No. 20-1156

IN THE

Supreme Court of the United States

ALAN H. OLEFSKY,

Petitioner,

v.

ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, AND CECILIA ABUNDIS, DIRECTOR OF THE DIVISION OF PROFESSIONAL REGULATION OF THE ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION,

Respondents.

On Writ of Certiorari to the Illinois Supreme Court

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1. Whether the IDFPR's Final Order indefinitely suspending Petitioner's medical license for two years pursuant to the first order on remand, or one year pursuant to the second order on remand, was an abuse of discretion when the discipline is overly harsh in light of mitigating circumstances and a violation of Petitioner's due process rights when compared to past discipline for similar facts?
2. Whether federal and state courts reviewing administrative decisions should be allowed to reference and consider past administrative decisions from the agency being reviewed if the past decisions were not part of the administrative record?
3. Whether the recent decision made on March 4, 2021, by Judge Hall of the Cook County Circuit

Court, has changed the standard for administrative review in Illinois to the extent that this case warrants the United States Supreme Court accepting the previously denied Petition for Writ of Certiorari?

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Petitioner, Alan Olefsky, M.D., respectfully petitions for rehearing of the Court's denial of Petitioner's Petition for Writ of Certiorari, which was denied by this Court on April 26, 2021. Petitioner moves this Court to grant this petition for rehearing and consider his case which merits briefing and oral argument. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court's decision in this case.

REASONS FOR GRANTING THE PETITION

On April 26, 2021, this Court denied Petitioner's Petition for Writ of Certiorari, which was filed on February 15, 2021. While this Court was reviewing Petitioner's Petition, the Circuit Court of Cook County, in Illinois, issued a ruling that

necessitates a rehearing of Petitioner's Petition. In quick summation, Petitioner's Petition for Writ of Certiorari asked this Court to review and remand the Illinois Supreme Court's decision to deny Petitioner's Petition for Leave to Appeal because lower courts in Illinois, and across multiple states, are in a constant disagreement over the appropriate amount of deference to give administrative agencies and the appropriate use of past administrative decisions in reviewing sanctions issued by such agencies. These ongoing inconsistencies leave Illinois courts without clear direction when assessing whether an agency-imposed disciplinary sanction is an abuse of discretion. Petitioner is a physician and surgeon in Illinois whose medical license was indefinitely suspended[1] because he allegedly failed to report past

[1] Initially for a minimum period of three (3) years; the lower Illinois courts have over time remanded the matter resulting in a one-year indefinite suspension. The current suspension is for

disciplinary action by the Drug Enforcement Administration on his license renewals to the Illinois Department of Financial and Professional Regulation ("Department"). After three (3) different complaints for administrative review in this matter, the Illinois Appellate Court, First District, held that past administrative decisions, which are not published, cannot be used by a reviewing court to determine if a sanction is arbitrary and capricious or otherwise an abuse of discretion. Furthermore, the Illinois Appellate Court held that all past decisions must be brought up first in the administrative record, although they do not specify at which point in the administrative record is appropriate. The Appellate Court decision included a concurrence by Judge Delort, who wrote that past administrative decisions

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a minimum of two (2) years based on the ruling of the Illinois Appellate Court in favor of a cross-appeal by the Respondents.

are accessible by the public and should be used by reviewing courts in determining the appropriateness of sanctions. The question still exists; must past administrative cases be part of the administrative record if they are to be considered in an administrative review?

In support of this petition for rehearing, the Circuit Court of Cook County's March 4, 2021 decision is an important intervening decision that further supports Petitioner's argument. The Circuit Court reversed and remanded an Illinois Department of Financial and Professional Regulation decision because the court found that the Department's actions violated their own rules. *Nwaokocha v. IDFPR and Cecilia Abundis*, 20 CH 02888.[2] In *Nwaokocha*, Judge

[2] It is important to note that while this case has the same name as an Illinois Appellate Court case previously cited by Petitioner in his Petition for Writ of Certiorari, this is a different matter involving the same plaintiff.

Hall, who was also the Circuit Court judge in Petitioner's case, reviewed a Motion to Dismiss that had been granted at the administrative level to dismiss the plaintiff's Petition for Termination of Suspension of License. The Department filed their Motion to Dismiss based on the argument that plaintiff's Petition for Termination of Suspension of License failed to comply with the requirements of Department Rule 1285.130 of the Administrative Code. While Rule 1285.130, on its face, only applies to expired or inactive licenses, the administrative law judge interpreted the rule to include suspensions, reasoning it would have been part of the legislative intent to include suspensions. The Director of the Department agreed with the administrative law judge and issued an Order dismissing the Petition on February 28, 2020.

Judge Hall found that the Department erred because "consideration of the intent of the legislature is not necessary where the plain and ordinary meaning of its language expresses its intent." Judge Hall found that the Department's behavior, dismissing a petition based on an incorrect reading of their own rules, was not allowed and was not appropriate. It is important to point out that while the standard of review in *Nwaokocha* carried less deference than the standard used in Petitioner's case, because one was a question of law and one was evaluating the manifest weight of the evidence, this is still a pivotal moment in administrative review in Illinois. Circuit Court judges rarely reverse and remand the Department's actions, even when presented with rules, laws, or case law that shows the Department is acting inappropriately. The fact that it is the same judge that previously ruled in favor of the

Department in Petitioner's case makes the ruling even more important and is evidence that this Court should reverse and remand the Illinois Appellate Court's decision in light of the change in deference in Illinois review cases.

Judge Hall's decision follows closely after the January 1, 2021 change to the Illinois Appellate Court and Illinois Supreme Court Rule 23. Under the previous Rule 23, litigants could not cite unpublished Illinois Appellate Court rulings, but with the increased availability of those cases due to electronic databases, the cases can now be cited as persuasive authority.

Petitioner argued, in his Petition for Writ of Certiorari, that the Department has been too rigid with their reading of another administrative rule. For the first time in the long judicial history of this case, involving numerous remands, the Cook County

Circuit Court and the Illinois Appellate Court, First District, both determined they could not review administrative decisions that are not referenced as part of a published Appellate Court case or within the administrative record, as defined in Section 10-35 of the Illinois Administrative Procedure Act. It is regarding Section 10-35, and whether past administrative cases must be in the record, where Justice Delort authored his concurring opinion in the Illinois Appellate Court decision in this case. Justice Delort went on to state: "I do not agree there should be a hard-and-fast rule prohibiting a court from considering an agency decision if it was not cited before the agency itself."[3] Section 10-35 does not discuss case law or past administrative cases, yet the lower courts all found that such cases needed to be

[3] Olefsky v. IDFPR and Jessica Baer, 2020 IL App (1st) 191059-U, 20.

part of the record if they are to be referenced on administrative review. The plain reading of this rule, similar to how Judge Hall read Rule 1285.130, does not state in plain and ordinary language what the courts have interpreted it includes. Therefore, if this matter were to be remanded to the lower courts again, a persuasive argument could be made that Judge Hall's recent ruling supports a reading of Section 10-35 in favor of Petitioner. It is well-settled that case law can be brought up at any point during an appeal. By citing to comparable administrative cases involving other physicians, Petitioner is not presenting new facts of his case outside of the record on review. Petitioner is citing to comparable cases the same way a Petitioner would cite to relevant case law in a civil case. The new ruling, which came down while Petitioner's Petition for Writ of Certiorari was pending, gives support to this petition for rehearing

and this Court should now take the opportunity to grant the Petition for Writ of Certiorari and reverse and remand the lower court's order.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for rehearing and order full briefing and argument on the merits of this case.

Respectfully submitted,

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