UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1519

SEPTEMBER TERM, 2014

RICHARD HARVEY

v.

MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Eyler, Deborah S.,
Kehoe,
Bair, Gary E.
(Specially Assigned),

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: November 16, 2015

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

In September 2012, the Washington County Health Department ("WCHD"), a local division of the Maryland Department of Health and Mental Hygiene ("DHMH"), the appellee, terminated the employment of Richard Harvey, the appellant. Harvey challenged his termination, seeking reinstatement and full back-pay and benefits. After a contested case hearing at the Office of Administrative Hearings ("OAH"), an Administrative Law Judge ("ALJ") issued a final agency decision upholding Harvey's termination for three of the four bases relied upon by the WCHD. Harvey petitioned for judicial review of that decision in the Circuit Court for Washington County. The circuit court heard argument and entered a judgment upholding the final agency decision to terminate.

Harvey presents one question for review, which we have rephrased: Was the final agency decision supported by substantial evidence in the record and legally correct? We answer that question in the affirmative.

FACTS AND PROCEEDINGS

Richard Harvey entered State employment in 1984. At all relevant times, he was employed as an Alcohol and Drug Associate Counselor ("ADAC") with the Behavioral Health Services division ("BHS") of the WCHD. In that capacity, he was responsible for providing direct clinical counseling services to clients—both individually and in group sessions—and for performing administrative case management functions.

BHS used an electronic medical recordkeeping system, known as SMART, for case management. All services provided by an ADAC were required to be documented electronically in the SMART system. A case note for each "encounter" with a client was required and each case note had to document the "funding source" for the client. In

addition to electronic record keeping, an ADAC also was required to maintain a paper file for each client. The paper file would include treatment plans, consents for release of information, and correspondence with referring agencies and the courts. An ADAC was expected to spend 15-20 hours per week, on average, providing direct clinical services and the remaining 20-25 hours per week on administrative tasks, including record keeping.

From 1996 until April 2011, Harvey had an informal "partnering" arrangement with Amy Landis, a Certified Addictions Counselor at BHS. Under their arrangement, Landis took responsibility for most of the administrative tasks, while Harvey focused on the direct provision of clinical services. This type of "partnering" arrangement was common practice at BHS at that time and was known to the supervisory staff.

In 2008, 2009, 2010, and 2011, Harvey received satisfactory performance evaluations and was rated highly for his clinical skills. His evaluations over that period of time reflected that he had difficulty "maintain[ing] regular work flow," "prioritiz[ing] work," "complet[ing] assignments accurately and on time," performing case management tasks, and completing documentation for his clients.

In April 2011, Landis transferred out of the WCHD. In June 2011, Harvey's performance evaluation stated that he had "assumed increased case management duties" due to Landis's departure, but that he had a "positive attitude" about the change. Because he was "struggling with completing all of the case management tasks," his then supervisor directed him to meet with her "every Friday to review case management status for the week."

In October 2011, Melissa Crawford-Halterman was appointed as BHS Program Coordinator and Melissa Bartles was appointed as BHS Program Manager. Bartles became Harvey's direct supervisor. Crawford-Halterman and Bartles encouraged BHS counselors to take a "paperwork day" once a month for several months. Harvey did not follow this suggestion.

Between January 4 and January 11, 2012, Harvey was out of the office on leave. During that time, Bartles covered his caseload. She received a phone call from the wife of one of Harvey's clients complaining that her husband had been in the BHS program longer than permitted under the terms of their health insurance and, as a result, their insurer might not pay for some of the sessions. Bartles also received calls from Harvey's clients seeking documentation that they had attended counseling sessions because they were on probation through the court system and verifying treatment was a condition of probation.

Upon looking into these matters, Bartles discovered that documentation was missing, incomplete, or inaccurate in a number of Harvey's case files. She became concerned and decided to conduct a review of Harvey's case files for the period between May 2011 and December 2011. During that time, Harvey had an average of 38 clients assigned to him for direct clinical services. Bartles's review identified 94 case files that required significant completion or correction, including numerous case files that had not been closed properly upon a client's discharge from the BHS program.

When Harvey returned from leave in mid-January, Bartles met with him and advised him of the issues with his case file documentation. She explained the steps he needed to

take to correct his case file documentation and discussed a timeline for him to complete that task.

Within a month, however, it became clear that Harvey would not be able to correct the deficiencies in his case files while also handling his direct clinical services responsibilities. For that reason, on February 9, 2012, Bartles removed Harvey from the clinical rotation and directed him to spend all of his working hours catching up on his case files record-keeping. She moved Harvey out of the BHS offices and into an office at the WCHD headquarters to facilitate his completing this task.

On February 21, 2012, Harvey penned a "Memo to Personnel file" in which he suggested that he was being "victimize[d]" for voicing his disagreement with the BHS program management decisions and accused the BHS Director, Rebecca Hogamier, of being verbally abusive to employees and overloading the BHS counselors with work.

By late March 2012, Harvey still was not making adequate progress updating his case files. Around that time, he requested and was granted a change of supervisor.

On April 1, 2012, Crawford-Halterman, who, as mentioned, was the BHS Program Manager, began supervising Harvey. She met with him on April 3, 2012. At that meeting, she and Harvey set a goal for him to complete updating and correcting four case files per day. At that rate, Crawford-Halterman expected that Harvey could finish updating all of his case files in about five weeks, *i.e.,* by mid-May.

Harvey, however, did not make sufficient progress in April 2012. He had been assigned a total of 35 case files to update that month, but only two of them were fully

corrected and approved during that month. Many of the files Harvey turned in to Crawford-Halterman were returned to him for further corrections. For example, Harvey was assigned seven case files to correct and update at the April 3, 2012 meeting. He submitted one of those files to Crawford-Halterman on April 5, 2012; two more on April 9, 2012; and the remaining four on April 16, 2012. All of these files were returned to Harvey for additional corrections, most on multiple occasions. These seven files ultimately were not approved by Crawford-Halterman until May 1, 2012, at the earliest, and July 10, 2012, at the latest.

Also in April 2012, Harvey filed a complaint pursuant to the Maryland Whistle Blower Act, Md. Code (1994, 2015 Repl. Vol.), section 5-301 *et seq*. of the State Personnel and Pensions Article ("SPP"), with the Office of Statewide Equal Employment Opportunity Coordinator at the Department of Budget and Management ("DBM"). He alleged, *inter alia*, that Hogamier had created a hostile work environment; that she was verbally and emotionally abusive to staff; that she required her counselors to take on high caseloads, in violation of COMAR; that she reassigned Landis and refused to allow Harvey to partner with another counselor while permitting other BHS counselors to partner; that she transferred Harvey to a different work space without cause; and that she directed the Personnel Officer for BHS to sit in on supervisory meetings and to monitor Harvey's phone use and his contact with his colleagues.

From late April 2012 through August 2012, Harvey still was not meeting expectations. He was progressively disciplined. *See* SPP § 11-104 (describing the disciplinary actions that may be imposed). On April 25, 2012, he received a letter of

counseling. In May 2012, he was suspended for five days; in June 2012, he was suspended for ten days; and in July/August 2012, he was suspended for fifteen days.[1] Crawford-Halterman allowed Harvey more time to complete his case files in light of these suspensions.

Meanwhile, the WCHD engaged a consulting firm to audit Harvey's case files and a random sampling of cases files assigned to other counselors. The results of that audit revealed that Harvey's files reflected a 47% error rate for billing and/or attendance documentation for face-to-face encounters with clients. The error rate in the files maintained by other counselors was only 14%.

On August 15, 2012, Harvey returned from his fifteen-day suspension. Crawford-Halterman met with him that day and assigned him 17 case files to complete in a week. She highlighted for him a recurring mistake pertaining to the identification of the funding source for clients with private medical insurance or State medical assistance.

A week later, on August 22, 2012, Crawford-Halterman met with Harvey again. She expected him to have completed 14 case files. He had completed six. Some of these six case files erroneously identified the funding source for clients.

The next day, Harvey attended a mitigation conference with the WCHD Health Officer, Earl Stoner. *See* SPP § 11-106(a) (prior to imposing discipline for employee misconduct, appointing authority must investigate, meet with employee, and consider

[1] Harvey appealed each of these disciplinary actions and each was sustained following a contested case hearing.

mitigating circumstances, if any). Stoner advised Harvey that he was considering recommending termination. Harvey inquired about retiring from the WCHD at that time. Harvey and Stoner signed an "Agreement to Waive Time Limits," stating that the WCHD would extend the time to take any disciplinary action for an "additional *thirty (30) days*." (Emphasis in original.) *See* SPP § 11-106(b) (requiring an appointing authority to impose a disciplinary action no later than 30 days after the appointing authority learns of the misconduct); SPP § 11-108(c) (permitting an employee and an appointing authority to enter into an agreement to waive the time limits imposed by the SPP article for imposing discipline).

On August 28, 2012, Harvey applied for service retirement from State employment.

On September 25, 2012, DBM issued a notice of termination "with prejudice" to Harvey. *See* SPP § 11-104(6)(ii) (termination may be with prejudice if "the appointing authority finds that the employee's actions are egregious to the extent that the employee does not merit employment in any capacity with the State"). The notice specified four "Causes For Termination," three of which pertained to "employee misconduct": 1) negligence in the performance of duties, pursuant to COMAR 17.04.05.04.B(1); 2) conduct that "has brought, or, if publicized, would bring the State into disrepute," pursuant to COMAR 17.04.05.04.B(3); and 3) failure to obey a lawful order, pursuant to COMAR 17.04.05.04.B(12). The fourth cause pertained to "employee performance" and stated that Harvey was "incompetent or inefficient" in the performance of his duties, under COMAR 17.04.05.03.B(1).

On September 28, 2012, within the WCHD, Harvey appealed his termination, asking that it be rescinded and that he be reinstated with full back pay and benefits.

On October 1, 2012, Harvey retired from State service and began receiving his retirement allowance.

Harvey's internal appeal was unsuccessful. On January 4, 2013, Harvey appealed to DBM. DBM held a settlement conference on January 28, 2013, but no resolution was reached. On January 31, 2013, DBM referred the matter to the OAH for it to hold a contested case hearing and issue a final agency decision. *See* SPP § 11-110(b) & (d).

The contested case hearing was held on April 8, 2013 and June 5, 2013. At the outset of the hearing, counsel for the WCHD moved to dismiss on the ground that the controversy had become moot in light of Harvey's retirement. The ALJ denied the motion, concluding that a live controversy existed because Harvey might be entitled to back pay and benefits for the five days between the September 25, 2012 termination notice and his October 1, 2012 retirement, and because his termination was "with prejudice," meaning that he was prohibited from seeking reemployment with the State.[2]

In its case, the WCHD presented testimony from Stoner and Crawford-Halterman. In his case, Harvey testified and called Landis; Wendy Puglisi, the former BHS Operations Coordinator; Dee Greenlee, a BHS addictions counselor; and James Bradford, also a BHS addictions counselor. WCHD recalled Crawford-Halterman in rebuttal.

[2] DHMH does not challenge the denial of its motion to dismiss in the instant appeal.

Stoner testified generally about the progressive disciplinary actions taken against Harvey. He also testified about some of the specific errors and deficiencies in Harvey's case files. In particular, he addressed Harvey's failure to discharge clients after their treatment was complete. He explained that, if a client continues treatment longer than his treatment plan provides, the private insurer or government program reimbursing the WCHD for that treatment will be "in essence, overpaying." Overpayments of that kind could be deemed fraudulent.

Crawford-Halterman testified about her supervision of Harvey between March 2012 and his termination. During that entire period, Harvey's only responsibility was to "resolve 94 client files that he had that had documentation and billing errors." Crawford-Halterman explained the deficiencies found in Harvey's case files as follows:

> The problems with Mr. Harvey's files were numerous. The main issues were that patients were – they personally or their insurance companies or the State of Maryland, Medicaid or PAC were billed for services that did not occur or just as dangerously, were not billed for services that did occur.
>
> Most of Mr. Harvey's files did not have clinical documentation in them, and so if you pulled up a file, there was not clinical documentation in the SMART electronic record which means that if . . . an attorney, judge, probation or Department of Social Services wanted to know how a patient was progressing in treatment, there was no documentation to be able to provide it to them.
>
> There were other documentation errors that put the division at risk with compliance reviews including the lack of treatment plans, lack of agreement to the treatment contract . . . .

Crawford-Halterman testified specifically about three case files she reviewed on August 23, 2012, after Harvey turned them in for her approval. One of those case files was extremely concerning because just three days earlier, on August 20, 2012, Harvey had

opened a new file on the client in the SMART system even though the client no longer was in treatment. In that new file, Harvey also had created a "dummy assessment," which, Crawford-Halterman explained, was made up of notes from "an interview with a patient that did not occur." Harvey had "created an intake for May 11th of [2011] as if he had met with the patient and done an intake that day when in fact the patient had met with . . . another counselor." Crawford-Halterman testified that she believed Harvey opened this new file because he had been unable to correct the client's existing file; she noted, however, that at no time had Harvey advised her that he needed assistance with the file.

Landis testified about her history at BHS and her "partnering" arrangement with Harvey. She explained that she and Harvey partnered because her "strength was . . . paperwork" and individual counseling, whereas Harvey excelled in the group setting. According to Landis, Harvey's poor administrative skills were common knowledge.

Greenlee testified that Harvey was a "great counselor," but he "stunk at paperwork." She recalled having been asked in 2006 by her supervisors to help Harvey with his paperwork. She refused because "[i]t was a mess." Greenlee explained that ordinarily she was able to keep up with her own paperwork because she tried to enter her case notes on the day of each encounter. In February 2012, she received an email from Bartles advising her that her case files were two weeks behind and asking her to get up to date. Greenlee was able to catch up on her paperwork in a week while also seeing clients.

Harvey testified that his caseload was unmanageable after Landis left BHS and that his supervisors offered him little to no support to accommodate the new demands placed

on him at that time. He characterized Bartles's and Crawford-Halterman's strategy of assisting him to correct the 94 case files as an "inquisition" and an "audit." He called the task of correcting the files "tedious" and claimed that there were numerous delays outside of his control, such as delays in reopening files in the SMART system so that he could make the corrections and delays in reviewing files he turned in for approval.

On July 22, 2013, the ALJ issued the final agency decision. As relevant here, the ALJ found that the problems with Harvey's case files were "serious" both because "documentation and recordkeeping are an essential part of a counselor's job, and because accurate records are necessary for billing and for clinical and legal purposes." (Footnote omitted.) Even the witnesses called by Harvey at the hearing "testified unequivocally" that he was "terrible at paperwork."

The ALJ found that when the deficiencies in Harvey's case files came to the attention of the WCHD it did not immediately impose discipline. Rather, it "developed a strategy whereby [Harvey] could correct the deficiencies over a reasonable period of time until he was caught up." When it became apparent that Harvey could not progress at an appropriate rate while continuing to provide direct clinical services, the WCHD relieved him of those duties on a temporary basis. After Crawford-Halterman became Harvey's supervisor in April 2012, she assigned him specific quotas for case file completion each week, but made allowances whenever he missed work due to illness or vacation, or because he was required to attend meetings or was suspended. Despite the allowances made by his supervisors, Harvey was able to correct only 71 of the 94 deficient files over a 19-week

period. The ALJ found that the WCHD afforded Harvey more than enough time to complete the assigned task.

The ALJ further found that Harvey's failure to properly document client encounters could bring the State into disrepute because the WCHD "could be accused of fraudulent billing" or "give[] the impression that . . . BHS is not performing competently."

The ALJ concluded that Harvey had failed to "take responsibility" for his failures, instead blaming his supervisors and casting himself as a victim. The ALJ specifically rejected Harvey's testimony that his caseload was in excess of that which was permitted under the applicable regulations (40 clients per counselor). The ALJ found that the WCHD had presented competent evidence that Harvey had averaged 38 active clients, and that Harvey had not refuted that evidence.

The ALJ also rejected Harvey's testimony that he was denied effective supervision and assistance with his case management responsibilities. The ALJ credited Crawford-Halterman's testimony that Harvey never asked for help until the problems in his case files were discovered in January 2012. The ALJ noted, moreover, that even if inadequate supervision contributed to the "errors and omissions" in Harvey's case files and to his backlog, that would not explain why he was unable to remedy those errors once he was relieved of his clinical duties and placed on a weekly supervision schedule.

The ALJ found that Harvey's reaction to the WCHD's strategy to correct the deficient files was telling. Rather than cooperate with his supervisors, Harvey reacted by resisting those efforts and by "portraying himself as a scapegoat or victim whose only

interest was in serving 'the people.'" Despite this resistance, the WCHD implemented numerous approaches to help Harvey correct the situation. Ultimately, however, "in light of the length of time and the amount of supervisory resources that were devoted to the task," Harvey's "rate of progress was simply not satisfactory."

The ALJ ruled that the WCHD had proved by a preponderance of the evidence that Harvey was negligent in the performance of his duties; that his negligent conduct could bring the State into disrepute; and that he was incompetent or inefficient in the performance of his duties. Because the WCHD did not identify a specific order or directive that Harvey had refused to follow, the ALJ did not rule that Harvey was insubordinate. The ALJ concluded that WCHD had "considered relevant mitigating circumstances, such as [Harvey]'s skills as a counselor and his length of service to WCHD" and had not abused its discretion in imposing the sanction of termination.

On August 21, 2013, Harvey filed a petition for judicial review in the Circuit Court for Washington County. On July 10, 2014, the circuit court entered an order upholding the final agency decision. This appeal followed.

DISCUSSION

In the instant case, the final agency decision was the decision of the ALJ. In an appeal from a judgment entered on judicial review of a final agency decision, we look "through" the decision of the circuit court to review the agency decision itself. *People's Counsel v. Country Ridge Shopping Center, Inc.*, 144 Md. App. 580, 591 (2002). Our role "in reviewing [the final] administrative agency adjudicatory decision is narrow." *Bd. of*

Physician Quality Assurance v. Banks, 354 Md. 59, 67 (1999) (citing *United Parcel v. People's Counsel*, 336 Md. 569, 576 (1994)). It "is limited to 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.'" *Id*. at 67-68 (quoting *United Parcel*, 336 Md. at 577). "An agency's fact-finding is based on substantial evidence if 'supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Kim v. Md. State Bd. of Physicians*, 196 Md. App. 362, 370 (2010), *aff'd* 423 Md. 523 (2011) (quoting *People's Counsel v. Surina*, 400 Md. 662, 681 (2007). "The agency's decision must be reviewed in the light most favorable to it; because it is the agency's province to resolve conflicting evidence and draw inferences from that evidence, its decision carries a presumption of correctness and validity." *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 751 (2006). With respect to legal conclusions, although we may "give weight to an agency's experience in interpretation of a statute that it administers, . . . it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Schwartz v. Md. Dep't of Natural Res.*, 385 Md. 534, 554 (2005).

Disciplinary actions against State employees are governed by Title 17, Subtitle 4, Part 5 of COMAR. "[T]he appointing authority bears the burden of proof in all disciplinary actions affecting an employee in the skilled and professional services." COMAR 17.04.05.01.G. Pursuant to COMAR 17.04.05.02C, an ALJ presiding over a contested case hearing challenging a disciplinary action "may not change the discipline imposed by the

appointing authority, as modified by the head of the principal unit or Secretary, unless the discipline imposed was clearly an abuse of discretion ***and*** clearly unreasonable under the circumstances." (Emphasis added.) Pursuant to COMAR 17.04.05.02B, "the appointing authority, head of the principal unit, the Secretary, and the Office of Administrative Hearings *shall consider mitigating circumstances when determining the appropriate discipline.*" (Emphasis added.)

Harvey contends the ALJ erred in rejecting his challenge to the termination because she failed to consider mitigating circumstances, as required by COMAR 17.04.05.02B, and because she did not find that his termination was an abuse of discretion and unreasonable under the circumstances, pursuant to COMAR 17.04.05.02C. He asserts that because the WCHD permitted him to partner with Landis for most of his career and for Landis to perform most of his administrative tasks it was unfair and unreasonable for the agency to subsequently penalize him for his inability to perform these tasks. Moreover, Harvey asserts, the WCHD "approached its issues with [him] with 'unclean hands'" because it initiated a review of his case files based upon a complaint from the wife of a client and then "embark[ed] on an ill-advised 'corrective' course."

DHMH responds that there was substantial evidence in the record to support the ALJ's findings that Harvey had failed to perform required job duties; that he was given ample opportunity to correct these deficiencies, but had not done so; and that this continued failure warranted termination. It disputes that the ALJ was required or authorized to "independently evaluate and weigh . . . mitigating circumstances," because the ALJ only

could change the sanction imposed by Harvey's appointing authority if the sanction was "clearly an abuse of discretion and clearly unreasonable under the circumstances." COMAR 17.04.05.02C.

We agree with DHMH. The evidence adduced at the two-day contested case hearing made abundantly clear that Harvey was incompetent and negligent in the performance of the administrative aspects of his job. It is undisputed that those tasks amounted to 50% of his job responsibilities as an ADAC. His negligence in the performance of those duties resulted in clients' cases being left open after they had left treatment; in charges being assessed to the wrong insurer or the wrong agency; and in services being provided that were not billed at all. All of these errors, if publicized, had the potential to bring the State into disrepute. The ALJ's findings in this respect were supported by substantial evidence and were legally correct.

The evidence also established and the ALJ found that the WCHD in fact considered mitigating circumstances, such as Harvey's long tenure as an ADAC, his stellar reputation as a clinician, and his long-time partnership with Landis, in determining the appropriate disciplinary sanction. In light of these factors, the WCHD approached Harvey about the issue of his case file documentation, gave him many months to correct the problems in the files, and even eliminated all of his clinical responsibilities to allow him to make the necessary corrections. Despite receiving the time and resources to bring his case files up to date, Harvey made little progress. Given Harvey's inability or unwillingness to complete 50% of his job responsibilities, the ALJ plainly did not err by concluding that the sanction

of termination was not "clearly an abuse of discretion and clearly unreasonable under the circumstances." Having concluded that the sanction imposed was warranted, the ALJ was neither required nor authorized under COMAR 17.04.05.02B to conduct an independent assessment of the mitigating circumstances.

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