement of a *revoked* license, not a *suspended* license, requires a new license examination. Section 7.1 states, in relevant part, as follows:

² Sections 5(c)(3), (6) of the Act provide:

- (c) When the board finds that the license of any pharmacist may be refused, revoked or suspended under the terms of subsection (a), the board may:

* * *

- (3) Revoke, suspend, *limit or otherwise restrict a license* as determined by the board.

* * *

- (6) Restore or reissue, in its discretion, a suspended license to practice pharmacy and *impose any disciplinary or corrective measure which it might originally have imposed.*

63 P.S. §390-5(c)(3), (6) (emphasis added).

Any person whose license, certificate or registration *has been revoked* may apply for reinstatement, after a period of at least five years, but *must meet all of the licensing qualifications of this act* for the license applied for, *to include the examination requirement*, if he or she desires to practice at any time after such revocation.

63 P.S. §390-7.1 (emphasis added). Section 7.1 does not impose the examination requirement upon one whose license has been suspended, and there is no comparable provision elsewhere in the Pharmacy Act for those whose licenses have been suspended.

The distinction between a suspension and a revocation has been established by our precedent. In *Brown v. State Board of Pharmacy*, 566 A.2d 913, 915 (Pa. Cmwlth. 1989), this Court explained that a suspension is a temporary deprivation of the ability to exercise a right. Specifically, we stated that a suspension is

[t]he act by which a party is deprived of the exercise of his right for a time. A temporary stop of a right, a partial extinguishment for a time, as contrasted with a complete extinguishment, where the right is absolutely dead. . . . It differs from extinguishment because a suspended right is susceptible of being revived which is not the case where the right was extinguished.

Id. (quoting BLACK'S LAW DICTIONARY 1297 (5th ed. 1979)). By contrast, a revocation is a "complete extinguishment." In *Pittenger v. Department of State, Bureau of Professional and Occupational Affairs*, this Court explained that

when a license or privilege is revoked, *it is extinguished and the former possessor is returned to the same position he occupied had the license or privilege never been issued.* The term "revoke" is defined as "[t]o annul or make void by recalling or taking back; to cancel, rescind, repeal or reverse."

596 A.2d 1227, 1230 (Pa. Cmwlth. 1991) (quoting BLACK'S LAW DICTIONARY 1188 (5th ed. 1979)) (emphasis added). It is logical, then, that Section 7.1 of the Pharmacy Act would require a new examination after a license revocation but not after a suspension.

The General Assembly could have required a new license examination before lifting a suspension of a pharmacist's license. It has done so in some circumstances. For example, Section 43(b) of the Medical Practice Act of 1985, Act of December 20, 1985, P.L. 457, *as amended*, states that

[a]ny person whose license . . . has been *suspended or revoked* because of a felony conviction under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act . . . *may apply for reinstatement after a period of at least ten years* has elapsed from the date of conviction . . . *if the person meets all other licensing qualifications of this act, including the examination requirement.*

63 P.S. §422.43(b) (emphasis added). Likewise, Section 9.2(b) of the CPA Law, Act of May 26, 1947, P.L. 318, *as amended*,³ provides, in relevant part, that

[a]n individual whose license has been *suspended for more than five years* shall not be eligible to apply for reinstatement of the license, but instead *must take the examination*....

63 P.S. §9.9b(b) (emphasis added). The Pharmacy Act does not impose a similar requirement upon pharmacist licenses that have been suspended, for any reason.

We must presume that the exclusion of any reference to suspended licenses in Section 7.1 was deliberate under the time-honored statutory construction *maxim expressio unius est exclusio alterius*. See *West Penn Allegheny Health System v. Medical Care Availability and Reduction of Error Fund (MCARE)*, 11 A.3d 598,

³ Section 9.2 of the CPA Law was added by the Act of September 2, 1961, P.L. 1165.

605-06 (Pa. Cmwlth. 2010) (explaining that “under the principle of *expressio unius est exclusio alterius*, the express mention of a specific matter in a statute implies the exclusion of others not mentioned”). Stated otherwise, the Board’s adjudication violates the plain language of Section 7.1 by extending the examination requirement to a suspended license.

Finally, the Board does not have the discretion to impose any condition it believes appropriate to a reinstatement of a suspended license. An administrative agency can exercise only those powers that have been conferred upon it by the legislature in clear and unmistakable language. *Aetna Casualty and Surety Company v. Insurance Department*, 536 Pa. 105, 118, 638 A.2d 194, 200 (1994). The Board has not been vested with the power, or discretion, to impose a new license examination as a condition of lifting a license suspension. *Cf.* Section 43(b) of the Medical Practice Act of 1985, 63 P.S. §422.43(b). Had the Board chosen to revoke Marchese’s license, undeniably it could be reinstated only upon successful completion of a new examination. The Board argues that because it could “originally have imposed” a revocation on Marchese, it can require him to take the entrance examination as a condition of lifting his suspension. The Board’s position conflates the clear differences in the Pharmacy Act between a license suspension and a license revocation; effects a revocation ten years after-the-fact; and imposes a sanction not allowed by “clear and unmistakable” language.

For these reasons, I would reverse the portion of the Board’s order requiring Marchese to take the pharmacy licensing exams.

MARY HANNAH LEAVITT, Judge

Judge Pellegrini and Judge McCullough join in this dissent.