UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0696

September Term, 2013

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YING-JUN CHEN

v.

MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ET AL.

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Woodward,
Nazarian,
Reed,

JJ.

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Opinion by Nazarian, J.

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Filed: June 10, 2015

Ying-Jun Chen worked for the Department of Health and Mental Hygiene (the "Department") until late fall of 2011, when he was suspended for ten days based on his low productivity and other problems, then suspended for an additional fifteen days after he responded inappropriately to the first suspension. An administrative law judge ("ALJ") upheld both suspensions after a hearing, and the circuit court affirmed that decision. Mr. Chen attacks both suspensions as procedurally deficient, and also attacks the ALJ's decision to uphold the fifteen-day suspension as arbitrary and capricious. We conclude that any procedural failings lay with Mr. Chen, and because the ALJ's findings were amply supported by the evidence, we affirm.

## I. FACTS

Mr. Chen worked as a policy analyst for the Maryland Health Care Commission (the "Commission"), a unit of the Department located in northwest Baltimore. He had several encounters with other employees beginning in early November 2011 that led to two suspensions. As the ALJ ultimately described it, Ben Steffen, the Acting Executive Director of the Commission, met with Mr. Chen on November 9, 2011, and informed him that he would be suspended for ten days "for inappropriate behavior in the workplace that occurred on November 2, 2011." (We refer to this suspension as "the ten-day suspension.") After Mr. Chen met with Mr. Steffen, MHCC's Director of Administration, Bridget Zombro, escorted him to the front door of the building, and he was told he could not return to work until November 28, 2011. Less than an hour later, Ms. Zombro and Linda Bartnyska, who had served as Mr. Chen's supervisor at one point, were walking outside of

the office when Mr. Chen came up to them and asked to speak with them. They declined and kept walking. Mr. Chen called yet another employee of the Commission around noon that day, and at 2:00 p.m. left a voicemail for Ms. Bartnyska asking to talk with her about his suspension, then devoted the remainder of his day to trying to contact various individuals to discuss his termination (including a visit to staff counsel at the Employee Relations Division of the Department in Baltimore).

When his efforts failed, Mr. Chen returned to the office and approached Ms. Bartnyska as she walked to her car at the end of the work day, around 6:00 p.m. (it was already dark). She was afraid and, in an effort to get away from him, tried to return to the building; he followed her there and confronted her in the vestibule of the building. She retreated to her car, and by the time she got there and looked back to the building, Mr. Chen was nowhere in sight. (As it turns out, he was able to re-enter the building because his keypad access had not yet been disabled.) Ms. Bartnyska called Ms. Zombro, apparently "frantic," and Ms. Zombro told her to call security. Ms. Bartnyska nonetheless went back to the building and found Mr. Chen speaking with Mr. Steffen, who told Ms. Bartnyska that everything was fine and she could go. She complied, and Mr. Chen left the building several minutes later.

Mr. Chen did not return to work again until November 29, 2011, when the ten-day suspension ended. (More than two weeks had passed because of the Thanksgiving holiday weekend.) Mr. Steffen told him at that time that he would be suspended for an additional fifteen days (the "fifteen-day suspension"), from November 30, 2011 until December 21,

2011. The Notice of Disciplinary Action (the "Notice") cited Mr. Chen's "inappropriate and unprofessional behavior" on November 9 as the basis for the fifteen-day suspension.[1]

Mr. Chen filed a grievance in accordance with Md. Code (1993, 2009 Repl. Vol.), §§ 11-109 and 11-110 of the State Personnel and Pensions Article ("SP"), and the case was referred to the Office of Administrative Hearings. The ALJ held a hearing on August 28, 2012 (the "Hearing"), and issued a decision on September 25, 2012 affirming the suspension. On October 23, 2012, Mr. Chen filed a petition for judicial review in the Circuit Court for Baltimore City, and on May 13, 2013, the circuit court affirmed the ALJ's decision. Mr. Chen filed a timely notice of appeal.

## II. DISCUSSION

By all appearances, Mr. Chen's efforts to rehabilitate himself in the eyes of the Department only got him in deeper trouble. He reacted to the ten-day suspension by behaving in a manner that led directly to the fifteen-day suspension, and even though the behavior is related, the two suspensions are entirely separate (and each is also unrelated to the Department's ultimate decision to terminate him). He seeks to appeal the ten-day suspension for procedural reasons, but as we will explain, he did not follow the right path

[1] Although it doesn't bear on our analysis, we note that the Department ultimately terminated Mr. Chen effective January 18, 2012, citing his unsatisfactory performance appraisals and his failure to improve. He appealed that decision and an ALJ ordered the Department to reinstate Mr. Chen based on a perceived procedural problem with the way he got notice of the termination (a decision the circuit court affirmed on procedural grounds). We reversed and directed judgment to be entered in favor of the Department. *See Department of Health and Mental Hygiene, et al. v. Chen*, No. 909, Sept. Term 2013 (Md. App. July 11, 2014), *cert. denied*, 440 Md. 225 (2014).

to appeal that decision. And as to the fifteen-day suspension, the Department's decision was procedurally correct, and the ALJ's subsequent decision was well-supported by the evidence.[2]

We laid out the standard of review of agency decisions in *Roane v. Maryland Bd. of Physicians*, 213 Md. App. 619, 630-31, *cert. denied*, 436 Md. 329 (2013):

> The scope of judicial review of agency decisions is defined by the Administrative Procedure Act, Md. Code (1984, 2009 Repl. Vol.), § 10–201 *et seq.* of the State Government Article ("SG"). Within that framework, our review is well defined and, for the most part, quite limited: we look through the circuit court's review to the agency decision itself and determine whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions. *Wallace H. Campbell & Co., Inc. v. Md. Comm'n on Human Relations*, 202 Md. App. 650, 662 (2011) (appellate court's role is narrowly circumscribed and "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions" (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005))). We "defer to the agency's fact-finding and drawing of inferences if they are supported by the record," *Bd. of Phys. Quality Assurance v. Banks*, 354 Md. 59, 68 (1999), and decide "whether a

[2] Mr. Chen's brief listed the following questions:

I. Did the ALJ err in contrary to law [sic] by concluding that [the Department] lawfully suspended [Mr. Chen] for fifteen working days without pay on COMAR 17.04.05.04B(2), (4), and (12) because [he] had not been notified of the regulatory provisions prior to hearing at OAH?

II. Was the ALJ's affirmance of [Mr. Chen's] fifteen-day suspension arbitrary and capricious?

III. Did [the Department] violate [SP] § 11-106(a) by imposing the initial 10-day suspension before properly notifying him of this disciplinary action?

> reasoning mind reasonably could have reached the factual conclusion the agency reached." *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512 (1978) (quoting *Dickinson-Tidewater v. Supervisor*, 273 Md. 245, 256 (1974)); *see also Noland*, 386 Md. at 572 (noting that a court's task is not to substitute its own judgment for that of an agency, reasoning that "the expertise of the agency in its own field should be respected"); *Salerian v. Md. State Bd. of Physicians*, 176 Md. App. 231, 246 (2007). Agency decisions receive no special deference on questions of law, which we review *de novo*. *Talbot County v. Miles Point Property, LLC*, 415 Md. 372, 384 (2010) (citing *Belvoir Farms Homeowners Ass'n. v. North*, 355 Md. 259, 267 (1999)).

*Id.* at 630-31.

**A. Mr. Chen Did Not Appeal The Ten-Day Suspension.**

Although Mr. Chen complained of the ten-day suspension at the outset, he did not follow any of the correct procedures for appealing it. SP § 11-109(c) requires that an employee appeal a disciplinary action "with the head of the principal unit," then appeal any adverse decision "in writing to the Secretary." *Id.* §11-110(a). A quick comparison of the procedure followed in the fifteen-day suspension highlights that Mr. Chen did not appeal the ten-day suspension:

- *The ten-day suspension.* Mr. Chen wrote an email to Mr. Steffen on November 14, 2011, with the reference line: "Asking for a reconsideration." Neither he nor his attorney filed follow-up correspondence or a notice appealing the decision.

- *The fifteen-day suspension.* Mr. Chen did not write anything directly to Mr. Steffen. Instead, on December 12, 2011, Mr. Chen's attorney wrote a letter to the Secretary of the Department, with the reference line: "Appeal of 15-Day Suspension."

Mr. Chen claims that the December 12, 2011 letter served to appeal both suspensions, but we see nothing to that effect in the letter itself. The letter refers to the ten-

day suspension in a narrative, but all headings, along with the letter's introduction and conclusion, refer quite clearly to the appeal of the fifteen-day suspension only.

Mr. Chen also conceded the issue at the Hearing before the ALJ when it came up after he questioned Mr. Steffen:

> JUDGE: [T]he subject of this hearing is not your 10-day suspension. Do you understand that?
>
> MR. CHEN: I understand. Okay.

When Mr. Chen brought up the ten-day suspension later in the Hearing, again revisiting how he conducted himself at the November 9 meeting and suggesting that the ten-day suspension was improper, the ALJ clarified once more what was *not* at issue on the appeal:

> JUDGE: Okay. I'm just asking you, remember, this is about the 15-day suspension, not the ten-day suspension. *You're not here to argue that, because that wasn't on appeal.*
>
> MR. CHEN: I understand. I understand.
>
> JUDGE: So, I mean, I can understand if you didn't agree with it, but that's really not the subject here.

(Emphasis added.) In light of the lack of any documentation that Mr. Chen properly appealed the ten-day suspension and his acknowledgment to the ALJ that he understood that only the fifteen-day suspension was on appeal, we decline to address Mr. Chen's argument that the Department did not notify him properly of the ten-day suspension. *See Finucan v. Md. State Bd. of Physicians*, 151 Md. App. 399, 423 (2003).

### B. Mr. Chen Did Not Preserve The Claim That He Was Not Properly Notified Of The Fifteen-Day Suspension.

Mr. Chen argues next that the Notice was legally insufficient because it failed to comply with statutory notice requirements. Specifically, he claims that SG § 10-207(b)(2) requires that a notice such as this one specifically reference COMAR 17.04.05.04B(2), (4), and (12), the sections that the Department claims he violated.[3] The Department concedes this technical defect, but points out that Mr. Chen failed to raise the argument at the Hearing, and therefore waived the right to argue it at the circuit court level or to us. And because we agree with the Department's assessment, we need not address its second-level argument that the defect was not fatal in any event.

Mr. Chen had a number of opportunities to raise this procedural defect, but never did so. *First*, when the Department's representative referred specifically to—and even read out loud—each relevant COMAR provision at the Hearing, Mr. Chen voiced no objection. *Second*, he did not object to entry of the Notice into the record. *Third*, when the issue came up again at the circuit court, the judge stopped Mr. Chen when he first raised the adequacy of notice:

> MR. CHEN: . . . In this instant case, the [Department] did not provide a notice of charge with the specific COMAR provision

[3] These provisions describe conduct susceptible to disciplinary action, including "(2) engaging in intentional misconduct, without justification, which injures another person, causes damage to property, or threatens the safety of the work place"; "(4) [b]eing unjustifiably offensive in the employee's conduct toward fellow employees, wards of the State, or the public"; and "(12) [v]iolating a lawful order or failing to obey a lawful order given by a superior, or engaging in conduct, violating a lawful order, or failing to obey a lawful order which amounts to insubordination." COMAR 17.04.05.04(B).

> so it deprived [Mr. Chen of the] opportunity to defend himself at the [Hearing.]. . .
>
> THE COURT: Pardon me, did you make this complaint to the [ALJ]?
>
> MR. CHEN: Your honor . . . since I'm not an attorney, I sense there's something wrong, but I did not raise the [matter] directly to . . . the ALJ until later I had did some research on myself [sic]—so I decided to appeal. . .
>
> THE COURT: But you agree that this was never mentioned to the [ALJ].
>
> MR. CHEN. No. I don't think—no, I did not mention [it] myself.

*Finally*, Mr. Chen again conceded in the circuit court that he failed to raise the issue at the Hearing, and the court noted this failure in its final decision:

> THE COURT: Mr. Chen has confirmed for me there are two issues, one procedural and one factual. The procedural issue was not raised before the [ALJ]. Mr. Chen would like me to excuse that based on the fact he's not an attorney. I do not have the authority to do that. And had I had the authority, I would not do that.

To the extent Mr. Chen wished to level a procedural attack, he was required to do so in the course of the Department's administrative process. *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 15 (2010); *Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 75 (2010) ("[A] court ordinarily may not pass upon issues presented . . . for the first time on judicial review and that are not encompassed in the final [agency] decision."). As we explained in *Finucan*, even Constitutional questions like those Mr. Chen seeks to raise here cannot be "raised for the first time in any action for judicial review." 151 Md. App. at 423 (citations and quotation marks omitted); *see also id.* at 423 n.11 (noting that even where the

individual being disciplined is *pro se*, that status does not relieve him of the obligation to follow procedural rules). To the contrary, "a reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not . . . presented" to the agency. *Brzowski v. Maryland Home Imp. Comm'n*, 114 Md. App. 615, 637 (1997) (quoting *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 519 (1978)). The circuit court here explained the rule quite clearly to Mr. Chen:

> We don't allow people to see problems, if you will, in one proceeding and then not mention it, and then later bring it up to somebody else because you . . . took away the chance for the [ALJ] to remedy any problem that might have existed, right? [¶] *You didn't mention it, and so you're not permitted to wait, not say a word, and then now say to me, you know, that was a very strange opening statement that [the Department] was permitted to make*."

(Emphasis added.)

We agree, and decline to let Mr. Chen raise arguments here that he failed to raise at the Hearing.

### C. The ALJ's Finding Was Supported By The Evidence.

Mr. Chen also attacks the substance of the ALJ's decision, which he characterizes as arbitrary and capricious. He claims that the ALJ "disregarded key elements" of the applicable regulations, and did not support her decision with specific findings of fact. We disagree, especially given our standard of review:

> [We must] defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court "must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to

> resolve conflicting evidence and to draw inferences from that evidence."

*Banks*, 354 Md. at 68 (citations and internal quotation marks omitted).

Before we address Mr. Chen's specific attack of each section, it's important to point out some of the ALJ's findings that bear on all three areas and that put Mr. Chen's behavior in context. This matters because although Mr. Chen sees his behavior on November 9 as an altogether harmless incident that was blown out of proportion, his history with the Department and the perspective of others played an important part in the ALJ's decision:

> Clearly, problems with [Mr. Chen] had been festering for a long time. Credible, detailed testimony from his supervisor and other [Department] employees amply supported the decision to impose the fifteen-day suspension. After more than a year of conflict and escalating difficulty with [Mr. Chen], his behavior on November 9, 2011 simply left [the Department] no choice but to impose discipline in an attempt to both sanction and redirect [Mr. Chen's] actions.
>
> Each of the [Commission] employees who testified for the [Department] . . . convincingly described [Mr. Chen] as an individual who refused to accede to direction, persisted in improperly intervening in an inappropriate manner, and whose behavior created *an atmosphere of menace.* . . . His confrontation with [Ms. Zombro and Ms. Bartnyska on November 9] unnerved them, and [he] was further instructed to leave the area.
>
> That afternoon [Mr. Chen] continued his pursuit of Ms. Bartnyska, leaving a vague message on her voice mail, heightening her concerns of an impending, and possibly dangerous encounter. In the evening, upon leaving work, Ms. Barnyska's fears were realized; as she exited the building in darkness, [Mr. Chen] rapidly approached her, imploring her to address his concerns. *Ms. Bartnyska credibly described the incident in detail, capturing her alarm and panicked attempt to both protect herself and alert others remaining in the building to what she interpreted as a possibly impending danger.*

> Mr. Steffen, who noted that he personally liked [Mr. Chen], corroborated the series of events leading to [his] fifteen-day suspension. . . .
>
> Although [Mr. Chen] attempted to minimize his actions on November 9, 2011, and characterize them as simply wanting to talk to others regarding his ten-day suspension, *I found his testimony singularly unconvincing*. . . . [¶] . . . [Mr. Chen's] anxious ricochets and phone calls between [the Commission, the Department, and others] attests to [Mr. Chen's] frenzied attempts to interfere with the disciplinary process. [His] display of extraordinarily poor judgment in returning to [the office] in the evening and his confrontations with Ms. Bartnyska and Mr. Steffen amply support [the Department's] decision to impose additional discipline.
>
> Moreover, *during the hearing, [Mr. Chen] displayed many of the traits described by [the Department's] witnesses.* Despite my frequent requests to refrain from asking the same questions repeatedly, [Mr. Chen] persisted. I could visibly observe [Mr. Chen's] pressing and insistent behavior that so clearly unnerved his co-workers. [Mr. Chen's] frequent apologies did not mitigate his failure to moderate his relentless demeanor.

(Emphasis added.)

As a general matter, the ALJ articulated the past behaviors that set the scene for the confrontations on November 9. Her findings of fact were based on the record, witness testimony, and her first-hand opportunity to judge the credibility of witnesses—most importantly, Mr. Chen—and the court's observations included his conduct during the Hearing itself. Looking next to each specific charge she upheld, she similarly gave the specific basis for each one and supported it with her findings.

*First,* Mr. Chen claims that he did not return to work the afternoon of November 9 with any intent to harm anyone, and argues that COMAR 17.04.05.04B(2) requires more

than that to find a violation. We disagree. He makes an important—and incorrect—leap in suggesting that the section requires an intent to threaten someone's safety. Rather, it requires intentional *conduct* that leads to workers' safety being threatened. On this record, the ALJ had ample evidence, especially in light of Ms. Bartnyska's testimony, to find a violation. Ms. Bartnyska detailed how Mr. Chen followed her out both early in the day and again in the evening. She had already had one experience with Mr. Chen that led to his suspension based on "aggressive behavior" toward her, and Mr. Chen does not dispute that he followed Ms. Bartnyska to her car and then back to the building.

*Second*, Mr. Chen claims that there was no evidence to support the ALJ's finding that his conduct was "unjustifiably offensive" within COMAR 17.04.05.04(B)(4). Although Mr. Chen claims the ALJ did not state what particular behavior of his was offensive, the testimony of the various employees, if believed, spelled out the offensive conduct in more than enough detail. Again, Mr. Chen's own subjective assessment of his conduct (and his concomitant disbelief that anyone could mistake it for offensive) is but one part of the picture, and the ALJ was free to reject that assessment in light of the testimony of other witnesses.[4]

[4] Mr. Chen also argues that the ALJ should have taken "mitigating circumstances" into account pursuant to the mandate of COMAR 17.04.05.04B, and he claims that the ALJ should have viewed the prior suspension, and Mr. Chen's claim that he returned to the office "in good faith," as mitigating. We decline to second-guess the ALJ on this point, and Mr. Chen's frame of reference does not provide a "mitigating circumstance" that the ALJ was required to consider.

*Third*, we disagree that Mr. Chen did not violate COMAR 17.04.05.04(B)(12) because he did not violate any "lawful order." At the outset, we note that Mr. Chen interprets the most strict terms of the section; but we see the more likely violation as "engaging in conduct . . . which amounts to insubordination." *Id.* Mr. Steffen told Mr. Chen in no uncertain terms *not* to return to work until November 28, yet he contends that he was never told "that he couldn't *enter* the building." (Emphasis added.) And Mr. Chen's reentry was no mere visit back: it followed an afternoon of harassment, threatening behavior to employees, and a trip to downtown Baltimore and back—all, as the ALJ saw it, to push authorities into giving Mr. Chen his job back. Mr. Chen views his efforts as sincere, but the ALJ had more than an adequate basis on this record to conclude that Mr. Chen's behavior was insubordinate and in direct violation of COMAR 17.04.05.04(B)(12).

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