

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1192

September Term, 2014

MARIA MATHIAS, et al.

v.

DEPARTMENT OF ASSESSMENTS AND
TAXATION

Krauser, C.J.,
Hotten,
Berger,

JJ.

Opinion by Hotten, J.

Filed: November 19, 2015

*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.

Appellants, Maria Mathias (“Ms. Mathias”) and Marc Menzie (“Mr. Menzie”) are employees of appellee, the State Department of Assessments and Taxation (“SDAT”). Appellants filed identical grievances alleging that SDAT failed to promote each of them to the position of Assessments Assistant Supervisor. In their grievances, both Ms. Mathias and Mr. Menzie sought “to be promoted and to be paid all back pay and benefits as permitted by law[,]” and “an investigation into how the recruitment and hiring process was conducted.” After proceeding through the three step administrative grievance process outlined in Md. Code (Repl. Vol. 2009), §§ 12-201 through 12-205 of the State Personnel & Pensions Article (“State Pers. & Pens.”), the consolidated grievance of appellants reached the Office of Administrative Hearings (“OAH”). The Administrative Law Judge (“ALJ”) subsequently dismissed the grievance for failure to state a claim upon which relief may be granted, and the Circuit Court for Baltimore City affirmed the decision of the ALJ. Appellants appealed and present one question for our review:

- I. Whether the ALJ erred in dismissing [appellants’] grievance for failure to state a claim, and without granting [appellants] a hearing on the merits of their grievance?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Appellants are employed with the personal property division of SDAT as Assessors Advance. In April of 2013, an opening for Program Manager II, Assessments Assistant Supervisor became available. The position description created for this opening listed the duties and minimum qualifications for a program manager – including “[e]ight (8) to [t]en

(10) years of professional or administrative experience in the assessment of business personal property.” Appellants and others assessors interviewed for this vacancy, but were not selected. Instead, the position was offered to and accepted by another assessor within the division (“J.H.”), who allegedly lacked the minimum experience reflected in the position description.¹

Subsequent to the denial of their respective applications, appellants filed identical grievances through the state employees’ grievance process.² Appellants alleged that they were “arbitrarily denied a promotion to the position of Assessments Assistant Supervisor for the Personal Property Division in violation of State Law.” Appellants sought “to be

¹ The parties dispute whether J.H. was qualified to perform the work listed in the position description. Appellants maintain that the qualifications for the position are contained in the State of Maryland recruitment posting, which require an applicant to have “eight (8) to ten (10) years of professional or administrative experience in the assessment of business personal property.” Appellee counters that the official position description maintained with the Office of Budget and Management does not require eight to ten years of experience, so J.H. was sufficiently qualified to perform the work described in the position description. For purposes of this decision, we assume that the relevant position description required eight to ten years of experience, because when reviewing a decision to dismiss for failure to state a claim upon which relief can be granted, “a court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them[.]” *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 155-56 (2010) (citation omitted).

² Appellants alleged that their claims were supported by title 12 of the State Personnel and Pensions Article, §§ 7-201 through 7-209 of the State Personnel and Pensions Article, and “[a]dditional issues of fact and law [that] may and will be developed during the course of discovery of employees grievance.”

promoted and to be paid all back pay and benefits as permitted by law,” and also “an investigation into how the recruitment and hiring process was conducted.”

Appellants’ respective grievances were denied at the first two steps of the three part grievance procedure outlined in State Pers. & Pens. § 12-201(a)(1) – during which the grievances were consolidated and recaptioned under Ms. Mathias’s name. Appellants then filed a step three appeal with the Department of Budget and Management (“DBM”). DBM scheduled a settlement conference for September 16, 2013. When the parties failed to settle the matter, DBM forwarded the appeals to OAH, where a hearing on the merits was scheduled for November 12, 2013.

Prior to the November hearing, SDAT filed a Motion for Summary Disposition.³ SDAT argued that appellants cannot “identify any personnel policy or regulation that is the subject of this grievance[,]” and have failed to raise “a grievable issue.” SDAT also noted that appointments to positions within the management service are discretionary and serve “at the pleasure of the appointing authority[,]” so appellants have “no legal right or expectation to such a promotion.” Lastly, SDAT averred that:

[Appellants] have requested a remedy that is outside the authority of OAH. There is no vacancy to which the [appellants] could be appointed and, therefore, the [appellants] cannot be promoted to a position that does not exist nor be paid for a position that they do not hold. Consequently, the [appellants] have not requested a remedy which can be granted.

³ SDAT’s motion was supported by an organization chart for the Personal Property Division, a position description for Program manager II, and an affidavit of Leroy Bryant, Assessments Supervisor in the Personal Property Division.

Appellants opposed the motion, arguing that SDAT’s “application of the statutory prerequisites to filling the position... of Program Manager II” is a grievable issue.⁴ Appellants further averred that “the process used by [SDAT] in filling the position was arbitrary, and capricious, and [their] only recourse is to challenge [SDAT’s] actions through the grievance process.” (citing *Robinson v. Burch*, 367 Md. 432 (2002)).

In an order dated November 8, 2013, the ALJ denied the Motion for Summary Disposition. The ALJ ruled that appellants’ allegation that SDAT “select[ed] a candidate who does not meet the minimum qualifications for the job[,]” raised a grievable issue under State Pers. & Pens. § 12-101(c). Nonetheless, the ALJ ruled that the appeal was “subject to dismissal under COMAR 28.02.01.12C for failure to state a claim upon which relief can be granted.” The ALJ reasoned as follows:

[T]he remedies available to a grievant under this title are limited to the restoration of the rights, pay, status, or benefits, that the grievant otherwise would have had if the contested policy, procedure, or regulation had been applied appropriately as determined by the final decision maker. Personnel Article, §12-402(a). An investigation into the hiring process is not contemplated by the statute. Moreover, I cannot promote either Grievant or *restore* rights, pay, status or benefits that neither grievant ever had. Accordingly, the Grievants have not stated a cause of action for which relief can be granted.

Appellants appealed the ALJ’s decision to the Circuit Court for Baltimore City on December 9, 2013. In their memorandum of law submitted to the circuit court, appellants contended that the ALJ erroneously dismissed their grievance pursuant to COMAR

⁴ Ms. Mathias’s opposition was supported by a recruitment notice for Program Manager II, and an affidavit of Ms. Mathias.

28.02.01.12C, which provides that “[u]pon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim upon which relief may be granted.” Appellants argued that SDAT’s motion for Summary Disposition, which was denied by the ALJ, was not sufficient to trigger the ALJ’s authority to dismiss their grievance under COMAR 28.02.01.12C. Appellants also argued that they were entitled to the relief sought, because title 12 of State Personnel and Pensions Article does not “limit an employee’s potential remedy to that which the employee *already* had before, presumably, a policy was misapplied.” (emphasis in original). Instead, “employees may seek that which he or she ‘*would have had*’ if the policy at issue had been applied properly.” (emphasis in original).

The circuit court affirmed the decision of the ALJ by order dated June 2, 2014, and reasoned as follows:

Beginning with the procedural issue, there clearly was a motion made by the Agency for summary disposition. That motion would have allowed, in fact, the ALJ discussed that motion by analogy to court proceedings. In a summary judgment, on a summary judgment motion, the court is allowed to assume the facts in favor of the nonmoving party and still conclude that as a matter of law the claim fails to state a claim upon which relief can be granted.

And the Agency in this case argued within its motion for summary disposition exactly what the ALJ ultimately concluded which is that the grievants were seeking a remedy which was not available as a matter of law to them.

In fact, I note on page 4 of the Agency’s motion, paragraph 11, it concluded, “Accordingly, the requested remedy is not relief that could be granted by OAH as a result of this grievance.” So, clearly, the Agency was making as part of its motion the argument that claims failed to state claims which could be granted as a matter of law or upon which relief could be granted.

I think that the administrative law judge was correct on the law that in this situation, a discretionary appointment to a management position, the ALJ did not have authority to overturn the Agency's exercise of discretion in selecting the candidate that the Agency thought best fit that position and, therefore, the ALJ would have been unable to grant the relief that was sought which is to undo the promotion and to grant the promotion to either one of the grievants with back pay or to order an investigation into the selection process that the Agency used.

Appellants timely filed a notice of appeal with this court on July 2, 2014.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

“We review an administrative agency’s decision under the same statutory standards as the circuit court. Therefore, we reevaluate the decision of the agency, not the decision of the lower court.” *Gigeous v. E. Corr. Inst.*, 363 Md. 481, 496 (2001). In reviewing an agency decision on questions of fact, we apply a substantial evidence test and ask “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68, (1999). We generally review legal conclusions reached by the agency under a *de novo* standard, *Mayer v. Montgomery County*, 143 Md. App. 261, 271 (2002) (citation omitted), yet the Court of Appeals has cautioned that “an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.” *Comptroller of Treasury v. Blanton*, 390 Md. 528, 534 (2006) (citation omitted).

DISCUSSION

I. Did the Administrative Law Judge err in dismissing the grievance pursuant to COMAR 28.02.01.12C?

Appellants first argue that the ALJ erroneously concluded that the consolidated grievance was subject to dismissal under COMAR 28.02.01.12C – the OAH’s own regulation providing that “*upon motion*, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim upon which relief may be granted.” (emphasis added). Appellants contend that appellee’s Motion for Summary Disposition and Supporting Memorandum were specific requests for summary disposition, as opposed to a request for the ALJ to dismiss the grievance for failure to state a claim upon which relief may be granted. Accordingly, there was no motion triggering the ALJ’s authority to dismiss. Appellee responds by pointing out that the ALJ’s grounds for dismissal – that OAH could not provide the requested relief – was explicitly included in appellee’s summary disposition motion. Accordingly, appellants “were fully apprised of the Department’s arguments and had ample opportunity to respond to those arguments.”

We are persuaded that appellee’s Motion for Summary Disposition qualified as a “motion” within the meaning of COMAR 28.02.01.12C, because appellee’s Motion for Summary Disposition provided notice and an opportunity to respond to appellee’s position regarding the relief sought by appellants. Additionally, appellee’s Motion for Summary Disposition was functionally equivalent to a motion to dismiss for failure to state a claim.

In regards to notice, in paragraph 11 of appellee’s Motion for Summary Disposition, appellee remarks that “[g]rievants are requesting a promotion to an Assessments Assistant

Supervisor, but... the requested remedy is not relief that could be granted by OAH as a result of this [g]rievance.” Appellee reiterated this point in the Memorandum in Support of the Motion for Summary Disposition as follows:

Grievants have requested a remedy that is outside the authority of OAH. There is no vacancy to which the Grievants could be appointed and, therefore, the Grievants cannot be promoted to a position that does not exist nor be paid for a position that they do not hold. Consequently, the Grievants have not requested a remedy which can be granted.

Appellants had an opportunity to oppose this Motion for Summary Disposition, yet filed an opposition motion that entirely failed to address appellee’s contention regarding the relief available under title 12 of the State Personnel and Pensions Article.

Furthermore, appellee’s Motion for Summary Disposition was functionally equivalent to a motion to dismiss for failure to state a claim, because the ALJ could have granted summary disposition to the appellee or dismissed appellants’ grievances on the exact same grounds, *i.e.* that the relief requested is unavailable as a matter of law.⁵ Even had appellee titled the motion filed with OAH as a motion to dismiss, the ALJ would have likely treated it as a motion for summary disposition, because of the inclusion of factual allegations outside of the filed grievances.⁶

⁵ This precise point was made by the circuit court:

[O]n a summary judgment motion, the court is allowed to assume the facts in favor of the nonmoving party and still conclude that as a matter of law the claim fails to state a claim upon which relief can be granted.

⁶ See *Worsham v. Ehrlich*, 181 Md. App. 711, 722 (2008) (noting that the court’s review of a motion to dismiss is limited to the facts contained in the pleadings and attached (continued . . .))

Accordingly, appellants' argument that the ALJ erred in dismissing their grievance in the absence of a motion erroneously focuses on the wording of COMAR 28.02.01.12C, where appellee raised the authority of the ALJ to grant the relief requested and the appellants had a full and fair opportunity to show that the relief requested was within the statutory grievance scheme. We therefore agree with the decision of the circuit court that the ALJ's order dismissing appellants' grievance for failure to state a claim was procedurally proper.

II. Is the relief requested by appellants within the scope of relief permitted § 12-402?

Under State Pers. & Pens. § 12-402(a), “[t]he remedies available to a grievant under this title are limited to the restoration of the rights, pay, status, or benefits, that the grievant otherwise would have had if the contested policy, procedure, or regulation had been applied appropriately as determined by the final decision maker.” Appellants argue that the relief requested in their grievance – that they each be promoted, and paid all back pay and benefits as permitted by law – is included amongst these remedies. Appellants take the position that:

[State Pers. & Pens. § 12-402(a)] does not limit an employee's potential remedy to that which the employee *already* had before, presumably, a policy

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exhibits); *see also Hansen v. City of Laurel*, 193 Md. App. 80, 88 (2010) (“when a trial judge is presented with factual allegations beyond those contained in the complaint to support *or oppose* a motion to dismiss and the trial judge does not exclude such matters, then the motion shall be treated as one for summary judgment.”). Although the abovementioned cases concern motions in the circuit courts, the ALJ in the present case acknowledged that “[i]n reviewing a motion for summary decision, an ALJ may be guided by case law that explains the nature of a summary judgment in court proceedings[.]”

was misapplied. An employee may seek that which he or she “*would have had*” if the policy at issue had been applied appropriately.

(emphasis in original).

Appellee’s response to this argument is two-fold. First, appellee echoes the sentiment of the ALJ that neither appellant can claim a right to a position that neither has held. Second, appellee remarks that the Assessments Assistant Supervisor is a Management Level II position, and as such, is a discretionary appointee. Thus, the ALJ lacked the authority to substitute its decision for the discretionary decision of management by granting either appellant the promotion requested.

For the reasons that follow, we agree with the ALJ that a grievant under title 12 of the State Personnel and Pensions Article cannot claim a right to a discretionary appointment that the grievant never held. Accordingly, the ALJ cannot promote either appellant, or award back pay that is commensurate with the classification of Program Manager II.

A grievance is defined under State Pers. & Pens. § 12-101(c)(1) as “a dispute between an employee and the employee’s employer about the interpretation of and application to the employee of: (i) a personnel policy or regulation adopted by the Secretary; or (ii) any other policy or regulation over which management has control.” Appellants’ grievance concerned the violation of appellee’s hiring protocols by selecting a candidate who failed to meet the minimum qualifications for the position. Assuming, *arguendo*, that appellee did in fact violate the hiring protocol, appellants were only entitled

to “the rights, pay, status, or benefits[,]” that they would otherwise have had if the hiring protocol had been followed. State Pers. & Pens. § 12-402(a).

In the case at bar, appellants are unable to demonstrate that they would have been entitled to the promotion that they both now seek, had the hiring protocol been followed. Aside from the requirement “that the individual appointed shall be qualified to perform the work described in the position description[,]” appointment to positions in the management service is discretionary. State Pers. & Pens. § 7-301(b). As such, had appellee strictly adhered to the experience requirement listed in the position description, appellee would have been free to appoint any applicant with eight to ten years of experience, who may or may not have been one of the appellants before this Court. Thus, the ALJ was correct to note that “I cannot promote either Grievant or *restore* rights, pay, status or benefits that neither of [(sic)] Grievant ever had.” (emphasis in original).

In an attempt to bring the requested relief within the scope of title 12 of the State Personnel and Pensions Article, appellants point to the reclassification remedy available under State Pers. & Pens. § 12-205(b)(1)(ii) – under which employees may seek a reclassification to a position which they do not formally hold. While this remedy is available under limited circumstances, examination of the cases where the court has held that a grievant is entitled to a reclassification reveal this analogy to be of little avail to appellants.⁷

⁷ As part the individually filed grievances, both appellants also sought “an investigation into how the recruitment and hiring process was conducted.” Appellants cite
(continued . . .)

As explained by the Court of Appeals, the State Personnel Management System (“SPMS”) is comprised of classes of positions which have assigned pay scales and varying duties. *Dep’t of Pub. Safety & Corr. Servs. v. Myers*, 392 Md. 589, 591 (2006). In *Myers*, the Court noted that “an employee may use the grievance procedure to complain that the employee’s duties and responsibilities are those assigned to a different classification.” *Id.* at 598. The Court in *Myers* then went on to hold that two employees of the Department of Public Safety and Correctional Services (“DPSCS”) were entitled to a reclassification, because both employees were currently performing the duties of Agency Buyer V, a classification with a higher pay grade than the classification that both employees actually held. *Id.* at 599-600.

Myers illustrates that reclassification is used where an employee has, in effect, held a position, but has not been classified appropriately. Appellants recognize as much before this Court: “An employee need not have ever held that classification sought in order to file a grievance seeking that classification – he or she must only believe that each is entitled to, and is performing the work of, the position sought.”

Contrary to the situation addressed in *Myers*, where the employee is currently performing the duties of the position for which they seek a reclassification, neither of the

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State Pers. & Pens. § 7-209(d) as support for this request. However, as acknowledged by appellee, Title 7, Subtitle 2 of the State Personnel and Pensions Article is titled “Appointment in Skilled Service and Professional Service.” Because Program Manager II is a Management Service Position, subtitle two is inapplicable.

appellants contend that their current occupational duties are that of a Program Manager II. Therefore, appellants’ reliance on the reclassification remedy is misplaced.

For the first time on appeal, appellants also argue that they are entitled to a fair process to compete for the position, and that the ALJ can grant “the benefit of a level, legal playing field in the appointment process.” We have decided that an employee is entitled to a “redo” of the promotional process, as opposed to a retroactive promotion and back pay in different, but similar cases. *Compare Prince George’s Cnty. v. O’Berry*, 133 Md. App. 549, 558 n. 3 (2000) (“[A] ‘redone’ promotional process is the only relief available to unsuccessful candidates who are the potential victims of a promotional process proven to have been flawed.”) *with Perry v. Dep’t of Health & Mental Hygiene*, 201 Md. App. 633, 640 (2011) (“Even assuming that appellant was fully qualified for the promotion as she alleges in her original grievance form, we must conclude that appellant did not have any “substantial right” to the promotion that she was denied.”). Nonetheless, we are tasked with directly reviewing the agency’s decision and the record available to the ALJ, which only included the relief requested in the employee grievance form filed by each appellant. Based on the record presented, the ALJ was correct in ruling that the relief requested in appellants’ grievances was outside of the relief available under title 12 of the State Personnel and Pensions Article. We therefore affirm the circuit court decision.

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